University of Arkansas at Little Rock Law Review

Volume 15 | Issue 1 Article 4

1992

Public Law—Modification of Consent Decrees—More Flexible Standard for Modifications in Institutional Reform Litigation. Rufo v. Inmates of the Suffolk County Jail.

Donna Wolfe

PUBLIC LAW—MODIFICATION OF CONSENT DECREES—MORE FLEXIBLE STANDARD FOR MODIFICATIONS IN INSTITUTIONAL REFORM LITIGATION. *Rufo v. Inmates of the Suffolk County Jail*, 112 S. Ct. 748 (1992).

I. FACTS

In 1971, the inmates of the Suffolk County Jail in Boston, Massachusetts[1] filed a class action lawsuit under 42 U.S.C. section 1983 alleging violations of their constitutional rights attributable to the inadequate conditions of the prison.[2] The lawsuit alleged violations of the inmates' constitutional rights embodied in the First, Sixth, Eighth, and Fourteenth Amendments.[3] The litigation ultimately resulted in a United States Supreme Court decision which adopted a more flexible standard under which courts may modify a consent decree in institutional reform litigation.[4]

The prison facility, known as the Charles Street Jail, had been in use since 1848[5] and had been the subject of seven different government studies from 1949 to 1970 that criticized the structure.[6] The district court held that incarceration of pretrial detainees at the Charles Street facility violated the fundamental liberties of presumptively innocent citizens awaiting trial and was "punishment" to such a degree that it violated the Due Process Clause of the Fourteenth Amendment.[7] The

---

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

2. Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973).

3. *Id.* at 677-78. The Eighth and Fourteenth Amendment violations were based upon "structural inadequacies, poor plumbing, space limitations, inadequate diet and health care, inadequate exercise and recreation, and inadequate provision for personal hygiene. . . ." *Id.* at 678. The First and Sixth Amendments formed the basis for a second category of requested relief. The plaintiffs argued that the inmates were primarily pretrial detainees, not convicts, and, therefore, were entitled to greater access to counsel, family, friends, books, magazines, and periodicals. *Id.* at 678-79.

4. *Rufo*, 112 S. Ct. at 765.

5. *Eisenstadt*, 360 F. Supp. at 679.

6. *Id.* at 681. Most of the studies recommended that the facility be abandoned and a new one constructed. *Id.*

7. *Id.* at 686. The court stated that when dealing with pretrial detainees a Fourteenth Amendment analysis was more appropriate than an Eighth Amendment analysis. Nevertheless, certain Eighth Amendment considerations also applied in this case. *Id.* at 688.

The court stated that the limitations on the liberty of a detainee must be weighed against the state's sole purpose of holding him for trial. That purpose must be achieved by narrowly tailored

court permanently enjoined the defendants "(a) from housing at the Charles Street Jail after November 30, 1973 in a cell with another inmate, any inmate who is awaiting trial and (b) from housing at the Charles Street Jail after June 30, 1976 any inmate who is awaiting trial."[8]

The defendants did not appeal the judgment, but by mid-November 1973, they informed the district court that the November 30 deadline could not be met.[9] The court ordered the defendant Commissioner of Correction to comply; he appealed the order without success.[10]

The defendants succeeded in postponing the June 30, 1976 deadline for the discontinued use of Charles Street as a pretrial detainee facility.[11] In order to achieve a constitutionally adequate pretrial detainee center, the district court, in November 1977, ordered the City Council to appropriate the funds to establish such a center.[12] The order was appealed and again affirmed, establishing October 2, 1978 as the date upon which the Charles Street Jail was to be closed as a pretrial detainee facility.[13]

As a result of the 1977 order, the parties to the lawsuit signed a consent decree in April 1979, which required that inmates be housed in single cells in a new facility to be constructed by 1983.[14] The facility's

---

means in order to protect fundamental personal liberties. *Id.* at 686. The deprivations at issue included ancient, leaky plumbing; cell toilets that often overflowed creating a fecal smell; rodent, roach, and mosquito infested cells; inadequate heat, health care, and fire protection; old, soiled mattresses; nutritionally inadequate meals; cramped living quarters; and time outside of cells limited to four and one-half hours per day. *Id.* at 679-83.

The court based its conclusions upon expert testimony, "voluminous" documentary evidence, affidavits of the inmates; and a viewing of the facility by Judge Garrity and his law clerk, including an unannounced overnight stay in a cell. *Id.* at 678.

8. *Id.* at 691. The court found that the inmates were double-celled in tiny cells for 19 to 21 hours per day and could be detained awaiting trial from five months to a year, or longer. *Id.* at 679-82.

9. Inmates of the Suffolk County Jail v. Eisenstadt, 494 F.2d 1196, 1197-98 (1st Cir. 1974).

10. *Id.* at 1198. The crowding at the jail could only be relieved by transferring inmates to other facilities outside Suffolk County and only the Commissioner had the statutory power to authorize the transfers. After he refused to cooperate, the district court ordered compliance. The First Circuit, relying on Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), upheld the order as within the court's equitable powers to remedy constitutional violations. *Id.* at 1198.

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

12. *Id.* at 99.

13. *Id.* at 100.

14. Attorney General of Mass. v. Sheriff of Suffolk County, 477 N.E.2d 361, 362 (Mass. 1985).

size was based upon projections of the anticipated jail population, which proved inaccurate by 1984 when the entire correctional system was overcrowded.[15] Due to the noncompliance of city officials in alleviating the overcrowding, the Attorney General of Massachusetts filed suit against the sheriff in 1984.[16] The suit resulted in a modification to the consent decree that would increase the number of cells in the new jail and thus assure future compliance with the 1979 decree.[17] One of the conditions for approval of the modification was the maintenance of single cell occupancy.[18]

In 1989, the sheriff sought a further modification of the decree to allow double-bunking of some inmate detainees.[19] The sheriff moved for the modification pursuant to *Federal Rule of Civil Procedure* 60(b)(5) and (6).[20] The district court ruled that there had not been a change in law or a change in fact to support the modification.[21]

The court considered two standards for modification of consent decrees.[22] As interpreted by the court, the more stringent standard set by *United States v. Swift & Co.*[23] required a showing of "grievous wrong evoked by new and unforeseen conditions."[24] A more flexible standard, applied in more recent cases by some courts, did not require that the

---

15. *Id.*

16. *Id.* at 362-63. By October, 1984, the construction of the new jail had not yet begun even though the 1979 consent decree had set the completion date for 1983. *Id.*

17. *Id.* at 363.

18. Inmates of the Suffolk County Jail v. Kearney, 734 F. Supp. 561, 563 (D. Mass. 1990).

19. *Id.* at 562. The sheriff proposed confining the inmates to cells of approximately 70 square feet of floor space for twelve hours per day, eight hours at night, and four hours during the day. The sheriff relied on statistics to show that 25% of the pretrial detainees are released within two days and 50% within eight days. These statistics were contested by the plaintiffs. *Id.* at 564.

20. *Id.* at 563, 565. The modification of a consent decree may be based upon a change in law or a change in material facts which occurred subsequent to the initial decree. The change in the law asserted by the sheriff was the United States Supreme Court's holding in Bell v. Wolfish, 441 U.S. 520 (1979), which was decided one week after the district court's original approval of the consent decree in 1979. *Id.* at 564. In *Bell* the Court clarified the law regarding conditions for confinement of pretrial detainees. The Court held that the test to determine the constitutionality of pretrial detention was whether the practice amounted to punishment of the detainee. *Bell*, 441 U.S. at 535. The Court further held that double-celling was not per se unconstitutional. *Id.* at 541-42. The change in facts asserted by the sheriff was the continuing and unanticipated increase in pretrial detainee populations. *Kearney*, 734 F.Supp. at 564.

21. *Kearney*, 734 F. Supp. at 564. The court found that *Bell* did not overrule any legal interpretation upon which the 1979 consent decree had relied to establish a constitutionally adequate facility. *Id.* at 563-64. The overcrowding was found to be neither a new nor an unforeseen condition and therefore did not support modification. *Id.*

22. *Id.* at 563, 565.

23. 286 U.S. 106 (1932).

24. *Id.* at 119.

change in circumstances necessarily be unforeseen.[25] The court found that neither standard could support the sheriff's motion.[26] Judge Keeton stated that even if he were to apply the flexible standard, the modification could still not be granted. The modification would defeat the purpose of the consent decree by eliminating a primary element of the relief originally sought—separate cells for detainees.[27] The court of appeals affirmed the decision of the district court.[28] The United States Supreme Court granted certiorari.[29]

The Court adopted the flexible standard for modification of consent decrees in institutional reform litigation.[30] The Court concluded that *Federal Rule of Civil Procedure* 60(b) permits the flexible standard for relief from a decree where prospective application is no longer equitable.[31] The Court held that the party moving for modification must satisfy a two-part requirement.[32] First, the party must establish a significant change in fact or law.[33] Second, the party must show that "the proposed modification is suitably tailored to the changed circumstance."[34] *Rufo v. Inmates of the Suffolk County Jail*, 112 S. Ct. 748 (1992).

II. HISTORICAL DEVELOPMENT

A consent decree is a negotiated agreement reached between two parties in settlement of litigation.[35] After court approval, the decree is either signed by the judge or embodied in a separate order.[36] Characteristics of both a private contract and an injunction combine to form the hybrid known as a consent decree.[37]

---

25. *See* Plyler v. Evatt, 846 F.2d 208 (4th Cir.), *cert. denied*,. 488 U.S. 897 (1988); New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983); Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981); Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

26. *Kearney*, 734 F. Supp. at 565.

27. *Id.*

28. Inmates of the Suffolk County Jail v. Kearney, 928 F.2d 33 (1st Cir. 1991).

29. 111 S. Ct. 950 (1991).

30. Rufo v. Inmates of the Suffolk County Jail, 112 S. Ct. 748, 765 (1992).

31. *Id.* at 758.

32. *Id.* at 760.

33. *Id.*

34. *Id.*

35. Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 725.

36. *Id.* at 726.

37. Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). *See also* Anderson, *supra* note 35, at 726.

The contract component comes from the parties drafting a compromise to settle the litigation.[38] The parties are free to define their rights and duties in the settlement.[39] Utilizing the parties' technical knowledge of the situation, the consent decree creates a more individualized and feasible approach than a judicial decree.[40] This negotiated decree promotes cooperation and compliance more than a court-structured order.[41]

The injunctive element results from judicial approval and the court's order compelling compliance.[42] The decree is as enforceable as other judgments.[43] Enforcement may be accomplished by a spectrum of judicial powers including interpretation of a provision, injunctions, or contempt sanctions.[44]

In addition to the negotiation and enforcement advantages, the consent decree saves time, expense, and the risk of litigation.[45] It can also provide greater relief to the plaintiffs than could be obtained at trial.[46]

A court's power to fashion and effectuate decrees is guided by equitable principles.[47] The jurisdiction of the American equity courts evolved to allow expansive remedies capable of vindicating individual rights, especially constitutional rights, when the law courts proved in-

---

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

39. Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 HARV. L. REV. 1314, 1317 (1959).

40. Anderson, *supra* note 35, at 726-27. *But see* Timothy S. Jost, *From* Swift *to* Stotts *and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1103 (1986) (arguing that a consent decree may turn out to be less durable than a litigated order if the parties have unequal bargaining power, unequal access to information, or incentives to place risks on nonrepresented persons to the negotiations). *See also* United States v. Armour & Co., 402 U.S. 673, 681-82 (1971) ("[T]he resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.").

41. Schwarzschild, *supra* note 38, at 899.

42. Anderson, *supra* note 35, at 726.

43. Note, *supra* note 39, at 1316.

44. Anderson, *supra* note 35, at 728-29.

45. United States v. Armour & Co., 402 U.S. 673, 681 (1971). On the other hand, the Court pointed out that each party risked compromising a term which might be won in litigation. *Id.*

46. *See Local Number 93*, 478 U.S. at 523-25. *See also* Wagner v. Warnasch, 295 S.W.2d 890 (Tex. 1956) (affirming a consent decree which required the specific performance of construction work). *But see* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (holding that an injunction was improper because it imposed on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial). *Id.* at 579.

47. Brown v. Board of Educ., 349 U.S. 294, 300 (1955).

adequate.[48] Through the use of injunctions, equity developed expansive and innovative doctrines not bound by legal remedies and precedents.[49] Traditionally, the injunction gave negative orders prohibiting an act rather than requiring affirmative action.[50] At the end of the nineteenth century, the use of injunctive relief to order affirmative action became more prominent.[51] As a result, equity used the affirmative decree, which had the force of law, to direct the conduct of the parties before the court.[52]

The federal courts have increased the use of consent decrees as a broad, new public law field developed.[53] Plaintiffs began asking the courts to restructure and supervise the reform of institutional programs rather than to simply correct an isolated violation of the law.[54] Institutional reform litigation evolved to redesign the operation of large, public organizations.[55] The organizations were often state bureaucracies[56] such as school systems, prisons, mental hospitals, welfare programs, public housing projects,[57] and other large scale employers capable of affecting the job market through discriminatory practices.[58] The administration of public programs often threatened constitutional rights or violated statutory provisions.[59] Constitutional rights involved in reform litigation included equality, due process, liberty, security of the person, and no cruel or unusual punishment.[60] In prison and mental institution cases, the decrees address unconstitutional conditions such as space availability, health services, sanitation, recreation, job train-

48. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1270-71.

49. *Id.* at 1271.

50. 4 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1337, at 934 (5th ed. 1941).

51. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1293 (1976).

52. *Id.*

53. Anderson, *supra* note 35, at 725. *See also* Schwarzschild, *supra* note 38, at 894, 934 (stating that 88% of the Equal Employment Opportunity Commission's Title VII suits from 1972 to 1983 were settled by consent decrees).

54. Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 44 (1979).

55. Owen M. Fiss, *The Supreme Court 1978 Term Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2-3 (1979).

56. *Id.* at 2.

57. Horowitz, *supra* note 48, at 1266.

58. Schwarzschild, *supra* note 38, at 899.

59. Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

60. Fiss, *supra* note 55, at 11.

ing, and staffing ratios.[61] The judge, through a consent decree or injunction, confronts the state bureaucracy and attempts to remove the constitutional threat by restructuring the organization.[62] The role of the court becomes not so much to settle a dispute, but to define constitutional values and correct the conditions within the organization that threaten constitutional rights.[63]

During the 1960s, certain events occurred which paved the way for institutional reform litigation.[64] First, the federal courts became active in school desegration and thrust the courts into social reconstruction.[65] Next, the Supreme Court in *Baker v. Carr*[66] redefined the political question doctrine and upheld judicial expansion into states' legislative reapportionment.[67] Once *Baker* declared that reapportionment was a justiciable issue, the justiciability of other issues followed and removed previous barriers restricting the courts' interference in the internal affairs of both legislative and administrative governmental bodies.[68] The courts then began reshaping prisons, welfare administrations, mental hospitals, and housing authorities.[69]

Enactment of federal antidiscrimination statutes further promoted

---

61. Chayes, *supra* note 59, at 51.

62. Fiss, *supra* note 55, at 11. The federal courts became the forum in which to attack these institutions. Diver, *supra* note 54, at 49.

63. Jost, *supra* note 40, at 1118. The reform litigation was "to give meaning to constitutional values in the operation of large-scale organizations." Fiss, *supra* note 55, at 5. A particular incident, such as discrimination or police brutality, may initiate the litigation, but the focus is on a social condition that threatens constitutional rights. *Id.* at 18. The plaintiff sues the institution to obtain long-term reform of the institution rather than compensation. *See id.* at 22-23. The plaintiff is usually a class challenging government actions. Chayes, *supra* note 59, at 27. The victim of the actions is not an individual but a group. Fiss, *supra* note 55, at 19.

64. *See* Horowitz, *supra* note 48, at 1266-69.

65. *See* Horowitz, *supra* note 48, at 1279-81. The Supreme Court in Brown v. Board of Educ., 347 U.S. 483 (1954), undertook to restructure the organization of the school system. The Court continued to uphold the federal courts' affirmative actions promoting desegregation. *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972); Wright v. Council of Emporia, 407 U.S. 451 (1972); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Cooper v. Aaron, 358 U.S. 1 (1958); and Brown v. Board of Educ., 349 U.S. 294 (1955). *See generally* JACK BASS, UNLIKELY HEROES (1981) (examining the lower courts efforts to enforce the desegregation requirements of *Brown*).

66. 369 U.S. 186 (1962).

67. Horowitz, *supra* note 48, at 1280.

68. Horowitz, *supra* note 48, at 1280. The *Baker* court held that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question." 369 U.S. at 209. The Court then examined areas previously considered nonjusticiable and discussed circumstances where adjudication would be proper in those areas. *Id.* at 210-17.

69. Horowitz, *supra* note 48, at 1280. By 1981, prison conditions litigation was pending in three-fourths of the states. *Id.* at 1281.

institutional reform litigation by creating individual rights which were often violated by the management of large, public institutions.[70] The alleged violation of these rights initiated litigation to decide the validity of certain governmental action or inaction.[71] The courts had to interpret the statues[72] and enforce the rights of a litigant, such as a prisoner, welfare recipient, or school child, compelled to be in a long-term relationship with the defendant institution.[73]

Once the reform litigation is initiated, the controversy often culminates in a consent decree.[74] The court, by its approval of the decree, utilizes judicial authority to achieve the operational reform of large, government institutions.[75] Consent decrees are complicated documents designed to bring about reform over a period of years.[76] The complexity and time span of the institutional decree created situations where modification became necessary.[77] Given the prospective nature of the decree, future changes in facts or the law or unanticipated effects from the decree may require revision of the decree to accommodate the changes.[78] The ability of a court to modify the decree is essential since the decree cannot provide for all future contingencies or simply may prove to be unworkable.[79] Fortunately, the ability to modify a decree is

---

70. Horowitz, *supra* note 48, at 1282. The acts included various civil rights acts. *See*, e.g., 42 U.S.C. §§ 2000c to 2000c-9 (1988) (public education); 42 U.S.C. §§ 2000e to 2000e-17 (1988) (employment); Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1988); and Freedom of Information Act, 5 U.S.C. § 552 (1988). *See also* Chayes, *supra* note 59, at 6.

71. Chayes, *supra* note 59, at 9.

72. Horowitz, *supra* note 48, at 1281-83.

73. Theodore Eisenberg and Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 511-12 (1980). The litigation arose from the continuing involvement between the American public and the large institutions. The litigant's well-being and support may be dependent upon the institution, and most of the time the court cannot sever the relationship between the plaintiff and the institutional defendant. Instead, the court must implement prospective and complex decrees to safeguard the plaintiff's constitutional rights.

74. Schwarzschild, *supra* note 38, at 888. The consent decree can be an alternative to litigation and may occur before trial or after substantial litigation on the merits. *Id.* at 900-02, 907, 911. Prior to approving the decree, the court may hold a fairness hearing about the proposed consent decree and its consequences. This provides an opportunity for litigants to voice suggestions or objections to the decree's provisions. *Id.* at 911-12.

75. Schwarzschild, *supra* note 38, at 888. *See also supra* note 42-44 and accompanying text. The federal courts' involvement raises the issues of comity and deference to state officials on fiscal matters. The federal court must be cognizant of budgetary limitations, but not allow constitutional violations to go unremedied. Eisenberg, *supra* note 73, at 506-07. *See also* Anderson, *supra* note 35, at 742-44.

76. Schwarzschild, *supra* note 38, at 899.

77. *See also* Rufo v. Inmates of the Suffolk County Jail, 112 S. Ct. 748, 758 (1992).

78. Jost, *supra* note 40, at 1104-05.

79. Anderson, *supra* note 35, at 727. *See also* United States v. United Shoe Mach. Co., 391

inherent in a court's equity power.[80]

The courts' historic power to modify a decree is codified in *Federal Rule of Civil Procedure* 60(b).[81] In response to a party's motion, Rule 60(b) gives a court the power to grant relief from final judgments.[82] This rule gives the issuing court continuing responsibility and equitable powers over the prospective operation of the decree.[83] Even though Rule 60(b)(5) sets out three grounds for relief, the most significant ground allows relief when prospective application of the final judgment is no longer equitable.[84] The courts have "wide discretion" when considering a motion to modify.[85]

Prior to the enactment of Rule 60(b)(5),the Supreme Court in *United States v. Swift & Co.*[86] recognized a court's inherent power to modify prospective decrees "as events may shape the need."[87] Setting the standard to use in modification requests, the Court held that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" would support revision.[88] The *Swift* consent decree was a complex, detailed compromise ending a long and bitter antitrust dispute between the United States and leading meat packers.[89] The defendant meat packers, citing changes in the grocery business, sought the revision to eliminate restrictions imposed by the de-

---

U.S. 244, 249 (1968) (holding that modification was justified if the decree failed to achieve its original purpose).

80. United States v. Swift & Co., 286 U.S. 106, 114 (1932). The Court stated that it was irrelevant whether the decree was by consent or litigation. The Court noted that the power existed either by reservation of the right within the decree's terms or "by force of principles inherent in the jurisdiction of the chancery." *Id.*

81. 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2961, at 598-99 (1982).

82. *Id.* § 2863, at 204. The Rule applies to any judgment with prospective relief. *Id.* at 205.

83. *Id.* § 2961, at 599.

84. *Id.* § 2863, at 204.

85. *See* System Fed'n No. 91 v. Wright, 364 U.S. 642, 648 (1961). *See also* 11 WRIGHT & MILLER, *supra* note 81, § 2961, at 599-600.

86. 286 U.S. 106 (1932).

87. *Id.* at 114.

88. *Id.* at 119. An early draft by Justice Cardozo was found among his personal papers stating that originally Cardozo affirmed the modification. Cardozo found that the decree worked a hardship on the defendants and the public and wrote: "A judgment for a continuing injunction involves a forecast of the future, which has been known to belie its prophets whether seated on the bench or elsewhere. The greater is the need therefore to strip the forecast of finality and leave a pathway for retreat." Jost, *supra* note 40, at 111 n.73.

89. Jost, *supra* note 40, at 1107-08. Consent decrees first gained prominence in antitrust litigation. Schwarzschild, *supra* note 38, at 888.

cree.[90] The Court reversed the district court's order granting modification.[91] The Court found that the changed circumstances were outweighed by the continuing existence of the original dangers that supported the decree and the lack of undue hardship on the defendants by continued enforcement.[92] However, the Court recognized the need to modify a decree when changed circumstances turned it into "an instrument of wrong" and noted that a decree is not an abandonment of the right to future revision.[93]

Granting an antitrust decree modification in *Chrysler Corp. v. United States*,[94] the Court reasoned that the change was necessary to effectuate the basic purpose of the original consent decree.[95] Contrary to *Swift*, where the defendants sought the modification, the plaintiff government in *Chrysler*, citing changed facts, requested the modification.[96] The modification in *Chrysler* granted the government a time extension for compliance with a term of the decree.[97]

The Court in *United States v. United Shoe Machinery Corp.*[98] again allowed a modification sought by the plaintiff government.[99] The district court had denied the modification relying upon the stringent standard established in *Swift*.[100] The Court held that the eleven year old decree had not achieved its purpose and that modification was proper when a decree failed to achieve its goals.[101] Further, the *United Shoe* Court said that *Swift* was not intended to ban all modifications and that modification would be possible upon an appropriate showing.[102] However, the decree cannot be modified to benefit defendants seeking to avoid the achievement or responsibilities of the decree's purpose.[103] The Court noted that the plaintiffs in *United Shoe* sought the

---

90. *Swift*, 286 U.S. at 111-13.
91. *Id.* at 120.
92. *Id.* at 119.
93. *Id.* at 115.
94. 316 U.S. 556 (1942).
95. *Id.* at 562.
96. *Id.* at 560. The Court allowed the government modification of the time limit to resolve its ongoing litigation with General Motors. The result of the General Motor's litigation would be used to determine the rights between the United States and Chrysler in their decree. *Id.* at 563.
97. *Id.*
98. 391 U.S. 244 (1968).
99. *Id.* at 249. The government alleged that the eleven year old decree had not achieved its purpose of establishing "workable competition" in the industry. *Id.* at 246-47.
100. United States v. United Shoe Mach. Corp., 266 F. Supp. 328, 329-30 (D. Mass. 1967).
101. *United Shoe*, 391 U.S. at 249.
102. *Id.* at 248.
103. *Id.*

modification to better achieve the decree's purpose and, therefore, modification was not precluded by *Swift*.[104]

In contrast to the factual changes relied upon in *United Shoe* and *Chrysler*, a change in law resulted in modification in *Railway Employees' Department v. Wright*.[105] In *Wright*, the parties' consent decree prohibited the carrier and union shops from forming agreements discriminating against nonunion employees, which was also prohibited under the Railway Labor Act.[106] After an amendment to the Railway Labor Act was passed allowing union shops, the defendant union moved for modification of the decree.[107] The district court, denying the request, held that the amendment did not nullify or prohibit the agreement and, therefore, the parties should be left to their agreement.[108] Overruling the district court's ruling, the Court, citing *Swift*, held that a court should not ignore significant changes in law or facts and turn the decree into an "instrument of wrong."[109] The Court also recognized that the need to modify a decree in light of subsequent changes to prevent the decree from becoming an "instrument of wrong"[110] must be balanced against the need for the parties' reliance on a decree's continuity.[111] However, the Court emphasized that there was no disputing that changes may call for modification.[112]

Despite the Supreme Court's decisions that quoted *Swift* for allowing modification, some district courts continued to apply the strict standard of *Swift* and required evidence of undue hardship before allowing modification.[113] These courts maintained that the consent decree should not be modified except in exceptional circumstances.[114] However, other district courts recognized that the institutional reform de-

---

104. *Id.* at 249.

105. 364 U.S. 642 (1961).

106. *Id.* at 643-44.

107. *Id.* at 644-45.

108. *Id.* at 645-46.

109. *Id.* at 647.

110. *Id.* (quoting United States v. Swift & Co., 286 U.S. 106, 115 (1932)).

111. *Id.* at 647-48.

112. *Id.* at 648.

113. *See* Humble Oil & Ref. Co. v. American Oil Co., 405 F.2d 803, 813 (8th Cir.), *cert. denied*, 395 U.S. 905 (1969) (relying on *Swift's* strict standard to deny modification in a trademark litigation case). *See also* Roberts v. St. Regis Paper Co., 653 F.2d 166 (5th Cir. 1981) (adhering to the strict standard of *Swift* to deny modification); Williams v. Lesiak, 822 F.2d 1223 (1st Cir. 1987) (citing the grievous wrong standard of *Swift* and remanding).

114. *See* Rajender v. University of Minn., 730 F.2d 1110 (8th Cir. 1984); *Roberts*, 653 F.2d at 174; *Humble Oil*, 405 F.2d at 813.

crees required greater flexibility than the strict *Swift* standard[115] and struggled in their attempts to address modification.[116] The courts became more flexible in reviewing modification requests, but lacked consistency in the approaches taken.[117]

One approach allowed modification when a new appreciation of the facts[118] or unforeseen changes in law or facts necessitated revision to effectuate the decree's purpose.[119] Often, the courts cited *Swift* to support a holding that changed events could necessitate revision[120] and distinguished *Swift* when the modification was sought to better achieve the decree's goals.[121]

In another approach, the courts balanced the moving party's need for modification against the impact of modification upon the general public.[122] Courts applied this analysis in cases involving overcrowded prisons in which an alternative to modification was the early release of inmates.[123] The courts of appeals reversed district courts that refused modification when the public interest was endangered and found an abuse of discretion if the public interest was not adequately weighed.[124]

The good faith compliance record of the party moving for modifi-

---

115. *See* Heath v. De Courcy, 888 F.2d 1105, 1110 (6th Cir. 1989); Newman v. Graddick, 740 F.2d 1513, 1520 (11th Cir. 1984); New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 969-71 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983); Nelson v. Collins, 659 F.2d 420, 424 (4th Cir. 1981); Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1120-21 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

116. Jost, *supra* note 40, at 1106.

117. Jost, *supra* note 40, at 1106, 1113.

118. *See* King-Seeley Thermos Co. v. Alladin Indus., 418 F.2d 31, 34-35 (2d Cir. 1969). Although not an institutional reform case, *King-Seeley* was often cited to support modification not only for a change in facts but also when a passage of time enhanced the significance of previously known facts and indicated the decree was unsuccessful in accomplishing its purpose. Jost, *supra* note 40, at 1117.

119. New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 968 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983); Nelson v. Collins, 659 F.2d 420, 423-24 (4th Cir. 1981).

120. *See Carey*, 706 F.2d at 967. Judge Friendly's opinion in *Carey* is often credited with developing the flexible approach for modification of consent decrees in institutional reform litigation. *See, e.g.*, Rufo v. Inmates of the Suffolk County Jail, 112 S. Ct. 748, 768 (1992) (Stevens, J., dissenting); Nelson v. Collins, 659 F.2d 420, 423-24 (4th Cir. 1981).

121. *See Carey*, 706 F.2d at 969; *King-Seeley*, 418 F.2d at 35.

122. Plyler v. Evatt, 846 F.2d 208, 212 (4th Cir.), *cert. denied*, 488 U.S. 897 (1988); Duran v. Elrod, 760 F.2d 756, 759 (7th Cir. 1985).

123. *See Plyler*, 846 F.2d at 212; *Duran*, 760 F.2d at 759. *See also* Twelve John Does v. District of Columbia, 861 F.2d 295 (D.C. Cir. 1988) (agreeing that the public interest must be weighed but the threat to the public must be supported by actual evidence of the release program's danger).

124. *See, e.g., Plyler*, 846 F.2d at 212; *Duran*, 760 F.2d at 759.

cation came under scrutiny in other courts.[125] While it was not clear if this was a requirement for modification or just another factor to consider,[126] total compliance with the decree was not mandatory for modification.[127] Some courts also acknowledged that the focus must be on the central purpose of the decree and not just the fulfillment of each single term.[128]

During the time that the lower courts were setting a more flexible modification standard than that indicated by *Swift*, the Supreme Court again addressed the issue of modification of consent decrees in *Firefighters Local Union No. 1784 v. Stotts*.[129] *Stotts* involved a consent decree between the Memphis Fire Department and minority group employees. The decree was meant to increase the number of blacks hired and promoted within the department.[130] In 1981 projected budget deficits required citywide layoffs of nonessential personnel. This was accomplished through a seniority system of "last hired, first fired."[131] Minority members asked the district court to enjoin the layoff procedure as a direct conflict with the 1974 consent decree's terms since most of the recently hired employees were black.[132] Reversing the district court's injunction prohibiting the firing, the Supreme Court denied the requested relief because (1) the injunction improperly granted relief beyond the scope and contemplation of the decree,[133] and (2) the de-

---

125. *See Plyler*, 846 F.2d at 213; Duran v. Elrod, 713 F.2d 292, 295-96 (7th Cir. 1983); Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1120-21 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980); Mitchell v. Helena Wholesale Inc., 163 F. Supp. 101 (E.D. Ark. 1958).

126. Twelve John Does v. District of Columbia, 861 F.2d 295 (D.C. Cir. 1988).

127. Badgley v. Santacroce, 853 F.2d 50 (2d Cir. 1988); Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984).

128. *See Plyler*, 846 F.2d at 212-13; *Carey*, 706 F.2d at 970 n.17. The *Plyler* court was asked to modify a prison consent decree which prohibited double-celling of inmates. The court found that the central goal of the decree was to provide constitutionally required prison conditions and that to focus solely on the double-celling provision was inappropriate. The court stated that the prisoners had received the essence of their bargain, and their confinement exceeded constitutional requirements even without single celling. *Plyler*, 846 F.2d at 212-13. *See also* Ruiz v. Lynaugh, 811 F.2d 856, 862 (5th Cir. 1987) (denying modification because it would abrogate the primary purpose of the decree).

129. 467 U.S. 561 (1984).

130. *Id.* at 556.

131. *Id.*

132. *Id.* at 564-66.

133. *Id.* at 574-75. The Court stated that the scope of the consent decree can only be determined by looking within its four corners and not by considering what might further the purpose of one of the parties. The *Stotts* decree did not mention layoffs, demotions, or an intent not to follow the existing seniority system, and, therefore, the injunction exceeded the terms of the decree and was impermissible. *Id.*

cree's modification would create a conflict between the decree and Title VII of the Civil Rights Act of 1964[134] which allows bona fide seniority systems.[135] Exhibiting judicial disarray over the correct approach for modification, the *Stotts* Court wrote four opinions, each presenting separate considerations for modification.[136] Thus, *Stotts* left uncertainty among the lower courts as to whether a barrier to modification was created or whether the holding applied only to the substantive issues raised in Title VII litigation.[137]

III. REASONING OF THE COURT IN *RUFO*

Recently, however, the Court recognized a need for flexibility in school desegregation decrees and granted modification in *Board of Education v. Dowell*.[138] The *Swift* standard was rejected as inappropriate when considering modification of school desegregation decrees.[139] The Court recognized that a relevant factor to weigh when considering modification was a school's good faith compliance with the decree.[140] The Court limited the reasoning to school desegregation decrees, never addressing the broad issue of institutional reform decrees.[141] Specifically addressing institutional reform litigation in *Rufo v. Inmates of*

---

134. *See* 42 U.S.C. § 2000e-2(h) (1988). Title VII prohibits employment discrimination due to race, color, sex, religion, or national origin. Title VII litigation is an example of the public law or institutional reform litigation that often is resolved by consent decrees. Schwarzschild, *supra* note 38, at 890-901.

135. *Stotts*, 467 U.S. at 576-77.

136. Jost, *supra* note 40, at 1121-24. First, the majority opinion by Justice White dealt primarily with the substantive issues of employment discrimination. However, addressing the modification of a consent decree, Justice White restricted the modification if the resulting order would be inconsistent with the law. The terms of the decree and equity cannot be the sole consideration. In one of the concurring opinions, Justice O'Connor also found that the decree must be tailored to prevent conflicts with the law. Additionally, she maintained that modification is inappropriate without weighing the public interest. In a separate concurring opinion, Justice Stevens argued that a consent decree became a final judgment and a legally enforceable obligation. A foreseeable changed circumstance, as in *Stotts*, he argued, prohibits modification. Finally, Justice Blackmun, in his dissenting opinion, argued for flexibility in modification, especially in civil rights litigation in which accurate foresight is unattainable. The modification should enforce the intent of the parties reflected in the decree. *Id.*

137. *See generally* Girardeau A. Spann, *Simple Justice*, 73 GEO. L.J. 1041 (1985) (stating the holding is directed toward the narrow substantive issues more than modification issues); *The Supreme Court, 1983 Term-Leading Cases*, 98 HARV. L. REV. 87, 267 (1984) (suggesting the holding is directed at the narrow issue of Title VII consent decrees related to seniority systems).

138. 111 S. Ct. 608 (1991).

139. *Id.* at 637.

140. *Id.* at 637-38.

141. *See Dowell*, 111 S. Ct. at 630.

the Suffolk County Jail,[142] the Court established the standard for modification and discussed various considerations in a modification request.[143]

First, the Court addressed the *Swift* standard and found that the particular facts in *Swift* created the "grievous wrong" standard, but that *Swift* did not foreclose modification when changed events necessitated revision.[144] Also, the Court stated that the *Swift* standard was not codified in *Federal Rule of Civil Procedure* 60(b), permitting a flexible standard for modification.[145] The Court determined that institutional decrees increase the need for flexibility due to the long-term force of the decree, the likelihood of change occurring in this extended time period, and the impact on the public interest in efficient institutions.[146] The Court adopted a two tier standard which the moving party must satisfy.[147] First, the party must establish a significant change in circumstances that warrants the modification.[148] If this standard is met, the party must then demonstrate that "the proposed modification is suitably tailored to the changed circumstance[s]."[149] This two part standard must be satisfied when the party seeks modification of a decree's term "that arguably relates to the vindication of a constitutional right."[150]

In order to comply with the first requirement, the moving party must show that a significant change in either law or fact warrants revision.[151] A factual change can sustain modification when compliance is made more onerous, when unforeseen obstacles make the decree unworkable, or when compliance becomes detrimental to the public interest.[152] The fact that the condition was reasonably foreseeable will not

---

142. 112 S. Ct. 748 (1992).

143. *Id.*

144. *Id.* at 757-58. The Court also examined past Supreme Court decisions that emphasized flexibility. *Id.*

145. *Id.* The Court noted that Rule 60(b)(5) allows relief when enforcement is no longer equitable, not "when it is no longer convenient to live with the terms." *Id.* at 760.

146. *Id.* at 758-59.

147. *Id.* at 760.

148. *Id.*

149. *Id.*

150. *Id.* at 760 n.7. Ordinarily, a minor change request should receive party consent, but the court can grant the request, over protest, when the moving party shows a reasonable basis for the request. *Id.*

151. *Id.* at 760.

152. *Id.*

foreclose modification.[153] The litigants are not required to foresee all factual changes that could occur,[154] and a moving party will not assume sole responsibility for inadequate foresight.[155] However, if an event is anticipated by the parties and the decree is agreed to nonetheless, the moving party bears a heavy burden to prove its good faith and reasonable efforts toward compliance before modification will be granted.[156] Thus, the *Rufo* Court directed the district court on remand to determine whether the increase in the Suffolk County inmate population was anticipated by the government and relied upon in the consent decree.[157] Appraising the situation, the Court found it significant that the 1985 modified consent decree referred to the jail population increases as unanticipated.[158] Also, the Court found it strange that the respondent inmates agreed to the inadequate new jail size if an upsurge in prison population was foreseen.[159]

The Court held that the district court also erred in its conclusion that modification was not possible, under any standard, because it would violate a primary purpose of the decree.[160] The Court reasoned that the purpose of the decree was to remedy the totality of unconstitutional conditions within the Charles Street jail and not just to provide single cells for pretrial detainees.[161] Therefore, even though the single-celling was an undertaking of the decree, modification of a single term does not violate the decree's purpose aimed at providing constitutional jail conditions.[162]

Next, the Court examined when a change in law is sufficient to establish the initial burden for granting modification.[163] A change in law that makes an obligation impermissible under federal law *must* be modified.[164] However, a change that makes legal what the decree prevents or a change clarifying the law *may* warrant modification but does not require it.[165] As examples of changes in law affecting a modifica-

153. *Id.* at 761 n.10.
154. *Id.* at 760.
155. *Id.* at 761 n.10.
156. *Id.* at 761.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 759.
161. *Id.* at 762.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*

tion request, the Court referred to two prior court decisions.[166] First, citing *Railway Employees' Department v. Wright*,[167] the Court acknowledged that modification was possible when a change in law occurred which permitted an act previously held illegal by the law existing at the time of the decree's formation.[168] Next, the Court referred to *Firefighters Local Union No. 1784 v. Stotts*[169] to illustrate a situation for denying modification when the resulting obligation would conflict with the law.[170]

The Suffolk County Commissioner had argued that a change of law in *Bell v. Wolfish*,[171] decided after the Charles Street decree was signed, required modification because the *Bell* Court announced for the first time that double celling was not always unconstitutional.[172] However, the *Rufo* Court ruled that modification was not required since *Bell* did not change the legality of single-celling that the government agreed to provide.[173] The Court noted the possibility, though, that the government had been unsure of the constitutionality of double-celling on the decree's date and granted single cells believing that the law required it.[174] The later clarification of the law may support modification when the parties base the agreement on a misunderstanding of the law and later prove that there had been a misunderstanding.[175]

After proving a significant change in law or fact sufficient to grant modification, the moving party must then meet the second tier of the modification standard.[176] The party must submit a proposed modification "suitably tailored to the changed circumstance."[177]

When the district court evaluates the proposed modification, three factors must be clear.[178] First, the modification cannot create or perpet-

---

166. *Id.*

167. 364 U.S. 642 (1961). *See supra* notes 105-09 and accompanying text.

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

169. 467 U.S. 561 (1984). *See supra* notes 125-37 and accompanying text.

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

171. 441 U.S. 520 (1979).

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

173. *Id.*

174. *Id.* at 763.

175. *Id.* On remand, the district court must decide if the government knew it was granting greater rights than constitutionally required, thus not supporting a misunderstanding of the law. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

uate a constitutional violation.[179] Second, the modification must be tailored to resolve only the problems created by the change in law or facts.[180] The purpose of modification is not to rewrite the decree to conform with the constitutional floor.[181] The parties had the right in the original consent decree to bargain not only for greater benefits than the Constitution requires but for more than the court could order absent the settlement.[182] The court should not reopen the negotiation any more than equity requires.[183] Finally, the public interest and deference to local government administration must be considered when determining if the modification is suitably tailored.[184] The courts may give deference to the government when structuring the decree;[185] however, the government does not receive deferential treatment when proving a change significant enough to warrant modifying the consent decree.[186] Therefore, fiscal constraints and concerns of public interest are legitimate considerations in tailoring a proposed modification.[187]

In her concurring opinion, Justice O'Connor stated that a proper examination by appellate courts should focus on the method that the district court used in ruling on a modification request.[188] If relevant considerations were accommodated in a reasonable way, then Justice O'Connor would determine that the decision was not an abuse of discretion.[189]

Justice O'Connor emphasized that foreseeability is not a dispositive factor and that balancing the public interest can outweigh other considerations.[190] She also emphasized that even though fiscal resources cannot excuse a constitutional violation, fiscal changes can provide the basis for finding that the decree is no longer equitable.[191]

However, Justice O'Connor maintained that the Court excessively limited the district court's discretion by removing the option to refuse modification for a single term regardless of the importance of that term

---

179. *Id.*
180. *Id.* at 764.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 764-65.
185. *Id.* at 764 n.14.
186. *Id.*
187. *Id.* at 764-65.
188. *Id.* at 765 (O'Connor, J., concurring).
189. *Id.*
190. *Id.* at 766 (O'Connor, J., concurring).
191. *Id.*

in the decree.[192]

Justice Stevens, in a dissenting opinion joined by Justice Blackmun, agreed that the flexible standard should be used in modification of institutional reform decrees.[193] Notwithstanding that agreement, the dissent maintained that changes reasonably foreseeable at the time of the initial negotiation should not support modification.[194] Justice Stevens also insisted that one term may be so critical that its modification would frustrate the core goals of the decree.[195] A strict standard should apply if modification goes to a central purpose of the decree.[196]

IV. Analysis and Significance

In *Rufo* the Court finally adopted the flexible modification standard for institutional reform decrees and established criteria that a moving party must satisfy before modification can be granted. However, the terms used by the Court provide wide latitude to the district court's discretionary decision as to whether a significant change has occurred that merits modification. Terms such as "changed factual conditions" making compliance "more onerous"[197] create an ambiguity for the parties structuring the consent decree. The decree must effectively embody the purposes each side has negotiated to accomplish and create some degree of finality. The decree's finality is undermined by allowing a difficulty in compliance to form the basis for a modification request. The difficulty does not need to reach the level of impossibility or impracticability but can be satisfied by an onerous standard. Regardless of the skill utilized in drafting the decree, the district court has the discretion to decide when compliance has become too onerous to warrant continuing adherence. The long-term application of a consent decree makes factual changes a virtual certainty, and the skill of the negotiation process can be offset by the skill of the opposing party in later portraying the oppressiveness of compliance.

Additionally, reliance upon the decree may be undermined by opening back doors for the government to achieve modification. The government may agree to conditions to save the expense of litigation but later employ fiscal considerations or public interest arguments,

192. *Id.* at 767 (O'Connor, J., concurring).
193. *Id.* at 768 (Stevens, J., dissenting).
194. *Id.* at 771-72 (Stevens, J., dissenting).
195. *Id.* at 772-73 (Stevens, J., dissenting).
196. *Id.* at 772 (Stevens, J., dissenting).
197. *See id.* at 760.

combined with a change in circumstances, to erode the decree's provisions. First, constraints are always present in governmental affairs and could provide an avenue of attack upon a decree. The only concrete restriction is that the modification cannot create a constitutional violation. Moreover, the government will not be foreclosed from obtaining modification based on a change regardless of its foreseeability; however, if the changing event was anticipated and relied upon in the decree, a modification is less likely to be granted.[198] Thus, the burden shifts to the plaintiffs to anticipate events and incorporate the events into the decree. The plaintiff will want to incorporate as many events as possible into the decree to impose a higher standard of proof for modification. Even then, fiscal constraints or public interest are strong factors promoting modification.

Another significant problem is that no single term is safe from modification, no matter how extensively negotiated.[199] Both the single term provision and the absence of foreseeability requirement established by the majority create drafting difficulties for the parties. The plaintiff will not be assured that any single term within the decree is safe, no matter how extensively bargained for or how important to the decree's purpose. The plaintiff must now implement alternative methods to achieve a particular objective in the decree. For instance, in prison cases when single-celling is desired, the plaintiff must negotiate for supplementary conditions to guarantee the inmates' rights if single cells are lost. This might be accomplished by setting a maximum number of hours spent in the cells or designating a hierarchy of inmate classifications available to be single-celled. In order to protect the expectations of the decree, the drafting skills of the parties may provide the most powerful tool to prevent frustration of the decree's terms.

The dissent fears that allowing litigants to avoid their commitments will discourage consent decrees. However, a consent decree's advantages remain a settlement incentive even though the finality has been undermined. The parties would still avoid the time and expense of trial and avoid the risk of losing the case at trial. Also, the *Rufo* Court acknowledged that the parties can negotiate for greater relief than the judge would grant after a trial.[200] This factor makes the consent decree very inviting to an institutional reform plaintiff. For instance, Title VII

198. *Id.* at 761.
199. *Id.* at 762.
200. *Id.* at 759-60.

employment discrimination plaintiffs may incorporate racial or gender quotas within the consent decree. The quotas stipulate that a certain proportion of all vacancies must be filled by minorities.[201] The Supreme Court has never upheld quotas as a court ordered remedy[202] but the *Rufo* Court concedes that the parties' negotiations may achieve greater benefits than litigation.[203]

The dissent advocated adhering to a strict standard for modification requests that impair the central purpose of a consent decree. This solution would allow flexibility for modification and yet promote the credibility of important terms. Under the majority's standard, the modification cannot be unlawful, unconstitutional, or reduce the decree to a constitutional minimum, but otherwise a significant change makes nothing sacred. The majority view disregards the parties' legitimate expectations by denying that any one term deserves protection from modification. Even though it is true that a decree's purpose is to safeguard the totality of the plaintiffs' constitutional rights, the majority's contention that no single term can embody the decree's purpose disregards and defeats the parties' expectations. The concurrence and the dissent recognize that some terms may be critical to the decree's core goal and these terms merit protection. This protection is denied by the *Rufo* decision. The majority overlooks the dissent's argument that a more stringent modification standard could be imposed for critical terms and still not foreclose modification. The majority also disregards the dissent's argument that the government may have other solutions available to respond to a problem such as prison overcrowding. The fact that double-celling provides the government the easiest and most economical solution is not a sufficient justification to compromise the decree's purpose and the parties' expectations.[204] The *Rufo* decision resolved the lower court's confusion as to whether a flexible modification standard is appropriate for institutional reform litigation, but the court created confusion for the parties attempting to negotiate and draft a decree capable of binding the state government's future compliance.

Donna Wolfe

---

201. *See* Schwarzschild, *supra* note 38, at 896.
202. Schwarzschild, *supra* note 38, at 896.
203. *Rufo*, 112 S. Ct. at 759-60.
204. *Id.* at 772 (Stevens, J., dissenting).