

KEEPING *RUFO* IN ITS CELL: THE MODIFICATION OF ANTITRUST CONSENT DECREES AFTER *RUFO v. INMATES OF SUFFOLK COUNTY JAIL*

JED GOLDFARB

INTRODUCTION

For many years, a defendant seeking to modify an antitrust consent decree¹ faced a rather steep challenge. As stated by Justice Cardozo in the 1932 case of *United States v. Swift & Co.*,² “[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed . . . with the consent of all concerned.”³ Decades later, in *United States v. United Shoe Machinery Corp.*,⁴ the Supreme Court added that modification should not be granted where the “purposes of the litigation as incorporated in the decree . . . have not been fully achieved.”⁵ Though *Swift* and *United Shoe* involved requests to modify antitrust

¹ A consent decree is a negotiated settlement of a case enforced through the court's inherent power to enforce its own equitable decrees or orders. See David I. Levine, *The Modification of Equitable Decrees in Institutional Reform Litigation: A Commentary on the Supreme Court's Adoption of the Second Circuit's Flexible Test*, 58 Brook. L. Rev. 1239, 1239 n.5 (1993). Traditionally, the consent decree has been treated as a hybrid of a long-term contract between the consenting parties and a judicial decree. See *id.* (describing consent decree's dual nature); *infra* Part I.A. In the antitrust context, the government offers to terminate the action in exchange for the defendant's acceptance of certain limitations on its future conduct. Consent decrees allow antitrust defendants to avoid swelling legal fees, unfavorable publicity, and uncertainty affecting business decisionmaking. See, e.g., John R. Wilke & Bryan Gruley, *Acquisitions Can Mean Long-Lasting Scrutiny By Antitrust Agencies*, Wall St. J., Mar. 4, 1997, at A1 (referring to common practice of merging companies entering into consent decrees to hasten government merger review). Further, because a consent decree is not considered an adjudication on the merits and does not constitute evidence or admission by any party, antitrust defendants avoid the potentially damaging *res judicata* effects of an adverse judgment on future treble suits by private parties. See *infra* notes 222-23 and accompanying text. Correspondingly, consent decrees provide the government with an attractive means to dispose of some cases quickly and to allocate limited enforcement resources efficiently. See *infra* notes 200, 206-03 and accompanying text; see also John D. Anderson, Note, *Modifications of Antitrust Consent Decrees: Over a Double Barrel*, 84 Mich. L. Rev. 134, 134 n.1 (1985) (stating that from 1955 to 1967, Department of Justice settled 81% of antitrust cases by consent decree).

² 286 U.S. 106 (1932).

³ *Id.* at 119.

⁴ 391 U.S. 244 (1968).

⁵ *Id.* at 248.

consent decrees, subsequent courts broadly applied the stringent "grievous wrong" standard to other forms of consent decrees and injunctions.⁶ In *Rufo v. Inmates of Suffolk County Jail*,⁷ however, the Supreme Court determined that "the 'grievous wrong' language of *Swift* was not intended to take on a talismanic quality."⁸ The Court concluded that parties seeking to modify institutional reform consent decrees⁹ need demonstrate neither "grievous wrong" nor that the decree's purposes have been fully achieved. Instead, the Court held, moving parties are required to show only that a "significant change in circumstances warrants revision of the decree."¹⁰ Because the consent decree in *Rufo* specifically involved institutional reform, lower courts are divided over the extent to which *Rufo*'s more flexible standard should apply beyond the institutional reform setting.¹¹

Since *Rufo* was decided, only two courts have considered whether *Rufo* extends to requests to modify antitrust consent decrees; both have answered in the affirmative. In *United States v. Eastman Kodak Co.*,¹² the Second Circuit applied *Rufo* to a defendant's request to terminate two longstanding antitrust consent decrees.¹³ Likewise, in *United States v. Western Electric Co.*,¹⁴ the D.C. Circuit

⁶ In a subsequent request to modify the *Swift* decree, the district court noted that by 1960, the *Swift* standard had been cited as authoritative in over 100 decisions regarding modification requests. See *United States v. Swift & Co.*, 189 F. Supp. 885, 901 (N.D. Ill. 1960); see also *Alexander v. Britt*, 89 F.3d 194, 197 (4th Cir. 1996) ("Prior to . . . *Rufo*, federal courts generally looked to *United States v. Swift & Co.* for the standard to apply when reviewing motions to terminate or modify permanent injunctions."); 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2863 (2d ed. 1995) (quoting *Swift* in explaining Fed. R. Civ. P. 60(b)); *infra* note 58 and accompanying text. For indicative examples of post-*Swift*, pre-*Rufo* views on modification, see *Money Store v. Harris Corp. Fin.*, 885 F.2d 369, 374 (7th Cir. 1989) (affirming injunction preventing use of trademark in particular region); *Williams v. Butz*, 843 F.2d 1335, 1336 (11th Cir. 1988) (vacating district court's refusal to modify consent decree preventing government agency from foreclosing on homes without judicial proceeding).

⁷ 502 U.S. 367 (1992).

⁸ *Id.* at 380.

⁹ "Institutional reform" decrees have increasingly been employed by plaintiffs to settle disputes with state governments or other public institutions over prison conditions, school desegregation, zoning, special education programs, toxic waste litigation, and conditions of public mental health institutions. See, e.g., Gregory C. Keating, Note, *Settling Through Consent Decrees in Prison Reform Litigation: Exploring the Effects of Rufo v. Inmates of Suffolk County Jail*, 34 B.C. L. Rev. 163, 163-64 (1992) (finding extensive use of decrees in prison reform litigation); see also *infra* Part I.C.

¹⁰ *Rufo*, 502 U.S. at 383.

¹¹ Courts and commentators have argued that a flexible modification standard is especially appropriate in the institutional reform setting. See *infra* notes 71-90 and accompanying text.

¹² 63 F.3d 95 (2d Cir. 1995).

¹³ See *id.* at 102.

¹⁴ 46 F.3d 1198 (D.C. Cir. 1995).

adopted *Rufo* in considering AT&T's last request to modify its broad-sweeping consent decree ordering divestiture of the twenty-two Baby Bells.¹⁵ Yet despite their explicit adoption of *Rufo*, both courts imported a requirement not adhered to in *Rufo* itself—the *United Shoe* mandate that the defendant demonstrate that modification will not undermine the primary purpose of the decree.¹⁶ The extensions of *Rufo* by the *Kodak* and *Western Electric* courts are therefore somewhat innocuous, representing little more than a *Swift/United Shoe* analysis under the guise of *Rufo*.¹⁷

The decisions in *Kodak* and *Western Electric* are little consolation to antitrust enforcers. Due to *Rufo*'s generally warm reception beyond the institutional reform context,¹⁸ uncertainty persists as to whether future courts will apply *Rufo* literally to requests to modify antitrust consent decrees. A literal application of the flexible *Rufo* standard to antitrust consent decrees would allow antitrust defendants to modify (or terminate) their consent decrees upon a showing of changed market conditions, even where modification would undermine a primary purpose of the decree.¹⁹ Adherence to the *Swift/United Shoe* standard—which requires an antitrust defendant to demonstrate that its proposed modification will not subvert the primary purpose of the consent decree—is thus essential to efficient enforcement of the antitrust laws. If courts apply *Rufo* literally, antitrust enforcement agencies, which currently settle more than seventy percent of their cases via consent decree,²⁰ likely will become reluctant to

¹⁵ See *id.* at 1203.

¹⁶ See *Kodak*, 63 F.3d at 102 (“[A]n antitrust defendant should not be relieved of the restrictions that it voluntarily accepted until the purpose of the decree has been substantially effectuated.”); *Western Elec.*, 46 F.3d at 1207 (finding that modification would not undermine primary purpose of AT&T's consent decree). For a more detailed discussion, see *infra* Part II.C.

¹⁷ The Court's tests from *Swift* (the “grievous wrong” standard) and *United Shoe* (the “purpose” standard) embrace a more contractual view of consent decrees, generally allowing modification only where significant, unforeseen changes in fact or law have occurred and the primary purpose of the decree would not be undermined. See *infra* notes 50-67 and accompanying text. Many courts (and the author) share the view of the Second Circuit that “[t]he true holding of *Swift* was stated in *United Shoe*.” *King-Seeley Thermos Co. v. Aladdin Indus.*, 418 F.2d 31, 34 (2d Cir. 1969); see cases cited *infra* note 67. Accordingly, the two standards will frequently be referred to hereinafter as one combined standard—the “*Swift/United Shoe*” standard.

¹⁸ See *infra* Part II.

¹⁹ The purpose underlying most antitrust consent decrees is to ensure a competitive marketplace. Thus, changes in market conditions are often ancillary to, if not themselves, the very purposes of antitrust consent decrees. See *infra* notes 184-91 and accompanying text.

²⁰ See *infra* note 224 and accompanying text. The Federal Trade Commission (FTC) settles its antitrust cases not by consent decree, but via administrative competition orders. See, e.g., *infra* note 21 (describing policy of terminating outdated administrative orders);

enter into consent decrees. Further, in light of a recently implemented antitrust enforcement policy that generally limits consent decrees to ten years,²¹ and antitrust defendants' already powerful incentives to settle via consent decree,²² the flexible *Rufo* standard is unnecessary and inappropriate in the antitrust context. Finally, several stark differences between institutional reform and antitrust litigation indicate that the rationales underlying *Rufo* are not applicable in the antitrust context.

Part I of this Note sets the stage for the discussion of the appropriate modification standard for antitrust consent decrees. It first contrasts two competing conceptual models of consent decrees: the contract model, which generally encompasses the Court's posture in *Swift* and *United Shoe*, and the judicial act model, the more flexible stance embodied in the *Rufo* decision. Part I next reviews *Swift* and *United Shoe*, which together embody the Supreme Court's rigid approach toward requests to modify consent decrees in the years prior to its *Rufo* decision. It then examines *Rufo* and the Court's justifications for departing from the stringent standard in the institutional reform context. In Part II, the Note examines the division among the circuit courts regarding whether the *Rufo* standard should be applied to modification requests beyond the institutional reform context. Next, it scrutinizes *Kodak* and *Western Electric*, the two decisions which explicitly extend *Rufo* to antitrust consent decrees. Part II concludes that while both courts failed to apply *Rufo* literally, the decisions nevertheless imperil the integrity of future consent decrees by muddling the appropriate standard to be applied to future modification requests in the antitrust context. Part III assesses the wisdom of extending the flexible *Rufo* standard to requests to modify antitrust consent decrees. First, it compares and contrasts the nature of consent decrees resulting

infra note 47 (referring to FTC authority to incorporate broad terms into administrative orders).

²¹ Recognizing that consent decrees may be rendered obsolete by changed market conditions, changes in our understanding of the way markets work, or changes in the law, both the Department of Justice and the FTC have implemented policies regarding the automatic termination of consent decrees and competition orders. The Department of Justice has adopted a policy generally limiting the life of any consent decree into which it enters to no more than 10 years. See Section of Antitrust Law of the ABA, Antitrust Law Developments 238 (1975); see also Michael E. DeBow, Judicial Regulation of Industry: An Analysis of Antitrust Consent Decrees, 1987 U. Chi. Legal F. 353, 354 (describing consent decree process). Likewise, the FTC recently implemented a new policy of automatically terminating all competition orders more than 20 years old. See 16 C.F.R. § 3.72 (1996).

²² Under the Clayton Act, 15 U.S.C. § 16(a) (1994), consent decrees entered before testimony is taken cannot be used by private claimants in treble damage suits as prima facie evidence against antitrust defendants regarding matters between the government and the defendant that would be estopped. See infra text accompanying note 222.

from institutional reform and antitrust litigation, demonstrating why the distinct characteristics of institutional reform litigation may necessitate a more flexible posture toward modification requests. Second, Part III explores the likely effects of a flexible standard on settlement incentives of parties to institutional reform and antitrust litigation. This Note concludes that while the flexible *Rufo* standard may be suitable for requests to modify institutional reform decrees, its extension to the antitrust context will reduce settlement incentives for antitrust enforcement agencies and lead to inefficient enforcement of the antitrust laws.²³

I

THE SUPREME COURT'S TREATMENT OF MODIFICATION REQUESTS

This Part surveys the Supreme Court's jurisprudence regarding requests to modify consent decrees. Part A provides a conceptual framework for the Court's conflicting standards. It shows that the Court's varying treatment of consent decrees in *Swift* and *United Shoe* on the one hand, and *Rufo* on the other, represents a conflict between two competing models of consent decrees—contract and judicial act. Part B then summarizes *Swift* and *United Shoe*, both antitrust cases, and examines the Court's justifications for applying such a stringent standard toward modification requests. Finally, Part C analyzes *Rufo* and its justifications for departing from *Swift/United Shoe* in favor of a more flexible standard in the institutional reform setting.

²³ This Note is concerned primarily with the proper standard to be applied to requests to modify antitrust consent decrees entered between the government and private antitrust defendants. While parties to a private antitrust suit may in some cases elect to resolve their dispute via consent decree, courts are less likely to apply a flexible modification standard because the public interest is less often implicated. See, e.g., *W.L. Gore & Assocs. v. C.R. Bard, Inc.*, 977 F.2d 558, 562 (Fed. Cir. 1992) (refusing to apply *Rufo* to consent decree involving commercial dispute between two private parties); *Heath v. De Courcy*, 883 F.2d 1105, 1109 (6th Cir. 1989) (viewing institutional reform decrees as "fundamentally different" than decrees between private parties because former affect more than the rights of immediate litigants); *Money Store v. Harris Corp. Fin.*, 885 F.2d 369, 374 (7th Cir. 1989) (Posner, J., concurring) ("The hard line against modification . . . in this private case is sensible for private cases but not for 'institutional reform litigation.'"). For further discussion of the rationales behind imposing a more stringent standard for modification of consent decrees between private parties, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284 (1976); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 49 (1979).

A. *Consent Decree: Contract or Judicial Act?*

The prevailing modern view is that a consent decree is a hybrid, possessing attributes of both a contract and a judicial decree.²⁴ This hybrid view is replete with tension because the two models prescribe opposing judicial treatment of modification requests. While the contract model stresses deference to the negotiated bargain and allows little judicial discretion in granting modification, the judicial act model compels judicial flexibility and invites vigorous scrutiny.²⁵

The judicial act model assumes that consent decrees require a significant degree of judicial involvement.²⁶ The court's stamp of approval bolsters consent decrees with a "weightier and more portentous" aura than typical contracts.²⁷ By entering the parties' judgment, the court has an "institutional stake" in the consent decree beyond simply honoring the parties' expectations and is therefore justified in retaining the power to order modification.²⁸ Professor Thomas Mengler points out that because courts are under a duty to protect the interests of third parties, a hands-on approach is necessary and the consent decree is essentially a "three-party venture."²⁹ Backers of the judicial act model also point out that courts have equitable powers to determine the adequacy of the injunctive relief so often included in consent decrees.³⁰

By contrast, the contract model regards consent decrees as similar to private contracts, which generally represent an efficient alloca-

²⁴ See *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1148 (6th Cir. 1992) ("The consent decree is . . . 'a voluntary settlement agreement which could be fully effective without judicial intervention' and 'a final judicial order . . . plac[ing] the power and prestige of the court behind the compromise struck by the parties.'" (quoting *Williams v. Vukivich*, 720 F.2d 909, 920 (6th Cir. 1983))); Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. 321, 324 (1988) (outlining different views of consent decree and recognizing dominance of hybrid view); Judith Resnik, *Judging Consent*, 1987 U. Chi. Legal F. 43, 56 (noting that "just because a consent decree 'looks like a judgment' doesn't mean that it is one" (quoting *Local 93 v. City of Cleveland*, 478 U.S. 501, 523 (1986))); see also *Black's Law Dictionary* 411 (6th ed. 1990) (defining consent decree as "not properly a judicial sentence, but . . . in the nature of a solemn contract or agreement of the parties, made under the sanction of the court").

²⁵ See Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. Rev. 291, 292 (1988).

²⁶ See Resnik, *supra* note 24, at 64 (noting that "symbolic import" of consent decrees flows in part from relative infrequency of judgments as compared to contractual agreements).

²⁷ *Id.*

²⁸ See Kramer, *supra* note 24, at 330.

²⁹ Mengler, *supra* note 25, at 315; see also *id.* at 315-17 (noting that affirmative action consent decree also attracted job-seeking third parties).

³⁰ See *id.* at 322.

tion of risks between the litigating parties.³¹ The parties therefore will have considered the foreseeable risks of their positions and reached a bargain which maximizes each party's utility.³² Thus, unless conditions have drastically changed, modification of a decree will usually lead to a less efficient outcome than forcing the parties to bargain with each other to iron out the difficulties.³³ Professor Timothy Jost believes that modification is appropriate only in two instances. First, where unforeseen changes render performance virtually impossible, modification may be warranted if it would shift the loss to the party who was *ex ante* the superior risk bearer.³⁴ Second, where such changes render the cost of performance excessive as compared to the value of performance, failure to modify would result in a "deadweight efficiency loss."³⁵

Judge Frank Easterbrook, who also views the decree as a contract, believes that the terms of the consent decree should be adhered to absent a breakdown of "some fundamental supposition of the contract."³⁶ If such a breakdown occurs, the decree should be dissolved and the case returned to the trial court.³⁷ In the usual situation where the dispute involves smaller, unanticipated matters, modification is not justified unless the decree itself could be *interpreted* as providing for such modification.³⁸

The Supreme Court has been reluctant to explicitly characterize the consent decree as either a contract or judicial act. Instead, the Court has recognized that consent decrees encompass characteristics of both models.³⁹ In *Swift* and *United Shoe*, the Court viewed consent decrees generally as contracts, refusing to permit modification except where the moving party has lived up to its bargain and the decree's

³¹ See Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 *Tex. L. Rev.* 1101, 1129-30 (1986).

³² See *id.* at 1130.

³³ See *id.* This view assumes that transaction costs are negligible and the parties are better able than the court to assess their own interests. See *id.* at 1130-31.

³⁴ See *id.* at 1138-39.

³⁵ *Id.* at 1140.

³⁶ Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 *U. Chi. Legal F.* 19, 40.

³⁷ See *id.* at 40-41.

³⁸ See *id.* at 41.

³⁹ A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992); see also *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968) (recognizing power of court of equity to modify injunctions even though entered through consent); *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932) (same).

purposes have been fully achieved.⁴⁰ Yet in *Rufo*, the Court treated the consent decree as if it were a judicial decree, emphasizing its power to intervene and the need for flexibility in considering modification requests.⁴¹ Generally speaking, courts embracing the contract model adopt the *Swift* and *United Shoe* standards, while those leaning toward the judicial act model tend to employ the *Rufo* standard.⁴²

B. Consent Decree as Contract: *Swift* and *United Shoe*

In *United States v. Swift & Co.*,⁴³ Justice Cardozo delivered the Supreme Court's initial attempt to define a court's power to modify a consent decree. *Swift* arose from an antitrust action brought by the government against the five largest players in the oligopolistic meatpacking industry.⁴⁴ The complaint charged the defendants with violating the Sherman Act⁴⁵ by controlling the supply and suppressing competition in the markets for meat, fish, vegetables, and other foods.⁴⁶ In 1920, the defendants agreed to a consent decree that sought to limit their dominance in the meat industry and to "fence them in" by restricting entry into 144 other product markets.⁴⁷

⁴⁰ See *United Shoe*, 391 U.S. at 248 (stating that decree may not be changed in defendants' interests if "purposes of the litigation as incorporated in the decree . . . have not been fully achieved"); *Swift*, 286 U.S. at 119 ("[W]e should leave the defendants where we find them, especially since the place where we find them is the one where they agreed to be."); see also *infra* text accompanying notes 51-67.

⁴¹ See *Rufo*, 502 U.S. at 380-81.

⁴² See Bernard T. Shen, Comment, From Jail Cell to Cellular Communication: Should the *Rufo* Standard Be Applied to Antitrust and Commercial Consent Decrees?, 90 Nw. U. L. Rev. 1781, 1789 (1996) ("[T]he choice between the *Swift* grievous wrong standard and the *Rufo* flexible standard is primarily a choice between the contract and judicial act models.").

⁴³ 286 U.S. 106 (1932).

⁴⁴ See *id.* at 109-10.

⁴⁵ 15 U.S.C. §§ 1-7 (1994). The meatpacking trust was "one of the principal rationales for and targets of the Sherman Act." Jost, *supra* note 31, at 1108.

⁴⁶ See *Swift*, 286 U.S. at 110.

⁴⁷ See *id.* at 111-12 (describing terms of decree). Antitrust enforcement agencies frequently "fence in" defendants by proscribing practices other than those alleged in the complaint to be violative of the antitrust laws. See, e.g., *Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) ("If the Commission is to attain the objective Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."); *Sterling Drug v. Federal Trade Comm'n*, 741 F.2d 1146, 1154 (9th Cir. 1984) (noting FTC's authority to draft orders encompassing broad product category to fence in known violators of FTC Act). Proscription of otherwise legal practices may be necessary to prevent defendants from engaging in future violations. See Notice, *United States v. Woman's Hosp. Found. & Woman's Physical Health Org.*, 61 Fed. Reg. 43380, 43383 (Dep't Justice 1996) (justifying fencing-in provision in consent decree as necessary to keep physicians from informally engaging in price fixing and other anticompetitive conduct). For a more detailed discussion of the *Swift* litigation

Twelve years later, the defendant meatpacking companies petitioned the court for modification of the consent decree to allow them to enter the market for the sale and distribution of groceries, arguing that significant changes in the structure of the food industry had eliminated the competitive dangers specified in the original complaint.⁴⁸ Over the government's objection, the district court granted modification, accepting the meat companies' arguments that the manufacture and distribution of food products had been taken over by large, vertically integrated wholesalers and that retail food sales had come under the control of powerful chain stores.⁴⁹ The Supreme Court reversed. Writing for the majority, Justice Cardozo declared that the modification of a consent decree requires "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions."⁵⁰

Cardozo's striking language and hardline approach toward the meatpackers' modification request appears to reflect a contractual view of the consent decree.⁵¹ He emphasized that the *Swift* decree did not explicitly provide for its restraints to be withdrawn after a limited time or after the defendants had relinquished their market power.⁵² Instead, the consent decree renounced indefinitely the defendants' privilege to deal in certain groceries. Although changes in the meatpacking industry had restored some degree of competition among the defendants and had reduced the likelihood of monopolistic abuse, the fear still existed that entry into the grocery business would allow the defendants to exert unfair pressure upon retailers and force them to buy from the defendants and not from rival grocers.⁵³ The

and consent decree, see Jost, *supra* note 31, at 1107-10; Douglas Laycock, *Modern American Remedies: Cases and Materials* 1029-35 (1985).

⁴⁸ See *Swift*, 286 U.S. at 113. Because the food industry had undergone significant change, the meatpackers claimed that the restraints of the decree had become "useless and oppressive." *Id.* at 113.

⁴⁹ The district court granted permission to deal at wholesale but maintained the injunction against dealing at the retail level. See *Swift*, 286 U.S. at 117; see also Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 Harv. L. Rev. 1303, 1309-10 (1967) (describing defendants' arguments and district court decision).

⁵⁰ *Swift*, 286 U.S. at 119.

⁵¹ See *id.* at 116, 119 (suggesting that defendants should not be released from decree which did not expressly provide for its own termination); Mengler, *supra* note 25, at 296 (noting that Cardozo, while explicitly rejecting contractual view of decrees, emphasized contractual features in his test); see also *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574 (1984) (warning that "'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'" (quoting *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971))).

⁵² See *Swift*, 286 U.S. at 116.

⁵³ See *id.* at 117-18.

modification, if granted, would have robbed the decree of so much of its teeth as to render it a "revers[al] under the guise of readjust[ment]." ⁵⁴ Because every industry is likely to witness changes during the passing of over a decade, the Court decided that the appropriate inquiry was "whether the changes are so important that dangers, once substantial, have become attenuated to a shadow." ⁵⁵ Relying implicitly on a contractual view of consent decrees, Cardozo saw little reason to release the defendants from their decree, because "the place where we find them is the one where they agreed to be." ⁵⁶

Subsequent courts broadly applied *Swift*'s stringent "grievous wrong" standard to other forms of consent decrees and injunctions. ⁵⁷ In fact, its widespread acceptance led many courts to construe the promulgation of Federal Rule of Civil Procedure 60(b)(5), which authorizes a court to "relieve a party . . . from a final judgment . . . [if] it is no longer equitable that the judgment should have prospective application," ⁵⁸ as a codification of *Swift*. ⁵⁹ In one oft-cited opinion indicative of lower courts' austere treatment of modification requests, then-Judge Blackmun set forth his interpretation of *Swift*:

Placed in other words, this means for us that modification is only cautiously to be granted; that some change is not enough; that the dangers which the decree was meant to foreclose must almost have disappeared; that hardship and oppression, extreme and unexpected, are significant; and that the movants' task is to provide close

⁵⁴ *Id.* at 119.

⁵⁵ *Id.* The opinion concludes with the observation that "[w]isely or unwisely, [the defendants] submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall." *Id.*

⁵⁶ *Id.*

⁵⁷ See *supra* note 6 and accompanying text.

⁵⁸ Fed. R. Civ. P. 60(b)(5). The equitable standard imposed by this rule is not particularly helpful in deciding whether to grant modification and is generally not relied upon by courts. See, e.g., *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248-51 (1968) (failing to mention Rule 60(b)(5) and instead discussing only *Swift*); *United States v. Motor Vehicle Mfrs. Ass'n*, 643 F.2d 644, 648-49 (9th Cir. 1981) (same). For background on this portion of Rule 60(b), see 7 James Wm. Moore et al., *Moore's Federal Practice* ¶ 60.26[4] (2d ed. 1996); Mary Kay Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 *Hastings L.J.* 41 (1978); James Wm. Moore & Elizabeth B.A. Rogers, *Federal Relief from Civil Judgments*, 55 *Yale L.J.* 623 (1946).

⁵⁹ See, e.g., *Holiday Inns v. Holiday Inn*, 645 F.2d 239, 244 (4th Cir. 1981) (stating that 60(b)(5) codified power delineated in *Swift*); *Inmates of Suffolk County Jail v. Kearney*, 734 F. Supp. 561, 563 (D. Mass. 1990) (labeling Rule 60(b)(5) as codification of *Swift*), *aff'd*, 915 F.2d 1557 (1st Cir. 1990), *rev'd & vacated sub nom. Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992); Jost, *supra* note 31, at 1105 (same); cf. Milton Handler & Michael Ruby, *Justice Cardozo, One-Ninth of the Supreme Court*, 10 *Cardozo L. Rev.* 235, 244 (1988) ("For many years Cardozo's opinion was regarded as the fountainhead of all learning on the modification of consent decrees, with most subsequent opinions starting and ending with his formulation.").

to an unanswerable case. To repeat: caution, substantial change, unforeseenness, oppressive hardship, and a clear showing are the requirements.⁶⁰

In 1968, seemingly in response to its often rote application, the Court clarified the *Swift* standard. In *United States v. United Shoe Machinery Corp.*,⁶¹ the government moved to modify a fifteen-year-old decree that had been entered after a finding that United Shoe had monopolized the manufacture of shoe machinery.⁶² Arguing that the decree had failed to effectuate its stated purpose of establishing workable competition in the shoe machinery market, the government requested modification to break United Shoe into two competing companies.⁶³ The district court denied the government's request on the grounds that the government had failed to discharge its burden of showing the "grievous wrong" required under *Swift*.⁶⁴ Justice Fortas, writing for a unanimous Supreme Court, reversed.⁶⁵ He warned that *Swift* must be construed in light of its context, wherein the defendant had failed to show that the purposes of the litigation as incorporated in the decree had been fully achieved.⁶⁶ *Swift*, Justice Fortas declared, should be interpreted as holding that "a decree may be changed upon an appropriate showing, and . . . 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."⁶⁷

⁶⁰ *Humble Oil & Ref. Co. v. American Oil Co.*, 405 F.2d 803, 813 (8th Cir. 1969).

⁶¹ 391 U.S. 244 (1968).

⁶² See *id.* at 245-47.

⁶³ See *id.* at 247.

⁶⁴ See *United States v. United Shoe Mach. Corp.*, 266 F. Supp. 328, 328-30, 334 (D. Mass. 1967) (citing *Swift*).

⁶⁵ See *United Shoe*, 391 U.S. at 247. The government appealed directly to the Supreme Court. See *id.*

⁶⁶ See *id.* at 248-49; see also *King-Seeley Thermos Co. v. Aladdin Indus.*, 418 F.2d 31, 34 (2d Cir. 1969) (Friendly, J.) (noting that in *United Shoe*, Justice Fortas eschewed the "rigidity the [*Swift*] Court did not intend"). After clarifying *Swift*, Justice Fortas held that modification was warranted because the decree had been ineffective in achieving its purpose of restoring workable competition in the market. See *United Shoe*, 391 U.S. at 251-52.

⁶⁷ *United Shoe*, 391 U.S. at 248. Because *United Shoe* actually dealt with the government's request to strengthen the decree's restraints, its clarification of the *Swift* standard and ensuing "purpose" test is technically dictum. Some courts have therefore limited *United Shoe*'s applicability to cases where the party seeking modification wishes to strengthen the prohibitions of the decree. See, e.g., *Building & Constr. Trades Council v. NLRB*, 64 F.3d 880, 885 (3d Cir. 1995) (mentioning *United Shoe* only in discussion of different considerations applicable to strengthening decree); *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332, 341 (3d Cir. 1993) (alluding to government's attempt to strengthen injunction in *United Shoe*).

The Supreme Court recently reaffirmed *United Shoe*'s "purpose" test, however, in *Board of Educ. v. Dowell*, 498 U.S. 237, 247 (1991) (citing *United Shoe* for proposition that once purposes of litigation have been fully achieved, "[n]o additional showing of 'grievous

C. Consent Decree as Judicial Act—Institutional Reform and *Rufo*

Beginning in 1954 with *Brown v. Board of Education*,⁶⁸ courts nationwide bore witness to the sprouting of a new breed of lawsuit—institutional reform litigation.⁶⁹ Plaintiffs in such suits, typically employing the class action vehicle, sought longterm reform of policies and conditions in government-operated institutions through the use of equitable decrees.⁷⁰ Due to fundamental differences between institutional reform and antitrust litigation, Judge Friendly, writing for the Second Circuit in *New York State Ass'n for Retarded Children v. Carey*,⁷¹ concluded that the goals of institutional reform litigation require that modification be allowed on a lesser showing than that re-

wrong evoked by new and unforeseen conditions' is required"). Further, most courts citing *United Shoe* have done so for its interpretation of *Swift* and not for its actual holding. See, e.g., *United States v. Eastman Kodak Co.*, 63 F.3d 95, 100-01 (2d Cir. 1995) (noting that *United Shoe* provides starting point for evaluating requests to modify antitrust consent decrees); *W.L. Gore & Assocs. v. C.R. Bard, Inc.*, 977 F.2d 558, 561 (Fed. Cir. 1992) (citing *United Shoe* and asserting that if a "contract voluntarily made turns out to be less or more favorable to one of the parties[, it] is insufficient ground for judicial intervention"); *King-Seeley Thermos Co. v. Aladdin Indus.*, 418 F.2d 31, 34-35 (2d Cir. 1969) (finding that *Swift* and *United Shoe* govern request to modify injunction entered in trademark case).

The *United Shoe* standard has also been adopted by the Department of Justice as the relevant standard for requests to modify antitrust consent decrees. See Reply Brief for the United States at 2-3, *United States v. Eastman Kodak Co.*, 63 F.3d 95 (2d Cir. 1995) (No. 94-6190) (on file with the *New York University Law Review*) (arguing that *United Shoe* remains good law despite Kodak's argument that it was overruled by *Rufo*). The FTC requires a similar showing before allowing modification. See FTC Act § 5, 15 U.S.C. § 45(b) (1994). The FTC Act provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. *Id.* A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. See S. Rep. No. 96-500, at 9 (1979), reprinted in 1980 U.S.C.C.A.N. 1073, 1102.

⁶⁸ 347 U.S. 483 (1954).

⁶⁹ See Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 Harv. L. Rev. 1020, 1020-21 (1986) (observing that previous 30 years had witnessed "flowering" of institutional reform lawsuit).

⁷⁰ 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. 579, 584 (1993) (discussing background of institutional reform litigation). Such decrees generally impose affirmative obligations on state governments to improve state institutions. See, e.g., *New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 959 (2d Cir. 1983) (directing New York to reduce population of state school for retarded children); *Philadelphia Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1116-17 (3d Cir. 1979) (ordering Pennsylvania to provide medical examinations to children of eligible impoverished families). Among the most common targets of institutional reform litigation are school systems, prisons, and mental institutions. See Note, *supra* note 69, at 1020-21.

⁷¹ 706 F.2d 956 (2d Cir. 1983).

quired under *Swift*.⁷² Judge Friendly also referred to Professor Abram Chayes's observation that institutional reform decrees are distinct in that they impose future-oriented relief designed to achieve broad public policy goals in a complex, evolving fact situation.⁷³ A trend quickly emerged among lower courts toward a flexible modification standard in the institutional reform setting.⁷⁴

Stoked by Judge Friendly's opinion in *Carey*, the Supreme Court finally validated this trend in 1992. In *Rufo v. Inmates of Suffolk County Jail*,⁷⁵ the Court explicitly abandoned *Swift*'s "grievous wrong" standard for requests to modify institutional reform consent decrees.⁷⁶ In *Rufo*, a local sheriff petitioned the court for modification of a consent decree which prohibited double bunking at the Suf-

⁷² See *id.* at 969. In *Carey*, suit was brought on behalf of mentally retarded persons residing at an overcrowded state mental institution to remedy conditions which allegedly violated constitutional rights protected by 42 U.S.C. § 1983. See *id.* at 958. The resulting consent decree ordered the State of New York to reduce the institution's population from 5700 to 250 by relocating its residents to smaller, non-institutional community placements. See *id.* at 959. In light of New York City's increasingly tight housing market, limited state and federal funding, and neighborhood resistance to erection of nearby mental institutions, however, the state moved to modify the consent decree to allow for placement of residents into larger institutions than those specified in the original decree. See *id.* at 960, 965-66. The district court, citing *Swift*, denied modification, but the Second Circuit reversed. See *id.* at 965-68. In contrast to the request in *Swift*, Judge Friendly noted, the defendant was not attempting to escape the primary objective of the decree—the emptying of a mammoth, overcrowded state institution within a reasonable period of time. See *id.* at 969. Instead, the defendant offered substantial evidence that modification was "essential to attaining that goal at any reasonably early date." *Id.* While modification did run counter to one of the decree's goals—placing the residents in small facilities—it did not undermine its primary purpose of alleviating the overcrowded, unconstitutional conditions existing at the Willowbrook State School. See *id.*

⁷³ See *id.* at 970 n.17 (citing Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 56 (1982)).

⁷⁴ See, e.g., *Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989) (observing need for flexible standard in considering requests to modify institutional reform decrees); *Shapp*, 602 F.2d at 1119-21 (allowing modification due to unanticipated changed conditions beyond control of institutional reform defendant); *Wright*, *supra* note 6, § 2863 (reviewing cases taking flexible approaches under *Swift*). Commentators have also insisted that a more flexible standard is necessary in the institutional reform context. See, e.g., Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 Va. L. Rev. 43, 62-63 (1979) (positing that implementation of remedial decree in institutional reform context requires "an incremental, continual adjustment of interests"); Fiss, *supra* note 23, at 27-28 (arguing that flexible modification standard is warranted because remedial phase in institutional reform litigation is "concerned not with the enforcement of a remedy already given, but with the giving or shaping of the remedy itself"); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 Yale L.J. 635, 640 (1982) (noting that in context of institutional reform, "a federal court must rely largely on its own ingenuity in discovering the likely consequences of its remedial decree and on its own institutions in evaluating the desirability of those consequences").

⁷⁵ 502 U.S. 367 (1992).

⁷⁶ See *id.* at 382-83.

folk County Jail and required the county to construct a larger, constitutionally acceptable jail.⁷⁷ The sheriff, not having anticipated that a marked increase in the population of pretrial detainees would render the new jail inadequate to provide single bunking for all inmates, contended that changed conditions justified modification.⁷⁸ The district court disagreed, holding that modification would have violated one of the primary purposes of the decree—to provide a separate cell for each detainee.⁷⁹ Although the First Circuit affirmed,⁸⁰ the Supreme Court vacated the lower court ruling, citing the importance of enabling district courts to modify longstanding consent decrees in response to changed conditions.⁸¹ The Court emphasized that a flexible standard was “often essential to achieving the goals of [institutional] reform litigation.”⁸² Moreover, the Court noted, because consent decrees in institutional reform cases “reach beyond the parties involved directly in the suit and impact on the public’s right to the sound and efficient operation of its institutions,” a flexible standard was necessary to safeguard the public interest.⁸³

The Court had little difficulty working its way around *Swift*. It simply concluded that *Swift*’s “grievous wrong” language “was not intended to take on a talismanic quality.”⁸⁴ It then adopted a more leni-

⁷⁷ See *id.* at 376.

⁷⁸ See *id.*

⁷⁹ See *id.* at 382.

⁸⁰ See *Inmates of Suffolk County Jail v. Kearney*, 915 F.2d 1557 (1st Cir. 1990).

⁸¹ See *Rufo*, 502 U.S. at 381-83.

⁸² *Id.* at 380-81 (citing *New York State Ass’n for Retarded Children v. Carey*, 706 F.2d 956 (2d Cir. 1983)).

⁸³ *Id.* at 381 (citing *Heath v. DeCourcy*, 888 F.2d 1105, 1109 (6th Cir. 1989)). The Court alluded to the petitioners’ argument that the public interest—that of both the prisoners and citizens living in close proximity to the jail—would be served best by modification. See *id.* at 381-82. Without the proposed modification, pretrial detainees would likely have been transferred to other less desirable facilities, further away from family members and counsel. See *id.* at 382. Also, the Court noted, overcrowding would necessitate the release of some pretrial detainees, and the transfer of others, to halfway houses. See *id.*

⁸⁴ *Id.* at 380. The Court noted that significant changes are likely to occur during the life of the decree because such decrees often remain binding for prolonged periods of time. See *id.* at 380 (citing *Philadelphia Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1119-21 (3d Cir. 1979)). Relying on the longstanding nature of institutional reform decrees as a basis to distinguish *Swift* is problematic. The *Swift* decree, for example, was not terminated until 1981—more than 60 years after it had been entered. See *United States v. Swift & Co.*, 1982-1 Trade Cas. (CCH) ¶ 64,464 (N.D. Ill. 1981). Regulatory decrees, such as the one in *Swift*, are often perpetual in nature and “establish a continuing supervisory relationship between the court in which the decree was entered and the defendant; more realistically, perhaps, between . . . the Antitrust Division and the defendant.” Richard A. Posner, A Statistical Study of Antitrust Enforcement, 13 J.L. & Econ. 365, 386 (1970); see also Charles W. “Tim” McCoy, Jr., *The Paramount Cases: Golden Anniversary in a Rapidly Changing Marketplace*, Antitrust, Summer 1988, at 32, 35 (describing longstanding decrees regulating motion picture industry). Today, consent decrees (and administrative orders)

ent standard: an institutional reform consent decree may be modified if the moving party "establish[es] that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance."⁸⁵

Notably, the Court did not require that a primary purpose of the decree—allocation of a separate cell for each detainee—be substantially achieved before granting modification, despite the fact that the district court's refusal to grant modification was based primarily on that issue.⁸⁶ With a tinge of circularity, the Court brushed aside the district court's concern:

Even if the decree is construed as an undertaking by petitioners to provide single cells for pretrial detainees, to relieve petitioners from that promise based on changed conditions does not necessarily violate the basic purpose of the decree. That purpose was to provide a remedy for what had been found, based on a variety of factors, including double celling, to be unconstitutional conditions obtaining in the Charles Street Jail. *If modification of one term of a consent decree defeats the purpose of the decree, obviously modification would be all but impossible. That cannot be the rule.*⁸⁷

The *Rufo* Court required only that the *broad* purpose of the underlying litigation—correction of unconstitutional conditions at the jail—not be undermined by modification.⁸⁸ It did not require that the most important *specific* purpose of the decree be preserved.⁸⁹ Under

entered by antitrust enforcement agencies are generally limited to 10 years. See *supra* note 21.

⁸⁵ *Rufo*, 502 U.S. at 393.

⁸⁶ See *id.* at 382 (acknowledging district court finding that modification "would violate one of the primary purposes of the decree, which was to provide 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'" (quoting *Inmates of Suffolk County Jail v. Kearney*, 734 F. Supp. 561, 565 (D. Mass. 1990))). Despite the district court's clear finding that modification would subvert the purposes of the decree, the Supreme Court hardly paid lip service to its prior decision in *United Shoe*. See *id.* at 379 (citing *United Shoe* solely for proposition that *Swift* standard must be read in context); see also *Alexander v. Britt*, 89 F.3d 194, 199 (4th Cir. 1996) (noting that defendants seeking relief in *Rufo* "did not claim that they had complied with the consent decree or that it had accomplished its purpose"); Levine, *supra* note 70, at 602 & n.140 (recognizing *Rufo*'s failure to reconcile *United Shoe*'s requirement that decree's purposes be achieved before defendant's modification request is granted).

⁸⁷ *Rufo*, 502 U.S. at 387 (emphasis added).

⁸⁸ See *id.*

⁸⁹ See *id.* By allowing the defendants to escape the central promise embodied in the decree, the Court offended any notion that a consent decree is part contract and appeared to disregard the fact that the concessions that the plaintiffs fought to include in the consent decree may have gone beyond those conditions mandated by the Constitution. See *id.* at 377 (noting district court's acknowledgment that "[a] separate cell for each detainee has always been an important element of the relief sought in this litigation—perhaps even the most important element"); *id.* at 382 (same). The contract model assumes that the purpose

Rufo, then, moving parties are not required to demonstrate that the decree's specific purposes have been achieved; they need only show that a significant change in circumstance (fact or law) warrants modification and that the modification is "suitably tailored to the changed circumstance."⁹⁰

II

EXTENSION OF *RUFO* BEYOND THE INSTITUTIONAL REFORM CONTEXT

Though the standards prescribed in *Rufo* and *Swift* reasonably may be characterized as "polar opposites,"⁹¹ both fall under the umbrella of Federal Rule of Civil Procedure 60(b)(5)'s allowance for modification where "it is no longer equitable that the judgment should have prospective application."⁹² Yet, in light of the malleability of any "equitable" standard and due to the dissimilar settings in which the *Rufo* and *Swift* decrees arose, the *Rufo* Court avoided overruling *Swift*⁹³ by limiting its holding to the institutional reform setting.⁹⁴ Despite the Court's express limitation, however, lower courts are divided over whether *Rufo*'s flexible standard is applicable outside of the institutional reform setting.

This Section examines the lower courts' use of the *Rufo* standard beyond the institutional reform context. Part A looks at the two circuits that have confined *Rufo* to the institutional reform context. Echoing *Rufo*, these circuits have acknowledged that the test to determine whether modification is "equitable" under Rule 60(b)(5) may vary according to context.⁹⁵ In contrast, Part B discusses the opinions of circuits that have extended *Rufo* to various types of consent decrees.⁹⁶ These circuits have construed *Rufo* as a general clarification of what is "equitable" under Rule 60(b)(5), a rule that does not explic-

of the consent decree itself—and not necessarily the underlying substantive law—is the purpose that must be respected. Because the parties elect to settle without admitting liability, both parties compromise for less than they may receive at trial. See Mengler, *supra* note 25, at 343-44. Therefore, consent decrees are designed to serve the purposes specifically articulated in the consent decree, even when those purposes would not be mandated by the underlying substantive law itself. See *id.* at 344.

⁹⁰ *Rufo*, 502 U.S. at 393.

⁹¹ *Alexis Lichine & Cie. v. Sacha A. Lichine Estate Selections, Ltd.*, 45 F.3d 582, 586 (1st Cir. 1995).

⁹² Fed. R. Civ. P. 60(b)(5).

⁹³ See *Rufo*, 502 U.S. at 379 (distinguishing *Swift* and repeating *United Shoe's* warning that *Swift* be read in context).

⁹⁴ See *id.* at 383.

⁹⁵ See *infra* notes 99-110 and accompanying text.

⁹⁶ See *infra* notes 112-25 and accompanying text.

itly differentiate between decrees arising in the various contexts.⁹⁷ Finally, Part C examines in detail the only two cases that have had occasion to consider, and ultimately to decide, to extend *Rufo* to the antitrust context.

A. Confining *Rufo* to Institutional Reform

Both the Sixth and Federal Circuits have demonstrated a reluctance to extend *Rufo* beyond the institutional reform context.⁹⁸ In *W.L. Gore & Associates v. C.R. Bard, Inc.*,⁹⁹ an alleged patent infringer sought to modify a consent decree precluding it from infringing Gore's patent on his GORE-TEX material.¹⁰⁰ The modification request was based on a change in law which made lawful certain practices proscribed by the consent judgment.¹⁰¹ Notwithstanding the burdens imposed by the intervening change in law, the Federal Circuit adhered to the stringent *Swift* standard,¹⁰² ruling that modification was still unwarranted because Bard failed to demonstrate that unexpected hardship and inequity had resulted from the change in law.¹⁰³ The court refused to extend *Rufo*, explaining that institutional reform

⁹⁷ See, e.g., *Building & Constr. Trades Council v. NLRB*, 64 F.3d 880, 885-88 (3d Cir. 1995) (applying *Rufo* to consent judgment prohibiting secondary boycotts by labor unions); *Patterson v. Newspaper & Mail Deliverers' Union*, 13 F.3d 33, 37-38 (2d Cir. 1993) (applying *Rufo* to consent decree governing settlement reached in civil rights litigation); *Hendrix v. Page (In re Hendrix)*, 986 F.2d 195, 198 (7th Cir. 1993) (applying *Rufo* to discharge in bankruptcy).

⁹⁸ One additional circuit has confronted the decision in *Rufo*. In *Alexis Lichine & Cie. v. Sacha A. Lichine Estate Selections, Ltd.*, 45 F.3d 582 (1st Cir. 1995), the First Circuit took a middle-of-the-road approach, viewing Rule 60(b)(5) as "set[ting] forth the umbrella concept of 'equitable' that both *Swift* and *Rufo* apply to particular, widely disparate fact situations." *Id.* at 586. In its consideration of a request to modify a consent decree governing a commercial dispute between two private parties, the First Circuit found neither "an 'institutional reform' exception to *Swift* [n]or a 'private commercial party' exception to *Rufo*." *Id.* Instead, the court deemed modification inequitable under Rule 60(b)(5) because the commercial dispute involved in the decree did not implicate concerns similar to those relied upon by the *Rufo* Court. See *id.* (citing absence of public interest implications).

⁹⁹ 977 F.2d 558 (Fed. Cir. 1992).

¹⁰⁰ See *id.* at 559.

¹⁰¹ See *id.* at 559-60. The change in law shielded from liability certain activities that involved a patented invention and that were reasonably related to federal regulatory approval of a new drug or biological product. See 35 U.S.C. § 271(e) (1994 & Supp. I 1995).

¹⁰² See *Gore*, 977 F.2d at 561-62. Because the question of the applicable standard for relief from judgment was not exclusive to the Federal Circuit, the court applied Third Circuit precedent in its review of the district court order denying modification. See *id.* at 561 n.3.

¹⁰³ See *id.* at 561-63. Because Bard had already obtained federal approval for its product and would be able to resume sale of that product upon expiration of Gore's patent six months later, the Federal Circuit found convincing the district court's determination that modification was inequitable. See *id.* at 563.

cases present greater public interest considerations than those found in consent decrees settling commercial disputes, which affect only the parties to the particular suit.¹⁰⁴ Viewing the consent decree as "having many of the attributes of a contract voluntarily undertaken,"¹⁰⁵ the Federal Circuit suggested that when parties make free, deliberate choices "to submit to a consent decree instead of seeking a more favorable judgment upon litigation, 'their burden [in seeking modification] is perhaps even more formidable than had they litigated and lost.'"¹⁰⁶ Moreover, citing *United Shoe*, the Federal Circuit emphasized that a defendant's request for modification is unwarranted where "the purposes of the litigation as incorporated in the decree . . . have not been fully achieved."¹⁰⁷

The Sixth Circuit also expressed its reluctance to extend *Rufo* beyond the institutional reform setting. In *Lorain NAACP v. Lorain Board of Education*,¹⁰⁸ a desegregation case, the Sixth Circuit followed *Rufo*'s mandate to apply a flexible standard toward requests to modify institutional reform decrees.¹⁰⁹ Yet, by reiterating *Rufo*'s justifications for treating institutional reform decrees as distinct from other decrees, the Sixth Circuit hinted that it would not extend *Rufo*'s flexible standard to other settings.¹¹⁰

B. Extension of *Rufo* Beyond Institutional Reform

Despite the Supreme Court's care in not overruling *Swift/United Shoe* and its narrow holding that the flexible *Rufo* standard should be applied only in the institutional reform context,¹¹¹ many courts have extended *Rufo* to cases not involving institutional reform. The Third Circuit in *Building and Construction Trades Council v. NLRB*¹¹² explicitly extended *Rufo* to a request by labor unions to modify consent decrees that prohibited them from going on strike.¹¹³ The court acknowledged that *Rufo* spoke "in terms of the issues that arise in connection with institutional reform [litigation]."¹¹⁴ However, it resolved

¹⁰⁴ See *id.* at 562.

¹⁰⁵ *Id.* at 561 (citing *Philadelphia Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1119-20 (3d Cir. 1979)).

¹⁰⁶ *Id.* (quoting *Shapp*, 602 F.2d at 1120).

¹⁰⁷ *Id.* (citing *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968)).

¹⁰⁸ 979 F.2d 1141 (6th Cir. 1992).

¹⁰⁹ See *id.* at 1149.

¹¹⁰ See *id.*

¹¹¹ See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 379-81 (1992); *supra* notes 82-86 and accompanying text.

¹¹² 64 F.3d 880 (3d Cir. 1995).

¹¹³ See *id.* at 882.

¹¹⁴ *Id.* at 887.

that since *Rufo* formulated its standard "in the context of interpreting Rule 60(b)(5), which does not draw distinctions based on the nature of the litigation,"¹¹⁵ the relevant standard should not depend on the case's characterization as institutional reform, antitrust, commercial dispute, or other litigation.¹¹⁶

Taking an extreme view, the Seventh Circuit in *Hendrix v. Page (In re Hendrix)*¹¹⁷ declared that the *Rufo* standard completely displaced *Swift* for all modification requests.¹¹⁸ The modification request in *Hendrix* was based upon the bankruptcy judge's misunderstanding of the applicable law in granting a bankruptcy discharge.¹¹⁹ Although such facts appear to present a relatively easy case for modification under any equitable standard, it remains significant that the Seventh Circuit went out of its way to declare that the stringent *Swift* standard was given the "coup de grace" by *Rufo*.¹²⁰

In *Protectoseal Co. v. Barancik*,¹²¹ the Seventh Circuit again extended *Rufo* to a modification request stemming from an intervening change in law. In *Barancik*, a shareholder moved to modify a permanent injunction preventing him from sitting as a director of a corporation.¹²² The injunction resulted from a successful suit brought by fellow board members under the Clayton Act, which prohibits individuals from holding concurrent directorships in competing companies.¹²³ After entry of the decree, Congress narrowed the Clayton Act's prohibitions to only those concurrent directorships where the agree-

¹¹⁵ Id. (citing *United States v. Western Elec. Co.*, 46 F.3d 1198, 1203 (D.C. Cir. 1995)).

¹¹⁶ See id. at 888. Although adopting *Rufo*, the court ultimately denied the modification request because the changed conditions asserted by the labor unions were not unforeseen at the time the decree was entered. See id. at 890.

¹¹⁷ 986 F.2d 195 (7th Cir. 1993).

¹¹⁸ See id. at 198. To date, no other court has joined the Seventh Circuit in this view.

¹¹⁹ See id. ("[T]he court can, where equity requires, modify an injunction based on a misunderstanding of the applicable law. Thus, if the . . . injunction erroneously enjoined the [plaintiffs] from proceeding against [the insurer], the court had the power . . . to modify the injunction in order to correct the error." (citation omitted)).

¹²⁰ See id. Interestingly, *Hendrix* involved two private parties, a setting which presumably does not implicate the public interest. Cf. *Evans v. City of Chicago*, 10 F.3d 474, 476 (7th Cir. 1993) (interpreting *Rufo* as holding that "consent decrees regulating the conduct of state or local governments may be modified more freely than those entered by private litigants"); *Money Store v. Harriscorp Fin.*, 885 F.2d 369, 374 (7th Cir. 1989) (Posner, J., concurring) (suggesting, prior to *Rufo*, that hard line against modification is warranted for "private cases").

¹²¹ 23 F.3d 1184 (7th Cir. 1994).

¹²² See id. at 1185.

¹²³ Under former section 8 of the Clayton Act, 15 U.S.C. § 19 (1970), in effect at the time the suit was initiated, no person could hold concurrent directorships in any two competing companies if either company had capital, surplus, and undivided profits aggregating more than \$1,000,000.

gate capital, surplus, and undivided profits exceed \$10,000,000.¹²⁴ The court thus held that the district court did not abuse its discretion in allowing modification, as the intervening change in law rendered lawful what had previously been forbidden.¹²⁵

C. Extending *Rufo* to Antitrust Consent Decrees¹²⁶

I. *United States v. Eastman Kodak Co.*

In *United States v. Eastman Kodak Co.*,¹²⁷ the Second Circuit explicitly adopted *Rufo*'s flexible standard in considering a request to terminate two antitrust consent decrees.¹²⁸ To settle alleged antitrust violations, Eastman Kodak in 1921 and 1954 entered into two consent decrees which prevented the company from selling private label film or from connecting the sale of its film to its photofinishing services.¹²⁹ In 1995, Kodak moved to modify the decrees and, not surprisingly, urged the court to apply the permissive *Rufo* standard.¹³⁰ The government objected, arguing that *United Shoe* provided the controlling standard for antitrust cases and that modification therefore was inap-

¹²⁴ See *Barancik*, 23 F.3d at 1186 (citing Antitrust Amendments Act of 1990, Pub. L. No. 101-588, 104 Stat. 2879, 2879 (amending Clayton Act § 8(a)(1), 15 U.S.C. § 19 (1970))).

¹²⁵ See *id.* at 1189. Like *Hendrix*, the facts of *Barancik* present a relatively compelling case for allowing modification, regardless of the standard applied. Even under *Swift*, many courts likely would have concluded that the intervening change in law was a "new and unforeseen condition" evoking "grievous wrong" on the bound party.

¹²⁶ The two circuit courts extending *Rufo* to antitrust consent decrees comprise a subset of the larger group of circuits finding *Rufo* applicable beyond the institutional reform context. They are treated separately here to facilitate the specific discussion of extending *Rufo* to antitrust consent decrees.

Beyond the following two cases, no other circuit court has had the opportunity to determine whether to extend *Rufo* to antitrust consent decrees. The two district courts hearing modification requests in the antitrust context have split. In *United States v. Agri-Mark, Inc.*, 156 F.R.D. 87, 88-89 (D. Vt. 1994), the court, applying *Rufo*, concluded that changed conditions in New England's milk market warranted termination of the decree because the vertical integration in the dairy industry which triggered the government's original suit had been undone by divestiture. In *United States v. American Society of Composers, Authors and Publishers*, 156 F.R.D. 64 (S.D.N.Y. 1994), however, the court, without even citing *Rufo*, granted modification, see *id.* at 73, after determining that proposed changes served the underlying antitrust policies of the decree and furthered the goal of competition, see *id.* at 69 & n.8.

¹²⁷ 63 F.3d 95 (2d Cir. 1995).

¹²⁸ Any difference between consent decree modification and termination is one of degree only, and the same standard is therefore applied to each. See *Alexander v. Britt*, 89 F.3d 194, 197 (4th Cir. 1996) ("[A] holding that motions to modify always require satisfaction of a more stringent standard than motions to terminate would be illogical."); *Kodak*, 63 F.3d at 100-02 (discussing modification and termination concurrently without drawing distinction between them in determining applicable standard).

¹²⁹ See *Kodak*, 63 F.3d at 98.

¹³⁰ See *id.* at 100.

propriate because Kodak had not demonstrated that the purposes of the decree had been achieved.¹³¹

The Second Circuit took a middle-of-the-road approach, noting:

[B]oth cases bear on the issue at hand. *Rufo* teaches that the power of a court to modify or terminate a consent decree is, at bottom, guided by equitable considerations. Indeed, Federal Rule of Civil Procedure 60(b)(5) makes no exception for antitrust decrees. However, . . . *United Shoe* provides a useful starting point for evaluating an antitrust defendant's request to modify or terminate a consent decree. In most cases, the antitrust defendant should be prepared to demonstrate that the basic purposes of the consent decrees—the elimination of monopoly and unduly restrictive practices—have been achieved.¹³²

The district court found that the relevant geographic market for film was worldwide and that Kodak no longer possessed market power.¹³³ The Second Circuit found no abuse of discretion and determined that, because the purposes of the decrees were thus judged to be achieved, termination was warranted.¹³⁴

In concocting its *Rufo/United Shoe* hybrid, the Second Circuit could “see nothing in *Rufo* that undermines the vitality of this approach.”¹³⁵ The Second Circuit failed to recognize that the *Rufo* standard, as announced by the Supreme Court, is clearly at loggerheads with *United Shoe*. *United Shoe* declared that modification may be granted only if the purposes of the decree have been achieved.¹³⁶ The Supreme Court in *Rufo*, however, granted modification even though a primary purpose of the decree was not consummated.¹³⁷ Had the Second Circuit applied *Rufo* strictly, it would have determined simply whether Kodak established that a significant change in facts warranted revision of the decree and whether the modification was suitably tailored to the changed circumstances.¹³⁸ Instead, by viewing *Rufo* as professing only that considerations of equity must govern modification requests,¹³⁹ the Second Circuit merely reiterated the mandate of

¹³¹ See *id.* at 100-01.

¹³² *Id.* at 101 (citing *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968)).

¹³³ See *id.* at 109.

¹³⁴ See *id.*

¹³⁵ *Id.* at 101.

¹³⁶ See *supra* notes 66-67 and accompanying text.

¹³⁷ See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 382-84 (1992); *supra* notes 71-90 and accompanying text.

¹³⁸ See *Rufo*, 502 U.S. at 393 (moving party must “establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance”).

¹³⁹ See *Kodak*, 63 F.3d at 101.

Federal Rule of Civil Procedure 60(b)(5)—a standard that allows for modification where “it is no longer equitable that the judgment have prospective application.”¹⁴⁰ On its face, the Second Circuit’s boiled-down interpretation of *Rufo* appears to follow the *United Shoe* mandate that modification be granted in favor of defendants only where the primary purpose of the decree has been achieved.¹⁴¹

Indeed, several decisions leading up to *Kodak* suggest that while the Second Circuit may view *Rufo* as generally applicable to all consent decrees, it would be hesitant to grant modification where the purposes of the decree have not been attained.¹⁴² In these decisions, the

¹⁴⁰ *Id.*

¹⁴¹ A closer examination of the findings of fact relied upon by the Second Circuit reveals that the decree’s purpose—elimination of monopoly and unduly restrictive practices—may not have been achieved. The trial court, sitting in Kodak’s hometown of Rochester, New York, found that Kodak possessed a 67% share of the U.S. film market and a 70% share of the U.S. wholesale photofinishing market. See *id.* at 98-99. Further, the court found that 50% of U.S. consumers would purchase Kodak film regardless of price and that Kodak was able to outsell its rivals while charging a higher price for similar-quality film. See *id.* at 108-09. Kodak was found to have an “own elasticity of demand” of 2. *Id.* at 108. Economists generally agree that when a firm is charging a profit-maximizing price, “if the elasticity of demand is 2, price is twice marginal cost.” Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 137 (2d ed. 1994); see also William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 *Harv. L. Rev.* 937, 940-41 (1981) (discussing Lerner index and elasticity of demand); Brief for United States at 19 & n.23, *United States v. Eastman Kodak*, 63 F.3d 95 (2d Cir. 1995) (No. 94-6190) (on file with the *New York University Law Review*) (discussing term “own elasticity of demand”). Because perfect competition generally drives price down to short run marginal costs, such an excess of price over short run marginal costs usually signals market power. See 2 Phillip Areeda & Donald F. Turner, *Antitrust Law* 337 (1978).

Yet the trial court concluded that foreign competitors—led by Fuji’s comparatively meager 10% U.S. market share—tempered Kodak’s ability to raise price and rendered the relevant geographic market a “world” market. See *Kodak*, 63 F.3d at 108-10. The government argued vehemently on appeal that the trial court’s adoption of the lenient *Rufo* standard prejudiced its view of the evidence and led to its finding of a world market. See Brief for United States, *supra*, at 8-9. Recent reports suggest that the government’s concerns about an unrestrained Kodak may have been valid. See Wendy Bounds, *Kodak Rebuilds Photofinishing Empire, Quietly Buying Labs, Wooing Retailers*, *Wall St. J.*, June 4, 1996, at B1 (noting that Kodak, “quietly gobbling up the photofinishing business” since being released from decree, was in “near-monopolistic position” with control of nearly 80% of wholesale photofinishing market); Emily Nelson, *Kodak Has Pact to Be Exclusive Supplier of Photofinishing to American Stores Co.*, *Wall St. J.*, Sept. 30, 1996, at B9 (describing Kodak’s success in increasing to 75% its share of domestic wholesale photofinishing market since lifting of consent decrees); see also Wendy Bounds, *Fuji Will Buy Wal-Mart’s Photo Business*, *Wall St. J.*, July 9, 1996, at A3 (describing Fuji pact as “coup” against Kodak, which “monopolizes the U.S. [photofinishing] market,” and lost bid for Wal-Mart due to potential noncompliance with antitrust laws). The Second Circuit, perhaps equally biased by its purported adoption of *Rufo*’s flexible approach, yielded to the trial court’s finding that the relevant geographic market for film was worldwide. See *Kodak*, 63 F.3d at 109.

¹⁴² The Second Circuit has also extended *Rufo* to modification requests outside of the institutional reform setting on two other occasions. In *Still’s Pharmacy v. Cuomo*, 981 F.2d

Second Circuit has retained the *United Shoe* requirement—abandoned in *Rufo*—that the decree's purpose be achieved before modification is granted.¹⁴³ Thus, despite its consistent explicit approval of *Rufo* beyond the institutional reform setting, it seems unlikely that the Second Circuit perceives *Rufo* as enough of a wholesale change to displace completely *United Shoe* as the relevant standard for modification of antitrust consent decrees.

2. *United States v. Western Electric Co.*

In *United States v. Western Electric Co.*,¹⁴⁴ AT&T sought to modify its consent decree¹⁴⁵ to permit its acquisition of McCaw Cellular, a large cellular service provider.¹⁴⁶ The requested modification was supported by the government¹⁴⁷ and contested only by BellSouth

632, 636-37 (2d Cir. 1992), the Second Circuit applied *Rufo* to a request to modify a consent decree governing New York State's compliance with a federal Medicaid prescription drug program. Also, in *Patterson v. Newspaper & Mail Deliverers' Union*, 13 F.3d 33, 37-38 (2d Cir. 1993), *Rufo* was applied to a request to modify an affirmative action consent decree by a union and its employees. In both cases, the Second Circuit stated that *Rufo* "constitutes a wholesale change, not limited to institutional reform cases." *Id.* (citing *Still's Pharmacy*, 981 F.2d at 636-37).

¹⁴³ See *Patterson*, 13 F.3d at 39 (granting modification because achievement of decree's goal justified elimination of affirmative action provisions); *Still's Pharmacy*, 981 F.2d at 639-40 (granting modification but denying termination of order until state showed that decree's purpose was achieved).

¹⁴⁴ 46 F.3d 1198 (D.C. Cir. 1995).

¹⁴⁵ The decree ordered divestiture of 22 regional Bell operating companies. See *id.* at 1199-1200. The consent decree has since been effectively nullified by passage of a section of the Telecommunications Act of 1996, 47 U.S.C. § 521 (Supp. I 1996). See Leslie Cauley, Telecom Czar Frets Over New Industry Rules, *Wall St. J.*, Feb. 12, 1996, at B1 (recounting reaction of Judge Greene, who oversaw AT&T consent decree for 12 years, to Telecommunications Act of 1996—termed by some as "Judge Greene Retirement Act"); Bryan Gruley, Justice Department Asks to Keep Data of Four Baby Bells, *Wall St. J.*, Feb. 29, 1996, at B3 (alluding to government attempt to retain background documents despite its motion to terminate decree on grounds of obsolescence).

¹⁴⁶ See *Western Elec.*, 46 F.3d at 1199. At the time, McCaw Cellular Communications was the largest U.S. cellular telephone service provider. See *id.* Because of McCaw Cellular's affiliation with several Regional Holding Companies (RHCs), McCaw fell within the consent decree's definition of a "Bell Operating Company." See *id.* at 1201 & n.1.

¹⁴⁷ In considering government-supported modification requests, courts have generally taken a deferential backseat to the Department of Justice, inquiring only whether modification is in the "public interest." See, e.g., *United States v. Sprint Corp.*, 1996-1 Trade Cas. (CCH) ¶ 71,300 (D.D.C. 1995) (providing that if modification is not contested by any party to agreement, "it shall be granted if the proposed modification is within the reaches of the public interest"); *United States v. Great Atl. & Pac. Tea Co.*, 1985-1 Trade Cas. (CCH) ¶ 66,546 (S.D.N.Y. 1985) (terminating, as within public interest and with consent of government, consent decree enjoining grocery chain's misuse of buying power); *United States v. Owens-Illinois, Inc.*, 1984-1 Trade Cas. (CCH) ¶ 66,060 (N.D. Cal. 1984) (terminating, as within public interest and with consent of government, consent decree enjoining glass company from leasing or selling vacuum-closing machinery); see also Edwin M. Zimmerman, The Antitrust Divisions's Decree Review and Private Litigation Programs, 51 *Antitrust*

Corp., a competitor that was not a party to the original decree.¹⁴⁸ AT&T contended that modification was warranted under *Rufo* because of an unanticipated change in factual conditions since entry of the decree.¹⁴⁹ The unanticipated change, AT&T argued, was that many of the Regional Holding Companies (RHCs) had begun providing exchange services outside of their regions and had acquired controlling interests in more than half of the twenty-five largest cellular markets.¹⁵⁰ The district court, adopting *Rufo*, granted AT&T's request, agreeing that neither party to the original decree anticipated the RHCs' entry into markets outside of their previously delegated regions.¹⁵¹ Because these unanticipated changes caused the decree effectively to prohibit significant business activity that the district court had decided to allow in the original entry of the decree, the decree had been rendered "substantially more onerous."¹⁵²

Although it acknowledged *Rufo*'s clear command that "it should generally be easier to modify an injunction in an institutional reform case than in other kinds of cases,"¹⁵³ the D.C. Circuit affirmed, holding that *Rufo* is generally applicable in all contexts.¹⁵⁴ The court explained its decision by noting that the *Rufo* Court formulated its test while interpreting Rule 60(b)(5), which does not distinguish based on the nature of the litigation.¹⁵⁵ Further, because the *Rufo* test did not incorporate the "grievous wrong" test of *Swift*, the D.C. Circuit deter-

L.J. 105, 113 (1982) (discussing application of *Swift* decree to consented-to modifications); Anderson, *supra* note 1, at 143-44 (explaining public interest standard for consented-to modifications). But cf. *Maryland v. United States*, 460 U.S. 1001 (1983) (Rehnquist, J., dissenting) (subjecting consent decree to intense review and conditioning approval on parties' acceptance of modifications that satisfied Court's own criteria for protecting public interest), *aff'g* *United States v. AT&T*, 1982-2 Trade Cas. (CCH) ¶ 64,979 (D.D.C. 1982); Note, *The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974*, 82 Mich. L. Rev. 153, 154 (1983) (analyzing AT&T decree and arguing that courts should not discharge their duty as protectors of public interest by deferring to Department of Justice).

¹⁴⁸ See *Western Elec.*, 46 F.3d at 1199. BellSouth was one of seven RHCs created by the consent decree, each of which wholly owned and operated a set of Bell operating companies. See *id.* at 1200. Interestingly, BellSouth conceded that *Rufo* was the applicable standard for the modification of AT&T's antitrust consent decree. See *id.* at 1203. It claimed error primarily in the district court's misapplication of *Rufo*, arguing that the changed conditions had been *anticipated* by AT&T. See *id.* at 1204.

¹⁴⁹ See *id.* at 1204.

¹⁵⁰ See *id.* at 1206.

¹⁵¹ See *id.* at 1204-05.

¹⁵² *Id.* at 1207.

¹⁵³ *Id.* at 1203. The D.C. Circuit also recognized that other circuits had limited *Rufo* to decrees involving institutional reform litigation. See *id.* (citing *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1148-49 (6th Cir. 1992) (en banc); *W.L. Gore & Assocs. v. C.R. Bard, Inc.*, 977 F.2d 558, 562 (Fed. Cir. 1992)).

¹⁵⁴ See *id.* at 1208.

¹⁵⁵ See *id.* at 1203.

mined that “[a]ny doubts about the continued significance of *Swift* were . . . laid to rest in *Rufo*.”¹⁵⁶

After finding modification warranted under the flexible *Rufo* standard, the D.C. Circuit proceeded to consider whether the district court was justified in finding that modification would not undermine the primary objective of the decree.¹⁵⁷ The court noted that the primary purpose of the decree was not to separate AT&T and the RHCs solely for the sake of separation.¹⁵⁸ Rather, the decree’s purpose was to remove the incentive and opportunity for the local bottleneck monopolies¹⁵⁹ to discriminate in favor of AT&T’s dominant inter-exchange services.¹⁶⁰ Because McCaw was not a bottleneck monopoly, the court determined that granting modification to allow AT&T’s acquisition of McCaw would not interfere with the decree’s purpose.¹⁶¹

Thus, like the Second Circuit in *Kodak*, the D.C. Circuit explicitly adopted the flexible *Rufo* standard for modification requests in the antitrust context. Yet neither case represents an actual departure from the *United Shoe* standard—both courts imported the *United Shoe* purpose test despite the Supreme Court’s failure to do so in *Rufo*. Nonetheless, in light of *Rufo*’s treatment of *United Shoe*’s “purpose” test¹⁶² and the professed willingness of a majority of circuits to extend *Rufo* fully,¹⁶³ antitrust enforcers are justified in their fear that future courts will apply *Rufo* to release defendants from con-

¹⁵⁶ Id. at 1202-03. Once it determined the appropriate standard, the D.C. Circuit reviewed the district court’s finding that AT&T’s request satisfied the *Rufo* standard. The D.C. Circuit agreed that there were significant changed conditions but looked into whether the parties had anticipated these changes upon entry of the decree. See id. at 1204. After close analysis of the prior opinions regarding the AT&T decree, the D.C. Circuit found that neither the United States nor AT&T had anticipated that RHCs would wind up providing local telecommunications services outside their regions soon after divestiture. See id. The court also agreed with the district court’s conclusion that because the decree barred AT&T from acquiring an interest in a greater number of companies, the decree was substantially more onerous. See id. at 1207.

¹⁵⁷ See id. at 1207.

¹⁵⁸ See id.

¹⁵⁹ “Bottleneck monopoly” describes a situation where one who possesses monopoly power in one market (e.g., local telephone service) uses its monopoly power or control of “the bottleneck” to restrict entry or otherwise injure competition in related markets (e.g., long distance telephone service). See Louis B. Schwartz et al., *Free Enterprise and Economic Organization: Government Regulation* 897 (6th ed. 1985).

¹⁶⁰ See *Western Elec.*, 46 F.3d at 1207.

¹⁶¹ See id.

¹⁶² See supra notes 86-90 and accompanying text.

¹⁶³ See supra notes 112-56 and accompanying text.

sent decrees before the primary purposes of the decrees have been achieved.¹⁶⁴

III

KEEPING *RUFO* IN ITS CELL

This Section explores some critical differences between institutional reform and antitrust litigation and demonstrates why a flexible standard, perhaps justified in the institutional reform context, is inappropriate for antitrust consent decrees. This Section also explains why a flexible standard unduly alters the settlement incentives of plaintiffs, who will become reluctant to enter into consent decrees to the extent that they fear their bargain will not be enforced. It concludes that the stricter *Swift/United Shoe* test is more appropriate in the antitrust context and is better suited toward efficient enforcement of the antitrust laws.

A. *The Differences Between Institutional Reform and Antitrust Consent Decrees*

In setting forth its flexible *Rufo* standard, the Supreme Court carefully steered its way around *Swift*, confining its holding to the institutional reform context.¹⁶⁵ It did so for several important reasons. First, the Court recognized that the unique nature of institutional reform litigation requires a flexible approach for the litigation to achieve its reform-oriented goals.¹⁶⁶ Second, the public's interest in the efficient operation of its institutions necessitates use of a flexible stance toward modification.¹⁶⁷ Third, the Court expressed concern that without a flexible standard, district courts may disturb the allocation of powers within our federal system by hindering local government administrators from solving the problems of institutional reform.¹⁶⁸ This Part examines more closely the Court's rationales for adopting a flexible standard in the institutional reform context, and it demonstrates why such a standard is not appropriate in the very dissimilar antitrust context.

¹⁶⁴ Uncertainty may persist even when the court purports to ensure that the decree's purposes have been achieved, as adoption of the lenient *Rufo* standard may tend to prejudice a court's view of the evidence. See Brief for United States at 4 n.2, *United States v. Eastman Kodak*, 63 F.3d 95 (2d Cir. 1995) (No. 94-6190) (on file with the *New York University Law Review*) ("[T]he [district] court . . . obviously and mistakenly believed that *Rufo* had substantially lightened Kodak's burden of proof." (citations omitted)).

¹⁶⁵ See *supra* notes 84-85 and accompanying text.

¹⁶⁶ See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380 (1992).

¹⁶⁷ See *id.* at 381.

¹⁶⁸ See *id.* at 392.

1. *Nature of Changed Conditions*

As the Supreme Court recognized in *Rufo*, antitrust litigation and institutional reform litigation are very different creatures, and the divergent nature and purposes of decrees arising in the two contexts justify application of differing modification standards.¹⁶⁹ In the institutional reform context, parties have increasingly resorted to consent decrees as a means of solving a wide spectrum of disputes involving public institutions.¹⁷⁰ Institutional reform decrees typically involve complex and detailed affirmative plans to reform the future operations of an institution.¹⁷¹ As such, these decrees often are based heavily on speculative predictions about future economic, demographic, and political conditions.¹⁷² Thus, many problems are bound to appear only after the plan is put into practice,¹⁷³ and “[b]road[] judicial discretion to modify the parties’ agreement is required so that [the decree] may be fine-tuned to accomplish its goal.”¹⁷⁴

The changes that occurred during the life of the problematic *Rufo* decree are illustrative of the need for a flexible standard in the institutional reform setting. Significant population changes plagued timely implementation of the *Rufo* decree from the outset. When the decree was entered in 1979, it specifically incorporated an architectural program designed to include 309 single occupancy cells.¹⁷⁵ By 1983, with construction not even started and the actual inmate population far ex-

¹⁶⁹ See *id.* at 380-81 (noting that “flexible approach is often essential to achieving the goals of reform litigation”).

¹⁷⁰ See Note, *supra* note 69, at 1020-21 (observing that reform decrees are typically employed by plaintiffs to settle disputes over prison conditions, school desegregation, zoning, special education programs, toxic waste litigation, and conditions of public mental health institutions).

¹⁷¹ See, e.g., *Rufo*, 502 U.S. at 367, 371-72 (aiming to reform prison conditions to meet constitutional standards); *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955) (implementing school desegregation plan); *New York State Ass’n for Retarded Children v. Carey*, 706 F.2d 956, 959 (2d Cir. 1983) (ordering state to place retarded patients in homes of no more than 10 patients); *Philadelphia Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1117-18 (3d Cir. 1979) (requiring defendants to implement reform in Medicaid program).

¹⁷² See, e.g., *Rufo*, 502 U.S. at 375-76 (finding decree had been based on prediction of future inmate population); *Carey*, 706 F.2d at 966 (finding decree had been based in part on prediction of New York City’s housing market); *United States v. City of Chicago*, 663 F.2d 1354, 1356 (7th Cir. 1981) (finding decree had been based on projection of racial composition of city’s labor force); *Shapp*, 602 F.2d at 1117 (finding decree had been based on prediction of number of welfare recipients needing medical checkups). See generally Note, *supra* note 69, at 1033 (asserting that institutional reform decrees “tend to be based unusually heavily on predictions about the future”).

¹⁷³ See Note, *supra* note 69, at 1034 (noting that subsequent events may “render institutional reform relief outdated, ineffectual, or counterproductive”).

¹⁷⁴ *Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989).

¹⁷⁵ See *Rufo*, 502 U.S. at 375. The architectural plan was based on a projected *decline* in inmate population. See *id.*

ceeding the population projected by the plan, the plaintiff prisoners petitioned the court to amend the decree to furnish a facility with 435 cells.¹⁷⁶ Due to the unanticipated increase in jail population, the district court granted modification.¹⁷⁷ In 1989, due to another unexpected increase in inmate population, the sheriff moved to modify the decree to permit double bunking in 197 cells.¹⁷⁸ This request, denied by the district and circuit courts, was granted only after the Supreme Court applied its flexible new standard.

In other cases, unexpected financial difficulties or unforeseen hurdles to implementation drove the government defendant to seek modification of complex ongoing remedial decrees. For instance, an unanticipated glut in the New York City housing market rendered compliance with one decree prohibitively expensive.¹⁷⁹ Elsewhere, an erroneous prediction of the number of future welfare recipients in need of medical checkups prompted the City of Philadelphia to seek modification of a decree requiring it to administer at least 180,000 checkups in a given year.¹⁸⁰ Finally, a failure to anticipate reductions in federal Medicaid funding forced New York State to seek modification of an order requiring reimbursements to state pharmacists.¹⁸¹ In such cases, institutional reform plaintiffs are more concerned with accomplishment of the underlying goal than with enforcement of the specific remedy already outlined in the consent decree.¹⁸² In light of such concerns, courts and commentators have stressed the need for flexibility in order to accomplish the broad goals of reform litigation.¹⁸³

Unlike the comprehensive, affirmative plans incorporated in most institutional reform decrees, antitrust consent decrees generally contain clear mandates which specify certain steps to be taken and/or proscribe certain anticompetitive behavior.¹⁸⁴ For example, the AT&T

¹⁷⁶ See *id.* at 375-76.

¹⁷⁷ See *id.* at 376.

¹⁷⁸ See *id.*

¹⁷⁹ See *New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 965-66 (2d Cir. 1983).

¹⁸⁰ See *Philadelphia Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1118 (3d Cir. 1979).

¹⁸¹ See *Still's Pharmacy v. Cuomo*, 981 F.2d 632, 637-38 (2d Cir. 1992).

¹⁸² See Fiss, *supra* note 23, at 27 (noting that remedial phase in institutional reform litigation "is concerned not with the enforcement of a remedy already given, but with the giving or shaping of the remedy itself").

¹⁸³ See *supra* notes 72-74 and accompanying text; see also Frances A. McMorris, *Consent Decrees Worry Strapped Cities*, *Wall St. J.*, Apr. 8, 1996, at B2 (providing examples of financially strapped cities and states seeking to modify longstanding consent decrees in light of changed social, economic, and political conditions).

¹⁸⁴ See, e.g., *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 245 (1968) (enjoining United Shoe from selling machines at certain terms, acquiring certain patents, and acquiring secondhand shoe machinery); *United States v. Swift & Co.*, 286 U.S. 106, 111

decree, while relatively complex in nature, set forth a clear directive to divest the "Baby Bells" and refrain from future investments in certain markets.¹⁸⁵ Likewise, the *Kodak* decrees imposed straightforward prohibitions on certain trade practices.¹⁸⁶ Of course, the imposition of restraints upon the trade practices of such corporate behemoths as AT&T and Kodak allows new competitors to more easily enter the market and enables existing competitors to strengthen their market positions. Additionally, introduction of innovative, competing products into the marketplace may further reduce the market power of those bound by antitrust consent decrees.¹⁸⁷ Although such significant market changes may competitively disadvantage the antitrust defendant,¹⁸⁸ such procompetitive market changes are often the very changes sought by the antitrust enforcement agencies and presumably are those anticipated by both parties upon entry of the decree.¹⁸⁹

(1932) (enjoining defendants from making certain acquisitions, selling meat at retail, and selling fresh milk or cream).

Antitrust consent decrees generally can be classified as either "once-for-all" decrees or "regulatory" decrees. See Posner, *supra* note 84, at 385. "Once-for-all" decrees, typically employed in merger cases, normally do not present modification problems because they eliminate the alleged antitrust violation by forcing an immediate change in the defendant's business (i.e., divestiture). See *id.* at 386. On the other hand, "regulatory" decrees may be viewed as establishing an ongoing supervisory relationship between the defendant and either the antitrust authorities or the court in which the decree was entered. See *id.*; see also Easterbrook, *supra* note 36, at 40-41 (referring to such decrees as "long-term relational contracts").

¹⁸⁵ See *United States v. Western Elec. Co.*, 46 F.3d 1198, 1200 (D.C. Cir. 1995).

¹⁸⁶ See *United States v. Eastman Kodak Co.*, 63 F.3d 95, 98 (2d Cir. 1995) (prohibiting Kodak's sale of "private label film" and bundling of photofinishing services with its film); see also text accompanying note 129.

¹⁸⁷ See, e.g., *United States v. Paramount Pictures*, 1980-2 Trade Cas. (CCH) ¶ 63,553 (S.D.N.Y. 1980) (describing change in motion picture industry with introduction of cable television, drive-in theaters, and VCR); see also McCoy, *supra* note 84, at 34-35 (suggesting that change in industry warrants termination of longstanding decrees regulating motion picture industry).

¹⁸⁸ See DeBow, *supra* note 21, at 357-58 ("A decree which made sense at the time it was entered may simply be overtaken by changes in the affected industry and rendered a nullity or worse may have adverse effects on competitive vigor."); McCoy, *supra* note 84, at 32 (describing changed conditions where parties restrained by decrees are smaller and less powerful than unrestrained competitors).

¹⁸⁹ Antitrust consent decrees often include provisions banning practices which, while not necessarily in violation of the antitrust laws, are considered to be harmful to competition. See *supra* note 47. These provisions are intended to "fence in" defendants who have illegally acquired market power, serving "as a broad check on potential monopolistic or oligopolistic abuses even after the companies' market power ha[s] diminished considerably." Note, *supra* note 69, at 1034; see also *Swift*, 286 U.S. at 110-11, 118 (noting that decree imposed additional restraints intended to prevent defendants from using their illegally acquired market power in meat industry to acquire unfair advantages in other food industries); *Kodak*, 63 F.3d at 98 (noting that decree prohibited Kodak from otherwise lawful practice of bundling its color film with photofinishing).

The *Kodak* district court's findings of fact suggest that the changes it relied upon in granting relief may have been those very changes anticipated upon entry of the decree. The *Kodak* decrees, entered in 1921 and 1954, aimed to dissolve the combination found to exist in violation of the Sherman Act and to create a competitive photofinishing market.¹⁹⁰ Thus, both parties presumably anticipated the entry of new competitors into the marketplace. Yet it was the entry of a new, foreign competitor—Fuji—which led to a decrease in Kodak's market share and constituted the basis for Kodak's modification request.¹⁹¹ The *Kodak* case therefore provides a telling example of the type of changed conditions relied upon in requests to modify antitrust consent decrees. In contrast to unforeseen hurdles to implementation of the affirmative remedy typically relied upon by institutional reform defendants seeking modification, the changes advanced by antitrust defendants are often the very ones that were anticipated by both parties upon entry of the decree. Such changes should not warrant modification unless the defendant can demonstrate that the purposes of the decree clearly have been achieved.

2. *Public Interest*

Another visible difference between antitrust and institutional reform consent decrees is the impact of public interest considerations on the modification standard. The *Rufo* Court determined that a flexible decree was necessary in the institutional reform context in part because such decrees "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions."¹⁹² In *Rufo*, the Court expressed concern that without modification, pretrial detainees would be released from the Suffolk County Jail, jeopardizing the public.¹⁹³ In addition, institutional reform decrees often implicate constitutional rights and affect the right of the general public to control the operation of its institutions.¹⁹⁴ Agreements made by public institutions frequently represent

¹⁹⁰ See *Kodak*, 63 F.3d at 98. At the time the decrees were entered, Kodak enjoyed a 90% share of both the film and photofinishing markets. See *id.*

¹⁹¹ See *id.* at 98-100; see also *supra* note 141.

¹⁹² *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 381 (1992) (citing *Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989)).

¹⁹³ See *id.* at 382. The Court conveniently ignored the public interest implicated in providing the prisoners, many of whom were not yet convicted, with constitutionally acceptable conditions. Recognition of this interest, of course, would have militated against modification.

¹⁹⁴ See *Patterson v. Newspaper & Mail Deliverers' Union*, 13 F.3d 33, 38 (2d Cir. 1993) (noting that flexible standard is appropriate when decree "seeks pervasive change in long-established practices affecting a large number of people, and the changes are sought to

political choices regarding the implementation of certain programs; such agreements should be modifiable where circumstances change, as more efficient techniques emerge, or as different conceptions of the public interest emerge.¹⁹⁵

Antitrust consent decrees, however, also implicate the public interest.¹⁹⁶ In antitrust cases, these considerations revolve around the preservation of the public's economic rights.¹⁹⁷ A more stringent modification standard therefore protects the public interest, as the decree itself is assumed to promote competition, thereby preserving the public's economic rights.¹⁹⁸ A flexible standard—especially one that does not require that the purposes of the decree be substantially achieved before modification—endangers the public's rights because it allows for the termination or modification of decrees which are still necessary to promote competition.¹⁹⁹

vindicate significant rights of a public nature"); Jost, *supra* note 31, at 1148-51 (discussing modification of injunctions by appeal to public interest).

¹⁹⁵ See Note, *supra* note 69, at 1035-36.

¹⁹⁶ Frequently, courts applying *Rufo* beyond the institutional reform context invoke without explanation *Rufo*'s public interest rationale. For example, the D.C. Circuit concluded that because the AT&T decree "regulates a large portion of the complex telecommunications industry," it reached far beyond the parties involved in the suit and "significantly affected the public." *United States v. Western Elec. Co.*, 46 F.3d 1198, 1203 (D.C. Cir. 1995). Although correct in concluding that the AT&T decree affects the public, the D.C. Circuit curiously omitted an explanation of *how* a flexible approach would better protect the public interest. See Brief for United States at 13 n.19, *United States v. Eastman Kodak*, 63 F.3d 95 (2d Cir. 1995) (No. 94-6190) (on file with the *New York University Law Review*) (citing district court's "perverse" conclusion that lower burden is appropriate "because Kodak seeks pervasive change in long-established practices affecting a large number of people, and seeks the changes to vindicate significant rights of a public nature" (quoting *United States v. Eastman Kodak Co.*, 853 F. Supp. 1454, 1465 (W.D.N.Y. 1994), *aff'd*, 63 F.3d 95 (2d Cir. 1995))).

¹⁹⁷ This Note assumes that the primary objective of antitrust enforcement agencies is to protect the economic rights of the public by promoting competition. See generally Eleanor M. Fox & Lawrence A. Sullivan, *Cases and Materials on Antitrust* 3-11 (1989). However, the more modern "interest group" or "economic" theory of regulation regards government regulation as a product, subject to ordinary market forces of supply and demand. See Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. Cal. L. Rev. 1293, 1303 (1988). On the demand side, interest groups seek favorable regulations as a means of transferring wealth from consumers (or other firms) to themselves. See *id.* On the supply side, regulators dispense such regulations in exchange for power, votes, money, or other consideration. See *id.*

¹⁹⁸ This line of reasoning assumes, of course, that as in *Swift* and *Kodak*, the antitrust defendant is the party seeking modification. In the less routine case where the government seeks modification, see, e.g., *United States v. United Shoe Mach. Corp.*, 391 U.S. 244 (1968), public interest considerations might suggest a more flexible approach.

¹⁹⁹ See *supra* notes 184-89 and accompanying text. Further, giving the court more discretion in granting modification essentially transfers responsibility for the public's economic rights from antitrust enforcement agencies to the comparatively less expert district courts.

To the extent courts' broad application of *Rufo*'s flexible standard encourages antitrust defendants to seek modification of existing decrees whose purposes have not yet been achieved, the public interest is also implicated. As more defendants seek "premature" modification, antitrust enforcement agencies will need to divert a greater percentage of their limited resources from initial investigation and prosecution of antitrust offenses toward retaining decrees whose continued validity is necessary to protect competition.²⁰⁰ The public interest considerations implicated by antitrust consent decrees thus militate in the opposite direction of those implicated by institutional reform decrees: with institutional reform, the public interest is generally best served with a flexible modification standard, while successful antitrust enforcement depends on a greater degree of rigidity and a stricter modification standard.

3. Federalism Concerns

Some courts and commentators have pinned the tail of the *Rufo-Swift* dichotomy on the "government-as-defendant" donkey.²⁰¹ Within the institutional reform context, consent decree modification is typically sought in federal courts by state and local governments. In response to this tension between the federal and state governments, the Supreme Court pointed out that "'the allocation of powers within our federal system' require[s] that the district court defer to local government administrators, who have the 'primary responsibility for . . .

²⁰⁰ See Brief for United States at 11, 31, *United States v. Eastman Kodak*, 63 F.3d 95 (2d Cir. 1995) (No. 94-6190) (on file with the *New York University Law Review*) (arguing that Department of Justice has been forced to relitigate de novo the same issues it had attempted to settle by decree). Justice Cardozo recognized this inefficiency in *Swift*, noting that "[t]he difficulty of ferreting out these evils and repressing them when discovered supplies an additional reason why we should leave the defendants where we find them." *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).

²⁰¹ See *Patterson v. Newspaper & Mail Deliverers' Union*, 13 F.3d 33, 34, 38 (2d Cir. 1993) (suggesting that modification standard may differ where government entity is involved); *Evans v. City of Chicago*, 10 F.3d 474, 476 (7th Cir. 1993) (interpreting *Rufo* as holding that "consent decrees regulating the conduct of state or local governments may be modified more freely than those entered by private litigants"); cf. Note, *supra* note 49, at 1311-14 (suggesting that Supreme Court cases after *Swift* imply that standard might be lessened when government requests modification); Rose E. King, Note, Consent Decree Modification and the Suffolk County Jail: What a Long Strange Trip It's Been, 21 *New Eng. J. on Crim. & Civ. Confinement* 231, 255 (1995) (reviewing cases that disagree about whether standard varies depending upon whether government is party seeking modification). A more flexible standard is in accord with the holdings of *Swift*, *United Shoe*, and *Rufo*, where the Court ruled in favor of each of the government parties. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 372 (1992); *United Shoe*, 391 U.S. at 247; *Swift*, 286 U.S. at 119-20.

solving' the problems of institutional reform, to resolve the intricacies of implementing a decree modification."²⁰²

An example of the deference compelled by federalism concerns was illustrated in *Rufo*. The Supreme Court in *Rufo* admonished the district court for paying short shrift to the state's plea that fiscal problems impeded its compliance with the decree.²⁰³ Although the Court acknowledged that financial difficulties should not be allowed to justify creation or perpetuation of constitutional violations, it declared that such difficulties are a legitimate concern of government defendants and must be considered in ruling on modification requests.²⁰⁴

Moreover, due to the local nature of institutional reform decrees, federalism concerns often dictate application of a more flexible standard where institutional reform decrees binding state or local governments go beyond what is constitutionally required.²⁰⁵ Antitrust consent decrees, on the other hand, generally bind corporations, not state or local governments. Accordingly, federalism concerns do not present themselves in the antitrust context. Overall, a more flexible standard may be justified by the unusual nature of institutional reform litigation, the public's interest in the efficient operation of its institutions, and the federalism concerns inherent in institutional reform litigation. Yet these factors are absent in—and cannot be relied upon to justify *Rufo*'s extension to—the antitrust context.

B. The Impact Upon Settlement Incentives

Perhaps the strongest rationale for confining *Rufo*'s flexible standard to the institutional reform context is the negative impact such a standard would have on antitrust enforcers' settlement incentives. In both institutional reform and antitrust litigation, consent decrees often

²⁰² *Rufo*, 502 U.S. at 392 (quoting *Board of Educ. v. Dowell*, 498 U.S. 237, 248 (1991); *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955)). Federalism concerns played a major role in the *Dowell* court's decision not to apply the stringent *Swift* standard. See *Dowell*, 498 U.S. at 248 ("Considerations based on the allocation of powers within our federal system . . . support our view that . . . *Swift* does not provide the proper standard . . .").

²⁰³ See *Rufo*, 502 U.S. at 392-93 (noting that district court should defer to local government administrators in resolving intricacies of decree).

²⁰⁴ See *id.*

²⁰⁵ Local and state governments cannot cry federalism to avoid complying with provisions which are minimally required by the Constitution. See *id.* at 392 (noting that financial constraints cannot justify creation or perpetuation of constitutional violations). Yet to the extent local officers agree to provisions beyond those constitutionally required, federalism concerns may dictate flexibility. See *id.* (recalling that local administrators have primary responsibility for dealing with problems of institutional reform); *Dowell*, 498 U.S. at 247-48 (citing federalism considerations and dissolving desegregation decree after local authorities had complied with it for reasonable period of time).

present an efficient alternative to litigated judgments.²⁰⁶ Consent decrees both enforce the legal rule and provide joint benefits for the parties to divide.²⁰⁷ Such settlements save judicial resources, reduce litigation costs, and allow the parties to negotiate a judgment tailored to their demands.²⁰⁸ Due to these significant advantages, the formulation of a modification standard should not shift the equilibrium so as to deter either side from entering into consent decrees.²⁰⁹

A standard which places undue emphasis on the need for finality may decrease settlement incentives for defendants. As modification becomes more difficult, defendants are more likely to roll the litiga-

²⁰⁶ Similar to contracts and other forms of settlement, consent decrees presumably represent an efficient allocation of risks between the negotiating parties. See Jost, *supra* note 31, at 1130. Further, unlike typical settlements, consent decrees may also ensure better compliance with longlasting injunctive relief, as parties seeking enforcement need not file an independent lawsuit every time the other party violates a provision of the decree. See Kramer, *supra* note 24, at 325. Consent decrees are also published as court orders and may therefore provide added benefits for plaintiffs to the extent other potential defendants are deterred from engaging in similar conduct. See Mengler, *supra* note 25, at 317-18; Shen, *supra* note 42, at 1787.

²⁰⁷ See Easterbrook, *supra* note 36, at 25. The government usually agrees to settle either because successful litigation would provide no greater relief or because the facts or law warrant compromise. The consent decree enables the government to obtain an "assured" and "immediate" result without proof of claims which may never be established at trial. See Milton Handler, *Antitrust—Myth and Reality in an Inflationary Era*, 50 N.Y.U. L. Rev. 211, 241 (1975). Antitrust defendants may settle because they hold little hope of prevailing at trial or because the issues do not warrant the expenditures inevitable in a full-fledged antitrust trial. See *id.*

²⁰⁸ See Resnik, *supra* note 24, at 63 ("[C]onsent decrees are frequently assumed to save both litigants and courts the expenses of litigation while enabling results akin to those produced by litigation.").

²⁰⁹ It is unclear whether a court would respect an express term in a consent decree providing for application of the *Swift* "grievous wrong" test or *United Shoe* "purpose" test instead of the flexible *Rufo* test. As one district court explained, typical modification provisions in consent decrees since *Rufo* tend to incorporate both the *United Shoe* and *Rufo* tests, providing for modification only if the movant clearly shows that

(i) a significant change in circumstances or significant new event subsequent to the entry of the Final Judgment requires modification of the Final Judgment to avoid substantial harm to competition or consumers in the United States, or to avoid substantial hardship to defendants, and

(ii) the proposed modification is (a) in the public interest, (b) suitably tailored to the changed circumstances or new events and would not result in serious hardship to any defendant, and (c) consistent with the purposes of the antitrust laws of the United States.

United States v. Sprint Corp., 1996-1 Trade Cas. (CCH) ¶ 71,300 (D.D.C. 1995). Of course, if courts were certain to defer to a standard expressly incorporated into the decree, parties could bargain for their own standard and deprive courts of much of their inherent power to modify consent decrees. Yet, where a significant intervening change in law or facts greatly changes the decree's complexion, courts would likely view the decree more as a judicial act and grant modification. Further, an incorporated modification standard is likely no more impervious to modification than other of the decree's terms, and a court would probably not allow parties to usurp its own inherent power to modify its own orders.

tion dice.²¹⁰ On the other hand, an excessively flexible standard risks chilling plaintiffs' settlement incentives because of a fear that their bargained-for agreement will not be enforced.²¹¹ As the modification standard becomes more flexible, plaintiffs are therefore more likely to pursue a more stable, litigated judgment. Such concerns reverberated throughout Justice Stevens's dissenting opinion in *Rufo*, which expressed his concern that the flexible standard adopted by the majority would undermine the incentives to end protracted litigation by consent decree.²¹²

Yet, a modification standard's impact on settlement incentives differs depending upon the context. Several factors suggest that a flexible standard will not significantly deter parties to institutional reform litigation from employing consent decrees as a means of dispute resolution. First, the perpetual and speculative nature of institutional reform litigation necessarily gives plaintiffs a significant role to play in both the development and later the potential modification of a remedial plan.²¹³ Thus, the alternative to settlement—a litigated court judgment—may not serve the specific needs of the plaintiff class efficiently.²¹⁴ Second, a litigated judgment is also prone to modification

²¹⁰ This argument assumes, of course, that parties electing not to settle by consent decree would not have settled without a consent decree. Due to the many advantages of consent decrees over private settlements, this assumption is well founded, especially vis-à-vis government initiated antitrust cases. See Resnik, *supra* note 24, at 45-47 (pointing out that consent decrees can be enforced by contempt proceedings, whereas settlements require parties to file new lawsuit based on breach of contract).

²¹¹ One commentator has suggested that to "open the floodgates for modification would be, in effect, to invite [X] to make concessions in order to induce [Y's consent] and then, subsequently, to renege on its bargain by attempting to add to the decree the very restrictions that [Y] opposed." Milton Handler, *Twenty-Fourth Annual Antitrust Review*, 72 *Colum. L. Rev.* 1, 33 (1972).

Such a conspicuously anticontractual approach toward consent decrees undermines the strong public policy, asserted in various Supreme Court decisions, of promoting finality of such agreements and assuring each party that its bargained-for agreement will remain undisturbed. The public interest justification advanced by the *Rufo* Court in support of its flexible standard undercuts the strong "[p]ublic policy . . . that there be an end of litigation; . . . that matters once tried shall be considered forever settled as between the parties." *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981); see also *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332, 341 n.16 (3d Cir. 1993) (recognizing criticism of *Rufo* for decreasing settlement incentives).

²¹² See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 407-08 (1992) (Stevens, J., dissenting) ("To the extent that litigants are allowed to avoid their solemn commitments, the motivation for particular settlements will be compromised, and the reliability of the entire process will suffer."); see also Keating, *supra* note 9, at 191-97 (arguing that flexible *Rufo* standard will threaten improvements negotiated by inmates in recent prison reform litigation).

²¹³ See *supra* notes 169-77 and accompanying text; see also *Philadelphia Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1120 (3d Cir. 1979).

²¹⁴ Parties are generally better off when allowed to tailor their own relief than when forced to rely on court fashioned relief. See *Rufo*, 502 U.S. at 383 ("[P]laintiffs . . . know

under the same flexible standard and provides no greater assurance that the defendant will be forced to perform in the face of changed conditions.²¹⁵ Finally, the often limited resources of plaintiff classes will only increase the attractiveness of the consent decree as a means of avoiding the costs and uncertainties of litigation.²¹⁶ Thus, a flexible approach toward modification is not likely to deter institutional reform plaintiffs from entering into consent decrees.

In antitrust litigation, by contrast, a flexible approach—especially one allowing modification that undermines the decree's central purpose—would significantly decrease the utility of the consent decree. The government will become increasingly reluctant to employ consent decrees if it fears that antitrust defendants will be able to subvert their purposes.²¹⁷ Of course, antitrust enforcement agencies may have no choice but to accept such concerns where their chances of winning at trial are weak or where the costs of protracted litigation outweigh the benefits to society of imposing restraints on the defendant. However, where the government's chances of winning are strong, it may elect to litigate and pursue more permanent remedies rather than take its chances with a flexible modification standard.²¹⁸ Unlike in the institu-

that if they litigate to conclusion and win, the resulting judgment or decree will give them what is constitutionally adequate at that time but perhaps less than they hoped for."); supra note 208 and accompanying text.

²¹⁵ Federal Rule of Civil Procedure 60(b)(5) applies not just to consent decrees but to any final judgment. Presumably, *Rufo* would likewise apply to requests to modify *litigated* decrees. See *Rufo*, 502 U.S. at 383.

²¹⁶ See Note, supra note 69, at 1020-22 (noting that institutional reform litigation impacts such classes as prisoners, mental health patients, students, and minorities).

²¹⁷ A flexible standard may also raise concerns that courts hearing modification requests will allow the flexible *Rufo* standard to prejudice its view of the evidence. See supra note 141.

²¹⁸ Some commentators have suggested that the public would be better served if antitrust enforcement agencies pursued litigated judgments instead of settling cases via consent decree. See Harry First, Is Antitrust "Law"?, *Antitrust*, Fall 1995, at 9, 11-12 (suggesting that antitrust enforcement policy be tested in "open litigation process" to verify whether such policies adequately address real competition problems and expressing concern that absent strong body of law, powerful interests may overcome antitrust enforcement officials); Owen M. Fiss, Against Settlement, 93 *Yale L.J.* 1073, 1076-78, 1085-87 (1984) (arguing that settlement is inefficient to extent that it deprives society of precedential value of adjudicated judgment or reflects parties' available resources rather than relative merits of claims); see also Peter M. Shane, Federal Policy Making By Consent Decree: An Analysis of Agency and Judicial Discretion, 1987 *U. Chi. Legal F.* 241, 241 (noting Judge Wilkey's warning of "evil[s] of government by consent decree" which have "potential to freeze the regulatory processes of representative democracy" (quoting *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1136 (D.C. Cir. 1983) (Wilkey, J., dissenting))). But cf. Easterbrook, supra note 36, at 27 ("Even if there were 'too few precedents' this would not demonstrate that settlements are unjust. . . . [L]itigation may increase social welfare, but the parties may be excused for thinking that justice does not require *them* to produce this uncompensated benefit for strangers.").

tional reform setting, where litigation typically culminates in court orders requiring an affirmative plan to effectuate reform, antitrust enforcement agencies have available more permanent remedies such as dissolution and divestiture. Indeed, although such remedies are often less efficient alternatives, the Department of Justice has indicated that it may seek such alternatives if a flexible modification standard prevails.²¹⁹

Although a flexible standard is likely to deter plaintiffs from entering into consent decrees, a standard requiring a showing that the purposes of the decree have been attained before modification is granted will not significantly undermine antitrust defendants' tremendous incentives to enter into consent decrees.²²⁰ Consent decrees allow antitrust defendants to avoid large legal fees, unfavorable publicity, and uncertainty affecting business decisionmaking.²²¹ Additionally, and most importantly, the Clayton Act forbids private parties from using a defendant's "admissions" in consent decrees as evidence in future actions.²²² Consent decrees thereby help shield antitrust defendants from subsequent treble damage suits by competitors seeking to piggyback on a successful government suit.²²³ In sum, while a flexible standard may not unduly alter plaintiffs' settlement incentives in institutional reform cases, antitrust enforcers are likely to be deterred from settling via decree if courts apply *Rufo* in the antitrust context. Further, the broad appeal of consent decrees to antitrust defendants ensures that a modification standard which merely holds each party to its bargain will not deter defendants from entering into consent decrees.

²¹⁹ See Brief for United States at 31, *United States v. Eastman Kodak*, 63 F.3d 95 (2d Cir. 1995) (No. 94-6190) (on file with the *New York University Law Review*) ("[I]f such decrees are easily subject to termination or substantial modification at the defendant's behest, . . . the government will have greater incentives to insist on relief that cannot easily be modified in the future.").

²²⁰ See *infra* note 224 (noting overwhelming percentage of antitrust cases settled by consent in years prior to *Rufo*).

²²¹ Companies anxious for their mergers to pass antitrust review are, to some extent, at the mercy of antitrust enforcement agencies. Even where the government's case is relatively weak, companies are often left with no practical choice but to yield to the government's demands. See Wilke & Gruley, *supra* note 1, at A1 ("Companies, eager to get their megadeals approved, are signing on.").

²²² See Clayton Act, 15 U.S.C. § 16(a) (1994).

²²³ Without the aid of an adverse judgment obtained by government litigation, private litigants are rarely able to maintain treble actions. See Staff of Antitrust Subcomm. of the House Comm. on the Judiciary, 86th Cong., 1st Sess., Report on Consent Decree Program of the Dep't of Justice 24 (Comm. Print 1959) ("Because of the protracted nature of antitrust litigation, with the expense and complexity of proof of the legal and economic issues involved, it is difficult at best for a private citizen to prosecute to conclusion an action under the antitrust laws.").

CONCLUSION

Over the past thirty years, antitrust enforcement agencies have fervently embraced the consent decree as a tonic for much of what ails a competitive marketplace.²²⁴ If courts refuse to respect the finality of settlements negotiated in antitrust consent decrees, they will cease to serve as an efficient means of dispute resolution.²²⁵

Courts faced with requests to modify antitrust consent decrees face the often difficult task of deciding whether, pursuant to Rule 60(b)(5), "it is no longer equitable that the judgment should have prospective application."²²⁶ Currently armed with the divergent choices of the *Swift/United Shoe* "grievous wrong"/"purpose" test and *Rufo*'s flexible standard, future courts are constrained only by the nebulous requirement that the decision be "equitable" under Rule 60(b)(5). Courts therefore have wide discretion to set aside the bargained-for, consensual resolution of antitrust actions.

Despite the arguments of some skeptics,²²⁷ many compelling justifications exist for adopting a flexible standard in the institutional reform setting.²²⁸ Nevertheless, it is imperative that courts do not blindly decide that *Rufo* applies in the antitrust context. As recognized by some circuits, "Rule 60(b)(5) sets forth the umbrella concept of 'equitable' that both *Swift* and *Rufo* apply to particular, widely dis-

²²⁴ See *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 249 (1975) (noting that consent decrees terminate about 70-80% of antitrust complaints filed by Department of Justice); Michael L. Weiner, *Antitrust and the Rise of the Regulatory Consent Decree*, *Antitrust*, Fall 1995, at 4, 4 (noting that roughly 70% of all civil complaints filed by Department of Justice are resolved by consent decree); Note, *The ITT Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 *Colum. L. Rev.* 594 (1973) (same); see also Wilke & Gruley, *supra* note 1, at A1 (noting that use of consent decrees by Federal Trade Commission and Department of Justice has risen sharply in past five years and pointing out that in great merger wave of 1990s, antitrust enforcers are "reluctant to take big cases to court, [and] are instead fashioning intrusive settlements that let big deals go ahead but leave the government with a continuing role in monitoring the business").

²²⁵ See Brief for United States at 11, *United States v. Eastman Kodak*, 63 F.3d 95 (2d Cir. 1995) (No. 94-6190) (on file with the *New York University Law Review*) ("[T]he easier it is to modify or terminate consent decrees, the less attractive they become as a means of settling litigation."); see also *supra* note 219 and accompanying text.

²²⁶ Fed. R. Civ. P. 60(b)(5).

²²⁷ For criticism of *Rufo*, see generally Levine, *supra* note 70, at 602-09 (arguing that while *Rufo* may have presented "workable" standard, it failed to explain properly how its standard differed from others and how that standard should be applied); Levine, *supra* note 1, at 1264-75 (same); King, *supra* note 201, at 255-62 (contending that legal test adopted in *Rufo* is flawed because it is applied only to institutional reform litigation and provides greater protection to economic rights of public at expense of individual rights of parties to litigation).

²²⁸ See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380-83 (1992) (noting public policy justifications for permitting modification).

parate fact situations.”²²⁹ Neither the Second Circuit nor the D.C. Circuit has employed *Rufo* to allow modification where the purposes of the decree have not been attained. Yet a general acceptance of *Rufo*, which fails to reconcile adequately *United Shoe*’s “purpose” test, presents such a danger.

²²⁹ *Alexis Lichine & Cie. v. Sacha A. Lichine Estate Selections, Ltd.*, 45 F.3d 582, 586 (1st Cir. 1995); see also *Building & Constr. Trades Council v. NLRB*, 64 F.3d 880, 886-88 (3d Cir. 1995) (finding that neither *Rufo* nor *Swift* controls every modification scenario but that “[i]nstead, each . . . represents a response to a particular set of circumstances”); cf. *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332, 341 n.15 (3d Cir. 1993) (noting that *Rufo* might not completely displace more rigid *Swift* standard).