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Free from Decree

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FROM THE MAGAZINE

Free from Decree

The Supremes decide for democracy.

David Schoenbrod, Ross Sandler

Mayors and governors come and go, but judicial decrees against state and local governments live forever. Change, however, is on the way. This June, the Supreme Court's decision in *Horne v. Flores* opened a door through which newly elected officials may more quickly be released from onerous, expensive, and counterproductive judicial supervision.

Judicial decrees are born after someone, often an advocacy group, launches a lawsuit against a state or city, charging that it failed to live up to the requirements of a law, often one related to the execution of social, education, or welfare programs. If the government officials being sued want to have some say in the duties to be imposed on them, they will often negotiate with the plaintiff's attorneys on the terms of the decree to be signed by the judge. Court orders resulting from this type of litigation come in many forms—consent orders, preliminary injunctions, declaratory judgments—but all give officials specific instructions on how to manage the programs in question. These decrees then become mandatory obligations on the officials' successors, meaning that incoming mayors and governors must struggle with the plans, bargains, and trade-offs that their predecessors agreed to—often decades earlier. In New York City, for example, three judicial decrees (governing special education, public housing, and Rikers Island) are more than 30 years old, and two others (governing the city's treatment of the homeless) are more than 20 years old.

Relief may finally be in the offing. *Horne's* roots go back to 2000, when a federal court—ruling that Arizona had violated a federal statute requiring states to take “appropriate action” to eliminate language hurdles for non-English-speaking children—ordered the state to appropriate more money for bilingual education. In 2006, the state's superintendent of education asked for the court order to be modified, maintaining that Arizona was actually in compliance with the statute: while not all the money called for by the decree had been appropriated, the superintendent argued, the state had met the federal law through other means, particularly a shift to English-language immersion, increases in education funding generally, and adherence to the No Child Left Behind statute. The lower courts found the superintendent's claim insufficient and ordered the state to go ahead and appropriate the extra money. But in *Horne*, the Supreme Court has reversed their ruling, deciding 5–4 that they adopted the wrong standard in reviewing the superintendent's motion. The Supreme Court sent the case back to district court, telling the judge to release officials from the requirement to appropriate the money, provided that they had complied with the original federal statute.

In the past, when newly elected officials sought to be released from court supervision, they met with stiff resistance from plaintiffs' attorneys and judges who, over the years, had become wedded to the old encrusted decrees and the power they afforded over municipal policy. The new standard sidesteps these obligations and returns to the language of the underlying federal statute. It would, the Court held, be inequitable to bind state and local officials to old decrees in instances where the federal law has already been vindicated. The Court said, in so many words, that an old decree is not a rigid contract but a means to an end, and that if the end has been achieved, judges should stand aside. The new formulation will be tested when lower-court judges actually begin to rule on motions by officials asking to be freed from obligations found in old decrees.

The *Horne* decision vindicates a long-running effort of the Manhattan Institute and *City Journal*. Fifteen years ago, encouraged by Edward Costikyan, a friend of *City Journal*, and Myron Magnet, then its editor, we first wrote about how old court orders hobbled newly elected New York City officials in adopting or refining policies (see “[Government by Decree](#),” Summer 1994). The article provoked discussion and debate, and the Manhattan Institute eventually helped support the writing of our 2003 book-length treatment, *Democracy by Decree*. Justice Samuel Alito, for the majority, and Justice Stephen G. Breyer, for the dissenters, both cited *Democracy by Decree* in their opinions.

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