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# Reviving the Declaratory Judgment: A New Path to Structural Reform

EMILY CHIANG†

## INTRODUCTION

We stand on the cusp of a new era in public interest litigation, one that has been several decades in the making and one that will shape the future of structural reform for years to come. After sixty years of being defined—and constrained—by *Brown v. Board of Education*,<sup>1</sup> it is time to move on to a new way of doing justice. This Article will begin the task of describing the shift in the making and urge reformers to take note, lest they lose the opportunity to help shape the institutional litigation of the future.

The giants of public interest legal scholarship, Abram Chayes and Owen Fiss, catalogued the first major shift in legal practice and philosophy, from a private rights dispute resolution model to a public law litigation model.<sup>2</sup> That shift, which began with *Brown*, has defined two generations of legal practice, informing how both academics and practitioners think about institutional reform and civil rights. But all good things must come to an end, and so too, the *Brown*-defined era of public interest litigation centered around the structural injunction.

Reformers and courts have begun to engage in new ways of transforming institutions. Some aspects of the change in the air are already evident in the existing literature, which

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1. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955); *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

2. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976); Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 17 (1979) [hereinafter Fiss, *1978 Term*].

describes a movement away from judge-centered injunctive relief towards a “new governance” in the form of more multilateral—and experimental—ways of fixing our most troubled social institutions.<sup>3</sup> Other aspects have yet to develop. This Article contends that (for better or worse) structural reform litigation as Professors Fiss and Chayes knew it has jumped the proverbial shark. It urges reformers to adapt, and to overhaul that which is firmly in their control—their requests for relief—or face the risk of being left behind. If reformers fail to adjust their pleadings and practice, the forces that have long pressed the decline in the traditional model of structural reform litigation will likely have their way.

Although lawyers continue to request injunctive relief and courts continue to grant it, this model of reform faces increasing and inexorable pressure to change, both doctrinally and culturally. Judicial minimalism and separation of powers ideologies are ascendant, and the paradigm of the judge as savior of the downtrodden and bringer of justice is in marked decline. As some scholars have already identified, new practices are emerging. Charles Sabel, William Simon, and Michael Dorf, for example, have written compellingly about the rise of experimentalism, wherein lower courts act on a smaller scale and encourage greater stakeholder participation in reform.<sup>4</sup> Margo Schlanger has argued that the traditional judge-centric understanding of structural reform is overly narrow and fails to take into account the multilateral nature of institutional reform.<sup>5</sup> Others have described a change in the nature of the

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3. See, e.g., Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 877-78 (2003); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 270 (1998); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345-50 (2004); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 55 (2011); Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2000-01 (1999) [hereinafter Schlanger, *Beyond the Hero Judge*].

4. See *infra* notes 58-65 and accompanying text.

5. See *infra* notes 66-71 and accompanying text.

structural injunctions issued to become narrower and more focused on “outputs” than “inputs.”<sup>6</sup>

To these observations, this Article adds the following: the emerging era of reform is defined by the fact that modern litigation is neither filed nor proceeds with the single-minded goal of procuring a structural injunction, but is rather intended to provide the leverage needed for negotiation with defendants; that just as the structural injunction is no longer the centerpiece of litigation, litigation is no longer the centerpiece of structural reform; and that repeat players, like the American Civil Liberties Union (“ACLU”) and large law firms, who increasingly drive structural reform have become too reliant on a cumbersome model of litigation.<sup>7</sup>

The new era of reform remains protean and institutional reform has not yet been completely foreclosed. New governance describes one aspect of the new era, but reformers—and litigators in particular—can still change the template by which systemic change is procured. This Article urges public interest lawyers to reconsider and repurpose a long overlooked remedy: the declaratory judgment. Declaratory judgments are currently an after-thought in public interest litigation, routinely appended onto claims that seek structural injunctive relief with little consideration. This approach devalues and arguably eliminates the need for declaratory relief, which is uniquely suited as a tool for structural reform in our age—and theoretically, at least, easier to procure than injunctions.

The declaratory judgment is a remedy with which even the most ardent judicial minimalists should be comfortable: it can provide the same leverage to drive negotiation as a request for a structural injunction and it can make the reform process more efficient and cost-effective, and thereby more available. Perhaps most importantly, it neatly dovetails the temperament of the modern reform era besotted with new governance—which seeks to replace judicial majesty with multilateral stakeholder involvement—but stays rooted in the exigencies of actual litigation practice. It is fully capable

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6. See, e.g., Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1019 (2004) [hereinafter Sabel & Simon, *Destabilization*].

7. See *infra* notes 86-92 and accompanying text.

of creating the space needed for the many facets of institutional reform we still require.

This Article urges litigators to let go of the traditional telling of the *Brown v. Board of Education* story—as the case that ushered in a brave new world of reform litigation centered on the structural injunction—and to welcome a new telling of the *Brown* story.<sup>8</sup> This retelling of *Brown* is a fuller and richer tale, which includes both *Browns I* and *II* as well as the years in between. It is one that shifts the emphasis away from the structural injunction and towards the need for remedies that prod the political branches to take action. It is one that values political and judicial expediency, efficiency in the use of limited resources, and practical impact over traditional pathways.

Some may consider this proposal threatening, or even dangerous, because it requires a certain surrender of control and may produce unpredictable results. But negotiated settlement has always been the true goal of institutional reform litigation and litigators would do well to “think outside of the regulatory tool box,” identifying new and improved ways to drive defendants to the bargaining table.<sup>9</sup>

Part I of the Article provides a brief summary of the traditional model for structural reform, decoupling the right at stake from the remedy traditionally sought, treating the paradigmatic case for reform separately from the structural injunction. Part II explores the new era in public interest litigation confronting courts and reformers today. It begins with the premise of a decline in the traditional structural injunction model, summarizes the current scholarship on the experimentalism and multilateralism that have evolved to fill the void, and identifies other critical aspects of the new reform. Part III introduces the declaratory judgment as a powerful and heretofore unconsidered vehicle for change, one that is both consistent with the separationist forces that have pressed the decline of the old reform model and one that

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8. Cf. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008); Michael Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9 (1994) (arguing that *Brown* was “directly responsible for only the most token forms of southern public school desegregation”).

9. Lobel, *supra* note 3, at 367.

offers increased efficiencies and doctrinal advantages. Finally, Part IV examines the declaratory judgment in action, exploring how the strategic use of declaratory judgments can streamline and make more effective systemic reform litigation in the real world.

## I. THE TRADITIONAL MODEL OF STRUCTURAL REFORM

As long as social institutions exist, there will be a need for institutional reform, but the means by which that reform takes place need not be static. This Part begins with the foundations first laid by Chayes and Fiss in the commentary and by *Brown* in the doctrine. It will first describe that which we cannot change—the underlying case demanding institutional reform—and then that which we can—the way in which institutional reform litigators have thus far chosen to meet that challenge. The point of this Part is to begin the process of decoupling these two: to recognize that the right is neither interchangeable nor inextricably intertwined with the remedy.

### A. *The Paradigmatic Structural Reform Case*

The structural, or administrative, injunction has long been the gold standard for a certain type of civil rights action: cases involving rights violations by an institution unresponsive to political reform.<sup>10</sup> These cases typically have several common (and related) characteristics, inherent to the nature of the problem they present. First, they involve rights violations that result from the structure of an institution rather than individual “one-off” rights violations.<sup>11</sup> School desegregation remains the paradigmatic example of this characteristic: no amount of individual damages awards could remediate the problem, which required a prospective structural remedy rather than individual retrospective relief.

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10. See, e.g., Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1144 (1977) [hereinafter Fiss, *Dombrowski*] (describing the administrative injunction as one that “attempts to change actual behavior,” as when it “seeks to reorganize an ongoing social institution”).

11. See, e.g., Fiss, 1978 *Term*, *supra* note 2, at 18.

The need for institutional reform arises from a failure of the institution writ large.

Second, the institution in question has failed to meet applicable legal standards.<sup>12</sup> Some scholars have characterized this element as “the least controversial aspect of institutional reform adjudication,” contending that “[o]ften the plaintiff’s claim that the institution fails to meet minimum standards is uncontested.”<sup>13</sup> Although this observation may hold true in some contexts and with respect to some institutional defendants, it is often not the case, particularly in the context of the areas of reform discussed below, which have been subject to extensive litigation on the liability front. In fact, it is precisely the refusal to concede liability that engenders the costly litigation this Article urges reformers to streamline and minimize, so that resources that might otherwise be spent defending a case may instead be invested in the institution that is the subject of litigation.

Third, these problems are typically what Michael Dorf calls “big cases,” or those that “tax the administrative capacities of courts,”<sup>14</sup> as opposed to hard cases, which

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12. Owen Fiss describes the institutions in question as constituting “a new unit of constitutional law—the state bureaucracy.” *Id.* at 4; *see also id.* at 22 (“The focus is on a social condition, not incidents of wrongdoing, and also on the bureaucratic dynamics that produce that condition.”). Charles Sabel and William Simon describe these problems as having “two elements: failure to meet standards and political blockage.” Sabel & Simon, *Destabilization*, *supra* note 6, at 1062.

13. Sabel & Simon, *Destabilization*, *supra* note 6, at 1062-63; *see also id.* at 1065 (“[D]efendants, or important constituents within the defendant institutions, are often sympathetic to the plaintiffs’ claims. Even more often, defendants welcome the new resources that the decree induces nonparty governmental and private sources to volunteer.”); John Choon Yoo, *Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1167 (1996) (“Although state officials are often the ones who violated the Constitution in the first place, remedies often can be implemented by other state governmental organs that were either unaware of the violations or that have experienced a change of heart.”). This Article is not as sanguine.

14. Dorf, *supra* note 3, at 973. Myriam Gilles similarly describes these cases as requiring “breadth and depth,” in the form of broad consensus that a problem exists and a depth of passion about resolving it. Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It’s Still Moving!*, 58 U. MIAMI L. REV. 143, 147-48 (2003).

typically implicate moral controversy.<sup>15</sup> Relatedly, they also tend to be “polycentric” in nature.<sup>16</sup> They present a variety of interrelated problems and the solutions are accordingly complex and interrelated as well. There are multiple moving parts, as with the classic example of allocating resources under a fixed budget.<sup>17</sup> It is difficult to solve one piece of the problem without affecting other portions of the institution—or other institutions—which may or may not themselves be the subject of litigation or the target of reform.

Finally, these problems are resistant to being solved by the political process.<sup>18</sup> They are extensive and complicated (and often expensive to resolve) which is why they tend to persist even where there is widespread acknowledgment that the problem exists.<sup>19</sup> And, moreover, those affected by the institution’s failure to meet standards often lack political power. They are often poor, of color, and/or literally disenfranchised because they are too young to vote, are felons, or are incarcerated.<sup>20</sup> Sometimes they are all of these things at once. Neither the political branches nor administrative agencies are typically inclined to take these issues on without external prodding.

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15. Dorf, *supra* note 3, at 972-73; *see also* Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 49-50 (1996) [hereinafter Sunstein, 1995 Term].

16. William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 645-47 (1982) (describing legal and non-legal polycentricity); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-96 (1978) (describing polycentric tasks).

17. Sabel & Simon, *Destabilization*, *supra* note 6, at 1058.

18. *See, e.g.*, Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 288 (1988) (noting the “numerous obstacles to legislative action, the most important of which are the power of inertia, the lack of time, and the futility of all-encompassing statutory codes”).

19. *Cf.* Sabel & Simon, *Destabilization*, *supra* note 6, at 1092 (“[I]t is remarkable how rarely the practices that the plaintiffs attack seem to have been the result of an exercise of authority by anyone. The situation is more often the consequence of a failure or refusal to make policy.”).

20. *Cf. id.* at 1064 (noting that one premise of public law reform cases “involves majoritarian political control unresponsive to the interests of a vulnerable, stigmatized minority”).

B. *The Paradigmatic Institutional Reform Remedy: the Structural Injunction*

Much as *Brown* presented the paradigmatic case for structural reform, the court-imposed solution in *Brown* became the paradigmatic remedy for structural reform.<sup>21</sup> Plaintiffs' side litigators came to see every case presenting the need for structural reform as one in which a structural injunction should be sought and judges often complied.<sup>22</sup> *Brown* was a true touchstone.<sup>23</sup> As Fiss notes, "*Brown* was accepted into the legal and popular culture as legitimate, so much so that it began to function as an axiom. . . . As a consequence federal court access was assumed for administrative decrees reaching state prisons and mental hospitals, public housing projects, and local police departments."<sup>24</sup>

In his groundbreaking article, *The Role of the Judge in Public Law Litigation*, Chayes describes an evolution from the traditional conception of adjudication—which was bipolar, retrospective, and self-contained, as with contracts

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21. As Donald Horowitz puts it, "*Brown* created a magnetic field around the courts . . . ." Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1281 (1983); see also Fiss, *1978 Term*, *supra* note 2, at 2 ("As a genre of constitutional litigation, structural reform has its roots in the Warren Court era and the extraordinary effort to translate the rule of *Brown v. Board of Education* into practice."); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 588 (1983) ("The very evolution of this extraordinary remedial weapon, now central to the modern conception of judicial power, is inseparable from the desegregation effort and resistance to it. . . . [J]udicial remedies became so intrusive largely because public resistance precluded alternative methods for making *Brown* a reality.").

22. See Yoo, *supra* note 13, at 1124 ("In 1994, federal court orders regulated the conditions of confinement in 244 prisons in thirty-four different jurisdictions . . . . [H]undreds of school districts remain under federal court order. . . . At one point in the 1970s, it appears that federal courts had taken control simultaneously of Alabama's schools, mental hospitals, and prisons.").

23. Indeed, *Brown* continues to serve as a touchstone in the context of the fight for marriage equality for gays, in both the social and academic commentary. See, e.g., Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 128-29 (2013).

24. Fiss, *Dombrowski*, *supra* note 10, at 1149 (footnote omitted).

or property disputes—to public law litigation.<sup>25</sup> This new litigation had a more complicated party structure: an adversary relationship that was “suffused and intermixed with negotiating and mediating processes at every point,” and a judge who presided majestically over the whole sprawling mess.<sup>26</sup> The end goal of the process was a structural injunction: “the centerpiece of the . . . public law model.”<sup>27</sup>

Fiss similarly describes the structural injunction as essential to the resolution of a case presenting a need for structural reform:

[T]he remedy at issue in a structural case is the injunction, and it does not require a judgment about wrongdoing, future or past. The structural suit seeks to eradicate an ongoing threat to our constitutional values and the injunction can serve as the formal mechanism by which the court issues directives as to how that is to be accomplished. It speaks to the future. The prospective quality of the injunction, plus the fact that it fuses power in the judge, explains the preeminence of the injunction in structural reform.<sup>28</sup>

Although Fiss notes in passing that “some other remedies (e.g., declaratory judgments, conditional habeas corpus) have many of the same qualities as the injunction, for example, its prospectivity, and could be expected to be found in structural suits,” his focus (and that of the courts) is on the injunction.<sup>29</sup>

Fiss adds that the injunction is predicated on legislative failure; judges must act because the legislature is either

25. Chayes, *supra* note 2, at 1281-84.

26. *Id.* at 1284; see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (identifying and critiquing the phenomenon of managerial judging); cf. ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 109-10 (2003) [hereinafter SANDLER & SCHOENBROD, *DEMOCRACY*] (“Judicial enforcement has gone from being a declaration of rights to a managerial process. As a result, the courts have found themselves up to their necks in budgetary, personnel, regulatory, and programmatic choices of the kind previously made only by elected state and local officials and their appointees.”).

27. Chayes, *supra* note 2, at 1298.

28. Fiss, *1978 Term*, *supra* note 2, at 23.

29. *Id.* at 23 n.50.

unwilling or unable to do so.<sup>30</sup> The judge must, moreover, act for as long as her involvement is required, which may be quite a while indeed. Per Fiss, the remedial phase in structural litigation is by nature and of necessity prolonged, “invariably result[ing] in a series of interventions—cycle after cycle of supplemental relief.”<sup>31</sup> The judge’s task is to manage the issue and retain jurisdiction “as long as the threat [to constitutional values] persists.”<sup>32</sup> To these observations about the nature of the injunction, others have added: they are extensive and affirmative in their commands; they are administrative in character and establish the courts as a source of authority and accountability; and they are legislative in nature.<sup>33</sup>

## II. A NEW ERA IN PUBLIC INTEREST LITIGATION

This Part contends that the decoupling process between the right to institutional reform and the remedy implemented has already begun. Structural reform continues to take place, but more seldom under the auspices of a structural injunction. A number of scholars have begun the

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30. *Id.* at 9-10, 24; *cf.* Chayes, *supra* note 2, at 1308 (arguing that the “judicial process is an effective mechanism for registering and responding to grievances generated by the operation of public programs in a regulatory state [because][u]nlike an administrative bureaucracy or a legislature, the judiciary must respond to the complaints of the aggrieved”).

31. Fiss, *1978 Term*, *supra* note 2, at 28. In fact, Fiss explicitly declares that the court’s task in these cases “is not to declare who is right or who is wrong.” *Id.* at 27.

32. *Id.* at 28.

33. Horowitz, *supra* note 21, at 1267-68. Horowitz also argues that structural injunctions are also resistant to appellate review but this characterization may not hold as strongly these days. *Id.* at 1268. Chayes has also described the structural injunction as one that

seeks to adjust future behavior, not to compensate for past wrong. It is deliberately fashioned rather than logically deduced from the nature of the legal harm suffered. It provides for a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer. Finally, it prolongs and deepens, rather than terminates, the court’s involvement with the dispute.

Chayes, *supra* note 2, at 1298; *see also* Fletcher, *supra* note 16, at 637-41 (describing typical institutional suit and remedial decrees).

process of identifying how and why this change is occurring, but the conversation can be further enriched so that reformers may better understand how to harness these changes to achieve their goals.

#### A. *The Decline of the Traditional Model*

Not everyone was enamored with the structural injunction model, which came under fierce criticism for showing “minimal regard for the limits of the federal courts’ inherent powers.”<sup>34</sup> Others have noted a number of the disadvantages associated with structural injunctions, such as the drain on court resources to formulate and implement, the political capital such injunctions often require courts to expend, and the degree of intrusion they require on the workings of institutions courts may not readily understand.<sup>35</sup>

Sometimes, as with *Brown*, a paradigm shift is easy to identify even without the benefit of hindsight. More often, it is difficult to say when exactly a shift is about to begin, whether one has begun, or when precisely it began.<sup>36</sup> The empirical question of whether the absolute number of structural injunctions issued has declined over the last several decades remains largely unanswered,<sup>37</sup> but the

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34. Yoo, *supra* note 13, at 1122; *see also* Sabel & Simon, *Destabilization*, *supra* note 6, at 1090 (“Structural injunctions are accused of . . . excessively concentrating power in the court at the expense of the electoral branches.”).

35. *See, e.g.*, SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 26, at 8-12; Fiss, *Dombrowski*, *supra* note 10, at 1148; Laura E. Little, *It’s About Time: Unravelling Standing and Equitable Ripeness*, 41 *BUFF. L. REV.* 933, 950-51 (1993); Meltzer, *supra* note 18, at 320-21; Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 *GEO. L.J.* 1355, 1379 (1991); Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 *REV. LITIG.* 99, 107 (2007); Yoo, *supra* note 13, at 1123 & nn.15-17.

36. In fact, Fiss, writing in 1979, had reason to believe the structural injunction was already at risk as a model of litigation. Fiss, *1978 Term*, *supra* note 2, at 4-5 (describing the “counterassault” against the structural injunction by the Burger Court).

37. Schlanger’s examination of prison litigation reform is a noteworthy exception. Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 *N.Y.U. L. REV.* 550, 553-54 (2006) [hereinafter Schlanger, *Civil Rights*].

academic commentary is largely in agreement that there has been a decline.<sup>38</sup>

To be sure, some scholars have argued that the purported decline has been exaggerated or does not actually exist. Even as they document the rise of experimentalism, for example, Sabel and Simon discuss the “protean persistence of public law litigation.”<sup>39</sup> Schlanger contends that in the context of jail and prison litigation, at least, there is plenty of on-going structural reform, and speculates “that the situation is similar in other types of civil rights injunctive litigation, as well.”<sup>40</sup> Myriam Gilles suggests that this type of court activity is actually alive and well because it has been co-opted by the conservative movement as, for example, in the higher education affirmative action cases.<sup>41</sup> Ross Sandler and David Schoenbrod argue that the landscape of federal statutory regulation has provided judges with new and ever-increasing means of entering decrees against state and local officials.<sup>42</sup>

This Article’s position is that although the structural injunction is far from dead (and will likely be with us for some time) it has lost its status as most favored remedy for structural reform.

First, on the doctrinal front, the Court has acted repeatedly to limit the scope and availability of these injunctions. Judith Resnik has persuasively argued that “the majority is developing a new theory of limitations on the

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38. See, e.g., Gilles, *supra* note 14, at 161; Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 648, 670 (1988); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 295 (1989) (noting that institutional reform litigation has decreased in the late twentieth century); Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 VA. L. REV. 1693, 1696-1705 (2004).

39. Sabel & Simon, *Destabilization*, *supra* note 6, at 1021.

40. Schlanger, *Civil Rights*, *supra* note 37, at 553-54; see also David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1020-21 (2004).

41. Gilles, *supra* note 14, at 169-70; see also Karen O’Connor & Lee Epstein, *Rebalancing the Scales of Justice: Assessment of Public Interest Law*, 7 HARV. J.L. & PUB. POL’Y 483, 493-502 (1984); Reva B. Siegel, *The Supreme Court 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013).

42. SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 26, at 11.

equitable powers of the federal courts.”<sup>43</sup> This set of limitations—such as those requiring abstention on the part of federal courts under certain conditions, or those governing standing for injunctive relief—serves to make wholly unavailable entire categories of relief for entire categories of plaintiffs.<sup>44</sup> Although some of these restrictions can be circumvented, such as by filing in state rather than federal court, they serve as the new doctrinal baseline with which litigants and the lower courts must work. While issuing these limitations, the Court has also made clear its declining interest in lower court micro-management of complex institutions.<sup>45</sup> It has repeatedly warned lower courts not to overstep the lines of judicial and federal propriety, framing its admonitions in terms of both separation of powers and federalism concerns.<sup>46</sup>

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43. Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 231 (2003). Resnik contends that “the majority has rejected conceptions of a ‘cooperative partnership’ between judges and Congress, sharing in the undertaking of lawmaking,” but notes that the door may still be open when the court is exercising its equitable powers in furtherance of the public interest, as opposed to private interests. *Id.* at 241, 249-52; *see also*, e.g., David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1235-36 (“[W]hile the Court has not heeded calls to eliminate the structural injunction, it has imposed procedural hurdles that substantially erode the availability of the equitable remedy.”) (footnote omitted).

44. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983) (imposing standing requirements for injunctive relief); *Rizzo v. Goode*, 423 U.S. 362, 371-73 (1976) (same); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971) (creating the *Younger* abstention doctrine).

45. *See, e.g.*, *Rhodes v. Chapman*, 452 U.S. 337, 351-52 (1981); *Bell v. Wolfish*, 441 U.S. 520, 562 (1979) (warning lower courts against becoming “enmeshed in the minutiae of prison operations”).

46. *See, e.g.*, *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 442 (2004) (noting that once a consent decree has been satisfied, responsibility must be returned to the state and that state officials “must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities”); *Lewis v. Casey*, 518 U.S. 343, 362 (1996) (striking down an injunction as being “inordinately—indeed, wildly—intrusive” and noting that the process by which it was developed “failed to give adequate consideration to the views of state prison authorities”); *Turner v. Safley*, 482 U.S. 78, 84-85 (1987) (“Running a prison is an inordinately difficult undertaking . . . peculiarly within the province of the legislative and executive branches of government. . . . [S]eparation of powers concerns counsel a policy of judicial restraint.”).

The second aspect of the decline is harder to quantify and attribute: more of a shift in the cultural *Weltanschauung* than anything else, a decline in motivating philosophy as opposed to empirical practice. Fiss describes it in relation to *Brown*, which by the mid-1970s had begun “to lose its axiomatic power.”<sup>47</sup> Some of the factors he identifies include the retirement of the justices originally responsible for *Brown*, a societal movement away from the integrative ideals of *Brown*, and “a fuller appreciation of the difficulties of administrative injunctions.”<sup>48</sup> As Gilles aptly puts it, there is “a sort of sub-constitutional, extra-legal discomfort with the role of judges in institutional reform litigation.”<sup>49</sup> The doctrinal developments in the case law are an inevitable result of this culture shift, much of which is itself rooted in separation of powers concerns.<sup>50</sup> And legislatures themselves have internalized and appropriated these arguments, using them to justify inaction in the face of judicial orders.<sup>51</sup> As one lawmaker from Kansas recently stated, “I think the bottom line is that you still have a constitutional issue here as to which branch has the power of the purse. . . . And clearly that duty lies with the legislative branch. I don’t believe that’s the place of the court.”<sup>52</sup>

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47. Fiss, *Dombrowski*, *supra* note 10, at 1149-50; *cf.* SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 26, at 33 (“The battle to overthrow segregation is not the right model for all interrelationships between federal and state and local officials.”). *Brown* arguably no longer means what it once meant substantively either. *See, e.g.*, Siegel, *supra* note 41, at 3-5.

48. Fiss, *Dombrowski*, *supra* note 10, at 1149-50; *cf.* Horowitz, *supra* note 21, at 1288 (“The use of litigation to effect change in large, complex, ongoing, public institutions is a more hazardous venture than it is frequently made out to be.”).

49. Gilles, *supra* note 14, at 146.

50. *See, e.g.*, *Bell*, 441 U.S. at 562 (noting that “under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan”); *see also infra* text accompanying notes 179-81 (providing a fuller discussion of these concerns).

51. *See, e.g.*, Trevor Graff & John Eligon, *Court Orders Kansas Legislature to Spend More on Schools*, N.Y. TIMES (Mar. 7, 2014), [http://www.nytimes.com/2014/03/08/us/kansas-school-spending-ruling.html?\\_r=0](http://www.nytimes.com/2014/03/08/us/kansas-school-spending-ruling.html?_r=0) (reporting that the Kansas state legislature has been withholding constitutionally mandated school payments in defiance of a court order).

52. *Id.*

Quantifying the decline, to the extent it exists, is ultimately irrelevant and unnecessary. It is sufficient to note the existing dissatisfaction with the structural injunction as the default means of procuring institutional reform. In many ways, the structural injunction is no more than a straw man, and has been nothing more for some time: the frequency with which these cases are resolved via settlement between the parties as opposed to trial has by now so often been stated as to be uninteresting.<sup>53</sup> If the desired end result is a negotiated consent decree or other form of settlement agreement, and the means of getting there (i.e., the relief requested) is what detractors find offensive and arguably unnecessary for procuring the desired end result, litigators can and should reevaluate the relief requested.

Although this Article takes no normative stance as to the death of the structural injunction, it urges litigators to begin the process of estate planning. If the right to institutional reform persists, can we identify a remedy worthy of the task and similarly capable of providing systemic relief?

#### B. *New Governance, Experimentalism & Multilateralism*

Gerald Rosenberg has famously described the idea that litigation alone can produce systemic change as a “hollow hope,”<sup>54</sup> and Stuart Scheingold has similarly decried “[t]he myth of rights,” by which court articulation of a right is sufficient to produce reform.<sup>55</sup> More recent scholarship has focused on what has arisen to take the place of traditional litigation. This scholarship—along with the phenomenon it explores—is often categorized as “new governance”: a shift away from rights-claiming litigation-focused strategies towards more experimental, multilateral, and flexible means of reform.<sup>56</sup>

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53. See *infra* text accompanying notes 72-80.

54. ROSENBERG, *supra* note 8.

55. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 5 (2d ed. 2004).

56. See, e.g., Bradley C. Karkkainen, “*New Governance*” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 472-74 (2004); Lobel, *supra* note 3, at 345-50; Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 324-26 (2009).

This Article will focus on those aspects of new governance most relevant to institutional reform and add the following: first, what we are seeing in the courts portends a wholesale paradigm shift in the way public interest litigation will be conducted in years to come, whether reformers like it or not; second, much of this shift is hostile to structural reform, and; third, there is still time for reformers to adapt the new constraints to their advantage to continue to pursue institutional change.

Some scholars contend that the decline of the structural injunction is nothing to mourn because more democratic solutions to the rights problem have evolved to take its place, in the form of experimentalist problem-solving courts.<sup>57</sup> In a series of articles beginning in the late 1990s, Michael Dorf, Charles Sabel, and William Simon make a compelling case that top-down institutional reform has gradually and increasingly been replaced by a more localized “democratic experimentalism.”<sup>58</sup> They identify a “Scylla of deference” and a “Charybdis of usurpation,”<sup>59</sup> and urge the legal system to embrace this experimentalism as a means of addressing broad social problems without having to resort to “judicial exhortation and intimidation.”<sup>60</sup>

These scholars, who might properly be referred to as “experimentalists,” offer many of the traditional critiques of the structural injunction. They argue that the institutions subject to traditional institutional reform have their own internal mechanisms for accountability that the courts have

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57. See, e.g., Sabel & Simon, *Destabilization*, *supra* note 6, at 1019-20. *But see*, e.g., Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1142-43 (2006) (critiquing the decline of formal adjudication via delegation and privatization and noting that access to quality adjudication is increasingly class based).

58. Dorf, *supra* note 3, at 884; Dorf & Sabel, *supra* note 3; Sabel & Simon, *Destabilization*, *supra* note 6, at 1019-20.

59. Dorf, *supra* note 3, at 882; *see also* Dorf & Sabel, *supra* note 3, at 393 (“[T]he Court in practice faces a familiar Hobson’s choice. It can defer to political decisions however arrived at, knowing that deference invites caprice and manipulation by the lawmaker. Or it can scrutinize the decision in the light of its balancing techniques. But this scrutiny threatens to paralyze or disqualify democracy.”).

60. Dorf & Sabel, *supra* note 3, at 395.

disregarded without legitimacy or expertise.<sup>61</sup> They prefer instead the work of experimentalist courts, sometimes referred to as problem-solving courts, which substitute participatory administration for comprehensive top-down reform.<sup>62</sup> They praise the increased flexibility of these courts and the collaboration and stakeholder participation they enable.<sup>63</sup> Although some experimentalist courts operate at the trial court level, as with the newly popular drug courts, others continue to issue injunctions, but focus more on outputs rather than inputs.<sup>64</sup> These new injunctions are praised for being less intrusive, more flexible, and more process oriented than those of old.<sup>65</sup>

In addition to experimentalism, there have been both normative and descriptive developments on the multilateral (as opposed to unilateral judge-centered) nature of structural reform in both the courts and the academic commentary. The courts have begun to press for increased involvement from stakeholders.<sup>66</sup> And, in contrast to the unilateral model propagated by Fiss, commentators have both begun to acknowledge that non-judicial players have always had a role to play and to urge their increased involvement.

Margo Schlanger, for example, details the many non-judicial players driving reform, such as plaintiffs' counsel and public interest lawyers, arguing persuasively that "[i]nstitutional reform litigation is not a judicial movement

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61. *E.g.*, Dorf, *supra* note 3, at 942.

62. *E.g.*, *id.* at 886.

63. *E.g.*, Sabel & Simon, *Destabilization*, *supra* note 6, at 1020.

64. *Id.* at 1019 (describing cases in which courts focus on providing the parties with "governing norms . . . that express the goals the parties are expected to achieve . . . leav[ing] the parties with a substantial range of discretion as to how to achieve these goals") (emphasis omitted).

65. John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1411-12 (2007) (describing "[n]ewer decrees [that] typically avoid the 'kitchen sink' approach to institutional reform in favor of orders that identify goals the defendants are expected to achieve and specify standards and procedures for measurement of performance").

66. *See, e.g.*, *Martin v. Wilks*, 490 U.S. 755, 761 (1989) (holding that nonparties affected by consent decrees may collaterally attack the decrees if they were not joined to the litigation).

but a political practice.”<sup>67</sup> She is representative of a group of scholars, whom some have denominated “multilateralists,”<sup>68</sup> who recognize that the polycentricity of the paradigmatic case for structural reform is resolved polycentrically, with a number of stakeholders participating and a focus on a negotiated result.<sup>69</sup> Experimentalists have also noted the multilateral nature of even the traditional model of structural reform.<sup>70</sup> And others have argued that judges are relatively passive even in traditional structural reform cases, anointing instead a “controlling group—a bureaucracy consisting of attorneys for the parties, the functionaries and experts they bring into the negotiating room, and various court-appointed officials such as special masters.”<sup>71</sup>

### C. *Other Aspects of the New Era*

The emerging era of reform has several other defining characteristics.<sup>72</sup> First and foremost, the new reform does not proceed with the single-minded goal of procuring a structural

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67. Schlanger, *Beyond the Hero Judge*, *supra* note 3, at 2036; *cf.* Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 176 (2003) (describing federal judges as “no longer heroic solo actors but part of a corporate body that has begun to socialize the next generation of judges to be suspicious of adjudication and to prefer negotiation”).

68. *See, e.g.*, Zaring, *supra* note 40, at 1028 (“Multilateralists conceptualize institutional reform lawsuits as independent, ad hoc committees convened in a courtroom and composed of stakeholders in a government institution—the officials who run it, the people most affected by it, and their lawyers and experts.”).

69. *See, e.g.*, SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 26, at 7; Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984) (coining the term “litigotiation”); Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981, 995-97 (1993) (discussing the importance of stakeholder participation and the participation values implicated by structural reform); Zaring, *supra* note 40, at 1062-72 (identifying various repeat players).

70. Dorf & Sabel, *supra* note 3, at 401 (noting that in the context of institutional reform litigation “[e]ven traditional courts often directly involve the parties in the formulation of remedial decrees”).

71. SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 26, at 118-19.

72. *See id.* at 117-38.

injunction, but rather with the intention of producing negotiated change, most often via pre-trial settlement.<sup>73</sup> If the defendants refuse to settle and a structural injunction is issued, so be it and all the better, but the injunction is not the be all and end all of litigation. The drive for injunctive relief no longer shapes the litigation, which is brought to provide the leverage needed to get defendants to the bargaining table.<sup>74</sup> The goal of litigation is not an injunction, per se, but relief, typically procured in the form of negotiated change. This Article contends that the conflation of the these two conceptually separate pieces—the change sought, on the one hand, and the injunction used as a means of getting there, on the other—is unnecessary and should be reexamined. Negotiated change may be procured through means other than a request for an injunction and, where those means would be more cost-effective and efficient, litigators should consider utilizing them.

Michael Dorf has written that “[e]ven the most enthusiastic defenders of structural reform litigation recognize that courts are at best ‘sub-optimal decision makers’ in these contexts.”<sup>75</sup> Dorf’s observation is precisely right. Reformers continue to file these cases not so much because they hope for court-ordered relief as because they see the litigation as necessary for destabilization.<sup>76</sup> Litigators seeking structural injunctions are fully cognizant of the normative and practical difficulties engendered by injunctions, but they do so regardless because the suits are designed to drive negotiation. The mistake critics of the structural injunction make is to think that the only

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73. See, e.g., Galanter, *supra* note 69, at 268 (referring to “the strategic pursuit of a settlement through mobilizing the court process”); Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 840 (1997) [hereinafter Resnik, *Litigating and Settling*] (“The shared understanding is that commencing a lawsuit is a plan to litigate or to settle a case but is rarely a plan to try a case.”).

74. Cf. SCHEINGOLD, *supra* note 55, at 148 (“The politics of rights . . . involves the manipulation of rights rather than their realization. Rights are treated as contingent resources which impact on public policy indirectly—in the measure, that is, that they can aid in altering the balance of political forces.”).

75. Dorf, *supra* note 3, at 941-42.

76. See Sabel & Simon, *Destabilization*, *supra* note 6, at 1020.

judicially-driven successes are those in which the court actually issues a structural injunction. It is the *request* for the injunction—and perhaps even more importantly, the evidence of wrong-doing exposed by the pre-filing and discovery process—that drives defendants to the bargaining table and that is the outcome by which success is and should be measured.

This shift in reform strategy is part and parcel of the settlement dynamic that pervades all of modern litigation, both civil and criminal. In most cases, the court is never even given the opportunity to issue the injunction.<sup>77</sup> In addition to the usual suspects driving settlement, there are a number of other additional factors in this context. Schlanger, for example, notes that “defendants who agree to a decree may transform themselves in the eyes of the public, and even in their own eyes, from ‘lawbreakers to law implementers.’”<sup>78</sup> She also theorizes that the parties may believe true institutional change more likely to result from a negotiated settlement rather than a judicially imposed order, and that defendants cooperate because they know settlement will result in increased resources for their institution.<sup>79</sup> Others have noted that defendants may settle to avoid even more burdensome court-imposed rules.<sup>80</sup>

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77. See, e.g., Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 928-29 (2000) (noting that roughly 60 to 70% of civil cases settle and exploring how federal judges came to understand their role as including the management and settlement of cases); see also Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 27-28 (1983) (putting the number at closer to 90%).

78. Schlanger, *Beyond the Hero Judge*, *supra* note 3, at 2012.

79. *Id.*; see also Zaring, *supra* note 40, at 1046 (“Because it is difficult to resort to another court for relitigation of a remedial determination, and because, when appeal is possible, those determinations are reviewed deferentially, institutional reform litigants face powerful incentives to agree on a remedy rather than waiting for the district court to impose one.”).

80. SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 26, at 122, 167-71; Frank M. Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CALIF. L. REV. 983, 994 (1979).

Second, just as the structural injunction is no longer the centerpiece of litigation, litigation itself is no longer the centerpiece of reform efforts.<sup>81</sup> It is now standard practice to treat litigation as but one of several inter-related activities, all designed to produce institutional change.<sup>82</sup> Litigation is now coordinated with a host of extra-judicial activities—such as lobbying, public education, and grassroots organizing—explicitly intended to mutually reinforce and amplify one another.<sup>83</sup>

Organizations like the ACLU increasingly file a lawsuit but then also publish related reports, profile individuals similarly situated to their named plaintiffs (or the named plaintiffs themselves), partner with other like-minded but non-litigating organizations, and hire lobbyists to work on the same issues addressed by the lawsuit. The litigation itself is but a pressure point, designed to bring political actors into compliance, lest the litigators procure less palatable court-ordered relief.<sup>84</sup> This way of doing business is reflected in foundation funding practices, which now pay for items like public messaging workshops for advocates and multi-pronged campaigns that include litigation as just one part of many.<sup>85</sup>

Third, although structural reform has often been driven primarily by an elite group of repeat players (like the ACLU),

81. See, e.g., Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2028 (2008) (surveying public interest lawyers and noting that “the organizational leaders . . . have been acutely aware of the limits of litigation in securing social change”).

82. See, e.g., SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 26, at 150-51; Rhode, *supra* note 81, at 2046-48.

83. See, e.g., SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 26, at 151; Rhode, *supra* note 81, at 2028.

84. It is nevertheless a much-needed pressure point. See, e.g., Rhode, *supra* note 81, at 2044 (noting that “[c]ourts may not always be the most effective dispute resolution forums, but they are often the most accessible; they are open as of right and can force more economically or politically powerful parties to the bargaining table”).

85. The Michigan Campaign for Justice, for example, is a 501(c)(4) coalition funded by Atlantic Philanthropies. *About Us*, MICHIGAN CAMPAIGN FOR JUSTICE, [http://www.michigancampaignforjustice.org/about\\_us.php](http://www.michigancampaignforjustice.org/about_us.php) (last visited May 6, 2014).

those players increasingly work from the same playbook and in cooperation with major law firms.<sup>86</sup> Each of these facets is arguably causally related to the others and together they result in an increasingly unwieldy model case structure. David Zaring has identified what he calls “transjudicial administration,” wherein law spreads horizontally between trial courts.<sup>87</sup> Zaring argues that information is “exchanged by repeat players who participate in multiple cases, most commonly as counsel or expert witnesses.”<sup>88</sup> In the context of structural reform, repeat players now include big firms, which routinely cooperate with non-profit organizations to bring large class action lawsuits, lending their expertise and resources in exchange for prestige and hands on experience for their junior associates.<sup>89</sup>

These typically defense-side firms have in turn brought their standard practices to their pro bono work and, indeed, pride themselves on treating their pro bono cases in the same way as their paying cases. Schlanger describes this dynamic in the context of prison litigation, but it holds true in the broader civil rights context as well. She contends that the personnel shift towards the private bar has “fed [an] arms race, as large-firm attorneys have followed their ordinary large-firm ‘playbook’ to make the cases even more expensive, more thoroughly litigated, and more complex.”<sup>90</sup> Schlanger observes the self-reinforcing nature of this change: “If it takes Wilson Sonsini’s resources to litigate a prison case

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86. See, e.g., Rhode, *supra* note 81, at 2070 (reporting that four fifths of public interest organizations reported extensive or moderate collaboration with the private bar); cf. SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 26, at 124 (noting that in typical structural reform litigation, “the plaintiff, usually a large class of people, is unable to control the attorney”); Resnik, *Litigating and Settling*, *supra* note 73, at 860 (“Everyone is an interested actor in this story—litigants, lawyers, guardians ad litem, special masters, court-appointed experts, testifying witnesses, litigant activist groups, objectors, judges. . . . [M]any are repeat players, whose incentives are framed by events beyond the case at hand.”).

87. Zaring, *supra* note 40, at 1016-17.

88. *Id.*

89. Rhode, *supra* note 81, at 2070-73.

90. Schlanger, *Civil Rights*, *supra* note 37, at 616; cf. Rhode, *supra* note 81, at 2035-36 (describing the increasing complexity of civil rights litigation).

successfully, there is ever more reason for inmate advocacy groups to find law firms to take cases on.<sup>91</sup>

It is only natural for repeat players to share stories, to coordinate, and to model future cases upon past successes. This tendency, combined with the involvement of large firms, has resulted in an increasingly cumbersome form of public interest litigation, wherein months and sometimes years of pre-filing research culminates in a lengthy complaint seeking every type of relief possible. The standard law firm model of litigation is a belt and suspenders model, in which one cannot conceive of not requesting a type of relief that might be granted, i.e., in which the pleadings will inevitably contain a request for both declaratory and injunctive relief.<sup>92</sup>

Structural reformers have had great success with this model, partnering with the same group of law firms repeatedly, and filing the same types of cases. The difficulty with this expansive and expensive model of litigation—however thorough, admirable, and successful—is that it has undoubtedly contributed to the decline in structural reform. As the cases have increased in size and complexity, it can become daunting even to conceive of filing one: those with the resources to file can often manage only one such case at a time, and those seeking pro bono counsel find potential partners wary of taking on such a large commitment, particularly in tougher economic times.

### III. AN OLD REMEDY FOR A NEW ERA

We should breathe new life into the declaratory judgment. It is uniquely suited to filling the gaps in structural reform left by the decline of the injunction and the rise of experimentalism, and at the same time responsive to the same anxieties that have created and shaped these gaps. Every age has its neuroses and the declaratory judgment seems almost specially tailored for ours, capable of providing market-driven reform as opposed to court-ordered regulated remedies. It is, moreover, also a powerful litigation tool that

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91. Schlanger, *Civil Rights*, *supra*, note 37, at 620-21.

92. For a discussion of how this dynamic has played out in the indigent defense reform context, see *infra* text accompanying notes 171-75.

has to date been overlooked, capable of streamlining litigation and reducing resource consumption while at the same time providing much-needed institutional reform.<sup>93</sup>

A. *Reconsidering & Repurposing the Declaratory Judgment*

Civil rights reformers typically request declaratory relief only in addition to injunctive relief, and courts in turn typically issue declarations only in conjunction with injunctions. The “better safe than sorry” approach makes a certain amount of sense from a litigator’s perspective;<sup>94</sup> the Declaratory Judgments Act explicitly permits the issuance of a declaration “whether or not further relief is or could be sought;”<sup>95</sup> and early advocates of declaratory relief, like Professor Edwin Borchard, advocated this type of pleading as well.<sup>96</sup> This Article urges reformers to rethink this strategy because it squanders the unique advantages of declaratory relief. Contrary to the popular belief that a plaintiff has “much to gain and nothing to lose by asking [for a declaration],” more is not always better.<sup>97</sup>

The classic use of the declaratory judgment is to provide relief where a potential wrong has not yet occurred (and therefore injunctive relief is not available).<sup>98</sup> The harm addressed is the uncertainty associated with not knowing

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93. As Fiss puts it in his casebook on injunctions, “[t]he declaratory judgment has failed to achieve its potential.” OWEN M. FISS & DOUG RENDLEMAN, *INJUNCTIONS* 172 (2d ed. 1984).

94. See, e.g., Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1322 (2010) [hereinafter Bray, *Preventive Adjudication*] (noting the “superfluous use of the declaratory judgment is now common practice”).

95. 28 U.S.C. § 2201(a) (2012).

96. Edwin M. Borchard, *The Declaratory Judgment—A Needed Procedural Reform II*, 28 YALE L.J. 105, 105-06 (1918).

97. *Id.* at 106.

98. As Borchard puts it, “[t]he court, in effect, by refusing an injunction informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it.” *Declaratory Judgments: Hearings on H.R. 5623 Before a Subcomm. of the S. Comm. on the Judiciary*, 70th Cong. 75-76 (1928); see also Edwin M. Borchard, *Judicial Relief for Peril and Insecurity*, 45 HARV. L. REV. 793 *passim* (1932).

whether an injury would occur,<sup>99</sup> and they provide what Samuel Bray calls preventive adjudication: adjudication that seeks an opinion not accompanied by a remedial order, that is prospective in nature, and that applies the law to a particular set of facts.<sup>100</sup> It has typically been sought on its own, independent of a request for an injunction, only to resolve discrete problems, such as patent infringement or an action to quiet title. When requested in the context of structural reform, it is typically an afterthought: an addendum to the real prize of a structural injunction.

This Article focuses on using the declaratory judgment where injunctive relief is *available*, either because the wrong is imminent or on-going, but nevertheless not *preferable*, because it is not the most efficient or effective means of pursuing relief.<sup>101</sup> It advocates the use of the declaratory judgment to serve the purpose that traditional injunctive relief does, to address on-going and/or imminent harm, and to achieve structural reform.<sup>102</sup>

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99. One of the main advantages of the declaratory judgment is its use for those who wish to establish the legality (or illegality) of conduct in which they would like to engage. This scenario typically arises where the plaintiff seeks a declaration in federal court that a state statute under which prosecution is anticipated is unconstitutional. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452 (1974).

100. Bray, *Preventive Adjudication*, *supra* note 94, at 1277-78.

101. This way of using the declaratory judgment is akin to the type of offensive deterrent remedy described by Daniel Meltzer, who notes the importance of such remedies when confronted by the “distinctive problems of preventing misconduct by public officials in an era of large government institutions.” Meltzer, *supra* note 18, at 278.

102. *Cf.* Bray, *Preventive Adjudication*, *supra* note 94, at 1279-80 (describing remedial adjudication as involving “an injury that has already happened (or will happen imminently)”). Bray is concerned about the use of preventive adjudication before the harm becomes imminent (at which point injunctive relief is available). *Id.* at 1285-86. This Article contemplates its use after the harm has already commenced, but is on-going. There is thus no concern that the declaratory judgment is an advisory opinion, the issuance of which is flatly prohibited by the Declaratory Judgment Act, which requires that an “actual controversy” exist. 28 U.S.C. § 2201(a) (2012); *see also* *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-42 (1937) (noting that the Act requires a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment).

Declarations remain distinct from injunctions even where both may be available. As Fiss puts it,

[t]he injunction consists of a declaration of rights and duties backed by threat of sanction. It gives the defendant one more chance. The declaratory judgment, on the other hand, gives the defendant two more chances: it consists of a declaration of rights and duties, and if the defendant disobeys the plaintiff cannot get a contempt order, but only an injunction to prevent another act of disobedience.<sup>103</sup>

Declarations are similar in temperament to what Fiss has called the “preventive injunction,” or an injunction that orders the defendant to stop doing a particular thing (e.g., “stop discriminating”).<sup>104</sup> They are also at least theoretically easier to procure than an injunction, as there is no need to demonstrate a lack of an adequate remedy at law or irreparable harm.<sup>105</sup>

Although some of the types of wrong-doing may be amenable to a preventive injunction (e.g., stop searching students without reasonable suspicion) others are much less easily so addressed (e.g., end mass incarceration). More complex problems require more complex remedies, but they do not necessarily require more complex requests for relief. Reformers, courts, and scholars have largely assumed that complex remedies must be delivered via a request for a structural injunction (that then typically results in a settlement agreement) that regulates the various systemic inputs and/or outputs to obtain the desired result.<sup>106</sup>

This Article contends that similar results can be obtained with purely declaratory relief. It may be sufficient, in other words, for the court merely to declare that the current situation is unconstitutional to prompt the negotiation over reform. The remainder of this Article will lay out the relative advantages and disadvantages of pursuing solely declaratory relief and then explore what this relief might look like in each

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103. Fiss, *Dombrowski*, *supra* note 10, at 1122; *see also* FISS & RENDLEMAN, *supra* note 93, at 174 (noting that injunctions “add contempt’s bite to the declaration’s bark”).

104. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 7-8 (1978) [hereinafter FISS, *CIVIL RIGHTS*].

105. *See infra* text accompanying notes 139-41.

106. *See* Sabel & Simon, *Destabilization*, *supra* note 6, at 1019-20.

of the major life stages of a reform action. As in real life, success will largely be measured by the extent to which defendants are persuaded to negotiate change; just as the request for an injunction can be decoupled from the negotiated reform, so too can the request for a declaration.

### B. *A Strong Separationist Approach*

Declaratory judging is eminently suited to producing structural reform in a way that even the most ardent proponents of judicial minimalism and separation of powers should feel comfortable with.<sup>107</sup> This Article will refer to these positions generally as “separationist” in nature. There are two strands to the separationist philosophy, one weak and the other strong. The weak version argues that decisions about restructuring institutions will eventually be made by the political branches regardless of the type of litigation relief sought or granted. The strong version argues that there are a variety of institutional and structural reasons why the political branches should be making these decisions instead of the courts. This Section will focus upon the merits of declaratory relief relative to the strong version.

Separationists argue in favor of judicial restraint for a variety of reasons. First, there are those who believe that judicial minimalism promotes democracy. Cass Sunstein, for example, urges “breathing space” for the political process and argues that judicially mandated reform is simply less democratic than reform that arises from the political branches.<sup>108</sup> In this telling, judicial minimalism is both “democracy-forcing” and related to legitimacy.<sup>109</sup> The less

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107. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 562 (1979) (arguing that “the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute”).

108. Sunstein, *1995 Term*, *supra* note 15, at 19-20; see CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 45-46 (1996) [hereinafter SUNSTEIN, *LEGAL REASONING*]; cf. Dorf, *supra* note 3, at 892 (describing “[t]he often praised but rarely practiced philosophy of judicial restraint [as] a relatively close cousin of radical democracy”).

109. Sunstein, *1995 Term*, *supra* note 15, at 7; cf. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (“It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the

judges do, the more the political branches are empowered to do, creating space for the democratic process, which is both more inclusive and produces a better outcome.<sup>110</sup> One might also contend that the increased transparency afforded by the political process (as opposed to injunctions and consent decrees) is beneficial to democracy as well.<sup>111</sup>

Second, many have identified the gap created by structural injunctions between what is constitutionally required to protect rights and what courts actually order defendants to do, noting that this problem increases with the specificity of the injunctive language.<sup>112</sup> It is often difficult to firmly ground the individual provisions of structural

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political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence.”).

110. Sunstein, *1995 Term*, *supra* note 15, at 19; *see also* SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 26, at 172 (“The annals of democracy by decree are full of cases in which defendants consented to a decree in order to avoid responsibility for politically difficult choices or to evade constitutional requirements for legislative action.”); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 *STAN. L. REV.* 661, 664 (1978) (“The substitution of government by the federal judiciary for local self-government involves dangerous disproportionality; it sacrifices fundamental democratic values in order to vindicate particular constitutional rights.”).

111. *Cf.* SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 26, at 199-200, 216-19 (proposing to increase the transparency and formality of consent decrees); Margo Schlanger, *Against Secret Regulation: Why and How We Should End the Practical Obscurity of Injunctions and Consent Decrees*, 59 *DEPAUL L. REV.* 515, 515 (2010) [hereinafter Schlanger, *Against Secret Regulation*] (noting that “notwithstanding the individual and collective importance of . . . injunctions, they languish in practical obscurity, unavailable to all but the extraordinarily persevering researcher who joins inside information with abundant funds”).

112. Nagel, *supra* note 110, at 708-10; *see also* SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 26, at 102 (arguing that judges have used structural reform to pursue “aspirational goals” rather than enforce rights); Fletcher, *supra* note 16, at 652-54 (noting the “distorting effect of the court’s power to order an affirmative remedy in the absence of an agreement among the parties” on settlement negotiations); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 *WASH. & LEE L. REV.* 949, 955-58 (1978); *cf.* Meltzer, *supra* note 18, at 249 (identifying “deterrent remedies” as “those in which the litigant obtains more than he is entitled to, when measured against the harm to his rights that he has suffered or is likely to suffer in the future”).

injunctions in concrete constitutional requirements.<sup>113</sup> Separationists delight in pointing out, for example, the court orders requiring that the temperature in a prison not exceed a certain temperature or that inmates be allotted a minimum particular square footage.<sup>114</sup>

Third, separationists typically contend that judges are less competent than the political branches to enact institutional reform. This criticism heightens when the injunction sought will inevitably be costly to implement and enforce. Separationists contend that these problems are polycentric because court-required expenditures may impact other programs and institutions not before the court and/or require tax increases.<sup>115</sup> The idea is that courts are ill-equipped to consider these external impacts and their institutional competency suffers in relation to that of the political branches accordingly.<sup>116</sup> This argument is related to the criticism that court cases almost always fail to consult all the impacted or relevant parties, some of whom may surface after the litigation has concluded and an injunction implemented.<sup>117</sup> Relatedly, others have argued that at least

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113. *Cf.* *Bell v. Wolfish*, 441 U.S. 520, 539 (1979) (“Courts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court’s idea of how best to operate a detention facility.”).

114. *See, e.g., id.* at 541-43; *Hutto v. Finney*, 437 U.S. 678, 711-14 (1978) (Rehnquist, J., dissenting); ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 96-97 (1976). Fiss’s response is that although the Constitution does not say anything about the temperatures of showers, “it does say something about equality and humane treatment, and a court trying to give meaning to those values may find it both necessary and appropriate—as a way of bringing the organization within the bounds of the Constitution—to issue directives on these matters.” Fiss, *1978 Term, supra* note 2, at 50.

115. *See, e.g.,* Gewirtz, *supra* note 21, at 591 (contrasting a “Rights Maximizing” approach with an “Interest Balancing” approach); Horowitz, *supra* note 21, at 1305 (noting that “[c]ourts operate one case at a time. They never need lay prison needs against welfare needs, because they work on the premise that they are declaring rights. If a party has a right, it is not bounded by cost.”); Nagel, *supra* note 110, at 710-11 (advocating the minimization of such judicial remedies with “third-party consequences”).

116. *See, e.g.,* Fletcher, *supra* note 16, at 648-49.

117. *See, e.g.,* Horowitz, *supra* note 21, at 1291-95 (describing “five assumptions typically indulged by the courts—and often incorrectly,” that the plaintiffs are homogenous, that the defendant organizations have a coherent structure, “that

some of the problems reformers have sought to address via structural reform are really resource problems, not rights problems, and therefore perhaps not problems for the courts at all.<sup>118</sup>

Finally, there is arguably a heightened separationist concern where a federal court seeks to take over a traditionally state run institution, such as a school system or state prison.<sup>119</sup>

The traditional response to the separationists is to say they have missed the whole point of structural reform, which is inherently countermajoritarian.<sup>120</sup> Given the decline of the structural injunction and the increasing sway separationist arguments appear to have on courts (and the Court), this response is no longer sufficient as a practical matter, however theoretically persuasive it may be. The approach urged by this Article seeks to address the separationist concerns more transparently while at the same time providing a practical mechanism for reformers to use to achieve the desired level of institutional change.

Use of declaratory judgments in the way this Article advocates is largely an exercise in judicial minimalism, but without many of the drawbacks to minimalism that Sunstein identifies: it does not threaten rule of law values, it does not

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the relevant organizations are before the court,” that the defendant organizations have consistent interests, and “that plaintiffs and defendants are on opposite sides of the case”); *cf.* *Martin v. Wilks*, 490 U.S. 755, 761 (1989) (holding that nonparties affected by consent decrees may collaterally attack the decrees if they were not joined to the litigation).

118. Horowitz, *supra* note 21, at 1289.

119. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70, 112-13 (1995) (O'Connor, J., concurring) (noting that factors contributing to school desegregation “are best addressed by the representative branches” and citing *Milliken v. Bradley*, 433 U.S. 267 (1977)); *Milliken*, 433 U.S. at 281 (admonishing federal courts to “take into account the interests of state and local authorities in managing their own affairs”).

120. *See, e.g., FISS, CIVIL RIGHTS, supra* note 104, at 60 (arguing that in the context of the civil rights injunction, “the nonrepresentative quality of the judiciary becomes a virtue rather than a vice. Constitutional rights are supposed to be countermajoritarian . . . .”); *see also Chayes, supra* note 2, at 1307-11 (identifying other responses to the separationist argument); Fiss, *1978 Term, supra* note 2, at 15, 32-35 (same).

produce unfairness through dissimilar treatment of the similarly situated, and there is no indication that the types of issues relevant to this discussion are those that are “ill suited to democratic choice, either because [they] should be off-limits to politics or because democratic deliberation is not functioning well”—to the extent the latter is true, the point of the declaration is to prompt the efficacious use of democratic deliberation to arrive at a solution to a problem some stakeholders were perhaps resistant to recognizing.<sup>121</sup>

There is a strong argument in favor of judicial minimalism in cases of moral uncertainty.<sup>122</sup> This Article contends that minimalism is actually also (or even more) called for not just in these hard cases, but in the big ones as well, in which the declaration of rights is not particularly difficult (or morally uncertain) and part of the issue is not rapidly changing circumstances but circumstances that have stayed the same for too long.<sup>123</sup>

Finally, with regard to the federalist flavor of the separationist concern, a declaratory judgment will often be less intrusive on state sovereignty than an injunction, offering the federal court confronted with a request to overhaul a state institution a remedy that respects comity but reserves authority.<sup>124</sup> Declarations may be drafted broadly and injunctions may be drafted narrowly, but the use of the declaration as advocated by this Article—to prod the responsible political entities to reform—should generally speaking, be less objectionable from a states’ rights

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121. Sunstein, *1995 Term*, *supra* note 15, at 29.

122. *Cf. id.* at 30.

123. *Cf. Bray, Preventive Adjudication*, *supra* note 94, at 1284 (noting that “[a]sking for only declaratory relief when more is available may perhaps be useful in public law cases, where courts are sometimes reticent or constrained in giving monetary or injunctive relief”).

124. Where abstention doctrine applies to injunctive relief, it will also apply to declaratory relief. *Younger v. Harris*, 401 U.S. 37, 41 & n.2 (1971); *Samuels v. Mackell*, 401 U.S. 66, 72-73 (1971); *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (“At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary.”).

perspective.<sup>125</sup> A less coercive sanction may also be easier to swallow, particularly when it is one that provides flexibility and requires stakeholder participation in crafting a solution.<sup>126</sup> And, of course, there is no change from the status quo where a negotiated settlement results.

C. *Efficiency, Efficiency, Efficiency: A Weak Separationist Approach*

The real role of litigation in the new era of public interest reform is to prod a negotiated settlement and it is unnecessary to seek injunctive relief to do so.<sup>127</sup> Seeking such relief also contributes to needless inefficiency in the litigation process.<sup>128</sup> If the eventual result of nearly all institutional reform litigation is negotiated settlement, that litigation should be structured as efficiently as possible. Furthermore, if an injunction is unlikely to result even in the event of a successful litigation (because the parties settled) and seeking an injunction is likely to complicate and prolong the litigation, litigators should seek relief that both avoids those complications and can still result either in the very same settlement or ultimate institutional change comparable to that which would be provided by an injunction.

The model of declaratory judging described above offers three main sources of efficiency and cost savings, not just for

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125. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1239 (1988) (noting that “an injunction may often be more intrusive on traditional state sovereign prerogatives than a declaratory judgment”).

126. *Cf. Lobel*, *supra* note 3, at 391.

127. Some experimentalists have described the process of structural reform as one of “destabilization,” in which a previously unaccountable institution is forced (or encouraged) to change its ways. *See, e.g.,* Sabel & Simon, *Destabilization*, *supra* note 6, at 1056; *see also* ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 550 (Verso 2004) (1987). The idea is that the litigation process “induces the institution to reform itself in a process in which it must respond to previously excluded stakeholders.” Sabel & Simon, *Destabilization*, *supra* note 6, at 1056; *see also id.* at 1020 (“Destabilization rights are claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability.”).

128. *See* Sabel & Simon, *Destabilization*, *supra* note 6, at 1056.

would-be reformers, but for defendants and the courts as well. Because it does not appear that anyone has actually ever filed a case seeking structural reform via solely declaratory relief, they are presented below from least to most speculative.

First, the declaratory judging model recognizes, whether as a normative or a descriptive matter, that the subject matter of institutional reform cases will end up before the political branches sooner or later because that is where the money is. From a descriptive perspective, the actual work of reforming an institution takes place only with the participation of the political branches and administrative agencies ultimately responsible for procuring funding for the institution, implementing new systems and controls, and complying with court orders or negotiated agreements.<sup>129</sup> The declaratory judgment prods those government actors to act sooner rather than later, with additional court action threatened should their solutions prove unsatisfactory to the plaintiff class.

From a normative separationist perspective, declaratory judgments are firmly sited within the core competences of the courts in a way that structural injunctions are not. Declaratory judgments ask courts to declare actions lawful or unlawful, applying well-defined legal standards to a set of facts.<sup>130</sup> In contrast to the traditional model of the structural injunction, which envisions an on-going dialogue between the court and the parties, the declaratory relief model envisions a dialogue between the parties and the political branches (after an introductory statement made by the court).<sup>131</sup>

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129. Cf. SCHEINGOLD, *supra* note 55, at 5.

130. Cf. Horowitz, *supra* note 21, at 1304 (“The courts have a comparative advantage when it comes to adjudicating rights; they have none when it comes to enforcing complex remedies.”); Edson R. Sunderland, *The Courts as Authorized Legal Advisers of the People*, 54 AM. L. REV. 161, 171-72 (1920).

131. Cf. Bray, *Preventive Adjudication*, *supra* note 94, at 1333 (“Preventive adjudication may foster democratic values, because by speaking *sotto voce* a court can engage in a dialogue with the legislative or executive branch about remedial choices.”); Fiss, *Dombrowski*, *supra* note 10, at 1144 (“An administrative decree requires a long continuing relationship between the equity court and the parties, in which initial directives are modified in light of changed conditions or new insights.”).

Following a court's declaration of rights, which serves as the baseline below which defendants may not fall, the various stakeholders are left to work out the details.<sup>132</sup>

The use of strategically escalated court involvement has ample support in the precedent. For example, in *Hutto v. Finney*,<sup>133</sup> the Court approved the imposition of a maximum limit on the number of days inmates could spend in solitary confinement, noting that the lower court had first given the state department of corrections a number of chances to fix the problem.<sup>134</sup> Similarly, in *Bounds v. Smith*,<sup>135</sup> another prison reform case, the Court stated that the "courts below scrupulously respected the limits on their role" by initially holding only that a constitutional guarantee had been violated and ordering defendants to devise a remedy themselves.<sup>136</sup>

It can be difficult even for relatively ardent separationists to conceive of structural reform without the active and central participation of the judge.<sup>137</sup> Some commentators have suggested ways in which judges can incentivize behavior change within the litigation framework that stop short of a complex structural injunction. William Fletcher notes, for example, that courts can use options that

range from soliciting acceptable plans from the parties and permitting the defendant to choose among them, to threatening

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132. Cf. Ross Sandler & David Schoenbrod, *The Supreme Court, Democracy and Institutional Reform Litigation*, 49 N.Y.L. SCH. L. REV. 915, 933 (2005) [hereinafter Sandler & Schoenbrod, *The Supreme Court*] (advocating a similar approach, but in the context of "soft rights").

133. 437 U.S. 678 (1978).

134. *Id.* at 687; see also *id.* ("[T]aking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance."); *Milliken v. Bradley*, 433 U.S. 267, 281 (1977) (explaining that although state and local authorities have primary responsibility for curing constitutional violations, the courts may act when they fail to meet that obligation).

135. 430 U.S. 817 (1977).

136. *Id.* at 832-33.

137. See, e.g., SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 26, at 193-221 (proposing new principles to guide structural reform, nearly all of which are judge-centered).

contempt if a defendant refuses to choose and implement an acceptable plan, to threatening to close a prison facility or to release prisoners if the state refuses to improve conditions, and even to threatening to appoint a receiver.<sup>138</sup>

The declaratory judgment is less intrusive than even these options, though perhaps closest in temperament to the threat of contempt, and far less judge-centered.

Second, for a variety of doctrinal reasons, there is reason to believe that should the parties be unable to settle, declaratory judgments would be easier to procure than injunctive relief. Plaintiffs seeking solely declaratory relief face a lower burden than plaintiffs seeking injunctive relief. As the Court noted in *Steffel*, “engrafting upon the Declaratory Judgment Act a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment is considered would defy Congress’ intent to make declaratory relief available in cases where an injunction would be inappropriate.”<sup>139</sup> There is no requirement to demonstrate irreparable injury, as there is for injunctive relief,<sup>140</sup> or a requirement that the plaintiff demonstrate no adequate remedy at law.<sup>141</sup>

Relatedly, because structural injunctions cost money to implement, defendants often raise immunity and separation of powers defenses.<sup>142</sup> Although the Court has held that court orders requiring expenditures to be made do not violate sovereign immunity principles, defendants often contend that they do.<sup>143</sup> Even if defendants fail (sometimes

138. Fletcher, *supra* note 16, at 695.

139. *Steffel v. Thompson*, 415 U.S. 452, 471 (1974); *see also* Fiss, *Dombrowski*, *supra* note 10, at 1123 (noting that the declaratory judgment is a statutory creation, “not moored to the history of equity”).

140. *Steffel*, 415 U.S. at 471-72; *see also* *Samuels v. Mackell*, 401 U.S. 66, 73-74 (1971); *Dombrowski v. Pfister*, 380 U.S. 479, 490 (1965); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937).

141. *Steffel*, 415 U.S. at 471-72; *see also* FED. R. CIV. P. 57 (“The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate.”); H.R. REP. NO. 73-1264, at 2 (1934).

142. *See infra* text accompanying notes 179-81.

143. *See id.*

repeatedly) to prevail on these issues, they often succeed in tying up structural reform litigation for years as questions of whether there was an adequate remedy at law, or whether the relief sought would violate separation of powers principles, are resolved by the courts.<sup>144</sup> Where only declaratory relief is sought, it may be easier for plaintiffs and the courts to assuage separation of powers concerns.

Finally, the mechanics of litigating a declaratory judgment action should result in monetary cost-savings. William Landes and Richard Posner observe that declaratory judgments require an investment of resources only to determine liability, not to craft a remedy or quantify damages.<sup>145</sup> They conclude that “[i]f the losing party will comply once the issue of liability is authoritatively resolved, he—in fact, both parties, plus the court—can economize on the expense of litigation by seeking only declaratory relief.”<sup>146</sup>

To be fair, the cost savings may more accurately be described as a cost shifting. Unlike the cases on which Landes and Posner focus, which are primarily insurance related and judicial review of administrative action cases, institutional reform cases require extensive investment in remedy crafting after the litigation over liability is resolved. That investment, however, is arguably reduced by removing the obstructionist incentives inherent to the litigation dynamic and likely borne by parties more appropriate than the court system. The remedies devised may also be more likely to procure real compliance and change.<sup>147</sup> From a more separationist view, declaratory judgments also result in cost-savings for the courts because they are no longer needed to

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144. See *infra* notes 182-86 and accompanying text.

145. William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683, 699 (1994).

146. *Id.*

147. Cf. SANDLER & SCHOENBROD, *DEMOCRACY*, *supra* note 26, at 105 (arguing that consent decrees seek to enforce “soft rights” and “often call for performance whose adequacy is difficult to judge” whereas “[o]fficials can often comply with traditional rights by just not doing what is forbidden”).

devise and enforce remedies or to remain involved for years on end.<sup>148</sup>

Furthermore, as others have noted, consent decrees and structural injunctions, not to mention settlement agreements, are not paragons of transparency.<sup>149</sup> It can be difficult for anyone beyond the immediate litigating parties and the specific additional stakeholders invited to participate to figure out how exactly a case was resolved, what precise legal principles were applied by the court, and what defendants agreed to do going forward.<sup>150</sup> To the extent that there is transnational adjudication in this context, there is a vast information asymmetry that affects primarily defendants, who are far less likely to be repeat players than plaintiffs' counsel. Ironically, the information asymmetry has adverse effects for plaintiffs' counsel and their future clients, because it forces them to relitigate issues with other defendants down the line.

There will always be defendants who insist on receiving their own day in court, but there are undoubtedly others who may be persuaded to reform if presented with a broader declaration of rights that clearly applies to them.<sup>151</sup> A statement that *x* practice violates *y* right is arguably more transferrable and of greater practical import to litigators than a specific structural injunction that applies only to one particular situation. In some circumstances, it may even be possible to leverage this aspect of the declaratory judgment to circumvent the need for a class action altogether.<sup>152</sup>

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148. *Cf.* Horowitz, *supra* note 21, at 1297, 1302.

149. *See, e.g.,* Schlanger, *Against Secret Regulation*, *supra* note 111, at 516-18.

150. *Cf.* Samuel L. Bray, *Announcing Remedies*, 97 CORNELL L. REV. 753, 756 (2012) [hereinafter Bray, *Announcing Remedies*] (noting the cost-saving benefits of announced remedies "because determining the remedy once is cheaper than determining it over and over again").

151. *Cf. id.* at 770 (describing the effects of "meta-announcement," in which "an announced remedy communicates not only what the remedy will be but also that the remedy will be the same for everyone") (emphasis omitted).

152. Gary F. Smith & Nu Usaha, *Dusting Off the Declaratory Judgment Act: A Broad Remedy for Classwide Violations of Federal Law*, 32 CLEARINGHOUSE REV. 112, 112-13 (July-Aug. 1998) (proposing that legal aid lawyers barred from class action practice use the declaratory judgment to obtain relief).

#### D. *Beyond Experimentalism*

This Article presents a different path around the Scylla and Charybdis, one that is arguably even less interventionist than the court-centered variant of democratic experimentalism and yet better suited to situations that demand structural reform. It contends that at least in the context of the paradigmatic structural reform case—involving an institutional failure to meet legal standards that is both big and polycentric—democratic experimentalism is simply insufficient to solve the problem. But the criticisms of structural injunctions remain, and so the question for reformers is how to fill the gap left by their decline even as we accept the changes that democratic experimentalism has wrought.

The comments below are intended more to demonstrate the inherent shortcomings of experimentalism when there is a case for structural reform than to argue that experimentalism is ill-advised as an enterprise altogether; experimentalism remains a worthy endeavor, but can never satisfy all of our reform needs.

First, experimentalism is at once insufficiently court-centered and overly so, advocating deference and outside participation when the court's expertise is arguably at its greatest—in the liability stage—and court participation when its expertise is arguably at its lowest—at the remedy stage.<sup>153</sup> The model of declaratory judging advocated by this Article flips this dynamic of judicial involvement to take advantage of core institutional competencies. Courts are asked to retain responsibility for determining liability, applying law to facts, but are asked to step back from the responsibility of structuring remedies.

Courts are indisputably within their core area of expertise when they evaluate a factual situation to determine whether rights have been violated. That expertise arguably diminishes when they seek to remedy the rights violation by

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153. Dorf & Sabel, *supra* note 3, at 401 (“Experimentalism . . . asks courts to involve the parties in exploring the realm of possibilities at the earlier stage of determining whether there is a legal violation. For trial courts, experimentalism can transform the role of the judge from the traditional Anglo-American model of passive referee into an active problem solver . . .”) (footnote omitted).

reforming the institution at fault. Declaratory judging asks courts to remain well within their core area of expertise and defer to the parties (and other stakeholders) on the actual task of institutional reform—and, of course, should the judgment prove insufficient, motivation to halt the rights violations, the model provides for a another bite at the apple.<sup>154</sup>

Second, experimentalism is (by design) ill-suited to providing wholesale, as opposed to retail, reform. Local change at an individual level may be appropriate, particularly where the problem confronted is “hard” in the sense that there is no clear doctrinal answer. But where the problem is “big” but less “hard”—as is the case with much of the institutional reform needed today, particularly in the context of racial justice—more wide-ranging relief is appropriate: these problems are by their very nature difficult, if not impossible, to tackle via one-off, individual litigation.

Experimentalism is not unsuited for all aspects of structural reform—where the issues are both big and hard, where the doctrinal answers are unclear, and where both law and society are unsettled, the approach suggested by the experimentalists may make sense.<sup>155</sup> But it is unnecessary and ill-suited for big cases that are not very difficult. Experimentalism as applied to those cases responds on a scale that is at once too large and too small, offering widespread court involvement but on an individual level, complaint by complaint, court case by court case. In contrast, declaratory judgments offer larger scale involvement on the group level but less overall involvement by courts, in the form of one declaration of liability for defendants’ actions affecting a class of people, which is then leveraged to generate the

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154. Dorf in fact identifies a place for this type of solution, noting that there is a version of the judicial/legislative dialogue “solution that bears a substantial resemblance to experimentalism . . . . A court might find that some challenged law or practice violates constitutional or other legal norms and order the legislature to adopt some solution, without specifying the precise contours of that solution.” Dorf, *supra* note 3, at 978.

155. Cf. Sunstein, *1995 Term*, *supra* note 15, at 7-8.

political accountability necessary to create a practical solution.

The experimentalist reply is to sing the praises of judicial modesty.<sup>156</sup> The point of this Section is to suggest that judicial modesty also has a price, and it is one that rises in proportion to the size and intractability of the root institutional problem. Problem-solving courts offer retail-level solutions to individuals and the relief is either retrospective or designed to help a criminal defendant navigate through their prosecution, as in the case of drug courts. They are ill-equipped to provide wholesale solutions to class-wide problems, and wholly unequipped to provide prospective relief.<sup>157</sup> Even the large-scale experimentalism that Sabel and Simon cite with approval, such as consent decrees providing for out-put oriented benchmarks rather than in-put oriented oversight, is the result of large-scale litigation in which plaintiffs' counsel committed vast institutional resources long after the original named plaintiffs were deinstitutionalized.<sup>158</sup> In contrast to experimentalism, declaratory judgments can produce wholesale, as opposed to retail, sorting, accommodating class-based relief across a broad spectrum of institutional practices.<sup>159</sup>

Third, the experimentalist model envisions (and indeed, places a premium upon) multilateral stakeholder participation, but is not particularly effective when it comes to actually ensuring that all stakeholders have an equal place at the table. Persons whose rights have been violated by an institution are often unable, unwilling, or unsuited to

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156. Dorf, *supra* note 3, at 942 (“A problem-solving court faces fewer competency obstacles than a court overseeing structural reform because the former does not itself run any institutions, nor does it place itself atop a hierarchical organization of personnel resentful of its authority.”).

157. Cf. William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1216 (2000).

158. Sabel & Simon, *Destabilization*, *supra* note 6, at 1028 (citing with approval the consent decree in a case in which the parties litigated for more than two decades over defendants' repeated failures to comply with the law).

159. Cf. Bray, *Preventative Adjudication*, *supra* note 94, at 1317-18 (contending that federal courts issuing declaratory relief participate in retail sorting, which results in “less judicial expertise, less accessibility to low-income plaintiffs, and more forum shopping. These drawbacks may help explain the seemingly moribund condition of the federal declaratory judgment.”).

bringing about institutional reform. To the extent these individuals are the subject of litigation, it is usually because they are being prosecuted, as in the case of drug courts and other experimental trial-level court systems. The facts presented by the paradigmatic case for structural reform involve institutions with sufficient control over a group of people to be able to violate their rights.

The persons affected, like prison inmates or students, necessarily have less power over their lives than others and, by extension, less of the leverage needed to bring those who run the institution to the bargaining table. There is little incentive to bring institutionalized persons to the bargaining table in the absence of litigation that they themselves have initiated as plaintiffs. A political process attempting to restructure prison practices, for example, is less likely to bring inmates to the negotiating table than it is to bring other institutional stakeholders. Plaintiff initiated litigation is still needed to enable the participation of these most essential stakeholders.

The declaratory judgment model recognizes that the stakeholders in the types of cases at hand are typically (and often literally) disenfranchised and that their needs are often served by organizations that have the resources needed to bring suit on their behalf, such as those dedicated to disability rights or civil liberties. This mediated participation may be of even greater importance where there is public resistance to direct participation by the stakeholders at issue.<sup>160</sup>

#### E. *Some Disadvantages*

Despite the myriad advantages described above, the declaratory judgment has been under-utilized in the context of civil rights reform. Plenty of lawsuits seek it, but only in conjunction with injunctive relief, eviscerating its true value. There are a number of reasons this is likely the case, but this Article contends a combination of risk adversity, inertia, and optimism is at work. Litigators seeking structural reform

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160. Sabel & Simon, *Destabilization*, *supra* note 6, at 1037 (acknowledging the strong “public resistance to participation in policymaking and administration by prisoners and their advocates”).

have taken insufficient notice of the increased reluctance of courts to issue sweeping structural injunctions and fear having to relitigate cases in the event that defendants defy a declaratory judgment; they ask for both types of relief because they and everyone they know have always done so and they believe that it is always possible the court will issue the structural injunction of their dreams. This Article urges close reconsideration of this dynamic.

Seeking solely declaratory relief in civil rights cases is, of course, not without its downsides, only some of which are predictable at this moment. If and when plaintiffs' counsel begin to bring these types of cases, defendants and courts will have a hand in shaping the challenges they will face and a new litigation dynamic will inevitably result. And some aspects of the old dynamic will remain unchanged, as there is only so much the declaratory judgment can do. The usual rules on abstention will still apply, for example, as will the various restrictions governing standing.<sup>161</sup>

First and foremost, seeking solely declaratory relief will likely result in the relitigation of at least some cases. Declaratory judgments may be binding in subsequent litigation only if the same plaintiff is involved, and, if defendants disregard the declaration issued, plaintiffs must return to the court for an injunction.<sup>162</sup> These wrinkles are problems presented by what we might call the bad-faith defendant. Should the plaintiffs return to court, they may of course procure an injunction, but at the expense of additional litigation costs and, on top of that, the facts to which the court previously applied the law will likely have shifted by the time the non-compliance has been ascertained.

Plaintiffs seeking an injunction will functionally need to rebuild their case on the basis of these new facts, many of which will be the result of changes in the defendants' behavior and thus calculated to reduce or eliminate liability. Defendants may defy a declaration insofar as they refuse to fully comply with legal norms, but adjust their behavior just enough to make it harder for plaintiffs to argue that they are

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161. See *supra* notes 44 & 124 and accompanying text.

162. See *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989).

still in non-compliance.<sup>163</sup> This is not a new phenomenon, however, as structural reform defendants are always free to adjust their behavior at any point during the life of a lawsuit prior to settlement or judgment regardless of the type of relief sought. If the adjustment is sufficiently significant, the need for further proceedings may be mooted. More often, when it is not, plaintiffs must adjust their litigation posture and invest resources in additional discovery, new expert reports, etc.

Another disadvantage to declaratory relief is that the reform implemented may not be as sweeping as that which a court would issue. As noted above, some commentators have identified a gap between what the law requires and what structural injunctions require.<sup>164</sup> This disparity may be a problem from a separationist perspective, but reformers are presumably more than happy to take advantage. When the outcome is reform via negotiated settlement, there is no functional difference, but where a judgment is actually issued, the declaratory judgment model may result in narrower solutions because they will be the result of political bargaining and not judicially imposed.

The bargaining process will also differ from the settlement negotiation process because more stakeholders will likely be involved, further muddying the waters and introducing competing resource needs—the prison official may now be at the same table with the school official, competing for the same limited pot of resources. However, it is equally likely that where the judge is a separationist, judicially or ideologically conservative, or otherwise hostile to reformers' claims, the declaratory judgment model can make reform more likely to take place and result in broader reform than the law would require because the political parties are free to make new law where the judge is not.

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163. See, e.g., Fiss, *1978 Term*, *supra* note 2, at 55 (noting the problem of forcing judges to choose “between a heavy and frequent use of criminal contempt power or an endless series of declarations of what was unacceptable”); cf. Bray, *Preventative Adjudication*, *supra* note 94, at 1295 (noting that “the resolution of fact-based indeterminacy has less preclusive or precedential force [because] the parties are not locked in: they have time to change their conduct”).

164. See *supra* text accompanying notes 112-14.

The resultant uncertainty may be discomfiting to some, but the process envisioned by this Article is one in which the substantive bargaining process is largely the same as in that produced by the traditional lawsuit seeking both an injunction and a declaration, just a bargaining process that the parties are able to arrive at in a more expeditious manner. As with new governance, this model of litigation and negotiation requires some amount of “optimis[m] about uncertainty and doubt.”<sup>165</sup>

Finally, just as there are some doctrinal advantages to seeking solely declaratory relief, the law also imposes at least one major doctrinal handicap. The ability of plaintiffs’ counsel to secure attorneys fees may be compromised.<sup>166</sup> This factor is obviously relevant, but should not be critical. Since *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*,<sup>167</sup> plaintiffs’ counsel have been unable to recover attorneys fees under Section 1988 and other federal statutes as the “prevailing party” under the theory that their lawsuit was merely a catalyst for change.<sup>168</sup> Although fees are still recoverable in the event a consent decree is entered, most structural reform cases settle well before that takes place and therefore would not be amenable to fees collection anyway. Perhaps relatedly, because so much institutional reform litigation brought today is initiated by well-established non-profits who receive foundation and private funding, as well as support from the private bar, it is not as dependent upon attorneys fees as, for example, individual cases filed for purely retrospective damages relief.

#### IV. THE DECLARATORY JUDGMENT IN ACTION

The remainder of the Article will explore how strategic use of the declaratory judgment action can streamline systemic reform litigation in the real world, providing a

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165. Lobel, *supra* note 3, at 395.

166. *See, e.g.*, *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (holding that a declaratory judgment “will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff”).

167. 532 U.S. 598 (2001).

168. *Id.* at 610.

practical view of how the theoretical efficiencies identified might play out. It will argue that actions seeking solely declaratory relief should result in meaningful improvement in four phases of litigated reform: pre-filing and claim structuring, motions to dismiss, remedy identification and implementation, and enforcement/deterrence.

This Part will draw from a variety of on-going areas of structural reform, such as public defense reform, school-to-prison pipeline reform, and prison reform. Rather than second-guessing failed efforts, it will focus on cases in which litigators actually procured reform, whether through a settlement agreement, a consent decree, other court-ordered relief, or as a catalyst for institutional change. It will also take as a given the current litigation and reform environment as described above.<sup>169</sup> Given the undeniable success reformers have had with the traditional model, which invariably seeks both declaratory and injunctive relief, one might reasonably ask why we should fix something that is not broken: because the litigation could and should be made more streamlined and efficient; because the cost of entry to file one of these cases has grown almost prohibitively expensive, dissuading advocates with fewer resources from filing anything at all; and because these successful efforts can and should be replicated more easily and cost-effectively.

#### A. *Pre-filing, Claim Structuring, and Discovery*

The pre-filing process is often a significant component of structural reform, both in terms of cost, resource allocation, and time. Plaintiffs' counsel must typically invest significant time and resources investigating and structuring their claims, not to mention recruiting pro bono counsel. Where they seek to reform a number of institutions all committing the same rights violations at once, counsel frequently file on behalf of persons affected by each individual institution or at a minimum number of representative institutions. The pre-filing investigation can be exhaustive (and exhausting) as attorneys must gather information, documents, and plaintiffs from each institution and take the additional step of weighing which ones to actually name. In the indigent

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169. See *supra* text accompanying notes 72-80.

defense reform context, for example, litigators expend a vast amount of resources conducting research and gathering data in a number of counties across a given state in an effort to demonstrate that the deficiency in services is state-wide.

A bloated claim structure results in increased costs throughout the life of the case, in the form of more complicated motions to dismiss (e.g., with different defendants filing separate motions, or more defenses to raise) and greater discovery needs (e.g., in the form of depositions and document requests). Perhaps in part because these costs are now largely borne by law firms, the traditional model of litigation in some areas of structural reform is increasingly cumbersome, expensive, and time-consuming.<sup>170</sup> For example, public defense reform litigation filed in the last ten years has largely hewed to a class action model that requests declaratory and injunctive relief on behalf of indigent criminal defendants who have not yet been convicted.<sup>171</sup> The complaint is typically an exhaustive account of all the various shortcomings of the public defense system in question, covering aspects like funding, supervision, training, and the performance of indigent defense counsel.<sup>172</sup> Relief is often sought against a variety of defendants, and, where the state is sued, the plaintiff class includes members from a range of

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170. One description of the on-going litigation over the public defense services provided in New York State noted that lead counsel in the case has been “assisted by a team of dozens of lawyers at Schulte Roth & Zabel, who have committed more than 20,000 hours to the case and absorbed more than \$500,000 in expenses.” Seth Stern, *Standing up for Gideon’s Mandate*, HARV. L. BULL., Winter 2014, at 46. The case was filed in 2007 and is still pending. *Id.*

171. See, e.g., Amended Complaint for Injunctive and Declaratory Relief, *Wilbur v. City of Mount Vernon*, No. 2:11-cv-01100 RSL (W.D. Wash. Nov. 10, 2011) [hereinafter *Wilbur Complaint*]; Complaint, *Duncan v. State*, No. 07-000242-CZ (Mich. Cir. Ct. 2007) [hereinafter *Duncan Complaint*]; Amended Complaint, *White v. Martz*, No. C DV-2002-133 (Mont. 1st Jud. Dist. Apr. 14, 2002) [hereinafter *White Complaint*]; Amended Class Action Complaint, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sup. Ct. Apr. 28, 2008) [hereinafter *Hurrell-Harring Complaint*]; Complaint, *Flora v. Luzerne Cnty.*, No. 04517 (Pa. C.P. Apr. 10, 2012) [hereinafter *Flora Complaint*].

172. See, e.g., *Wilbur Complaint*, *supra* note 171; *Duncan Complaint*, *supra* note 171; *White Complaint*, *supra* note 171; *Hurrell-Harring Complaint*, *supra* note 171; *Flora Complaint*, *supra* note 171.

counties from across the state and allegations in the complaint include sections for each of those counties.<sup>173</sup>

One case recently filed in 2014, for example, seeks declaratory and injunctive relief on behalf of four juvenile and four adult named plaintiffs against the state of Georgia, the governor, a variety of state and county officials from four counties, an array of juvenile and superior court judges, public defenders, and district attorneys.<sup>174</sup> The complaint, which is eighty-three pages long (excluding exhibits), lists four attorneys from the Southern Center for Human Rights and eight from Arnold & Porter, LLP.<sup>175</sup>

Although much of the litigation model cannot be changed by virtue of doctrinal necessity, a move towards a request for solely declaratory judgment would streamline the pre-filing and claim structuring process.<sup>176</sup> Plaintiffs could file litigation seeking declaratory relief with respect to only one institution, leveraging success against that particular institution against all other similarly situated institutions. In the context of public defense reform, they could sue on the basis of the facts in only one county in the state and name only one defendant: the state. The declaration requested could be that the state is ultimately responsible for the provision of public defense services in that particular county and that the services as described in that county fall below the constitutional minimum. Although the state could then choose to fix the system only with respect to that one particular county, plaintiffs could and should seek to leverage that declaration against the state with respect to all other counties. One could imagine a similar reform structure

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173. In *White v. Martz*, for example, plaintiffs sued seven out of Montana's fifty-six counties. See *White Complaint*, *supra* note 171, at 1-2. In Michigan, plaintiffs discussed three out of Michigan's eighty-seven counties. See *Duncan Complaint*, *supra* note 171. In New York, plaintiffs discuss the pitfalls in five of New York's sixty-two counties. See *Hurrell-Harring Complaint*, *supra* note 171.

174. Complaint for Injunctive and Declaratory Relief, *Darden ex rel. N.P. v. State*, No. 2014CV241025 (Ga. Super. Ct. Jan. 7, 2014).

175. *Id.* at 84-85.

176. Plaintiffs will still likely want to seek class certification, for example, and rely on extensive pleadings cataloging the various deficiencies of the system in question.

for prison conditions cases and, depending upon the state, school cases.

Perhaps of greatest relevance to this calculus is the fact that the primary goal of plaintiffs is to drive defendants to the bargaining table. Although reformers in the public defense context have had some victories in the form of definitive court orders,<sup>177</sup> most cases have been resolved by state legislative action, sometimes even prior to the filing of intended litigation.<sup>178</sup> Members of the plaintiff class lack the political leverage to spur reform in the absence of a lawsuit, but there is no reason for the lawsuit that provides the leverage to be as unwieldy as some of those recently filed.

### B. *Motions to Dismiss*

There are a number of doctrinal areas in which filing solely for declaratory relief would streamline the motion to dismiss process across a spectrum of public interest cases. For example, arguments related to the separation of powers, sovereign immunity, and justiciability would be largely foreclosed (barring other independent issues). Institutional reform cases typically request relief in the form of things like special food for prisoners, training for school personnel, or adequately resourced attorneys for indigent criminal defendants. These things cost money, which must eventually and ultimately come from the legislature. Defendants often contend that these requests for relief would violate separation of powers principles because a court order would require the legislature to spend money;<sup>179</sup> that various state

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177. See, e.g., *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013); *Settlement Agreement, Best v. Grant Cnty.*, No. 04-2-00189-0 (Wash. Super. Ct. Nov. 2, 2005).

178. See, e.g., Idaho Public Defense Act, ch. 247, 2014 Idaho Sess. Laws 616 (to be codified at IDAHO CODE ANN. §§ 19-848 to -850, 19-853, 19-859 to -8620); Michigan Indigent Defense Commission Act, Act No. 93, 2013 Mich. Pub. Acts 53 (codified at Mich. Comp. Laws §§ 780.981-780.1003 (2013)); Montana Public Defender Act, ch. 449, 2005 Mont. Laws 1564 (codified at Mont. Code Ann. §§ 41-3-425, 47-1-104 to -105, 47-1-202 (2012)).

179. See, e.g., *Duncan v. State*, 284 Mich. App. 246, 276-84 (2009) (describing and analyzing defendants' argument court could not order legislature to expend money); *Motion to Dismiss at 12-14, Flora v. Luzerne*, 3:13-cv-01478-MEM (M.D. Pa. June 21, 2013) (arguing the court cannot mandate additional funding for the

immunity doctrines are implicated because plaintiffs functionally seek an appropriation from the legislature, akin to money damages;<sup>180</sup> or that the claims are not justiciable.<sup>181</sup>

It is immaterial that courts reject these defenses because the mere fact of their existence prolongs and needlessly complicates the litigation. A case seeking public defense reform filed in Michigan in 2007, following two years of active investigation by the ACLU and the Brennan Center for Justice, was only recently resolved in 2013.<sup>182</sup> The state supreme court granted two motions for reconsideration (reversing itself, only to re-reverse itself)<sup>183</sup> and ultimately denied two additional requests for reconsideration.<sup>184</sup> Hundreds of pages worth of duplicative motions were filed in the intervening years before the plaintiffs eventually

public defender office unless it would affect the court's own ability to administer justice); Defendants-Appellants' Consolidated Brief, *Duncan v. State*, No. 278652, 278858, 278860 (Mich. Ct. App. May 30, 2008) [hereinafter Defendants-Appellants' Consolidated Brief]; Brief for Respondents, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Dec. 4, 2009).

180. *See, e.g.*, *Duncan v. State*, 284 Mich. App. 246, 266-71 (2009) (discussing defendants' immunity claims); Defendants' Brief in Support of their Motion to Dismiss at 23-24, *Stempfle ex rel. D.B. v. Granholm*, No. 2:06-cv-13548-NGE-DAS (E.D. Mich. Dec. 12, 2007).

181. *See, e.g.*, Memorandum of Law in Support of Defendants' Motion to Dismiss at 3, *Harris v. Atlanta Indep. Sch. Sys.*, No. 1:08-CV-01435-CC (N.D. Ga. Apr. 23, 2008) [hereinafter AISS Motion to Dismiss] (systemic litigation over alternative school); *see also, e.g.*, Letter from Janice L. Birnbaum & Abigail Goldenberg to Hon. Allyne Ross at 2 (Mar. 22, 2005), *J.G. v. Mills*, No. 1:04-cv-05415-ARR-SMG (E.D.N.Y.) (arguing that school reform case should be dismissed because 20 U.S.C. § 1232(a) prohibits federal "direction, supervision or control" over state educational institutions); State's Memorandum in Support of Motion to Dismiss Joint Petition at 8-15, *Campbell Cnty. Sch. Dist. v. Wyoming*, No. 129-59 (D. Wyo. Sept. 8, 2004) (arguing court should defer to legislative process in school funding case); State's Motion to Dismiss Plaintiff's First General Cause of Action (The Education Clause Claims) at 2-3, *Moore v. State*, No. 3AN-04-9756CI (Sup. Ct. Alaska Dec. 21, 2004) (same).

182. *Duncan* Complaint, *supra* note 171. In the interests of full disclosure, the author was the lead attorney on the Michigan investigation, the primary author of the complaint, and argued the motion to dismiss before the county court.

183. *Duncan v. State*, 780 N.W.2d 843, *rev'd*, 784 N.W.2d 51, *rev'd*, 790 N.W.2d 695 (Mich. 2010).

184. *Duncan v. State*, 795 N.W.2d 820 (Mich. 2011); *Duncan v. State*, 791 N.W.2d 721 (Mich. 2010); *Duncan v. State*, 795 N.W.2d 820 (Mich. 2011).

prevailed, six years after the complaint was first filed and without taking any discovery in the case.<sup>185</sup> And the resolution did not come via a court-ordered injunction, but rather bi-partisan legislation to create a state-funded public defense system after a number of favorable court rulings.<sup>186</sup>

Because litigation seeking solely declaratory relief would not in and of itself require any additional expenditures by the legislature—which would be free to work out a political solution to the problem—or a court takeover of a state institution, it appears likely that this line of motion practice could be side-stepped.

Defendants in these cases often also contend that plaintiffs have not suffered or are not at imminent risk of suffering irreparable harm and that they have an adequate remedy at law.<sup>187</sup> This line of reasoning typically amounts to an administrative exhaustion argument, that plaintiffs should undergo individual adjudication through the institutions' established processes before resorting to the court system.<sup>188</sup> In the public defense context, for example, defendants argue that plaintiffs' adequate remedy at law is the ineffective assistance of counsel claim or motions to

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185. See Defendants-Appellants' Consolidated Brief, *supra* note 179.

186. Michigan Indigent Defense Commission Act, Act No. 93, 2013 Mich. Pub. Acts 53 (codified at Mich. Comp. Laws §§ 780.981-780.1003 (2013)); *Duncan v. State*, 832 N.W.2d 761 (Mich. Ct. App. 2013) (permitting plaintiffs to proceed with class discovery).

187. See, e.g., Defendants' Memorandum of Authorities in Support of Motion to Dismiss Second Amended Complaint at 5, *Hornsby ex rel. J.A. v. Barbour*, No. 3:07cv394DPJ-JCS (S.D. Miss. Feb. 1, 2008) (making these arguments in suit over state run juvenile training institution); SAO Defendants' Combined Memorandum of Law in Support of Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction at 26-27, *First Def. Legal Aid v. City of Chicago*, No. 01 C 9671 (N.D. Ill. Mar. 15, 2002) (making these arguments in suit over practices at state attorney's office); Defendant, Secretary Michael Moore's Motion to Dismiss the Individual Plaintiffs on Statute of Limitations Grounds at 8-10, *NAACP v. Fla. Dep't of Corrections*, No. 500-CV-157-OC-10 (M.D. Fla. May 3, 2000) (action against prison).

188. See, e.g., Memorandum of Law in Support of Motion to Dismiss at 31-35, *ACLU of Minn. v. Tarek ibn Ziyad Acad.*, No. 09-CV-138 DWF/JJG (D. Minn. Apr. 21, 2009); Reply Brief in Support of Motion to Dismiss Amended Complaint at 2-7, *Bill M. v. Neb. Dep't Health & Human Servs.*, 4:03CV3189 (D. Neb. Nov. 24, 2003).

substitute counsel,<sup>189</sup> and in the schools context, it is individual school administrative hearings.<sup>190</sup> Because plaintiffs need not allege they do not have an adequate remedy at law for declaratory relief, there is ample reason to believe that defendants would no longer raise these arguments on motion to dismiss (absent a statutory requirement to exhaust).

### C. *Remedy*

The traditional model of structural reform litigation explicitly envisions extensive and prolonged court involvement during the remedial phase of the litigation, as the court plays an integral role in designing the remedy and in its enforcement.<sup>191</sup> This involvement comes at undeniable cost to the court system itself, as judges must oversee proceedings and negotiations; magistrate judges, special masters, and monitors must be appointed and report back to the court; consent decrees must be reviewed and approved; and injunctions crafted and enforced. It is not unusual for plaintiffs to attempt to prolong the court's involvement, assuming that continued court involvement will procure better results and ensure greater compliance from defendants.

In a school-to-prison pipeline reform case filed by the ACLU in 2006, for example, plaintiffs succeeded in procuring a comprehensive consent decree after mediation before a magistrate judge.<sup>192</sup> The case challenged racially discriminatory discipline practices affecting Native American students in a South Dakota school district.<sup>193</sup> In addition to prohibiting defendants from requiring students to

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189. *See, e.g.*, Defendants' Motion for Summary Judgment at 3, *Wilbur v. City of Mt. Vernon*, 2:11-cv-01100-RSL (W.D. Wash. Sept. 29, 2011).

190. *See, e.g.*, AISS Motion to Dismiss, *supra* note 181, at 10 ("Having failed to avail themselves of their statutory remedy, Plaintiffs are now barred from seeking equitable relief . . .").

191. *See supra* text accompanying notes 30-33.

192. Consent Decree, *Antoine v. Winner Sch. Dist. 59-2*, No. 3:06-03007-CBK (D.S.D. Dec. 10, 2007) [hereinafter *Antoine Consent Decree*].

193. Complaint, *Antoine v. Winner Sch. Dist. 59-2*, No. 3:06-03007-CBK (D.S.D. Mar. 27, 2006).

make statements that could be used against them in a juvenile or criminal court proceeding, the decree required defendants to: (1) abide by Fifth Amendment norms after deciding to refer a student to law enforcement; (2) provide annual trainings on the constitutional rights of students, Native American education and educational equity, and student-on-student conflict resolution; (3) retain an expert to develop discipline procedures that would eliminate mandatory police referrals, define discrete categories of misconduct, set forth appropriate consequences for misconduct, and incorporate the use of traditional Native American practices; (4) maintain consistent and accurate records of disciplinary incidents; (5) evaluate all students disciplined three or more times in an academic year; (6) hire a Native American ombudsperson and establish a Principal's Advisory Committee; (7) provide a series of specific Native American classes, programs, and activities; (8) increase the number of Native American employees; (9) improve parental participation; (10) invite the Rosebud Sioux Tribal Education Department to participate in school board meetings; (11) retain a monitor to oversee defendants' activities; and (12) develop and meet benchmarks regarding graduation rates, school discipline, academic achievement and other factors.<sup>194</sup>

The court was to retain jurisdiction for four consecutive school years.<sup>195</sup> In 2014, eight years after the original complaint was filed, the ACLU sought an amendment to the consent decree: "Rather than risking the possibility of having the Original Consent Decree end in its entirety, the Amended Consent Decree is intended to be in effect for either the next two or four years" depending upon the school district's ability to meet certain outcome measures.<sup>196</sup>

This Article argues that court involvement with remedial processes like these may in some instances be streamlined when only a declaratory judgment is sought. Short, targeted periods of court involvement could and would be contemplated where defendants defy the declaration, act in

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194. Antoine Consent Decree, *supra* note 192, at 2-15.

195. *Id.* at 16.

196. Notice of Proposed Amendment to Consent Decree in School Discrimination Lawsuit at 2, Antoine v. Winner Sch. Dist. 59-2, No. 3:06-cv-03007-CBK (D.S.D. Jan. 8, 2014).

bad faith, or fail to implement appropriate institutional reform. But, long, broad, and continuous court involvement would no longer be the norm.

#### D. *Enforcement and Deterrence*

In the vast majority of cases, the declaratory judgment model will likely resolve disputes in the same way the traditional model does, with a settlement agreement. There are meaningful differences, however, when they do not. Consent decrees are notoriously difficult to locate even when one has knowledge of a particular decree's existence.<sup>197</sup> Both they and structural injunctions can be strikingly specific to the particular institution subject to a particular lawsuit.<sup>198</sup> This Article contends that more widespread and thoughtful use of declaratory judgments may result in increased transparency, transferability, and deterrence via the articulation of constitutional norms. If the other efficiencies identified above hold, they may also result in increased litigation activity which can itself increase deterrence. We can reasonably assume that at least some institutional defendants choose not to undertake institutional reform because they believe no one has the resources to sue them and/or they believe they might as well wait until someone does. The efficiencies identified in this section are most salient where a number of similarly situated institutions are suspected of committing the same or similar rights violations, i.e., where "meta-structural reform" may be needed.

Where the outcome is negotiated reform, there is no functional difference, but declaratory judgments actually issued that find particular actions to be rights violating should be easier to locate, summarize, and circulate than the contents of consent decrees and structural injunctions. They should also be more easily applicable to other potential defendants—although they will have no preclusive effect, they serve as powerful evidence that subsequent litigation over the same or similar behavior would be similarly

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197. See *supra* text accompanying note 149-50.

198. See, e.g., *supra* text accompanying note 194 (describing consent decree issued in *Antoine v. Winner Sch. Dist.* 59-2).

successful. This dynamic should be particularly forceful where the litigation filed is purely rights-determining, as in the religious freedom of exercise cases in various institutions, such as prisons. These cases seek a simple adjudication of rights: whether prisoners have a right to the particular item or activity requested. The ability to replicate results quickly, cheaply, and effectively should be particularly compelling in this context; the applicable law is a federal statute, many would-be plaintiffs lack funds and access to litigation resources, and similar issues are presumably widespread.

And yet plaintiffs' counsel in these cases consistently seek declaratory relief only in conjunction with injunctive relief, with little to no value added as a result of the injunctive relief. In *Moussazadeh v. Texas Department of Criminal Justice*, for example, attorneys from the Becket Fund (which specializes in litigating religious liberty cases) and Latham & Watkins LLP sought both declaratory and injunctive relief on behalf of a Jewish prisoner who had been denied kosher food in violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA").<sup>199</sup> Six months after the suit was filed, the district court stayed discovery at the request of the parties to permit settlement negotiations.<sup>200</sup> A year later, Texas began to offer kosher food in many of its prison dining halls.<sup>201</sup> The litigation recommenced when the original plaintiff, who was still incarcerated, committed disciplinary infractions and was transferred to a unit that offered kosher food only for purchase.<sup>202</sup> The Fifth Circuit eventually ruled that the prison's practices had substantially burdened the plaintiff's ability to exercise his religious beliefs and remanded the case to the district court.<sup>203</sup>

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199. Complaint for Injunctive and Declaratory Relief and Attorneys Fees; And Demand for Jury Trial, *Moussazadeh v. Tex. Dep't Criminal Justice*, No. 3:07-cv-00574 (E.D. Tex., Oct. 12, 2005).

200. *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 785 (5th Cir. 2012).

201. *Id.* at 785-86.

202. *Id.* at 786.

203. *Id.* at 794.

Several aspects of this case are noteworthy. First and foremost, within months, the lawsuit successfully provided the leverage necessary to get defendants to the bargaining table and in large part procured the relief requested. Second, the Fifth Circuit ruling functioned largely as a declaration of rights, holding that forcing Jewish inmates to pay for kosher food is a substantial burden for the purposes of RLUIPA and that prisons seeking to do so must demonstrate that it is the least restrictive alternative.<sup>204</sup> The parties could either appeal this functional declaration, work through it on their own in conjunction with the political and administrative agency processes, seek additional guidance from a court on remand, or all of the above.<sup>205</sup> The request for injunctive relief neither drove the outcome of the case nor improved it, and a lawsuit that sought solely declaratory relief might well have resulted in a clearer statement from the courts more readily transferable to other prison systems and claims.

These observations hold true even where plaintiffs succeed in procuring a consent decree for all intents and purposes identical to a structural injunction. For example, in a case over an inmate's right under RLUIPA to obtain and use eagle feathers in connection with Native American religious exercises, the ACLU obtained a consent decree tethered to changes the Wyoming Department of Corrections made to its Handbook of Religious Beliefs.<sup>206</sup> After litigation, the handbook was edited to permit Native American prisoners up to four eagle feathers, with the proviso that they "may be kept as loose feathers or may be bound together with string, sinew, or beaded string," in addition to "a feather fan comprised of more than four feathers . . . for group activities . . ."<sup>207</sup> A declaration of rights pursuant to RLUIPA would arguably be of greater use to future plaintiffs.

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204. *Id.* at 795-96.

205. In *Moussazadeh*, defendants did actually seek an *en banc* hearing but were denied. *Moussazadeh v. Tex. Dep't of Criminal Justice*, 709 F.3d 487, 488 (5th Cir. 2013).

206. Consent Decree and Order of Dismissal, *Yellowbear v. Lampert*, No. 08-CV-013J (D. Wyo. July 29, 2008).

207. *Id.* at 2.

E. *Protecting Future Structural Reform Efforts*

Although not properly a phase of litigation, one additional way in which declaratory judging may better meet the constraints of the new reform era is by preserving and protecting structural reform as an option for future generations of litigators. In 2013, federal district court Judge Shira Scheindlin issued a truly Fissian structural injunction against the New York City police department pursuant to a decision finding its stop and frisk policies and practices unconstitutional.<sup>208</sup> What at first appeared a powerful repudiation of the premise of this Article evolved into a political firestorm that underscores how urgent and important it is for litigators to recognize the emerging new era of public interest reform.

The *Floyd* and *Ligon* cases were brought, litigated, and adjudicated pursuant to the old rules. As the Second Circuit later described it, “[t]en days before Judge Scheindlin’s supervisory authority under the settlement agreement [in a different case] was set to expire, she heard argument on a motion brought by the . . . plaintiffs to extend the settlement period” and counseled them to file a lawsuit.<sup>209</sup> In the manner of the prototypical “hero judge,”<sup>210</sup> she stated, “[i]f you got proof of inappropriate racial profiling in a good constitutional case, why don’t you bring a lawsuit? You can certainly mark it as related.”<sup>211</sup> Plaintiffs’ counsel—which included the New York Civil Liberties Union, the Center for Constitutional Rights, Shearman & Sterling LLP, and Covington & Burling LLP—obliged, filing suit seeking declaratory and injunctive

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208. *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013).

209. *Ligon v. City of New York (In re Reassignment of Cases)*, 736 F.3d 118, 124 (2d Cir. 2013).

210. Scheindlin’s judging style is presumably informed and influenced by her personal experiences serving as a special master. See Jeffrey Toobin, *Rights and Wrongs: A Judge Takes on Stop-and-Frisk*, THE NEW YORKER (May 27, 2013), [http://www.newyorker.com/reporting/2013/05/27/130527fa\\_fact\\_toobin?currentPage=all](http://www.newyorker.com/reporting/2013/05/27/130527fa_fact_toobin?currentPage=all); cf. Schlanger, *Beyond the Hero Judge*, *supra* note 3.

211. Joseph Goldstein, *Court Blocks Stop-and-Frisk Changes for New York Police*, N.Y. TIMES (Oct. 31, 2013), [http://www.nytimes.com/2013/11/01/nyregion/court-blocks-stop-and-frisk-changes-for-new-york-police.html?\\_r=0](http://www.nytimes.com/2013/11/01/nyregion/court-blocks-stop-and-frisk-changes-for-new-york-police.html?_r=0).

relief, and marking the cases as related to the earlier case, which was over the city's racial profiling practices.<sup>212</sup>

The injunction Judge Scheindlin eventually issued was majestic in scope, seemingly a dream come true for plaintiffs' counsel. It begins with the premise that "the court has the power to order broad equitable relief," including "broad authority to enter injunctive relief."<sup>213</sup> Among other things, it requires the city to appoint a particular monitor to oversee the required reforms and specifies the monitor's roles and functions; orders a joint remedial process, and specifies how that process is to be carried out; requires that certain police department forms be revised; requires the police to provide narrative descriptions of stops in activity logs; requires the police department to transmit a message about the court's ruling over its internal messaging system; and orders the department to implement a one year pilot project testing the use of body cameras.<sup>214</sup>

Roughly two months later, the fallout began. The Second Circuit granted Defendants' request for a stay and, in an unusual order, also found that "the appearance of impartiality had been compromised by certain statements made by Judge Scheindlin during proceedings in the district court and in media interviews."<sup>215</sup> It reassigned the case to a different district judge, to be chosen randomly.<sup>216</sup> It also issued a subsequent opinion explaining the basis for and superseding that order.<sup>217</sup> Judge Scheindlin retained counsel for herself, including four law professors, who filed a brief on her behalf before the Second Circuit.<sup>218</sup> The entire kerfuffle

212. Complaint, *Ligon v. City of New York*, No. 1:12-cv-02274 (S.D.N.Y. Mar. 28, 2012); Complaint, *Floyd v. City of New York*, No. 1:08-cv-01034 (S.D.N.Y. Jan. 31, 2008).

213. *Floyd*, 959 F. Supp. 2d at 671, 674.

214. *Id.* at 676-89.

215. *Ligon v. City of New York (In re Reassignment of Cases)*, 736 F.3d 118, 121 (2d Cir. 2013).

216. *Ligon v. City of New York*, 538 F. App'x 101, 102-03 (2d Cir. 2013).

217. *Ligon*, 736 F.3d at 129.

218. See Jeffrey Toobin, *The Last Word on Stop-and-Frisk?*, THE NEW YORKER (Nov. 11, 2013), <http://www.newyorker.com/online/blogs/comment/2013/11/the-last-word-on-stop-and-frisk.html>.

was eventually mooted on January 1, 2014, with the inauguration of a new New York City mayor, who had campaigned in part on promises to reform the stop and frisk policies of the police department and who vowed to drop the city's appeal.<sup>219</sup>

The saga of the *Floyd* and *Ligon* cases offers a number of lessons for reformers, who ultimately got what they wanted—an end to racially charged stop and frisk practices in New York City—but through the political process rather than litigation. Although they requested and initially received a structural injunction from a judge who by all intents was committed to “doing justice” in the Fissian sense, that injunction was never implemented and the backlash against it from within the courts was fierce. It is futile to speculate as to whether a declaration of illegality would have been greeted in the same manner, but the injunction was issued in the context of a judge-prompted, centered, and managed litigation, and that judicial centrality was at the heart of the Second Circuit's objections. The *Floyd* and *Ligon* litigation and ensuing remedies opinion were, in other words, everything the new era is not.<sup>220</sup>

### CONCLUSION

*Brown* has served as a touchstone for generations of public interest lawyers and its gravitational pull is hard to escape. The story it tells is a compelling one for those who seek to do justice, engendering hope in those who see the need for wide-scale institutional change. But the model of reform

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219. *Ligon v. City of New York*, 743 F.3d 362, 365 (2d Cir. 2014) (granting city's motion to remand to district court for settlement discussions and refusing to decide motions by police unions to intervene in case).

220. In Judge Scheindlin's defense, she gave defendants a first bite at the apple by welcoming them to the bargaining table and issued the injunction only after the city refused to participate. *Floyd v. City of New York*, 959 F. Supp. 2d 668, 674-75 (S.D.N.Y. 2013) (“I have always recognized the need for caution in ordering remedies that affect the internal operations of the NYPD, the nation's largest municipal police force and an organization with over 35,000 members. I would have preferred that the City cooperate in a joint undertaking to develop some of the remedies ordered in this Opinion. Instead, the City declined to participate . . . .”) (footnotes omitted).

it has inspired has grown cumbersome and increasingly ill-suited to the legal, political, and social pressures of our time.

This Article urges not so much a repudiation of *Brown* in the face of these pressures as a reconceptualization: reformers must re-read *Brown I* and *Brown II* together in their proper historical context.<sup>221</sup> *Brown I* ended in a declaration of constitutional rights and an invitation to the South to participate in the process of crafting a remedy.<sup>222</sup> Fifty-four weeks passed between *Brown I* and *Brown II*, during which time a number of communities voluntarily desegregated their schools and others announced they would resist.<sup>223</sup> Prior to the hearing in *Brown II*, the Court received input from a number of stakeholders, including the NAACP, the federal government, and a number of southern states.<sup>224</sup> And in the wake of *Brown II*, after another decade of massive resistance, a political solution was finally arrived at in the form of the 1964 Civil Rights Act.<sup>225</sup> The new era in structural reform may not be so new after all, for the historical path marked by *Brown* hews closely to the one described in this Article: an initial declaration followed by a court-imposed remedy, followed by politically crafted relief.<sup>226</sup> But read in

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221. Cf. BRUCE ACKERMAN, *THE CIVIL RIGHTS REVOLUTION* 7-12 (2014) (urging an expansion of the civil rights canon beyond *Brown* to include the landmark statutes of the era as well).

222. 347 U.S. 483, 495-96 (1954).

223. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 714 (1st 1976).

224. *Id.* at 723-36.

225. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (enacted July 2, 1964).

226. Others have commented on this dynamic. See, e.g., Fletcher, *supra* note 16, at 674-76 (tracing the historical development of the Court's transition from legally mandating desegregation to legally mandating integration); Gewirtz, *supra* note 21, at 614-16 (discussing the implications of resistance to remedial effectiveness in the context of *Brown*); Sunstein, *1995 Term, supra* note 15, at 51 (noting that "it is at least relevant to the evaluation of *Brown* that the Court did not impose its principle all at once, and that it allowed room for other branches to discuss the mandate and to adapt themselves to it"); cf. Fiss, *1978 Term, supra* note 2, at 3 (describing *Brown II* as "a recognition of the magnitude of the task and an attempt to buy time"); Gewirtz, *supra* note 21, at 610 (commenting on the meaning and function of the phrase, "all deliberate speed," in *Brown II*).

this way, perhaps reformers can truly build a new way of doing justice.

There will be inevitable resistance to this proposal, both from hard-driving litigators who have invested so much time, energy, and resources in the old way of litigating these cases, and from idealists who feel great affection for a remedy that has long served their reform goals well. The structural injunction will likely be with us for some time and hopefully will never entirely depart the scene. But as none other than Fiss reminds us, it “must be seen in instrumental terms.”<sup>227</sup> The structural injunction is not a goal in and of itself, but rather a means to an end. We must decouple the right from the remedy, lest the resistance to structural injunctions evolve into resistance to structural reform itself.

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227. Fiss, *1978 Term*, *supra* note 2, at 50.