NOTES

A Barrier to Child Welfare Reform: The Supreme Court's Flexible Approach to Federal Rule of Civil Procedure 60(b)(5) and Granting Relief to States in Institutional Reform Litigation

Rachel Dunnington[*]

I. INTRODUCTION

In 1998, thirteen foster care children in Washington State sued the state, the Department of Social and Health Services (DSHS), and the Secretary of DSHS.[1] The lead plaintiff, twelve-year old Jessica Braam, had been placed in thirty-four different foster homes by the time the lawsuit was filed.[2] Other plaintiffs included children who had been moved to numerous homes, placed in inappropriate and unsafe care, denied necessary mental health treatment, and separated from their siblings.[3] The class grew to include foster children who had experienced or who were at risk of experiencing three or more placements.[4]

These plaintiffs claimed that the State's practices violated the children's substantive due process rights to be free from unreasonable risk of

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[*] J.D. Candidate, Seattle University School of Law, 2013; B.A., International Studies and Spanish, Willamette University, 2009.

1. Columbia Legal Services, *Braam 101*, BRAAM KIDS (Sept. 2007), braamkids.org/552.html.

2. *Id.*

3. Fifth Amended Complaint at 1–8, Braam *ex rel*. Braam v. State, 81 P.3d 851 (Wash. 2003) (No. 98 2 01570 1). Other harm suffered by plaintiff-children included children placed with known child molesters, children inappropriately placed in drug rehab with adult addicts and in inappropriate mental facilities, children sleeping on the floors of DSHS offices because they were without placement, and children placed with parents who, unaware of and unable to care for the child's behavioral issues, responded inappropriately, such as twisting one child's nipples until they bled and making him eat hot peppers. *Id.*

4. *Braam*, 81 P.3d at 855.

harm. The Washington Supreme Court agreed with the plaintiffs,[5] and after mediation subsequent to that decision, the parties entered into a consent decree that is still in force today.[6] A consent decree is a court decree that all parties agree to.[7] The terms in a consent decree are binding on the parties and are fully enforceable by the court.[8] Through a consent decree, the parties in *Braam* created an oversight panel that was to be responsible for monitoring progress throughout the life of the decree.[9]

The Braam panel continuously monitored the decree, and on October 31, 2011, it was modified and extended by twenty-six months.[10] The modified decree recognizes that although the State of Washington, DSHS, and the Children's Administration have made significant progress, additional foster care system reform is needed and continued court oversight is the correct method to reform the foster care system.[11] The *Braam* settlement is an example of court oversight resulting from a consent decree entered into between plaintiffs—a large class of foster children—and a child welfare agency. Litigation and the agreement have spanned over a decade but have significantly and positively impacted the child welfare system in Washington State.[12]

As of June 2011, twenty-one child welfare consent decrees were in place, operating in sixteen different states.[13] An additional seven states

5. *Id.* at 865 (holding that "foster children have substantive due process rights to be free of unreasonable risk of harm, and a right to reasonable safety" and that "[a]lleged violations of that right will be measured on the professional judgment standard").

6. *Braam 101*, *supra* note 1.

7. BLACK'S LAW DICTIONARY 471 (9th ed. 2009).

8. AMY KOSANOVICH & RACHEL MOLLY JOSEPH, CHILD WELFARE CONSENT DECREES: ANALYSIS OF THIRTY-FIVE COURT ACTIONS FROM 1995 TO 2005 2 (Child Welfare League of America 2005). Consent decrees usually arise out of a class action lawsuit and are often the goal of institutional reform litigation. Many subjects and classes of underrepresented and underserved populations use litigation and consent decrees to achieve social change.

9. COLUMBIA LEGAL SERV., THE BRAAM IMPLEMENTATION PLAN: FURTHERING LEGISLATIVE MANDATES (2007), *available at* http://braamkids.org/552.html. The decree established six main focus areas: 1) placement stability, 2) mental health, 3) foster parent training and information, 4) unsafe and inappropriate placements, 5) sibling separation, and 6) services to adolescents. *Id.*

10. *Braam Settlement Agreement*, WASH. STATE DEP'T OF SOC. & HEALTH SERVICES, http://www.dshs.wa.gov/ca/about/imp_settlement.asp (last visited Nov. 11, 2011).

11. *Id.*

12. Historically, prison reform has also used institutional reform litigation giving rise to consent decrees to require local governments to change prison conditions such as overcrowding. *See, e.g.*, Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367 (1992).

13. KAI GUTERMAN, CONSENT DECREE MATRIX 2 (Casey Family Programs 2011). The states currently operating under a court consent decree include: Arizona, Connecticut, the District of Columbia, Georgia, Illinois (three cases), Maryland, Michigan, Mississippi, New Jersey, New York, New York City (four cases), Ohio, Rhode Island, and Texas.

were engaged in litigation likely to give rise to consent decrees.[14] Most decrees that have been active over the last two decades have addressed states' failures to properly train and license foster parents; place children in adequate and safe foster and group homes; properly report, investigate, and address abuse and neglect incidents; provide needed medical, dental, and mental health services to foster children; ensure adequate parent-child or sibling visitation; ensure social workers have manageable case-loads, training, and supervision; and provide children and families with adequate case planning and review.[15]

Between 1995 and 2005, eleven states successfully complied with the terms of consent decrees governing their respective child welfare agencies, and thus those decrees were dismissed.[16] Many of those states enacted legislation or policies as a result of the decrees, and some continue to have advisory groups monitor the child welfare agencies' activities.[17] In other states, decrees have been modified because of partial compliance by the state or state agency.[18] Further still, some states made significant changes to their child welfare systems even though no settlement or consent decree was entered.[19] Increased awareness and accountability are collateral goals of institutional reform actions; in this regard, institutional reform litigation brought some deficiencies to the surface even when no consent decree was entered into. As shown by the large number of existing decrees that govern states and the outcomes they eventually obtain, class action lawsuits can effectuate large-scale systemic change for child welfare systems. Plaintiffs in these cases use the court system as an avenue for social change, asking the courts to bind states, state agencies, and local officials to commitments for positive change affecting the lives of children.

Yet, in a period of recession, state budget crises, and a conservative court system, consent decrees in child welfare systems are under attack. Most notably, the United States Supreme Court has diminished the effectiveness of consent decrees by placing concerns for states' rights above

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14. *Id.* Those states and counties currently in litigation include: California, Los Angeles County, Massachusetts, Nevada, Oklahoma, Rhode Island, and Texas.

15. KOSANOVICH & JOSEPH, *supra* note 8, at 5.

16. *Id.* The states that successfully exited their consent decrees include: Arkansas, Florida, Hawaii, Idaho, Kansas, Michigan, Minnesota, New Hampshire, New Mexico, New York, and North Carolina.

17. *Id.*

18. *Id.* at 6; *see also* Braam *ex rel.* Braam v. State, 81 P.3d 851 (Wash. 2003).

19. KOSANOVICH & JOSEPH, *supra* note 8, at 7 (citing *Foster Care Reform Litigation Docket*, NATIONAL CENTER FOR YOUTH LAW (2000), http://www.youthlaw.org/publications/fc_docket/alpha/all_cases_printout/).

the statutory and constitutional violations that result in harm to children. In a recent decision, *Horne v. Flores*,[20] the Court demanded a broader and more flexible application of Federal Rule of Civil Procedure (Rule) 60(b)(5). In doing so, the Court opened the door for states to seek relief from court-enforced agreements like consent decrees. This decision undermines the use of institutional reform litigation as a means of fixing the child welfare system and thus deals a further blow to the nation's most vulnerable citizens.

This Note will discuss *Horne*'s impact on consent decrees stemming from institutional reform litigation in child welfare. Part II will explore the history of Rule 60 as it applies to final judgments, and specifically consent decrees. Additionally, Part II discusses the Supreme Court's application of Rule 60(b)(5) in *Horne*. Part III will critique the Court's decision for providing a more flexible standard that weighs federalism concerns above the merits of the case. Part IV discusses the importance of consent decrees in child welfare and proposes suggestions for their ongoing use to be effective. Finally, Part V provides a brief conclusion.

II. FEDERAL RULE OF CIVIL PROCEDURE 60(B)(5) AND *HORNE V. FLORES*

Due to the sanctity of final judgments, Rule 60 is unique because it allows for the modification or vacation of a final judgment. The rule is designed to remove the uncertainties and limitations of ancient remedies while preserving all of the various kinds of relief that those remedies afforded. This Note first discusses the plain language of the rule. This analysis is followed by an account of *Rufo v. Inmates of Suffolk County Jail*,[21] the leading case before *Horne* to dictate what standard is to be used when courts decide a Rule 60(b)(5) motion. Lastly, this Part discusses the majority's holding in *Horne.* As the current Supreme Court is growing increasingly hostile to the use of institutional reform litigation and continued court oversight, the *Horne* case has provided an additional avenue for defendants to get out from under a judgment.

A. Federal Rule of Civil Procedure 60(b)(5)

Rule 60(b)(5) attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that jus-

20. 557 U.S. 433 (2009).
21. 502 U.S. 367 (1992).

tice must be done.[22] In general, Rule 60 regulates the procedures by which a party may obtain relief from a final judgment.[23] Specifically, Section (b)(5) provides that a court may relieve a party from a final judgment, order, or proceeding if the judgment has been satisfied; if it is based on an earlier judgment that has been reversed or vacated; or if applying it prospectively is no longer equitable.[24]

Additionally, the rule provides that a party may ask a court to vacate or modify a judgment or order if a "significant change either in factual conditions or in law" renders continued enforcement "detrimental to the public interest."[25] The party seeking relief bears the burden of establishing that changed circumstances warrant relief.[26] Once the party carries that burden, a court abuses its discretion when it refuses to modify an injunction or consent decree in light of such changes.[27]

B. Rufo v. Inmates of Suffolk County Jail

Before *Horne*, the leading case involving the appropriate standard for reopening, modifying, or setting aside a judgment on the ground that "applying it prospectively is no longer equitable" was *Rufo v. Inmates of Suffolk County Jail*.[28] While *Rufo* established a flexible standard, the Court held that "it does not follow that a modification will be warranted in all circumstances . . . . [A party may obtain relief when it is no longer equitable,] not when it is no longer convenient to live with the terms of a consent decree."[29] Furthermore, the *Rufo* court established that "[m]odification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more

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22. 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §2851 (2d. ed. 1995).

23. *Id*.

24. FED. R. CIV. P. 60(b)(5).

25. *Horne*, 557 U.S. at 447 (quoting *Rufo*, 502 U.S. at 384).

26. *Id*.

27. *Id.* (citing Agostini v. Felton, 521 U.S. 203, 215 (1997)).

28. *Rufo*, 502 U.S. at 367. In this institutional reform litigation case, the government was seeking to modify a consent decree that required reform of a constitutionally deficient jail. Among the requirements in the decree, the jail had to provide single occupancy cells for pretrial detainees. The petitioner sheriff moved to modify the decree to allow double bunking in a certain number of cells because of a significant increase in the number of incarcerated persons. *Id.*; *see also* 12 JOSEPH T. MCLAUGHLIN, MOORE'S FEDERAL PRACTICE § 60.47 (2)(a) (2001).

29. *Rufo*, 502 U.S. at 383. Additionally, the court found:

> A consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law. But modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent.

Id. at 388. However, this aspect of the rule is not at issue here.

onerous" or when "a decree proves to be unworkable because of unforeseen obstacles . . . or when enforcement of the decree without modification would be detrimental to the public interest."[30]

Once a moving party has met its burden of establishing a change in fact or law warranting modification of a consent decree, the analysis shifts, and the "district court should determine whether the proposed modification is suitably tailored to the changed circumstance."[31] Regarding this step of the analysis, the *Rufo* Court warns that a modification must not create nor perpetuate a constitutional violation.[32] Additionally, a consent decree is a final judgment that may be reopened only to the extent that equity requires; therefore, a proposed modification should not rewrite a consent decree so that it merely conforms to the constitutional floor.[33]

Next, the Court recognized the financial and political limitations of local governments, but also highlighted the strong public interest(s) often present in impact litigation[34] cases. For example, the Court recognized that state and local officers in charge of institutional litigation may agree to do more than what is required by the Constitution to settle a case and avoid further litigation, but a court should keep the public interest in mind when ruling on a request to modify.[35] Additionally, the Court legitimated government concerns surrounding financial constraints, but also noted that "[f]inancial constraints may not be used to justify the creation or perpetuation of constitutional violations."[36] In conclusion, the *Rufo* Court held that "[u]nder the flexible standard we adopt today, a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the pro-

30. *Id.* at 384. In addition, the court found that litigants are not required to anticipate every exigency that could arise during the life of a consent decree; however, modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree. *Id.* at 385.

31. *Id.* at 391.

32. *Id*. In *Rufo*, petitioners argued that double bunking inmates would be constitutional. Respondents countered that double bunking at the new jail would violate the constitutional rights of pretrial detainees. The Court remanded, concluding that the modification should not be granted if the reviewing court finds double bunking unconstitutional. *Id.*

33. *Id.*

34. In this context, impact litigation refers to the use of the court system to obtain relief for groups of people or to change entire systems through litigation. Attorneys who engage in impact litigation strategically bring cases to obtain systemic relief, instead of relief just for their clients. For example, the American Civil Liberties Union (ACLU) often engages in impact litigation.

35. *Rufo*, 502 U.S. at 392.

36. *Id*. at 392–93.

posed modification is suitably tailored to the changed circumstance."[37] In *Horne*, the Court used this flexible approach when determining whether the lower federal courts abused their discretion when denying the petitioners' Rule 60(b)(5) motion to vacate the standing injunction.[38]

C. Horne v. Flores

In 2009, the Supreme Court granted certiorari in *Horne v. Flores* to revisit the issue of when defendants could obtain relief from final judgments under Rule 60(b)(5). In *Horne,* English Language Learner (ELL) students in the Nogales Unified School District (Nogales) and their parents filed a class action lawsuit, alleging that the state of Arizona was violating the Equal Educational Opportunities Act (EEOA) by failing to take appropriate action to overcome language barriers.[39] In 2000, the case finally went to trial, and the U.S. District Court for the District of Arizona concluded that defendants violated the EEOA because the amount of funding the state allocated for the special needs of ELL students was "arbitrary and not related to the actual funding needed to cover the costs of ELL instruction in Nogales."[40] As a result, the Court entered a declaratory judgment with respect to Nogales, and in 2001, the judgment was extended to apply to the entire state.[41] Defendants did not appeal the district court's order.[42]

After the final judgment, petitioners repeatedly sought relief from the district court's orders, on the basis that subsequent legislative acts warranted relief from the consent decree, but to no avail.[43] The timeline after the 2000 injunction was as follows. First, in 2006, the Arizona Legislature passed House Bill (HB) 2064, which increased ELL funding.[44] In light of the passage of HB 2064, the legislators and superintendent, as

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37. *Id.* at 393. It is important to note that the *Rufo* Court developed this flexible standard for when a party seeks to *modify* a consent decree. In contrast, in *Horne*, the petitioners were motioning to vacate an agreement in its entirety.

38. *See* Horne v. Flores, 557 U.S. 433 (2009).

39. Flores v. State, 172 F. Supp. 2d 1225, 1226 (D. Ariz. 2000); Equal Education Opportunities Act of 1974 (EEOA), 20 U.S.C. § 1703(f). The relevant portion of the EEOA states: "No State shall deny equal education 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 instructional programs." *Id.*

40. Horne v. Flores, 557 U.S. 433, 441 (2009); *see also Flores*, 172 F. Supp. 2d at 1239.

41. Flores v. State, No. CIV. 92–596TUCACM, 2001 WL 1028369 (D. Ariz. June 25, 2001).

42. *Horne*, 557 U.S. at 441.

43. *Id*. at 439.

44. *Id.* at 442. HB 2064 was designed to implement a permanent funding solution to the problems identified by the district court in 2000. *Id.* HB 2064 was implemented after Arizona acquired multiple fines from the district court—up to two million dollars per day—after the court found Arizona in contempt for failing to appropriately fund the ELL program as mandated by the court. *Id.*

new petitioners, moved to purge the contempt order; in the alternative, they moved for relief under Rule 60(b)(5). The district court denied the motion.[45] The Ninth Circuit vacated the district court's order and remanded for an evidentiary hearing to determine whether Rule 60(b)(5) relief was warranted.[46]

On remand, the district court denied the motion because the funding was still insufficient. On appeal, the Ninth Circuit affirmed, holding that the progress made did not warrant relief because petitioners had not shown that there were no longer incremental costs associated with ELL programs in Arizona, or alternatively, that Arizona had altered its funding model.[47] Additionally, the court rejected the argument that the enactment of the No Child Left Behind Act (NCLB) of 2001 constituted a changed legal circumstance that warranted Rule 60(b)(5) relief.[48] The Supreme Court granted certiorari to address a state's obligation under the EEOA and the nature of the inquiry that is required when parties seek relief under Rule 60(b)(5).[49]

The Court looked extensively at the burdens of institutional reform litigation on a state and its systems, specifically the education system. First, the Court noted that injunctions often remain in force for many years, and the passage of time frequently brings about changed circumstances. These changed circumstances may include changes in the nature of the underlying problem, changes in the governing law or its interpretation by the courts, or new policy insights that warrant reexamination of the original judgment.[50] Second, the Court held that institutional reform injunctions often raise sensitive federalism concerns and can involve areas of core state responsibility, such as public education.[51] Finally, the

45. *Id.* at 443–44. The district court found that HB 2064 was flawed for three reasons: 1) $80 student increase was not rationally related to effective ELL programming; 2) two-year limit on funding for each ELL student was irrational; and 3) HB 2064 violated federal law by using federal funds to "supplant" rather than "supplement" state funds. *Id.* at 444.

46. *Id.* at 444. The Ninth Circuit remanded because the district court did not initially address petitioner's Rule 60(b)(5) claim that changed circumstances rendered continued enforcement of the original declaratory judgment order inequitable. *Id.*

47. *Id.*

48. Flores v. Arizona, 516 F.3d 1140, 1156, 1169 (9th Cir. 2008).

49. *Horne*, 557 U.S. at 445.

50. *Id.* at 448.

51. *Id.* (citing Missouri v. Jenkins, 515 U.S. 70, 99 (1995) ("recogniz[ing] that local autonomy of school districts is a vital national tradition, and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution")).

Court reiterated that federalism concerns are heightened when a federal court decree affects state or local budget priorities.[52]

The Court further held that the dynamics of institutional reform litigation differ from those of other cases. Public officials sometimes consent to or refrain from opposing decrees that go beyond what is required by federal law.[53] Additionally, 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. Moreover, overbroad or outdated consent decrees can limit officials' abilities to respond and fulfill their duties.[54] Finally, the Court reiterated that in the past, the Supreme Court has held that courts must take a "flexible approach" to Rule 60(b)(5) motions addressing such decrees.[55] Therefore, federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate federal law or does not flow from such a violation.[56]

Applying the facts of *Horne*, the Court found that the lower courts used a heightened standard that paid insufficient attention to federalism concerns. Rather than inquiring broadly into whether changed conditions in Nogales provided evidence of an ELL program that complied with the EEOA, the district court focused solely on whether increased ELL funding complied with the original declaratory judgment order.[57] Similarly, the Supreme Court criticized the Ninth Circuit for focusing on the defendants' failure to appeal the original 2000 order, rather than evaluating the Rule 60 motion based on *Rufo*. The Court's analysis asked only whether a change in factual conditions or in law renders continued enforcement of the judgment detrimental to the public interest.[58] In reality, Rule 60(b)(5) contains a disjunctive "or," and that satisfaction of an earlier judgment is one of the enumerated bases for relief, but not the only basis for relief.[59] The Court added that the EEOA leaves state and local educational authorities a substantial amount of latitude in choosing how

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52. *Id.* The Court held that "[s]tates and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs." *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 450; *see also* Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 381 (1992).

56. *Horne*, 557 U.S. at 450 (citing Milliken v. Bradley, 433 U.S. 267 (1977)).

57. *Id*. at 450.

58. *Id*. at 453.

59. *Id.* at 454 (citing FED. R. CIV. P. 60(b)(5) ("[T]he court may relieve a party . . . [if] 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.") (emphasis added)).

their court-ordered obligation is met.[60] Finally, the Court concluded that the district court erred by asking only whether petitioners had satisfied the original declaratory judgment through increased funding, thereby abusing its discretion.[61]

In conclusion, the *Horne* Court held that the lower courts misperceived both the nature of the obligation imposed by the EEOA and the breadth of the inquiry called for under Rule 60(b)(5). The Court remanded for a proper examination of at least four important factual and legal changes that may warrant granting relief from the judgment: Arizona's adoption of a new ELL instructional methodology,[62] Congress's enactment of NCLB,[63] structural and management reforms in Nogales,[64] and increased overall education funding.[65]

III. CRITIQUE

The dissent drew principal conclusions to undermine the majority's conclusion that the district court only considered the amount of funding

60. *Id.* at 454–55 (citing Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) ("We think Congress' use of the less specific term, 'appropriate action,' rather than 'bilingual education,' indicates that Congress intended to leave state and local authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA.")).

61. *Id.* at 455.

62. *See id.* at 460–61. ELL instruction in Nogales changed in 2003 from instruction based primarily on bilingual education to a "structured English immersion" (SEI) approach. The Court found there to be documented evidence that SEI is a better approach and that through HB 2064, the legislature created an Arizona English language learners task force. On remand, the Court ordered that all of this evidence be considered to decide if it constitutes a significantly changed circumstance that warrants relief. *Id.*

63. *Id.* at 461–62. Petitioners argue that through compliance with NCLB, the state has established compliance with the EEOA because the Federal Department of Education approved Arizona's plan. Petitioners argue that this is evidence that the state has taken appropriate action to overcome language barriers within the meaning of the EEOA. *Id.*

64. *Id.* at 465–66. Structural and management reforms in Nogales, including reduced class sizes, improved teacher quality, and uniform textbook and curriculum planning (among other things), were implemented by then Superintendent Kelt Cooper. *Id.* The Supreme Court found that their import was not recognized by the Ninth Circuit or the district court. Finally, the Court found that, "[e]ntrenched in the framework of incremental funding, both courts refused to consider that Nogales could be taking 'appropriate action' to address language barriers even without having satisfied the original order." *Id.*

65. *Id.* at 468–69. The original judgment noted five sources of funding that collectively financed education in the state: state's base level funding, ELL incremental funding, federal grants, regular district and county taxes, and special voter-approved taxes. *Id.* at 468. "All five sources have notably increased since 2000." *Id.* The Supreme Court found the Ninth Circuit in clear legal error when they found that it was not an appropriate step for the petitioners to take funding out of other programs and put it into ELL programs. *Id.* at 469. The Supreme Court noted that the EEOA does not require any particular level of funding, and it does not require it to come from any specific source. *Id.* Additionally, the EEOA does not give the federal courts authority to judge whether a state is providing appropriate instruction in other subjects. *Id.*

when evaluating the Rule 60 motion.[66] First, the dissent concluded that "the Rule 60(b)(5) 'changes' upon which the district court focused included the 'changed teaching methods' and the 'changed administrative systems' that the Court criticize[d] the district court for ignoring."[67] In this same regard, contrary to the majority's differing assertions, the lower courts did examine structural and management reforms in Nogales when evaluating the 60(b)(5) motion.[68] Similarly, on remand, the majority wanted the district court to examine whether compliance with the NCLB substitutes as compliance with the EEOA.[69] However, neither party ever argued that the district court should take account of the types of changes proposed by the majority, and therefore the district court did not commit legal error.[70] Finally, the Court suggested that the lower courts did not properly examine an overall increase in the education funding available in Nogales.[71] Again, Justice Breyer adamantly questioned the majority's characterization of the district court's analysis as clear legal error; he argued that, in reality, the district court reviewed the increased funding, but the majority disagreed with its conclusion.[72]

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66. *Id.* at 456.

67. *Id.* at 482–83 (Breyer, J., dissenting). For example, the dissent emphatically pointed out that two of the eight days of evidentiary hearings were devoted to the State's claim that focused on the adoption of the new English Immersion programming. *Id.* at 498–99. The district court recognized the advances and acknowledged that the state had taken steps, but that many of the new standards were still evolving and it would be premature to make an assessment of some of these changes. *Id.* at 499 (citing Flores v. Arizona, 480 F. Supp. 2d 1157, 1160 (2007)). Additionally, in his dissent, Justice Breyer hypothesized that perhaps the majority did not mean to suggest that the lower courts failed to examine these changes, but that they came to the wrong conclusion. *Id.* at 500. This judgment included a host of fact-related inquiries that warranted deference to the district court. *Id.*

68. *Id.* at 504–05 (Breyer, J., dissenting) (arguing that the majority disagreed with the district court's conclusion and once again, that the Court failed to give deference to the district court's fact-related judgments).

69. *Id.* at 501 (Breyer, J., dissenting) (agreeing with the Ninth Circuit "that because of significant differences in the two statutory schemes, compliance with NCLB will not necessarily constitute 'appropriate action' under the EEOA").

70. *Id.* at 501–03 (Breyer, J., dissenting). The majority suggested that the lower courts wrongly failed to take account of four other ways in which the new Act is significant: 1) its prompting significant structural and programming changes; 2) its increases in federal funding; 3) its assessment and reporting requirements; and 4) its shift in federal education policy. *Id.* at 463–64 (citing majority opinion). However, the Court fails to follow the principle that it only reviews the district court's decision for an abuse of discretion. A reviewing court must not substitute its judgment for that of the district court. *Id.* at at 501–03. The dissent argues that where, as here, entitlement to relief depends heavily on fact-related determinations, deference should be accorded to the district court, and the power to review the district court's decision should seldom be called into action unless the Rule 60 standard appears to have been grossly misapplied. *Id.* (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 490–91 (1951)).

71. *Id.* at 509 (Breyer, J., dissenting).

72. *Id*. "The question here is whether the State has shown that its new funding program amounts to a 'change' that satisfies subsection (f)'s [of the EEOA] requirement. The District Court

The majority and dissent agreed that *Rufo's* flexible standard for relief applies; however, the action in *Rufo* was for a modification and not a setting aside of a judgment.[73] According to Moore's Federal Practice,[74] courts normally only set aside a judgment if the moving party shows that the decree has served its purpose, and there is no longer any need for the injunction.[75] For example, on other occasions, the Supreme Court has held that "[a] decree may be changed upon an appropriate showing, and it may not be changed . . . if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved."[76] Furthermore, the Court said nothing about the well-established principle that to have a decree set aside entirely, a moving party must show both (1) that the decree's objects have been attained and (2) that it is unlikely, in the absence of the decree, that the unlawful acts it prohibited will occur again.[77] For proponents of institutional reform litigation, one of the biggest concerns surrounding the *Horne* decision is the fact that the Court did not focus on whether the constitutional violations had been remedied.

Accordingly, petitioners failed to show that the decree's objectives had been attained. For example, in 2000, the district court found that the state's minimum funding level for ELL programs was "arbitrary and capricious" and bore no "rational relation" to the actual funding needed to insure that ELL students could achieve academic standards.[78] Seven years later, the same district court held that "circumstances in this regard remain the same. The moving parties have not shown compliance with the court's decree, much less changed circumstances that would warrant modification or dissolution of this court's order."[79] In that case, petition-

found it did not. Nothing this Court says casts doubt on the legal validity of that conclusion." *Id.* at 510.

73. *Id.* at 488 (Breyer, J., dissenting).

74. 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 60.47(2)(c) (3d ed. 2009).

75. *Horne*, 557 U.S. at 491–92 (Breyer, J., dissenting) (arguing that the majority did not apply this distinction, but instead criticized the Ninth Circuit when it referred to situations in which changes justified setting an unsatisfied judgment entirely aside as likely rare).

76. Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237, 247 (1991) (quoting United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968) (ordering the district court, on remand, to determine whether the school board has acted in good faith and whether the vestiges of past discrimination have been eliminated to the extent practicable, thereby rendering the judgment unnecessary)).

77. *Horne*, 557 U.S. at 49–92 (Breyer, J., dissenting) (citing Frew v. Hawkins, 540 U.S. 431, 442 (2003)); *see also Dowell*, 498 U.S. at 247 (holding that if the school district was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment and if it was unlikely that the school would return to its former ways, the desegregation litigation would be deemed fully achieved).

78. Flores v. State, 480 F. Supp. 2d 1157, 1167 (D. Ariz. 2007); *see also* Flores v. State, 172 F. Supp. 2d 1225 (D. Ariz. 2000).

79. *Flores*, 480 F. Supp. 2d at 1167.

ers attempted to demonstrate that the judgment had been satisfied through HB 2064 as evidence of new methods and funding,[80] but the district court concluded that HB 2064 violated federal law because it took into consideration federal funds and attempted to "supplant" funds that the state would otherwise provide.[81] In conclusion, the district court held that the "changed circumstances" that petitioners put forth—i.e. increased funding from HB 2064—failed to comply with the "appropriate action" requirement of Section (f) of the EEOA.[82]

Whether or not the district court considered the appropriate factors, it held that Arizona had not complied with the court's decree. In this manner, the *Horne* majority allowed for re-litigation of previously litigated matters. First, the petitioners did not appeal earlier judgments. Second, a party cannot use Rule 60 to attack the reasoning underlying the original judgment or to show that the facts as they were then did not justify the order.[83] The majority charged the district court with a flawed understanding of what constituted compliance, but "[t]he original judgment rested upon a finding that the State had failed to provide Nogales with adequate funding 'resources'. . . in violation of Subsection (f)'s 'appropriate action' requirement."[84] When the majority suggested that petitioners may comply despite lack of rational funding, it impermissibly put the burden back on the original plaintiff (now respondent) or the court to reestablish what has once been decided.[85]

Because *Horne* operated under the auspice of *Rufo*, yet failed to focus on the merits of the claim or recognize that this was not a motion solely for modification, the quasi-new, more flexible standard that remains is confusing. It is unclear to what extent and how courts will inter-

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80. *Id.* at 1165.

81. *Id.* at 1166. Additionally, the district court found that HB 2064 imposes an impermissible two-year limitation on funding for ELL instruction. *Id.*

82. *Id.*; *see also* Evans v. Fenty, 701 F. Supp. 2d 126, 164 (D.D.C. 2010) (finding that "under *Horne* and earlier Supreme Court decisions, a motion to vacate, such as defendants have filed here, requires the Court to determine whether the 'objective' of the court orders has been attained"). If there is an argument between *Horne* and *Rufo* or *Frew*, the Supreme Court did not acknowledge it. *Evans*, 701 F. Supp. 2d at 166. Similarly, the second part of the test to determine the likelihood in the absence of the decree that the unlawful acts it prohibited will again occur was not discussed in the *Evans* opinion. In this regard, the burden should be on the petitioners to show that they will not violate the EEOA again. There is nothing in the majority or dissent opinions of the *Horne* case that discusses this issue. Perhaps this is a question of fact and the district court did not get to the second part of this analysis after finding that the first part of the analysis—that the decree's objectives have been attained—was not satisfied.

83. *See Horne*, 557 U.S. 433, 493 (2009) (Breyer, J., dissenting); Browder v. Dep't of Corr. of Ill., 434 U.S. 257, 263 n.7 (1978).

84. *Horne*, 557 U.S. at 493 (Breyer, J., dissenting).

85. *Id.*

pret this new standard. Undoubtedly, critics will read the majority's decision as hostile to institutional reform litigation and as a potential barrier for plaintiffs to use the courts to change state systems.[86] This new set of rules creates the dangerous possibility that long final orders, judgments, and decrees will be unwarrantedly subject to perpetual challenge, offering defendants unjustifiable opportunities to endlessly re-litigate violations with the burden of proof imposed, once again, upon the plaintiffs.[87]

IV. *HORNE*'S IMPACT ON CHILD WELFARE AND SUGGESTIONS

> [I]f the Court were to permit defendants to walk away from their obligations under the consent orders simply because there is a new administration that believes that all it needs to do is achieve the constitutional floor . . . that would mean that there would be no future consent decrees involving governmental entities. Plaintiffs would have no incentive to enter into consent decrees if the next administration could force a retrial based on a claim that the constitutional floor has now been met. While *Horne* may have provided parameters for court involvement in institutional reform litigation and consent decrees, it did not declare their demise.[88]

Consent decrees and institutional reform litigation have historically and contemporaneously been used to effectuate change within child welfare systems. This Part highlights two cases where the state attempted to use *Horne* as a vehicle for getting out from its respective consent decree. Then, after exploring the use of consent decrees in child welfare pre- and post-*Horne*, this Part proposes various suggestions for the ongoing and productive use of consent decrees and institutional reform litigation within the context of child welfare.

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86. In Frew v. Hawkins, 540 U.S. 431, 434–35 (2003), the Court unanimously held that the Eleventh Amendment permits a federal district court to enforce a consent decree against state officials seeking to bring the State into compliance with federal law. Any further discussion of this issue is beyond the scope of this Comment.

87. *Horne*, 557 U.S. at 494; *see also* Summers v. Howard Univ., 374 F.3d 1188, 2018 (D.C. Cir. 1997) (warning that the use of Rule 60(b)(5) could encourage litigants to burden the federal courts with a deluge of Rule 60(b)(5) motions premised on nothing more than the claim that the various judges or justices have stated that the law had changed and that this court eroded the institutional integrity of the court).

88. Evans v. Fenty, 701 F. Supp. 2d 126, 171 (D.D.C. 2010) (denying defendants' motion to vacate the consent decree after residents of an institution for persons with developmental disabilities brought class action against the District of Columbia, alleging they received constitutionally deficient care, treatment, education, and training).

*A. Post-*Horne *Child Welfare Cases*

1. *L.J. v. Wilbon*

In the first case, the city of Baltimore attempted to use *Horne* to get out from under a consent decree almost immediately after they entered into the decree. In *L.J. v. Wilbon*,[89] a class of foster children in the care and custody of the Baltimore City Department of Social Services (BCDSS) brought a civil rights action pursuant to 42 U.S.C. § 1983 against BCDSS alleging mismanagement of the foster care program that resulted in children suffering physical abuse, sexual abuse, medical neglect, and otherwise being subjected to dangerous living conditions.[90] In 2009, the parties reached a final agreement on the entered consent decree; however, shortly thereafter, *Horne* was decided and appellants asked the court to allow briefing on the potential applicability of the Supreme Court's decision.[91] Appellants alleged that *Horne* stood for the proposition that a court may not enforce a consent decree based on a statute that does not provide a private cause of action. The district court rejected this interpretation and found that, because there remains a concern about violations of federal law, there is a federal interest that is not inappropriate to enforce, even if these particular plaintiffs lacked a private right of action.[92] The Fourth Circuit affirmed, finding that *Horne* did not establish a change in the law sufficient to support appellant's 60(b)(5) motion, but that "[a]t most, *Horne* reinforced the well-established principle that private plaintiffs cannot bring a claim to enforce a statute that lacks a private right of action."[93] While the defendants filed a petition to the Supreme Court for certiorari, calling into question the circuit split that has emerged after *Horne* when evaluating Rule 60(b)(5) motions based on a change in law, the petition was denied.[94]

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89. 633 F.3d 297 (4th Cir. 2011).

90. *Id.* at 299.

91. *Id.* at 303.

92. *Id.* at 304.

93. *Id.* at 307. The Fourth Circuit also discussed Rule 60(c), which requires that a motion for relief under Rule 60(b)(5) be made within a reasonable period of time. This provision was completely disregarded by the *Horne* court. In *Wilbon*, the court noted that Suter v. Artist M., 503 U.S. 347 (1992), the case in which the moving party relied on as a change in law warranting relief, was decided more than eighteen years ago. *Wilbon*, 633 F.3d at 307–08. Therefore, the court concluded that "even if *Suter* had indeed changed the law, [a]ppellants' lengthy delay in filing a motion based upon it would bring into question the appropriateness of equitable relief." *Id.* at 308.

94. Dallas v. L.J., 132 S. Ct. 757 (2011), *sub nom.* L.J. v. . For example, the Fourth Circuit applied a "dead fish" standard; in this regard, to obtain relief based on an intervening change in law, an earlier decision in the case must have been dead wrong. *Wilbon*, 633 F.3d at 311. This is in contrast to the approach taken by the Sixth and Seventh Circuits, which considered whether changes in

2. *LaShawn A. ex rel. Moore v. Fenty*

In the second case, the District of Columbia (D.C.) attempted to get out from under their consent decree despite the horrendous state of their foster care system. In *LaShawn A.* ex rel. *Moore v. Fenty*,[95] the district court denied the defendant's motion to vacate a consent decree that the parties entered into in 1991.[96] The decree was entered into because of statutory and constitutional violations in the administration of the District's foster care system. These allegations included the failure to initiate timely investigations into reports of abuse and neglect, failure to provide services to families, failure to place children in appropriate homes, failure to develop case plans, and failure to move children into situations of permanency.[97] In 2010, appellants brought an action to dismiss the consent decree for a variety of reasons, including structural changes, economic hardship, statutory compliance, and good faith compliance for a reasonable period of time.[98]

First, the court distinguished *Horne* by finding that the appellants mentioned structural changes without discussing actual impacts or alleging new policy insights. In contrast, in *Horne* the movants provided detailed descriptions of the state's implementation of ELL.[99] In addition, the court held that the costs of monitoring are not considered obstacles or changed circumstances.[100] Under statutory compliance, appellants contended that they are in substantial compliance with certain areas such as case planning, timely investigations, placements, adoptions, and system infrastructure; however, the court concluded that based on the evidence provided, the appellants were not in full statutory compliance to warrant complete relief.[101] Finally, as a result of the District's refusal to abide by provisions of the stipulated order, the court found that the appellants had not maintained a period of good faith compliance.[102]

Based on these findings, the court concluded that while the District's child welfare system had improved drastically, defendants had yet to deliver a fully satisfactory child welfare system.[103] The D.C. Circuit

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the law have altered the status of the underlying federal rights supporting the decree. Similarly, these courts took a more flexible approach, which the moving party argued was proper.

95. 701 F. Supp. 2d 84 (D.D.C. 2010).

96. *See* LaShawn A. v. Dixon, 762 F. Supp. 959 (D.D.C. 1991).

97. *Id.* at 960.

98. LaShawn A. *ex rel*. Moore v. Fenty, 701 F. Supp. 2d 84 (D.D.C. 2010).

99. *Id.* at 101.

100. *Id.* (citing Agostini v. Felton, 512 U.S. 203, 216 (1997)).

101. *LaShawn A.*, 701 F. Supp. at 102–10.

102. *Id.* at 110.

103. *Id*. at 116.

found no error in the district court's decision and affirmed, finding the request for termination premature in light of the discovery in 2008 of "the decomposing bodies of four girls who received no help from" the child welfare system.[104] Defendants did not appeal.

In both cases, the *Horne* decision affected the defendants' actions. In *Wilbon*, the parties reached a final agreement that both sides believed was "fair, reasonable, adequate, and in the best interest of the plaintiff class" in June 2009.[105] Shortly thereafter, the appellants moved to vacate the decree based on the *Horne* decision and brought a Rule 60(b)(5) motion.[106] In other words, both parties were ready and willing to engage in modifications to a long-standing and necessary consent decree. The only reason appellants sought to vacate the consent decree was because of the *Horne* decision. The appellees brought the original action in 1988 because children in Baltimore's mismanaged foster care program experienced physical and sexual abuse, medical neglect, and were otherwise subjected to dangerous living conditions.[107] In this regard, the appellants never alleged that the decree should be vacated because the above listed concerns had been addressed or that the decree was no longer necessary.[108] It is hard to reconcile the appellant's desire to vacate the consent decree when the original reasons behind the decree remained an ongoing problem. Moreover, arguments based on state budget concerns lose validity when money being spent fighting and re-litigating orders could be used to make positive changes for children instead.

Similarly, in *LaShawn A.*, the moving party was concerned with terminating court oversight rather than the state of their child welfare system. First, both the district court and the D.C. Circuit referenced the four decomposing bodies found as recently as 2008. Even someone without a background in child welfare can understand the implications that such a discovery has with regard to the state of a welfare system. Secondly, at the time that the District of Columbia moved for removal of the decree, the Attorney General of the District of Columbia was on a rampage to end court oversight.[109] In 2010, the District of Columbia was

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104. LaShawn A. *ex rel.* Moore v. Gray, 412 F. App'x. 315, 316 (D.C. Cir. 2011).

105. L.J. v. Wilbon, 633 F.3d 297, 303 (4th Cir. 2011).

106. *Id.*

107. *Id.* at 300.

108. *Id.* at 312 n.5 (noting that the option of seeking to have the decree vacated on the basis of compliance also remains available to appellants; however, in September 2009, appellants reported data that showed several ongoing compliance problems).

109. Mike DeBonis, *Getting the Courts to Stop Governing D.C.*, WASHINGTON CITY PAPER, (Jan. 15, 2010), http://www.washingtoncitypaper.com/articles/38334/getting-the-courts-to-stop-governing-dc.

held accountable under six different consent decrees.[110] When the Rule 60(b)(5) motion was brought to end court oversight of the child welfare system, Attorney General Peter Nickles was more concerned about separation of powers than ensuring the best and safest outcomes for the children going through the District of Columbia's child welfare system. In a D.C. newspaper, Nickles commented, "I think I'm preaching a message here, . . . I believe not only in separation of powers when it comes to the power of the executive versus the power of the legislature . . . but also vis-à-vis the judiciary."[111] Additionally, Nickles responded that he was absolutely trying to forestall a new generation of lawyers from attempting to take over city and state agencies.[112] Nickles was criticized for his attempt to use the *Horne* decision to get out from under the *LaShawn* consent decree. For example, of the ten consent decrees entered into between child welfare systems and the group Children's Rights, Nickles' government was the only one using *Horne* to get out from its decree. As the lawyer for Children's Rights commented, "In all of our other cases, the defendants are trying to do what they were supposed to do[.]"[113]

Besides the two cases highlighted above, Rule 60(b)(5) motions have been brought in other districts that have long-standing consent decrees within their child welfare systems. For example, in *Juan F. v. Rell*,[114] plaintiffs alleged that the Department of Children and Families failed to place children with their siblings, meet the basic needs of children in the foster care system, or have an adequate number of foster homes, in addition to many other constitutional and statutory viola-

110. *Id*. Attorney General Peter Nickles and his administration have taken action concerning some of the other consent decrees. First, the longest-standing *Dixon* decree concerned the treatment of the mentally ill. In 2009, a Rule 60(b)(5) motion was brought to dismiss the decree. As recently as September 2011, a federal judge approved a settlement agreement between the District and the *Dixon* plaintiffs. *See* D.C. Dep't of Mental Health, *Dixon Case*, http://dmh.dc.gov/node/222782 (last visited Feb. 7, 2013). Next, the Nickles administration attempted to use *Horne* to get out from under a consent decree governing services for the developmentally disabled. This is now embodied in Evans v. Fenty, 701 F. Supp. 2d 126 (D.D.C. 2010); *see also supra* note 88. Relief was denied. The third decree, entered into in 1985, concerned the handling of youth offenders. Most recently embodied as District of Columbia v. Jerry M., 717 A.2d 866 (D.C. Cir. 2000), it does not appear that any action has been taken by Nickles to overturn this decree. In the final two decrees, governing the District's delivery of special education and subsequently, the busing needs that stem from such education, litigation is ongoing (which Nickles is a part of), but it does not appear that Nickles has brought a Rule 60(b)(5) motion to get out from either decree. *See* Blackman v. District of Columbia, 633 F.3d 1088 (D.C. Cir. 2011); Petties v. District of Columbia, 779 F. Supp. 2d 95 (D.D.C. 2011).

111. DeBonis, *supra* note 109.

112. *Id.* Other plaintiffs' attorneys criticized Nickles for exerting so much energy towards undoing consent decrees when he is only delaying changes and coinciding with the idea that the District should just meet the conditions of the consent decree and then get out.

113. *Id.* (quoting Marcia Robinson Lowry).

114. No. 3:89–CV–859, 2010 WL 5590094 (D. Conn. Sept. 22, 2010).

tions.[115] Defendants brought an action in 2010 claiming that relief was warranted under Rule 60 because they achieved substantial compliance over the past two decades, including the passage of several federal child welfare laws. They also raised federalism concerns and argued that *Horne* has significantly altered the Rule 60(b)(5) standard.[116] Most significantly, the court rejected the moving party's broad interpretation of *Horne*. The court found that *Horne* did not call into question a district court's authority to enforce a validly entered consent decree negotiated by the parties and that it did not turn Rule 60(b)(5) motions into vehicles to re-litigate the original claim.[117] The court concluded that the decree will not end until the state has fully met its responsibilities in addressing the needs of these children.[118]

B. Suggestions

This section highlights why consent decrees are necessary and suggests ways to improve them to effectuate more positive change. That being said, it is important to understand that consent decrees are a way to reform, rather than abolish, the child welfare system. The child welfare system is full of children of color who have been uprooted from their parents, families, and communities at a disproportionate rate to white children and in lieu of providing these families with the money and services they need.[119] Abolishing the child welfare system would have to

115. *Id.* at *1.

116. *Id.* at *2–3.

117. *Id.* at *3. In terms of the other arguments put forth by defendants, the court first found that the defendants' substantial compliance would not hold up. Not only were the defendants aware of what was required of them because of their ongoing participation in the consent decree, the Supreme Court has required that if changed circumstances are to form the basis for a court's decision to vacate a decree, those changes must have been unforeseen; they were not unforeseen here because of defendants' heavy involvement in drafting the decree. *Id.* Next, the court found that the child welfare laws generally promote and do not hinder the objectives of the decree; therefore, they do not constitute changed legal circumstances. *Id.* Third, the court dismissed the defendants' claim that federalism concerns warrant relief because of the decree's impact on the state budget. *Id.* The court concluded that the state's spending was required by the state's constitutional and statutory obligations to the children in its care. *Id.*

118. *Id.* at *4.

119. The disproportionate number of children of color going through the child welfare system is due to the relationship between slavery, poverty, motherhood, the prison industrial complex, and child welfare, which is beyond the scope of this article. For more information on these topics *see* Patricia Allard, *Crime, Punishment, and Economic Violence*, *in* COLOR OF VIOLENCE THE INCITE! ANTHOLOGY 157, 157 (Incite! Women of Color Against Violence ed., 2006); Ellen M. Barry, *Parents in Prison, Children in Crisis*, *in* OUTSIDERS WITHIN 59, 64 (Jane Jeong Trenka, Julia Chinyere Oparah & Sun Yung Shin eds., 2006); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U.J. GENDER & L. 1, 7 (1993); Dorothy E. Roberts, *Adoption Myths*, *in* OUTSIDERS WITHIN 49, 50 (Jane Jeong Trenka, Julia Chinyere Oparah & Sun Yung Shin eds.,

extend beyond the confines of the law and into the work of future generations. In contrast, consent decrees are important now as they can change the daily and often-inhumane conditions for children. In this regard, *Horne* was a blow to efforts to reform and abolish the child welfare system. If plaintiffs do not use the courts and litigation as an avenue for social change, what other means do they have to reform the current system?[120]

One answer to this question is that individual plaintiffs could bring individual claims seeking money damages, relief from their current situations, or both. However, there are problems with this option. First, children are one of the most voiceless and vulnerable classes in society, and foster children are even more vulnerable as wards of the state. Access to attorneys and the court system would be unrealistic, timely, and costly. The burden to attorneys, the court system, and children is unfathomable

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2006); Dorothy E. Roberts, *Feminism, Race, and Adoption Policy*, *in* COLOR OF VIOLENCE THE INCITE! ANTHOLOGY 42, 44 (Incite! Women of Color Against Violence ed., 2006).

120. *See* CHARLES L. USHER ET. AL., MEASURING PERFORMANCE IN CHILD WELFARE: SECONDARY EFFECTS OF SUCCESS, FAMILY FOSTER CARE IN THE NEXT CENTURY 30 (Child Welfare League of America, 2001). The authors note:

> At the state and local level, efforts to bring about change have come in three forms: (1) consent decrees; (2) reform initiatives embarked on by governors, child welfare leaders, and other stakeholders; and, (3) demonstration programs authorized by waivers of federal regulations based on Title IV-E of the Social Security Act, under which state out-of-care-home programs obtain federal funding.

Id. The initiatives under prong two take time and are politically motivated. Initiatives like this can supplement, rather than supplant, consent decrees. The political arena cannot be trusted or expected to initiate its own reforms in a time when states are dramatically cutting their budgets, and areas such as child welfare are taking the brunt of these cuts. In terms of prong three, Federal IV-E waivers have had success. *See* CASEY FAMILY PROGRAMS, THE NEED TO REAUTHORIZE AND EXPAND TITLE IV-E WAIVERS (May 2010), *available at* http://www.casey.org/Resources/Publications/NeedForWaivers.htm. Through Title IV-E, the federal government spends more than $12 billion on foster care each year, which comprises approximately half of what states spend on foster care. Currently, IV-E funding is only allowed to maintain eligible children in foster care, but it has the potential to do more. Through IV-E waivers, certain states have been able to use these funds more flexibly to support community and home-based support programs that support vulnerable children in their parents' homes. Title IV-E is not a capped program, but is directly related to the number of children in the child welfare system; therefore, if the number of children in care goes down, so does a state's IV-E funding. Flexible waivers allow states to try additional methods, and in the five states where waivers are currently approved, the number of children in care has decreased. However, these waivers are experimental, and not all states have had positive outcomes or used their funds appropriately. In conclusion, IV-E waivers are one option of an experimental funding mechanism that should continue; however, they cannot replace the current practice of using consent decrees to instigate change. Title IV-E waivers focus heavily on the relationship between states and the federal government and on funding, whereas the courts are in a better position to look at the bigger picture. Courts can look at what services and outcomes a specific community needs and incorporate IV-E waivers, their funding, and the experimental programs into the consent decrees it issues. *Id.*

and impossible. It is unclear who would pay for attorney services, and the financial burden on the state as the defendant could be greater than the financial burden of consent decrees on local budgets.

Secondly, and most importantly, relief for children would have to be remedial. Claims could only be brought once harm had been done. One of the biggest advantages of class action consent decrees is that they become certified to protect all children currently in foster care and those that will be similarly situated in the future by creating a better child welfare system.[121]

A second alternative would be to make the entire child welfare system less adversarial. Currently, termination[122] and dependency[123] hearings involve lawyers on both sides; the state is represented by its own attorneys who are well versed in this type of juvenile litigation, and in response, birth parents retain their own attorneys.[124] In some states and in some proceedings,[125] children are also entitled to representation; however, in many states children are simply represented by a community volunteer known as a Court Appointed Special Advocate, a guardian ad litem, or their interests are not represented at all.[126] If the system became less

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121. *See, e.g.*, Braam *ex rel.* Bram v. State, 81 P.3d 851 (Wash. 2003) (certified class consisted of thirteen foster children and thousands of other children who had been moved to three or more homes while in the state's custody).

122. Termination is when a parent's rights are being permanently terminated. WASH. REV. CODE § 13.34.132 (2011).

123. Dependency hearings occur when a child is deemed to need protective services or some other protection or services from the state. WASH. REV. CODE § 13.34.040 (2011).

124. *See e.g.*, WASH. REV. CODE § 13.34.090 (2000) (allowing for parental representation and requiring appointment of an attorney in the case of indigent parents). For an interesting discussion of *parens patriae*—the concept that the state acts as a "parent" to children in its custody—*see* Jennifer K. Smith, *Putting Children Last: How Washington Has Failed to Protect the Dependent Child's Best Interest in Visitation*, 32 SEATTLE U. L. REV. 769 (2009). *Parens patriae* creates an ethical dilemma for attorneys and courts because what is presumed to be in the child's best interest may not align with the child's wishes.

125. For example, in Washington children twelve years of age and older are given the option of having their own attorney. *See* WASH. REV. CODE § 13.34.100(6)(a) (2010) (a child shall be notified on his or her twelfth birthday of the right to counsel).

126. *See e.g.*, WASH. REV. CODE § 13.34.100 (2010); *see also In Re* the Dependency of MSR & TSR, 271 P.3d 234 (Wash. 2012) (children have a fundamental due process interest that must be protected in termination-of-parental-rights proceedings). While a child's right to counsel in termination and dependency hearings is beyond the scope of this Note, one possible safeguard that will decrease the need for consent decrees is providing all children with representation. If an attorney were looking out for the best interest of a child, certain safeguards would be put in place that could help prevent constitutional and statutory violations in the future. For example, attorneys could help ensure that siblings remain together and that a child is not moved from home to home. While it is not the responsibility of individual attorneys to do the job of state-run child welfare agencies, having an attorney become responsible for looking out for individual children will positively impact the entire child welfare system. Currently, only twelve states require the appointment of an attorney for all children. *See* CHILD WELFARE INFORMATION GATEWAY, REPRESENTATION OF CHILDREN IN CHILD

adversarial to the extent that lawyers were not needed at all, then the argument for consent decrees would be significantly weakened because it would not make sense to have lawyers play such a dominant role in a system they were excluded from for all other relevant purposes; however, it is highly unlikely that the child welfare system will ever become less adversarial because each party's interests are too high. Most importantly, a parent's right to custody of their child is a fundamental right that can only be taken away if the state meets the highest burden of strict scrutiny.[127] It is unlikely that parents will ever choose to fight for the custody of their child(ren) without representation. Similarly, the interest of the state is admittedly very high. The state's interest is one of safety for its minor citizens. Safety is always an important state interest. Additionally, the state is advantaged because its lawyers are well versed in the specific state laws that govern dependency and termination proceedings. Of course there are other alternatives than those that I have listed, but they all come with their own disadvantages.[128] Ideally, litigation, which is admittedly timely and costly, will not be necessary in the future; but presently there is no better alternative that would make such a deep impact on child welfare systems.

Returning to consent decrees, there are ways to ensure more successful approaches to litigation and multi-decade consent decrees that actually make continuous changes. In many ways, identifying the problem is the easy part of litigation; identifying the appropriate remedy is more difficult.[129] Despite challenges, there are ways that courts and parties can be creative and generate effective consent decrees with operational guidelines that lead to positive outcomes. One of the main problems with consent decrees and similar judgments stemming from institutional reform litigation is that they last for long periods of time when most changes tend to come at the beginning. Oftentimes, the litigating attorneys on both sides have moved on, the original plaintiffs may have "aged out" of foster care, the politics of the state have inevitably

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ABUSE AND NEGLECT PROCEEDING: SUMMARY OF STATE LAWS (2011), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/represent.pdf (introduction revised May 2012). The Children's Law Center in Washington D.C. illustrates a good example of how this could work. At the Children's Law Center, pro-bono and staff attorneys represent children in custody cases when their family stability is jeopardized. They also provide free counsel to grandparents, foster parents, and other relatives who wish to obtain guardianship or custody of children trapped in the child welfare system. The center also strives to change laws and policies in D.C. based on the need they see when representing foster children.

127. *See* Stanley v. Illinois, 405 U.S. 645 (1971).

128. A more complete list of alternatives is beyond the scope of this Note.

129. *See, e.g.*, Brown v. Bd. of Educ., 349 U.S. 294 (1955) (identifying school segregation as an evil that needed to be remedied, but requiring further discussion of appropriate remedies).

changed, and the passion that was behind the litigation may have dissipated.

There are multiple ways to combat this. First, many consent decrees or judgments now have exit plans in place that monitor timelines and ensure things will be re-evaluated to see if certain markers have been met.[130] Timelines can be tailored to be as realistic and expedient as possible. Secondly, many times consent decrees and judgments give rise to panels or monitors who are not lawyers, but experts in the field appointed by the court and agreed upon by the parties, resulting in continued oversight with less direct court involvement.[131] For example, as a result of the *Braam* consent decree in Washington State, the Braam panel was created and it continues to monitor the progress of DSHS.[132] The Braam Oversight Panel is a five-member panel of child welfare experts and advocates from across the nation. It monitors improvements in selected services for foster children that are provided by DSHS.[133] Since the original decree was entered into, the panel has played a constant and major role in the ongoing monitoring of Washington's child welfare system. Additionally, the panel publishes regular reports and evaluations of outcomes. In October of 2011, the decree was re-evaluated and extended. The attorneys and leaders on both sides of the litigation are able to work with the panel, comprised of non-attorneys, to reach the best outcomes for the state, plaintiffs, and all foster children. As a result there is continued oversight, but less direct court involvement. One of the main criticisms of court involvement is the lack of experience and expertise on behalf of judges who implement the decrees. As a supplemented approach, a panel, such as the Braam Oversight Panel, calls for continued oversight but by national experts in the field of child welfare. Washington's system still requires reform, but much progress has been made.[134]

Finally, parties can work together to make a lot of changes at the beginning. All parties involved desire speedy outcomes; on the one side, the sooner progress is made, the sooner violations against children will be stopped. Conversely, the sooner the decree or judgment is satisfied, the sooner the court's enforcement can end, which frees the state agency from the court's orders.[135]

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130. *See* BRAAM PANEL, http://braampanel.org (last visited Mar. 3, 2013).

131. *See id.*

132. *See id.*

133. *Id.*

134. *See id.* The new decree details twenty-one, instead of the previous thirty-three, enforceable outcomes and continued oversight by the Panel. *Id.*

135. The impact of a judgment over time can be illustrated by school segregation cases. *See, e.g.*, Brown v. Bd. of Educ., II, 349 U.S. 294 (1955) (remanding case to lower courts wherein de-

A second suggestion to improve consent decrees in the child welfare system is to create other mini-systems within the child welfare system. For example, the Child and Family Services Agency (CFSA) was created as a result of *LaShawn A*.[136] The mission of CFSA is to improve the safety, permanence, and well-being of abused and neglected children and to strengthen their families.[137] CFSA takes and investigates reports, assists families, provides safe out-of-home care, and re-establishes permanent homes. Sub-agencies, like CFSA, can help monitor and strive for the outcomes determined in the consent decree. While this is not a perfect solution,[138] it is one way to ensure ongoing implementation of those outcomes and best practices agreed upon by the parties.

V. CONCLUSION

In conclusion, the current Supreme Court is increasingly hostile to institutional reform litigation.[139] Because the Court is heavily invested in the federalism debate and preserving states' rights, *Horne* mandated a quasi-new, more flexible and confusing standard that left the door open for parties to seek relief from consent decrees.[140] Coupled with the new *Horne* standard are other recent cases that could negatively impact all institutional reform litigation, including child welfare reform.[141] Similarly, during the current economic recession states are more reluctant to engage in lengthy litigation because of the time and high costs it produces. Overall, child welfare consent decrees and similar judgments stem-

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crees were created enjoining the public schools from segregating). Since the era of *Brown*, other schools and districts have been parties to consent decrees requiring desegregation. In all of these cases, desegregation has largely occurred, specifically with regard to de jure segregation. However, a lot of segregation and discrimination still takes place in public schools; once the original and main objective of the segregation decrees was met (e.g., desegregation), courts' involvement decreased, and as a result, the last vestiges of discrimination and segregation remain.

136. *LaShawn A. v. Fenty*, NATIONAL CENTER FOR YOUTH LAW (Nov. 29, 2011), http://www.youthlaw.org/publications/fc_docket/alpha/lashawnavwilliams/.

137. *Who We Are*, D.C. CHILD & FAMILY SERVICES AGENCY (Nov. 29, 2011), http://cfsa.dc.gov/DC/CFSA/About+CFSA/Who+We+Are.

138. For example, even with the implementation of the CFSA, *LaShawn A.* is still an active consent decree because of D.C.'s failure to comply with the judgment.

139. *See, e.g.*, Bruce A. Boyer & Amy E. Halbrook, *Advocating for Children in Care in a Climate of Economic Recession: The Relationship Between Poverty and Child Maltreatment*, 6 NW. J. L. & SOC. POL'Y 300, 315 (2011).

140. *See supra* Part II. One of the main concerns of the Supreme Court in *Horne* was the federal government's control over Arizona's state budget. Horne v. Flores, U.S. 577 U.S. 433, 448 (2009).

141. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (creating more barriers to class action certification).

ming from institutional reform litigation are in jeopardy and face significant barriers.

Most significantly, the Supreme Court's decision in *Horne v. Flores* placed federalism concerns above the merits of the case and did not give due deference to the district court's findings that Arizona was still in violation of the EEOA. The Court's decision has already led to increased litigation in the realm of child welfare, and the time and effort expunged on this new litigation has taken away from reform efforts aimed at keeping vulnerable children safe and families together. Although lower courts have hesitated to grant post-*Horne* Rule 60(b)(5) motions to vacate ongoing consent decrees, it is unclear how long this trend will last. Defendants are attempting to read the *Horne* decision broadly and the confusing, new standard has resulted in circuit splits over how to interpret *Horne*.[142] Thus far, the Supreme Court has declined to revisit its decision and the appropriate standard to be applied when parties seek to use Rule 60 as a vehicle to vacate final judgments. Hopefully lower courts will continue to focus on the statutory and constitutional violations that are ongoing against children, and courts will not be so quick to vacate consent decrees that were initially agreed to by all parties.

142. *See* L.J. v. Wilbon, 633 F.3d 297, 304 (4th Cir. 2011).