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Aging Injunctions and the Legacy of Institutional Reform Litigation

*Jason Parkin**

*Institutional reform litigation has been an enduring feature of the American legal system since the Supreme Court's ruling in *Brown v. Board of Education*. The resulting injunctions have transformed countless bureaucracies notorious for resisting change, including public school systems, housing authorities, social services agencies, correctional facilities, and police departments. But these injunctions face an uncertain future. The Supreme Court has held that institutional reform injunctions must be easier to terminate than all other injunctions issued by the federal courts. Some institutional reform injunctions go unenforced or are forgotten entirely. Others expire due to sunset provisions. At the same time, doctrinal shifts have made it more difficult for plaintiffs to win new injunctions in institutional reform cases.*

Scholars have been tracing the decline of institutional reform litigation for years, but little attention has been paid to the fate of the countless injunctions that remain in place. This Article sheds light on this essential but overlooked aspect of institutional reform litigation. First, it identifies three ways that institutional reform injunctions are dying off—by dissolution, by design, and by disuse—and the implications of each form of injunction death. Then, it argues that scholars, judges, and litigants must rethink their approach to the end stages of institutional reform injunctions, offering strategies to ensure that current and future injunctions are not terminated prematurely. This Article thus adds an important new perspective to the debate over the legacy of institutional reform litigation.

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INTRODUCTION

What will become of aging institutional reform injunctions? Sixty years have now passed since the Supreme Court first endorsed the notion that courts could order system-wide reforms intended to bring government agencies into compliance with the law.¹ During that time, institutional reform litigation has transformed countless bureaucracies notorious for resisting change, including public school systems, social services agencies, correctional facilities, housing authorities, and police departments.² The injunctions that result from

1. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*).

2. See, e.g., Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1021–52 (2004) (tracing the history of institutional

these lawsuits comprise a body of binding, enforceable obligations that supplement the rights and requirements created by constitutional, statutory, and regulatory law. As time passes, however, how long these injunctions will remain in force is far from clear.

Although institutional reform litigation has been the subject of much legal scholarship, comparatively little attention has been paid to how its remedial phase should come to an end. As this novel form of litigation rose to prominence in the 1960s and 1970s, it sparked heated debates among scholars. The cases were controversial from the beginning, as they involved judges (usually federal) compelling government agencies (usually state and local) to honor the rights (usually federal) of individuals who interact with those agencies. Its proponents viewed institutional reform litigation as an important tool for ensuring that governmental entities comply with the law,³ while critics objected on federalism, separation of powers, and judicial legitimacy and capacity grounds.⁴ More recently, public law scholars have shifted their focus to the increasingly hostile terrain facing plaintiffs bringing new lawsuits challenging governmental policies and practices. Aside from law review articles commenting on the winding down of school desegregation remedies,⁵ the fate of existing institutional reform injunctions has been largely ignored.⁶

reform remedies, with particular attention to litigation involving education, mental health services, prisons, police, and housing).

3. Leading scholars such as Abram Chayes and Owen Fiss provided crucial early support. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter Fiss, *Forms of Justice*]; OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978) [hereinafter FISS, *THE CIVIL RIGHTS INJUNCTION*]. Their work, as well as the work of other proponents of institutional reform litigation, is discussed in Part I, *infra*.

4. *See, e.g.*, Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19; William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265; Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295; Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

For more contemporary critiques of institutional reform litigation, see, for example, ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003) [hereinafter SANDLER & SCHOENBROD, *DEMOCRACY BY DECREE*]; Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637 (2014); Ross Sandler & David Schoenbrod, *The Supreme Court, Democracy and Institutional Reform Litigation*, 49 N.Y.L. SCH. L. REV. 915 (2005) [hereinafter Sandler & Schoenbrod, *Supreme Court*]; and John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121 (1996).

5. *See, e.g.*, David I. Levine, *The Latter Stages of Enforcement of Equitable Decrees: The Course of Institutional Reform Cases After Dowell, Rufo, and Freeman*, 20 HASTINGS CONST. L.Q.

Unlike academics, the litigants and judges involved with institutional reform litigation do not have the luxury of ignoring questions related to the end stages of these injunctions. Although the Supreme Court has rarely addressed when and how institutional reform injunctions should conclude, its most recent ruling on this topic—the 2009 decision in *Horne v. Flores*—emphasized that institutional reform injunctions must be easier to terminate than all other types of injunctions.⁷ In response, government defendants have moved aggressively to overturn or dissolve long-standing injunctions.⁸ This has altered the dynamic of institutional reform litigation in recent years, as previously victorious plaintiffs are finding themselves on the defensive, fighting to preserve remedies won at earlier stages of the litigation.⁹

But government motions to terminate injunctions represent only part of the story when it comes to the death of institutional reform injunctions. The remedies are also coming to an end in two less visible—but no less important—ways. First, institutional reform injunctions are terminating according to their own design.¹⁰ An institutional reform injunction can be written so that it applies in perpetuity, or it can specify the terms of its demise in a termination or “sunset” provision. Such provisions are typically triggered by the passage of a specified period of time or by the defendant’s satisfaction of performance benchmarks. Whether bargained for by parties as part of a consent decree or inserted by judges fashioning a litigated remedial order, these provisions have become common as defendants and judges seek to avoid long-term court oversight and enforcement of institutional reform injunctions.

Second, institutional reform injunctions are terminating due to disuse.¹¹ Even when institutional reform injunctions are in effect on paper, they remain viable only as long as the parties and the court

579 (1993); Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283 (2002).

6. Two recent exceptions do not address the broader issues considered by this Article. See Catherine Y. Kim, *Changed Circumstances: The Federal Rules of Civil Procedure and the Future of Institutional Reform Litigation After Horne v. Flores*, 46 U.C. DAVIS L. REV. 1435 (2013); Mark Kelley, Note, *Saving 60(b)(5): The Future of Institutional Reform Litigation*, 125 YALE L.J. 272 (2015).

7. 557 U.S. 433 (2009). The *Horne* decision relied, in part, on earlier Supreme Court rulings that expressed growing skepticism of institutional reform litigation. See *Frew v. Hawkins*, 540 U.S. 431 (2004); *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367 (1992); *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991).

8. See *infra* Part II.A.

9. See *infra* Part II.A.

10. See *infra* Part II.B.

11. See *infra* Part II.C.

continue to implement and enforce them. For injunctions issued five, ten, twenty, thirty, or even forty years ago, this can be quite a difficult task. The plaintiffs, defendants, attorneys, and judges involved in the litigation all must exit the case eventually (whether because of relocation, retirement, death, or other reasons), creating a need for new participants to ensure that the injunction is not ignored or forgotten. In addition, the circumstances of the underlying legal violations may evolve over time in ways that create a mismatch between the terms of the injunction and the problem it was intended to remedy. These changes do not necessarily mean that aging injunctions should be discarded; to the contrary, the proper response may be to update rather than cast aside the injunction. But when an injunction falls into disuse, for whatever reason, it may effectively terminate even though the injunction otherwise remains a valid court order.

Taken together, these three forms of injunction death—by dissolution, by design, and by disuse—show that the end stage of institutional reform litigation is more complex and less visible than suggested by court decisions and law review articles. Litigated injunctions are not as permanent as they once seemed—even when they are labeled “permanent injunctions” by the court. Similarly, the stability of consent decrees negotiated by plaintiffs and defendants, and overseen by judges, is also in doubt, either because defendants are demanding the inclusion of sunset provisions or they are filing motions to terminate the decrees. In sum, regardless of the cause, the lifespan of institutional reform injunctions is shortening in ways that have escaped attention thus far.

This shift has important implications for the plaintiffs, defendants, lawyers, and judges involved in institutional reform litigation. Termination of an institutional reform injunction threatens to result in rights violations that go unaddressed. This could occur because the injunction ends before the defendant has fully remedied the underlying unlawful activity, or because violations that had ceased begin again after the injunction is dissolved. To be sure, such undesirable outcomes are not automatic; however, the shift toward earlier termination of institutional reform injunctions increases the likelihood that an injunction will be terminated before its objectives have been met.

Sooner-than-expected termination can also upset the expectations of the parties and judges who designed the injunctions. Effective institutional reform takes time, and institutional reform injunctions often call for remedial measures and performance improvements that require years, if not decades, to be achieved.

Particularly for older injunctions, it is likely that the drafters assumed that the injunctions would remain in force for many years. But now, with the lifespan of injunctions shortening, those injunctions may not last long enough for their provisions to be implemented as intended.

Reducing the duration of injunctions also adds uncertainty and cost to the process of institutional reform. At the most basic level, it undermines one of the goals of institutional reform injunctions: to create a stable set of requirements and expectations for government institutions that have failed to comply with the law. But if the requirements and expectations established by an injunction are perceived to be merely temporary, true systemic reform is harder to achieve. The perception that institutional reform injunctions are susceptible to termination can also consume litigation and judicial resources, with parties litigating, and courts ruling on, more frequent motions to terminate injunctions as well as new lawsuits challenging violations that were targeted by injunctions that have been terminated.

When considering the fate of aging institutional reform injunctions, it is important to note that just because an injunction has been in place for years without full compliance does not necessarily mean that it is outdated or ineffectual. Long-standing injunctions can be the source of ongoing, vigorous monitoring and enforcement efforts aimed at bringing a recalcitrant defendant into compliance with the law. Decades-old injunctions aimed at reforming New York City's public schools¹² and New Jersey's child welfare system provide two examples.¹³ Those injunctions went into effect in 1979 and 2003, respectively, and they continue to influence the day-to-day operation of vital government agencies.

But even injunctions that have prompted the intended reforms are not necessarily ready for the scrap heap. A vivid illustration is provided by the *Flores v. Reno* consent decree, which established minimum standards for the treatment of minor children in the custody of immigration officials.¹⁴ The district court approved the consent

12. See Judgment, *Jose P. v. Ambach*, No. 79 Civ. 270 (EHN) (E.D.N.Y. Dec. 14, 1979). This injunction has been modified and supplemented since 1979. See, e.g., Stipulation, *Jose P. v. Sobol*, No. 79 Civ. 270 (EHN) (E.D.N.Y. Aug. 3, 1988).

13. See Settlement Agreement, *Charlie & Nadine H. v. McGreevey*, Civ. Action No. 99-3678 (SRC) (D.N.J. Sept. 2, 2003). This injunction was modified in 2008. Modified Settlement Agreement, *Charlie & Nadine H. v. Corzine*, Civ. Action No. 99-3678 (SRC) (D.N.J. July 18, 2006).

14. See Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997). The lawsuit was initially filed as *Flores v. Meese*, No. CV 85-4544-RJK(Px) (C.D. Cal. July 11, 1985), but Attorney General Janet Reno had been substituted as the lead defendant by the time it settled.

decree in 1997, and the government complied with its terms for many years. Although there were times when it appeared to be just another old injunction that had outlived its purpose and fallen into disuse, the *Flores* decree has been called into action twice during its lifespan.¹⁵ In 2007, a group of children challenged their confinement in a Texas facility that failed to comply with the consent decree's terms,¹⁶ and, in 2015, the *Flores* class returned to court to enforce the decree on behalf of children detained after fleeing violence in Central America.¹⁷ Both actions were resolved in the plaintiffs' favor, with the government agreeing or being ordered to adjust its policies in accordance with the original *Flores* consent decree.¹⁸

As these and other examples demonstrate, the story of institutional reform litigation is incomplete without an accounting of how institutional reform injunctions come to an end. Yet while this is becoming increasingly apparent as more injunctions are terminated, it has been obscured by other shifts in the doctrinal landscape occupied by institutional reform litigation. Recent Supreme Court decisions related to standing, class-action standards, private rights of action, and the scope of injunctions, all make it harder for plaintiffs seeking institutional reform to win system-wide relief.¹⁹ While important, those developments affect the ability of *new* plaintiffs to obtain *new* injunctions. The future of institutional reform litigation surely will depend on what happens in lawsuits that have not yet been brought—but the fate of countless existing injunctions is an essential part of that future as well.

Considering the end stages of institutional reform injunctions raises difficult normative questions. It can be tempting to adopt across-the-board rules limiting the lifespan of these injunctions to a

15. A 2001 amendment to the consent decree added a termination provision, but the conditions of that provision have not been satisfied and the decree remains in force. Stipulation and Order, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Dec. 12, 2001) (“All terms of this agreement shall terminate 45 days following defendants’ publication of final regulations implementing this Agreement.”).

16. Complaint for Declaratory and Injunctive Relief, *In re Hutto Family Detention Ctr.*, No. A-07-CA-164-SS (W.D. Tex. Mar. 6, 2007).

17. See Motion to Enforce Settlement of Class Action, *Flores v. Johnson*, No. CV 85-4544 RJK(Px) (C.D. Cal. Feb. 2, 2015).

18. Settlement Agreement, *In re Hutto Family Detention Ctr.*, No. A-07-CA-164-SS (W.D. Tex. Aug. 26, 2007); *Flores v. Johnson*, No. CV 85-4544 DMG (AGRx) (C.D. Cal. July 24, 2015) (granting plaintiffs’ motion to enforce settlement and denying defendants’ motion to amend settlement agreement), *aff’d in part, rev’d in part sub nom.* *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016). The government’s compliance with the most recent *Flores* remedial order is in dispute. See Motion to Enforce Settlement and Appoint a Special Monitor, *Flores v. Lynch*, No. CV 85-4544 DMG (AGRx) (C.D. Cal. May 17, 2016).

19. See *infra* notes 110–118 and accompanying text.

specified period of time. Indeed, Congress enacted such temporal limitations in the Prison Litigation Reform Act of 1996 (“PLRA”), which mandates that injunctions in prison-conditions lawsuits terminate within two years unless the court makes certain findings.²⁰ And, more recently, the U.S. House of Representatives passed bills seeking to extend similar limitations to all consent decrees that bind state and local government officials.²¹ This Article questions whether such bright-line limitations are desirable in the institutional reform litigation context. It looks instead for approaches that link the duration of injunctions to the government’s ability to remedy the underlying violations.

The tension between permanent and temporary legal obligations is not limited to institutional reform litigation. Federal legislation offers one useful comparison. Congress generally passes two types of laws: laws that remain valid unless and until a future Congress repeals them, and explicitly short-term laws, such as appropriations bills and bills with sunset provisions,²² that are valid only for a limited period of time. These are roughly analogous to permanent and temporary injunctions issued by courts. However, when statutes are subject to expiration, the conditions are discussed and debated up front, and the costs are internalized by the political process. Long-standing institutional reform injunctions, in contrast, can be subject to early termination without up-front bargaining over the conditions of termination.

Despite raising concerns about the premature termination of institutional reform injunctions, this Article does not argue that the injunctions must remain in effect indefinitely. There will surely be instances in which a government defendant can demonstrate that it

20. Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1367–68 (1996) (codified at 18 U.S.C. § 3626(b) (2012)).

21. Federal Consent Decree Fairness Act, H.R. 3041, 112th Cong. (2011). The proposed legislation would mandate that state and local government officials be able to terminate consent decrees within four years of entry or upon the expiration of predecessor officials’ term in office, unless the court finds that the plaintiffs have “demonstrate[d] 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 that—(i) was actionable by such party; and (ii) was addressed in the consent decree.” *Id.* § 3. The bill was first introduced in 2005, and it was most recently reintroduced in 2011.

22. *See, e.g.*, Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 901(a), 115 Stat. 38, 150 (2001) (establishing ten-year sunset provision for reductions in tax rates); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110105(2), 108 Stat. 1796, 2000 (1994) (establishing ten-year sunset provision for federal ban on certain “assault weapons”). *See generally* Daniel E. Herz-Roiphe & David Singh Grewal, *Make Me Democratic, but Not Yet: Sunrise Lawmaking and Democratic Constitutionalism*, 90 N.Y.U. L. REV. 1975, 1982–85 (2015) (discussing “sunset lawmaking”).

has implemented effective and durable reforms. In other cases, the passage of time may bring about new facts and circumstances that make an existing injunction unnecessary or even nonsensical.

This Article has two primary goals, one descriptive and one normative. First, it identifies the ways that existing institutional reform injunctions are dying off and the implications of each form of injunction death for institutional reform litigation. Second, based on this account of injunction termination, it argues that scholars, judges, and litigants must rethink their approach to the end stages of institutional reform injunctions, and it offers strategies to ensure that current and future institutional reform injunctions are not terminated prematurely. The Article thus injects a new perspective into the debate over the legacy of institutional reform litigation.

Part I of this Article surveys the relatively short history of institutional reform injunctions as they have evolved since the Supreme Court's decision in *Brown II*. After introducing institutional reform litigation and the debate surrounding its rise to prominence, this Part focuses on the injunctions obtained by plaintiffs through this form of litigation. By highlighting the wide range of injunctions that remain in force today, this Part reveals the continuing importance of institutional reform litigation and the stakes involved when injunctions are terminated. It also identifies the relative lack of attention paid to the termination of institutional reform injunctions.

Next, Part II examines the shrinking pool of aging institutional reform injunctions. It identifies and describes three different ways that institutional reform injunctions are coming to an end: by dissolution, by design, and by disuse. For each form of injunction death, this Part identifies the varying implications for the parties, lawyers, and judges involved in institutional reform litigation.

Part III then explores how scholars, judges, and litigants should think about the termination of existing and future institutional reform injunctions. Drawing on the discussion in Part II, this Part begins by arguing that the current, seemingly haphazard approach to injunction termination should be reconsidered and replaced with an approach that takes as its touchstone the goals of the injunction. To that end, this Part then proposes strategies for improving and rationalizing how institutional reform injunctions come to an end now and in the future. The Article concludes by calling for renewed attention to the end stages of institutional reform injunctions so that the injunctions are not terminated prematurely.

I. THE RISE OF INSTITUTIONAL REFORM INJUNCTIONS

For over sixty years, institutional reform litigation has influenced the operation of government institutions and agencies at the local, state, and federal levels. It has also been the subject of a significant amount of critical scrutiny, attracting the attention of judges, legislators, government officials, and scholars. Far from a static concept, institutional reform litigation has evolved since its earliest days, as the number of new lawsuits filed has declined and the scope and nature of the resulting remedies have narrowed. But institutional reform litigation is far from dead, and, more importantly for this Article, doctrinal and attitudinal shifts in the institutional reform litigation landscape are raising difficult questions concerning the lifespan of institutional reform injunctions. After first tracing the origin and defining features of institutional reform injunctions, this Part then examines the critical backlash against this type of remedy and the pool of injunctions that nonetheless remain in force.

A. Novel Litigation Brings Novel Remedies

Institutional reform litigation has been part of the American legal landscape for over sixty years. Whether referred to as “institutional reform litigation,” “structural reform litigation,” or “public law litigation,”²³ this type of lawsuit seeks court-ordered injunctions²⁴ aimed at reforming the day-to-day operation of government institutions that are accused of committing systemic violations of the law. This type of injunction dates back to the landmark *Brown v. Board of Education* litigation,²⁵ and specifically the Supreme Court’s second ruling in the case.²⁶ That decision, known

23. See Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 994, 1995 (1999) (explaining that this type of litigation has been “termed, variously, ‘public law litigation,’ ‘structural reform litigation,’ or ‘institutional reform litigation’”).

24. This Article uses the term “injunction” to refer to court orders that are the product of a litigated decree (i.e., an injunction that is designed and so-ordered by the judge), a consent decree or a settlement agreement (i.e., an injunction that is designed by the parties and so-ordered by the court), or similar relief.

25. 349 U.S. 294 (1955).

26. See, e.g., Robert E. Buckholz, Jr. et al., Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 788 n.9 (1978) (“The birth of modern institutional reform litigation can be traced to [Brown II] . . .”); Fiss, *Forms of Justice*, *supra* note 3, at 2 (“As a genre of constitutional litigation, structural reform has its roots in the Warren Court era and the extraordinary effort to translate the rule of *Brown v. Board of Education* into practice.” (citation omitted)); David Zaring, *National Rulemaking Through Trial Courts: The Big*

as *Brown II*, implicitly acknowledged that merely ordering a government agency to comply with its legal obligations—in that case, the Equal Protection Clause of the Fourteenth Amendment—may not be sufficient to eradicate the unlawful conduct. Rather, the Court instructed the district courts to fashion a remedy that would compel the defendant to take certain prescribed steps to ensure compliance with its constitutional mandates.²⁷

In the years since *Brown II*, institutional reform litigation has spread far beyond the context of school desegregation.²⁸ Plaintiffs have brought lawsuits challenging the operation of a wide range of government institutions, including police departments,²⁹ prisons and jails,³⁰ school districts,³¹ child welfare and social services agencies,³² mental health facilities,³³ and public housing authorities,³⁴ among

Case and Institutional Reform, 51 UCLA L. REV. 1015, 1026 (2004) (referring to *Brown II* as “the case that began the institutional reform era”).

27. See *Brown II*, 349 U.S. at 301 (instructing the district courts “to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases”); Fiss, *Forms of Justice*, *supra* note 3, at 3 (noting that the Supreme Court in *Brown II* “delegated the reconstructive task to the lower federal judges”); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 552 (2006) (“*Brown II* authorized district judges to assess the need for, order, and oversee sweeping changes not only to schools but to the full range of important governmental institutions.”).

28. See, e.g., Fiss, *Forms of Justice*, *supra* note 3, at 3–4 (noting that “in time, the lessons of school desegregation were transferred to other contexts”); Schlanger, *supra* note 23, at 1994–95 (“[T]hrough implementation of *Brown*, the nation’s litigants, lawyers, and judges grew accustomed both to issuance of permanent injunctions against state and local public institutions, and to extended court oversight of compliance.”).

29. See, e.g., Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 94–95 & n.6 (2012).

30. See, e.g., MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* 13–17 (1998); Schlanger, *supra* note 23, at 2004 (discussing “a nationwide flood of class-action lawsuits leading to major court orders requiring reform in such areas as housing conditions, security, medical care, mental health care, sanitation, nutrition, and exercise”).

31. See, e.g., James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 192–207 (2003) (discussing institutional reform litigation challenging public school segregation and inequitable funding).

32. See, e.g., SUSAN GLUCK MEZEY, *PITIFUL PLAINTIFFS: CHILD WELFARE LITIGATION AND THE FEDERAL COURTS* (2000) (exploring the role of litigation in reforming the child welfare system).

33. See, e.g., MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* (2d ed. 1989) (examining mental disability law in the United States and how the courts have influenced this area).

34. See, e.g., Joseph Seliga, Comment, *Gautreaux a Generation Later: Remediating the Second Ghetto or Creating the Third?*, 94 NW. U. L. REV. 1049 (2000) (examining the effects of institutional reform litigation on the public housing authority in Chicago).

others. Plaintiffs have sought to enforce their rights under the Constitution³⁵ as well as a host of statutes and regulations.³⁶ Although most of these cases have been litigated in federal court, state courts have provided a forum for institutional reform litigation as well.³⁷

It is difficult to offer a comprehensive definition of institutional reform litigation. Lawsuits challenging a governmental entity's system-wide policies or practices can be brought by individuals as well as government officials acting in their enforcement capacity.³⁸ The targeted institutions are typically creatures of state or local governments, but federal agencies can also be defendants in institutional reform litigation.³⁹ Regardless of the identity of the plaintiffs or defendants, institutional reform lawsuits seek to bring to bear the remedial power of the courts—in the form of an injunction—to force a government institution to change how it operates so that it honors the rights of the individuals it serves.⁴⁰

Just as there is no standard type of institutional reform lawsuit, there is also no standard type of institutional reform injunction. The Supreme Court, beginning with *Brown II*, has declined to specify what institutional reform remedies should look like.⁴¹ Moreover, the injunctions can be the product of very different design

35. For example, most institutional reform litigation targeting correctional facilities involves claims to enforce provisions of the Constitution. See FEELEY & RUBIN, *supra* note 30.

36. For example, most institutional reform litigation targeting public housing authorities involves claims to enforce federal statutes and regulations. See Seliga, *supra* note 34 (discussing litigation against the Chicago Housing Authority).

37. See Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO L.J. 1355, 1358 (1991) (noting “what appears to be a growing docket of public law cases” in state courts).

38. Although institutional reform plaintiffs are typically individuals or classes of individuals who are being harmed by the defendant's unlawful policies or procedures, the federal government has also been an active plaintiff in institutional reform lawsuits. See, e.g., Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189 (2014) (discussing the Department of Justice's use of litigation to prompt structural reform of police departments).

39. See, e.g., Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) (establishing minimum standards for the treatment of minor children in the custody of federal immigration officials).

40. Institutional reform litigation “does not include all litigation involving institutions. For example, cases that do no more than address the constitutionality of a statutory scheme governing institutions should not be characterized as institutional litigation.” Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 468 (1980).

41. See *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (instructing the district courts “to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases”). The Supreme Court's reluctance to provide significant guidance is not surprising, as designing institutional reform injunctions is “one of the most difficult tasks in our system of government.” PHILLIP J. COOPER, *HARD JUDICIAL CHOICES* 3 (1988).

processes: in cases in which a judge issues an injunction after ruling on the merits of a lawsuit (referred to as “litigated injunctions”), the judge typically designs an injunction setting forth what the defendant must do to comply with the law;⁴² in contrast, judges can have little or no role in the creation of injunctions that the parties design themselves and submit to the judge for approval (referred to as “consent decrees”).⁴³ Institutional reform remedies may also emerge from hybrid processes in which, for example, a judge facilitates negotiations between the parties⁴⁴ or designates a special master to help the parties formulate a remedy.⁴⁵ Not surprisingly, the different ways in which they are designed introduces considerable variation among institutional reform injunctions.

Institutional reform injunctions also differ with respect to their scope and level of detail. All institutional reform injunctions do more than merely order a defendant to comply with the law, but the specificity of the injunction’s directives varies from case to case (and sometimes as time goes on within a case).⁴⁶ Some injunctions provide detailed instructions for the day-to-day operation of the institution,⁴⁷

42. See Buckholz et al., *supra* note 26, at 800–05 (discussing different ways that judges can dictate institutional reform remedies).

43. See *id.* at 797–800 (discussing institutional reform injunctions formulated without the participation of the judge). Even where judges do not participate directly in the formulation of the remedy, “judges frequently do play a substantive role in encouraging and crafting complex settlements of all kinds, including consent decrees, both actively and indirectly through the parties’ surmises or knowledge about a judge’s substantive inclinations.” Schlanger, *supra* note 23, at 2013; see also Marc Galanter & Mia Cahill, “*Most Cases Settle: Judicial Promotion and Regulation of Settlements*,” 46 STAN. L. REV. 1339, 1340 (1994) (describing how, even in cases that settle without a ruling on the merits, judges “are a ghostly but influential presence, through their rulings in adjudicated cases and their anticipated response to the case at hand”); Schlanger, *supra* note 23, at 2013–14 (“Decrees develop out of the complex interplay of the judges’ promotion of settlement and the parties’ expectations as to the outcome of litigation and varying stakes and information.” (footnotes omitted)).

44. See Buckholz et al., *supra* note 26, at 809–12 (discussing negotiated remedies); Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 856 (1990) (arguing that judges in prison reform lawsuits should act as “catalyst[s]” who “create[] processes and incentives in order to induce the parties to participate in a deliberative process to formulate and implement an effective remedy”).

45. See Buckholz et al., *supra* note 26, at 805–09 (discussing remedies formulated through a process supervised by a judge-appointed special master).

46. For example, an injunction that initially gives a defendant broad discretion over how it reforms its policies and practices may, after a period of non-compliance, be revised to specify the particular actions that the defendant must take to remedy its unlawful actions.

47. Highly detailed directives have advantages and disadvantages. See, e.g., Buckholz et al., *supra* note 26, at 844 (“Although detailed substantive provisions offer considerable advantages for monitoring compliance and for administration, they restrict the defendants in ways that may prove unreasonable in the long run.”); Fiss, *Forms of Justice*, *supra* note 3, at 49–50 (acknowledging that some observers find the detailed directives contained in structural reform injunctions to be “baffling,” but arguing that specific directives may be “necessary and

while others grant broad discretion to the government officials charged with running the institution.⁴⁸ Similarly, depending in part on the legal claims at issue⁴⁹ and whether the injunction was imposed by the court or agreed to by the parties,⁵⁰ the scope of the injunction can be narrow or broad.⁵¹ The injunctions can also vary according to their monitoring, reporting, and enforcement provisions.

Notwithstanding the diversity of institutional reform injunctions, the remedies generally rely on two necessary conditions to achieve their goals. First, the injunctions require a degree of flexibility in their implementation.⁵² When trying to spur systemic reforms within a public institution, it is nearly impossible to identify all of the

appropriate . . . either as a way of minimizing the risk of evasion or as a way of helping the bureaucratic officers know what is expected of them”).

48. See Sabel & Simon, *supra* note 2, at 1082–99 (discussing less-directive structural reform injunctions).

49. Obviously, some institutional reform lawsuits involve more claims and challenge more government actions than other lawsuits.

50. The range of relief that a court can order after finding liability is narrower than the relief that the parties can agree to in a court-approved consent decree. As the Supreme Court has explained:

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 . . . [defendants] 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 the settlement.

Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 389 (1992); see also *Suter v. Artist M.*, 503 U.S. 347, 354 n.6 (1992) (“[P]arties may agree to provisions in a consent decree which exceed the requirements of federal law.”); *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (“[A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.”); *Schlanger*, *supra* note 23, at 2011 (“Such consent decrees have frequently incorporated terms that a judge could not lawfully include in a contested order.”).

Indeed, a consent decree must only “spring from, and serve to resolve, a dispute within the court’s subject-matter jurisdiction[.] . . . come within the general scope of the case made by the pleadings[,] and . . . further the objectives of the law upon which the complaint was based.” *Frew v. Hawkins*, 540 U.S. 431, 437 (2004).

51. See Buckholz et al., *supra* note 26, at 813 (“In a significant number of cases, the affirmative program is of such extensive scope that its realization involves a basic restructuring of the procedures or organization of the defendant institution.”).

52. See *id.* at 818 (“Given the detail of these decrees and the lack of judicial expertise, substantive modification and adjustment are unavoidable and should willingly be undertaken.”); Fiss, *Forms of Justice*, *supra* note 3, at 49 (discussing the “tentative and hesitant character” of institutional reform injunctions and contending that they “must always be open to revision”). *But see* Sabel & Simon, *supra* note 2, at 1020 (characterizing institutional reform remedies of the 1970s and 1980s as “one-time readjustment[s] to fixed criteria”).

necessary changes at the outset.⁵³ As Professor Owen Fiss has observed, “There is no easy, one-shot method of reconstructing an institution.”⁵⁴ After an injunction is ordered by a court, revisions will often be necessary because, for example, the injunction is not working effectively or its obligations become unduly burdensome for the defendant.⁵⁵ Such revisions can be the product of negotiations between the parties or a litigated dispute before a judge. Regardless of how it happens, the success of an institutional reform injunction can depend on whether it is adapted to changing conditions.

The second necessary condition is durability. An institutional reform injunction must remain in force long enough to achieve its goals, typically to eradicate the unlawful behavior that was the basis for the underlying lawsuit.⁵⁶ It is not enough for the injunction to compel a series of remedial steps and then immediately dissolve into the ether. Rather, the injunction must remain in effect—and the court must retain jurisdiction to enforce the injunction—as long as is required to bring the government institution into compliance with its legal obligations.⁵⁷ Although institutional reform injunctions must eventually come to an end,⁵⁸ the difficulty of reforming government

53. See Buckholz et al., *supra* note 26, at 789 (“The necessarily speculative nature of the institutional planning required to devise these remedial regimes means that no single order of relief can be regarded as definite and final . . .”).

54. FISS, THE CIVIL RIGHTS INJUNCTION, *supra* note 3, at 28. According to Fiss, “[A] series of interventions are inevitable, for the defendants’ performance must be evaluated, and new directions issued, time and time again.” *Id.*; see also Buckholz et al., *supra* note 26, at 817 (“The complexity of the structural injunctions that are the usual outcome of successful institutional reform litigation does much to deprive them of their finality.”).

55. See Buckholz et al., *supra* note 26, at 817 (explaining that revisions to institutional reform injunctions “may be triggered by a variety of circumstances or events that emerge in the process of implementation”).

56. See, e.g., *id.* at 842 (“The pervasive changes required of defendants are neither rapidly nor easily made.”); Fiss, *Forms of Justice*, *supra* note 3, at 28 (“[T]he remedy involves the court in nothing less than the reorganization of an ongoing institution, so as to remove the threat it poses to constitutional values. The court’s jurisdiction will last as long as the threat persists.”).

57. See, e.g., Buckholz et al., *supra* note 26, at 842–44 (discussing how long courts retain jurisdiction over institutional reform injunctions); *cf. id.* at 842 (“Jurisdiction may even continue after the defendant’s full compliance with the terms of the decree: some courts have expressed concern that the reform be permanent.”).

58. See, e.g., *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 247 (1991) (emphasizing that “[f]rom the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination”). Writing in dissent, Justice Thurgood Marshall offered a somewhat different assessment of the appropriate duration of institutional reform injunctions involving school desegregation:

The concepts of temporariness and permanence have no direct relevance to courts’ powers in this context because the continued need for a decree will turn on whether the underlying purpose of the decree has been achieved. “The injunction . . . is ‘permanent’ only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing

institutions means that the injunctions may need to remain in place for an extended period of time.⁵⁹

The flexibility and durability of institutional reform injunctions make it possible for institutional reform lawsuits to do more than merely identify legal violations and assign blame. Indeed, the injunctions have the potential to fundamentally reshape public institutions so that they comply with the law. But not all institutional reform injunctions achieve their goals,⁶⁰ and even the successful ones have been assailed by critics of this form of litigation. The balance of this Part explores the debate over institutional reform litigation and the current state of institutional reform remedies.

B. Institutional Reform Injunctions Under Attack

Institutional reform litigation—and specifically the injunctions obtained through these lawsuits—has been controversial from the outset.⁶¹ With its focus on systemic policies and practices of large public institutions rather than isolated disputes between parties, early critics characterized institutional reform litigation as a radical departure from the traditional model of litigation.⁶² At the most basic level, the controversy is rooted in concerns about courts and judges restructuring government institutions that are failing to comply with

intimidation. Familiar equity procedure assures opportunity for modifying and vacating an injunction when its continuance is no longer warranted.”

Id. at 267 n.11 (Marshall, J., dissenting) (quoting *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 298 (1941)).

59. See, e.g., Buckholz et al., *supra* note 26, at 813 (noting that successful implementation of institutional reform injunctions “[g]enerally . . . requires ongoing remedial action extending over a substantial period of time”); Fiss, *Forms of Justice*, *supra* note 3, at 27 (stating that the remedial phase in institutional reform litigation “involves a long, continuous relationship between the judge and the institution”).

60. See, e.g., GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008) (discussing attempts by the courts to bring about institutional reform).

61. See Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 656 (1988) (observing that, by 1976, “concern about the legitimacy of judicial efforts to implement social policy through structural decrees was widespread”).

62. See, e.g., Chayes, *supra* note 3 (comparing institutional reform litigation with “the traditional conception of adjudication”); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (arguing that litigation was not well-suited to the types of problems at issue in institutional reform litigation); see also Fiss, *Forms of Justice*, *supra* note 3, at 17 (“The structural mode is most often attacked on the ground that it involves a departure from some ideal form.”).

Not all scholars agree that institutional reform litigation represents such a departure from traditional forms of litigation. See Eisenberg & Yeazell, *supra* note 40 (arguing that institutional reform litigation broke no new ground with respect to either procedure or remedy); cf. Fiss, *Forms of Justice*, *supra* note 3, at 36 (arguing that “what has evolved has been the *form* of adjudication, but not the *function*”).

the law. Thus, while proponents of institutional reform litigation have characterized it as an essential tool for ensuring that government institutions honor their legal obligations,⁶³ opponents have questioned the legitimacy and capacity of courts ordering and overseeing such remedies, while also highlighting federalism and separation-of-powers concerns.

Challenges to the legitimacy of institutional reform remedies tend to focus on the role of the judge in institutional reform litigation.⁶⁴ Some scholars claim that judges who design, oversee, and enforce institutional reform remedies are stepping outside their proper role, exercising powers that are reserved to the executive and legislative branches of government.⁶⁵ Such actions, they argue, raise concerns about the separation of powers⁶⁶ and undermine political accountability.⁶⁷ Relatedly, injunctions that involve federal judges overseeing state and local institutions have sparked strong objections on federalism grounds.⁶⁸

Critics of institutional reform litigation have also questioned whether judges have the capacity to design and oversee the types of injunctions that result from these lawsuits.⁶⁹ Under this view,

63. For early defenses of institutional reform litigation, see, for example, FISS, *THE CIVIL RIGHTS INJUNCTION*, *supra* note 3; Chayes, *supra* note 3; and Fiss, *Forms of Justice*, *supra* note 3. More recent proponents of institutional reform litigation include Margo Schlanger, Charles Sabel, and William Simon. See Sabel & Simon, *supra* note 2; Schlanger, *supra* note 27.

64. See, e.g., Fletcher, *supra* note 4, at 637 (contending “that since trial court remedial discretion in institutional suits is inevitably political in nature, it must be regarded as presumptively illegitimate”); see also Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It’s Still Moving!*, 58 U. MIAMI L. REV. 143, 161 (2003) (discussing “the core, and very deep, critique that judges exercising broad, long-term remedial authority over local institutions are playing God: making rules and issuing orders based solely or largely on their own personal moral views”).

65. See, e.g., Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978) (questioning the desirability of federal-court oversight of state governmental institutions); Nagel, *supra* note 4 (arguing that separation-of-powers principles limit the authority of federal courts to order relief against state institutions).

66. See Nagel, *supra* note 4, at 664 (arguing that “separation of powers clearly does impose limitations on the authority of federal courts to undertake executive and legislative functions when ordering relief against state officials”); Yoo, *supra* note 4, at 1123–24 (arguing that “separation of powers principles require that the answer come from the political branches” rather than the courts).

67. See Mishkin, *supra* note 65, at 958 (arguing that institutional reform remedies “can be used essentially to bypass majoritarian political controls”).

68. See, e.g., Yoo, *supra* note 4, at 1140–41 (arguing that federal court involvement with day-to-day operations of state institutions violates federalism principles).

69. See, e.g., ROSENBERG, *supra* note 60, at 11–12 (discussing how judges are constrained in their decisions by both the prevailing legal culture and precedent); Sabel & Simon, *supra* note 2, at 1017–18 (summarizing concerns about the capacity of courts and judges to reform institutions).

institutional reform remedies are undermined by the judge's and the plaintiffs' lack of access to information about how the targeted institution operates,⁷⁰ the inability to reach other government actors who are implicated in the institution's ability to comply with the law,⁷¹ and the limited influence on low-level bureaucrats who must ultimately carry out the sought-after reforms.⁷²

Other critics have focused more on the remedies themselves and less on the role and limitations of the judge. For example, some have worried that institutional reform injunctions—especially those that contain highly detailed action items—can entrench or “lock in” particular policies and procedures, thereby preventing future government officials from adopting their own approaches.⁷³ A related concern is the potential for collusion between government defendants and plaintiffs during the injunction design phase. This can arise when the parties jointly craft a consent decree in which the defendant agrees to reforms that would be difficult or impossible to secure through the usual political processes.⁷⁴

The critiques of institutional reform litigation have not gone unaddressed. Scholars have vigorously defended the legitimacy of institutional reform litigation,⁷⁵ while also proposing adjustments that

70. See, e.g., Sabel & Simon, *supra* note 2, at 1017 (“[C]ritics doubted that courts had the necessary information to supervise institutional restructuring effectively.”).

71. See, e.g., Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 46 (1979) (acknowledging the “structural limitations on the extent to which judges can utilize the role of political powerbroker”); Horowitz, *supra* note 4, at 1293 (“Even in a complex lawsuit with many parties, it is quite likely that some major actors in the field have been left out of the litigation.”).

72. See, e.g., Sturm, *supra* note 44, at 807 (explaining that “[c]ourts lack the administrative capacity to alter basic institutional practices directly and are constrained by both a limited constitutional mandate and a narrow vision of their role”).

73. See, e.g., Easterbrook, *supra* note 4, at 34 (“It is impossible for an agency to promulgate a regulation containing a clause such as ‘My successor cannot amend this regulation.’ But if the clause appears in a consent decree, perhaps the administrator gets his wish to dictate the policies of his successor.”); McConnell, *supra* note 4; see also SANDLER & SCHOENBROD, *DEMOCRACY BY DECREE*, *supra* note 4; Morley, *supra* note 4; Sandler & Schoenbrod, *Supreme Court*, *supra* note 4; Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 892, 896–97 (2011) (discussing institutional reform consent decrees as a “source of [government] entrenchment through private law involv[ing] local governments entering into contractual precommitments that bind future governments”).

74. See, e.g., Horowitz, *supra* note 4, at 1294, 1305 (arguing that a consent decree can be “a shortcut around political constraints”); McConnell, *supra* note 4, at 301 (arguing that “one of the evils to be guarded against is the collusive settlement—government lawyers settling a suit on favorable terms to the opposing party precisely because they expect that successive administrations may be less sympathetic to its cause”); Serkin, *supra* note 73, at 897 (“The litigation process allows government actors to agree to politically unpalatable policy changes.”).

75. See, e.g., Owen M. Fiss, Dombrowski, 86 YALE L.J. 1103, 1107 (1977) (dismissing federalism concerns by arguing that “the states are bound by federal law, including the Bill of Rights, and the ultimate power to determine the consistency of state laws with superior federal

would mitigate some of the concerns raised by critics.⁷⁶ Yet while challenges to institutional reform litigation continue,⁷⁷ its defenders have largely departed from the field.⁷⁸

As the debate over institutional reform litigation has unfolded in the pages of law reviews, the Supreme Court has expressed growing discomfort with this form of litigation.⁷⁹ Since granting lower courts considerable leeway to formulate appropriate remedies in *Brown II*, the Court has offered increasingly unfavorable assessments of institutional reform litigation and its resulting injunctions.⁸⁰ This criticism reached its peak in the Court's most recent consideration of the subject, its 2009 decision in *Horne v. Flores*.⁸¹ In *Horne*, a 5-4 majority held that injunctions resulting from institutional reform litigation must be easier to terminate than all other types of

norms is allocated to a federal court"); Sturm, *supra* note 37, at 1359 (offering "a model of public remedial decisionmaking that accounts for the particular demands of the remedial process while complying with the requirements of a legitimate judicial role"); Zaring, *supra* note 26, at 1033–34 ("To be sure, consent decrees permit elected officials to bind their successors, but the same is true of any contract with lock-in effects. By providing stability and certainty, consent decrees need not necessarily always be pernicious." (footnote omitted)).

76. See, e.g., Sturm, *supra* note 44, at 808 (describing how courts "should structure the remedial process to avoid, or at least minimize, the negative consequences of the remedial dilemma").

77. See, e.g., Morley, *supra* note 4.

78. See Schlanger, *supra* note 27, at 629 (arguing that "civil rights injunctions deserve the energetic defense of those in favor of the values they protect").

79. See, e.g., Fiss, *Forms of Justice*, *supra* note 3, at 5 (discussing the "Burger Court counterassault" on institutional reform litigation); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006) (discussing the Rehnquist Court's hostility toward institutional reform litigation); Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 886 n.70 (2010) (observing, after *Horne v. Flores*, that "the Court's hostility to prospective, injunctive relief seems, if anything, to have deepened").

80. See *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (discussing the permissible scope of institutional reform remedies); *Milliken v. Bradley*, 433 U.S. 267, 280–81 (1977) (explaining that courts "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution"); *Bell v. Wolfish*, 441 U.S. 520, 562 (1979) (expressing concern that federal courts are "becom[ing] increasingly enmeshed in the minutiae of prison operations"); *Rhodes v. Chapman*, 452 U.S. 337, 351 (1981) (urging federal courts to ground their rulings in constitutional requirements "rather than a court's idea of how best to operate a detention facility" (quoting *Bell*, 441 U.S. at 539)); *Block v. Rutherford*, 468 U.S. 576, 584 (1984) (emphasizing "the very limited role that courts should play in the administration of detention facilities"); *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 381 (1992) (holding that district courts must take a "flexible approach" to motions to modify or terminate institutional reform injunctions); *Frew v. Hawkins*, 540 U.S. 431, 441 (2004) (expressing concern about institutional reform injunctions that "improperly deprive future officials of their designated legislative and executive powers"); *Horne v. Flores*, 557 U.S. 433, 434 (2009) (holding that courts must "ensur[e] that 'responsibility for discharging the State's obligations is returned promptly to the State and its officials'" (quoting *Frew*, 540 U.S. at 442)).

81. 557 U.S. 433 (2004).

injunctions ordered by the federal courts.⁸² Such differential treatment is necessary, the Court explained, for three reasons: the likelihood that changed circumstances will necessitate a reexamination of injunctions that last for many years, federalism concerns caused by federal court interference with state and local institutions, and what the Court characterized as the unusual “dynamics” of institutional reform litigation.⁸³ Thus, while the Court has not put an end to institutional reform litigation,⁸⁴ the *Horne* decision reveals a Court that is deeply skeptical of this type of lawsuit and its resulting remedies.⁸⁵

Legislators have also expressed hostility towards institutional reform litigation. Congress targeted institutional reform litigation in 1996, when it limited lawsuits challenging the policies and practices of America’s prisons.⁸⁶ Under the Prison Litigation Reform Act, it is now more difficult for courts to issue new prison reform injunctions,⁸⁷ and it is easier for defendants to overturn prison reform injunctions after they are in place.⁸⁸ In addition, the U.S. House of Representatives has

82. *Id.* at 450.

83. *Id.* at 447–48.

84. *See, e.g.*, Gilles, *supra* note 64, at 156 (“[T]he Supreme Court has not sustained any broadside constitutional challenges to structural reform injunctions; challenges mounted on federalism and separation of powers grounds have succeeded only in causing the Court to warn lower court judges to be mindful of state and congressional prerogatives.”); Siegel, *supra* note 79, at 1113 (observing that “the apocalyptic confrontation between Warren Court ‘activism’ and Rehnquist Court ‘restraint’ never came to fruition” and “institutional reform limped on”); Yoo, *supra* note 4, at 1133 (“[T]his concern about federalism appears to be nothing more than that—a concern. The Court does not appear to have ever invalidated a structural remedy on the ground that it improperly intruded upon the proper authority of state and local institutions.”).

85. *See, e.g.*, Karlan, *supra* note 79, at 886 n.70 (observing, after *Horne*, that “the Court’s hostility to prospective, injunctive relief seems, if anything, to have deepened”); Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 139 (2015) (characterizing *Horne* as “an extended critique of (almost a rant against) institutional reform litigation”); Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931, 940 (2010) (“In *Horne v. Flores*, the Court imposed new barriers to systemic reform cases.”).

86. *See* Prison Litigation Reform Act of 1996, Pub. L. No. 104-34, 110 Stat. 1321 (codified as amended at 11 U.S.C. § 523(a); 18 U.S.C. §§ 3624(a), 3626; and in scattered sections of 28 and 42 U.S.C.).

87. *See* 18 U.S.C. § 3626(a)(1)(A) (“The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”).

88. *See* 18 U.S.C. § 3626(b)(1)(A). Under the PLRA,

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 . . . 2 years after the date the court granted or approved the prospective relief [or] 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph.

introduced legislation that would impose similar limits on the duration of consent decrees in all civil cases, but that bill has not yet been enacted into law.⁸⁹ State legislatures have also passed laws intended to limit state officials' ability to enter into consent decrees in institutional reform cases.⁹⁰

Given these barriers to securing and defending systemic relief, it is not surprising that institutional reform litigation is commonly understood to be in retreat. Indeed, observers have been commenting on its decline for decades,⁹¹ with some perceiving the death of institutional reform litigation⁹² and others characterizing institutional reform injunctions as “vestiges of a bygone era.”⁹³ Whether due to the doctrinal shifts documented above, or a changing sense of the role of litigation in securing meaningful institutional reform, this form of litigation has lost much of the prominence and momentum it had during its initial phases.⁹⁴

18 U.S.C. § 3626(b)(1). The court shall grant the motion to terminate the injunction unless the court makes written findings that the injunction “remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.” *Id.* § 3626(b)(3).

89. Consent Decree Fairness Act, H.R. 3041, 112th Cong. (2011). This was not the first time that Congress has attempted to limit the duration of institutional reform injunctions. *See* Judicial Improvement Act, 144 CONG. REC. S6187–88 (daily ed. June 11, 1998) (proposing a reform bill that would “prevent consent decrees from remaining in effect once a proper remedy has been implemented”).

90. *See, e.g.,* Jane Perkins, *Negotiating Consent Decrees that Work*, 41 CLEARINGHOUSE REV. 500, 502 (2008) (stating that “[s]ome states have enacted laws that require state officials to obtain the governor’s or legislature’s permission before entering into a consent decree”).

91. *See, e.g.,* Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 7 (1982) (observing that, by the mid-1970s, “[t]he long summer of social reform that occupied the middle third of the century was drawing to a close”). *But cf.* Schlanger, *supra* note 27, at 568–69 (comparing the “conventional story” of decline with a “revisionist story . . . of continuity in volume and perhaps in other important aspects of court-ordered practice”).

92. *See* Marsha S. Berzon, *Rights and Remedies*, 64 LA. L. REV. 519, 525 (2004) (observing that “structural injunctions have receded from the remedial scene” (internal quotation marks omitted)); Gilles, *supra* note 64, at 145 (referring to the “apparent death of the structural reform injunction”). *But cf.* Gilles, *supra* note 64, at 146–47 (discussing the rise of “calls for injunctive relief to restructure public institutions [coming] from the unlikely quarters of conservative think tanks and institutes”); Schlanger, *supra* note 27, at 566 (challenging “the generally accepted view . . . that civil rights injunctive practice has become essentially moribund”).

93. Gilles, *supra* note 64, at 144 (observing that “judicially mandated structural reform injunctions appear to be vestiges of a bygone era”).

94. *See id.* at 146 (attributing the decline of structural reform litigation to “a sort of sub-constitutional, extra-legal discomfort with the role of judges in institutional reform litigation”); Schlanger, *supra* note 27, at 565 (observing that the “most common explanation” for changes in institutional reform litigation practice is “the increasing conservatism of the federal bench”). *But cf.* Schlanger, *supra* note 27, at 553 (“[T]he increasing conservatism of the federal bench has not been as devastating to civil rights injunctive practice as a more jurocentric view might predict.”).

Yet institutional reform litigation endures.⁹⁵ Even though the number of new lawsuits has fallen from its peak,⁹⁶ institutional reform litigation remains a powerful force for change.⁹⁷ Public institutions continue to violate rights in a systemic manner,⁹⁸ plaintiffs continue to bring institutional reform lawsuits, and courts continue to order new injunctions aimed at reforming those government institutions.⁹⁹ Moreover, countless injunctions issued in the past continue to influence the day-to-day operation of government institutions across a wide range of legal areas.¹⁰⁰ The remedies may look somewhat different than in the past¹⁰¹—for example, many injunctions have shifted from highly detailed command-and-control-style directives to what Professors Charles Sabel and William Simon call “experimentalist intervention”¹⁰²—but institutional reform litigation has not vanished.¹⁰³ Indeed, even in the context of prisoner litigation,

95. See, e.g., SANDLER & SCHOENBROD, *DEMOCRACY BY DECREE*, *supra* note 4, at 10 (arguing that “the incidence and effect of institutional reform litigation” have not waned); Sabel & Simon, *supra* note 2, at 1021 (referring to the “protean persistence of public law litigation”); Schlanger, *supra* note 27, at 629 (“Public law litigation is far from dead.”).

96. See Schlanger, *supra* note 23, at 2032 n.165 (observing that “the number of class action filings and of civil rights class action filings, brought both by prisoners and nonprisoners, followed a downward trend from their peak in the mid 1970s until the early 1990s”).

97. See *id.* (disputing claim that institutional reform litigation has decreased in significance).

98. See Gilles, *supra* note 64, at 145 (“There continue to exist sufficiently egregious, systemic constitutional issues that inspire (or could inspire) the requisite breadth of support and depth of reformist zeal to motor the machinery of the structural reform injunction.”).

99. See, e.g., SANDLER & SCHOENBROD, *DEMOCRACY BY DECREE*, *supra* note 4, at 11 (“New decrees get issued, piling up on the old, few of which are actually terminated.”); Margo Schlanger, *Against Secret Regulation: Why and How We Should End the Practical Obscurity of Injunctions and Consent Decrees*, 59 DEPAUL L. REV. 515, 515 (2010) (“Every year, federal and state courts put in place orders that regulate the prospective operations of certainly hundreds and probably thousands of large government and private enterprises.”).

100. See, e.g., Schlanger, *supra* note 23, at 2034–35, 2035 nn.178–83 (identifying “current litigation and ongoing court-ordered reform in the areas of child welfare, mental health and mental retardation facilities, juvenile correction facilities, public housing, and public school funding” (footnotes omitted)).

101. See, e.g., Schlanger, *supra* note 27, at 602 (identifying, in the prison reform context, “a marked shift in what might be called the *depth* of court-ordered regulation, as the paradigm intervention shifted from an omnibus model to something more finegrained”).

102. Simon & Sabel, *supra* note 2, at 1019 (“The evolution of structural remedies in recent decades can be usefully stylized as a shift away from *command-and-control* injunctive regulation toward *experimentalist* intervention.”). As Sabel and Simon explain, command-and-control regulation “takes the form of comprehensive regimes of fixed and specific rules set by a central authority. . . . By contrast, experimentalist regulation combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability.” *Id.*

103. See *id.* at 1018 (stating that “despite decades of criticism and restrictive doctrines, the lower courts continue to play a crucial role in a still-growing movement of institutional reform in the core areas of public law practice . . . : schools, prisons, mental health, police, and housing”); Zaring, *supra* note 26, at 1020 (observing that institutional reform litigation “remains a vibrant

where, for over twenty years, federal law has curtailed the scope and duration of injunctions, institutional reform litigation persists.¹⁰⁴

C. What's Left: The Pool of Aging Institutional Reform Injunctions

Whatever the future holds for institutional reform litigation, there is currently a pool of injunctions that remain in effect, binding the parties, directing government defendants to take specified remedial measures, and granting judges continuing jurisdiction over the underlying case. The injunctions may be increasingly outdated¹⁰⁵ and difficult to identify,¹⁰⁶ but they continue to influence a wide range of government institutions.¹⁰⁷

Yet it is not clear what will happen to these injunctions as they age. Whether due to lack of foresight or well-considered choices, the

and active part of the law, governing a variety of different types of local institutions”). The Supreme Court’s decision in *Brown v. Plata*, upholding a controversial prison reform injunction that addressed medical and mental health care, is the most recent example of a structural reform injunction surviving review by the Court. See 563 U.S. 493 (2011).

104. See Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 155 (2015) (arguing that the PLRA “has succeeded in radically shrinking—but not eliminating—the coverage” or injunctions in prison reform litigation); Simon & Sabel, *supra* note 2, at 1038 (observing that even after the PLRA, “the volume of prison litigation remains substantial, and although structural orders tend to be narrower than in the past, they are still common”).

105. See, e.g., Shima Baradaran-Robison, *Kaleidoscopic Consent Decrees: School Desegregation and Prison Reform Consent Decrees After the Prison Litigation Reform Act and Freeman-Dowell*, 2003 BYU L. REV. 1333, 1350 (“With the growth of prison litigation, Congress witnessed an analogous growth in ‘out-dated consent decrees’ managed by federal courts.” (quoting Peter Hobart, Comment, *The Prison Litigation Reform Act: Striking the Balance Between Law and Order*, 44 VILL. L. REV. 981, 1003 (1999))).

106. See Schlanger, *supra* note 99, at 520 (describing the “practical obscurity” of institutional reform injunctions); Schlanger, *supra* note 27, at 570–71 (noting that institutional reform injunctions are often “completely unobservable by ordinary case research methods”). As Margo Schlanger explains:

[I]t turns out that most injunctive orders are not public, or at least not effectively so. They are filed with courts and then hidden away in court archives. They are typically difficult to obtain, as a collection or a single source, even for the well-funded and well-informed. They are not embedded in an easily usable information infrastructure. Even a person who knows the type of case or its caption, its filing date, and its court, may or may not be able to obtain a particular injunction for a reasonable fee. The most persevering experts struggle and probably fail to find all the injunctions obtained by or against most government agencies, or all the injunctions about a specified subject.

Schlanger, *supra* note 99, at 516. Even where courts have adopted electronic filing systems, older cases are either excluded from those systems or have had just their docket sheet digitized. And even where injunctions are available electronically, “locating a digitized decree often requires the same type of case-specific information needed to locate a hard-copy file.” *Id.* at 521.

107. See, e.g., Schlanger, *supra* note 23, at 2034–35 (referring to “ongoing court-ordered reform in the areas of, for example, child welfare, mental health and mental retardation facilities, juvenile correction facilities, public housing, and public school funding” (footnotes omitted)).

parties and judges who designed institutional reform injunctions rarely specified how the injunctions should end. Rather, the text of the injunctions typically focused on the steps that government defendants must take in order to achieve compliance with their legal obligations, how their progress would be measured, and how the injunction could be enforced.

It is easy to ignore the pool of existing institutional reform injunctions. After all, the injunctions are the product of lawsuits that were brought years, if not decades, ago. But these aging injunctions are not dusty relics from a bygone era. Unlike antiquated statutes that fall into desuetude, the passage of time has not rendered the injunctions irrelevant to the people whose rights they are designed to vindicate.¹⁰⁸ To the contrary, the injunctions are concerned with governmental activities that are as vital today as they were when the injunctions were issued.¹⁰⁹

Moreover, once an institutional reform injunction is gone, there is no guarantee that plaintiffs can again obtain similar relief if the original violations reoccur. Changes in the legal landscape since *Brown II* have made it harder for plaintiffs to win new institutional reform lawsuits.¹¹⁰ Although not necessarily arising in the context of institutional reform litigation, a number of recent Supreme Court decisions now make it difficult or impossible for institutional reform plaintiffs to establish standing to sue,¹¹¹ adequately plead their claims in a complaint,¹¹² invoke private rights of action to enforce

108. See, e.g., Schlanger, *supra* note 27, at 629 (“[C]ivil rights injunctions deserve the energetic defense of those in favor of the values they protect.”).

109. See, e.g., *id.* (“[W]e can be sure that [public law litigation] continues to regulate much government conduct in many jurisdictions.”).

110. See, e.g., SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT (2015) (discussing the increasing limitations on plaintiffs’ ability to enforce their rights through litigation); Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1536 (2016) (observing that “procedural and substantive constraints on legal access now litter the doctrinal landscape”).

111. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983); *Rizzo v. Goode*, 423 U.S. 362, 372 (1976); see also Gilles, *supra* note 64, at 146 (explaining that “courts have erected barriers, principally in the form of standing requirements, to the institution of suits aimed at structural reform injunctions”); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 333 (2002) (arguing that Article III standing rules disadvantage low-income plaintiffs).

112. See *Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); see also Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193 (2014) (demonstrating that *Twombly*, *Iqbal*, and other recent Supreme Court decisions have had “palpably negative effects on plaintiffs”).

constitutional, statutory, and regulatory provisions,¹¹³ and proceed as a class action.¹¹⁴

Even when institutional reform claims remain viable, plaintiffs may not be able to find lawyers to bring the lawsuits.¹¹⁵ Federal funding for legal services has not kept up with the rising demand for representation since the early 1980s,¹¹⁶ and the legal services offices that receive federal funding have been barred from bringing class actions since 1996.¹¹⁷ Moreover, lawyers who are permitted to represent plaintiffs in institutional reform lawsuits are now less likely to be eligible for attorneys' fees due to changes in Supreme Court precedent.¹¹⁸

Despite the stakes, scholars have had little to say about the death of institutional reform injunctions. Institutional reform litigation received considerable attention as it rose to prominence in the 1960s and 1970s,¹¹⁹ but that largely waned by the 1990s.¹²⁰ The

113. See *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) (rejecting a private right of action to enforce Supremacy Clause); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002) (rejecting a private right of action to enforce federal statutory provisions); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (rejecting a private right of action to enforce federal regulatory provisions); see also Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 MICH. L. REV. 893, 900 (2016) (discussing recent cases that have “narrowed the rights of private parties to challenge statutory violations in court”).

114. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (adopting a highly restrictive interpretation of Rule 23(a)(2)); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (enforcing arbitration provision containing a class-action waiver despite lower-court ruling that it was unconscionable); see also Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 629 (2012) (observing that “most class cases will not survive the impending tsunami of class action waivers” following *Concepcion*); David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 781 (2016) (“Present-day upheaval in class action procedure threatens to alter—perhaps to imperil—structural reform litigation in the federal courts.”).

115. See Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 VA. L. REV. 1693, 1696–1705 (2004) (discussing limitations on the ability of lawyers to pursue NAACP-style litigation campaigns).

116. See, e.g., Alan W. Houseman & Linda E. Perle, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States*, CTR. FOR LAW & SOC. POL’Y 19–22, 29–33 (2007), <http://www.clasp.org/admin/site/publications/files/0158.pdf> [<https://perma.cc/SN3K-AC2G>] (summarizing history of legal services funding in the United States).

117. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321, 1321–53 (1996) (“None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . . that initiates or participates in a class action suit.”).

118. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 610 (2001) (rejecting the “catalyst theory” as a permissible basis for an award of attorneys’ fees); see also Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U. L. REV. 1459, 1462 (2007) (discussing Supreme Court decisions limiting the ability of plaintiffs to recover attorneys’ fees).

119. See *supra* Part I.A–B.

winding down of school desegregation injunctions,¹²¹ the PLRA's limits on prison reform injunctions,¹²² and the Supreme Court's sporadic interest in reviewing motions to terminate or modify institutional reform injunctions,¹²³ prompted some analysis of the end stages of institutional reform remedies. However, larger questions concerning the fate of existing injunctions have gone unanswered.¹²⁴

Parts II and III of this Article examine the fate of current and future institutional reform injunctions. For those injunctions, the pressing questions are: What *is happening* to the pool of existing institutional reform injunctions, and what *should happen* to those injunctions? Part II explores the first of these questions, while Part III takes up the second.

II. A SHRINKING POOL: THE DEATH OF AGING INSTITUTIONAL REFORM INJUNCTIONS

Despite the controversy and backlash generated by institutional reform litigation, many institutional reform injunctions remain in effect. This pool of existing injunctions is not frozen in place, however. As an injunction ages, the likelihood that it will be terminated increases. While the termination of institutional reform injunctions is not intrinsically good or bad—indeed, every injunction must come to an end eventually—how and when an injunction terminates can have varying implications for the parties and judges involved in the litigation. By identifying the three ways that institutional reform injunctions are currently coming to an end—by dissolution, by design, and by disuse—and by drawing out the consequences of each form of injunction death, this Part offers a new perspective on this essential, yet often overlooked, aspect of institutional reform litigation.

120. See Schlanger, *supra* note 27, at 567 (discussing “the sharp drop-off in scholarly interest in civil rights injunctions between the 1980s and the 1990s, when the stream of books and major law review articles slowed to a trickle”).

121. See, e.g., Levine, *supra* note 5; Poser, *supra* note 5.

122. See, e.g., Baradaran-Robison, *supra* note 105; Mark Tushnet & Larry Yackle, *The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997).

123. See, e.g., Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101 (1986); Kim, *supra* note 6; David S. Konczal, *Ruining Rufo: Ramifications of a Lenient Standard for Modifying Consent Decrees and an Alternative*, 65 GEO. WASH. L. REV. 130 (1996); Kelley, *supra* note 6; Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020 (1986).

124. *But see* SANDLER & SCHOENBROD, *DEMOCRACY BY DECREE*, *supra* note 4 (expressing concern about the longevity of institutional reform injunctions).

A. Death by Dissolution

The most visible way that institutional reform injunctions end is when the court that originally ordered the injunction dissolves or terminates it. This can happen when, at some point during the lifespan of the injunction, the defendant files a motion to terminate the injunction under Rule 60(b) of the Federal Rules of Civil Procedure.¹²⁵ The most common basis for termination under Rule 60(b) is that “a significant change either in factual conditions or in law” renders continued enforcement of the injunction “detrimental to the public interest.”¹²⁶ If a defendant carries this burden, the court must terminate or modify the injunction in light of such changed circumstances.¹²⁷ Unlike the other forms of injunction death discussed in this Part, termination through a Rule 60(b) motion typically results in a judicial opinion that creates a record of the termination.¹²⁸

While Rule 60(b) relief has always been available in institutional reform litigation,¹²⁹ the standard for terminating an institutional reform injunction has changed in recent years. During the early decades of institutional reform litigation, the injunction-termination standard was difficult to satisfy. Defendants needed to show either a change in law that rendered the injunction inconsistent with the law, or a “grievous wrong evoked by new and unforeseen conditions.”¹³⁰ This was the termination standard that applied to any injunction issued by a federal court, regardless of whether it arose from institutional reform litigation or another type of litigation.

More recently, the Supreme Court has made it easier to terminate institutional reform injunctions. Beginning in the early 1990s¹³¹ and culminating with its 2009 decision in *Horne v. Flores*,¹³²

125. Motions to terminate an institutional reform injunction are typically made pursuant to Rule 60(b)(5), which states that “the court may relieve a party . . . from a final judgment, order, or proceeding” if “the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.” FED. R. CIV. P. 60(b)(5).

126. *Horne v. Flores*, 557 U.S. 433, 447 (2009) (quoting *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 384 (1992)).

127. *Horne*, 557 U.S. at 447.

128. See, e.g., 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2863 (3d ed. 2016) (collecting cases).

129. Aside from the general restyling of the Federal Rules of Civil Procedure that took place in 2007, the current version of Rule 60(b) has been in effect since 1946. See FED. R. CIV. P. 60 notes.

130. *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).

131. *Rufo*, 502 U.S. 367 (adopting flexible approach to Rule 60(b) motions for all institutional reform injunctions); *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237,

the Supreme Court has instructed lower courts to take a more “flexible approach” to motions to terminate institutional reform injunctions.¹³³ According to the Court, this flexibility should be used “to ensure that responsibility for discharging the [defendant’s] obligations is returned promptly to the State and its officials.”¹³⁴ Regardless of whether the injunction is the product of a litigated decree or a consent decree,¹³⁵ courts must terminate institutional reform injunctions in accordance with this easier-to-satisfy standard.

The Supreme Court’s message in *Horne* was clear: aging institutional reform injunctions are not entitled to the same respect as other injunctions.¹³⁶ Indeed, the decision has been viewed as an invitation to defendants to file Rule 60(b) motions seeking to overturn institutional reform injunctions.¹³⁷ And that appears to be what has

248 (1991) (adopting flexible approach to Rule 60(b) motion to dissolve a school desegregation injunction).

132. 557 U.S. 433.

133. *Id.* at 450 (quoting *Rufo*, 502 U.S. at 381). The Court first adopted the “flexible approach” seventeen years earlier in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 381 (1992), but *Horne* applied it in a way that made it even easier to terminate institutional reform injunctions. See Porter, *supra* note 85, at 140 (“Despite characterizing its decision as adhering to a ‘flexible approach,’ the Court made clear that such ‘flexibility’ had but one purpose: to return oversight responsibility to state and federal officials as soon as possible.”); Kelley, *supra* note 6, at 292 (arguing that the Court’s approach in *Horne* “would functionally eliminate the power of prophylactic decrees”).

134. *Horne*, 557 U.S. at 450. The Court offered three reasons for making it easier to terminate institutional reform injunctions: the likelihood that changed circumstances will necessitate a reexamination of injunctions that last for many years, federalism concerns caused by federal court interference with state and local institutions, and what the Court characterized as the unusual “dynamics” of institutional reform litigation. *Id.* at 447–48.

135. See *Rufo*, 502 U.S. at 378 (describing a “consent decree” as “an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees”); see also *Sys. Fed’n No. 91 v. Wright*, 364 U.S. 642, 647 (1961) (“The source of the power to modify [an existing consent decree] is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief.”); *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) (“We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent. . . . If the reservation had been omitted [from the terms of the decree], power there still would be by force of principles inherent in the jurisdiction of the chancery.”).

136. See, e.g., Karlan, *supra* note 79, at 886 n.70 (arguing that *Horne* demonstrates the Court’s deepening hostility to prospective, injunctive relief); Kim, *supra* note 6, at 1466 (“*Horne* and its progeny have made it significantly easier for government-defendants to terminate ongoing decrees in institutional reform cases.”); Kelley, *supra* note 6, at 307 (“All the new standards introduced in *Horne* make it much easier for state and local governments, even those with a history of neglect, to escape court orders.”).

137. See, e.g., *Horne*, 557 U.S. at 496 (Breyer, J., dissenting) (expressing concern that the majority opinion “will create the dangerous possibility that orders, judgments, and decrees long final or acquiesced in, will be unwarrantedly subject to perpetual challenge, offering defendants unjustifiable opportunities endlessly to relitigate underlying violations with the burden of proof

happened during the seven years since *Horne* was decided. Lower courts have granted some motions¹³⁸ and denied others,¹³⁹ but the pattern has been established: government defendants claim that changed circumstances warrant the dissolution (or at least weakening) of existing institutional reform injunctions, while plaintiffs are left clinging to injunctions that are becoming increasingly outdated.

At first glance, death by dissolution may appear to be entirely favorable to defendants and unfavorable to plaintiffs. But the implications of injunction termination under the easier-to-satisfy *Horne* approach can cut in different directions. On the one hand, government defendants are able to obtain relief from institutional reform injunctions that are no longer necessary or no longer equitable due to changes in the facts or law. Yet on the other hand, by signaling that institutional reform injunctions are worthy of less respect than other injunctions, the Supreme Court's current approach is likely to complicate the implementation of existing injunctions. For example, if defendants believe that they can terminate injunctions sooner than originally expected, they may be less committed to the difficult work of achieving true and lasting structural reform. Similarly, defendants may choose to engage in foot-dragging in anticipation of an early motion to terminate. But even assuming good faith, an easier-to-satisfy termination standard may create an added layer of uncertainty for defendants, especially those operating under older injunctions. If termination appears to be easier to obtain than in the past, defendants may be left unsure about the ongoing validity of injunctions that have been in force for some time. After all, if the defendant can go back to court and ask for termination based on the

imposed once again upon the plaintiffs"); Porter, *supra* note 85, at 140 (observing that *Horne* decision "practically invit[es] those operating under consent decrees to file 60(b)(5) motions and strongly signal[s] lower courts to get out of the business of institutional reform"); Jonathan Simon, Horne v. Flores: *The Roberts Court Takes Aim at Institutional Reform Litigation*, PRAWFSBLAWG (Aug. 3, 2009 12:49 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2009/08/horne-v-flores-the-roberts-court-takes-aim-at-institutional-reform-litigation.html> [<https://perma.cc/GG49-MLWM>] ("What goes without saying is that there will be a great deal of new litigation testing the meaning of institutional reform injunction under these new defendant (and intervenor) friendly standards.").

138. See, e.g., Frew v. Janek, 780 F.3d 320 (5th Cir. 2015); John B. v. Emkes, 710 F.3d 394 (6th Cir. 2013); Petties v. District of Columbia, 662 F.3d 564 (D.C. Cir. 2010); Consumer Advisory Bd. v. Harvey, 697 F. Supp. 2d 131, 132–33 (D. Me. 2010); Basel v. Bielaczysz, No. 74-40135-BC, 2009 WL 2843906 (E.D. Mich. Sept. 1, 2009).

139. See, e.g., United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty., 712 F.3d 761 (2d Cir. 2013); L.J. v. Wilbon, 633 F.3d 297 (4th Cir. 2011); United States v. Tennessee, 615 F.3d 646 (6th Cir. 2010); Evans v. Fenty, 701 F. Supp. 2d 126 (D.D.C. 2010); Juan F. v. Rell, No. 3:89-CV-859 (CFD), 2010 WL 5590094 (D. Conn. Sept. 22, 2010); LaShawn A. *ex rel.* Moore v. Fenty, 701 F. Supp. 2d 84, 98–100, 115 (D.D.C. 2010).

Horne analysis, government officials may feel less pressure to comply with the injunction. But until an injunction is terminated, it remains binding and a defendant's failure to comply may expose it to court-ordered sanctions.

The Court's apparent disdain for institutional reform litigation and the weaker injunction-termination standard announced in *Horne* are also likely to lead to earlier and more frequent termination motions.¹⁴⁰ These motions impose costs on the parties and the court. As a general matter, litigating motions to terminate diverts attention and resources from the implementation, monitoring, and enforcement of the injunction. Motions to terminate can also waste judicial and litigant resources, particularly when they are merely a second bite at the apple, enabling defendants to relitigate issues that were decided before the injunction came into effect. These costs typically affect institutional reform plaintiffs more than defendants, as the plaintiffs' access to legal resources is usually more limited.

Beyond the impact on the pool of existing injunctions, the Supreme Court's approach also has implications for the design and implementation of future injunctions. In the past, when institutional reform injunctions were subject to the traditional injunction-termination standard, the designers of an injunction could justifiably assume that it would be in place for an indefinite period of time. This is no longer a safe assumption. Thus, designers today must anticipate the possibility of earlier termination by, for example, requiring the defendant to implement reforms and come into compliance on a compressed timetable. Similarly, the specter of early termination may also prompt quicker motions for contempt when a defendant is out of compliance with the injunction; if plaintiffs are not confident that an injunction will remain in place, they may feel compelled to aggressively enforce its terms rather than give the defendant more time to improve its performance.

B. Death by Design

Terminating an institutional reform injunction does not necessarily require a trip to court—some end according to the terms of the injunction itself. This occurs when the designers of the injunction—whether the judge in the case of a litigated decree, or the parties in the case of a consent decree—specify at the outset when and under what conditions the injunction will terminate. Although there is no standard language or set of triggering events for injunction-

140. See *supra* note 137.

termination provisions, they can be grouped into two categories: those based on the passage of time and those based on the defendant's performance.¹⁴¹

Time-based termination provisions mandate that the injunction will end after the passage of a specified period of time or on a particular date. The injunction's termination is therefore not linked to whether the policies and practices targeted by the injunctive relief actually have been reformed. Indeed, the injunction will cease to bind the parties once the time limit is reached regardless of the defendant's compliance with the injunction.

In contrast, performance-based termination provisions become operative only when the defendant meets certain benchmarks or standards set forth in the injunction. Performance-based termination provisions are common where the legal violation targeted by the lawsuit is one that is easily measurable. So, for example, in institutional reform lawsuits challenging delays in agency processing or adjudication, the injunction may remain in force until the defendant shows that the unlawful delays have been eliminated. Similarly, if the litigation is targeting systemic agency errors, the injunction can be designed to last until the error rate is reduced to an acceptable level. Regardless of the specific goals, these performance-based termination provisions are intended to ensure that the injunction remains in force as long as necessary to remedy the underlying violation.

The implications of injunction death by design vary depending on whether the termination is based on time or performance. For injunctions that end due to the mere passage of time, the most striking consequence is that the injunction may terminate before the defendant has actually remedied the alleged unlawful conduct that gave rise to the litigation in the first place. To be sure, injunctions that include time-based termination provisions are intended to fix the problem before the injunction expires;¹⁴² however, it is not difficult to imagine violations persisting when the injunction's time-based termination provision becomes operative. Plaintiffs are always free to file a new lawsuit and seek another injunction against the defendant, but such relitigation threatens to waste judicial and litigant resources. Moreover, given that plaintiffs in institutional reform lawsuits tend to

141. Some termination provisions are hybrids, establishing that the injunctions will come to an end based on some combination of the passage of time and the achievement of specified performance benchmarks.

142. After all, that is the point of the injunction. In addition, in institutional reform lawsuits that proceed as class actions, any settlement or consent decree cannot be approved by the district court until the court finds that it is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2).

have limited access to legal resources, relitigating a violation because a previous injunction was time-limited raises distributive justice concerns. Finally, knowing that the injunction will terminate regardless of its performance can create undesirable incentives for the defendant; for example, in an effort to run out the clock, it may choose strategic foot-dragging over implementing the difficult reforms necessary to remedy the violations targeted by the litigation.

In contrast, injunctions that are set to terminate upon the satisfaction of specified performance goals have a different set of implications for institutional reform litigation. Although somewhat counterintuitive, not all injunctions that end due to performance-based terminations are success stories. Performance-based termination provisions are typically part of an injunction's original design, meaning that years—if not decades—can go by before the provisions become operative. Given the limits of foresight, just because a defendant's performance reaches a previously specified benchmark does not guarantee that the underlying violations have been remedied.¹⁴³ That depends on the extent to which the benchmark continues to reflect compliance with the law. Relatedly, the success of performance-based termination provisions also depends on the injunction's monitoring and reporting provisions; without access to performance data that is comprehensive and accurate, it is difficult for the parties and the court to know whether a defendant has satisfied the performance goals that trigger termination of the injunction.¹⁴⁴

Performance-based termination of institutional reform injunctions raises another concern: the threat of relapse. Injunctions that end because the defendant meets or exceeds the prescribed performance benchmarks may no longer be necessary, as where the defendant has institutionalized reforms that will prevent future violations from occurring. However, meeting performance benchmarks at one point in time does not necessarily mean that a defendant has undergone such reforms. Thus, performance-based termination may leave the door open for old violations to recur soon after the plaintiff and the court direct their gaze elsewhere.

143. See, e.g., Jost, *supra* note 123, at 1102 (describing the “baffling perplexities” that courts encounter when they attempt to envision the future in institutional reform litigation).

144. The difficulty of designing effective performance metrics for governmental entities is well documented in the bureaucracy literature. See, e.g., MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE 40–53 (rev. ed. 2010); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 154–78 (1991).

C. Death by Disuse

Institutional reform injunctions are also ending as a result of disuse. This is a form of constructive termination that occurs when an injunction is forgotten or ignored by the parties responsible for implementing and monitoring it, and by the court charged with overseeing it. For injunctions that do not automatically expire upon the passage of a specified period of time,¹⁴⁵ death by disuse can happen when an otherwise indefinite injunction ages and the parties, lawyers, and judges who were involved in the litigation shift their attention to other matters, retire, or even die themselves. The injunction remains binding on paper, but at some point it falls into desuetude and becomes, in effect, dormant.¹⁴⁶

For obvious reasons, the likelihood of this form of termination increases as an injunction ages. Although the participants in institutional reform litigation can take actions to ensure that old injunctions do not fade away—for example, new lawyers can take over for outgoing lawyers, new party representatives can be substituted for those who are no longer involved in the case, and new judges can replace judges who leave the bench—these steps are not always taken. Thus, as institutional reform injunctions grow older, they become susceptible to falling into disuse.

By its very nature, death by disuse is nearly impossible to observe or track. It results not from a court ruling or a termination provision written into the injunction, but from inactivity, inattention, and fading memories. That said, an example from New York City spanning over twenty years and two separate lawsuits illustrates one way that this form of injunction death can unfold.

The story begins in 1980, when individuals with mobility impairments filed *Heyer v. New York City Housing Authority*, challenging the public housing authority's failure to provide reasonable accommodations.¹⁴⁷ The district court certified a class,¹⁴⁸

145. See *supra* Part II.B.

146. See, e.g., Sarah N. Welling & Barbara W. Jones, *Prison Reform Issues for the Eighties: Modification and Dissolution of Injunctions in the Federal Courts*, 20 CONN. L. REV. 865, 886 (1988) (noting that some institutional reform injunctions “just lapse into a dormant state from lack of attention”). It is possible that such injunctions can be revived after years of dormancy. See, e.g., Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 215 (2013) (discussing the potential revival of “orphan” prisoner-rights decrees following the Supreme Court's decision in *Brown v. Plata*, 563 U.S. 493 (2011)). This Section, however, is focused on injunctions that effectively terminate due to disuse.

147. Complaint, *Heyer v. N.Y. City Hous. Auth.*, No. 80 Civ. 1196 (RWS) (S.D.N.Y. Feb. 29, 1980). Specifically, the plaintiffs alleged that the New York City Housing Authority failed to

and, in 1982, so-ordered a settlement agreement that required the defendant to take certain remedial steps under the supervision of the district court.¹⁴⁹ The *Heyer* settlement had no termination provision, but at some point it fell into disuse.¹⁵⁰ This became apparent in 2002, when a new group of plaintiffs filed *Bennett v. New York City Housing Authority*, a class action challenging similar violations at the housing authority.¹⁵¹ None of the participants in the *Bennett* litigation initially were aware of the *Heyer* settlement—not the plaintiffs (who were members of the class certified in *Heyer*), not the government defendants, not the lawyers for either side, and not the judge assigned to the case. In fact, the parties fully litigated a motion to dismiss, which resulted in a reported decision.¹⁵² It was not until 2005—three years after *Bennett* was filed—that the parties and the court became aware of the *Heyer* settlement. At that point, the *Bennett* litigation was consolidated with the *Heyer* litigation, and the parties negotiated a new settlement agreement that was approved by the *Heyer* judge in 2006.¹⁵³

The implications of injunction death by disuse are not easy to assess. It may be that disuse is a sign that an injunction is no longer necessary. An injunction may fall into disuse when both the plaintiffs and the defendants are content with the inactivity, either because the status quo is acceptable to both parties or because the potential benefit of disturbing the status quo—for example, by making a motion to enforce, modify, or terminate the injunction—creates risks or costs that neither party wants to incur. Either way, this type of disuse does not seem to be objectionable.

However, injunctions that fall into disuse can have implications that are not so benign. Whether the product of a litigated injunction or a consent decree, institutional reform injunctions set

provide individuals with mobility impairments who have been, are, or will be qualified for the Section 8 program with effective assistance in finding accessible housing. *See id.*

148. *Heyer v. N.Y. City Hous. Auth.*, No. 80 Civ. 1196 (RWS) (S.D.N.Y. May 22, 1980) (order granting plaintiffs' motion for class certification).

149. *Heyer v. N.Y. City Hous. Auth.*, No. 80 Civ. 1196 (RWS) (S.D.N.Y. Sept. 13, 1982) (approving Stipulation of Settlement and Order).

150. *See Special Litigation Unit: Bennett v. NYCHA (2002)*, N.Y. LEGAL ASSISTANCE GRP. (2016), <http://nylag.org/units/special-litigation-unit/monitoring-and-individual-relief-cases/bennett-v-new-york-city-housing-authority> [https://perma.cc/QY9N-KYCF] (stating that the *Heyer* settlement was “never enforced”).

151. Complaint, *Bennett v. N.Y. City Hous. Auth.*, No. 1:02-cv-03499 (CPS) (E.D.N.Y. Jun. 17, 2002). The *Bennett* plaintiffs brought claims under the Americans with Disabilities Act and the Fair Housing Act.

152. *Bennett v. N.Y. City Hous. Auth.*, 248 F. Supp. 2d 166 (E.D.N.Y. 2002).

153. *Heyer v. N.Y. City Hous. Auth.*, No. 80 Civ. 1196 (RWS), 2006 WL 1148689 (S.D.N.Y. Apr. 28, 2006).

forth what the government defendant is required to do. Yet as these injunctions age and their viability is eroded by the passage of time, the injunctions are becoming an unexpected source of uncertainty. When an aging injunction falls into disuse, it becomes less clear to the defendant whether it is still bound by the injunction. The defendant does not know whether its actions are still governed by the injunction or whether it will be subject to a contempt or enforcement motion for failing to comply. The injunction's beneficiaries are similarly left in the dark: they do not know whether the injunction continues to be a source of rights or whether they can challenge the defendant's violations of those rights by enforcing the terms of the injunction.

Injunctions that effectively end due to disuse also raise concerns about the allocation of institutional reform litigation resources. When an injunction fades away, the violations that gave rise to the underlying lawsuit may resume in the future. In such instances, rather than using the old injunction to challenge the violations, new plaintiffs must bring a new lawsuit. Such litigation occurs on a clean slate, requiring the parties and the judge to expend resources that were already spent as part of the earlier lawsuit and would have been avoided had the earlier injunction remained active.

Death by disuse can also raise distributive justice concerns. Preventing an institutional reform injunction from falling into disuse is largely the job of the plaintiffs. Unless the plaintiffs monitor the defendant's compliance with the injunction and seek to enforce the injunction when noncompliance becomes apparent, an injunction is likely to become inactive. Such vigilance requires the expenditure of legal resources well after the injunction has been secured. As discussed above, plaintiffs in institutional reform litigation typically have limited access to legal resources, meaning that they have less capacity to vigilantly police their injunctions than plaintiffs who win injunctions in other types of lawsuits. Thus, injunction death by disuse is likely to disproportionately prejudice low-income plaintiffs who rely on overburdened and under-resourced public interest lawyers.

Finally, there is also a less obvious consequence to injunction death by disuse: the impact on the rule of law. Until a judge affirmatively terminates an institutional reform injunction, the injunction is a court order that creates legally binding obligations. But when institutional reform injunctions lapse into dormancy, the legal force of these injunctions is cast into doubt even though the injunction—at least on paper—is as binding as it was on the day it was issued. In this way, an otherwise valid court order can lose its power without any action from the court. And, consequently,

defendants can defy the injunction without fear of sanction. Thus, death by disuse renders institutional reform injunctions more vulnerable to disrespect and disregard than other court orders that similarly remain on the books for years after they are issued by a court.

III. THE FUTURE OF AGING INSTITUTIONAL REFORM INJUNCTIONS

As time marches on, a growing number of aging institutional reform injunctions will predictably come to an end. As has been the case thus far, the parties and judges involved with institutional reform lawsuits will struggle with determining how and when the injunctions should be terminated. Part II of this Article surveyed the current state of institutional reform injunction death, cataloguing three different ways in which these injunctions are ending. It also suggested that even though each form of termination has a similar result—the injunction is no longer in force—they have different implications for institutional reform litigation.

This Part shifts the focus to the future: it considers the fate of institutional reform injunctions that are currently in force as well as those injunctions that have yet to come into existence. Section A argues that now is the time to move away from the often haphazard termination of injunctions, and to think more explicitly about when and how institutional reform injunctions should end. Then, Section B and Section C explore two moments in the course of institutional reform litigation in which the issue of injunction death is vital. The first is when an injunction is in force but in danger of termination, and the second is when the parties or the judge are designing a new injunction. In sum, by drawing on relevant doctrine and recent experience with aging injunctions, Part III offers a roadmap for the end stages of institutional reform litigation that is consistent with the goals and limitations of this important and enduring form of litigation.

A. Reconsidering the Death of Institutional Reform Injunctions

By any measure, institutional reform litigation has received its fair share of scrutiny during the sixty years since *Brown II*.¹⁵⁴ Yet scholars have paid comparatively little attention to the end stages of institutional reform injunctions, focusing instead on foundational questions concerning the legitimacy and effectiveness of this form of

154. See *supra* Part I.

litigation.¹⁵⁵ Nonetheless, injunction death is an essential part of the institutional reform story, and the number of cases to reach that final stage only grows with time.

All participants in institutional reform litigation—the parties, the lawyers, and the judges—must at some point grapple with the end of the litigation. It is easy to overlook or postpone end-stage planning in favor of focusing on the design and implementation of an injunction’s substantive provisions. But, ultimately, when and under what conditions the injunction terminates may be as vital to the goals of the litigation as other, more substantive aspects of the remedy.

Indeed, the parties in institutional reform litigation ignore injunction death at their own peril. As the discussion in Part II illustrates, how an injunction ends can have significant implications for the participants in the underlying litigation. Yet despite the seemingly haphazard ways that institutional reform injunctions often come to an end, when and how an injunction dissolves need not be left to the whims of fate. By preparing for that eventual outcome at earlier stages of the litigation, parties and judges can increase the likelihood that an injunction is terminated at the appropriate time and in an appropriate manner.¹⁵⁶

Looking ahead, the lessons of past injunction terminations offer useful guidance for both the termination of existing injunctions and the design of future injunctions. For injunctions that are already in place, the challenge is to prevent them from being terminated before their goals have been achieved. This can involve identifying aging injunctions to ensure that they do not fall into disuse, carefully applying Supreme Court case law on the standard for motions to terminate institutional reform injunctions, and reviving a truly flexible understanding of Rule 60(b) of the Federal Rules of Civil Procedure. For future injunctions, this effort can include design innovations that establish, at the outset, when and how the injunction should terminate and the monitoring and reporting that will be used to trigger termination. Taken together, these efforts can help ensure that institutional reform injunctions are not terminated before their objectives have been achieved.

155. *See supra* Part I.C.

156. *See, e.g.*, COOPER, *supra* note 41, at 350 (observing that participants in institutional reform litigation “have become acutely aware of the need to clarify the conditions for terminating jurisdiction at the time the order is crafted”).

B. Avoiding Premature Death of Existing Injunctions

Institutional reform injunctions that are currently in force can seem to be under constant threat of termination. Rule 60(b) enables government defendants to file termination motions at any time, and the Supreme Court's recent approach to these motions has increased the likelihood that lower courts will grant them.¹⁵⁷ But Rule 60(b) allows for more than just dissolution of court orders, and the Supreme Court has declined to bar institutional reform injunctions despite ample opportunities to do so.¹⁵⁸ Thus, even though institutional reform injunctions appear to be under siege, premature death can be prevented by, for example, carefully applying the Supreme Court's Rule 60(b) precedents, pursuing truly flexible Rule 60(b) relief, and ensuring that aging injunctions are not forgotten.

1. Careful Application of the Supreme Court's Rule 60(b) Precedents

For institutional reform injunctions that face termination pursuant to Rule 60(b), careful application of Supreme Court precedent is essential to ensure that the injunctions are not dissolved prematurely. Although the Supreme Court decided *Horne v. Flores* more than seven years ago, it remains the Court's most recent pronouncement on the termination of institutional reform injunctions.¹⁵⁹ Because *Horne* is the leading case on the Rule 60(b) standard, it is important to identify with specificity what the Court said (and did not say) about the termination of institutional reform injunctions.

Horne identifies three aspects of institutional reform litigation that, in the Court's view, justify relaxing the termination standard for injunctions arising from this particular type of lawsuit. According to the Court, institutional reform injunctions must be easier to overturn because they often remain in force for many years, they raise sensitive federalism concerns, and the dynamics of institutional reform litigation differ from those of other cases.¹⁶⁰ Each of these features

157. See *supra* Part II.A.

158. See, e.g., Siegel, *supra* note 79, at 1113 (explaining that “the apocalyptic confrontation between Warren Court ‘activism’ and Rehnquist Court ‘restraint’ never came to fruition” and “institutional reform litigation limped on”); Gilles, *supra* note 64, at 156 (“[T]he Supreme Court has not sustained any broadside constitutional challenges to structural reform injunctions; challenges mounted on federalism and separation of powers grounds have succeeded only in causing the Court to warn lower court judges to be mindful of state and congressional prerogatives.”).

159. 557 U.S. 433 (2009).

160. See *id.* at 448.

highlights important issues related to institutional reform litigation, but, upon closer examination, they do not apply equally to every institutional reform injunction.

The *Horne* Court is surely correct that institutional reform injunctions “often remain in force for many years, and the passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment.”¹⁶¹ Yet not every institutional reform injunction challenged under Rule 60(b) fits this description.¹⁶² It is the court’s task to determine whether changed circumstances are present in a particular case.¹⁶³ If such changes have occurred, the court must then decide whether modification or termination of the injunction is appropriate.¹⁶⁴ Indeed, that is what Rule 60(b) requires.¹⁶⁵ Whether institutional reform injunctions, as a general matter, “often remain in force for many years, and the passage of time frequently brings about changed circumstances,”¹⁶⁶ is not relevant to whether, in a particular case, the circumstances have changed in a way that requires modification or termination of the injunction.

Similarly, it may be true that, as *Horne* states, “institutional reform injunctions often raise sensitive federalism concerns” and that these concerns are “heightened” when an injunction “has the effect of dictating state or local budget priorities,” for example, when “a federal court orders that money be appropriated for one program.”¹⁶⁷ Some institutional reform injunctions, like the one at issue in *Horne*, require state and local governments to devote substantial resources, financial and otherwise, to remedy ongoing violations of the law. But not all do, either because they involve only federal government defendants,¹⁶⁸ or because they do not impinge on state and local governments to a similar extent. Lower courts reviewing Rule 60(b) motions can surely distinguish between these types of injunctions. Thus, *Horne*’s generalized federalism concerns should not weigh in favor of

161. *Id.*

162. *See, e.g.,* United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty., 712 F.3d 761 (2d Cir. 2013) (affirming denial of Rule 60(b) motion seeking to dissolve injunction entered less than four years earlier).

163. *See* *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367 (1992).

164. *See id.*

165. FED. R. CIV. P. 60(b)(5) (stating that a party may be relieved from a judgment when “applying it prospectively is no longer equitable”).

166. *Horne*, 557 U.S. at 448 (emphasis added).

167. *Id.* at 448.

168. *See supra* note 39 and accompanying text.

termination without a court finding that those concerns are present with respect to the injunction under review.

The *Horne* Court's third concern calls for closer scrutiny as well. According to the Court, a lower threshold for Rule 60(b) motions is necessary because "the dynamics of institutional reform litigation differ from those of other cases."¹⁶⁹ As examples, the Court noted that "public officials sometimes consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law," and these decrees "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.'"¹⁷⁰ Furthermore, the Court explained that "[w]here 'state and local officials . . . inherit overbroad or outdated consent decrees that limit their ability to respond to the priorities and concerns of their constituents,' they are constrained in their ability to fulfill their duties as democratically-elected officials."¹⁷¹ Again, while it *may* be true that these "dynamics" are present in *some* cases, even the *Horne* majority acknowledged that not all (or even most) institutional reform injunctions raise these concerns.¹⁷² Moreover, it is far from clear that the Court's concerns about policy entrenchment and collusion are as unusual or troubling as the Court suggests.¹⁷³ In any event, rather than accept these broad characterizations as grounds for dissolving institutional reform injunctions under Rule 60(b), lower courts must determine whether the injunction at issue in fact raises the types of concerns identified by the *Horne* Court.

Thus, not all of the concerns identified in *Horne* are present in all institutional reform cases. It is therefore the task of the lower

169. *Horne*, 557 U.S. at 448.

170. *Id.* at 449 (quoting *Frew v. Hawkins*, 540 U.S. 431, 441 (2004)).

171. *Id.* (quoting American Legislative Exchange Council, Resolution on the Federal Consent Decree Fairness Act (2006), App. to Brief for American Legislative Exchange Council et al. as Amici Curiae 1a–4a).

172. *See id.* at 448 ("[P]ublic officials *sometimes* consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law." (emphasis added)); *id.* at 449 (institutional reform injunctions that "bind state and local officials to the policy preferences of their predecessors . . . *may* thereby 'improperly deprive future officials of their designated legislative and executive powers'" (emphasis added) (quoting *Frew*, 540 U.S. at 441)).

173. As Justice Breyer observed in dissent, the *Horne* majority's discussion of institutional reform litigation "reflects one side of a scholarly debate about how courts should properly handle decrees in 'institutional reform litigation.'" *Id.* at 496 (Breyer, J., dissenting). More specifically, with respect to the majority's concerns about institutional reform injunctions limiting government officials' ability to change or adopt new policies, such policy entrenchment is neither uncommon for government officials nor necessarily a reason to overturn such injunctions. *See, e.g., Zaring, supra* note 26, at 1033–34 ("To be sure, consent decrees permit elected officials to bind their successors, but the same is true of any contract with lock-in effects. By providing stability and certainty, consent decrees need not necessarily always be pernicious.").

courts adjudicating Rule 60(b) motions to find whether and to what extent the concerns are present in the particular case under review. If, as the majority found in *Horne*, all three are present, then a more flexible approach to termination may be warranted.¹⁷⁴ However, if a motion to terminate is based on nothing more than a defendant's invocation of one or more of the concerns identified in *Horne*, the court should apply the normal Rule 60(b) standard.¹⁷⁵

In addition to scrutinizing what *Horne* did say, it is important to note what the Court did not say. The Court did not disturb its prior holdings concerning the scope of consent decrees in institutional reform litigation. *Horne* involved an injunction issued by the district court based on its findings that the defendants had violated the law. In reviewing the injunction, the Court relied on prior decisions holding that litigated injunctions cannot order the defendant to do more than federal law requires.¹⁷⁶ *Horne* left undisturbed the Court's long-standing view that a consent decree—unlike a litigated decree—can compel an institutional reform defendant to do more than is required by law.¹⁷⁷ Thus, *Horne's* demand for a seamless fit between the

174. See *Horne*, 557 U.S. at 447–51.

175. The Second Circuit rejected such an argument in *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 712 F.3d 761 (2d Cir. 2013). There, the county defendant argued that the injunction should be terminated under Rule 60(b) and *Horne* because members of the county government are subject to term limits and therefore “cannot bind their successors to the obligations of the consent decree.” *Id.* at 771. The Second Circuit disagreed, noting that, “if accepted, it would terminate all of the obligations under the consent decree at the close of the terms of office during which the agreement was entered. Such a conclusion would amount to a sea change in the operation of consent decrees in the United States.” *Id.* The court thus rejected the defendant's argument, holding that “a local government is not relieved of its obligations under a consent decree taken on behalf of a previous administration merely because new local officials will and do take office.” *Id.*; cf. *Harris v. City of Philadelphia*, 47 F.3d 1311, 1327 (3d Cir. 1995) (holding, prior to *Horne*, that “the election of a new administration does not relieve [a local government] of valid obligations assumed by previous administrations”).

176. See *Horne*, 557 U.S. at 450 (explaining that “courts must remain attentive to the fact that ‘federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation’” (quoting *Milliken v. Bradley*, 433 U.S. 267, 282 (1977))); see also *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 389 (1992) (“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.”).

177. See, e.g., *Rufo*, 502 U.S. 367, 389 (1994) (“[W]e have no doubt that . . . [the government defendants] 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 . . . , but also more than what a court would have ordered absent the settlement.”); *Suter v. Artist M.*, 503 U.S. 347, 354 n.6 (1992) (“[P]arties may agree to provisions in a consent decree which exceed the requirements of federal law.”); *Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (“[A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.”).

defendant's federal-law violation and the terms of the injunction does not extend to institutional reform injunctions that arise from consent decrees.

Nor did *Horne* overrule the Court's prior rulings concerning when it is appropriate to dissolve injunctions under Rule 60(b).¹⁷⁸ Prior to *Horne*, the Court made clear that continued enforcement of an institutional reform injunction is appropriate until the defendant has implemented a remedy that is durable. In other words, a defendant cannot escape an injunction the moment it fixes whatever problems gave rise to the underlying litigation. For example, the Court ruled that dissolution of a school desegregation injunction was appropriate when the district court found that the school board has complied with the law for "a reasonable period of time" and that it was "unlikely that the school board would return to its former ways."¹⁷⁹ Although the *Horne* Court did not speak clearly on the appropriate duration of institutional reform injunctions,¹⁸⁰ its reference to a remedy that is "durable" suggests that lower courts should not terminate institutional reform injunctions the moment the defendant has managed to cease its unlawful behavior.¹⁸¹ Rather, as is the case with all prospective injunctive relief, the injunctions should remain in force as long as they are still deterring noncompliance with the law.¹⁸²

178. See Kelley, *supra* note 6, at 293 (observing that the *Horne* Court "did not explicitly disavow prior decisions that employed stricter standards for modifying decrees").

179. Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 247–48 (1991).

180. Compare *Horne*, 557 U.S. at 450 ("If a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper." (emphasis added)), with *id.* at 450 ("A flexible approach [to the Rule 60(b) analysis] allows courts to ensure that responsibility for discharging the State's obligations is returned promptly to the State and its officials' when the circumstances warrant." (quoting *Frew v. Hawkins*, 540 U.S. 431, 442 (2004) (emphasis added))), and *id.* at 451 (criticizing the lower court for failing to "apply a flexible standard that seeks to return control to state and local officials as soon as a violation of federal law has been remedied" (emphasis added)). Not surprisingly, in the wake of *Horne*, "lower courts have struggled to ascertain the standards applicable in various cases." Kelley, *supra* note 6, at 293.

181. See *Horne*, 557 U.S. at 450 ("If a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper."); see also *Evans v. Fenty*, 701 F. Supp. 2d 126, 171 (D.D.C. 2010) ("What it means to have a 'durable remedy' is a question that *Horne* does not answer, but at a minimum, a 'durable' remedy means a remedy that gives the Court confidence that defendants will not resume their violations of plaintiffs' constitutional rights once judicial oversight ends.").

182. See, e.g., *Welling & Jones*, *supra* note 146, at 888 ("If an injunction is no longer necessary to deter future noncompliance, it stands only as a punishment for past transgressions and should be dissolved. Alternatively, if the injunction is still deterring noncompliance, it should be continued.").

2. Truly Flexible Rule 60(b) Relief

From the earliest days of institutional reform litigation, judges and scholars understood that institutional reform injunctions needed to be flexible and adaptable in order to achieve their goals.¹⁸³ They recognized that the best efforts of parties and judges to create an effective remedy could be undermined by changes in circumstances.¹⁸⁴ Thus, the parties and judges involved in institutional reform litigation must be able to revisit and revise the injunctions to ensure that the remedies remain in sync with current realities. Modifications could respond to developments that render prior remedial steps ineffective, unduly burdensome, or counterproductive in ways that were unanticipated when the injunction was originally designed.

Rule 60(b) provides the natural mechanism for adapting and adjusting institutional reform injunctions. As discussed above, under Rule 60(b) a party may ask a court to modify or terminate an injunction in certain situations, including when there has been “a significant change either in factual conditions or in law”¹⁸⁵ that renders continued enforcement of the injunction “no longer

183. See, e.g., *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 381 (1992) (“The experience of the District Courts and 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.”); *Sys. Fed’n No. 91 v. Wright*, 364 U.S. 642, 647 (1961) (“There is . . . no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen.”); *N.Y. State Ass’n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 970 (2d Cir. 1983) (discussing need for a flexible modification standard for institutional reform injunctions); *Phila. Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1119–21 (3d Cir. 1979).

As Professor Owen Fiss has explained:

The judge must search for the “best” remedy, but since his judgment must incorporate such open-ended considerations as effectiveness and fairness, and since the threat and constitutional value that occasions the intervention can never be defined with great precision, the intervention can never be defended with any certitude. It must always be open to revision

Fiss, *Forms of Justice*, *supra* note 3, at 49.

184. See, e.g., *Jost*, *supra* note 123, at 1103 (“Because the injunction is necessarily a static, predated response to a dynamic evolving problem, over time it almost inevitably becomes less responsive to the problem it addresses.”); see also *Rufo*, 502 U.S. at 403 n.2 (Stevens, J., dissenting) (“It is the difficulty in determining prospectively which remedy is best that justifies a flexible standard of modification.”). The Court has also noted the need for modification of injunctions in cases that do not involve institutional reform. See, e.g., *Sys. Fed’n No. 91*, 364 U.S. at 647 (observing that “an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief”).

185. *Rufo*, 502 U.S. at 384; *accord* *Horne v. Flores*, 557 U.S. 433, 447 (2009).

equitable.”¹⁸⁶ For institutional reform injunctions that remain in place for many years, such changes are common. While some changes render the injunction obsolete or unnecessary,¹⁸⁷ others call for the injunction to be updated rather than discarded. Thus, it would seem that both plaintiffs and defendants in institutional reform litigation would have occasion to return to court seeking to modify injunctions that have fallen out of sync with the facts on the ground.

Yet Rule 60(b) has become something of a one-way ratchet, used almost exclusively by defendants to weaken or dissolve institutional reform injunctions. This is not surprising, as Supreme Court decisions since the early 1990s have made it easier for defendants to escape their obligations under the injunctions.¹⁸⁸ As a result, defendants increasingly have sought to free themselves from court oversight by challenging injunctions that have been in place for years, while plaintiffs have assumed a defensive posture, fighting to preserve the injunctions they previously won.¹⁸⁹

It does not need to be this way. Just because an institutional reform injunction has been affected by changed circumstances does not mean that the only response is to weaken or dissolve the injunction.¹⁹⁰ Lower courts have broad power to modify injunctions.¹⁹¹ As the Supreme Court explained in *Rufo*, “[T]he focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances.”¹⁹² And even when changed circumstances render aspects of an injunction unnecessary or

186. FED. R. CIV. P. 60(b)(5). As the Supreme Court has explained, “The Rule encompasses the traditional power of a court of equity to modify its decree in light of changed circumstances.” *Frew v. Hawkins*, 540 U.S. 431, 441 (2004).

187. *See, e.g.*, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Wisconsin*, 769 F.3d 543, 548 (7th Cir. 2014) (Posner, J.) (“[I]n the case of regulatory decrees, . . . often the passage of time renders them obsolete, so that the case for modification or rescission actually grows with time, as in *Horne v. Flores* . . .”).

188. *See Horne*, 557 U.S. 433; *Rufo*, 502 U.S. 367; *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991); *see also supra* Part II.A (discussing dissolution of institutional reform injunctions).

189. *See supra* Part II.A.

190. *Cf. Rufo*, 502 U.S. at 391 (warning that Rule 60(b) should not be used “to rewrite a consent decree so that it conforms to the constitutional floor”).

191. *See, e.g.*, *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, 712 F.3d 761, 767 (2d Cir. 2013) (“[T]hough a court cannot randomly expand or contract the terms agreed upon in a consent decree, judicial discretion in flexing its supervisory and enforcement muscles is broad.” (quoting *Davis v. N.Y.C. Hous. Auth.*, 278 F.3d 64, 80 (2d Cir. 2002))).

192. *Rufo*, 502 U.S. at 391.

inequitable, courts can dissolve those parts while leaving the rest of the injunction in place.¹⁹³

In addition, Rule 60(b) relief is not limited to defendants in institutional reform litigation. To be sure, the Supreme Court decisions applying Rule 60(b) in this context have involved motions made by defendants rather than plaintiffs.¹⁹⁴ However, even in those decisions the Court has been careful to describe Rule 60(b) relief as available to “a party” and not just a defendant.¹⁹⁵ Indeed, plaintiffs have a long history of invoking Rule 60(b) in institutional reform litigation¹⁹⁶ as well as more traditional litigation.¹⁹⁷ Regardless of the context, courts have recognized that modification is appropriate when changes are necessary to achieve the goal of the injunction.¹⁹⁸

Taking a more expansive view of Rule 60(b) relief can help ensure that institutional reform injunctions are not undermined by changing circumstances.¹⁹⁹ Modification can be necessary when, due to

193. See *Freeman v. Pitts*, 503 U.S. 467, 490–91 (1992) (holding “that, in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations”).

194. See *Horne v. Flores*, 557 U.S. 433 (2009); *Rufo*, 502 U.S. 367; *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991).

195. See, e.g., *Horne*, 557 U.S. at 447 (“Rule [60(b)] provides a means by which a party can ask a court to modify or vacate a judgment or order if ‘a significant change either in factual conditions or in law’ renders continued enforcement ‘detrimental to the public interest.’” (citation omitted)); *Frew v. Hawkins*, 540 U.S. 431, 441 (2004) (“Rule 60(b)(5) allows a party to move for relief if ‘it is no longer equitable that the judgment should have prospective application.’”); *Rufo*, 502 U.S. 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.”); see also *David C. v. Leavitt*, 242 F.3d 1206, 1211 (10th Cir. 2001) (noting that “nothing in *Rufo* limits its application to cases in which modification is sought by the defendant party”).

196. See, e.g., *David C.*, 242 F.3d at 1212–13 (applying *Rufo* in a case where modification was sought by the plaintiff party); *Williams v. Edwards*, 87 F.3d 126, 131–32 (5th Cir. 1996) (same); *Juan F. v. Weicker*, 37 F.3d 874, 879 (2d Cir. 1994) (same); *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1018 (6th Cir. 1994) (same).

197. See, e.g., *United States v. United Shoe Mach. Corp.*, 391 U.S. 244 (1968) (holding that plaintiff could seek modification of an injunction where the injunction had failed to achieve its desired result); *Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06–CV–896, 2013 WL 4008758 (S.D. Ohio Aug. 5, 2013).

198. See *United Shoe Mach. Corp.*, 391 U.S. at 251 (observing that when “the decree has not, after 10 years, achieved its ‘principal objects,’ . . . the time has come to prescribe other, and if necessary more definitive, means to achieve the result”); see also *Doe v. Bush*, 261 F.3d 1037, 1063–64 (11th Cir. 2001) (concluding that changed circumstances and failure to achieve the decree’s aims both may warrant decree modification); *Police Ass’n of New Orleans ex rel. Cannatella v. City of New Orleans*, 100 F.3d 1159, 1168 (5th Cir. 1996) (“It is settled that, to the extent a decree is drafted to deal with events in the future, the court must remain continually willing to modify the order to ensure that it accomplishes its intended result.”).

199. See *Rufo*, 502 U.S. at 381 (“The experience of the District Courts and 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.”); see also *United Shoe Mach. Corp.*, 391 U.S.

changed circumstances, an injunction's remedial provisions are no longer able to prevent a defendant's unlawful conduct. This can occur when violations continue despite a defendant's compliance with an injunction's remedial steps, or when a defendant is wasting time and resources implementing provisions that have become unnecessary due to new facts and circumstances. For example, advances in technology may create opportunities for a defendant to comply with its legal obligations in more efficient or less burdensome ways, but the injunction mandates actions that have become inefficient or unduly burdensome. While district courts do not have limitless discretion when altering a defendant's obligations under an existing injunction,²⁰⁰ using Rule 60(b) to do more than weaken or dissolve institutional reform injunctions can be "essential to achieving the goals of reform litigation."²⁰¹

A truly flexible approach to Rule 60(b) relief can also help assuage the concerns expressed by the Supreme Court in *Horne v. Flores*.²⁰² If, as the Court worried, an institutional reform injunction "locks in" a remedial approach that is later shown to be ineffective, inefficient, or unduly burdensome,²⁰³ the response need not be dissolution of the injunction pursuant to Rule 60(b). Instead, a district court could modify the injunction so that it incorporates the types of "new insights and solutions" that the Court feared would otherwise be precluded by the injunction.²⁰⁴ Similarly, if an institutional reform injunction is found to violate federalism principles as discussed in *Horne*,²⁰⁵ Rule 60(b) relief could result in modifications that respond to such concerns. For example, an injunction that uses a command-and-control approach to reforming an institution could be adjusted so that the defendant possesses more discretion and flexibility to remedy the unlawful conduct in ways that it sees fit.²⁰⁶

To be sure, exposing institutional reform injunctions to more frequent judicial scrutiny creates risks for both plaintiffs and

at 251–52 (1968) ("If the decree has not . . . achieved its principal objects . . . the time has come to prescribe other, and if necessary more definitive, means to achieve the result." (internal quotation marks omitted)).

200. See, e.g., *Rufo*, 502 U.S. at 389 (highlighting the importance of preserving "the finality of [consent decrees]").

201. *Id.* at 381.

202. See *Horne v. Flores*, 557 U.S. 433, 447–50 (2009) (discussing reasons for a flexible approach to Rule 60(b) motions seeking to modify or terminate institutional reform injunctions).

203. *Id.* at 449.

204. *Id.* (quoting *Rufo*, 502 U.S. at 442).

205. See *id.* at 448.

206. See Sabel & Simon, *supra* note 2, at 1082–93 (discussing how an experimentalist approach to institutional reform injunctions relates to areas of doctrinal controversy).

defendants. From the plaintiffs' perspective, a higher frequency of Rule 60(b) motions may increase the number of injunctions that are weakened or dissolved in response to the motions. But when the alternative is to leave in place injunctions that are increasingly ineffective and susceptible to death by dissolution or by disuse, it is not clear that the plaintiffs have much to lose. Similarly, from the defendant's perspective, more frequent modification can introduce considerable uncertainty into its obligations under the injunction. However, to the extent that this results in injunctions that are updated to reflect current circumstances, it may be a worthwhile tradeoff.

3. Identification of Aging Injunctions

Premature death of institutional reform injunctions can also be avoided by identifying the injunctions before it is too late. After all, awareness of an injunction's existence is the first step toward ensuring that it does not inappropriately fall into disuse. Yet even though institutional reform injunctions are court orders, simply identifying the injunctions that are currently in effect is exceedingly difficult. A few are published in the Federal Supplement or in electronic databases such as Westlaw and Lexis, but the vast majority are not.²⁰⁷ Injunctions that were issued since 2001 may be included in the federal courts' electronic database of court filings (entitled "Public Access to Court Electronic Records" or "PACER");²⁰⁸ however, due to the limitations of PACER's interface, one cannot use PACER to find an injunction without first knowing of its existence.²⁰⁹ And PACER does not contain most injunctions issued prior to 2001.²¹⁰ Thus, as

207. See Schlanger, *supra* note 99, at 516 ("Injunctions are court orders, so one might think that they would be embodied in court opinions, which are accessible to and searchable by, most prominently, subscribers of Westlaw or Lexis. Think again."); Schlanger, *supra* note 27, at 570 (observing that because institutional reform lawsuits "are likely to settle, they may well not lead to any judicial decisions at all, but rather to negotiated court orders that are completely unobservable by ordinary case research methods").

208. See *PACER: Public Access to Court Electronic Records*, U.S. COURTS, <http://www.pacer.gov> (last visited Sept. 25, 2016) [<https://perma.cc/X8RH-CPSR>].

209. See Schlanger, *supra* note 99, at 520–21 (explaining that someone trying to locate a specific injunction must know the court and either the defendant name or case docket number). This may be changing, as Bloomberg Law, a subscription-based service for online legal research launched in 2010, enables users to search federal-court dockets and court filings that were previously accessible only through PACER. See BLOOMBERG LAW, <http://www.bloomberglaw.com> (last visited Sept. 25, 2016) [<https://perma.cc/T5M9-QUAD>].

210. In fact, "even now, some district courts digitize very little more than the docket sheet itself, and such incomplete digitization used to be far more prevalent." Schlanger, *supra* note 99, at 521.

Professor Margo Schlanger has observed, “[N]otwithstanding the individual and collective importance of all these injunctions, they languish in practical obscurity, unavailable to all but the extraordinarily persevering researcher who joins inside information with abundant funds.”²¹¹

Recent efforts have been made to catalogue institutional reform injunctions, but more must be done. The Civil Rights Litigation Clearinghouse is doing heroic work logging and making available institutional reform injunctions on its website; however, it is not comprehensive.²¹² Given that the courts maintain jurisdiction over the injunctions, they have both a substantial interest in keeping track of their orders and the capacity to do so.²¹³ And with respect to future injunctions, the federal courts could modify PACER so that orders with prospective effect are tagged and, at the very least, judges are aware of injunctions that remain in force.

C. Ensuring Appropriate Death of Future Injunctions

The previous Section offered recommendations aimed at preventing institutional reform injunctions that are currently in place from terminating before their goals are achieved. This Section, in contrast, turns to injunctions that have yet to be written and offers ideas for how future injunctions can be designed so that they do not terminate prematurely.

Designers of institutional reform injunctions cannot assume that the injunction will remain in force indefinitely. Truly permanent injunctions are increasingly unavailable to institutional reform plaintiffs, whether because many institutional reform defendants now refuse to enter into consent decrees without sunset provisions, or because of the Supreme Court’s apparent preference for ending federal court involvement in institutional reform at the earliest possible date.²¹⁴ Thus, new injunctions should address two related questions,

211. *Id.* at 515.

212. See *Civil Rights Litigation Clearinghouse*, U. MICH. L. SCH., <http://www.clearinghouse.net> (last visited Sept. 25, 2016) [<https://perma.cc/6UAB-24JW>]. As of November 14, 2016, “the Clearinghouse is posting at least partial information on 6,794 cases, including a litigation summary for each, as well as 49,676 dockets, complaints, filings, opinions, settlements, court orders, and other documents.” *What is the Clearinghouse?*, *Civil Rights Litigation Clearinghouse*, U. MICH. L. SCH., <http://www.clearinghouse.net/about.php> (last visited Nov. 14, 2016) [<https://perma.cc/6AYK-ANF7>].

213. *But cf.* Schlanger, *supra* note 99, at 521 (“There is no hope of getting the information from the courts, which do not index their lawsuits except by a few variables, all of which are irrelevant here.”).

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

namely what should trigger the injunction's termination, and how the parties and the court will know when the triggering event has occurred. In response to these questions, this Section recommends termination clauses based on the defendant's performance, paired with monitoring and reporting obligations that measure the defendant's performance with precision and accuracy. These features are not unfamiliar to institutional reform litigation; however, based on the experience of injunction death discussed in Part II, as well as important new technological developments, there are now ways to improve the design of injunctions so that they do not terminate prematurely.

1. Performance-Based Termination Clauses

Termination clauses are now commonly included in institutional reform injunctions, either because the defendant negotiating a consent decree demands it, or because the judge issuing the injunction includes it. But not all termination clauses are the same, and the differences can have a significant effect on whether the goals of the injunction are achieved. Thus, when considering how to ensure that new institutional reform injunctions do not die prematurely, it is essential to focus on the design of the termination clause.

Merely referring to performance of certain remedial tasks is not necessarily sufficient to ensure that the goals of the injunction are met. The termination provision may also need to specify that termination is appropriate only upon a showing that the targeted legal violations have ended. This may seem like a distinction without a difference—after all, if a defendant has dutifully implemented the injunction's action items, it would seem to be in full compliance and termination would be appropriate under a performance-based theory of termination. However, just because a defendant takes the actions mandated by an injunction does not mean that the underlying unlawful conduct has been eradicated. Foresight is limited, especially as it relates to reforming complex government institutions that are subject to ever-changing circumstances.²¹⁵ Indeed, this is what creates the need for the types of modifications available pursuant to Rule 60(b).²¹⁶

215. See, e.g., Jost, *supra* note 123, at 1102 (describing the “baffling perplexities” that courts encounter when they attempt to envision the future in institutional reform litigation).

216. See *supra* Part III.B.2.

The distinction between a defendant's compliance with an injunction and its compliance with the law has been held to be dispositive by at least one court since the Supreme Court's ruling in *Horne v. Flores* refined the Rule 60(b) analysis. In a recent decision by the U.S. Court of Appeals for the Fifth Circuit, the court ruled that the district court erroneously denied a motion to terminate an institutional reform injunction even though the defendant had not established that it was in compliance with the law.²¹⁷ According to the Fifth Circuit, because the defendant had undertaken the various action items specified by the sunset clause—and because the clause did not refer to the defendant's actual compliance with the law—termination was required despite the existence of ongoing legal violations.²¹⁸ Although the Fifth Circuit's view of sunset clauses may be an outlier,²¹⁹ it is nonetheless a reminder that performance-based termination provisions must be linked to compliance with the law in order to ensure that the injunction is not terminated prematurely.

In addition to performance-based triggers, termination provisions should require some showing that the defendant's lawful conduct is not merely a temporary or one-time-only occurrence. Without such a durability requirement, a defendant would be able to seek termination immediately upon satisfying the injunction's performance goals. Yet for cases involving institutional reform, a defendant's ability to comply with its legal obligations at one point in time does not necessarily establish that the unlawful policies and practices that gave rise to the litigation have been truly reformed. Indeed, the Supreme Court recognized this aspect of institutional reform litigation in *Board of Education of Oklahoma City v. Dowell*, when it ruled that dissolution of a school desegregation injunction was appropriate when the district court found that the school board had complied with the law for “a reasonable period of time” and that it was

217. See *Frew v. Janek*, 780 F.3d 320 (5th Cir. 2015).

218. See *id.* at 329–30.

219. The Ninth Circuit, for example, appears to have taken a different approach to terminating institutional reform injunctions in accordance with the injunction's sunset clause. See *Jeff D. v. Otter*, 643 F.3d 278 (9th Cir. 2011) (holding that compliance with the injunction's action items alone was not a sufficient basis for dissolving the decree). According to the Ninth Circuit, “Explicit consideration of the goals of the [injunction], and whether those goals have been adequately served, must be part of the determination to vacate the consent decrees.” *Id.* at 289. *But cf. Frew*, 780 F.3d at 329–30 (noting that the sunset clause at issue in *Jeff D.* provided that the decree would remain in force until, inter alia, “[the district court was] satisfied by stipulation or otherwise that the claims as alleged in the Complaint have been adequately addressed” (quoting *Jeff D.*, 643 F.3d at 281)).

“unlikely that the school board would return to its former ways.”²²⁰ Thus, by requiring a defendant to establish the durability of its compliance, a performance-based termination clause can increase the likelihood that the injunction remains in effect long enough to achieve its goals.

2. Monitoring and Reporting Obligations

It is not enough for an institutional reform injunction to link termination to the defendant’s satisfaction of well-designed performance goals. For a performance-based termination provision to operate as intended, the parties and the court must be able to determine the extent to which those goals have been met. Because institutional reform defendants do not typically gather and publicize information about their inner workings,²²¹ it is up to the injunction to specify how the defendant’s performance will be monitored and what its reporting obligations (to the plaintiffs and to the court) will be. Thus, performance-based termination criteria must be paired with monitoring and reporting obligations that specify the data that the defendant is required to gather and how frequently and to whom it must be disclosed.²²²

Although monitoring and reporting have long been features of institutional reform injunctions, changes in technology have created new opportunities for the generation of more accurate and complete

220. Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 247–48 (1991); *see also id.* at 247 (explaining that a finding that the defendant was operating in compliance with the law and that it was unlikely that the violations would resume, “would be a finding that the purposes of the . . . litigation had been fully achieved”); *cf.* Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 390 (1992) (explaining, in the context of consent decrees, that the legally enforceable obligations are “not confined to meeting minimal constitutional requirements”).

Although the Court’s decision in *Horne v. Flores* was contradictory on this aspect of institutional reform remedies, *Horne* did not overrule any of the Court’s prior decisions touching on this issue. *Compare* *Horne v. Flores*, 557 U.S. 433, 450 (2009) (“If a *durable remedy* has been implemented, continued enforcement of the order is not only unnecessary, but improper.” (emphasis added)), *with id.* at 450 (“A flexible approach [to the Rule 60(b) analysis] allows courts to ensure that ‘responsibility for discharging the State’s obligations is *returned promptly to the State and its officials’ when the circumstances warrant.*” (quoting *Frew v. Hawkins*, 540 U.S. 431, 442 (2004) (emphasis added))), *and id.* at 451 (criticizing the lower court for failing to “appl[y] a flexible standard that seeks to return control to state and local officials *as soon as a violation of federal law has been remedied*” (emphasis added)).

221. This is not always true. In some contexts, the government agencies involved in institutional reform litigation disclose information about their compliance with the law as a matter of course.

222. *Cf.* Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH. U. L. REV. 1519, 1577–78 (2014) (discussing the importance of data generation and data sharing when seeking to hold defendants accountable for compliance with an institutional reform remedy).

data about a defendant's performance. For one thing, technological developments have dramatically reduced the burden of gathering and analyzing many types of data that are at issue in institutional reform cases. In cases involving agency processing or adjudication, relevant information is increasingly digitized and maintained in vast electronic databases.²²³ While in prior years a government defendant would have gathered that information by retrieving paper case files and photocopying individual documents, today the information can be made available and analyzed with the push of a few buttons.²²⁴

In addition to reducing the burden of monitoring and reporting obligations, technological developments can open up new possibilities for designing performance-based termination provisions. Aware of government defendants' growing capacity to disclose increasingly detailed and accurate compliance data, the parties and the court can design performance-based termination provisions that are more targeted and nuanced than were possible in previous years.²²⁵ In addition, the rise of electronic databases enables more frequent reporting: no longer are monitoring and reporting obligations necessarily confined to monthly, quarterly, or annual disclosures, as real-time or rolling production of performance data is increasingly possible.²²⁶

Requiring institutional reform defendants to undertake the types of enhanced monitoring and reporting obligations discussed in this Section should not raise concerns under *Horne v. Flores*. The *Horne* Court questioned the appropriateness of federal courts dictating the policies and procedures of state and local institutions.²²⁷ Monitoring and reporting obligations, in contrast, do not intrude on the defendant's authority to operate as it sees fit and should not trigger the same type of scrutiny.

In fact, taking advantage of these technological developments can help institutional reform injunctions avoid some of the concerns raised in *Horne*.²²⁸ For example, more detailed information about the implementation of an institutional reform injunction can enable district courts to make better-informed assessments of whether the injunction is still necessary to remedy the defendant's unlawful

223. Cf. Jason Parkin, *Due Process Disaggregation*, 90 NOTRE DAME L. REV. 283, 314–18 (2014).

224. *See id.*

225. Designing effective performance metrics remains challenging, however. *See, e.g.*, LIPSKY, *supra* note 144, at 40–53; WILSON, *supra* note 144, at 154–78.

226. *See* Parkin, *supra* note 223, at 314–18.

227. *See* *Horne v. Flores*, 557 U.S. 433, 448–50 (2009).

228. *Id.* at 447–50.

actions.²²⁹ Such disclosures also help the parties and the court assess whether another concern raised in *Horne*—the impact of changed circumstances²³⁰—may require that the injunction be modified or terminated. Thus, knowing more about how a defendant is implementing an injunction is important not just for measuring the defendant’s performance, but also for ensuring that as time passes the injunction does not run afoul of *Horne*.

Lastly, the information generated by an injunction’s monitoring and reporting obligations is arguably more valuable today that at any point during the history of institutional reform litigation. The shift from command-and-control injunctions to experimentalist regimes means that it is essential for the parties and the court to know which remedial actions are working and which are not.²³¹ In addition, in a world in which Rule 60(b) motions are more frequent, courts require detailed and accurate data to determine whether an injunction should be dissolved or modified.

CONCLUSION

Institutional reform litigation cannot succeed unless its remedies are both durable and adaptable. That is, the resulting injunctions must remain in place long enough to prompt meaningful systemic reform, and they must be flexible enough to account for changing facts and circumstances. Yet changes in the legal landscape—including, most significantly, the Supreme Court’s hostility toward aging institutional reform injunctions—have undermined the durability and flexibility of institutional reform injunctions. As a result, the injunctions are in danger of being terminated before their goals are achieved.

It is not too late to correct course. Understanding the different ways that institutional reform injunctions are ending is a necessary first step. After all, whether the injunctions are dying by dissolution, by design, or by disuse has varying implications for the parties, lawyers, and judges involved in the litigation. From there, it is possible to identify strategies for avoiding premature termination of existing injunctions and for ensuring that future injunctions are

229. *See id.* at 450 (“If a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper.”); *see also* *United States v. Tennessee*, 986 F. Supp. 2d 921, 935 (W.D. Tenn. 2012) (stating that “the Court cannot conclude that the State has a durable remedy in place to ensure class member safety without an adequate reporting system in place”).

230. *See Horne*, 557 U.S. at 448.

231. *See* Sabel & Simon, *supra* note 2.

terminated appropriately. These strategies will be essential to protect the legacy of institutional reform litigation and to ensure that aging institutional reform injunctions are more than dusty relics from a bygone era.