RESEGREGATION AND NONPARTY PRECLUSION

STEVEN D. MARCUS*

A discriminatory school district is sued, placed under court supervision, remedies the discrimination, and is released from court supervision. What next? There is a growing, and worrisome, trend towards the resegregation of schools following their release from supervision. While the problems of resegregation have recently drawn attention among social scientists and journalists, the procedural hurdles to litigating a claim of resegregation remain largely unexamined. Indeed, certain procedural hurdles could greatly impede litigation to challenge resegregation. This Note examines the defense of preclusion in the resegregation context, and concludes that in two categories of cases—pre-1966 class actions, and post-1966 "implied" class actions—school districts cannot rely on preclusion to defeat an action challenging resegregation. The first category, pre-1966 class actions, were filed before the 1966 Amendments to Rule 23, which provide greater procedural protections to ensure adequate representation. The second category, implied class actions, were filed after the 1966 amendments, never formally certified as class actions, but informally treated as such by courts. Because many pre-1966 class actions and post-1966 implied class actions do not provide the procedural protections to satisfy the constitutional requirement for adequate representation, judgments releasing school districts from court supervision cannot properly bind future plaintiffs challenging resegregation.

 J.D. Candidate, 2016, New York University School of Law; A.B., 2010, Princeton University. I would like to thank everyone who helped the development of this Note, especially Professors Troy McKenzie, David Kamin, and Catherine Sharkey; the Furman Fellows and members of the Furman Academic Scholars Program; and the editors of the *New York University Law Review*, especially Ali Ziegler.

INTRODUCTION

What procedural hurdles face litigants challenging the resegregation of public schools after the termination of court supervision? Consider the history of the Tuscaloosa City Schools. In 1969, lawyers from the NAACP Legal Defense & Educational Fund ("LDF") added the City of Tuscaloosa's School System as a defendant to a class action challenging school segregation in Alabama originally filed in 1963.[1] A three-judge federal panel approved a desegregation plan for the district in 1967,[2] and in 1979, the court approved the merger of Tuscaloosa's black high school and white high school to create Central High School.[3] Central became an exemplar for successful integration, with both black and white students racking up academic, extracurricular, and athletic accolades.[4] In 2000, over the objection of the LDF and many black residents, the federal court released Tuscaloosa City Schools from court supervision by granting the school district's motion for a declaration of unitary status.[5] Within months of their release from supervision, the Tuscaloosa School City Board voted to dis-

[1] *See* Lee v. Macon Cty. Bd. of Educ., 429 F.2d 1218, 1219 (5th Cir. 1970) (recounting the history of the Tuscaloosa City Schools desegregation litigation).

[2] Lee v. Macon Cty. Bd. of Educ., 257 F. Supp. 458, 486–91 (M.D. Ala. 1967).

[3] *See* Lee v. Macon Cty. Bd. of Educ., 616 F.2d 805, 807 (5th Cir. 1980) (considering the Department of Justice's challenge to the Tuscaloosa City Schools' desegregation plan; the Department of Justice challenged only the plan's treatment of the elementary schools).

[4] *See* Nikole Hannah-Jones, *Segregation Now*, PROPUBLICA (Apr. 16, 2014, 11:00pm), http://www.propublica.org/article/segregation-now-full-text (describing the success of Central High School's debate team, math team, cheerleaders, football team, and the school's numerous National Merit Scholars).

[5] *See* Kathleen M. Kinslow, *Resegregation: A Case Study of the Failure of the Color Blind Ideal in K–12 Schooling Policy* 38 n.6 (2009) (unpublished Ph. D. dissertation, University of Alabama) (on file with the University of Alabama) (reporting Judge Blackburn's 2000 order declaring Tuscaloosa City Schools unitary), http://acumen.lib.ua.edu/content/u0015/0000001/0000075/u0015_0000001_0000075.pdf; *see also* Hannah-Jones, *supra* note 4 (describing the community's "raw" emotions and the opposition of LDF to the district's motion for declaration of unitary status).

mantle Central High School by creating two new high schools, and redrawing the attendance zone for Central High School to encompass only an almost-entirely black neighborhood.[6] Unlike its peer high schools in Tuscaloosa, the new Central High School supported no Advanced Placement courses, had no yearbook or school newspaper, and did not offer a physics class until 2013.[7]

How might plaintiffs challenge the resegregation of Tuscaloosa City Schools, and what role does the declaration of unitary status play in such a challenge? First, a definitional note: A declaration of unitary status is a final order that terminates court supervision of a school district.[8] Two Supreme Court cases from the 1990s hold that when district courts review school districts' motions for a declaration of unitary status, they must consider (1) whether the district "complied in good faith with the desegregation decree since it was entered,"[9] and (2) "whether the vestiges of past discrimination had been eliminated to the extent practicable."[10] It is hard to overstate the impact of court supervision on the operation of a school district: While under court supervision, the "heavy burden" rests with a school district to *dis*prove discriminatory intent in any actions that may cause segregation.[11] When a court issues a declaration of unitary status, the school district is free from the burden shifting, which returns to the plaintiffs, who must hoe the tough road to prove discriminatory intent.[12] By way of example, when the Pulaski County Special School District, a district under court supervision, sought to modify their student assignment plan, the district court applied a presumption that any racial imbalances were unconstitutional, and rejected the district's efforts to over-

---

[6] One black school board member joined four white members voting in favor of the plan; two black school board members voted against the plan. *See* Hannah-Jones, *supra* note 4 (detailing the school board's response to the release of court supervision).

[7] *See id.* (comparing the post-2000 Central High School to the newly-created Northridge High School).

[8] *See* United States v. Georgia, 171 F.3d 1344, 1347 (11th Cir. 1999) ("Upon [a] finding that a school system has achieved 'unitary status,' the district court must end its supervision of the school system and dismiss the case.") (internal citations omitted).

[9] Bd. of Educ. v. Dowell, 498 U.S. 237, 249–50 (1991).

[10] *Id.*; *see* Freeman v. Pitts, 503 U.S. 467, 491 (1992) (permitting the termination of judicial supervision where a school district had not achieved complete compliance with a desegregation decree, but had nevertheless complied in good faith with the decree).

[11] *See* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979) (describing the school board's heavy burden to show that segregatory actions "serve important and legitimate ends").

[12] *See* Sch. Bd. of Richmond, Va. v. Baliles, 829 F.2d 1308, 1312 (4th Cir. 1987) ("[T]he court was correct in declaring that RPS is now unitary and that the burden of proof rests on the plaintiffs.").

come that presumption.[13] In contrast, when the Austin Independent School District, a district that had been declared unitary, sought to modify their student assignment plan, the court applied a presumption of constitutionality, placing the burden on plaintiffs to prove intentional discrimination, and found that they did not meet their burden.[14]

Although previous scholarship has addressed the normative question of whether and how courts should treat claims of resegregation following a declaration of unitary status differently from traditional desegregation claims,[15] the procedural barriers to challenging resegregation have largely gone unexamined in scholarship while courts are beginning[16] to confront these arguments.[17] This Note attempts to fill

---

[13] *See* Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1, 839 F.2d 1296, 1305 (8th Cir. 1988) ("In a system with a history of segregation, there is a need for specific and effective remedial criteria, and courts must apply a presumption of unconstitutionality against schools in previously segregated systems which remain substantially disproportionate in their racial composition.") (citation omitted).

[14] *See* Price by Price v. Austin Indep. Sch. Dist., 729 F. Supp. 533, 549 (W.D. Tex. 1990) ("Plaintiffs have failed to bear their burden in this case.").

[15] *See, e.g.*, Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653, 665 (1987) (arguing that the school board should bear the burden of disproving segregatory intent for all actions that reintroduce racial separation after a declaration of unitary status); Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1605–15 (2003) (blaming the Supreme Court's 1970s and 1990s decisions for the resegregation of schools by rejecting interdistrict remedies and ordering the end of desegregation litigation); Brian K. Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 LA. L. REV. 789, 838 (1988) (arguing that courts should focus on whether resegregation actions reinstate the effects of past discrimination); Monika L. Moore, Note, *Unclear Standards Create an Unclear Future: Developing a Better Definition of Unitary Status*, 112 YALE L.J. 311, 312 (2002) (arguing for courts to adopt a "twelve-year plan" model, whereby a court should terminate supervision twelve years after a declaration of unitary status).

[16] *See, e.g.*, Spurlock v. Fox, 716 F.3d 383 (6th Cir. 2013) (upholding trial court's rejection, after a bench trial, of a claim challenging the resegregation of Nashville schools); Complaint at 1–3, Johnson v. Troy City Bd. of Educ., 2:13-cv-00579-WHA-WC (M.D. Ala. dismissed Dec. 11, 2013), 2013 WL4840493 (alleging resegregation and noting "history of intentionally discriminating against African American students").

[17] Two authors have turned their attention to procedural issues in desegregation litigation. *See* Hugh Joseph Beard, Jr., *The Role of Res Judicata in Recognizing Unitary Status and Terminating Desegregation Litigation: A Response to the Structural Injunction*, 49 LA. L. REV. 1239 (1989); Landsberg, *supra* note 15, at 827 (raising briefly the assumption in a school board's preclusion defense that plaintiffs might be bound by prior judgments, as "the original desegregation suit probably was brought as a 'class action' prior to the 1966 amendment to Rule 23"). Beard responds to Landsberg's argument that courts should look past a declaration of unitary status and consider the resegregative effects of school board actions. *See* Landsberg, *supra* note 15. Beard argues, in part, that a declaration of unitary status should be res judicata on parties seeking to challenge resegregation. *See* Beard, *supra*, at 1291–94 (rejecting Landsberg's position and arguing that "[d]iscriminatory intent has to be 'proved in a given case'" (citation omitted)). This Note disagrees with Beard's analysis, and expands on Landsberg's brief discussion of the assumption that plaintiffs are bound by pre-1966 class actions.

that void by examining the preclusive effects of declarations of unitary status on resegregation litigation. This Note focuses on the potential problem raised by the defense of preclusion, which has successfully been deployed by school boards to defeat resegregation litigation. When successfully argued, preclusion raises what has thus far been an insurmountable hurdle for plaintiffs by shifting the burden to plaintiffs to prove discriminatory intent and precluding plaintiffs' reliance on historical evidence of discrimination—crucial evidence to prove discriminatory intent.[18] This operation of issue preclusion is the focus of this Note: when courts preclude resegregation plaintiffs from introducing historical evidence of discrimination because the issue of the school district's discrimination was resolved in the original segregation case, the plaintiffs face an overwhelming uphill battle. Indeed, the Supreme Court has recognized that evidence of historical discrimination is "highly relevant" to a discrimination claim.[19] Precluding such relevant evidence spells further trouble for plaintiffs.[20]

This Note argues that in a great number of cases, declarations of unitary status should not be found to preclude challenges to resegregation. A successful preclusion defense requires the finding that the plaintiffs in the original desegregation class action adequately represented the plaintiffs in the resegregation suit. However, because many desegregation class actions were filed before the 1966 amendments to Rule 23 ("pre-1966 class actions"), they were never certified as class actions, and no court has inquired into the adequacy of the named plaintiffs' representation. Similarly, many desegregation class actions were filed after the 1966 amendments to Rule 23, never formally certified, and treated as an implied class ("post-1966 implied class actions"). A declaration of unitary status in most pre-1966 class actions and post-1966 implied class actions cannot be said to preclude resegregation litigation because these cases do not provide the crucial procedural protections of Rule 23 that the Supreme Court has endorsed as required for nonparty preclusion.

The problem of resegregation extends far beyond the Tuscaloosa City Schools' dramatic and sudden retrogression. Indeed, as of December 2014, 329 school districts were under court supervision.[21]

---

[18] *See infra* notes 46–66 (describing the litigation against Norfolk Public Schools).

[19] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. 429 U.S. 252, 268 (1977) ("The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body . . . .").

[20] *See infra* notes 46–70 (describing the litigation against Norfolk Public Schools).

[21] *See* Jeff Larson, Nikole Hannah-Jones & Mike Tigas, *School Segregation After* Brown, ProPublica (May 1, 2014), http://projects.propublica.org/segregation-now/ (compiling data from Stanford University and Common Core of Data).

Many large districts, including the Milwaukee School District, both Baltimore City and County Public Schools, Indianapolis Public Schools, and the Lansing Public Schools remain under court supervision.[22] Since 2010, 25 school districts have been released from court supervision.[23] Many districts are in litigation now, seeking declarations of unitary status.[24]

A spate of recent social science research has shed new light on the growing problem of the resegregation of U.S. school districts. While previous research had largely examined the resegregation of individual school districts,[25] recent studies have attempted to quantify the effect of declarations of unitary status on resegregation generally. The data is sobering. ProPublica's 2014 study analyzed the demographic changes in school districts deemed unitary between 1990 and 2011, and concluded that in 2014, 53 percent of black students in those districts now attend "apartheid schools," a term used to describe schools where the white population is one percent or less.[26]

Framed by mounting evidence of, and attention on, resegregation, this Note offers the first analysis of the preclusion problem raised by resegregation litigation. The Note proceeds in three parts. Part I discusses the two classes of desegregation litigation at the center of my argument: pre-1966 class actions and post-1966 implied class actions. To represent a typical pre-1966 class action, this Note describes the

---

[22] *See id.* (tallying school districts still under court supervision).

[23] *See id.* (listing recently-released school districts, including Sumter County, South Carolina, and Jefferson Davis Parish, Louisiana).

[24] *See, e.g.*, *Pulaski County Special School District Seeks Unitary Status for Special Ed*, ARKANSAS NEWS BUREAU (Dec. 15, 2014, 5:39 PM) http://arkansasnews.com/news/arkansas/pulaski-county-special-school-district-seeks-unitary-status-special-ed (describing litigation concerning the special education district in Little Rock); Jane Dail, *Appeal Revisits Unitary Status*, DAILY REFLECTOR (Dec. 14, 2014), http://www.reflector.com/news/appeal-revisits-unitary-status-2734691 (describing litigation over Pitt County schools in North Carolina).

[25] *See, e.g.*, Roslyn Arlin Mickelson, *The Incomplete Desegregation of the Charlotte-Mecklenburg Schools and its Consequences, 1971–2004*, *in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 87, 99 (John Charles Boger & Gary Orfield eds., 2005) (examining student demographic data in the Charlotte-Mecklenburg school district before and after declaration of unitary status, concluding that in the year following the declaration of unitary status, "7.4 percent fewer middle schools, and 20.6 percent fewer high schools were racially balanced than [before the declaration of unitary status]").

[26] Hannah-Jones, *supra* note 4; *see also* Charles T. Clotfelter, Jacob L. Vigdor & Helen F. Ladd, *Federal Oversight, Local Control, and the Specter of "Resegregation" in Southern Schools*, 8 AM. L. & ECON. REV. 347, 350 (2006) (finding "some suggestive links between the decisions of federal courts and school segregation as reflected in two measures of racial imbalance"); Byron Lutz, *The End of Court-Ordered Desegregation*, 3 AM. ECON. J.: ECON. POL'Y 130, 146 (2011) (using a different dataset to conclude that "the dismissal of a desegregation plan reverses approximately 60 percent of the effect of the plan's implementation").

litigation challenging segregation in Norfolk Public Schools; to represent a typical post-1966 implied class action, this Note describes the litigation challenging segregation in Walton County Public Schools. Part II details the Supreme Court's growing formalization of the adequacy of representation inquiry, offering a contrast to the classes of litigation described in the preceding part. Part III applies this formalization to the classes of litigation discussed in Part I, and argues that judgments arising out of both classes of litigation would likely not be granted preclusive effect because they failed to adequately represent nonparties. This Note concludes by discussing this implication in the context of declarations of unitary status.

I
Pre-1966 Class Actions and Post-1966 Implied Class Actions

A. Pre-1966 Class Actions

The Supreme Court's 1954 decision in *Brown v. Board of Education* triggered a host of class action litigation seeking the desegregation of American schools.[27] These class actions, filed before 1966, were governed by the version of Rule 23 promulgated in 1938 ("1938 Rule 23"),[28] which remained in effect until the sweeping 1966 Rule 23 Amendments.[29] The 1938 Rule 23 differed significantly from its contemporary version: Rather than categorizing class actions by the relief sought as the modern Rule 23 does,[30] the 1938 Rule 23 categorized class actions based on the relationships between class members.[31] True class actions involved "joint, common, or secondary rights;" hybrid class actions described actions involving "several" rights related to "specific property;" spurious class actions were defined as involving

---

[27] *See, e.g.*, Whittenberg v. Greenville Cty. Sch. Dist., 298 F. Supp. 784 (D.S.C. 1969) (South Carolina districts); Vick v. Cty. Bd. of Educ. of Obion Cty., Tenn., 205 F. Supp. 436 (W.D. Tenn. 1962) (Obion Cty. district); Hall v. St. Helena Parish Sch. Bd., 268 F. Supp. 923 (E.D. La. 1967) (St. Helena Parish district); Yarbrough v. Hulbert-West Memphis Sch. Dist. No. 4, 243 F. Supp. 65 (E.D. Ark. 1965) (Hulbert-West Memphis district); *see generally* Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 518 (1980) (noting *Brown*'s impact on civil rights litigation).

[28] Fed. R. Civ. P. 23 (1938).

[29] Fed. R. Civ. P. 23 (1966).

[30] Fed. R. Civ. P. 23 (creating inconsistent or varying adjudication classes, limited fund classes, injunctive or declaratory relief classes, and predominantly money damages classes).

[31] Fed. R. Civ. P. 23 (1938) (creating 23(a)(1) "true" class actions, 23(a)(2) "hybrid" class actions, and 23(a)(3) "spurious" class actions); *see generally* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 Fla. L. Rev. 657, 671–73 & n.82 (2011) (describing true, hybrid, and spurious class actions under 1938 Rule 23).

several rights affected by a common question and related to common relief.[32] While the modern Rule 23(c)(1) calls for a formal certification order,[33] the 1938 Rule 23 did not require formal certification.[34]

Notably, the 1938 Rule 23 created a unique scheme for determining the preclusive effect of a judgment on nonparties. Although the text of the 1938 Rule 23 was silent on preclusion, Professor James William Moore, the chief architect of the 1938 Rule 23, argued that only true class actions bound nonparties.[35] Spurious class actions, Moore wrote, only bound named plaintiffs and members of the class who had affirmatively intervened into the suit.[36] Moore's view was highly influential on courts.[37]

Pre-1966 desegregation cases were almost entirely brought as spurious class actions.[38] However, unlike other pre-1966 cases, spurious desegregation class actions were generally treated as preclusive on, and enforceable by nonparties.[39] For instance, in *Jeffers v. Whitley*, the Fourth Circuit found the judgment in a desegregation case enforceable by nonparty students, even though the court noted that the case was brought as a "spurious class action."[40] Growing sym-

---

[32] *See* James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft,* 25 GEO. L.J. 551, 572–76 (1937) (describing true, spurious, and hybrid class actions).

[33] FED. R. CIV. P. 23(c)(1).

[34] Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1261 (2002) ("Prior to 1966, Rule 23 made no explicit reference to certification at all.") (citing 3 B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.50, at 23-884.4 (2d ed. 1996)).

[35] *See* James Wm. Moore & Marcus Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 561 (1938) ("The decree in the spurious type of class action is not binding, as in the true class action, upon the entire class; it binds only those actually before the court.").

[36] Robert G. Bone*, The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 669 (2014) (citation omitted) ("Although the Rule itself said nothing about preclusion, its drafter, James William Moore, published an article in 1938 describing its preclusive effects, and many courts followed Moore's lead.")

[37] *See* Zachariah Chafee, Jr., *Some Problems of Equity*, in THE THOMAS M. COOLEY LECTURES 251 (1950) ("So great is the deserved respect for his treatise, that his scheme about binding outsiders has had almost as much influence upon judges as if it had been embodied in Rule 23.").

[38] *See* Brunson v. Bd. of Trs. of Sch. Dist. No. 1, S.C., 311 F.2d 107, 109 (4th Cir. 1962) (noting that "comparable cases have been almost uniformly brought as spurious class actions under Rule 23(a)(3)"); *see also, e.g.*, Potts v. Flax, 313 F.2d 284, 288 (5th Cir. 1963) ("The complaint alleged with great precision that the action was a class suit brought for all under F.R.Civ.P. 23(a)(3)."). *But see, e.g.*, Sys. Fed'n No. 91 v. Reed, 180 F.2d 991, 997 (6th Cir. 1950) (characterizing the class action as "under [the present] circumstances, the 'character of the right sought to be enforced for . . . the (plaintiff) class is . . . joint, or common,' within the clear intendment of Rule 23(a)(1)").

[39] *See* Marcus, *supra* note 31, at 681–83 (providing examples of spurious desegregation class actions that courts treated as preclusive on and enforceable by nonparties).

[40] Jeffers v. Whitley, 309 F.2d 621, 629 (4th Cir. 1962).

pathy on the federal bench for racial equality in education led to a relaxation of rules formalism for desegregation plaintiffs.[41]

The Supreme Court's order implementing the 1966 amendment to Rule 23 created some confusion for lower courts deciding pending cases. The order provided, "that the foregoing amendments and additions to the Rules of Civil Procedure shall take effect on July 1, 1966, and shall govern all proceedings in actions then pending except to the extent that in the opinion of the Court their application in a particular action then pending would not be feasible or would work injustice in which event the former procedure applies."[42]

The order takes the position that the amendments should apply retroactively by default, in the absence of infeasibility or injustice, but no clear standard arose to determine those exceptions.[43] By contrast, in the desegregation context, courts largely seem to take non-retroactivity as the default.[44] However, some appellate courts have noted district courts' failures to comply with the Supreme Court's promulgation in desegregation cases.[45]

1. Norfolk Public Schools

The litigation against Norfolk public schools exemplifies the pre-1966 desegregation class action suits and the preclusive effect of a declaration of unitary status on resegregation litigation. In 1956, plaintiffs brought a class action against the School Board of Norfolk, alleging that the Board had operated a dual school system based on race and

---

[41] *See* Marcus, *supra* note 31, at 679 & n.122 (attributing the unique treatment of desegregation class actions in part to "a cadre of federal judges [who] refused to countenance southern foot-dragging any longer").

[42] Amendments to Rules of Civil Procedure for the United States Dist. Cts., 383 U.S. 1031 (1966) (reporting amendments to the Federal Rules of Civil Procedure for the United States District Courts to the United States Senate and House of Representatives).

[43] For examples of circuit courts ruling on retroactivity, see *Hohmann v. Packard Instrument Co.*, 399 F.2d 711, 713 (7th Cir. 1968) (affirming the district court's decision to apply the 1966 Rule 23 amendment to a class action filed in 1963), and *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 823 (5th Cir. 1967) (holding "that to the maximum extent possible, the amended Rules should be given retroactive application").

[44] *See, e.g.*, Whittenberg v. Sch. Dist. of Greenville Cty., 607 F. Supp. 289, 303 (D.S.C 1985) ("[T]he absence of certification may be explained by the fact that Rule 23 as it existed in 1963 did not require class certification by the Court.").

[45] *See, e.g.*, Jones v. Caddo Parish Sch. Bd., 704 F.2d 206, 213 (5th Cir. 1983) ("Despite the general retroactive applicability of the amendments to Rule 23, the record in this case indicates that no class certification in accordance with Rule 23(c)(1) was ever requested or ordered. Thus, the true nature of the class was never judicially ascertained."); Williams v. City of New Orleans, 729 F.2d 1554, 1569 n.4 (5th Cir. 1984) (Higginbotham, J., concurring) ("We are learning that much of our school litigation has proceeded with ill-defined and largely ignored classes of litigants.").

had discriminated against black students.[46] In 1970, the Fourth Circuit upheld the district court's finding that the School Board of the city of Norfolk, Virginia had unlawfully discriminated against black students and ordered the district court to implement a desegregation plan that would transform the Norfolk school system into a unitary school system free from discrimination.[47] In 1971, the district court adopted a desegregation plan that made heavy use of free cross-town busing to achieve desegregation, the Fourth Circuit affirmed implementation of this plan.[48]

In 1975—four years later—the district court concluded that the Board had eliminated racial discrimination, and that the district had become unitary.[49] For eight years, the Board continued to operate as it had under court supervision.[50] In 1983, however, in response to steady "white flight" from the Norfolk public school system, the Board voted to eliminate busing for elementary school students and to return to a geographic assignment plan to determine elementary school enrollments.[51] Plaintiffs filed a class action, *Riddick by Riddick v. School Board of the City of Norfolk*, challenging the new student assignment plan, alleging that it "was racially motivated and that its implementation would violate the rights of the plaintiffs under the Fourteenth Amendment."[52]

Plaintiffs relied on demographic data from the school board's plan to argue that eliminating busing would result in resegregation of the elementary schools. Under the busing plan, four of Norfolk's thirty-six elementary schools had black populations greater than seventy percent; under the new plan, twelve of the thirty-six elementary schools would be greater than seventy percent black.[53] Of those

---

[46] Adkins v. Sch. Bd. of Newport News, 148 F. Supp. 430, 436 (E.D. Va. 1957) (finding that Virginia's Pupil Placement Act contravened *Brown v. Board* and was unconstitutional), *aff'd* 246 F.2d 325 (4th Cir. 1957).

[47] Brewer v. Sch. Bd. of Norfolk, Va., 434 F.2d 408, 410–12 (4th Cir. 1970).

[48] Brewer v. Sch. Bd. of Norfolk, Va., 456 F.2d 943 (4th Cir. 1972).

[49] Riddick by Riddick v. Sch. Bd. of Norfolk, 784 F.2d 521, 525 (4th Cir. 1986) (reprinting the district court's 1975 order, which declared "that the Norfolk School System is now 'unitary'"). Curiously, the plaintiffs did not appeal this decision. *Id.* ("No appeal was taken from the order dismissing the case.").

[50] *See id.* ("No legal action was taken with respect to the desegregation of Norfolk's public schools from 1975 until the present action was filed in 1983.").

[51] *Id.* Curiously, even though the Board had been released from court supervision for eight years, they sought district court approval of the plan to eliminate busing, and filed a motion to reinstate the previous desegregation case. *Id.* After the plaintiffs filed suit challenging the rescission of the busing program, the Board voluntarily dismissed its motion to reinstate. *Riddick*, 784 F.2d at 525.

[52] Riddick by Riddick v. Sch. Bd. of Norfolk, 627 F. Supp. 814, 816 (E.D. Va. 1984), *aff'd*, 784 F.2d 521 (4th Cir. 1986).

[53] *Riddick*, 784 F.2d at 527.

twelve schools, ten of them would be greater than ninety-five percent black.[54]

The district court and the Fourth Circuit rejected the plaintiffs' resegregation argument.[55] Most relevantly, the Fourth Circuit placed great weight on the preclusive effect of the 1975 declaration of unitary status on the resegregation litigation.[56] The court concluded that the declaration of unitary status terminated district court supervision over the Norfolk school system and shifted the burden to the plaintiffs to prove intentional discrimination for any resegregatory acts.[57] The court argued that while district courts have "broad" power to fashion desegregation orders, they can only exercise that power "[in] those cases in which a constitutional violation has occurred . . . ."[58] The court held that where a declaration of unitary status was issued all constitutional violations were rectified.[59]

Two key questions remained for the Fourth Circuit's analysis in *Riddick*: First, did the 1975 declaration of unitary status—a judgment arising out of a 1956 class action—have preclusive effect on the 1984 plaintiffs? Second, if the declaration of unitary status did have preclusive effect, what precisely is precluded from the 1984 plaintiffs' argument?

The Fourth Circuit affirmed the district court's conclusion that the declaration of unitary status did bind the 1984 plaintiffs, even though the 1984 plaintiffs were not party to the 1956 action.[60] As discussed *infra*, in order for a judgment to bind nonparties, the court

---

54 *Id.* The new plan also provided for a transfer option, under which a student attending a school where her race comprised 70 percent or more of the student body is eligible to transfer, with free transportation, to any school in the district where her race comprises less than 50 percent of the student body. *Id.* The Fourth Circuit noted that even with this option, all ten of the schools with 95 percent or more black students would remain above 95 percent black. *Id.* The plan also called for "multi-cultural programs to expose students in racially isolated elementary schools to students of other races." *Id.*

55 *Riddick*, 627 F. Supp. 814 (E.D. Va. 1984), *aff'd*, 784 F.2d 521 (4th Cir. 1986).

56 *Riddick*, 784 F.2d at 531–32.

57 *Id.* at 534. While a school district is under court supervision, the district bears the burden to disprove intentional discrimination when enacting or altering significant policies. *See* Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653, 657 (1987) (describing the shift of a "'heavy burden' of showing that school board decisions tending to reestablish the dual system serve 'important and legitimate ends'") (citing Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979) (quoting Green v. Cty. Sch. Bd., 391 U.S. 430, 439 (1968))). By contrast, in litigation against school districts not under court supervision, the burden rests with plaintiffs to prove discriminatory intent. *See* Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1220 (2000).

58 *Riddick*, 784 F.2d at 535.

59 *Id.* ("[O]nce the goal of a unitary school system is achieved, the district court's role ends.").

60 *Id.* at 532.

must find that the plaintiffs in the first action adequately represented the plaintiffs in the second action.[61] The Fourth Circuit's reasoning on this point was cursory. The court noted that the 1956 class and the 1984 class both claimed to represent "Norfolk's black school children . . . ."[62] Citing the Sixth Circuit's decisions in similar cases concerning Cincinnati Public Schools[63] and Akron Public Schools,[64] the court concluded that the "two classes are in sufficient privity for the principles of collateral estoppel or issue preclusion to apply."[65]

Regarding the preclusive effect of the declaration of unitary status, the court was less clear, as the Norfolk plaintiffs did not rely extensively on historical discrimination to make out their segregation claim.[66] Unlike the Cincinnati and Akron desegregation cases, where the Sixth Circuit explicitly held that preclusion prevented plaintiffs from relying on any historical evidence of segregative intent from prior to the first preclusive decision,[67] the Fourth Circuit here obfuscated. The court held that plaintiffs should not be able to *ad infinitum* rely on evidence of historical discrimination, but did not explicitly explain under what circumstances plaintiffs should be able to rely on historical evidence.[68] The Fourth Circuit's reference to the Akron and Cincinnati cases, however, suggests an endorsement of preclusion of historical evidence.[69]

---

[61] *See infra* Part II (describing the Supreme Court's formalization of nonparty preclusion).

[62] *Riddick*, 784 F.2d at 532.

[63] Bronson v. Bd. of Educ., 525 F.2d 344, 349 (6th Cir. 1975) (applying issue preclusion to a second group of plaintiffs, finding privity with a separate prior litigation against Cincinnati, and precluding the second plaintiffs from relying on evidence of historical discrimination in proving discriminatory intent). *See* Deal v. Cincinnati Bd. of Educ., 244 F. Supp. 572, 582 (S.D. Ohio 1965), *aff'd*, 369 F.2d 55, 65 (6th Cir. 1966) (rejecting plaintiffs' claim that Cincinnati operated a segregated school district).

[64] Bell v. Bd. of Educ., 683 F.2d 963, 965–66, 968 (6th Cir. 1982) (finding privity and adequate representation with plaintiffs in a 1965 class action and applying preclusion to bar historical discrimination evidence).

[65] *Riddick*, 784 F.2d at 532.

[66] *Id.* at 539.

[67] *See supra* notes 60–61 (describing the Cincinnati and Akron litigation).

[68] *Riddick*, 784 F.2d at 539 ("And, to repeat, we keep in mind that while the history of discrimination is not dispositive, it is relevant to a court's determination of the school board's intent.").

[69] *See id.* at 532 (citing *Bell*, 683 F.2d at 965–66, 968); Bronson v. Bd. of Educ., 525 F.2d 344, 349 (6th Cir. 1975). The court later circumscribes their position, noting that "[w]hile that history of discrimination cannot and should not be ignored, it 'cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.'" *Id.* at 539 (quoting City of Mobile v. Bolden, 446 U.S. 55, 74 (1980), *superseded by statute on other grounds*, Civil Rights Act of 1965, Pub. L. No. 97-205, 96 Stat. 134, *as recognized in* Thornburg v. Gingles, 478 U.S. 30, 71 (1986)).

The *Riddick* case demonstrates how courts have treated the preclusive effects of pre-1966 class actions. To find that a prior judgment binds the future nonparty plaintiffs, the court conducts a cursory inquiry into the prior plaintiffs' adequacy of representation. When the court concludes that the prior plaintiffs did adequately represent the subsequent plaintiffs, the effect of preclusion is to eliminate a set of evidence crucial to the subsequent plaintiff's claim. Ninety two of the 392 active school desegregation cases are pre-1966 cases.[70]

B. Post-1966 Implied Class Actions

Although the modern Rule 23 plainly calls for formal certification of class actions, some class actions filed after the promulgation of the 1966 Amendments have proceeded without any formal certification. This set of cases is smaller than the pre-1966 class actions described above, but the doctrine is on even shakier ground as a result of the Supreme Court's recent jurisprudence.[71] Courts have also relied on the doctrine of implied class actions to allow classes in suits filed before 1966,[72] but the doctrine has more at stake for plaintiffs in post-1966 suits, who cannot rely on the argument that they complied with the less demanding 1938 Rule 23.

In *Bing v. Roadway Express*, the Fifth Circuit established a test to determine whether a suit filed after 1966 could be considered a class action in the absence of a certification order. The court relied on four factors to conclude that the class action should be allowed in spite of the district court's failure to certify the class: (1) the complaint was brought on behalf of the plaintiff and "all others similarly situated"; (2) the defendants never objected to the "class nature"; (3) the trial court made statements suggesting that it believed the case was a class action; and (4) the district court's order provided relief "aimed at a class of people."[73] The *Bing* framework has been followed in the

---

[70] *See* Larson, Hannah-Jones & Tigas, *supra* note 21.

[71] *See supra* Part II.

[72] *See, e.g.*, Evans v. Buchanan, 416 F. Supp. 328, 337 n.19, 338 (D. Del. 1976), *aff'd*, 555 F.2d 373, 376 (3d Cir. 1977) (allowing a desegregation suit filed in 1957, *see* Evans v. Buchanan, 379 F. Supp. 1218, 1220 (D. Del. 1974), to proceed as a class action where "the action had been treated by all concerned as a proper class action").

[73] Bing v. Roadway Express, Inc., 485 F.2d 441, 446–47 (5th Cir. 1973).

First,[74] Sixth,[75] and Eleventh Circuits,[76] and expressly rejected in the Third Circuit.[77]

The Supreme Court has directly called into question the implied class action doctrine in the desegregation context in *Pasadena City Board of Education v. Spangler*, where the Court rejected the *Bing* factors in dicta.[78] The First and Eleventh Circuits' reliance on *Bing* both post-date *Spangler*. While the First Circuit expressly distinguishes *Spangler*,[79] the Eleventh Circuit does not mention the case.[80]

1. Walton County Public Schools

In 1968, plaintiffs in Walton County, Georgia, filed suit against the Walton County Board of Education, alleging that the board operated discriminatory schools.[81] The complaint was brought on behalf of the named plaintiffs and "all other N[egro] school children of Walton County, Georgia" and explicitly notes that the suit "is a class action under Rule 23, Federal Rules of Civil Procedure."[82] In their brief in response, the Board of Education "neither admitted nor denied the allegations . . . that [the] case should proceed as a class action . . . ."[83] The district court issued no ruling on the certification of the class, but in an order entered a few months after the complaint was filed, the court referred to "[t]he plaintiffs, suing for themselves and two

---

[74] *See* Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325, 1334 (1st Cir. 1991) ("While express class certification is a fundamental requirement, uncertified actions have on occasion been recognized as class actions.").

[75] *See* Senter v. Gen. Motors Corp., 532 F.2d 511, 522 (6th Cir. 1976) ("To state at this late date that this was not a class action, 'would be to ignore the substance of the proceedings below in favor of an excessively formalistic adherence to the Federal Rules of Civil Procedure.'" (quoting *Bing*, 485 F.2d at 447)).

[76] *See* Doe v. Bush, 261 F.3d 1037, 1049 (11th Cir. 2001), *cert. denied*, 534 U.S. 1104 (2002) ("Accordingly, although we recognize that the district court failed to properly certify a class, we conclude, nevertheless, that an 'implied class' exists.").

[77] *See* Brown v. Phila. Hous. Auth., 350 F.3d 338, 344 (3d Cir. 2003) ("[W]e are neither attracted to, nor persuaded by . . . *Bing* . . . .").

[78] *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 430 (1976) (finding the implied class action argument to be moot, noting that "[e]xcept for the intervention of the United States, we think this case would clearly be moot").

[79] *See* Navarro-Ayala, 951 F.2d at 1334–36 (distinguishing *Spangler* because of the existence of a written stipulation discussing class-wide relief, and because the question of whether the case was a class action was first raised in the district court, not an appellate court).

[80] *Doe*, 261 F.3d at 1037.

[81] *See* Graves v. Walton Cty. Bd. of Educ., 300 F. Supp. 188, 191–92 (M.D. Ga. 1968) (challenging, *inter alia*, the suspension of certain teachers, censorship of students, and student assignments).

[82] Graves v. Walton Cty. Bd. of Educ., 686 F.2d 1135, 1139 n.2 (Former 5th Cir. Unit B 1982) (excerpting the complaint).

[83] Graves v. Walton Cty. Bd. of Educ., 91 F.R.D. 457, 460 (M.D. Ga. 1981), *aff'd*, *rev'd in part on other grounds*, 686 F.2d 1135, 1136 (Former 5th Cir. Unit B 1982).

classes . . . ."[84] When the district court accepted the Board of Education's proposed integration decree, the decree provided relief "for the entire plaintiff class . . . ."[85] All parties—plaintiffs, defendant, and judge—appeared under the impression that the case was a class action.

That curiosity might have gone unnoticed had a group of predominantly white parents not sought to intervene in the case. In response to their motion for intervention, the Fifth Circuit directed the district court to make a finding on whether the case was properly certified as a class action.[86] The district court allowed the intervention,[87] and the Fifth Circuit affirmed, applying the *Bing* factors to rule that the case was an implied class action.[88] The court wrote that to find otherwise "'would be to ignore the substance of the proceeding below in favor of an excessively formalistic adherence to the Federal Rules of Civil Procedure.'"[89] The Fifth Circuit also distinguished *Spangler* on the grounds that the doctrine of implied class actions is "deeply implemented in desegregation cases" because mootness problems regularly arise due to the graduation of named plaintiffs.[90] The case was closed in 2007, when the district court granted the Board of Education's motion for declaration of unitary status.[91]

The Walton County school board litigation is typical of a post-1966 implied class action. Although the 1966 Amendment to Rule 23 took effect on July 1, 1966,[92] requiring an order certifying the class,[93] some cases filed as class actions after the Amendment took effect were never certified. On appellate review, courts examine whether the relevant parties—plaintiff, defendant, and judge—understood the case to be a class action.[94]

---

84 *Graves*, 300 F. Supp. at 191; *Graves*, 91 F.R.D. at 460.

85 *Id.* at 464 (describing the desegregation decree).

86 *See id.* at 457–58 (reprinting the Fifth Circuit's unpublished opinion, remanding the case to the district court in response to a motion to dismiss for mootness).

87 *Id.* at 475.

88 Graves v. Walter Cty. Bd. of Educ., 686 F.2d 1135, 1140 (Former 5th Cir. Unit B 1982) (relying on *Bing*, but noting in particular that "this case was in fact a class action and was specifically described and treated as such by the parties and the trial court").

89 *Id.* (quoting Senter v. Gen. Motors Corp., 532 F.2d 511, 522 (6th Cir. 1976)).

90 *Id.* at 1138. Of course, *Spangler* itself was a desegregation case, and it is not clear why regular mootness concerns justify exception to a doctrine.

91 Order Dismissing With Prejudice, No. 3:68-cv-00681-CDL (M.D. Ga. Sept. 21, 2007), Doc. No. 251.

92 Amendments to Rules of Civil Procedure for the United States District Courts, 383 U.S. 1029, 1031 (1966).

93 FED. R. CIV. P. 23(c)(1).

94 The litigation against the Benton Harbor Area School District, a district in Michigan, followed a similar pattern to the litigation against the Walton County litigation. *See* Berry v. Sch. Dist. of City of Benton Harbor, 442 F. Supp. 1280, 1285–86 (W.D. Mich. 1977)

Unlike the Norfolk Public Schools litigation, no subsequent plaintiff has sought to relitigate a segregation claim against the Walton County Public Schools. It is not hard to imagine how the argument would go: A new group of plaintiffs would argue that the Walton County School Board implemented some new policy, resulting in resegregation. Plaintiffs would need to prove that the School Board acted with segregative intent, and the School Board would respond that the prior decision precludes any reliance on pre-2007—the date of the declaration of unitary status—evidence. In order for this response to be successful, and for preclusive effect to be given, a court must find that the prior plaintiffs adequately represented the subsequent plaintiffs. No court has yet ruled on whether an implied class action can adequately represent nonparties. Whether a court would do so depends in large part on the doctrine discussed in the next section.

II
ADEQUATE REPRESENTATION AND NONPARTY PRECLUSION

Nonparty preclusion binds persons with no involvement in a suit to its judgment. The doctrine seems to run counter to the established principle that everyone is entitled to his or her day in court.[95] As such, the Supreme Court has generally treated nonparty preclusion as an "exception."[96] Beginning with *Hansberry v. Lee*, the Supreme Court has maintained that adequate representation is constitutionally required before preclusion can be triggered.[97] This section briefly explores the development of adequate representation, with particular emphasis on the doctrine as deployed in civil rights cases. This Part focuses on the Court's two recent pronouncements on the issue: *Taylor v. Sturgell* and *Smith v. Bayer*. I argue that the doctrine of adequate representation has grown from a relatively informal, but important, position to a formal inquiry. Part III then compares the

(describing the trial court's 1971 decision finding discrimination and referring to relief for plaintiffs and "members of their class," even though no class certification was offered); *id.* at 1286 (treating the 1971 decision as recognition of an implied class action because the case had "been treated by the court, and the parties, as a class action since the filing of the original complaint").

[95] *See* Richards v. Jefferson Cty., 517 U.S. 793, 798 (1996) (noting the "deep-rooted historical tradition that everyone should have his own day in court").

[96] *See* Taylor v. Sturgell, 553 U.S. 880, 893–95 (2008) (describing six categories of exceptions to the rule against nonparty preclusion).

[97] Hansberry v. Lee, 311 U.S. 32 (1940); *see also* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4455, at 452 (2d ed. Supp. 2000) ("It has long been the general understanding that only adequate representation can justify preclusion against nonparticipating class members.").

formalism of the adequate representation inquiry discussed in this Part to pre-1966 class actions and post-1966 implied class actions described in Part I.

A. Hansberry *and the Development of the 1966 Rule 23 Amendments*

Hansberry v. Lee, a 1940 decision, remains the Court's most decisive statement on the constitutional requirement for adequate representation. *Hansberry* concerned a racially restrictive covenant prohibiting African Americans from buying or using land within a particular Chicago neighborhood.[98] The defendants in *Hansberry* argued that the judgment in a previous class action that included the Hansberrys—*Burke v. Kleiman*—[99]precluded the Hansberrys from the second suit. The Supreme Court ruled that the Hansberrys were not precluded because the *Burke* class did not adequately represent the Hansberrys.[100] The animating question for the Court was whether the class "fairly insure[d] the protection of the interest of absent parties who are to be bound by it."[101] *Hansberry*'s conception of adequate representation turned in part on whether notice was given to the *Burke* class,[102] a theme reiterated by the Court's decision a decade later in *Mullane v. Central Hanover Bank & Trust*.[103]

The inclusion of adequate representation as a requirement in the 1966 Rule 23 Amendment reinforces the importance of the principle, which reflects both a constitutional and a rules-based element. The drafters of the 1966 Rule 23 Amendment cited both *Hansberry* and *Mullane* in crafting amendments to the rule which require adequate representation and notice for certain class actions.[104] Like *Hansberry*,

---

98 *Hansberry*, 311 U.S. at 37–38.

99 Burke v. Kleiman, 277 Ill. App. 519 (1934).

100 *Hansberry*, 311 U.S. at 45–46.

101 *Id.* at 42.

102 *See id.* at 40 (reviewing a state court judgment for want of due process includes examining whether "notice and opportunity to be heard" were given).

103 Mullane v. Cent. Hanover Bank & Trust, 339 U.S. 306, 314 (1950) ("The fundamental requisite of due process of law is the opportunity to be heard.") (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)); *see generally* Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 573–74 (1997) (interpreting the *Hansberry* jurisprudence to argue that adequate representation alone is not sufficient to bind absent class members).

104 Advisory Committee's 31, Proposed Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 107 (1966). After a court has certified a Rule 23(b)(3) class seeking money damages, absent class members must be provided notice and have opportunity to opt out. FED. R. CIV. P. 23(c)(2). These requirements do not hold for Rule 23(b)(2) classes seeking injunctive or declaratory relief. *Id.* David Marcus argues that this distinction is best explained by the drafters' sympathy for the desegregation agenda. *See* Marcus, *supra* note 31, at 661–62.

the 1966 Rule 23 Amendment provides no clarity to explain when representation is adequate.[105] Indeed, it remains an open, if largely unasked, question as to whether the constitutional adequacy requirement and the Rule 23 adequacy requirement are identical.[106]

B. Between the 1966 Amendments and Taylor*:* Amchem *and* Ortiz

The search for parameters to define adequate representation gained some traction after the 1966 Amendment, ultimately morphing into a formalistic inquiry in *Amchem* and *Ortiz*. A 1977 employment discrimination case, *East Texas Motor Freight System v. Rodriguez*,[107] identified some factors to assess adequate representation. The Court highlighted two indicators that the class representatives had failed to adequately represent the class: first, the representatives' failure to move for class certification before trial; second, a conflict between class members evidenced by a split vote among class members regarding the relief sought.[108] Five years later, in another Title VII employment discrimination class action, the Court used broader language to further define adequate representation, noting that the doctrine includes "concerns about the competency of class counsel and conflicts of interest."[109]

Although the Court seemed to be heading in a clarifying direction, the Court's subsequent jurisprudence added little to the substance of *Rodriguez* and *Falcon*. In another employment discrimination case, *Martin v. Wilks*,[110] the Court rejected the claim that a nonparty's failure to intervene in litigation precluded the nonparty from subsequent litigation. *Martin* relied on *Hansberry* to note that a suit in which a nonparty has her interests adequately represented can bind nonparties, but declined to require nonparties to intervene.[111] In *Phillips Petroleum v. Shutts*,[112] the Court reempha-

---

[105] *See* Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1676–701 (2008) (interpreting adequate representation to refer to classes free from structural conflict, not from inadequate performance of class counsel).

[106] *See* William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 810 (2007) (noting that both courts and commentators "all just assume an equivalence" between the constitutional and Rule 23 requirements for adequacy).

[107] 431 U.S. at 403 (1977) (finding that the named plaintiff inadequately represented the class).

[108] *Id.* at 405 (noting that some class members had voted to reject a merger of bargaining units, while the named plaintiffs' complaint in the case sought that very relief).

[109] Gen. Tel. Co. of S.W. v. Falcon, 457 U.S. 147, 157–58 n.13 (1982).

[110] 490 U.S. 755 (1989).

[111] *Id.* at 762 n.2.

[112] 472 U.S. 797 (1985) (holding that absent class members cannot be required to do anything during the course of litigation).

sized the due process requirement for adequate representation "at all times."[113] Both *Martin* and *Shutts* confirm the core premise of *Hansberry*, but offer little help in defining adequate representation.

The litigation arising out of the many asbestos-related class actions in the 1990s lent some clarity and formality to the adequate representation doctrine. Both *Amchem Products, Inc. v. Windsor*[114] and *Ortiz v. Fibreboard Corp.*[115] arose out of class settlements in asbestos litigation, and the Supreme Court rejected the class settlements proffered in both cases. In *Amchem* and *Ortiz*, structural conflicts within the design of the class accounted for inadequate representation. The *Amchem* class settlement included both persons presently symptomatic with asbestos-related illness and persons presently asymptomatic, but who may become symptomatic, with asbestos-related illness.[116] The *Amchem* Court reiterated *Falcon*'s concern for conflicts of interest between the class, and found that there were significant conflicts between the presently symptomatic, who wanted "generous immediate payments," and the asymptomatic plaintiffs, who wanted a "fund for the future."[117] After *Amchem*, the focus for those seeking to challenge class settlement shifted to ferreting out every possible conflict between class members.[118]

In *Ortiz*, the Court again considered a challenge to a class settlement. The class representatives in *Ortiz* were found inadequate because they included both people exposed to asbestos before 1959, and people exposed after.[119] Because insurance policies covered pre-1959 exposure, but not post-1959 exposure, a class settlement combining both groups amounted to a subsidy from those exposed pre-1959 to those exposed post-1959.[120]

Amchem and *Ortiz*'s approach to assessing adequate representation has been criticized as overly formalistic.[121] The criticism generally

---

113 *Id.* at 812.

114 521 U.S. 591 (1997).

115 527 U.S. 815 (1999).

116 *Amchem*, 521 U.S. at 626–27.

117 *Id.* at 595.

118 *See* Issacharoff & Nagareda, *supra* note 106, at 1681 (describing the increased focus on intraclass conflict after *Amchem*).

119 *Ortiz*, 527 U.S. at 857.

120 *Id.* (recognizing that the pre-1959 claimants had more valuable claims, because they were still covered by the defendant's insurance policy, which expired in 1959).

121 John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 372–74 (2000) (noting that *Amchem* and *Ortiz* "rely more on rule formalism than due process to reach their results" and cautioning that both cases' focus on "class cohesion" could lead to excessive subclassing); *see, e.g.*, Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 340–41 ("[I]t is that the Court's reluctant return to rules formalism at the end of the day in both *Amchem* and *Ortiz* obscures the otherwise extremely positive

falls into two categories: criticism that the decisions lean too heavily on Rule 23, as opposed to functionalist due process analysis, and criticism that the decisions will generate undesirable consequences, such as excessive subclassing.[122] The former strand of criticism continues to be a concern for commentators, if not for the Court itself.

C. Taylor *and* Smith*: The Roberts Court Continues Formalization*

Although *Taylor* did not involve a class action, the Court set out parameters for the use of nonparty preclusion in a unanimous decision that rejected the doctrine of virtual representation.[123] Virtual representation allowed for a prior suit—not necessarily a class action—to preclude a subsequent suit if the plaintiffs in the prior and subsequent suits shared an "identity of interests."[124] The Supreme Court unanimously reversed the D.C. Circuit, which had allowed for virtual representation through a five-factor test,[125] holding that virtual representation is not a recognized exception to the rule against nonparty preclusion.[126]

---

development of a due process-based analysis for the law of representative actions."); Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 977 (2012) (characterizing the Court's approach to adequate representation in *Amchem* and *Ortiz* as "strict formalism").

122 *See* Coffee, Jr., *supra* note 122, at 374–75 (noting that *Amchem* and *Ortiz* "may provide only a temporary respite and could be outflanked by revisions to Rule 23" and that "an expansive reading of *Amchem* and *Ortiz* threatens the viability of the class action across a broad range of litigation contexts").

123 In *Taylor*, Greg Herrick, an antique airplane enthusiast, sought copies of specifications pertaining to the vintage F-45 airplane model, and filed a Freedom of Information Act (FOIA) request asking the Federal Aviation Administration (FAA) for such copies in 1997. *See* Taylor v. Sturgell, 553 U.S. 880, 885–86 (2008) (detailing the factual basis of the FOIA requests). The FAA denied Herrick's request, a decision upheld by the District Court for the District of Wyoming and, in 2002, the Tenth Circuit. *Id.* at 886–87. A few weeks after the Tenth Circuit's decision, Brent Taylor, one of Herrick's acquaintances, filed a nearly identical FOIA request for the same specifications Herrick had sought. *Id.* at 887. The FAA ignored Taylor's request, and when Taylor filed suit in the District Court for the District of Columbia, the court invoked the doctrine of virtual representation to preclude Taylor's suit. *Id.* at 887–88.

124 *See id.* at 888 (quoting Tyus v. Schoemehl, 93 F.3d 449, 455 (8th Cir. 1996)) (describing the Eighth Circuit's approach to virtual representation).

125 *See* Taylor v. Blakey, 490 F.3d 972–77 (D.C. Cir. 2007), *rev'd sub nom.* Taylor v. Sturgell, 553 U.S. 880 (2008) (describing the five factors as identity of interests, adequate representation, a close relationship between prior and subsequent plaintiffs, substantial participation by the subsequent plaintiff in the prior case, and tactical maneuvering by the subsequent party to avoid preclusion by the prior suit).

126 *See id.*; *see also* Taylor v. Sturgell, 553 U.S. at 898–901 (noting that the virtual representation doctrine violates the default presumption against nonparty preclusion, does not guarantee adequate representation, and would lead to increased complexity and confusion).

The Court's decision in *Taylor* offered a review of the Court's adequate representation jurisprudence. The Court began by citing *Hansberry* for the general proposition that a subsequent plaintiff cannot be bound by a prior suit to which she was not party.[127] Then, the Court identified six categories of exceptions to the rule against nonparty preclusion.[128] Most relevantly, the Court recognized a category where a nonparty may be bound by a judgment because she was adequately represented by someone with the same interests who was a party to the suit. Representative suits with preclusive effect on nonparties include properly conducted class actions, and suits brought by trustees, guardians, and other fiduciaries.[129]

Undergirding the six exceptions, the Court framed its precedent[130] as establishing two fundamental routes to nonparty preclusion: either "special procedures to protect the nonparties' interests" or "an understanding by the concerned parties that the first suit was brought in a representative capacity."[131]

The "special procedure" referred to above is typically the class action procedure. The Court emphasized the importance of formal Rule 23 procedure, writing that "[i]n the class action context," the limitations of adequate representation "are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23."[132] Against this backdrop, virtual representation amounted to "in effect, a common-law kind of class action . . . shorn of the procedural protections prescribed in *Hansberry*, *Richards*, and Rule 23."[133] The Court also justified its formalism by noting the comparably low administra-

---

127 *Id.* at 893 ("'[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940))).

128 *See id.* at 893–95.

129 *Id.* at 894–95 (citations omitted) (internal quotation marks omitted).

130 The Court was particularly critical of the D.C. Circuit for "misapprehend[ing]" *Richards v. Jefferson County*. *Id.* at 897. *Richards* reversed an Alabama Supreme Court's application of nonparty preclusion on due process grounds because there was no evidence that the prior plaintiff, who had not brought a class action, sought to protect the interests of nonparties, nor was there evidence that the prior plaintiff intended to bring a suit on behalf of nonparties. Richards v. Jefferson Cty., 517 U.S. 793, 802 (1996). The Court criticized the D.C. Circuit for essentially reading a functionalist analysis into *Richards*: The D.C. Circuit did not think *Richards* allowed adequate representation only when "special procedures were followed," *Taylor v. Blakey*, 490 F.3d at 971, but the Court disagreed.

131 *Taylor v. Sturgell*, 553 U.S. at 897 (citing *Richards*, 517 U.S. at 801–02).

132 *Id.* at 900–01. In neither *Taylor* nor *Smith* does the Court describe the procedural protections that Rule 23 provides. *Wal-Mart Stores, Inc. v. Dukes*, handed down four days after *Smith*, describes the procedural protections of a Rule 23(b)(3)—a suit for money damages—class: predominance, superiority, mandatory notice, and the right to opt out. 131 S. Ct. 2541, 2558 (2011). Of course, a Rule 23(b)(2) class, seeking injunctive relief, does not require mandatory notice nor the right to opt out. FED. R. CIV. P. 23(c)(2)(A), (B).

133 *Taylor v. Sturgell*, 553 U.S. at 901.

tive burden of relying on the certification binary, as opposed to vague, multi-factor tests.[134] The opinion reminds us that preclusion is intended to decrease the litigation burden on parties and courts, not to introduce more confusing, timely, and expensive standards.[135] The Court offered little clarity in *Taylor* as to what a "properly conducted class action" was, but revisited the issue just a few years later.

Smith v. Bayer Corp.,[136] a 2011 decision, arose out of a West Virginia state court denial of class certification in 2001. George McCollins brought a class action under West Virginia Rule of Civil Procedure 23 against Bayer concerning their sale of the prescription drug Baycol.[137] Bayer removed McCollins's case to federal court, and the case was transferred to the District Court for the District of Minnesota, where Baycol cases had been consolidated.[138] A few weeks after McCollins filed his suit, Smith filed the case, a class action similar to McCollins's, which eventually reached the Supreme Court.[139] Bayer was unable to remove Smith's suit, which progressed in state court while McCollins's progressed in federal court. The federal court in McCollins's case was the first of the two to rule on class certification; the District Court denied certification to McCollins's class.[140] Bayer also asked the District Court to issue an order enjoining the West Virginia state court in Smith's case from certifying Smith's class.[141] The Eighth Circuit affirmed, holding that although the federal Anti-Injunction Act generally forbids federal courts from enjoining state court proceedings, issue preclusion prohibited the West Virginia court from granting Smith's certification motion.[142] The Eighth Circuit found that Smith was a member of the class that McCollins sought certified, and Smith and McCollins had similar interests.[143]

The Supreme Court reversed.[144] The Court revisited nonparty preclusion, holding that Smith and McCollins' relationship did not fall

---

134 *See id.* (critiquing the "all-things-considered balancing approach" as "time-consuming" and "expensive").

135 *See id.* (worrying that "a diffuse balancing approach to nonparty preclusion would likely create more headaches than it relieves").

136 131 S. Ct. 2368 (2011).

137 *See id.* at 2373 (describing McCollins's state court suit).

138 *Id.*

139 *Id.*

140 *See id.* at 2374 ("Applying Federal Rule of Civil Procedure 23, the District Court declined to certify McCollins's proposed class of West Virginia Baycol purchasers.").

141 *Id.* Bayer argued that Smith's proposed class was identical to the class McCollins had sought to have certified. *Id.*

142 *In re* Baycol Prods. Litig., 593 F.3d 716, 724 (8th Cir. 2010).

143 *Id*.

144 *Smith*, 131 S. Ct. at 2375.

into one of *Taylor*'s exceptions to the rule against nonparty preclusion.[145] First, the Court found that Smith was not a "party" in McCollins's case because not only had McCollins's class not yet been certified, it had been denied.[146] Relying on the explicit procedures of Rule 23, the Court wrote that "Federal Rule 23 determines what is and is not a class action in federal court."[147] Because McCollins's suit resulted in "the absence of a certification under [Rule 23], the precondition for binding Smith was not met."[148] The Court, clarifying *Taylor*'s reference to a "'properly conducted class action,'" wrote that such a class action "can come about in federal courts in just one way—through the procedure set out in Rule 23."[149] In a footnote, the opinion cites to the Restatement (Second) of Judgments, defining adequate representation in the class context only where the class representative was formally designated as such by a court.[150]

The *Smith* Court justified its reliance on Rule 23 by referencing the procedural protections that the rule provides. The Court wrote that allowing an uncertified class action to generate a preclusive judgment would be, as virtual representation was in *Taylor*, like recognizing a "common-law kind of class action."[151] Without the protections of Rule 23, the *Smith* Court was concerned that courts could "create *de facto* class actions at will."[152]

Both *Taylor* and *Smith* rejected two different forms of nonparty preclusion—virtual representation in *Taylor*, and an uncertified, rejected class action in *Smith*—through strongly formalist reasoning. Both opinions put stock in the procedure of Rule 23 to protect the due process rights of nonparties, and reject alternative relationships as giving rise to preclusion. Operating against this doctrinal backdrop are over 300 school districts still under court supervision, many arising out of pre-1966 or post-1966 implied class actions.

---

145 *See id.* at 2376 ("Smith was neither a party nor the exceptional kind of nonparty who can be bound.").

146 *Id.* at 2379.

147 *Id.* at 2380.

148 *Id.*

149 *Id.* at 2381.

150 *Id.* at 2381 n.11 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 41(1) (1980)).

151 *Id.* at 2380 (quoting Taylor v. Sturgell, 553 U.S. 880, 901 (2008)).

152 *Id.* at 2381 (quoting *Taylor*, 553 U.S. at 901).

III
The Preclusive Effect of Declarations of Unitary Status in Resegregation Litigation

Neither pre-1966 class actions nor post-1966 implied class actions rise to meet the Supreme Court's contemporary formalization of adequate representation, and therefore violate the constitutional due process right to adequate representation first articulated in *Hansberry*. Accordingly, judgments resulting from these cases should not preclude nonparties seeking to relitigate claims after an adverse judgment. This Part discusses this implication in the context of resegregation litigation and concludes that declarations of unitary status in pre-1966 class actions and post-1966 implied class actions should not be a procedural hurdle for resegregation plaintiffs.

A. Pre-1966 Class Actions

A simple application of rules formalism might suggest that pre-1966 desegregation class actions should be preclusive on nonparties: After all, most of those classes were certified pursuant to the 1938 Rule 23. A more nuanced type of rules formalism, more closely aligned with the current adequate representation doctrine, cuts in the other direction. The lack of procedural protections, failure to abide by the Supreme Court's order implementing the 1966 Rules, and the 1938 Rule 23 itself all suggest that many desegregation pre-1966 class actions should not be given preclusive effect today.[153]

1. Procedural Protections

The Supreme Court's adequate representation doctrine gives great weight to the procedural protections that Rule 23 offers.[154] Neither *Smith* nor *Taylor* discuss the particular procedural protections the Court has in mind, although in *Wal-Mart v. Dukes*, handed down just four days after *Smith*, the Court discusses the protections of predominance, superiority, mandatory notice, and the opportunity to opt out, as some of the protections available in a 23(b)(3) class action

---

[153] I do not intend to suggest that no pre-1966 class action would be given preclusive effects under the post-*Taylor* and *Smith* doctrine. Rather, I address here the unique situation of the desegregation cases, which were treated quite differently than other pre-1966 class actions. *See* Marcus, *supra* note 31, at 681–95 (describing the unique treatment of pre-1966 desegregation class actions).

[154] *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 900–01 (2008) ("In the class-action context, these limitations [of adequate representation] are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23."); *Smith*, 131 S. Ct. at 2381 ("We could hardly have been more clear that a 'properly conducted class action,' with binding effect on nonparties, can come about in federal courts in just one way—through the procedure set out in Rule 23.").

for money damages.[155] None of these protections were included in the 1938 Rule 23.[156] Indeed, the advisory committee, charged with amending Rule 23 in 1966, noted as much, critiquing the 1938 Rule 23 because it did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class.[157]

The 1938 Rule 23 did offer some procedural protections. The drafters in 1938 required numerosity to be fulfilled before a class could be created, and required the class representative to "fairly insure the adequate representation" of the class.[158] The tripartite distinction in the Rule, between true, hybrid, and spurious class actions, also offered some protection. For 23(a)(3) spurious class actions, under which most desegregation cases were brought, the right sought by class members was required to be several.[159] Spurious suits also required a common question of law or fact affecting the several right, and the class was required to seek common relief.[160]

Yet crucial protections were left out of the 1938 Rule 23.[161] As noted above, the 1938 Rule 23 did not provide notice[162] or opt-out protections on class formation.[163] The class representative needed only to fairly insure the adequate representation of the class; the Rule did not require any showing that the representative's claims were typ-

---

155 *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2558 (2011) (noting that the (b)(2) class had historically been used in "challenges to racial segregation"). Rule 23(b)(2) class actions do not require mandatory notice or mandatory opt-out. FED. R. CIV. P. 23(c)(2)(A).

156 FED. R. CIV. P. 23 (1938) (amended 1966), *reprinted in* 39 F.R.D. 69, 94–96 (1966).

157 FED. R. CIV. P. 23 Advisory Committee on Rules note to 1966 Amendment.

158 FED. R. CIV. P. 23(a) (1938) (amended 1966).

159 FED. R. CIV. P. 23(a)(3) (1938) (amended 1966).

160 *Id.*

161 The American Law Institute's Principles of the Law of Aggregate Litigation also requires judicial approval—a kind of certification—before a representative can adequately represent nonparties. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.01(b). The Principles allow a representative to bind a nonparty if the nonparty "belongs to a class of persons similarly situated, designated as such *with the approval of the court* and led by a party." *Id.* (emphasis added).

162 The 1938 Rule 23 does mention notice in the dismissal context: Notice to class members was required for true class actions before a suit could be dismissed or compromised. FED. R. CIV. P. 23(c) (1938) (amended 1966).

163 FED. R. CIV. P. 23 (1938) (amended 1966).

ical of the class.[164] No protections governed the selection or appointment of class counsel.[165]

Most notably, the 1938 Rule 23 did not require any court order or decree to form a class. Unlike the modern Rule 23(c)(1), which delineates requirements for a certification order before a class action can proceed, the 1938 Rule 23 did not contemplate any court action until the end of a class suit: The court was called on only to approve or deny the dismissal of a class suit.[166] In practice, courts were rarely involved in reviewing whether a pre-1966 class was assembled in accordance with the 1938 Rule 23, stepping in only if a defendant objected.[167]

These lacking procedural protections are precisely what the *Taylor* and *Smith* Courts contemplated in denying preclusive effect to virtual representation and denied class actions. Of particular concern to the Court in those cases was the risk that courts could "create *de facto* class actions at will," untethered from formal requirements.[168] But the 1938 Rule 23 produced a similar scenario: Without judicial supervision at the outset—class formation—a court's judgment in a pre-1966 class action amounts to a de facto class action by creating class-wide relief without ever investigating the bases of class formation. A final judgment in a pre-1966 true class action, with binding effect on nonparties, amounts to a de facto class action in the same way that a judgment binding a virtually represented party does. Pre-1966 class actions should not be given preclusive effect because the vital protections to ensure adequate representation were noticeably lacking.

2. The Supreme Court's Order Directing Retroactive Application

The failure of many district courts in desegregation cases to comply with the Supreme Court's order implementing the 1966 amendments to Rule 23 is an additional concern for the preclusive effects of those cases. The order calls for the retroactive application of

---

164 *Compare* FED. R. CIV. P. 23(a) (1938) (ensuring only adequate representation), *with* FED. R. CIV. P. 23(a)(3) (adding typicality requirement for class representative).

165 *See* FED. R. CIV. P. 23(g) (amended 1966) (prescribing detailed procedures for appointment of class counsel, which did not appear in the 1938 Rule).

166 *See* FED. R. CIV. P. 23(c) (1938) (amended 1966) ("A class action shall not be dismissed or compromised without the approval of the court.").

167 *See* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 284 (1990) (reviewing STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987)) (noting that courts would typically review representative suits only if defendant raised objections prior to the 1966 amendments).

168 Smith v. Bayer Corp., 131 S. Ct. 2368, 2381 (2011) (quoting Taylor v. Sturgell, 553 U.S. 880, 901 (2008)).

the newly amended rules, except in cases where "in the opinion of the Court their application in a particular action then pending would not be feasible or would work injustice in which event the former procedure applies."[169] The order makes retroactive application the default, while maintenance of a suit under the 1938 Rule is the exception. The Fifth Circuit, site of the bulk of the desegregation litigation, interpreted the Supreme Court's order such that "to the maximum extent possible, the amended Rules should be given retroactive application."[170]

The only courts to have seemingly considered the retroactive application of the 1966 Rule 23 Amendment in the desegregation context were the Sixth Circuit, in the Akron Public Schools litigation discussed *supra*,[171] and the Fifth Circuit, in a 1983 decision in the ongoing litigation concerning the desegregation of the Caddo Parish Schools in Louisiana.[172] In that case, the Fifth Circuit commended the district court for "correctly view[ing] this action as one involving only two parties, and not as a class action," citing the Supreme Court's order setting retroactivity as the default.[173] In the Akron Public Schools case, the district court applied the 1966 amendments retroactively and found the case uncertified;[174] the Sixth Circuit reversed and treated the case as an implied class action.[175] No other desegregation cases confronted the retroactive application of the Rule 23 Amendment, nor have courts made a finding that a retroactive application would be infeasible or work injustice.

It is difficult to imagine the circumstances in a desegregation case that would give rise to the infeasibility or injustice exceptions to the retroactivity default. Desegregation cases, operating on extended, decades-long timelines, are relatively easy targets for retroactive

---

169 Amendments to the Rules of Civil Procedure for the United States Dist. Cts., 383 U.S. 1031 (1966) (reporting amendments to the Federal Rules of Civil Procedure for the United States District Courts to the United States Senate and House of Representatives).

170 Atlantis Dev. Corp. v. United States, 379 F.2d 818, 823 (5th Cir. 1967); *see also* Alvarez v. Pan Am. Life Ins. Co., 375 F.2d 992, 994 (5th Cir. 1967) (finding "sound basis for applying new Rule 23" to a class action filed before 1966).

171 *See supra* note 64 and accompanying text.

172 Jones v. Caddo Parish Sch. Bd., 704 F.2d 206, 212–13 (5th Cir. 1983).

173 *Id.* at 212.

174 Bell v. Bd. of Educ., Akron Pub. Sch., 491 F. Supp. 916, 920 (N.D. Ohio 1980) ("*Arnold* was pending on July 1, 1966, and the court did not make a finding that it was not feasible or that it would work injustice to apply Rule 23 as amended. Thus, *Arnold* must be treated under amended Rule 23.").

175 Bell v. Bd. of Educ., Akron Pub. Sch., 683 F.2d 963, 970 (6th Cir. 1982) ("The fact is, however, that *Arnold v. Ott* was filed as a class action to which the 1966 amendments applied, was treated as such by the parties, and while an order of certification was not entered, the district court's opinion twice refers to it as a class action."); *see infra* notes 185–96 and accompanying text.

application: The district court can simply apply the standards of the 1966 amended Rule 23 to the class already assembled. District courts certified many post-1966 desegregation cases with nearly identical classes as pre-1966 desegregation cases—typically a class of minority parents, students, or parents and students together.[176] It is conceivable, or even likely, that such classes would have passed muster on retroactive review, as they were certified when they were brought under the modern Rule 23 anyway.

The failure of district courts to properly apply the Supreme Court's order is further reason why pre-1966 desegregation cases should be denied preclusive effect. Retroactive application would have offered the protection of the "special procedure[ ]" that the *Taylor* Court wrote was one of only two routes to adequate representation necessary for nonparty preclusion.[177] The Supreme Court contemplated that, at the time of the 1966 Rule 23 Amendment, pending class actions should generally be held to the standards of the new Rule 23. The failure to retroactively apply Rule 23—a task which would not have been difficult—further suggests that pre-1966 desegregation class actions should not be given preclusive effect.

3. The 1938 Rule 23

Even if district courts were correct in largely ignoring the Supreme Court's retroactive order, this Note contends that under a traditional reading of the 1938 Rule 23, pre-1966 desegregation cases would not be given preclusive effect after *Taylor* and *Smith*. Recall that the 1938 Rule 23 categorized class actions as true, hybrid, or spurious, depending on the character of the right sought.[178] Most desegregation cases were brought as spurious class actions.[179]

---

[176] *Compare* Ga. State Conference v. Georgia, 775 F.2d 1403, 1407 (11th Cir. 1985) (post-1966 desegregation case filed on behalf of forty-five black schoolchildren and "all other black students similarly situated in Georgia"), *and* Mendoza v. United States, 623 F.2d 1338, 1341 (9th Cir. 1980) (post-1966 desegregation case filed on behalf of "[b]lack elementary and junior high school students"), *with* Bush v. Orleans Parish Sch. Bd., 308 F.2d 491, 499 (5th Cir. 1962) (pre-1966 desegregation case interpreted to include a class consisting of black schoolchildren), *and* Whittenberg v. Sch. Dist. of Greenville Cty., S.C., 607 F. Supp. 289, 303 (D.S.C. 1985) (pre-1966 desegregation case filed as a class action by black school children and their parents).

[177] Taylor v. Sturgell, 553 U.S. 880, 897 (criticizing the D.C. Circuit's five-factor test for virtual representation and listing two routes to adequate representation including "an understanding by the concerned parties that the first suit was brought in a representative capacity").

[178] *Supra* notes 30–32.

[179] *See* Brunson v. Bd. of Trs., 311 F.2d 107, 109 (4th Cir. 1962) (noting that "comparable cases have been almost uniformly brought as spurious class actions under Rule 23(a)(3)"). The Clarendon County School District at issue in *Brunson* remains under court supervision. Larson, Hannah-Jones & Tigas, *supra* note 21.

While the 1938 Rule 23 did not speak explicitly to the preclusive effects of true, hybrid, or spurious class actions, spurious suits were generally thought to not bind nonparties. Professor Moore, whose writings on the 1938 Rule 23 were highly influential on the courts,[180] argued that spurious class actions bound only, and were enforceable by only, the named parties.[181] Nonparties were permitted to intervene in the suit, even after a court issued a judgment, to benefit from a favorable disposition, but nonparties were otherwise not bound.[182] By the late 1950s and early 1960s, however, judges in the South had come to favor integration, and relaxed procedural requirements in order to make desegregation suits binding.[183] These judges did not explain their differing treatment of class action procedure in desegregation cases.[184]

Because spurious suits did not typically bind nonparties, those pre-1966 class actions filed as spurious suits should not be given preclusive effect. Although, by the eve of the 1966 Rule 23 Amendment many courts treated desegregation class actions as binding on, and enforceable by, represented nonparties, courts were only able to achieve this transformation by redefining the relief sought by classes seeking desegregation.[185] It was through creative manipulation by sympathetic judges, turning classes filed as spurious class actions into true class actions, that courts created binding class actions.[186] This is precisely the kind of de facto class action, with only a weak tie to procedural rules, that the Court rejected in *Taylor*.[187] If the Court considers these spurious class actions on their own terms,

---

[180] *See Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 930 (1958) ("There has been an almost complete acceptance by the courts of Moore's labels and of the binding effect which he attributes to each classification.") (footnote omitted).

[181] *See* 2 James Wm. Moore & Joseph Friedman, MOORE'S FEDERAL PRACTICE § 23.07, at 2291 (arguing that the judgment in a spurious class action would "bind[ ] only those actually before the court").

[182] *See* Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1938 (1998) ("With 'spurious' class suits, absentees were not bound, although they could elect to take advantage of a judgment favorable to the class by intervening in the action, even after judgment.").

[183] *See* Marcus, *supra* note 31, at 693 ("A rough survey of case law during [the late 1950s and early 1960s] yields a tight correlation between a judge's sympathy for integration and his aggressiveness with respect to class action doctrine.").

[184] *Id.* at 695.

[185] *See* Marcus, *supra* note 31, at 691 ("[C]ourts just redefined Fourteenth Amendment rights as 'joint, common, or secondary' and thus as candidates for true class suits.").

[186] *See id.* (arguing that progressive judges "remolded class action doctrine in [desegregation] cases because they believe that integration needed the class treatment of claims").

[187] *See* Taylor v. Sturgell, 553 U.S. 880, 901 (2008) (rejecting virtual representation because it amounted to "in effect, a common-law kind of class action") (citation omitted).

the jurisprudence of *Taylor* and *Smith* would make it hard for the Court to conclude that such suits, at present day, bind nonparties.

B. Post-1966 Implied Class Actions

Post-1966 implied class actions also should not be given preclusive effect. Dicta from the Supreme Court's 1976 decision in *Pasadena City Board of Education v. Spangler* suggests hostility to the implied class action doctrine.[188] Plaintiffs' counsel, representing students and parents, argued that their suit was a class action because all relevant parties had treated it as such; plaintiffs argued that requiring Rule 23 certification would be a "meaningless 'verbal recital.'"[189] *Spangler* arose in the mootness context, but the Court criticized plaintiff's argument that their suit constituted an implied class action, noting that there had been no certification of the class.[190] At least one circuit has read *Spangler* to reject the doctrine of implied class actions altogether.[191]

Implied class actions bear a close similarity to virtual representation. The Fifth Circuit, in *Bing v. Roadway Express*,[192] set out four necessary factors to allow an implied class action, which has been followed in three circuits.[193] The *Bing* factors call for evidence that the plaintiff intended to represent nonparties, that defendants never objected to a representative action, that the trial court believed the case to be a class action, and that the district court's relief was directed at a class of persons.[194] The first factor—whether the plaintiff intended to represent nonparties—satisfies a route to adequate representation discussed in *Taylor*: "the party understood herself to be acting in a representative capacity."[195] The *Taylor* Court goes on to add, however, that "[i]n the class-action context, these limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23."[196] One such safeguard is the use of judicial review of the class to ensure numerosity, commonality, typicality, and

---

188 427 U.S. 424, 430 (1976) (finding a case or controversy because of the United States' intervention into the case).

189 *Id.*

190 *See id.* (finding that the lack of class certification would normally be a fatal error).

191 *See* Brown v. Phila. Hous. Auth., 350 F.3d 338, 344 (3d Cir. 2003) (interpreting *Spangler* to have "summarily dismissed any doctrine of 'implied class certification' in dicta").

192 485 F.2d 441 (5th Cir. 1973).

193 *See supra* notes 69–71.

194 *See Bing*, 485 F.2d at 446–47.

195 Taylor v. Sturgell, 553 U.S. 880, 900 (2008).

196 *Id.* at 900–01.

adequate representation.[197] Whether an allegedly representative plaintiff or a defendant believed the suit to be a class action is not a substitute for the court's review. The *Bing* factors also require implicit consent from the trial court, but a close reading of *Taylor* finds this factor insufficient for preclusive effect: The Court in *Taylor* was concerned, in part, with the protection of the nonparty,[198] who receives no protection or notice with the trial court's silence.

The administrative and judicial economy considerations underlying *Taylor* support denying preclusion to implied class actions. Recognizing implied class actions challenges the background principle that a nonparty cannot be bound by a judgment to which she was not a party except in limited circumstances.[199] Further, granting preclusive effect to implied class actions would create, like virtual representation, a "diffuse balancing approach to nonparty preclusion"[200] by asking courts to ascertain the intent of multiple parties. Such inquiries would increase the time and monetary burden of litigation on litigants and the judiciary, and would dull the sharp corners of a binary certified/uncertified test for preclusion.

Nevertheless, some commentators have suggested that in the school desegregation context, preclusion should be applied expansively to prevent challenges to resegregation. Hugh Joseph Beard, Jr. has argued that even where "no class definition may ever have been made in the previous litigation," the doctrines of "virtual representation" or "stare decisis . . . in its strongest sense" should apply to preclude subsequent litigation.[201] Beard's position is grounded in the traditional goal of expansive preclusion: to achieve finality.[202] But expansive preclusion comes at a price, a price the Supreme Court has found too high to justify extending preclusion to the virtual representation context.[203] While finality is important, a party's right to her day in court is so fundamental that it should be subject only to "discrete exceptions."[204] Further, Beard's support for virtual representation and

---

197 *See* FED. R. CIV. P. 23(a), (c) (listing requirements for class certification).

198 *See Taylor*, 553 U.S. at 900 ("In addition, adequate representation sometimes requires [ ] notice of the original suit to the persons alleged to have been represented.") (citation omitted).

199 *See id.* at 898 (emphasizing the general rule "that a litigant is not bound by judgment to which she was not a party" with only discrete exceptions in "limited circumstances").

200 *Taylor*, 553 U.S. at 901.

201 Beard, *supra* note 17, at 1312–13.

202 *See id.* at 1314 (describing the need to "end federal intervention").

203 *See Taylor*, 553 U.S. at 904 (rejecting virtual representation as a means to achieve nonparty preclusion).

204 *Taylor*, 553 U.S. at 898 (recognizing the "fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party").

strong stare decisis are belied by his call for "[b]right lines,"[205] as the application of virtual representation and stare decisis are hardly "crisp rules with sharp corners"[206] easily applied by courts. Lastly, recognizing nonparty preclusion outside the scope of Rule 23, as Beard's conception of virtual representation and stare decisis does, amounts to a "common-law kind of class action,"[207] obviating the need for Rule 23 entirely.

C. Declarations of Unitary Status

Given the hundreds of school districts still under court supervision, the preclusive effect of the pre-1966 class actions and post-1966 implied class actions remains a relevant question for the future of desegregation litigation. This Note contends that these two categories of school desegregation litigation should not be granted preclusive effect. As a result, judgments resulting from these class actions should not preclude nonparties from relitigating the claims. In conclusion, this Note explores the effect of denying preclusion as a defense after a declaration of unitary status.

A declaration of unitary status dissolves court supervision of a school district.[208] In order to obtain a declaration of unitary status, a school district must prove three elements: (1) that it has "complied in good faith with the desegregation decree since it was entered";[209] (2) that it has eradicated "the vestiges of past discrimination . . . to the extent practical";[210] and (3) that it is "unlikely that the Board would return to its former ways."[211] To determine whether a district has met the second requirement and eradicated vestiges of discrimination, courts examine six factors representing significant elements of school operations.[212] A school district need not eliminate all vestiges of prior discrimination, it need only do so "to the extent practical."[213]

---

205 Beard, *supra* note 17, at 1314.

206 *Taylor*, 553 U.S. at 901 (citing Bittinger v. Tecumseh Prods. Co., 123 F.3d 877, 881 (6th Cir. 1997) (internal citations omitted)).

207 Tice v. Am. Airlines, 162 F.3d 966, 972 (7th Cir. 1998) (arguing that Rule 23 would be obviated if "de facto class actions" could be created through virtual representation).

208 *See* United States v. Georgia, 171 F.3d 1344, 1347–48 (11th Cir. 1999) ("Upon finding that a school system has achieved 'unitary status,' the district court must end its supervision of the school system and dismiss the case.") (internal citations omitted).

209 Bd. of Educ. v. Dowell, 498 U.S. 237, 249–50 (1991).

210 *Id.* at 250.

211 *Id.* at 247.

212 *See* Green v. Cty. Sch. Bd., 391 U.S. 430, 435 (1968) (identifying "the composition of student bodies . . . faculty, staff, transportation, extracurricular activities and facilities").

213 *See* Missouri v. Jenkins, 515 U.S. 70, 101 (1995) (rejecting an expansive remedy in the form of a desegregation decree, which required salary increases for teachers in a Kansas City, Missouri, school district).

I contend that applications of preclusion in cases like *Norfolk Public Schools* and *Walton County Public Schools* is improper.[214] The trend towards formalization of adequate representation should therefore be welcome news for plaintiffs, who rely heavily on historical evidence of segregation to prove intentional discrimination.[215] The Supreme Court has recognized as much, identifying "historical background" as an important source of evidence to prove discriminatory intent.[216] The application of preclusion has hampered plaintiffs by prohibiting their reliance on historical evidence.[217]

How, then, should a court treat the application of preclusion in a case alleging resegregation after a declaration of unitary status? In the two types of desegregation cases discussed here—pre-1966 class actions and post-1966 implied class actions—courts should not preclude the plaintiffs in the resegregation case from relying on evidence of segregative intent from a time prior to the declaration of unitary status. While the *Riddick* court is surely justified in its concern that school districts with any history of discrimination should not forever remain under judicial scrutiny,[218] evidence of resegregation presents a

---

[214] It is also worth noting that the application of preclusion in these cases may be altogether improper, as the subsequent court in these cases tends to obfuscate what the "issue" actually decided and necessarily litigated in the first case was. In the subsequent resegregation case, the court applies issue preclusion to exclude historical evidence of segregative intent. *See* Bell v. Bd. of Educ., 683 F.2d 963, 967–68 (6th Cir. 1982) ("Since it is our view that the 1968 Akron case precludes reconsideration of plaintiffs' claims that pre-1965 zoning in West Akron intentionally produced a segregated system by 1965, plaintiffs leave the record without any proof of board conduct based on segregative intent."); Bronson v. Bd. of Educ., 525 F.2d 344, 349 (6th Cir. 1975) ("The district court's order forecloses the plaintiffs from showing that the defendants did, prior to July 26, 1965, act with a segregative intent or that the actions, inactions or policies of the Board prior to that date violated the constitutional rights of minority pupils or their parents."). However, declarations of unitary status do not involve a finding that a school board has *never* discriminated. Quite to the contrary, a declaration of unitary status necessarily finds that a school board *had* operated with segregative intent, but had, as of that declaration, eliminated all prior vestiges of prior discrimination. It is not clear that those two "issues" are at all similar and should give rise to preclusion.

[215] *See, e.g.*, Bronson v. Bd. of Educ., 604 F. Supp. 68, 74 (S.D. Ohio 1984) ("Many of the events upon which Plaintiffs would have relied to prove their case occurred prior to July 26, 1965."); *see also* White v. Regester, 412 U.S. 755, 766–67 (1973) (affirming the district court findings that Texas's history of discrimination against minorities in the political process was evidence of intentional discrimination).

[216] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977) ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.").

[217] *See, e.g.*, Riddick by Riddick v. Sch. Bd., 784 F.2d 521, 538–39 (4th Cir. 1986) (dismissing resegregation suit and holding that the resegregation claim was precluded); Bell v. Bd. of Educ., 683 F.2d 963, 965 (6th Cir. 1982) (same); Bronson v. Bd. of Educ., 525 F.2d 344, 348–49 (6th Cir. 1975) (same).

[218] *Riddick*, 784 F.2d at 539 ("If the rule were otherwise, virtually every action of the school board with respect to any of its various affairs would be suspect.").

pressing concern. Barring evidence of segregative intent from prior to the declaration of unitary status frustrates the purpose of the desegregation litigation and the declaration of unitary status: if school districts are able to simply return to segregative policies following a declaration of unitary status, districts will have less incentive to establish meaningful desegregation reforms. Rather, districts will comply with the desegregation plan sufficient to obtain a declaration of unitary status, and will revert to segregative policies with the comfort of procedural protections from resegregation claims.

School boards should not be able to rely on declarations of unitary status to preclude resegregation litigation—but might plaintiffs be able to rely on declarations of unitary status to prove resegregation? Procedurally, the answer is both yes and no. As discussed *supra*, plaintiffs should not be precluded from introducing evidence of historical discrimination from prior to the declaration of unitary status in order to prove segregative intent. However, and contrary to the views of scholars,[219] courts have not treated resegregation claims any differently than traditional segregation claims.[220] Plaintiffs are still required to prove intentional discrimination by the school board, even when challenging acts that would clearly have been prohibited by the federal court while the district was under supervision.[221]

This framework is ill-equipped to properly supervise school districts who have consistently, and particularly recently, demonstrated an interest in returning to segregation.[222] Turning a blind eye to the history of discrimination in a school district denies the opportunity to view the actions of institutions in a context, which can shed important light on institutional behavior. The procedural arguments made in this Note represent one way in which courts can view the actions of school districts in that context: by allowing plaintiffs to introduce evidence of historical discrimination that date from prior to a declaration of unitary status. However, this small step would not lessen the doctrinal hurdle of proving intentional discrimination that plaintiffs in resegregation cases still face.

---

[219] *See Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, *supra* note 15, at 653 (arguing that a school board should bear the burden to disprove unlawful discrimination where its post-declaration of unitary status actions have a resegregatory effect).

[220] *See, e.g.*, Vaughns by Vaughns v. Bd. of Educ. of Prince George's Cty., 758 F.2d 983, 988 (4th Cir. 1985) ("Once a school system has achieved unitary status, a court may not order further relief to counter-act resegregation that does not result from the school system's intentionally discriminatory acts.").

[221] *See, e.g.*, *Riddick*, 784 F.2d at 537 (limiting remedial relief to situations where resegregation results from the intentionally discriminatory acts of a school district).

[222] *See* Hannah-Jones, *supra* note 4 (describing recent resegregation in Tuscaloosa).

The threat of resegregation following a declaration of unitary status is not hypothetical. This Note has already discussed data points from the Norfolk Public Schools, which implemented a new student assignment plan after being released from court supervision.[223] Taking a broader view, a 2010 study found that "a declaration of unitary status, holding other relevant factors constant, is associated with resegregation."[224] Resegregation in districts declared unitary also takes place at a greater rate than other districts.[225]

School districts that have long been subject to judicial supervision continue to file motions seeking declarations of unitary status.[226] Civil rights attorneys, with knowledge of the significance of court supervision, vigorously oppose such motions.[227] When school districts prevail on those motions in class actions filed before 1966, or filed as implied class actions, the Court's jurisprudence offers plaintiffs a second chance to secure court supervision. To be sure, litigation is an expensive option, particularly in desegregation cases, which often last for years or decades. But relitigation, either to challenge resegregation, or to seek a more sympathetic judge, should be an option for plaintiffs who were not adequately represented in the prior case. The Court's formalization of preclusion removes at least one barrier for plaintiffs seeking to reopen court supervision.

CONCLUSION

The majority of pre-1966 class actions and post-1966 implied class action desegregation cases cannot preclude challenges to resegregation. These cases lack crucial constitutional protections for adequate representation. Courts have already made resegregation challenges difficult by holding that declarations of unitary status shift the burden

---

223 *See supra* note 46–51 and accompanying text.

224 *See* Jeffrey S. Morrow, *Separating, but Equal? Resegregation in Newly Unitary School Districts* 4 (Apr. 14, 2010) (Unpublished M.P.P., Georgetown University), https://repository.library.georgetown.edu/handle/10822/553831.

225 *Id.* ("[N]ewly unitary districts experience increased segregation at a greater rate than either group, with the simple binary of having been declared unitary a consistently significant factor.").

226 *See, e.g.*, Order Granting Motion for Declaration of Unitary Status, United States v. Bd. of Educ., 70-Cv-861 (M.D. Ga. July 24, 2014) (granting declaration of unitary status); *Pulaski County Special School District Seeks Unitary Status*, ARKANSAS NEWS BUREAU (Dec. 15, 2014), http://arkansasnews.com/news/arkansas/pulaski-county-special-school-district-seeks-unitary-status-special-ed (describing school district's intention to file for unitary status); Dail, *supra* note 25 (reporting appeal to order granting school district's motion for declaration of unitary status).

227 *See, e.g.*, Thomas v. St. Martin Parish Sch. Bd., 879 F. Supp. 2d 535, 537–38 (W.D. La. 2012) (describing the history of litigation against St. Martin Parish School Board, and noting both the plaintiff's counsel's and the Department of Justice's opposition to closing the case).

to plaintiffs to prove discriminatory intent, even in cases where the school district's actions look resegregatory.[228] By eliminating the procedural hurdle that preclusion presents, plaintiffs should be in a better position to confront the increasing, and troubling, resegregation of schools.

---

[228] *See, e.g.*, Riddick by Riddick v. Sch. Bd. of City of Norfolk, 784 F.2d 521, 527 (4th Cir. 1986) (rejecting plaintiff's claim, even though the Norfolk school's actions appeared to resegregate the district).