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New Standard for the Modification of Consent Decrees, A

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A New Standard for the Modification of Consent Decrees

Rufo v. Inmates of Suffolk County Jail[1]

I. INTRODUCTION

A common method of dispute resolution in institutional reform litigation[2] is the consent decree. Although they are entered into voluntarily, consent decrees are sanctioned by courts in the same manner as other final judgments under Federal Rule of Civil Procedure 60(b).[3] The consent decree has been used to avoid court-ordered remedies which do not adequately meet the needs of either party in the dispute. The traditional standard for the modification of such decrees is the "grievous wrong" standard.[4] By maintaining this rigorous standard, courts have guarded against modifications of consent decrees to bring order to the highly chaotic and controversial disputes that these decrees are often used to solve.

II. FACTS

In 1971, inmates of the Suffolk County Jail[5] sued the Suffolk County Sheriff, the Commissioner of Correction for the State of Massachusetts, the Mayor of Boston, and nine city councilors,[6] claiming that existing prison conditions were unconstitutional.[7] The jail was found to be negligently maintained and unconstitutionally deficient by the district court.[8] The district court issued a permanent injunction which enjoined the defendants "(a) from housing at the Charles Street Jail after November 30, 1973 in a cell with

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1. 112 S. Ct. 748 (1992).

2. Institutional reform litigation cases typically involve prison reform, desegregation plans, etc.

3. *See* FED. R. CIV. P. 60.

4. The "grievous wrong" standard was developed in United States v. Swift & Co., 286 U.S. 106, 119 (1932).

5. The Suffolk County Jail is sometimes referred to in the cases as the "Charles Street Jail" in reference to its specific street location.

6. *Rufo*, 112 S. Ct. at 754.

7. *Id.*

8. *Id.* The lower court held that

> [a]s a facility for the pretrial detention of presumptively innocent citizens, Charles Street Jail unnecessarily and unreasonably infringes upon their most basic liberties, among them the rights to reasonable freedom of motion, personal cleanliness, and personal privacy. The court finds and rules that the quality of incarceration at Charles Street is "punishment" of such a nature and degree that it cannot be justified by the state's interest in holding defendants for trial; and therefore it violates the due process clause of the Fourteenth Amendment.

Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 686 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974).

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."[9] The defendants did not appeal the district court's decision.[10] However, five months after the issuance of the injunction, the defendants informed the district court that they could not comply with the November 30 deadline.[11] Thus, "[t]he district court ordered the Commissioner to transfer inmates to other institutions, and the Commissioner appealed, claiming that the court lacked the power to order him to make the transfers."[12] On appeal to the First Circuit, the court of appeals affirmed the district court's decision, holding that the Commissioner should have appealed the original decision of the district court.[13]

In 1977, the conditions at the jail had not improved, and the district court again ordered the defendants to renovate the jail or provide an alternative facility.[14] On appeal, the court of appeals stated that: "[g]iven the present state of the record and the unconscionable delay that plaintiffs have already endured in securing their constitutional rights, we have no alternative but to affirm the district court's order to prohibit the incarceration of pretrial detainees at the Charles St. Jail."[15] The court ordered that the jail be closed on October 2, 1978, "unless a plan was presented to create a constitutionally adequate facility for pretrial detainees in Suffolk County."[16] Four days before the deadline, the defendants presented a plan to the district court outlining changes designed to meet constitutional standards, and, pursuant to the plan, the court entered a formal consent decree.[17]

The architectural program contained in the consent decree called for the commencement of construction on the modifications to the jail in 1983.[18] However, construction had not begun by 1984, so in 1985 the Massachusetts Supreme Court ordered the defendants to build a larger jail.[19] By the time this order was given, however, the proposed architectural program would no longer adequately provide for the inmates, so the inmates (with the sheriff's

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9. *Eisenstadt*, 360 F. Supp. at 691.

10. *Rufo*, 112 S. Ct. at 754.

11. *Id.* at 754 n.2.

12. *Id.*

13. Inmates of Suffolk County Jail v. Eisenstadt, 494 F.2d 1196, 1200 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974).

14. Appellant's Brief at 22, Inmates of Suffolk County Jail v. Kearney, Civ. Action No. 71-162-G (D. Mass. June 30, 1977), *aff'd*, 573 F.2d 98 (1st Cir. 1978).

15. Inmates of Suffolk County Jail v. Kearney, 573 F.2d 98, 100 (1st Cir. 1978).

16. *Rufo*, 112 S. Ct. at 755.

17. Appellant's Brief at 51, 55, *Kearney*, Civ. Action No. 71-162-G.

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

19. *Id.*

support) moved to modify the consent decree.[20] The district court allowed the modification to meet the original requirements.[21]

The modification increased the number of cells to 453.[22] The construction on the new jail began in 1987 and was not completed in 1989, when the sheriff moved to modify the decree "to allow the double bunking of male detainees in 197 cells."[23] This change would have raised the capacity of the new jail to 610 inmates.[24] The sheriff based his motion on a change in the law[25] and a change in the facts[26] which allegedly called for a modification of the consent decree.[27] The district court refused the request, and the court of appeals affirmed the district court's opinion.[28] The Supreme Court of the United States granted certiorari.[29] The Supreme Court of the United States held that the *Swift*[30] standard did not apply to requests to modify consent decrees stemming from institutional reform litigation.[31]

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20. *Id.* The plaintiffs hoped to increase the size of the jail to 435 cells. The plaintiffs cited "the unanticipated increase in jail population and the delay in completing the jail" as the basis for building the new facility. *Id.*

21. *Id.* The decree provided that:

> (a) single-cell occupancy is maintained under the design for the facility;
> (b) under the standards and specifications of the Architectural Program, as modified, the relative proportion of cell space to support services will remain the same as it was in the Architectural Program;
> (c) any modifications are incorporated into new architectural plans;
> (d) defendants act without delay and take all steps reasonably necessary to carry out the provisions of the Consent Decree according to the authorized schedule.

Appellant's Brief at 110, 111, *Kearney*, Civ. Action No. 71-162-G.

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

23. *Id.*

24. *Id.*

25. *Id.* The change was based on the ruling in Bell v. Wolfish, 441 U.S. 520 (1979). The decision was handed down one week after the consent decree was originally approved.

26. *Rufo*, 112 S. Ct. at 756. The change in the facts was the increased population.

27. *Id.*

28. *Id.*

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

30. *See infra* notes 34-46 and accompanying text.

31. *Rufo*, 112 S. Ct. at 764-65.

III. LEGAL BACKGROUND

The traditional standard for modifying consent decrees[32] was established in *United States v. Swift & Co.*[33] *Swift* involved an alleged Sherman Act[34] antitrust violation by five meat-packers[35] who had allegedly created a monopoly on "a large part of the food supply of the nation."[36] The Court entered an injunction to dismember the monopoly.[37] The decree, however, did not stop the controversy.[38] Despite the legal maneuvers of the packing companies, the Supreme Court refused to allow a modification of the injunction.[39]

The Court reaffirmed the power of the courts, in equity, to modify consent decrees.[40] The Court recognized that the monopoly may have been broken by the combined effect of the consent decree and changing economic conditions,[41] but also pointed out that abuses could still continue.[42] Thus,

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32. To begin the modification process, the movant must move under Federal Rule of Civil Procedure 60(b). The pertinent language is contained below:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

FED. R. CIV. P. 60(b). This is the language that modification cases are seeking to construe.

33. 286 U.S. 106 (1932).

34. 15 U.S.C. § 4 (1988).

35. The meat-packer defendants were: Swift & Co., Armour & Co., Wilson & Co., the Morris Packing Company, and the Cudahy Packing Company. *Swift*, 286 U.S. at 110.

36. *Id.* at 110-11.

37. *Id.* at 111. The decree entered on February 27, 1920, enjoined the defendants from maintaining a monopoly and from entering into or continuing any combination in restraint of trade and commerce. In addition, they were enjoined both severally and jointly from (1) holding any interest in public stockyard companies, stockyard terminal railroads, or market newspapers; (2) engaging in, or holding any interest in, the business of manufacturing, selling, or transporting any of 114 enumerated food products (principally fish, vegetables, fruit, and groceries) and thirty other articles unrelated to the meat packing industry; (3) using or permitting others to use their distributive facilities for the handling of any of these enumerated articles; (4) selling meat at retail; (5) holding any interest in any public cold storage plant; and (6) selling fresh milk or cream. *Id.*

38. *Id.* at 112.

39. *Id.* at 120.

40. *Id.* at 114. ("A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.").

41. *Id.* at 113. The meat packers argued that the rise of competition between meat packers excused them from continuing to follow the consent decree. The Court disagreed, stating "[t]he size of the component units is substantially unchanged." *Id.* at 117. Thus, the Court feared that to lift the decree would give the meat packers "[t]he opportunity . . . to renew the war of extermination that they waged in years gone by." *Id.* at 118.

42. *Id.* at 117. ("Changes there have been that reduce the likelihood of a monopoly in the

the Court limited its inquiry, stating "[w]e are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree."[43] The Court further stated that "[t]he inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow."[44] Finally, the Court announced "[n]othing 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."[45] In rejecting the meat-packers' position, the *Swift* Court announced a high standard for the modification of consent decrees.[46]

Although the common approach in modification of consent decree cases was to follow the *Swift* standard, some cases chipped away at the rigid standard set forth by Justice Cardozo in *Swift*.[47]

One decision which, while citing *Swift* with approval, allowed a modification of the decree is *System Federation No. 91, Railway Employees Department v. Wright*.[48] In *Railway Employees*, nonunion employees sued a railroad and its union employees for discrimination.[49] The nonunion employees and the defendants entered into a consent decree that enjoined the defendants from future discriminatory action in return for a release of their claims.[50] The defendants sought to overturn the consent decree based on the 1951 amendments to the Railway Labor Act[51] which "under certain circumstances" permitted employment contracts requiring a union shop.[52] Thus, in 1957, the petitioners moved to have the prior consent decree modified in order that they might exercise this new statutory option.[53]

The Supreme Court of the United States agreed with the petitioners and remanded to the district court for modification.[54] The Court began its analysis by restating the principle that "[f]irmness and stability must no doubt

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business of the sale of meats, but none that bear significantly upon the old-time abuses in the sale of other foods. The question is not whether a modification as to groceries can be made without prejudice to the interests of the classes whom this particular restraint was intended to protect.").

43. *Id.* at 119.

44. *Id.*

45. *Id.*

46. In *Swift* the Court emphasized the importance of final judgments, and would rarely allow modifications of the decree, but decisions after *Swift* emphasized importance of the courts' power to modify the decree.

47. *See infra* notes 48-89 and accompanying text.

48. 364 U.S. 642 (1961).

49. *Id.* at 643. The plaintiffs alleged that the defendant had violated the Railway Labor Act, 45 U.S.C. §§ 151-152 (1988), which outlawed coercion by unions against nonunion employees. *Railway Employees*, 364 U.S. at 643.

50. *Railway Employees*, 364 U.S. at 644.

51. 45 U.S.C. § 152.

52. *Railway Employees*, 364 U.S. at 644.

53. *Id.* at 644-45.

54. *Id.* at 653.

be attributed to continuing injunctive relief based on adjudicated facts and law."[55] The Court, however, shifted its focus, stating: "[T]he court cannot be required to disregard significant changes in law or facts if it is 'satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.'"[56] The *Railway Employees* Court showed that res judicata must be balanced against a court's discretion in setting aside judgments.[57]

In *Railway Employees*, the Court utilized its discretion to overturn the decision.[58] The Court focused on the fact that once the statutory basis for the prior consent decree had been altered, there was ample room to either topple or amend the decree based upon such a foundation.[59] Although the Court quoted *Swift* several times, it was never quoted for its rigid standard concerning modification, but rather for its pronouncement of situations where modification would be allowed.[60] Despite its facial disagreement with *Swift*, *Railway Employees* can be seen as a distinct and wholly logical exception to the "grievous wrong" standard of *Swift*.

Once the above exception to the *Swift* standard was firmly established, other decisions began to chip away at the standard itself. In *United States v. United Shoe Machinery Corp.*,[61] the United States sought modification of an antitrust decree.[62] The district court had read *Swift* as establishing a rigid standard.[63] However, the Supreme Court held that the context of the case is most indicative of the standard to be applied.[64] The Court stated that

> *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 (the elimination of monopoly and restrictive practices) have not been fully achieved.[65]

Thus, the Court did not follow the rigid *Swift* standard when the United States was requesting a modification.[66]

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55. *Id.* at 647.

56. *Id.* (quoting *Swift*, 286 U.S. at 114-15).

57. *Id.* at 647-48.

58. *Id.* at 653.

59. *Id.* at 651. ("The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction. In a case like this the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce.").

60. *Id.* at 647, 650-51.

61. 391 U.S. 244 (1968).

62. *Id.* at 247.

63. *Id.* at 248.

64. *Id.*

65. *Id.*

66. The Court not only failed to apply the *Swift* standard, but it also failed to elaborate on this separate test, deciding only to use more flexibility.

In *New York State Ass'n for Retarded Children, Inc. v. Carey*,[67] the Court of Appeals for the Second Circuit also called for a more relaxed and flexible standard.[68] In *Carey*, the consent decree[69] in question was entered in 1975 as a result of a complaint filed by several plaintiffs representing mentally retarded persons.[70] The action alleged that the Willowbrook State School for the Mentally Retarded (presently the Staten Island Developmental Center) maintained the facility with inhuman conditions in violation of the retarded persons' constitutional rights.[71]

In 1981, the defendants moved to modify the consent decree to allow for a higher bed limit than under the previous agreement.[72] The district court refused the modification, basing its decision on the rigid language in *Swift*.[73] The court of appeals disagreed with the district court's standard, suggesting the adoption of a more flexible approach.[74] The court of appeals found that changed circumstances, including a tight housing market, neighborhood opposition, and the necessity of compliance with Medicaid procedures prevented the center from housing the retarded persons according to the consent decree.[75] The *Carey* court interpreted *Swift* as allowing equitable modifications of a consent decree.[76] The court of appeals stated that "[t]he power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible."[77]

The court of appeals also stated that

> [i]t is well recognized that in institutional reform litigation such as this judicially-imposed remedies must be open to adaptation when unforeseen obstacles present themselves, to improvement when a better understanding of the problem emerges, and to accommodation of a wider constellation of interests than is represented in the adversarial setting of the courtroom.[78]

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67. 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983).

68. *Id.* at 970.

69. *Id.*

70. *Id.* at 958. The complaint was originally filed by the New York State Association for Retarded Children, Inc., other organizations, and a few mentally retarded persons. *Id.*

71. *Id.*

72. *Id.* at 960.

73. *Id.* at 960, 967-68.

74. *Id.* at 969-71.

75. *Id.* at 965-66.

76. *Id.* at 967. The court stated:

> A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. . . . The distinction is between restraints that give protection of 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.

Id.

77. *Id.*

78. *Id.* at 969.

Thus, the court of appeals singled out institutional reform litigation as somewhat unique, requiring more flexibility than the *Swift* standard allowed.

The most recent word from the United States Supreme Court on the issue of modification of consent decrees is *Board of Education v. Dowell*.[79] In *Dowell*, the Supreme Court rejected the use of the rigid *Swift* standard in school desegregation cases.[80] *Dowell* involved a consent decree which was entered in 1972,[81] following a determination that state-imposed segregation had not been abated.[82] The controversy began when the Oklahoma City School Board amended the plan in 1984.[83] Following the board's proposed amendments, the respondents moved to reopen the case, "contending that the School District had not achieved 'unitary' status and that the SRP was a return to segregation."[84]

The Court held that the "grievous wrong" standard of *Swift* did not apply in this case.[85] The Court held that:

> [a] finding by the District Court that the Oklahoma City School District was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the school board would return to its former ways, would be a finding that the purposes of the desegregation litigation had been fully achieved. No additional showing of "grievous wrong evoked by new and unforeseen conditions" is required of the school board.[86]

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79. 111 S. Ct. 630 (1991).

80. *Id.* at 636-38.

81. Dowell v. Board of Educ., 338 F. Supp. 1256, *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). The plan called for kindergartners to attended neighborhood schools unless parents opted out; it called for children in grades 1-4 to attend formerly all white schools (black children would be bused to these schools); 5th grade students would attend formerly all black schools (white children would be bused); students above grade 5 would be bused to maintain integration; and integrated neighborhoods would contain stand-alone schools. *Id.*

82. *Dowell*, 111 S. Ct. at 633.

83. *Id.* at 634. The Court stated:

> As more and more neighborhoods became integrated, more stand-alone schools were established, and young black students had to be bused further from their inner-city homes to outlying white areas. In an effort to alleviate this burden and to increase parental involvement, the Board adopted the Student Reassignment Plan (SRP), which relied on neighborhood assignments for students in grades K-4 beginning in the 1985-86 school year. Busing continued for students in grades 5-12. Any students could transfer from a school where he or she was in the majority to a school where he or she would be in the minority. Faculty and staff integration was retained, and an "equity officer" was appointed.

Id.

84. *Id.*

85. *Id.*

86. *Id.* at 636-37.

The Court explicitly held that the *Swift* standard would not apply in school desegregation cases.[87] The Court supported its holding by pointing out the lack of perpetuity of such decrees and emphasizing the importance of local control over educational problems.[88]

The above cases demonstrate that the *Swift* decision has been severely limited, as it does not apply when changes in the law or in the circumstances underlying the initial decree have changed.[89] In addition, the equitable power to modify such decrees has been extended, because the barrier of the *Swift* standard no longer applies to school desegregation cases.[90]

IV. INSTANT DECISION

The Supreme Court's decision in *Rufo* finalizes the Court's steps toward establishing a flexible standard for the modification of consent decrees in institutional reform litigation.[91] In *Rufo*, the Court limited the *Swift* standard to its facts.[92] The Court stated that "[r]ead out of context, this language suggests a 'hardening' of the traditional flexible standard for modification of consent decrees."[93] The Court pointed out that "[o]ur decisions since *Swift* reinforce the conclusion that the 'grievous wrong' language of *Swift* was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees."[94]

The Court found that the increase in institutional reform litigation following *Brown v. Board of Education*[95] "has made the ability of a district court to modify a decree in response to changed circumstances all the more important."[96] The Court also stated that the passage of time increases "the likelihood of significant changes occurring during the life of the decree."[97]

Following the Court's adoption of the flexible standard, the Court addressed the respondent's argument that the flexible standard will "deter parties to litigation such as this from negotiating settlements and hence destroy the utility of consent decrees."[98] The Court found that logic unpersuasive.[99] The Court found that plaintiffs already realize that even if they won in court, Rule 60(b) would still equitably allow modification.[100] Thus, the Court

87. *Id.* at 637.

88. *Id.* ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs.").

89. *See supra* notes 48-88 and accompanying text.

90. *See supra* notes 79-88 and accompanying text.

91. *Rufo*, 112 S. Ct. at 764-65.

92. *Id.* at 757-58.

93. *Id.*

94. *Id.* at 758.

95. 347 U.S. 483 (1954).

96. *Rufo*, 112 S. Ct. at 758.

97. *Id.*

98. *Id.* at 759.

99. *Id.*

100. *Id.* This statement begs the question; the issue is whether the Rule 60(b) modification

reasoned that the imposition of such a standard on the consent decree process will not place a further burden on the plaintiff.[101]

The Court then proclaimed a new two-step standard for the modification of consent decrees. The first step requires that "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances [change in facts] warrants revision of the decree."[102] The second part stated: "If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance."[103]

The Court issued a caveat, warning that "[o]rdinarily, however, modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree."[104] However, the Court refused to adopt the respondent's contention that a change should only be allowed "when a change is both 'unforeseen and unforeseeable.'"[105]

The Court found that "[o]nce a moving party has met its burden of establishing either a change in fact or in law warranting modification of a consent decree, the District Court should determine whether the proposed modification is suitably tailored to the changed circumstance."[106] The Court found that three "matters" should be examined to complete this analysis.[107]

First, the Court held that "the modification must not create or perpetuate a constitutional violation."[108] In explaining the standard, the Court pointed out that the issue of whether double-celling is permitted under the decision in *Bell v. Wolfish*[109] would aid in the determination.[110]

Second, the Court pointed out that "[a] proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor."[111] This requirement is important because it strives to keep intact the core of the consent decree when feasible, preserving as much of the final judgment as possible.[112] Thus, a consent decree which mandates behavior that exceeds the minimum requirements of the Constitution is equally protected from modification.[113]

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will be evaluated under a strict or flexible standard.

101. *Id.*

102. *Id.* at 760.

103. *Id.*

104. *Id.*

105. *Id.* (quoting Brief for Respondents at 35).

106. *Id.* at 763.

107. *Id.*

108. *Id.*

109. 441 U.S. 520 (1979). The *Bell* case holds that double-celling of inmates is not per se unconstitutional. *Rufo*, 112 S. Ct. at 764.

110. *Rufo*, 112 S. Ct. at 764. The Court pointed out that *Bell* did not mandate single-celling as necessary to achieve constitutional prison conditions. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

Third, the Court concluded that the district court "should defer to local government administrators."[114] This requirement seeks again to balance the possible hardship of the modification by utilizing the expertise and experience of local officials in dealing with the problems of institutional reform litigation.[115] Therefore, the majority concluded that the flexible standard was the correct standard.[116]

Justice O'Connor wrote a concurring opinion differing with the Court's adoption of new standards.[117] Justice O'Connor found that while the Court removed three of the barriers erroneously constructed by the district court, the Court had replaced them with new constraints which were equally arbitrary.[118]

First, Justice O'Connor disagreed with the Court's implication that modification of a single term in a consent decree can never defeat the decree's purpose.[119] Justice O'Connor argued that

> [i]t may be that the 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, especially if that term is 'the most important element' of the decree.[120]

Second, Justice O'Connor disagreed with the majority's suggestion that the district court should give deference to local officials.[121] Justice O'Connor argued that courts should not "defer to prison administrators in resolving whether and how to modify a consent decree."[122] Although Justice O'Connor recognized local officials' expertise, she believed the final determination should hinge upon whether it is equitable for the decree to be modified.[123] Justice O'Connor believed that this finding is properly before the court and not the local administrator.[124]

A dissenting opinion was filed in this case by Justice Stevens, who was joined by Justice Blackmun.[125] The dissent agreed with the standard set forth by the majority, but disagreed with the application of the standard.[126]

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114. *Id.*
115. *Id.*
116. *Id.* at 764-65.
117. *Id.* at 767 (O'Connor, J., concurring).
118. *Id.* (The three barriers erroneously erected by the district court were: (1) using the *Swift* standard; (2) using an "impossibly strict version" of the flexible standard; (3) "permitting the court to consider petitioners' fiscal constraints.").
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 768 (Stevens, J., dissenting).
126. *Id.*

First, the dissent felt that the history of noncompliance should persuade the Court to hold the defendants to their original agreement.[127] Second, the dissenters emphasized the need to encourage a policy of settling "protracted litigation."[128] Third, the dissent felt that the proposed modification to switch to double-celling of inmates undermined the central purpose of the original consent decree.[129] The dissent analogized *Rufo* to the holding in *Carey* which allowed modification in order to facilitate transfer of the retarded individuals to more humane quarters, which was the core of the original consent decree.[130] The dissent felt that the modification imposed in the instant case did not improve the conditions in the Suffolk County Jail to the level that was fairly won by the plaintiffs in the original decree.[131]

V. COMMENT

As courts have moved away from the rigid *Swift* standard toward a more flexible approach, the value of settling a case has lowered. Although the flexible standard does not restrict the plaintiff's ability to try the case on its merits, it does weaken the incentive to fashion a consent decree through settlement, because a favorable settlement may eventually be modified after a period of long delay, at no penalty to the noncomplying party.

It is also problematic that the court has erected additional barriers by promulgating the two-step test. For example, in determining whether the modification is suitably tailored, giving deference to state and local officials increases the possibility of thwarting the purpose of the original decree. Because local officials are often involved in the entry of the original consent decree, these same local officials probably will seek to modify the decree to satisfy their original aims. Local officials will now stand in a much stronger bargaining position relative to the plaintiffs in institutional reform actions, because the *Rufo* Court demonstrated little reverence for the original decree.[132] The *Rufo* decision only increases the incentive of local governments to refuse to listen to the complaints of minorities and handicapped persons who are already considerably disadvantaged. The change that mandates deference to local officials may prove more significant than the Court's decision to abolish the rigid standard for modification of consent decrees in institutional reform litigation.

The most onerous problem of the *Rufo* opinion is the failure of the Court to adequately define "institutional reform litigation." Although the Court cites cases which deal with institutional reform, it does not clearly delineate the

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127. *Id.* at 772. The dissent pointed out that the petitioners' claims of "fiscal limitation" and inability to promptly allocate the necessary funds had existed since the original decree in 1973. *Id.* The dissent felt that these claims should not suddenly be sufficient to justify modification of the decree. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 772-73 (Stevens, J., dissenting).

types of cases in which the flexible standard applies. Although this failure may be an oversight, it is likely that the Court is willing to keep this area shrouded and unclear, disguising its targeted weakening of consent decrees which protect civil rights.

The promulgation of the flexible standard reflects the Court's willingness to weaken the finality of judgments which uphold the rights of racial minorities, handicapped persons, and prisoners. In so holding, the Court creates a special category of judgments that can be disturbed more easily. Under the guise of flexibility, the Court has opened the door to the elimination of the many institutional reform plans born in the past three decades. The Court's regressive moves are hidden sloppily under the banner of "flexibility."

VI. CONCLUSION

Equity is always the highest consideration when courts embark on disturbing final judgments such as consent decrees. The injection of local officials' discretion into the district court's determination greatly enhances the power of the local government, while robbing the impoverished plaintiff of a previously entered consent judgment. The Court's failure to adequately define "institutional reform litigation" or adequately limit its holding points to an uncertain future for consent decrees designed to improve the flawed institutions of these United States.

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