Attacks on federal administrative action historically have consisted of individual challenges to particular agency decisions. Recent cases, however, have confronted courts with more general challenges to federal agency enforcement policies and practices. The plaintiffs in

1. See, e.g., FTC v. Universal Rundle Corp., 387 U.S. 244 (1967) (action challenging cease and desist order); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973) (action seeking review of agency determination that construction of jail would not significantly affect environment). In cases in which courts have held such decisions reviewable and found agency action inadequate or improper, they have typically granted only limited relief. See, e.g., East Oakland-Fruitvale Planning Council v. Rumsfeld, 471 F.2d 524, 534 (9th Cir. 1972) (requiring Office of Economic Opportunity to reconsider state executive's veto of project funding, although ultimate OEO decision beyond review); Templeton v. Dixie Color Printing Co., 444 F.2d 1064, 1065 (5th Cir. 1971) (reversing lower court order "summarily" directing union election to be held, ordering instead only investigation by National Labor Relations Board).


The courts in Nader and Adams expressly drew the distinction between challenges to individual agency decisions and challenges to the general enforcement policies and practices of agencies. See Nader v. Saxbe, 497 F.2d 676, 679 (D.C. Cir. 1974) (complaint does not ask court "to assume the essentially Executive function of deciding whether a particular . . . violat[ion] should be prosecuted" but only seeks "a conventionally judicial determination of whether certain fixed policies . . . lie outside the constitutional and statutory limits of 'prosecutorial discretion'"); Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc) (suit not brought to challenge HEW decisions in "a few" cases, but to challenge "consciously and expressly adopted . . . general policy which is in effect an abdication of . . . statutory duty"). Such a distinction has also been recognized in the scholarly literature. See J. Mashaw & R. Merrill, Introduction to the American Public Law System 882 (1975); cf. Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976) (outlining model of "public law" litigation and contrasting it with traditional adjudicatory model of dispute resolution between private parties); Note, Implementation Problems in Institutional Reform Litigation, 91 Harv. L. Rev. 428 (1977) (emphasizing differences in judicial remedial activity between private litigation and "public law" litigation).
these cases have alleged "systemic enforcement inadequacies," that is, fundamental failures in statutory implementation affecting significant numbers of beneficiaries. Specifically, the plaintiffs have alleged either nonenforcement of all or part of a congressional mandate or significant delay in its administration. The cases illustrate the variety of causes of these systemic inadequacies: refusal to spend appropriated funds, misinterpretation of statutory duty, inefficiency in administration, and insufficiency of appropriations.

Two recent suits alleging systemic inadequacies in statutory enforcement by federal agencies are of particular interest, because they involve major national priorities and programs and because the courts entered unusually broad injunctive relief against the agencies. In *Adams v. Richardson,* the District of Columbia Circuit confronted a claim that the Department of Health, Education, and Welfare (HEW) had completely failed to enforce certain civil rights statutes. In *White v.*

3. This definition is intended to embrace all agency failures to give full effect to substantive congressional mandates. Systemic enforcement inadequacies may result from policy choices made by agencies or from the insufficiency of available enforcement resources. See pp. 423-27 infra.


10. 480 F.2d 1159 (D.C. Cir. 1973) (en banc).

11. *Adams* was originally a class action by black plaintiffs complaining of an HEW policy of nonenforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970), with respect to school districts in 17 Southern and border states. See *Adams v. Richardson*, 351 F. Supp. 636 (D.D.C. 1972), enforced, 356 F. Supp. 92 (D.D.C.), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc). HEW attempted to justify its failure to commence enforcement proceedings against noncomplying school districts "on the grounds that it [was] still seeking voluntary compliance through negotiation and conciliation." 351 F. Supp. at 658. The district court, however, found that "[t]he time permitted by Title VI for securing voluntary compliance . . . has[d] long since passed," and ordered the agency to commence enforcement proceedings within two months. 356 F. Supp. at 95. HEW was similarly ordered to commence enforcement proceedings against a large number of school districts that the agency had previously found to be in presumptive violation of Supreme Court desegregation decisions and to demand from another large number of school districts an explanation of racial disproportionalities in apparent
Administrative Enforcement

Mathews, the Second Circuit faced a challenge to the delay-ridden administration of Social Security disability benefits. Both courts found a violation of the agencies' enforcement duties and issued de-

violation of those decisions. Id. at 97. The remedial order was affirmed, with slight modifications, by a unanimous Court of Appeals sitting en banc. Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).

Subsequently, further relief was sought and obtained when it became clear that HEW was not enforcing Title VI with respect to school districts that were not covered by the previous order, but that had apparently begun to violate Supreme Court desegregation decisions. Adams v. Weinberger, 39 l F. Supp. 169 (D.D.C. 1975), modified sub nom. Adams v. Mathews, No. 3095-70 (D.D.C. July 17, 1975). The court once again ordered the agency to require a large number of districts to rebut or explain the substantial racial imbalance in them. More significantly, however, the court entered a general order concerning "future HEW compliance with Title VI." Id. at 273. The court also afforded an important expansion of relief by ruling that "HEW has a duty to commence prompt enforcement activity upon all complaints or other information of racial discrimination in violation of Title VI." Id. Finally, the court set particular time frameworks for the agency to follow in acting on complaints. Id.

Thereafter HEW began responding to complaints by women and Mexican-Americans of discrimination on the basis of sex (in violation of Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1686 (1976)) and national origin (in violation of Title VI) by stating that it could not investigate them because, pursuant to the court's order in Adams, it was devoting "a major portion" of its resources to handling race discrimination complaints. See, e.g., Letter from John A. Bell, Chief, Elementary and Secondary Education Branch, Region VI, Office for Civil Rights of HEW, to Ms. Kay Paul Whyburn (Nov. 20, 1975) (copy on file with Yale Law Journal). Women's and Mexican-American groups soon intervened in the litig. on. See Adams v. Mathews, 586 F.2d 417, 418 (D.C. Cir. 1976) (per curiam) (women held "entitled to intervene . . . as of right"); Adams v. Mathews, No. 3095-70 (D.D.C. Mar. 30, 1976) (Mexican-Americans granted leave to intervene). The question of limited resources then became prominent. The issue was never resolved by the court, however, because a settlement was negotiated among the parties. The settlement was entered by the court in 1976 as an order modifying that section of its supplemental order of 1975 concerning "future HEW compliance with Title VI." Adams v. Mathews, No. 3095-70 (D.D.C. June 14, 1976).

This 1976 order provided: that all Title VI and Title IX complaints were to be handled within specified time frameworks, id. § 8; that the Director of the Office for Civil Rights could, on a temporary basis and by region, authorize exceptions not exceeding 20% of the complaints received if he determined that the resources in any region were inadequate, id. § 11(a); and that complaints should be selected for exception by subject category (race, sex, or national origin) in proportion to the number of such complaints received in the preceding year, id. §§ 11(c), 21. The order also provided that all compliance reviews be handled within similar specified time frameworks. Id. § 14.

HEW failed to comply with the 1976 order. In an order published in October 1977, the court found that HEW had not taken all possible steps to use available resources and to secure additional resources in order to comply with the 1976 order. The court therefore directed HEW to indicate to OMB what resources were lacking and to take all steps necessary with OMB to obtain them. Adams v. Califano, No. 3095-70 (D.D.C. Oct. 26, 1977). HEW complied, but OMB forwarded to Congress a request for only slightly more than half the additional resources sought by HEW. Shortly thereafter another settlement was negotiated and entered as an order by the court. Adams v. Califano, No. 3095-70 (D.D.C. Dec. 29, 1977). The order stated that HEW was not to be considered in violation to the extent that it fully utilized available resources. Id. § vi. The order reserved the possibility, however, that "other defendants" could be sued, id., OMB apparently being the likely candidate. Furthermore, the order's substantive provisions were made applicable to the entire nation rather than merely the 17 Southern and border states covered by the court's previous orders. Id. § v. See generally pp. 423-25 infra.

tailed "enforcement injunctions," that is, injunctions significantly redirecting the agency's enforcement effort. Yet neither opinion provides the theoretical framework necessary to guide judicial responses to complaints of systemic enforcement inadequacies.

This Note argues that the exercise of broad remedial powers by courts is often appropriate to correct systemic inadequacies in federal administrative enforcement efforts. The Note develops a legal framework to direct courts in the exercise of their power to issue enforcement injunctions against federal agencies. Part I advances a standard to guide courts in determining when and to what extent to go beyond declaratory orders and actively engage in constructing a remedy.

Under the proposed standard, the remedy in each case is determined by evaluating the likelihood of "substantial noncompliance" and the

14. It is useful to compare with this category of injunctions the taxonomy advanced in O. Fiss, INJUNCTIONS 1 (1972). Professor Fiss distinguishes among three types: preventive, regulatory, and structural injunctions. "A preventive injunction tries to stop a discrete event or act." Id. A regulatory injunction contains "a general prohibition" and is used "to regulate a party's behavior over a long period of time." Id. A structural injunction "alter[s] or reorganiz[es] some institutional arrangement." Id. It is the structural injunction that is most similar to the enforcement injunction. An enforcement injunction may be a structural injunction; at a minimum, it is a "structural injunction" with respect to some significant segment of the agency it addresses. Thus, much of Fiss's analysis of structural injunctions applies with equal force to enforcement injunctions. See, e.g., p. 412 infra.


16. This Note is concerned only with challenges to federal administrative enforcement policies and practices, although much of its analysis is clearly applicable to actions by state and local entities as well. On the state and local level, federalism, rather than the separation of powers, operates as a limitation on the breadth of federal judicial remedies.

This Note is also concerned exclusively with allegations of inadequate statutory enforcement rather than with claims of agency failure to "enforce" constitutional provisions. It is a semantic sleight of hand to describe statutory enforcement schemes that are violative of the Constitution as failures by the agency to "enforce" the relevant constitutional provisions. Such a description obscures the primary concern of statutory enforcement actions by confusing the enforcement issue with the separable issue of the validity of the underlying enactment. If the enforcement violates the Constitution, either the enforcement is improper or the statute is invalid.

Finally, the Note is not concerned with cases that involve exclusively procedural, rather than substantive, attacks on agency enforcement policies and practices. Examples include cases involving attacks on processes of formal and informal rulemaking, see, e.g., Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973), and cases involving agency choice of mode of action, see, e.g., NLRB v. Guy F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952). Admittedly the line between substance and process is not always a sharp one, see Rosenblatt, Health Care Reform and Administrative Law: A Structural Approach, 88 YALE L.J. 243, 261-63 (1978) (discussing how seemingly procedural reforms produce substantive changes); individuals may be considered as having separate substantive rights to participate in agency policymaking when the statute so provides. Complaints concerning particular agency decisions about the process by which a general policy is to be adopted are, however, clearly analogous to traditional rather than systemic actions and so will not be considered here.

17. A declaratory order is a minimal remedy that is almost always appropriate in the context of systemic enforcement inadequacies and is, other things being equal, usually to be preferred. See pp. 417-18 infra. It thus constitutes the baseline relief.

410
nature of the “group right,” the right shared in common by the statutory beneficiaries. Part II applies the standard to several major cases involving challenges to general enforcement policies and practices of federal agencies. Part III explores the implications of the proposed standard, pointing to limiting principles that make it workable and noting its various benefits.

I. A Suggested Remedial Standard

As government has grown in recent years in response to mounting social and legal demands, the task of administering legislative mandates has become increasingly complex, and the failure of agencies to fulfill congressional objectives has become both increasingly common and increasingly severe. Perhaps because these fundamental failures of statutory enforcement have become critical, courts have shown a greater willingness to attempt to remedy them. That the courts are the appropriate bodies to provide the needed remedy is apparent for several reasons. First, the political branches are frequently incapable of fulfilling this role adequately. Executive self-regulation and congressional oversight are ineffective means of grappling with these fundamental or “systemic” enforcement inadequacies. Second, the problem

18. Normally the good faith willingness of agencies to obey the law ensures compliance with important congressional dictates. Agency self-regulation, however, is more limited when the problem involves systemic failure of enforcement. First, when pervasive institutional bad faith lies at the basis of the systemic inadequacy, agency self-review is likely to be infected by the same bad faith. Cf. Keyes v. School Dist. No. 1, 413 U.S. 189, 201-03 (1973) (evidence of bad intent in some institutional actions creates presumption that bad intent has infected other institutional actions). Second, internal agency checks will often not detect honest mistakes of law and inefficiency in administration. See M. Crozier, The Bureaucratic Phenomenon 195 (1964); cf. F. Rourke, Bureaucracy, Politics, and Public Policy 148 (1969) (“executive agencies find difficulty in shifting their sights when past policies are no longer appropriate”). The recurring instances of administrative misfeasance and malfeasance are evidence enough of the frequent inadequacy of efforts by federal agencies to police themselves. See, e.g., Delays in Social Security Appeals: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means, 94th Cong., 1st Sess. (1975) [hereinafter cited as Social Security Hearings]; Senate Subcomm. on Separation of Powers of the Comm. on the Judiciary, 91st Cong., 1st Sess., Report on Congressional Oversight of Administrative Agencies (National Labor Relations Board) (Comm. Print 1970). Furthermore, even when such inadequacies are detected, agencies are normally slow to act to correct the problem. This “bureaucratic stasis” has been commonly noted as a prominent feature of large administrative agencies. See, e.g., F. Rourke, supra, at 148-49 (“bureaucratic inertia”).

Congressional oversight is also inherently limited in its ability to detect and rectify systemic enforcement inadequacies. See T. Henderson, Congressional Oversight of Executive Agencies 2 (1970) (“[C]ongressional oversight . . . is carried out within relatively isolated policy compartments centered in the various committees . . . .”); id. at 73-74 (“[T]he relationship between the information [Congress] obtains [in its oversight role] and policy output . . . is erratic at best, and, more often than not, nonexistent. . . .
of systemic enforcement inadequacies is well-suited to judicial resolution.19 Suits alleging systemic enforcement inadequacies present more questions of law than they do of fact. Finally, courts are vested with power to formulate effective remedies such as the enforcement injunction, an order that refocuses or reorganizes in some detail an agency’s enforcement effort.20 Courts in the last few decades have made increasing use of similar injunctions under their powers to fashion appropriate remedies for violations of federal rights.21 The injunction, it has been argued, no longer occupies a subordinate position in the

19. See pp. 430-32 infra. When challenges to agency inaction present major issues of statutory interpretation, the courts are particularly appropriate forums. Resolution of such questions of law and determination of the rights of groups and individuals are the traditional functions of the courts. See United States v. Nixon, 418 U.S. 683, 703 (1974); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

It is, moreover, inappropriate to refer complainants back to the political process when the gist of their complaint is the inadequacy of that process. Plaintiffs in actions alleging inadequate agency enforcement come into court having initially won in the political arena: their complaint is simply that of executive failure to enforce the rights they have won. There is no basis in precedent or reason for requiring such plaintiffs to return to the political forum and seek renewed recognition of their rights, probably under more difficult circumstances. In fact, judicial protection should be guaranteed to plaintiffs whose effective use of the political process has been frustrated or denied. See White v. Regester, 412 U.S. 755, 765-69 (1973) (invalidating multimember election districts in light of history of political discrimination against black and Mexican-American residents); Graham v. Richardson, 403 U.S. 365, 372 (1971) (invalidating state welfare statute establishing long residency qualification for aliens; aliens termed “discrete and insular minority” for whom “heightened judicial solicitude” appropriate).

20. See note 14 supra. When systemic enforcement inadequacies are alleged, equitable relief rather than monetary damages is appropriate. See D. Dobbs, REMEDIES 57-58 (1973) (legal remedy is usually inadequate when plaintiff is deprived of entitlement, if he would need multiple suits to effectuate legal remedy, if he is entitled to some performance by defendant, or if damages are so speculative that a monetary award is likely to be inadequate).

21. See O. Fiss, THE CIVIL RIGHTS INJUNCTION 4 (1978) (increasing use of structural injunction). Although it first gained “a special prominence” in the early civil rights cases, id., the injunction soon became commonplace in “litigation involving electoral reapportionment, mental hospitals, prisons, trade practices, and the environment,” id. at 4-5. Indeed, these developments constitute a revolution in our remedial jurisprudence. See id. at 1-5.
Administrative Enforcement

remedial hierarchy. Moreover, specific congressional enactments support the use of extensive remedies in the context of systemic enforcement inadequacies.

In determining the appropriate response in cases alleging systematic agency failure to enforce federal statutes adequately, the court should make three inquiries. First, the court must determine whether there is a systemic enforcement inadequacy that would justify consideration of some form of equitable relief. If such an inadequacy is found to exist, the court should gauge the need for some form of enforcement injunction, in accordance with the standard proposed in this Note. Under this standard, the court should evaluate the nature of the group right involved and the likelihood that the agency will solve the problem with minimal judicial supervision. Finally, the court should choose the detail appropriate for the initial order in light of the urgency of the remedial need.

A. Determination of "Systemic Inadequacy"

When faced with an allegation of a systemic enforcement inadequacy, the court must first establish whether there exists a violation that

22. Id. at 1-6; see Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 1020 (1965) [hereinafter cited as Developments].

There is also broad policy support for the use of extensive remedies in the context of systemic enforcement inadequacies. See pp. 433-35 infra.
justifies judicial remedial action. The two initial determinations that
the court must make are whether the enforcement is “inadequate” and
whether the inadequacy is “systemic.”

1. “Inadequate” Enforcement

In determining whether enforcement is inadequate, the court must
first determine what congressional goals are embodied in the statute.
This involves some assessment of congressional intent to grant rights
to enforcement. The court must then determine whether and to what
extent the agency has met these goals. In Adams, for example, the
court found that HEW had violated “Congress’s clear statement of an
affirmative enforcement duty” when it failed to use the coercive power
specifically given the agency in the statute.24

The determination of congressional intent will rarely prove to be
easy. The discrepancy between the absolute language of substantive
statutes and the limited enforcement budgets provided by subsequent
appropriations bills25 presents difficult questions for courts confronted
with allegations of inadequate agency enforcement. Arguably, in-
dividuals have no right to enforcement efforts greater than those
achievable under existing appropriations bills, no matter what the
language of the underlying statute.26 When limited appropriations

25. Rights granted us are often cast in absolute terms, but our commitment to these
ideals is in fact limited. This is nowhere more evident than in the enforcement ap-
for example, prohibits in bold terms federal funding of, inter alia, any educational in-
stitution practicing racial discrimination. Annual HEW appropriations, however, contain
only specific amounts for the enforcement of Title VI with respect to educational in-
stitutions.
26. This position was adopted in dicta in Adams v. Richardson, 480 F.2d 1159, 1166
(D.C. Cir. 1973) (en banc), but was rejected in White v. Mathews, 559 F.2d 852 (2d Cir.
1977), cert. denied, 435 U.S. 908 (1978). The White court found the statutory enforce-
ment inadequate despite the fact that existing appropriations were fully and optimally
J., concurring) (statutory entitlement not limited in its creation by instrument providing
(distinguishing Arnett and holding, on particular facts, no entitlement created when
instrument set forth narrow procedures).

Undoubtedly part of the reason the White court rejected the proposition that the
statutory right was limited by the enforcement appropriation was the possibility, in that
case, of affording relief under the existing statutes. Appropriations for benefits pay-
ments, the specific appropriations involved in White, are handled somewhat differently
from appropriations for program administration: a large fund is created from which pay-
ments in any year can be drawn, to be replenished by additional appropriations in sub-
sequent years. See 42 U.S.C. § 401 (1970 & Supp. VI 1976). There is in effect an “appro-
priations lag.” Thus, the White court was able simply to order the agency to speed up
its appeals processing—leaving the agency to figure out how to do it—or begin making
prospective payments to those individuals whose appeals it could not consider in timely
fashion.

414
Administrative Enforcement

reflect a congressional intent to curtail the prior mandate, this argument would probably be valid. For example, a shifting political climate or external contingencies might impel Congress to reorder national priorities, and this might be reflected in diminished appropriations. Often, however, it is apparent that limited budgets do not indicate a congressional intent to curtail the entitlements previously created. In many cases, the discrepancy between the actual appropriations and the necessary funds is attributable in part to an inability on the part of Congress to anticipate expenses\(^2\) and in part to an understandable desire to underestimate administrative costs in order to maintain that degree of tension conducive to optimal efficiency in administration.\(^2\)

Moreover, since the appropriations process begins with the agency's own suggestions and priorities,\(^2\) lack of funds may sometimes reflect the agency's, not Congress's, substantive judgment.

Because of the complexity of federal budgetary processes, however, it is often difficult to determine the extent to which limitations on appropriations reflect substantive congressional judgments. Due to this fact, as well as the significant potential for abuse that would exist if an agency claim of inadequate resources were accorded preliminary consideration in determining whether a prima facie violation exists, it is more desirable for courts to consider such claims only at trial. For jurisdictional purposes, inadequacy of enforcement should be measured solely with respect to the substantive entitlement, irrespective of arguable limitations reflected in enforcement appropriations. If at trial or during subsequent proceedings it becomes apparent that such limitations do reflect substantive congressional judgments, the court can modify its decree accordingly or relinquish jurisdiction altogether.\(^3\)

\(^{27}\) See Hearings on Improving Congressional Budget Control Before the Joint Study Comm. On Budget Control, 93d Cong., 1st Sess. 5-6 (1973) (testimony of George Schultze); Fisher, Presidential Spending Discretion and Congressional Controls, 37 LAW & CONTEMP. PROB. 135, 136, 150-52 (1972).

\(^{28}\) See H. LINDE & G. BUNN, LEGISLATIVE AND ADMINISTRATIVE PROCESSES 335 (1976) ("The tension between the practical needs of administrative flexibility and the legislative desire to maintain policy control . . . is reflected . . . in contests over the choice between 'line-items' and 'lump-sums' appropriations."); Miller, Separation of Powers: An Ancient Doctrine Under Modern Challenge, 1976 DUKE L.J. 299, 317 ("Congress . . . has . . . routinely starved the regulatory arms of government—deliberately, it would seem . . . ")

\(^{29}\) See H. LINDE & G. BUNN, supra note 28, at 249-50, 253.

\(^{30}\) See, e.g., Adams v. Califano, No. 3095-70 (D.D.C. Dec. 29, 1977) (modifying previous decree to recognize limitation on available resources reflecting substantive high-level executive judgment).
2. "Systemic" Inadequacy

After deciding that an enforcement inadequacy exists, the court must then determine whether the inadequacy is systemic. In so doing, the court should look to the pervasiveness of the inadequacy, the degree to which identifiable subclasses of beneficiaries are disproportionately affected, the nature of the agency policy or practice in question, and the purposes of the underlying statute.

First, the fact that large numbers of people are directly affected by an agency course of action not only suggests that there is a greater need for meaningful relief, but also tends to indicate that the enforcement scheme has an underlying defect of some generality. The enforcement need not be inadequate with respect to all statutory beneficiaries, however; a systemic inadequacy may exist when agency nonenforcement or delay is directed toward one or more subclasses of beneficiaries.

In addition to pervasive or systematically harmful agency inaction, however, an agency policy or practice of a general nature is required before the inadequacy can be considered systemic. The Food and Drug Administration’s decision to permit marketing of a particular drug, for example, may affect millions of people, but the decision is usually far removed from the basic statutory purposes and is linked instead to particularized factual judgments. It thus reflects little about the agency’s general enforcement effort. Finally, the minimum nonenforcement or delay actionable may vary with the purposes of the underlying statute; when the right involved is more important, courts should be less tolerant of systematic agency inaction.

B. Determination of Remedial Need

After deciding that a systemic enforcement inadequacy exists, the court must choose among the various remedial options by assessing the gravity of the remedial need. The range of equitable remedies that a court could enter includes a declaratory judgment and dismissal of the case without further action, a declaratory judgment in which the

31. See p. 434 infra.
33. Thus the nature of the group right may affect not only the degree of relief afforded, see pp. 418-20 infra, but also the initial determination of whether a violation exists.
34. See p. 419 infra.
Administrative Enforcement

court retains jurisdiction to require the agency to return periodically and demonstrate compliance, an order to the agency to submit a compliance plan for court approval, an order requiring the agency to attc.npt to procure additional resources in order to further its enforcement effort, and, most importantly, an order to the agency to implement the court’s own compliance plan. If the court decides to order the implementation of its own compliance plan, it may enter a highly detailed order or it may enter an order cast in more general terms, leaving the agency with considerable discretion to select the means by which compliance is effected.

Declaratory relief, at the very least, is almost always appropriate in the context of systemic enforcement inadequacies, because the issues generally involve “statutory interpretation uncluttered by factual disputes” and are “purely federal” and “of major national consequence.” Moreover, declaratory relief has historically been more readily provided than has injunctive relief, in part because it is a less intrusive


37. See O. Fiss, supra note 14, at 416; cf. Adams v. Richardson, 351 F. Supp. 636, 642 (D.D.C. 1972), aff’d, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (plaintiffs required to submit order “consistent with [court’s] findings and conclusions” but also directed to “confer with defendants on the wording and substance”).


39. Although often relying heavily on suggestions from either plaintiffs or defendants or both, the court ultimately decides on the content of the order. An exercise of relatively great court initiative took place in American Pub. Health Ass’n v. Veneman, No. 1847-70 (D.D.C. Oct. 11, 1972) (modification of initial order by court). See Developments, supra note 22, at 1063. From the defendants’ point of view, it makes little difference whether the plan imposed was initially drafted by the plaintiffs or by the court.

The court’s plan may be either a substantive compliance plan that directs the agency to enforce particular policies or a procedural compliance plan that directs the agency to utilize particular means in order to effect given statutory ends. Cf. Glazer, Should Judges Administer Social Services?, 46 PUB. INTEREST 64, 65 (1978) (distinguishing between injunctive orders with procedural and with substantive requirements).

40. Bradley v. Saxbe, 388 F. Supp. 53, 56 (D.D.C. 1974). Although the granting of declaratory relief is subject to the discretion of the court, the exercise of that discretion must be sound and in the public interest. See 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2379, at 784 (1973). The Bradley court found that, in light of the quoted factors, declaratory judgment was “appropriate in the public interest.” 388 F. Supp. at 56. Declaratory judgments have been entered when issues of large public importance are at stake, notwithstanding competing prudential considerations. See, e.g., Powell v. McCormack, 355 U.S. 486, 550 (1969) (declaration that House of Representatives could not exclude congressman).

41. See Perez v. Ledesma, 401 U.S. 82, 122 (1971) (Brennan, J., concurring in part and dissenting in part) (considerations governing grant of declaratory judgment are “quite different” from those governing injunctions); Zwickler v. Koota, 389 U.S. 241, 254 (1967) (court erred in refusing declaratory relief simply because injunction was inappropriate). The injunction has been regarded as an extraordinary remedy, see 11 C. WRIGHT & A. MILLER, supra note 40, § 2942, at 368, while declaratory relief has been characterized as “alternative or cumulative and not exclusive or extraordinary,” Fed. R. Civ. P. 57, Ad-
remedy and in part because it has received specific congressional endorsement. On the other hand, the injunction has the added element of coercion, based on the immediate availability of contempt for violation of its dictates. To be sure, if a defendant disobeys the declaratory order, an injunction may then be sought against him, but this would involve additional delay. The injunction "gives the defendant one more chance" to comply, while the declaratory order "gives the defendant two more chances."

In determining remedial need, the court should look to two major factors. First, the court should consider the nature of the group right impaired by the inadequate enforcement. Second, the court should evaluate the likelihood of substantial agency noncompliance with a declaratory order or an injunction of limited specificity.

1. Nature of the Group Right

In assessing the nature of the group right the court should first discern whether the plaintiffs are the "especial beneficiaries" of the statute or merely ancillary ones. Whether a particular plaintiff is an especial
beneficiary of a statute depends on the specificity with which Congress desired to protect the right of the members of his class. The court should ask not only whether relief seems consistent with congressional purposes, but also how much relief seems consistent.\textsuperscript{47}

Next the court should consider the relative importance of the group right.\textsuperscript{48} Greater relief would seem appropriate where constitutional rights or “fundamental interests”\textsuperscript{49} are implicated.\textsuperscript{50} Quasi-constitutional rights\textsuperscript{51}—those created by statute to effectuate some constitutional provision—should also merit careful consideration. In the realm of pure statutory rights, liberty interests tend to be favored by courts,\textsuperscript{52} as do certain property entitlements that are essential to a minimum standard of life.\textsuperscript{53} When the group right involved is important, prudential considerations weighing against the issuance of a detailed enforcement injunction\textsuperscript{54} will more often be outweighed by the individual and public interests at stake.

Finally, the court should consider the characteristics of the group

\textsuperscript{47} Cf. Dunlop v. Bachowski, 421 U.S. 560 (1975) (segregating issues of reviewability and scope of review, based on congressional purposes).

\textsuperscript{48} Although courts have occasionally eschewed such analyses, they have nonetheless engaged in them, if only to a limited extent. See, e.g., Berends v. Butz, 357 F. Supp. 143, 152 (D. Minn. 1973) (emergency disaster relief too “important” a right to be left to “whims” of administrator). Compare Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (individual entitled to evidentiary hearing before termination of welfare benefits) with Mathews v. Eldridge, 424 U.S. 319, 340-42 (1976) (individual not entitled to evidentiary hearing prior to termination of Social Security disability benefits). Moreover, courts should be less hesitant to undertake such assessments when, as here, they do so in the discretionary context of determining the extent of the equitable relief to be afforded. See Gewirtz, \textit{supra} note 18, at 77 n.126 (“courts assess the importance of policies in deciding whether to grant equitable relief”).


\textsuperscript{50} Although agencies may have the power to make constitutional determinations in the first instance, see Note, \textit{The Authority of Administrative Agencies to Consider the Constitutionality of Statutes}, 90 \textit{Harv. L. Rev.} 1682 (1977), such is not their expertise, and in any event there has, by hypothesis, already been an initial agency failure.

\textsuperscript{51} The term “quasi-constitutional right” is here used to refer to a right created by a statute to effectuate some constitutional provision. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970), which the plaintiffs sought to enforce in Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc), is an example. The statute may be considered quasi-constitutional both because it seeks to effectuate a policy embodied in the Fourteenth Amendment and because it seeks to avoid action in direct violation of the Fifth Amendment. There is little doubt that by affirmatively channeling funds to schools practicing racial discrimination the federal government would be violating the prohibitions of the Fifth Amendment. The \textit{Adams} case, then, presented a statutory claim, but a claim of a very special nature. Cf. Katzenbach v. Morgan, 384 U.S. 641 (1966) (court gives special deference to congressional attempt to effectuate Constitution).


\textsuperscript{54} See pp. 430-33 infra.
affected. The court should inquire into the number of people adversely affected by the systemic enforcement inadequacy. When agency inaction results in a greater total number of rights violations, there is a more compelling justification for sweeping injunctive relief. In addition, the court should determine whether the agency inaction disproportionately affects an identifiable minority. Where the agency engages in a course of conduct that systematically disadvantages a discrete group of statutory beneficiaries, a detailed enforcement injunction will probably be necessary.

2. Probable Substantial Noncompliance

The second major factor to be considered by courts in determining the seriousness of the remedial need is the likelihood that the agency will not comply with a declaratory order or injunction of limited specificity. In cases in which there is a likelihood of noncompliance, the historical preference for declaratory relief must yield to the greater coercive power and specificity of the enforcement injunction. The greater intrusion on agency autonomy and expertise is justified when such independence undermines legislative goals. The entry of a detailed enforcement injunction is necessitated by the need for coercion of a specific agency response.

These policies suggest what may be termed a "principle of probable substantial noncompliance": to the extent that agency elimination of enforcement inadequacies in response to a declaratory order is unlikely, some form of mandatory injunction should be issued, and to the extent that such elimination in response to a general injunction is unlikely, a more detailed order should be issued.

The determination of probable substantial noncompliance involves inquiries into the severity of and reasons for the enforcement inadequacy. The severity of the enforcement inadequacy is measured along a continuum from full enforcement, to delay, to total nonenforcement. Total nonenforcement presents a stronger case for broad relief not merely because the deprivation of the group entitlement is more complete but also because agency reform is more unlikely.

The reasons for systemic enforcement inadequacies should be derived from the full history of the agency's enforcement effort and

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55. See p. 434 infra.
56. See pp. 417-18 supra.
57. See F. Rourke, supra note 18, at 148-49; Rosenblatt, supra note 16, at 264-330 (case studies showing resistance of agencies to consumer demands for enforcement of legislative mandates).
Administrative Enforcement

may include bad faith obstruction by the agency, agency error of law, inefficiency in administration, or actual lack of funds. In whatever form, bad faith on the part of the agency suggests that substantial non-compliance would be highly probable with respect to all but the most rigorously structured remedy. In such cases, the scope of agency discretion in statutory implementation is properly restricted. To the extent that honest error of law is the cause of inadequate enforcement; full compliance with a declaratory order can reasonably be expected, although a serious lack of clarity in the law, coupled with the fact of initial agency failure at implementation, may require a highly detailed declaratory order.

Complete good faith or clear bad faith on the part of the agency would usually be difficult to ascertain, however, and to that extent an active judicial role would often be appropriate on a prophylactic theory, depending on the severity of the enforcement inadequacy and the nature of the group right involved. Even in some cases of complete good faith, such as cases involving simple administrative incompetence, a declaratory order would be unlikely to remedy the enforcement inadequacy. A moderately detailed injunction may provide the needed direction and impetus. Furthermore, some judicial role is possible even when the agency enforcement effort is optimal and the inadequacy is due solely to real limitations on available resources. In such cases a court order may be useful in giving administrators greater leverage in effectively requesting funds needed for adequate enforcement.

C. Construction of Remedial Orders

When a court finds that some form of injunctive relief from systemic enforcement inadequacies is required, it must consider, in determining the specificity of relief to be afforded, not only the remedial need but also practical constraints that limit its ability to construct the injunction.

1. Specificity of the Initial Decree

The specificity of the initial decree depends in large part on the court’s evaluation of the remedial need, an evaluation based on the agency’s ability and willingness to eliminate the enforcement in-

58. See p. 408 supra.
60. Cf. Glazer, supra note 39, at 70 (there is possibility of collusion at trial by administrative defendants “hoping to get by judicial order what they could not get through budgetary presentations to [the] executive and legislature”).

421
adequacy and the urgency of the problem as reflected by the nature of the group right. The court should attempt to limit its decrees to general guidelines that permit the agency to remedy the problem itself, but more detailed enforcement injunctions are appropriate when substantial noncompliance is expected with decrees of lesser specificity or when the loss of group rights is especially damaging.

In addition to the remedial need, the court should consider the nature of the decisions that it must make in constructing a particular remedy. In ordering relief, the court should attempt only such detail in its decisions as can reasonably be derived from the statute and supplemental regulations. The clarity and specificity of the substantive statute thus directly affect the degree of detail appropriate in the injunction.

2. Ongoing Remedial Modification: The Principle of “Phasing”

Under the standard proposed above, the nature of the agency's past enforcement effort is an important determinant of the initial remedy. Similarly, when the court orders injunctive relief or enters a declaratory judgment and retains jurisdiction, the nature of the agency's response determines the court's subsequent action. To the extent that the agency fails to comply with previous decrees, injunctions of increasing specificity may be issued. The possibility of “phasing” decrees allows the court to give proper recognition to the need for administrative flexibility and the presumably greater expertise of the agency by issuing more general injunctions initially. Moreover, the use of phasing allows courts to tailor their actions more closely to remedial need and to preserve limited judicial resources. Phasing may be an important tool when legal error or inefficiency in administration is the basis of the inadequate enforcement; it is clearly inappropriate when the agency has exhibited bad faith.

II. The Standard Applied

The principle set forth in this Note is that courts should use increasingly detailed remedies for systemic enforcement inadequacies as...
the seriousness of the remedial need increases. Under the proposed standard, when the severity of the enforcement inadequacy and the nature of the past enforcement effort indicate that the agency is unlikely to respond adequately to limited remedial orders, more forceful decrees become appropriate. Moreover, when the nature of the group right is especially pressing, the proposed standard would have courts insist on greater certainty that the agency will respond appropriately; this would generally entail initial imposition of more highly detailed decrees than would otherwise be called for. The suggested standard can be further elaborated by application to several major cases.

A. Adams v. Richardson: Detailed Enforcement Injunction

Adams originally involved a challenge to a policy of virtually total nonenforcement of Title VI of the Civil Rights Act of 1964. The initial remedy in Adams was limited strictly to school districts then in violation, although it was based on a finding that HEW’s general policy violated Title VI. Only after HEW continued this nonenforcement policy with respect to new school districts did the court enter an order directly addressing HEW’s general enforcement duties under Title VI; the order was short and merely imposed a time framework and reporting requirements on the agency. Only after noncompliance with that decree did the court enter its highly detailed order of 1976, setting forth elaborate enforcement priorities and time frameworks. Finally, after serious noncompliance with the 1976 plan, the court acted in 1977 to require HEW to attempt to secure additional resources from Congress through the Office of Management and Budget (OMB). HEW complied, but full funding from OMB was not forthcoming. The court then modified its 1976 decree to recognize the potential inadequacy of enforcement resources.

As it originally came before the court, Adams presented a situation in which there was total nonenforcement of a quasi-constitutional right, with a strong indication of deliberate abdication of statutory

68. Id.
duty by the agency.\textsuperscript{71} Under the test proposed by this Note, such a compelling remedial need suggests the desirability of early imposition of a highly specific, court-devised remedy. The severity of the enforcement inadequacy in the context of the bad faith that characterized the agency's past enforcement effort indicated that substantial noncompliance would be probable with respect to all but the most highly detailed orders. The important and "especial" nature of the group right\textsuperscript{72} made issuance of such an order all the more necessary.

The main criticism to be leveled against the court, therefore, is one of excessive self-restraint. A phasing of remedies was chosen when circumstances demanded more immediate action. The content of the remedial order eventually filed in 1976 is, however, consistent with principles advanced in this Note. In fashioning its plan, the court made a number of major policy decisions,\textsuperscript{73} which might have been inappropriate and perhaps even intrusive in other contexts, but which were justified and necessitated by the circumstances in Adams. For example, the court emphasized complaint investigations over compliance reviews as a means to effectuate the statutory mandate.\textsuperscript{74} Because complaints may not accurately reflect the incidence of violations of rights,\textsuperscript{75} com-

\textsuperscript{71} See Adams v. Richardson, 480 F.2d 1159, 1166 (D.C. Cir. 1973) (en banc); Adams v. Richardson, 351 F. Supp. 636, 640 (D.D.C. 1972), aff'd, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (dramatic decrease in number of enforcement proceedings initiated after new Director of Office for Civil Rights assumed power).

\textsuperscript{72} In fact, each of the orders entered by the Adams court was substantially what the plaintiffs had requested and furnished to the court. The fact that such plans were flawed and too conservative does not reflect any inherent defect in systemic actions, however: rather than being unrepresentative, the plaintiffs may simply have been too compromising and deferential to a perceived conservatism on the part of the court. What the inadequacy of the plaintiffs' plans does indicate is that the court must always be an independent judge of the appropriateness of any remedial plan, and must always be willing to use its inherent equitable powers to fashion its own plan when that is necessary.

\textsuperscript{73} The court's order included decisions regarding the amount of time allowed for voluntary compliance before HEW should bring enforcement actions, the speed with which each complaint would be handled, the manner in which complaints from different minority groups should be handled, the relative priority given complaints and compliance reviews, the emergencies and exceptions that would be recognized, and the agency's interactions with OMB. See note 11 supra.

\textsuperscript{74} Although the court's order did not contain an express provision establishing a preference for complaint investigations over compliance reviews, it implicitly entailed such a preference. Apart from a special provision for Fiscal Year 1976, the order did not specify how many compliance reviews HEW was to conduct, but only required that any reviews initiated be completed within certain timeframes. See Adams v. Mathews, No. 3095-70, ¶¶ 12-15 (D.D.C. June 14, 1976). The order did, however, require that all complaints be investigated. See id. ¶ 8. The combined effect of these provisions was to reduce the use of compliance reviews by HEW. Some enforcement resources were shifted to complaint investigations, although not nearly enough for full compliance with the court's order.

\textsuperscript{75} Some minority groups may tend to file more formal complaints than others. The Mexican-American intervenors, for example, advanced the claim that Mexican-Americans
Administrative Enforcement

Compliance reviews may instead represent a more effective enforcement machinery. Yet in light of the agency's bad faith, judicial insistence on complete complaint investigation was the course most likely to result in full enforcement.

The court's actions subsequent to the filing of the 1976 order are consistent with the standard proposed in this Note. In the face of continued noncompliance with its 1976 order, the court forced HEW to confront OMB with its budgetary needs. When OMB then reduced the requested budget before forwarding it to Congress, the court backed away somewhat, stating that HEW would not be "deemed in violation" to the extent that it efficiently utilized available resources. The court specifically reserved, however, the plaintiffs' right to bring in other defendants—OMB apparently being the likely candidate. Thus, while giving some heed to the specific consideration of Title VI funding problems by high-level executive officials, the court implicitly recognized that before a systemic inadequacy could definitively be said not to exist, some specific congressional consideration might be required.

B. American Public Health Association v. Veneman:

General Enforcement Injunction

American Public Health Association v. Veneman involved delay in enforcement by the Food and Drug Administration (FDA) of the 1962 amendments to the Pure Food and Drug Act, which mandated "efficacy reviews" for all marketed drugs. The statute was intended for the especial benefit of members of the consuming public, and involved important individual interests in personal health and privacy. The delay in Veneman was serious, and the threatened delay more serious

are less likely than others to file such complaints when discriminated against. This claim is supported by statistics demonstrating that far more complaints alleging sex discrimination are filed each year than are complaints alleging discrimination on the basis of national origin. See Interview with Lawrence Velez, Office for Civil Rights, HEW (Oct. 11, 1978) (notes on file with Yale Law Journal).

76. Effective enforcement may not be the only legitimate goal. Investigation of all complaints might be justified as increasing individuals' perceptions of governmental responsiveness and augmenting their sense of personal importance.

77. Objective statistical evidence may be a more reliable guide than complaint filing patterns. Moreover, the intuition of local administrators, which is another common guide in initiating compliance reviews, is a factor that should not be disregarded.


79. See id.


425
In addition, there was some indication that the agency had not been acting in complete good faith. At best, there was serious legal error accompanied by considerable inefficiency in administration. These three factors—the implication of rights affecting personal health, the egregiousness of the delay, and the questionable nature of the agency's enforcement effort—suggest, under the test propounded in this Note, that a moderately detailed injunction would have been appropriate.

The court order actually entered in Veneman, however, did both too little and too much. On the one hand, in imposing certain decisions in the remedy it ordered, the Veneman court arguably made policy decisions based on insufficient data and better left to the expertise of the FDA. For example, the opinion, in setting review priorities, ordered drugs with multiple uses to be given an overall efficacy rating equal to the highest rating for any one of the drug's uses. The court might instead have ordered that distinctions be drawn among uses, with some uses labeled "effective" and others labeled "ineffective." In view of the FDA's "solicitude" for the drug industry, however, there was reason to believe that the agency would not have moved with sufficient speed on its own. The court's plan thus offered a more effective enforcement scheme than the FDA seemed likely to develop.

On the other hand, the Veneman court was ultimately too cautious in its demands on the agency. Its second order cut back substantially on the original remedy. In several instances the court granted the agency considerable discretion to determine exceptions to the order's requirements. Thus, the Veneman remedy became a de facto declaratory order.

82. 349 F. Supp. at 1316-17. The court termed it "intolerable procrastination." Id. at 1317 n.19.
83. The court spoke of the agency's "solicitude" for the drug industry. Id. at 1316 n.14. Also, the court's reference to the agency's "procrastination" suggests that the delay may have been deliberate. Id. at 1317 n.19.
84. Under the court's final order, a drug that was ineffective as to its main use and effective as to one of its incidental uses received the same review priority as a drug that was effective as to all its uses. See American Pub. Health Ass'n v. Veneman, No. 1847-70, ¶ III (D.D.C. Oct. 11, 1972).
88. See American Pub. Health Ass'n v. Veneman, No. 1847-70, ¶ II (D.D.C. Oct. 11, 1972) (allowing defendants to determine "maximum extent feasible" to which available resources could be utilized); id ¶ VIII (allowing defendants to make exceptions to review priorities "where public health considerations or administrative efficiency justify such action"); id. ¶ XIV (allowing defendants to permit some drugs to remain on market pending efficacy studies where "compelling justification of . . . medical need" exists, if justification is filed with court).
C. White v. Mathews: *Declaratory Judgment and Injunction To Seek Funding*

White concerned delay in the processing of Social Security disability appeals, involving a statutory right of "especial benefit" to the plaintiff class.\(^{89}\) The court expressly noted the good faith of the agency in attempting to enforce the statute in the face of a number of severe external strains,\(^{90}\) and the agency apparently recognized its legal duty to provide timely hearings.\(^{91}\) It is more difficult to discern whether administrative inefficiency existed. Indeed, the court made no findings of inefficiency, but instead recited numerous steps the agency had taken to minimize delays.\(^{92}\) The probable cause for the delays was therefore insufficiency of resources, and there is some indication that the White court so viewed the case.\(^{93}\)

\(^{89}\) This is true despite the Supreme Court's holding in Mathews v. Eldridge, 424 U.S. 319 (1976), that disability recipients are not constitutionally entitled to a hearing prior to the termination of their benefits. The standard for implying congressional intent to afford relief from systemic enforcement inadequacies is clearly different from the due process standard governing the provision of pretermination adversary hearings. In fact, the Eldridge opinion itself recognizes the great importance of disability benefits to the individual. And as the White court noted, "the absence of pre-termination hearings makes it all the more important to expedite adjudication of claims of erroneous termination." White v. Mathews, 559 F.2d 852, 859 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978).

\(^{90}\) Id. at 859.

\(^{91}\) The agency agreed that a claimant was entitled to a hearing within a reasonable time, and took steps to reduce delay, although it maintained that certain extenuating circumstances justified considerable delay. The agency's failure to recognize a duty to respond differently to the administrative problems that beset it, specifically its failure to seek further resources, may well be considered legal error. However, the factor of overriding significance for the purpose of determining the basic remedy to be offered would seem to be the nature of the agency action with respect to its present utilization of resources. The agency apparently correctly interpreted its duties in this regard. See id. at 858.

\(^{92}\) Id. at 859.

\(^{93}\) There was certainly no express finding of inefficiency. The district court did at one point assert generally that the delay-reducing steps the agency had already taken served to show "that improvements are possible." White v. Mathews, 494 F. Supp. 1252, 1261 (D. Conn. 1976), aff'd, 559 F.2d 852 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978).

Although this could be taken as a finding that enforcement was not totally efficient, the lack of a specific basis for the statement suggests that the court may have been merely groping for some justification for judicial intervention. The court did not specify how the agency was to comply with the time framework it imposed for appeals processing. There is some suggestion that the court viewed the enforcement problem as stemming from a temporary deficiency in appropriations—a lag between changing demands for funds and the congressional response to those changing demands—so that the only question concerned the proper course of action until enforcement appropriations were updated. See 559 F.2d at 859 ("the question truly is . . . 'not whether there shall be costs incurred, but who shall bear them while the governmental machinery responsible for providing appeals puts itself in order'). The court might thus have fully intended that some prospective payments be made; it might have realized that full compliance with the time framework would be impossible. The court would have done well to have been more specific on this matter. Inherent in setting strict time frameworks may be some policy determination regarding the process that Individual
Based on these findings the district court in White entered an enforcement injunction ordering the agency either to comply with certain appeals processing time frameworks or begin making prospective payments to individuals whose petitions it could not consider in a timely fashion. Yet under the test proposed in this Note, White presents a far weaker case for a detailed initial injunction than does Adams: the group right is less significant, the inadequacy consists only of delay, and there is no evidence of bad faith or even of inefficiency. The court in White should have granted a declaratory judgment stating plaintiffs' rights to speedier hearings, retained jurisdiction to require the agency to return periodically and demonstrate compliance, and entered an injunction calling for officials to seek additional funds from the agency or from OMB. Such an order would remand the problem to complaints should receive; at the very least the court's lack of clarity regarding the extent to which compliance with the time framework was really expected and the means by which it should be effected might foreseeably lead to agency revisions of individual-process policy determinations.


95. The individual interest in disability benefits, though substantial, is still not quite as great as that in certain other statutory entitlements. Compare Goldberg v. Kelly, 397 U.S. 254 (1970) (individual entitled to evidentiary hearing prior to termination of welfare benefits) with Mathews v. Eldridge, 424 U.S. 319 (1976) (individual not entitled to evidentiary hearing prior to termination of social security disability benefits). Moreover, the right involved in Adams was a quasi-constitutional right of extraordinary importance to the individual. See note 51 supra.

96. The White case can be profitably compared with Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974), in which a declaratory judgment would also have been appropriate but in which there was no need for an injunction to secure additional resources. Nader was an action alleging a Department of Justice policy of essentially total nonenforcement of the Federal Corrupt Practices Act of 1925, ch. 568, tit. III, 43 Stat. 1070 (codified in scattered sections of 2, 18 U.S.C.) (repealed 1974), which “required candidates and committees supporting candidates for the Presidency, the Senate, and the House of Representatives to file reports on campaign contributions and expenditures” with officers of the Congress. 497 F.2d at 677. The policy adopted was that of initiating prosecutions only in cases referred to the Department by Congress. Id. at 678. Although fundamental interests of the plaintiffs were implicated—interests in voting and in the fairness of the political process—the nonenforcement seems to have been the result of simple legal error rather than bad faith. The policy had prevailed at the Department for decades, had spanned numerous administrations, and was facially plausible in light of the statute's requirement that reports be filed with Congress. Id. Moreover, although the plaintiff was seeking only general enforcement of the statute, rather than particular prosecutions, the unique nature of criminal prosecutions is a special factor militating against significant judicial intervention even in the limited context of remedying systemic inadequacies. The Nader court should have entered a declaratory order with a requirement that the Department return to court and offer some evidence of steps taken toward implementation. In fact, no remedy was ever ordered: the action was dismissed after being mooted by repeal of the Federal Corrupt Practices Act. Id. at 682. Extensive dicta in the case, however, suggest the court would have agreed with the analysis just advanced. See id. at 679 and nn. 18 & 19, 681 and n.27, 682 and nn. 30, 31.
Administrative Enforcement

the political branches for further consideration and might be extremely useful in highlighting the issues at stake.\textsuperscript{97}

III. Implications of the Proposed Standard

Courts and commentators have thus far failed to examine the legal propriety, foundation, and limitations of judicial intervention into the federal administrative process by means of detailed enforcement injunctions.\textsuperscript{98} Such intervention is justified in law and policy when the agency has systematically failed to execute a congressional mandate that specifically protects a group of beneficiaries.\textsuperscript{99} There are, how-


\textsuperscript{98} See White v. Mathews, 559 F.2d 852 (2d Cir. 1977), \textit{cert. denied}, 435 U.S. 908 (1978) (court considers only jurisdiction, mootness, and class certification); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (court considers only prosecutorial discretion issue). The cases have not been widely commented upon, nor has any commentator independently addressed these issues.

\textsuperscript{99} Courts are formally empowered as well as functionally suited to entertain actions alleging systemic enforcement inadequacies. Most suits brought to correct systemic enforcement problems would represent sufficiently concrete and adversarial cases or controversies for courts to adjudicate under Article III of the Constitution. For example, most such suits are distinguishable from Rizzo v. Goode, 423 U.S. 362 (1976), in which the Supreme Court found that the plaintiffs had an insufficient “personal stake” in the case to justify federal jurisdiction to grant enforcement injunctions directed against state officials. \textit{Id.} at 372-73. \textit{Rizzo} was an action brought directly under 42 U.S.C. § 1983 (1976) and thus was fundamentally different from a challenge to some alleged systemic enforcement inadequacy. The plaintiffs claimed that the defendants had a duty to “eliminate” future police misconduct, \textit{id.} at 376, but the Court found that no such duty existed, \textit{id.;} it did not, therefore, go on to consider whether that duty had been adequately fulfilled. When plaintiffs complain that a general agency policy or practice inadequately enforces a statute, however, it is clear that there is a “real and immediate” injury or threat of injury. The injury is the inadequate enforcement itself. See \textit{Allee v. Medrano}, 416 U.S. 802 (1974).

Furthermore, most meritorious complaints of systemic enforcement inadequacies will meet the strict “injury in fact” test for constitutional standing outlined in \textit{Warth v. Seldin}, 422 U.S. 490 (1975), and \textit{Simon v. Eastern Ky. Welfare Rights Organization}, 426 U.S. 26 (1976). \textit{Warth} was an action claiming that a town’s zoning ordinance violated the plaintiffs’ constitutional and statutory civil rights; the plaintiffs were found to lack standing because there was not a sufficient causal link between their injury and the defendants’ conduct. 422 U.S. at 508-09. Although the plaintiffs in \textit{Warth} raised general “policy” issues, they did so in the context of attacking the validity of a legislative enactment. Where plaintiffs seek instead to have such an enactment enforced, there is presumptive causality once injury-in-fact is shown. Cf. \textit{White v. Mathews}, 434 F. Supp. 1252, 1257 n.55 (D. Conn. 1976), \textit{aff’d}, 559 F.2d 852 (2d Cir. 1977), \textit{cert. denied}, 435 U.S. 908 (1978) (distinguishing restrictive interpretation of 42 U.S.C. § 405(h) (1970) in \textit{Weinberger v. Salfi}, 422 U.S. 749 (1975), on basis that plaintiff there sought jurisdiction to make “substantive attack upon the statute”). The very existence of a federal statute indicates congressional recognition of the plaintiffs’ interest and of the fact that enforcement is necessary for the realization and protection of that interest. Congress cannot, of course, merely by express statutory language grant standing in circumvention of the Article III case-or-controversy limitation. See \textit{Muskrat v. United States}, 219 U.S. 346
ever, important constitutional and prudential limitations on this power. The proposed standard is one that preserves limiting considerations as vital constraints on the court's exercise of its equitable powers in determining the scope and specificity of the relief to be afforded. Moreover, adoption of the proposed standard will result in a number of institutional and equitable benefits.

A. Respect for Limits on Courts

The remedial standard proposed in this Note comports with the basic constitutional and prudential limitations on judicial intervention in administrative decisionmaking. The main constitutional constraint on such intervention flows from the separation-of-powers doctrine. Under that doctrine, courts cannot dictate to agencies what the result of their actions must be when the law is applied to specific facts. However, the existence of a case or controversy is measured against the standard of congressionally created interests. See Warth v. Seldin, 422 U.S. 490, 500 (1975).

*Simon* presented essentially a claim of systemic inadequate enforcement, and thus is much more relevant than *Warth*. The *Simon* plaintiffs alleged that the defendants, by adopting a revenue ruling in violation of the tax code, "encouraged" hospitals to deny services to indigents. 426 U.S. at 42. The Court, however, interpreted their claim as alleging a particularized harm rather than a systemic one. The Court found the alleged injury to be denial of hospital services, *id.* at 42-43, rather than interference with the plaintiffs' "opportunity and ability" to receive medical services. *Id.* at 47 (Brennan, J., concurring in the judgment and dissenting). The Court then found that the plaintiffs lacked standing because there was not a sufficient causal connection between the injury alleged and the conduct challenged. *Id.* at 42-43, 45.

When an agency delays a benefit, as in *White*, or fails to enforce a statute that would directly profit the protected class, as in *Adams*, there is sufficient actual injury to guarantee standing to members of the affected class. Plaintiffs will be able to show easily that agency enforcement would remove the detriment to the protected class. Allegations that administrative breakdown systematically denies a protected class its statutory benefits would seem a far cry from *Simon's* gloomy description of the "remote possibility, unsubstantiated by allegations of fact, that [the plaintiffs'] situation might have been better had [the defendants] acted otherwise, and might improve were the court to afford relief." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 44 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 507 (1975)).


The doctrine of separation of powers also prevents courts from deciding "political questions" that are more properly the province of agencies or the Congress. See Baker v. Carr, 369 U.S. 186, 217 (1962) ("several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers"). Yet the guidelines in *Baker* that most directly implicate separation-of-powers concerns are facially less applicable to claims of systemic enforcement inadequacies than to traditional challenges to executive actions. There is in the systemic context no need for an "initial policy determination" better left to the political branches. *Id.* (emphasis supplied). By hypothesis there has already been an initial agency attempt at implement-
suggested standard defers to the administrative process in such factual
decisions and concentrates instead on enforcement guidelines. The
most extensive remedy, a detailed enforcement injunction, is invoked
only in the most compelling cases, those in which the executive "takes
measures incompatible with the express or implied will of Congress."\(^{101}\)

More important are the prudential limitations emanating from the
separation-of-powers and political-question doctrines. Extensive reme-
dies should not be ordered when there are no "judicially discoverable
or manageable standards."\(^{102}\) The proposal in this Note would derive
such standards directly from the congressional entitlement and supple-
tion. There is no "unusual need for unquestioning adherence" to a policy or practice
that has proved itself woefully inadequate. Id. Finally, the court does not express a
"lack of respect" or risk "embarrassment from multifarious pronouncements" when it acts
to ensure fulfillment of basic congressional mandates. Id.

101. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J.,
concurring). Although Youngstown involved the question of whether the executive's
actions constituted a violation of law, the same considerations of separation of powers
are relevant in determining whether broad equitable relief may be entered against the
executive after it is established that a violation of law exists.

and White arguably made certain missteps in fashioning remedies, such errors do not in-
dicate that no theoretically manageable standards existed. One problematic decision by
the Adams court, for example, was its requirement that complaints from different
minority groups be handled in proportion to the total number of complaints received
from each group. See Adams v. Mathews, No. 3095-70 \(\S\) 11(c) (D.D.C. June 14, 1976).
Underlying this provision was an erroneous assumption that the number of formal com-
plaints filed accurately reflected the relative incidence of rights violations among different
minorities. The 1977 modification of the order specifically recognized the varying litigious-
ness of different minorities and directed HEW to use compliance reviews in order to
compensate for it. See Adams v. Califano, No. 3095-70 \(\S\) 19 (D.D.C. Dec. 29, 1977). This
initial error in remedy construction, however, does not suggest that the court exceeded
the bounds of its competence or discretion. Rather, the initial misstep was likely due to
the court's failure to consider its actions openly. This in turn can probably be traced to
a judicial sensitivity and overcautiousness regarding its role and the appropriateness of
its decisions. Cf. O. Fiss, supra note 21, at 36 ("political considerations" and "ambivalence
toward the underlying decree" might affect court's remedial posture). Moreover, the
court was at least quick to right its mistake once that mistake became evident. Given
the pervasive bad faith on the part of the agency, elaborate specification by the court was
highly preferable, even if it did involve some trial-and-error.

Finally, there is no indication that, even in the absence of bad faith, HEW would have
been able to implement Title VI without making the very same mistakes that the Adams
court did. Had HEW been sensitive to the varying litigiousness of different minority
groups and been able to foresee the inequality that would result from the court's ex-
clusive reliance on pro rata complaint investigation, it could easily have brought these
points to the court's attention. There is no indication whatever that the court would not
have been receptive to such a presentation, or that it would not have modified its decree
accordingly. In fact, the court's concern for adequate enforcement, as reflected in other
provisions of its order, and its speed in modifying its order once the problem became
evident, both indicate that the court would have been very receptive to input from
HEW. If anything, the experience with the 1976 order highlights HEW's failures—
fails to anticipate enforcement problems and act to prevent them—and thus reinforces
the Adams court's basic role. Cf. p. 426 supra (discussing remedial errors and hesitant pos-
ture of Venemen court); note 93 supra (discussing questionable aspect of White order).
mental regulations according to traditional principles of statutory interpretation. The standard implicitly recognizes that statutes that clearly vest important rights in a protected class of beneficiaries can yield such guidelines, though laws creating only generalized expectations to no particular class of beneficiaries are less able to do so.

The restriction of broad relief to cases of systemic enforcement inadequacies helps ensure that prudential notions of separation of powers are respected: agency discretion will not be unduly intruded upon, and practical problems will not overwhelm the courts. These dual goals are further served by restricting, in accordance with the standard proposed in this Note, broadest relief to cases in which agency elimination of the enforcement inadequacy is unlikely or the nature of the group right is especially pressing.

Two functional problems should make courts cautious about intervening to too great an extent in agency operations by means of enforcement injunctions. First, premature judicial intervention might intrude on agency autonomy and expertise. Courts should give the agency a chance to respond in good faith unless there is reason to believe that the agency cannot or will not do so. Under the proposed standard, every opportunity is given the agency to remedy the problem in its own way. The suggested approach leaves the executive with as much discretion as is consistent with the judicial duty to protect individual rights. The basic role of the court is "to assure that the agency properly construes its statutory obligations, and that the policies it adopts and implements are consistent with those duties and not a negation of them." The principle of phasing guarantees that the agency will be given flexibility in its response, except in cases of the greatest remedial need. And the latter cases are precisely those in which deference to the agency should be "at its lowest ebb."

Second, overseeing implementation of highly detailed enforcement injunctions could place significant strain on finite judicial resources, although such use of resources is often justifiable when large groups of statutory beneficiaries are involved. The standards proposed for the specificity of the initial order and for the use of phasing would minimize court involvement in the operational decisions best made by the agencies themselves. Although some monitoring of compliance is of course necessary as a part of systemic relief, the general nature of the issues presented in such litigation allows the courts to avoid the exten-

103. Adams v. Richardson, 480 F.2d 1159, 1163-64 (D.C. Cir. 1973) (en banc).
sive participation in daily administration that causes most concern. Moreover, the courts in *Adams, Veneman,* and *White* all imposed time frameworks indicating that they contemplated only a temporary monitoring role for the courts. The standard proposed in this Note similarly contemplates a temporary role: court intervention ceases as soon as agency elimination of the enforcement inadequacy appears probable.

### B. Benefits

In addition to entailing explicit, principled recognition of the limitations on extensive judicial oversight of the federal administrative process, the proposed standard would be advantageous, at the very least, in forcing courts to explore and articulate the reasons for granting broad enforcement injunctions. The legitimacy of judicial action, as well as the evolution of more precise rules, depends on such articulation. Moreover, the standard would serve two further goals: it would guarantee extensive and effective judicial action in cases in which the violation of individual rights or the statutory mandate is the most serious, and it would create a useful dialectic to stimulate agency self-reform and greater sensitivity to efficient utilization of agency resources.

1. **Appropriate Judicial Remedy**

The restriction of broad relief to cases of systemic inadequacy in agency enforcement would help ensure effective use of judicial resources. Granting relief in such cases would obviate the need for numerous individual administrative and judicial challenges involving essentially identical legal and factual issues, challenges that would be burdensome on agencies and courts alike. Thus, by entertaining actions alleging systemic enforcement inadequacies, courts may well facilitate the administrative process as well as preserve limited judicial resources.

105. *See, e.g.,* Glazer, *supra* note 39; *Too Much Law?*, Newsweek, Jan. 10, 1977 at 42, col. 1. Courts have often ordered large-scale institutional reform and administered their decrees quite successfully. *See, e.g.,* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (reform in operation of Alabama state mental health institution); Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974) (reform of juvenile justice system in Texas). Although there are substantial practical problems associated with affording such relief, they do not for the most part afflict the court providing relief from systemic enforcement inadequacies.


Moreover, courts will be most active in the most appropriate cases, namely those presenting the greatest remedial need. Under the standard advanced in this Note, important individual rights—constitutional rights, civil rights, liberty interests, and entitlements to the physical necessities of life—will be vindicated. Furthermore, these rights will be vindicated for large numbers of people.108

Second, the proposed standard will be most protective of these important individual rights in cases in which the agency itself is not expected to act effectively. If the nonenforcement or delay is systemic, there is a greater chance that the defect is fundamental or that there is bad faith. Judicial oversight of the agency in such circumstances is both more necessary and, given the general nature of the issues presented, more feasible. Finally, insofar as our constitutional system of checks and balances embraces an active judicial role to protect legislative mandates against executive nonenforcement,109 systemic enforcement inadequacies would seem to be optimal cases for extensive judicial activity, because they are the most serious violations of legislative commands. The proposed standard, tied as it is to statutory purposes, will protect congressional mandates from being ignored.

2. **Dialectic of Reform**

Adoption of the principles of this Note will contribute to the creation of a forced dialogue of reform among courts, agencies, Congress, and, not least importantly, statutory beneficiaries. The proposed standard envisions the fundamental role for the courts as initiating the dialogue when systemic enforcement inadequacy is found to exist, forcing the dialogue to continue if it fails initially to solve the problem, and encouraging creative, constructive solution in the end. Sometimes, as in *Adams*, the court will dominate the discussion, because of serious insufficiency of the agency's enforcement efforts. In other instances, rather than merely resolving the specific issues of the case, the court will stimulate greater agency self-reform. In fact, the mere initiation of suit may trigger or accelerate such reform.110

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110. See *Goldberg v. Kelly*, 397 U.S. 254, 259 n.5 (1970). In the two years between initiation of the *Veneman* litigation and actual entry of judgment, the FDA increased
Administrative Enforcement

Finally, in some cases, the dialogue will include Congress as well as the agency. Appropriate use of the injunction to secure additional resources will force congressional and high-level executive consideration of basic issues of entitlement and implementation. Similarly, appropriate issuance of detailed enforcement decrees will force Congress to confront more details of administration in cases in which adequate agency action seems unlikely or the nature of the group right is especially pressing. Heightened congressional deliberation and specification will in turn contribute to the dialectic of reform.

manpower working on safety and efficacy reviews more than tenfold, apparently in direct response to the suit. See Rogovin, Public Interest Law: The Next Horizon, 63 A.B.A.J. 334, 337 (1977). By one assessment, the suit "resulted in the FDA's timetable being reduced from forty years to four" even before the decision was handed down. Id.