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Consent Decrees in Prison and Jail Reform--Relaxed Standard of Review for Government Motions to Modify Consent Decrees

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CONSENT DECREES IN PRISON AND JAIL REFORM—RELAXED STANDARD OF REVIEW FOR GOVERNMENT MOTIONS TO MODIFY CONSENT DECREES

Rufo v. Inmates of the Suffolk County Jail, 112 S. Ct. 748 (1992)

I. INTRODUCTION

In *Rufo v. Inmates of the Suffolk County Jail*,[1] the United States Supreme Court held that a flexible standard of review should apply to requests to modify consent decrees stemming from institutional reform litigation.[2] In doing so, it rejected the use of the "grievous wrong" standard set forth in *United States v. Swift & Co.*[3] Under the *Rufo* Court's flexible standard, "a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance."[4] The Court noted that in addition to the effects of the decree on the parties themselves, the effects of the decree on third parties and the public interest should be taken into account when determining whether or not a change in fact warrants a modification of the decree.[5] The Court also held that if a change in fact or law warrants a modification of a consent decree, the district courts should show great deference to the plans submitted by government officials for implementing such modifications.[6]

This Note examines the development of consent decree review standards from the *Swift* "grievous wrong" standard first enunciated in antitrust litigation, to the dual standards that now apply in public and private law litigation. This Note asserts that the relaxed *Rufo* standard correctly recognizes the need for flexibility in administer-

[1] 112 S. Ct. 748 (1992).
[2] *Id.* at 764-65.
[3] 286 U.S. 106 (1932).
[4] *Rufo*, 112 S. Ct. at 765.
[5] *Id.* at 759.
[6] *Id.* at 764.

ing consent decrees involving the reform of public institutions. This Note also argues that the deferential standard for reviewing proposed modifications effectively reduces the intrusive presence of the courts in the administration of public institutions while insuring that consent decrees remain viable tools for the settlement of institutional reform cases.

II. BACKGROUND

The consent decree is a hybrid of a contract and an injunction. Two litigating parties fashion a prospective remedy and then request the court to enter judgment based on that agreement. As it would in the case of an injunction, the court then monitors the agreement to ensure that the parties comply with its terms.[7] The consent decree offers the parties three benefits over the pursuit of litigation: first, the parties save the costs of a court battle; second, the parties avoid the uncertainties of a trial; and third, the parties retain control over the creation of the remedial plan.[8] However, as is the case with any ongoing relationship, the ability of the parties to foresee all possible changes in circumstances is limited. Changes in fact or law may occur that partially or substantially frustrate the original purposes of the agreement.[9]

In instances where changes in fact or law occur, the nature of the consent decree as a judgment comes into play. The federal courts, bound by the equitable principles embodied in Federal Rule of Civil Procedure 60(b)(5), must upon motion by one of the parties terminate or modify a consent decree if "it is no longer equitable that the judgment should have prospective application."[10] Given the wide range of discretion historically associated with equitable jurisprudence, the rope that binds the courts to a duty to modify the consent decree is tied loosely. As a result, courts have varied widely in their interpretations of what constitutes a change in circumstances significant enough to require a modification of the original injunction.

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7 Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 894.

8 *Id.* at 899.

9 Timothy Stoltzfus Jost, *From* Swift *to* Stotts *and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1102 (1986).

10 Federal Rule of Civil Procedure 60(b) states:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgement, order, or proceeding for the following reasons: . . . (5) the judgement has been satisfied, released, or discharged, or a prior judgement upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgement should have prospective application.

A. THE *SWIFT* STANDARD AND ANTITRUST LITIGATION

The Supreme Court set forth the general principles regarding the modification of consent decrees in *United States v. Swift & Co.*[11] Decided in 1932, *Swift* involved a request for a modification of a consent decree between the federal government and the five largest meat packing companies in the country.[12] The consent decree was originally entered as a settlement of a case under the Sherman Antitrust Act[13] to break up the oligopoly structure of the meat-packing industry.[14] In 1930, ten years after the initial decree, Swift & Co. and Armour & Co. requested that the provision banning investment in related industries be modified to allow the two packers to engage in most of the activities prohibited by the decree.[15] They claimed that the food industry "had been transformed so completely that restraints of the injunction . . . were now useless and oppressive."[16] The lower courts allowed the modification of the consent decree, but the Supreme Court overturned the ruling, denying the request for modification.[17]

Writing for the Court, Justice Cardozo set forth what has become the basic standard for evaluating requests for modification of consent decrees:

> No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.[18]

Taken on its own, this language suggests that a party seeking a modification must meet a high burden of proof in order to receive relief. The references to extreme and unexpected hardship, and the requirement of a "clear showing of a grievous wrong," suggest that

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11 286 U.S. 106 (1932).

12 *Id.* at 110.

13 15 U.S.C. §§ 1-7 (1988).

14 *Swift*, 286 U.S. at 110. The five largest packers, Swift & Co., Armour & Co., Wilson & Co., Morris Packing Co., and Cudahy Packing Co., effectively controlled the meat packing industry and together moved to control "substitute foods" by controlling wholesale and retail food distribution.

15 *Id.* at 113. The provisions of the decree included stipulations banning the five companies from engaging in or holding interests in public stockyard companies, railroads, market newspapers, and cold storage facilities, as well as "manufacturing, selling or transporting any of 114 enumerated food products." *Id.* at 111.

16 *Id.*

17 *Id.* at 120.

18 *Id.* at 119.

Cardozo supported an impossibility of performance[19] approach to the problem, which many lower courts have continued to follow.[20] Yet, earlier in the opinion, Cardozo specifically stated, "We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not a judicial act," and "a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."[21]

The strong assertion of the courts' right to modify consent decrees seems at odds with the shackles Justice Cardozo later put on their ability to exercise that power. A number of courts, including the Supreme Court in *United States v. United Shoe Machinery Corp.*,[22] have attempted to explain this dichotomy by noting that in *Swift*, conditions had not changed enough to prevent the meat-packers from exerting monopoly power in the businesses from which they were banned.[23] In *United Shoe Machinery Corp.*, the Court stated that

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19 The impossibility of performance doctrine in classical contract law requires that a change in law or fact actually make the performance of the contract terms impossible before the parties will be released from their responsibilities under the contract. As Williston states, "The fact that by supervening circumstances, performance of a promise is made more difficult and expensive, or the counter-performance of less value than the parties anticipated when the contract was made, will ordinarily not excuse the promisor [from performance]." 18 WILLISTON ON CONTRACTS § 1963 (3d ed. 1978).

20 *See, e.g.*, Twelve John Does v. District of Columbia, 861 F.2d 295 (D.C. Cir. 1988) (grievous wrong standard applied in jail reform case); Fortin v. Comm'r of Mass. Dep't of Pub. Welfare, 692 F.2d 790 (1st Cir. 1982) (denial of motion by welfare department to modify consent decree regarding welfare eligibility determinations); Coalition of Black Leadership v. Cianci, 480 F. Supp. 1340 (D.R.I. 1979) (grievous wrong standard applied to a request for modification of consent decree in police brutality case); Fox v. United States Dep't of Hous. and Urban Dev., 680 F.2d 315 (3d Cir. 1982) (inability of plaintiffs to procure private mortgage financing not sufficient change in fact to require change in consent decree to force HUD to increase low income rental subsidies); Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987) (district court correct in applying grievous wrong standard to government request for modification of consent decree in prison reform case). *See also* Roberts v. St. Regis Paper Co., 653 F.2d 166 (5th Cir. 1981); United States v. Western Electric Co., 900 F.2d 283 (D.C. Cir.), *cert. denied sub nom.* MCI Communications Corp. v. United States, 111 S. Ct. 283 (1990); SEC v. Advance Growth Capital Corp., 539 F.2d 649 (7th Cir. 1976); Humble Oil & Ref. Co. v. Am. Oil Co., 405 F.2d 803 (8th Cir.), *cert. denied*, 395 U.S. 905 (1969).

21 *Swift*, 286 U.S. at 114-15.

22 391 U.S. 244 (1968).

23 *Id.* at 259. *See* Badgley v. Santacroce, 853 F.2d 50 (2d Cir. 1988) (flexible standard applied but modification of consent decree not allowed); United States v. City of Chicago, 663 F.2d 1354 (7th Cir. 1981) (en banc) (application of grievous wrong standard by district court in request for modification of police promotion quotas incorrect); Keith v. Volpe, 784 F.2d 1457 (9th Cir. 1986) (grievous wrong standard inappropriate when one party moves to have an open term in the consent decree defined); Newman v. Graddick, 740 F.2d 1513, 1520 (11th Cir. 1984) ("A consent decree includes the supervision of changing conduct or conditions and is therefore provisional, modification may be more freely granted."). *See also* King-Seeley Thermos Co. v. Aladdin Indus., Inc., 418

"*Swift* teaches that a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved."[24]

United Shoe Machinery Corp., like *Swift*, involved a government action under the Sherman Act to break United Shoe's monopoly in the manufacturing of shoe machinery.[25] While the government originally sought to have the company dissolved, the district court instead entered an injunction placing restrictions on United Shoe's operations. Despite these measures, United Shoe continued to dominate its market and the government moved for a modification of the earlier decree to break the company into two competitive entities.[26] The district court denied this request, noting that the government had not met its burden under the *Swift* standard and that the decree "had put in motion forces which . . . have eroded United's power."[27] The Supreme Court vacated the district court's decision, stating that "[t]he District Court misconceived the thrust of this Court's decision in *Swift*."[28] The Court felt that the purpose of the United Shoe decree was to try intermediate measures to eliminate the problem before moving to the more extreme measures requested by the government, and that the general purpose of ending United Shoe's dominance of the market was not being advanced.[29]

Given the nature of the issue and the language in the opinion, it is not surprising that *United Shoe Machinery Corp.* has lent itself to a variety of interpretations. Some courts and commentators have interpreted the decision to be a renunciation of the inflexible *Swift* standard.[30] Others, adhering to a more contractual view of the consent decree, note that *United Shoe Machinery Corp.* involved a decree entered after litigation and as such does not apply to consent decrees.[31]

F.2d 31, 34 (2d Cir. 1969); Heath v. DeCourcy, 888 F.2d 1105 (6th Cir. 1989); Plyler v. Evatt, 846 F.2d 208, 212 (4th Cir.) *cert. denied*, 488 U.S. 897 (1988); Nelson v. Collins, 659 F.2d 420, 424 (4th Cir. 1981) (en banc).

24 *United Shoe Machinery Corp.*, 391 U.S. at 248.

25 *Id.* at 245.

26 *Id.* at 247.

27 *Id.* (quoting *United Shoe Machinery Corp.*, 266 F. Supp. 328, 334 (D. Mass., 1967)).

28 *Id.* at 248.

29 *Id.* at 252.

30 *See* King-Seeley Thermos Co. v. Aladdin Indus., Inc., 418 F.2d 31, 34 (2d Cir 1969); Alliance to End Repression v. City of Chicago, 742 F.2d 1007 (7th Cir. 1984) (rehearing en banc); *see generally* Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020 (1986).

31 *See, e.g.*, Fox v. United States Dep't of Hous. and Urban Dev., 680 F.2d 315, 323 (3d Cir. 1982) (stating that *United Shoe Machinery Corp.* was "clearly inapposite" because

Those courts adhering to a contractual view of consent decree look to the Supreme Court's ruling in *United States v. Armour & Co.*[32] for support. *Armour* involved a request by the United States as the plaintiff to modify the 1931 consent decree entered by the court in *Swift*[33] to prevent Greyhound Corp. from acquiring Armour.[34] The government argued that because Greyhound held controlling interests in two grocery firms, the addition of Armour would allow Armour to assert the anti-competitive power the original decree was designed to prevent.[35] Justice Marshall's opinion suggests a contractual interpretation of consent decrees:

> Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy one of the parties to it.[36]

An explanation for this rather technical and narrow reading of the purposes of the decree could be that the Supreme Court, recognizing the inapplicability of a fifty-one-year-old decree, wanted to release Armour from its obligations. The language though, remains as support for a rigid reading of the *Swift* decision.[37]

Whereas *Swift*, *United Shoe Machinery Corp.*, and *Armour* concerned modification requests based on changes in fact, *System Federation No. 91 v. Wright* dealt with a modification request based on a change in law.[38] *System Federation* involved a 1945 consent decree between the railway workers union and non-union railway workers.

"there was an explicit prior adjucation that the defendant had monopolized the relevant market in violation of § 2 of the Sherman Act"). *See also* Rajender v. Univ. of Minnesota, 730 F.2d 1110, 1115 (8th Cir. 1984).

32 402 U.S. 673 (1971).

33 *See supra* notes 11-21 and accompanying text.

34 *Armour*, 402 U.S. at 685. In 1969, the federal government entered a request to modify a consent decree prohibiting Armour from engaging in the grocery business to include General Host Corp., a company involved in food manufacture and sales, and thereby prohibit General Host from purchasing Armour. General Host was then acquired by Greyhound Corp., which in turn acquired a controlling interest in Armour, precipitating the government's request for a modification of the consent decree, which forms the basis for the case at hand. *Id.* at 674.

35 *Id.*

36 *Id.* at 681-82 (footnote omitted).

37 *See also* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (the Supreme Court combined a "four corners" textual interpretation of a consent decree between minority firefighters and the City of Memphis with a policy argument based on the need to respect the interests of innocent third parties (white firefighters) to deny a request for a modification of a consent decree).

38 364 U.S. 642 (1961).

The decree settled a lawsuit brought by the non-union workers under the Railway Labor Act by mandating an open shop in conformity with the Act.[39] In 1957, the Railway Labor Act was amended to permit closed union shops and the railway workers union moved to limit the prospective application of the consent decree.[40] The Supreme Court, reversing the lower court decision, found that the union's acquiescence to the consent decree resulted from the illegality of the closed union shop, and therefore the change in law was a sufficient circumstantial change to require a modification of the decree.[41]

B. THE INSTITUTIONAL REFORM EXPLOSION

The emergence of institutional reform litigation in the 1960s added to the general confusion regarding the review of motions to modify consent decrees. Since *Brown v. Board of Education*,[42] the number of cases alleging violations of statutory or constitutional rights by public institutions has steadily increased.[43] While the nature of the rights violated and the type of remedy needed vary greatly depending on the institution involved, all institutional reform cases present a number of problems which call for added flexibility in the implementation of consent decrees. First, because institutional reform decrees involve a plan for the future operation of the institution, as opposed to strict prohibitions on future activity often seen in antitrust actions like *Swift*, many problems will only appear after the plan is put into practice.[44] In addition the parties face the problem of devising a plan which is equitable to all parties involved, including third parties who inevitably will be affected by changes to the institution.[45] Along these same lines, when the de-

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39 *Id.* at 643. In an open shop, union membership cannot be a prerequisite to employment. While the union may represent the employees, it cannot prevent management from employing laborers who are not members of the union. In a closed shop, union membership is a prerequisite to employment in positions represented by the union.

40 *Id.* at 644-45.

41 *Id.*

42 349 U.S. 294 (1955).

43 *See, e.g.*, Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984) (development of toxic waste discharge regulations); New York State Ass'n for Retarded Children, v. Carey, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983) (regulation of public mental health facilities); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 161 F.2d 1006 (7th Cir. 1980) (discriminatory zoning laws reformed); Alliance to End Repression v. City of Chicago, 742 F.2d 1007 (7th Cir. 1984) (rehearing en banc) (reform of FBI investigation procedures which infringed on right to free speech).

44 *The Modification of Consent Decrees in Institutional Reform Litigation*, *supra* note 30, at 1020.

45 *Id.*

cree affects the public institution, it also affects the right of the general public to control the operation of its institutions.[46] The courts' role in devising and implementing consent decrees in institutional reform cases creates separation of powers concerns.[47] Finally, by requiring courts to monitor the operation of the institution over a long period of time, the institutional reform cases increase the administrative burden on courts.[48]

The circuit courts began to recognize the special characteristics of institutional reform decrees and some modified their standards of review accordingly. In *Philadelphia Welfare Rights Org. v. Shapp*,[49] the Third Circuit affirmed a district court decision to modify a consent decree involving the number of health screenings to be performed by the defendants as part of their Medicaid program where the defendant had made a good faith effort to comply with the terms of the decree.[50] In *Duran v. Elrod*,[51] the Seventh Circuit looked to the public safety interest as its basis for vacating a district court decision denying a request for modification of a consent decree to allow double-bunking in the Cook County Jail.[52]

In 1983, the Second Circuit set forth an influential standard of

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46 Jost, *supra* note 9, at 1148.

47 Schwarzschild, *supra* note 7, at 901-07.

48 *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 404-05 (1974) (courts should show deference to prison administrators' decisions regarding the management of prisons because of the lack of judicial expertise in prison management and the added administrative burdens on the courts brought on by such efforts).

49 602 F.2d 1114 (3d Cir. 1979), *cert. denied sub nom.* Thornburgh v. Philadelphia Welfare Rights Org., 446 U.S. 1026 (1980).

50 *Id.* at 1117. The court noted that the goal of 180,000 screenings could not be met because not enough of the plaintiff class wanted the screenings, despite a good-faith effort on the part of the Commonwealth to make the services available. The consent decree entered between the Commonwealth of Pennsylvania and the class of Pennsylvania Medicaid recipients required the Commonwealth, among other things, to implement a statewide outreach program extending the preventative medicine services of the Medicaid program to eligible recipients with a goal of 180,000 health screenings each year. Finding that outside factors had frustrated the purpose of the decree, the court refused to enforce its penalty payment provisions, which would have resulted in "a windfall to unidentified class members" rather than providing "a financial incentive for the achievement of outreach goals." *Id.* at 1121.

51 760 F.2d 756 (7th Cir. 1985).

52 *Id.* at 762. The Seventh Circuit noted that the principal reason the district court turned down the modification request was the court's "belief that the County had created the fix it was in by having failed to enlarge the jail fast enough." *Id.* The court felt that punishment was not an adequate reason for refusing modification when balanced with the public safety interest in having detainees with high recidivism rates remain in prison. In addition, the court noted that the motivation of enforcing decrees as an example for other defendants in reform cases in the long run will cause the "parties to be reluctant to sign a consent decree if they will be locked into its terms however the future may unfold." *Id.* (citing *Philadelphia Welfare Rights Org.*, 602 F.2d at 1120).

review for institutional reform cases in *New York State Association for Retarded Children, Inc. v. Carey*.[53] This case involved a 1975 consent decree between the patients of an overcrowded mental hospital and the State of New York, whereby the State was to place the 5,000 patients in homes of no more than ten patients by 1981.[54] In 1980, the State moved for a modification to allow the patients to be placed in homes of up to fifty beds to facilitate the emptying of the Willowbrook facility within the time frame set forth by the decree.[55] The Second Circuit recognized that because the defendant was the party requesting the modification, the case resembled *Swift* more than *United Shoe Machinery Corp*. Nevertheless, the court distinguished the case from *Swift*, declaring that the State's modification request was not "in derogation of the primary objective of the decree, namely to empty such a mammoth institution as Willowbrook . . ."[56] Stating that "any modification will perforce alter some aspect of the decree," the Second Circuit rejected the *Armour* four-corners approach to the interpretation of consent decrees in institutional reform cases.[57]

Recently, in two rulings involving school desegregation decrees, the Supreme Court considered the separation of powers question which arises when courts engage in ongoing management of public institutions.[58] In *Missouri v. Jenkins*,[59] the Court held that the district court's call for a property tax increase in violation of Missouri law "contravened the principles of comity that must govern the exercise of the district court's equitable discretion in this area."[60] In *Jenkins*, the district court entered a desegregation plan for the Kansas City Metropolitan School District (KCMSD), which it estimated would cost $88 million.[61] Because of a state law prohibiting the increase of local property taxes, the KCMSD could not raise the funds locally to pay for the plan. In the face of the state statute, the district court ordered a tax increase to pay for the plan.[62] Justice

53 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983).

54 *Id.* at 958-59.

55 *Id.* at 960.

56 *Id.* at 969.

57 *Id.* The Second Circuit looked to its own decision in King-Seeley Thermos Co. v. Aladdin Indus., Inc., 418 F.2d 31 (2d Cir. 1969), to support its premise that "[w]hen a case involves drawing the line between legitimate interests on each side, modification will be allowed on a lesser showing [than in *Swift*]."

58 Missouri v. Jenkins, 495 U.S. 33 (1990); Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 111 S. Ct. 630 (1991).

59 495 U.S. 33 (1990).

60 *Id.* at 50.

61 *Id.* at 38 (citing Jenkins v. Missouri, 639 F. Supp. 19, 43-44 (W.D. Mo. 1985)).

62 *Id.*

White, writing for the Court, stated that instead of levying the tax directly, the district court should have "authorized or required the KCMSD to levy property taxes at a rate adequate to fund the desegregation remedy and could have enjoined the state laws that would have prevented the KCMSD from exercising this power."[63] The key difference between the district court's and the Supreme Court's approaches is that the Supreme Court placed the responsibility for devising and implementing the remedy in the hands of the local government rather than in the hands of the courts.[64]

The second desegregation case, *Board of Education of Oklahoma City Public Schools v. Dowell*,[65] involved a request by the plaintiffs to reopen a thirty-year-old desegregation case as a result of a change in the busing arrangement originally implemented in the decree.[66] In 1977, the district court concluded that "compliance with the constitutional requirements" had been achieved and terminated its jurisdiction in the case.[67] In 1984, the school district altered their busing plan to conform with demographic changes.[68] The Court refused to allow a reopening of the case, noting the need for flexibility in adopting reform plans over time, the proper role of the local government and citizens in making such decisions regarding their institutions, and the impropriety of courts' indefinite involvement in the running of institutions, which have complied with constitutional standards for many years.[69]

By the time the Supreme Court granted certiorari in *Rufo*, the grievous wrong standard had ceased to serve as the guiding force in institutional reform cases. The circuit courts generally allowed in-

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63 *Jenkins*, 495 U.S. at 51.

64 Justice White relied on Brown v. Bd. of Educ., 349 U.S. 294, 299 (1955), and Milliken v. Bradley (Milliken II), 433 U.S. 267, 281 (1977), for the premise that the "local authorities have the 'primary responsibility for elucidating, assessing and solving' the problems of desegregation." *Jenkins*, 495 U.S. at 51-52 (quoting *Brown*, 349 U.S. at 299).

65 Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 111 S. Ct. 630 (1991).

66 *Id.* The plan approved by the District Court in 1972 required the school system to bus children in predominately minority areas to predominately white areas to school for grades K-4, and children from predominately white areas to predominately minority areas for grades 5-6 with busing patterns in the higher grades to be set as needed to obtain integration. Dowell v. Bd. of Educ. of Okla. City Pub. Sch., 338 F. Supp. 1256, *aff'd*, 465 F.2d 1012 (10th Cir. 1972), *cert. denied*, 409 U.S. 1041 (1972).

67 *Id.* at 634 (citing Dowell v. Bd. of Educ. of Okla. City Pub. Sch., Civ. Action No. 9452 (W.D. Okla., Jan. 18, 1977)).

68 *Id.*

69 *Id.* at 636-37. The Court relied on Milliken v. Bradley (Milliken I), 418 U.S. 717, 742 (1974), when it stated "[s]uch decrees, unlike the one in *Swift*, are not intended to operate in perpetuity. Local control over the education of children allows citizens to participate in decision making, and allows innovation so that school programs can fit local needs." *Id.*

stitutional defendants greater latitude in modifying consent decrees.[70] Yet at the same time, the Supreme Court, in *United States v. Armour & Co.*[71] and *Firefighters Local Union No. 1784 v. Stotts*,[72] was giving signals that a more contractual view of the consent decree should apply. In school desegregation cases like *Missouri v. Jenkins*[73] and *Board of Education of Oklahoma City Public Schools v. Dowell*,[74] however, the Supreme Court signaled a turn toward deference to local authorities in the modification of consent decrees. This deference only makes sense if the consent decree itself could be modified upon a lesser showing than that required under the *Armour & Co.* "four corners" standard.[75]

III. Facts and Procedural History

In 1971, the inmates of the Suffolk County Jail sued the Suffolk County Sheriff, the Commissioner of Correction of the State of Massachusetts, the Mayor of Boston, and nine City Councilors, charging that the conditions in the Charles Street Jail, where they were being held as pretrial detainees, violated their constitutional rights protected by the Eighth and Fourteenth Amendments.[76] The Charles Street Jail was built in 1848 with single cells to hold 180 male detainees.[77] A number of problems associated with the age of the jail existed, including pests and inadequate ventilation, heat, dining and kitchen facilities, fire escapes, hygiene and recreational facilities.[78] Additionally, the population of the jail had reached 340, necessitating double-bunking in nearly all of the 142 operable cells.[79]

In June 1973, the United States District Court found the conditions in the Charles Street Jail to be in violation of the detainees' constitutional rights to due process under the Fourteenth Amend-

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70 *See* Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114 (3d Cir. 1979), *cert. denied sub nom.* Thornburgh v. Philadelphia Welfare Rights Org., 446 U.S. 1026 (1980); New York Ass'n for Retarded Children v. Carey, 706 F.2d 956 (2d Cir. 1983); and Duran v. Elrod, 760 F.2d 756 (7th Cir. 1985).

71 402 U.S. 673 (1971).

72 467 U.S. 561 (1984).

73 495 U.S. 33 (1990).

74 111 S. Ct. 630 (1991).

75 If the *Armour* standard were applied in *Dowell*, the terms of the consent decree could not be altered for the terms themselves represent the bargain of the parties. The question of how much deference to the give to the local authorities' plan for a change in the implementation of the decree would be moot.

76 Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 678 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974).

77 *Id.* at 679.

78 *Id.* at 679-80.

79 *Id.* at 681.

ment.[80] Taking into account the extreme overcrowding at the jail and the procrastination of the authorities addressing the problems, the district court enjoined the defendants from double-bunking inmates at the Charles Street Jail after November 30, 1973, and from housing any inmates at the Charles Street Jail after June 30, 1976.[81] In 1977, the problems at the jail remained unresolved and the county was operating the jail in violation of the original order of the district court.[82] The district court then ordered that the jail be closed; the First Circuit Court of Appeals affirmed this decision, setting a closing date for October 1978.[83] The closing was staved off at the end of September 1978, when the parties submitted a plan that formed the basis of the consent decree entered by the district court in May 1979.[84] The decree included a plan to build a new jail with 309 single cells, seventy square feet in size.[85] While this plan called for the new jail to be built by 1983, in 1984 the Boston City Council had not yet approved the funding for the project.[86] The Sheriff of Suffolk County then sued the Boston Mayor, the City Council, and the Commissioner of Correction to get the funds appropriated for the new jail.[87]

By the time the funds were appropriated in the wake of the state court action, the inadequacy of the 309-cell jail was readily apparent. The inmates, in conjunction with the Sheriff, moved to modify the terms of the consent decree to allow for a 453-cell facility.[88] The district court modified the decree but stipulated that the "single-cell occupancy is maintained under the design for the new facility."[89] Construction of the new jail then began in 1987.[90]

In July 1989, during the construction of the new jail, the Sheriff moved to have the consent decree modified to allow double-bunking in 197 cells, to raise the capacity of the new jail to 610 detainees.[91] As a basis for his request, the Sheriff claimed that the

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80 *Id.* at 691.

81 *Id.*

82 Rufo v. Inmates of the Suffolk County Jail, 112 S. Ct. 748, 755 (1992).

83 Inmates of the Suffolk County Jail v. Kearney, 573 F.2d 98, 99 (1st Cir. 1978).

84 Inmates of the Suffolk County Jail v. Kearney, Civ. Action No. 71-162-G (D. Mass. Oct. 2, 1978).

85 *Id.*

86 *Rufo*, 112 S. Ct. at 756.

87 Att'y Gen. v. Sheriff of Suffolk County, 477 N.E.2d 361 (Mass. 1985).

88 Inmates of the Suffolk County Jail v. Kearney, Civ. Action No. 71-162-G (D. Mass. Apr. 11, 1985).

89 *Id.*

90 *Rufo*, 112 S. Ct. at 756.

91 Inmates of the Suffolk County Jail v. Kearney, 734 F. Supp. 561, 562 (D. Mass. 1990).

continued increase in the inmate population constituted a change in fact which required a modification of the decree. In addition, the Sheriff claimed that the decision of the Supreme Court in *Bell v. Wolfish*,[92] which confirmed the constitutionality of double-bunking, constituted a change in law which would render the application of the consent decree inequitable.[93]

The district court rejected the change in law as a basis for the modification, claiming that "*Bell* did not directly overrule any legal interpretation on which the 1979 consent decree was based."[94] The district court, noting that the Sheriff should have foreseen the increase in the inmate population, also denied the Sheriff's motion based on a change in fact.[95] It based this holding on the fact that the motion did not meet the standard set forth in *United States v. Swift & Co.*,[96] which required a "clear showing of a grievous wrong evoked by new and unforeseen conditions."[97] Finally, the court also claimed that even if it applied a more flexible standard, it could not allow a modification for double-bunking because, "[a] separate cell for each detainee has always been an important element of the relief sought in this litigation—perhaps even the most important element."[98]

The First Circuit affirmed the district court's decision,[99] and the Supreme Court granted certiorari to consider whether the lower courts applied the correct standard review in denying the motion.[100]

IV. Supreme Court Opinions

A. THE MAJORITY OPINION

In an opinion written by Justice White,[101] the Court vacated the decision of the district court and remanded the case for reconsideration under the flexible standard set forth in its opinion.[102] Under this standard, a party seeking a modification of a consent decree in an institutional reform case need only establish that a "significant

92 441 U.S. 520 (1979).
93 *Kearney*, 734 F. Supp. at 564.
94 *Id.*
95 *Id.* at 565.
96 286 U.S. 106 (1932). *See supra* text accompanying notes 11-21.
97 *Kearney*, 734 F. Supp. at 563.
98 *Id.* at 565.
99 Inmates of the Suffolk County Jail v. Kearney, 915 F.2d 1557 (1st Cir. 1990).
100 Rufo v. Inmates of the Suffolk County Jail, 112 S. Ct. 748, 757 (1992).
101 Justices Scalia, Kennedy, Souter, and Chief Justice Rehnquist joined in Justice White's majority opinion. Justice Thomas took no part in the decision or consideration of the case.
102 *Rufo*, 112 S. Ct. at 765.

change in facts or law warrants a revision of the decree and that the proposed modification is suitably tailored to the changed circumstance."[103]

The Court first noted that the district court erred in its assumption that Federal Rule of Civil Procedure 60(b)(5) codified the "grievous wrong" standard articulated by Justice Cardozo in *Swift*.[104] Justice White opined that in *Swift*, the lack of a change in fact rather than rigid prohibition on the modification of consent decrees prevented the modification of the decree. He noted that Justice Cardozo saw the need for flexibility in decrees where they "involve[d] the supervision of changing conduct or conditions."[105] Justice White then mentioned that the Court's decisions since *Swift* "emphasized a need for flexibility in administering consent decrees."[106]

Justice White also noted that the special nature of institutional reform litigation requires that the courts apply a flexible standard because consent decrees in such cases may involve court supervision of the institution for a long period of time.[107] Such reform efforts will often be new to the institution and require modification over time to help "in achieving the goals of reform litigation."[108] Justice White then recognized that consent decrees involving institutional reform affect not only the parties involved but also the public interest, which may not have a representative voice in the creation of the decree.[109] Finally, Justice White dismissed the respondent's claim that increasing the flexibility of consent decrees would decrease the impetus for reform groups to enter into the decrees. In doing so, he emphasized that the benefits of avoiding the uncertainty and cost associated with litigation will continue to serve as an enticement to enter into consent decrees.[110]

After establishing the need for a more flexible standard than that applied by the district court, Justice White went on to discuss the application of the flexible standard to the petitioner's request

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103 *Id.*

104 *Id.* at 757.

105 *Id.* at 758 (quoting United States v. Swift & Co., 286 U.S. 106, 114-15 (1932)).

106 *Id.* Justice White specifically mentions Syst. Fed'n No. 91 v. Wright, 364 U.S. 642 (1961) (change in law as basis for modification of consent decree); and Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 111 S. Ct. 630 (1991) (change in fact as basis for closure of court supervision of consent decree).

107 *Id.*

108 *Id.*

109 *Id.* at 759.

110 *Id.* at 759-60.

for double-bunking at the new jail.[111] The Court found that the increase in the number of pretrial detainees did constitute a change in fact significant enough to warrant a change in the consent decree.[112] While it allowed that a party should not be able to rely on changes in circumstances foreseen when they entered into the decree, the Court rejected the respondent's assertion that "modification should be allowed only when a change in facts is both 'unforeseen and unforeseeable.' "[113] To establish that the increase in the population was unforeseen, Justice White looked to the projections in the original architectural plan, which predicted a decrease in the number of pretrial detainees.[114] He also noted that if the current increase could have been foreseen when the plan was modified in 1985, both parties would not have "settled for a new jail that would not have been adequate to house pretrial detainees."[115]

The Court then put forward two arguments dismissing the district court's finding that single-celling was the primary purpose of the decree.[116] First, the Court found that "the decree itself nowhere expressly orders or reflects an agreement by petitioners to provide jail facilities having single cells sufficient to accommodate all future pretrial detainees, however large the number of such detainees might be."[117] Then the Court went beyond the text of the decree, declaring that the proper inquiry is not whether the decree is an undertaking to provide single cells, but rather whether the modified decree continues to provide an adequate remedy for the problems that precipitated its creation.[118]

The Court rejected the petitioner's claim that *Bell v. Wolfish*[119] constituted a change in law sufficient to allow for a modification of the consent decree.[120] An example of a change in law that would allow for a modification of a consent decree is one in which a decree was entered to prohibit an illegal act but, after a change in law, the acts under the decree themselves were outside the spirit of the law.[121] In *Bell*, the affirmation of the constitutionality of double-

111 *Id.* at 761.

112 *Id.*

113 *Id.* at 760 (quoting Respondents' Brief at 35, *Rufo* (Nos. 90-954; 90-1004)).

114 *Id.* at 761 (the original consent decree included inmate population projections of 232 from 1985-89, 226 from 1990-94, and 216 from 1995-99).

115 *Id.* at 761.

116 Rufo v. Inmates of the Suffolk County Jail, 734 F. Supp. 561, 565 (D. Mass. 1990).

117 Rufo v. Inmates of the Suffolk County Jail, 112 S. Ct. 748, 755, 761 (1992).

118 *Id.* at 762.

119 441 U.S. 520 (1979).

120 *Rufo*, 112 S. Ct. at 762.

121 *Id. See supra* notes 38-41 and accompanying text.

bunking "did not cast doubt on the legality of single celling."[122] The Court noted that allowing changes in consent decrees based on a decrease in constitutional standards "would necessarily imply that the only legally enforceable obligation assumed by the state under the consent decree was that of ultimately achieving minimal constitutional . . . prison standards."[123] By limiting the ability of a party to base a request for a modification of consent decrees on a change in the law, the Court sought to uphold the "finality of agreements" and promote negotiation of settlements.[124]

The Court then turned its attention to the standards involved in deciding "whether the proposed modification is suitably tailored to the changed circumstance."[125] Justice White began his discussion by stating that a proposed modification must not "create or perpetuate a constitutional violation" and that a "proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor."[126] The Court then limited the discretion of courts considering modification requests to a review of whether the proposed change will rectify the problem it seeks to solve.[127] By limiting the role of courts in modifying decrees, the Court intended to place the responsibility for plan administration in the hands of those who have the experience of running the institution and implementing the reforms.[128] Finally, the Court emphasized that, to the extent they do not create or perpetuate constitutional violations, fiscal constraints are relevant concerns in institutional reform cases and courts should keep them in mind when reviewing proposed changes.[129]

B. JUSTICE O'CONNOR'S CONCURRING OPINION

Justice O'Connor concurred in the Court's judgment to vacate the lower court decision and remand for reconsideration. She wrote her own opinion, however, "to emphasize the limited nature of our review; to clarify why, despite our limited review, the case should be returned to the district court; and to explain [her] concerns with certain portions of the Court's opinion."[130] Justice O'Connor began her concurrence by noting that appellate courts should apply an

122 *Rufo*, 112 S. Ct. at 762.
123 *Id.* at 763 (quoting Plyler v. Evatt, 924 F.2d 1321, 1327 (4th Cir. 1991)).
124 *Id.*
125 *Id.*
126 *Id.* at 763-64.
127 *Id.* at 764.
128 *Id.*
129 *Id.*
130 *Id.* at 765 (O'Connor, J., concurring).

abuse of discretion standard when reviewing consent decree modification decisions.[131] She stated that appellate courts should "examine primarily the method in which the district court exercises its discretion, not the substantive outcome the district court reaches."[132] Justice O'Connor's standard of review requires only that a district court judge "take into account the relevant considerations . . . and accommodate them in a reasonable way."[133] She noted that in institutional reform cases, the judges have often been supervising the reform process for a number of years and therefore are in a better position to understand the problem.[134]

In her review of the district court's decision, Justice O'Connor noted three errors of law. First, the district court relied on the *Swift* foreseeability standard to dismiss the modification request.[135] She observed that even if a problem is foreseeable, "modification could conceivably still be 'equitable.' "[136] Second, the district court failed to take into account the petitioner's fiscal problems in its determination of what was equitable.[137] Justice O'Connor explained that excessive costs of reform could lead to an inequitable situation if they infringed on competing government interests.[138] Finally, she noted the cyclical reasoning in the district court's assertion that because the proposed modifications would set aside obligations of the decree, the modifications could not comply with the purpose of the decree.[139]

After pointing out the flaws in the district court's review, Justice O'Connor nonetheless recognized that if these errors were cured on remand and the substantive result were the same, such a result would be perfectly within the district court's discretion.[140] She then proceeded to criticize the majority opinion. First, Justice O'Connor attacked Justice White's statement that, "[i]f modification of one term of a consent decree defeats the purpose of the [consent] decree, obviously modification would be all but impossible."[141] She noted that some elements of a decree could exist that are so important that any modification would defeat the purpose of the decree,

131 *Id.* (O'Connor, J., concurring).
132 *Id.* (O'Connor, J., concurring).
133 *Id.* (O'Connor, J., concurring).
134 *Id.* (O'Connor, J., concurring).
135 *Id.* at 766 (O'Connor, J., concurring).
136 *Id.* (O'Connor, J., concurring).
137 *Id.* (O'Connor, J., concurring).
138 *Id.* (O'Connor, J., concurring).
139 *Id.* (O'Connor, J., concurring).
140 *Id.* (O'Connor, J., concurring).
141 *Id.* at 767 (O'Connor, J., concurring).

while other elements could exist that would be open for change.[142] To suggest that a court oversteps its authority if it finds some elements of a consent decree too central to be changed is "an unwarranted and ill-advised" limit on its discretion, according to Justice O'Connor.[143]

Justice O'Connor then criticized what she saw as the majority's call for the district courts to "defer to local government administrators . . . to resolve the intricacies of implementing a decree modification."[144] She argued that deferring to one of the parties in the suit is not equitable, and judges should decide what is equitable.

C. JUSTICE STEVENS' DISSENTING OPINION

Justice Stevens,[145] in his dissenting opinion, agreed with the standard for modifying consent decrees articulated by the majority, but stated that under this standard, the district court's findings must be upheld.[146] A determination that the district court was correct in finding that the respondent could foresee the increases in the pretrial detainee population when it modified the decree in 1985 lies at the heart of Justice Stevens' argument.[147] The dissent noted that given the marked increase in the detainee population, which caused the 1985 modification and the nature of our society at this time, an increase in detainee population in the future, if not then foreseen, was reasonably foreseeable.[148] He also dismissed the petitioners' claim based on a change in law to allow double-bunking, noting that the legality of double-bunking was known to both parties in 1985 when the consent decree was modified and that the petitioners did not request double-bunking at that time.[149]

In addition to the foreseeability of the detainee population increase, Justice Stevens cited a number of concerns which should influence the Court when deciding the equity of the proposed modification. Justice Stevens first mentioned the petitioners' history of non-compliance with the injunctions in 1973 and the consent decree since 1979.[150] According to Justice Stevens, not only did these failures cast doubt on the motives of the petitioners in moving for a modification, but they also represented hardships endured by

142 *Id.* (O'Connor, J., concurring).
143 *Id.* (O'Connor, J., concurring).
144 *Id.* (O'Connor, J., concurring).
145 Justice Blackmun joined in Justice Stevens' dissenting opinion.
146 *Rufo*, 112 S. Ct. at 768 (Stevens, J., dissenting).
147 *Id.* at 769 (Stevens, J., dissenting).
148 *Id.* at 771-72 (Stevens, J., dissenting).
149 *Id.* at 771 (Stevens, J., dissenting).
150 *Id.* at 772 (Stevens, J., dissenting).

the respondents in exchange for the gains they thought they were going to receive under the consent decree.[151] Second, he argued that claims of fiscal restraint should not be allowed in this case because they represented a continued lack of fortitude on the part of government officials to come up with the funds needed to rectify the problems, rather than a severe infringement on the pubic interest.[152] Third, Justice Stevens claimed that "to the extent litigants are allowed to avoid their solemn commitments, the motivation for particular settlements will be compromised."[153] Finally, he agreed with the district court's assessment of single-celling as the central purpose of the litigation, and thus found that any alteration of that term would defeat the decree's purpose.[154]

V. ANALYSIS

In *Rufo*, the Court faced the challenge of striking a balance between two competing views of the consent decree. On one hand, the consent decree can be seen as a remedial measure designed to alter the future behavior of a public institution so as to prevent its infringement upon the private rights of the plaintiff class.[155] Under this view, the parties to a consent decree can be seen as working together to create a solution to the inadequacies of the institution. The prospective nature of this remedy requires the consent decree to be applied with enough flexibility to allow the institution to adapt to unforeseen changes.

On the other hand, the consent decree can be seen as a contract between the two adversarial parties in which the plaintiff class gives up their right to pursue their case in return for the promise by the defendant institution to undertake specific agreed-upon actions.[156] Under this view, protecting the sanctity of judgments under consent

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151 *Id.* (Stevens, J., dissenting).

152 *Id.* (Stevens, J., dissenting).

153 *Id.* (Stevens, J., dissenting).

154 *Id.* (Stevens, J., dissenting).

155 The view of the consent decree as an attempt to provide a plan for the reformation of the institutional operations shall be referred to in this Note as the remedial model. This description of the consent decree in public law cases has been set forth by Maimon Schwarzschild, *supra* note 7, at 907. Schwarzschild draws a distinction between public law cases, in which the remedy is "heavily influenced by legislative facts," and private law cases, which tend to be more adversarial in nature. *Id.* The consent decree in a public law case presents a "double anomaly" because not only is the legislative branch left out of the decisionmaking process, but the parties themselves also prevent the court from providing its expertise as a finder of fact and law. *Id.*

156 This view of the consent decree shall be referred to in this note as the contractual model. Justice Marshall advocated this view in United States v. Armour & Co., 402 U.S. 673 (1971). *See supra* notes 32-37 and accompanying text.

decree is necessary to preserve consent decrees as a viable tool for settling cases involving the government.

If viewed as more of a remedial than a contractual measure, the consent decree brings up the further question of separation of powers.[157] For a consent decree to remain flexible enough to adapt to changes in fact or law, a court must maintain the equitable discretion to alter the terms of the decree. The power of equity carries with it the danger that the court will remain unaccountable to democratic pressures.[158] Without a check on this power, there exists a potential for abuse by overly active judges and error by inadequately informed courts.

This Note argues that the *Rufo* Court properly recognized the need for flexibility as paramount in institutional reform cases. Furthermore, the flexible standard of review set forth by the Court maintains safeguards for plaintiffs that adequately prohibit the government defendants from shirking their consent decree duties. Finally, the Court properly removed the district courts from the business of devising reform plans and limited them to the roles of reviewing plans for constitutionality and enforcing decrees.

A. SHOULD THE CONSENT DECREE BE MODIFIED?

In *Inmates of the Suffolk County Jail v. Rufo*, the Supreme Court set forth a two-part test for courts to apply when entertaining requests for the modification of decrees.[159] The first part of the test requires that "a party seeking modification of a consent decree . . . establish that a significant change in facts or law warrants revision of the decree."[160] The language of this threshold test suggests a more lenient standard than the traditional *Swift* standard with its requirements for a "clear showing of a grievous wrong."[161] In rejecting the "grievous wrong" standard, the Court recognized that the consent decree in an institutional reform case resembles the remedial model more than the contractual model. In fact, the dissent did not seem to lament the passing of the contractual *Swift* standard either.[162] The explanation for the unanimous abandonment of *Swift*

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157 In the case where the institution being reformed is under state or local control and a federal court is administering the consent decree, federalism concerns also arise as federal institutions take a role in the management of state entities. For the purposes of this Note, only the separation of powers issues will be addressed.

158 For a summary of the problems traditionally associated with equitable remedies, *see* PETER CHARLES HOFFER, THE LAW'S CONSCIENCE 17-20 (1990).

159 Rufo v. Inmates of the Suffolk County Jail, 112 S. Ct. 748, 764-65 (1992).

160 *Id.*

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

162 *Rufo*, 112 S. Ct. at 768. In his dissent, Justice Stevens also endorses the flexible

may lie in the fact that in *Swift*, Justice Cardozo himself recognized the difference between contractual and remedial consent decrees when he distinguished "between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative."[163] Following the *United Shoe Machinery Corp.*[164] view of *Swift*, the Court interpreted *Swift* as a case where no significant change occurred in original conditions that the decree was implemented to remedy.[165] If the *Rufo* test was applied to the facts in *Swift*, modification would still have been denied because the defendants failed to show a significant change in fact, which would require modification of the decree.

While the flexible standard put forth in *Rufo* can be harmonized with the language in *Swift*, on its face the *Rufo* standard seems incompatible with the contractual "four corners" rule put forth by the Court in *United States v. Armour & Co.*[166] and *Firefighters Local Union No. 1784 v. Stotts*.[167] The four-corners rule assumes an adversarial model in which the decree has no single general purpose but is rather a convergence of the competing purposes of the parties.[168] The Court's statement in *Rufo* that the "purpose [of the decree] was to provide a remedy for what had been found, based on a variety of factors, including double celling, to be unconstitutional conditions obtaining in the Charles Street Jail"[169] suggests a model of cooperation between the two parties seeking a remedy for constitutional deficiencies. The terms of the decree, therefore, serve as a means for reaching this common end, rather than as the end in and of itself.

Like *Swift*, however, *Armour* can also be limited to its facts. In *Armour*, the age of the decree that the government sought to modify

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standard set forth in New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983).

163 *Swift*, 286 U.S. at 114-15.

164 391 U.S. 244 (1968).

165 *Rufo*, 112 S. Ct. at 762. *See also* Plyler v. Evatt, 846 F.2d 208, 211-12 (4th Cir.), *cert. denied*, 488 U.S. 897 (1988) (in allowing for double-bunking where South Carolina board of corrections was faced with unanticipated increase in prison population, the Plyler court stated: "[w]e agree that the general teaching of *Swift & Co.* 'is merely that harm and continuing need must always be weighed in the balance in deciding whether continued enforcement of any injunctive decree is equitable in the light of specific changed circumstances' " (quoting Holiday Inns, Inc. v. Holiday Inn, 645 F.2d 239, 245 (4th Cir.), *cert. denied*, 454 U.S. 106 (1981)).

166 402 U.S. 673 (1971).

167 467 U.S. 561 (1984).

168 *See supra* notes 32-37 and accompanying text.

169 *Rufo*, 112 S. Ct. at 762.

pointed to the inappropriateness of the modification as much as did the terms of the decree itself.[170] If the consent decree in *Armour* was viewed from a remedial, rather than a contractual standpoint, the intended remedy of the decree would be to prevent Armour & Co. from exercising monopoly power in the food industry. Given the vast changes in the industry over fifty-one years, the purchase of Armour by Greyhound did not pose the anti-competitive threat that the decree originally sought to prevent.

Like the *Swift* standard before it, the Court enunciated the four-corners rule in an antitrust case. In antitrust litigation, the parties often enter into a negative injunction which prohibits the defendant from continuing a harmful activity. The nature of the remedy ensures an adversarial relationship between the parties to the consent decree because the defendant has little to gain by limiting their own freedom of action. Thus, Justice Marshall's view of the parties as adversaries entering into a contractual relationship is justified in the context of the private party defendant. Where the defendant is a government institution, however, the lines between the parties become blurred. Authorities in charge of the institutions have a motivation to gain additional funds and power for themselves and their departments. This could lead to a collusion between the parties to the decree—at the expense of the interests of the general public and third parties who would be affected by the decree.[171] Therefore, the terms of the consent decree would represent only the common purposes of two parties with interests outside those obtainable through litigation.[172]

Even if the parties to the institutional reform decree remain adversarial, the decree, because it modifies the operation of a public institution, will affect the rights of unrepresented third parties. The Court correctly recognized this fact when it stated, "[t]he public interest is a particularly significant reason for applying a flexible standard in institutional reform litigation because such decrees reach beyond the parties involved directly in the suit and impact on the

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170 *Armour*, 402 U.S. at 675.

171 *See* Duran v. Elrod, 760 F.2d 756, 759 (7th Cir. 1985) ("Federal Courts must be wary of entanglement in the intramural struggles of state or local government."). *See also* Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1294; Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295.

172 For a discussion of interests of third parties in consent decrees, *see* Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103; Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321 (1988).

public's right to sound and efficient operation of its institutions."[173] Some of the third party interests noted by the Court in *Rufo* include: the interest of detainees at other institutions, who would experience double-bunking as a result of the prohibition of double-bunking at the Suffolk County Jail; the interests of beneficiaries of the work of other public institutions, which will be effected by a reduction in their percentage share of limited government funds; the public safety interest underlying the incarceration of the accused prior to trial; and the interest of taxpayers, who could be forced to pay higher taxes.[174] While it is true that *United Shoe Machinery Corp.* requires the fulfillment of the decree's purposes prior to any modification of the decree in favor of the defendants, the purposes of the decree must include the interests of third parties, which will not likely be covered in the terms of the decree itself.[175]

Although the Court applied the four corners analysis to deny the modification of a consent decree in an institutional reform setting in *Firefighters Local Union No. 1784 v. Stotts*,[176] the Court noted that the modification would violate the rights of innocent third parties.[177] In *Stotts*, the Court used the four-corners rule to reject the premise that an affirmative action plan should take precedence over a seniority plan where no language in the affirmative action consent decree suggested such a hierarchy.[178] In *Stotts*, as in *Rufo*, a change in fact unforeseen at the inception of the consent decree required the court to take into account third-party interests to change the application of the remedial plan.[179]

While both the district court and Justice Stevens' dissent claim to apply the same flexible standard as the majority, they focus only on the effects of a change in circumstances on the parties to the decree, rather than the effects of the change on third parties. For example, the district court found that the inmates had accepted years of unconstitutional conditions under the consent decree in re-

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173 *Rufo*, 112 S. Ct. at 759 (quoting Heath v. DeCourcy, 888 F.2d 1105, 1109 (6th Cir. 1989)).

174 *Id.*

175 United States v. United Shoe Machinery Corp., 391 U.S. 244, 248 (1968).

176 467 U.S. 561, 574 (1984).

177 *Id.* at 575.

178 *Id.* at 574.

179 The Supreme Court reversed the decision of the court of appeals because a change in fact (a decrease in funds available for the Memphis fire department) created a situation in which protecting the racial quotas set forth in the consent decree would lead to an infringement on the rights of white firefighters under the city's seniority plan. The four-corners rule of interpretation is used to justify limiting the scope of the consent decree so as to take into account the interest of the third parties. *Id.*

turn for the promise of single-celling granted by the sheriff.[180] The years of hardship serve as consideration for the benefits of single-celling.[181] According to the district court, this perseverance indicates that single-celling is a central element of the decree.[182] Yet under the district court's analysis, because the interests of third parties are not set forth explicitly in the negotiating process, they do not form any part of the contractual relationship between the jail and the inmates.

Justice Stevens' standard, while nominally more flexible than the district court's,[183] remains bound to a contractual view of the consent decree. The dissent, like the district court, found single-celling to be the central purpose of the decree. Justice Stevens stated, "[a] prohibition against double celling was a central purpose of the relief ordered by the district court in 1973, of the bargain negotiated in 1979 and embodied in the original consent decree, and in the order entered in 1985 that the petitioners now seek to modify."[184] If, though, the fact that several drafts of a decree contain the same term was enough to make that term a central purpose of the decree, then any provision in the decree over several drafts, such as the amount of recreational space or the color of the paint, would be considered central to the decree. The majority opinion correctly recognized this fact when it stated, "[i]f modification of one term of a consent decree defeats the purpose of the decree, obviously modification would be all but impossible."[185] Instead, if the flexible standard was truly applied, no term in and of itself would stand as an embodiment of the purpose of the decree, since the purpose of the decree would simply be the formation of a remedy.

An application of the dissent's standard to the facts of two cases illustrates its inflexibility. The dissent's standard would allow for modification in *Philadelphia Welfare Rights Org. v. Shapp*,[186] in which a change in fact (not enough members of the plaintiff class were willing to take advantage of the free screenings) made the implementation of a term of the consent decree impossible. But this

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180 Inmates of the Suffolk County Jail v. Kearney, 734 F. Supp. 561, 565 (D. Mass. 1990).

181 *Id.*

182 *Id.*

183 Rufo v. Inmates of the Suffolk County Jail, 112 S. Ct. 748, 772 (1992) (Stevens, J., dissenting) ("It is certainly true that when exercising their equitable powers courts should properly consider the interests of the 'public.' ").

184 *Id.* at 772.

185 *Id.* at 762.

186 602 F.2d 1114 (3d Cir. 1979), *cert. denied sub nom.* Thornburgh v. Philadelphia Welfare Rights Org., 446 U.S. 1026 (1980). *See supra* notes 49-52 and accompanying text.

impossibility of performance exception is not truly a flexible standard but rather a contract doctrine. While the dissent claimed to adapt the *New York State Association for Retarded Children, Inc. v. Carey* standard, if the Second Circuit analyzed the consent decree in that case in the same manner as Justice Stevens analyzed the terms of the consent decree in *Rufo*, it is unlikely that the change in the decree ordered by Judge Friendly would have taken place.[187]

The belief that if the sanctity of the judgment is not upheld, the consent decree will cease to provide an effective means of dispute resolution underlies the dissent's support of a contractual interpretation of consent decrees.[188] As the majority opinion pointed out, however, the dissent's apprehension is misplaced.[189] With regard to the plaintiff's incentives to enter into consent decrees that may be modified, the Court noted that the incentives of avoiding the costs and uncertainties of litigation and taking a more active role in the design of the remedial plan will exist regardless of the ability of the government to request modification.[190] The Court properly emphasized keeping the government involved in entering into consent decrees. If courts rigidly hold parties to the terms in the consent decree, the government will not likely enter into the decrees, except in those cases where individual administrators see an opportunity to reap personal benefit at the expense of the general public. This will lead to higher litigation costs for the taxpayers and the plaintiffs, as well as higher demands on the limited resources available to the courts.[191] These increased costs may impair the ability of injured plaintiff classes to bring reform litigation, as they will generally have fewer resources than the government with which to assert their rights.[192]

While the majority opinion correctly recognized the need for courts to look beyond the terms of the consent decree, it went too

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187 In New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956 (2d Cir.), *cert denied*, 464 U.S. 915 (1983), the consent decree contained provisions requiring the State of New York to remove mental patients from an overcrowded facility and place them in intimate groupings. Because the State could not establish homes for all of the patients by the deadline in the decree, it requested a modification to allow for placement in larger groupings than those allowed under the terms of the agreement. If Justice Stevens' rationale in *Rufo* were applied to these facts, then the purpose of the *New York State Ass'n for Retarded Children v. Carey* consent decree would be to provide intimate placements for the mental patients, no matter what the cost to the taxpayer.

188 Rufo v. Inmates of the Suffolk County Jail, 112 S. Ct. 748, 772 (1992) (Stevens, J., dissenting).

189 *Id.* at 759.

190 *Id.*

191 *See* McConnell, *supra* note 171, at 307.

192 *See* Kramer, *supra* note 172, at 322.

far when it stated, "if modification of one term of a consent decree defeats the purpose of a consent decree, obviously modification would be all but impossible."[193] As Justice O'Connor noted in her concurring opinion, "[t]he modification of one term of a decree does not always defeat the purpose of the decree. But it hardly follows that the modification of a single term can never defeat the decree's purpose."[194] Justice White's statement regarding the effects of a one-term change, if applied literally and standing alone, could allow the modification of decrees so as to completely contradict the purpose of the decree by placing a negative modifier in front of a key provision.[195]

Justice O'Connor's criticism of Justice White's statement conforms with her belief that the majority's guidelines infringe upon the equitable discretion of the Court.[196] She not only questioned the Court's attempt to set guidelines for lower courts exerting equitable powers, but also whether such an endeavor can even be accomplished.[197] This criticism fails to recognize that the Court did not attempt to place a limit on the district courts' discretion to decide whether or not a change in fact or law warrants modification. Rather, the Court, by de-emphasizing the importance of the language of the consent decree, attempted to focus the district courts' attention on the remedial rather than the contractual nature of the institutional reform consent decree.

The Court outlined two safeguards which attempt to uphold the integrity of the consent decree. First, the Court stated that any change in fact or law should be unforeseen at the time the parties enter into the consent decree.[198] The requirement that changes be unforeseen prevents defendants from using foreseeable changes in fact or law to escape their responsibilities under a consent de-

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193 *Rufo*, 112 S. Ct. at 762.

194 *Id.* at 767 (O'Connor, J., concurring) (citations omitted).

195 It is possible to think of a modification of one term of the consent decree that would contradict the entire purpose of the decree. For example, in *Rufo*, if there were a change in fact which allowed for a change in a consent decree, the plaintiff could request that the word "no" be added in front of single-celling to provide that double-celling be mandatory. So long as the double-celling did not violate constitutional limits, the modification would be allowed to stand.

196 *Id.* at 765 (O'Connor, J., concurring).

197 *Id.* Justice O'Connor wrote:

> The Court devotes much of its attention to elaborating a "standard" for lower courts to apply in cases of this kind. I am not certain that the product of this effort—"A party seeking modification of a consent decree may meet its initial burden by showing either a significant change in factual conditions or in law"—makes matters any clearer than the equally general language of Rule 60(b)(5). (citations omitted).

198 *Id.* at 760.

cree.[199] The Court applied this limitation to reject the petitioner's argument that the Supreme Court decision in *Bell v. Wolfish*[200] constituted a change in law which should allow the modification of the consent decree, observing that the parties could foresee the basis for that judgment prior to the entry of the original consent decree.[201]

The Court somewhat weakened the foreseeability provision, however, in its review of the 1985 modification of the consent decree. In reply to the dissent's argument that the increases in the inmate population that led to the 1985 modification made further increases foreseeable, Justice White argued that the Sheriff's approval of the 1985 modification indicated the failure to foresee the continued growth in the inmate population.[202] The logical problem with these arguments is that each attempts to infer the knowledge level of the defendant before the agreement from the defendant's actions after the agreement. If the Court's rationale is carried to its logical conclusion, knowledge of a change in circumstances could never be imputed to a defendant at the time of the creation of an inadequate consent decree. The Court, therefore, has effectively emasculated the protection of the requirement that changes be unforeseen.

The ability of both the majority and dissent to use foreseeability as a crutch for their positions illustrates a reason behind Justice O'Connor's choice to write a separate concurrence.[203] If the Court applied a limited standard review, the question of what is foreseeable at the time of the entrance of the decree would be left to the discretion of the district court, which is better informed of the parties' knowledge as of the date of the consent decree. Of course, only the parties themselves truly know their intentions. The majority opinion may, therefore, prompt the parties' to clarify their true intentions within the decree so as to reduce the risk involved when courts attempt to peer into the minds of the parties.

The statement that a "proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional

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199 *Id.*

200 441 U.S. 520 (1979) (upholding the constitutionality of double-bunking inmates).

201 *Rufo*, 112 S. Ct. at 763 (citing Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 437-38 (1976) and Nelson v. Collins, 659 F.2d 420, 428-29 (4th Cir. 1981)). The Court notes that if the moving party can prove that the consent decree was based on a misunderstanding of the applicable law, this would satisfy the unforeseeability standard. *Id.*

202 *Id.* at 761.

203 *Id.* at 765 (O'Connor, J., concurring) ("I write separately . . . to clarify why, despite our limited review, the cases should be returned to the District Court.").

floor,"[204] provides a second safeguard against wholesale modification of the terms of consent decrees. Under this element of the standard of review, institutional defendants must propose modifications which respond to the changed circumstances underlying their request, and not just use those changed circumstances as an excuse to rewrite the consent decree in their favor. Yet, given the wide discretion of courts sitting in equity, Justice White's statement in and of itself offers little protection against lower courts allowing arbitrary and excessive lowering of decree requirements.[205] But the statement does place the lower courts on notice that they must reject an argument for a revision of a consent decree based on the allegation that it exceeds a lowered constitutional standard.

B. HOW SHOULD THE CONSENT DECREE BE MODIFIED?

If a party moving for a modification satisfies its initial burden of showing that a change in fact or law warrants a revision of the decree then, under the second half of the *Rufo* test, the reviewing court should only inquire as to suitability of the proposed modification given the changed circumstances.[206] This standard significantly restricts the role of the district courts in devising and overseeing the implementation of consent decrees in institutional reform cases. This limitation is proper when considered in light of the principle of separation of powers, the special nature of institutional reform litigation, and the general need to reduce the burdens on the federal court system.

This second half of the Court's standard of review is consistent with Supreme Court decisions involving institutional reform injunctions, stretching back to *Brown v. Board of Education*.[207] The Court, quoting its decision in *Brown*, stated, " '[c]onsiderations based on the allocation of powers within our federal system' require that the district court defer to local government administrators who have the 'primary responsibility for elucidating, assessing and solving' the problems of institutional reform, to resolve the intricacies of implementing a decree modification."[208] The Court also cited *Missouri v. Jenkins*, in which the principles of federalism were invoked to pre-

204 *Id.* at 764.

205 *But see* HOFFER, *supra* note 158, at 18. While equitable discretion is greater than that normally exercised by a court, the decisions of higher courts guide lower courts in exercising their discretion.

206 Rufo v. Inmates of the Suffolk County Jail, 112 S. Ct. 748, 764 (1992).

207 349 U.S. 294 (1954). *See also* Bd. of Educ. of Okla. City Sch. v. Dowell, 111 S. Ct. 630 (1991); Missouri v. Jenkins, 495 U.S. 33 (1990); Milliken v. Bradley, 433 U.S. 267 (1977).

208 *Rufo*, 112 S. Ct. at 764 (quoting *Brown*, 349 U.S. at 299).

vent the courts from enacting an affirmative injunction requiring a tax levy.[209] Both *Brown* and *Jenkins* rest on the idea that under the separation of powers in our federal system, the executive and legislative branches of government have greater practical knowledge of how to run public institutions. In addition, these two decisions recognize that the executive and legislative branches of government are more attuned to the needs of the public due to the democratic nature of their organization.

The circumstances in *Rufo* present a slightly different problem for the Court than those before it in *Brown* and *Jenkins*. In *Brown*, the Court ordered the remedial action on the part of the local authorities, but it left it to the local school board to implement the plan.[210] In *Jenkins*, the Court was faced with a bare assertion of legislative power on the part of the district court.[211] Alternatively, the case before the Court in *Rufo* involved a consent decree between two parties, not an injunction as in *Brown* or *Jenkins*. Justice O'Connor noted that because the consent decree involves an agreement between two parties, the proper role for the court is to hammer out a modification that is "equitable to all concerned."[212]

Justice O'Connor incorrectly drew a distinction between *Rufo* and *Jenkins* and *Brown* based on whether the judgment occurred due to an injunction by the court or a consent decree between the parties. Once rendered inapplicable, a term in the original consent decree falls out and must be replaced. At this stage, the parties to the consent decree reassume their original bargaining positions and are free to negotiate a new term themselves or leave it up to the court. The plaintiff class has the same incentives and abilities to negotiate the modification as they do the original consent decree.[213] In fact, the plaintiff class occupies a stronger bargaining position with respect to the modification because the burden of proving the necessity of the modification lies with the defendant, whereas the initial burden of proving the need for reform lies with the plaintiff. The new provision, if not negotiated, resembles an injunction by the court, not a consent decree. Thus, the deference to the local authorities called for in *Brown* and *Jenkins* should apply.

Justice O'Connor's criticism of the standard also failed to take

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209 *Id.* (citing *Jenkins*, 495 U.S. at 51).

210 *Brown*, 349 U.S. at 294.

211 *Jenkins*, 495 U.S. at 41-42 (district court levied tax to pay for desegregation plan).

212 *Rufo*, 112 S. Ct. at 767 (O'Connor, J., concurring).

213 For an analysis of the economic model of settlement in the consent decree context, *see* Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19.

into account the amount of discretion the second part of the majority's test left in the hands of courts. Under the standard set forth by Justice White, the reviewing court retains the power to reject any proposed modification that is ill-suited to remedy the problems at hand or is overreaching.[214] This power will prevent abuses on the part of the local authorities, while at the same time reducing the role courts play in devising decrees.

The Court also relied on *Board of Education of Oklahoma City Public Schools v. Dowell*[215] to support the idea that federal courts should defer to the local government administrators to "resolve the intricacies of implementing a decree modification."[216] In *Dowell*, the defendant's good-faith compliance with the district court's decrees justified the Court's reliance on the defendant's continued good behavior in the absence of the decree.[217] As noted in the *Rufo* opinion by both Justice O'Connor and Justice Stevens, however, the Sheriff of Suffolk County did not have a history of good-faith compliance. Justice O'Connor echoed the fox guarding the hen house parable when she stated, "[d]eference to one of the parties to a lawsuit is usually not the surest path to equity; deference to these particular petitioners, who do not have a model record of compliance with previous court orders . . . is particularly unlikely to lead to an equitable result."[218]

Justices O'Connor and Stevens overstated the danger of the defendant taking advantage of the modification of the decree to continue its history of noncompliance. In *Rufo*, the fact that construction had begun on the new jail insured the defendants' compliance with its promise to build a new facility, lest it waste its investment. In *Dowell*, the Court's decision not to reopen the case was not a reward for good-faith compliance with the decree, but rather was based on the low probability of the defendant undertaking discriminatory practices after years of good-faith compliance with the decree.[219] To refuse to defer to the judgment of the local officials in a case where they have previously failed to comply with the decree's provisions serves only to punish if the facts, as in *Rufo*, suggest that the local officials have begun to comply.[220] Whether or not a refusal to modify a decree serves to punish or to uphold the

214 *Rufo*, 112 S. Ct. at 764.
215 111 S. Ct. 630 (1991).
216 *Rufo*, 112 S. Ct. at 764.
217 *Dowell*, 111 S. Ct. at 630. *See supra* notes 65-69 and accompanying text.
218 *Rufo*, 112 S. Ct. at 767.
219 *Dowell*, 111 S. Ct. at 637.
220 *See* Duran v. Elrod, 760 F.2d 756, 762 (7th Cir. 1985) (punishment as a reason for refusing to modify consent decree unjustified because of the effects of the decree on

basic purpose of the decree can be determined by asking if the modification would still be necessary had the defendant complied with the decree. If so, then the refusal of modification serves only to punish, a task better achieved through court sanctions against the offending administrators than the imposition of an inefficient consent decree upon the public institution.

VI. CONCLUSION

Justice White's majority opinion properly recognized that government institutions are not self-contained and determinative entities. The needs of the general public limit the discretion of individual public institutions and, as such, must be taken into account when making decisions that affect the operation of those institutions. By defining the purpose of consent decrees as a general reformation of constitutional violations at an institution, the Court recognizes the dangers involved when individuals, acting on behalf of the government, bind the discretion of future democratically elected officials. In further deference to these democratic ideals, the second half of the standard put forth by the *Rufo* Court ensures that control over public institutions remains in the hands of the public, rather than the federal courts. The dissent's suggestion that the standard adopted by the Court destroys the usefulness of the consent decree by allowing public institutions to avoid their responsibilities under such decrees fails to recognize the need to provide incentives for the institutional defendant to come to the bargaining table. The Court's standard should increase the likelihood of consent decrees as government defendants will feel more at ease engaging plaintiffs in a dialogue aimed at reforming the institution. Finally, removing the courts from their role in developing reform programs will reduce the pressure on the courts' congested dockets. In the end, the *Rufo* decision properly leaves institutional administrators with the task of running institutions and the courts with the task of protecting constitutional and statutory rights.

MICHAEL J. FIEWEGER

non-parties and the disincentive to future defendants to enter into inflexible consent decrees).