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Changed Circumstances: The Federal Rules of Civil Procedure and the Future of Institutional Reform Litigation After Horne v. Flores

Catherine Y. Kim
University of North Carolina School of Law, cykim@email.unc.edu

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Changed Circumstances: The Federal Rules of Civil Procedure and the Future of Institutional Reform Litigation After *Horne v. Flores*

Catherine Y. Kim[*]

Since Brown v. Board of Education*, the federal courts have played an expansive role in institutional reform litigation to restructure state and local government institutions, such as public school systems, prisons, law enforcement agencies, and health care facilities accused of systemic violations of individual rights. The propriety of such federal judicial intervention, however, has long been the subject of heated scholarly and political debate. In 2009, a five-member majority of the Supreme Court in* Horne v. Flores *opened the door for a significant reinterpretation of Federal Rule of Civil Procedure 60(b)(5) to enlarge government-defendants' ability to terminate ongoing judicial oversight in these cases, undermining the continued viability of this model of social reform.*

Regardless of one's views on the desirability of institutional reform litigation, the judiciary's categorical and unilateral reinterpretation of Rule 60(b)(5) is subject to critique. Such an approach misses a valuable opportunity to employ the formal rule-amendment process to obtain a more transparent, deliberative, and democratically accountable approach to defining the optimal standard for terminating institutional reform decrees, one that considers the varied circumstances in which the costs of institutional reform litigation might outweigh its potential benefits.

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INTRODUCTION

Since the Supreme Court's decision in *Brown v. Board of Education*,[1] the federal courts have played an expansive role in remedying systemic denials of individual rights by government institutions such as public schools. Given the enormity of such reform efforts, federal courts have maintained continuing oversight over institutions for years, even decades, not only enjoining current discriminatory practices, but also restructuring institutions to eliminate vestiges of prior unlawful practices. This model of institutional reform litigation (sometimes alternately referred to as structural reform or public law litigation), with active and ongoing oversight by the federal courts, has provided impetus to social reform for generations.[2]

The desirability of institutional reform litigation has long been the subject of heated debate, as scholars have contested the judiciary's institutional capacity to reform government institutions[3] as well as the democratic legitimacy of judicial intrusion into state and local policymaking.[4] These latter concerns, framed as charges of "judicial

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[1] Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954); Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955).

[2] Professor Abram Chayes first referred to this new model of litigation as "public law litigation," Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284-85 (1976), while Professor Owen Fiss referred to it as "structural reform litigation," Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979). Today, scholars frequently refer to "institutional reform litigation," although the other two variants remain in usage. *See, e.g.*, Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004) (using all three terms).

[3] *Compare* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008) (challenging institutional capacity of courts to bring about social reform), *with* Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1531-32 (2007) (arguing that courts are more effective in reforming government institutions than their administrative or legislative counterparts).

[4] *Compare* ERIC A. HANUSHEK & ALFRED A. LINDSETH, SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS (2009) (challenging legitimacy of institutional reform litigation on grounds of democratic accountability), ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2004) (same), *and* Donald R. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265 (1983) (same), *with* Chayes, *supra* note 2 (defending legitimacy of institutional reform litigation), Fiss, *supra* note 2 (same), John C. Jeffries & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387 (2007) (same), James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003) (same), *and* Sabel & Simon, *supra* note 2 (same).

activism" and usurpation of political authority, have also influenced debates in Congress.[5]

In its 2009 *Horne v. Flores*[6] decision, a five-person majority of the Supreme Court provided ammunition for the opponents of institutional reform litigation.[7] In that case, the Court applied Federal Rule of Civil Procedure 60(b)(5), which permits a district court to terminate a prospective decree on equitable grounds,[8] to reverse a district court's rejection of a government-defendant's attempt to dissolve an institutional reform decree. Lower courts have improperly applied *Horne* broadly to categorically alter the standard and even the burden for terminating ongoing federal decrees in all institutional reform cases.

In recent years, the federal judiciary repeatedly has been subject to scholarly criticism for reinterpreting procedural rules to achieve substantive policy goals. As we will see below, *Horne v. Flores* and its progeny present only the most recent manifestation of this same trend. In contrast to prior instances, such as the voluminous criticism following the judiciary's decision to heighten the pleading standard of Rule 8(a)[9] in *Iqbal*[10] and *Twombly*[11] to further an ideological agenda,[12]

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[5] *See, e.g.*, Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143, 146 (2003) (discussing political opposition to institutional reform litigation); James E. Ryan, *The Real Lessons of School Desegregation*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 73, 75 (Joshua M. Dunn & Martin R. West eds., 2009) (maintaining that debate over institutional reform litigation tends to break down along political lines); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Cases*, 81 N.Y.U. L. REV. 550, 556 (2006) (describing contest over institutional reform litigation as one between progressives and conservatives); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 13-22 (1997) (analyzing political challenges to institutional reform litigation).

[6] Horne v. Flores, 557 U.S. 433, 433-34 (2009).

[7] Citing scholarly critics of institutional reform cases such as Sandler and Schoenbrod, Michael McConnell, and Donald Horowitz, for example, the Court emphasized the risk that elected officials would abuse institutional reform decrees as political cover to "block ordinary avenues of political change" and "sidestep political constraints." *See id.* at 448-49. In the words of Justice Breyer, the Court's analysis "reflect[ed] one side of a scholarly debate about how courts should properly handle decrees in institutional reform litigation" without acknowledging the other side. *Id.* at 496 (Breyer, J., dissenting).

[8] *See* FED. R. CIV. P. 60(b)(5).

[9] FED. R. CIV. P. 8(a): "A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3)

little has been written about the judiciary's reinterpretation of Rule 60(b)(5) to disfavor institutional reform litigation. Indeed, to date, little of any sort has been written about *Horne*'s implications for the future of institutional reform litigation.[13] This Article fills that gap.

Part I provides an overview of institutional reform litigation, including the dominant characteristics of institutional reform decrees,

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a demand for the relief sought, which may include relief in the alternative or different types of relief."

[10] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[11] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[12] *See* Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 599-600 (2010) (maintaining that "[t]he new procedural law made by the Court manifests political objectives and gives special meaning to the term 'judicial activism' . . . by weaken[ing] the enforcement of public laws by private citizens . . . thus conform[ing] to the deregulation or tort-reform politics favored by many business interests"); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 9-10 (2010) (arguing that "[f]ederal civil procedure has been politicized and subjected to ideological pressures" and describing *Twombly* and *Iqbal* "as the latest steps in a long-term trend" of a "continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth"); *see also* Stephen B. Burbank, *Pleading and the Dilemma of "General Rules"*, 2009 WIS. L. REV. 535, 561-62 (2009) (criticizing Supreme Court reinterpretation of Rule 8(a) pleading standard in *Twombly*).

[13] *But see* William S. Koski, *The Evolving Role of the Courts in School Finance Reform Twenty Years After* Rose, 98 KY. L.J. 789, 808 n.59 (2009) (noting in the footnote *Horne*'s hostility to institutional reform litigation); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1458 (2011) (acknowledging *Horne*'s hostility to institutional reform litigation); Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931, 940 (2010) (identifying *Horne* as an exception to a general judicial preference for injunctive relief in civil rights cases).

One possible reason for the relative dearth of scholarship in this area is the misperception that federal courts no longer play an important role in institutional reform litigation. *See, e.g.*, Schlanger, *supra* note 5, at 553 (discussing misconception that institutional reform litigation is dead); *see also* Michael Heise, *State Constitutions, School Finance Litigation, and "The Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1151-53 (1995) [hereinafter *State Constitutions*] (noting that institutional reform advocacy in education has shifted to state courts).

Federal courts, however, remain critical sites for challenging structural denials of individual rights by government institutions. *See infra*, notes 33-50 and accompanying text; *see also* Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, 1 DUKE F. FOR L. & SOC. CHANGE 47, 57-59 (2009) [hereinafter *A New Strategy*] (arguing for expansive role of federal courts in securing equal educational opportunity rights); Rebell, *supra* note 3, at 1467 (same); Sabel & Simon, *supra* note 2, at 1021 (describing "protean persistence" of institutional reform litigation); Schlanger, *supra* note 5, at 551 (challenging "conventional wisdom" that institutional reform litigation "peaked long ago and is now moribund").

their continued importance today, and the development of the doctrine on terminating these remedial decrees prior to *Horne*. Part II analyzes the *Horne v. Flores* decision and its application of Rule 60(b)(5) to terminate an ongoing injunctive decree. It then analyzes lower courts' improperly broad application of *Horne* to mandate termination of institutional reform decrees absent an ongoing violation of federal law, regardless of whether the goals of the decree have been satisfied, and even regardless of whether the decree was entered into with the consent of the parties. It then explores the implications of this approach, suggesting that such a broad reinterpretation of Rule 60(b)(5) threatens the continued viability of this form of social reform.

Part III critiques this broad and categorical approach to reinterpreting Rule 60(b)(5) for missing a valuable opportunity to take advantage of the insights and careful deliberation that would be gained through the formal rule amendment process mandated by the Rules Enabling Act ("the Act").[14] Employing this formal process would facilitate a transparent and politically accountable normative debate over the proper balance to strike in the trade-off between principles of democratic policymaking and the rigorous enforcement of individual rights. It would enable consideration of, and perhaps commission empirical data on, the effectiveness of federal courts in reforming public institutions. Finally, it would permit nuanced study of the differences in the cost-benefit calculus that might apply to different types of institutional reform decrees. Such an approach would thus consider the complex, nuanced, and varied circumstances in which the costs of institutional reform litigation might outweigh its potential benefits.

I. OVERVIEW OF INSTITUTIONAL REFORM LITIGATION

For decades, the federal courts have used comprehensive remedial decrees with ongoing judicial oversight to restructure state and local government institutions shown to have engaged in systemic violations of rights. This Part describes the development of these decrees and

[14] The Rules Enabling Act provides that any proposed change to a properly enacted Federal Rule of Civil Procedure be subject to public comment; consideration by the procedural experts of the Rules Advisory Committee, the Judicial Conference of lower court judges, and other committees including members of the bar and representatives from the executive branch; adoption by the Supreme Court; and a five-month time period for congressional consideration. 28 U.S.C. §§ 2073, 2074 (2012); *see also* Carrington, *supra* note 12, at 605 (describing process of rulemaking in practice).

their continuing importance today. It then analyzes the doctrinal standards prior to *Horne* for dissolving these often long-running decrees.

A. Development of Institutional Reform Decrees

As various scholars have observed, *Brown II*[15] ushered in a new model of institutional reform litigation.[16] This model was initially born out of a need to counter political resistance to court orders to desegregate public schools. The foot-dragging of Southern states in the face of judicial mandates to desegregate made clear that a simple order enjoining public schools from assigning students to schools on the basis of race would not suffice.[17] Meaningful equal educational opportunity would require a comprehensive decree altering the very structure of public schools, with ongoing judicial oversight to ensure compliance.

Although there is no consensus definition of institutional reform litigation,[18] it typically involves a suit against a government institution alleging systemic violations of individual rights and seeking an expansive prospective decree and retention of jurisdiction to monitor the defendant's compliance with the order.[19] These remedial decrees form the centerpiece of institutional reform litigation and serve multiple functions.[20] As in traditional private-law cases, equitable decrees entered in institutional reform litigation serve a *preventative* function: to prevent future violations of the plaintiffs' civil rights. Institutional reform decrees, therefore, almost always enjoin

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[15] 349 U.S. 294 (1955).

[16] Chayes, *supra* note 2, at 1284; Fiss, *supra* note 2, at 2; Schlanger, *supra note* 5, at 552.

[17] *See* Kristi L. Bowman, *The Civil Rights Roots of* Tinker*'s Disruption Tests*, 58 AM. U. L. REV. 1129, 1132-34 (2009); Kimberly Jenkins Robinson, *Resurrecting the Promise of* Brown*: Understanding and Remedying How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 798-801 (2010).

[18] *Compare* Horne v. Flores, 557 U.S. 433, 447 n.3 (2009) (concluding that case seeking remedy that would restrict a state's ability to "make basic decisions regarding educational policy, appropriations, and budget priorities" qualifies as "institutional reform litigation"), *with id.* at 496 (Breyer, J., dissenting) (suggesting that case that does not raise constitutional issues or involve a "comprehensive judicial decree that governs the running of a major institution" or a "highly detailed set of orders" may not qualify as "institutional reform litigation").

[19] *See, e.g.*, Susan Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1355 n.1 (1991) (describing slight variations in the definition of the synonymous terms "public law litigation," "institutional reform litigation," and "structural reform litigation").

[20] Chayes, *supra* note 2, at 1298.

defendants from continuing to violate the plaintiffs' rights in the future.[21] Civil rights decrees, however, often serve two additional functions: a *reparative* function to "compel the defendant to engage in a course of action that seeks to correct the effects of a past wrong" and a *structural* function to eradicate the discrimination embedded in the structure of the government institution.[22]

Thus, in the seminal desegregation cases, resulting judicial decrees were not limited to prohibiting school systems from assigning students to schools on the basis of race (preventative function). Rather, they further sought to improve the educational opportunity of students formerly denied the right to equal educational opportunity (reparative function) and to restructure the daily operations of schools — including, for example, student assignments, faculty hiring, and remedial education programs — to ensure that no school would remain racially identifiable (structural function).

In *Green v. County School Board*,[23] the Supreme Court articulated the structural function of remedial decrees. Expressly rejecting the defendant school district's attempt to limit the remedy to a preventative function enjoining future race-based student assignments, Justice Brennan's opinion for a unanimous Court held that formerly segregated school districts were required to take additional steps to restructure themselves. They would be required to alter not only the racial composition of their student bodies, but also "every facet of school operations — faculty, staff, transportation, extra-curricular activities and facilities"[24] — that was tainted by discrimination. Such restructuring, the Court reasoned, was necessary to ensure conversion to a unitary system in which racial discrimination had been "eliminated root and branch."[25]

In *Milliken II*,[26] the Court articulated the reparative function of institutional reform decrees. In that case, the district court ordered a school system to implement a comprehensive desegregation plan that mandated, among other things, remedial and compensatory education programs. Defendants argued that because the nature of its legal

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[21] *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 11 (1978).

[22] *See id.*; *see also* Chayes, *supra* note 2, at 1295 ("If a mental patient complains that he has been denied a right to treatment, it will not do to order the superintendent to 'cease to deny' it.").

[23] Green v. Cnty. Sch. Bd., 391 U.S. 430 (1968); *see also* Robinson, *supra* note 17, at 805-07 (exploring the *Green* decision and its aftermath).

[24] *Green*, 391 U.S. at 435.

[25] *Id.* at 437-38.

[26] Milliken v. Bradley (*Milliken II*), 433 U.S. 267 (1977); *see also* Robinson, *supra* note 17, at 834 (exploring the *Milliken II* decision and its aftermath).

liability was limited to unlawful student assignments, the scope of the remedy likewise must be limited to student assignments.[27] In a resounding rejection of this position, Chief Justice Burger held that "where, as here, a constitutional violation has been found, the remedy does not 'exceed' the violation if the remedy is tailored to cure the condition that offends the Constitution."[28] Because the district court found that the educational programs were necessary to restore minority children to the position they would have occupied absent discrimination, the Court concluded that the remedies were entirely within the bounds of the district court's remedial authority.[29] In this manner, the Court refused to limit the decree to a preventative function of prohibiting current and ongoing race-based student assignments, holding instead that the decree appropriately pursued broader reparative functions.

The Supreme Court repeatedly justified these expansive remedial functions based on the breadth and flexibility of the federal district courts' inherent equity powers in fashioning remedies. In *Swann v. Charlotte-Mecklenburg Board of Education*,[30] a unanimous Court affirmed the district court's inherent equitable authority to mandate student-assignment policies utilizing "clustering" and "pairing" of schools, as well as busing to improve racial integration and balance for each school. In doing so, Chief Justice Burger, writing for the Court, endorsed a theory of broad and flexible remedial authority of the federal district courts: "Once a right and a violation have been shown, the scope of a district court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[31]

The process of developing institutional reform decrees and the respective roles of the parties and the court in designing the remedy has varied from one case to the next. In cases resulting in *consent decrees*, the parties negotiate a settlement agreement on their own, either before or after a finding of liability (i.e., a judicial determination that the government-defendant has violated individual rights), setting forth the remedial steps the government-defendant agrees to undertake. The parties then submit this agreement to the court for approval and entry as a formal decree. With the court's approval, these

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[27] *Milliken II*, 433 U.S. at 281.

[28] *Id.* at 282.

[29] *Id.* at 282, 287-88.

[30] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); *see, e.g.*, Robinson, *supra* note 17, at 808-10 (detailing *Swann*'s background and its impact on institutional reform litigation).

[31] *Swann*, 402 U.S. at 15.

consent decrees become judicially enforceable through exercise of the court's contempt power. Regardless of whether the decree is developed before or after the finding of liability, the government-defendant, along with the plaintiffs, plays the leading role in designing the remedial decree, although its negotiating leverage vis-à-vis the plaintiffs of course is reduced subsequent to entry of a finding of liability.

By contrast, in cases resulting in a *court-ordered injunctive decree*, the court has entered a finding of liability and imposes the remedial decree without the consent of the government-defendant. Although in theory government-defendants play no role in shaping the remedy in these cases, in practice they possess considerable latitude in shaping even court-ordered injunctive decrees. In the desegregation cases, for example, courts finding a school district defendant liable typically invited the school system to submit a proposed desegregation plan to be considered, along with other proposed plans, in shaping the ultimate injunctive decree.

In these ways, institutional reform decrees vary in terms of whether they are entered before or after a finding of liability on the part of defendants and whether the government-defendants have consented to the remedies imposed. Notwithstanding these differences, however, these decrees share the defining characteristics of relying on the breadth and flexibility of the federal courts' equitable authority to restructure the operation of public institutions.

B. The Contemporary Role of Institutional Reform Litigation

Although institutional reform litigation was initially developed in the context of school desegregation, advocates quickly began employing this model to restructure other types of public institutions, including prisons, hospitals, mental institutions, welfare systems, and law enforcement agencies.[32] Notwithstanding periodic claims of its death, institutional reform litigation in federal courts continues to play

[32] *See* Fiss, *supra* note 2, at 3-4 (describing transfer of structural reform model to other contexts beyond desegregation); Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 580-81 (1999) [hereinafter *Public Law Remedies*] (describing Supreme Court approach to public law remedies as transsubstantive, reaching beyond desegregation cases). The University of Michigan Law School's Civil Rights Litigation Clearinghouse provides case information on thousands of institutional reform cases against a variety of governmental institutions, including prisons and jails, state welfare systems, and mental health facilities, among others. *See* THE CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net/index.php (last visited Jan. 16, 2013).

an important role in contemporary efforts to protect against systemic violations of individual rights.[33]

For example, in the context of education rights, although state courts have become increasingly active in imposing and monitoring structural decrees over school systems,[34] federal courts remain active sites for challenges to structural discrimination in public school systems.[35] First, federal courts retain responsibility for enforcing the scores of remaining school desegregation decrees.[36] Second, and perhaps more important, federal courts continue to enforce congressionally created education rights, including the statutory protections against discrimination by schools and school systems based on race, ethnicity and national origin,[37] sex,[38] disability,[39] and limited English proficiency.[40]

For example, students with disabilities rely on federal courts to protect against systemic violations of their rights under the Individuals

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[33] For a discussion of the persistence of institutional reform generally, see Schlanger, *supra* note 5, at 551 (challenging "conventional wisdom" that institutional reform litigation "peaked long ago and is now moribund"); *see, e.g.*, Sabel & Simon, *supra* note 2, at 1021 (describing "protean persistence" of institutional reform litigation).

[34] Scholars have emphasized the growing influence of state courts in institutional reform litigation involving educational rights in the two most recent waves of school finance reform litigation to secure educational equity and then educational adequacy pursuant to state constitutions. *See* Heise, *State Constitutions*, *supra* note 13, at 1151-53; Rebell, *supra* note 3, at 1526-27.

[35] *See generally* Bowman, *A New Strategy*, *supra* note 13, at 57-59 (2009) (discussing "fourth wave" of education cases based on federal statutory provisions); Liebman & Sabel, *supra* note 4, at 278-98 (articulating federal role in contemporary education reform efforts); Rebell, *supra* note 3 (discussing role of federal courts in securing equal educational opportunity rights).

[36] *See* U.S. COMM'N ON CIVIL RIGHTS, BECOMING LESS SEPARATE? SCHOOL DESEGREGATION, JUSTICE DEPARTMENT ENFORCEMENT, AND THE PURSUIT OF UNITARY STATUS 23 (2007) (noting 266 desegregation cases that remain under court supervision in which the Department of Justice is a party); Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157-60 [hereinafter *School Desegregation*] (conducting empirical study of remaining desegregation cases).

[37] Civil Rights Act of 1964, *Pub. L. No. 88-352, tit. VI, 78 Stat. 252* (codified as amended at 42 U.S.C. §§ 2000d (2012)).

[38] Education Amendments of 1972, *Pub. L. No. 92-318, tit. IX, 86 Stat. 373* (codified as amended at 20 U.S.C. §§ 1681).

[39] Individuals with Disabilities Education Act, Pub. L. No. 91-230, 4 Stat. 175 (1970) (codified as amended at 20 U.S.C. §§ 1400 (2012)); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (2012)).

[40] Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, tit. II, 88 Stat. 514 (codified as amended at 20 U.S.C. §§ 1701–03 (2012)).

with Disabilities Education Act ("IDEA"), which guarantees qualified students an extensive set of procedural and substantive rights, including the right to a "free and appropriate public education" with special education and related services.[41] In *Jamie S. v. Milwaukee Public Schools*, a class of plaintiffs filed suit in 2001 against the Milwaukee public school system, seeking to restructure policies for identifying students with disabilities and the delivery of special education services and to secure remedial educational services for those youth whose rights have been denied.[42] More recently in 2010, a class of students filed suit against the State of Louisiana in *P.B. v. Pastorek* to restructure the provision of special education services for students with disabilities in New Orleans public schools.[43]

Similarly, English language learners ("ELL") or students with limited English proficiency ("LEP") rely on institutional reform litigation in federal courts to secure rights guaranteed to them under the Equal Educational Opportunities Act ("EEOA"). Congress enacted the EEOA in 1975 to codify the Supreme Court's decision in *Lau v. Nichols*, requiring school districts to take "appropriate action" to overcome language barriers.[44] The plaintiffs in *Horne v. Flores* itself filed suit to enforce this provision, seeking a prospective decree that would increase funding for ELL programs across the state of Arizona.

Advocates also continue to seek institutional reform decrees in federal court to protect against systemic discrimination on the basis of sex under Title IX of the Education Amendments of 1972[45] and race, color, or national origin under Title VI of the Civil Rights Act of 1964.[46] For example, in *Antoine v. Winner School District*, a class of Native Americans filed suit in 2006 alleging systemic race discrimination in the imposition of school discipline and a racially

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[41] 20 U.S.C. § 1412(a) (2006). *But see* Pasachoff, *supra* note 13, at 1424-27 (questioning viability of institutional reform litigation to enforce IDEA rights).

[42] Jamie S. v. Milwaukee Pub. Schs., 668 F.3d 481, 484-85 (7th Cir. 2012).

[43] Complaint at 4, P.B. v. Pastorek, No. 2:10-cv-04049-JCZ-KWR (E.D. La. Oct. 26, 2010).

[44] *See* 20 U.S.C. § 1703(f) (2006).

[45] *See id.* § 1681(a) (2006) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.").

[46] *See* 42 U.S.C. § 2000d (2012) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

hostile educational environment.[47] They secured an expansive consent decree in which the school system agreed to restructure its policies and procedures for school discipline, incorporate a culturally sensitive academic curriculum, and improve the academic performance of the Native American student body.[48]

Federal courts also continue to play an active role in institutional reform litigation outside of the education context. In the law enforcement context, in *United States v. Maricopa County*, the United States Department of Justice filed suit alleging that the Sheriff's Department run by Joe Arpaio engages in a pattern and practice of racial profiling and harassment of Latino residents, discrimination against jail inmates with limited English proficiency, and retaliation for reporting abuses, in violation of Latinos' rights under the Equal Protection Clause and Fourth Amendment of the U.S. Constitution and Title VI of the Civil Rights Act of 1964. The complaint asks the federal district court to impose ongoing injunctive relief to implement structural changes to the Department's training policies; alter the policies and practices for conducting stops, searches, and arrests; reform the process for complaining about officer misconduct; and provide for increased community engagement.[49]

In the context of child welfare, a class of plaintiffs filed suit in April of 2010 against the Commonwealth of Massachusetts in *Connor B. v. Patrick*. Plaintiffs allege systemic abuse resulting in physical and psychological harm for children in the state foster care system in violation of substantive due process rights and the federal Adoption Assistance and Child Welfare Act of 1980.[50] They seek a prospective decree to restructure the operations of caseworkers and also increase medical and mental health services for the children in foster care.

In these and countless other cases, advocates continue to rely on federal courts to remedy systemic denials of rights by government institutions. Although the cases range across different types of government institutions and claim different types of statutory and constitutional rights, they share the common goal of seeking the

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[47] Complaint at 2, Antoine *ex rel.* Milk v. Winner Sch. Dist., No. 3:06-cv-03007 (D.S.D. filed Mar. 27, 2006).

[48] Consent Decree at 3-4, 8-10, Antoine *ex rel.* Milk v. Winner Sch. Dist., No. 3:06-CV-03007 (D.S.D. Dec. 10, 2007); *see* Catherine Y. Kim, *Procedures for Public Law Remediation in School-to-Prison Pipeline Litigation: Lessons Learned from* Antoine v. Winner School District, 54 N.Y.L. SCH. L. REV. 955, 970-72 (2010).

[49] Complaint at 31, United States v. Maricopa County, No. 2:12-CV-00981-LOA (D. Ariz. May 10, 2012).

[50] Complaint at 1-2, 66-67, Connor B. v. Patrick, No. 3:10-CV-30073-MAP (D. Mass. Apr. 15, 2010).

federal courts' intervention to restructure a state or local government institution that has engaged in a systemic violation of individual rights.

C. Terminating Institutional Reform Decrees

Although the judicial restructuring of government institutions often takes years, even decades, institutional reform decrees were never intended to operate in perpetuity. Federal Rule of Civil Procedure 60(b)(5) provides the formal mechanism for determining when an institutional reform decree is no longer needed and judicial oversight over the government institution should be terminated. That Rule states, "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding [where] . . . applying it prospectively is no longer equitable."[51] The Supreme Court over time has provided differing formulations to elucidate the conditions under which termination of prospective relief is appropriate.

1. The Development of Rule 60(b)(5)

Even before the Federal Rules of Civil Procedure had come into existence, courts had always been understood to retain authority to amend prospective judgments for equitable reasons.[52] In 1932, Justice Cardozo articulated this understanding in *United States v. Swift & Co.*,[53] involving a motion to modify a permanent injunction against a group of meatpackers accused of violating the Sherman Antitrust Act. Relying on "principles inherent in the jurisdiction of the chancery," Justice Cardozo stated: "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions."[54]

This equitable power to modify, however, was not without limit. Rather, Justice Cardozo cautioned against attempts to modify a previously entered decree that would unduly compromise the finality of judgment. To protect interests of finality, the Court would permit modification of a previously entered prospective decree only upon a

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[51] FED. R. CIV. P. 60(b)(5).

[52] *See* Timothy Stoltzfus Jost, *From* Swift *to* Stotts *and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1105 (1968); David I. Levine, *The Latter Stages of Enforcement of Equitable Decrees: The Course of Institutional Reform Cases After* Dowell, Rufo, *and* Freeman, 20 HASTINGS CONST. L.Q. 579, 585 (1993).

[53] United States v. Swift & Co., 286 U.S. 106 (1932).

[54] *Id.* at 114.

"clear showing of grievous wrong evoked by new and unforeseen conditions."[55]

Notwithstanding this precedent, the original 1938 version of the Federal Rules did not specify that a court could modify or terminate an existing decree on grounds of equity. Rather, Rule 60(b) initially permitted a court to grant relief from judgment only on grounds of "mistake, inadvertence, surprise or excusable neglect," and only where a motion for such relief had been filed within six months of the judgment.[56] Lower courts nonetheless continued to rely on their inherent equity power to grant relief from prospective judgment.[57]

Seeking to reconcile the Rule with actual practice, the Advisory Committee considered amending Rule 60(b) to expressly grant lower courts the authority to amend prospective decrees on equitable grounds. Professor James William Moore urged the adoption of such explicit language to conform with historical practice, submitting a memorandum to the Committee explaining, "It was also settled that where a final decree granting a permanent injunction has become of no use or benefit to the one whose rights were thus protected, or where it would be inequitable to continue it, because of the occurrence of facts and conditions since its rendition, the decree may be modified or vacated."[58]

Adopting Moore's suggestion, the 1948 Amendments to the Rules set forth new grounds for relief from judgment, including where "applying it prospectively is no longer equitable."[59] This clause thus

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[55] *Id.* at 119.

[56] FED. R. CIV. P. 60(b) (1938) (amended 1946).

[57] *See* James Wm. Moore & Elizabeth B.A. Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 643-44 (1946).

[58] ADVISORY COMM. ON RULES OF CIV. PROC., MINUTES 555 (Mar. 25-26, 1946), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV03-1946-min-Vol3.pdf.

[59] Federal Rule of Civil Procedure 60(b) today reads as follows:

> GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;

codified judicial discretion to grant relief from a prospective decree based on equity principles.

Importantly, the final adopted text did not supply any further standard to determine when prospective application would no longer be equitable. Lower courts continued to apply the *Swift* standard to hold that under Rule 60(b)(5), modification was only warranted where the moving party could establish a "grievous wrong" would result absent relief.[60] In subsequent years, however, the Supreme Court would develop a body of case law to guide the lower courts in terminating prospective decrees, particularly in institutional reform cases.

2. The Standard for Termination

The desegregation case *Board of Education of Oklahoma City Schools v. Dowell*[61] provided the first opportunity for the Supreme Court to articulate a standard for granting relief from judgment through

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(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

FED. R. CIV. P. 60(b). The first three grounds impose a one-year time limit for seeking relief, while relief pursuant to the remaining three grounds must be sought "within a reasonable time." FED. R. CIV. P. 60(c).

Interestingly, the addition of subsection (6), but not subsection (5), caused a great deal of controversy. Scholars expressed concern that the catch-all provision of subsection (6) threatened to destroy any notion of finality and potentially undermine other Rules such as Rule 44 imposing strict time limits for direct appeal. Mary Kay Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 HASTINGS L.J. 41, 43 (1978); Note, *Federal Rule 60(b): Relief from Civil Judgments*, 61 YALE L.J. 70 (1952) (criticizing lack of guidance for application of Rule 60(b)(6)). To mitigate this risk that parties would abuse Rule 60(b)(6) as a substitute for appeal, courts interpreted it narrowly to limit its reach. The Supreme Court embraced such limits in *Klapptrott v. United States*, 335 U.S. 601 (1949), by requiring that a losing party show "extraordinary circumstances" to warrant relief from judgment under Rule 60(b)(6). Subsequent case law established that such extraordinary circumstances were rare indeed. 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2864 (3d ed. 1998).

[60] The Money Store, Inc. v. Harriscorp Fin., Inc., 885 F.2d 369, 371-73 (7th Cir. 1989); Fortin v. Comm'r of the Mass. Dep't of Pub. Welfare, 692 F.2d 790, 799 & n.12 (1st Cir. 1982); Air Transport Ass'n of Amer. v. Prof'l Air Traffic Controllers Org., 667 F.2d 316, 323 (2d Cir. 1981).

[61] Bd. of Educ. of Okla. City Schs. v. Dowell, 498 U.S. 237 (1991); *see also* Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 116 (2004) (discussing termination standard for desegregation decrees in *Dowell*); Levine, *supra* note 52, at 624-25 (same); Parker, *School Desegregation*, *supra* note 36, at 1163-68 (same); Robinson, *supra* note 17, at 820 (same).

termination of an institutional reform decree. Although *Dowell* did not discuss the termination standard under Rule 60(b)(5), the Court has subsequently cited *Dowell* in discussing the standard for termination under the Rule.[62] In *Dowell,* the School Board for the Oklahoma City public schools moved to end a desegregation decree that had been in operation for nearly thirty years.[63] The district court rejected the motion, relying on *United States v. Swift* to conclude that termination was proper only if the School Board could establish that a "grievous wrong" would result if relief was not granted. In a five-three majority opinion, Chief Justice Rehnquist held that the *Swift* standard was too high a barrier to the termination of desegregation decrees, which, unlike the antitrust decree at issue in *Swift*, were intended to be temporary, with the ultimate goal of returning the school system to local control.[64]

Nonetheless, the Court made clear that a government-defendant seeking to dissolve a desegregation decree had to satisfy a significant burden to warrant termination of judicial oversight. First, the defendant bore the burden to show that it "had complied in good faith with the desegregation decree since it was entered."[65] Second, it was required to establish that "the vestiges of past discrimination had been eliminated as far as practicable."[66] In determining whether the vestiges had been eliminated, district courts were ordered to "look not only at student assignments," but also at the entire structure of the public school system, including "every facet of school operations – faculty, staff, transportation, extra-curricular activities and facilities."[67] Thus, *Dowell* rejected a standard for termination that would limit the decree to a preventative function, which would have permitted termination as soon as the school system had ceased its ongoing violations of plaintiffs' rights by assigning students to schools in a race-neutral fashion. Instead, *Dowell* endorsed the broader structural function — requiring the school system to show that the institutional structure had been revamped before termination would be granted.

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[62] Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 380 (1992); *see also* Parker, *Public Law Remedies*, *supra* note 32, at 507 (noting that "the Supreme Court's approach to public law remedies is generally transsubstantive — principles developed in one area of public law are applied in other areas as well").

[63] *Dowell*, 498 U.S. at 240.

[64] *Id.* at 248.

[65] *Id.* at 249-50.

[66] *Id.* at 250.

[67] *Id.* (internal quotation omitted); *see also* Parker, *School Desegregation*, *supra* note 36, at 1164, 1167 (observing that *Dowell* imposed a high burden on defendants to "prov[e] the success of the remedy").

Subsequent cases modified the *Dowell* standard for termination to the extent it suggested that the government-defendant's strict compliance with the terms of the decree would always be required prior to termination. In *Rufo v. Inmates of Suffolk County Jail*,[68] decided the year after *Dowell*, a class of inmates brought suit challenging overcrowded jail conditions. The district court found defendants liable, and the parties negotiated a consent decree in which the defendants agreed to build a new facility with "single cells of 80 square feet for inmates" among other "critical features." Ten years later, when it became apparent that limiting cells in the new facility to a single inmate would not accommodate the sharp increase in the inmate population, defendants moved pursuant to Rule 60(b)(5) to modify the decree's prohibition against double-bunking on equitable grounds. The district court denied the motion, and the circuit court affirmed.[69]

Reversing, Justice White's opinion for the majority held that, notwithstanding the defendant's failure to comply with the terms of the decree, Rule 60(b)(5) permits modification "when changed factual circumstances make compliance with the decree substantially more onerous," "when a decree proves unworkable because of unforeseen obstacles," "or when enforcement of the decree without modification would be detrimental to the public interest."[70] In announcing this new formulation, the Court emphasized the need for district courts to retain flexibility to modify prospective decrees.[71] Thus, although *Rufo* appeared to eliminate the *Dowell* requirement that a defendant comply with all of the terms of a decree in order to justify termination, it affirmed prior precedent holding that the party seeking modification bears the burden of persuasion to show that modification is warranted.[72]

In addition, *Rufo* affirmed the authority of the district court to preserve a consent decree, even after the preventative function had been accomplished. It expressly rejected the position that a structural

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[68] Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367 (1992); *see* Levine, *supra* note 52, at 596.

[69] Inmates of Suffolk Cnty. Jail v. Kearney, 734 F. Supp. 561, 566 (D. Mass. 1990), *aff'd*, 915 F.2d 1557 (1st Cir. 1990).

[70] *Rufo*, 502 U.S. at 384.

[71] *Id.* at 381 ("The experience of federal courts in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation.").

[72] *Id.* at 383 ("[A] party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree.").

decree entered with the consent of the parties could do no more than require compliance with the minimum legal requirements necessary to avoid an ongoing violation of law. The Court reasoned:

> Federal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated. But we have no doubt that, to save themselves the time, expense, and inevitable risk of litigation, petitioners could settle the dispute over the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires (almost any affirmative decree beyond a directive to obey the Constitution necessarily does that), but also more than what a court would have ordered absent a settlement.[73]

For these reasons, the Court emphasized that "a proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor."[74] In this manner, *Rufo* preserved the district court's ability to pursue structural reform by retaining oversight over a consent decree, even where the defendant had ceased its violation of rights and conformed to the minimum legal requirements.

Frew v. Hawkins[75] provided an additional gloss on the standard for determining when to terminate institutional reform decrees. In *Frew*, involving a challenge to Texas's administration of the federal Medicaid statute, the parties entered a consent decree prior to any adjudication of liability. Pursuant to the decree, the State agreed to extensive and detailed requirements for the provision of services that went far beyond the "brief and general mandate of the statute itself."[76] When the State subsequently challenged the enforceability of the decree on sovereign immunity grounds, the Court in a unanimous opinion by Justice Kennedy invoked Rule 60(b)(5) as the proper vehicle for determining whether relief was warranted.

In doing so, the Court held that termination under the Rule would be proper where "the [objects of the decree] have been attained."[77] It reasoned that in institutional reform cases, lower courts must "exercise their equitable powers" in conformity with this standard to

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[73] *Id.* at 389 (internal citations and quotations omitted).

[74] *Id.* at 391.

[75] Frew v. Hawkins, 540 U.S. 431 (2004).

[76] *Id.* at 441.

[77] *Id.* at 442.

ensure that "responsibility for discharging the State's obligations is returned promptly to the State and its officials."[78] As in *Rufo*, the Court noted that the burden of persuasion rested with defendants to show that termination was warranted.[79]

Frew did not provide any additional guidance on how lower courts were to define the "objects of the decree." Previously, *Dowell* had suggested that the "object of the decree" might be the total restructuring of a public school system. *Rufo* had suggested that the object of a properly negotiated consent decree might reach far beyond the minimum statutory or constitutional floor. Without articulating any further guidance, *Frew* appeared to leave intact the district court's discretion, in exercising its equity powers, to make this determination.

A few principles can be gleaned from these cases taken as a whole. First, the Supreme Court has provided various formulations for determining when termination of a prospective decree is appropriate pursuant to Rule 60(b)(5). With one partial exception, the Court has never suggested that any holding in this line of cases from *Dowell* to *Rufo* to *Frew* has been overruled, and the differing standards announced in each case must be interpreted in a manner consistent with the standards announced in the other two cases. Although the portion of *Dowell* requiring strict compliance with a decree's requirements prior to termination has been cast into doubt by *Rufo* and *Frew*, the portion of *Dowell* holding that the standard for termination requires a defendant to show it has successfully eliminated the vestiges of its prior unlawful conduct to the extent practicable appears to remain good law. At the same time, this standard must be reconciled with *Rufo*'s holding that Rule 60(b)(5) permits termination where changed circumstances render continued enforcement against the public interest, as well as *Frew*'s formulation that termination under Rule 60(b)(5) is mandated where the objectives of the decree have been attained.

Second, the cases consistently emphasize that the district court retains broad discretion in determining when termination is warranted. *Frew* holds that termination is required when the decree's objectives have been attained, but does not appear to limit the district court's definition of those objectives. Indeed, *Rufo* holds that the objectives of a decree entered with the consent of the parties may properly reach beyond minimal compliance with the constitutional or

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[78] *Id.*

[79] *See id.* ("If the State establishes reason to modify the decree, the court should make the necessary changes; otherwise, the decree should be enforced according to its terms.").

statutory floor. Thus, the absence of an ongoing violation of statutory or constitutional rights, standing alone, does not justify terminating the decree.

Third, the case law makes clear that the party seeking to terminate a decree — typically the government-defendant — bears the burden of persuasion to show that the relevant standard for modification or termination has been met.

II. *HORNE V. FLORES* AND SUBSEQUENT INTERPRETATIONS OF RULE 60(B)(5)

Although federal courts continue to play an expansive role in restructuring state and local government institutions, many have grown increasingly skeptical of this model of social reform. Most recently, the Supreme Court's 2009 decision in *Horne v. Flores*[80] opened the door for lower courts to reinterpret Rule 60(b)(5) of the Federal Rules of Civil Procedure to dramatically enlarge government-defendants' ability to terminate judicial oversight in these types of cases. This Part analyzes the *Horne* decision and the differing possible interpretations of its application of Rule 60(b)(5). It then sets forth lower courts' improperly broad interpretation of *Horne*, resulting in a categorical reduction in the standard and burden for terminating judicial oversight in institutional reform cases. Finally, it explores the likely impact of the *Horne* decision on the future viability of institutional reform litigation.

A. Facts

In 1992, a group of ELL students enrolled in the Nogales School District along the Arizona-Mexico border filed a class action suit alleging that the State inadequately funded ELL programs in violation of rights protected by the Equal Educational Opportunities Act.[81] Plaintiffs named as defendants the State of Arizona ("Defendant State"), the Arizona State Board of Education ("Defendant State Board"), and the Arizona State Superintendent of Public Education ("Defendant State Superintendent").

After trial, the district court found the defendants in violation of the EEOA, which requires states to take "appropriate action" to overcome

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[80] Horne v. Flores, 557 U.S. 433 (2009).

[81] *Id.* at 438; *see* Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV. 911, 959 (2010) [hereinafter *Pursuing Educational Opportunities*] (discussing *Horne*'s analysis of EEOA standards).

language barriers for ELL students,[82] by providing a level of ELL program funding in Nogales School District that was "arbitrary and capricious and bore no relation to the actual funding need."[83] To remedy this violation, the court entered a prospective decree ordering defendants to conduct a cost-study to determine the amount of funding necessary to implement an effective ELL program and to develop a funding mechanism rationally related to that amount.[84]

Defendants did not appeal the order but neither did they attempt to comply.[85] After over five years of inaction, the district court entered a contempt order against defendants and ordered the state legislature — which had not been party to the suit — to "appropriately and constitutionally fund the state's ELL programs."[86] In March 2006, after accruing over $20 million in contempt fines, the state legislature passed H.B. 2064, increasing funding for ELL students and providing for programmatic and structural changes to the statewide ELL program.[87]

Upon enactment of H.B. 2064, Defendant State Superintendent, joined by leaders of the state legislature seeking to intervene, moved to dissolve the district court's decree pursuant to Federal Rule of Civil Procedure 60(b)(5). They claimed that a "significant change in circumstances" warranted relief from the judgment, citing increases in funding for ELL students, the replacement of bilingual education instructional programs with English immersion programs in the state, and various changes specific to Nogales School District, including

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[82] 20 U.S.C. § 1703 (2006) ("No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instruction programs.").

[83] *Horne*, 557 U.S. at 480 (internal citation omitted). The Fifth Circuit in *Castaneda v. Pickard*, 648 F. 2d 989 (5th Cir. 1981), interpreted the EEOA provision at issue to require that: (1) the school system's selected instructional program for ELL students rests on sound educational theory; (2) the practices, resources, and personnel allocated to the program are reasonably calculated for effective implementation; and (3) the performance outputs of the program demonstrate success in actually overcoming language barriers. Every lower federal court to examine the issue has adopted the *Castaneda* test, as have the Departments of Justice and Education. *See* Bowman, *Pursuing Educational Opportunities*, *supra* note 81, at 930 (discussing *Castaneda* test). Congress created an express private right of action to enforce the EEOA's provisions in federal district court. 20 U.S.C. §§ 1706, 1708 (2006). The district court in *Horne* concluded that the defendants had failed the second prong of the *Castaneda* inquiry.

[84] *Horne*, 557 U.S. at 479-80.

[85] *Id.* at 441.

[86] *Id.* at 441-42.

[87] *Id.* at 442.

changes in administration and funding and the improved academic performance of ELL students in that district. After an eight-day evidentiary hearing, the district court denied the Rule 60(b)(5) motion, finding that the State continued to fund ELL instruction in an "arbitrary and capricious" manner that "bore no rational relation to the actual funding needed" and that the moving parties had failed to show changed circumstances warranting modification.[88] The Ninth Circuit affirmed.[89]

Justice Alito reversed for a five-member majority of the Court, holding that the district court abused its discretion in refusing to terminate the decree. In doing so, the Court expressed skepticism about institutional reform litigation, underscoring particular facts of the case that, in the majority's view, exacerbated the democratic accountability concerns inherent in these types of cases.[90]

1. Party Alignment

In *Horne,* the Court emphasized the threat to democratic accountability posed by institutional reform decrees. Speaking of structural decrees in general, the Court noted:

> [P]ublic officials sometimes consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law . . . . Injunctions of this sort bind state and local officials to the policy preferences of their predecessors and may thereby improperly deprive future officials of their designated legislative and executive powers . . . . Where state and local officials inherit overbroad or outdated consent decrees that limit their ability to respond to the priorities and concerns of their constituents, they are constrained in their ability to fulfill their duties as democratically-elected officials.[91]

In this case, none of the defendants challenged the original district court finding that the Nogales School District was in violation of the EEOA on appeal.[92] This failure to appeal, in the Court's view, heightened the risk that the putative defendants actually embraced the

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[88] Flores v. Arizona, 480 F. Supp. 2d 1157, 1167 (D. Ariz. 2007), *aff'd* 516 F.3d 1140 (9th Cir. 2009), *rev'd sub nom.* Horne v. Flores, 557 U.S. 433 (2009).

[89] Flores v. Arizona, 516 F.3d 1140 (9th Cir. 2009).

[90] *Horne*, 557 U.S. at 447-50.

[91] *Id.* at 448-49 (internal quotations and citations omitted).

[92] *Id.* at 442.

remedial decree, hoping to achieve policies aligned with their institutional priorities that would then become immune from political contest.[93] Indeed, the Attorney General took the unusual step of requesting that the district court extend the injunctive order *statewide*, concerned that any district-specific funding remedy would run afoul of the state constitution requiring a "general and uniform public school system."[94]

Moreover, at no point after the finding of liability did the three named defendants claim or attempt compliance with the terms of the decree. Rather, they placed the onus on the legislature to produce the funding necessary for compliance. The Court observed, "[t]he record suggests that some state officials have welcomed the involvement of the federal court as a means of achieving appropriations objectives that could not be achieved through the ordinary democratic process."[95]

When the legislature finally acted, only one of the three original defendants, joined by the state legislators, moved to terminate the decree. The other two defendants concluded that the State's funding for ELL programming remained insufficient and opposed the motion. Citing this realignment, the Court stated, "[p]recisely because different state actors have taken contrary positions in this litigation, federalism concerns are elevated."[96]

In the majority's view, the unusual alignment of parties on the Rule 60(b)(5) motion "turned the risks of institutional reform litigation into reality" by permitting at least some defendants to collude with plaintiffs to develop favorable policy to be imposed through a judicial decree, which would then become insulated from subsequent political challenge and amendment.[97]

2. Funding Remedy

In addition, the Court expressed concern that the particular remedy imposed in *Horne* exacerbated the federalism concerns inherent in many institutional reform decrees. These concerns involve the

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[93] *Id.* at 448-50.

[94] *Id.* at 472 ("We are told that the former attorney general affirmatively urged a statewide remedy because a Nogales only remedy would run afoul of the Arizona Constitution's requirement of a general and uniform public school system.") (internal quotations and citations omitted).

[95] *Id.* at 447 n.3. *But see id.* at 489 (Breyer, J., dissenting) (contesting majority's characterization that defendants "welcomed" the decree).

[96] *Id.* at 452.

[97] *See id.* at 452-53.

propriety of a politically unaccountable federal court inserting itself into the domain of state and local policymaking. As the Court stated, "institutional reform injunctions often raise sensitive federalism concerns" because they "commonly involve[] areas of core state responsibility, such as public education."[98] The exclusive remedial focus of *Horne* — commanding the state legislature to appropriate funds — clearly troubled the majority, uncomfortable with the specter of federal district courts commanding state legislatures to allocate specific dollar amounts to particular education programs. "Federalism concerns are heightened when, as in this case, a federal court decree has the effect of dictating state or local budget priorities."[99]

In these ways, the facts of *Horne* underscored the risks to democratic accountability and federalism principles inherent in federal institutional reform cases generally.

B. Application of Rule 60(b)(5)

In light of these facts, which in the Court's view exacerbated more general concerns about institutional reform litigation, the Court concluded that the government-defendant was entitled to terminate the prospective decree pursuant to Rule 60(b)(5). Moreover, lower courts have employed a broad interpretation of *Horne* to categorically reduce the standard for terminating institutional reform decrees, replacing the textual and precedential commitment to a balancing of equities under Rule 60(b)(5) — manifest in the phrase "is no longer equitable" — with the imposition of a rigid rule requiring termination where there is no longer an ongoing violation of law. In addition, while *Horne* affirmed that the defendant bears at least the initial burden in a Rule 60(b)(5) motion, at least one lower court has applied *Horne* to impose a lesser burden on a moving defendant that more closely resembles a burden of production rather than the usual burden of persuasion; the ultimate burden of persuasion on the question of termination has been shifted to the nonmoving plaintiff.

1. Standard for Termination

Horne opened the door for a transformation of the standard for terminating injunctive relief in institutional reform cases. As set forth below, lower courts have relied on *Horne* to reinterpret Rule 60(b)(5), which permits relief from judgment whenever "applying prospectively

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[98] *Id.* at 448.

[99] *Id.*

is no longer equitable," to mandate termination where there is "no ongoing violation of federal law."

Concluding that the district court abused its discretion in denying defendants' motion to terminate, the *Horne* majority held that in determining the merits of the Rule 60(b)(5) motion, the lower court was required to "ascertain whether ongoing enforcement of the original order was supported by an ongoing violation of federal law (here, the EEOA)."[100] Citing *Frew* for the proposition that a decree must be terminated where its objectives have been attained, *Horne* continued: "a critical question in this Rule 60(b)(5) inquiry is whether the objective of the District Court's 2000 declaratory judgment order — i.e., satisfaction of the EEOA's 'appropriate action' standard — has been achieved."[101] Once the ongoing violations of federal law had ceased, termination would be mandated.

Horne's description of the standard for terminating injunctive decrees under Rule 60(b)(5) remains subject to varying interpretations. On the one hand, lower courts might adopt a narrow interpretation of *Horne* by confining the holding to the facts of that case. Under this narrow reading, termination would be mandated absent an ongoing violation of law only where the parties seek relief under the EEOA, or only where the decree's objectives were, in fact, limited to preventing ongoing violations of law.

Lower courts might minimize the breadth of *Horne* by applying its description of the proper standard for termination to cases brought under the Equal Educational Opportunities Act only. In holding that dissolution under Rule 60(b)(5) is required where there is no ongoing violation of federal law, the Court stated, "[w]e note that the EEOA itself limits court-ordered remedies to those that are essential to correct particular denials of equal educational opportunity or equal protection of the laws."[102] Based on this language, a lower court might conclude that although a decree entered pursuant to the EEOA must be terminated upon the cessation of ongoing violations of the law, a decree entered pursuant to other federal laws — including constitutional provisions — is not so limited.

Similarly, lower courts might limit *Horne*'s description of the proper standard for terminating a decree to cases in which the objectives of the decree were in fact limited to stopping ongoing violations of the law. The decree entered by the district court in *Horne* sought only to prevent defendants from continuing to provide inadequate funds for

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[100] *Id.* at 454-56.

[101] *Id.* at 450.

[102] *Id.* (quoting 20 U.S.C. § 1712 (2006)).

ELL programs in violation of the EEOA; it did not seek any other structural or reparative functions. A narrow interpretation of the case might thus conclude that *Horne* is inapplicable to other decrees with broader objectives, such as desegregation decrees serving reparative and structural functions or consent decrees requiring compliance beyond the statutory or constitutional floor.

On the other hand, lower courts might adopt an expansive reading of *Horne*, concluding that Rule 60(b)(5) requires termination absent an ongoing violation of law in all institutional reform cases, regardless of whether the case involved the EEOA or some other federal law, whether the objectives of the decree reached beyond the bare minimum constitutional or legal floor, or indeed whether the decree was entered into with the consent of the parties.

Unfortunately, lower courts have tended to opt for such a broader reading of *Horne*. No lower court to date has limited the applicability of *Horne* to cases brought under the EEOA. For example, in *Petties v. District of Columbia*,[103] a case arising not under the EEOA but rather under the IDEA, the district court had imposed a prospective decree requiring the District of Columbia to timely provide payments to providers of special education services. The Court of Appeals applied *Horne* to reverse the district court's denial of the government-defendant's Rule 60(b)(5) motion to terminate because there was no evidence of an ongoing violation of law.

Moreover, lower courts have applied *Horne* to require termination absent an ongoing violation of law without considering, for example, whether the vestiges of prior unlawful conduct have been eliminated, whether the public interest is served by preserving the decree, or whether the initial objectives of the decree have been attained. Indeed, some courts have even gone so far as to require termination of a consent decree absent an ongoing violation of law. In *Consumer Advisory Board v. Harvey*, the district court for the District of Maine applied *Horne* to grant the government-defendant's motion to terminate a prospective decree absent evidence of an ongoing violation of law, even though the decree was entered into with the consent of the parties. In that case, the government-defendants had consented to a decree under which they agreed to improve conditions for involuntarily confined residents of a state-run mental institution.[104] Defendants subsequently moved to terminate pursuant to Rule 60(b)(5), although they had failed to comply with many of the

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[103] 662 F.3d 564 (D.C. Cir. 2010).

[104] Consumer Advisory Bd. v. Harvey, 697 F. Supp. 2d 131, 132-33 (D. Me. 2010).

substantive requirements of the decree. Granting defendant's motion, the district court cited *Horne* to conclude, "to the extent that the 1994 Consent Decree can be read to include multiple substantive requirements that extend beyond the requirements of the Constitution and federal law, the Decree falls squarely within the category of decrees" that "may improperly deprive future officials of their designated legislative and executive powers."[105] In response to the plaintiffs' attempt to distinguish the court-ordered injunctive decree entered in *Horne* from the consent decree entered in their own case, the district court held that "these differences did not change the applicability of *Horne* to this case."[106]

Such a categorical reading of *Horne* to reduce the standard for terminating prospective decrees in all institutional reform cases, rather than limiting *Horne* to its particular facts, contravenes the express language of Rule 60(b)(5), which requires a case-by-case balancing of the equities. Moreover, such a broad reading of *Horne*, requiring termination whenever there is no longer an ongoing violation of law, repudiates earlier cases' explicit rejection of the notion that relief must be limited to preventing ongoing violations of law. It contravenes the long line of cases affirming federal district courts' discretion to order broad remedies that seek not only preventative relief, but also structural and reparative relief as well.

Dowell held that termination of a desegregation decree would only be appropriate where the government-defendant could show that all "vestiges of prior discrimination have been eliminated to the extent practicable."[107] It made clear that a school system that formerly operated a de jure segregated system could not terminate judicial oversight merely by showing that the preventative function of the decree had been achieved. Although it was no longer assigning students to schools on the basis of race in violation of law, the school system would be required to show that the structural and reparative functions of the decree had also been achieved.[108]

Similarly, although *Rufo* held that "changed circumstances" might warrant modification, it affirmed that an institutional reform decree — at least one entered into with the consent of the parties — could properly reach beyond the minimum statutory or constitutional floor.

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[105] *Id.* at 137.

[106] *Id.*; *see also* United States v. Bd. of Educ. of Chi., 663 F. Supp. 2d 649, 656 (N.D. Ill. 2009) (stating in the context of a desegregation case, "the *Horne* opinion makes no distinction between court-ordered or consent decrees").

[107] Bd. of Educ. of Okla. City Schs. v. Dowell, 498 U.S. 237, 250 (1991).

[108] *See supra* notes 62-68 and accompanying text.

In these circumstances, a consent decree would remain in force even absent an ongoing violation of law.[109]

Finally, although *Frew* held that termination would be proper where "the objectives of the decree have been attained," it did not purport to limit the permissible objectives of a decree in any way. Instead, it appeared that district courts retained discretion to determine the purposes of a decree — be they preventative, reparative, structural, or even something altogether different in the case of properly negotiated consent decrees, as suggested in *Rufo*.[110]

Fortunately, not all cases have extended *Horne* to require termination of all institutional reform decrees absent an ongoing violation of law. In *Evans v. Fenty*,[111] involving the treatment of institutionalized individuals with developmental disabilities, defendants moved to vacate the consent decree, arguing that although they had failed to comply with the decree, the orders should nonetheless be vacated because there was no current and ongoing violation of federal law. Rejecting the motion, the district court for the District of Columbia emphasized that *Horne* involved a litigated judgment and did not overrule *Frew* and *Rufo*, which held that consent decrees may reach beyond the bare bones of what a court could order absent government consent.[112] This reading of *Horne* is consistent with the traditional understanding that government-defendants may consent to requirements beyond what a federal court could on its own impose. It is also consistent with *Rufo*, which expressly prohibited courts from attempting to rewrite consent decrees to conform to the constitutional or statutory floor.

These divergent approaches suggest that the future of institutional reform litigation largely depends on whether lower courts employ the *Horne* standard for termination broadly or narrowly. To date, at least some courts have opted for the broader application, contravening the text of Rule 60(b)(5) and the long line of preceding cases interpreting that provision.

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[109] *See supra* notes 76-77 and accompanying text.

[110] *See supra* notes 79-81 and accompanying text.

[111] Evans v. Fenty, 701 F. Supp. 2d 126 (D.D.C. 2010).

[112] *Id.* at 165-66; *see also* Juan F. v. Rell, No. 3:89-CV-859 (CFD), 2010 WL 5590094, at *3 (D. Conn. Sept. 22, 2010) ("But the defendants overstate the impact of *Horne* . . . . *Horne* did not call into question a district court's authority to enforce a validly entered Consent Decree negotiated by the parties."); LaShawn A. *ex. rel.* Moore v. Fenty, 701 F. Supp. 2d 84, 98-100, 115 (D.D.C. 2010) (denying defendant's Rule 60(b)(5) motion to terminate decree in case challenging administration of child welfare system, reasoning that *Horne* preserves the holding in *Frew* allowing consent decrees to require more than the court could order absent consent of the parties).

2. Defendant's Burden

In addition, at least one lower court has applied *Horne* to reduce the burden borne by defendants in moving for termination. In *Horne*, the majority expressly affirmed that in a Rule 60(b)(5) motion, as with all motions, "the party seeking relief bears the burden of establishing that relief is warranted."[113] However, the manner in which the Court applied this burden might be interpreted as imposing on defendants a more modest burden of production rather than the traditional burden of persuasion. It thus opens the door for lower courts to impose the ultimate burden of persuading the court on the question of whether termination is warranted on the nonmoving plaintiff.

In *Horne*, defendant-movants pointed to four purported changes in circumstances to argue for dissolution of the decree, including an increase in educational funding for ELL students, the adoption of a new ELL instructional methodology, the improved performance of ELL students in Nogales School District, and structural and management reforms in the Nogales School District.[114] The district court heard evidence on these facts during an eight-day hearing, but ultimately found that, although there were improvements in the provision of ELL services in the State, defendants ultimately failed to establish compliance with the EEOA.[115]

The Supreme Court reversed, concluding that the district court abused its discretion in denying the motion. Importantly, the Court did not conclude that the proffered changes constituted sufficient evidence of current compliance; instead, it remanded the case back to the district court for further litigation. This posture suggests that defendant-movants may bear only a burden of production rather than a burden of persuasion to trigger further litigation on the Rule 60(b)(5) motion. If the defendant-movants bore the burden of persuasion, the absence of any court's finding that the requisite standard had been satisfied — in this case compliance with the EEOA, according to the Court — would properly result in the denial of the motion. Yet, the holding that the district court abused its discretion in denying the motion might be interpreted as imposing on the defendant-movant only a burden of production — to show there was some question as to whether it was currently in compliance — to warrant further litigation.

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[113] Horne v. Flores, 557 U.S. 433, 447 (2009).

[114] *Id.* at 459.

[115] *Id.* at 473 (Breyer, J., dissenting).

Such a reduction of the initial burden would place prevailing plaintiffs at the disadvantage of having to re-litigate the central question of defendant's liability in order to sustain judicial oversight and involvement every time the defendant satisfies a mere burden of production by suggesting it may now be in compliance with the law.[116] As Justice Breyer's dissent observed, the *Horne* ruling

> [c]reates a dangerous possibility that such orders, judgments and decrees, long final or acquiesced in, will be unwarrantedly subject to perpetual challenge, offering defendants unjustifiable opportunities endlessly to relitigate underlying violations . . . . What else is it doing by putting the plaintiff or the court to the unnecessary burden of reestablishing what has once been decided?[117]

Moreover, although the Court did not address the issue, it is at least possible that once this burden of production is satisfied, the ultimate burden of persuasion may shift back to plaintiffs during litigation over the Rule 60(b)(5) motion.

Again, lower courts' application of the burdens of production and persuasion will determine the precise impact of *Horne* on the future of institutional reform cases. At least one lower court decision to date appears to have applied the ultimate burden of persuasion on plaintiffs. In the unpublished decision of *Basel v. Bielaczyz*,[118] plaintiffs had obtained a favorable consent decree after filing a procedural due process challenge to the timeliness of hearings on applications for state-administered welfare benefits. On defendant's subsequent Rule 60(b)(5) motion to terminate the decree, however, the Eastern District of Michigan applied an expansive interpretation of *Horne* to place the burden of persuasion on the plaintiff to establish a current and ongoing violation of law to justify preserving the decree.[119] The court acknowledged that the plaintiffs had previously filed several contempt motions alleging defendants' noncompliance with the decree, but pointed out that none of these motions had been successful. It then stated that in light of various changes in the policies and practices of

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[116] *See* Kane, *supra* note 59, at 68 ("[A] system of relief that even suggests to litigants that it may be worthwhile to bring such motions should be questioned.").

[117] *Horne*, 557 U.S. at 493 (Breyer, J., dissenting).

[118] Basel v. Bielaczyz, No. 74-40135-BC, 2009 WL 2843906 (E.D. Mich. Sept. 1, 2009).

[119] *Id.* at *6 (citing *Horne* for proposition that "the court must 'ascertain whether ongoing enforcement of the original order [is] supported by an ongoing violation of federal law'" (quoting *Horne*, 557 U.S. at 454)).

the State, "whether the plaintiff class would have viable federal claims today is highly questionable."[120] Given *plaintiff's* failure to prove a current and ongoing violation of law, the district court concluded that dissolution was warranted.

C. Implications of Horne *for the Future of Institutional Reform Litigation*

In this manner, *Horne* and its progeny have made it significantly easier for government-defendants to terminate ongoing decrees in institutional reform cases. At least some lower courts have interpreted *Horne* broadly to require termination of a decree any time the defendant satisfies a burden of production suggesting that it is no longer in violation of law and the plaintiff fails to satisfy the shifted burden of persuasion to prove otherwise. In these cases, termination has been deemed mandatory regardless of whether the defendant complied with the terms of the decree, regardless of whether the decree's objectives had been achieved, and regardless of whether the decree was entered into with the consent of the parties. Lower courts' expansive application of *Horne* suggests that plaintiffs will no longer be able to obtain, or at least preserve, institutional reform decrees that go beyond merely preventing ongoing violations of law; the structural and reparative functions of decrees are now in question.

Moreover, application of the *Horne* standard to consent decrees will mean that plaintiffs who successfully negotiated a consent decree with defendants will no longer be entitled to the benefit of that bargain, because the decree may be terminated to the extent it requires more than a mere cessation of ongoing violations of law. Significantly, this application of *Horne* to consent decrees would also have a negative impact on defendants and the efficiency of the judicial system, because plaintiffs in institutional reform cases would no longer have an incentive to settle cases and would seek to establish liability and obtain court-ordered relief in every case.

In addition, the reduction of the burden on defendants in a Rule 60(b)(5) motion to terminate increases the likelihood that institutional reform decrees will be dissolved prematurely, perhaps even before the defendant achieves compliance with federal law, given the resource constraints of these types of cases. As it is, plaintiffs who file institutional reform cases — cases seeking injunctive relief and generally foregoing claims for money damages — must rely on a handful of public interest organizations or law firms working pro bono

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[120] *Id.* at *8.

to fund and litigate these comprehensive and long-running cases.[121] Such counsel may not be able or willing to devote the necessary resources to repeatedly re-litigate the question of liability,[122] particularly where evidence from the initial liability trial has become stale.[123] Alternatively, they might choose to devote their limited resources to defending against Rule 60(b)(5) motions, thereby declining to file new enforcement actions in other institutional reform cases.[124] Indeed, although an empirical analysis of the precise impact of the *Horne* decision is beyond the scope of this Article,[125] the parallels between *Horne* and the Prison Litigation Reform Act of 1996[126] suggest that, unless confined to its facts and procedural context, *Horne* could significantly curtail the continued viability of institutional reform litigation.

The Prison Litigation Reform Act ("PLRA") expressly sought to cabin the remedial authority of federal courts by curbing judicial intrusion into the operation of state prisons. Of particular relevance to the *Horne* analysis, section 802(a) of the PRLA provides, "In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener" unless "the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right . . . ."[127] Section 802(c)

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[121] The high costs of institutional reform cases and the length of time necessary to monitor compliance with the decree serve to limit the types of attorneys and firms that can litigate these cases. *See, e.g.*, ROSENBERG, *supra* note 3, at 91-93 (discussing the costs of litigation and the importance of the NAACP's involvement in school desegregation cases); Schlanger, *supra* note 5, at 571-72 (discussing the public interest organizations involved in prison reform cases seeking injunctive relief).

[122] *See* Schlanger, *supra* note 5, at 600-01 (discussing funding for plaintiffs' counsel in institutional reform cases).

[123] Professor Margo Schlanger has observed that relitigating the issue of liability in the context of determining whether a decree should be terminated "can create an extremely high hurdle for plaintiffs' lawyers . . . [b]ecause much of their prior preparation will be stale [and] they may need to reassemble a new array of evidence to go to trial." *Id.* at 627-28.

[124] *See id.* at 591.

[125] Tracking structural decrees poses significant research challenges, as decisions are often unreported and conflicts are often resolved through settlement. *See id.* at 569 (noting difficulties in gathering data on court-ordered regulation because they are often "completely unobservable by ordinary case research methods").

[126] Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 802(a), 110 Stat. 1321, 1321-66 (1996).

[127] *Id.* § 802(a), 110 Stat. at 1321-67 to -68 (codified as amended at 18 U.S.C. §§ 3626(b)(1), (3) (2006)). The Act provides that such decrees are subject to termination two years after entry, and every year thereafter, subject to the same

expressly applies these limitations to consent decrees as well as court-ordered injunctive decrees.[128] Lower courts have interpreted these provisions to impose the ultimate burden of persuasion on plaintiff-prisoners to prove an ongoing violation of federal law to defeat termination.[129]

Thus, similar to overbroad interpretations of *Horne*, the PLRA replaces the language of Rule 60(b)(5), permitting termination of a decree where "applying it prospectively is no longer equitable," with language requiring termination of a decree unless "relief remains necessary to correct a current and ongoing violation" of federal law.[130] Further, similar to some lower courts' interpretation of *Horne*, the PLRA's limitations on permissible relief apply to consent decrees as well as court-ordered injunctive decrees. Finally, at least some lower courts have interpreted both the PLRA and *Horne* to impose the ultimate burden of persuasion on whether dissolution is warranted on plaintiffs rather than defendants.

By all accounts, the Prison Litigation Reform Act has been successful in cabining the impact of institutional reform litigation in the context of prison reform. An empirical study conducted by Margo Schlanger found that "[b]y drastically widening the escape route for correctional jurisdictions seeking to terminate court orders," "the PLRA has contributed to a major decline in the regulation of prisons and jails by court order."[131] Other commentators, both sympathetic to and critical of the PRLA, agree.[132] To the extent that *Horne* mirrors provisions of the PLRA, we might expect a similar decline in the number of government institutions subject to federal court oversight in coming years.

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exception. *Id.*

[128] *Id.* § 802(a), 110 Stat. at 1321-66, -68 (codified as amended at 18 U.S.C. § 3626(a), (c)(1) (2006)).

[129] Guajardo v. Tex. Dep't. of Crim. Justice, 363 F.3d 392, 395-96 (5th Cir. 2004) (stating agreement with "the great majority of courts to address this issue"); Skinner v. Lampert, 457 F. Supp. 2d 1269, 1276-77 (D. Wyo. 2006). *But see* Clark v. California, 739 F. Supp. 2d 1168, 1175, 1213 (N.D. Cal. 2010) (concluding that defendants failed to carry their burden to terminate relief under PLRA).

[130] *But see* Tushnet & Yackle, *supra* note 5, at 20-21 (suggesting that PLRA arguably does not alter the standard for dissolution from prior case law).

[131] Schlanger, *supra* note 5, at 602.

[132] SANDLER & SCHOENBROD, *supra* note 4, at 183-92; William C. Collins, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV. 651, 669-70 (2004).

III. TOWARD AN ACCOUNTABLE AND DELIBERATIVE PROCESS FOR REFORM

Regardless of one's views on the desirability of institutional reform litigation, the overbroad reading that lower courts have attributed to *Horne v. Flores* is subject to criticism for categorically amending one of the Federal Rules of Civil Procedure without adhering to the formal rule-amendment process mandated by the Rules Enabling Act. Lower courts' unilateral reinterpretation of Rule 60(b)(5) to significantly compromise, or even foreclose, this model of social reform misses a valuable opportunity to engage with the robust political and scholarly discussions regarding the advantages and disadvantages of institutional reform decrees, and the considerable differences across decrees. In light of these differences, lower courts' categorical extension of *Horne* to all institutional reform decrees without distinction violates the norms of rigorous study, deliberation, and political accountability imposed by the Federal Rules.

In delegating to the Supreme Court the authority to promulgate procedural rules through the Rules Enabling Act of 1934, Congress was cognizant of the risk that the politically unaccountable Court would develop procedural rules to achieve substantive policy goals, a task properly left to the political branches.[133] To protect against such encroachment, the Act prohibits a properly promulgated rule from being amended except through the formal process set forth in the Rules Enabling Act.[134] Specifically, the Act requires that any proposed change to a procedural rule be subject to public comment; approved by committees consisting of procedural scholars, lower court judges, members of the bar, and representatives from the executive branch; adopted by the Supreme Court; and subject to a six-month time period for congressional consideration.[135] Acknowledging the potential impact that procedural rules may have on substantive rights, this process ensures that any proposed change not only be subject to a measure of democratic accountability, but also to a transparent and rigorous process of empirical study and deliberation.[136]

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[133] Burbank, *supra* note 12, 541-42; Miller, *supra* note 12, at 84.

[134] *See* Burbank, *supra* note 12, at 536 ("[O]nce made through 'The Enabling Act Process,' these general rules can only be changed through that process (or by legislation)."); Miller, *supra* note 12, at 84 ("[O]nly the rulemaking machinery or an act of Congress can change a properly promulgated Federal Rule . . . .").

[135] 28 U.S.C. §§ 2071(b), 2073(a), 2074(a) (2006); *see also* Carrington, *supra* note 12, at 605 (describing process of rulemaking in practice).

[136] Carrington, *supra* note 12, at 605 ("This political process had several virtues: transparency, disinterest, access to advice and empirical data, and a measure of

This Part argues that changes to Rule 60(b)(5) should undergo the formal rule-amendment process, which offers significant benefits over the lower courts' current approach of ad hoc judicial decision-making. First, the formal rule-amendment process offers a measure of transparency and democratic accountability, critically important in light of the normatively contentious debate over the legitimacy of this model of social reform. Second, the formal rule-amendment process would allow for careful empirical study of the effectiveness of institutional reform decrees, crucial to determine whether the costs of such decrees outweigh their benefits. Finally, unlike the current categorical approach of some of the lower courts — treating all institutional reform decrees with equal suspicion — the formal rule-amendment process would allow for a nuanced consideration of institutional reform decrees in their myriad forms. The careful deliberation of the rule-amendment process would consider the differences between, for example, decrees enforcing statutory rights and those enforcing constitutional rights, between experimentalist decrees and those following a command-and-control model, or between consent decrees and court-imposed injunctive decrees. As developed more fully below, such decrees vary significantly in terms of their likely effectiveness in reforming government institutions, the risks they pose to federalism and separation-of-powers principles, and their administrative efficiency. For these reasons, efforts to reform Rule 60(b)(5) should take into account these varied considerations.

A. Transparent and Democratically Accountable Debate

In light of the normative contentiousness of the debate over institutional reform litigation, changes to the standard or burden for terminating institutional reform decrees should not be accomplished through judicial fiat. Rather, they should be subject to the transparency and democratic accountability provided by the formal rule-amendment process.

The contest over the legitimacy of institutional reform litigation has occupied scholars almost since the emergence of this model of social reform.[137] This contest typically pits those who would emphasize the

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accountability to all three branches of government."); *see also* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 454 (2008); *The Supreme Court, 2006 Term – Leading Cases*, 121 HARV. L. REV. 305, 313 (2007).

[137] *See, e.g.*, Koski, *supra* note 13, at 793 (noting in 2009 that "in the last three years alone, four full volumes have been published that take a decidedly skeptical, if not outright hostile, view of court intervention in public schooling"). *Compare* HANUSHEK & LINDSETH, *supra* note 4, at 83-117 (questioning democratic legitimacy of

need for political accountability and deference to state and local policymakers, on the one hand, against those who would emphasize the need for judicial enforcement of individual rights and minority interests, on the other.[138]

Opponents of institutional reform litigation have challenged the legitimacy of structural decrees entered by politically unaccountable federal courts in light of the proper allocation of powers in our constitutional system.[139] For example, Ross Sandler and David Schoenbrod have argued that the administration of state and local institutions — be they public schools, prisons, or hospitals — are properly left to the political branches of state and local governments, not the federal judiciary. In this way, structural decrees raise the countermajoritarian concerns of all judge-made law, creating legal standards unconstrained by the traditional mechanisms of democratic accountability.

A related critique of institutional reform litigation raises concerns about the subversion of democratic accountability where elected officials use structural decrees as "political cover" to achieve policies aligned with their personal preferences but for which they do not want to be held politically accountable.[140] As frequently observed, putative defendants sometimes welcome institutional reform litigation because

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institutional reform litigation), *and* SANDLER & SCHOENBROD, *supra* note 4, at 4-9 (same), *with* Chayes, *supra* note 2, at 1313-16 (defending legitimacy of institutional reform litigation), Fiss, *supra* note 2, at 6-7, 29-44 (same), Jeffries & Rutherglen, *supra* note 4, at 1411-13, 1422 (same), Rebell, *supra* note 3, 1529-38 (same), *and* Sabel & Simon, *supra* note 2, at 1100 (same).

[138] Debates over the legitimacy of institutional reform litigation also frequently take on partisan undertones. *See, e.g.*, Ryan, *supra* note 5, at 74-75 (arguing that debate over court involvement in education reform tends to break down along partisan lines); Schlanger, *supra* note 5, at 556-57 (describing contest over institutional reform litigation as one between progressives and conservatives); Tushnet & Yackle, *supra* note 5, at 13-22 (analyzing Republican challenges to institutional reform litigation).

[139] *See generally* SANDLER & SCHOENBROD, *supra* note 4, at 4-5 (criticizing lack of democratic accountability in institutional reform litigation); Gilles, *supra* note 5, at 159-61 (discussing federalism and separation-of-powers concerns over structural reform litigation as voiced by conservatives such as Justice Clarence Thomas and Professor John Yoo, as well as overall political disavowal of "judicial activism").

[140] *See* HANUSHEK & LINDSBETH, *supra* note 4, at 140-41 (describing collusion between plaintiffs and the school systems that serve as putative defendants in education reform litigation); SANDLER & SCHOENBROD, *supra* note 4, at 3-5; Horowitz, *supra* note 4, at 1294-95; *see also* Sabel & Simon, *supra* note 2, at 1093 ("[T]he most plausible separation-of-powers objection to the role of the court . . . is not that it usurped executive responsibilities, but that it allowed the use of its office to give political cover to a governor who should have taken responsibility for the decision on his own.").

a victory for plaintiffs often results in increased budgets and resources for defendants' operations.[141] For example, suppose that a class of students with disabilities sues a superintendent alleging substandard special education services in violation of the Individuals with Disabilities Education Act. The superintendent has an incentive to concede liability and submit to a decree enforceable through the court, as the decree is likely to result in increases in legislative funding for special education programs — increases which, presumably, would have failed through ordinary political processes. These judicially enforceable agreements become immune from subsequent reversal through the normal political process, even after the initial defendant is no longer in office.

Defenders of institutional reform litigation, for their part, counter these charges by arguing that the separation of powers and political independence of the federal judiciary are necessary precisely to protect the rights of politically powerless groups — be they ethnic or racial minorities, language minorities, individuals with disabilities, prisoners, or mental health patients — against majoritarian preferences.[142] In the words of Professor Chayes, "one may ask whether democratic theory really requires deference to majoritarian outcomes whose victims are prisoners, inmates of mental institutions, and ghetto dwellers."[143] This defense of institutional reform litigation views the federal courts as playing a critical role in mitigating the excesses of democracy. Where the executive and legislative branches of state and local government have denied rights to politically vulnerable populations, the need for courts to remediate such denials outweighs the need to defer to majoritarian principles.[144]

This ultimately normative question of whether the cost to democratic accountability outweighs the benefit of robust judicial protection of individual rights and minority interests in institutional reform litigation is undoubtedly a difficult one to resolve. But this very

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[141] *See, e.g.*, Sabel & Simon, *supra* note 2, at 1092 ("[M]ore often than not, agency heads or operations officers welcome the suit or at least concede many of the plaintiffs' allegations."); Parker, *School Desegregation*, *supra* note 36, at 1206 (noting that defendants exhibit a great reluctance to even request dismissal); Schlanger, *supra* note 5, at 562-63 (noting that prison officials are often collaborators in the prison-conditions litigation, hoping that a victory for plaintiffs will increase their budgets).

[142] *See* Chayes, *supra* note 2, at 1307, 1314 (noting that judicial insulation from "narrow political pressures" presents an institutional advantage); Rebell, *supra* note 3, at 1538; *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 74 (1980).

[143] Chayes, *supra* note 2, at 1315.

[144] *See* Jeffries & Rutherglen, *supra* note 4, at 1387.

difficulty counsels against unilateral procedural rulemaking by the judiciary alone. Indeed, the politicized nature of the debate, evident from continuing congressional battles to amend the standards governing institutional reform litigation, render the judiciary's unilateral attempt to resolve the issue through a reinterpretation of one of the Federal Rules of Civil Procedure — rules that are supposed to be substantively neutral — particularly inappropriate.

The passage of the Prison Litigation Reform Act, described in the preceding part, which reduced the standard for terminating institutional reform decrees in prison cases, exemplifies the partisan battle lines in Congress. Republicans urged adoption of the PLRA to restore responsibility over prison administration to state and local policymakers. Senator Robert Dole testified that the act was necessary "to restrain liberal Federal judges who see violations of constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison systems."[145] Senator Spencer Abraham similarly maintained, "In many jurisdictions . . . judicial orders entered under Federal law have effectively turned control of the prison system from elected officials accountable to the taxpayer, and over to the courts. The courts, in turn, raise the costs of running prisons far beyond what is necessary."[146]

Democrats opposed the proposal on the ground that it would unduly compromise judicial protections for prisoners' rights. For example, Senator Edward Kennedy warned that the PLRA "would radically and unwisely curtail the power of the Federal courts to remedy constitutional and statutory violations in prisons, jails, and juvenile detention facilities"[147] and expressed "great concern that the bill would set a dangerous precedent of stripping the Federal courts of the ability to safeguard the civil rights of powerless and disadvantaged groups."[148] The politicized nature of the PLRA debates suggests that determining the appropriate termination standard for institutional reform decrees is ill-suited for unilateral resolution by the democratically unaccountable judiciary.

Indeed, judicial imposition of a PLRA-like termination standard for all institutional reform decrees is particularly inappropriate in light of

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[145] 141 CONG. REC. S14414 (daily ed. Sept. 27, 1995) (statement of Sen. Robert Dole).

[146] 141 CONG. REC. S14419 (daily ed. Sept. 27, 1995) (statement of Sen. Spencer Abraham).

[147] 142 CONG. REC. S2296 (daily ed. Mar. 19, 1996) (statement of Sen. Edward Kennedy).

[148] *Id.* at S2296-97.

Congress's failed attempts to extend the PLRA's standards to cases brought on behalf of more sympathetic constituencies such as schoolchildren or mental health patients. In 1998, Senators Orrin Hatch and Strom Thurmond proposed the Judicial Improvement Act, which, among other things, would mandate termination of all prospective decrees binding state or local officials unless "the federal court makes written findings based on the record that relief remains necessary to correct an ongoing violation of law."[149] Similarly, the proposed Federal Consent Decree Fairness Act,[150] first introduced in 2005 and most recently reintroduced in 2011, would enable state or local government officials to terminate prospective consent decrees within strict time limits (within four years of entry or upon expiration of a predecessor's term of office), unless the plaintiff satisfies a burden of persuasion "to demonstrate that the denial of the motion to modify or terminate the consent decree or any part of the consent decree is necessary to prevent the violation of a requirement of Federal law." To date, however, neither proposal has gained the political support necessary for legislative enactment.

Yet, the lower courts have purported to accomplish what Congress has failed to achieve legislatively, through a unilateral re-reading of Rule 60(b)(5) — replacing that provision's textual commitment to a case-by-case balancing of the equities with a categorical rule mandating termination unless the decree remains necessary to prevent an ongoing violation of federal law. In light of Congress's repeated failure to garner the political support for amending the standard for terminating institutional reform decrees beyond the prison context, the judiciary's unilateral attempt to do so, under the auspices of procedural rule, is particularly suspect. A superior method for considering changes to the standard or burden for terminating institutional reform decrees would be through the open, transparent, and politically accountable process mandated by the Rules Enabling Act.

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[149] 144 CONG. REC. S6187 (daily ed. June 11, 1998); *see also* Steven G. Calabresi, *The Congressional Roots of Judicial Activism*, 20 J. L. & POL. 577, 585 (2004) (proposing that Congress legislate limits to federal district court injunctive authority in institutional reform cases).

[150] H.R. 3041, 112th Cong. (2011). The bill was referred to the Subcommittee on Courts, Commercial and Administrative Law on October 12, 2011. *See* The Library of Congress, THOMAS, *available at* http://thomas.loc.gov/cgi-bin/bdquery/D?d112:1:./temp/~bssjXLm:@@@L&summ2=m& (last visited May 22, 2012).

B. Empirical Study of the Effectiveness of Institutional Reform Decrees

The deliberative process mandated by the Rules Enabling Act would also allow for the rigorous empirical study necessary to determine the relative costs and benefits of institutional reform decrees. Scholars have debated the effectiveness of institutional reform litigation for almost as long as they have debated its legitimacy. Influenced by legal process theories,[151] critics of institutional reform litigation question the institutional capacity of federal courts to achieve systemic reform of state and local bureaucratic institutions, emphasizing the lack of judicial expertise on the relevant policy issues, courts' limited access to information, and the difficulty courts face in monitoring the street-level bureaucrats responsible for actual implementation.[152] Defenders of institutional reform litigation counter by claiming that notwithstanding the institutional limits of the judiciary, federal courts are at least as well equipped to implement meaningful reform as their legislative and executive counterparts.[153]

To date, empirical research on the effectiveness of judicial decrees in reforming public institutions is mixed. For example, Gerald Rosenberg's research suggests that courts have limited ability to improve state and local bureaucracies, while empirical studies conducted by Michael Rebell suggest that courts are more effective than other institutions.[154]

This evidence suggests that the debate over the effectiveness of public law litigation is far from over, and likely will only be resolved, if at all, with further empirical study. Consequently, any future

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[151] *See, e.g.*, Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978) (developing concept of "polycentric" problems ill-suited for judicial resolution).

[152] *See, e.g.*, HANUSHEK & LINDSETH, *supra* note 4, 139-44 (describing institutional limits to judicial capacity to implement effective educational reform); R. Shep Melnick, *Taking Remedies Seriously: Can Courts Control Public Schools?*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN EDUCATION, *supra* note 5, at 17, 24 (describing school systems as closed bureaucracies resistant to judicial reform); *see also* Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2420 (2004); Donald R. Horowitz, *supra* note 4, at 1265.

[153] *See* Koski, *supra* note 13, at 803; Rebell, *supra* note 3, at 1531-32.

[154] *Compare* HANUSHEK & LINDSETH, *supra* note 4, at 145-70 (conducting empirical studies to conclude that courts are ineffective in improving student academic performance), *and* Rosenberg, *supra* note 3 (conducting empirical studies suggesting that courts working independently of the other branches of federal government have limited influence in effectuating national social change), *with* Rebell, *supra* note 3, at 1531-32 (citing studies Rebell conducted with Arthur Block suggesting that courts have been more effective in improving educational opportunities than administrative of legislative institutions).

proposal to amend the standard or burden for terminating institutional reform decrees should consider, and perhaps commission, empirical studies of the effectiveness of judicial decrees in reforming government institutions. The formal rule-amendment process mandated by the Rules Enabling Act, which provides a mechanism for developing and considering exactly these types of empirical studies, should be employed in this context.

C. Nuanced Consideration of Institutional Reform Decrees in Their Myriad Forms

Finally, the formal rule-amendment process would allow for careful consideration of the considerable differences across decrees. Language in the *Horne* opinion suggests that institutional reform litigation against government-defendants pose special federalism and separation-of-powers dangers,[155] and at least some lower courts have interpreted *Horne* to categorically treat all institutional reform cases with the same degree of skepticism and subject to the same new standard for termination without distinction. As a growing body of scholarship indicates, however, not all institutional reform decrees are the same. Some decrees seek to enforce statutory rights, while others seek to enforce constitutional rights; some employ innovative "experimentalist" models, while others employ more traditional "command and control" approaches; some are entered into with the consent of the parties, while others are imposed by the court. These differences significantly impact a decree's effectiveness in reforming public institutions and efficiency, as well as the costs the decree poses to federalism, separation-of-powers, and democratic accountability principles. In light of these differences, it may well be that differing standards for termination should apply to different types of decrees.

1. Decrees to Enforce Statutory Rather than Constitutional Rights

In terms of a threat to the proper allocation of powers, institutional decrees seeking to enforce congressionally-created rights pose fewer federalism and separation-of-powers concerns than those seeking to enforce constitutional rights. In cases enforcing statutory rights, the federal court is properly understood to be enforcing the popular will of Congress, thereby eliminating separation-of-powers concerns. In

[155] Horne v. Flores, 557 U.S. 433, 447-48 (2009) (discussing special concerns of institutional reform litigation); *id.* at 473-74 (Breyer, J., dissenting) (describing the majority as "set[ting] forth special 'institutional reform litigation' standards applicable when courts are asked to modify judgments and decrees entered in such cases").

cases such as those arising under the Equal Educational Opportunities Act or the Individuals with Disabilities Education Act, in which Congress has delegated to the courts the duty to provide substantive meaning to the rights guaranteed therein through the express grant of a private right of action, concerns about judicial intrusion into the legislative function are particularly inapposite.[156] As to federalism concerns, the supremacy of congressional statute over conflicting state and local policies is firmly established. Finally, judicial decisions interpreting a congressional statute are, at least in theory, subject to some measure of democratic accountability, as political displeasure could result in Congress "correcting" a mistaken judicial interpretation of its will through subsequent repeal or amendment of the statute at issue.[157] Justice Breyer's dissent in *Horne* noted this distinction, suggesting that the traditional concerns about institutional reform litigation are more commonly associated with the enforcement of constitutional standards and do not necessarily apply to decrees enforcing federal statutory requirements.[158]

In light of these differences, any proposal to alter the standard or burden for terminating institutional reform decrees should consider the differing costs to federalism and separation-of-powers principles posed by decrees enforcing statutory, as opposed to constitutional, interests. Such consideration might even generate a consensus to impose one standard for terminating decrees enforcing statutory rights and another one for terminating decrees enforcing constitutional interests.

2. Experimentalist Decrees

A second major distinction between institutional reform decrees that should be considered in determining the appropriate standard for

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[156] *See* Chayes, *supra* note 2, at 1314 ("For cases brought under an Act of Congress rather than the Constitution, the problem [of reconciling public law litigation with the majoritarian premises of American political life], formally at least, is not difficult. The courts can be said to engaged in carrying out the legislative will, and the legitimacy of judicial action can be understood to rest on a delegation from the people's representatives."); Koski, *supra* note 13, at 796-97 (noting that separation of powers critique of institutional reform litigation misplaced in cases involving the IDEA, in which Congress crafts an active role for courts to fashion remedies for violations of special education rights); Sabel & Simon, *supra* note 2, at 1090 (noting instances in which legislature has authorized structural relief).

[157] *See* Chayes, *supra* note 2, at 1314 ("[T]he judiciary is also, at least in theory, accountable: if Congress is dissatisfied with the execution of its charge, it can act to modify or withdraw the delegation.").

[158] *See Horne*, 557 U.S. at 496-97.

termination involves the extent to which decrees micromanage the target government institution. In recent years, a number of influential scholars — notably Professors Charles Sabel and William Simon — have observed the emergence of an innovative "experimentalist" model of institutional reform and maintain that this model moots many of the concerns associated with traditional institutional reform decrees.[159]

In the initial desegregation cases, decrees tended to adhere to a top-down "command-and-control approach," in which the court would dictate a series of procedural steps the government-defendant would need to undertake to establish compliance.[160] Through these decrees, the court would often dictate the policies and practices relating to the day-to-day operation of schools, perhaps mandating a particular number of buses or bus routes, or requiring particular teacher-recruiting practices, for example.[161]

Through time, however, a second model emerged, one that focused not on the day-to-day operation of public institutions, but rather on the "inputs" — namely funding levels — committed to the institution. Popularized in the education context with the emergence of the second-wave of school finance cases focusing on educational equity, decrees employing this model typically required the government-defendant to provide a minimum level of funding to the institution or program at issue.[162] The *Horne* case itself involved a decree based on

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[159] Sabel & Simon, *supra* note 2, at 1016; Jeffries & Rutherglen, *supra* note 4, at 1422; Koski, *supra* note 13, at 789; Liebman & Sabel, *supra* note 4, at 184; Rebell, *supra* note 3, at 1539-41.

[160] *See* Jeffries & Rutherglen, *supra* note 4, at 1411-12 (describing traditional "command-and-control" type decrees); Sabel & Simon, *supra* note 2, at 1019-21 (same).

[161] *See* Sabel & Simon, *supra* note 2, at 1024 ("[O]nce the courts saw improving educational quality as a remedial goal, almost every aspect of education policy was potentially relevant. When defendants were recalcitrant, the courts tended to increase both the scope and the detail of their orders. Thus, consent decrees often took the form of highly detailed regulatory codes embracing vast provinces of administration."). For an example of a federal decree employing this type of approach in more recent years, see e.g., Consent Decree, AB v. Rhinebeck Central Sch. Dist., No. 03 Civ. 3241 (S.D.N.Y. Mar. 24, 2006) (requiring defendant to retain an expert, conduct a school climate assessment, provide a mandatory education and training program for school board members, employees, and students, and develop a comprehensive plan to prevent, identify, and remediate harassment and discrimination on the basis of sex), *available at* http://www.justice.gov/crt/about/edu/documents/rcsdor.pdf.

[162] *See* Heise, *State Constitutions*, *supra* note 13, at 1157-62.

this model, mandating the state of Arizona to provide funding for ELL programs that was reasonably related to actual needs.[163]

Most recently, a number of scholars have observed that decrees have begun to adopt a third "experimentalist" approach.[164] As described by Professors Sabel and Simon, the purpose of these decrees is not to micromanage the daily operation of institutions, nor is it to dictate the level of resources that must be devoted to them. Rather, the purpose is to destabilize the status quo to permit "new publics" that are accountable to traditionally disenfranchised groups to emerge.[165] The role of the court, then, is merely to convene these stakeholders who negotiate, under principles of collaboration and consensus, substantive goals in the form of outcome performance measures of compliance.[166] They describe:

> [E]xperimentalist regulation combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability. In the most distinctive cases, the governing norms are general standards that express the goals the parties are expected to achieve – that is, outputs rather than inputs. Typically, the regime leaves the parties with a substantial range of discretion as to how to achieve these goals. At the same time, it specifies both standards and procedures for the measurement of the institution's performance. Performance is measured both in relation to parties' initial commitments and in relation to the performance of comparable institutions.[167]

Scholars contend that this new experimentalist model moots many of the traditional critiques against institutional reform litigation.[168] Concerns regarding the limited institutional capacity of the judiciary in developing policy solutions are mitigated by the fact that the court is not, in experimentalist decrees, imposing a top-down decree; rather, the officials responsible for implementation retain discretion to determine the particular policies to be employed in order to achieve

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[163] *See also, e.g.*, Blackman v. District of Columbia, 454 F. Supp. 2d 1 (D.D.C. 2006) (approving consent decree requiring government-defendant to provide $15 million to remedy systemic violations of the IDEA in the provision of special education benefits in the District of Columbia).

[164] *See* sources cited *supra* note 159.

[165] *See* Sabel & Simon, *supra* note 2, at 1020.

[166] *Id.* at 1019.

[167] *Id.*

[168] *Id.* at 1016, 1082-1100.

the consensually developed performance goals. Similarly, the critical role played by these officials in shaping the remedy minimizes the concern regarding judicial encroachment on state and local policymaking functions: again, the court is not the institution determining the particular policies to be employed; rather, its role is limited to facilitating an ongoing dialogue between stakeholders. Finally, experimentalist decrees arguably mitigate concerns about the use of decrees as "political cover" to obtain the preferred policy preferences of elected officials who do not want to be held politically accountable for those preferences. They do so by imposing transparency in the setting of policymaking goals and accountability for their achievement. In these ways, proponents argue that experimentalist decrees actually enhance democratic accountability.[169]

Future attempts to modify the standard or burden for terminating institutional reform decrees should determine whether the cost-benefit calculus associated with experimentalist decrees is sufficiently different from that associated with command-and-control or other types of decrees to warrant applying a different standard. Such study might conclude that while the costs (in terms of effectiveness, democratic accountability, etc.) associated with command-and-control decrees outweigh their potential benefits (in terms of enforcement of individual rights), the same is not true for experimentalist decrees. If so, it may well be that these different types of decrees should be subject to different standards for termination.

3. Consent Decrees

A third major distinction among institutional reform decrees is between those entered with the consent of the parties and those imposed by the court. These two categories threaten democratic accountability to differing degrees and pose a dramatically different calculus for the efficient administration of the judicial system. For these reasons, it is not at all clear that these two types of decrees should be subject to the same termination standard.

As others have observed, institutional reform decrees entered with the consent of the parties, especially those imposed prior to a finding of liability, pose the greatest threat to principles of democratic accountability. In these cases, putative defendants are most likely to have colluded with plaintiffs to design a decree that reaches far beyond the defendants' legal obligations but aligns with both groups' private policy preferences. By contrast, in cases in which defendants have

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[169] *Id.* at 1093-94.

litigated and lost on the question of liability, defendants are less likely to have negotiated a sweetheart deal with plaintiffs.[170] Justice Breyer's dissent underscored this distinction in *Horne*, pointing out that the decree imposed in that case — by the court after a finding of liability — did not implicate the same concerns about party collusion as ordinary consent decrees.[171] These differences suggest that decrees entered with the consent of the parties, perhaps even more than court-ordered injunctions, compromise principles of democratic accountability in a manner that justifies an easing of the standard and burden for terminating them.

Yet, extending the *Horne* rule — requiring termination of a decree unless the court finds it remains necessary to correct an ongoing violation of law — to consent decrees imposes significant costs, not only to the parties, but also to the judicial system as a whole. As the debates surrounding the proposed Consent Decree Fairness Act demonstrate, such a rule would discourage settlements because plaintiffs would have an incentive to proceed through trial on the issue of both liability and remedy. Defendants, for their part, would spend their limited resources on litigating these cases through trial, rather than devoting those resources to improving their institutions; indeed, litigation might ultimately cost more than implementing a consent decree. And, the court system as a whole would be required to accommodate the resulting increase in workload.[172]

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[170] *See generally* Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295 (1987) (discussing special problem of consent decrees).

[171] Justice Breyer noted in his dissent:

> [N]or is the decree at issue here a 'consent decree' as that term is normally understood in the institutional litigation context . . . . [T]he State vigorously contested the plaintiffs' basic original claim . . . presented proofs and evidence to the District Court designed to show that no violation of federal law had occurred, and it opposed entry of the original judgment and every subsequent injunctive order, save the relief sought by petitioners here. I can find no evidence, beyond the Court's speculation, showing that some state officials 'welcomed' the District Court's decision 'as a means of achieving appropriations objectives that could not [otherwise] be achieved.

Horne v. Flores, 557 U.S. 433, 489 (Breyer, J., dissenting).

See Jeffries & Rutherglen, *supra* note 4, at 1413-14 ("[A]s nominal defendants, [state officials] might take positions anywhere along a spectrum from active opposition to tacit support of plaintiffs' claims.").

[172] *See Federal Consent Decree Fairness Act: Hearing on H.R. 1229 Before the H. Comm. on the Judiciary*, 109th Cong. 13 (2005) (statement of Hon. Nathaniel Jones, Blank Rome LLP); Letter from Thomas Susman, Dir., Am. Bar Assoc., to Howard Coble, Chairman, Subcomm. on Courts, Commercial and Admin. Law 2 (Feb. 1,

For these reasons, consideration of the question of whether the *Horne* standard should apply to consent decrees as well as court-ordered injunctive relief would benefit from careful deliberation and study. The very different costs and benefits associated with consent decrees as opposed to injunctive decrees might well warrant application of a different standard for terminating these two types of decrees.

CONCLUSION

The purpose of this Article is not to resolve the long-standing debate over the appropriate role of courts in reforming state and local government institutions, or the efficacy or legitimacy of institutional reform litigation as a whole. Whatever one's views on these important issues, this Article contends that process matters. The judiciary's use of the Federal Rules of Civil Procedure to side with the opponents of institutional reform litigation in a manner that circumvents the democratic accountability and careful deliberation required by the Rules Enabling Act fits poorly within our constitutional system.

2012), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012feb1_federalconsentdecreefairnessact.authcheckdam.pdf; *see also* Harold Baer, *A Necessary and Proper Role for Federal Courts in Prison Reform*, 52 N.Y.L. SCH. L. REV. 3, 61 (2007-2008).