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# Kaleidoscopic Consent Decrees: School Desegregation and Prison Reform Consent Decrees After the Prison Litigation Reform Act and Freeman-Dowell

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Kaleidoscopic Consent Decrees: School Desegregation  
and Prison Reform Consent Decrees After the Prison  
Litigation Reform Act and *Freeman-Dowell*

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## I. INTRODUCTION

Since the Prison Litigation Reform Act (PLRA or “the Act”) and its changes to modification and termination standards in school desegregation, kaleidoscopic changes have altered the character of an important dispute resolution tool: the consent decree. Traditionally, the consent decree has been recognized as a hybrid between a judicial order and a settlement agreement entered into by parties.<sup>1</sup> However, the modification and termination<sup>2</sup> standards for both prison reform consent decrees and school desegregation consent decrees have changed.

Prison reform consent decrees, along with all other types of institutional reform consent decrees, formerly relied on the *Rufo v. Inmates of Suffolk County Jail* modification standard but now do not rely on this standard.<sup>3</sup> In 1995, Congress set forth a more stringent statutory standard under the PLRA, making it easier to modify or terminate prison reform consent decrees regardless of the conditions set out in the consent decree. Similarly, in school desegregation consent decree cases, the Supreme Court started applying a “good faith” element in termination of school desegregation consent decrees that has allowed courts more discretion even when the goals of the decree have not been met. In each respective area, Congress and the Supreme Court changed the consent decree modification and termination standards to more efficiently return control over prisons and schools to state and local control.<sup>4</sup> These

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1. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992); see also *Ho v. Martin Marietta Corp.*, 845 F.2d 545, 548 (5th Cir. 1988) (noting that “[o]nce the district court enters the settlement as a judicial consent decree ending the lawsuit, the settlement takes on the nature of a judgment”). A leading treatise, however, views it differently:

The judgment is not, like the settlement agreement out of which it arose, a mere contract *inter partes*. The court is not properly a recorder of contracts; it is an organ of government constituted to make judicial decisions, and when it has rendered a consent judgment it has made an adjudication.

1B JAMES W. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 0.409[5], at III-151 (2d ed. 1993); see also *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) (noting that consent decrees have characteristics of judicial orders and contracts).

2. The First Circuit defined “terminate” as “to put an end to” or “to end.” *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 662 (1st Cir. 1997) (quoting *BLACK’S LAW DICTIONARY* 1471 (6th ed. 1990)).

3. See *infra* text accompanying note 74. Other consent decrees still rely on the *Rufo* modification standard. See *infra* Part II.C. As discussed *infra* notes 44-47 and accompanying text, parties have applied the termination standards for school desegregation consent decrees to other areas of institutional reform litigation.

4. See *infra* notes 71-73 and accompanying text for a discussion of Congress’s motivations for creating the new PLRA termination and modification standards. See *infra* note 123 and

changes in prison reform and school desegregation consent decrees have altered the character of consent decrees in these two areas to resemble judicial orders rather than hybrids between a judicial order and settlement agreement and have changed incentives for parties to enter into consent decrees in these areas.

Despite the changes, some courts have concluded that prison reform and school desegregation consent decrees continue to be governed by similar modification and termination standards. Although there has been much legal commentary recently about the changes to prison reform cases brought about by the PLRA<sup>5</sup> and about the constitutionality of the new statutory standards of the PLRA,<sup>6</sup> there has been no discussion regarding the impact of the PLRA's statutory requirements in altering the nature of prison reform consent decrees. There has also been no discussion about the changes in school desegregation consent decree termination standards or the parallels between these changes and the changes in prison reform consent decrees. Now, eight years since the passage of the PLRA and over ten years since the establishment of new

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accompanying text for a discussion of the good faith standard which allows courts to more efficiently return school systems back to state and local control.

5. See, e.g., Theodore K. Cheng, *Invading an Article III Court's Inherent Equitable Powers: Separation of Powers and the Immediate Termination Provisions of the Prison Litigation Reform Act*, 56 WASH. & LEE L. REV. 969, 972 (1999) (arguing that "Congress violates the separation of powers doctrine when it places restrictions on the equitable remedies afforded by Article III courts that adjudicate federal constitutional rights," as it did in the Prison Litigation Reform Act); Brian M. Hoffstadt, *Retaking the Field: The Constitutional Constraints on Federal Legislation that Displaces Consent Decrees*, 77 WASH. U. L.Q. 53, 58-62 (1999) (arguing that certain constitutional provisions, like "the Takings Clause, the Contracts Clause, and the Due Process Clause" affect Congress's "ability to retake the field" from the judiciary and "place only modest limits" on legislation like the PLRA); David M. Adlerstein, Note, *In Need of Correction: The "Iron Triangle" of the Prison Litigation Reform Act*, 101 COLUM. L. REV. 1681, 1681 (2001) ("[T]he PLRA is best understood as a flawed product of three competing imperatives: that penal facilities be administered without judicial or federal interference, that costs of incarceration be controlled, and that procedural conduits for the protection of prisoners' rights be instituted.").

6. See, e.g., Ira Bloom, *Prisons, Prisoners, and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power*, 40 ARIZ. L. REV. 389, 394 (1998) (noting that the PLRA demonstrated an attempt by Congress to exert "'overruling influence' through the employ of several constitutionally questionable devices"); Deborah Decker, Comment, *Consent Decrees and the Prison Litigation Reform Act of 1995: Usurping Judicial Power or Quelling Judicial Micro-Management?*, 1997 WIS. L. REV. 1275, 1276 (analyzing the "constitutional and common sense infirmities of the PLRA's [immediate termination and automatic stay] provisions" in examining whether they violate "constitutional principles of separation of powers"); Anne K. Heidel, Comment, *Due Process Rights and the Termination of Consent Decrees Under the Prison Litigation Reform Act*, 4 U. PA. J. CONST. L. 561, 564 (2002) ("[T]he PLRA violates plaintiffs' rights by denying them a full and fair adjudication of their constitutional and statutory claims before previously ordered relief is automatically stayed and ultimately terminated.").

school desegregation termination standards, after kaleidoscopic application of consent decree modification standards by courts and unnoticed changes in the character of consent decrees, discussion of the broader implications of these new standards is in order.

The purpose of this Comment is to compare the traditional consent decree modification and termination standards with the new modification and termination standards for prison reform and school desegregation consent decrees to demonstrate how the new standards (1) have changed the character of consent decrees in these two areas to be more characteristic of judicial orders, (2) have altered traditional incentives to enter into consent decrees in these areas, and (3) will allow courts in the prison reform setting to achieve more success in the shared goal of more efficiently returning control over prisons to state and local control than courts will achieve in the school desegregation setting. Part II of this Comment discusses the traditional definition of a consent decree, the incentives for parties to enter into them, and a court's authority to modify and terminate consent decrees and litigated judgments. Part III introduces school desegregation decrees and addresses the termination standard for desegregation decrees and the expanded use of the good faith standard to return control over school districts to state and local governments. Part IV introduces prison reform litigation, the pre-PLRA modification and termination standard, and the new termination provisions of the PLRA. Part V analyzes the new modification and termination standards of prison reform and school desegregation. It discusses the changes in the character of prison reform and school desegregation consent decrees, incentives to enter into them, and state and local control over consent decrees. It then provides a recommendation of how to balance disincentives to enter into school desegregation consent decrees as well as other consent decrees. Part VI provides a brief conclusion.

## II. CONSENT DECREES

Before discussing the new modification and termination standards of prison reform and school desegregation consent decrees, this section will provide vital background on the definition of, incentives to enter into, and modification standards of traditional consent decrees. Discussion of traditional consent decrees will allow for later comparison with the new standards applied in prison reform and school desegregation consent decree cases.

*A. Definition of Traditional Consent Decrees*

Traditional consent decrees are a hybrid between a judicial order and a settlement agreement or contract.<sup>7</sup> A consent decree resembles a judicial order in that courts can enforce the agreement between parties and modify it in certain circumstances.<sup>8</sup> A consent decree also resembles a contract because it is formed by a pretrial agreement signed by the parties.<sup>9</sup> Due to the hybrid nature of a consent decree, a consent decree is the product of the parties' agreement, but a court maintains long-established, broad, and flexible equitable powers to modify the decree.<sup>10</sup> As evidence of the judicial character of a consent decree, a court maintains power to modify and terminate the decree even beyond the

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7. Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1207 (2000) ("A consent decree is a settlement agreement, typically containing injunctive relief, which the judge agrees to enforce as a judgment."); see *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992) ("A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature."); *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236-37 n.10 (1975) (noting that consent decrees "have attributes both of contracts and of judicial decrees," a "dual character" that has resulted in different treatment for different purposes); see also *supra* note 1.

8. Since a consent decree is partially a judicial order, it is subject to Federal Rule of Civil Procedure 60(b), which deals with judgments and decrees. See also 18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 4443, at 260 (2002).

9. See *United States v. City of Northlake*, 942 F.2d 1164, 1167 (7th Cir. 1991). In fact, courts have noted that district courts lack free-ranging "ancillary" or "inherent" jurisdiction to interpret or enforce a consent decree if "neither the decree nor the order dismissing the case expressly retain[s] jurisdiction" to enforce the decree. *Pigford v. Veneman*, 292 F.3d 918, 924 (D.C. Cir. 2002). But see *Waste Mgmt. of Ohio, Inc. v. City of Dayton*, 132 F.3d 1142, 1146 (6th Cir. 1997) (holding that "[c]ourts . . . have a duty to enforce, interpret, modify, and terminate their consent decrees as required by circumstance" and that "[a]lthough interpretation of a consent decree is to follow the general rules prescribed in contract law, the courts, in effectuating the purposes or accomplishing the goals of a decree, are not bound under all circumstances by the terms contained within the four corners of the parties' agreement" (second alteration in original) (quoting *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1148 (6th Cir. 1992))). The court has inherent power to interpret a consent decree, but this power is limited by the scope of the parties' agreement. The court "will look to the plain language of the written agreement as the best expression of the parties' intent." *Northlake*, 942 F.2d at 1167.

10. *Rufo*, 502 U.S. at 381 n.6 (citation omitted). In addition, courts have always had "inherent authority to enforce compliance with its orders" and broad "equitable powers" to provide a variety of remedies. *McGee v. Ill. Dep't of Transp.*, No. 02 C 0277, 2002 WL 31478261, at \*5 (N.D. Ill. Nov. 5, 2002) (exercising power to enter into a consent decree) (citations omitted); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); see also *Spallone v. United States*, 493 U.S. 265, 276 (1990) (discussing courts' power to enforce a consent decree). Other courts have suggested that the court can enforce its orders and provide a remedy when a decree is violated. See *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 737 (7th Cir. 1999).

parties' intent.<sup>11</sup> As evidence of its contractual nature, a court relies on the intent of the parties as expressed through their agreement to interpret the provisions of a consent decree.<sup>12</sup>

There are two additional defining characteristics of consent decrees. First, the court does not resolve any factual disputes between the parties.<sup>13</sup> Second, the court maintains supervision over the case for an indefinite period of time and retains power to enforce the decree if a party does not comply with its terms.<sup>14</sup>

### *B. Incentives to Enter into Traditional Consent Decrees*

Many incentives induce parties to enter into traditional consent decrees rather than to litigate or even settle cases. First, parties often choose to enter into consent decrees because of the flexibility of judicial

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11. Unlike with consent decrees, when a court uses equitable remedies with contracts, its *sole* intent is to rewrite or reform the written contract to correspond to the original and actual intent of the parties. *See, e.g.*, *Roberson Enters., Inc. v. Miller Land & Lumber Co.*, 700 S.W.2d 57, 58 (Ark. 1985); *Kohn v. Pearson*, 670 S.W.2d 795, 797 (Ark. 1984). Professor Michal Gal notes:

Contract law places significant value on the freedom of market participants to contract. Accordingly, it strives to give effect to the parties' intent, as long as the contract does not conflict with public policy. In so doing, it is concerned with the comparative rights and duties of the contracting parties as they are reflected in the contract.

Michal S. Gal, *Harmful Remedies: Optimal Reformation of Anticompetitive Contracts*, 22 *CARDOZO L. REV.* 91, 101 (2000).

12. 18A *WRIGHT & MILLER*, *supra* note 8, § 4443, at 257 (noting that consent decrees are "to be enforced in accord with the intent of the parties").

13. 18A *Id.* § 4443, at 256–57 (noting that the court does not have to "resolve[] the substance of the issues presented" in consent decree cases).

14. *See In re Pearson*, 990 F.2d 653, 658 (1st Cir. 1993) ("A consent decree is not simply a contract entered into between private parties seeking to effectuate parochial concerns. The court stands behind the decree, ready to interpret and enforce its provisions. This ongoing supervisory responsibility carries with it a certain correlative discretion." (citations omitted)); *see also Rufo*, 502 U.S. at 379 (noting that consent decrees are often in place for long periods of time); *Lorain NAACP*, 979 F.2d at 1148 ("Because of their dual character, consent decrees may be 'treated as contracts for some purposes but not for others' . . ." (quoting *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 n.10 (1975))); 46 *AM. JUR. 2D Judgments* § 224 (2002) (noting that consent decrees can be in place indefinitely); *cf. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574 (1984) ("[T]he 'scope of a consent decree must be discerned within its four corners . . .'" (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681–82 (1971))); *ITT Cont'l Baking*, 420 U.S. at 236–37 ("[S]ince consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation.").

oversight.<sup>15</sup> Unlike private settlements, consent decrees have the added benefit of judicial “oversight and interpretation,” which allow often complicated consent decrees to be “carried out over a period of years.”<sup>16</sup> In institutional reform litigation, which involves “the operation of governmental institutions or organizations,” courts supervise the progression of the pertinent governmental institution in meeting the provisions of the decree until the decree is no longer necessary.<sup>17</sup> Judicial oversight is particularly helpful in institutional reform litigation, such as school desegregation and prison reform cases.

Second, parties enter into consent decrees because parties may agree upon broader relief than a court may award after a trial.<sup>18</sup> Consent decrees allow parties to obtain a “more flexible repertoire of enforcement measures.”<sup>19</sup> In consent decrees, parties can agree to provide relief above the constitutional minimum, whereas if they litigated the case, the court would not be permitted to do so.<sup>20</sup> Government institutions party to

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15. *Alberti v. Klevenhagen*, 46 F.3d 1347, 1365 (5th Cir. 1995) (“There is little question that the district court has wide discretion to interpret and modify a forward-looking consent decree . . .”).

16. 46 AM. JUR. 2D *Judgments* § 224 (2002).

17. *Lorain NAACP*, 979 F.2d at 1148; *see also* *United States v. Louisville & Jefferson County Metro. Sewer Dist.*, 983 F.2d 1070, 1993 WL 7516, at \*3 (6th Cir. Jan. 12, 1993) (“[A] Consent Decree must remain in effect so long as its continued enforcement is necessary to effectuate its purposes.”).

18. *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (“[A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.”); *Komyatti v. Bayh*, 96 F.3d 955, 963 (7th Cir. 1996) (noting that “a federal consent decree can contain a provision not explicitly required by the Constitution as long as the criteria set forth in *Firefighters* are met”); *Bragg v. Robertson*, 83 F. Supp. 2d 713, 721 (S.D. W.Va. 2000) (“The Court does not examine the [Consent] Decree to determine whether the agreement of the parties affords relief the Court could or would have chosen to award.”); *see also* *United States v. Telluride Co.*, 849 F. Supp. 1400, 1402 (D. Colo. 1994) (noting that a judge should not “substitute [her] judgment of what constitutes an appropriate settlement”). However, in *Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002), the court distinguished *Firefighters* in holding that “even if a federal court is not necessarily barred from entering a consent decree providing broader relief than it could have awarded at trial, it must fall back on its own jurisdiction when it issues an order enforcing the decree.” *Id.* at 543.

19. *See Firefighters*, 478 U.S. at 524 n.13. Consent decrees allow for “imaginative and hence often more effective solutions to practical problems.” *Kindred v. Duckworth*, 9 F.3d 638, 644 (7th Cir. 1993).

20. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1992) (“[P]etitioners could settle the dispute over the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires . . .”). The *Rufo* Court noted that although the petitioners may have been aware that they were agreeing to single celling of prisoners when double celling may have been constitutional, it was “immaterial.” *Id.* at 388. The Court then noted that although “[f]ederal courts may not order States or local governments, over their objection,

consent decrees often agree to provide plaintiffs relief above the constitutional minimum to avoid the expense of a trial.

Third, parties may choose a consent decree over a trial because of the benefits of avoiding litigation. Significant incentives exist for parties to settle by means of a consent decree to avoid the time, expense, and inevitable risk of litigation.<sup>21</sup> In addition, litigation over a consent decree takes place in a single forum so that the parties avoid the waste and risk of litigating over choice of forum, as well as the potential problem of “inconsistent or conflicting obligations.”<sup>22</sup> Moreover, in obtaining enforcement of a consent decree, the parties do not have to prove facts that they would otherwise have to prove in an ordinary action.<sup>23</sup>

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to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated,” petitioners could agree upon a remedy that undertook “to do more than the Constitution itself requires.” *Id.* at 389 (emphasis added). In addition, distinguishing consent decrees from litigated judgments, the *Rufo* Court concluded that parties to a *consent decree* can agree to a remedy beyond what a court would have ordered in a *litigated judgment*. *Id.*

The *Rufo* Court also noted that plaintiffs in institutional reform cases “know 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.” *Id.* at 383. However, if plaintiffs enter into a consent decree, “[a]t least they will avoid further litigation,” the risk of losing, “and perhaps will negotiate a decree providing more than what would have been ordered without the local government’s consent.” *Id.*; *see also id.* at 391 (confirming that “[a] proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor”).

21. *Kindred*, 9 F.3d at 644. Consent decrees are “economical of the court’s time and of the parties’ pocketbook.” *Id.* Also,

[a] consent decree is a valuable tool in the effective enforcement of civil rights law. It permits flexibility in adapting a judicial order to the particular needs of the case at hand.

That all interested parties have a hand in its formation leads to a greater degree of cooperation and reduces the inevitable friction that accompanies litigation.

*Id.*; *see also* *Langton v. Johnston*, 928 F.2d 1206, 1217–18 (1st Cir. 1991). In addition, consent decrees allow for earlier resolution of disputes than litigation:

Early resolution by consent decree reduces the uncertainties associated with litigation and allows the parties to make plans based on the decree’s terms. When parties enter into a consent decree, they understand that controversies may arise in implementing the decree. The parties nevertheless anticipate that these disputes will be restricted to the terms negotiated by the parties and signed by the court. Thus, early resolution by consent decree does not necessarily end disputes between the parties, but greatly restricts their scope and nature. . . . Entering a consent decree rather than trying the case and hearing an appeal is also generally cost efficient for the judicial system.

Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 327–29 (1988).

22. *Firefighters*, 478 U.S. at 524 n.13.

23. *Id.*

*C. Courts' Power to Modify a Consent Decree*

The source of federal courts' modification power lies in Federal Rule of Civil Procedure 60(b)(5), which provides in part that a judgment may be modified if "it is no longer equitable that the judgment should have prospective application."<sup>24</sup> The standard for modifying consent decrees was first established by *United States v. Swift and Co.*, an antitrust case, and later altered by *Rufo v. Inmates of Suffolk County Jail* for institutional reform cases.<sup>25</sup>

*United States v. Swift and Co.* "was the product of a prolonged antitrust battle between the Government and the meat-packing industry."<sup>26</sup> Originally, "the defendants agreed to a consent decree that

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24. FED. R. CIV. P. 60(b)(5) states in relevant part:

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

*Id.* However, the most significant part of the rule is the "final ground, allowing relief if it is no longer equitable that the judgment should have prospective application." 11A WRIGHT & MILLER, *supra* note 8, § 2863, at 336.

25. *United States v. Swift & Co.*, 286 U.S. 106 (1932). The *Rufo* Court never explicitly mentioned whether its modification standard applied to noninstitutional reform litigation. However, courts consider the *Rufo* standard to be the modification standard applied to *all* consent decree cases. *See Bldg. and Constr. Trades Council v. NLRB*, 64 F.3d 880, 887–88 (3d Cir. 1995) (holding that *Rufo* requires a balancing test for all petitions brought under the equity provision of Rule 60(b)(5) and "cannot depend on whether the case is characterized as an institutional reform case, a commercial dispute, or private or public litigation"); *United States v. W. Elec. Co.*, 46 F.3d 1198, 1203 (D.C. Cir. 1995) ("*Rufo* gave the 'coup de grace' to *Swift*[:] and . . . the Supreme Court's summary of what might render a modification 'equitable' relates to all types of injunctive relief."); *Alexis Lichine & Cie v. Sacha A. Lichine Estate Selections, Ltd.*, 45 F.3d 582, 586 (1st Cir. 1995) (positing that *Rufo* and *Swift* are "polar opposites of a continuum in which we must locate the instant case"); *Patterson v. Newspaper & Mail Deliverers' Union*, 13 F.3d 33, 38 (2d Cir. 1993) (choosing to "apply a flexible standard" in situations other than those involving institutional reform of an instrumentality of government); 12 MOORE ET AL., *supra* note 1, § 60.47[2][b], at 60–162 & n.17 (3d ed. 1998) ("The better view clearly is that the flexible, *Rufo* standard should not be limited to 'institutional reform' litigation because it 'is no less suitable to other types of equitable cases.'" (citations omitted)); *cf. W.L. Gore & Assocs. v. C.R. Bard, Inc.*, 977 F.2d 558, 562 (Fed. Cir. 1992) (refusing to apply the *Rufo* flexible standard to traditional commercial litigation); 12 MOORE ET AL., *supra* note 1, § 60.47[2][b], at 60–162 n.16 (listing two cases as "hav[ing] expressed doubts" about whether the *Rufo* standard applies to all equitable cases); 11A WRIGHT & MILLER, *supra* note 8, § 2961, at 402 (2d ed. 1995) ("Courts considering modifications in other contexts have not adopted the *Rufo* . . . approach, however. Rather they have limited the holdings to those areas and have continued to apply the 'grievous wrong' standard of *Swift* to other contexts.")

26. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 379 (1992); *Swift*, 286 U.S. at 109–11.

enjoined them from manipulating the meat-packing industry and banned them from engaging in the manufacture, sale, or transportation of other foodstuffs.”<sup>27</sup> Ten years later, “several meat-packers petitioned for modification of the decree, arguing that conditions in the meat-packing and grocery industries had changed.”<sup>28</sup> The Supreme Court rejected their claim and refused to grant modification, holding that “[n]othing less than a clear showing of *grievous wrong* evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.”<sup>29</sup>

Courts used the narrow “grievous wrong” standard to modify consent decrees until *Rufo v. Inmates of Suffolk County Jail*, which set forth a flexible standard for consent decree modification.<sup>30</sup> In *Rufo*, a county sheriff moved for modification of a consent decree in a prison reform case.<sup>31</sup> In holding that the *Swift* standard no longer applies, the Supreme Court explained in *Rufo* that the language in *Swift* did not intend a “hardening” of the flexible modification standard for consent decrees.<sup>32</sup>

The Supreme Court in *Rufo* then established a two-part test for modifying consent decrees in institutional reform cases.<sup>33</sup> First, the party seeking to modify a consent decree “bears the burden of establishing that a significant change in circumstances warrants revision of the decree”; that change in circumstances may be a product of “either a significant change either in factual conditions or in law,” or the emergence of “unforeseen obstacles.”<sup>34</sup> Second, the party seeking modification of a consent decree must demonstrate that the “proposed modification is

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27. *Rufo*, 502 U.S. at 379; *Swift*, 286 U.S. at 111.

28. *Rufo*, 502 U.S. at 379; *Swift*, 286 U.S. at 113.

29. *Swift*, 286 U.S. at 119 (emphasis added).

30. 502 U.S. at 374–80.

31. *Id.* at 378.

32. *Id.* at 379. The court also noted that “[b]ecause such decrees often remain in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased.” *Id.* at 380; see, e.g., *Phila. Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1119–21 (3d Cir. 1979), cert. denied, 444 U.S. 1026 (1980).

33. *Rufo*, 502 U.S. at 383.

34. *Id.* at 383–84. The *Rufo* Court also noted that its “decisions since *Swift* reinforce the conclusion that the ‘grievous wrong’ language of *Swift* was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees.” *Id.* at 380. A court may also modify a consent decree when a change in law brings the terms of a consent decree in conflict with statutory objectives. See *id.* at 384, 389 (emphasizing that the party must not rely on a “clarification in the law” since modification based on clarifications in the law would “undermine the finality” of consent decrees and “serve as a disincentive to negotiation of settlements in . . . litigation”).

suitably tailored to the changed circumstance.”<sup>35</sup> In meeting the “suitably tailored” prong, the *Rufo* Court instructed that “[a] proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor.”<sup>36</sup>

#### *D. Courts’ Power to Terminate a Consent Decree*

Courts have traditionally examined whether the terms of the decree have been met in deciding whether to terminate consent decrees.<sup>37</sup> The *Rufo* standard, established originally for consent decree modification, has also been applied to terminate consent decrees along with the termination standard set forth in *Board of Education v. Dowell*.<sup>38</sup> One term before *Rufo*, the Supreme Court in *Dowell* rejected the *Swift* “grievous wrong”

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35. *Rufo*, 502 U.S. at 383. A consent decree must change no more than necessary to resolve the problems created by the change in circumstances and the proposed modification must *not* defeat the core purpose of the consent decree or create a constitutional violation. *Id.* at 391–92.

36. *Id.* at 391. Further, the Court noted that the modification inquiry requires “that the district court defer to local government administrators, who have the ‘primary responsibility for elucidating, assessing, and solving’ the problems of institutional reform, to resolve the intricacies of implementing a decree modification.” *Id.* at 392. (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955) (Brown II)). However, the Court also noted that the deference to local government officials should only be considered in the “suitably tailored” inquiry, not in the first inquiry where the court determines if there has been a change in the factual circumstances or in the law that warrants modification of the consent decree. *Id.* at 392 n.14.

37. *See, e.g.*, *United States v. Louisville & Jefferson County Metro. Sewer Dist.*, 983 F.2d 1070, 1993 WL 7516, at \*5 (6th Cir. Jan. 12, 1993) (declining to apply *Freeman-Dowell* to terminate an environmental consent decree and noting that a “consent decree should terminate when the purpose of the decree has been fulfilled”); *Lamphere v. Brown Univ.*, 706 F. Supp. 131, 138 (D.R.I. 1989) (relying on *Swift* in noting that the goals of an employment discrimination consent decree must be met in order for it to be terminated).

Some courts have applied *Dowell* without the “good faith” standard to non-school desegregation consent decree cases. *See, e.g.*, *Youngblood v. Dalzell*, 925 F.2d 954, 960 (6th Cir. 1991) (noting that the proper *Dowell* termination standard for this employment discrimination consent decree case was “whether the purposes of the desegregation litigation, as incorporated in the decree, have been fully achieved”); *see also Patterson v. Newspaper & Mail Deliverers’ Union*, 13 F.3d 33, 38 (2d Cir. 1993) (noting that termination and modification of a decree “should be ordered in light of either changed circumstances or substantial attainment of the decree’s objective”); *accord Consumer Advisory Bd. v. Glover*, 989 F.2d 65, 68 (1st Cir. 1993).

If courts do apply *Dowell* to terminate consent decrees outside of the school desegregation setting, they should at least examine whether the specific terms of the consent decree have been met in terminating the decree rather than relying on the “good faith” standard. *See infra* notes 132–35 and accompanying text for discussion of why the *Freeman-Dowell* “good faith” standard should not be applied outside of the school desegregation context.

38. *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991). *See infra* notes 44–47 for cases applying *Rufo* and *Dowell* to terminate consent decrees.

standard “as a barrier to a motion”<sup>39</sup> to terminate a school desegregation decree.<sup>40</sup> The *Dowell* test for termination of consent decrees examined “[1] whether the Board had complied in good faith with the desegregation decree since it was entered, and [2] whether the vestiges of past discrimination had been eliminated to the extent practicable.”<sup>41</sup> The Supreme Court later applied the *Dowell* termination standard in *Freeman v. Pitts*,<sup>42</sup> so this standard is referred to as the *Freeman-Dowell* test.

While the *Dowell* holding related specifically to desegregation decrees, in *Rufo*, the Supreme Court noted that the rejection of *Swift* in *Dowell* illustrates the “same theme” of flexibility as the *Rufo* decision.<sup>43</sup> Due to this language in *Rufo*, a split exists among federal circuit courts of appeal regarding what standard is proper for modification versus termination of consent decrees. Some courts insist that the “standards employed in *Dowell* and *Rufo* are but variations on a single theme,” not separate standards for modification and termination.<sup>44</sup> Several lower courts apply the *Freeman-Dowell* good faith and vestiges standard to terminate school desegregation consent decrees.<sup>45</sup> Courts also interchangeably apply *Freeman-Dowell* with the *Rufo* standard to modify school desegregation consent decrees.<sup>46</sup> However, other courts strictly

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39. *Rufo*, 502 U.S. at 380.

40. *Dowell*, 498 U.S. at 246–248; *see also Rufo*, 502 U.S. at 380.

41. *Dowell*, 498 U.S. at 249–50.

42. 503 U.S. 467, 471 (1992).

43. *Rufo*, 502 U.S. at 380.

44. *Alexander v. Britt*, 89 F.3d 194, 197–98 (4th Cir. 1996) (noting that although *Rufo* and *Dowell* set forth different standards, the Court’s “approach was the same” and “[i]n both cases, the Court eschewed *Swift*’s rigid ‘grievous wrong’ standard in favor of a more flexible approach appropriate to the situation”).

45. *See, e.g., Reed v. Rhodes*, 934 F. Supp. 1533 (N.D. Ohio 1996) (applying *Freeman-Dowell* to partially terminate judicial supervision under consent decree), *aff’d*, 179 F.3d 453 (6th Cir. 1999).

46. *Alexander*, 89 F.3d at 199 (noting also that “it is clear that *Dowell* and *Rufo* are entirely consistent; they do, indeed, sound the ‘same theme.’” (citation omitted)); *United States v. City of Miami*, 2 F.3d 1497, 1505–06, 1508 (11th Cir. 1993) (“[T]he principles articulated in *Rufo* and *Dowell* are applicable to requests to modify or terminate decrees in employment discrimination class actions . . . .”); *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1149 (6th Cir. 1992) (noting that *Rufo* applies in modifying school desegregation cases); *Ho ex rel. Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316, 1326 n.12 (N.D. Cal. 1997) (noting that since plaintiffs moved to “terminate the . . . [school desegregation] Consent Decree rather than to modify it,” it did not address modification under *Rufo*). For a more in-depth discussion of the *Dowell* standard in the school desegregation context see *infra* Part III.B.

apply *Rufo* to modification cases and *Freeman-Dowell* to termination cases and reject *Freeman-Dowell* as a replacement for *Rufo*.<sup>47</sup>

The next section will provide a background to school desegregation consent decrees and discuss the nature of judicial authority over school desegregation decrees and the current standard for termination of school desegregation decrees.

### III. SCHOOL DESEGREGATION CONSENT DECREES

#### A. Background to School Desegregation Decrees

Although segregation has been a problem for public schools throughout American history, the federal courts chose not to intervene to desegregate schools until 1954.<sup>48</sup> In 1954, a unanimous Supreme Court held that racial segregation of public schools violated the Equal Protection Clause of the Fourteenth Amendment.<sup>49</sup> The next year, the Supreme Court also directed the district courts to take “necessary and proper” actions to achieve nondiscriminatory school systems “with all deliberate speed.”<sup>50</sup>

To achieve nondiscriminatory school systems, district courts issued remedial desegregation decrees that required school districts to affirmatively act to “eliminat[e] all vestiges of state imposed segregation.”<sup>51</sup> School districts demonstrate compliance with such

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47. *City of Miami*, 2 F.3d at 1503–05, 1508–09 (ordering the district court to apply the *Rufo* standard to modification motions and the *Dowell* standard to termination motions); accord *Heath v. DeCourcy*, 992 F.2d 630, 633–35 (6th Cir. 1993). Courts have also rejected the use of *Dowell* in the place of *Rufo* in noninstitutional reform litigation. See *Alliance to End Repression v. City of Chicago*, 66 F. Supp. 2d 899, 911 (N.D. Ill. 1999) (noting that the flexible *Rufo* standard, not *Dowell*, replaced the *Swift* standard, and that the “distinction the *Dowell* court makes between the desegregation decree and the one in *Swift* suggests that it would be inappropriate to use the *Dowell* standard” in modifying a civil rights decree), *rev’d and remanded*, 237 F.3d 799 (7th Cir. 2001); *Giles v. Coughlin*, No. 95 CIV. 3033 JFK, 1997 WL 770391, at \*4 (S.D.N.Y. Dec. 11, 1997) (rejecting application of the *Dowell* standard in favor of *Rufo* in a prison consent decree case).

Currently, there is no clear distinction between the standards applied to terminate and modify consent decrees, but this Comment argues in Part V.E that the *Dowell* standard should apply to terminate only *school desegregation* consent decrees and that *Rufo* should apply to modify school desegregation and other consent decrees.

48. *Brown v. Bd. of Educ.*, 349 U.S. 294, 295 (1954) (Brown II).

49. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (Brown I).

50. *Brown II*, 349 U.S. at 299–301.

51. *Jenkins v. Missouri*, 639 F. Supp. 19, 23 (W.D. Mo. 1985).

decrees by achieving “unitary,” racially integrated school systems.<sup>52</sup> In order for a court to determine whether a school district has achieved a unitary system, the court determines what “vestiges of past discrimination” or aspects of racial inequality remain and whether the school district acted in good faith<sup>53</sup> and can “practicably” eliminate the vestiges.<sup>54</sup> Upon demonstrating compliance, a school district may become free from judicial supervision by obtaining a court order terminating the desegregation decree.

*B. Termination of School Desegregation Decrees:  
“Vestiges” and Good Faith*

Due to the difficulty in applying the “vestiges” inquiry and because of the impatience of restoring local control of school systems, courts began applying a good faith requirement that provides opportunities for relinquishment of judicial supervision even when a school has not reached full unitary status.<sup>55</sup> In providing guidance on the decision to terminate judicial supervision over a school desegregation decree, the Supreme Court provided the *Green v. County School Board* test to determine whether vestiges of past discrimination have been eradicated in a school district.<sup>56</sup> However, even with the guidance of the *Green*

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52. *Manning v. Sch. Bd.*, 244 F.3d 927, 929 (11th Cir. 2001); *Reed v. Rhodes*, 179 F.3d 453, 456 (6th Cir. 1999).

53. *Freeman v. Pitts*, 503 U.S. 467, 490, 492 (1992) (stating that good faith compliance by a school board is “one of the prerequisites to relinquishment of [judicial] control”).

54. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991) (noting that the district court should address “whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination [have] been eliminated to the extent practicable”).

55. *Dowell ex rel. Dowell v. Board of Education*, 8 F.3d 1501, 1515–16 (10th Cir. 1993), notes that the determination of “whether the school board has proved that the racial identifiability present in an aspect of school operations is not causally connected to prior *de jure* segregation” is a difficult one. In addition, *Hull v. Quitman County Board of Education* observes:

Following *Freeman*, the lower courts have discretion to terminate a desegregation case if a school board has consistently complied with a court decree in good faith and has eliminated the vestiges of past discrimination to the extent ‘practicable.’ *Freeman* created a framework in which *equitable decrees will not remain in effect perpetually and school districts can be returned to local control*.

1 F.3d 1450, 1454 (5th Cir. 1993) (emphasis added).

56. 391 U.S. 430, 435–36 (1968) (noting that not all racial inequality is a “vestige” of past discrimination and identifying six areas to examine for racial inequality that is a vestige of past alleged discrimination: student assignments, administrative problems, faculty, staff, transportation, extracurricular activities and facilities). For a complete list of the *Green* factors, see *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 361 (W.D. Ky. 2000).

factors, determining whether a vestige of past discrimination exists in a school district remains a complex inquiry. It is often difficult for a court to determine if continuing segregation in a school district is due to the actions of a school district or to socio-economic or housing factors unrelated to the school system. Due to this difficulty, many school districts have been managed by federal courts for long periods of time, conflicting with the Supreme Court's goal of returning school districts to local control as soon as possible.<sup>57</sup> While demonstration of good faith was mentioned early in school desegregation cases,<sup>58</sup> *Board of Education v. Dowell* and *Freeman v. Pitts* were the first Supreme Court cases to use good faith as a factor in terminating a consent decree.<sup>59</sup>

In *Freeman v. Pitts*, the Supreme Court held that the "district court need not retain active control over every aspect of school administration

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To obtain termination of the decree, the school district must prove that the disparity is caused by a nondiscriminatory policy or is due to conditions beyond its control. *Freeman*, 503 U.S. at 494–95. If the disparity does not fall in one of the *Green* areas, the party claiming the disparity is a vestige of past discrimination has the burden of proving the disparity is due to a constitutional violation caused by the school district. *Id.* However, this inquiry is not as straightforward as it seems. Often courts consider socio-economic disparities, housing situations, student choices, and national trends as the cause for *Green* factors, not pinning the racial disparity on the school district. *See, e.g.*, *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 767 (3d Cir. 1996) (blaming the shortage of minority teachers on an "unfortunate contemporary national trend" rather than a "vestige of *de jure* segregation"); *Hampton*, 102 F. Supp. 2d at 361 (noting that "federal courts should hold school boards accountable for their own bad conduct and its consequences, but not for all society's other racial, economic, and educational ills").

57. *Manning v. Sch. Bd.*, 244 F.3d 927, 941 (11th Cir. 2001) ("The ultimate objective of any desegregation order is the 'restoration of state and local authorities to the control of a school system that is operating in compliance with the Constitution.'" (quoting *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995))); *see* *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 318 (4th Cir. 2001) ("Implicit in the Supreme Court's use of the term 'practicable' is 'a reasonable limit on the duration of . . . federal supervision.'" (alteration in original) (quoting *Coalition to Save Our Children*, 90 F.3d at 760)).

58. *See, e.g.*, *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1954) (*Brown II*) (stating that "courts will have to consider whether the action of school authorities constitutes *good faith* implementation of the governing constitutional principles") (emphasis added).

59. Good faith was *not* a factor in terminating a consent decree before *Freeman* and *Dowell* but was simply taken into account by the Court. In *Green*, the Court noted that the school board must establish an effective plan "toward disestablishing state-imposed segregation," weighing

any alternatives which may be shown as feasible and more promising in their effectiveness. . . . [T]he availability to the board of other more promising courses of action may indicate a lack of good faith; and at the least it places a *heavy burden* upon the board to explain its preference for an apparently less effective method.

391 U.S. at 439 (emphasis added); *cf.* *Freeman*, 503 U.S. at 498 (noting that the Court "stated in *Dowell* that the good-faith compliance of the district with the court order over a reasonable period of time is a *factor* to be considered in deciding whether or not jurisdiction could be relinquished") (emphasis added).

until a school district has demonstrated unitary status in all facets of its system.”<sup>60</sup> Rather, “[p]artial relinquishment of judicial control, where justified by the facts of the case, can be an important and significant step in fulfilling the district court’s duty to return the operations and control of schools to local authorities.”<sup>61</sup> The Court then considered good faith in ordering a withdrawal of control over a school district in examining

whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its *good-faith commitment* to the whole of the court’s decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.<sup>62</sup>

*Freeman* established the “good-faith commitment” to the court’s decree as a required factor for relinquishment of judicial control. It applied the good faith inquiry to partially relinquish judicial control, but left room for courts to apply it to relinquish full judicial control over schools.<sup>63</sup> The *Freeman* “good faith” requirement has been applied to free school districts of judicial supervision of desegregation decrees when the “vestiges” test alone would not have allowed relinquishment of judicial control.<sup>64</sup>

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60. 503 U.S. at 471.

61. *Id.* at 489.

62. *Id.* at 491 (emphasis added). In *Missouri v. Jenkins*, the Court reaffirmed the *Freeman* test emphasizing the importance of a school district’s good faith compliance with the desegregation decree. 515 U.S. 70, 89, 98–100 (1995).

63. *Freeman*, 503 U.S. at 491. See also *Liddell ex rel. Liddell v. Bd. of Educ.*, 126 F.3d 1049, 1057–58 (8th Cir. 1997) (noting that the district court will consider the *Dowell* and *Freeman* factors in deciding “whether to grant *full* or partial unitary status” in a school desegregation case) (emphasis added).

64. For example, after instruction by the Supreme Court, the court of appeals in *Dowell* reviewed the findings to determine if any “vestiges” of state-enforced segregation still existed. In determining whether any “vestiges” existed, the court made a point to mention that the “racial identifiability present in an aspect of school operations is not [always] causally connected to prior *de jure* segregation.” *Dowell ex rel. Dowell v. Bd. of Educ.*, 8 F.3d 1501, 1515–16 (10th Cir. 1993). The court then reviewed the residential segregation in Oklahoma City and found “independent bases for concluding that the vestiges of *de jure* school segregation had been eliminated to the extent practicable.” *Id.* at 1516. The court attributed the segregation existing in the Oklahoma schools to “individuals making private choices in response to economic and social forces over which the school board had no control.” *Id.* Only after finding that there were independent factors that could have caused the segregation in Oklahoma City, the court found that the Oklahoma City school board demonstrated good faith. *Id.* at 1513.

#### IV. PRISON REFORM CONSENT DECREES

This section provides background to prison reform litigation before the Prison Litigation Reform Act and discusses the relevant termination provisions of the PLRA.

##### *A. Background to Pre-PLRA Prison Reform Litigation*

Early on, federal courts did not intervene in prison reform, but 1960s and 1970s prison reform cases were litigated and later cases settled through consent decree.<sup>65</sup> The early stance of the federal courts was not to intervene on behalf of state prisoners under the “hands-off attitude.”<sup>66</sup> However, in the 1960s and 1970s, the Supreme Court altered its course in allowing 42 U.S.C. § 1983 to be used to assert prisoners’ constitutional rights.<sup>67</sup> By 1995, twenty-five percent of suits filed in federal district court were brought by prisoners.<sup>68</sup> While the first set of prison reform cases were litigated, later generations of prison reform cases were settled by consent decree.<sup>69</sup> With the growth of prison

65. Litigation over prison conditions in federal court is a relatively recent phenomenon. MICHAEL MUSHLIN, *RIGHTS OF PRISONERS* § 1.02, at 7 (2d ed. 1993) (“The Constitution did not breach prison walls for over 170 years.”).

66. *Procunier v. Martinez*, 416 U.S. 396, 404 (1974) (stating that “[t]raditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration,” due mostly to the “complementary perceptions about the nature of the problems and the efficacy of judicial intervention”), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (overruling *Martinez* and holding that prison regulations must comply with a reasonableness standard).

67. *See, e.g., Cooper v. Pate*, 378 U.S. 546 (1964). Before long, prison reform litigation resulted in class action lawsuits by prisoners leading to

the definition and enforcement of minimum standards of health care, to the establishment of minimum procedural due-process requirements for the imposition of disciplinary punishments, to the equal protection of the laws for different categories of inmates, and to the upholding of the Eighth Amendment guarantee against cruel and unusual punishments.

Norval Morris, *The Contemporary Prison: 1965–Present*, in *THE OXFORD HISTORY OF THE PRISON* 245 (Norval Morris & David J. Rothman eds., 1995).

68. *Roller v. Gunn*, 107 F.3d 227, 230 (4th Cir. 1997) (citing ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1995 FEDERAL COURT MANAGEMENT STATISTICS 167); *see also* Ashley Dunn, *A Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES, Mar. 21, 1994, at A1 (commenting on the proliferation of prisoner lawsuits in the judicial system). The number of lawsuits filed by prisoners grew from 6,600 in 1975 to more than 39,000 in 1994. 141 CONG. REC. S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole); *see also* Heidel, *supra* note 6, at 561.

69. In these consent decree cases, “prison administrators frequently agreed to wide-ranging changes in prison practices that exceeded the constitutional minimum.” *Gilmore v. California*, 220 F.3d 987, 995 (9th Cir. 2000) (noting that under prison consent decrees the role of federal courts “has been especially ‘hands-on’—e.g., appointing special masters, imposing sanctions for contempt,

litigation, Congress witnessed an analogous growth in “out-dated consent decrees” managed by federal courts.<sup>70</sup>

### B. Termination Provisions of the PLRA

To put an end to federal courts’ long-term involvement in prison reform through consent decrees under the *Rufo* standard, Congress passed the Prison Litigation Reform Act.<sup>71</sup> The Act was passed to stop federal courts from “micromanaging our Nation’s prisons.”<sup>72</sup> Congress clearly intended to reduce judicial involvement in the improvement of prison conditions and to stop federal courts from providing more than the constitutional minimum “necessary to remedy the proven violation of federal rights.”<sup>73</sup>

The PLRA replaces the *Rufo* modification standard and the *Dowell* termination standard<sup>74</sup> with a standard that makes it more difficult to maintain judicial supervision over prison reform consent decrees. Under the PLRA, the relief provided in a consent decree must be terminated immediately if granted without satisfying the decree’s requirements.<sup>75</sup> Courts refer to the three requirements for terminating or modifying consent decrees as the “need-narrowness-intrusiveness findings.”<sup>76</sup> In the

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and modifying or expanding the relief provided by the decrees—where prison administrators have failed to effectuate the terms of the decrees”).

70. Peter Hobart, Comment, *The Prison Litigation Reform Act: Striking the Balance Between Law and Order*, 44 VILL. L. REV. 981, 1003 (1999).

71. See *infra* notes 72–73.

72. 141 CONG. REC. S14,418 (daily ed. Sep. 27, 1995) (statement of Sen. Hatch); see also *id.* at S14,414 (daily ed. Sep. 27, 1995) (statement of Sen. Dole) (“These guidelines will work to restrain liberal Federal judges who see violations on [sic] constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison systems.”) (emphasis added).

73. H.R. REP. NO. 104-21, at 24 n.2 (1995); see also H.R. REP. NO. 104-378, at 166 (1995) (“[The PLRA] amends 18 U.S.C. 3626 to require that prison condition remedies do not go beyond the measures necessary to remedy federal rights violations . . .”).

74. PLRA § 3626(a)(1)(A), (a)(2), and (e)(1) require all prison consent decrees being modified or terminated in a litigated or consent decree case to be ruled on promptly by a court according to the termination provisions of § 3626(a)(1)(A) and (a)(2). These subsections also demonstrate that the PLRA termination standards replace former *Rufo* and *Dowell* standards applied in modifying and terminating consent decrees. See 18 U.S.C. § 3626(a)(1)(A), (a)(2), (e)(1) (2000).

75. *Id.* § 3626(b)(2) (providing “immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding” of need-narrowness-intrusiveness); see also Mark Tushnet & Larry Yackle, *The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 55 (1997) (explaining the PLRA termination provisions).

76. *Benjamin v. Jacobson*, 172 F.3d 144, 158 (2d Cir. 1999).

termination provisions,<sup>77</sup> the PLRA first sets out that all prospective relief “with respect to prison conditions shall extend no further than *necessary* to correct the violation of the Federal right of a particular plaintiff or plaintiffs.”<sup>78</sup> It also requires that the prospective relief be “*narrowly drawn*” and be “the least *intrusive* means necessary to correct the violation of the Federal right.”<sup>79</sup> The PLRA also provides that a federal court shall immediately terminate prospective relief if the relief was “approved or granted in the absence of a finding by the court” of need-narrowness-intrusiveness.<sup>80</sup> However, if a written finding of need-narrowness-intrusiveness is made demonstrating that the relief is necessary to “correct a current and ongoing violation of a Federal right,” the court will not terminate the decree.<sup>81</sup>

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77. Although these requirements are used to terminate and modify consent decrees they are often referred to as the “termination provisions.” *See, e.g.*, Heidel, *supra* note 6, at 562.

78. 18 U.S.C. § 3626(a)(1)(A) (emphasis added).

79. *Id.* (emphasis added).

80. *Id.* § 3626(b)(2). As discussed *infra* Part V.A.1, the PLRA defines consent decrees as “prospective relief.”

81. *Id.* § 3626(b)(3). The text of the Act is unclear about *how* a court is to find a “current and ongoing” violation. The Supreme Court has provided little guidance on this issue, but one court explained that the (b)(3) requirement of “written findings” means that the immediate termination of (b)(2) was necessarily less than *instantaneous*. *Berwanger v. Cottey*, 178 F.3d 834, 839 (7th Cir. 1999) (noting that “immediate” in (b)(2) does not mean “instant,” given that the court needs “time to decide whether to make [the] finding” called for in (b)(3)). The Fifth Circuit Court of Appeals clarified § 3626(b)(3) by holding that “a court must look at the conditions in the jail at the time termination is sought” but no evidentiary hearing is necessarily required. *Castillo v. Cameron County*, 238 F.3d 339, 353 (5th Cir. 2001) (examining evidence on conditions of Texas prisons produced in the year that the termination was sought to rule if current and ongoing constitutional violations existed, but not explicitly requiring a district court to conduct an evidentiary hearing); *accord Ruiz v. Johnson*, 154 F. Supp. 2d 975, 983 (S.D. Tex. 2001).

Other courts have suggested that only some circumstances warrant additional evidentiary findings and some courts actually require them for all circumstances. *See, e.g.*, *Laaman v. Warden*, 238 F.3d 14, 17 (1st Cir. 2001) (“In certain circumstances . . . it would seem an appropriate use of the court’s discretion to hold an evidentiary hearing; similarly, in certain circumstances it would be an abuse of that discretion to deny plaintiffs an evidentiary hearing once requested.”). The *Laaman* court held that the district court abused its discretion by denying plaintiffs an opportunity to supplement evidence of violations after 1995 when terminating the consent decree in 1999. *Id.* at 19; *see also Hadix v. Johnson*, 228 F.3d 662, 671–72 (6th Cir. 2000) (noting that “the party opposing termination must be given the opportunity to submit additional evidence”); *Gilmore v. California*, 220 F.3d 987, 1008 (9th Cir. 2000) (“[U]nless plaintiffs do not contest defendants’ showing that there is no current and ongoing violation under § 3626(b)(3), the court must inquire into current conditions at a prison before ruling on a motion to terminate.”); *Cagle v. Hutto*, 177 F.3d 253, 258 (4th Cir. 1999) (holding that a district court, “[a]t a minimum, . . . must hold . . . a [pretermination evidentiary] hearing when the party opposing termination alleges specific facts which, if true, would amount to a current and ongoing constitutional violation”); *Loyd v. Ala. Dep’t of Corr.*, 176 F.3d 1336, 1342 (11th Cir. 1999) (failing to find that an evidentiary hearing was mandated by the PLRA,

In essence, the default rule of the PLRA is that federal courts terminate or modify a consent decree immediately.<sup>82</sup> The exception to the rule is that a consent decree will continue to be enforced by the federal court, but only if the relief set out in the decree continues to meet the need-narrowness-intrusiveness requirements and is “necessary to correct a current and ongoing violation of the Federal right.”<sup>83</sup>

Part III discussed the new termination standards for school desegregation consent decrees established by the “good faith” prong of *Freeman-Dowell*. Part IV analyzed the termination and modification standard for prison reform consent decrees set forth by the statutory provisions of the PLRA. The next section will discuss the implications of these new modification and termination standards in changing the character of prison reform and school desegregation consent decrees and returning state and local control over decrees.

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but holding that a district court’s refusal to hold an evidentiary hearing was an abuse of discretion, even when current reports were provided to the court); *Benjamin v. Jacobson*, 172 F.3d 144, 166 (2d Cir. 1999) (“Evidence presented at a prior time . . . [can]not show a violation that is ‘current and ongoing.’ Hence, the ‘record’ referred to [in § 3626(b)(3)] . . . must mean a record reflecting conditions *as of the time* termination is sought.”) (emphasis added); *Tyler v. Murphy*, 135 F.3d 594, 597 (8th Cir. 1998) (agreeing that parties in favor of prospective relief under the PLRA must be given an opportunity on remand to present evidence supporting such relief).

While the PLRA does not specify whether courts are required to conduct evidentiary hearings at the time of the termination motion to determine whether to terminate a consent decree or litigated judgment, since the main purpose of the PLRA was to stop federal courts from maintaining long-term control over state prison systems, it seems that this purpose would not be hindered if a court holds an evidentiary hearing before ruling on a termination motion. Conducting an evidentiary hearing simply complies with the termination provisions of the PLRA in ensuring that no *current* and ongoing constitutional violation exists before terminating a decree.

82. 18 U.S.C. § 3626(b)(1). That section also provides circumstances in which the court may wait one or two years to terminate relief:

- (1) Termination of prospective relief.—(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener—
  - (i) 2 years after the date the court granted or approved the prospective relief;
  - (ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or
  - (iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

*Id.*

83. *Id.* § 3626(b)(3).

V. IMPLICATIONS OF NEW MODIFICATION AND TERMINATION  
STANDARDS FOR PRISON REFORM AND SCHOOL DESEGREGATION  
CONSENT DECREES

Despite statements by some courts,<sup>84</sup> modification and termination standards for prison reform and school desegregation cases have undergone dramatic changes since the PLRA and the implementation of the *Freeman-Dowell* standard. These new standards have changed the character of, incentives to enter into, and state control over prison reform and school desegregation consent decrees. First, the PLRA and *Freeman-Dowell* standards have respectively changed the character of prison reform and school desegregation consent decrees from a hybrid judicial order and settlement agreement, so that they now more closely resemble judicial orders. Second, due to new standards, the PLRA better addresses the general concern of the Supreme Court of returning prisons to state and local control than *Freeman-Dowell* does with school systems. Third, the new standards change incentives for parties to choose to enter into prison reform and school desegregation consent decrees rather than litigate. Finally, a recommendation is provided which, if followed by courts, will balance the disincentive for parties to enter school desegregation consent decrees and possibly decrease the disincentive to enter other types of consent decrees.

*A. Change in Traditional Character of Prison Reform Consent Decrees*

Since the PLRA, prison reform consent decrees have changed in three major ways. First, the definition and traditional character of prison

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84. Some courts have insisted that the PLRA is in line with the standards established by Supreme Court precedent for granting remedies in cases of constitutional violations. See *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 188 (3d Cir. 1999) (noting that the “PLRA amounts to little more than a codification of already-existing rules governing judicial interference with prisons” in “limit[ing] . . . the court’s authority to issue prospective injunctive relief to remedy constitutional violations”); *Green v. Peters*, No. 71 C 1403, 1997 WL 769458, at \*8 (N.D. Ill. Dec. 5, 1997) (noting that the “PLRA does not in fact deprive courts of their authority to decide and remedy constitutional violations in prison condition cases . . . completely in line with what case precedent otherwise requires”) (emphasis added). The *Green* court cites *Smith v. Arkansas Department of Corrections*, which holds that in prison conditions cases Supreme Court precedent requires that “the remedy must not go beyond what is necessary to remedy the particular constitutional injury.” 103 F.3d 637, 645–46 (8th Cir. 1996). However, note also that *Smith* is a prison reform case involving a *litigated* decree, not a *consent* decree. The *Green* court fails to acknowledge that although federal judges were restrained in providing broad constitutional remedies in pre-PLRA *litigated* cases, in consent decree cases under *Rufo*, judges were allowed to provide remedies above the constitutional minimum.

reform consent decrees has changed from a judicially enforced settlement agreement between parties to “relief” provided by a judicial order.<sup>85</sup> Second, prison reform consent decrees no longer require changed circumstances to modify or terminate a decree. Third, prison reform consent decrees now depart from traditional consent decrees in that they no longer provide relief above the constitutional minimum. These three changes have resulted in a change in the character of prison consent decrees, resulting in prison consent decrees resembling judicial orders rather than hybrid settlement agreements and judicial orders.

*1. Prison reform consent decrees change from a judicially enforced settlement agreement to “relief”*

Post-PLRA prison reform consent decrees define consent decrees as “relief.” One year before the PLRA, the courts referred to consent decrees as *settlement agreements* “subject to continued judicial policing . . . [that] should be construed to preserve the position for which the parties bargained.”<sup>86</sup> However, § 3262(g)(1) of the PLRA defined consent decrees as “any *relief* entered by the court that is based in whole or in part upon the consent or acquiescence of the parties.”<sup>87</sup>

One demonstration that the PLRA change in definition of a consent decree to “relief” is more than semantic<sup>88</sup> is the confusion over the meaning of “termination of prospective relief” in § 3626(b)(2). All circuit courts of appeal have now interpreted the PLRA termination provisions to mean that if a consent decree does not meet the need-narrowness-intrusiveness requirements, both the consent decree and the relief set out in it must be terminated.<sup>89</sup> However, under the Second

85. *See infra* Part V.A.1.

86. *United States v. Michigan*, 62 F.3d 1418, 1995 WL 469430, at \*6 (6th Cir. Aug. 7, 1995) (citations and internal quotations omitted).

87. 18 U.S.C. § 3626(g)(1) (emphasis added). The definition of consent decrees excludes private settlements. *Id.*

88. Although it can be argued that the PLRA’s definition of consent decrees as “relief” rather than a judicially enforced settlement agreement is simply a semantic difference, misinterpretation of the termination standard by the Second Circuit as well as congressional motivations to change the definition of the consent decree are good indications that this was a definitional change that had real implications.

89. Currently, all of the circuit courts of appeal that have addressed the issue have upheld the PLRA termination provisions against a separation of powers challenge. *See Benjamin v. Jacobson*, 172 F.3d 144, 161–62 (2d Cir. 1999) (en banc); *Hadix v. Johnson*, 133 F.3d 940, 943 (6th Cir. 1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 656–57 (1st Cir. 1997); *Dougan v. Singletary*, 129 F.3d 1424, 1426–27 (11th Cir. 1997); *Gavin v. Branstad*, 122 F.3d 1081, 1087 (8th Cir. 1997); *Plyler v. Moore*, 100 F.3d 365, 371, 374 (4th Cir. 1996). However, the Ninth Circuit

Circuit's former interpretation, the PLRA *did not terminate* the underlying consent decree but denied the federal courts of *jurisdiction to enforce* prospective relief within the decree, allowing state courts to enforce the relief provided by a decree.<sup>90</sup> Consent decrees have traditionally been defined as judicially enforced settlement "agreements" formed *by parties* as an alternative to litigation or traditional settlement; whereas the "relief" provided in a case has always been a function of *courts*, not parties, to determine after trial. Since terminating consent decrees without the consent of parties has not been a function of courts,<sup>91</sup> the Second Circuit was justifiably confused in not allowing consent decrees to be terminated by courts under the PLRA.<sup>92</sup>

Another demonstration that the definitional change is more than semantic is a strong congressional motivation to limit the judicial role and to avoid constitutional problems in changing the purpose of a prison consent decree.<sup>93</sup> Again, since providing *relief* has traditionally been a

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struck down the PLRA on separation of powers grounds but then vacated the opinion. Taylor v. United States, 143 F.3d 1178, 1184 (9th Cir. 1998), *vacated by* 158 F.3d 1059 (9th Cir. 1998).

90. Benjamin v. Jacobson, 124 F.3d 162, 177 (2d Cir. 1997), *vacated on reh'g en banc*, 172 F.3d 144 (2d Cir. 1999). The former Second Circuit interpretation was also considered by the court in *Inmates of Suffolk County Jail v. Sheriff of Suffolk County*, 952 F. Supp. 869 (D. Mass. 1997). It is important to note that the PLRA provisions make no distinction and apply the same standard to modifying and terminating decrees. *See supra* note 77.

91. Courts have been allowed to terminate consent decrees *sua sponte* when significant changes in circumstances have occurred or the purposes of the decree have been satisfied. Courts have also terminated decrees *sua sponte* or upon motion by parties when parties demonstrate that the consent decree has achieved its objective or when the court determines that the goals of the decree have been met. For example, in *United States v. City of Miami*, the Eleventh Circuit stated:

When the remedy prescribed in the consent decree has been accomplished, a district court does not have to await a party's motion to terminate a decree which requires temporary supervisory jurisdiction of an agreed upon consent decree. . . . [T]he district court . . . is authorized to consider *sua sponte* whether termination of the consent decree is appropriate.

2 F.3d 1497, 1506 (11th Cir. 1993). Before the PLRA however, courts could not terminate consent decrees without a change in circumstances. This is discussed *infra* Part V.A.2.

92. It should also be noted that the Second Circuit made a major flaw in interpreting § 3626. The major flaw in the Second Circuit's former interpretation of the provision is reading the word "termination" out of the PLRA and substituting it with the word "jurisdiction." Termination of a consent decree has always meant that the court "put an end to" a consent decree, so if the decrees were really "terminated," as the PLRA states, then neither federal nor state courts could enforce the relief existing in consent decrees. *Rouse*, 129 F.3d at 662.

93. *See* 18 U.S.C. § 3626(g)(1) (2000); *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 400, S. 866, S. 930, and H.R. 667 Before the S. Comm. on the Judiciary*, 104th Cong. 2 (1995) (statement of Sen. Hatch) (noting the importance of restoring control of the prisons to the states and to the political branches).

judicial function, the court and Congress have been able to restrict it;<sup>94</sup> however, setting the *terms* for a consent decree has been a party function, so the court is less justified in limiting consent decree terms. In changing the definition of a consent decree to relief, Congress may have intended to enforce its power to limit the relief in consent decrees without explicitly forcing courts to alter the decree's terms. This allows the removal of federal courts from excessive involvement brought about by parties' agreements and restores the power of the federal courts to determine the appropriate relief for the violation at hand without infringing on the rights of parties. In addition to restoring the power of determining appropriate relief in the prison reform cases to federal courts, Congress may have been trying to avoid constitutional problems that could exist in terminating a *settlement*, or even worse, a *contract between the parties*, by instead referring to consent decrees as "prospective relief."<sup>95</sup>

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Rather than allowing parties freedom to establish relief that exceeds the constitutional minimum and goes beyond what the court might order in a litigated judgment, Congress may have intended to limit the judicial role. Changing the definition of a consent decree from a "judicially enforced agreement" to "relief" seems to justify Congress's removal of parties' flexibility to enter consent decrees through the need-narrowness-intrusiveness requirements.

94. Congress clearly has the power to alter the standard for prospective relief provided by courts. See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) (Wheeling II) (standing for the proposition that when Congress alters the substantive law on which an injunction is based, the injunction may be enforced only insofar as it conforms to the changed law); see also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995) (noting that in *Wheeling II* Congress altered the prospective effect of an injunction entered by an Article III court); *Sys. Fed'n No. 91, Ry. Employees' Dep't v. Wright*, 364 U.S. 642, 650–53 (1961) (holding that the district court abused its discretion by failing to revise an injunction to permit labor practice that had been unlawful when the consent decree was entered but later legalized by Congress).

95. John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 450 (2001) (quoting *Miller v. French* 530 U.S. 327, 344–45 (2000)); *id.* at 449 n.79 (2001) ("While *Miller* addressed the constitutionality of the PLRA's automatic stay provision . . . its separation of powers rationale is essentially the same as that of the courts of appeals in upholding [its] judgment termination provisions . . ." (citations omitted)). The Supreme Court has not ruled whether the PLRA termination provisions, which allow Congress to place requirements on a court in termination, violate the separation of powers; however, all circuit courts of appeal that have addressed this issue have declared these provisions to be constitutional. While the Supreme Court has not explicitly ruled on the constitutionality of the PLRA termination provisions, the Court ruled in *Miller*, 530 U.S. at 344–45, that the PLRA's automatic stay provision, 18 U.S.C. § 3626(e), is constitutional because it does not prescribe a rule of decision but imposes the consequences of the court's application of a new legal standard.

For the text of the need-narrowness-intrusiveness requirements see *supra* text accompanying notes 76–80.

2. *Prison reform consent decrees no longer require “changed circumstances”*

The PLRA eliminated the “changed circumstances” requirement to modify consent decrees, demonstrating that post-PLRA prison reform consent decrees have changed from a hybrid judicial order and contract to a judicial order.

Currently, the PLRA no longer requires a component of “changed circumstances” to terminate or modify a consent decree. Under *Rufo*, one of the two requirements for modifying a consent decree was a significant and unforeseen *change in circumstances* from the time the consent decree was issued. This requirement brought out the contractual character of a consent decree because, like a contract, the decree could not be changed unless dramatic changes occurred. Instead, the PLRA adopted need-narrowness-intrusiveness requirements that resemble *Rufo*’s second prong, which provides that a modification be “suitably tailored” to the circumstances. The PLRA requires any relief to extend “no further than *necessary* to correct the violation of the Federal right” and requires prospective relief to be “*narrowly drawn*.”<sup>96</sup> This PLRA provision does not require any change of circumstance to modify or terminate a decree, as previously required by the first *Rufo* prong.<sup>97</sup> For example, if a pre-PLRA consent decree prohibits actions beyond what is necessary to correct a constitutional violation, it can now be terminated under the PLRA if there are no current violations of constitutional rights in that prison, even if *no* circumstances have changed from the time of entry into the consent decree. The PLRA only inquires whether the “consent decree is currently necessary,” “*not* whether the defendants are in compliance with the consent decree” or whether “the objectives of the consent decree have been achieved.”<sup>98</sup>

Now the focus of the court is on narrowly remedying the constitutional violation rather than granting the parties exactly what they bargained for in an agreement. This requirement also seems to emphasize the new “relief” definition of a prison reform consent decree rather than the former “settlement agreement” definition. Elimination of the changed circumstances requirement by the PLRA demonstrates the change in

96. 18 U.S.C. § 3626(a)(1)(A) (emphasis added).

97. For discussion of the *Rufo* test see *supra* notes 33–36 and accompanying text.

98. *Hadix v. Johnson*, 228 F.3d 662, 673 (6th Cir. 2000) (emphasis added).

character of the consent decree from a hybrid judicial order and contract to a purely judicial order.

*3. Prison reform consent decrees no longer allow relief above the constitutional minimum*

Parties to prison reform consent decrees can no longer provide remedies above the constitutional minimum, demonstrating that post-PLRA prison reform consent decrees have changed from a hybrid judicial order and contract to a purely judicial order.

Unlike the previous *Rufo* standard, which allowed consent decrees to provide relief above the constitutional minimum,<sup>99</sup> the PLRA now prohibits all prospective relief dealing with prison conditions from exceeding the constitutional minimum.<sup>100</sup> Previously, one motivation to enter into consent decrees in institutional reform cases was that consent decrees could provide relief above that required by the constitutional minimum.<sup>101</sup> With the PLRA, defendants lose their bargaining power to provide more relief than the constitutional minimum in exchange for saving the plaintiffs, who are unsure of the current posture of the law, the risk of a trial.<sup>102</sup> Removal of parties' bargaining power in providing relief diminishes the contractual nature of a consent decree. The PLRA's removal of parties' discretion in providing relief above a constitutional minimum further demonstrates the change in the character of a consent decree from a hybrid court order and settlement agreement to a purely judicial order.

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99. See *supra* note 20 and accompanying text for discussion of the *Rufo* standard allowing remedies above the constitutional minimum.

100. Under the PLRA, prospective relief may not be granted "unless the court finds that such relief is *narrowly drawn* . . . and is the *least intrusive* means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A) (emphasis added); see *Hallett v. Morgan*, 296 F.3d 732, 743-44 (9th Cir. 2002) ("The limits on federal court jurisdiction are [that relief should only be provided if it is] *no more than necessary* to correct the underlying constitutional violation." (emphasis added) (quoting *Gilmore v. California*, 220 F.3d 987, 1006 (9th Cir. 2000))); *Watson v. Ray*, 192 F.3d 1153, 1157 (8th Cir. 1999) (holding that a consent decree was subject to immediate termination under the PLRA partly because it provided "more relief than the Constitution required").

101. See *supra* text accompanying notes 18-20.

102. Often prison reform plaintiffs also used the option of providing relief above the constitutional minimum as a way to induce defendants to avoid the cost of a trial. See *supra* note 20 for further discussion.

*B. Change in Traditional Character of School  
Desegregation Consent Decrees*

The character of school desegregation consent decrees has also changed from a hybrid to now resemble a judicial order more than a settlement agreement. The Supreme Court, instead of Congress, has altered the definition of consent decrees in the school desegregation arena through *Freeman-Dowell*. Under the *Freeman-Dowell* test, both the vestiges and good faith standards allow for broad judicial discretion in termination of a consent decree. As discussed above, to relinquish federal court supervision under the *Freeman-Dowell* test, a school system must ultimately prove both that it has “complied in good faith with the desegregation decree since it was entered” and that “the vestiges of past discrimination ha[ve] been eliminated to the extent practicable.”<sup>103</sup>

The “vestiges” inquiry grants more weight to eliminating the constitutional violation set out in the decree and focuses more on giving the parties what they bargained for, but still allows for judicial discretion. Courts claim that the obligation to eliminate vestiges of discrimination is a constitutional as well as a “contractual” obligation.<sup>104</sup> However, when the contractual obligation is evaluated, the enforcement does not resemble the enforcement of a traditional contract because judges often retain flexibility to interpret the findings. The vestiges prong of the *Freeman-Dowell* test allows for flexibility in that the parties only have to eliminate vestiges of past discrimination provided in the decree “to the extent practicable,” not to the “*maximum*” extent possible.<sup>105</sup>

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103. *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991).

104. *See NAACP v. Duval County Sch.*, 273 F.3d 960, 966 (11th Cir. 2001).

“[T]he obligations required of each party to a consent decree must be found ‘within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.’”

The Board, of course, must also meet its constitutional obligation to eliminate the vestiges of *de jure* segregation to the extent practicable.

*Id.* (alteration in original) (quoting Jacksonville Branch, *NAACP v. Duval County Sch. Bd.*, 978 F.2d 1574, 1578 (11th Cir. 1992) (citation omitted)); *Dowell*, 498 U.S. at 249–51.

105. *Jenkins*, 515 U.S. at 101 (noting that the test is whether the school district eliminated vestiges of past discrimination to the extent practicable, not to its “maximum potential”); *Duval County Sch.*, 273 F.3d at 973–74 (“The Supreme Court has made quite clear, however, that the Constitution does not require a school board to eliminate the vestiges of past discrimination ‘to the maximum extent practicable.’” (citations omitted)).

Even more so, the good faith inquiry allows judges to examine defendants' attitudes and dealings with plaintiffs and toward court orders, and generally allows courts broad judicial discretion and flexibility.<sup>106</sup> The good faith analysis depends largely on whether the defendants acted in compliance with court orders and the decree and *sought* to achieve its goals rather than on whether a violation set out in the decree still exists.<sup>107</sup> In determining that a school district fulfilled the good faith prong of the *Freeman* test, one court noted that the plaintiff "views the good-faith glass as half-empty," recognizing that there was conflicting evidence that could lead to a finding that the school district acted in good or bad faith but going on to hold that the school district acted in good faith.<sup>108</sup>

In allowing broader judicial discretion with the vestiges and good faith inquiries, the *Freeman-Dowell* test changed the character of a consent decree from a hybrid court order and settlement agreement to a decree most resembling a judicial order. With the good faith requirement, the Court intended to terminate more consent decrees and to free more school districts from federal court control. However, the Court attempted

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106. *Manning v. Sch. Bd.*, 244 F.3d 927, 946 (11th Cir. 2001) (noting that "discerning a school board's good faith is in some respects a subjective finding . . . [and] depends in part on the judge's personal observation of the witnesses").

107. Determining whether a constitutional violation still exists can be a difficult task. *See Dowell ex rel. Dowell v. Bd. of Educ.*, 8 F.3d 1501, 1515–16 (10th Cir. 1993) (noting that "the court must undertake the *difficult task* of determining whether the school board has proved that the racial identifiability present in an aspect of school operations is not causally connected to prior *de jure* segregation") (emphasis added); *Dowell*, 498 U.S. at 249–50 (pointing out that the school board complied with court orders and lacked intent to discriminate in examining the good faith of the school board). The good faith inquiry may simplify the termination decision because rather than relying on conflicting expert opinion on the root of segregation in a certain city, the court can just examine the court record for evidence of a reasonable period of good faith compliance with a consent decree. The good faith inquiry is relied upon in school desegregation cases because the cause of racial segregation in schools can be linked either to a school district's actions or to social and economic factors, making it difficult for a judge to decipher a constitutional violation from voluntary housing segregation. Good faith often can be the factor that tips the scale, allowing courts to terminate judicial supervision over decrees.

108. *Duval County Sch.*, 273 F.3d at 974–75. The *Duval* court asserts that "the Board has never been found to be in violation of any provision" of the consent decree and that it has "exhibited enormous good faith in performing its agreement to craft a school system which protects student and parent choice while vigorously encouraging a race neutral distribution of students throughout the system," even though it opted not to use all of the "standard school desegregation techniques" mentioned in the consent decree. *Id.* However, the dissent argues that these "techniques" "failed to achieve" the goals of the CSA, the document that outlined the goals of the school board, "with regard to the core city's historically black schools under the magnet program, and that it did not give fair consideration to the CSA's supplementary methods for desegregating these schools." *Id.* at 988 (Barkett, J., dissenting).

to return school districts to local control, not by reducing judicial discretion, as with the PLRA, but by allowing broader judicial discretion and thereby degrading the contractual character of a consent decree.<sup>109</sup>

### *C. State and Local Control over Prisons and School Systems*

The change in character of school desegregation and prison reform consent decrees impacts the ability of courts to return school systems and prisons back to state and local control. Two hallmark traits shared by former school desegregation and prison consent decrees were broad judicial discretion to modify the decree and long-term judicial enforcement of the decree. These traits hindered courts from quickly returning prisons and school systems to state and local control.<sup>110</sup>

First, “broader judicial discretion to modify the [consent decree was] ‘required so that the agreed upon solution to the problem giving rise to the litigation [would be] fine-tuned to accomplish its goal.’”<sup>111</sup> However, there is a conflict with the courts having “broad” remedial power and

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109. See *supra* notes 44–47 and accompanying text for a discussion of how courts use both the *Rufo* and *Dowell* standards to rule on termination and modification motions.

110. Three hallmark traits are set out in *Lorain NAACP v. Lorain Board of Education* to describe and justify a flexible modification standard for institutional reform consent decrees. Two of the traits are described in the text accompanying notes 111 and 116. The third trait is that institutional consent decrees “affect more than the rights of the immediate litigants.” *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1149 (6th Cir. 1992) (quoting *Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989)). School desegregation decrees often affect the rights of those beyond the immediate litigants and courts have not made limitations in this area. *Heath*, 888 F.2d at 1109 (“While institutional consent decrees are similarly born by agreement between the parties, they affect more than the rights of the immediate litigants. The 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.”). *But see* Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 580 (1997) (noting that Congress wants to “restrict the broad based remedies” in prison reform litigation and possibly in school desegregation and employment discrimination litigation). However, under PLRA § 3626(a)(1)(A), prospective relief granted to prisoners only extends to “correct the violation of the Federal right of a particular plaintiff or plaintiffs.” 18 U.S.C. § 3626(a)(1)(A) (2000) (emphasis added). This new requirement seems to do away with the prior goal of institutional litigation, which was to “affect more than the rights of immediate litigants.” It is unclear whether the § 3626(a)(1)(A) language provides any substantive limitations, but defendants have unsuccessfully argued that this language prohibits certification of prisoner class actions. *Anderson v. Garner*, 22 F. Supp. 2d 1379, 1383 (N.D. Ga. 1997). The district court rejected defendant’s argument holding that this provision “addresses only the *type* of relief courts may use to redress constitutional violations, and says nothing about the nature of the proceedings underlying the remedy ordered by the court.” *Id.* (citing *Alexander S. v. Boyd*, 113 F.3d 1373, 1380 (4th Cir. 1997) (noting that, in lawsuits which challenge confinement conditions arising under any federal law, § 3626(a)(1) limits the available remedies).

111. *Lorain NAACP*, 979 F.2d at 1149 (quoting *Heath*, 888 F.2d at 1109); *United States v. Michigan*, 62 F.3d 1418, 1995 WL 469430, at \*7 (6th Cir. Aug. 7, 1995).

ability to control consent decrees for “extended periods of time” and allowing states to maintain local control over their prisons and prisoners.<sup>112</sup> As demonstrated above, under *Freeman-Dowell*, the Court views *broad* judicial discretion to modify a school desegregation consent decree as necessary to achieve a “fine-tuned” result.<sup>113</sup> In the prison area, the PLRA greatly *narrows* judicial discretion in prison reform cases to achieve prospective relief that is “narrowly drawn” and “extends no further than necessary.”<sup>114</sup> The PLRA parts with former decree standards under which federal courts maintained control over day-to-day concerns of the state prisons, such as the nutrition, health, exercise, and mail distribution to prisoners over decades.<sup>115</sup> In other words, the PLRA and *Freeman-Dowell* use different means (broad judicial discretion versus narrow judicial discretion) to achieve the same goal (fine-tuned, narrowly drawn solutions to institutional reform litigation).

Second, courts formerly maintained the long-term ability to modify consent decrees, since consent decrees were assumed to last for “extended periods of time, [which increased] the likelihood of significant changes occurring during the life of the decree.”<sup>116</sup> In the school desegregation area, courts often still supervise school desegregation decrees for decades at a time and terminate a decree when it is no longer necessary, rather than when it negatively impacts state institutions. Even the new good faith requirement, intended more promptly to return school districts to local control, requires judicial time and resources to establish a *history* of compliance for a party.<sup>117</sup> Establishing good faith is no easy

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112. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380 (1992); *see also Michigan*, 1995 WL 469430, at \*8 (keeping in mind the “strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons” (quoting *Kendrick v. Bland*, 740 F.2d 432, 437 (6th Cir. 1984))).

113. *See Lorain NAACP*, 979 F.2d at 1149.

114. 18 U.S.C. § 3626(a)(1)(A).

115. *Bolding v. Holshouser*, 575 F.2d 461, 464–65 (4th Cir. 1978) (noting that the plaintiffs “alleged that defendants ‘unreasonably delayed the delivery of incoming mail and the posting of outgoing mail, and have . . . failed or refused to deliver incoming mail or post outgoing mail’”) (alteration in original); *Johnson v. Horn*, 150 F.3d 276, 281–82 (3d Cir. 1998) (noting that the First Amendment requires that prison officials provide inmates with “a kosher diet sufficient to sustain the [i]nmates in good health”).

116. *See Lorain NAACP*, 979 F.2d at 1149 (quoting *Rufo*, 502 U.S. at 380) (alteration in original); *see also Phila. Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1119–21 (3d Cir. 1979) (allowing modification of a consent decree because of changed circumstances not contemplated by the court or parties when entering the decree and beyond defendants’ control).

117. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991) (emphasis added). In *Dowell*, the Court noted that the district court should address “whether the Board had complied in good faith

task and will not likely reduce the burden and time commitment of federal courts in school desegregation decrees.<sup>118</sup> Managing the modification and enforcement of consent decrees will continue to consume judicial time and resources as well as limit the power and accountability of states in controlling their school systems.

In contrast, under the PLRA, either party to a consent decree can move to terminate the decree only *two* years after the consent decree is created.<sup>119</sup> The likelihood of changes occurring during the life of a PLRA decree are less than with other institutional reform decrees because the PLRA demands that federal courts choose the “least intrusive” means of correcting a violation *considering the impact* to the state criminal justice system.<sup>120</sup>

The PLRA standards, rejecting broad judicial discretion and long-term judicial control in the prison reform area, have allowed courts to more quickly return control over prisons to state and local governments than school desegregation decrees under *Freeman-Dowell*. The hallmark traits shared by prison reform and school desegregation consent decrees

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with the desegregation decree since it was entered, and whether the vestiges of past discrimination [have] been eliminated to the extent practicable.” *Id.* It also noted that “[n]ot only do the personnel of school boards change *over time*, but the same passage of time enables the District Court to observe the good faith of the school board in complying with the decree.” *Id.* at 249 (emphasis added); see also Charles L. Patin, Jr. & William M. Gordon, *School Desegregation Cases: The “Good Faith” Requirement*, 159 ED. L. REP. 407, 407 (2002) (“The ‘good faith’ requirement may be the single most difficult of all the requirements of a unitary [school] system.”). In addition to the difficulty, Patin & Gordon also emphasize the length of time it takes for a school district to establish good faith. They note that the “good faith” requirement consists of a “*history* of compliance with the orders of the court, punctuated by minimal judicial intervention into the affairs of a school district.” *Id.* at 416 (emphasis added). “Good faith” also requires “the adoption and implementation of school board policies demonstrating a *consistent pattern* of lawful conduct.” *Id.* (emphasis added). The “*long journey* to unitary status cannot be completed where a school district’s compliance is constantly coerced by judicial edict . . .” *Id.* at 417 (emphasis added); see also *Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987) (“A finding of good faith . . . reduces the possibility that a school system’s compliance with court orders is but a temporary constitutional ritual.”).

118. This is not a comment on the normative value of the *Freeman-Dowell* “good faith” standard, but simply a statement that it does not help courts to more quickly return school districts back to state and local control.

119. See 18 U.S.C. § 3626(b)(1)(A)(i) (2000). Parties can also stipulate to end federal court supervision over prison consent decrees earlier than two years after creation of the consent decree.

120. See *id.* § 3626(a)(1)(A) (commanding federal courts to “give substantial weight to any adverse impact on *public safety* or the *operation of a criminal justice system* caused by the relief”) (emphasis added). While the statute does not specifically say “least intrusive means to state and local control,” it is clear from reading the statute that there would be an intrusion on states if the federal courts were to choose a more intrusive means. *Id.*

now only represent school desegregation decrees.<sup>121</sup> The Supreme Court instructed in school desegregation cases that “federal supervision of local school systems was [always] intended as a temporary measure to remedy past discrimination,” emphasizing that consent decrees are temporary and schools must be returned to state control as soon as possible.<sup>122</sup> However, school desegregation cases still rely on broad, long-term judicial discretion and allow parties to provide remedies above the constitutional minimum, which prevents them from quickly restoring local control over school districts.<sup>123</sup> In the prison reform area, experts claim that there has been “a significant decrease in the number of prisons, juvenile facilities, and jails under court order” since passage of the PLRA,<sup>124</sup> demonstrating that courts have achieved success in returning prison systems back to state and local control. After consideration of the above factors, federal courts will likely continue to be more effective in quickly returning prisons under consent decrees to state control than school systems.

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121. See *United States v. Michigan*, 62 F.3d 1418, 1995 WL 469430, at \*7 (6th Cir. Aug. 7, 1995) (“In *Lorain N.A.A.C.P.*, we held that a consent decree involving school desegregation, namely, institutional reform litigation, was subject to the same standards enunciated in *Rufo* and *Heath*.”). Since the PLRA, only school desegregation cases are subject to the flexible standards of *Rufo* and *Dowell*. See *supra* Part III for discussion of termination standards of school desegregation consent decrees.

122. *Dowell*, 498 U.S. at 247 (finding that if the district court concluded “that the purposes of the desegregation litigation had been fully achieved,” judicial supervision over the desegregation decree could be terminated); *Brown v. Bd. of Educ.*, 349 U.S. 294, 299–301 (recognizing the “complexities arising from the transition to a system of public education freed of racial discrimination” but requiring that school desegregation be carried out “with all deliberate speed”). However, there is no set standard that courts use to decide what is practicable, and sometimes courts seem to equate a long period of judicial supervision as adequate to show that the school district has done everything practicable to eliminate vestiges of past discrimination. Some courts recognize that regardless of the time period granted, some circumstances are beyond the control of the school district. See, e.g., *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 537 (7th Cir. 1997) (noting that “the gap in educational achievement between black and white students . . . would have been closed by now” if there were a “feasible means, decreeable by court, of closing the gap”).

123. With school desegregation, the Court stated that its “end purpose must be to remedy the violation and . . . to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.” *Freeman v. Pitts*, 503 U.S. 467, 489 (1992) (citing *Milliken v. Bradley*, 433 U.S. 267, 280–81 (1977)). The Court also expanded this reasoning to “other cases involving the framing of equitable remedies to repair the denial of a constitutional right,” such as prison reform cases. *Id.* at 487 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15–16 (1971)).

124. Elizabeth Alexander, *Prison Litigation Reform Act Raises the Bar*, CRIM. JUST., Winter 2002, at 10, 16.

*D. Effect of New Modification and Termination Standards on Incentives to Enter into Prison Reform and School Desegregation Decrees*

Besides affecting courts' success in returning prisons and schools to local control, the new modification standards also change incentives for parties to enter into prison reform and school desegregation consent decrees rather than litigate. Traditional incentives to enter into consent decrees have been altered by the change in character of prison reform and school desegregation consent decrees. These changes could result in decreased incentive for parties to enter into prison reform consent decrees and possibly decreased incentive to enter into school desegregation consent decrees.

First, the incentive for plaintiffs to enter into a consent decree to obtain broader remedies than are constitutionally required is diminished for prison reform cases but remains the same for school desegregation cases. In school desegregation cases, courts still allow parties to consent to more than the constitutional minimum to settle their disputes voluntarily with a consent decree. Parties do not have this option in *litigated* school desegregation cases.<sup>125</sup> The incentive to enter consent

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125. While some courts have applied the same *Rufo* standard to consent decrees and to modifying litigated judgments, this part of the *rationale* of *Rufo*, which allows parties to obtain broader remedies through a consent decree, has never applied in litigated cases. Although *Rufo* did not explicitly hold whether its new modification standard applied to litigated judgments as well as consent decrees, some courts have applied the *Rufo* two-prong test to determine whether to modify or vacate injunctive relief in litigated judgments. *Bellevue Manor Assoc. v. United States*, 165 F.3d 1249, 1256–57 (9th Cir. 1999) (holding that Rule 60(b)(5) sets forth the umbrella concept of “equitable” and that the *Rufo* standard applies in “determining whether to modify or vacate a prior injunction or consent decree”); *In re Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993) (holding that the *Rufo* standard allows modification of injunctions whenever equity principles require); *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1149 n.2 (6th Cir. 1992); *Heath v. De Courcy*, 888 F.2d 1105, 1107 n.1 (6th Cir. 1989) (noting “that in *Swift* the Court said the standard for modifying a decree is the same whether entered after trial or upon consent of the parties”). *United States v. Swift*, 286 U.S. 106, 114 (1932), noted that “[t]he result is all one whether the decree has been entered after litigation or by consent.” See also Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1111 (1988) (“[T]he [Cardozo] opinion [in *Swift*] claimed that consent decrees should be treated the same as fully litigated decrees for modification purposes . . .”).

In addition, the Supreme Court in *Agostini v. Felton* applied the *Rufo* test to a litigated decree providing relief from a permanent injunction based on later discredited Establishment Clause jurisprudence. 521 U.S. 203, 215, 238–39 (1997) (holding that modification or vacature of an injunction under Rule 60(b)(5) is required where there has been “a significant change either in factual conditions or in law”) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)); Brief for Respondents at 16 n.2, *Agostini v. Felton*, 521 U.S. 203 (1997) (Nos. 96–552, 96–553) (“Although *Rufo* involved a consent decree, the district court held (Dist. Ct. Op. at 6), and petitioners agree, that *Rufo*’s general statements concerning the appropriate standard for relief under

decrees in school desegregation cases remains since courts will not allow parties to establish remedies above the constitutional minimum in litigated cases. Under the PLRA, there is no additional incentive to enter into a consent decree rather than litigate since the PLRA's statutory provisions do not allow parties to obtain relief above the constitutional minimum. It is unclear how much of the PLRA applies to litigated judgments as well as consent decrees.<sup>126</sup> Although the language of the Act is not explicit,<sup>127</sup> the courts that have addressed this issue have decided that the PLRA *does* apply to injunctions granted in litigated judgments as well as consent decrees.<sup>128</sup> Since the PLRA most likely applies to litigated judgments and consent decrees, neither can provide relief above the constitutional minimum, and consequently there is no additional incentive to enter into a consent decree rather than litigate.

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Rule 60(b) are applicable here."); *see also* Valero Terrestrial Corp. v. Paige, 211 F.3d 112 (4th Cir. 2000).

126. Some courts have found that a portion of the PLRA that requires all prisoners to exhaust administrative remedies applies to litigated decrees. *Alexander v. Hawk*, 159 F.3d 1321, 1328 (11th Cir. 1998) (concluding that 42 U.S.C. § 1997e(a) [of the PLRA] requires a prisoner to exhaust available administrative remedies for his claim for monetary and injunctive relief before filing claims in federal court); *see also* Lavista v. Beeler, 195 F.3d 254, 258 (6th Cir. 1999) (holding that under the PLRA plaintiff must exhaust his administrative remedies before bringing suit in federal court).

127. The termination provisions of the PLRA order termination of "any prospective relief if the *relief*" meets the need-narrowness-intrusiveness requirements. 18 U.S.C. § 3626(b)(2) (2000) (emphasis added). Later the Act defines the term "relief" as "*all relief in any form* that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements." *Id.* § 3626(g)(9) (emphasis added). Here, the Act excludes private settlement agreements but *not* litigated judgments. The text of the PLRA also implicitly applies to litigated judgments since it refers to "civil actions" in which courts order temporary restraining orders or preliminary injunctive relief. *Id.* § 3626(a)(2).

128. *Benjamin v. Jacobson*, 935 F. Supp. 332, 351 (S.D.N.Y. 1996), *rev'd in part*, 124 F.3d 162 (2d Cir. 1997), *vacated on reh'g en banc*, 172 F.3d 144 (2d Cir. 1999) ("What Congress has done here that has changed the law significantly is to apply the standards for a litigated judgment to *all* judgments, including those entered on consent.") (emphasis added). In discussing the possible motivations of Congress in passing the PLRA, the district court in *Benjamin* noted that "Congress could also have wanted to create a uniform national standard for consent and litigated judgments based on a belief that consent judgments, even though agreed to initially, imposed severe burdens on states and local governments and that these burdens exceeded what was constitutionally required. These are legitimate interests." *Benjamin*, 935 F. Supp. at 354; *see* *Smith v. Ark. Dep't of Corr.*, 103 F.3d 637, 647 (8th Cir. 1996) (stating in dicta that the PLRA did not change the standards for determining whether to grant an injunction). *But see* *Watson v. Ray*, 192 F.3d 1153, 1156-57 & n.3 (8th Cir. 1999) (declining to decide whether litigated judgments automatically comply with the PLRA where "the finding of unconstitutional conditions was made by the district court and not by the consent of the parties").

Second, incentive for parties to enter into school desegregation consent decrees may diminish, since after *Freeman-Dowell* courts maintain more judicial discretion to terminate school desegregation consent decrees due to the good faith requirement.<sup>129</sup> Since consent decrees in the school desegregation context are more characteristic of judicial orders than contracts, with broad judicial discretion, parties may lack the surety that they will receive what they bargained for in a consent decree. In turn, the incentive for parties to enter into school desegregation consent decrees may diminish. Judicial discretion does not impact incentives in prison reform cases, since the PLRA actually *narrows* judicial discretion in terminating decrees.<sup>130</sup>

On balance, this analysis indicates that parties will have less incentive to enter into prison reform consent decrees.<sup>131</sup> Parties may also have decreased incentive to enter into school desegregation consent decrees if they value the ability to obtain remedies above the constitutional minimum more than they fear broader judicial discretion in terminating consent decrees.

*E. Recommendation for Courts: Apply Freeman-Dowell Only to Terminate School Desegregation Cases*

While the purpose of this Comment is to demonstrate the kaleidoscopic nature of prison reform and school desegregation consent decrees and not to offer a normative analysis of the current state of these decrees, one recommendation is appropriate to stop courts from creating a further disincentive to enter into school desegregation and other consent decrees. Courts should *stop* adopting the *Freeman-Dowell* termination standard to modify *or* terminate consent decrees outside of the school desegregation setting.<sup>132</sup> As discussed above, the *Freeman-*

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129. As illustrated in the text accompanying notes 104–09, this does not indicate that courts under *Freeman-Dowell* will terminate consent decrees more quickly under the good faith standard.

130. See *supra* notes 78–83 and accompanying text for further discussion.

131. Even though parties in prison reform lack the ability to obtain broader remedies with consent decrees, they may still enter into consent decrees rather than litigate because they will save the cost of a trial and potentially obtain the same remedies they would after a trial.

132. For example, *Wyatt v. Rogers* applies the *Freeman-Dowell* good faith standard to terminate a consent decree binding a mental health facility. 985 F. Supp. 1356, 1385 (M.D. Ala. 1997). Several cases have also combined the *Rufo* and *Freeman-Dowell* factors as important in modifying *or* terminating an injunction. For an example, see *Crutchfield v. United States Army Corps of Engineers*, wherein the court stated:

Relevant decisional law has identified a number of factors that serve to focus the inquiry whether to modify or dissolve an injunction. Among these are the following: (1)

*Dowell* good faith standard allows judges broad judicial discretion to terminate decrees.<sup>133</sup> Broad discretion is warranted with school desegregation decrees where courts attempt to reach the idealistic goal of a “unitary” school district when vestiges of past discrimination are difficult to ascribe to a school district or to socio-economic factors. However, the good faith standard should *not* be expanded to other contexts because it allows judges more flexibility than the *Rufo* standard and allows courts to place less emphasis on granting parties what they agreed to in a decree. The expansion of the good faith standard can act as a disincentive for parties to enter into consent decrees,<sup>134</sup> which are a beneficial dispute resolution tool. Application of the *Rufo* standard in terminating school desegregation cases can also cause further disincentive for parties to enter into school desegregation consent decrees because parties entering decrees will not have any surety of what standard the court will apply when it comes to terminating the decree. However, courts should continue to apply the *Rufo* standard in modifying consent decrees in school desegregation cases and in other substantive areas of the law.<sup>135</sup>

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the circumstances leading to entry of the injunction and the nature of the conduct sought to be prevented; (2) the length of time since entry of the injunction; (3) whether the party subject to its terms has complied or attempted to comply in *good faith* with the injunction; (4) the likelihood that the conduct or conditions sought to be prevented will recur absent the injunction; (5) whether the moving party can demonstrate a significant, *unforeseen change in the facts or law* and whether such changed circumstances have made compliance substantially more onerous or have made the decree unworkable; and (6) whether the objective of the decree has been achieved and whether continued enforcement would be detrimental to the public interest.

175 F. Supp. 2d 835, 844 (E.D. Va. 2001) (emphasis added); *see also* Bldg. and Constr. Trades Council v. NLRB, 64 F.3d 880, 888 (3d Cir. 1995).

The termination standard, which takes into account whether the terms of the decree have been met (and not good faith), should be used to terminate consent decrees in other substantive areas of the law. That standard is discussed *supra* note 37.

133. See *supra* Part III.B for a description of the *Freeman-Dowell* good faith standard.

134. If judicial authority to oversee a consent decree is too broad, this may weigh against a party's decision to enter into a consent decree. Thomas Mengler notes:

Implicit, therefore, in the parties' decision to settle by consent decree is the idea that entering into a consent decree poses fewer future uncertainties than litigating. Parties who settle in the form of a consent decree believe they limit significantly the court's discretion to frame relief. If the parties are wrong in this assumption — that is, if the court, in implementing a consent decree, has broad discretion to alter the terms — they will be less inclined to use the consent decree procedure.

Mengler, *supra* note 21, at 330.

135. Two reservations accompany this general recommendation of broadly applying the *Rufo* standard for modification. First, there should be more analysis of the specific type of consent decree

## VI. CONCLUSION

Since the PLRA termination provisions and the advent of the *Freeman-Dowell* termination standards, prison reform and school desegregation consent decrees have both changed in character from a hybrid judicial order and contract to resemble a judicial order. School

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(i.e., employment and labor, environmental, civil rights, antitrust) before wholesale application of *Rufo*. See *supra* note 25 for discussion of applying *Rufo* to institutional reform and noninstitutional reform cases. Second, there may be a lack of uniformity problem in modification under *Rufo*, which demonstrates that courts may struggle in applying its standards consistently and may cast some doubt on the appropriateness of broadly applying *Rufo*. As discussed earlier, before the new modification standards, the *Rufo* test was applied to both school desegregation and prison reform decrees. *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1149 (6th Cir. 1992). However, the application of the *Rufo* test in the two contexts was not always uniform, as in *Reed v. Rhodes* and *Cooper v. Noble*, discussed below. However, inconsistent application may be solved through more careful application of *Rufo* rather than abandoning *Rufo* for another modification test or statutory standards.

For example, in *Reed v. Rhodes*, the original school desegregation consent decree required that the “racial composition of the student body of any school within the system” not deviate more than 15% from the percent ratio of the school district as a whole. 179 F.3d 453, 457 (6th Cir. 1999). During the life of the decree, the parties implemented a new educational program allowing more parental choice in student assignments. *Id.* at 463–64. The court majority determined that the 15% requirement and the new program were irreconcilable, *id.* at 464, and that the new program was a “material factual change and unforeseen circumstance” which would compel the court to modify the existing decree. *Id.* at 457. However, earlier in the opinion, the majority admitted that in the first few years of the Vision 21 program, it “came as *no surprise*” to anyone that forty schools “exceeded the 15% remedial mandate.” *Id.* at 464 (emphasis added). Since it was expected that the Vision 21 program would cause more schools to fall out of the 15% parameter established by the consent decree, the dissent in *Reed* argued that this was an *anticipated* circumstance, not an *unforeseen* circumstance justifying modification. *Id.* at 479 (Cole, J., dissenting).

In the prison reform context, a court applied the same *Rufo* test and rejected modification under similarly “anticipated” circumstances. In *Cooper v. Noble*, county officials moved for relief from a prison consent decree claiming that “‘dramatic’ and ‘unforeseen’ changes have occurred” in the Madison County Detention Center (“MCDC”) since the decree was issued and that the new center housed more prisoners with more diverse criminal records from different governmental agencies, which made “compliance” with the consent decree “substantially more onerous.” 33 F.3d 540, 543–44 (5th Cir. 1994). The court rejected the county officials’ modification request because “many or all of [the changes] were changes *made by the county officials* [themselves],” *id.*, pointing to evidence that the officials “enjoy[ed]” working in the new prison facility and also “that the MCDC *voluntarily* accept[ed] federal inmates.” *Id.* at 544 n.7 (emphasis added). Since the county officials voluntarily created the factual change in circumstances, the court held that they clearly did not reasonably try to comply with the consent decree despite changed circumstances. *Id.* at 544.

The courts in *Cooper* and *Reed* both should have rejected modification under *Rufo*. As in *Cooper*, where the county officials *voluntarily* created the changes that they felt warranted a modification of the consent decree, in *Reed* the school district *voluntarily* adopted a new program that did not meet the conditions of the original consent decree. But while the court of appeals in *Cooper* ruled that voluntary changes in circumstances do not warrant modification, the court of appeals in *Reed* ruled in favor of modifying of the consent decree.

desegregation cases apply a two-prong vestiges and good faith analysis, which allows for broad judicial discretion in terminating decrees. The two-prong test also relies more on obedience of parties to court orders than remedying the constitutional violation set out in the decree. Prison reform cases, under statutory provisions, allow for narrow judicial discretion and have also transformed the character of consent decrees to resemble judicial orders by removing the “changed circumstance” requirement and substituting it with the “need-narrowness-intrusiveness” requirement. The new requirements rely more on how tailored the remedy is to the violation than on granting the parties what they agreed to in the decree.

The kaleidoscopic change in prison reform and school desegregation decrees is *not* just a semantic change, but the alteration in treatment of consent decrees in these areas has several broad-reaching effects. First, because PLRA prison reform cases reject broad judicial discretion and long-term supervision over consent decrees, they will likely continue to achieve success in quickly returning prison systems to state and local control. On the other hand, school desegregation cases still rely on broad judicial discretion and long-term judicial supervision over decrees and will likely be less successful at quickly returning control over school systems to state and local governments.

Second, due to changes in the character of consent decrees in prison reform and school desegregation, the PLRA may decrease the incentive for plaintiffs to enter into consent decrees rather than litigate. The PLRA no longer allows parties to obtain remedies above the constitutional minimum in consent decrees, reducing the incentive for parties to enter into consent decrees. School desegregation cases may decrease incentive to enter into consent decrees by allowing courts broad discretion in termination of decrees. However, parties may retain incentive to enter into consent decrees, since school desegregation decrees still allow parties to provide remedies above the constitutional minimum, where litigated decrees do not allow broader remedies. Finally, courts should balance the disincentive for parties to enter school desegregation consent decrees and possibly other types of consent decrees by applying *Freeman-Dowell* to terminate *only* school desegregation cases and *Rufo* to modify consent decrees in school desegregation cases and other areas.

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