CONSTITUTIONAL CATCH-22: THE UNVINDICATED RIGHTS OF FOSTER CHILDREN

Clare Elizondo*

In 2015, a federal court ruled that the Texas foster care system was so unsafe that it violated foster children's constitutional rights. Yet the Fifth Circuit struck down much of the court's remedial order on narrow tailoring grounds, and today, the rights of Texas foster children remain far from vindicated. In this Article, I argue that today's legal landscape places foster children in a catch-22: federal courts must increasingly defer to the political branches, but foster children cannot advocate for themselves in state political processes. This Article advocates for broader remedial power when courts are adjudicating the rights of foster children.

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INTRODUCTION

Political leaders and advocates have been sounding the alarm on dangerous conditions in the Texas foster care system for almost thirty years. As one court put it, Texas foster children "have been shuttled throughout a system where rape, abuse, psychotropic medication, and instability are the norm."[1] In 2015, the United States District Court for the Southern District of Texas ruled that the Texas foster care system violated the United States Constitution's guarantee that foster children be kept safe from unreasonable risk of harm. Despite the judicial mandate to reform the system, the Texas legislature and executive branch have failed to cure the constitutional violation in the decade since the ruling.

The gridlock in Texas is not an anomaly. Since the 1970s, federal judges have embraced the narrow tailoring doctrine, which limits judicial power to enforce robust structural injunctions. Narrow tailoring requires courts to fashion limited injunctions that tightly fit the constitutional violation at issue. Before the rise of this doctrine, federal courts could use wide-ranging structural injunctions to cure complex constitutional violations, from dangerous conditions in Arkansas prisons to abuse in state mental health institutions.[2] Today, the United States District Court for the Southern District of Texas has been unable to cure the constitutional violations facing foster children. Over the course of several years, the court has been hamstrung by narrow tailoring rulings from the Fifth Circuit and recalcitrance from the State of Texas.

The Texas foster care crisis illustrates how the narrow tailoring doctrine permits state political branches to defy the United States Constitution. In this Article, I show that these limitations on federal judicial enforcement are particularly pernicious in the foster care context. I argue that today's legal landscape places foster children in a catch-22: federal courts can no longer enforce structural injunctions because they must give significant deference to state political branches, but foster children do not have the power to advocate for themselves in state political processes. Modern jurisprudence makes it possible for states to leave constitutional violations unaddressed and children's rights unprotected, even after the federal judiciary has intervened.

The shocking results of these unaddressed constitutional violations are documented in *M.D. ex rel. Stukenberg v. Abbott*, the case in which Judge Janis Jack ruled the Texas foster care system unconstitutional in 2015. One teenager, S.A., entered the foster care system when she was just five years old and has since been shuffled through over forty-five foster care placements and twenty-eight caseworkers.[3] Due to these years of instability, S.A.'s mental health deteriorated so significantly that she was experiencing daily mental breakdowns and was hospitalized multiple times.[4] S.A.'s psychologist later described S.A. as "a danger

1. M.D. *ex rel.* Stukenberg v. Abbott, 152 F. Supp. 3d 684, 828 (S.D. Tex. 2015).

2. *See, e.g.*, Hutto v. Finney, 437 U.S. 678 (1978); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

3. *M.D.*, 152 F. Supp. 3d at 732-35 (S.D. Tex. 2015).

4. *Id.* at 734.

to herself and others" and recommended that she be committed to a hospital for permanent psychiatric care.[5] Another child, D.I., was placed in an overcrowded foster home in which he was sexually assaulted multiple times by a group of older boys.[6] Instead of closing the dangerous foster home, the state simply moved D.I. to another crowded foster home that also housed many older boys.[7] D.I. was later admitted to a psychiatric hospital, where he was given powerful psychotropic medications rather than sexual abuse counseling to address the assault he had experienced.[8] D.I. has since developed severe behavioral issues and is struggling academically due to the side effects of his medications.[9] Foster care is meant to be a safe haven for children who are in danger at home, but in Texas, foster care placements can be even more dangerous than the homes these children leave behind.

The factual allegations in *M.D. ex rel. Stukenberg v. Abbott* are not new—S.A. and D.I. are just two of thousands of foster children that Texas has been unable to protect. Since the early 2000s, government leaders and activists alike have been sounding the alarm on the dangerous Texas foster care system.[10] After years of failed reform attempts from state executive and legislative leaders,[11] Texas foster children sought intervention from the federal courts. In 2011, a national advocacy group brought a major class action against the State of Texas for violating foster children's constitutional rights.[12] After years of litigaiton, the federal district court ruled that the state's foster care system violated the Fourteenth Amendment.[13] Yet to this day, stories of unconstitutionally dangerous conditions in the Texas foster care system still dominate the headlines.[14]

Under the Fourteenth Amendment, children in state foster care systems have a right to be free from an unreasonable risk of harm.[15] In 2018, the United States

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5. *Id.* at 736.

6. Complaint ¶¶ 38-39, *M.D.*, 152 F. Supp. 3d (No. 2:11-cv-00084).

7. *Id.*

8. *Id.* ¶¶ 40, 42.

9. *Id.*

10. *See, e.g.*, CAROLE KEETON STRAYHORN, FORGOTTEN CHILDREN (2004); Michael King, *Perry Calls for CPS Probe*, AUSTIN CHRON. (July 9, 2004), https://perma.cc/4PWF-DF62.

11. Texas leaders have tried various approaches, including privatization, emergency legislative sessions, and a revolving door of leaders at the Texas Department of Family and Protective Services (DFPS). These reform attempts are described in Part I.

12. Complaint, *supra* note 6.

13. *M.D.*, 152 F. Supp. 3d at 828 ("Plaintiffs have a Fourteenth Amendment substantive due process right to be free from an unreasonable risk of harm caused by the State. Texas currently violates that right.").

14. *See* Patrick Michels, *Not Even a Federal Judge Can Make Texas Protect Kids*, TEX. MONTHLY (Feb. 2024), https://perma.cc/KXS3-PA3Z; Sneha Dey, *Federal Judge Again Threatens Contempt-of-Court Fines for Texas' Slow Progress on Foster Care Reforms*, TEX. TRIB. (Jan. 27, 2023), https://perma.cc/B7SY-VEBY.

15. *M.D.*, 152 F. Supp. 3d at 696 ("[F]oster children have the right to be free from an unreasonable risk of harm. The Fifth Circuit is not alone. With near unanimity, the other circuits have found that states owe a duty of care to their foster children." (citations omitted)).

District Court for the Southern District of Texas entered a final order requiring the Texas foster care system to adopt a detailed improvement plan to cure the foster care system's constitutional violations. The Fifth Circuit later struck down many of these provisions based on the narrow tailoring doctrine.[16] However, in 2025, Texas still has not complied with the requirements the Fifth Circuit left standing. In response to this failure, the federal district court has repeatedly held Texas in contempt of court, even levying significant fines.[17] Meanwhile, federal monitors recently released a report identifying 49 children who had died while in Texas foster care between 2019 and 2023.[18] This data and others show that Texas' foster care system continues to put children at an extreme risk of harm despite the federal judiciary's intervention.[19]

Texas' failed foster care system is emblematic of the shortcomings of judicial intervention when children's rights are at stake. With the rise of the narrow tailoring doctrine, modern federal courts have become increasingly hamstrung in their ability to order powerful structural injunctions against states. Instead, federal courts are confined by separation-of-powers and federalism principles that encourage federal courts to defer to a state's political branches.[20] Today's constitutional jurisprudence assumes that plaintiffs will use state political processes to seek relief where the federal court cannot intervene. Yet foster children lack a voice in state political processes due to their age, low income and often minority status, and lack of adult support—meaning that insufficient federal court intervention leaves them without recourse to vindicate their constitutional rights. While scholars have written extensively on this decline in judicial power and its effect on constitutional rights,[21] analysis of this phenomenon in the context of child welfare is sparse.[22]

This paper proceeds in four Parts. Part I examines the ineffectiveness of Texas' political branches in the foster care context. Part II analyzes the federal

16. *See infra* notes 169-176 and accompanying text.

17. *See* Order at 250-51, *M.D.*, 152 F. Supp. 3d (No. 2:11-cv-00084), ECF No. 1017 [hereinafter 2020 Contempt Order] ("[T]he only way that the Court has been able to coerce compliance from Defendants . . . has been through severe coercive sanctions."); Order at 1, *M.D.*, 152 F. Supp. 3d (No. 2:11-cv-00084), ECF No. 725 [hereinafter 2019 Contempt Order].

18. Seventh Report of the Monitors at 133, *M.D.*, 152 F. Supp. 3d (No. 2:11-cv-00084).

19. *See, e.g.*, Reese Oxner, *Over 100 Children Have Died in Texas' Child Welfare System Since 2020, Report Says*, TEX. TRIB. (Apr. 4, 2022), https://perma.cc/7N2U-D4TA (citing *DFPS Committee Follow-Up*, TEX. DEP'T FAM. & PROTECTIVE SERVS. (Mar. 21, 2022), https://perma.cc/BPV9-PTU6).

20. *See, e.g.*, Owen Fiss, *The Law of Narrow Tailoring*, 23 U. PA. J. CONST. L. 879 (2021).

21. *See, e.g.*, *id.*; Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops. . . It's Still Moving!*, 58 U. MIAMI L. REV. 143, 143 (2003); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 63 U. VA. L. SCH. PUBLIC L. & LEGAL THEORY WORKING PAPER SERIES (2007).

22. One example of scholarship in this area is Scott J. Preston, *"Can You Hear Me?": The United States Court of Appeals for the Third Circuit Addresses the Systemic Deficiencies of the Philadelphia Child Welfare System in Baby Neal v. Casey*, 29 CREIGHTON L. REV. 1653, 1705 (1996), although it was published almost thirty years ago.

court's ruling that the Texas foster care system was unconstitutional, the Fifth Circuit rulings that weakened the district court's comprehensive injunction, and Texas' failure to comply with the injunction that remained. Using Texas as an example, Part III argues that today's legal landscape places foster children in a catch-22: federal courts increasingly must defer to the political branches, but foster children do not have the power to advocate for themselves in state political processes. Part IV advances a proposal for a more expansive conception of remedial power when the constitutional rights of a vulnerable population are at stake.

I. THE FAILED TEXAS FOSTER CARE SYSTEM

Evolving restrictions on judicial power have allowed state political branches to default on their constitutional obligations. In her 2015 order, Judge Janis Jack stated that "Texas' foster care system is broken, and it has been that way for decades."[23] The story of Texas' foster care is one of inadequate funding and routine scandal. Since the 1990s, Texas governors have called for a major overhaul of the child protection system at least three times.[24] Yet generations of Texas leaders have failed to address the entrenched issues facing the state's foster care system. As a result, constitutional violations continue to occur daily, leaving the rights of foster children unprotected. The following Subparts explain how the Texas foster care system came to its current state of disrepair and identify the political processes that have failed to keep foster children safe.

A. Historical Inadequacies

Texas leaders have been at the helm of a dangerous foster care system for decades. Today's foster care system is a product of Texas' ineffective political processes and lackluster attempts at reform. The state's values of small government and self-sufficiency have long ensured that Texas' child protection efforts remained smaller than those of many other states.[25] As one scholar writes, "Texas has been notoriously slower in developing child welfare laws than the rest of the country."[26] For instance, Texas was one of the last states to pass compulsory school laws and child labor laws, in part due to children's involvement in the state's agricultural economy.[27] Texas' historically minimalist approach to child

23. *M.D.*, 152 F. Supp. 3d at 828 (S.D. Tex. 2015).

24. R.G. Ratcliffe, *The Legislature of the Children*, TEX. MONTHLY (Jan. 9, 2017), https://perma.cc/79CT-KXH5.

25. *Funding Child Protection in Texas*, CTR. FOR PUB. POL'Y PRIORITIES (Oct. 2004), https://perma.cc/5G4C-3NAT.

26. Amber Florence Miller, The Evolution of U.S. Child-Protective Services, with Emphasis on the Experience of New York and Texas (May 2012) (Honors Thesis, Baylor University) at 57, https://perma.cc/Y4SU-P7CB.

27. *Id.*

welfare remains intertwined with the problems facing its foster care system today.

The Texas Legislature first undertook the task of child protection in 1919 when it established a state-run home for needy and neglected white children.[28] In 1931, the Texas Legislature formalized its role in child protection through the Division of Child Welfare, an executive branch agency tasked with enforcing child welfare laws in the state.[29] In the following decades, Texas' child welfare efforts became more formalized as the federal government increased its involvement in child welfare efforts across the county.[30] Today, Texas' role in child protection has significantly expanded. The Division of Child Welfare is now called the Department of Family and Protective Services (DFPS), a standalone agency whose commissioner is appointed by the governor.[31] DFPS includes Child Investigation Services (CIS), which investigates child abuse and neglect allegations, removes children from unsafe homes, and works with police on child safety investigations; and Child Protective Services (CPS), which provides services to struggling families, places children in foster care, and helps children get adopted.[32] This Article primarily focuses on CPS because of its role in Texas' foster care system.

Texas leaders have long recognized—and sometimes exacerbated—the shortcomings of the foster care system. Under Governor George W. Bush in the 1990s, Texas ranked fiftieth in the nation in government spending per person as leaders sought to minimize taxpayer dollars spent on social services.[33] Governor Bush's vision of a low-cost, privatized social services system aligned with his goal for foster care to serve only as a limited, short-term bridge to adoption.[34] Under his leadership, the Texas Legislature substantially cut funding for Texas' CPS staff, resulting in the layoff of one thousand workers.[35] Bush's desire to privatize social services and reduce foster care capacity would remain a theme in the Texas government for years to come.

Problems with the foster care system became more apparent under Governor

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28. 1919 Tex. Gen. Laws 301.

29. 1931 Tex. Gen. Laws 323.

30. *See* Ashika Sethi, *A Brief History of Foster Care in the United States*, CASA OF TRAVIS CNTY. (May 4, 2021), https://perma.cc/L62R-E4S9.

31. 2017 Tex. Gen. Laws 601 (removing the Department of Family and Protective Services from the Texas Health and Human Service Commission's purview and making it a standalone agency).

32. *See Texas Department of Family and Protective Services*, DFPS (last visited Oct. 26, 2024), https://perma.cc/4PPH-AUXV.

33. George Lardner Jr. & Edward Walsh, *George W. Bush: The Texas Record*, WASH. POST (Oct. 23, 1999), https://perma.cc/B46L-NBMZ.

34. Alison Mitchell, *Bush Proposes Move to Promote Adoption*, N.Y. TIMES (July 12, 2000), https://perma.cc/EQJ9-K6U9.

35. *Proposals to Change Protective Services for Children and the Elderly*, TEX. HOUSE RSCH. ORG., at 2 (Dec. 22, 2004), https://perma.cc/XH92-82KY; Morgan Palmer, *CPS Investigated, East Texas Caseworkers Handle Heavy Load*, KLTV (July 6, 2004), https://perma.cc/2ADZ-8KQU.

Rick Perry, who became the Governor of Texas in 2000 after George W. Bush resigned to serve as President. Following several headline-grabbing child abuse cases in the early 2000s, watchdogs sounded the alarm on dismal conditions and fraud allegations within the Texas child welfare system.[36] In November 2003, the Speaker of the Texas House announced the creation of the Special Interim Committee on Child Welfare and Foster Care for the upcoming 79th Texas Legislative Session.[37] The following year, the Committee released a report detailing the "oftentimes tragic shortcomings" of the Texas foster care system.[38] The 250-page report made dozens of recommendations, from identifying relative caregivers for foster children to better assessing foster children's educational needs.[39] While Texas implemented a few of these recommendations, such as bolstering the attorney *ad litem* program for child welfare proceedings, overall, Texas failed to implement the most important of these reforms effectively.[40] Presciently, the Committee's final recommendation was to "take rapid, comprehensive action . . . to reduce the threat of legal action against CPS that could abrogate the Legislature's policymaking powers."[41]

A year after the Committee's report was released, Texas Comptroller Carole Keeton Strayhorn published a 300-page analysis of the Texas foster care system titled "Forgotten Children."[42] Strayhorn drafted the report in response to a series of articles published by the *Dallas Morning News* detailing shortcomings and fraud in the foster care system.[43] The report stated: "The system reflects a legacy of weak leadership; an atmosphere of helpless acquiescence to the status quo; a reluctance to look too closely into dark corners; and a culture of self-protection and buck-passing."[44] The wide-ranging report included eighty-seven recommendations, which included increasing the quality of private foster care placements, strengthening administrative responses to abuse and neglect in foster homes, and requiring caseworkers to visit foster children more often.[45] The Comptroller later

36. *See* HOUSE COMM. ON CHILD WELFARE AND FOSTER CARE, A REPORT TO THE HOUSE OF REPRESENTATIVES 79TH TEXAS LEGISLATURE, Tex. 78th Sess., at 5-6 (2004), https://perma.cc/8JHK-5PLF.

37. *Id.* at 5.

38. *Id.*

39. *Id.* (making over one hundred recommendations in the following topic areas: CPS system review, child abuse prevention and early intervention, family-based services, community-based programs, data sharing and information technology, transitioning youth, psychotropic medications, funding, privatization of CPS, and legal actions against the state).

40. *Id.* at 142, 148. Some of the most important recommendations that went unaddressed included reducing cases per caseworker and enforcing more safeguards on the prescription of psychotropic medications in the foster system.

41. HOUSE COMM. ON HUMAN SERVS., INTERIM REPORT TO THE HOUSE OF REPRESENTATIVES 79TH TEXAS LEGISLATURE, Tex. 78th Sess., at 151 (2004), https://perma.cc/7TVP-QBWP.

42. STRAYHORN, *supra* note 10.

43. Jordan Smith, *Strayhorn on Woodside Trails*, AUSTIN CHRON. (Nov. 21, 2008), https://perma.cc/S6NQ-645Y.

44. STRAYHORN, *supra* note 10, at xi.

45. *Id.*

reported that Texas had adopted only seven of her eighty-seven recommendations.[46]

A few months later, another child welfare scandal broke in Texas. A grand jury indicted Texas DFPS—a very rare occurrence for an entire state agency—for its knowing failure to protect three teenage sisters from severe abuse and rape at the hands of their parents.[47] Rather than pushing for immediate reform, Governor Perry ordered the Texas Health and Human Services Commission (HHSC) to conduct yet another investigation into CPS.[48] Comptroller Strayhorn responded: "The time for studies has run out. The time for investigations has run out. The time is for action."[49]

At this time in the early 2000s, Texas ranked 48th in the nation for spending on child protection.[50] An independent 2004 study from the Center for Public Policy Priorities summed it up succinctly: "Texas has a small, inadequately funded child protection system."[51] The study pointed out that workloads for Texas caseworkers were the highest in the nation—and over twice as high as the national average.[52] Similarly, Texas HHSC's own study found that DFPS's policies were implemented unevenly across the state and that Texas lacked the staffing to handle its rising caseloads.[53] Overall, the HHSC study attributed Texas' problems to a "critical shortage of caseworkers" and made recommendations to hire more staff and better supervise them, echoing proposals previously provided by Comptroller Strayhorn and the Texas House's Special Interim Committee.[54]

In 2006, Comptroller Strayhorn released a second 300-page report on the state of the Texas foster care system, this time focusing on healthcare.[55] In this report, Strayhorn investigated the Medicaid claims of foster children, revealing

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46. Polly Ross Hughes, *State Begins Intensive Investigation of CPS*, HOUSTON CHRON. (July 3, 2004), https://perma.cc/L8PF-KJNJ.

47. King, *supra* note 10. CPS was aware of severe abuse allegations at the victims' home but did not take timely action to remove the three sisters from their parents' home and place them in foster care. Ultimately, the sisters' mother beat them severely and allowed their stepfather to rape the three girls, impregnating one. A grand jury in Hidalgo County later indicted DFPS on three felony counts of causing bodily injury to a child for their knowing failure to intervene. The District Attorney later dismissed the indictment because he believed it would be impractical to criminally prosecute an entire agency. *See Mother Facing Abuse Allegations Arrested*, MY PLAINVIEW (July 15, 2004), https://perma.cc/2EY3-2G4C.

48. King, *supra* note 10.

49. *Id.*

50. *Funding Child Protection in Texas*, *supra* note 25, at 1 (noting that Texas annually spent an average of $110 per child, 60 percent below the U.S. average ($277 per child) and 40 percent below the Southern-state average ($186 per child), which the Center argues cannot be attributed to the lower cost of doing business in Texas).

51. *Id.*

52. *Id.*

53. *Proposals to Change Protective Services for Children and the Elderly*, *supra* note 35, at 2.

54. *Id.*

55. CAROLE KEETON STRAYHORN, TEXAS HEALTH CARE CLAIMS STUDY—SPECIAL REPORT ON FOSTER CHILDREN (2006), https://perma.cc/ER4L-VFXF.

widespread use of powerful psychotropic medications, a lack of consistent medical histories, and high rates of pregnancy and sexually transmitted infections.[56] Strayhorn stated that her findings "represent[] nothing less than a failure of the entire Texas foster care system."[57] This time, the Comptroller's proposals were focused on improving foster children's health outcomes; the report recommended that Texas CPS hire a full-time physician to serve as medical director, reduce the system's reliance on psychotropic medications, and improve services for medically fragile foster children.[58] The report also reiterated recommendations from the Comptroller's 2004 report that had gone unaddressed.[59] Unfortunately, the response to the report was lackluster, with Texas leaders even accusing the Comptroller of using the report to score political points during an election year.[60]

For decades, Texas leaders have been aware of the tragic inadequacies of the foster care system. Despite comprehensive studies and negative media attention, the system's failures continue to this day. The following Subpart considers the state political processes that have failed to make Texas foster children safe.

B. Ineffective Reforms

Federal courts increasingly defer to state political processes to vindicate constitutional rights. Yet decades of powerful Texas governors and legislatures could not—or would not—create a foster care system that met the minimum thresholds of constitutionality. Starting in 2005, Governor Perry announced that fixing the state's child protective services was an "emergency issue" for the 79th Texas Legislative Session.[61] The next Subpart discusses Texas' ineffective reform efforts in the legislature, and the following Subpart covers those efforts undertaken by the executive branch.

1. The Legislature

During the 79th Legislative Session, state legislators successfully passed

56. *Id.*

57. *Id.* at iii.

58. *Id.* at *1.

59. *Id.* These recommendations included creating a "medical passport" to follow each foster child from placement to placement.

60. April Castro, *Comptroller Reports Foster Care Abuse, Neglect*, MRT (June 22, 2006), https://perma.cc/P3QX-3485.

61. *Legislature Agrees on Protective Services Reform Package*, TEX. SENATE NEWS (May 27, 2005), http://perma.cc/ELA9-TZT4.

Senate Bill 6, designed to comprehensively overhaul DFPS.[62] Senate Bill 6 reorganized the structure of CPS and privatized certain CPS functions.[63] Private contractors had previously handled 80% of foster care placement and adoptions in Texas, and Senate Bill 6 mandated that private contractors handle all of them going forward.[64] Most notably, Senate Bill 6 completely privatized CPS' oversight function, which was previously managed by CPS caseworkers.[65] This meant that private contractors would serve as advocates for children in the foster care system from the child's first intake all the way to appearances in court.[66] Proponents of privatization hoped that Senate Bill 6 would shift the responsibility for foster children away from overburdened CPS workers and into a more efficient private market.[67] Texas planned to pilot the privatized oversight function in San Antonio before a statewide rollout, but the plan never got off the ground.[68] In the fall of 2006, three foster children in the care of a private provider in North Texas were severely abused and killed.[69] Following these deaths, questions arose about whether private providers were capable of taking over CPS' oversight functions in addition to handling their foster placement responsibilities.[70] The pilot oversight privatization program in San Antonio was placed indefinitely on hold.[71]

In addition to the privatization effort, Senate Bill 6 granted $250 million in new funding for child abuse investigations, resulting in CPS hiring over 3,200 new caseworkers to conduct child abuse investigations in homes across Texas.[72] Yet Senate Bill 6 had not allocated any new funds to increase the capacity of the foster care system.[73] The influx of resources to CPS' investigative unit led to an unintended consequence: the investigations uncovered more child abuse in homes throughout the state, the number of children needing foster care skyrocketed, and the foster care system did not have the capacity to care for them.[74] Thus, Texas legislators returned to the next Texas Legislative Session with yet another

62. S.B. 6, 79th Leg. Sess. (Tex. 2005); *see also* Stephen M. Ryan, *Texas Foster Care: Current Issues, Reform Efforts and Remaining Problems*, TEX. APPLESEED (Sept. 2007), https://perma.cc/KGH5-RN2A.

63. S.B. 6, 79th Leg. Sess. (Tex. 2005); Ryan, *supra* note 62, at 3.

64. Dave Mann, *Child's Play: Foster Care's Fiasco*, TEX. OBSERVER (Mar. 9, 2007), https://perma.cc/HAB9-6D2V.

65. *Id.*

66. *Id.*

67. *See* Morgan Young, *Texas Is Quietly Privatizing Foster Care in North Texas. How Will It All Work?,* WFAA (Sept. 24, 2023), https://perma.cc/2C96-MU6R.

68. Mann, *supra* note 64.

69. Ryan, *supra* note 62, at 5; *see also Girl in Texas Foster Home Dies; Boy, 14, Arrested*, NBC NEWS (Dec. 7, 2006), https://perma.cc/746E-3BQD.

70. Mann, *supra* note 64.

71. *Id.*

72. Ryan, *supra* note 62, at 3-4.

73. *Id.*

74. *Id.* at 4 ("[T]he number of children removed from their homes increased from 13,431 in 2004 to 17,547 in 2006.").

mandate to fix the broken foster care system.[75]

The 80th Texas Legislature passed Senate Bill 758, eliminating Senate Bill 6's requirement for complete privatization of CPS' oversight function and replacing it with a pilot program to privatize oversight for just five percent of foster care cases.[76] Senate Bill 758 also required an increase in foster care placement capacity and greater oversight of foster care homes, among other reforms.[77] Yet Senate Bill 758 did not allocate any funds to create the pilot oversight program, nor did it reduce caseloads for overworked CPS staff; instead, legislators remained focused on making low-cost improvements to the system.[78] Despite two major legislative efforts, the Texas foster care system remained inadequately funded and understaffed.

A decade later, in 2017, the Texas Legislature passed another major reform bill aimed at solving the foster care crisis. Senate Bill 11 mandated the complete privatization of the Texas foster care system through "community based care," which was to be rolled out in phases over several years.[79] Under community based care, a private contractor called a "single source continuum contractor" would take on the role of DFPS in each of eleven regions across the state.[80] These contractors would be responsible for maintaining networks of foster care placements and directly managing the cases of foster children.[81] Proponents of community based care hoped that the localized nature of the model would keep more foster children within their communities, lessen the burden on CPS caseworkers, and keep taxpayer costs low.[82] However, others were concerned that relying on private entities to provide social services would only worsen the foster care crisis, with one advocate arguing that "Texas should acknowledge it has failed maltreated children 'instead of passing this task on to private [contractors].'"[83]

The rollout of community based care has been much slower and more difficult than expected. To this day, the model has never been fully implemented, as regions struggled to hire private contractors willing to take responsibility for the

75. *Id.* at 5.

76. S.B. 758, 80th Leg. Sess. (Tex. 2007).

77. *Id.*

78. *Id.*

79. S.B. 11, 85th Leg. Sess. (Tex. 2017); *About Community-Based Care (CBC)*, TEX. DEP'T FAM. & PROTECTIVE SERVS. & OFF. COMMUNITY-BASED CARE TRANSITION (2024), https://perma.cc/KLQ8-CMJ9.

80. S.B. 11, 85th Leg. Sess. (Tex. 2017).

81. *Id.*

82. Sneha Dey, *Across Texas, a Slow and Sputtered Rollout of Foster Care Privatization*, TEX. TRIB. (May 31, 2023), https://perma.cc/F2VQ-Y3SZ.

83. Robert T. Garrett, *Long-Planned Changes to Texas Foster Care System Have 'Sputtered,' Senators Say*, DALLAS MORNING NEWS (May 16, 2022), https://perma.cc/HF39-7AWB; *see also* Carole Levine, *Privatizing Foster Care in Texas: the Good, the Bad, the Unknown. . .*, NONPROFIT QUARTERLY (Nov. 1, 2019), https://perma.cc/HS4K-XHEW ("Almost anything in the human service area that's been privatized has ultimately given you a worse system than you already had—private prisons, private mental health hospitals instead of public systems. You don't have the accountability, you don't have the transparency, and you don't get the results.").

foster care system.[84] Single source continuum contractors have been expected to invest millions of their own dollars as well as rely on charitable donations to be able to fully fund their foster care contracts.[85] When state funds proved inadequate, one Fort Worth-based nonprofit spent millions from its own endowment to continue its foster care functions.[86] Today, only one-quarter of foster children are covered by the community based care model, though Texas plans to have all foster children part of the program by 2029.[87] So far, commentators have observed that Texas' performance measures under the community based care model have not shown improvement compared to the previous state-run system.[88] Despite multiple legislative efforts, Texas has been unable to make meaningful improvements to its foster care system.

2. The Executive Branch

In addition to failures in the legislative branch, Texas' child welfare crisis has continued unabated through the tenures of three powerful Texas governors: George W. Bush, Rick Perry, and Greg Abbott. During his first gubernatorial term, Greg Abbott pledged to prioritize reforms to improve the child welfare system. A recent report had shown that, from 2010 to 2014, a staggering 144 Texas children had died while under CPS investigation for possible abuse and neglect at home.[89] Governor Abbott announced that he would not allow one more death of a child in the child welfare system to occur under his watch, and he distributed an additional $40 million to child welfare services in his first year.[90] Despite the increased funding, deaths of children involved in the child welfare system only increased during Abbott's first year as governor.[91] Later in Abbott's term, from 2017 to 2021, deaths of children in foster care did not improve either, hovering between 37 and 44 deaths each year.[92] Governor Abbott has been unable to keep his promise to save lives in the Texas child welfare system, in part due to disorganization and discord among leadership at Texas DFPS.

Under Governor Abbott, Texas has seen a revolving door of leadership unsuccessfully attempt to solve the foster care crisis. In April 2016, Governor Abbott appointed Hank Whitman, the Chief of the Texas Rangers, to be the next DFPS Commissioner.[93] Whitman had significant law enforcement experience,

84. *See* Garrett, *supra* note 83.

85. *Id.*

86. *Id.*

87. *About Community-Based Care (CBC)*, *supra* note 79.

88. *See* Garrett, *supra* note 83.

89. Becky Fogel, *What Led to the 'Broken' Foster Care System in Texas*, TEX. STANDARD (Jan. 31, 2017), https://perma.cc/N7EQ-UEPB.

90. *Id*.

91. Marissa Evans, *"Beat on Me," Foster Care Chief Tells Lawmakers. And They Do.*, TEX. TRIB. (Oct. 26, 2016), https://perma.cc/U58J-KUJH.

92. Jason Steele, *DFPS Committee Follow Up: Requested at House Human Services Hearing*, TEX. DEP'T FAM. & PROTECTIVE SERVS. (Mar. 21, 2022) at 20.

93. *Governor Abbott Releases Statement on DFPS Leadership Changes*, OFF. OF TEX.

but none in child welfare.[94] Early on, Whitman appeared before the Texas Senate with a proposal to address the failed foster care system: he requested over $50 million for improvements to hire more caseworkers and raise their salaries.[95] Lawmakers from both parties questioned the benefit of earmarking more funding for an agency that had not improved despite previous financial support.[96] After months of deliberation and mounting public pressure, the Texas Legislature approved $150 million in emergency funding for DFPS, hoping to reduce caseworker turnover, address the mounting backlog of cases, and bolster caseworkers' reporting requirements.[97] Ultimately, the emergency funding markedly reduced caseworker turnover at DFPS, but systemic issues of high caseloads and unsafe foster care placements remained.[98]

By May 2019, Hank Whitman had retired from his role as Commissioner.[99] As the Texas Tribune noted, "Whitman will perhaps best be remembered as an outsider with little experience in social services who . . . advocat[ed] fiercely at the Texas Capitol for pay raises for his frontline staff."[100] A wide range of entrenched issues remained in the foster care system, and the Texas foster care system remained locked in litigation over the rights of foster children. To replace Whitman, Governor Abbott appointed Jaime Masters, the former Chief of Health Services for Jackson County, Missouri.[101] Like commissioners before her, Masters lacked significant expertise in the child welfare space, with her primary work experience being in government health agencies.[102] Masters struggled to implement court-ordered reforms to the foster care system and faced backlash when media outlets reported that foster children were regularly sleeping in DFPS offices and hotels.[103] During a federal court hearing, Masters said, "I do feel like I am failing the children."[104]

GOVERNOR (Apr. 11, 2016), https://perma.cc/YCL5-UKZ8.

94. *Head Of Texas' Beleaguered Child Welfare System to Step Down*, CBS NEWS TEX. (May 28, 2019), https://perma.cc/4FKJ-3AGY.

95. *Id.*

96. *Id.*

97. Marissa Evans, *Child Protective Services Funding Gets Final OK—with Restrictions*, TEX. TRIB. (Dec. 2, 2016), https://perma.cc/4U9Q-K23Z.

98. *See* Paul Flahive, *Texas Foster Care in Crisis After a Decade in Litigation and 5 Years Under Federal Oversight*, TEX. PUB. RADIO (Jan. 12, 2022), https://perma.cc/F8D6-X3YX; Edgar Walters, *Texas Child Welfare Chief Hank Whitman Announces Retirement*, TEX. TRIB. (May 28, 2019), https://perma.cc/VJ3R-BSK9.

99. *Hank Whitman Steps Down as DFPS Commissioner*, TEX. DEP'T FAM. & PROTECTIVE SERVS. (May 28, 2019), https://perma.cc/RA5F-H9W8.

100. Walters, *supra* note 98.

101. *Governor Abbott Announces Intent to Appoint Jaime Masters as Commissioner of the Department of Family and Protective Services*, OFF. OF TEX. GOVERNOR (Oct. 9, 2019), https://perma.cc/E6AR-9STN.

102. *See* Julie Chang, *New Foster Care, CPS Chief Tapped*, AUSTIN AMERICAN-STATESMAN (Oct. 9, 2019), https://perma.cc/PB6J-E6S4.

103. Sarah Rafique, *'I Am Failing These Children,' Says Head of State's Foster Care System*, ABC 13 (Sept. 14, 2021), https://perma.cc/J2YS-5PKR.

104. *Id.* In 2021, the Texas Legislature passed legislation hoping to once again reform the failed Texas foster care system. House Bill 567 increased the statutory standards for a

In February 2022, Masters faced a new crisis: Governor Abbott sent her a letter ordering the already overburdened DFPS to investigate families with transgender children for child abuse.[105] Texas caseworkers began to quit in even larger numbers than before, some saying that they "couldn't morally continue."[106] That year, DFPS saw over 2,000 employees leave the agency,[107] reversing the progress that Commissioner Whitman had made on reducing turnover during his tenure. A state judge halted the investigations into transgender youth a month later,[108] but irreparable damage had already been done to transgender youth and their families.[109] While DFPS was taking on this new category of politically motivated investigations, it was further eroding its capabilities to improve an unconstitutionally dangerous foster care system.

Even in these past few years, executive leadership in the Texas foster care system has remained in a state of turmoil. Governor Abbott fired Commissioner Masters without explanation in November 2022.[110] Masters was replaced by Stephanie Muth, a healthcare consultant and former State Medicaid Director, in January 2023.[111] Muth was the third DFPS Commissioner in less than four years.

Texas has tried to fix its foster care system. But it has been unsuccessful, whether due to inadequate funding, a misplaced focus on privatization, or a lack of sustained commitment. For decades, Texas' political processes have failed to keep foster children safe—or even meet the low threshold of constitutionality, as discussed in the next Part.

II. THE UNCONSTITUTIONALITY OF TEXAS FOSTER CARE

While Texas leaders failed to reform the foster care system, children's rights

finding of neglect, with the goal of reducing the number of children removed from their homes due to parental neglect, as well as required caseworkers to conduct more thorough due diligence to find absent parents of foster children. These reforms were met with mixed reactions, with some experts worried that at-risk children would be left in unsafe homes. H.B. 567, 87th Leg. Sess. (Tex. 2021).

105. Letter from Greg Abbott to Jaime Masters, OFF. OF TEX. GOVERNOR (Feb. 22, 2022), https://perma.cc/4ATQ-ZRKJ.

106. Jo Yurcaba, *Texas Child Welfare Workers Quit over Governor's Transgender Directive*, NBC NEWS (Apr. 19, 2022, 2:02 PM), https://perma.cc/8CP5-5MV2 ("More than a half dozen Child Protective Services employees in the state told The Texas Tribune this month that they have either resigned or were looking for new jobs as a result of Abbott's directive.").

107. Rhonda Fanning, *Investigating Gender-Affirming Care as Child Abuse Pushing State Agency to 'Brink of Collapse,' Staff Warns*, TEX. STANDARD (Sept. 1, 2022, 12:56 PM), https://perma.cc/6MC4-8PET.

108. Juan Perez Jr., *Texas Judge Halts Abbott's Transgender Investigation Order*, POLITICO (Mar. 11, 2022), https://perma.cc/8NH3-EWGR.

109. *See* Sneha Dey & Karen Brooks Harper, *Transgender Texas Kids Are Terrified After Governor Orders That Parents Be Investigated for Child Abuse*, TEX. TRIB. (Feb. 28, 2022), https://perma.cc/XZC2-VM4L.

110. Cayla Harris, *Gov. Greg Abbott Fires Head of Embattled Child Welfare Agency*, HOUSTON CHRON. (Nov. 29, 2022), https://perma.cc/UB4U-W5RF.

111. *Governor Abbott Announces New Senior Leadership of DFPS*, OFF. OF TEX. GOVERNOR (Nov. 28, 2022), https://perma.cc/82UB-CL25.

advocates took matters into their own hands in *M.D. ex rel. Stukenberg v. Abbott*. The advocates recognized that Texas' political branches were unable to keep foster children safe, so they sought to vindicate the rights of foster children through the federal judiciary.[112] In 2011, the nonprofit Children's Rights brought a federal lawsuit against Governor Rick Perry and other state officials on behalf of the 12,000 Texas children in long-term foster care.[113] The suit sought declaratory and injunctive relief under 42 U.S.C. § 1983 on the grounds that the State of Texas was violating foster children's constitutional rights.[114] The litigation lasted for eight years and through two governors, with the State of Texas fighting aggressively to defeat the lawsuit at every turn.[115]

In December 2015, the foster children plaintiffs won a major victory when Judge Janis Jack ruled the Texas foster care system unconstitutional in a fiery 140-page opinion.[116] The opinion stated: "Years of abuse, neglect, and shuttling between inappropriate placements across the State has created a population that cannot contribute to society, and proves a continued strain on the government through welfare, incarceration, or otherwise. Although some foster children are able to overcome these obstacles, they should not have to."[117] Two years after this opinion, with the help of court-appointed special masters, Judge Jack ordered Texas to comply with a detailed structural injunction designed to cure the unconstitutionality of the foster care system.[118] Some of the injunction's provisions mirrored past recommendations made by Comptroller Strayhorn and Texas HHSC, such as improving reporting procedures and reducing worker caseloads.

Despite this landslide victory, the rights of Texas foster care children today remain far from vindicated. The Fifth Circuit has since significantly weakened the district court's structural injunction using the narrow tailoring doctrine, and Texas has failed to comply with the provisions that the Fifth Circuit left standing despite contempt hearings and fines from the district court.[119] *M.D. ex rel. Stukenberg v. Abbott* illustrates how today's constitutional jurisprudence places foster children in a bind. The narrow tailoring doctrine limits the scope of structural injunctions, making it difficult for federal courts to order meaningful remedies even for the most egregious of constitutional harms. This phenomenon allows states to default on their constitutional obligations. To understand how the

112. *See* M.D. *ex rel*. Stukenberg v. Abbott, 152 F. Supp. 3d 684 (S.D. Tex. 2015).

113. Complaint, *supra* note 6, at 1.

114. *Id.* at 4-5.

115. *See* Fogel, *supra* note 89.

116. *M.D.*, 152 F. Supp. 3d at 828.

117. *Id.* at 823.

118. Final Order, *M.D.*, 152 F. Supp. 3d (No. 2:11-cv-00084).

119. The remaining provisions included implementing a professional development training program for new caseworkers, enforcing graduated caseloads for newly hired caseworkers, presenting a completed workload study to the court, establishing internal guidelines for caseload ranges based on the workload study, ensuring that allegations of abuse and neglect are promptly investigated, increasing face-to-face contacts with foster children, and requiring more timely submission of reports following child abuse investigations. *See, e.g.*, Seventh Report of the Monitors, *supra* note 18.

federal judiciary has struggled to rectify the constitutional violation in *M.D.*, the below Subparts analyze the constitutional rights of foster children, the *M.D.* case itself, and the court's attempts to hold Texas accountable.

A. The Rights of Foster Children

The constitutional rights of foster children under the Fourteenth Amendment are limited and difficult to vindicate in court. Under the Fourteenth Amendment, foster children only have the right to be free from unreasonable risk of harm. This makes the federal court's ruling of unconstitutionality in *M.D.* all the more noteworthy. The *M.D.* ruling should be understood as enforcing a very low bar of safety for children in foster care, mandated by the United States Constitution. Yet the federal judiciary has still failed to enforce even this low threshold on the Texas foster care system. The following paragraphs analyze foster children's limited constitutional rights and consider how today's federal courts cannot enforce even the minimal rights granted to foster children by the Constitution.

Up until relatively recently, the Supreme Court had never considered the constitutional rights of foster children. For decades, scholars called for various constitutional protections for foster children, from a right to safety to a right to housing to a right to counsel.[120] In 1989, the Supreme Court decided the seminal case on child welfare in *DeShaney v. Winnebago County Department of Social Services*.[121] The Supreme Court has not further articulated the rights of foster children since.

In *DeShaney*, a Wyoming court had awarded custody of one-year-old Joshua DeShaney to his father during divorce proceedings.[122] Joshua and his father moved to Wisconsin shortly thereafter.[123] Two years later, the Winnebago County Department of Social Services became aware that Joshua's father was physically abusing him.[124] Caseworkers investigated multiple times and repeatedly found concerning evidence of child abuse, but did not take further action to protect Joshua from his father.[125] Eventually, Joshua's father beat him so badly that Joshua incurred severe brain damage, confining him to a mental institution for the rest of his life.[126] Joshua's mother brought a Section 1983 lawsuit against the Wisconsin Department of Social Services on behalf of herself and her son, alleging Fourteenth Amendment due process violations for failing to keep Joshua safe from his father's violence.[127]

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120. *See, e.g.*, Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199 (1988).

121. 489 U.S. 189 (1989).

122. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 812 F.2d 298, 299 (7th Cir. 1987).

123. *Id.*

124. *DeShaney*, 489 U.S. at 192.

125. *Id.* at 192-93.

126. *Id.* at 193.

127. *Id.*

The Supreme Court ruled against Joshua and his mother, holding that the Fourteenth Amendment's Due Process Clause does not impose a duty on the state to protect individuals from private actors if the state did not create the harm.[128] Thus, the state was not responsible for protecting Joshua from the abuse of his father.[129] Yet in a famous footnote, the Court left the door open for due process claims in circumstances where a child is the ward of the state: "Had the State . . . removed Joshua from free society *and placed him in a foster home operated by its agents*, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."[130] While *DeShaney* did not result in the outcome children's rights advocates sought, the Supreme Court hinted that there may be substantive due process rights for foster children.

In subsequent years, federal circuit courts overwhelmingly held that a special relationship exists between the state and foster children.[131] As the Fifth Circuit has stated, when a state takes custody of a child, "it assume[s] the responsibility to provide constitutionally adequate care."[132] This substantive due process right, derived from the Fourteenth Amendment, is similar to the rights held by wards of the state, such as prisoners and patients involuntarily held in mental institutions.[133] Courts have reasoned that, since the government has taken custody of the individual, the government has taken on an affirmative duty of care for that person.[134] This right is a low bar, defined by the federal district court in *M.D.* as "the right to be free from unreasonable risk of harm."[135] The Fifth Circuit has made clear that this right entitles foster children to protection from physical abuse and violations of bodily integrity, as well as a limited right to be free from severe psychological abuse and emotional trauma.[136] Notably, the due process right does not entitle foster children to be treated optimally or to be free from any kind of psychological distress caused by the state.[137]

To prevail on this constitutional claim in court, foster care plaintiffs must meet the standards of a two-pronged test. The first step is to establish that the

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128. *Id.* at 203.

129. *See id.*

130. *Id.* at 201 n.9.

131. M.D. *ex rel.* Stukenberg v. Abbott, 152 F. Supp. 3d 684, 696 (S.D. Tex. 2015) (listing these cases).

132. Griffith v. Johnston, 899 F.2d 1427, 1439 (5th Cir. 1990).

133. *Id.*

134. *DeShaney*, 489 U.S. at 200 (1989).

135. *M.D.*, 152 F. Supp. 3d at 696. On appeal, the Fifth Circuit defined the substantive due process right afforded to foster children as a right to "personal security and reasonably safe living conditions." M.D. *ex rel.* Stukenberg v. Abbott, 907 F.3d 237, 250 (5th Cir. 2018) (quoting Hernandez *ex rel.* Hernandez v. Texas Dep't of Protective & Regul. Servs., 380 F.3d 872, 881 (5th Cir. 2004)). The Fifth Circuit noted that the district court's definition, "the right to be free from unreasonable risk of harm," was not inconsistent with Fifth Circuit precedent to the extent that the definition is a paraphrasing of the right articulated in *Hernandez*. *M.D.*, 907 F.3d at 250 n.18.

136. *M.D.*, 907 F.3d at 250.

137. *Id.* at 251.

state executive branch has failed to keep the foster children free from unreasonable risk of harm.[138] The second step is to establish that the state action was an arbitrary deprivation of the plaintiffs' rights.[139] The Supreme Court has stated that the "touchstone of due process is [the] protection of the individual against arbitrary action[s] of [the] government."[140] The definition of "arbitrary" depends on whether the constitutional violation stems from legislation or executive action.[141] While courts apply various "arbitrariness" standards to cases challenging legislation depending on the right at stake (e.g., strict scrutiny, rational basis), courts can only apply a stringent "shocks the conscience" standard in cases challenging executive actions.[142] In *M.D.* and other foster care cases, plaintiffs generally must satisfy the "shocks the conscience" standard because child protection agencies are part of the state's executive branch. Thus, a court will only determine the executive branch's action to be arbitrary if the action is so severe that it "shocks the conscience."

Circuit courts have interpreted the rather subjective "shocks the conscience" standard in various ways in foster care cases. Most commonly, courts use a secondary standard—either the deliberate indifference standard or the professional judgment standard—to determine if government action shocks the conscience.[143] The deliberate indifference standard, commonly applied in prison rights cases, requires that the state knowingly disregard an excessive risk to the plaintiff's safety.[144] Additionally, actual knowledge of the risk can be inferred when the risk is obvious.[145] The professional judgment standard, commonly applied to patients involuntarily committed in mental health institutions, is less stringent, requiring that a state's action substantially depart from accepted professional judgment.[146] The most important difference between the two "shocks the conscience" standards is that the deliberate indifference standard has a knowledge requirement while the professional judgment standard does not.[147] To date, most courts have applied the deliberate indifference standard to foster care cases.[148] Federal courts have acknowledged that the deliberate indifference standard is "a significantly high burden for plaintiffs to overcome."[149]

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138. *M.D.*, 152 F. Supp. 3d at 697.

139. Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

140. *Id.*

141. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) ("[C]riteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.").

142. Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 311 (2010).

143. *M.D.*, 152 F. Supp. 3d at 697-98.

144. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

145. Hernandez *ex rel.* Hernandez v. Tex. Dep't of Protective & Regul. Servs., 380 F.3d 872, 881 (5th Cir. 2004).

146. Youngberg v. Romeo, 457 U.S. 307, 321-23 (1982).

147. *M.D.*, 152 F. Supp. 3d at 697-98.

148. *Id.* at 699.

149. *Hernandez*, 380 F.3d at 882 (citing Doe v. Dall. Indep. Sch. Dist., 153 F.3d 211,

These high bars to establishing Fourteenth Amendment violations ensure that courts will only rule against the most egregious misconduct of a state executive branch. Without copious evidence of knowing and severe mistreatment, foster children plaintiffs are unlikely to prevail on the merits, making the foster children's victory in *M.D.* all the more momentous. The following Subparts discuss the plaintiffs' victory in *M.D.* and the court's struggle to enforce its remedy.

B. The Outcome of *M.D. v. Abbott*

The district court's ruling in *M.D.* was initially a major win for Texas foster children, but opinions from the Fifth Circuit and opposition from state leaders have significantly weakened the ruling's power. At the time, children's rights advocates hoped *M.D.* would usher in a new era for children's rights in the state. The foster children in *M.D.* proved that Texas officials violated their substantive due process right to be free from unreasonable risk of harm.[150] The plaintiffs successfully certified a class of Texas children in long-term foster care, and their claims were based on a wide range of factual allegations, including that Texas did not employ enough caseworkers, did not have a sufficient array of foster care placements, and did not adequately oversee children in foster care.[151] The parties completed a trial on the merits in December 2014 before Judge Janis Jack in the United States District Court for the Southern District of Texas.[152] The Texas Attorney General's Office vigorously fought the lawsuit at every turn, arguing that the federal court was interfering with Texas' right to implement its own reforms through the political branches.[153]

A year later, Judge Jack ruled in favor of the foster children on all counts besides those associated with one subclass.[154] She decided that the copious factual record established that Texas was failing to keep foster children safe from unreasonable risk of harm.[155] Next, Judge Jack considered the two "shocks the conscience" standards. She held that Texas' actions shocked the conscience under *both* the professional judgment standard and the deliberate indifference

218 (5th Cir. 1998)).

150. *M.D.*, 152 F. Supp. 3d at 790.

151. *Id.* at 690-701.

152. *Foster Care Litigation*, TEX. DEP'T FAM. & PROTECTIVE SERVS., https://perma.cc/FD6A-ZUP7.

153. *See* Fogel, *supra* note 89.

154. *M.D.*, 152 F. Supp. 3d at 690. The court certified a General Class and three subclasses in *M.D.*: children in (1) licensed foster care, (2) foster group homes, and (3) basic care general residential operations. The court declined to certify a subclass of children in "unverified kinship placements" because the subclass lacked adequate representation. *Id*. Unverified kinship placements are placements in which a child is placed with a relative or someone to which they have a close relationship but is not certified as a foster parent. Amended Complaint ¶ 23, *M.D.*, 152 F. Supp. 3d (No. 2:11-cv-00084).

155. *M.D.*, 152 F. Supp. 3d at 790.

standard.[156] Therefore, the arbitrary actions of Texas officials violated the Fourteenth Amendment due process rights of children in long-term foster care.

To enforce her comprehensive ruling, Judge Jack appointed two special masters, Francis McGovern and Kevin Ryan, to study the Texas foster care system and recommend solutions to cure its constitutional violations.[157] McGovern was a professor at Duke Law School and an expert on institutional reform efforts who had served as a special master in almost one hundred prior cases.[158] Ryan had decades of legal experience working with vulnerable youth, had formerly served as the New Jersey Commissioner of the Department of Children and Families, and had worked as a court-appointed master for structural foster care issues in the past.[159] To start, McGovern and Ryan reached out to Texas DFPS in an effort to work collaboratively on developing solutions and garner buy-in for future reforms. [160] Yet DFPS refused to participate in any of the special masters' reform efforts.[161] McGovern and Ryan then spent almost two years intensively researching the Texas foster care system, interviewing key stakeholders, and consulting child welfare experts[162]—all without the state's help.

The result of the special masters' research was a compilation of detailed, data-backed recommendations that they expected would cure the constitutional violations.[163] After filing those with the court, the special masters spent another year developing the recommendations into an implementation plan that Texas could follow to meet its constitutional requirements.[164] In January 2018, Judge Jack entered a permanent injunction requiring Texas to adopt the implementation plan, which contained over one hundred provisions.[165] These provisions required that Texas cap caseloads at fourteen to seventeen cases per worker, establish a twenty-four-hour crisis hotline for foster children, and implement an integrated

156. *Id.* at 700.

157. *Federal Judge Appoints Special Masters to Reform Texas Foster Care as 5th U.S. Circuit Denies State's Request for a Stay*, CHILD.'S RTS. (Mar. 21, 2016), https://perma.cc/R6NE-UENW.

158. Robert T. Garrett, *Federal Judge Picks 'Best of the Best' to Help Her Overhaul Texas Foster Care*, DALL. MORNING NEWS, https://perma.cc/V57X-2ZVX (last updated Mar. 21, 2016, 5:54 PM). Francis McGovern passed away in 2020 at the age of 75. *Duke Law Mourns Francis McGovern, Preeminent Expert in ADR, Resolving Mass Tort Claims*, DUKE L. (Feb. 19, 2020), https://perma.cc/BS3D-E7Y6. Deborah Fowler has since succeeded him as special master. *See, e.g.*, Seventh Report of the Monitors, *supra* note 18.

159. *Federal Judge Appoints Special Masters*, *supra* note 157; Garrett, *supra* note 158.

160. M.D. *ex rel.* Stukenberg v. Abbott, 907 F.3d 237, 272 (5th Cir. 2018) ("[Texas] has repeatedly refused to work with the court-appointed Special Masters in creating corrective policies.").

161. *Id.*

162. Final Order, *supra* note 118, at 2-4.

163. *Id.*

164. Implementation Plan, M.D. *ex rel.* Stukenberg v. Abbott, 152 F. Supp. 3d 684 (S.D. Tex. 2015) (No. 2:11-cv-00084).

165. Final Order, *supra* note 118.

record-keeping system, among many others.[166] Attorney General Ken Paxton immediately appealed the ruling, stating that "[t]he judge and the special masters acted outside of their legal authority and ordered a plan that is both incomplete and impractical."[167] The Fifth Circuit granted Texas a temporary administrative stay while it heard the appeal.[168]

Children's rights advocates hoped that the comprehensive structural injunction, informed by years of expert study, would finally turn the tide on Texas' failing foster care system. But it was not to be. A few months later, the Fifth Circuit struck down the majority of the injunction's provisions on the grounds that the remedy was not narrowly tailored to the constitutional violation.[169] While the Fifth Circuit highlighted Texas' repeated failures to fix the foster care system on its own, it held that the district court's injunction went far beyond what was minimally required to comport with the Constitution.[170] It struck down the crisis hotline and the caseload cap, among over fifty other provisions.[171] Puzzlingly, the Fifth Circuit acknowledged that the caseload cap struck at the heart of the constitutional violation but was "too blunt a remedy for a complex problem."[172] The court asserted that the caseload cap was too broad because it overlooked certain logistical difficulties, like variations in case complexity and worker expertise.[173] In a scathing dissent, Judge Patrick Higginbotham rejected the majority's premise that the district court had overreached into state policymaking: "Here, the district court only ordered what the State failed for years to do—to enforce the law."[174] The Fifth Circuit remanded to the district court, the district court narrowed the permanent injunction accordingly, and Texas once again appealed the order.

On the second appeal, the district court's now weakened injunction was further eroded. The Fifth Circuit struck down several more major provisions, including the requirement to implement an integrated record-keeping system. The Fifth Circuit had previously acknowledged that DFPS's record-keeping methods were "shockingly haphazard and inefficient," leading to serious, systemic issues in the foster care system.[175] Yet the Fifth Circuit held that a modern record-keeping system was not narrowly tailored enough, jettisoning that key provision along with several others.[176] Once again, Judge Higginbotham dissented, decrying "a

166. *Id.*

167. Marissa Evans & Emma Platoff, *Federal Judge Says Texas Still Needs Oversight to Fix Its "Broken" Foster Care System*, TEX. TRIB. (Jan. 19, 2018), https://perma.cc/PGT4-SERU.

168. M.D. *ex rel*. Stukenberg v. Abbott, 907 F.3d 237, 247 (5th Cir. 2018).

169. *Id.* at 274-75.

170. *Id.*

171. *Id.* at 274, 279.

172. *Id.* at 274.

173. *Id.*

174. *Id.* at 297 (Higginbotham, J., dissenting).

175. *Id.* at 245 (majority opinion).

176. M.D. *ex rel.* Stukenberg v. Abbott, 929 F.3d 272, 279 (5th Cir. 2019).

retreat by this court, once a refuge for such innocents."[177] The Fifth Circuit then remanded to the district court, with instructions to begin implementing the modified injunction.[178] What was left of the permanent injunction went into effect in July 2019. Key provisions that remained included requiring graduated caseloads for newly hired caseworkers, submitting a caseworker workload study to the court, and tracking abuse investigations that were not completed in a timely manner.[179] Since then, a court-appointed team of federal monitors has been assessing Texas' compliance—and lack thereof—with the watered-down version of the injunction.[180]

C. Texas' Failure to Comply

Though the court has implemented the permanent injunction, Texas' constitutional problems remain far from solved. In the past several years, Texas has consistently failed to comply with the twice-weakened version of the federal court's injunction. Governor Abbott and Attorney General Paxton have called Judge Jack an "activist" judge for her rulings in *M.D.*,[181] while state lawmakers have commented that the foster care system's issues should not be adjudicated by the federal courts.[182] Texas' resistance to federal court intervention has persisted from the litigation phase of the lawsuit to the remedial phase, drawing anger from Judge Jack and the plaintiffs' attorneys.[183] Texas' resistance entered a new phase in May 2023, when it hired well-connected attorneys from the private law firm Gibson Dunn to take over the litigation.[184] The Gibson Dunn attorneys had all completed clerkships on the Fifth Circuit, and one of the attorneys is married to Fifth Circuit Judge James Ho.[185] Texas paid over five million dollars in a single year to Gibson Dunn for this representation.[186]

Given Texas' aggressive resistance to her order, Judge Jack has held Texas

177. *Id.* at 292 (Higginbotham, J., dissenting).

178. *Id.* at 281 (majority opinion).

179. *See* First Court Monitors' Report, M.D. *ex rel.* Stukenberg v. Abbott, 152 F. Supp. 3d 684 (2015) (No. 2:11-CV-00084).

180. *See* Seventh Report of the Monitors, *supra* note 18.

181. Walters, *supra* note 98.

182. Marissa Evans, *Report Says Child Protective Service Workers Are Overloaded, Urges Overhaul*, TEX. TRIB. (Nov. 4, 2016), https://perma.cc/2APY-KL3L.

183. Cameron Langford, *Texas' Inept Foster-Care Reform Efforts Anger Federal Judge*, COURTHOUSE NEWS SERV. (June 27, 2023), https://perma.cc/65AH-LA3J; Fogel, supra note 89.

184. Robert T. Garrett, *Texas Hires Well-Connected Private Lawyers, May Stiffen Defense in Foster-Care Lawsuit*, DALL. MORNING NEWS (May 11, 2023), https://perma.cc/25FJ-HSEN.

185. Judge James Ho has stated that he would recuse himself from any case involving his wife or her law firm, though *M.D.* has not come before him since Gibson Dunn's involvement. *Id.*

186. Ryan Autullo, *Gibson Dunn Foster Care Defense Costs Texas $5 Million in a Year*, BLOOMBERG L. (Dec. 4, 2024), https://perma.cc/A7FU-ZF3J.

in contempt of court three times for failing to comply with the permanent injunction. In 2019, Judge Jack held Texas in contempt and fined the state $50,000 per day for three days for not complying with certain injunction provisions, such as providing adequate supervision in foster care group homes.[187] In 2020, the federal monitors submitted a 363-page report to the federal court, reporting that "the Texas child welfare system continues to expose children in permanent managing conservatorship [] to an unreasonable risk of serious harm."[188] In response, Judge Jack once again held Texas in contempt of court,[189] stating that "I actually am stunned by the noncompliance of the state."[190] In 2024, Judge Jack held Texas in contempt a third time, fining the state $100,000 per day, which Texas' new private attorneys appealed to the Fifth Circuit.[191] In a highly unusual move, the attorneys also petitioned the Fifth Circuit to remove Judge Jack from the case entirely, arguing that she had become too biased against the state.[192] Much to the plaintiffs' alarm, the Fifth Circuit granted these requests in October 2024, reversing Judge Jack's most recent contempt ruling and ordering that Judge Jack be removed from the case.[193] The plaintiffs immediately petitioned for a rehearing *en banc*, which the Fifth Circuit denied.[194] As of March 2025, Judge Randy Crane has replaced Judge Janis Jack on the case.[195] After over a decade of Judge Jack's efforts to hold Texas accountable, her removal presents an extraordinary and unprecedented setback in rectifying the constitutional violations facing foster youth.

Texas' noncompliance has caused problems not only in federal courtrooms, but in state courtrooms throughout Texas. Family court judges are caught in a bind when ruling on child abuse cases, knowing that at-risk children face danger both at home and in foster care. Some state judges have tried to address the foster

187. 2019 Contempt Order, *supra* note 17; *see also* Edgar Walters, *Federal Judge Hammers Texas Officials over Failures to Improve Foster Care System*, TEX. TRIB. (Nov. 5, 2019), https://perma.cc/VRY8-Z3SG.

188. First Court Monitors' Report, *supra* note 179; *see also* Emma Platoff, *Years After a Judge Ordered Fixes, Texas' Child Welfare System Continues to Expose Children to Harm, Federal Monitors Say*, TEX. TRIB. (June 16, 2020), https://perma.cc/A5NC-KFTQ.

189. 2020 Contempt Order, *supra* note 17.

190. Edgar Walters, *Federal Judge Says She Will Again Hold Texas in Contempt of Court for Failing to Meet Foster Care Reforms*, TEX. TRIB. (Sept. 4, 2020), https://perma.cc/B2PQ-EE39

191. Karen Brooks Harper, *State's Move to Bump Federal Judge from Longtime Foster Care Lawsuit Caps Years of Battles*, TEX. TRIB. (July 8, 2024), https://perma.cc/M7KK-YR7Q.

192. *Id.*

193. M.D. *ex rel.* Stukenberg v. Abbott, 119 F.4th 373 (5th Cir. 2024); *see also* Avery Travis, *What's Next After an Appeals Court Removes Federal Judge in Longstanding Texas Foster Care Case?*, KXAN (Oct. 15, 2024), https://perma.cc/BWX6-7M86; Forrest Wilder, *Instead of Fixing the Foster Care System, Texas Is Trying to Game the Courts*, TEX. MONTHLY (Dec. 2024), https://perma.cc/X55T-CDYM.

194. *See* Paul Flahive, *New Judge Appointed to Oversee Texas' Foster Care System*, TEX. PUB. RADIO (Mar. 4, 2025), https://perma.cc/8MD6-PJQ6.

195. *Id.*

care crisis from within their chambers. In 2022, Judge Mary Lou Alvarez twice ordered that DFPS spend a certain amount of money per day to care for two high-needs foster children.[196] In court, she stated, "I will no longer be the trial court that becomes complicit in the Department's incompetence and failure of duty to place this child where she needs to be."[197] The state appeals court quickly overruled Judge Alvarez based on the separation-of-powers clause in the Texas Constitution, holding that the executive branch had sole authority over decisions relating to child-specific contracts.[198] In another foster care case, the same judge ordered DFPS to transfer eight cases from one caseworker to others because the caseworker was juggling too many cases.[199] Once again, a Texas appeals court overruled her based on the Texas separation-of-powers clause.[200] To this day, Texas children, families, and even judges are struggling to handle the chaos caused by Texas' continuous noncompliance with the permanent injunction.

Even though the Texas foster care system "shocks the conscience," the rights of Texas foster children remain unaddressed. The next Part analyzes why today's federal courts are unable to address these constitutional crises without the state's cooperation.

III. THE LIMITS OF JUDICIAL REMEDIES

Today's separation-of-powers principles are failing foster children. As Judge Higginbotham wrote in his dissent in *M.D.*, "[i]t is beyond dispute that there was no effective political process for the district court to displace."[201] Powerful Texas governors from George W. Bush to Greg Abbott have sought to reform the Texas foster care system and failed. The Texas Legislature has repeatedly attempted to solve the foster care crisis, to no avail. Now, the federal judiciary is finally intervening, only for its injunction to be hamstrung by the narrow tailoring doctrine.[202] Texas foster children are caught in a catch-22: the federal court system directs them to use the political process to remedy their mistreatment, but foster children lack the power to advocate for themselves in the political branches. The following Subparts explain how this phenomenon arose and why federal courts must be able to do more to protect the rights of foster children.

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196. *In re* Tex. Dep't of Fam. & Protective Servs., 660 S.W. 3d 161, 164 (Tex. App. 2022); *In re* Tex. Dep't of Fam. & Protective Servs., No. 04-22-00165-CV, 2022 WL 2135534, at *1 (Tex. App. June 15, 2022).

197. *In re* Tex. Dep't of Fam. & Protective Servs., 660 S.W. 3d at 165.

198. *Id.* at 171-72; *In re* Tex. Dep't of Fam. & Protective Servs., 2022 WL 2135534, at *3.

199. *In re* Tex. Dep't of Fam. & Protective Servs., No. 04-22-00096-CV, 2022 WL 2135572, at *1 (Tex. App. June 15, 2022).

200. *Id.* at *6-7.

201. M.D. *ex rel.* Stukenberg v. Abbott, 907 F.3d 237, 298 (5th Cir. 2018) (Higginbotham, J., dissenting).

202. *See id.*; M.D. *ex rel.* Stukenberg v. Abbott, 929 F.3d 272 (5th Cir. 2019).

A. The Declining Power of the Structural Injunction

The federal judiciary has struggled to remediate Texas' foster care system in part due to the fading power of the structural injunction. In *M.D.*, the district court handed down a detailed structural injunction to cure Texas' constitutional violations, informed by two years of research by two leading legal experts.[203] Yet on appeal, the Fifth Circuit twice stripped away key portions of the district court's injunction based on separation-of-powers principles.[204] The Fifth Circuit's restrictive rulings are part of a larger trend of federal courts curtailing the power of the structural injunction.[205] This trend has made it increasingly difficult for plaintiffs to vindicate rights in the face of complex institutional violations, such as those at stake in *M.D.*

The structural injunction has been controversial since its beginnings in *Brown v. Board of Education*.[206] During that time, the country was undergoing a civil rights revolution, and the Supreme Court began using its power to restructure institutions for the first time.[207] This sort of remedy was well outside traditional notions of court power, such as money damages and criminal punishment.[208] As such, some saw the advent of the structural injunction as an alarming power grab by the courts. For instance, Judge Learned Hand complained that the Supreme Court had "assume[d] the role of a third legislative chamber."[209]

The Warren Court's order in *Brown II*—requiring that the federal district courts ensure that public schools desegregate with "all deliberate speed"—was an early example of a wide-ranging structural injunction.[210] Initially, civil rights advocates decried the vagueness of the order, which allowed some southern school districts to delay their desegregation efforts for years.[211] The Supreme Court had to intervene several more times after *Brown II*, such as in *Griffin v. County School Board*, a Virginia desegregation case in which the Supreme Court ruled that "the time for mere 'deliberate speed' has run out."[212] Despite their flaws, the Supreme Court's orders were crucial in addressing a nationwide crisis of segregation in the face of intense political pressure. As one U.S. Senator said, "If we can organize the Southern States for massive resistance to [*Brown*], . . .

203. Final Order, *supra* note 118.

204. *See M.D.*, 907 F.3d at 271-88; *M.D.*, 929 F.3d at 277-81.

205. *See, e.g.*, Russell L. Weaver, *The Rise and Decline of Structural Remedies*, 41 SAN DIEGO L. REV. 1617 (2004).

206. Brown v. Bd. of Educ. (*Brown II)*, 349 U.S. 294 (1955); *see also* Preston, *supra* note 22; Brenda Álvarez, *Revisiting Brown v. Board of Education – 70 Years Later*, NEATODAY (May 9, 2024), https://perma.cc/TZ8E-HYHK.

207. Fiss, *supra* note 20, at 879.

208. OWEN FISS, THE CIVIL RIGHTS INJUNCTION 87-88 (1978).

209. LEARNED HAND, THE BILL OF RIGHTS 55 (1958).

210. *Brown II*, 349 U.S. at 301.

211. *Separate Is Not Equal:* Brown v. Board of Education, SMITHSONIAN NAT. MUSEUM AM. HIST. https://perma.cc/Z62H-A7TU.

212. 377 U.S. 218, 234 (1964).

the rest of the country will realize that racial integration is not going to be accepted in the South."[213]

Yet desegregation became the law of the land. In this instance, the federal judiciary leveraged its insulated status to hold schools accountable for segregation in ways that the political branches could not. To this day, *Brown* is held up as the shining moment in the Supreme Court's history, despite the fierce backlash to judicial overreach at the time. As former Justice Stephen Breyer said in a speech, "May 17, 1954, [the day *Brown I* was decided] was a great day—many would say the greatest day—in the history of that institution."[214]

After *Brown*, renowned legal scholar Owen Fiss predicted that structural injunctions could become perhaps the most important mode of constitutional adjudication.[215] And for a time, it was. Federal courts began to use structural injunctions to address other previously unsolvable constitutional maladies. Federal courts reformed government institutions from mental health institutions and schools to prisons and state agencies.[216] Courts ordered schools to bus students to other districts to remedy segregation and required prisons to implement population caps to improve living conditions for prisoners.[217] But as the federal court system shaped the country in unprecedented ways, a growing backlash began to brew.

Richard Nixon became president in 1969, running on a platform that included reigning in the activist Warren Court.[218] Social conservatives had grown alarmed by the Warren Court's landmark rulings, including ordering desegregation, legalizing contraceptives, and banning school-sponsored prayer in public schools.[219] Within two years, President Nixon had replaced four Supreme Court Justices with his own strict constructionist choices.[220] The new Supreme Court delivered on Nixon's promise to take back the court system. In a series of decisions, the Court handed down new precedents requiring "narrow tailoring" of remedies to constitutional violations.[221]

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213. *The Southern Manifesto and "Massive Resistance" to* Brown, NAACP LEGAL DEF. & EDUC. FUND, https://perma.cc/USH8-WHM3.

214. Just. Stephen Breyer, Brown*: One Constitution. . ...One People. . ...One Nation*, U.S. SUP. CT. (May 17, 2004), https://perma.cc/BJB8-8SLX.

215. *See* FISS, *supra* note 208.

216. *See, e.g.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Hutto v. Finney, 437 U.S. 678 (1978).

217. *See infra* Part IV.C.

218. *See generally* Chris Hickman, *Courting the Right: Richard Nixon's 1968 Campaign against the Warren Court*, 36 J. SUP. CT. HIST. 287 (2011).

219. Matt Ford, *Conservatives' Coming War on the Warren Court*, NEW REPUBLIC (Mar. 4, 2019), https://perma.cc/KMU8-RLM7.

220. *Nixon and the Supreme Court*, NAT'L ARCHIVES (Sept. 22, 2021), https://perma.cc/7VWB-P476.

221. Fiss, *supra* note 20, at 879-80. This Article discusses one version of narrow tailoring, the type that regulates the scope of injunctions. This Article does not address the other version of narrow tailoring, which requires that laws with racial classifications be narrowly tailored to a compelling public purpose. *See id.* at 879.

For instance, in *Milliken v. Bradley*, the Court used narrow tailoring to strike down an injunction that would have desegregated Detroit's metropolitan school district by imposing desegregation procedures on suburban school districts.[222] That same year, the Fifth Circuit held that narrow tailoring required injunctions to tightly fit the constitutional violation, so much so that a court could not order "relief beyond what was minimally required to comport with the Constitution[]."[223] Yet narrow tailoring directly conflicted with traditional understandings of equity jurisprudence, which requires that injunctions be broad and effective.[224] As a result, Owen Fiss argued that "the Supreme Court has been moving backwards on civil rights" for the last fifty years.[225] The narrow tailoring doctrine has become a fixture of constitutional litigation in recent years, making effective injunctions for rights violations elusive.

B. Reforming Foster Care Systems Without the Structural Injunction

With the decline of the structural injunction, foster care plaintiffs have found an alternate way to reform foster care systems in today's hostile legal landscape. Since the 1980s, advocacy groups such as Children's Rights and the National Center for Youth Law have brought over forty class action lawsuits against child welfare agencies.[226] And despite the high bars to bringing constitutional claims based on executive branch action,[227] federal courts only dismissed a few of these cases in pre-trial litigation.[228] Rather, in the vast majority of these cases, the government defendants entered into settlement agreements or consent decrees with the foster children plaintiffs.[229] These settlement agreements or consent decrees are enforceable by the federal district court and often include years of reporting and monitoring by independent parties.[230] These agreements have caused states to spend hundreds of millions of dollars to fix systemic issues in their foster care systems that may have otherwise been left unaddressed.[231]

Advocates in the child welfare space now rely primarily on consent decrees

222. 418 U.S. 717, 750 (1974).

223. Gates v. Collier, 501 F.2d 1291, 1303 (5th Cir. 1974).

224. Fiss, *supra* note 20, at 880-81.

225. *Id.* at 903.

226. *Summary of Child Welfare Class Action Litigation*, CASEY FAMILY PROGRAMS (Feb. 28, 2024), https://perma.cc/BHN9-C9HL [hereinafter Casey Summary]; *see also In the Courts*, CHILD.'S RTS. https://perma.cc/A9TT-7XKA (last visited Nov. 21, 2024).

227. *See supra* Part II.A.

228. Casey Summary, *supra* note 226.

229. *Id.*

230. *Id.*

231. *See, e.g.*, Gene Perry, *In The Know: Oklahoma DHS Reforms to Cost $150 Million a Year*, OK POLICY (Apr. 2, 2012), https://perma.cc/M8GY-VP7K (describing an effort in Oklahoma to reform the child welfare system amounting to $150 million per year following a settlement agreement with Children's Rights).

and settlement agreements to drive reform in state foster care systems.[232] Child protection agencies in over a dozen states (including Arizona, Missouri, Georgia, Florida, and Kansas) are currently operating under court supervision through either consent decrees or settlement agreements.[233] Another eleven states are facing ongoing class action litigation, and at least ten older class action cases have been resolved within the last ten years following successful compliance by the state agency.[234] For example, after fourteen years of monitoring brought on by a consent decree from a 1988 class action lawsuit, Alabama quadrupled its spending on child welfare and reduced its average caseload per worker from fifty to eighteen.[235] In this way, advocates have been able to reform foster care systems by relying on state cooperation (through consent decrees) rather than forcing state cooperation (through structural injunctions).

Legal realists posit that this type of reform is prevalent because outside factors push state agencies to settle early in child welfare cases.[236] Foster care class actions include shocking factual allegations, often about children who have been severely abused and even killed.[237] These facts, even when coupled with less powerful legal claims, push state agencies toward settlement.[238] Foster care class actions also attract negative media attention, which pressures states to end litigation quickly.[239] Most of the states that have been sued, even those with a more conservative approach to social services (such as Arizona, Florida, and Georgia), have acquiesced to these pressures.[240] In fact, the nonprofit Casey Family Programs, which tracks class action litigation related to child welfare, identified almost thirty class action lawsuits that resulted in a settlement agreement or consent decree, and just one case—*M.D.* in Texas—that was ultimately resolved through a court order.[241] This means that child welfare class actions almost always end in settlement and rarely proceed to judgment, likely due to the external pressures of child welfare litigation. Of course, the efficacy of these outside factors depends entirely on the state agency itself and whether state leaders are swayed by these pressures.

An example of this phenomenon is *D.G. v. Yarbrough*,[242] an Oklahoma case

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232. Zach Strassburger, *Crafting Complaints and Settlements in Child Welfare Litigation*, 21 U. PA. J. L. & SOC. CHANGE 219, 224 (2018).

233. Casey Summary, *supra* note 226. A consent decree is a negotiated resolution that is entered as a court order, which allows for prompt enforcement if breached. U.S. Dep't of Just., Just. Manual § 1-20.010 (2023).

234. Casey Summary, *supra* note 226.

235. Erik Eckholm, *Bleak Stories Follow a Lawsuit on Oklahoma Foster Care*, N.Y. TIMES (Apr. 16, 2008), https://perma.cc/3AWR-CHA3 (describing the Alabama settlement).

236. Strassburger, *supra* note 232, at 220.

237. *See, e.g.*, Complaint, *supra* note 6, ¶¶ 343-44; Casey Summary, *supra* note 226.

238. Strassburger, *supra* note 232, at 220.

239. *Id.*

240. *See* Casey Summary, *supra* note 226; *State Safety Net Interactive*, BROOKINGS (June 4, 2024), https://perma.cc/AWH5-W3P9.

241. Two cases were dismissed on procedural grounds. Casey Summary, *supra* note 226.

242. D.G. *ex rel.* Stricklin v. Yarbrough, No. 08-CV-074, 2012 WL 7829602 (N.D.

that dealt with Fourteenth Amendment violations in the state's foster care system.[243] Like in *M.D.*, Children's Rights brought a Section 1983 class action lawsuit against Oklahoma state officials on behalf of thousands of foster children.[244] The foster children alleged deprivations of their due process right to be free from unreasonable risk of harm, which included allegations of excessive caseworker caseloads, dangerous emergency shelters, a severe shortage of foster homes, and unsafe placements for foster children.[245] Oklahoma was initially resistant to the allegations, defending itself in the news and asserting that "Oklahoma is very aggressive at protecting children."[246] But after four years of litigation, the foster children reached a settlement agreement with the State of Oklahoma[247] requiring the State to spend over $100 million over five years to meet thirty child welfare standards that federal monitors identified.[248]

Some of the Oklahoma Department of Human Services Commissioners initially opposed the settlement because it required oversight from out-of-state experts, but the Commissioners eventually approved the settlement with a vote of 6-3.[249] A panel of three monitors will oversee Oklahoma's foster care system until it reaches two years of continuous good-faith compliance with the thirty standards in the settlement, which Oklahoma is implementing through a program called the Pinnacle Plan.[250] In her final State of the State address, Oklahoma Governor Mary Fallin framed the settlement as an accomplishment for the State of Oklahoma, lauding "the great policy strides we made to enact on the Department of Human Services Pinnacle Plan to meet the needs of abused or abandoned children."[251]

Pressuring state agencies into wide-ranging settlements and consent decrees has been a creative way to fight for foster children's rights in an increasingly hostile legal landscape. This approach circumvents separation-of-powers gridlock: when the state executive and legislature fail to uphold constitutional rights of foster children, courts are the last remaining venue to seek redress. As the Executive Director of Children's Rights states, "Children's Rights has the legal expertise to litigate these kinds of cases. But we view these cases more as reform

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Okla. Dec. 19, 2012).

243. Complaint for Injunctive and Declaratory Relief and Request for Class Action ¶¶ 236-40, *D.G.*, 2012 WL 7829602 (No. 08-CV-074).

244. *Id.* ¶¶ 1, 5.

245. *Id.* ¶¶ 8, 239.

246. Eckholm, *supra* note 235.

247. Final Order Approving Compromise and Settlement Agreement, *D.G.*, 2012 WL 13418934 (No. 08-CV-074).

248. Tess Maune, *$100 Million Plan to Improve Oklahoma Foster Care System Approved*, NEWS ON 6 (July 25, 2012), https://perma.cc/Q2GS-S99H; Casey Summary, *supra* note 226.

249. *Oklahoma Settles Foster Kids' Suit, Agrees to Reform State-Run System*, 18 WESTLAW J. CLASS ACTION 13 (2012).

250. Casey Summary, *supra* note 226.

251. *Oklahoma Gov. Mary Fallin's 2018 State of The State Speech*, KGOU (Feb. 6, 2018), https://perma.cc/HZ8V-HPSH.

campaigns than as lawsuits."[252] Current jurisprudence makes clear that the federal judiciary is moving away from the interventionist era of *Brown* and into a more hands-off approach, which is what makes settlement particularly effective. By leveraging outside pressures, these class action lawsuits can push state governments into transformational settlements without implicating the weakened injunctive powers of the federal judiciary. Yet not every state is willing to enter into such settlement agreements with children's rights advocates.

C. A Foundational Flaw in Rights Enforcement for Foster Children

Despite the success of settlements in other states, Texas shows that the emphasis on early settlement in the public litigation landscape is not a failsafe solution to protect the rights of foster children. *M.D.* is one of the very few foster care class actions that has actually gone to judgment, and it exposes the insufficient remedial power of federal courts in the foster care context. As the *Texas Standard* reports, "While other states normally settle these kinds of class action lawsuits and work with the courts to improve foster care, the state of Texas has fought Jack's ruling tooth and nail."[253] Texas' recalcitrance exposes a foundational flaw in the way this country's legal system protects vulnerable children: an unwilling state government can continuously fail to comply with a federal court's injunction, even after the injunction has been weakened on appeal and even after the state has been held in contempt. Without robust enforcement mechanisms, courts cannot enforce the constitutional rights of vulnerable foster children.

As shown by the many lawsuits alleging unsafe conditions in foster care systems nationwide, the rights of foster children are routinely deprioritized in state political processes.[254] By definition, foster children are unable to vote or meaningfully participate in other political processes due to their underage status. Where other children might benefit from their parents' advocacy, foster children do not, as they often lack reliable parental figures with the capacity to participate in political processes on their behalf. Foster children's lack of political power is further complicated by their status as low-income and often racial minorities. Nationwide, the majority of foster children are children of color, and they are disproportionately Black.[255] Studies show that 23% of foster children are Black even though only 14% of the country's children are Black.[256] Additionally, studies show that almost half of foster children come from families with incomes

252. Marcia Robinson Lowry, *A Powerful Route to Reform or When to Pull the Trigger: The Decision to Litigate*,
in FOR THE WELFARE OF CHILDREN: LESSONS LEARNED FROM CLASS ACTION LITIGATION 1, 6 (Judith Meltzer et al. eds., 2012).

253. Fogel, *supra* note 89.

254. *See* Casey Summary, *supra* note 226.

255. *Race of Children in Foster Care: Understanding Disparities and Statistics*, PENNY LANE CTRS., https://perma.cc/UZ85-L65P.

256. *Id.*; *Population Distribution of Children by Race/Ethnicity*, KAISER FAM. FOUND.,

below the federal poverty limit.[257]

Foster children are the precise population that should be protected by the federal courts' mandate to vindicate constitutional rights, but in today's federal courts, they are not. The following Part proposes a path forward to enable federal courts to protect foster children.

IV. TOWARDS A RIGHTS-FOCUSED THEORY OF REMEDIAL POWER FOR FOSTER CHILDREN

When the magnanimity of state leaders is not enough to ensure compliance, courts must apply more robust mechanisms to enforce the rights of vulnerable foster children. The Fourteenth Amendment *is* the law of the state—failing to comply with it due to state policy failures is not an option.[258] Fifty years ago, federal courts used broad injunctions to redress constitutional violations even more complex than that of *M.D*.[259] Now, federal courts are confined by narrow tailoring and other deferential doctrines that allow state constitutional violations to go unchecked. I argue that the federal judiciary should return to its prior jurisprudence—using broad remedies rather than narrow tailoring—when (1) the institution has been historically resistant to reform and (2) when the rights of a vulnerable population are at stake.

A. Narrow Tailoring's Democratic Values

Scholars have long questioned the true purpose of narrow tailoring. Narrow tailoring mandates that a federal court may not order "relief beyond what was minimally required to comport with the Constitution[]."[260] In other words, a court's remedy must tightly fit the constitutional violation. As Owen Fiss has argued, the narrow tailoring doctrine is "infused with contested political or moral notions that are, as far as I can tell, not rooted in the Constitution and that are, in any event, at odds with the overarching purpose of the Civil War Amendments."[261] Abram Chayes has explained that it is perhaps impossible to establish that a remedy tightly fits with a constitutional violation because injunctions, by their nature, stem from a federal court's broad, equitable powers.[262] For these

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https://perma.cc/Q86Z-NXWZ.

257. Stephanie Nieto, *The Cost of Being Poor: Entering Foster Care and Losing Hope*, PETERSHEIM ACAD. EXPOSITION (2019), https://perma.cc/KA3Z-E35Q.

258. Testa v. Katt, 330 U.S. 386, 391 (1947); *see also* M.D. *ex rel.* Stukenberg v. Abbott (), 907 F.3d 237, 297 (5th Cir. 2018) (Higginbotham, J., dissenting).

259. Fiss, *supra* note 20, at 879.

260. Gates v. Collier, 501 F.2d 1291, 1303 (5th Cir. 1974).

261. Fiss, *supra* note 20, at 880. Fiss points out that history shows that the Civil War Amendments were meant to prevent the state from perpetuating the harms caused by slavery. The political or moral notions associated with the conservatism of narrow tailoring are thus not historically supported, in Fiss's view.

262. Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 46 (1982) ("This discretion makes it impossible to identify a unique remedial regime

reasons, some have wondered whether the values underlying narrow tailoring are grounded in the law, or rather in the political imperatives of previous Supreme Courts.[263]

Other scholars have argued that the narrow tailoring doctrine is a necessary outgrowth of separation of powers. The Constitution grants the judiciary only the power to decide cases and controversies[264]—not to make policy or spend money—hence Alexander Hamilton's assertion that the judiciary would be "the least dangerous" branch.[265] When judicial remedies cross into the realm of policymaking, the concern is that courts are exercising powers that the Constitution has delegated to the other branches.[266] But in cases involving complex institutional problems, federal courts may be unable to remedy a constitutional violation without handing down an injunction that could be seen as encroaching on the political branches.[267] In these kinds of cases, the doctrine of narrow tailoring is meant to curtail courts' intrusion into policymaking by requiring a court's remedy to tightly fit the constitutional violation at issue.[268]

For instance, in the desegregation case *Milliken v. Bradley*, the Supreme Court struck down a remedial order that would have required suburban school districts to participate in busing to address segregation in metropolitan Detroit school districts.[269] The federal district court determined that it would be impossible to desegregate the metropolitan school districts without involving the suburban districts, even though only the metropolitan school districts were unconstitutionally segregated.[270] Under narrow tailoring, the scope of the district court's remedy did not fit the scope of the violation, so the Supreme Court struck it down.[271] While some applauded the court's emphasis on separation of powers through the narrow tailoring doctrine, many others did not. As Martha Minow noted recently, "*Milliken* marked the beginning of the end of serious efforts to desegregate America's public schools."[272]

Narrow tailoring is also meant to advance key principles of federalism when the federal judiciary imposes a remedy on a state. While separation of powers explicitly applies to the three federal branches of government, principles of federalism apply those separation-of-powers constraints on the federal judiciary relative to state branches of government as well.[273] As Justice Thomas once wrote,

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that follows ineluctably from and is measured by the determination of substantive liability.").

263. *See supra* Part III.A.

264. U.S. CONST. art. III, § 2, cl. 2.

265. THE FEDERALIST NO. 78 (Alexander Hamilton).

266. *See School Desegregation*, 109 HARV. L. REV. 239, 246 (1995).

267. *See* Chayes, *supra* note 262, at 46.

268. *See, e.g.*, M.D. *ex rel.* Stukenberg v. Abbott, 929 F.3d 272, 287-88 (5th Cir. 2019).

269. 418 U.S. 717, 745-46 (1974).

270. *Id.* at 718.

271. *Id.* at 750, 752.

272. Brown *at 60 and* Milliken *at 40*, HARV. ED. MAG. (June 4, 2014), https://perma.cc/3BZU-87ZP.

273. *See School Desegregation*, *supra* note 266, at 247.

"what the federal courts cannot do at the federal level they cannot do against the States; in either case, Article III courts are constrained by the inherent constitutional limitations on their powers."[274] On top of preventing the judiciary from intervening in political processes, narrow tailoring is meant to limit federal government intrusion into state activities, like child welfare in *M.D.* and public education in *Milliken*. In a perfect world, narrow tailoring would strike a balance between a court's mandate to address constitutional violations and its obligation to give deference to the states and to the political branches.

B. Narrow Tailoring's Flawed Assumptions

Unfortunately, narrow tailoring does not live up to the important democratic values it is meant to uphold. Cases like *M.D.* in Texas show that narrow tailoring is flawed because it relies on false assumptions. Narrow tailoring assumes that government institutions have constitutional violations that are discrete, rather than complex and interconnected. It assumes that if a court hands down a narrowly tailored remedy, state political branches will comply. Lastly, narrow tailoring assumes that the political process works for vulnerable populations. These assumptions fail in cases like *M.D.*, in which Texas has been able to ignore the federal judiciary's narrow remedy, leaving foster children without recourse. The following paragraphs consider why these assumptions about narrow tailoring fail in the context of foster care.

Narrow tailoring assumes that institutions have constitutional violations that are discrete enough to tightly fit with a given remedy.[275] But constitutional violations often stem from incredibly complex and entrenched institutional problems. In a recent prison reform case, a federal judge described California's complex constitutional violation as "a spider web, in which the tension of the various strands is determined by the relationship among all the parts of the web, so that if one pulls on a single strand, the tension of the entire web is redistributed in a new and complex pattern."[276] It is unrealistic to assume that a remedy can always tightly fit an institution's constitutional violation.[277]

In *M.D.*, the Fifth Circuit ultimately affirmed two broad constitutional violations in the Texas foster care system: the first was caseload management, and the second was monitoring and oversight.[278] These categories do not lend themselves to discrete remedies; rather, a variety of solutions are likely necessary to resolve issues as broad as these. The district court's injunction attempted to address the wide-ranging nature of the violations, requiring a broad swath of remedies, from specific kinds of worker training to more rigorous child visitation

274. Missouri v. Jenkins, 515 U.S. 70, 132 (1995) (Thomas, J., concurring).
275. *See, e.g.*, M.D. *ex rel.* Stukenberg v. Abbott, 929 F.3d 272, 287-88 (5th Cir. 2019).
276. Brown v. Plata, 563 U.S. 493, 525 (2011).
277. *See, e.g.*, Chayes, *supra* note 262, at 46.
278. M.D. *ex rel.* Stukenberg v. Abbott, 907 F.3d 237, 273, 276 (5th Cir. 2018).

policies.[279] Yet on appeal, the Fifth Circuit used narrow tailoring to strike down these remedial provisions and dozens of others.[280] The Fifth Circuit even struck down a cap on cases per caseworker, which the judges acknowledged struck "at the heart of" the caseload management violation.[281] The Fifth Circuit's rulings in *M.D.* show how narrow tailoring can be used to weaken needed remedies even when the constitutional violation is extensive.

Narrow tailoring also assumes that an institution will fully comply with the narrow list of remedies imposed by the court. Under narrow tailoring, courts provide an extremely limited set of remedies to exactly address the constitutional violation at issue.[282] But what happens when a state only complies with half of these carefully whittled-down remedies? Or none? Rights bearers find themselves no closer to having their rights vindicated than when they first started the lawsuit. In *M.D.*, the Fifth Circuit struck down most of the remedial provisions the federal district court ordered.[283] Yet Texas has not complied with most of those remaining provisions.[284] From a legal realist perspective, if the Fifth Circuit had refrained from striking so many provisions from the district court's order, like the caseload cap or the explicit training requirements, Texas may have felt more pressure to at least comply with *some* of the remedies.[285] Even after years of supervision by an engaged district court judge—who has now been removed from the case—Texas has not come close to curing its constitutional violation.[286] If the federal court had been empowered to hand down a more robust structural injunction, with stronger enforcement provisions attached, the judiciary could have pressured Texas to make greater progress on remedying its constitutional violation.

One of the most insidious assumptions underlying narrow tailoring is the assumption that the political process will work to protect vulnerable individuals. Foster children cannot effectively advocate for themselves in political processes due to their age, low-income and often minority status, and lack of adult support. Instead, foster children must hope that the media will pick up their stories or that children's rights advocates will decide to represent them in court.[287] Even when those external factors are at play, foster children, like those in Texas, may still

279. Final Order, *supra* note 118, at 22, 70.

280. *M.D.*, 907 F.3d at 271.

281. *Id.* at 274.

282. *See, e.g.*, Gates v. Collier, 501 F.2d 1291, 1303 (5th Cir. 1974) (stating that a court could not order "relief beyond what was minimally required to comport with the Constitution").

283. *See M.D.*, 907 F.3d at 271; M.D. *ex rel.* Stukenberg v. Abbott, 929 F.3d 272 (5th Cir. 2019).

284. *See, e.g.*, Dey, *supra* note 14.

285. *Cf.* Robert E. Easton, Note, *The Dual Role of the Structural Injunction*, 99 YALE L. J. 1983, 1985 (1990) ("Past decrees show that specific, street-level directives instructing officials to behave in certain ways are . . . relatively successful at achieving specific reforms within an institutional setting.").

286. *See, e.g.*, Dey, *supra* note 14.

287. *See supra* Part III.B.

find themselves unable to vindicate their constitutional rights.[288]

For instance, in *M.D.*, Texas' "monitoring and oversight" constitutional violation stemmed in large part from a record-keeping system that was "shockingly haphazard and inefficient."[289] Yet the Fifth Circuit struck down a remedy requiring DFPS to deploy an integrated record-keeping system, which would have resolved the issue.[290] Once again, the court chose a less invasive approach, deferring to Texas' contention that creating an integrated record-keeping system would be "tremendously expensive."[291] The Fifth Circuit did not want to impose that cost on the state, even though legally, it could have.[292] Rather, the Fifth Circuit removed the record-keeping remedy from the order so that Texas could resolve its record-keeping issues as it wished.[293] The Fifth Circuit did not impose any kind of intermediate remedy or require Texas to make progress in this area.[294] Predictably, Texas' political branches chose not to take action on overhauling the record-keeping system—instead, Texas continued to move forward with its low-cost efforts to privatize the foster care system.[295] Courts should not assume that the rights of vulnerable individuals will be vindicated when they defer key remedies to political processes.

M.D. demonstrates that the decline of the structural injunction and the rise of narrow tailoring prioritizes separation-of-powers and federalism principles over children's constitutional rights. But modern jurisprudence does not need to be this way. As Doug Rendleman has argued, principles of federalism and separation of powers "are not persuasive when balanced against society's need to vindicate plaintiffs' constitutional rights."[296] The Supreme Court has reiterated this notion.[297] Justice Kennedy discussed this phenomenon in a recent prison reform case, emphasizing that courts "must not shrink from their obligation to 'enforce the constitutional rights of all persons,' even when "a remedy would involve intrusion into the realm of [state policy]."[298] The following Subpart proposes an alternative to narrow tailoring that could better vindicate the rights of foster children, like those still waiting for justice in Texas.

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288. *See supra* Part III.C.

289. M.D. *ex rel.* Stukenberg v. Abbott, 907 F.3d 237, 268 (5th Cir. 2018).

290. M.D. *ex rel.* Stukenberg v. Abbott, 929 F.3d 272, 279 (5th Cir. 2019).

291. *Id.*

292. *See infra* Part IV.C (describing prior cases in which courts have imposed significant costs on states to cure constitutional violations).

293. *M.D.*, 929 F.3d at 279.

294. *Id.*

295. *See supra* Part I.B.

296. Doug Rendleman, Brown II*'s "All Deliberate Speed" at Fifty: A Golden Anniversary or a Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 SAN DIEGO L. REV 1575, 1597 (2004).

297. *See* Brown v. Plata, 563 U.S. 493, 511 (2011) (quoting Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam)).

298. *Id.*

C. A Rights-Focused Theory to Replace Narrow Tailoring

Narrow tailoring and weak judicial interventions are failing foster children. Because of this, Texas has been able to default on its constitutional obligations to its most vulnerable children.[299] I propose that federal courts return to using broad injunctive relief to cure constitutional violations when (1) the institution has been historically resistant to reform, and (2) the rights of a vulnerable population are at stake.

The power of a federal court to grant comprehensive injunctions is a logical next step when a state institution, for a period of years, is aware of its structural deficiencies but does not remedy them. The Fifth Circuit panel in *M.D.* suggested a version of the first prong I propose: "principles [of State deference] are less applicable where, as here, the State has had ample opportunity to cure the system's deficiencies."[300] In *Plata v. Brown*, a prison reform case, the Supreme Court pointed out a similar phenomenon in handing down a robust remedy under the Prison Litigation Reform Act: "The Court cannot ignore the political and fiscal reality behind this case. California's Legislature has not been willing or able to allocate the resources necessary to meet this crisis . . . . There is no reason to believe it will begin to do so now."[301]

Federal courts must be able to take more aggressive action when facing entrenched constitutional violations such as those at issue in *M.D.* and *Plata*. The most famous example is desegregation: following decades of unabated school segregation, federal courts in the 1970s went so far as to require states to bus thousands of students to various schools to cure a constitutional violation.[302] Without broad remedial powers, federal courts would not have made headway in addressing school segregation when faced with the intransigence of state officials.

The second prong in my proposed scheme recognizes that deferring to the political branches to remedy constitutional violations is not a solution when plaintiffs have no voice in the political process. The many guardrails on federal remedial power derive from a deference to state policymaking,[303] and Texas has repeatedly argued against federal court intervention using states' rights rationales.[304] Yet it is unrealistic to expect foster children to advocate for themselves in the state political process. In general, foster children are low-income and racial minorities; they are too young to vote and lack adult figures who can advocate

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299. *See supra* Part II.C.

300. M.D. *ex rel.* Stukenberg v. Abbott, 907 F.3d 237, 272 (5th Cir. 2018).

301. *Plata*, 563 U.S. at 530 (holding that a court-mandated population limit on California prisons was necessary to remedy constitutional violations faced by prisoners and was authorized by the federal Prison Litigation Reform Act).

302. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971).

303. *See, e.g.*, Holt v. Sarver, 300 F. Supp. 825, 833 (E.D. Ark. 1969); Wyatt v. Stickney, 344 F. Supp. 373, 377 (M.D. Ala. 1972).

304. *See, e.g.*, *AG Paxton Defends Constitutionality of Texas' Foster Care System at 5th Circuit*, TEX. ATT'Y GEN. (Feb. 15, 2018), https://perma.cc/6G2B-AX7U.

for them.[305] The federal judiciary must temper its deference to separation-of-powers principles in situations like these, and instead understand that vulnerable foster children are unlikely to vindicate their constitutional rights through the other branches. Federal courts must take these realities into account to fashion robust, realistic structural injunctions to avoid leaving foster children without recourse as the modern federal judiciary has done in *M.D.*[306]

If the Fifth Circuit had used this approach in *M.D.*, the Texas foster care system might look very different today. The district court's comprehensive order originally included over one hundred specific, data-backed remedies designed to force Texas to fix its longstanding constitutional violations against foster children.[307] If the district court had been able to use its broad injunctive powers without the Fifth Circuit's intervention, Texas would have been required to limit the number of caseworkers per supervisor, implement comprehensive training and competency testing for new caseworkers, and report quarterly on the number of casework-child visits, among many other requirements.[308] These steps (and the many other provisions in the order) would have drastically improved the operations of Texas' broken foster care system by mandating concrete, specific reforms informed by years of research by the court's special masters.[309] Instead, the foster care system has remained in stasis.

Along with a more effective remedy, broad equitable powers could have enabled the district court to enforce its remedial order more strictly.[310] For instance, in one 1970s case, a federal court required that Arkansas pay a large fee directly out of the Department of Corrections' funds for lack of compliance.[311] Similarly, a federal court with broad equitable powers could levy large fines against Texas if it missed certain compliance deadlines, and increase the fines if the defiance continued. A court with broad powers could even place these fines in escrow and return them only for spending on the foster care system.[312] In this scenario, once Texas had complied with the provisions—which could have been formulated by the special masters in collaboration with Texas officials—the court could phase out its oversight of Texas' foster care system completely.[313] Even with broader powers, the courts' involvement in the state political branches would have a clear

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305. *See supra* Part III.C.

306. M.D. *ex rel.* Stukenberg v. Abbott, 152 F. Supp. 3d 684, 828 (S.D. Tex. 2015).

307. *See* Final Order, *supra* note 118.

308. *See id.* at 22, 65, 70.

309. *Id.* at 2-4.

310. *Cf.* Hutto v. Finney, 437 U.S. 678, 687 n.9 (1978) (observing that the state's non-compliance with earlier court orders gave the district court broad equitable powers to cure constitutional violations).

311. *Id.* at 689-93.

312. *Cf. id.* at 690-91 (describing conditional fines as a potential remedy in civil contempt proceedings).

313. *See* Casey Summary, *supra* note 226 (identifying nine states within the past ten years that had completely exited court oversight following compliance with previously negotiated child welfare standards).

end date. This kind of proposal would significantly strengthen the current remedial order, which lacks key provisions to fix the foster system's most pressing problems and relies on contempt threats from the district court judge to attempt to move the remedies along.[314]

Of course, there will be strong objections to a more powerful role for the federal judiciary in these kinds of cases. The first objection is that federal courts are not suited to solving complex institutional problems.[315] Federal judges are generalists and are not necessarily familiar with issues of child welfare or foster care. They are also not immersed in the day-to-day activities of the state political branches, which are responsible for the function and funding of the offending agencies. As such, Texas officials have argued that federal intervention will make it harder for Texas to fix an already complex problem.[316] One state official pointed out that families and nonprofits may be deterred from participating in the foster care system for fear of being audited by federal monitors.[317] While these concerns are valid, they hold less weight given that Texas has had decades to rectify its foster care system on its own. As one state senator put it, "We've lost the chance to make these decisions on our own."[318] Concerns about practicality are also mitigated by the involvement of the district court's special masters. These child welfare experts spent years on the ground researching the Texas foster care system, and their research became the remedial order that the district court handed down.[319] While the federal judge may not have been well-suited to develop the remedial order, the special masters were.

A second major objection to this proposal is that federal courts are not democratically accountable. Allocating broad powers to federal courts risks placing unchecked power in the hands of unelected, insulated judges.[320] In the context of structural injunctions, judges could become long-term managers of state systems without having to answer to the public.[321] Opponents of robust court power assert that it is better to prevent courts from imposing broad injunctions out of deference to the separation of powers than to ensure that constitutional harms are redressed.[322] Yet this approach leaves the rights of vulnerable populations unprotected. Instead, courts should find ways to make structural injunctions more

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314. *See, e.g.*, Dey, *supra* note 14; Wilder, *supra* note 195.

315. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1309 (1976) (identifying counterarguments to broader judicial involvement, including asking, "[c]an the relatively unspecialized trial judge . . . respond adequately for the demands for legislative and predictive fact-finding in the new model?").

316. Reese Oxner & Neelam Bohra, *Texas Foster Care Crisis Worsens, with Fast-Growing Numbers of Children Sleeping in Offices, Hotels, Churches*, TEX. TRIB. (July 19, 2021), https://perma.cc/7LPS-8CZJ.

317. *Id.*

318. Evans, *supra* note 91 (quoting Texas Senator Kirk Watson).

319. *See* Special Masters' Recommendations, M.D. *ex rel.* Stukenberg v. Abbott, 152 F. Supp. 3d 684 (S.D. Tex. 2015) (No. 2:11-cv-00084); Final Order, *supra* note 118.

320. *See, e.g.*, Chayes, *supra* note 315, at 1309.

321. *See School Desegregation*, *supra* note 266, at 246.

322. *Cf. id.* at 247-49.

democratically accountable. First, structural injunctions should continue to include guardrails to keep federal judges from completely taking over state policymaking in a certain area. When exercising broad power, courts need to include clear exit criteria so that the court's management has an established end. For example, once the state agency meets certain performance metrics that place it above the constitutional threshold, the court should phase out its oversight. Additionally, courts could solicit input from state officials and employees to inform their remedial orders.[323] This way, the injunction could be viewed as a collaborative, clearly defined project rather than a takeover by the judicial system.

Historically, the use of broad injunctive power in the face of intransigent government agencies has been effective in other kinds of cases. In the prison rights case of *Hutto v. Finney*, a federal court used its broad injunctive power to remedy a long-standing constitutional violation facilitated by the State of Arkansas.[324] In 1969, a federal district court ruled that conditions in the Arkansas prison system constituted cruel and unusual punishment, violating the Eighth and Fourteenth Amendments.[325] The court initially required that Arkansas "make a substantial start" to improve prison conditions and report on its progress.[326] But the court later found Arkansas' progress to be inadequate and issued a new injunction identifying the four most pressing problem areas for the state to address.[327] The court later found that the conditions in Arkansas had improved and began to make plans to relinquish supervision.[328] But by 1976, the district court found that the prison conditions had once again deteriorated.[329] It ruled that the constitutional violations first identified in 1969 remained uncured seven years later.[330]

In response, the federal court imposed a new, strict remedial order and significant fines on Arkansas.[331] The order set the maximum isolation sentence to thirty days and limited the number of prisoners who could be placed in one cell, among many other requirements.[332] The court also ruled that the state had acted in bad faith, imposing a hefty attorney's fee "to be paid out of Department of Correction Funds."[333] On appeal, Arkansas challenged the court's thirty-day cap on isolation sentences, arguing that the remedy was overbroad because indeterminate isolation sentences were not necessarily unconstitutional.[334]

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323. Note that the special masters in *M.D.* attempted to solicit input from Texas officials, but Texas officials refused to participate. *See* Final Order, *supra* note 118, at 3, 65.

324. 437 U.S. 678, 687 (1978); *see also* Preston, *supra* note 22, at 1692-94 (discussing the structural injunction in *Hutto*).

325. Holt v. Sarver (*Holt I*), 300 F. Supp. 825, 833 (E.D. Ark. 1969).

326. *Id.*

327. Holt v. Sarver (*Holt II)*, 309 F. Supp. 362, 385 (E.D. Ark. 1970).

328. Holt v. Hutto (*Holt III*), 363 F. Supp. 194, 216 (E.D. Ark. 1973).

329. Finney v. Hutto, 410 F. Supp. 251, 275 (E.D. Ark. 1976).

330. *Id.*

331. *Id.* at 270, 272, 274, 277-81, 285.

332. Hutto v. Finney, 437 U.S. 678, 684 (1978).

333. *Id.* at 684-85 (quoting *Finney*, 410 F. Supp. at 285).

334. *Id.* at 685.

In its ruling for the prisoners, the Supreme Court emphasized the interdependence of the remedial orders and how they would ultimately work together to fix the violation, as one single remedy could not directly cure the constitutional issue.[335] The Supreme Court made clear that it was well within the district court's broad remedial power to fashion and refashion injunctive relief to cure constitutional violations.[336] As the Court stated, "[T]aking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance."[337] While it took a decade, Arkansas eventually achieved substantial compliance with the court's structural injunction, addressing entrenched issues from inadequate medical services to prisoner-on-prisoner brutality.[338]

Hutto, like *M.D.*, centered on a seemingly unsolvable state crisis: deplorable conditions in prisons across the state, described as "a dark and evil world completely alien to the free world."[339] Arkansas had been unwilling to fix the unconstitutional prison conditions, and prisoners had little opportunity to assert themselves in the Arkansas state political process. The federal court's persistent, comprehensive, and enforceable injunctions led to significant improvements in Arkansas prisons.[340] As Owen Fiss and Doug Rendleman wrote, the litigation "was widely recognized as a catalyst for prison change and improvement."[341] State leaders explained that the pressure to reform the Arkansas prison system derived from the district court's injunction coupled with the court's willingness to enforce the injunction with sanctions.[342] Today, *Hutto* can be seen as an effective example of a broad remedial judicial intervention, but unfortunately, federal courts have retreated from this decision in years since.[343]

Since *Hutto*, many have opposed the unprecedented judicial intervention—the structural injunction—that became the hallmark of public law litigation in the 1950s and 1960s.[344] As federal courts have retreated from those powers in recent years, the country is left with a question: Are we comfortable leaving constitutional violations unaddressed? *M.D.* in Texas is a prime example of the shortcomings of the narrow tailoring doctrine. Considering the dangerous gridlock facing foster children, federal courts would be well-served in reclaiming their former remedial powers in certain instances. Federal courts must have the power

335. *See id.* at 687.

336. *Id.*

337. *Id.*

338. M. KAY HARRIS & DUDLEY P. SPILLER, JR., U.S. DEP'T OF JUST., AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 71-80 (1977), https://perma.cc/QQ6M-9UA2.

339. *Hutto*, 437 U.S. at 681 (quoting Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970)).

340. *See* OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS 748 (2d ed. 1984).

341. *Id.*

342. *Id.* at 747.

343. H. Brent McKnight, *How Shall We Then Reason? The Historical Setting of Equity*, 45 MERCER L. REV. 919, 962-64 (1994).

344. *See* Fiss, *supra* note 20, at 879.

to take decisive action when state governments are not receptive to reform and when the rights of vulnerable foster youth are at stake. When courts cannot protect constitutional rights, the consequences are real. Nowhere is this more apparent than in Texas' dangerous foster care system.

CONCLUSION

Foster children are among the most vulnerable in our communities. They are predominately low-income children of color, with little ability to advocate for themselves in states' political processes. In Texas, hundreds of thousands of foster children have been shuttled through a dangerous foster care system for decades. Three governors and a dozen legislative sessions later, the Texas foster care system remains constitutionally inadequate. Yet in today's legal landscape, even a federal ruling of unconstitutionality is insufficient to solve Texas' foster care crisis. Today's foster children find themselves at the mercy of state bureaucracies as separation-of-powers principles increasingly weaken federal court remedies. Foster children are caught in a catch-22: the federal court system directs them to use the state political process to remedy their mistreatment, but foster children lack the power to advocate for themselves in the political branches. As each year goes by, more children are irreparably harmed by Texas' unconstitutional foster system. The federal judiciary must evolve to protect them.