Climate Injunctions: The Power of Courts to Award Structural Relief Against Federal Agencies

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In the landmark climate suit Juliana v. United States*, a group of youth plaintiffs asserted that the federal government violated their constitutional rights by promoting climate change, and asked the court to develop and supervise a plan to reduce carbon dioxide emissions. While the plaintiffs' assertion of a constitutional right to a stable climate drew headlines, their requested relief—a structural injunction—was equally distinct in recent litigation. The idea of a court overseeing agency policymaking might seem unusual, but the structural injunction has a long history in American law, most prominently in school desegregation cases. This paper assesses the continuing relevance of this instrument in addressing global climate change, drawing on case studies of successful and unsuccessful structural injunctions against the federal government to evaluate the prospects of a more limited climate injunction.*

Part II of this paper explores the origins of the structural injunction in the era of desegregation, the scholarly debate over its function, and its relevance to the Juliana *suit. Part III provides four case studies of structural injunctions against the federal government, and elucidates that, historically, successful injunctions have been limited to a single agency or program and have relied on the cooperation of the agency to succeed in effectively reshaping the targeted program. Part IV analyzes these case studies in light of the injunctive relief requested by plaintiffs in* Juliana*, which demanded action from several different agencies and required complex judicial intervention that the appeals court was unwilling to entertain.*

This paper suggests that the relief requested by the plaintiffs in Juliana *was overly broad. But it argues that, despite the failure of* Juliana*, courts still have significant latitude to restrict federal activity contributing to climate change. It proposes a narrowly tailored structural injunction targeted at the Bureau of Land Management's fossil fuel leasing program as one example of how a more targeted injunction might succeed.*

I. INTRODUCTION

Juliana v. United States was "no ordinary lawsuit."[1] Challenging the federal government's role in anthropogenic climate change, the youth plaintiffs advanced a novel argument in American litigation: that the federal defendants "have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty."[2] Over the course of a convoluted life cycle that included multiple trips to the Supreme Court[3] and a defeat in the Ninth Circuit,[4] the lawsuit commanded attention and inspired a Congressional resolution,[5] a book,[6] and a Netflix documentary.[7] The lawsuit also inspired similar suits in both other countries[8] and in the states; a first-of-its-kind suit in Montana appears set to go to trial in June.[9]

The remedy that the *Juliana* plaintiffs requested was as bold as their assertion of a constitutional right to a stable climate. Following what they saw as the "strategic roadmap laid by *Brown v. Board of Education*," plaintiffs asked the court to order the government to develop a plan to phase out fossil fuel emissions to effectuate "a fundamental transformation of this country's energy system."[10]

The Ninth Circuit was not receptive to the idea that a court could order this sweeping remedy and dismissed the suit. The majority opinion noted that "it is beyond the power of an Article III court to

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1. Juliana v. United States, 217 F. Supp. 3d 1224, 1234 (D. Or. 2016).

2. *Id.* at 1261.

3. *See* United States v. U.S. Dist. Ct. for Dist. of Or., 139 S. Ct. 1 (2018) (mem.); *In re* United States, 139 S. Ct. 452 (2018) (mem.).

4. Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

5. S. Con. Res. 8, 117th Cong. (2021).

6. *See* Megan Mayhew Bergman, *They Knew: The U.S. Government's Role in Causing the Climate Crisis*, ORION (Oct. 19, 2021), https://orionmagazine.org/2021/10/they-knew/ [https://perma.cc/7RG8-EUA7] (reviewing JAMES GUSTAVE SPETH, THEY KNEW (2021)).

7. YOUTH V GOV (Christi Cooper dir., 2020).

8. *See* JOANA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2021 SNAPSHOT 18-19 (2021); CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES 64, 128, 292 (Ivano Alogna, Christine Bakker & Jean-Pierre Gauci eds., 2021).

9. Nick Ehli, *Kids Want to Put Montana on Trial for Unhealthy Climate Policies*, KAISER HEALTH NEWS (July 14, 2022), https://khn.org/news/article/climate-change-state-energy-policies-children-lawsuits/ [https://perma.cc/S7DC-NS2H]; Megan Michelotti, *Montana Youths Take Climate Case to Trial in Historical First*, HELENA INDEP. REC. (Feb. 15, 2023), https://helenair.com/news/local/montana-youths-take-climate-case-to-trial-in-historical-first/article_a457d52f-1ac2-5fdc-8b60-29cb4f46a626.html [https://perma.cc/55S6-RNMV].

10. Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020).

order, design, supervise, or implement the plaintiffs' requested remedial plan."[11] But the majority reached this conclusion without grappling with the long history of courts ordering similarly broad relief, beginning with *Brown v. Board of Education*.[12] The majority opinion leaves unclear when, if ever, federal courts can order federal agencies to change constitutionally suspect practices. At least one commentator has suggested that the majority's reasoning may impose "new limits on district courts' remedial authority," without spelling out precisely what those limits are.[13]

In fairness to the *Juliana* majority, very few cases explore when the injunctive power of federal courts may be brought to bear on federal agencies, or suggest how to navigate the resulting separation-of-powers concerns. But those few do provide some guidance on how courts may address these questions. This Note seeks to apply this guidance to the *Juliana* opinion by examining the historic use of structural injunctions to reform federal agencies and how this tool might be used to address climate change going forward. Part II surveys the development of the structural injunction and the debate over its merits. Part III presents four case studies of federal courts assuming broad managerial power over federal agencies. Part IV discusses how these case studies could inform future injunctive relief on climate change. This Note argues that the relief sought by the *Juliana* plaintiffs was much broader than in other structural injunction cases, crossing geographic and agency boundaries in an attempt to win sweeping nationwide relief. But *Juliana*'s failure should not close the door on the structural injunction as a tool to address climate change. Courts and litigators can draw on these case studies to tailor requests for relief and address separation-of-powers concerns in seeking to act on climate through the courts.

II. HISTORY OF THE STRUCTURAL INJUNCTION

From the Founding into the mid-1950s, the dominant view of the legal process saw it as "a vehicle for settling disputes between private parties about private rights."[14] The "dispute-resolution model" of litigation is "triadic and highly individualistic: a lawsuit is visualized—with the help of the icon of justice holding the scales of

11. *Id.* at 1171.

12. *See infra* text accompanying notes 28-44.

13. Recent Case, Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020)*, 134 HARV. L. REV. 1929, 1935-36 (2021).

14. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976).

justice—as a conflict between two individuals, one called plaintiff and the other defendant, with a third standing between the two parties, as a passive umpire."[15] Although later developments challenged this view, it continues to hold significant sway today.[16]

Beginning in the 1970s, however, a model of litigation began to emerge that broke from convention. Dubbed "structural reform litigation" or "public law litigation," this litigation sought to use the courts as a tool by which to make public policy.[17] The new model originated alongside the modern welfare state and sought not to settle disputes, but instead to vindicate constitutional rights against "the bureaucracies of the modern state."[18] The end goal was not to secure damages, but to restructure bureaucracies in order to remedy ongoing constitutional violations.[19] The judiciary's shift "from economic issues to issues of individual right" also introduced a new set of litigants, as racial and economic minorities "turned to the lawsuit as an instrument of reform."[20]

At the center of structural reform litigation sat the injunction, a remedy "fashioned ad hoc" by the court to dictate "whether or how a government policy or program [should] be carried out."[21] Injunctions often included extremely specific instructions directed to the implementing agencies, requiring the parties to return to the issuing court "for enforcement or modification of the original order in light of changing circumstances"[22] as the court sought to "manage the reconstruction of the bureaucratic organization."[23] The judge stayed minutely involved in managed "an ongoing remedial regime," mediated disputes between the parties, and oversaw

15. Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 23 (1979).

16. *See, e.g.*, *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr.) ("Judges are like umpires. Umpires don't make the rules, they apply them.").

17. *See* Fiss, *supra* note 15, at 2; Chayes, *supra* note 14, at 1288.

18. *See* Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW AND HUMAN BEHAVIOR 121, 128 (1982). Some scholars have traced the development of this model to earlier modes of injunctive relief. *See* Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977, 986-89 (2020).

19. Fiss, *supra* note 18, at 124.

20. Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901, 906-07 (1979).

21. Chayes, *supra* note 14, at 1294-95.

22. *Id.* at 1292.

23. OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS 528 (1984) (2d ed.).

implementation.[24] The specificity of these directives led observers to wonder how "the Constitution requires a report on September 15, or showers at 110ºF, or a thirty-day limitation on confinement on an isolation cell."[25] Equally remarkable was the court's prolonged engagement with the case: engaged in "construct[ing] a new social reality," the court's involvement "may have to last almost as long as the social reality it attempts to create."[26] This remedy has been varyingly identified an "institutional decree," an "administrative injunction," a "public law remedy," "complex enforcement," and—the term this Note uses—a "structural injunction."[27]

The first test of this new tool came in 1955, when the Supreme Court declared in *Brown* that district courts would retain jurisdiction over desegregation cases to "consider the adequacy of any plans the defendants may propose . . . and to effectuate a transition to a racially nondiscriminatory school system."[28] The Court ordered judges to proceed with "all deliberate speed," an ambiguous standard that, while initially permitting district judges to delay desegregation,[29] ultimately "encouraged the federal courts to see themselves as managers of programs of social transformation," not merely ordering the immediate vindication of a right but designing and implementing comprehensive remedial programs.[30] In the following years, courts came to manage the desegregation process with a remarkable degree of detail,[31] an arrangement blessed by the Supreme Court in 1968.[32] Judges found themselves empowered to redraw district lines,[33] order school tax hikes,[34] and place schools into receivership.[35]

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24. Chayes, *supra* note 14, at 1301.

25. Fiss, *supra* note 15, at 49. *But see* Johnson, *supra* note 20, at 911 ("*Time* magazine might wonder why the court order dictated minimum requirements in such detail; the public, however, recognized the order as a response to total default by the state.").

26. Fiss, *supra* note 18, at 124.

27. Toussaint v. McCarthy, 801 F.2d 1080, 1088 n.2 (9th Cir. 1986); *see also* FISS & RENDLEMAN, *supra* note 23, at 528 (explaining that the structural injunction "bears only a formal resemblance to the classic preventive injunction").

28. Brown v. Bd. of Educ. (*Brown II*), 394 U.S. 294, 301 (1955).

29. *See* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 29-30 (1998).

30. Mark Tushnet, *Public Law Litigation and the Ambiguities of Brown*, 61 FORDHAM L. REV. 23, 27-28 (1992).

31. *See, e.g.*, Bradley v. Bd. of Pub. Instruction, 431 F.2d 1377, 1383 (5th Cir. 1970) (specifying attendance zones for three high schools).

32. Green v. Cnty. Sch. Bd., 391 U.S. 430, 439 (1968) ("[T]he court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed.").

33. *See* Milliken v. Bradley, 418 U.S. 717, 756 (1974) (Stewart, J., concurring).

34. Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 233 (1964).

35. *See* Barry Stuart Roberts, *The Extent of Federal Judicial Equitable Power: Receivership of South Boston High School*, 12 NEW ENG. L. REV. 55, 70-71 (1976).

As courts and litigators grew comfortable with this power, courts expanded its use beyond desegregation. One of the most prominent arenas in which structural injunctions were used was reforming the criminal justice system,[36] which Feeley and Rubin identify as "the most striking example of judicial policy making in modern America."[37] Advocates requested structural injunctions to reform prisons,[38] juvenile confinement facilities,[39] and mental health facilities.[40] But the structural injunction was not limited to desegregation and prison reform: multiple district court judges assumed the role of "perpetual fishmasters" by using structural injunctions to settle disputes over tribal fishing rights,[41] while judicial oversight of hydroelectric dams in the Columbia Basin produced "an archetypal example" of structural reform litigation.[42] As judges grew accustomed to using the tool in the desegregation context, they were often eager to apply their new skillset to reforming other public institutions.[43] The structural injunction also found a home in state courts, particularly in education funding.[44]

Almost as soon as it was identified, the structural injunction provoked a counterreaction. By the mid-1970s, Owen Fiss observed, a substantial bloc of Justices "sought to reverse the processes that

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36. *See, e.g.*, Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 810 (1990); *see also* Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 558-61 (2006) (tracing the evolution of structural injunctions in prison reform).

37. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 13 (1999).

38. *See, e.g.*, Jordan v. Arnold, 408 F. Supp. 869, 876-77 (M.D. Pa. 1976); Bono v. Saxbe, 450 F. Supp. 934, 947 (E.D. Ill. 1978).

39. *See* Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. REV. 675, 681-86 (1998); *see also* Will Singer, Comment, *Judicial Intervention and Juvenile Corrections Reform: A Case Study of* Jerry M. v. District of Columbia, 102 J. CRIM. L. & CRIMINOLOGY 901, 903 (2012) (profiling one such lawsuit).

40. *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 373, 378-79 (M.D. Ala. 1972) (issuing injunctive relief against state mental hospitals); *see generally* Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975) (chronicling the implementation of the *Wyatt* decree).

41. *See* United States v. Washington, 520 F.2d 676, 693 (9th Cir. 1975) (Burns, J., concurring); United States v. Michigan, 520 F. Supp. 207, 211 n.5 (W.D. Mich. 1981).

42. Michael C. Blumm & Aurora Paulsen, *The Role of the Judge in ESA Implementation: District Judge James Redden and the Columbia Basin Salmon Saga*, 32 STAN. ENV'T L.J. 87, 109 (2013).

43. *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 4-5 (1978).

44. *See* Kamina Aliya Pinder, *Reconciling Race-Neutral Strategies and Race-Conscious Objectives: The Potential Resurgence of the Structural Injunction in Education Litigation*, 9 STAN. J. C.R.-C.L. 247, 256-59 (2013).

were still afoot in the lower courts."[45] In 1982, Abram Chayes noted that the "general tone of scholarly, journalistic, and political commentary has been increasingly skeptical of judicial efforts to ride herd on state and federal bureaucracies."[46] Although in the 1960s the opponents of the structural injunction "had no, or little, credibility in the profession," by the 1970s, courts questioned "the use of the injunction to reform existing social structures."[47] Emblematic of this emerging critique was Justice Lewis Powell, who noted in 1974 "how often and how unequivocally" the Court had expressed its displeasure with serving as "an open forum for the resolution of political or ideological disputes about the performance of government."[48]

The Court embarked on "a decades-long period of retrenchment beginning in the early 1970s" and continuing through the 1980s and 1990s, which narrowed the availability of structural relief.[49] Emblematic of this shift is 1996's *Lewis v. Casey*, in which Justice Scalia declared that a prison reform injunction had become "inordinately—indeed, wildly—intrusive."[50] When seeking to vindicate a constitutional right, he emphasized, courts must not become "enmeshed in the minutiae" of agency operations.[51] In other cases, the Supreme Court also sought to tighten justiciability doctrines,[52] further reducing the volume of structural litigation by limiting which plaintiffs could bring such claims.[53] Congress joined in this effort in 1996 by passing the Prison Litigation Reform Act[54], which limited the circumstances under which new structural injunctions could be brought against prisons, made it easier to

45. Fiss, *supra* note 15, at 4.

46. Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 7 (1982).

47. FISS & RENDLEMAN, *supra* note 23, at iii.

48. United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

49. Brandon L. Garrett, *Structural Reform Prosecution*, VA. L. REV. 853, 870-71 (2007); *see also* Bradley W. Joondeph, Missouri v. Jenkins *and the De Facto Abandonment of Court-Enforced Desegregation*, 71 WASH. L. REV. 597, 599-600 (1996).

50. Lewis v. Casey, 518 U.S. 343, 362 (1996).

51. *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 562 (1979)).

52. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983); Rizzo v. Goode, 423 U.S. 362, 380 (1976).

53. *See* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 74 (1984).

54. Pub. L. No. 104-134, 110 Stat. 1321-66 (1996).

dismiss old ones, and prohibited legal services attorneys from challenging public welfare schemes.[55]

By the mid-2000s, conventional wisdom held that the structural injunction's window was "essentially closed."[56] In 2009, the Court seemed to confirm this conclusion in *Horne v. Flores*, loosening the requirements for terminating structural injunctions and, in the process, citing several academic critics of institutional reform litigation.[57]

Despite all this, the structural injunction remains alive.[58] The Supreme Court has reaffirmed the importance of district courts' involvement in prison oversight, writing that "[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration."[59] In *Brown v. Plata*, the lower court's prisoner-release order prodded California's political branches into reducing prison overcrowding and improving the state prison healthcare system.[60]

A. *Key Features of the Structural Injunction*

Across desegregation, prison reform, and other fields, three features distinguish the structural injunction. The first is that an injunction is "fashioned ad hoc on flexible and broadly remedial lines," often producing detailed orders that cannot be "logically derived from the substantive liability."[61] The second is the process by which an injunction develops, which is "not imposed but negotiated,"[62] often with the defendant's active collaboration. Third is the ongoing role of the court in monitoring performance and enforcing compliance with the injunction.[63] This subpart considers each of these features in turn.

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55. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1353, *invalidated by* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 549 (2001).

56. Schlanger, *supra* note 36, at 553.

57. Horne v. Flores, 557 U.S. 433, 448-49 (2009) (citing Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295).

58. *See infra* Part II.B.2.

59. Brown v. Plata, 563 U.S. 493, 511 (2011).

60. *See* Bailey W. Heaps, Note, *The Most Adequate Branch: Courts as Competent Prison Reformers*, 81 STAN. J. C.R.-C.L. 281, 310-13 (2013) (summarizing post-2011 improvements in California's prison system).

61. Chayes, *supra* note 14, at 1302.

62. *Id.*

63. *See id.* (mentioning that the injunction "requires the continuing participation of the court").

1. *Abstract rights, specific remedies.*

All structural injunctions seek to redress "a grievance about the operation of public policy."[64] The injunction responds to the breach of a legal duty by a government agency,[65] often a violation of "new affirmative rights" that necessitate "continuous, complex remedies."[66] In *Brown*, the new right was the right to an integrated education, necessitating a complex process of desegregation.[67] The prison cases, for comparison, are often founded on the principle that "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment,[68] which leads to complex injunctions reforming prison medical systems.

Once the court identifies a breach, it typically walks through a multi-step process to determine an appropriate remedy. As described by Doug Rendleman:

> After being satisfied that the defendant breached the plaintiffs' right, the judge inquires into the plaintiffs' actual situation. What comprises their real, but second-best, world? The judge next fashions a counterfactual world: what would the plaintiffs' actual "better world" have been if the defendant had obeyed the substantive standard? The judge, finally, decides how to formulate an injunction to move the plaintiffs from their actual but second-best condition to the better world the defendant's breach prevented. By granting an injunction the judge seeks to transform the plaintiffs' reality to correspond with their substantive right.[69]

64. *Id.*

65. Large-scale corporate wrongdoing is remedied through class actions and other mass torts. *See* Donald G. Gifford, *The Constitutional Bounding of Adjudication: A Fuller(ian) Explanation for the Supreme Court's Mass Tort Jurisprudence*, 44 ARIZ. ST. L.J. 1109, 1118 (2012).

66. Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV 465, 510-15 (1980).

67. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

68. Estelle v. Gamble, 429 U.S. 97, 104 (1976); *see, e.g.*, Coleman v. Schwarzenegger, 922 F. Supp. 2d. 882, 887 (E.D. Cal. 2009) (citing *Estelle*, 429 U.S.).

69. Doug Rendleman, Brown II*'s "All Deliberate Speed" at Fifty: A Golden Anniversary or a Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 SAN DIEGO L. REV. 1575, 1579 (2004).

The structural injunction thus serves to organize the interaction between the judiciary and the agency defendant,[70] in the form of a comprehensive decree spelling out how that agency should be run.[71]

Once a court identifies a violation, it enjoys "broad power to fashion a remedy."[72] The Supreme Court puzzled over the lack of definite limits of this power in *Swann*, ultimately concluding that "words are poor instruments to convey the sense of basic fairness inherent in equity,"[73] and that district courts are free to "respond[] to practical considerations . . . resource availabilities, and perhaps the preferences of the parties" to shape the remedy.

All of these considerations are unrelated to the violation, meaning the relationship between the violation and the remedy often appears quite abstract.[74] In crafting the remedy, the court must navigate "a complex set of formal and informal relationships that may be irrelevant to establishing the legal violation but [are] critical to the development of a remedy."[75] The resulting remedies are thus often complex, extending far beyond the particular violation.

The Court briefly sought to narrow the scope of structural injunctions by requiring remedies to be closely tied to the right that the government had allegedly violated.[76] In *Milliken*, the Court noted that the proposed "interdistrict remedy," the redrawing of school district boundaries, had to be justified by an "interdistrict violation."[77] But the Court later clarified that plaintiffs were not required to "prove with respect to each individual act of discrimination precisely what effect it had," permitting systemic remedies not necessarily linked to specific violations.[78] The Court has

70. Fiss, *supra* note 15, at 2.

71. Horne v. Flores, 557 U.S. 433, 496 (2009) (Breyer, J., dissenting). The *Horne* majority classified any injunction restricting a state's ability to "make basic decisions" as institutional reform litigation. *Id.* at 447 n.3.

72. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

73. *Id.* at 31.

74. Chayes, *supra* note 46, at 47-48.

75. Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1364 (1991); *see also* John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 112-13 (1999); Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 REV. LITIG. 99, 101-03 (2007).

76. Chayes, *supra* note 46, at 48-49, 51-52.

77. Milliken v. Bradley (Milliken I), 418 U.S. 717, 744-45 (1974); *see also* Dayton Bd. Of Educ. v. Brinkman (Dayton I), 433 U.S. 406, 417 (1977) (invalidating a remedy "going beyond the scope" of the violation).

78. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 541 (1979).

wavered on how strictly the remedy must be tied to the violation,[79] though in recent years it has emphasized a stricter connection.[80]

Requiring a right-remedy link also limits litigation's effectiveness once the institution is no longer actively violating protected rights. In the prison reform context, Margo Schlanger notes that litigation under the Eighth Amendment cannot reach "many of the issues that matter most to prisoners, such as educational programming, work and other activities, and the custody level."[81] So long as prisons ensure that living conditions remain above the Eighth Amendment's "constitutional floor," courts can find no violation on which to hang an expansive remedy.[82]

Sabel and Simon observe that, as the structural injunction has developed, judges have adopted an "experimentalist" approach, under which the decree serves as a "flexible and provisional" starting point for negotiations, followed by a "process of reassessment and revision with continuing stakeholder participation."[83] This model makes explicit what has long been known about the structural injunction: the participation of all parties, including the defendant, is often key to success.

2. *Cooperative remedial design.*

Once a judge has identified a violation, her next task—in theory—is to design the remedy. In practice, however, the parties often define the terms of the remedy. Margo Schlanger has chronicled how judges crafting prison reform injunctions "generally acted by following a path proposed by plaintiffs' counsel,"[84] with the decree produced from "the interplay of the judge's promotion of settlement and the parties' expectations as to the outcome of litigation."[85] The judge primarily serves not as adjudicator but as "political powerbroker,"

79. *Compare* Hutto v. Finney, 437 U.S. 678, 687 (1978) ("We find no error in the court's conclusion that, taken as a whole, conditions . . . violate the prohibition against cruel and unusual punishment."), *with Dayton Bd. of Educ.*, 443 U.S. at 714 (Rehnquist, J., dissenting) ("The District Court's order enjoins a practice which has not been found inconsistent with the Constitution.").

80. *E.g.* Lewis v. Casey, 518 U.S. 343, 357 (1996).

81. Schlanger, *supra* note 36, at 622.

82. *See id.*

83. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1069 (2004).

84. Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2015-16 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998)).

85. *Id.* at 2013-14.

tasked with overseeing—and shaping—the "highly structured bargaining game" between plaintiffs and defendant.[86] At the end, the judge may issue a detailed injunction, approve a consent decree designed by the parties, or pursue something in between.[87]

The judge can also shape the terms on which parties participate. In one prison reform case, for example, Judge William Wayne Justice inventoried *pro se* complaints, selected representative plaintiffs, and located experienced counsel to represent them.[88] Individually, the prisoners had little hope of negotiating with the state prison system,[89] but after Judge Justice's intervention, the prisoners—certified as a class and represented by the NAACP—could effectively bargain with the state. Judge Justice next invited the United States to appear as *amicus curiae*, which further shifted the balance in favor of the prisoners by providing them with an ally in the litigation that could mobilize the necessary resources to engage in extensive discovery.[90] The Justice Department, whether as *amicus curiae* or plaintiff-intervenor, has often provided the technical expertise to fashion the relief and the resources to monitor compliance essential to the success of structural injunctions.[91]

Defendants also play a key role in shaping the relief nominally issued against them. Defendants are frequently willing to cooperate because the relief often aligns with their institutional interests. In prison litigation, the relief often involves "increasing their budgets, controlling their inmate populations, and encouraging the professionalization of their workforces"—all outcomes that prison administrators want.[92] The difference between success and failure in this litigation often depends on litigants' ability to enlist "the support of crucial insiders within the targeted system."[93] Similar patterns

86. Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 77 (1979).

87. *See* Jason Parkin, *Aging Injunctions and the Legacy of Institutional Reform Litigation*, 70 VAND. L. REV. 167, 180 (2017) (describing "hybrid processes" of remedy formulation).

88. *See* William Wayne Justice, Address, *The Origins of* Ruiz v. Estelle, 43 STAN. L. REV. 1, 4-5 (1990).

89. *See id.* at 2-3.

90. *See id.* at 6.

91. *See* Robert D. Dinerstein, *The Absence of Justice*, 63 NEB. L. REV. 680, 687-89 (1984).

92. Schlanger, *supra* note 36, at 563; *see also* FISS & RENDLEMAN, *supra* note 23, at 736 (noting that Arkansas prison administrators saw structural litigation as "a catalyst for additional funding" and "a potential tool that could be used politically to improve the system") (quoting M. HARRIS AND D. SPILLER, U.S. DEP'T OF JUST., AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS (1976)).

93. Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 683-84 (1993).

appear in desegregation litigation: in Kansas City, Missouri, the local school district requested extensive remedies in the knowledge that the state would ultimately foot a portion of the bill.[94] Even absent these sorts of financial incentives, continuing desegregation litigation may offer political cover for otherwise unpopular reforms, and institutional defendants are frequently reluctant to let the litigation end.[95] Defendants thus frequently "win by losing."[96]

In cases involving recalcitrant defendants, by contrast, the judge's power to change the agency's culture may be limited.[97] Gerald Rosenberg has explored this problem in prison litigation, where judges depend on prison staff to monitor conditions and prison administrators to implement orders. I—if the individual line-level enforcers are unwilling to ensure compliance, the judge can do little to change the conditions inside the prison.[98]

3. *Ongoing judicial supervision & revision.*

Chayes explains that public law litigation "prolongs and deepens, rather than terminates, the court's involvement with the dispute,"[99] while Fiss describes the injunction as "a means of initiating a relationship between a court and a social institution."[100] For example, the 1986 consent decree that sought to reform juvenile correctional facilities in the District of Columbia included a detailed list of required reforms and appointed a court monitor to ensure compliance.[101] As the D.C. juvenile justice agency dragged its feet, the court appointed a series of special masters, attempted to appoint an educational receiver in 1998, and threatened to place the entire agency into receivership by 2004.[102] Such continuing escalation of compliance mechanisms—specific orders, special masters, and

94. Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 539 (1999); *see* Missouri v. Jenkins (Jenkins II), 495 U.S. 33, 77 (1990) (Kennedy, J., concurring).

95. *See* Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1212-13 (2000); *see also* JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER 70 (1988) (noting state legislators often rely on prison litigation as political cover for necessary but "politically unpalatable" reforms).

96. Schlanger, *supra* note 84, at 2012.

97. *See, e.g.*, Blumm & Paulsen, *supra* note 42, at 149.

98. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 310 (1991).

99. Chayes, *supra* note 14, at 1298.

100. FISS, supra note 43, at 36-37.

101. Singer, *supra* note 39, at 906-08.

102. *Id.* at 909-10.

eventually receivership—in the face of resistance is fairly common in structural litigation.[103] Over the course of the litigation, the "lawsuit's substantive 'proceedings only gradually merge' into the plaintiffs' practical reality," as rounds of negotiations and new decrees work to reshape the agency and slowly bring it into line with what the Constitution requires.[104]

The twenty-two years it took to implement the D.C. consent order is a short timeframe in structural litigation. Paul Wilson was a novice attorney when he argued *Brown* on behalf of Kansas in 1952. When he published his memoirs in 1994, the *Brown* litigation was still active in the same court under the same case number.[105] This duration often comes as a surprise to all parties. For instance, as Judge Raymond J. Broderick observed midway through a decades-long asylum reform case, no one "anticipated that this civil action commenced on May 30, 1974 would be actively litigated for more than ten years, requiring 2,192 docket entries, about 500 court orders, twenty-eight published opinions, and three arguments before the Supreme Court."[106]

As the litigation develops, the role of the judge transforms, from judge-as-adjudicator and judge-as-powerbroker to judge-as-manager.[107] After the first decree, judges "impose rules, negotiate with the parties, appoint monitors, mobilize support, and use intervention to punish recalcitrant parties."[108] The managerial role is the "single most controversial aspect of the entire process," because institutions are often resistant to judges establishing themselves as "comprehensive reform administrators."[109] This role requires judges to draw on a range of tools to monitor the institution's compliance with the order—from special masters to citizens' committee—as well as an equally broad array of enforcement tools—from positive incentives to contempt citations—to address noncompliance.[110]

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103. *See* Brian K. Landsberg, *Does Prison Reform Bring Sentencing Reform? The Congress, the Courts, and the Structural Injunction*, 46 MCGEORGE L. REV. 749, 752-53 (2014).

104. Rendleman, *supra* note 69, at 1582 (quoting FRANZ KAFKA, THE TRIAL 264 (Willa & Edwin Muir trans. 1956)).

105. *See* PAUL E. WILSON, A TIME TO LOSE: REPRESENTING KANSAS IN *BROWN V. BOARD OF EDUCATION* 6, 223-24 (1995).

106. Halderman v. Pennhurst St. Sch. & Hosp., 610 F. Supp. 1221, 1222 (E.D. Pa. 1985).

107. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 377 (1982) (discussing the "managerial aspects of such postdecision judicial work").

108. FEELEY & RUBIN, *supra* note 37, at 356.

109. *See id.* at 299, 302.

110. *See generally* Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 437-55 (1977) (describing the tools available to district courts); *see also*

Having a variety of tools is necessary to respond to the range of disputes judges may be asked to resolve during this stage, ranging from "hearing individual grievances" and "investigating particular problems" to "negotiating policy matters" and "forming liaisons with relevant actors outside the institution."[111] Sturm suggests this range of "creative and constructive" tools enables judges and litigants to develop cooperative relationships, ultimately furthering problem-solving.[112] Chayes points to this feature as one of the benefits of the structural injunction, as it permits the judge to further tailor the injunction as both he and the parties implement it.[113]

B. *Assessing the Structural Injunction*

The sweeping powers asserted by courts during desegregation sparked significant debate. Structural injunctions "reject[] many of the constraints of judicial methods and procedure," offering the courts great latitude to shape agency operations—in other words, to engage in policymaking.[114] The debate over the efficacy of structural injunctions is complicated by differing conceptions of the tool: different scholars have presented the structural injunction as either a unilateral, judge-driven process or a multilateral process driven primarily by the parties, producing different conclusions and recommendations.[115] The scholarly debates tend to focus on two questions: whether trial courts were successful in managing these injunctions, and whether the structural injunction remains relevant to twenty-first century litigation.

1. *Courts' legitimacy and capacity.*

Early scholarship questioned whether the structural injunction reflected an appropriate use of the judicial power, often arguing it should be limited by federalism and separation of powers.[116] Then-professor William Fletcher argued that a judge issuing a structural

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Margaret G. Farrell, *The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts*, 2 WIDENER L. SYMP. J. 235, 240-42 (1997); Thomas, *supra* note 75, at 112-13.

111. *Implementation Problems in Institutional Reform Litigation*, *supra* note 110, at 445-46.

112. Sturm, *supra* note 93, at 685-86.

113. *See* Chayes, *supra* note 14, at 1308.

114. *Id.* at 1315.

115. *See* David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. Rev. 1015, 1021-1037 (2004).

116. *See, e.g.*, Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 706-07 (1978).

injunction moves "beyond the normal competence and authority of a judicial officer, into an arena . . . where ordinary legal rules frequently are inapplicable."[117] While Fletcher acknowledges that there are circumstances where "the failure of the political bodies is so egregious and the demands for protection of constitutional rights so importunate that there is no practical alternative to federal court intervention," he suggests that structural injunctions should be viewed as "presumptively illegitimate."[118] Otherwise, an aggressive federal judiciary risks trampling on both federalism and separation of powers.[119] In these critics' view, "the framers of the Constitution seem clearly to have intended Congress," not the courts, "to be the main policy-maker."[120]

By contrast, other scholars have argued that structural injunctions fit within the traditional role of the judge. Owen Fiss contends that the power to "enforce and create society-wide norms, and perhaps even to restructure institutions, as a way . . . of giving meaning to our public values" is what distinguishes the judge from an arbitrator, whose power is limited to deciding the case before him.[121] Chayes likewise defends the structural injunction, noting that "the American legal tradition always acknowledged the importance of substantive results for the legitimacy and accountability of judicial action."[122]

In part, this defense of structural injunctions rests on the idea that, even if courts are not the ideal actor, they are often the only one willing to intervene. The legitimacy of the judiciary, in Chayes' view, hinges on its response to "the deep and durable demand for justice in our society."[123] The judiciary's response to denials of constitutional rights is particularly important when "the courts are the only entity with the will to enforce the Constitution."[124] In these cases, the choice is not between the judiciary and the executive or legislature, but

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117. William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 641 (1982).

118. *Id.* at 696-97; *see also* Paul J. Mishkin, Lecture, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 950-51 (1978) (arguing that structural injunctions should be limited to cases of "special, adequate justification").

119. *See* John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1140-42 (1996).

120. Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 L. & CONTEMP. PROBS., Summer 1976, at 46, 47.

121. Fiss, *supra* note 15, at 31.

122. Chayes, *supra* note 14, at 1316.

123. *Id.*

124. *See* Erwin Chemerinsky, *The Essential but Inherently Limited Role of the Courts in Prison Reform*, 13 BERKELEY J. CRIM. L. 307, 311-12 (2008).

between a judiciary willing to attempt to remedy the violation and an executive and legislature that have failed to do so. Sabel and Simon argue these circumstances give rise to a "destabilization right," defined as "a right to disentrench or unsettle a public institution" that is "substantially immune from conventional political methods of correction."[125] Judge Frank Johnson, who led the charge on desegregation in Alabama, characterized intervention as proper when "[f]aced with defaults by government officials."[126] The alternative would be declaring that "litigants have rights without remedies," in violation of the settled common law principle of *ubi jus, ibi remedium*.[127]

Other scholars have questioned courts' capacity to manage structural injunctions. Donald Horowitz argues that judges are ill-equipped to weigh alternatives and calculate costs, emphasizing the limited ability of judges to process social science and translate it into policy.[128] Lon Fuller has similarly contended that litigation is ill-suited to address "polycentric" problems involving large groups of people with varying priorities and interests.[129] More recently, Ross Sandler and David Schoenbrod argue that structural injunctions are frequently governed by a "controlling group" of plaintiffs' lawyers, who exercise undue influence over the resulting order.[130] They argue that judges should decline to issue structural injunctions vindicating "open-ended, impractical statutory mandate[s]" and should generally defer to defendants on initial remedial steps.[131]

The response from proponents of structural injunctions is twofold. First, they contend that the relief offered is well within courts' managerial capacity. Drawing parallels to modes of relief developed in probate and bankruptcy, Eisenberg and Yeazell argue that the structural injunction merely reflects well-established

125. Sabel & Simon, *supra* note 83, at 1062.

126. Frank M. Johnson, Jr., *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271, 274 (1981).

127. *Id.*; *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, (1803) ("[E]very right, when withheld, must have a remedy, and every injury its proper redress.").

128. *See* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 273-75, 293-94 (1977).

129. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978).

130. *See* ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 123-27 (2003).

131. *Id.* at 205-06. *But see* Susan Poser, *What's a Judge to Do? Remedying the Remedy in Institutional Reform Litigation*, 102 MICH. L. REV. 1307, 1320 (2004) (reviewing *id.*) ("[T]he line between stopping the violations and doing policymaking . . . is not as clear as Sandler and Schoenbrod suggest.").

remedies wielded to defend new statutory and constitutional rights.[132]

Second, proponents contend that courts are effective in achieving results. Michael Rebell has chronicled how the records developed by courts overseeing structural injunctions in education were "more complete and had more influence on the actual decisionmaking process" than those compiled by legislatures, and more objective than those compiled by agencies.[133] In prison reform, Rubin and Feeley argue that judicial intervention "must be regarded as a success" because no other political body "has seriously attempted to undo what these trial courts have argued."[134] Other assessments have been more mixed: Susan Sturm contends that, while structural injunctions sometimes "prompted dramatic, systemic changes," in other cases they achieved only "superficial impact[s]." Nevertheless, she concludes, this model of litigation plays a "crucial" oversight role that other branches are unable or unwilling to fulfill.[135] Although determining whether judicial intervention produced the *best* possible results in any policy area is difficult, the examples of successful interventions suggest that the structural injunction can produce effective policy change.[136]

2. *Current status.*

Conventional wisdom holds that the structural injunction, if not yet dead, "has become essentially moribund."[137] The desegregation injunctions, in this version of the story, led to judges overextending themselves, relying too much on a remedy that "should be used only as a last resort."[138] A string of unfavorable Supreme Court decisions has also led scholars to recommend that these remedies, while still occasionally relevant in dealing with particularly recalcitrant

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132. *See* Eisenberg & Yeazell, *supra* note 66, at 481-86; *see also* Johnson, *supra* note 126, at 274.

133. Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1531-32 (2007).

134. Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617, 659 (2003); *see also* FEELEY & RUBIN, *supra* note 37, at 368-72.

135. Sturm, *supra* note 93, at 681, 691-97.

136. *See* Richard Stacey, *Dynamic Regulatory Constitutionalism: Taking Legislation Seriously in the Judicial Enforcement of Economic and Social Rights*, 31 NOTRE DAME J. L., ETHICS & PUB. POL'Y 85, 94-95 (2017).

137. Schlanger, *supra* note 36, at 566 (describing "the generally accepted view").

138. *See* Russell L. Weaver, *The Rise and Decline of Structural Remedies*, 41 SAN DIEGO L. REV. 1617, 1628-29 (2004).

agencies, should "be limited to correcting the constitutional violation" and "last no longer than necessary."[139] Recent scholarship has, therefore, focused less on the structural injunction's merits and more on whether it continues to be relevant.[140]

One explanation for the perceived decline in the use of structural injunctions is that desegregation litigation in federal courts is now "all but exhausted." Even though some desegregation lawsuits dating back to the 1960s are still pending in several Southern district courts,[141] many of these inactive injunctions may be suffering "death by disuse."[142] Another reason why structural injunctions may be viewed as defunct is that the use of structural injunctions in other litigation is less high-profile. For instance, school finance litigation is on the rise,[143] but has primarily played out in less-visible state courts,[144] apart from a brief wave in the federal courts in the early 1970s. In education, "structural injunction litigation in trial courts flies under professors' appellate-based radar" and stays "out of sight."[145]

A growing chorus has challenged the conventional assessment, pointing out the "protean persistence" of institutional reform litigation.[146] While the form of the injunction has changed, Sabel and Simon observe that there is "no indication of a reduction in the volume or importance" of structural injunctions.[147] In the area of prison reform, Susan Sturm has likewise found that, "although courts are rejecting claims that may have been successful fifteen years ago, plaintiffs continue to prevail in cases challenging core conditions of confinement."[148] Recent scholarship confirms the importance of

139. *Id.* at 1631.

140. *See, e.g.*, Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV 143, (2003).

141. *See* Parker, *supra* note 95, at 1206-09 (2000).

142. *See* Parkin, *supra* note 87, at 199-202.

143. Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, 1 DUKE F.L. & SOC. CHANGE 47, 52 (2009).

144. *See* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Advocacy*, 68 TEMPLE L. REV. 1151, 1157 (1995).

145. Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. COLO. L. REV. 887, 930 (2020).

146. Sabel & Simon, *supra* note 83, at 1021.

147. *Id.* at 1018-19; *see, e.g.*, Garrett, *supra* note 49, at 873-74.

148. Sturm, *supra* note 93, at 705; *see also* Schlanger, *supra* note 36, at 554 ("[T]he claim that there was a decline in the reach of court-order regulation in the 1980s and 1990s is simply wrong.").

injunctive relief in that area.[149] Myriam Gilles has identified two modern preconditions for structural reform: (1) a broad consensus among legal intellectuals that "some institutionalized practice is systematically depriving individuals of constitutional rights," and (2) a sense that those violations are "intolerable in a just society."[150] Where these two conditions are met, the logic goes, a court will still feel comfortable issuing a structural injunction.

Although there has been little work on the subject in the last decade, the persistence of a handful of high-profile injunctions confirms that these lawsuits still play an important role.[151] These newer structural injunctions differ from those of the 1960s: they are "narrower and more focused," producing "orders that identify goals the defendants are expected to achieve and specify standards and procedures for measurement of performance," rather than providing a precise list of reforms to implement.[152] Courts now lean more into their managerial role,[153] focusing less on laying out a laundry list of specific reforms and more on collecting data, monitoring conditions, and imposing requirements for reporting and auditing.[154] The resulting injunctions are "more fine-grained, more process-oriented, and in important ways less intrusive" than those of the desegregation era.[155]

C. *Injunctive relief in* Juliana v. United States

In 2015, a group of youth plaintiffs filed suit against the federal government.[156] The plaintiffs, the legal manifestation of a broader "youth current" in the environmental movement,[157] argued that the federal government's contributions to climate change violated their right to "a climate system capable of sustaining human life,"[158] as well

149. *See* Allison M. Freedman, *Rethinking the PLRA: The Resiliency of Injunctive Practice and Why It's Not Enough*, 32 STAN. L. & POL'Y REV. 317, 345-55 (2021).

150. Gilles, *supra* note 140, at 147-48.

151. *See, e.g.*, Brown v. Plata, 563 U.S. 493, 514-15 (2011); Melendres v. Arpaio, 784 F.3d 1254, 1265 (9th Cir. 2015).

152. John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1411 (2007).

153. *Id.*

154. *See supra* Part II.A.3.

155. Jeffries & Rutherglen, *supra* note 152, at 1412.

156. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016).

157. *See* Kelsey Dunn, Currents of Change: Tracing the History of the U.S. Climate Movement 92 (June 2021) (B.A. thesis, Wellesley College), https://repository.wellesley.edu/object/ir1571 [https://perma.cc/8VKU-85HK].

158. *Juliana*, 217 F. Supp. 3d at 1250.

as their rights under the Equal Protection Clause, the Ninth Amendment, and the public trust doctrine.[159] The complaint sought an order requiring the federal government "to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions."[160] As in other structural injunctions, the plaintiffs requested that the district court retain jurisdiction "to monitor and enforce Defendants' compliance with the national remedial plan."[161]

The plaintiffs won an early victory when Judge Ann Aiken of the District of Oregon denied the federal government's motion to dismiss. The government's motion focused on the court's power to order relief, explaining that, "[t]o provide the relief requested by Plaintiffs in this case, the Court would be required to make and enforce national policy concerning energy production and consumption, transportation, science and technology, commerce, and any other social or economic activity that contributes to carbon dioxide ('CO2') emissions."[162] Formulating this policy, the federal defendants argued, "lies outside this Court's competence and jurisdiction."[163]

Plaintiffs, by contrast, claimed that "courts do this all the time," citing desegregation and prison reform.[164] Judge Aiken agreed, concluding that determining whether the government "violated plaintiffs' constitutional rights" is "squarely within the purview of the judiciary."[165] Judge Aiken acknowledged that the court would "be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy," but the court retained "broad authority 'to fashion practical remedies when confronted with complex and intractable constitutional violations.'"[166]

The federal defendants unsuccessfully sought stays and writs of mandamus, which were repeatedly denied by the Ninth Circuit,[167] and moved for summary judgment and judgment on the pleadings.[168]

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159. First Amended Complaint ¶¶ 290-310, Juliana v. United States, 217 F. Supp. 3d 1224 (No. 15-cv-01517) (D. Or. Sept. 10, 2015), ECF No. 7.

160. *Id.* at Prayer for Relief ¶ 7.

161. *Id.* ¶ 9.

162. Federal Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 1, *Juliana*, 217 F. Supp. 3d 1224 (No. 15-cv-01517) (D. Or. Nov. 17, 2015), ECF No. 27-1.

163. *Id.* at 14-15.

164. Memorandum of Plaintiffs' in Opposition to Federal Defendants' Motion to Dismiss at 39, *Juliana*, 217 F. Supp. 3d 1224 (No. 15-cv-01517) (D. Or. Jan. 6, 2016), ECF No. 41.

165. *Juliana*, 217 F. Supp. 3d at 1241.

166. *Id.* at 1242 (quoting Brown v. Plata, 563 U.S. 493, 526 (2011)).

167. *In re* United States, 884 F.3d 830, 838 (9th Cir. 2018); *In re* United States, 895 F.3d 1101, 1104 (9th Cir. 2018).

168. *See* Juliana v. United States, 339 F. Supp. 3d 1062, 1073-75 (D. Or. 2018).

In the latter motions, they again argued that the proposed relief "crosses the line from adjudication into legislation and execution of the law."[169] In response, the plaintiffs again cited desegregation and prison reform to argue otherwise.[170] The district court sided with the plaintiffs once more, finding that courts have an "important duty to fulfill their role as a check on any unconstitutional actions of the other branches of government."[171]

The tenor of the case changed when the Supreme Court, in denying the federal defendants' stay petition, noted that "adequate relief may be available" in the Ninth Circuit.[172] The Court mentioned that "the justiciability of [plaintiffs'] claims presents substantial grounds for difference of opinion."[173] While the Court did not spell out its concerns, the federal defendants repeated their argument about the breadth of the requested relief, claiming that "[n]o federal court . . . has ever purported to use the 'judicial Power' to perform such a sweeping policy review,"[174] and that "running Executive Branch agencies" simply lies beyond the power of the federal courts.[175] Plaintiffs again drew on the Court's case law approving "broad-based injunctive relief to remedy systemic constitutional violations" to argue that their request was well within the judicial power.[176]

The Ninth Circuit "invited the district court to revisit certification," after which the district court "reluctantly" reconsidered its prior denials of interlocutory appeal.[177] On appeal, the federal defendants again emphasized redressability, arguing the

169. Defendants' Motion for Judgment on the Pleadings, *Juliana*, 217 F. Supp. 3d 1224 (No. 15 cv-01517) (D. Or. May 9, 2018), ECF No. 195, at 31; Defendants' Motion for Summary Judgment, *Juliana*, 217 F. Supp. 3d 1224 (No. 15-cv-01517) (D. Or. May 22, 2018), ECF No. 207, at 21.

170. *See* Plaintiffs' Response in Opposition to Defendants' Motion for Judgment on the Pleadings, *Juliana* 217 F. Supp. 3d 1224 (No. 15-cv-01517) (D. Or. June 15, 2018), ECF No. 241, at 20-22; Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment, *Juliana* 217 F. Supp. 3d 1224 (No. 15-cv-01517) (D. Or. June 28, 2018), ECF No. 255, at 26, 38.

171. *Juliana*, 339 F. Supp. 3d at 1085-86.

172. *In re* United States, 139 S. Ct. 452, 453 (2018) (mem.).

173. United States v. U.S. Dist. Court for Dist. of Or., 139 S. Ct. 1, 1 (2018) (mem.).

174. Petition for Writ of Mandamus, *In re* United States, 139 S. Ct. 452 (No. 18-505), 2018 WL 5098492, at *21.

175. *Id.* at *22 (quoting Missouri v. Jenkins, 515 U.S. 70, 133 (1995) (Thomas, J., concurring)).

176. Brief for Respondents in Opposition to Petition for Writ of Mandamus, *In re* United States, 139 S. Ct. 452 (No. 18-505), 2018 WL 6134241, at *27 (citing Brown v. Bd. of Educ., 349 U.S. 295 (1955); Hills v. Gautreaux, 425 U.S. 284 (1976); Brown v. Plata, 563 U.S. 493 (2011)).

177. Juliana v. United States, 947 F.3d 1159, 1166 (9th Cir. 2020).

district judge could not "seize control of national energy production, energy consumption, and transportation."[178] Plaintiffs likewise invoked desegregation and prison reform to argue that the relief is "firmly within the competence of the judiciary."[179] In response, the federal defendants attempted to distinguish those cases involving injunctions "against particular school districts" or "in a particular prison system" from the *Juliana* plaintiffs' request for the court to "take control of [an] entire range of government policy-making."[180]

At oral argument, Judge Josephine Staton questioned Assistant Attorney General Jeffrey Clark about the history of desegregation and prison reform, to which Clark responded by arguing that injunctions issued against the federal government are "a different situation" than those issued against states.[181] Judge Staton brought up this "state–federal distinction" while questioning Julia Olson, who was representing the plaintiffs. Olson explained that a case against the federal government is actually "an easier decree" because it does not implicate federalism, leading Judge Hurwitz to question whether Olson believed that "federalism is more important than separation of powers."[182]

Judge Hurwitz's majority opinion reversed the district court, concluding that the requested relief, which "calls for no less than a fundamental transformation of this country's energy system," was "beyond the power of an Article III court to order, design, supervise, or implement."[183] Courts, he reasoned, cannot make "complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."[184] Instead, plaintiffs had to make their case "to the political branches or to the electorate at large."[185] The fact that other branches "may have abdicated their responsibility to remediate the problem" did not grant the courts "the ability to step into their shoes."[186]

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178. Appellants' Opening Brief, *Juliana*, 947 F.3d 1159 (No. 18-36082), 2019 WL 439256, at *9.

179. Plaintiffs-Appellees' Answering Brief, *Juliana*, 947 F.3d 1159 (No. 18-36082), 2019 WL 981552, at *26.

180. Appellants' Reply Brief, *Juliana*, 947 F.3d 1159 (No. 18-36082), 2019 WL 1224378, at *15.

181. Oral Argument at 16:26, *Juliana*, 947 F.3d 1159 (No. 18-36082), https://www.ca9.uscourts.gov/media/video/?20190604/18-36082/ [https://perma.cc/CTC8-U9N9].

182. *Id.* at 33:33.

183. Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020).

184. *Id.*

185. *Id.* at 1175.

186. *Id.*

Judge Staton dissented, arguing that relief analogous to desegregation and prison injunctions would "vindicate plaintiffs' constitutional rights without exceeding the Judiciary's province."[187] Citing both *Brown v. Plata*, a landmark prison reform decision, and *Brown v. Board of Education*, Judge Staton argued that, while injunctive relief "may take some time," mere complexity "does not put the issue out of the courts' reach."[188]

The Ninth Circuit denied the plaintiffs' request for rehearing *en banc*.[189] Plaintiffs then sought to amend their complaint to remove the request for injunctive relief, bringing this chapter to a close.[190]

The *Juliana* case raised an array of procedural and substantive issues. Dozens of articles have debated the merits of a right to a stable climate[191] and the public trust doctrine.[192] Even the propriety of the interlocutory appeal has been subjected to scholarly scrutiny.[193] Only a handful, however, have examined the Ninth Circuit's treatment of the proposed structural injunction in the case. One piece relied heavily on *Brown v. Plata* to design a proposed injunction for future climate litigants,[194] while another cited a string of examples to justify this model of relief.[195] A third, an unsigned piece in the *Harvard Law Review*, concluded that the *Juliana* opinion "subtly but significantly narrows the remedial capacity of courts."[196] Comparing *Juliana* to the desegregation cases, the piece noted that the majority "did not offer any explicit guidance on how to distinguish desegregation cases (or their analogs) from climate change."[197]

None of this scholarship, however, specifically discusses the role of courts in crafting structural injunctive relief against the federal

187. *Id.* at 1176 (Staton, J., dissenting).

188. *Id.* at 1188-89.

189. Juliana v. United States, 986 F.3d 1295 (9th Cir. 2021) (mem.).

190. Plaintiffs' Motion for Leave to Amend and File Second Amended Complaint for Declaratory and Injunctive Relief at 15-16, Juliana v. United States, No. 6:15-cv-01517-AA (D. Or. Mar. 9, 2021), ECF No. 462.

191. *See, e.g.*, Kevin Kennedy, *Watching the World Burn: Substantive Due Process and the Right to a Sustainable Climate*, 93 TEMP. L. REV. ONLINE 61, 85-94 (2021).

192. *See, e.g.*, Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 42-54 (2017).

193. *See* Michael E. Solimine, *The Renaissance of Permissive Interlocutory Appeals and the Demise of the Collateral Order Doctrine*, 53 AKRON L. REV. 607, 620-24 (2020).

194. *See* Jina J. Kim, Note, *Leave No One Behind: Realizing Environmental Justice Through Climate Litigation Remedies*, 48 ECOLOGY L.Q. 409, 426-30 (2021).

195. Mary Christina Wood, *"On the Eve of Destruction": Courts Confronting the Climate Emergency*, 97 IND. L.J. 239, 254 n.90, 261, 263-64 (2022).

196. Recent Case, *supra* note 13, at 1929.

197. *Id.* at 1935.

government. This is somewhat understandable. Federal programs are only rarely targeted for structural injunctive relief.[198] When they are, agencies often prefer to negotiate a consent decree rather than find themselves subject to a court's ongoing supervision.[199] This omission, however, neglects a line of cases that seek to address precisely the separation-of-powers concerns that arise in such litigation. The *Harvard Law Review* piece mentions in passing that federal judges are limited in their ability to order injunctive relief by "the separation of powers and 'principles of federalism' when they craft equitable remedies."[200] But it only cites Supreme Court cases involving injunctions against state and local governments,[201] neglecting the separate line of cases illustrating how separation-of-powers principles apply to injunctions against the federal government.

This Note clarifies that judges may issue structural injunctions to reform federal agencies. "[A] distinct number of institutional reform cases have been brought against federal agencies," and the courts in these cases showed "no reluctance to issue structural injunctions against federal government entities."[202] Part III looks at four such cases, which illustrate that the "state–federal distinction" proposed by the government at oral argument in *Juliana* is a mirage. All of these cases involve federal agencies that have found themselves under a federal judge's oversight. Several of these cases also explicitly consider and address the separation-of-powers concerns raised by Judge Hurwitz in *Juliana*. A closer examination of these case studies shows that, while the relief requested by the *Juliana* plaintiffs was unusually broad, there is no inherent problem with courts issuing structural injunctions against the federal government to vindicate constitutional rights.

198. *See* Jeffries & Rutherglen, *supra* note 152, at 1414.

199. *See* Cobell v. Norton, 283 F. Supp. 2d 66, 107 (D.D.C. 2003).

200. Recent Case, *supra* note 13, at 1934 (quoting Rizzo v. Goode, 423 U.S. 362, 380 (1976)).

201. *Id.* at 1934 n.53 (citing *Rizzo*, 423 U.S. 362 (city police department); O'Shea v. Littleton, 414 U.S. 488 (1974) (county magistrate and circuit judge); Spallone v. United States, 493 U.S. 265 (1990) (city government); and Missouri v. Jenkins, 495 U.S. 33 (1990) (state government)).

202. *Cobell*, 283 F. Supp. 2d at 107.

III. CASE STUDIES OF STRUCTURAL INJUNCTIONS BROUGHT AGAINST THE FEDERAL GOVERNMENT

A. *Desegregating Public Schools:* Adams v. Richardson

The early success of desegregation litigation was aided by an executive branch committed to rooting out discrimination.[203] When the Nixon administration took office, however, it quickly moved to limit the circumstances under which the Department of Housing, Education and Welfare (HEW) would cut off federal funding to school systems that resisted desegregation.[204] Attorneys at the NAACP Legal Defense Fund sued HEW for failing to enforce Title VI of the Civil Rights Act of 1964,[205] producing a case that scholars consider "the most vital decision since *Brown* in the annals of American higher education."[206] The district court agreed that HEW violated its legal obligations,[207] issuing a detailed, six-part injunction requiring HEW to begin enforcement proceedings and provide periodic updates.[208]

The *en banc* appellate court largely upheld the injunction, specifically affirming the district court's decision to require HEW to monitor desegregation in certain districts.[209] In subsequent proceedings, the district court crafted general deadlines for investigations and enforcement actions, ordered additional enforcement proceedings against specific districts,[210] rejected desegregation plans that had been previously accepted by HEW,[211] and eventually ratified a consent decree.[212] Following the decree, additional orders reached even further into agency operations, setting deadlines for investigating complaints and initiating

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203. *See, e.g.*, Lee v. Macon Cnty. Bd. of Educ., 267 F. Supp. 458, 461 (M.D. Ala. 1967).

204. *See* Kenyon D. Bunch & Grant B. Mindle, *Judicial Activism and the Administration of Civil Rights Policy*, 1993 B.Y.U. EDUC. & L.J. 76, 78-79.

205. *See* John Egerton, Adams v. Richardson: *Can Separate Be Equal?*, CHANGE, Winter 1974/1975, at 29, 29.

206. ROBERT A. DENTLER, D. CATHERINE BALTZELL & DANIEL J. SULLIVAN, UNIVERSITY ON TRIAL: THE CASE OF THE UNIVERSITY OF NORTH CAROLINA 23 (1983).

207. Adams v. Richardson, 351 F. Supp. 636, 637 (D.D.C. 1972).

208. Adams v. Richardson, 356 F. Supp. 92, 95-100 (D.D.C. 1973).

209. Adams v. Richardson, 480 F.2d 1159, 1165-66 (D.C. Cir. 1973) (en banc) (per curiam).

210. Adams v. Weinberger, 391 F. Supp. 269, (D.D.C. 1975).

211. Adams v. Califano, 430 F. Supp. 118, 119-21 (D.D.C. 1977).

212. *See* Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 250-51 (1987).

enforcement proceedings and directing HEW to commence enforcement proceedings in specific cases.[213]

The *Adams* litigation displayed the characteristic features of a structural injunction. It began with a claim of a statutory violation: HEW's failure to enforce Title VI, which required that no person "be subjected to discrimination under any program or activity receiving Federal financial assistance."[214] After finding a violation, the district court fashioned an exacting remedy, requiring, among other provisions, that HEW commence enforcement proceedings against a list of forty-two districts.[215] Plaintiffs' counsel played "a major role in the development of HEW's 1977 desegregation criteria," and the timetables ordered by the judge mirrored those proposed by plaintiffs' counsel.[216] As the litigation evolved, the injunctive relief expanded, with the court imposing detailed time schedules for specific agency actions.[217]

1. *Separation-of-powers concerns in* Adams*.*

Despite the district court's expansive orders, separation-of-powers concerns were largely absent from the first decade of the *Adams* litigation. In HEW's first appeal, the agency argued its enforcement decisions were beyond the review of courts, an argument the D.C. Circuit rejected.[218] Any suggestion that the district court's meddling was inappropriate then vanished, despite district court orders commanding HEW to make specific staffing decisions[219] and ordering hiring to enforce the decree.[220] Some individual employees raised separation-of-powers concerns, with one agency attorney complaining that the litigation gave the agency "no time to

213. *See* Adams v. Bell, 711 F.2d 161, 165 n.25 (D.C. Cir. 1983).

214. 42 U.S.C. § 2000d (1967).

215. Adams v. Richardson, 356 F. Supp. 92, 97, 101 (D.D.C. 1973).

216. Kenyon D. Bunch, *Patrick E. Higginbotham's Third Road to Desegregating Higher Education: Something Old or Something New*, 18 OHIO N.U. L. REV. 11, 20 (1991).

217. Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. 370, 417 (2021).

218. Adams v. Richardson, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973). The Supreme Court approvingly cited this exception to the general presumption that agency non-enforcement decisions are unreviewable. Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985).

219. *See* Olatunde C.A. Johnson, *Lawyering that Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1239, 1307 (2014).

220. JACK GREENBERG, CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT 428 (anniversary ed. 2004).

get control of the place," but the agency itself did not question the judge's authority in its filings.[221]

In 1983, separation-of-powers concerns resurfaced when the D.C. Circuit rejected attempts to establish the court as "perpetual supervisor" of HEW's enforcement actions.[222] The plaintiffs, in the majority's view, sought a "specific plan" to bring HEW into compliance, which lay beyond the power of a court to order.[223] The validity of the constraints imposed by the majority were contested, both by the dissent[224] and a subsequent district court case, which concluded that "the dicta in the majority opinion was [sic] based on a misreading."[225]

At any rate, the federal defendants raised the issue again in 1983, claiming the district court's oversight "impermissibly intrude[d] on their statutory and constitutional authority to manage and supervise their [agency]," in violation of "fundamental principles of separation of powers."[226] The government's brief argued that the district court operated as the agency's perpetual supervisor, "reversing the normal relations between the agency and the court."[227]

The appeals court remanded on standing grounds, but noted that its ruling did not determine whether relief "would adversely implicate separation-of-powers limitations."[228] The district judge, taking a hint, proceeded to dismiss on separation-of-powers grounds, explaining that his prior orders improperly sought "to control the way defendants are to carry out their executive responsibilities" by "governing every step in the administrative process."[229] Stephen Halpern quotes one circuit judge as concluding that the district judge "just got tired of being the Czar of civil rights enforcement."[230]

But the Court of Appeals reversed: if the agency had violated Title VI, then-Judge Ruth Bader Ginsburg wrote, "judicial review . . . would serve to 'promote rather than undermine the separation of

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221. *See* STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 143 (1995) (quoting an attorney for HEW's Office for Civil Rights).

222. Adams v. Bell, 711 F.2d 161, 166 (D.C. Cir. 1983) (en banc).

223. *Id.*

224. *Id.* at 183-86 (Wright, J., dissenting).

225. Cobell v. Norton, 283 F. Supp. 2d 66, 109 n.26 (D.D.C. 2003).

226. Women's Equity Action League v. Bell, 743 F.2d 42, 42-43 (D.C. Cir. 1984) (per curiam).

227. HALPERN, *supra* note 221, at 218.

228. *Id.* at 44.

229. Adams v. Bennett, 675 F. Supp. 668, 680 (D.D.C. 1987), *rev'd sub nom.* Women's Equity Action League v. Cavazos, 879 F.2d 880 (D.C. Cir. 1989).

230. HALPERN, *supra* note 221, at 221.

powers, for it helps to prevent the executive branch from ignoring congressional directives.'"[231] The circuit court ordered further briefing on this issue.[232] Just a year later, however, Judge Ginsburg changed course and dismissed the case without reaching the separation-of-powers arguments.[233]

It is difficult to reconcile Judge Ginsburg's apparent concern in 1990 about the propriety of "continuing, across-the-board federal court superintendence of executive enforcement" with her 1989 suggestion that such superintendence could *promote* the separation of powers.[234] Although the court never formally reached the issue, some scholars have speculated that it was concerned by the litigation's "metastatic tendencies," noting language suggesting "it was inappropriate for a district court to superintend a federal agency."[235] Others interpret this language as an effort by Judge Ginsburg to "spotlight, and thus preserve against an unsympathetic panel, the possibility of more targeted suits."[236]

2. *Effectiveness of the injunction.*

In some sense, *Adams* must be considered a success for the plaintiffs, who successfully compelled a reluctant administration to enforce desegregation. The desegregation criteria produced in *Adams* are still the yardstick of whether states are complying with Title VI.[237]

In hindsight, however, many scholars are critical of the injunction. The court imposed so many "deadlines for so many

231. Cavazos, 879 F.2d at 886 (quoting Cass Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 670 (1985)).

232. *Id.* at 887.

233. Women's Equity Action League v. Cavazos, 906 F.2d 742, 747 (D.C. Cir. 1990).

234. *Id.*

235. Ceballos et al., *supra* note 217, at 420; *see also* HALPERN, *supra* note 221, at 225 ("[W]hat emerges from Judge Ginsburg's opinion is the strong hint that the court objected to the kind of power that Judge Pratt had come to exercise . . .").

236. Ceballos et al., *supra* note 217, at 421; *see also* HALPERN, *supra* note 221, at 226 ("The court seemed deliberately to avoid treating the larger and more interesting jurisprudential questions about the proper role of judges and courts."). Whatever door Ginsburg's opinion left open to such suits was subsequently slammed shut by the court. *See* Joy Milligan, *Remembering: The Constitution and Federally Funded Apartheid*, 89 U. CHI. L. REV. 65, 133 (2022) (discussing how, in subsequent cases, "[c]onservatives and liberals seemingly agreed that there was no place for the judiciary in monitoring federal agencies' compliance" with Title VI).

237. *See* Mary Ann Connell, *The Road to* United States v. Fordice*: What Is the Duty of Public Colleges and Universities in Former De Jure States to Desegregate?*, 62 MISS. L.J. 285, 314 (1993).

contradictory enforcement tasks that virtually no staff was available for any fresh policy initiative."[238] By 1982, the Office of Civil Rights dedicated 95% of its staff time solely to *Adams* compliance.[239] Federal bureaucrats felt an intense burden to comply with the *Adams* deadlines and pressured complainants to withdraw complaints and accept inadequate settlements.[240] The court's management produced a "small claims court for civil rights," capable of quickly processing complaints but unable to effectively enforce the law.[241]

The effects of this regime fell most harshly on complainants whose claims fell outside the *Adams* framework of racial discrimination—an effect that prompted additional litigation by civil rights groups representing women and Mexicans.[242] Though plaintiffs initially compelled a reluctant agency to enforce the law, continued supervision produced an agency "reluctant to risk controversial initiatives," content to limit itself to investigating only the most obvious and straightforward violations and neglecting any other responsibilities that agency officials "might not be able to wrap up within the *Adams* timetables."[243]

B. *Desegregating Public Housing: The* Gautreaux *Litigation*

Best known as the birthplace of the environmental justice movement,[244] the Altgeld Gardens public housing project was also the birthplace of the *Gautreaux* litigation. Dorothy Gautreaux, a longtime resident who has been described as a "tribune of the [Chicago Housing Authority] tenants" in Chicago's civil rights movement,[245] gave her name to the lawsuit that would reshape housing policy in Chicago. *Gautreaux*, the first public-housing desegregation suit in the country, included two companion cases: one against the Chicago

238. Bunch & Mindle, *supra* note 204, at 90 (quoting GARY ORFIELD, MUST WE BUS? 317 (1978)).

239. HALPERN, *supra* note 221, at 217 (quoting Clarence Thomas, Assistant Secretary of Education for the Office of Civil Rights).

240. Bunch & Mindle, *supra* note 204, at 94.

241. *Id.* at 98; *see also* HALPERN, *supra* note 221, at 188 (arguing a focus on procedure "eclipsed in importance a concern for what all of that managing and processing produced").

242. HALPERN, *supra* note 221, at 102, 108-09.

243. JEREMY RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY 170-71 (1989).

244. *See* Quinn Myers, *Life in the Doughnut*, SOUTH SIDE WEEKLY (Apr. 16, 2019), https://southsideweekly.com/life-in-the-doughnut-future-environmental-justice/ [https://perma.cc/2EPP-LBK8].

245. Hal Baron, *Women in the Movement II: Dorothy Gautreaux*, *in* THE CHICAGO FREEDOM MOVEMENT: MARTIN LUTHER KING JR. AND CIVIL RIGHTS ACTIVISM IN THE NORTH 369, 369-70 (Mary Lou Finley, Bernard Lafayette Jr., James R. Ralph Jr. & Pam Smith eds. 2016).

Housing Authority (CHA), and one against the U.S. Department of Housing and Urban Development (HUD).[246]

The case against the CHA succeeded, with the district court finding that "[n]o criteria, other than race, can plausibly explain" patterns of racial segregation in public housing.[247] The plaintiffs' claim was that HUD had acquiesced in the CHA's discriminatory policies, in violation of the Due Process Clause. The district court initially dismissed this constitutional claim,[248] which was novel at the time.[249] The Seventh Circuit reversed, holding that HUD's contribution to segregation could not be excused as an "accommodation" of the CHA's policy.[250] On remand, the district judge asked the parties to negotiate, requiring them to "formulate a comprehensive plan to remedy the past effects of unconstitutional site selection procedures."[251] HUD, however, declined to bargain.[252] The district judge rejected the plaintiffs' proposed metropolitan area-wide plan,[253] but the Seventh Circuit again reversed, concluding that any effective plan "must be on a suburban or metropolitan area basis."[254]

The Supreme Court unanimously affirmed the district court's authority to order metro-wide relief in 1976,[255] specifically mentioning that the district court could remedy the violation by effectively rewriting HUD's project-selection criteria.[256] Faced with this pressure, HUD was now willing to negotiate.[257] HUD and the plaintiffs produced a Letter of Understanding that created a housing voucher program for 400 class members; the program was

246. *See* Leonard S. Rubinowitz & Michelle Shaw, *Delayed Synergy: Challenging Housing Discrimination in Chicago in the Streets and in the Courts*, 17 NW. J. L. & SOC. POL'Y 1, 5 n.17, 32-36 (2022).

247. Gautreaux v. Chi. Hous. Auth., 296 F. Supp. 907, 912 (N.D. Ill. 1969).

248. *See* Gautreaux v. Romney, 448 F.2d 731, 733 (7th Cir. 1971).

249. *See* Rubinowitz & Shaw, *supra* note 246, at 21-22 & n.147-149.

250. *Id.* at 738-39.

251. Hills v. Gautreaux, 425 U.S. 284, 290 (1976).

252. Rubinowitz & Shaw, *supra* note 246, at 35 n.251.

253. Gautreaux v. Romney, 363 F. Supp. 690, 690-91 (N.D. Ill. 1973).

254. Gautreaux v. Chi. Hous. Auth., 503 F.2d 930, 936 (7th Cir. 1974).

255. *See* Hills v. Gautreaux, 425 U.S. 284, 299-300 (1976).

256. *Id.* at 301-303.

257. *See* Rubinowitz & Shaw, *supra* note 246, at 45-47; *see also supra* note 199 and accompanying text.

successful, extended twice, and eventually solidified in a consent decree.[258]

The Gautreaux Assisted Housing Program (GAHP), developed out of the decree, proved remarkably successful and has served as a model for almost all new federal housing assistance programs.[259] Notably, this model also diminished CHA's power to control housing policy: CHA had little say in the consent decree, and the new voucher-based program was overseen by HUD.[260] As in many structural injunctions, the nominal defendant (HUD) influenced the decree's requirements,[261] and the consent decree provided for "continuing court jurisdiction to monitor the progress in fulfilling the decree" and judicial intervention under certain circumstances.[262] The consent decree was terminated in 1997.[263]

1. *Separation-of-powers concerns in* Gautreaux*.*

Separation-of-powers concerns were largely—and surprisingly—absent from *Gautreaux*. This absence may be *Gautreaux*'s most notable feature: "[T]he presence of a federal agency in an institutional reform case did not prevent the Supreme Court from directing that structural relief be ordered."[264] The Supreme Court only remarked on HUD's presence to note that the agency's involvement "actually increased the scope of available injunctive relief that could be ordered by the district court."[265] This near-total omission is particularly notable given the Supreme Court's focus on concerns that the remedial order might intrude on the powers of suburban municipalities. The Court, in other words, paid more attention to the autonomy of the Village of Tinley Park than that of the U.S. Department of Housing and Urban Development.[266]

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258. *See* Gautreaux v. Landrieu, 523 F. Supp. 665, 668 (N.D. Ill. 1981). The consent decree was approved by the Seventh Circuit in *Gautreaux v. Pierce*, 690 F.2d 616, 638 (7th Cir. 1982).

259. *See* Kristine L. Zeabart, Note, *Requiring a True Choice in Housing Voucher Programs*, 79 IND. L.J. 767, 779-82 (2004) (summarizing studies demonstrating GAHP's success); Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 GEO. J. ON POVERTY L. & POL'Y 35, 58-62 (2002) (same).

260. *See* Janet Koven Levit, *Rewriting Beginnings: The Lessons of* Gautreaux, 28 J. MARSHALL L. REV. 57, 71 (1994).

261. *Id.* at 75.

262. Gautreaux v. Landrieu, 523 F. Supp. 665, 671-72 (N.D. Ill. 1981).

263. Gautreaux v. Chi. Hous. Auth., 981 F. Supp. 1091, 1094-95 (N.D. Ill. 1997).

264. Cobell v. Norton, 283 F. Supp. 2d 66, 103 (D.D.C. 2003).

265. *Id.*

266. *See* Leonard S. Rubinowitz, *Metropolitan Public Housing Desegregation Remedies: Chicago's Privatization Program*, 12 N. ILL. U. L. REV. 589, 604-05 (1992).

This absence extends to the scholarly discussion of *Gautreaux*. Janet Koven Levit, the only scholar to investigate this issue in detail, explained that while the court's "on-going, supervisory relationship with HUD" may "appear suspect," the judge redistributed his power to other institutions rather than retaining it.[267] Even Levit devotes most of her article to more intrusive decrees targeting the CHA and the Chicago City Council; the decree targeting HUD receives comparatively less attention.[268]

The Seventh Circuit likewise did not appear to think HUD's involvement in the litigation raised any unique concerns. It only occasionally remarked on HUD's presence, once to note that HUD's involvement "does not alter the pertinent standards" for finding a Fifth Amendment violation,[269] and once to mention the fact that "public housing is a federally supervised program with early roots in federal statutes" justified more expansive relief in *Gautreaux* than in desegregation litigation.[270] The only judge who expressed any concern was Judge Austin, who—in dismissing the suit in 1970—concluded that he lacked jurisdiction "to direct and control the policies of the United States,"[271] an objection he dropped in his subsequent orders.

The lack of discussion may be because the court's orders were geographically limited. The *Gautreaux* orders sought only to reform agency operations in a particular metropolitan area, not take control of an agency's nationwide policymaking. In dismissing the *Adams* litigation, the D.C. Circuit distinguished between "the broad style of action" advanced in *Adams* and "situation-specific suits" like *Gautreaux*.[272]

That HUD was ultimately willing to negotiate may have also allayed any concerns that judges were imposing terms on an unwilling agency. HUD already administered many of its housing

267. Levit, *supra* note 260, at 84-88.

268. *Id.*

269. Gautreaux v. Romney, 448 F.2d 731, 738 (7th Cir. 1971).

270. Gautreaux v. Chi. Hous. Auth., 503 F.2d 930, 936 (7th Cir. 1974).

271. Alexander Polikoff, Gautreaux *and Institutional Litigation*, 64 CHI.-KENT L. REV. 451, 464 (quoting unpublished slip opinion).

272. Women's Equity Action League v. Cavazos, 906 F.2d 742, 749 (D.C. Cir. 1990) (citing *Gautreaux*, 448 F.2d at 739-40). This logic also applies to injunctive relief ordered against specific federal penitentiaries, *see* note 38 *supra*, or specific federal programs, *e.g.* Blumm & Paulsen, *supra* note 42, at 109-11.

programs on a metropolitan area-wide basis,[273] meaning the metropolitan area-wide relief sought by plaintiff actually aligned well with HUD's existing priorities. That the relief "would not interfere with the agency's administrative prerogatives" may have further confirmed that this intervention was appropriate.[274]

All the same, some federal litigators were deeply concerned about the court assuming control of HUD. Solicitor General Robert Bork petitioned for certiorari because he opposed federal courts interfering in federal agency operations, and "wanted to stop the trend of judicial governance of administrative agencies."[275] That the Supreme Court did not take up this concern suggests that, at least for geographically defined injunctions like *Gautreaux*, separation-of-powers concerns are not dominant.

2. *Comparing* Gautreaux *and* Juliana*.*

Gautreaux, unlike the other case studies, was cited by the *Juliana* plaintiffs, who characterized it as a case where "the Supreme Court approved a structural remedy for a comprehensive remedial plan similar to the relief" they requested.[276] The federal defendants disputed the analogy, claiming that *Gautreaux* only "addressed the scope of the lower courts' remedial order."[277] Their response fails to recognize that the important lesson from *Gautreaux* is what it did *not* say about HUD's involvement. At a minimum, *Gautreaux* challenges the government's argument in *Juliana* that injunctions against the federal government are a "different situation" than those against states.[278]

Gautreaux also provides at least a partial answer to Judge Hurwitz's question about whether "federalism is more important than separation of powers."[279] In *Missouri v. Jenkins*, the Supreme Court struck down an inter-district school desegregation plan, distinguishing it from *Gautreaux* because the latter "involved the imposition of a remedy upon a federal agency" and thus "did not raise the same federalism concerns that are implicated when a federal

273. *See Gautreaux*, 503 F.2d at 937; *see also* Leonard S. Rubinowitz & Roger J. Dennis, *School Desegregation Versus Public Housing Desegregation: The Local School District and the Metropolitan Housing District*, 10 URB. L. ANN. 145, 174 (1975).

274. Rubinowitz & Shaw, *supra* note 246, at 46.

275. *Id.* at 36 n.262.

276. Plaintiffs-Appellees' Answering Brief, *supra* note 179 at 30, 33.

277. Appellants' Reply Brief, *supra* note 180, at 21 n.1.

278. Oral Argument, *supra* note 181, at 16:26.

279. *Id.* at 33:33.

court issues a remedial order against a State."[280] The Court's logic in *Jenkins* has been criticized,[281] but to the extent it can be reconciled with *Gautreaux*, it suggests that separation-of-powers concerns merit less weight in these cases than federalism. In *Jenkins,* the Court relied on federalism to strike down an injunction against a state despite upholding similar relief against a federal agency in *Gautreaux*, no matter the separation-of-powers concerns that accompany the latter. Reading *Gautreaux* and *Jenkins* together supports Julia Olson's argument in *Juliana* that an injunction against the federal government is actually "an easier decree" because it does not implicate federalism.[282]

C. *Indian Trust Accounts: The* Cobell *Litigation*

The Secretary of the Interior collects revenues generated from grazing, logging, and mining on lands held in trust for individual Indians in Individual Indian Money (IIM) accounts.[283] In 1994, Congress obligated the Secretary to render an accounting of all IIM trust money.[284] Two years later, a trust beneficiary named Elouise Cobell, who was concerned that the Secretary was neglecting this duty, filed a class action lawsuit to compel the Secretary to perform this accounting.[285] The district court issued an order "to compel those actions which had been unlawfully withheld or unreasonably delayed," remanding and retaining jurisdiction.[286]

From those origins, the *Cobell* litigation metastasized into a sprawling monstrosity aptly summarized by Judge James Robertson, the second district judge to oversee the litigation:

> The "suit has, in course of time, become so complicated" that "no two lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises." It has been on my docket for one year, during which time I have dismissed persons who were still "parties in [the suit] without knowing how or why," resolved

280. Missouri v. Jenkins, 515 U.S. 70, 98 (1995).

281. *See, e.g.*, David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1122-25 (2004) (arguing that the Court's logic in *Jenkins* "distort[ed]" *Gautreaux*).

282. *Id.*

283. *See* Cobell v. Babbitt (*Cobell V)*, 91 F. Supp. 2d 1, 8-9 (D.D.C. 1999); *see generally* Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and* Cobell v. Salazar, 46 GONZAGA L. REV. 609, 614-18 (2010/11).

284. *Cobell V*, 91 F. Supp. 2d at 40.

285. Cobell v. Norton (*Cobell VI*), 240 F.3d 1081, 1092-93 (D.C. Cir. 2001).

286. *Id.* at 1107.

> dozens of motions, enforced an attorneys' fee award that pre-dated the invasion of Iraq, and studied the case enough to be among the few people "alive [who] know[] what it means."[287]

The suit would finally produce a settlement in December 2009, which Congress authorized per the terms of the settlement in 2010, and the district court approved in 2012.[288] Two aspects of the *Cobell* litigation—the injunctive relief ordered by Judge Royce Lamberth and the measures he used to enforce his order—illustrate how broad-ranging injunctive relief may be available against federal agencies in the modern context, as well as the potential perils of seeking such relief.[289]

1. *Separation-of-powers concerns in* Cobell*.*

Separation-of-powers issues appeared from the beginning of the litigation. In *Cobell II*, the circuit court swatted aside the federal defendants' separation-of-powers arguments, citing *Brown* in concluding the district court "was justified in fashioning equitable relief that would ensure the vindication of plaintiffs' rights. That this case involves decades-old Indian trust funds rather than segregated schools does not change the nature of the court's remedial powers."[290] The court's orders were limited: the court-ordered reporting requirements were not "disproportionate to the nature of the government's breach," and the agencies could choose on remand how exactly they were to bring themselves into compliance.[291]

The following year, in deciding whether to appoint a receiver, Judge Lamberth offered a full discussion of the separation-of-powers concerns at issue. In his view, the court's power to appoint a receiver "is an important structural safeguard" that "prevents the executive branch from placing itself over the judiciary and the legislature."[292] Judge Lamberth's opinion echoes then-Judge Ginsburg's first opinion in the *Adams* litigation, suggesting that judicial oversight may promote rather than undermine the separation of powers.[293]

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287. Cobell v. Kempthorne (*Cobell XX*), 532 F. Supp. 2d 37, 103 (D.D.C. 2008) (quoting CHARLES DICKENS, BLEAK HOUSE (1853)).

288. *See* CONG. RSCH. SERV., RL34628, THE INDIAN TRUST FUND LITIGATION: AN OVERVIEW OF *COBELL V. SALAZAR* 8-10 (2012).

289. For a full description, see *id.*, or "consult the *Cobell v.* [*Salazar*] Wikipedia entry." *Cobell XX*, 532 F. Supp. 2d 37, 39 (D.D.C. 2008).

290. *Cobell VI*, 240 F.3d 1081, 1108 (D.C. Cir. 2001).

291. *Id.* at 1109.

292. Cobell v. Norton (*Cobell VII*), 226 F. Supp. 2d 1, 142 (D.D.C. 2002).

293. *See supra* note 231 and accompanying text.

In 2003, Judge Lamberth issued a comprehensive structural injunction that, according to one account, was the first time a judge had effectively taken control of a federal agency since 1973.[294] Frustrated by the Department of the Interior's "continued refusal to comply with the clear directives of Congress and the courts,"[295] Judge Lamberth produced "over two hundred pages of detailed instructions," including an accounting plan to be implemented "on a timetable of his choosing," all backed by the threat of contempt.[296]

Judge Lamberth sought to justify his order by reference to the history of structural injunctions, including in his order a detailed history of the injunction's use against federal agencies.[297] After finding that *Adams* had failed to resolve the separation-of-powers issue, Judge Lamberth determined that general principles did not bar courts from issuing structural injunctions against federal agencies where necessary "to afford relief commensurate to redressing claims that they have adjudicated."[298] Balancing the interests of the judiciary and the executive, he concluded, was no contest: the "demonstrated, specific interest" of the judiciary in affording relief "outweighs Interior's generalized interest in exercising untethered administrative discretion."[299] Judge Lamberth concluded by citing the Trail of Tears as an example of a court abdicating its responsibilities, arguing that failure to provide relief "undermine[s] the integrity of the judicial branch."[300]

After Congress temporarily paused Interior's obligations in 2003 to afford itself more time to attempt to develop a legislative solution,[301] Judge Lamberth issued another injunction in 2005.[302] Crucially, although the appeals court vacated both injunctions (on different grounds), it "never held that such relief was categorically beyond district courts' authority."[303]

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294. *See* Richard J. Pierce, Jr., *Judge Lamberth's Reign of Terror at the Department of Interior*, 56 ADMIN. L. REV. 235, 236 (2004) (citing Cobell v. Norton (*Cobell X*), 283 F. Supp. 2d 66 (D.D.C. 2003)).

295. *Cobell X*, 283 F. Supp. at 232.

296. Pierce, *supra* note 294, at 236.

297. *Id.* at 86-107.

298. *Id.* at 120.

299. *Id.* at 135.

300. *Id.* at 236.

301. Cobell v. Norton (*Cobell XIII*), 392 F.3d 461, 466 (D.C. Cir. 2004).

302. Cobell v. Norton (*Cobell XIV*), 357 F. Supp. 2d 298, 302-07 (D.D.C. 2005).

303. Ramirez v. U.S. Immigr. and Customs Enf't., 568 F. Supp. 3d 10, 25 (D.D.C. 2021).

2. *Controversial remedial measures in* Cobell*.*

Judge Lamberth's wide-ranging and intrusive relief generated no small amount of controversy.[304] The suit has been described as "[t]he most notorious example of judicial abuse of managerial power,"[305] with critics focusing on his liberal use of the contempt power, as well as repeated orders to disconnect computers that could access Indian trust account data from the internet—in practice, an agency-wide shutdown.[306] For his part, Judge Lamberth, who described the litigation as "an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few," saw himself as holding the responsible parties to account—namely, the Interior Department, which he derided as the "last pathetic outpost of the indifference and anglocentrism we thought we had left behind."[307] And defenders of Judge Lamberth's handling of the case have pointed out that "the bungled, fraudulent handling of Indian trust funds" more than justified his response.[308]

The D.C. Circuit eventually removed Judge Lamberth from the case,[309] but the court never questioned the legitimacy of the structural relief he issued. If a general principle can be drawn from *Cobell*, it is from *Cobell VI*: the federal agency's participation in the suit "does not change the nature of the court's remedial powers," including the power to issue a structural injunction.[310] *Cobell* sits well within the "long line of institutional reform cases in the federal courts."[311]

D. *Veterans Claims Processing:* Veterans for Common Sense v. Shinseki

The structural injunction in *Veterans for Common Sense (VCS) v. Shinseki* was not long for this world, but merits mention as the most recent structural injunctive relief (nearly) issued against a federal agency. Although initially successful, *VCS* ultimately backfired: the

304. *Compare* Pierce, Jr., *supra* note 294, at 249 *with* Jamin B. Raskin, *Professor Richard J. Pierce's Reign of Error in the Administrative Law Review*, 57 ADMIN L. REV. 229, 268-73 (2005).

305. Todd David Peterson, Response, *Separation-of-Powers Suits in the Post-Trump Era*, 135 HARV. L. REV. F. 194, 196 (2022).

306. *Id.* (quoting Pierce, *supra* note 294, at 235-36).

307. Cobell v. Norton (*Cobell XV*), 229 F.R.D. 5, 7 (D.D.C. 2005).

308. *Id*.

309. Cobell v. Kempthorne (*Cobell XIX*), 455 F.3d 317, 335 (D.C. Cir. 2006).

310. Cobell v. Norton (*Cobell VI*), 240 F.3d 1081, 1108 (D.C. Cir. 2001).

311. Raskin, *supra* note 304, at 272.

Ninth Circuit approved the injunction before reversing *en banc* in a decision that limited the reach of structural injuctions in veterans' law.

The case began when plaintiffs, two veterans' advocacy groups, filed a class-action lawsuit against the Department of Veterans Affairs (VA), seeking an injunction requiring the VA to reform its veterans' disability claim system.[312] The district court denied VCS's request, finding that the injunction "would call for a complete overhaul of the VA system, something clearly outside of this Court's jurisdiction."[313]

The appellate panel reversed, holding that the due process violations were so egregious—an average of 573 days to certify appeals, for instance—that the court had to act.[314] Judge Reinhardt's opinion explained that, although the political branches are "better positioned than are the courts to design the procedures" necessary to vindicate plaintiffs' rights, "that is only so if those governmental institutions are willing to do their job."[315] On remand, the district court asked the parties to negotiate a "remedial plan," subject to court approval, and warned that if they failed to come to an agreement, the court could itself enter an order requiring new procedural safeguards.[316] Reinhardt's opinion instructed the district court to consider, as in *Adams*, setting timelines for various procedural steps,[317] as well as appointing a special master to create and implement the remedial plan.[318] In dissent, Chief Judge Kozinski accused the majority of attempting to "hijack" the VA's programs and install "a district judge as reluctant commander-in-chief," a maneuver tantamount to an "Article III putsch."[319]

On remand, the district judge summoned the parties for a status conference, expressing concern that "the VA may have done little to

312. *See* Veterans for Common Sense v. Peake, 563 F. Supp. 2d 1049, 1055-56 (N.D. Cal. 2008).

313. *Id.* at 1091-92.

314. Veterans for Common Sense v. Shinseki, 644 F.3d 845, 851-52, 859 (9th Cir. 2011); *see also* Contessa M. Wilson, Note, *Saving Money, Not Lives: Why the VA's Claims Adjudication System Denies Due Process to Veterans with Post-Traumatic Stress Disorder and How the VA Can Avoid Judicial Intervention*, 7 IND. HEALTH L. REV. 157, 167-78 (2010) (arguing the Veterans' Judicial Review Act does not preclude relief).

315. *Veterans for Common Sense*, 644 F.3d at 850-51.

316. *Id.* at 878, 886-87.

317. Court-imposed deadlines are a well-established form of relief for constitutional violations resulting from excessive agency delay. *See* Michael Serota & Michelle Singer, *Veterans' Benefits and Due Process*, 90 NEB. L. REV. 388, 428-32 (discussing similar relief issued against the Social Security Administration).

318. *Veterans for Common Sense*, 644 F.3d at 887.

319. *Id.* at 890 (Kozinski, C.J., dissenting).

improve the problems with its system."[320] It appeared at that point that the district court was preparing "to wade deeply into the operations of VA in an attempt to resolve these issues."[321] In the end, however, the district court never got a chance to do so. On *en banc* review, the Ninth Circuit held that the district court lacked jurisdiction to hear plaintiffs' claims.[322]

Complex jurisdictional questions may limit *VCS*'s applicability to other cases where judges are asked to oversee agencies. Chief Judge Kozinski's dissent from the panel majority, despite a separation-of-powers undertone, focused on the Veterans' Judicial Review Act (VJRA), a statute he read as insulating certain VA decisions from judicial review.[323] Judge Bybee's opinion for the *en banc* Ninth Circuit likewise emphasized that "Congress, in its discretion, has elected to place judicial review of claims related to the provision of veterans' benefits beyond our reach."[324] Scholarly criticism of the Ninth Circuit's original decision focused on the idea that the district judge "essentially crafting VA policy" is "exactly the situation the VJRA was intended to avoid."[325] Whether a structural injunction would have been permissible absent the VJRA, or if issued by the Court of Appeals for Veterans Claims[326] or the Federal Circuit,[327] is an unresolved question. Judge Bybee's opinion concluded that "the type of institutional reform that VCS requests" is "left to Congress and the Executive, and to those specific federal courts charged with

320. Russ Bleemer & Peter Siemons, ADR Brief, *"This is Their Wake-Up Call": Ninth Circuit Trashes the Veterans' Administration Claim Processes*, 29 ALTS. TO HIGH COST LITIG. 130, 137 (2011) (quoting plaintiffs' counsel).

321. James D. Ridgway, *Equitable Power in the Time of Budget Austerity: The Problem of Judicial Remedies for Unconstitutional Delays in Claims Processing by Federal Agencies*, 64 ADMIN. L. REV. 57, 119 (2012).

322. Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1016 (9th Cir. 2012) (en banc).

323. Veterans for Common Sense v. Shinseki, 644 F.3d 845, 898-900 (9th Cir. 2011) (Kozinski, C.J., dissenting).

324. *Veterans for Common Sense*, 678 F.3d at 1016.

325. Andrew Silverio, Case Comment, *Ninth Circuit Guts the VA: Amidst Alarming PTSD and Suicide Rates, the Current System Violates Veterans' Rights to Health Care*, 8 J. HEALTH & BIOMED. L. 117, 130 (2012).

326. But note that Congress has limited the Veterans Court's jurisdiction to "addressing only appeals and petitions brought by individual claimants." American Legion v. Nicholson, 21 Vet. App. 1, 8 (2007) (en banc).

327. Limits on the Federal Circuit's jurisdiction may likewise prevent it from imposing such a remedy. *See* Michael P. Allen, *Significant Developments in Veterans Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J. L. REFORM. 483, 523-24 (2007).

reviewing their actions," theoretically leaving the door open to large-scale injunctive relief from one of those courts.[328]

IV. *JULIANA* REVISITED: DESIGNING A CLIMATE INJUNCTION

These case studies make clear that there is nothing exceptional about a federal court issuing a structural injunction against a federal agency. Federal district and appellate courts have repeatedly affirmed that granting this type of injunctive relief falls within the "broad equitable powers" of district courts.[329] In the absence of an explicit statutory command to the contrary, no court has held that these powers categorically fail on separation-of-powers grounds.

The relief requested by the *Juliana* plaintiffs, however, was more expansive than any of these case studies, all of which were limited to a single agency. While district court judges have broad equitable powers, they cannot "become enmeshed in the minutiae" of administering agencies,[330] and are limited to issuing the relief "necessary to cure the [agency's] legal transgressions."[331] The *Juliana* petition, by contrast, sought "an enforceable national remedial plan to phase out fossil fuel emissions,"[332] asking the court to oversee agencies ranging from the Department of Agriculture to the Export-Import Bank, as well as vehicles and buildings operated by every federal agency.[333] Even the most reform-minded judge might balk at that request.

A. *Finding a Right to a Stable Climate*

The Ninth Circuit may have been unwilling to consider relief in *Juliana* because the validity of the right plaintiffs invoked is currently uncertain. In *Adams* and *Gautreaux*, by contrast, the injury was clear: Plaintiffs were injured by segregation and asked the court to vindicate their rights under the Due Process Clause.[334] In *Cobell*, the right violated was even simpler: the government was obligated by statute to account for plaintiffs' money.[335]

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328. *Veterans for Common Sense*, 678 F.3d at 1037.

329. *Cobell VI*, 240 F.3d 1081, 1108 (D.C. Cir. 2001); Gautreaux v. Romney, 457 F.2d 124, 132 (7th Cir. 1972).

330. Bell v. Wolfish, 441 U.S. 520, 562 (1979).

331. *Cobell VI*, 240 F.3d at 1108.

332. First Amended Complaint, *supra* note 159, at Prayer for Relief ¶ 7.

333. Juliana v. United States, 947 F.3d 1159, 1167 n.4 (9th Cir. 2020).

334. *See* Adams v. Richardson, 356 F. Supp. 92, 95 (D.D.C. 1973); Gautreaux v. Romney, 448 F.2d 731, 740 (7th Cir. 1971).

335. *Cobell VI*, 240 F.3d at 1089-90.

Meanwhile, in *Juliana*, the plaintiffs asserted a novel right to a stable climate,[336] which presents a problem for equitable relief. Over the last several decades, "the Supreme Court has mostly gotten 'out of the business' of recognizing new unenumerated fundamental rights."[337] Some scholars have argued that, while there are exceptions to that rule,[338] climate change "do[es] not raise the same type of liberty and equality issues" as cases like *Obergefell*.[339]

As another district court has flagged, recognizing a right to a stable climate risks creating a right "without apparent limit."[340] This lack of a limit to the right (and, consequently, the remedy) distinguishes *Juliana* from the earlier case studies. In the desegregation cases, the desired result was clear: desegregate the schools. Even if district courts had to retain jurisdiction for decades to ensure this happened,[341] desegregation was always within the power of the defendant school district. Once the district court concluded that the agency had, to the extent practicable, eliminated "the vestiges of past discrimination," the court's oversight would cease.[342] Similarly, *Cobell* concerned "a statutory duty" owed to members of Indian tribes.[343] Once the federal government satisfied its duty, or settled the litigation,[344] the case would be over. Vindicating a right to a stable climate, by contrast, could require oversight without end. In *Juliana*, the Ninth Circuit seized on statements from plaintiffs' experts that the right would require "no less than a fundamental transformation of this country's energy system, if not that of the industrialized world."[345]

Further complicating any limit on the remedy is *Massachusetts v. EPA*. The *Juliana* dissent reads *Massachusetts v. EPA* as concluding that "a perceptible reduction in the advance of climate change is

336. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016).

337. Recent Case, *supra* note 13, at 1933.

338. *See* Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

339. Bradford C. Mank, *Can Judges Use Due Process Concepts in* Obergefell *to Impose Judicial Regulation of Greenhouse Gases and Climate Change?: The Crucial Case of* Juliana v. United States, 7 BELMONT L. REV. 277, 294 (2020).

340. Clean Air Council v. United States, 362 F. Supp. 3d 237, 251 (E.D. Pa. 2019).

341. *See supra* notes 105-106 and accompanying text.

342. *See* Brown v. Unified Sch. Dist. No. 501, 56 F. Supp. 2d 1212, 1214 (D. Kan. 1999) (closing the *Brown* desegregation case filed in 1951).

343. *Cobell XXII*, 573 F.3d 808, 812 (D.C. Cir. 2009).

344. Cobell v. Salazar, 679 F.3d 909, 917 (D.C. Cir. 2012).

345. Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020). The court noted that this right may also conflict with Congress's Property Clause powers. *Id.* at 1170 (citing U.S. CONST. art. IV, § 3, cl. 2).

sufficient to redress a plaintiff's climate change-induced harms."[346] The *Juliana* majority, by contrast, noted the case concerned only procedural harms and benefited from the "special solicitude" afforded state plaintiffs,[347] and expressed concern that "many of the emissions causing climate change happened decades ago or come from foreign and non-governmental sources."[348] The majority's concern, in other words, is that plaintiffs' injury may not be redressed—and the district court could thus retain jurisdiction—even after the United States meets its goal of net-zero emissions by 2050.[349]

Should a court recognize a right to a stable climate, however, it would be difficult to avoid issuing some form of injunction designed to address the problem. Judges "simply are not in a position to refuse to respond to proper cases instituted by appropriate parties."[350] In his study of institutional reform litigation, Phillip Cooper quotes one judge as concluding that, "[i]f the problem is properly presented, there's no way the judge can avoid deciding it."[351]

It may be possible to design injunctive relief on climate change that addresses the Ninth Circuit's concerns. Sabel and Simon discuss a "trend in structural remedies" that diverges from the from the historic "command-and-control" approach.[352] They suggest that the court should intervene whenever a public institution is "failing to satisfy minimum standards of adequate performance" and the political system cannot otherwise bring the institution into compliance, such as in cases of agency capture.[353] Instead of decreeing specific agency's actions, the court in this new approach relies on "democratic experimentalism," where the court-ordered relief serves merely as a starting point to negotiate a remedy.[354] In its simplest form, this model takes the form of a declaratory judgment, with no accompanying order.[355]

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346. *Juliana*, 947 F.3d at 1182 (Staton, J., dissenting).

347. *Id.* at 1171 n.7.

348. *Id.* at 1170.

349. *See The Biden Plan for a Clean Energy Revolution and Environmental Justice*, DEMOCRATIC NAT'L COMM., https://joebiden.com/climate-plan/ [https://perma.cc/5Y48-2BXQ] (archived Apr. 5, 2023).

350. PHILLIP COOPER, HARD JUDICIAL CHOICES 328 (1988).

351. *Id.*

352. *See* Sabel & Simon, *supra* note 83, at 1062.

353. *See id.* at 1062, 1064-65.

354. *Id.* at 1098-99.

355. *See generally* Emily Chiang, *Reviving the Declaratory Judgment: A New Path to Structural Reform*, 63 BUFF. L. REV. 549 (2015) (discussing the declaratory judgment's use as a remedy).

Pursuing relief along these lines may address the separation-of-powers concerns raised by the *Juliana* majority by adopting a more limited role for the district court in managing the relief. Such an approach has also found success in the courts of other countries, which have relied on a similar approach to order relief on climate change. This Part discusses how injunctive relief may be tailored to address the majority's concerns, drawing on *Cobell* and *Adams* to sketch a possible injunction against one subdivision of one particular agency: the Bureau of Land Management's oil, gas, and coal leasing program.

B. *Limiting Judicial Overreach Through Numerical Targets*

Democratic experimentalism seeks to balance the need for effective relief with the need for agency flexibility. One way to implement this model is for the court to issue an order setting numerical targets, leaving it up to the agency to decide how best to restructure its operations to meet the target. In *VCS* and similar cases, these targets were claim processing times, with the agency ordered simply to adopt new processes to reduce unacceptable delays;[356] in *Adams,* the court similarly imposed timelines for complaint investigations and resolutions.[357]

In proposing this model of relief in the *VCS* litigation, James Ridgway suggests that this "blunt, timeline-based approach" could be more effective than the "judicial micromanagement" typical of structural injunctions, at least as applied to federal benefits agencies.[358] In this model, the court would establish a timeline and penalty if the agency failed to comply.[359] Sabel and Simon call this a "penalty default" and identify it as a key feature of the new experimentalist approach to structural injunctions.[360] This approach limits separation-of-powers concerns by minimizing the court's involvement and leaving most decision-making up to the agency.[361]

The *Juliana* plaintiffs likewise embedded a numerical limit in their requested relief. A stable level of atmospheric carbon dioxide, according to plaintiffs' experts, is "atmospheric carbon levels of 350

356. *See* Ridgway, *supra* note 321, at 114-17.

357. *See supra* note 210 and accompanying text.

358. *See* Ridgway, *supra* note 321, at 127-28.

359. *See id.* at 122-25 (citing the timeline-based approach in *Brown v. Plata* as one possible model).

360. Sabel & Simon, *supra* note 83, at 1067.

361. *See* Ridgway, *supra* note 321, at 121-22, 129.

parts per million."[362] Their requested "national remedial plan" sought to draw down excess atmospheric carbon dioxide, with federal agencies theoretically able to choose among "multiple technologically and economically feasible paths . . . that would result in reductions in GHG emissions consistent with returning the global concentration of CO_2 to 350 ppm by 2100."[363]

In other countries that have recognized a right to a stable climate, courts have adopted similar approaches to vindicating this right. In the *Neubauer* case in Germany, for example, plaintiffs sought a declaration that the legislature had violated their rights by adopting greenhouse gas reduction targets insufficient to meet the temperature goal established in the Paris Agreement. The German Federal Constitutional Court agreed, ordering the legislature to meet aggressive emissions targets, but permitting the legislature to decide how to do so within Germany's carbon budget.[364] In the *Urgenda* case in the Netherlands, the court likewise declared that the state breached its duty of care by failing to aggressively reduce emissions, but left it up to the government to determine how best to comply.[365] In the latter case, this mode of relief effectively addressed separation-of-powers concerns: by leaving the relief open-ended, the executive and legislature retained their power to choose how to comply, while the court fulfilled its obligation to redress violations of human rights.[366]

In *Juliana,* however, setting a numerical limit proved insufficient to address the Ninth Circuit's concerns that the plaintiffs' requests were too broad. Although *Neubauer* and *Urgenda* directed broad injunctive relief against the entire government, successful structural injunctions in the United States have been limited to a single agency, such as the Department of the Interior in *Cobell* or HUD in *Gautreaux*. The *Juliana* plaintiffs' demands, which targeted several agencies,[367] sought relief on a scale unprecedented in the American context. Basic separation-of-powers principles would likely prevent even a reform-

362. Juliana v. United States, 947 F.3d 1159, 1176 (9th Cir. 2020).

363. Plaintiffs-Appellees' Answering Brief at 28, Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020) (No. 18-36082).

364. *See* Jacqueline Peel & Rebekkah Markey-Towler, *Recipe for Success? Lessons for Strategic Climate Litigation From the* Sharma*,* Neubauer*, and* Shell *Cases*, 22 GER. L.J. 1484, 1495, 1497 (2021).

365. Recent Case, *Hof's-Gravenhage 9 oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda)*, 132 HARV. L. REV. 2090, 2092 (2019).

366. *Id.* at 2092-93.

367. First Amended Complaint, *supra* note 159, ¶¶ 98-130

minded court from granting such relief, despite the numerical limit theoretically restraining the court's power.

The second problem with the *Juliana* numerical limit is easier to fix: the plaintiffs used the wrong number. While 350 ppm is the consensus global target,[368] it is also, as the majority noted, one that the United States cannot achieve on its own.[369] Prior injunctions against federal agencies have focused on relief that the agency can deliver, such as desegregating its programs or handing over payments. Although climate change is a global problem, litigants may find more success by presenting a number entirely within the control of the targeted agency.

C. *Tailoring the Injunction*

The problems with the *Juliana* lawsuit are not insurmountable. This subpart proposes a new climate injunction grounded in the successful features of the case studies discussed in Part III.

First, the request for injunctive relief should propose a different numerical limit. Instead of relying on global carbon dioxide concentrations, plaintiffs should frame their request in terms of U.S. emissions and the nation's carbon budget. In *Neubauer*, the plaintiffs successfully obtained an injunction by arguing that a German law was insufficient to meet Germany's Paris Agreement obligations.[370] The *Neubauer* court based its ruling in part on Germany's duty to stay within the German carbon budget.[371] The *Urgenda* litigation likewise addressed an individual state's obligations: the court concluded that the Netherlands' goal of a 20% reduction was insufficient, and ordered the government to increase the target to 25%.[372] Even if plaintiffs will still have to confront difficult questions of redressability, presenting the relief in terms of U.S. emissions—"50% by 2030," "net-zero by 2050"—could help judges avoid feeling like they are being asked to effectuate a "fundamental transformation" of the energy system "of the industrialized world."[373] Instead, they will

368. *See* James Hansen et al., *Target Atmospheric CO_2: Where Should Humanity Aim?*, 2 OPEN ATMOSPHERIC SCI J. 217, 226 (2008).

369. *See* Juliana v. United States, 947 F.3d 1159, 1170-71 (9th Cir. 2020).

370. *See* Peel & Markey-Towler, *supra* note 364, at 1491-93 (describing the *Neubauer* litigation, among other lawsuits).

371. *Id.* at 1494.

372. Recent Case, *supra* note 365, at 2091-92.

373. *Juliana*, 947 F.3d at 1171.

confront a more manageable request for relief, limited to what is within the power of the federal government to grant.[374]

The use of an objective target number would ensure that the district court does not engage in "a broad range of policymaking," satisfying at least some of the *Juliana* majority's concerns.[375] While still able to "pass judgment on the sufficiency of the government's response," establishing an objective metric in the initial injunction would limit the district court's role "to accepting or rejecting proposals, rather than dictating their substance."[376] The district court would simply determine whether the government is on track to meet the goal established in the initial order. The use of an overall limit, rather than challenging a broad array of programs as in *Juliana*,[377] would also address the majority's concern that the executive might conclude "that economic or defense considerations called for continuation of the very programs challenged."[378] A numerical goal would allow the agency to fashion its policies through "the usual processes of our representative democracy."[379] While this approach would not fully address the majority's concern that the executive might choose a "less robust approach," this form of relief would address at least some of their separation-of-powers concerns.

Second, plaintiffs should request relief that targets a single agency. Selecting the appropriate agency may be challenging: on the one hand, separation-of-powers will likely limit any realistic request to one agency;[380] on the other, proving redressability requires the chosen agency be capable of redressing plaintiffs' injury. For instance, while the President's Office of Science and Technology Policy plays an important role in developing climate policy,[381] relief directed solely at that office (primarily an advisory body) would likely not meaningfully reduce emissions. Targeting eight cabinet-level departments, as in *Juliana*, swings too far in the opposite direction by expanding the relief beyond what a judge may feel capable of overseeing.

The case studies demonstrate that greater specificity is essential to a successful structural injunction. In *Gautreaux*, for instance, the

374. *See supra* text accompanying notes 340-345.
375. *Juliana*, 947 F.3d at 1172.
376. *Cobell XII*, 391 F.3d 251, 258 (D.C. Cir. 2004).
377. *See, e.g.*, First Amended Complaint, *supra* note 159 ¶¶ 179-84.
378. *Juliana*, 947 F.3d at 1172.
379. Kim, *supra* note 194, at 429.
380. *See Juliana*, 947 F.3d at 1173.
381. *See* First Amended Complaint, *supra* note 159, ¶ 100(c).

appeals court invalidated the district court's threat to terminate funds granted to Chicago through HUD's Model Cities program, because the "Model Cities Program involvement with [the] low-cost public housing for low-income families" at issue in *Gautreaux* was "minimal."[382] In the *Cobell* litigation, Judge Lamberth's order that mandated the Interior Department unplug its computers likewise contained a carveout for computers that the Department certified could not access the data at issue in the case.[383] While these cases demonstrate that courts can be willing to take an active role in overhauling specific agency programs, they also illustrate that courts are unwilling to extend their orders to cover unrelated functions.

Taken together, these cases suggest that an ideal injunction should be specific not just to one agency, but to a specific agency program. In the environmental area, this is difficult, because "[r]arely do environmental problems have one isolated cause that can be fixed by holding just one agency accountable."[384] But the case studies indicate that a district court, despite its broad equitable powers, likely will not reach beyond the challenged program to interfere with unrelated operations to increase pressure on the agency to comply.

Third, the plaintiffs should attempt to cooperate with the target agency. Persuading the agency to negotiate may be difficult, as agencies are loathe to surrender their decision-making autonomy to a federal judge.[385] As proved true in *Gautreaux* and *Adams*, however, after an initial adverse ruling, the agency is often willing to bargain over a decree to maintain some control over the process.[386] The resulting decree often benefits the agency by providing additional funding or political cover.[387] Climate plaintiffs should thus attempt to identify a sympathetic agency that may be willing to cooperate in implementing the injunction.

Fourth, an injunction should start small and proceed incrementally. This may seem counterintuitive, as scholars have noted that the "sheer urgency of the climate crisis" makes a case for

382. *See* Gautreaux v. Romney, 457 F.2d 124, 127 (7th Cir. 1972).

383. Cobell v. Norton, 274 F. Supp. 2d 111, 135-36 (D.D.C. 2003)

384. MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 248 (2014).

385. See text accompanying note 199 *supra*.

386. *See* notes 257-258 and accompanying text (discussing HUD's willingness to negotiate in *Gautreaux*); *see also* notes 209-213 and accompanying text (discussing the lack of separation-of-powers objections to *Adams*).

387. *See supra* Part II.A.2.

"more intense judicial supervision."[388] But Sabel and Simon emphasize that this approach is essential to the new model of public law litigation, which relies on a "process of reassessment and revision."[389] Litigants should seek to ease the court into the sometimes-uncomfortable role of agency oversight. *Adams* and *Gautreaux* began by requesting the agency comply with its desegregation obligations; *Cobell* and *VCS* began with requests for payment or accounting of funds owed plaintiffs. As courts encountered difficulties, they were willing to turn to more aggressive remedies. The *Juliana* dissent correctly notes that "[t]here is no justiciability exception for cases of great complexity and magnitude."[390] But as the majority opinion illustrates, opening with a request for "broad judicial relief" may lead the court to conclude it cannot award anything.[391]

D. *An Ideal Target for Climate Injunctive Relief: The Bureau of Land Management*

The fossil fuel leasing program administered by the Bureau of Land Management (BLM) is an ideal target for any future climate injunction, allowing plaintiffs to achieve meaningful emissions reductions through injunctive relief directed at a single program. BLM's operations are responsible for a quarter of national carbon dioxide emissions.[392] Onshore leases account for 7% of domestic oil and 8% of domestic gas production, with offshore leasing accounting for an additional 16% of domestic oil and 3% of domestic gas production.[393] While only a few percentage points of global emissions,[394] 25% is a substantial portion of U.S. emissions administered through a single agency program, and phasing out

388. Mary Christina Wood & Charles W. Woodward IV, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. ENV'T L. & POL'Y 633, 667 (2016).

389. Sabel & Simon, *supra* note 83, at 1069.

390. Juliana v. United States, 947 F.3d 1159, 1185 (9th Cir. 2020) (Staton, J., dissenting).

391. *Id.* at 1175.

392. *See* MATTHEW D. MERRILL ET AL., U.S. GEOLOGICAL SURVEY, SCI. INVESTS. REP. 2015-5131, FEDERAL LANDS GREENHOUSE GAS EMISSIONS AND SEQUESTRATION IN THE UNITED STATES: ESTIMATES FOR 2005-14, at 6 (2018).

393. Janice Schneider & Nathaniel Glynn, *The Pendulum Swings: Analyzing the Biden Administration's New Priorities and Energy Sector Impacts*, 67 ROCKY MTN. MIN. L. INST. 25-1, at 25-10 to 25-11 (2021).

394. *See* Kate Larsen, Hannah Pitt, Mikhail Grant & Trevor Houser, *China's Greenhouse Gas Emissions Exceeded the Developed World for the First Time in 2019*, RHODIUM GRP. (May 6, 2021), https://rhg.com/research/chinas-emissions-surpass-developed-countries / [https://perma.cc/HN4Q-46JU].

these emissions could allow the federal government to achieve net-zero emissions by 2030.[395]

Injunctive relief directed at BLM could, therefore, hit the sweet spot: it would be meaningful enough to redress climate injuries while limiting the court's reach to a single agency's leasing programs. The relief would also focus on halting government action, by requiring BLM to stop issuing and renewing leases. The *Juliana* majority expressed skepticism of the plaintiffs' affirmative remedial plan; limiting the relief to halting a program may get more traction.[396]

Furthermore, BLM already has a numerical target it is obligated to meet: zero emissions. A lawsuit against BLM would, therefore, merely request the agency be compelled to meet its own target. In a 2021 executive order, President Biden established a goal of achieving "net-zero emissions economy-wide by no later than 2050," specifically invoking the federal government's role as "the single largest land owner" to underscore one way to reach this target.[397] While some environmental groups have panned this goal as "too little too late,"[398] it provides a concrete target for BLM. The Ninth Circuit may have brushed off the *Juliana* plaintiffs' experts when they talked about "a fundamental transformation of this country's agency system,"[399] but a lawsuit asking the court to compel an agency to meet its *own* target may be more difficult to ignore. This target could also serve as the basis of a penalty default, establishing a baseline from which BLM and the plaintiffs could negotiate a more measured phase-out. For example, the default could be an abrupt halt to leasing and production, with BLM able to negotiate a more measured phase-out with the plaintiffs in exchange for protecting landscapes that function as carbon sinks.

Additionally, BLM may be willing to acquiesce to a court-ordered decarbonization process, allowing for the collaborative remedial development that has been a hallmark of successful structural injunctions. The Biden administration is expected to reform the oil and gas leasing program, requiring the agency to consider the social cost of carbon in its decision-making.[400] These reforms have faced

395. *See* WILDERNESS SOC'Y, NET ZERO WEDGES TOOLKIT 6-7 (2021).

396. *See* Sharon Buccino, Speech, *Our Children's Future: Applying Intergenerational Equity to Public Land Management*, 31 COLO. NAT. RES., ENERGY & ENV'T L. REV. 509, 517 (2020) (recommending plaintiffs limit "the relief they seek to an injunction forcing the federal government to cease actions supporting fossil fuel development").

397. Exec. Order No. 14,057, 86 Fed. Reg. 70,935 (Dec. 13, 2021).

398. *See, e.g.*, CLIMATE CRISIS ADVISORY GRP., THE FINAL WARNING BELL 3 (2021).

399. Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020).

400. *See* Schneider & Glynn, *supra* note 393, at 25-10.

legal challenges,[401] which has forced the agency to alter its leasing strategy.[402] An injunction could, for BLM, be a blessing in disguise: while any structural injunction would constrain agency discretion, it could also help shield decisions from legal challenge and, paradoxically, afford the agency more discretion than it enjoys in the status quo.[403] Oversight from a friendly court could help ward off other federal courts seeking to invalidate agency decision-making, granting BLM the cover that institutional defendants have historically found attractive.[404]

Finally, BLM is already statutorily required to manage public lands "to prevent unnecessary or undue degradation," which may provide the statutory guidance that the majority found missing in *Juliana*.[405] The *Juliana* majority expressed concern that there was no standard to guide the district court in administering the injunction, noting the Supreme Court requires "legal standards" to guide the exercise of equitable power.[406] For BLM, however, its statutory mandate "imposes a definite standard,"[407] which the district court could rely on to guide its implementation of the injunction. BLM's existing statutory authority also ensures the court's relief would be limited to an area where BLM already has authority to act,[408] addressing the *Juliana* majority's concern that the requested relief would "demand action not only by the Executive, but also by Congress."[409]

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401. *See* Dan Farber, *Taking the Court's Temperature on Global Warming*, LEGAL PLANET (Apr. 29, 2022), https://legal-planet.org/2022/04/29/taking-the-courts-temperature-on-global-warming/ [https://perma.cc/Y8LA-FXWS].

402. *See* Niina H. Farah, *How the Courts Have Shaped Biden's Leasing Strategy*, E&E NEWS (May 17, 2022), https://www.eenews.net/articles/how-the-courts-have-shaped-bidens-leasing-strategy/ [https://perma.cc/623W-MKHE].

403. For an example of how the status quo exposes agency actions to challenge, see, e.g., Maxine Joselow, *Court Ruling on Social Cost of Carbon Upends Biden's Climate Plans*, WASH. POST (updated Feb. 22, 2022, 11:17 AM EST), https://www.washingtonpost.com/ climate-environment/2022/02/21/social-cost-of-carbon-biden/ [https://perma.cc/LM9W-QVFR].

404. *See supra* note 95 and accompanying text.

405. 43 U.S.C. § 1732(b).

406. Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020) (quoting Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019)).

407. Sierra Club v. Hodel, 848 F.2d 1075 (10th Cir. 1988), *overruled on other grounds*, Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

408. *See* MICHAEL SAUL, TAYLOR MCKINNON & RANDI SPIVAK, CTR. FOR BIOLOGICAL DIVERSITY, GROUNDED: THE PRESIDENT'S POWER TO FIGHT CLIMATE CHANGE, PROTECT PUBLIC LANDS BY KEEPING PUBLICLY OWNED FOSSIL FUELS IN THE GROUND 8-14 (2015); *see also* Mary Greene, *Reforming Oil and Gas Leasing on Public Lands*, 45 VT. L. REV. 575, 588-89 (2021).

409. *Juliana*, 947 F.3d at 1172.

E. *Strategic Considerations*

Establishing that a court could issue such an injunction does not, of course, mean it would be wise for plaintiffs to seek such relief now, as there are significant strategic risks involved in requesting injunctive relief in climate litigation.

As a preliminary matter, any litigation that relies on an asserted right to a stable climate rests on an uncertain foundation.[410] Such a challenge would run the risk of an unfavorable ruling on the merits, which could "deal a fatal blow to this sort of rights-based litigation in federal court."[411] Even decisions that do not reach the merits, like *Juliana*, can shift legal standards in ways that disadvantage climate plaintiffs.[412]

The likelihood of relief is equally uncertain. Although a structural injunction may be theoretically permissible, the federal judiciary has shied away from issuing these remedies since *Adams* and *Cobell*,[413] resulting in a general sense—whether or not that sense is justified—that their era is over.[414] Courts may be reluctant to attempt to design a remedy that is no longer frequently employed, even if precedent provides some justification for it.

Moreover, given the nature of the relief, even if plaintiffs won on the merits, courts might not be willing to see an injunction through. For instance, *Adams* illustrates how a court may retreat once the relief it ordered becomes unmanageable, possibly with sharper concerns for separation of powers as the remedy becomes more complex and requires more management.[415] Climate litigation is still in its early days, but courts have thus far proven reluctant to even meaningfully engage with climate suits, feeling "compelled to exercise judicial restraint."[416]

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410. *See supra* Part IV.A.

411. Benjamin T. Sharp, Commentary, *Stepping into the Breach: State Constitutions as a Vehicle for Advancing Rights-Based Climate Litigation*, 14 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 39, 62 (2019).

412. *See* William Montgomery, Note, Juliana v. United States*: The Ninth Circuit's Opening Salvo for a New Era of Climate Litigation*, 34 TUL. ENV'T L.J. 341, 354-55 (2021); *see also* Recent Case, *supra* note 13, at 1935-36 (arguing *Juliana* could heighten requirements for structural injunctions in the Ninth Circuit).

413. *See, e.g.*, Amul R. Thapar & Benjamin Beaton, *The Pragmatism of Interpretation*, 116 MICH. L. REV. 819, 826-27 (2018) (reviewing RICHARD A. POSNER, THE FEDERAL JUDICIARY: STRENGTHS AND WEAKNESSES (2017)); *see also* Recent Case, *supra* note 13, at 1935-36 (discussing how the *Juliana* majority's standard coexists uneasily with historic practice).

414. *See* Ridgway, *supra* note 321, at 114.

415. *See supra* Part III.A.1.

416. Katrina Fischer Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 ECOLOGY L.Q. 731, 743-44 (2019).

Continued climate litigation may nevertheless prove advantageous. This Note does not attempt to analyze the value of litigation beyond the narrow confines of the courtroom. Even in defeat, a well-written dissent like Judge Staton's in *Juliana* can have strategic value for a social movement,[417] complementing other movement-building strategies.[418] Some of the legal strategies discussed in this Part, such as narrowly tailoring relief, may be counterproductive to litigation employed for that purpose.

On the legal merits, there are also circumstances where pursuing injunctive relief may be appropriate. For example, a new administration may seek to undo the Biden administration's progress on climate change, dragging the U.S. further away from its emissions-reductions goals. Should that happen, the threat of adverse precedent may be outweighed by the damage that would be wrought by four years of a climate-hostile administration, making the strategy outlined above worth the legal risk. An injunction seeking to hold the United States to its climate budget could then be presented as maintaining the status quo, ensuring the federal government will meet its net-zero commitment despite the change in administration.[419] This framing may be more palatable to a judiciary that is looking, more than anything, for a "remedy that it feels comfortable granting."[420]

V. CONCLUSION

The four case studies illustrate that structural injunctive relief against the federal government, despite separation-of-powers concerns, has historically found some success. The case studies discussed above illustrate that this type of relief is most likely to succeed in achieving its goals when four conditions are met: (1) the injunction is directed at a single agency program; (2) plaintiffs seek to use the injunction as a starting point for negotiations; (3) the injunction begins with a small aspect of the program instead of immediately seeking to implement a range of policy goals; and (4) the injunction grants the agency significant latitude to shape its policy response. At a time when the Supreme Court has sharply limited the

417. *See* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 987-88 (2011); *see also* Nathaniel Levy, Note, Juliana *and the Political Generativity of Climate Litigation*, 43 HARV. ENV'T L. REV. 479, 496-98 (2019) (applying NeJaime's framework to climate litigation).

418. *See* Maxine Burkett, *Litigating Separate and Equal: Climate Justice and the Fourth Branch*, 72 STAN. L. REV. ONLINE 145, 152-54 (2020).

419. *See* WILDERNESS SOC'Y, *supra* note 395, at 6-7.

420. *See* Kim, *supra* note 194, at 432.

EPA's power to regulate carbon emissions, these lessons provide a valuable roadmap for litigators still seeking to leverage the courts to compel federal action on climate change. A request for injunctive relief against the Bureau of Land Management's fossil fuel leasing program, for example, could apply the lessons from the case studies to possibly succeed where *Juliana* failed.