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THE MODIFICATION OF EQUITABLE DECREES IN INSTITUTIONAL REFORM LITIGATION: A COMMENTARY ON THE SUPREME COURT'S ADOPTION OF THE SECOND CIRCUIT'S FLEXIBLE TEST

David I. Levine*

INTRODUCTION

In the nearly forty years that have passed since *Brown v. Board of Education*¹ was decided, institutional reform litigation has become almost commonplace, especially in federal courts.² In institutional reform litigation, plaintiffs (usually using the class action device)³ seek long-term reform of the policies and conditions in government-operated institutions through the use of equitable decrees.⁴ The experience of many courts with such decrees, whether issued as ordinary judicial decrees or as consent decrees,⁵ has been that they are broad in scope and long-

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¹ 347 U.S. 483 (1954) (*Brown I*) and 349 U.S. 294 (1955) (*Brown II*).

² For example, there are over 500 local school districts currently operating under court orders to desegregate, and prisons in over 40 states are under judicial supervision due to overcrowding and other unconstitutional conditions. David O. Stewart, *No Exit: Supreme Court Finds No Easy Path to Terminate Structural Injunctions*, 78 ABA. J. 49 (1992). See also Wayne N. Welsh, *The Dynamics of Jail Reform Litigation in California Counties*, 26 LAW & SOC'Y REV. 591 (1992) (almost one-third of jails in the United States with populations of over 100 prisoners currently under court orders to alleviate unconstitutional conditions).

³ FED. R. CIV. P. 23.

⁴ There is a mass of legal literature on institutional reform litigation. See, e.g., DAVID SCHOENBROD ET AL., REMEDIES: PUBLIC AND PRIVATE (1990); David I. Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753 (1984).

⁵ A consent decree is a negotiated settlement of a case brought in equity that is enforced through the court's power to enforce equitable decrees or orders. Thus, a consent decree traditionally has been treated as possessing characteristics of both a long-term contract between the parties and a judicial decree. See, e.g., *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (treating a consent decree as both); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975) ("consent decrees and orders have attributes both of contracts and of judicial decrees"). See generally Symposium, *Consent Decrees: Practical Problems and Legal Dilemmas*, 1987 U. CHI.

lasting in effect. As a result, over the years of judicial supervision, it is not uncommon for parties to seek modification of the decrees in light of subsequent developments.⁶

Since everyone's crystal ball inevitably becomes cloudy,⁷ it might seem natural for courts to allow modifications generously. Indeed, rule 60(b) of the Federal Rules of Civil Procedure expressly provides that "the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application."⁸ The rule, however, has not always been interpreted very generously.⁹

LEGAL F. 1.

⁶ For collections of cases where parties have sought modifications, see Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725; Thomas J. Andre, Jr., *The Collateral Consequences of SEC Injunctive Relief: Mild Prophylactic or Perpetual Hazard?*, 1981 U. ILL. L. REV. 625; Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101 (1986); Karen Keeble, Note, *Judicial Modification of Consent Judgments in Institutional Reform Litigation*, 50 BROOK. L. REV. 657 (1984); Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291 (1988); Stacey L. Murphy, Note, *Modification of Consent Decrees in Institutional Reform Litigation: A Return to the Swift Standard*, 8 REV. LITIG. 203 (1989); Maimon Schwarzchild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887; Steven R. Shapiro, *The Modification of Equitable Decrees: A Critical Commentary*, 50 BROOK. L. REV. 433 (1984); Marc I. Steinberg, *SEC and Other Permanent Injunctions—Standards for Their Imposition, Modification and Dissolution*, 66 CORNELL L. REV. 27 (1980); Harvard Law Review Association, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020 (1986) [hereinafter *Modification of Consent Decrees*].

⁷ Professor Timothy Jost has aptly described the situation:

Because the injunction is necessarily a static . . . response to a dynamic evolving problem, over time it almost inevitably becomes less responsive to the problem it addresses. . . . The future tricks the court; the injunction, the court's now outdated prediction, plods off into irrelevancy, leaving the beneficiary bereft of protection or the obligor subject to oppression.

Jost, *supra* note 6, at 1103-04.

⁸ FED. R. CIV. P. 60(b). For background on this portion of rule 60(b), which codified equitable procedure of long-standing duration, see 7 JAMES W. MOORE ET. AL., MOORE'S FEDERAL PRACTICE ¶ 60.26[4] (2d ed. 1992); 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2863 (1973). See also Mary Kay Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 HASTINGS L.J. 41 (1978); Theodore R. Mann, Note, *History and Interpretation of Federal Rule 60(b) of the Federal Rules of Civil Procedure*, 25 TEMP. L.Q. 77 (1951); James W. Moore & Elizabeth B. A. Rogers, *Federal Relief From Civil Judgments*, 55 YALE L.J. 623 (1946).

⁹ See, e.g., Jost, *supra* note 6, at 1111 n.74 (citing cases that "have considered requests for modification much as they would view collateral attacks on judgments not involving injunctions"); WRIGHT & MILLER, *supra* note 8, § 2863, at 208 n.10 (1973) (citing cases where, "[b]ecause the standard is an exacting one, many applications for relief .

Over time, courts have taken one of two basic approaches to modification requests. The first approach, developed over sixty years ago, set a high standard: the "grievous wrong" test.¹⁰ Many commentators contended subsequently that a different approach was needed for certain contexts, especially institutional reform litigation. For these situations, some courts have applied an easier standard over the past decade: the "flexible" test.¹¹

Each test has a judicial parent with a top-notch pedigree: the grievous wrong test is the child of Justice Benjamin Cardozo¹² and the flexible test for institutional reform litigation is Judge Henry Friendly's offspring.¹³ While each test has had its critics,¹⁴ Judge Friendly's version of the flexible test has met particularly stern criticism, much of it coming from authors writing in the pages of the *Brooklyn Law Review* (the "Brooklyn critics").¹⁵

The Supreme Court recently addressed the question of which standard should apply to modification requests in institutional reform litigation.¹⁶ In *Rufo v. Inmates of Suffolk County*

. . . are denied").

¹⁰ The test takes its name from a phrase used in *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.").

¹¹ The paradigm case taking this approach in the institutional reform context is *New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956 (2d Cir.), cert. denied, 464 U.S. 915 (1983).

¹² See, e.g., Milton Handler & Michael Ruby, *Justice Cardozo, One-Ninth of the Supreme Court*, 10 CARDOZO L. REV. 235, 245 (1988) (Justice Cardozo's opinion in *Swift* has been "regarded as the fountainhead of all learning on the modification of consent decrees.").

¹³ See, e.g., Murphy, *supra* note 6, at 230 (calling Judge Friendly "the champion" of the flexible test).

¹⁴ See *supra* note 4. One observer has been especially harsh on *Swift*. See 2 MILTON HANDLER, *TWENTY-FIVE YEARS OF ANTITRUST* 943 (1973) (portion of opinion "defies common sense"); Handler & Ruby, *supra* note 12, at 250 ("disastrous effect on the law governing modification of consent decrees").

¹⁵ See Shapiro, *supra* note 6, at 433; Keeble, *supra* note 6, at 657 [hereinafter the *Brooklyn critics*]. Other commentators criticizing the flexible test rely heavily on the Brooklyn critics. See, e.g., Murphy, *supra* note 6, at 203.

¹⁶ The case is part of a larger effort on the part of the Supreme Court to create standards for institutional reform decrees. See, e.g., *Freeman v. Pitts*, 112 S. Ct. 1430 (1992); *Board of Education of Oklahoma City Schools v. Dowell*, 498 U.S. 237 (1991). See David I. Levine, *The Latter Stages of Enforcement of Equitable Decrees: The Course of Institutional Reform Cases After Dowell, Rufo and Freeman*, 20 HASTINGS CONST. L.Q. (1993) (forthcoming).

Jail,¹⁷ the Justices relied heavily on Judge Friendly's opinion in *New York State Association for Retarded Children v. Carey*¹⁸ as the basis for adopting the flexible test in this context. This Commentary reviews the development of both tests, including the Supreme Court's apparent rejection of the flexible test just one year after *Carey* was decided in *Firefighters Local Union No. 1784 v. Stotts*.¹⁹ The Commentary then assesses the Court's recent adoption of the flexible test for institutional reform litigation, particularly in light of the points raised by the Brooklyn critics in response to *Carey*, the key precedent for *Rufo*.²⁰

Partisan readers of the *Brooklyn Law Review* will be disappointed to learn that the Brooklyn critics were not cited by name in *Rufo*. However, careful comparison of *Carey* and *Rufo* shows that the Supreme Court's *Rufo* decision avoided most of the shortcomings the critics had identified in Judge Friendly's *Carey* opinion. Despite the merits of *Rufo*, unfortunately, the Court has created the risk of unnecessary confusion in lower courts by failing to discuss two important matters in full. First, the Court did not explain why it embraced the flexible test in *Rufo* after it had seemingly rejected it in *Stotts*. Without such an explanation, lower courts will not know which precedent to follow. Second, although the *Rufo* majority invoked *Carey* frequently, the Court made no attempt to explain that its version of the flexible test actually differed significantly from that of Judge Friendly. This failure may lead lower courts to conclude wrongly that *Carey* is a reliable guide to the Supreme Court's approach to modifications in institutional reform litigation. If, as a result, lower courts follow *Carey* blindly, they may make the same errors identified by the Brooklyn critics.

I. THE DEVELOPMENT OF THE "GRIEVOUS WRONG" TEST

A. *Justice Cardozo Decides United States v. Swift & Co.*

Justice Cardozo established the basic modern standards for evaluating any request to modify an injunction or consent decree in his 1932 opinion for the Court in *United States v. Swift &*

¹⁷ 112 S. Ct. 748 (1992).

¹⁸ 706 F.2d 956 (2d Cir.), cert. denied, 464 U.S. 915 (1983); see *supra* note 11 and accompanying text.

¹⁹ 467 U.S. 561 (1984).

²⁰ 112 S. Ct. at 748.

Co.²¹ *Swift* arose from an antitrust consent decree entered in 1920 against the five largest meat packers in the country.²² The defendants had promised in the decree not to deal in or distribute a variety of food products, including meat at the retail level and over 100 other non-meat foods and groceries.²³ Beginning in 1922, the defendants engaged in a string of legal maneuvers in an attempt to avoid the decree's constraints.²⁴ In 1930 two of the defendants moved once again to modify the decree, claiming that the food industry had changed substantially in the ten years since the decree had been agreed upon.²⁵ After the Supreme Court of the District of Columbia granted the requested modifications,²⁶ the United States, joined by associations of wholesale grocers, appealed.²⁷

Justice Cardozo's opinion clarified many issues concerning the trial court's power to modify an injunction or consent decree. He determined that a court had the inherent power to

²¹ 286 U.S. 106 (1932). The vote was 4-2, with three justices not participating in the decision because of their roles in the case before being appointed to the Court. Comment, *The Packer Consent Decree*, 42 YALE L.J. 81, 91 n.44 (1932)[hereinafter *Packer Consent Decree*]. *Swift* was Justice Cardozo's second Supreme Court opinion. It was argued in his first week on the bench. Handler & Ruby, *supra* note 12, at 239, 244.

²² For fuller descriptions of the long course of the litigation, see OWEN FISS, *INJUNCTIONS* 325-99 (1st ed. 1971); Jost, *supra* note 6, at 1107-11; see also *Packer Consent Decree*, *supra* note 21, at 81.

²³ *Swift*, 286 U.S. at 110-12.

²⁴ *Id.* at 112-13. In addition to activity in the lower courts, the Supreme Court itself had already turned down two challenges to the decree before this case. See *Swift & Co. v. United States*, 276 U.S. 311 (1928); *United States v. California Coop. Canneries*, 279 U.S. 553 (1929). Justice Cardozo made it clear that he took a dim view of these attempts. *Swift*, 286 U.S. at 112 ("[T]he expectation would have been reasonable that a decree entered upon consent would be accepted by the defendants . . . as a definitive adjudication setting controversy at rest.").

Professor Douglas Laycock has noted that the defendants fought vigorously against the decree from the very first because it turned out that they had made a poor prediction in a crucial case then pending before the Supreme Court. In *United States v. United States Steel Corp.*, 251 U.S. 417 (1920), which was handed down just two days after the decree in *Swift* was entered, the Court settled a previously open question of antitrust law in a way that would have favored the *Swift* defendants. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 1029-30 (1985).

²⁵ Professor Jost points out that the defendants' goal in this motion to modify—obtaining the right to enter the retail grocery market—would have been their legal right in the absence of the decree because this was a market that they had not unlawfully dominated or in which they had engaged in restraint of trade. Jost, *supra* note 6, at 1109.

²⁶ 286 U.S. at 106.

²⁷ *Id.* at 109.

modify its own decree,²⁸ whether or not the decree provided expressly for future modification.²⁹ Moreover, because the entry of the decree was "a judicial act," Justice Cardozo held that the court could modify the decree, whether it had been entered after a trial on the merits or as part of a settlement with the consent of the parties.³⁰ Although the decree had certain aspects of a contract governing prospective behavior, it did not bind the parties in quite the same way as would a private contract.³¹

Even as he confirmed that the court had the power to modify the decree, Justice Cardozo established a difficult standard for parties seeking the exercise of that power:

There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. . . . We are not at liberty to reverse under the guise of readjusting. . . . The inquiry for us is whether the changes [in the grocery business] are so important that the dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. *Nothing less than a clear showing of grievous wrong* evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.³²

Under this standard, commonly referred to as the "grievous wrong" test, the court rebuffed the meatpackers' motion to mod-

²⁸ Before *Swift*, it was unresolved whether an injunction was modifiable or whether it should be treated as a final judgment that was only subject to review on appeal. See *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1080-81 (1965) (citing cases).

²⁹ "If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *Swift*, 286 U.S. at 114.

³⁰ *Id.* at 115.

³¹ "[The parties' consent] was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be." *Id.*

³² *Id.* at 119 (emphasis added). One noteworthy feature of this section of Justice Cardozo's opinion is the absence of citation to any authority. Virtually all of the passages in the opinion that make determinations regarding the law of modification are similarly devoid of authority. For discussion of a radically different earlier draft of Justice Cardozo's opinion, which would have had the court finding for the meat packers and adopting a significantly more flexible standard for modifications, see Handler & Ruby, *supra* note 12, at 241; Jost, *supra* note 6, at 1111 n.73.

ify the injunction. Moreover, under the grievous wrong test, federal courts, including the Supreme Court, kept the decree in effect against the meat packers for another fifty years.³³

B. *The Inconsistent Application of Swift*

Perhaps because a jurist of the eminence of Justice Cardozo wrote the opinion or perhaps because in the quoted paragraph he crafted some of his more memorable phrases,³⁴ many lower courts have interpreted *Swift* stringently.³⁵ The leading case taking the strict approach is *Humble Oil & Refining Co. v. American Oil Co.*³⁶ In an opinion written by then-Judge Harry Blackmun, the Eighth Circuit refused to modify a thirty-year-old injunction that had allocated the use of the petroleum trademark "Esso." In Judge Blackmun's view, the party seeking modification had to "provide close to an unanswerable case. . . . [C]autious, substantial change, unforeseenness, oppressive hardship, and a clear showing are the requirements."³⁷ Other lower courts have followed this lead, even in situations where a strict approach seems terribly harsh, if not unjust.³⁸

The Supreme Court has been inconsistent in its approach to

³³ The decree was not finally dissolved until 1981. *United States v. Swift & Co.*, 1982-1 Trade Cas. (CCH) ¶ 64,464 (N.D. Ill. 1981).

³⁴ See *Holiday Inns, Inc. v. Holiday Inn*, 645 F.2d 239, 245 (4th Cir. 1981) (Phillips, J., dissenting) ("Inevitably also given the authorship courts have sometimes been tempted to ascribe to several felicities of phrase . . . a talismanic significance that, with all deference, I suggest the author of *The Nature of the Judicial Process* would never have claimed for them.").

³⁵ See, e.g., *Modification of Consent Decrees*, *supra* note 6, at 1023-24 (describing a 1960 opinion, *United States v. Swift & Co.*, 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd mem.*, 367 U.S. 909 (1961), as "[p]erhaps the starkest example of judicial unwillingness to grant even modest modifications in the face of substantially changed circumstances"). Under this rigid interpretation of *Swift*, the 1920 decree was not finally dissolved until 1981. *United States v. Swift & Co.*, 1982-1 Trade Cas. (CCH) ¶ 64,464 (N.D. Ill. 1981). Not all lower courts have seen *Swift* so rigidly. See, e.g., *Jost*, *supra* note 6, at 1113-21 (reviewing cases taking flexible approaches under *Swift*); 11 WRIGHT & MILLER, *supra* note 8, § 2863, at 208-11 (same).

³⁶ 405 F.2d 803 (8th Cir.), *cert. denied*, 395 U.S. 905 (1969).

³⁷ 405 F.2d at 813.

³⁸ See, e.g., *Holiday Inns, Inc. v. Holiday Inn*, 645 F.2d 239 (4th Cir.), *cert. denied*, 454 U.S. 1053 (1981) (court refused to modify injunction that prohibited defendant from indicating that its name was registered as a trademark, even though mark had been established in patent court after initial judgment); Leigh Ann Galbraith, Note, *Injunction Modification Standards: Uniformity v. Flexibility*, 39 WASH. & LEE L. REV 490, 492-501 (1982) (criticizing *Holiday Inn* decision as too harsh).

the modification question.³⁹ To give just one example,⁴⁰ in a later opinion in *United States v. Swift & Co.*⁴¹ the Court summarily affirmed a refusal to modify the *Swift* decree. The lower court had based its refusal largely on Cardozo's rigid phrases, even though another twenty-five years had passed since the original opinion and market conditions had changed dramatically.⁴² Conversely, in an opinion issued just weeks before, *Railway Employees v. Wright*,⁴³ the Court relied heavily on *Swift* in holding that it was an abuse of discretion for a trial court to refuse to modify a consent decree after Congress amended the statute, which was the basis for the decree.⁴⁴

In 1968 the Court undertook its first full re-examination of *Swift* in *United States v. United Shoe Machinery Corp.*⁴⁵ *United Shoe*, like *Swift*, was an antitrust case. Unlike *Swift*, where private defendants attempted to modify a consent decree, *United Shoe* concerned an attempt by the United States as plaintiff to modify an injunction issued by the trial court after a

³⁹ Some commentators have been less charitable:

No one serious about defining a district court's task in interpreting a consent decree should look to the Supreme Court for guidance. Because its stated view on interpretation has shifted with the merits of each case, the Court has charted all the possibilities and fixed its sights on none of them. Consequently, the Court has said nothing useful for lower courts, unless one thinks providing a grab-bag of options is useful.

Mengler, *supra* note 6, at 299-300.

⁴⁰ Needless to say, there are others. Compare *Chrysler Corp. v. United States*, 316 U.S. 556 (1942) (granting government's request for modification to extend time decree would be effective) with *Ford Motor Co. v. United States*, 335 U.S. 303 (1948) (denying government's request for modification to extend time because an identical decree arising from the same litigation would be effective). See also Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 HARV. L. REV. 1303, 1313 (1967) ("[W]hatever liberalization one reads into *Chrysler* must be largely read out of *Ford* six years later") [hereinafter *Antitrust Consent Decrees*]. But see Mengler, *supra* note 6, at 298-99 n.61 (although *Swift* was not cited in *Ford*, the automobile cases were factually distinguishable from each other).

⁴¹ 367 U.S. 909 (1961).

⁴² See *Antitrust Consent Decrees*, *supra* note 40, at 1310-11 (describing changed conditions).

⁴³ 364 U.S. 642 (1961).

⁴⁴ The Court found an abuse of discretion even though Congress simply amended the Railway Labor Act to permit (but not require) union shops; the consent decree had enjoined the railroad and union from requiring a union shop, which reflected the then-existing law. *Id.* at 644. Thus, the injunction did not require unlawful behavior on the part of the defendants; its continuance would simply prohibit them from doing something that was now permitted.

⁴⁵ 391 U.S. 244 (1968).

full hearing on the merits. The trial court denied the motion on the grounds that the government had failed to meet *Swift*'s test for modification.⁴⁶ Writing for the Court, Justice Fortas emphasized that Justice Cardozo's decision had been framed in the context of defendants who sought "not to achieve the purposes of the provisions of the decree, but to escape their impact."⁴⁷ In remanding for reconsideration of the government's petition to modify, Justice Fortas made it clear that if the trial court's original order had not been effective in remedying the antitrust violations,⁴⁸ it had the power and the obligation to modify the order so that the federal antitrust laws would be enforced.⁴⁹ Although the Court opened the way for a modification, Professor Jost has noted that *United Shoe* is ambiguous precedent because it was unclear which of the important factual differences that distinguished it from *Swift* really was of greatest doctrinal importance.⁵⁰

The Court next gave detailed attention to modifications in *Firefighters Local Union No. 1784 v. Stotts*.⁵¹ In 1980 the trial court entered a consent decree in which the City of Memphis, Tennessee, committed itself to certain hiring and promotion goals with respect to African-American employees in its fire department. In 1981 the City announced that it would have to lay-off some employees due to unexpected budget shortfalls and that it would use a "last-hired, first-fired" system for the layoffs. At the plaintiff's request, the district court issued a preliminary injunction which modified the consent decree to make the impact of the layoffs less severe on the plaintiffs.⁵² The Sixth Cir-

⁴⁶ *United States v. United Shoe Mach. Corp.*, 266 F. Supp. 328, 329-30 (D. Mass. 1967).

⁴⁷ 391 U.S. at 249. "*Swift* teaches that a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed in the interest of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." *Id.* at 248.

⁴⁸ The case was settled subsequently by a new consent decree. *United States v. United Shoe Mach. Corp.*, 1969 Trade Cas. (CCH) ¶ 72,688 (D. Mass. 1969).

⁴⁹ *United Shoe*, 391 U.S. at 251-52; see also Note, *Requests by the Government for Modification of Consent Decrees*, 75 YALE L.J. 657 (1966) (discussing issue before *United Shoe*).

⁵⁰ Jost, *supra* note 6, at 1024-25 (citing and assessing alternative interpretations); see also *Modification of Consent Decrees*, *supra* note 6, at 1028 ("lower courts' responses . . . present a confusing mix of doctrinal analysis").

⁵¹ 467 U.S. 561 (1984).

⁵² *Id.* at 567.

cuit affirmed the issuance of the preliminary injunction,⁵³ but the Supreme Court reversed.

Despite the apparent similarities to the facts of *United Shoe*—both cases involved plaintiffs attempting to effectuate the general purposes of the respective decrees—Justice White's opinion for the majority took a surprisingly strict approach to modifications. Treating the consent decree first as a contract, Justice White noted that the "'scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it' or by what 'might have been written had the plaintiff established his factual claims and legal theories in litigation'."⁵⁴ Given that the decree mentioned neither layoffs, demotions nor "an intention to depart from the existing seniority system or from the City's arrangements with the Union,"⁵⁵ the majority could not "believe that the parties to the decree thought that the City would simply disregard . . . the seniority system it was then following."⁵⁶ The majority ignored the dissenting argument raised by Justice Blackmun for himself and Justices Brennan and Marshall that, in the context of the complex and lengthy process of implementing a civil rights action, leaving the trial court discretion to handle unforeseen circumstances was not a rewriting of the parties' agreement, but was part of the attempt to implement the written terms.⁵⁷

⁵³ *Stotts v. Memphis Fire Dep't*, 679 F.2d 541 (6th Cir. 1982).

⁵⁴ *Stotts*, 467 U.S. at 573 (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)). *Armour* was the fifth time the meatpackers decree was before the Court. See HANDLER, *supra* note 14, at 9321 n.126.

⁵⁵ 467 U.S. at 573. Justice Stevens's concurring opinion also rested on a similar rationale. *Id.* at 590-92 (Stevens, J., concurring).

⁵⁶ *Id.* at 575. Justice White also noted that it was not likely that the City would have bargained away seniority rights since neither the union nor the non-minority employees were parties when the 1980 consent decree was entered. *Id.* at 575-76. Justice O'Connor emphasized this point in her concurring opinion. *Id.* at 587-88 (O'Connor, J., concurring). Subsequently, the Court has taken an even stronger approach to protecting the rights of non-parties. *Martin v. Wilks*, 490 U.S. 755 (1989) (non-parties cannot be bound in either a formal or practical sense by a consent decree). But see Civil Rights Act of 1991, Pub. L. No. 102-166, § 108 (reversing *Martin* under limited circumstances).

⁵⁷ *Stotts*, 467 U.S. at 609. The majority also ignored the dissent's important point that the case was being reviewed after the trial court had issued a preliminary injunction, not a permanent injunction. The trial court was entitled to extra deference in this context. *Id.* at 610; see *infra* note 154 with accompanying text; see also *American Hosp. Supply Corp. v. Hospital Prods., Ltd.*, 780 F.2d 589, 594-95 (7th Cir. 1986) (Posner, J.) (noting the substantial deference due the trial court "in the hectic atmosphere of a pre-

Justice White also explained that the trial court did not have inherent power to modify the consent decree in response to the unexpected financial crisis: "Title VII necessarily acted as a limit on the District Court's authority to modify the decree over the objections of the City; the issue cannot be resolved solely by reference to the terms of the decree and notions of equity."⁵⁸ Under the interpretation of title VII the Court had provided in *International Brotherhood of Teamsters v. United States*,⁵⁹ the district court could not alter the seniority system in this context unless it made a finding either that the seniority system was adopted with discriminatory intent or that it could not make whole a proven victim of discrimination without such an alteration.⁶⁰

Stotts is generally recognized as the Supreme Court's missed opportunity to clarify the rules for modifications, especially in the institutional reform context.⁶¹ Most lower courts have read *Stotts* as a decision based largely on the special protections that title VII provides *bona fide* seniority systems.⁶² Since the Supreme Court did not make the overall standards explicit, whatever the Court's actual intent, the case has been overlooked for its effects on the law of modification of injunctions.⁶³

liminary-injunction proceeding").

⁵⁸ *Stotts*, 467 U.S. at 576 n.9.

⁵⁹ 431 U.S. 324 (1977).

⁶⁰ *Stotts*, 467 U.S. at 576 n.9. The dissent objected that in the context of a preliminary injunction to modify a consent decree, it was impossible for a court to know the extent and nature of any past discrimination by the City. The parties had never been to trial on these claims in either the original action leading to the consent decree or in this action seeking modification. *Id.* at 609. The Court later clarified that despite *Stotts*, a district court could enter a consent decree that benefitted individuals who were not actual victims of an employer's discriminatory practices despite title VII's apparent restrictions. The majority distinguished those situations where a district court would be barred by title VII from providing such relief, "after a trial or, as in *Stotts*, in disputed proceedings to modify a decree." *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 529 (1986).

⁶¹ See, e.g., Jost, *supra* note 6, at 1123 ("*Stotts* illustrates the confusion resulting from the variety of judicial approaches to modification that have evolved since *Swift*"); *Modification of Consent Decrees*, *supra* note 6, at 1032 n.79 (reviewing differing ways commentators have evaluated *Stotts*).

⁶² See, e.g., *Deveraux v. Geary*, 765 F.2d 268 (1st Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); *Wilmington Firefighters v. City of Wilmington*, 632 F. Supp. 1177, 1185 (D. Del. 1986) (collecting cases).

⁶³ See, e.g., SCHOENBROD ET AL., *supra* note 4, at 246 n.1; *The Supreme Court, 1983 Term—Leading Cases*, 98 HARV. L. REV. 87, 267 (1984) [hereinafter *Leading Cases*].

II. THE FLEXIBLE TEST

For several years some commentators and courts have contended that, at least in the context of institutional reform litigation, a strict interpretation of *Swift* is inappropriate. They have called for flexibility based on a variety of factors.⁶⁴ Professor Owen Fiss is perhaps the most well-known commentator embracing the flexible approach. He has noted that in an institutional reform case, the remedial phase "is concerned not with the enforcement of a remedy already given, but with the giving or shaping of the remedy itself. . . . The task is to remove the condition that threatens the constitutional values."⁶⁵ Professor Fiss focused on effective enforcement of constitutional rights through necessarily complex, on-going involvement of the trial court in shaping the relief. In some cases a flexible approach seems warranted. For example, in *Philadelphia Welfare Rights Organization v. Shapp*⁶⁶ the Commonwealth of Pennsylvania had agreed to provide 180,000 medical examinations to welfare recipients or face substantial penalties. When the numerical

⁶⁴ Professor Timothy Jost has probably done the most thorough job of assessing the situations where courts should find it appropriate to permit modifications: "[W]hen necessary to accommodate a change of the law or legally material change of fact, to relieve the obligor from oppression, to effectuate the rights of the beneficiary, or, in certain cases, to protect the public interest, a court should be open to modification." Jost, *supra* note 6, at 1162.

Professor Jost has also categorized a large number of cases adopting a flexible approach to modifications. *Id.* at 1113 n.84. See also Brian Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 LA. L. REV. 789 (1988); Steinberg, *supra* note 6, at 71-73 (both advocating an ad hoc approach to modification based on large numbers of factors); Edward A. Tomlinson, *Modification and Dissolution of Administrative Orders and Injunctions*, 31 MD. L. REV. 312, 326 (1971) (same). But see Hugh J. Beard, *The Role of Res Judicata in Recognizing Unitary Status and Terminating Desegregation Litigation: A Response to the Structural Injunction*, 49 LA. L. REV. 1239, 1241-42 (1989) ("[I]logically and necessarily flowing . . . is the preclusion of a continuing and flexible modification of the decree"); *Modification of Consent Decrees*, *supra* note 6, at 217 (rejecting the flexible approach because it allows political considerations to affect judicial decisions on modification).

⁶⁵ Owen Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 27 (1979). Professor Fiss's view has been expressly adopted by some judges. See, e.g., *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 770 (1992) (Stevens, J., dissenting); *Battle v. Anderson*, 708 F.2d 1523, 1538 (10th Cir. 1983) (McKay, J., concurring), *cert. dismissed*, 465 U.S. 1014 (1984). Professor Abram Chayes is another preeminent professor also closely associated with this position. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298-1302 (1976) (advocating flexible, on-going relief with the judge's active participation).

⁶⁶ 602 F.2d 1114 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

quota could not be met because the welfare population went down, the court approved a request for modification of the consent decree because it made little sense to enforce the penalty when the actual purpose of the decree—a minimal level of health care for people on welfare—was being met.⁶⁷

A. Judge Friendly's Case for Flexibility

Before *Rufo*, the leading case adopting the flexible approach to modifications in the institutional reform context was *New York State Association for Retarded Children v. Carey*.⁶⁸ *Carey* was a class action brought on behalf of mentally retarded residents of the Willowbrook State School in New York City. A consent judgment entered in 1975 committed the defendants to reduce the population of Willowbrook from 5700 to 250 by relocation of the residents to community placements.⁶⁹ Despite extensive efforts to enforce the consent judgment, as of mid-1981, 999 members of the original class had been transferred temporarily to other large institutions, and another 1369 members still remained at Willowbrook.⁷⁰ When the plaintiffs moved for an order declaring the defendants out of compliance with portions of the consent judgment, the defendants responded in part by seeking modification of the fifteen-bed/ten-bed limitation to a fifty-bed limitation. After hearing twenty-five days of testimony on these motions, the district court held that the defendants were not in compliance with provisions of the consent judgment, appointed a special master to protect classmembers from harm and rejected the defendants' request for modification, which would allow the use of larger facilities.⁷¹

The district court rejected the request to modify for several reasons. The plaintiffs' expert witnesses persuaded the court

⁶⁷ *Id.* at 1120-21.

⁶⁸ 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983). For background on the case, see DAVID J. ROTHMAN & SHEILA M. ROTHMAN, *THE WILLOWBROOK WARS* (1984); Philip P. Frickey & David I. Levine, *Book Review*, 3 CONST. COMM. 270 (1986) (reviewing Rothman & Rothman).

⁶⁹ Community placements were to be in non-institutional residences located in residential facilities with a size limitation known as the "fifteen-bed/ten-bed limitation." Those with multiple handicaps were to be placed in facilities with a "six-bed/three-bed limitation." 706 F.2d at 959.

⁷⁰ *Id.* at 960.

⁷¹ *New York State Ass'n for Retarded Children v. Carey*, 551 F. Supp. 1165 (E.D.N.Y. 1982).

that the needs of the class members were better met in group homes than in larger facilities and that placement in small facilities was "still an important goal" of the consent judgment.⁷² Although the court recognized that the defendants' difficulties in finding suitable small facilities in the tight New York City housing market warranted an extension of time for transferring the remaining class members, the court noted that at least in part the defendants had created their own obstacles to finding placements.⁷³ Relying on a rigid reading of *Swift*, the district court concluded that the defendants had "failed to show exceptional circumstances or any grievous wrong as a basis for relief."⁷⁴ In the district court's view, "[i]t would seem to be elementary that a party cannot show changed conditions created by its own misconduct, or by a change in its own theories or thinking as justifying modification."⁷⁵

In reviewing the decision on appeal, the Second Circuit upheld most of the district court's decision, but reversed its refusal to modify the consent judgment's fifteen-bed/ten-bed limitation.⁷⁶ Writing for the panel, Judge Henry Friendly reviewed the evidence supporting the defendants' "strong showing that only by modifying the fifteen-bed/ten-bed limitation . . . could they expeditiously relocate the remaining . . . residents."⁷⁷ Judge Friendly did not review the trial court's rejection of this evidence in favor of the plaintiff's case under the standard tests—whether the findings of fact were clearly erroneous or whether the conclusions were an abuse of discretion.⁷⁸ Instead, he framed the inquiry under the most flexible language from Justice Cardozo's opinion in *Swift*⁷⁹ and rejected the trial court's

⁷² *Id.* at 1184. The defendants also offered extensive expert testimony to buttress their claims that class members could receive equally good or even superior care in larger facilities. *Id.* at 1181-84.

⁷³ *Id.* at 1188-90.

⁷⁴ *Id.* at 1191. The district court cited the Second Circuit as having endorsed *Swift*'s stringent test. *Id.* at 1190-91 (quoting *Chance v. Board of Examiners*, 561 F.2d 1079, 1086 (2d Cir. 1977)).

⁷⁵ 551 F. Supp. at 1191.

⁷⁶ *Carey*, 706 F.2d 965, 971 (2d Cir. 1983).

⁷⁷ *Id.* at 965-67.

⁷⁸ The court used these standards in evaluating other portions of the lower court's decision. *Id.* at 962, 965. See also Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235 (1991) (scope of review of institutional reform litigation decisions).

⁷⁹ *Carey*, 706 F.2d at 967, quoting *United States v. Swift & Co.*, 286 U.S. 106, 114

reliance on Justice Cardozo's stricter language.⁸⁰ Judge Friendly rightly pointed out that *Swift's* language had to be read in the context of that case.

Turning to the context of the case at hand, Judge Friendly acknowledged that although the defendant was seeking modification, "it [was] not, as in *Swift*, in derogation of the primary objective of the decree."⁸¹ In Judge Friendly's view, the primary objective was to empty "mammoth" Willowbrook; the fact that the modification would counter another objective, placing residents "in small facilities bearing some resemblance to a normal home"⁸² was just a consequence of the modification.⁸³ Judge Friendly found a closer analogy between *Carey* and his own majority opinion in *King-Seeley Thermos Co. v. Aladdin Industries, Inc.*,⁸⁴ than between *Carey* and either *Swift*⁸⁵ or *United Shoe*.⁸⁶ In *King-Seeley* the Second Circuit acknowledged that *Swift* must be read in context. Thus, "[w]hen a case involves drawing a line between legitimate interests on each side, modification will be allowed on a lesser showing."⁸⁷

Judge Friendly pointed to two other factors that supported his conclusion that a more flexible standard was appropriate in

(1932) ("A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. . .").

⁸⁰ *Carey*, 706 F.2d at 967-968.

⁸¹ *Id.* at 969.

⁸² *Id.*

⁸³ *Id.* ("any modification will perforce alter some aspect of the decree").

⁸⁴ 418 F.2d 31 (2d Cir. 1969).

⁸⁵ 367 U.S. 909 (1961); see *supra* notes 37-38 & accompanying text.

⁸⁶ 391 U.S. 244 (1968); see *supra* notes 41-44 & accompanying text.

⁸⁷ *Carey*, 706 F.2d at 969. Judge Friendly went on to quote from *King-Seeley*: While changes in fact or in law afford the clearest bases for altering an injunction, the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes.

Id. at 969 (quoting *King-Seeley*, 418 F.2d at 35).

King-Seeley was a dispute "between two kinds of right-doing, King-Seeley's legitimate interest in protecting its trademark [in the capitalized word "Thermos"] insofar as this is valid and Aladdin's equally legitimate interest in being free to sell its products by use of a generic term ["thermos" as a lower case word]." 418 F.2d at 35. Judge Friendly pointed out that the injunction gave the defendant equitable relief and that the case could have easily arisen with the parties in reversed positions. *Id.* He did not answer directly the charges of the dissenting judge who asserted that Judge Friendly simply had substituted himself for the trial judge in making findings of fact and also had overruled a unanimous affirmance of the original decree by another panel of the court. *Id.* at 37 (Moore, J., dissenting).

this case. First, he quoted extensively from several sources, including Professors Chayes and Fiss, to support his general conclusion 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.⁸⁸

Thus, in Judge Friendly's view, "a consensus is emerging among commentators in favor of modification with a rather free hand."⁸⁹

Second, in this case in particular, "especially great generosity [was] mandated" because of a then-recent Supreme Court decision, *Youngberg v. Romeo*.⁹⁰ Judge Friendly believed that under *Youngberg* the district court was not free to choose between the testimony offered by the witnesses for the plaintiffs and the defendants. The lower court could only determine whether the defendants' request for modification to use larger facilities "constituted 'professionally acceptable choices'."⁹¹ Judge Friendly rejected the position expressed by the United States as *amicus curiae* that the defendants had already and irrevocably exercised their professional judgment in agreeing to the terms of the consent decree because their agreement was based on the mistaken belief that small facilities could be

⁸⁸ *Carey*, 706 F.2d at 969.

⁸⁹ *Id.* at 970. *See id.* at 971 ("Applications to modify a decree such as that in this case should thus be viewed with generosity.").

⁹⁰ 457 U.S. 307 (1982). *Youngberg*, which was decided two months after the district court ruled in *Carey*, concerned a suit for damages brought by a retarded man who had been committed to a state-run institution and allegedly had received inadequate treatment. In deciding whether the defendant state officials were liable, the Supreme Court emphasized that:

Courts must show deference to the judgment exercised by a qualified professional. . . . [T]he decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Youngberg, 457 U.S. at 322-23 (quoted in *Carey*, 706 F.2d at 965, 971). For a recent critical assessment of the professional judgment standard, see Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639 (1992).

⁹¹ *Carey*, 706 F.2d at 971.

found.⁹² The Second Circuit panel remanded the case to the district court on the narrow question of whether the defendants' experts had exercised professional judgment in supporting the request for modification to allow a fifty-bed limit.⁹³

B. *The Brooklyn Critics*

The *Carey* decision was severely criticized in the *Brooklyn Law Review* by Steven R. Shapiro, Esquire,⁹⁴ and a student note author.⁹⁵ The Brooklyn critics faulted Judge Friendly's Second Circuit opinion for several reasons. In their views: (1) Judge Friendly relied inappropriately on precedent, specifically *United Shoe, Youngberg and King-Seeley*; (2) the court failed to explain why it overruled the district court's determination of the primary objective of the decree; (3) the opinion improperly assumed that professional judgment rather than the foreseeable difficulties in finding housing was the basis for the defendants' motion to modify; (4) Judge Friendly ignored the distinctions between the standards for issuing a consent decree originally and modifying it later; (5) the court made inappropriate use of scholarly commentators on institutional reform litigation, especially Professor Owen Fiss, whose clear focus in his writings is on the need to use flexibility as a means of enforcing decrees effectively; and (6) the appellate court used an improper standard for reviewing a denial of a request for relief under rule 60(b) of the Federal Rules of Civil Procedure.⁹⁶ Despite the significant criticisms raised by the Brooklyn critics, however, the *Carey* opinion has enjoyed wide acceptance in federal courts over the past decade.⁹⁷

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Shapiro, *supra* note 6, at 433. At the time he wrote, Mr. Shapiro was a staff attorney for the New York Civil Liberties Union, attorneys for the plaintiff class in *Carey*. Shapiro had no direct role in the case, however. *Id.* at 459 n.*.

⁹⁵ Keeble, *supra* note 6, at 657.

⁹⁶ A student writing in another scholarly publication has made similar criticisms of *Carey* in reliance on the work of the Brooklyn critics. Murphy, *supra* note 6, at 203.

⁹⁷ All courts in the Second Circuit have followed *Carey* without questioning its premises. See, e.g., *Kozlowski v. Coughlin*, 871 F.2d 241, 246-47 (2d Cir. 1989) (stating that under *Carey* and *Swift*, however, the "guiding principle" was that modification was favored when necessary to carry out the purposes of the decree); *Tetra Sales (U.S.A.) v. T.F.H. Publications, Inc.*, 727 F. Supp. 92 (S.D.N.Y. 1989). Other federal courts have also adopted the *Carey* approach. See, e.g., *Plyler v. Evatt*, 846 F.2d 208 (4th Cir.), *cert.*

III. THE SUPREME COURT'S APPROACH TO MODIFICATIONS IN INSTITUTIONAL REFORM LITIGATION

A. *The Adoption of Carey in Rufo v. Inmates of Suffolk County Jail*

The *Carey* opinion achieved even greater significance when the Supreme Court relied heavily on it in *Rufo v. Inmates of Suffolk County Jail*,⁹⁸ its most recent opinion on the modification of consent decrees in institutional reform cases. *Rufo* began in 1971 when inmates sued the sheriff of Suffolk County, Massachusetts and other state and local officials, alleging that pretrial detainees were being held under unconstitutional conditions.

1. The Background of *Rufo*

In 1973 District Judge Robert Keeton agreed that conditions in the facility, the Charles Street Jail, which had been built in Boston in 1848, were constitutionally deficient under the Due Process Clause of the Fourteenth Amendment. The district court issued a permanent injunction which prohibited pretrial detainees from being double-celled after November 30, 1973 and would prohibit their incarceration at the jail after June 30, 1976. This order was not appealed.⁹⁹ In 1978, with the problems still not solved, the First Circuit affirmed the district court's subsequent orders. It declared that the jail would be closed on October 2, 1978, unless an acceptable plan for creating a proper facility was presented to the district court before that date.¹⁰⁰ The defendants met this deadline in substance;¹⁰¹ seven months later, the district court entered a consent decree which included plans for a new jail housing 309 detainees in single occupancy rooms.

Construction on the new jail did not even begin until more than one year after the projected completion date. Since growth

denied, 488 U.S. 897 (1988); *Heath v. DeCourcy*, 888 F.2d 1105 (6th Cir. 1989); *Newman v. Graddick*, 740 F.2d 1513 (11th Cir. 1984). Some courts have not found it necessary to decide whether to follow *Carey* or *Swift*. See, e.g., *Twelve John Does v. District of Columbia*, 861 F.2d 295 (D.C. Cir. 1988); *Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987).

⁹⁸ 112 S. Ct. 748 (1992).

⁹⁹ *Id.* at 754.

¹⁰⁰ *Id.* at 755 (quoting *Inmates of Suffolk County Jail v. Kearney*, 573 F.2d 98, 99-100 (1st Cir. 1978)).

¹⁰¹ 112 S. Ct. at 755.

in the inmate population had in the meantime, outpaced the projections, the defendants were ordered to build a larger jail by the state court in a separate action.¹⁰² The district court subsequently modified the decree in 1985 to allow the capacity to be increased to any amount on the condition that "single-cell occupancy is maintained under the design for the facility."¹⁰³

While the jail was under construction in 1989, the Suffolk County sheriff moved to modify the decree to allow some double celling of detainees. The sheriff contended that the motion was supported by both a change in law and a change in fact. The asserted change in law was the Supreme Court's decade-old opinion in *Bell v. Wolfish*,¹⁰⁴ which held that double celling was not unconstitutional *per se*. The asserted change in fact was the increase in the population of pretrial detainees the jail had experienced.

Judge Keeton refused to grant the request for modification because the sheriff had not met the "grievous wrong" standard from *Swift*. In the district court's view, *Bell* did not overrule any legal interpretation that formed the basis for the 1979 consent decree. As for the increase in the jail population, it was "neither new nor unforeseen."¹⁰⁵ The court also stated that even under a flexible modification standard, as adopted in *Carey*, the sheriff would not be permitted to introduce double celling. According to Judge Keeton, who had handled the case for years, a separate cell "has always been an important element of the relief sought in this litigation—perhaps even the most important element."¹⁰⁶ The First Circuit affirmed.¹⁰⁷ In *Rufo* the Supreme Court reversed.¹⁰⁸

¹⁰² *Id.* at 756.

¹⁰³ *Id.*

¹⁰⁴ 441 U.S. 520 (1979). The Supreme Court handed down *Bell* just one week after Judge Keeton had approved the consent decree in 1979. See *Rufo*, 112 S. Ct. at 756.

¹⁰⁵ *Rufo*, 112 S. Ct. at 756 (quoting *Inmates of Suffolk County Jail v. Kearney*, 734 F. Supp. 561, 564 (D. Mass. 1990)).

¹⁰⁶ 112 S. Ct. at 756-57 (quoting *Inmates of Suffolk County Jail v. Kearney*, 734 F. Supp. 561, 565 (D. Mass. 1990)).

¹⁰⁷ *Inmates of Suffolk County Jail v. Kearney*, 915 F.2d 1557 (1st Cir. 1990).

¹⁰⁸ 112 S. Ct. 748 (1992).

2. The Supreme Court's *Rufo* Decision

a. *The Majority*

Writing for a majority of five,¹⁰⁹ Justice White noted that even though a consent decree was "in some respects contractual in nature," the parties "desire and expect" that the decree will be enforceable as a judicial decree.¹¹⁰ As such, the decree is subject to rule 60(b) of the Federal Rules of Civil Procedure. Although the district court had recognized these facts, Justice White stated that it was error to hold that rule 60(b)(5) was nothing but a codification of the "grievous wrong" standard of *Swift*.¹¹¹

After detailing the history of the *Swift* litigation, Justice White cited *Carey* as a leading case, recognizing that Justice Cardozo's language read out of context suggested a "hardening" of the traditional flexible standard for modification of consent decrees.¹¹² Moreover, other decisions of the Supreme Court itself "reinforce[d] 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."¹¹³ Justice White underscored that the terms of rule 60(b) permitted "a less stringent, more flexible standard."¹¹⁴ Relying again on *Carey*, Justice White noted that "[t]he upsurge in institutional reform litigation since [*Brown I*] has made the ability of a district court to modify a decree in response to changed circumstances all the more important."¹¹⁵

¹⁰⁹ Chief Justice Rehnquist and Justices Scalia, Kennedy and Souter joined the opinion. Justice O'Connor wrote a concurring opinion. Justice Stevens wrote a dissent, which Justice Blackmun joined. Justice Thomas took no part in the case, which was argued before he joined the bench. *Id.* at 754.

¹¹⁰ *Id.* at 757.

¹¹¹ *Id.*

¹¹² *Id.* at 757-58.

¹¹³ *Id.* at 758. Justice White cited only two cases for this point: *Railway Employees v. Wright*, 364 U.S. 642 (1961) and *Board of Education v. Dowell*, 498 U.S. 237 (1991). Although both opinions cited *Swift*, neither precisely applies to the situation in *Rufo*. In *Railway Employees* the Supreme Court held that the district court had to modify a decree that tracked then-existing labor laws after Congress amended the particular statute in question. 364 U.S. at 651. *Dowell* concerned a motion to dissolve a desegregation decree after the terms of the decree had been satisfied. See *infra* note 125.

¹¹⁴ *Rufo*, 112 S. Ct. at 758.

¹¹⁵ *Id.* Justice White also rejected the contention that a flexible standard would deter negotiated settlements. *Id.* at 758-59.

Justice White then explained that even though a district court should be flexible in considering requests for modification of institutional reform decrees, "it does not follow that a modification will be warranted in all circumstances."¹¹⁶ Relief is appropriate under rule 60(b)(5) when it is no longer equitable, not "when it is no longer convenient to live with the terms of a consent decree."¹¹⁷ According to the majority, a party seeking modification has the burden of establishing that "a significant change in circumstances warrants revision of the decree."¹¹⁸ Once this burden is met, a district court must consider whether the proposed modification is suitably tailored to the changed circumstance.¹¹⁹ The Court then specified that the initial burden can be met by showing a significant change in either factual conditions or in the law.

Changed factual conditions could make compliance inequitable where the decree proves to be unworkable due to unforeseen obstacles¹²⁰ or when enforcement without modification would be detrimental to the public interest. Justice White rejected a proposed test that would allow modification only when a change in facts is both "unforeseen and unforeseeable."¹²¹ He noted that such a standard would be even more rigid than *Swift*. He acknowledged that "[o]rdinarily . . . modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree."¹²² Justice White did not state expressly what a court should do when the facts were subjectively unforeseen but reasonably foreseeable. The clear implication, however, is that flexibility is called for in

¹¹⁶ *Id.* at 760.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ In a footnote the Court specified that this standard applied to modification of a term of a consent decree that "arguably relates to vindication of a constitutional right." *Id.* at 760 n.7. Such a showing is not necessary to implement minor changes in extraneous details such as the paint color of a building facade. If such minor changes cannot be handled by consent, the district court would be directed to grant the change if the moving party had a reasonable basis for the request. *Id.* The Court did not explain how to distinguish between the two situations or what test to apply when the motion to modify concerned something that fell between the two extremes.

¹²⁰ The Court cited to *Carey* as an example. *Id.* at 760.

¹²¹ *Id.* at 760.

¹²² *Id.* "[T]hat party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)." *Id.* at 761.

that situation.¹²³

Changes in the law could also be the basis for a modification. Justice White identified one situation where modification was clearly required—if an obligation imposed on the parties becomes impermissible under federal law.¹²⁴ He also stated that modification might be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent.¹²⁵ Justice White rejected the defendants' claim that *Bell v. Wolfish*¹²⁶ was a change in the law requiring modification. *Bell* neither banned double celling nor did it cast doubt on the legality of single celling. Moreover, the defendants "were undoubtedly aware that *Bell* was pending when they signed the decree."¹²⁷ Justice White also noted that the parties were free to enter into a settlement that committed the defendants to do more than the Constitution required.

The majority recognized that there was a risk that the unceasing stream of clarifications of the law inherent in the legal system would open the door to constant relitigation, undermine finality and discourage parties from settling their differences. To avoid this, Justice White stated that decisions merely clarifying the law, rather than changing it, generally could not be the basis for a modification motion. On the other hand, a clarifying decision could be the basis for a motion for modification if it turned out that the parties had based their agreement on a misunderstanding of the governing law. Justice White suggested that

¹²³ "We note that the dissent's 'reasonably foreseeable' standard differs significantly from that adopted by the Court today." *Id.* at 761 n.10. In the absence of a clear written agreement and a fully developed record, the Court was not willing to impose sole responsibility on a local governmental entity for responding to any "reasonably foreseeable" increase in the detainee population by increasing the capacity of the jail, "potentially infinitely." *Id.*

¹²⁴ *Id.* at 762.

¹²⁵ *Id.* citing *Railway Employees*, 364 U.S. 642 (1961) and *Stotts*, 467 U.S. 561 (1984); see *supra* notes 45-57 and accompanying text. Curiously, this is the only citation to *Stotts*, Justice White's then-most recent majority opinion on modification of a consent decree in an institutional reform case. It is somewhat strange that Justice White made no effort to distinguish the rigid approach he took in *Stotts*, which rebuffed the plaintiff's efforts to seek a modification to deal with an unforeseen (but probably foreseeable) event, a layoff of employees, with the flexible approach he took in *Rufo*, which assisted the defendant who sought a modification to deal with a foreseeable and probably foreseen event, an increased jail population.

¹²⁶ 441 U.S. 520 (1979).

¹²⁷ 112 S. Ct. at 762.

Rufo could be such a case if the defendants could establish that the parties had thought that single celling was constitutionally mandated at the time they entered into the decree.¹²⁸

Once the moving party has met its burden of establishing a change of law or fact warranting modification, the Court directed the lower court to decide whether the proposed modification was "suitably tailored" to the changed circumstance.¹²⁹ This inquiry should be guided by three factors: (1) the modification would not create or perpetuate a constitutional violation; (2) a proposed modification should address the problems created by the change in circumstances and should not attempt to rewrite the decree so that it conforms to the constitutional floor; and (3) federalism requires deference to local governmental administrators where the changed condition made it substantially more onerous and expensive to comply with the decree.¹³⁰

b. *The Separate Opinions in Rufo*

In their separate opinions, Justice O'Connor, concurring, and Justice Stevens (joined by Justice Blackmun), dissenting, make clear their approval of the adoption of a flexible standard for modification of consent decrees in institutional reform cases.¹³¹ They wrote separately from the majority to clarify their differences on other points.

In Justice O'Connor's view, the Court's new standard was no clearer than the general language of rule 60(b)(5). She would have simply reviewed the district court's exercise of the discretion permitted under the rule. She believed that the majority's opinion could be understood to say that, in this case, the district

¹²⁸ *Id.* at 763. Justice White noted that the decree stated that it "sets forth a program which is both constitutionally adequate and constitutionally required." *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 763-64. In a footnote added to respond to Justice O'Connor's concurring opinion, Justice White clarified that no deference was involved in the first step of the inquiry—whether there had been a significant change of law or fact. In the second step, however, "principles of federalism and simple common sense" required giving significant weight to views of the officials who had to implement the decree. *Id.* at 764 n.14. Justice White did not elaborate on exactly how principles of federalism might have an effect in this context. For one attempt to do so, see Alan Effron, Note, *Federalism and Federal Consent Decrees Against Governmental Entities*, 88 COLUM. L. REV. 1796 (1983).

¹³¹ Justice O'Connor approved of the majority's rejection of the strict language of *Swift*. 112 S. Ct. at 766 (O'Connor, J., concurring). Justice Stevens specifically agreed with the majority's "endorsement" of *Carey*. *Id.* at 768 (Stevens, J., dissenting).

court had taken too narrow a view of the permissible discretion in three ways. First, the district court was wrong to think that under *Swift* "new and unforeseen conditions" were a prerequisite to any modification. Modification could still be equitable under the rule even if the rise in prison population had been foreseen; the danger to the public from the pretrial release of inmates might outweigh the failure to accommodate even a foreseen increase in the jail population.¹³² Second, the district court was wrong to flatly reject fiscal constraints as a reason to modify. Although lack of resources cannot excuse a failure to obey constitutional requirements, it could be the basis for concluding that the decree was no longer equitable. For example, the costs of implementing the decree may have turned out to be far greater than anyone had expected.¹³³ Third, by rejecting the proposed modification on the ground that it would "set aside obligations of that decree,"¹³⁴ the district court had established a test that made it impossible to ever modify a decree.¹³⁵

Although Justice O'Connor supported the majority's position on these points, she expressed concern that the Court had placed unnecessary new constraints on the district court's discretion. She thought that the majority's opinion might be read to suggest that the district court could not conclude on remand that it would be inequitable to double cell the plaintiffs.¹³⁶ She also thought that the majority was wrong to suggest that the district court had to defer to local officials when deciding whether

¹³² *Id.* at 766 (O'Connor, J., concurring). Justice O'Connor did not explain how there would be danger to the public from releasing class members who were *pretrial* detainees, i.e., people who might not have made bail for a variety of reasons (such as poverty), but who nonetheless were entitled to the legal presumption of innocence. *See also* *Duran v. Elrod*, 760 F.2d 756 (7th Cir. 1985) (Posner, J.) (allowing modification to protect public on the same basis).

¹³³ 112 S. Ct. at 766 (O'Connor, J., concurring).

¹³⁴ *Id.* (quoting *Inmates of Suffolk County Jail v. Kearney*, 734 F. Supp. 561, 565 (D. Mass. 1990)).

¹³⁵ Although Justice O'Connor acknowledged that the district court might have meant merely that the plaintiffs would not have agreed to the consent decree originally without the provision on single celling, she felt that she had to take the lower court at its word. 112 S. Ct. at 766 (O'Connor, J., concurring).

¹³⁶ While she agreed that modification of just one term of a decree did not automatically defeat the purpose of the decree, she could not agree with the proposition that a single modification could never defeat the decree's purpose. *Id.* at 767 (O'Connor, J., concurring). In this case, the district court had recognized single celling as "perhaps even the most important element" in the decree. *Id.* at 759.

and how to modify the decree, especially in a case where the defendants did not have a "model record of compliance with previous court orders."¹³⁷

Although Justice Stevens endorsed the Court's adoption of *Carey*, he dissented because he concluded that even under *Carey*'s standard the district court's refusal to modify should have been affirmed.¹³⁸ His dissent focused on the context of the case, which was a motion to modify the 1979 consent decree, as modified and reaffirmed in 1985, entered after litigation had established a serious constitutional violation and five years of non-compliance with an injunction. The basic task of the district court and the parties was to fashion the "best" remedy in a complex situation where there was no way to quantify the constitutional values at issue.¹³⁹ The parties arrived at a constitutionally adequate remedy. There was no basis to assume that the parties (mistakenly or otherwise) believed that any single provision of the decree, including the prohibition against double celling, was constitutionally required.

Moreover, because the decree already had been modified in 1985, the defendants had to point to conditions of law or fact that had changed since that time to justify further modification. *Bell v. Wolfish*¹⁴⁰ did not qualify as a change of law because it was pending when the decree was entered in 1979;¹⁴¹ its meaning

¹³⁷ *Id.* at 767 (O'Connor, J., concurring). For the Court's response, see *supra* note 130.

¹³⁸ Justice Stevens noted that the district court already had applied *Carey*'s flexible standard as an alternate holding. *Id.* at 768 n.1 (Stevens, J., dissenting). Justice O'Connor was careful to point out that the Court had found fault with the district court's method only; on remand, the district court was free to come to the same conclusion as had Justice Stevens. *Id.* at 766 (O'Connor, J., concurring).

¹³⁹ *Id.* at 769-70 (Stevens, J., dissenting). In a long footnote Justice Stevens explained that "[i]t is the difficulty in determining prospectively which remedy is best that justifies a flexible standard of modification." *Id.* at 770 n.2 (Stevens, J., dissenting). He quoted the passage in Judge Friendly's opinion in *Carey* that had quoted Professor Fiss approvingly. *Id.* at 770 n.2 (Stevens, J., dissenting). Unlike Judge Friendly, however, see *supra* notes 88-89, Justice Stevens understood and adopted Professor Fiss's perspective, see *supra* note 65. "The justification for modifying a consent decree is not that the decree did 'too much,' but that in light of later circumstances, a modified decree would better achieve the decree's original goals." *Id.*

¹⁴⁰ 441 U.S. 520 (1979).

¹⁴¹ Thus, like *Swift*, 286 U.S. 106 (1932), in which the decree was entered while an important case was pending, the parties in *Rufo* had taken the certainty of a negotiated settlement over the gamble of waiting for the Supreme Court's pronouncement.

was certainly clear when the decree was modified in 1985.¹⁴² Similarly, although an increased population of pretrial detainees was an unanticipated change of fact that justified the 1985 modification, it was neither a new nor unforeseen problem after that date.¹⁴³ Justice Stevens pointed to other factors counselling against modification in this case, including the defendants' history of noncompliance with court orders in the case and their continued use of fiscal problems as an excuse for their unwillingness to budget funds to avoid or rectify the constitutional violations. He also relied on Judge Friendly's recognition that any modification had to be consistent with the "central purpose" of the decree. In Justice Stevens's view, prohibiting double celling was a central purpose of this decree and this purpose should not be frustrated by a modification.

3. Contrasting *Rufo* and *Carey*

The two-part test that Justice White adopted in *Rufo*—the movant must show both a change in law or fact and that the proposed modification is tailored to the changed circumstances—should be a fairly workable standard for deciding modification cases in the future. It is consistent with rule 60(b)(5) and *Swift*.¹⁴⁴

Rufo would have been an even better opinion, however, if it had not placed such unquestioning reliance on Judge Friendly's opinion in *Carey*. In certain important respects, *Rufo* is an improvement over Judge Friendly's analysis. In view of the weighty criticism levelled at *Carey* by the Brooklyn critics,¹⁴⁵ however, it would have been helpful for future litigants and courts if the

¹⁴² Justice Stevens underscored that *Bell* did not represent a policy preference for double celling; it simply held that double celling was not unconstitutional *per se*. 112 S. Ct. 771 n.5 (Stevens, J., dissenting). As such, it was distinguishable from *System Federation v. Wright*, 364 U.S. 642 (1961), which required modification of a consent decree to reflect a policy preference that Congress had made to further the statutory purposes of the Railway Labor Act. 112 S. Ct. at 771 n.5 (Stevens, J., dissenting).

¹⁴³ Justice Stevens found the trial court's conclusion that the increase was not unforeseen amply supported by the record. He would also charge the parties "with notice of those events that reasonably prudent litigants would contemplate when negotiating a settlement." *Id.* at 771-72 (Stevens, J., dissenting). He clarified that he would not use foreseeability in the tort sense of something that could conceivably arise, as the majority had charged. Compare *id.* at 771 (Stevens, J., dissenting) with *id.* at 760.

¹⁴⁴ See Levine, *supra* note 4, at 753.

¹⁴⁵ See *supra* notes 88-91 and accompanying text.

Rufo majority had pointed out where it parted company from Judge Friendly.¹⁴⁶ Without clarification, it is quite conceivable that the Supreme Court's evident reliance on *Carey* will tempt lower courts to look to Judge Friendly's opinion for guidance in interpreting *Rufo*.¹⁴⁷ Furthermore, had the Court answered the criticisms levelled at *Carey*, it also would have removed some potential confusion that *Rufo* may create.

a. *Reliance on Precedent Regarding Modification*

The Brooklyn critics demonstrated that *Carey* did not deal in a persuasive fashion with the key precedent concerning modification.¹⁴⁸ The most important example for present purposes is its use of *United States v. United Shoe Machinery Corp.*¹⁴⁹ *United Shoe* held that it was inappropriate to use *Swift*'s grievous wrong standard to assess a plaintiff's request to modify. It held that under *Swift* a decree "may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved."¹⁵⁰ Judge Friendly applied *United Shoe*'s flexible test even though the motion to modify in *Carey* came from a defendant and the purposes of the decree had not been achieved at the time of the request for modification.¹⁵¹ Although *Rufo* came to the Supreme Court in exactly the same posture as *Carey* came to the Second

¹⁴⁶ As in *Swift*, the unquestioned reliance on *Carey* may be another example of a court being distracted by the reputation of the author of the precedent. Both the name of the case and Judge Friendly's name are frequently invoked in *Rufo*. The stature of *Carey* may also be attributable, in part, to the fact that it was a unanimous opinion of a most distinguished panel; Circuit Judge Jon Newman and District Judge Charles Wyzanski joined Judge Friendly's opinion in full. Coincidentally, Judge Wyzanski was the trial judge in *United Shoe* who was said to have "misconceived the thrust" of *Swift*, *United Shoe*, 391 U.S. at 248, when he denied the government's petition for modification on the grounds that it had not met the requirements of the grievous wrong test. *United States v. United Shoe Mach. Corp.*, 266 F. Supp. 328, 329-30 (D. Mass. 1967). Perhaps Judge Wyzanski went along in *Carey* because he was "once bitten, twice shy."

¹⁴⁷ For examples of cases relying on both *Carey* and *Rufo*, see *W.L. Gore & Assocs., Inc. v. C.R. Bard, Inc.*, 977 F.2d 558 (Fed. Cir. 1992); *Patterson v. Newspaper & Mail Deliverers' Union*, 797 F. Supp. 1174 (S.D.N.Y. 1992); *Wyatt v. King*, 1992 WL 232395 (M.D. Ala. 1992). *Accord Still's Pharmacy, Inc. v. Cuomo*, 981 F.2d 632 (2d Cir. 1992) ("the test articulated by the Court in *Rufo* does not differ significantly from the test we articulated in *Carey*").

¹⁴⁸ See *supra* notes 88-91.

¹⁴⁹ 391 U.S. 244 (1968).

¹⁵⁰ *Id.* at 248.

¹⁵¹ See Shapiro, *supra* note 6, at 470.

Circuit, Justice White did not fully explain whether the factors that were important to the *United Shoe* Court mattered any longer.¹⁵²

This question is of special interest because Justice White ignored his own precedent concerning the modification of consent decrees in institutional reform cases: *Firefighters Local Union No. 1784 v. Stotts*.¹⁵³ In *Stotts* the plaintiffs brought the motion for modification, seeking to effectuate the overall purpose of the decree, which was to achieve affirmative action in the hiring and promotion of African-American firefighters. Rather than following *United Shoe*, which was on all fours with *Stotts*, Justice White emphasized a strict approach to reading the consent decree.¹⁵⁴ He did not suggest in *Stotts* that the parties should frame the inquiry in terms of whether layoffs were a foreseen, foreseeable or unforeseen event. It was sufficient for Justice White that within the "four-corners" of the agreement, the consent decree did not expressly provide for layoffs. Moreover, he simply concluded that it was not believable that the parties thought that the city would affect its seniority system through the consent decree.

In *Rufo* Justice White relied heavily upon the need for flexibility in modifying decrees in institutional reform cases. In *Stotts* the dissent took that position in reaction to the rigid approach used in Justice White's majority opinion. Justice White did not directly explain in *Stotts* why it was incorrect to treat institutional reform decrees differently from other types of cases. Although one cannot expect a majority opinion to respond to every point made by a dissent, it is peculiar that Justice

¹⁵² Justice White simply quoted the discussion of *Swift* in *Carey* without discussing Judge Friendly's treatment of *United Shoe*. *Rufo*, 112 S. Ct. 748, 758-59 n.6 (1992). At a later point, Justice White said that the defendants' claim that the constitutional violation had disappeared was "not well taken." *Id.* at 763 n.12.

¹⁵³ 467 U.S. 561 (1984); see *supra* notes 45-60.

¹⁵⁴ The majority's approach was so strict that it ignored the important point Justice Blackmun made in dissent: the majority took no account of the procedural posture of the case, which was on appeal from a preliminary injunction the district court issued to protect temporarily the terms of a consent decree. Justice Blackmun took the majority to task for basing part of its decision on what plaintiffs had failed to prove when they had not had an appropriate opportunity to submit their proof. In reviewing the propriety of the district court's decision to issue a preliminary injunction, he would have focused on what the plaintiffs might have demonstrated at a full hearing. *Stotts*, 467 U.S. at 611.

White saw no need in *Rufo* to explain his own change of heart.¹⁵⁵

After *United Shoe* an observer might have had the impression that the rule for modification was that a plaintiff seeking to effectuate the purposes of the decree was entitled to the benefits of a reasonably flexible modification standard, but that a defendant seeking a modification over a plaintiff's objection had to meet *Swift*'s stringent "grievous wrong" standard.¹⁵⁶ After *Rufo* and *Stotts*, however, that observer might well conclude that the new rule is that a *plaintiff* seeking modification has to meet an onerous burden while a *defendant* enjoys the benefits of a flexible standard.¹⁵⁷ Since Justice White did not discuss *Stotts* in *Rufo*, he left himself (and the Court) open to such misunderstanding.¹⁵⁸

¹⁵⁵ It is especially odd that Justice White's majority opinion in *Rufo* provides no explanation because, in effect, *Rufo* overrules the approach his majority opinion adopted in *Stotts*. This difference in approach carries beyond the question of the need for flexibility. For example, in *Rufo* Justice White emphasized that the parties were free to agree to do more than was constitutionally required. A modification request had to be tailored in light of what had been agreed upon, not the constitutional floor that might have been imposed after a case were fully litigated. 112 S. Ct. at 764. In *Stotts* Justice White held that in a litigated request for modification, the district court could not grant more relief than it could after full litigation. 467 U.S. at 576-77 n.9. Needless to say, Justice White does not explain how his two majority opinions are to be reconciled on this point either.

¹⁵⁶ See, e.g., *King-Seeley Thermos Co. v. Aladdin Indus. Inc.*, 418 F.2d 31, 34 (2d Cir. 1969) (describing the district court's understanding of the rules established by *Swift* and *United Shoe* as summarized by Judge Friendly before developing the "true holding"). Compare *id.* at 37 (Moore, J., dissenting) ("Nor did Judge Anderson acquire a 'rigidity' of mind by a misconstruction of the *Swift* and *United Shoe* cases. To the contrary, his analysis of these cases demonstrate that he was fully aware of the extent of their holdings."). See also *King-Seeley Thermos Co. v. Aladdin Indus. Inc.*, 169 U.S. Pat. Q. 85 (D. Conn. 1970) (terms of injunction as modified after remand).

¹⁵⁷ See, e.g., Mengler, *supra* note 6, at 311 ("The case law, beginning with *Swift* and ending with *Stotts*, certainly provides evidence that . . . the result always has dictated the Court's articulation of the nature of consent decrees.").

¹⁵⁸ Justice White could have distinguished the two cases in fairly persuasive ways. For example, in *Stotts*, one party was trying to effectuate a purpose that evidently was not and—because of the rights of unrepresented third parties that would have been implicated—really could not have been contemplated by the decree. See *Martin v. Wilks*, 490 U.S. 755 (1989). In contrast, in *Rufo* the party seeking modification clearly was attempting to effectuate an express purpose of the decree, ending unconstitutional conditions of confinement. 112 S. Ct. at 748. Or, Justice White might have pointed out that the district court in *Stotts* (but not in *Rufo*) was particularly limited in what it was permitted to grant in a request for modification because of the special policy preferences that Congress had expressed in title VII. *Stotts*, 467 U.S. at 576-77 n.9; cf. *Rufo*, 112 S. Ct. at 771 n.5 (Stevens, J., dissenting) (distinguishing the district court's authority and duty to modify in cases where Congress has or has not expressed a policy preference).

By not making these or other distinctions, Justice White's opinion leaves the *Rufo*

b. *Determination of the "Primary Objective" of the Decree*

In his commentary on the opinion, Shapiro criticized the Second Circuit in *Carey* for shifting the inquiry from whether the purposes of the decree had been achieved to whether the modification would be "in derogation of the [decree's] primary objective."¹⁵⁹ He pointed out that this question was posed by the Supreme Court in neither *United Shoe* nor in *Swift*.¹⁶⁰ In *Carey* Judge Friendly did not explain "the hierarchy of values [he] ascribed to the conditions imposed by the consent judgment" and made no attempt to reconcile his view of the "primary objective of the consent decree with that of the district court."¹⁶¹ The Second Circuit simply decided the question without granting any deference to the findings of the district court on the matter.

Rufo is subject to similar criticism. Justice White's opinion for the majority understood the primary purpose of the decree to be to provide a remedy for "unconstitutional conditions obtaining in the Charles Street Jail."¹⁶² He did not undertake to explain why the trial court, which had handled the case for years, was incorrect to characterize the decree as providing for "[a] separate cell for each detainee [which] has always been an important element of the relief sought in this litigation—perhaps even the most important element."¹⁶³

Court open to the charge that it is being result-oriented and overly deferential to local governmental officials. This would not be the first time that such charges had been aimed at this Court. See, e.g., *Payne v. Tennessee*, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting) ("Power, not reason, is the new currency of this Court's decisionmaking.").

¹⁵⁹ Shapiro, *supra* note 6, at 470 (quoting *Carey*, 706 F.2d at 969).

¹⁶⁰ Shapiro disagreed that *King-Seeley*, a case dealing with a modification in "morally neutral territory," was appropriate precedent for *Carey*, where the state defendants were violating the constitutional rights of its citizens. Shapiro, *supra* note 6, at 470-71 n.59. The same is true in *Rufo*. 112 S. Ct. at 748. Neither *Carey* nor *Rufo* involve "the legitimate interests of approximately equal parties." Keeble, *supra* note 6, at 674.

¹⁶¹ Shapiro, *supra* note 6, at 474. In *Carey* the question was whether the "primary purpose" of the decree was to place the plaintiffs into small, homelike facilities (the plaintiffs' and the trial court's view) or to get them out of the large institution (the defendants' and Judge Friendly's view for the appellate majority). See also *King-Seeley Thermos Co. v. Aladdin Indus. Inc.*, 418 F.2d 31, 37 (2d Cir. 1969) (Moore, J., dissenting) (objecting to Judge Friendly's majority substituting itself for the trial court).

¹⁶² *Rufo*, 112 S. Ct. at 762.

¹⁶³ *Id.* at 759 (quoting 734 F. Supp. at 565). See also 112 S. Ct. at 767 (O'Connor, J., concurring) (calling for deference to district court's views on need to ban double celling); 112 S. Ct. at 772 (Stevens, J., dissenting) (supporting prohibition against double celling

It would be helpful for litigants and courts to know how to make it clear what is a (or the) "primary purpose" of the decree.¹⁶⁴ If *Carey* and *Rufo* are the guide, the considered judgment of the district court that entered the decree originally will be insufficient. That court's judgment can be second-guessed by the appellate court, which evidently will not be bound on this issue by the regular deferential standards of appellate review. If they wish to attempt to avoid this result, parties should label all the "primary purposes" of the decree as such.¹⁶⁵

c. *Deference to Defendants' Judgment*

Judge Friendly's opinion in *Carey* was criticized for giving undue deference to the professional judgment of the defendants' experts on the appropriateness of the requested modification to allow plaintiffs to be placed in larger facilities.¹⁶⁶ Under *Carey* almost any change in the defendants' attitude¹⁶⁷ toward any aspect of the consent decree will lead inevitably to modification if the change in attitude can be labeled as professional judgment.

Justice White has included an element of deference in *Rufo*, but it should not be as supine a standard as in *Carey*. Justice White was careful to emphasize that no deference is involved in the threshold inquiry of establishing a significant change in law or fact warranting modification.¹⁶⁸ There is an element of deference, based on, "principles of federalism and common sense" only in the second stage, when examining whether the proposed modification is tailored to resolve the problems caused by the

as consistent with the central purpose in the litigation).

¹⁶⁴ Without an express joint declaration of the purposes of the decree, it is virtually a *non sequitur* to say that the decree has a "purpose." As the Court pointed out over 20 years ago, only the parties have purposes and those purposes are "generally opposed to each other." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). Thus, in actuality, "the court's task is to give full effect to the judgment . . . without going beyond its four corners. To interpret is to explain and elucidate, not to add to or subtract from the text." HANDLER, *supra* note 14, at 952.

¹⁶⁵ See, e.g., Stewart, *supra* note 2, at 51 (responding to *Rufo*, ACLU prison lawyers now use "cast-in-stone" language in consent decrees).

¹⁶⁶ See, e.g., Shapiro, *supra* note 6, at 477 ("tilt toward openendedness is decidedly one-sided in favor of defendants"); Keeble, *supra* note 6, at 680-81 (questioning application of "professional judgment" standard to *Carey*).

¹⁶⁷ Compare Comment, *Dissolution and Modification of Federal Decrees on Grounds of Change of Attitude*, 25 U. Chi. L. Rev. 659 (1958) (analyzing Fair Labor Standards Act cases under *Swift*).

¹⁶⁸ 112 S. Ct. 748, 764 n.14 (1992).

changed circumstances. The basis is the defendants' primary responsibility to resolve the intricate problems in implementing an institutional reform decree.¹⁶⁹ That this standard involves only modest deference is underscored by Justice White's clear statements to the effect that a modification is not to be used as an excuse to rewrite the decree to conform to the constitutional floor or to use financial constraints as an excuse for the perpetuation of constitutional violations.¹⁷⁰ Only later cases will determine whether this standard strikes the appropriate balance.¹⁷¹ On its face, it seems better than the "balance" struck in *Carey*.¹⁷²

d. *Distinguishing Between the Standards for Modification and Original Approval of a Consent Decree*

In *Carey* Judge Friendly's endorsement of a flexible test may not have distinguished properly between the standard for issuing a decree and the stricter standard for modifying the decree under *Swift*.¹⁷³ Justice White did not make the same mis-

¹⁶⁹ See *id.* at 764, citing *Brown v. Board of Education*, 349 U.S. 294, 299 (1955) (*Brown II*); *Missouri v. Jenkins*, 495 U.S. 33 (1990); *Milliken v. Bradley*, 433 U.S. 267, 281 (1977) (*Milliken II*).

¹⁷⁰ 112 S. Ct. at 764 & n.14. But see *id.* ("To refuse modification of a decree is to bind all future officers of the State, regardless of their view of the necessity of relief from one or more provisions of a decree that might not have been entered had the matter been litigated to its conclusion.").

¹⁷¹ For an example of an opinion written as if *Rufo* incorporates an extremely deferential standard, see *Inmates of Allegheny County Jail v. Wecht*, 797 F. Supp. 428 (W.D. Pa. 1992). In 1989 the parties entered into a consent decree that committed the defendants to build a facility for the forensic mentally ill. The district court allowed modification on the grounds that the defendants' desire to follow a "popular . . . significant change in treatment" of the mentally ill—deinstitutionalization—constituted a sufficient change under *Rufo*. *Id.* at 435. The plaintiffs' position—that the defendants had agreed to build the facility less than three years before—was brushed aside. The defendants made no showing that deinstitutionalization of the mentally ill, a concept that is at least 20 years old, constituted a significant change of fact or law of the type that *Rufo* appeared to contemplate. This case is a good example of what may happen in the future due to Justice White's failure to differentiate expressly the Court's beliefs about deference from Judge Friendly's more extreme views about the need to bow to professional judgment.

¹⁷² But see, e.g., 112 S. Ct. at 767 (O'Connor, J., concurring) ("[d]eference to one of the parties to a lawsuit is usually not the surest path to equity"); *id.* at 772 (Stevens, J., dissenting) (defendants' "history of noncompliance . . . provides an added reason for insisting that they honor their most recent commitments").

¹⁷³ See, e.g., Shapiro, *supra* note 6, at 476-77; Mengler, *supra* note 6, at 336-45 (distinguishing approval, interpretation and modification stages). See also Humble Oil &

take in *Rufo*. It is clear in the majority opinion that flexibility applies only to resolving the problem created by changed circumstances.¹⁷⁴ The proposed solution is to be tailored to the problem identified; it is emphatically not an opportunity to relitigate the decree. On this point *Rufo* is appropriately consistent with *Swift*.¹⁷⁵

e. *Use of Commentators on Institutional Reform Litigation*

Judge Friendly buttressed his position in *Carey* with a discussion of academic commentary on the standard to be applied to modifications of institutional reform litigation.¹⁷⁶ Although academic commentators might be expected to be pleased with a court's heavy reliance on academic commentary, in this instance they should have been distressed. The Brooklyn critics pointed out that Judge Friendly was wrong to conclude that "a consensus is emerging among commentators in favor of modification with a rather free hand."¹⁷⁷ For example, while Judge Friendly relied heavily on Professor Owen Fiss,¹⁷⁸ their respective goals for modifications were completely different. Judge Friendly focused on deference to the defendants' professional judgment while, as is evident in the very language Judge Friendly quoted,

Ref. Co. v. American Oil Co., 405 F.2d 803, 821 (8th Cir.), cert. denied, 395 U.S. 905 (1969) ("world of difference" between original entry and modification of decree). *Humble Oil* was rejected by Judge Friendly as "too severe" in *King-Seeley*, 418 F.2d 31, 35 n.2 (2d Cir. 1969). The *Carey* Court cited *Humble Oil* as having "steadfastly hewed to the *Swift* line." 706 F.2d at 969 n.16.

¹⁷⁴ "[A] consent decree is a final judgment that may be reopened only to the extent that equity requires." *Rufo*, 112 S. Ct. at 764.

¹⁷⁶ Compare, e.g., *United States v. Swift*, 286 U.S. 106, 118 (1932) ("We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree."). For a case following *Rufo* that appears to have applied the standard correctly, see *Lorain NAACP v. Lorain Board of Education*, 979 F.2d 1141 (6th Cir. 1992) (district court's authority to impose additional obligations on defendants limited by terms of the decree; improper to change negotiated cap on state's contribution to city's desegregation costs from \$1 million to \$9 million without showing additional violation or other changed conditions).

¹⁷⁸ *Carey*, 706 F.2d 956, 970-71 (2d Cir.), cert. denied, 464 U.S. 915 (1983).

¹⁷⁷ *Id.* at 970. Compare *Keeble*, *supra* note 6, at 677-79 (demonstrating that there was no such consensus in the sources cited by Judge Friendly).

¹⁷⁸ Judge Friendly stated that "[t]he best statement we have found with respect to the appropriate legal standard for evaluating a defendant's motion for modification of a consent judgment in institutional reform litigation is that of Professor Owen Fiss." *Carey*, 706 F.2d at 970 (quoting Owen Fiss, *The Supreme Court—1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 49 (1979)).

the concern of Professor Fiss (and others)¹⁷⁹ is the effectiveness of the decree to achieve relief for the plaintiffs.¹⁸⁰

Justice White did not rely on academic commentators in *Rufo*. He did rely on cases like *Carey*, which in turn purported to rely on the commentary. Only Justice Stevens quoted or relied on any commentary.¹⁸¹ As a result, the use (or misuse) of academic commentary should not be a significant factor in the future application of *Rufo*. At best it would have been moderately clarifying if Justice White had acknowledged that Justice Stevens had captured the intent of Professor Fiss's remarks and Judge Friendly had not.

f. *Standard for Reviewing a Denial of Relief under Rule 60(b)*

Judge Friendly rejected the traditional abuse of discretion standard in reviewing the trial court's decision in *Carey* to deny the request for modification. Instead, the court of appeals acted as if it was free to examine the question *de novo*.¹⁸²

Justice White did not focus expressly on the issue in *Rufo* because, as he framed the question for the majority, the district court made an error of law by believing that rule 60(b)(5) had codified *Swift's* "grievous wrong" standard.¹⁸³ Such an error is reviewable freely by the appellate court.¹⁸⁴ In contrast, both Jus-

¹⁷⁹ "The commentators instead speak generally of the need for effective, constitutionally sufficient results." Keeble, *supra* note 6, at 677; see *id.* at 676 (Judge Friendly relied on "isolated segments from each commentary").

¹⁸⁰ "A revision is justified if the remedy is not working effectively" *Carey*, 706 F.2d at 970 (quoting Fiss, *supra* note 178, at 49); see also Keeble, *supra* note 6, at 676 n.125 ("It is erroneous to imply that Fiss would sanction modification merely because it is burdensome for defendants to comply with provisions necessary to protect plaintiffs' constitutional rights.").

¹⁸¹ While quoting Judge Friendly's excerpt from Professor Fiss, Justice Stevens added language that accurately reflected Fiss's view. The quotation is sandwiched between two comments made by Justice Stevens: "It is the difficulty in determining prospectively which remedy is best that justifies a flexible standard of modification. The justification for modifying a consent decree is not that the decree did 'too much', but that in light of later circumstances, a modified decree would better achieve the decree's original goals." *Rufo*, 112 S. Ct. 748, 770 n.2 (1992).

¹⁸² Compare *Carey*, 706 F.2d at 971 (embracing view of request for modification with "generosity") with *id.* at 960 (rejecting claims of abuse of discretion and clearly erroneous findings of fact on issue of defendants' noncompliance with the consent judgment).

¹⁸³ *Rufo*, 112 S. Ct. at 757.

¹⁸⁴ See, e.g., J. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 13.4, at 600 (1985).

tices O'Connor and Stevens framed the issue under the abuse of discretion standard.¹⁸⁵ The majority did not expressly disagree that this was the appropriate standard to apply when reviewing a district court's decision based on a proper understanding of the law. It probably would have been better, however, if the majority had clarified the point either by expressing agreement with the concurrence and dissent or by noting that it was parting company with any contrary implication that might be derived from *Carey*.

g. Determining When the Law has "Changed"

Because of the context in which the *Carey* case arose, neither Judge Friendly nor the Brooklyn critics had occasion to consider how to determine when the law has changed to a sufficient degree that it will support a motion for modification.¹⁸⁶ In *Rufo* Justice White tried to establish some standards for making this determination.¹⁸⁷ It remains to be seen whether the standards that he set in *Rufo* will provide sufficient guidance. Probably the most difficult task for lower courts and litigants will be to decide whether there has been a "change" in the law which might support modification, or merely a "clarification," which will not.¹⁸⁸

Perhaps one reason that the majority in *Rufo* did not undertake to explain how to make the distinction is that in close cases, at least, it is nearly impossible to do so. To illustrate why, briefly consider the difficulties the Court has had in making the same distinction in an unrelated area of the law: *habeas corpus*. In *Teague v. Lane*¹⁸⁹ and its progeny¹⁹⁰ the Supreme Court has determined that a federal "*habeas* [*corpus*] petitioner generally cannot benefit from a new rule of criminal procedure announced

¹⁸⁵ *Rufo*, 112 S. Ct. at 765 (O'Connor, J., concurring); *id.* at 768 (Stevens, J., dissenting).

¹⁸⁶ *Carey* was essentially a "change of fact" case. The relevant issue was whether the difficulties the defendants encountered in locating small community placements for the plaintiffs constituted a sufficient change to warrant modification.

¹⁸⁷ See *supra* notes 117-21 and accompanying text.

¹⁸⁸ *Rufo*, 112 S. Ct. at 762-3.

¹⁸⁹ 489 U.S. 288 (1989).

¹⁹⁰ *Graham v. Collins*, 113 S. Ct. 892 (1993); *Stinger v. Black*, 112 S. Ct. 1130 (1992); *Wright v. West*, 112 S. Ct. 2482 (1992); *Butler v. McKellar*, 494 U.S. 407 (1990); *Saffie v. Parks*, 494 U.S. 484 (1990); *Sawyer v. Smith*, 497 U.S. 227 (1990); *Penry v. Lynaugh*, 492 U.S. 302 (1989).

after his conviction has become final on direct appeal."¹⁹¹ Thus, in many federal *habeas corpus* petitions, a court must determine whether an opinion which the prisoner is relying on, but which was released after his or her conviction became final, announced a new rule. If the opinion did announce a new rule, it is not retroactive and of no benefit to the prisoner. If it has merely clarified the law or applied it in a new factual context, however, the opinion would be retroactive. As one circuit court that has struggled with the issue said: "the 'new rule' rule is easier to recite than apply in most cases. . . . Suffice it to say that discerning the domain of a given rule and marking the precise point at which its younger sibling, rather than it, applies is more an art than a science."¹⁹² One commentator has called the Supreme Court's attempts to distinguish new rules from old ones a "logical house of cards."¹⁹³

Courts faced with petitions to modify that are based on asserted changes in the law will have to deal with the same problem. Few situations will be as obvious as the one that the *Rufo* Court faced: whether *Bell v. Wolfish*¹⁹⁴ qualified as a change in the law requiring modification. In closer cases, it is safe to predict that courts will have some trouble making the determination.¹⁹⁵ Even after deciding whether there has been a change in

¹⁹¹ Wright v. West, 112 S. Ct. 2482, 2489 (1992). See also Markus Dubber, *Prudence and Substance: How the Supreme Court's New Habeas Retroactivity Doctrine Mirrors and Affects Substantive Constitutional Law*, 30 AM. CRIM. L. REV. 1 n.1 (1992) (collecting commentary on *Teague*).

¹⁹² Taylor v. Gilmore, 954 F.2d 441, 445 (7th Cir.), cert. granted, 113 S. Ct. 52 (1992).

¹⁹³ Dubber, *supra* note 191, at 19. Dubber does an excellent job of demonstrating in detail how difficult, if not futile, it is to make sense of the Supreme Court's "new rule" tests. "The logical relationship between precedent and the rule under observation, of course, is no easier to capture than the precise syllogisms of judicial opinions." *Id.*

¹⁹⁴ 441 U.S. 520 (1979).

¹⁹⁵ In Taylor v. Gilmore, 954 F.2d 441 (7th Cir.), cert. granted, 113 S. Ct. 52 (1992), the Seventh Circuit developed an approach to the *Teague* problem that might be helpful to courts trying to apply *Rufo*:

[W]e adopt the following analysis when deciding whether a case announces a new rule under *Teague*. First we determine whether the case clearly falls in one category or another—if it overrules or significantly departs from precedent, or decides a question previously reserved, it is a new rule, while if it applies a prior decision almost directly on point to a closely analogous set of facts, it is not. Second, when the question is a close one, we will look to (1) whether the case at issue departs from previous rulings by lower courts or state courts, and (2) the level of generality of prior precedent in light of factual context in which that precedent arose.

the law, courts will have to decide whether the change warrants modification of the decree. For example, a change might not be warranted where the defendants had voluntarily committed themselves to do more than it turned out they were obligated to do under the Constitution.¹⁹⁶ In contrast, they might be entitled to a change where they have committed themselves to do no more than the law requires or where the court itself has issued an injunction, which will be limited necessarily by the changing contours of the law.¹⁹⁷ Here again, the *Rufo* Court would have been of great assistance to lower courts had it taken the time to explain fully how to handle the problems that might arise in applying its tests.

IV. THE IMPLICATIONS OF *RUFO* FOR OTHER INSTITUTIONAL REFORM CASES

It is clear that *Rufo* has direct application to all future institutional reform cases.¹⁹⁸ In addition to relying on *Carey*, a case involving the care of the mentally retarded, both Justice White's majority opinion and Justice Stevens's dissent cited school desegregation cases such as *Brown* to explain why flexibility is required in the entire class of institutional reform cases. No Justice even remotely suggested that the analysis adopted in *Rufo* is *sui generis* to prison cases.¹⁹⁹

The *Rufo* opinion also makes it clear that *Swift* is still valid. The test adopted in *Rufo* is consistent with the structure Justice Cardozo established in *Swift*. As Professor Mengler has pointed out, the functional characteristics of a consent decree should guide the court in ruling on a petition to modify it.²⁰⁰ The par-

Id. at 448.

¹⁹⁶ *Rufo*, 112 S. Ct. at 762.

¹⁹⁷ See, e.g., *System Federation No. 91, Railway Employee's Dep't, AFL-CIO v. Wright*, 364 U.S. 642 (1961).

¹⁹⁸ See, e.g., *People Who Care v. Rockford Bd. of Educ.*, 1992 WL 184303 (N.D. Ill. 1992) (school desegregation); *Wyatt v. King*, 1992 WL 232395 (M.D. Ala. 1992) (institutions for mentally ill and retarded). In both cases, defendants' requests for modification were denied under *Rufo*.

¹⁹⁹ *Accord Lorain NAACP v. Lorain Board of Education*, 979 F.2d 1141 (6th Cir. 1992) (*Rufo* not limited to prison reform cases and so applies to school desegregation cases); *United States v. City of Chicago*, 978 F.2d 325, (7th Cir. 1992) (applying *Rufo* to employment discrimination case); *Epp v. Kerrey*, 964 F.2d 754 (8th Cir. 1992) (applying *Rufo* to abortion rights case).

²⁰⁰ Mengler, *supra* note 6, at 343-44.

ties have chosen to avoid the uncertainties of litigation, no party has admitted liability and both parties have compromised.²⁰¹ The decree is designed primarily to serve the purposes of the parties, as articulated in the decree; in general, the parties do not intend merely to implement the purposes of the underlying substantive law.²⁰² Justice Cardozo anticipated this situation perfectly: "We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree."²⁰³

Rufo properly noted that Justice Cardozo distinguished between two types of decrees that parties might enter with one another.

The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. . . . The consent is to be read as directed toward events as they were then. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.²⁰⁴

In *Swift* the parties framed a decree on "facts . . . substantially impervious to change."²⁰⁵ In that specific context, the "grievous wrong" standard was utterly appropriate. Institutional reform decrees, such as those arising from prison reform cases like *Rufo*, or school desegregation cases, are examples of the other type of decree Cardozo identified. "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need."²⁰⁶ When a party has demonstrated that events have shaped the need to modify an institutional re-

²⁰¹ See, e.g., *Suter v. Artist M.*, 112 S. Ct. 1360, 1366 (1992); *Wyatt v. King*, 803 F. Supp. 377 (M.D. Ala. 1992) (parties may agree to terms in a consent decree that exceed requirements of federal law).

²⁰² In the less likely case that the injunction was entered by the court and is not a consent decree, then a motion to modify should be tested against the purposes of the substantive law. "A litigated decree works if the relief effectively remedies the wrong and fails to work if the relief does not remedy the wrong. But a consent decree works if the parties comply with its terms, and does not work if one or both parties do not comply." Mengler, *supra* note 6, 344-45.

²⁰³ *Swift*, 286 U.S. 106, 119 (1932).

²⁰⁴ *Rufo*, 112 S. Ct. 748, 758 (1992) (quoting *Swift*, 286 U.S. at 114-15).

²⁰⁵ *Swift*, 286 U.S. at 114.

²⁰⁶ *Id.*

form decree, the district court should respond appropriately.²⁰⁷

In applying *Swift* and *Rufo* to a motion to modify under rule 60(b)(5), courts need to remember that their job is to implement the parties' purposes, as expressed in the decree. In doing so, courts need to keep in mind the "principles inherent in the jurisdiction of chancery."²⁰⁸ To wit, if there is doubt about the obligations of the parties under the decree, the district court needs to interpret the agreement and its decision should be reviewed on appeal under the traditional standards: free review for questions of law, but the clearly erroneous test or the abuse of discretion formula for other matters.²⁰⁹ The court of appeals should not presume lightly that it can do a better job than the district court in interpreting the agreement of the parties.²¹⁰

CONCLUSION

After *Rufo*, how is a court to decide that the prospective application of a decree in an institutional reform case would be inequitable? Although its reliance on *Carey* is somewhat misplaced, the *Rufo* Court provides a workable answer to this question.²¹¹ *Rufo* places the burden on the party requesting modifica-

²⁰⁷ There is no reason that a plaintiff cannot rely upon this standard as well. Thus, *United Shoe's* call for flexibility to help a plaintiff implement the purposes of the decree is completely valid under *Rufo*. *United Shoe*, 391 U.S. 244 (1968); see *supra* notes 41-44.

²⁰⁸ *Swift*, 286 U.S. at 114.

²⁰⁹ See, e.g., David I. Levine & Hillary Salans, *Exceptions to the Clearly Erroneous Test After the Recent Amending of Rule 52(a) for the Review of Fact Based Upon Documentary Evidence*, 10 AM. J. TR. ADVOC. 409, 431 (1987). Justices O'Connor and Stevens properly focused in *Rufo* on the need to review the district court's work under these traditional standards. Professor Mengler suggests that a district court can avoid some of the interpretation problems by holding a "clarification hearing" at the time the decree is approved. The record of that hearing would provide a type of legislative history of the decree that would guide judicial interpretation in the future. Mengler, *supra* note 6, at 336-37. For a case that appears to have done something like what Professor Mengler recommended, see *Wyatt v. King*, 803 F. Supp. 377 (M.D. Ala. 1992) (looking at the history and terms of consent decree to determine whether modification was warranted).

²¹⁰ Compare *Rufo*, 112 S. Ct. 748, 762 (1992); *Carey*, 706 F.2d 956, 969 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983). One exception is where the decree would ostensibly permit the parties to do something that the law prohibits or prohibits something that the law requires. See, e.g., *Rufo*, 112 S. Ct. at 762; *Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 341-42 (7th Cir. 1987) (consent decree impermissibly called for illegal conduct).

²¹¹ See also Comment, *Rufo v. Inmates of Suffolk County Jail: Modification of Consent Decrees in Institutional Reform Litigation*, 26 GA. L. REV. 1025, 1042-44 (1992) (calling *Rufo* a "sensible" approach because of three "distinctive traits" of institutional reform litigation: "the speculative and complex quality of decree remedies, the status of the government as defendant, and the probability of impact upon nonparties").

tion to demonstrate both a significant change in circumstances and that the proposed modification is suitably tailored to the changed circumstance.

The major concerns raised about *Carey* apply to *Rufo* as well. First, there is concern that the district court will be too deferential to the professional judgment of the defendants. Second, it is possible that the appellate court will not give appropriate deference to the district court in deciding the "primary purposes" of the decree and the best way to implement those purposes. It is too soon to tell whether these concerns will turn out to be justified.²¹² Despite these concerns and those raised about certain other aspects of the opinion,²¹³ properly understood, the test that the Court adopted in *Rufo* should succeed as a workable basic standard for deciding whether the prospective application of any institutional reform decree is still equitable.²¹⁴

²¹² It is impossible to know at this early date whether a case like *Inmates of Allegheny County Jail v. Wecht*, 797 F. Supp. 428 (W.D. Pa. 1992), is a sport or the harbinger of how lower courts will interpret *Rufo*. See also *Leading Cases*, *supra* note 63, at 89 (*Rufo* affords courts too much flexibility to modify decrees).

²¹³ Another problem that seems to be arising is that some defendants are using *Rufo* as an excuse to avoid or delay their obligations under the applicable consent decrees. In effect, they are contending that *Rufo* itself is a change in the law that warrants modification. See, e.g., *Halderman v. Pennhurst State Sch. & Hosp.*, 784 F. Supp. 215, 216 (E.D. Pa. 1992) (expressing dismay at defendants' attempt to use *Rufo* to avoid their obligations when there is no change of law or fact).

²¹⁴ There is little apparent reason why the test announced in *Rufo* cannot apply generally to all requests for modification under rule 60(b)(5). See WRIGHT & MILLER, *supra* note 8, § 2863, at 208-10 ("[O]n an adequate showing the courts will provide relief if it is no longer equitable that the judgment be enforced, whether because of subsequent legislation, a change in the decisional law or a change in the operative facts." (citing modifications granted in cases of wide variety of subject matter)).

Some courts already have recognized *Rufo*'s general application. See, e.g., *Still's Pharmacy, Inc. v. Cuomo*, 981 F.2d 632 (2d Cir. 1992) (Medicaid prescription-drug pricing consent decree); *United States v. Western Elec. Co.*, 969 F.2d 1231, 1235 n.7 (D.C. Cir. 1992) (antitrust consent decree); *Deweerth v. Baldinger*, 804 F. Supp. 539 (S.D.N.Y. 1992) (granting modification under *Rufo* due to change of law in a case involving ownership of works of art). But see *W.L. Gore & Assocs., Inc. v. C.R. Bard, Inc.*, 977 F.2d 558 (Fed. Cir. 1992) (majority in patent case relied on *Carey* to distinguish *Rufo* as applying only to "public or service institution" cases; concurrence believes *Rufo* applies to all types of cases); Justin Weaver Lilley, Comment, *A Judicial Role for Proceedings Involving Uncontested Modifications to Existing Consent Decrees*, 41 CATH. U. L. REV. 665, 667 n.9 (1992) (*Swift* still applies to modifications of antitrust decrees).