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Catherine Y Kim, University of North Carolina at Chapel Hill

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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†

ABSTRACT

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 violating individual rights. The 2009 decision in Horne v. Flore, in which a five-four majority of the Supreme Court employed a novel interpretation of the Federal Rules of Civil Procedure to substantially enlarge government-defendants’ ability to terminate ongoing judicial oversight in these types of cases, threatens the future viability of this model of social reform. The propriety of institutional reform litigation has long been the subject of heated scholarly and political debate. Regardless of one’s views on this contest, however, the Court’s use of a procedural rule to choose sides in this ideological debate is subject to critique. By violating the foundational principles of the Federal Rules of Civil Procedure requiring transsubstantivity and an inclusive and democratically-accountable rule-amendment process, the Court engages in precisely the sort of judicial activism the Federal Rules are designed to protect against.

† Assistant Professor of Law, University of North Carolina School of Law. The author wishes to thank the following for their generous comments and feedback: Jack Boger, Kristi Bowman, Al Brophy, John Coyle, Charles Daye, Elizabeth Gibson, Myriam Gilles, Olati Johnson, Joe Kaplan, Ann Klinefelter, Jim Liebman, Bill Marshall, Michael Olivas, Dana Remus, Mark Weisburd, and the participants in the UNC Summer Faculty Workshop. She is grateful for the excellent research assistance of Tiffany Brown, Alex Bryant, and Tyler Hill.
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INTRODUCTION

Since the Supreme Court’s decision in Brown v. Board of Education, the federal courts have played an expansive role in challenges to systemic denials of individual rights by government institutions such as public schools. Given the complexity and enormity of this endeavor, 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 litigation or public law litigation), with active and ongoing oversight by the federal courts, has provided the backbone for social reform for generations.

Yet the desirability of institutional reform litigation has long been the subject of heated debate, as scholars have contested the judiciary’s institutional capacity to effectively reform government institutions as well as the democratic legitimacy of judicial intrusion into state and local policymaking. These latter

1 347 U.S. 483 (1954); 349 U.S. 294, 301 (1955).
4 Compare Eric A. Hanushek & Alfred A. Lindseth, SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA’S PUBLIC SCHOOLS
Concerns, translated into charges of “judicial activism” and usurpation of political authority, have manifested in the partisan policymaking debates of Congress. In 2009, a five-four majority of the Supreme Court in Horne v. Flores definitively sided with the opponents of institutional reform litigation by making it substantially easier for government-defendants to terminate judicial oversight in these cases. The Court accomplished this doctrinal shift by interpreting Federal Rule of Civil Procedure 60(b)(5), which provides in relevant part, “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,” to reduce the standard and burden that a government-defendant would need to satisfy to dissolve an institutional reform decree. Horne departed from the text of the Rule and prior precedent to conclude that a

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7 FED. R. CIV. PRO. 60(b)(5).
federal district court must grant relief from a prospective decree in institutional reform litigation cases where there is no ongoing violation of federal law. Moreover, the Court suggested that the defendant as a moving party bears only a burden of production to show that relief is warranted, rather than a more onerous burden of persuasion. Reinterpreting Rule 60(b)(5) in this manner, the Court effectuated a substantive policy preference of disfavoring institutional reform litigation.

In enacting the Rules Enabling Act of 1934 delegating to the Supreme Court the authority to promulgate procedural rules governing the federal courts, however, Congress sought to protect against the risk that the politically independent judiciary would develop rules to achieve substantive policy goals, a task properly left to the political branches; consequently, the Act and the resulting Federal Rules set forth two foundational principles to protect against such encroachment.8

The first principle requires that all rules be general and transsubstantive; that is, procedural rules should be generally applicable to all types of cases. This principle rests on the premise that procedural rules should be neutral as to substantive policy choices, as those substantive policy decisions must be determined through the political process.9

The second principle prohibits a Rule from being amended except through the formal process set forth in the Rules Enabling Act, subjecting any proposed change 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

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9 Miller, supra note 8, at 90 (“Because the mission of procedural rulemaking has been thought to help execute the policy choices made by others, the theory is that substance-specific rules should be generated by those other institutions and processes.”); Carrington, supra note 8, at 617 (“Those who designed and enacted the 1934 Rules Enabling Act did not suppose that a procedure equally suited to all kinds of cases could be devised, but if special rules for a substantive category of cases were needed, their creation would be a task for Congress.”).
from the executive branch; adoption by the Supreme Court; and a six-month time period for congressional consideration. These steps were designed to ensure that the development of procedural rules would be objective, transparent, and subject to rigorous study and deliberation, as well as a measure of democratic accountability.

In recent years, the Supreme Court repeatedly has been subject to scholarly criticism for violating these foundational norms to achieve substantive policy goals. *Horne v. Flores* presents only the most recent manifestation of this same trend. However, in contrast to the immediate and voluminous criticism generated after prior instances such as *Twombly* and *Iqbal*, in which the Court was condemned for heightening the pleading standard of Rule 8(a) to further its own ideological agenda, nothing has been written about *Horne’s* use of the Federal Rules to advance the substantive policy goal of disfavoring institutional reform litigation. Indeed, little to date has been written about *Horne’s* broad implications for the future of institutional reform litigation at all. This article seeks to fill that gap.

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10 28 U.S.C. §§2073, 2074; *see also* Carrington, supra note 8, at 605 (describing process of rulemaking in practice).

11 *See* Carrington, supra note 8, at 605.

12 The text of the Rule provides: “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) a demand for the relief sought, which may include relief in the alternative or different types of relief.” *Fed. R. Civ. Proc.* 8(a).

13 Miller, supra note 8, at 9-10 (arguing that “[f]ederal civil procedure has been politicized and subject 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”); Carrington, supra note 8, at 599-600 (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”).

Part I provides an overview of institutional reform litigation, setting forth the dominant characteristics of institutional reform decrees, the development of the doctrine on terminating these remedial decrees prior to *Horne*, and the ongoing importance of this model of social reform today.

Part II analyzes the *Horne v. Flores* decision, describing its departure from the text of Rule 60(b)(5) and prior precedent to make it significantly easier for government-defendants to terminate federal judicial oversight in institutional reform cases. It then explores the likely future implications of the *Horne* decision, concluding that *Horne* threatens the very viability of institutional reform litigation as we know it today.

Part III critiques *Horne*'s use of the Federal Rules of Civil Procedure to effectuate this doctrinal shift in violation of the foundational principles of the Rules. Had the Court adhered to the transsubstantive norm, it would have deferred to a democratically accountable Congress to develop a special rule to address the

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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 TEMPLE L. REV. 1151, 1151-53 (1995) [hereinafter Heise, *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 nn. 61-79 and accompanying text; see also Sabel & Simon, supra note 2, at 1021 (describing “protean persistence” of institutional reform litigation); see also Schlanger, supra note 5, at 551 (challenging “conventional wisdom” that institutional reform litigation “peaked long ago and is now moribund”); see also Rebell, supra note 3 (arguing for expansive role of federal courts in securing equal educational opportunity rights); Kristi Bowman, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, 1 DUKE FORUM FOR L. AND SOC. CHANGE 47, 57-59 (2009) [hereinafter Bowman, *A New Strategy*] (same).
perceived hazards of institutional reform litigation. Even setting aside the transsubstantive principle, adherence to the formal rule-amendment process would have ensured that the development of a new procedural rule would have benefited from consideration by the procedural experts of the Rules Advisory Committee, the input of lower federal court judges and practitioners, and approval by a democratically accountable Congress. This process could have generated empirical data on the effectiveness of federal courts in reforming public institutions, a transparent debate regarding the proper balance to strike in the trade-off between principles of democratic accountability and the rigorous enforcement of individual rights, and a nuanced understanding of the manner in which the costs and benefits associated with institutional reform litigation differ for different types of decrees, such as those seeking to enforce statutory as opposed to constitutional rights, those employing innovative “experimentalist” models that provide a far greater role for state and local officials in developing the decree, and those entered with the consent of the parties. Instead, by unilaterally imposing a new procedural rule to limit institutional reform litigation, the Court engages in precisely the sort of judicial activism the Federal Rules were designed to protect against.

15 See Sabel & Simon, supra note 2, at 1016 (describing innovations of “experimentalist” decrees that mitigate concerns associated with institutional reform litigation); see also Liebman & Sabel, supra note 4, at 281 (describing emerging model of “non-court-centric judicial review”); Rebell, supra note 3, at 1539 (describing “colloquy” model of institutional reform litigation).
I. OVERVIEW OF INSTITUTIONAL REFORM LITIGATION

For decades, the federal courts have played an active role in restructuring state and local government institutions to protect against systemic violations of rights, largely through the imposition of comprehensive remedial decrees with ongoing judicial oversight. This part provides a general overview of the dominant characteristics of these decrees and how they are developed in a given case. It then analyzes the doctrinal standards for dissolving these often long-running decrees and terminating judicial oversight prior to Horne. Finally, it explores the continuing importance of federal structural decrees today.

A. Dominant Characteristics of Institutional Reform Decrees

As various scholars have observed, Brown II\(^{16}\) ushered in a new model of institutional reform litigation.\(^{17}\) This model was born out of necessity when it became apparent that the federal courts would need powerful remedial tools to counter the political resistance to desegregating public schools. The foot-dragging of southern states in complying with the desegregation mandate made it clear that a simple judicial order enjoining public schools from assigning students to schools on the basis of race would not suffice.\(^{18}\) Rather, 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 on a precise definition of institutional reform litigation,\(^{19}\) in general these cases involve a

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\(^{17}\) See, e.g., Chayes, supra note 2, at 1294; Fiss, The Forms of Justice, supra note 2, at 2; Schlanger, supra note 5, at 552.


\(^{19}\) Compare Horne v. Flores, 577 U.S. at 2593 n. 3 (concluding that case seeking remedy that would restrict State ability to “make basic decisions regarding educational policy, appropriations, and budget priorities” qualifies as institutional reform litigation), to 557 U.S. at 2621
suit against a government institution alleging systemic violations of individual rights, in which the court imposes an expansive prospective decree and retains jurisdiction to monitor the defendant’s compliance with its order.

These remedial decrees form the centerpiece of institutional reform litigation and serve multiple functions. As in traditional private-law cases, decrees entered in institutional reform litigation serve a preventative function—to prevent future violations of the plaintiffs’ civil rights; in this sense, an injunction might enjoin defendant from discriminating against plaintiffs in the future. However, the innovation of decrees developed in the civil rights context was the additional assumption of both 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.

Thus, in the seminal desegregation cases, courts entered decrees not only to prohibit school systems from assigning students to schools on the basis of race (preventative function), but also 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—involving everything from faculty hiring to remedial education programs—to ensure that no school would remain racially identifiable (structural function).

In Green v. County School Board, 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—simply enjoining future race-based

(Breyer, J. dissenting) (suggesting that a 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); see also Susan Sturm, A Normative Theory of Public Law Remedies, 79 Geo. L.J. 1355, 1355 n.1 (1991) (noting 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.


22 Id.; see also Chayes, supra note 2, at 1294 (“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.”).

23 391 U.S. 430 (1968); Robinson, supra note 18, at 805-07.
student assignments, Justice Brennan’s opinion for a unanimous Court instead 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.”

Such restructuring, the Court reasoned, was necessary to ensure conversion to a unitary system in which racial discrimination had been “eliminated root and branch.”

In *Milliken II*, the Court articulated the reparative function of institutional reform decrees. In that case, the district court ordered a comprehensive desegregation plan for a school system that mandated, among other things, remedial and compensatory education programs. Defendants argued that because the nature of its legal liability was limited to unlawful student assignments, the scope of the remedy likewise must be limited to student assignments. 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.” 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.” 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.

In authorizing these expansive remedial functions, the Supreme Court repeatedly justified them based on the breadth and flexibility of the federal district courts’ inherent equity powers in fashioning remedies. In *Swann v. Charlotte-Mecklenburg Board of

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24 391 U.S. at 435.
25 391 U.S. at 437-38.
26 *Milliken v. Bradley*, 433 U.S. 267 (1977); Robinson, supra note 18, 834;
27 Id. at 281.
28 Id. at 282.
29 Id. at 282, 287-88.
Education, a unanimous Court affirmed the district court’s inherent equitable authority to mandate, against the objections of the defendant school system, the development of student-assignment policies that sought to achieve a particular range of racial balance for each school utilizing “clustering” and “pairing” of schools as well as bussing to improve integration. 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.”

The process of developing institutional reform decrees and the respective roles of the parties and the court in designing the remedy vary across cases, however. In cases resulting in consent decrees, the parties on their own negotiate a settlement agreement, 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 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 a 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

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30 402 U.S. 1 (1971); see, e.g., Robinson, supra note 18, at 808-10.
31 Id., at 15.
proposed desegregation plan to be considered, along with other 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. 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 provides in relevant part, “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.” The Supreme Court has provided an evolving doctrine to determine when termination of such 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. Justice Cardozo articulated this reasoning in the 1932 case *United States v. Swift & Co.*, involving a motion to modify a permanent injunction against a group of meatpackers accused of violating the Sherman Anti-Trust Act: “We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed

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34 Fed. R. Civ. Pro. 60(b)(5).

35 Jost, supra note 33, at 1105; Levine, supra note 33, at 585.

36 286 U.S. 106 (1932).
conditions.” Basing such power on “principles inherent in the jurisdiction of the chancery,” Justice Cardozo reasoned “[a] continuing decree of injunction directed to events to come is always subject to adaptation as events may shape the need.”

The interest of finality in judgments, however, cabined this ability to modify. As Justice Cardozo explained:

The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting…. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow…. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was once decreed after years of litigation with the consent of all concerned.

Consequently, in order to preserve finality, even decrees that had prospective application would be subject to change only upon satisfaction of a high standard of showing a “grievous wrong” would occur absent modification.

The original 1938 version of the Federal Rules, however, did not specify that a court could modify or terminate an existing decree on grounds of equity. Rather, the original version of Rule 60(b) 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. Lower courts nonetheless continued to rely on their inherent equity power to grant relief from prospective judgment. Seeking to reconcile the rule with current practice, the Advisory Committee considered amending Rule 60(b) to acknowledge this authority. Professor James William Moore urged the adoption of language expressly permitting relief for equitable reasons, 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

37 Id. at 114.
38 Id. at 119.
39 FED. R. CIV. P. 60(b) (1938).
to continue it because of the occurrence of facts and conditions since its rendition, the decree may be modified or vacated.”

Consequently, the 1948 Amendments to the Rules set forth additional grounds for relief from judgment, including where “applying it prospectively is no longer equitable.” This clause thus codified judicial discretion to grant relief from a prospective

42 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;
   (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.

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); FEDERAL PRACTICE & PROCEDURE § 2863; Moore & Rogers, supra note 40, at 623 (analyzing 1938 version of Rule 60(b) and proposing amendments). 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 by requiring in Klapprott v. United States, 335 U.S. 601 (1949), 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. FED. PRAC. & PRO. § 2684.
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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. 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 Evolving Standard for Termination

The desegregation case Board of Education of Oklahoma City Schools v. Dowell⁴³ provided the first opportunity for the Supreme Court to articulate a standard for granting relief from judgment through termination of an institutional reform decree. Although Dowell did not discuss the termination standard within the context of a Rule 60(b)(5) motion, the Court has subsequently cited Dowell in its discussions of the standard for termination under the Rule.⁴⁴ In Dowell, the School Board for the Oklahoma City public schools moved to terminate a desegregation decree that had been in operation for nearly thirty years.⁴⁵ The district court rejected the motion, relying on language from Swift v. United States to conclude that termination would only be proper 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 standard for terminating desegregation decrees because desegregation decrees, 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.⁴⁶ Nonetheless, the Court made clear that a government-defendant seeking to dissolve a desegregation decree would need to satisfy a significant burden before termination of judicial oversight became warranted. First, the defendant bore the burden


⁴⁴ 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”).

⁴⁵ 498 U.S. at 240.

⁴⁶ Id. at 248.
to show that it “had complied in good faith with the desegregation decree since it was entered.” 47 Second, it was required to establish that “the vestiges of past discrimination had been eliminated as far as practicable.” 48 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.” 49 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, and instead endorsed the broader structural function – requiring the school system to show that the institutional structure had been revamped before termination would be granted.

Subsequent cases modified the *Dowell* standard for termination, suggesting that the government-defendant’s strict compliance with the terms of the decree may not be required. In *Rufo v. Inmates of Suffolk County Jail*, 50 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 the new facility was not going to be able to 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. 51

Reversing, Justice White’s opinion for the majority against two dissents held that, notwithstanding 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

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47 Id. at 249-50.
48 Id. at 249-250.
49 Id. at 250; see also Parker, *Future of School Desegregation*, supra note 43, at 1164, 1167 (observing that *Dowell* imposed a high burden on defendants to “prov[e] the success of the remedy”).
50 502 U.S. 367 (1992); Levine, supra note 33, at 596.
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decree proves unworkable because of unforeseen obstacles,” “or when enforcement of the decree without modification would be detrimental to the public interest.” Further, it made clear that the party seeking modification bears the burden of persuasion to show that modification is warranted. In announcing this new standard, the Court emphasized the need for district courts to retain flexibility to modify prospective decrees: “The experience of the District Courts of Appeals in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation.”

In addition, Rufo expressly rejected the position that a structural decree – at least one 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.

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.” In this manner, Rufo preserved the district court’s ability to retain oversight over a consent decree even where the defendant had ceased its violation of rights and conformed to the minimum legal requirements.

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52 502 U.S. at 384.
53 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.”).
54 Id. at 381.
55 Id. at 389.
56 Id. at 391.
changed circumstances

Frew v. Hawkins\(^{57}\) adopted yet another standard for terminating 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 in which the State agreed to extensive and detailed requirements for the provision of services to children far beyond the “brief and general mandate of the statute itself.”\(^{58}\) 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 was proper where “the objects of the decree have been attained.” It reasoned that in institutional reform cases, lower courts must “exercise their equitable powers” in conformity with this standard to ensure that “responsibility for discharging the State’s obligations is returned promptly to the State and its officials.”\(^{59}\) Nonetheless, it noted that the burden of persuasion rested with defendants to show that termination was warranted.\(^{60}\)

Importantly, Frew did not provide any additional guidance for how lower courts were to define the “objects of the decree.” Dowell suggested that the “object of the decree” might be the total restructuring of a public school system. Rufo 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 this evolution of cases. First, notwithstanding language in Dowell, the subsequent cases of Rufo and Frew hold that modification or even termination of an institutional reform decree might be warranted even where government-defendants fail to show strict compliance with the terms of the decree. The surviving portion of Dowell states that termination is warranted where the defendant can show it has


\(^{58}\) Id. at 435

\(^{59}\) Id. at 442.

\(^{60}\) Id. at 442 (“If the State establishes reason to modify the decree, the court should make the necessary changes; where it has not done so, however, the decree should be enforced according to its terms.”).
successfully eliminated the vestiges of its prior unlawful conduct to the extent practicable. Rufo holds that modification is proper where changed circumstances render continued enforcement against the public interest. Frew holds that termination is mandated where the objectives of the decree have been attained.

Second, however, the district court retains broad discretion in determining when termination is warranted. Frew holds that termination is required where the decree’s objectives have been attained, but does not appear to limit the district court’s definition of those objectives. Indeed, Rufo suggested that the objectives of a decree, at least one entered with the consent of the parties, may properly reach beyond ensuring that the government-defendant complies with the bare minimum of the constitutional or 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.

C. Institutional reform litigation today

Although institutional reform litigation was initially developed in the context of school desegregation, the model quickly extended to enforce other education rights. At the same time, advocates began employing this model to restructure other types of public institutions, including prisons, hospitals, mental institutions, welfare systems, and law enforcement agencies. Notwithstanding periodic claims of its death, institutional reform litigation in federal courts continues to play an important role in

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61 See Wendy Parker, Public Law Remedies, supra note 32 (describing Supreme Court approach to public law remedies as transsubstantive, reaching beyond desegregation cases); Fiss, The Forms of Justice, supra note 2, at 3-4 (describing transfer of structural reform model to other contexts beyond desegregation). Outside the context of education rights, plaintiffs have brought institutional reform litigation against a variety of government institutions, including prisons and jails, state welfare systems, and mental health facilities, among others. The University of Michigan Law School’s Civil Rights Litigation Clearinghouse provides case information on thousands of institutional reform cases from federal and state court. See http://www.clearinghouse.net/index.php.
contemporary efforts to protect systemic violations of individual rights.\footnote{For a discussion of the persistence of institutional reform generally, see e.g., Sabel & Simon, supra note 2, at 1021 (describing “protean persistence” of institutional reform litigation); see also Schlanger, supra note 5, at 551 (challenging “conventional wisdom” that institutional reform litigation “peaked long ago and is now moribund”).}

For example, in the context of education rights, although state courts have become increasingly active in imposing and monitoring structural decrees over school systems,\footnote{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, e.g., Rebell, supra note 3, at 1526; Heise, State Constitutions, supra note 14, at 1151-53.} \footnote{See generally Rebell, supra note 3 (discussing role of federal courts in securing equal educational opportunity rights); Bowman, A New Strategy, supra note 14, at 57-59 (2009) Liebman & Sabel, supra note 4, at 278-298.} federal courts also remain active sites for challenges to structural discrimination in public school systems.\footnote{U.S. Comm’n on Civil Rights, Becoming Less Separate? School Desegregation, Justice Department Enforcement, and the Pursuit of Unitary Status (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, supra note 43 (conducting empirical study of remaining desegregation cases).} First, federal courts retain responsibility for enforcing the scores of remaining school desegregation decrees.\footnote{For example, in the context of education rights, although state courts have become increasingly active in imposing and monitoring structural decrees over school systems, federal courts also remain active sites for challenges to structural discrimination in public school systems. First, federal courts retain responsibility for enforcing the scores of remaining school desegregation decrees. Second, and perhaps more important, federal courts continue to play an important role in enforcing congressionally created education rights, including the statutory rights against discrimination on the basis of race, ethnicity and...} Second, and perhaps more important, federal courts continue to play an important role in enforcing congressionally created education rights, including the statutory rights against discrimination on the basis of race, ethnicity and
national origin, sex, disability, and limited English proficiency.

Students with disabilities, for example, rely on federal courts to protect against systemic violations of their rights under the Individuals 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. 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. 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.

Similarly, English language learners (ELLs) 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. The plaintiffs in Horne v. Flores itself filed suit to enforce this provision, seeking a

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70 20 U.S.C. § 1412(a); but see Pasachoff, supra note 14 (questioning viability of institutional reform litigation to enforce IDEA rights).
71 Jamie S. v. Milwaukee Public Schools, 668 F.3d 481 (7th Cir. 2012).
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 and race, color, or national origin under Title VI of the Civil Rights Act of 1964. 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 hostile educational environment. 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.

In addition, federal courts continue to play an active role in institutional reform litigation outside of the education context. In the law enforcement context, in the recent high-profile example of 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

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74 20 U.S.C. § 1681(a) (“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.”).

75 42 U.S.C. § 2000(d) (“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.”).


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.\textsuperscript{78} In the context of child welfare, a class of plaintiffs filed suit in April of 2010 against the Commonwealth of Massachusetts in \textit{Connor B. v. Patrick} alleging 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.\textsuperscript{79} 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 federal 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 federal court’s intervention to restructure a state or local government institution that has violated the rights of a traditionally disenfranchised group.

\textsuperscript{78} Complaint in United States v. Maricopa County, 2:12-cv-00981-LOA (D. Ariz. filed May 10, 2012).

II. *HORNE v. FLORES: REINTERPRETING RULE 60(b)(5) TO TERMINATE INSTITUTIONAL REFORM DECREES*

Although federal courts continue to play an expansive role in restructuring state and local government institutions to protect federal rights, the Supreme Court has grown increasingly skeptical of this model of social reform. Most recently, in its 2009 decision of *Horne v. Flores*, a five-four majority of the Court expressed hostility to institutional reform litigation by reinterpreting Rule 60(b)(5) of the Federal Rules of Civil Procedure to make it significantly easier for government-defendants to terminate judicial oversight in these types of cases. This part begins by discussing the particular facts of *Horne*, which in the Court’s view exemplified the problems inherent in all institutional reform cases. It then analyzes the *Horne* majority’s interpretation of Rule 60(b)(5) to alter the standard and burden for terminating judicial oversight in institutional reform cases, contrasting it with the text of the Rule and prior precedent on terminating structural decrees. 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 English language learner (ELL) students enrolled in the Nogales School District – a relatively small 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 (EEOA) of 1974. 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).

The EEOA provides in relevant part, “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

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language barriers that impede equal participation by its students in its instruction programs.”

The Fifth Circuit in *Castaneda v. Pickard* interpreted this provision 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.

Congress created an express private right of action for private individuals to file suit in federal district court to enforce the EEOA’s provisions.

After trial, the district court found the defendants in violation of the second prong of the *Castaneda* inquiry because the level of ELL program funding in Nogales School District was “arbitrary and capricious and bore no relation to the actual funding need.” 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.

Defendants chose not to appeal the order but nonetheless did nothing to comply. 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.” 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.

Upon enactment of H.B. 2064, Defendant State Superintendent, joined by leaders of the state legislature seeking to

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84 *See* Bowman, *Pursuing Educational Opportunities*, supra note 82, at 930 (discussing *Castaneda* test).
85 20 U.S.C. §§ 1706, 1708
86 129 S. Ct. at 2611.
87 Id.
88 Id. at 2590.
89 Id. at 2590.
90 Id. at 2590.
intervene, moved to dissolve the 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 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.\footnote{480 F. Supp.2d 1157, 1167 (D. Ariz. 2007).} The Ninth Circuit affirmed.

On certiorari, Justice Alito reversed for a five-four majority of the Court, holding that the district court abused its discretion in refusing to terminate the decree. In doing so, the Court expressed deep skepticism of institutional reform litigation, underscoring particular facts of the case that, in its view, exacerbated the democratic accountability concerns inherent in these types of cases. First, two of the three named Defendants opposed the motion to terminate and sided with Plaintiffs. Second, the decree focused exclusively on a funding remedy – requiring the state legislature to appropriate funds to satisfy the decree.

1. Party alignment

In \textit{Horne}, the Court emphasized the threat to democratic accountability posed by institutional reform decrees and pointed to particular facts of the case before it that exacerbated these concerns. Speaking of structural decrees in general, the Court noted:

\begin{quote}
[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
\end{quote}
constituents, they are constrained in their ability to fulfill their duties as democratically-elected officials.\textsuperscript{92} This concern that government officials as putative defendants would embrace a remedial decree to achieve policies aligned with their personal preferences that then become immune from subsequent political change was heightened in this case, the Court maintained, because none of the Defendants challenged the original district court finding that the Nogales School District was in violation of the EEOA on appeal. On the contrary, the Attorney General took the unusual step of requesting that the district court extend the injunctive order \textit{statewide}, concerned that any district-specific funding remedy would run afoul of the state constitution requiring a “general and uniform public school system.”\textsuperscript{93}

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.”\textsuperscript{94}

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.”\textsuperscript{95}

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

\textsuperscript{92} 129 S. Ct. at 2594 (internal quotations and citations omitted).
\textsuperscript{93} Id. at 2590, 2607 (“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).
\textsuperscript{94} Id. at 2593 n.3; \textit{but see id.}, at. 2617 (Breyer, J., dissenting) (contestening majority’s characterization that defendants “welcomed” the decree).
\textsuperscript{95} Id. at 2596.
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.\textsuperscript{96}

2. Funding remedy

Moreover, the Court expressed skepticism regarding the political legitimacy of institutional reform decrees imposed by the federal judiciary, given the proper allocation of powers in our federalist system. These concerns involve the 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.”\textsuperscript{97}

It then pointed out that the specific remedy sought in the \textit{Horne} case heightened these concerns. The exclusive remedial focus of \textit{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.”\textsuperscript{98} In these ways, the facts of \textit{Horne} underscored the risks to democratic accountability and federalism principles inherent in all federal institutional reform cases generally.

B. Reinterpreting Rule 60(b)(5)

These facts, exacerbating ordinary concerns about institutional reform litigation, formed the backdrop to the dramatic narrowing of the traditional breadth and flexibility of federal district courts’ remedial authority in these cases. Departing from both the text of Rule 60(b)(5) and prior precedent, the Court altered the standard and burden for dissolving an institutional reform decree, substantially enlarging a government-defendants’ ability to terminate judicial oversight in public law cases. First, it replaced the textual and precedential commitment to a balancing of equities – 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. Second, the Court restricted

\textsuperscript{96} Id. at 2596.
\textsuperscript{97} Id. at 2593.
\textsuperscript{98} Id. at 2593-94.
the traditional flexibility of district courts’ remedial authority by altering the “may” in the actual text to a “must,” requiring district courts to terminate injunctive decrees in certain circumstances rather than simply permitting such termination. Third, while it affirmed that the defendant bears at least the initial burden in a Rule 60(b)(5) motion, its application of that standard to the facts suggested that the burden borne by defendants is more akin to a burden of production than a burden of persuasion.


First, Horne transformed the standard for terminating injunctive relief in institutional reform cases, reinterpreting the language of Rule 60(b)(5), which permits relief from judgment where “applying prospectively is no longer equitable,” to require 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 a Rule 60(b)(5) motion, lower courts must “ascertain whether ongoing enforcement of the original order was supported by an ongoing violation of federal law (here, the EEOA).”

Citing Frew for the proposition that a decree must be terminated where its objectives have been attained, it suggested that the only permissible objective of an injunctive decree would be to prevent an ongoing violation of federal law: “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.” Once the ongoing violations of federal law had ceased, termination would be mandated.

This requirement for termination absent an ongoing violation of law departs from the long line of institutional reform cases that preceded it. 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.” 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 because it was no longer assigning students to schools on the basis of race in violation of law; rather, the school system

99 Id. at 2597.
100 Id. at 2595.
would be required to show that the structural and reparative functions of the decree had also been achieved.

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. In these circumstances, a consent decree would remain in force without termination even absent an ongoing violation of law.

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.101

After Horne, by contrast, the touchstone for the Rule 60(b)(5) termination inquiry is the existence of an ongoing violation of the law. Read broadly, Horne appears to repudiate the long line of precedent permitting district court discretion in determining when termination is appropriate, suggesting that federal district courts’ remedial authority is limited to providing preventative relief only; where the defendant is no longer currently violating plaintiffs’ rights, termination is mandated.

The applicability of this new standard, requiring termination of institutional reform decrees absent an ongoing violation of federal law, remains subject to varying interpretations. Lower courts might adopt a narrow interpretation of Horne by limiting its holding to cases arising under the EEOA only. Alternatively, they might conclude that the new Horne standard is confined to the facts of that case, where the decree’s objectives were, in fact, limited to preventing ongoing violations of law.

First, lower courts might minimize the impact of Horne by limiting its holding 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

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101 See generally MOORE FEDERAL PRACTICE § 60.47
Based on this language, a lower court might conclude that although the EEOA limits permissible remedies to the cessation of ongoing violations of the law, remedies granted pursuant to other laws – including constitutional provisions – are not so limited.

In fact, however, no lower court that has applied Horne’s interpretation of Rule 60(b)(5) has limited it to EEOA cases. For example, in Petties v. District of Columbia, 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 that case 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. As no lower court to date has limited the Horne standard to EEOA cases, it is unlikely that the impact of Horne on the number of institutional reform decrees subject to termination will be limited in this manner.

Second, lower courts might cabin the impact of Horne by limiting its holding to the facts of the case, in which the objectives of the decree were in fact limited to stopping ongoing violations of the EEOA. The decree entered by the district court sought only to prevent defendants from continuing to inadequately fund ELL programs in violation of the EEOA; it did not seek any other structural or reparative functions. A narrow interpretation of the case might conclude that Horne says nothing about the permissible objectives of other decrees, particularly those entered with the consent of the parties, which might reach beyond the mere cessation of ongoing violations of law.

Whether Horne holds that the objective of any structural decree must be limited to preventing ongoing violations of the law – and therefore should be terminated as soon as the ongoing violations of law have ceased – is particularly important given the importance of consent decrees in institutional reform cases. The vast majority of successful institutional reform cases result in consent decrees rather than court-ordered injunctive relief. Traditionally, it has been understood that government-defendants may consent to requirements beyond what a federal court could on its own impose. Rufo expressly affirmed this principle, prohibiting courts from attempting to rewrite consent decrees to conform to the

102 129 S. Ct. at 2595.
103 662 F.3d 564 (D.C. Cir. 2010).
constitutional or statutory floor. Nothing in *Horne*, however, suggested that its conclusion that a decree’s objectives must be limited to preventing ongoing violations of law was unique to injunctive decrees and would not apply equally to consent decrees.\(^{104}\) On the contrary, its concerns regarding the threat to democratic accountability apply equally, if not with more force, to consent decrees.\(^{105}\)

Lower courts have split on whether federal courts may enforce consent decrees that reach beyond what would be required to prevent ongoing violations of federal law after *Horne*. On the one hand, some courts have held that *Horne*’s requirement for termination absent an ongoing violation of law applies equally to consent decrees as well as court-ordered injunctive decrees. In *Consumer Advisory Board v. Harvey*, for example, the district court entered a consent decree in which the government-defendant agreed to improve conditions for involuntarily confined residents of a state-run mental institution.\(^{106}\) Defendants subsequently moved to terminate pursuant to Rule 60(b)(5), but plaintiffs objected on the ground that the defendants had failed to comply with many of the substantive requirements of the decree. Granting defendant’s motion, the district court for the District of Maine 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.”\(^{107}\) 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.”\(^{108}\)

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\(^{104}\) 129 S. Ct. at 2594, 2597.


\(^{107}\) Id.

\(^{108}\) See also U.S. v. Bd. of Educ. of the City of Chicago, 663 F. Supp.2d 649 (N.D. Ill. 2009) (stating in the context of a desegregation
On the other hand, some courts have refused to apply *Horne* to decrees negotiated by and entered into with the consent of defendants. In *Evans v. Fenty*, the treatment of institutionalized individuals with developmental disabilities, defendants moved to vacate the consent decree arguing that although it 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 bare bones of what a court could order absent government consent.

In these ways, the precise impact of *Horne* on the future of institutional reform litigation depends in part on whether the lower courts apply the new standard broadly or narrowly.

2. Flexibility in remedial decrees.

In addition to altering the standard for terminating prospective decrees in institutional reform cases, *Horne* replaced the more open-ended discretionary principles associated with district courts’ inherent equity powers with a more rule-like approach to termination. The Court altered the language in Rule 60(b)(5) providing that a court “may” grant relief from judgment where prospective application is no longer equitable, to a requirement mandating that a court “must” grant relief where the standard has been satisfied.

It has always been understood that the authority to grant relief from a prospective decree derives from the district court’s discretionary exercise of its inherent equity authority. The Supreme Court in its public law jurisprudence has repeatedly emphasized the need to preserve district court flexibility in this case, “The *Horne* opinion makes no distinction between court-ordered or consent decrees.”).


110 See also LaShawn A. v. Fenty, 701 F. Supp.2d 84 (D.D.C. 2010) (denying defendant’s Rule 60(b)(5) motion to terminate injunctive 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); *Juan F. v. Rell*, 2010 WL 5590094 (D. Conn. Sept. 22, 2010) (No. 3:89-CV-859) (“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.”).
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regard. For example, in *Freeman v. Pitts*, the circuit court had held that the district court erroneously granted partial termination of a desegregation decree where the school system failed to show that it was in compliance with all of the decree’s requirements.

Justice Kennedy, writing for the Court with no dissents, reversed, relying on the breadth and flexibility of the district courts’ traditional equitable authority: “The essence of a court’s equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress injuries caused by unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision.”

For these reasons, a district court’s decision on a Rule 60(b)(5) motion is subject to an abuse of discretion standard.

*Horne*, by contrast, converts the more flexible standard, calling on a district court to balance the equities and render a discretionary decision, into a more rule-based requirement, mandating the district court to grant Rule 60(b)(5) relief when the relevant standard – absence of an ongoing violation of law – has been met. As Justice Breyer’s dissent noted, “the Court mentions, but fails to apply, the well-settled legal principle that appellate courts, including this Court, review district court denials of Rule 60(b) motions (of the kind before us) for abuse of discretion…. The Court’s bare assertion that a court abuses its discretion when it fails to order warranted relief...fails to account for the deference due to the District Court’s decision.”

Moreover, not only did *Horne* require dissolution where there is no ongoing violation of law, it also cast doubt on the types of evidence that a district court might consider in determining whether there is a current violation of law. First, the majority expressed skepticism of a court’s reliance on funding levels to determine compliance with substantive federal education rights, claiming “a growing consensus in education research that increased funding alone does not improve student achievement.”

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112 Id. at 487.
113 Id. at 2619 (Breyer, J., dissenting).
114 See Bowman, Pursuing Educational Opportunities, supra note 82, at 961 (discussing impact of *Horne* on limiting funding remedies in education cases).
115 Id. at 2603; see also id. at 2597 (“Of course, any educational program, including the ‘appropriate action’ mandated by the EEOA,
At the same time, the majority was at best ambivalent about the probative value of student performance as an indicator of compliance with federal education rights. The majority acknowledged evidence of “the subpar performance of Nogales’ high school students,” which, as Justice Breyer’s dissent pointed out, showed that ELL students in Nogales School District graduated at a rate of only 59 percent and passed the state assessment test at a rate of only 28 percent. Yet the majority dismissed such data, stating “[t]here are many possible causes for the performance of students in Nogales’ high school ELL programs. These include the difficulty in teaching English to older students … and problems, such as drug use and the prevalence of gangs.” Elsewhere in the opinion it concluded, “it is inevitable that ELL students (who, by definition, are not yet proficient in English) will underperform as compared to native speakers.”

Thus, *Horne* limited the district court’s discretion by mandating, rather than merely permitting, termination of prospective relief where the relevant standard had been satisfied. In addition, it limited the district court’s discretion in determining what types of evidence would support a finding that the standard had been satisfied.

3. Defendant’s burden.

Finally, not only did *Horne* alter the standard for termination and drastically limit the district courts’ discretionary authority, it also appeared to reduce the burden borne by defendants in moving for termination. On the surface, the majority 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.” However, the manner in which the Court applied this burden to the facts suggested that defendant bears a more

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116 Id. at 2605.
117 Id. at 2625 (Breyer, J., dissenting).
118 Id. at 2605 n.20.
119 Id. at 2603 n. 16. In other portions of the opinion, however, the majority suggested that positive student performance might provide probative evidence of compliance. Discussing the availability of data on student progress and achievement under the No Child Left Behind Act, the Court held “[t]his evidence could prove persuasive evidence of the current effectiveness of Nogales’ ELL programming. Id. at 2062-03.
120 129 S. Ct. at 2593.
modest burden of production rather than the traditional burden of persuasion.

In *Horne*, defendant-movants pointed to four purported changes in circumstances to argue for dissolution, 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. 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.

On certiorari, 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, by holding that the district court abused its discretion in denying the motion, the Court suggests that the defendants-movants bore only a burden of production – to show there was some question as to whether they were currently in compliance – to warrant further litigation.

This reduction of the initial burden places 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 burden of production suggesting it may now be in compliance with the law. As Justice Breyer’s dissent observed, the *Horne* ruling creates a dangerous possibility that such orders, judgments and decrees, long final or acquiesced in,

121 Id. at 2600.
122 Id. at 2591.
123 See Kane, 30 Hastings L.J. at 67 (“A system of relief that even suggests to litigants that it may be worthwhile to bring such motions must be questioned.”).
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?\textsuperscript{124}

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 \textit{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 in \textit{Basel v. Bielaczyc},\textsuperscript{125} involving a procedural due process challenge to the timeliness of hearings on applications for state-administered welfare benefits, the Eastern District of Michigan applied an expansive interpretation of \textit{Horne} to place the burden of persuasion on the plaintiff to establish a current and ongoing violation of law to defeat defendant’s Rule 60(b)(5) motion to terminate a prospective consent decree.\textsuperscript{126} 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 the State, “whether the plaintiff class would have viable federal claims today is highly questionable.”\textsuperscript{127} Given plaintiff’s failure to prove a current and ongoing violation of law, the district court concluded that dissolution was warranted.

\textbf{C. Implications of Horne for the future of institutional reform litigation}

In this manner, \textit{Horne} and its progeny have made it significantly easier for government-defendants to terminate

\textsuperscript{124}129 S. Ct. at 2620 (Breyer, J., dissenting).
\textsuperscript{126}Id. at *6 (citing \textit{Horne} for proposition that “the court ‘must ascertain whether ongoing enforcement of the original order [is] supported by an ongoing violation of federal law.’”).
\textsuperscript{127}Id. at *7-*8.
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; termination has been deemed required regardless of whether 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 will 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 to fund and litigate these comprehensive and long-running cases. Such counsel may not be able or willing to devote the necessary resources to repeatedly

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128 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; Schlanger, supra note 5.
re-litigate the question of liability, particularly where evidence from the initial liability trial has become stale. 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.

Indeed, although an empirical analysis of the precise impact of the *Horne* decision is beyond the scope of this article, the parallels between *Horne* and the Prison Litigation Reform Act of 1996 suggest that *Horne* will significantly limit the continued viability of institutional reform litigation.

The Prison Litigation Reform Act (PLRA), initially proposed as part of the Republican Contract with America, 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 Act 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…” Section 802(c) expressly applies these limitations to consent decrees as well as court-ordered injunctive

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129 See Schlanger, supra note 5, at 627 (discussing funding for plaintiffs’ counsel in institutional reform cases).
130 Describing the impact of the PLRA on decrees relating to prison conditions, Professor Margo Schlanger observed that reopening the decree “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.” Schlanger, supra note 5, at 627-28.
131 See Schlanger, supra note 5, at 591.
132 Tracking structural decrees poses significant research challenges, as decisions are often unreported and conflicts are often resolved through settlement. See Schlanger, supra note 5, at 571 (noting difficulties in gathering data on court-order regulation because they are often “completely unobservable by ordinary case research methods”).
134 18 U.S.C. § 3626(b)(1), (3). The Act provides that such decrees are subject to termination two years after entry, and every year thereafter, subject to the same exception.
decrees. 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.

Thus, similar to *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. Further, similar to some lower courts’ interpretation of *Horne*’s limitations, 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. For example, 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.” Other commentators, including those in favor of and opposed to institutional reform litigation, agree. To the extent that *Horne* mirrors provisions of the PLRA, then, we might expect a similar decline in the number of government institutions subject to federal court oversight in coming years.

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137 *But see* Tushnet & Yackle, supra note 5 (suggesting that PLRA arguably does not alter the standard for dissolution from prior case law).
III. VIOLATING THE FOUNDATIONAL PRINCIPLES OF THE FEDERAL RULES OF CIVIL PROCEDURE

Regardless of one’s views on the desirability of institutional reform litigation, the Supreme Court’s opinion in *Horne v. Flores* is subject to criticism for its misuse of the transsubstantive Federal Rules of Civil Procedure to achieve a substantive policy goal. In delegating to the Supreme Court the authority to promulgate procedural 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.\(^{139}\)

To protect against such encroachment, the Act and the resulting Federal Rules set forth two foundational principles. The first principle required that procedural rules be general and transsubstantive.\(^{140}\) The second principle prohibited a Rule from being amended except through the formal process set forth in the Rules Enabling Act.\(^{141}\) The *Horne* decision violates both of these foundational norms. Had the Court adhered to these foundational principles – designed to protect procedural rules against unchecked politicization – the development of any new procedural rule governing institutional reform litigation would have benefited from a measure of democratic accountability and objective empirical study. Instead, by unilaterally reinterpreting Rule 60(b)(5) to further its substantive policy preference disfavoring institutional reform litigation, the *Horne* majority engaged in precisely the type of judicial activism the Federal Rules are designed to protect against.

A. Transsubstantivity

The first foundational principle of the Federal Rules of Civil Procedure requires that all rules be general and transsubstantive; that is, procedural rules should be generally

\(^{139}\) Miller, supra note 8, at 84; Burbank, supra note 8, 541-42.  
\(^{140}\) Id.  
\(^{141}\) Miller, supra note 8, at 84; Burbank, supra note 8, at 536 (describing foundational assumption that “once made through ‘The Enabling Act Process,’ these general rules can only be changed through that process (or by legislation)”).
applicable to all types of cases.\footnote{142}{Miller, supra note 8, at 84.} This principle rests on the premise that procedural rules should be value-neutral as to substantive policy choices, as those substantive policy decisions must be developed through the political process.\footnote{143}{Miller, supra note 8, at 90 ("Because the mission of procedural rulemaking has been thought to help execute the policy choices made by others, the theory is that substance-specific rules should be generated by those other institutions and processes.").} As Paul Carrington notes, "the responsibility for making non-transsubstantive law is constitutionally vested in Congress, not the Court."\footnote{144}{Carrington, supra note 8.} Discussing the Court’s opinion in \textit{Bell Atlantic Corp. v. Twombly}, which suggested that a heightened Rule 8(a) pleading requirement should apply to antitrust cases, he stated: "If, for example, there is to be a different standard for summary judgment or motions for judgment on the pleadings applicable to antitrust cases, the institution to promulgate such a law was and is Congress, not the Court."\footnote{145}{Id.}

\textit{Horne} violates the transsubstantive norm by reinterpreting Rule 60(b)(5) to reduce the standard and burden for terminating prospective decrees in institutional reform cases only. According to the Court, special standards are necessary in this context to protect against the special federalism and separation-of-powers dangers posed by institutional reform decrees against government defendants.\footnote{146}{Horne v. Flores, 129 S. Ct. at 2593 (discussing special concerns of institutional reform litigation); \textit{id.} at 2608 (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").} However, the transsubstantive principle mandates that if there is to be a different standard for terminating prospective decrees applicable in institutional reform cases only, then it is for Congress, not the Court, to develop such a rule.

Indeed, members of Congress have repeatedly attempted to do just that, as Republican lawmakers have expressed growing frustration at institutional reform litigation. To date, however, they have not been able to garner the political support necessary to ease the burden and standard for terminating decrees in all institutional reform cases.

Their most significant victory to date has been the Prison Litigation Reform Act, described in the preceding part, which
reduced the standard for terminating institutional reform decrees in prison cases only. Even this law, however, was subject to heated partisan debate.

On the one hand, Republicans urged adoption to restore responsibility over prison administration to state and local policymakers. Senator Bob 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.”\(^{147}\) 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.”\(^{148}\)

Democrats, by contrast, opposed the proposal on the ground that it would unduly compromise judicial protections for prisoners’ rights. Senator Ted Kennedy, for example, 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”\(^{149}\) 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.”\(^{150}\)

Given the political opposition to limiting institutional reform litigation for prisoners, it is plausible that Congress would have even less political support to reduce the burden and standard for termination in all institutional reform cases, such as those brought on behalf of more politically palatable constituencies such as schoolchildren or mental health patients.

In fact, Republican attempts to extend the PLRA’s standards for terminating prospective decrees to other forms of institutional reform litigation have failed. In 1998, Senators Orrin Hatch and Strom Thurmond proposed the Judicial Improvement Act, which would, among other things, impose a five-year time

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150 Id. at S2297.
limit on the operation of all prospective injunctive decrees and consent judgments 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.”151 Similarly, the proposed Federal Consent Decree Fairness Act,152 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 sufficient support for enactment.

Given the politicized nature of the debate around institutional reform decrees, the need for a politically accountable process to develop the proper standard and burden for their termination becomes all the more important. Congress’ repeated attempts to apply a special standard for terminating prospective decrees to all institutional reform cases failed to garner sufficient political support. In light of this failure, the Court’s unilateral attempt to do so, under the auspices of a non-transsubstantive procedural rule, is particularly suspect.

B. Formal Rule-Amendment Process

Even setting aside the importance of the transsubstantive norm, if the Federal Rules were to be amended to facilitate termination of institutional reform decrees, the second foundational principle of the Federal Rules requires that such a change cannot be developed by the Supreme Court alone. Rather, to protect against the unchecked politicization of procedural rules, the second foundational principle provides that, once properly promulgated, a Federal Rule may only be amended through the formal process set

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forth in the Rules Enabling Act.\textsuperscript{153} 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.\textsuperscript{154} Acknowledging the potential impact that procedural rules may have on substantive rights, this process ensures that any proposed change be subject to a transparent and rigorous process of empirical study and deliberation, and a measure of democratic accountability.\textsuperscript{155}

Adherence to this second foundational principle is particularly important in light of the significant debate and scholarship over the efficiency and legitimacy of institutional reform litigation. First, scholars contest the institutional capacity of federal courts to effectively reform state and local government institutions. Second, they have long debated the democratic legitimacy of judicial intrusions into the policymaking functions of state and local officials. Third, they have challenged the applicability of the various critiques of institutional reform litigation to different forms of decrees, including decrees that enforce statutory as opposed to constitutional rights, those that employ innovative “experimentalist” approaches that grant far more discretion and control to state and local actors, and those that are entered into with the consent of the parties. The formal rule-amendment process would have provided the opportunity to develop empirical studies to evaluate these claims and a transparent forum to debate the benefits and costs of institutional reform litigation across different contexts.

\textsuperscript{153} Miller, supra note 8, at 84 (“[O]nly the rulemaking machinery or an act of Congress can change a properly promulgated Federal Rule”); Burbank, supra note 8, at 536 (“[O]nce made through ‘The Enabling Act Process,’ these general rules can only be changed through that process (or by legislation))”).

\textsuperscript{154} 28 U.S.C. §§2073, 2074; see also Carrington, supra note 8, 605 (describing process of rulemaking in practice).

\textsuperscript{155} Carrington, supra note 8, at 605 (“This political process had several virtues: transparency, disinterest, access to advice and empirical data, and a measure of 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: Civil Procedure: Pleading Standards, 121 HARV. L. REV. 305, 313 (2007).

For decades, scholars have debated the desirability of institutional reform litigation on the basis of efficacy. Influenced by legal process theories, critics of institutional reform litigation have questioned 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. Defenders of institutional reform litigation have countered 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.

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. This evidence suggests that the

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156 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).
157 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, (Joshua M. Dunn & Martin R. West, eds.) (2009) at 17-48 (describing school systems as closed bureaucracies resistant to judicial reform); Michael Heise, Litigated Learning and the Limits of Law, 57 VAND. L. REV. 2417 (2004); Donald R. Horowitz, supra note 4.
158 Rebell, supra note 3, at 1531-32; Koski, supra note 14, at 803.
159 Compare 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) and Hanushek & Lindseth, supra note 4, at 145-70 (conducting empirical study to conclude that courts are ineffective in improving student academic performance), to Rebell, supra note 3, at 1531-32 (citing studies he conducted Arthur Block suggesting that courts have been more effective in improving educational opportunities than administrative of legislative institutions).
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.

Compliance with the formal rule-amendment process would have permitted such further study, as well as consideration by lower court judges and practitioners, who no doubt could provide invaluable input as to the effectiveness of judicial remedies in reforming public institutions. The Supreme Court, however, circumvented this process to impose a new procedural rule for institutional reform litigation devoid of empirical support or practical consideration by those who are most directly impacted.

2. Politically accountable debate over the legitimacy of institutional reform decrees.

Perhaps even more heated than the debate over efficacy, the contest over the democratic legitimacy of institutional reform litigation has occupied scholars almost since the emergence of this model of social reform. As exemplified by the Congressional debates over the PLRA, this contest typically pits those who would emphasize the need for democratic 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. By circumventing the formal rule-amendment process, the Supreme Court definitively sided with the opponents of institutional reform litigation and

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160 See e.g., Koski, supra note 14, at 795 (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, Sandler & Schoenbrod, supra note 4; Horowitz, supra note 4, to Chayes, supra note 2, Fiss, Forms of Justice, supra note 2, Rebell, supra note 3, Jeffries & Rutherglen, supra note 4; Sabel & Simon, supra note 2, Liebman & Sabel, supra note 4.

161 Debates over the legitimacy of institutional reform litigation also frequently take on partisan undertones. See, e.g., Ryan, supra note 5, at 75 (arguing that debate over court involvement in education reform tends to break down along partisan lines); Tushnet & Yackle, supra note 5, at 13-22 (analyzing Republican challenges to institutional reform litigation); Schlanger, supra note 5, at 556 (describing contest over institutional reform litigation as one between progressives and conservatives); Gilles, supra note 5, at 146.
denied the possibility of a transparent and democratically accountable debate on this difficult issue.\textsuperscript{162}

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.\textsuperscript{163} 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.\textsuperscript{164} As frequently observed, putative defendants sometimes welcome institutional reform litigation because a victory for plaintiffs often results in increased budgets and resources for defendants’ operations.\textsuperscript{165} For example, suppose that a class of students with

\textsuperscript{162} 129 S. Ct. at 2593 (citing scholarship questioning legitimacy of institutional reform litigation); see also 129 S. Ct. at 2620 (Breyer, J., dissenting) (criticizing majority for failing to acknowledge scholarship defending institutional reform litigation).

\textsuperscript{163} See generally, Sandler & Schoenbrod, supra note 4 (criticizing lack of democratic accountability in institutional reform litigation); Gilles, supra note 5, (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”).

\textsuperscript{164} Sandler & Schoenbrod, supra note 4; 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); Horowitz, supra note 4, at 1294-95; see also Sabel & Simon, supra note 2, at 1093 (“The 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.”).

\textsuperscript{165} See, e.g., Sabel & Simon, supra note 2, at 1092 (“More often than not, agency heads or operations officers welcome the suit or at least
disabilities sues a superintendent alleging substandard special education services in violation of the IDEA. 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. 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.” As John Hart Ely maintained, federal judicial review is most important where elected officials have violated the rights of the politically powerless. 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.

Ultimately, much of the contest over the legitimacy of institutional reform litigation tracks the age-old debate over the proper role of the judiciary in our constitutional system, pivoting conceded many of the plaintiffs’ allegations.”); Parker, The Future of School Desegregation, supra note 43, at Schlanger, supra note 5, at 562 (noting that prison officials are often collaborators in the prison-conditions litigation, hoping that a victory for plaintiffs will increase their budgets).

166 See Chayes, supra note 2, at 1307, 1314 (noting that judicial insulation from “narrow political pressures” presents an institutional advantage and noting that “); Rebell, supra note 3, at 1538.


168 Jeffries & Rutherglen, supra note 4.
around the tension between deference to democratic processes, on the one hand, and protecting the interests of identifiable minority groups, on the other.\textsuperscript{169}

In \textit{Horne}, however, the majority definitively sided with one side of this long-standing debate. It justified its reinterpretation of Rule 60(b)(5) by underscoring the “sensitive federal concerns” implicated in these types of cases, and the need for district courts to “strive to restore state and local authorities to the control of a school system.”\textsuperscript{170} Citing scholarly critics of institutional reform cases such as Sandler and Schoenbrod, Michael McConnell, and Donald Horowitz, it emphasized the risk that elected officials would abuse structural decrees as political cover to “block ordinary avenues of political change” and “sidestep political constraints.”\textsuperscript{171} As Justice Breyer’s dissent notes, however, the Court’s analysis “reflects one side of a scholarly debate about how courts should properly handle decrees in institutional reform litigation”\textsuperscript{172} without acknowledging the other side.

The 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 difficulty counsels for an open and transparent process of careful deliberation, one that permits a measure of political accountability, precisely the type of process the Rules Enabling Act mandates. Instead, by resolving the question through a unilateral reinterpretation of the Federal Rules, the Supreme Court has foreclosed the possibility of such a process.

3. Nuanced consideration of institutional reform decrees in their myriad forms.

Finally, scholars have explored the different ways that the harms associated with institutional reform decrees apply to different forms of structural decrees. First, scholars have pointed out that decrees seeking to enforce statutory rights pose a lesser threat to principles of federalism and separation-of-powers than

\begin{itemize}
\item \textsuperscript{169} See generally, \textit{e.g.}, James S. Liebman & Brandon L. Garrett, \textit{Madisonian Equal Protection}, 104 Colum. L. Rev. 837 (2004) (discussing framers’ debate over structural protections against encroachment by political majorities on the rights of minorities).
\item \textsuperscript{170} 129 S. Ct. at 2593.
\item \textsuperscript{171} Id. at 2594.
\item \textsuperscript{172} Id. at 2620 (Breyer, J., dissenting).
\end{itemize}
those seeking to enforce constitutional rights. Second, they have maintained that decrees employing innovative experimentalist models granting far greater discretion and control to state and local actors, moot many of the efficacy and democratic accountability concerns associated with more traditional institutional reform decrees. Third, they have pointed out that institutional reform decrees entered with the consent of the parties pose a different calculus in terms of compromising efficiency and democratic accountability than injunctive decrees that are court-ordered.

Ignoring these distinctions, however, the *Horne* majority’s application of the new Rule 60(b)(5) standard to terminate, based as it is on generic pronouncements regarding the harms associated with institutional reform decrees generally, threatens to apply equally to all types of decrees, regardless of whether they enforce statutory as opposed to constitutional rights, employ experimentalist models, or are entered into with the consent of the parties. Had the Court instead deferred to the formal rule-amendment process, by contrast, the development of the new rule could have benefited from careful consideration of the various nuances of differing decrees.

a. 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 cases such as those arising the EEOA and IDEA, 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.173 As to federalism concerns, the

173 Koski, supra note 14, at 797 (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 and Simon, supra note 2, at 1090 (noting instances in which legislature has authorized structural relief); Chayes, supra note 2, at 1314 (“For cases brought under an Act of Congress rather than the Constitution, 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. Justice Breyer’s dissent 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 like the one at issue in *Horne*. Notwithstanding these differences, the *Horne* majority issued a general pronouncement regarding the threat to federalism and separation-of-powers principles posed by all institutional reform decrees without distinction. In doing so, it foreclosed the possible use of the formal rule-amendment process to consider and possibly even generate a consensus on whether decrees enforcing statutory rights might be subject to different termination standards than those enforcing constitutional interests.

b. Experimentalist decrees

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. Notwithstanding this emerging area of scholarship, the Supreme Court’s holding in *Horne* threatens to treat all institutional reform cases with the same degree of skepticism and subject to the same new standard for termination.

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.”)

174 See Chayes, supra note 2, at 1314 (“The 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 legislation.”).

175 129 S. Ct. at 2621.

176 Sabel & Simon, supra note 2; see also Liebman & Sabel, supra note 4; Rebell, supra note 3; Koski, supra note 14, Jeffries & Rutherglen, supra note 4.
As many scholars of institutional reform litigation have recognized, not all institutional reform decrees are the same. One important distinction tracks the extent to which the federal court micromanages the institution. 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. 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.177

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 requires the government-defendant to provide a minimum level of funding to the institution or program at issue.178 The *Horne* case itself involved a decree based on this model, mandating the state of Arizona to provide funding for ELL programs that was reasonably related to actual needs.179

177 Sabel & Simon, supra note 2, at 1024 (“Once 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 Consent Decree in A.B. v. Rhinebeck Central Sch. Dist., No. 03 Civ. 3241 (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, 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.


179 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
Most recently, a number of scholars have observed that decrees have begun to adopt a third “experimentalist” approach.\textsuperscript{180} 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.\textsuperscript{181} 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.\textsuperscript{182} They describe:

\begin{quote}
\textit{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.\textsuperscript{183}
\end{quote}

Scholars contend that this new experimentalist model of institutional reform litigation moot many of the traditional critiques against institutional reform litigation.\textsuperscript{184} 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

\footnotesize{\textsuperscript{180} Sabel & Simon, supra note 2; see also Liebman & Sabel, supra note 4; Rebell, supra note 3; Koski, supra note 14, Jeffries & Rutherglen, supra note 4.}
\footnotesize{\textsuperscript{181} Sabel & Simon, supra note 2, at 1020.}
\footnotesize{\textsuperscript{182} Id. at 1019.}
\footnotesize{\textsuperscript{183} Id. at 1019.}
\footnotesize{\textsuperscript{184} Id. at 1016, 1082-1100.}
determine the particular policies to be employed in order to achieve 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.185

Fortunately, the Horne majority’s analysis leaves open the possibility that lower courts may impose a different standard for decrees employing experimentalist models. By focusing on the unique federalism concerns implicated in decrees such as the one at issue in Horne, which followed the second model by commanding state and local budgets, lower courts may retain the flexibility to apply a stricter standard for terminating experimentalist decrees that do not dictate budget priorities. Nonetheless, the Court’s lack of respect for the formal rule-amendment process forecloses the possibility that a more rigorous process, including procedural experts, judges, and practitioners, would be employed to determine the appropriate standard for termination in these types of cases.

c. 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. Scholars have argued that the two categories threaten democratic accountability to differing degrees. The two categories also pose a 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

185 Id. at 1094.
of democratic accountability because 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’ policy preferences. In cases in which defendants have litigated and lost on the question of liability, by contrast, defendants are least likely to have negotiated a sweetheart deal with plaintiffs. 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. 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 Congressional debates over 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

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187 129 S. Ct. at 2617 (Breyer, J., dissenting) (“Nor 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.’); See Jeffries & Rutherglen, supra note 4, at 1413-14 (“As nominal defendants, [state officials] might take positions anywhere along a spectrum from active opposition to tacit support of plaintiff’s claims.”).
more than implementing a consent decree. And, the court system as a whole would be required to accommodate the resulting increase in workload.188

For these reasons, consideration of whether the *Horne* standard should apply to consent decrees as well as court-ordered injunctive relief would benefit from careful deliberation and study. Fortunately, the *Horne* opinion itself leaves open the possibility that lower courts, considering these issues, might decline to apply the *Horne* standard to consent decrees. Nonetheless, the better solution would have been for the formal rule-amendment process, with its access to empirical evidence and involvement of procedural experts, judges, and practitioners, to consider these questions and develop the proper standard or standards accordingly.

In these ways, the Supreme Court’s use of Rule 60(b)(5) in *Horne* to cabin the remedial authority of district courts violates the two foundational principles of the Federal Rules of Civil Procedure – by developing a non-transsubstantive rule and ignoring the formal rulemaking process – to further a politicized goal of curbing institutional reform litigation. Compromising principles of transparency, deliberation, and democratic accountability in this manner, it casts a shadow on the legitimacy of procedural law, as well as the Supreme Court itself as an institution.

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 Supreme Court’s use of the Federal Rules of Civil Procedure to side with the opponents of institutional reform litigation in a manner that evades any form of democratic accountability fits poorly within our constitutional system.