

# The Underexplored World of Remedial Law in Public Administration Scholarship: An Examination and Proposed Research Agenda

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## Abstract

Remedial law involves the use of litigated reform and injunctive relief to bring misfeasant state and local bureaucracies in line with federal law. This article highlights the need for further scholarly engagement with remedial law. It also indicates that within each stage of the remedial process lies a series of important research questions, making the area fertile ground for the very type of administrative expertise and agency-centric approaches that are lacking from our scholarly discourse. Attention to remedial law would not only strengthen the management of rights-driven reform but also contribute to the ongoing legitimacy of the public administration field.

## Keywords

remedial law, organizational reform, democratic-constitutionalism, public management

## Introduction

In 1926, Leonard White famously proclaimed public administration to be a field of management rather than law, with its foundation set in executive

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administration and private business rather than in judicial values or courts. The rule of law, however, is core to the American political consciousness and foundational to administration within a democratic-constitutional framework (Scheingold, 2004). Despite this fact, many public administration scholars heed White's observation and either appear to take law for granted or see it as an impediment to efficient, effective, and economical administration (e.g., Behn, 2001; Jos & Thompkins, 2004).

These views persist despite the oppositional case made by a distinguished group of scholars who grounded public administration in legal foundations. Leading voices like Frank Goodnow (1905) and Dwight Waldo (1984) were among the first to position law at the center of administrative management. Over the past 30 years or so, a cohort of academic writers, led by, David Rosenbloom (1983, 1987, 2007, 2010), John Rohr (1986, 2002), Rosemary O'Leary (1993, 1995), Phillip Cooper (1988, 2006), Lawrence Lynn (2009), Ronald Moe (1994), and Charles Wise (1985, 1993), began a persistent and ongoing effort to articulate the notion that accountability, equity, transparency, representativeness, due process, the appropriate use of administrative discretion, and a host of other legal values are as critical to modern public administration as managerial values like efficiency, effectiveness, and economy.

The nature of the argument in defense of the rule of law has come in several forms. The most effective of these have relied on careful retellings of history, exhaustively documenting modern administration's roots in constitutional principles as expressed by the founders (Rohr, 1986), the New Deal era Congress (Rosenbloom, 2000), and the orthodox administrative thinkers (Bertelli & Lynn, 2006), among others. Although incredibly persuasive, they tend not to reach broader audiences in the field than those already focused on the legal environment of public sector management.

Of late, many public administration scholars interested in legal foundations have shifted away from historical arguments, favoring instead those that tie law and legal values to a healthy, robust conception of public administration. After documenting the dearth of law in public administration scholarship, Lynn (2009), for example, argues that the field's "benign neglect" of the rule of law creates an almost existential crisis, "undermin[ing] the legitimacy and usefulness of a profession that aspires to be indispensable to constitutional governance" (p. 803). Others have taken a more practical tack. In his 2008 Gaus Lecture, Don Kettl (2009) argued that the rule of law is necessary for combating the various issues of the day:

If government is to rise to the challenge of problems ranging from managing this [financial] meltdown to making sure consumers can

safely buy tomatoes in the supermarket, it will need to understand how to build effective new layers of accountability supported by an effective rule of law. (p. 17)

For his part, Rosenbloom (2007) has offered recently a creative way to harness to power of the “measurement movement” to promote constitutional values and legal norms in administrative practice: “Democratic-constitutional impact statements [should] be required as part of all substantial prescriptions for administrative reform and . . . that evaluations of program and policy implementation routinely include democratic-constitutional scorecards” (p. 28).

Stephanie Newbold (2010) argues forcefully for a recommitment to the field’s constitutional legal traditions by establishing a constitutional school for American Public Administration, a move she believes will “not only add to the intellectual history of the field, but also enhance our knowledge and understanding of how administrative scholars, civil servants, and state institutions work to conserve a particular type of democratic-republican order” (p. 545). Christensen, Goerdel, and Nicholson-Crotty (2011) document the long-standing tension between law and management in the administrative literature, and offer a roadmap for reconciling the two conflicting approaches to governance and policy implementation. They conclude that only by integrating these competing approaches into a broader view of public service delivery will the field achieve an administrative model “that is efficient, effective, and defensible in the constitutional democracy of the United States” (Christensen et al., 2011, p. i136).

Consistent with the aforementioned scholarship, this article relies on a detailed discussion of institutional reform litigation, or remedial law, to address the role of legal values and the rule of law in public administration scholarship and practice. Public administrators must be more aware of and involved in the process of remedial law and the interface between judges, lawyers, and managers that occurs over the extended period of litigation and institutional reform. In so doing, there is potential for the field to improve the remedial process and to take a step toward overcoming the tension between legalism and managerialism that characterizes much of the existing public administration literature.

## **Remedial Law and the Role of Legal Values in Public Administration**

The expansion of individual constitutional and statutory rights in the 1960s and 1970s cemented litigation as a policy instrument and guaranteed the judiciary a prominent role in the definition of certain key social policy

issues. This change inevitably went beyond defining rights through judicial opinions. In the face of unresponsive and frequently incapable public agencies, courts engaged in the implementation and management of certain types of organizational change needed to meet requisite constitutional standards. Through the enforcement of constitutional rights, remedial litigation has contributed to the desegregation of local school districts (*Milliken v. Bradley*, 1977), reform of public prisons (*Ruiz v. Estelle*, 1980), and the deinstitutionalization of mental health facilities (*Youngberg v. Romeo*, 1982).<sup>1</sup> Institutional reform litigation has also been used to articulate and implement statutorily derived rights on a range of issues, including special education, police practices, prison management, and access to reproductive health clinics, to name a few.

Courts have overseen prisons in 41 states and local jails in all 50 (Feeley & Rubin, 1998), and federal judges continue to monitor conditions in prison systems throughout the country (*Brown v. Plata*, 2011; Confessore, 2010). Hundreds of school districts remain subject to desegregation decrees, the “vast majority” of which continue with “no hint of impending termination” (Parker, 2000, quoted in Sandler & Schoenbrod, 2003, p. 4). Research documenting “resegregation” in many southern school districts (Boger & Orfield, 2005; Orfield & Eaton, 1996) suggests that remedial decrees will remain a critical component of public education for the foreseeable future.<sup>2</sup>

Over the past 15 years, the U.S. Department of Justice (DOJ) has used remedial decrees to drive reform in several of the country’s largest police departments, including Pittsburgh, Los Angeles, Washington, D.C., and Cincinnati.<sup>3</sup> These initiatives have drawn wide acclaim from both scholars (Livingston, 1999; Walker, 2003) and practitioners (“Federal consent decrees,” 2008), and have shown considerable promise in their ability to eliminate patterns of unlawful use of force and racial profiling (Davis et al., 2002; Stone et al., 2009). Today, the DOJ relies heavily on remedial law to ensure that local police departments respect constitutional law and the rights of all citizens. (Perez, 2010). In short, remedial law continues to be “an influential and promising instrument of democratic accountability” across various policy domains (Sabel & Simon, 2004, p. 1015).

The extent to which remedial decrees affect the provision of public services in the United States highlights the need for further attention to the issue. First, remedial law implicates several of public administration’s core issues, including (a) the impact of rights and legal norms on the management of public bureaucracies; (b) the relationship between judicial values and managerial norms; (c) the costs and benefits of externally driven, top-down

reform; and (d) the role of legal actors, including judges, lawyers, and interest group advocates, in the administration of public agencies and government programs. Equally important, attention to remedial law gives public administration scholars a voice on matters central to the operation of our democracy: federalism, pluralism, political representation, the separation of powers, and accountability under the rule of law.

Second, like most specialized areas of public law, remedial law is verdant research ground. As this article will demonstrate, several pivotal questions remain unaddressed, leaving a considerable opportunity for public administrators to engage with and shape the intellectual and practical conversation. These issues are accessible via diverse research methodologies, and present opportunities for both quantitative and qualitative empirical research across a wide range of substantive policy issues. Until now, public administration scholars have ceded the intellectual matter almost entirely to legal academics. This omission has contributed to diminishing the influence of public administration writ large, and has allowed remedial law's "legal" aspects to heavily overshadow the various managerial and administrative components that define the issue.

Third, and perhaps most important, further attention to the matter has the potential to bring much-needed administrative expertise to the practice of negotiating and managing remedial decrees. Active engagement by public managers and administrative experts will necessarily impart the central lessons of our field and will move the development and implementation of future decrees toward a greater appreciation for the administrative challenges they present.

## **The Process of Remedial Law**

The typical remedial law effort occurs in four phases: (a) the triggering event, which generates litigation and ultimately liability; (b) remedy crafting; (c) post-remedy implementation and management; and (d) termination.<sup>4</sup> Much of what has been written about remedial law comes from legal academics. This literature tends to gloss over aspects of the remedial process most relevant to administrative scholars and leaves much to be said about the issue from the perspective of public managers and government agencies. The public administration literature that does exist illuminates the issue and offers an insightful look at various aspects of the process. But the issues demands a much more thorough examination. With the goal of facilitating such additional research, I propose a systematic research agenda that I hope

will help bring a measure of organizational clarity and focus to the task. To that end, the following section evaluates each phase of the remedial process, identifying relevant gaps in existing literature and presenting the most promising areas for future study.

### *The Triggering Event(s) and Litigation*

It is not uncommon for a seemingly random occurrence—for example, a critical op-ed newspaper article written about a persistently segregated school district or an inmate taken to a local hospital with severe injuries inflicted by police officers—to bring attention to government policies or behaviors that potentially violate constitutional law or federal statutory provisions. Some remedial cases, however, derive not from happenstance but from careful planning and thoughtful strategy on the part of lawyers and interest groups (e.g., Epp, 1998, 2009; Klarman, 2006; Sandler & Schoenbrod, 2003; Tushnet, 2005). In either case, when questions arise concerning the operational legality of a school system or a prison, litigation is often the chosen course of action for those affected negatively. When public bureaucracies are alleged to have violated the rights of entire groups of people—minority schoolchildren, mental patients, or prisoners—a class action lawsuit is a common form of legal action (Bertelli, 2004; Cooper, 1988). Should the litigants opt for trial,<sup>5</sup> a federal judge hears the case and renders a decision as to whether the defendant bureaucracy is liable for the alleged constitutional or statutory violations.

Public administration scholars, as such, have not paid significant attention to the nature of events that trigger remedial litigation. Several existing works on remedial law begin by describing those facts that have instigated institutional reform litigation (Chilton, 1991; DiIulio, 1990; Dunn, 2008; Epstein & Kobylka, 1992; Feeley & Rubin, 1998; Schlanger, 2006), but few offer any specific analysis of this phase in the process.<sup>6</sup> One imagines that a systematic review of events preceding remedial cases might generate a widely testable set of theoretical propositions. At minimum, such research would contribute to a discussion about the importance of how legal cases start, and what factors (e.g., who, when, why, how) trigger litigation aimed at institutional reform.

Relatedly, scholars from a wide range of academic fields have yet to address the decision by plaintiffs to seek redress through litigation rather than through a negotiated settlement (or vice versa). There are no studies that attempt to test empirically the notion that settlements save time and money, or preserve existing institutional relationships. Furthermore, other than casual treatment by Cooper (1988), no study investigates the differences in

outcomes when reform is pursued by plaintiffs who chose to litigate rather than negotiate a settlement. Important questions that the field should consider include the following: Is there any difference in the ability of defendant agencies to implement and institutionalize reforms driven by settlement rather than adversarial litigation? Have plaintiffs who chose litigation received a more thorough redress of the legal violations suffered? Do those who choose to settle sacrifice depth of redress for expediency and urgency of agency reorganization?

Finally, though efforts have been made to track instances of remedial law nationwide,<sup>7</sup> and scholars continue to examine these trends by issue (Sabel & Simon, 2004; Schlanger, 2006), there has been a disproportionate emphasis on the most difficult and sensational cases (Jeffries & Rutherglen, 2007). As a result, several basic descriptive questions remain unanswered. Here, we need to address what kinds of issues are triggering remedial cases, and who is filing suit? What kinds of public agencies are involved? Are any geographical patterns evident? This particular area of study would benefit greatly from a systematic update not only of current activity but also of the current state of the law.

### *The Remedy Crafting Phase*

Whether decided on the merits or settled in advance of litigation, the next step in the remedial process is the remedy crafting phase. At this point in the process, a remedial order that will suitably alleviate the observed constitutional violations must be developed. Although the specific nature of judicial involvement is disputed (Bertelli, 2004; Bertelli & Lynn, 2003; Chayes, 1976; O'Leary & Wise, 1991; Sandler & Schoenbrod, 2003), most agree that the remedy is seldom simply a function of judicial mandate. Rather, the specific organizational remedial decree is a product of a negotiation between many actors and several moving parts against the backdrop of evolving political landscapes and disparate incentives. The intensity of this process is heightened by the tension between protection of individual rights and the continued search for efficiency and economy that characterizes the drive to bring affected agencies to legal compliance (Rosenbloom, O'Leary, & Chanin, 2010).

The public administration literature lacks significant descriptive knowledge and theoretical insight into the roles played by the judge throughout the remedy crafting phase. Is the judge an active participant, guiding the plaintiff and defendant to a desired result? Does she remain neutral, allowing legal

stricture to circumscribe any negotiated solution? How do plaintiffs' lawyers affect the process? These questions matter for public administrators, as each actor represents different institutional values and norms, and the nature of their influence may affect directly an agency's operational protocol, in both the short and long term. Furthermore, how do agencies behave throughout the remedy crafting phase? What incentives drive an agency's behavior in this capacity? Do they see federal judges as "partners," as Judge Bazelon (1976) once assumed? Furthermore, how does the choice to litigate or settle affect the composition of remedial decrees?

Bertelli (2004) suggests that agencies remain a strategic player throughout the remedial process, looking to maximize their budgetary gains and reach desired policy positions. Does his claim hold true when applied more broadly? If so, does this (largely economic) self-interest necessarily conflict with mandated constitutional changes and the legal values driving the remedial decree? Do agencies maintain their own preferences, or do they hold true to pluralistic form and negotiate on behalf of powerful interest groups? Is institutional rational choice theory the best way to explain agency behavior? Is agency behavior at the remedy crafting phase necessarily uniform, or does it change depending on the nature of the organization or the alleged violation?

The conflict between judicial and administrative values occurs within a broader political context and environment. Exogenous environmental factors can serve to complicate the remedial process (Feeley & Rubin, 1998; O'Leary & Wise, 1991). Consider, as an example, the extent to which a frayed relationship between a pair of defendant government agencies might affect the budgetary negotiation process that often accompanies the design of a remedial order. Furthermore, how does an agency's political clout or intergovernmental support for the decree shape their bargaining position or the nature of the decree's terms? To what extent do elections—and the new set of political actors they produce—change things? Does the identity of each litigant or nature of the substantive issue affect the terms of the decree? Is a school district found in violation of the equal protection clause more likely to face far-reaching, aggressive reform than a public housing authority also found in violation of the Fourteenth Amendment, for example?

Public agencies are not the field's only blind spot. Little is known about the incentives, agendas, and roles encompassed by each specific exogenous actor, including interest groups. Wood (1990) suggests that interest groups have a heavy stake in the outcome of a remedial litigation case, and argues that their positions change over time and tend to favor not the preferences of the most needy, but the position most capable of furthering the interest group's cause. Sandler and Schoenbrod (2003) contend that interest groups



are a central part of a “controlling group” that drives the plaintiff’s side of the remedial process. Does this hold true under wider empirical testing? What role do these actors play when it comes to setting a defendant agency’s agenda? Public administration’s long history of attention to nonprofit organizations and insight into interest group participation in the policy process ought to ensure a meaningful contribution here.

The media also tends to play a powerful role in the negotiation of remedial decrees and subsequent implementation efforts (Wood, 1990), yet little has been said about the nature of the media’s impact on various aspects of the remedial process. Does the high-profile nature of a school desegregation case, for example, cause plaintiffs to drive a harder bargain at the crafting phase? How does media attention affect the judge, if at all? Does coverage of the case render either settlement or litigation more likely?

The inquiry should not stop at questions related to the process of crafting remedial decrees. Issues of substance are also crucial for a thorough understanding of the remedy crafting phase. How has the substance of modern decrees changed over time? Are today’s decrees less likely to be the kinds of “command and control” instruments that dominated in the 1970s (Sabel & Simon, 2004)? Are Jeffries and Rutherglen (2007) correct when they assert that today’s remedial decrees “emphasize[s] data collection, measurement, process, and participation” (p. 1422)? To what extent does such a shift in approach affect the implementation of reform?

### *Implementation and Ongoing Judicial Management: The Agency Perspective*

Once the appropriate remedy has been determined, the offending agency is legally required to begin taking the appropriate steps toward change. In some cases, the implementation of remedial decrees is managed directly by the presiding judge. Even if the judge chooses not to oversee the day-to-day implementation process, he or she tends to remain involved so as to ensure that the plaintiff in fact receives the legal protection they were awarded in court. Needless to say, the notion of judicial management raises legal, political, and administrative questions among scholars, and has caused some conflict among participants in actual remedial suits. That so few public administration scholars have weighed in on this discussion does a disservice both to the field itself and to the implementation of rights-driven reform.

In light of the challenge presented by crafting and managing a suitable remedy, some have suggested that the natural means of navigating this highly charged legal and political atmosphere is close coordination - the

development of a “new partnership” - between judge and agency (Bazelon, 1976; O’Leary & Wise, 1991; Rosenbloom, 1987). However, despite a commitment from both judges and administrative agencies to develop a symbiotic working relationship, institutional limitations on either side often prevent smooth implementation and management of the remedy. There are a number of reasons for this.

First, many remedial suits are filed against “site-specific organizations,” whose extreme pathology and irregularity are thought to exacerbate any mandated organizational change (Wood, 1990). Site-specific organizations are public bureaucracies where government officials who administer public services and individuals who consume those services exist in the same physical location, like a prison or a public school. These organizations tend to operate outside the purview of public and elected officials, are often organized by informal norms, and are frequently pervaded by a culture of insularity and skepticism of external influence, if not outright corruption and administrative incompetence (Wood, 1990). This lack of institutional integrity creates a “remedial law Catch-22”: Courts must prescribe the most arduous organizational endeavor—comprehensive change, the terms of which often conflict directly with the most efficient or preferred managerial approach—on the least competent organizations serving sets of the neediest clients (Wise & Christensen, 2005; Wood, 1990).

Second, judicial management of remedial orders evokes disparate and often unpredictable responses among bureaucratic agencies. Despite a handful of in-depth case studies that examine the implementation of high-profile Supreme Court opinions (Hansen, 1980; M. W. Orfield, 1987; Rosenberg, 1991; Wasby, 1976), and several more that address the implementation of remedial decrees (Carroll, 1998; Chilton, 1991; DiIulio, 1990; Dunn, 2008; Yackle, 1989), little is known about the agency response to detailed legal mandates and judicial oversight. The existing scholarship offers an interesting and thought-provoking look at the transformation of a judicial opinion into public policy. There is relatively little that links these pieces theoretically, however, and none of them offer an account of the issue from the perspective of government agencies or public managers.

Given the attention paid by the field to implementation of executive and legislative branch policy (Bardach, 1982; Mazmanian & Sabatier, 1989; Pressman & Wildavsky, 1984), the relative dearth of similar research systematically evaluating judicial policy is hard to explain. Certainly it is not for want of a theoretical framework from which to work. Scholars could easily evaluate the applicability of existing theoretical frameworks to the implementation of remedial decrees. Or, in the alternative, interested researchers could test Canon

and Johnson's (1999) framework for understanding judicial policy implementation, both in the context of remedial law and otherwise. Canon and Johnson describe in thorough detail several factors thought to shape implementation by those actors affected by a judge's decision, including groups that interpret, implement, and consume the new policy. This framework offers to public administration and policy implementation scholars a ready-made theoretical point of reference from which to evaluate judicial policy implementation and has yet to be tested in any real way in terms of remedial law.

Bertelli (2004) suggests that remedial litigation has the ability to affect an agency's policy agenda, preferred administrative techniques, and budgets. He also notes that suits challenging agency behavior often change the complexion of agency management (Melnick, 1994; see also, O'Leary, 1995). All of these possible changes create both predictable and unpredictable consequences. Some agencies have responded to these types of changes pathologically, preferring blatant obstructionism, resistance (Cooper, 1988; DiIulio, 1990; O'Leary & Wise, 1991), and overly technical compliance (Wood, 1990),<sup>8</sup> to any cooperative position. Other agencies choose to respond strategically, using the instance of remedial litigation to expand agency budgets (Harriman & Straussman, 1983; Horowitz, 1977b; Straussman, 1986) or to justify politically unpopular administrative or policy choices (Cooper, 1988).

The inherent difficulty of this process has prompted scholars like Anthony Bertelli (2004) to develop a metric for administrative capacity in the face of judicially driven remedial action. He attempts to apply the principle-agent theory to the court-agency remedial law relationship to explain strategic agency behavior throughout the implementation process. In so doing, Bertelli assumes that the remedial decree itself serves as the accountability instrument, functioning like a contract between court and agency, setting out rules to guide the agency's behavior (Bertelli, 2004). The Bertelli model presents a detailed perspective on the court-agency relationship and the remedial decree generally. He concludes that in many situations, a strategic agency comes to dominate a passive version of the presiding judge. This result conflicts with the prevailing idea that judges maintain a dominant position throughout the process (Chayes, 1976; Diver, 1979; O'Leary & Wise, 1991; Straussman, 1986; Wise & O'Leary, 2003; Wood, 1990; Yoo, 1996).

Although the model does not address Wood's notion of the dysfunctional and powerless site-specific agency or the role of cause lawyers and agenda-driven interest groups, and all but ignores the fluid and unpredictable external political environment in which remedial law takes place, it provides an exciting theoretical advancement in public administration's look at remedial law. Bertelli's view deserves further attention from public administration scholars

because of the quality of its idea, its unique result, and most importantly, the freshness of its perspective.

Of course, attention to this area should not be limited to challenging the theoretical underpinnings or empirical strength of the Bertelli model; there is ample need for further original descriptive and theoretical work in this area. Are site-specific organizations actually more difficult to work with than are other more traditional bureaucracies? Have Supreme Court doctrine, state and federal legislation, and deinstitutionalization efforts, eliminated site-specific organizations from the remedial litigation landscape? If not, how have these issues changed in light of the Prisoner Litigation Reform Act (1996) and other statutes designed to curtail remedial suits?

There is also demand for further description of the effects litigation has on agency management. How do agencies' policy choices change? Are these changes consistent with those predicted by rational choice models? Are they consistent with other notions of institutionalism? What effects do variables like the availability of a remedy, and the scope, nature, and duration of a selected remedy, have on the defendant agency? To what extent can remedial decrees, whose legal authority operates primarily against senior agency officials, hold street-level bureaucrats accountable to the law? Similarly, is there a more appropriate set of theoretical tools available to model the impact of litigation on agency behavior? Does the implementation literature offer any insight into the types of issues faced by agencies struggling with remedial litigation?

### *Implementation and Ongoing Judicial Management: The Court Perspective*

Most legal scholars writing about remedial law focus on the legitimacy of court-managed reform. Those critical of the process believe that the use of the federal judiciary to manage the reform of local institutions at the very least raises difficult separation of powers and federalism questions (Diver, 1979; Horowitz, 1983; Mishkin, 1978). It is state and local administrative agencies that should be worried about managing public prisons and schools, they argue, not federal judges. More acutely, many of these scholars assert that the remedial process places judges in a position for which they are neither qualified nor accustomed. As a result, judicial management of institutional reform threatens the judiciary's institutional prestige and inevitably results in illegitimate and undesirable outcomes (Horowitz, 1977a; Sandler & Schoenbrod, 2003; Yoo, 1996). Several others laud the remedial law process for its ability to drive reform in public institutions

shown to have systematically violated established legal principles. To proponents, results, in the form of the defense of individual rights against powerful and abusive bureaucracies, outweigh most costs associated with the process (Chayes, 1976; DiIulio, 1990; Feeley & Rubin, 1998; Jeffries & Rutherglen, 2007; Sabel & Simon, 2004; Schlanger, 2006).

Judicial capacity to manage the ongoing implementation of a remedial decree has generated a solid amount of research in public administration, much of it consistent with existing legal scholarship. This work suggests that a judge's lack of managerial experience and distaste for anything beyond a dispositive ruling are the first of his or her many problems (Fletcher, 1982; Schuck, 1983; Wise & Christensen, 2005; Wood, 1990). Furthermore, that most judges do not possess intimate knowledge of the affected organization (Fletcher, 1982; Wise & Christensen, 2005), or the ability to accept and understand heterogeneity within a target institution (Wood, 1990), has drawn attention. Some argue that judges also lack the same institutional norms that guide their decision making in a more traditional legal dispute (Fletcher, 1982; Wise & Christensen, 2005) and, therefore, must rely on imperfect tools with which to communicate their order (Wise & Christensen, 2005; Yoo, 1996). These limitations exacerbate the judge's inability to anticipate consequences two and three steps down the chain of causation (Wood, 1990).

Among this litany of issues, Wise and Christensen (2005) consider the central tension of judicial management to be a mismatch between the open-ended nature of the types of social problems that lie at the root of the federal judicial intervention and the desire to limit the amount of time federal judges supervise state and local institutions. They argue that before agreeing to arbitrate claims of bureaucratic abuse, federal courts should weigh the ability of state courts to redress plaintiff claims and the affected agency's capacity ("accountability, decision-making process, and resource adequacy" (p. 597) to self-correct. The implementation of this "abstention doctrine" would "achieve a [more] balanced approach to the vindication of individual rights and diminish the complexity of achieving meaningful remedies" (p. 603). Bertelli and Lynn (2003) make a similar argument, claiming that "a court should not substitute its judgment for that of an agency with respect to its means of balancing individual and collective justice unless it is clear that the agency is unresponsive to the demands of the political branches" (p. 263).

Although the prudence or feasibility of either viewpoint has strengths and weaknesses, both sets of scholars take an interesting and original position on the legitimacy of judicial management. Much more of this type of work is needed before the field truly begins to understand the incongruities of remedial management. With the exception of Christensen and Wise (2005), who

conduct a quantitative analysis of 124 school districts to evaluate the managerial impact of judges, there is little existing research that purports to test empirically assumption related to judicial management. Their research should certainly be replicated using data from other school districts. Similar studies on prison litigation, police reform, and other areas of remedial law would contribute to knowledge of those substantive issues and increase considerably the understanding of a judge's capacity to manage the remedial process and the effects of judicial management on the administration of public policy.

As a whole, this phase of the remedial process would benefit greatly from detailed and systematic analysis. Most of the published research in this area is normative; few scholars attempt to substantiate claims about judicial management capacity with any sort of generalizable empirical evidence (Jeffries & Rutherglen, 2007; Sabel & Simon, 2004; Yoo, 1996; Zaring, 2004; notable exceptions include Horowitz, 1977a; Cooper, 1988; Schlanger, 2006; and Feeley & Rubin, 1998). What is more, little work has been done to build on what does exist along these lines.

### *Termination*

Due to the constitutional and administrative complexity of their development and implementation, remedial law cases have incredible staying power. Consider *Missouri v. Jenkins* (1989, 1990, 1995), a Kansas City, Missouri-based school desegregation case originally filed in 1977. Despite three separate decisions by the Supreme Court, and decade's worth of effort on the part of the school district, parents, city council members, and other stakeholders, the Kansas City Missouri School District (KCMSD) remains deeply in debt and is no closer to finding a sustainable, constitutional means of educating students. The school board recently decided to close 28 of the KCMSD's 61 schools (Saulny, 2010). The reasons for this seeming intractability are numerous. Broadly, managerial values that tend to drive implementation, including efficiency and economy, often pull in an opposite direction from court-mandated, rights-based reform. In many instances, the drive to terminate existing remedial orders forces administrators and judges to choose between conflicting rights and equally deserving constituencies.

Even when established on a case-by-case basis, constitutional rights are notoriously hard to define, as are the organizational changes necessary for achieving them. At their core, remedial cases are no different than any other contentious public debate. They reflect the fickle and vexed nature of complex policy, complete with entrenched political and interest group forces, a sensationalized media, tight jurisdictional budgets, and so on. The absence of

clear or obvious answers to fundamental questions further complicates an effort to find a natural end to the reform process. What is satisfactory desegregation, after all? Should courts evaluate the school district using desegregation metrics or standards of education? Which branch of government should we ask to draw the line between two such issues?

Remedial cases often pit constitutional principles against one another (DiIulio, 1990; Dunn, 2008; Feeley & Rubin, 1998; Wise & O'Leary, 2003), which tends to perpetuate conflict and generate further litigation. For example, plaintiffs in a school desegregation case may push for continued judicial management, citing Fourteenth Amendment equal protection in support of their claim. School district lawyers might counter by claiming that continued federal oversight violates the principles of federalism and separation of powers. These claims resonate loudly when pursuit of desegregation necessitates the use of tax and spend authority typically reserved for the political branches, as was the case in *Missouri v. Jenkins* (1995). It is logical to assume that the adversarial nature of the process further entrenches litigants and contributes to a dispute settlement approach singularly reliant on formal litigation.

Several other factors complicate termination of the remedial law process. It is not uncommon for new issues to arise and replace the circumstances that motivated the original suit. For instance, over time the KCMSD's remedial effort became less about desegregation and more a debate about public finance, property taxes, federalism, and the separation of powers (see *Missouri v. Jenkins*, 1995). As means replace ends and fresh policy issues supplant legal conflict, new interest groups join the fray, injecting into the remedial process a renewed passion and intensity (Cooper, 1988; Wise & O'Leary, 2003). Finally, state and local administrators may eschew termination to perpetuate whatever financial and political support the remedial process has provided (Cooper, 1988; Wise, 2003). Why, for example, would a school board that receives an annual budget three times its normal allotment while operating under a remedial decree favor terminating the reform effort?

Sensitive to the challenges judicial management presents for our federalist system and its separation of powers model, the Supreme Court has developed a legal framework to guide the termination of remedial orders. Recent case law suggests that courts will support terminating a remedial order if the government can demonstrate that it has "complied in good faith" with the terms of the decree and that the unconstitutional or unlawful conduct had been eliminated to "the extent practicable" (*Freeman v. Pitts*, 1992, p. 502 [quoting *Board of Education of Oklahoma City v. Dowell*, 1991]). Furthermore, in *Horne v. Flores* (2009), the court uses a broadly inclusive and "flexible"

approach to evaluate the factors that determine whether defendant agencies have met the obligations established under a remedial decree. Based on this and other case law, courts tend to favor the government's view of the facts and have used their considerable discretion over issues of termination to grant deference to agencies.

Wise and O'Leary (2003) provide the only recognizable public administration research on remedial law termination. They do a solid job drawing on the facts of *Missouri v. Jenkins* (1995) to illustrate the inherent complexity in the termination of remedial orders and to highlight several problems with extended judicial management. Their conclusions are hardly surprising. Judicial management of the KCMSD has altered public budgeting and municipal finance operations, as well as personnel and infrastructure management. Ongoing judicial management has also affected KCMSD's strategic planning efforts. The authors find evidence to suggest that administrative planning is done to meet the prescriptions of the judge rather than the educational needs of school district students and parents (Wise & O'Leary, 2003). The effect of interest groups and issue networks on KCMSD's remedial efforts, particularly in the latter stages of the process, is perhaps this study's most notable finding."

Termination of judicial management is an area ripe for research. It not only raises interesting theoretical and practical questions but has the potential to provide a lens into overarching debates about the long-term value of remedial law. The field would benefit greatly from a closer examination of judicial termination in other desegregation cases, as well as a deeper look into other policy areas where remedial law has played a role. How did judicial management of the prison and mental hospital cases end, for example? Were the effects of continued management in these substantive areas consistent with those found in *Missouri v. Jenkins*? How has recent case law shaped the nature of termination? Are there differences in the termination of constitutional decrees versus statutory remedial orders? To what extent does agency operation change after termination? How are remedial efforts most effectively evaluated? Do they actually work?

## Analysis

Remedial law is an ideal domain for grappling with the role of law in the administration of public policy. The study of such issues provides public administrators with a unique vehicle for considering the relationship between judges and public managers, between the federal judiciary and state and local bureaucracies, and the interplay between Congress, the courts, and the



executive. To engage with remedial law is to take on questions of federalism, separation of powers, and political representation, framed in terms of pressing and current policy issues.

More broadly, the remedial law process highlights an inherent tension between legalism and managerialism in the operation of our democratic-constitutional system. Unlike the more traditional management scenario, however, it is law that takes precedence. Affected bureaucracies are forced to adjust their organizational, operational, and programmatic emphases to comply with remedial orders, regardless of how inefficient or expensive such changes may be. Remedial cases represent an instance where legal compliance and administrative accountability subjugate other relevant values and operational considerations. It is the legal system—rather than the political system—that identifies and articulates agency priorities. What is more, remedial law is the tangible expression of rights in the day-to-day operation of public bureaucracies. The implementation and management of these cases represent the tough fiscal, political, and managerial choices that define the pursuit of equity in public administration.

Thus, it is engaging with these big questions—many of them core to the history of public administration and fundamental to the field's modern theoretical and practical ambitions—that should be the primary focus of future research efforts. Perhaps more important than what public administration has to gain from engaging with remedial law is what the field has to give. As is clear from this review, much of what is understood about these issues derives from research conducted by academic lawyers, written from the perspective of judges. Public managers—and the insight from a field of experts schooled in the ways of organizing and managing public policy—have for the most part overlooked the operation of remedial cases. Many of the issues that define our field—organizational reform, implementation, public personnel management, and budgeting—shape the process of remedial law. Incorporating administrative expertise into the negotiation, development, implementation, and termination of remedial cases, either through active participation or scholarly analysis, would no doubt make the process more efficient and effective.

To that end, the four stages of the remedial process present a useful point of departure. No doubt each stage presents an infinite number of important and unanswered research questions, all of which demand the perspective of public administrators. Research that examines from an agency perspective issues related to the management and termination of remedial decrees is of particular need. It is here where existing knowledge remains the most limited and where administrative expertise could be brought to bear immediately.

This work will not be easy. Remedial cases can extend for decades and typically involve an endlessly complex set of actors, interests, and issues. There are no prepackaged quantitative data sets upon which to rely, and much of the involved research will be conducted by working around confidentiality agreements, statutes geared toward protecting agency staff, and attorney–client privilege. What is more, the sensitivity and controversy that attaches to these cases may render potential interviewees reticent and documents difficult to acquire. Despite that, there are many outstanding examples on which to model future research (Bertelli, 2004; Bertelli & Lynn, 2003; Christensen & Wise, 2005; Dunn, 2008; Feeley & Rubin, 1998; Wise & O’Leary, 2003).

The challenge presented by remedial law was born out of the post-*Brown v. Board of Education* (1954) era, where federal judges attempted to force recalcitrant southern and Midwestern school districts into compliance with constitutional law. This work continues today across several policy areas, though with inadequate attention from members of the public, media outlets, and scholars. Those of us trained as public administrators are guiltier than most.

This is true precisely because of what the field has to offer on the matter, both in terms of theoretical development and the practice of remedial law. Although the field’s roots may be in management, as Leonard White argued decades ago, the democratic-constitutional system will forever mandate that law remains foundational to the operation and study of American government. Remedial law highlights aspects of this system—federalism, separation of powers, pluralism, and the rule of law—so often overlooked, yet fundamental to a comprehensive vision of the field. Beyond a wealth of research opportunities, thorough engagement with remedial law will bring us a step closer to a full appreciation of this fact and help to position the field at the center of an important administrative issue.

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### **Notes**

1. Some legal scholars argue that institutional reform litigation, or remedial law, is a term properly affixed only to those cases involving constitutional claims and

the day-to-day judicial management of reform decrees (see Justice Breyer's dissent in *Horne v. Flores*, 2009). Jeffries and Rutherglen (2007) argue that a pervasive feature of remedial law is "the preeminence of constitutional claims" before noting that "the term is not subject to hard-and-fast definition" (pp. 1413-1414). Although there are certainly relevant distinctions between constitutional and statutory remedial decrees, for the purposes of this article, these distinctions are basically without difference. Both types of cases present similar research questions for public administration scholars, and each would benefit from further engagement by administrative experts.

2. Interestingly, Orfield places primary blame for southern resegregation on the abandonment of the issue by federal courts in the wake of the Supreme Court's decision in *Board of Education of Oklahoma City v. Dowell* (1991). This view and the supporting empirical evidence provide fodder for the normative debate over the value of court-based reform.
3. This authority derives from Section 14141 of the 1994 Violent Crime Control and Law Enforcement Act. This provision makes unlawful a "pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States" and establishes that the attorney general "may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice" (42 U.S.C. Sec. 14141). The U.S. Department of Justice enjoys similar authority vis-à-vis public prisons under the Civil Rights of Institutionalized Persons Act of 1980 (42 U.S.C. Sec. 1997, 2000).
4. Both Cooper (1988) and Wood (1990) offer sound descriptive and semi-theoretical examinations of remedial law. Cooper presents a detailed analysis of four high-profile cases and provides an easily accessible framework for understanding and synthesizing the complexities of the issue. Wood summarizes a 1987 colloquium that brought together judges, attorneys, special masters, and academics to discuss and debate a series of cases with which each participant was involved personally or had studied closely. The product is a much less detailed but perhaps more theoretically insightful look at remedial law. The framework used to organize this essay is largely a reflection of their work.
5. Many plaintiffs opt for a negotiated settlement rather than litigation. Articulated by a consent decree, the product of a negotiated settlement may come at lower cost in both time and money, and may spare each party the animosity and acrimony engendered by protracted litigation (Cooper, 1988).
6. The study by Sandler and Schoenbrod (2003) is a notable exception. The authors argue that the profusion of remedial decrees is not the product of a single triggering event but a natural by-product of expanded statutory rights created by legislative actors bent on doing good at little or no political cost) enforced in

court by aggressive cause lawyers funded by issue-driven interest groups and indulged by activist federal judges hoping to amass power, all at the expense of the political branches of state and local governments. Their case is well argued and raises many interesting empirical questions.

7. See Schlanger and Lieberman (2006) for a discussion of remedial law-related research and the efforts to catalog relevant data at the University of Michigan's Civil Rights Litigation Clearinghouse ([www.clearinghouse.net](http://www.clearinghouse.net)).
8. "Overly technical compliance" is Wood's phrase for the classic bureau-pathology where bureaucratic rules become the desired end rather than a means to sound policymaking.

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