RESEGREGATION AND NONPARTY PRECLUSION

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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.

INTRODUCTION .................................................. 2119

I. PRE-1966 CLASS ACTIONS AND POST-1966 IMPLIED CLASS ACTIONS .................................. 2124
   A. Pre-1966 Class Actions ...................................... 2124
      1. Norfolk Public Schools .................................. 2126
   B. Post-1966 Implied Class Actions ....................... 2130
      1. Walton County Public Schools ........................ 2131

II. ADEQUATE REPRESENTATION AND NONPARTY PRECLUSION ............................................ 2133
   A. Hansberry and the Development of the 1966 Rule 23 Amendments ........................................ 2134
   B. Between the 1966 Amendments and Taylor: Amchem and Ortiz ........................................... 2135
   C. Taylor and Smith: The Roberts Court Continues Formalization .............................................. 2137

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December 2015] RESEGREGATION AND NONPARTY PRECLUSION 2119

III. THE PRECLUSIVE EFFECT OF DECLARATIONS OF UNITARY STATUS IN RESEGREGATION LITIGATION ........................................ 2141
A. Pre-1966 Class Actions .................................................. 2141
   1. Procedural Protections .............................................. 2141
   2. The Supreme Court’s Order Directing Retroactive Application ........................................ 2143
B. The 1938 Rule 23 .......................................................... 2145
C. Declarations of Unitary Status ......................................... 2149

CONCLUSION ........................................................................ 2152

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).
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/ud0015/0000001/0000075/ud0015_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. 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.

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. Two Supreme Court cases from the 1990s hold that when dis-
trict 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,” and (2)
“whether the vestiges of past discrimination had been eliminated to
the extent practicable.” 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
disprove discriminatory intent in any actions that may cause segrega-
tion. 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. 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 imbal-

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).
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).
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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{15} the procedural barriers to challenging resegregation have largely gone unexamined in scholarship while courts are beginning\textsuperscript{16} to confront these arguments.\textsuperscript{17} This Note attempts to fill

\textsuperscript{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).

\textsuperscript{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.”).


\textsuperscript{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”).

\textsuperscript{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).
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. Since 2010, 25 school districts have been released from court supervision. Many districts are in litigation now, seeking declarations of unitary status.

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, 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.

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

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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).
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”).
languitigation 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. These class actions, filed before 1966, were governed by the version of Rule 23 promulgated in 1938 (“1938 Rule 23”), which remained in effect until the sweeping 1966 Rule 23 Amendments. The 1938 Rule 23 differed significantly from its contemporaneous version: Rather than categorizing class actions by the relief sought as the modern Rule 23 does, the 1938 Rule 23 categorized class actions based on the relationships between class members. 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


28 FED. R. CIV. P. 23 (1938).


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 deter-
mining 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 preclu-
sive 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
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

I. 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”).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{48}

In 1975—four years later—the district court concluded that the Board had eliminated racial discrimination, and that the district had become unitary.\textsuperscript{50} For eight years, the Board continued to operate as it had under court supervision.\textsuperscript{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.\textsuperscript{51} Plaintiffs filed a class action, \textit{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.”\textsuperscript{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.\textsuperscript{53} Of those

\begin{itemize}
  \item \textsuperscript{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 \textit{Brown v. Board} and was unconstitutional), \textit{aff’d} 246 F.2d 325 (4th Cir. 1957).
  \item \textsuperscript{47} Brewer v. Sch. Bd. of Norfolk, Va., 434 F.2d 408, 410–12 (4th Cir. 1970).
  \item \textsuperscript{48} Brewer v. Sch. Bd. of Norfolk, Va., 456 F.2d 943 (4th Cir. 1972).
  \item \textsuperscript{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. \textit{Id.} (“No appeal was taken from the order dismissing the case.”).
  \item \textsuperscript{50} \textit{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.”).
  \item \textsuperscript{51} \textit{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. \textit{Id.} After the plaintiffs filed suit challenging the rescission of the busing program, the Board voluntarily dismissed its motion to reinstate. \textit{Riddick}, 784 F.2d at 525.
  \item \textsuperscript{53} \textit{Riddick}, 784 F.2d at 527.
\end{itemize}
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 \textit{infra}, in order for a judgment to bind nonparties, the court

\(^{54}\) \textit{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. \textit{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. \textit{Id.} The plan also called for “multi-cultural programs to expose students in racially isolated elementary schools to students of other races.” \textit{Id.}


\(^{56}\) Id. at 531–32.


\(^{58}\) Riddick, 784 F.2d at 535.

\(^{59}\) \textit{Id.} (“[O]nce the goal of a unitary school system is achieved, the district court’s role ends.”).

\(^{60}\) \textit{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 Schools63 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).
December 2015 | RESEGREGATION AND NONPARTY PRECLUSION 2131

First,\textsuperscript{74} Sixth,\textsuperscript{75} and Eleventh Circuits,\textsuperscript{76} and expressly rejected in the Third Circuit.\textsuperscript{77}

The Supreme Court has directly called into question the implied class action doctrine in the desegregation context in \textit{Pasadena City Board of Education v. Spangler}, where the Court rejected the Bing factors in dicta.\textsuperscript{78} The First and Eleventh Circuits’ reliance on Bing both post-date \textit{Spangler}. While the First Circuit expressly distinguishes \textit{Spangler},\textsuperscript{79} the Eleventh Circuit does not mention the case.\textsuperscript{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.\textsuperscript{81} The complaint was brought on behalf of the named plaintiffs and “all other N\textsuperscript{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.”\textsuperscript{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 . . . .”\textsuperscript{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

\textsuperscript{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.”).

\textsuperscript{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)).

\textsuperscript{76} See Doe v. Bush, 261 F.3d 1037, 1049 (11th Cir. 2001), \textit{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.”).


\textsuperscript{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”).

\textsuperscript{79} See Navarro-Ayala, 951 F.2d at 1334–36 (distinguishing \textit{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).

\textsuperscript{80} \textit{Doe}, 261 F.3d at 1037.


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

When the district court accepted the Board of Education’s proposed integration decree, the decree provided relief “for the entire plaintiff class . . . .” 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. The district court allowed the intervention, and the Fifth Circuit affirmed, applying the Bing factors to rule that the case was an implied class action. 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.’” 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. The case was closed in 2007, when the district court granted the Board of Education’s motion for declaration of unitary status.

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, 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.

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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.
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. As such, the Supreme Court has generally treated nonparty preclusion as an “exception.” Beginning with Hansberry v. Lee, the Supreme Court has maintained that adequate representation is constitutionally required before preclusion can be triggered. 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”).


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—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 insur[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, 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,

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98 Hansberry, 311 U.S. at 37–38.
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. Indeed, it remains an open, if largely unasked, question as to whether the constitutional adequacy requirement and the Rule 23 adequacy requirement are identical.

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, 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.

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.”

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, the Court rejected the claim that a nonparty’s failure to intervene in litigation precluded the non-party 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.

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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).


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.” 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 and Ortiz v. Fibreboard Corp. 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. 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.” After Amchem, the focus for those seeking to challenge class settlement shifted to ferreting out every possible conflict between class members.

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. 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.

Amchem and Ortiz’s approach to assessing adequate representation has been criticized as overly formalistic. The criticism generally

113 Id. at 812.
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 non-party preclusion.126
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. Then, the Court identified six categories of exceptions to the rule against nonparty preclusion. 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.

Undergirding the six exceptions, the Court framed its precedent 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.”

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.” 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.” The Court also justified its formalism by noting the comparably low administr-
tive burden of relying on the certification binary, as opposed to vague, multi-factor tests.\textsuperscript{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.\textsuperscript{135} The Court offered little clarity in \textit{Taylor} as to what a “properly conducted class action” was, but revisited the issue just a few years later.

\textit{Smith v. Bayer Corp.},\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{142} The Eighth Circuit found that Smith was a member of the class that McCollins sought certified, and Smith and McCollins had similar interests.\textsuperscript{143}

The Supreme Court reversed.\textsuperscript{144} The Court revisited nonparty preclusion, holding that Smith and McCollins’ relationship did not fall

\textsuperscript{134} See id. (critiquing the “all-things-considered balancing approach” as “time-consuming” and “expensive”).

\textsuperscript{135} See id. (worrying that “a diffuse balancing approach to nonparty preclusion would likely create more headaches than it relieves”).

\textsuperscript{136} 131 S. Ct. 2368 (2011).

\textsuperscript{137} See id. at 2373 (describing McCollins’s state court suit).

\textsuperscript{138} Id.

\textsuperscript{139} Id.

\textsuperscript{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.”).

\textsuperscript{141} Id. Bayer argued that Smith’s proposed class was identical to the class McCollins had sought to have certified. Id.

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

\textsuperscript{143} Id.

\textsuperscript{144} Smith, 131 S. Ct. at 2375.
into one of Taylor’s exceptions to the rule against nonparty preclusion.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{147} Because McCollins’s suit resulted in “the absence of a certification under [Rule 23], the precondition for binding Smith was not met.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{151} Without the protections of Rule 23, the Smith Court was concerned that courts could “create \textit{de facto} class actions at will.”\textsuperscript{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.

\textsuperscript{145} See \textit{id.} at 2376 (“Smith was neither a party nor the exceptional kind of nonparty who can be bound.”).
\textsuperscript{146} \textit{Id.} at 2379.
\textsuperscript{147} \textit{Id.} at 2380.
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.} at 2381.
\textsuperscript{150} \textit{Id.} at 2381 n.11 (citing \textsc{Restatement (Second) of Judgments} § 41(1) (1980)).
\textsuperscript{151} \textit{Id.} at 2380 (quoting Taylor v. Sturgell, 553 U.S. 880, 901 (2008)).
\textsuperscript{152} \textit{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

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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.\textsuperscript{155} None of these protections were included in the 1938 Rule 23.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{160}

Yet crucial protections were left out of the 1938 Rule 23.\textsuperscript{161} As noted above, the 1938 Rule 23 did not provide notice\textsuperscript{162} or opt-out protections on class formation.\textsuperscript{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-

\textsuperscript{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. \textit{Fed. R. Civ. P. 23(g)(2)(A).}


\textsuperscript{157} \textit{Fed. R. Civ. P. 23} Advisory Committee on Rules note to 1966 Amendment.


\textsuperscript{160} \textit{Id.}

\textsuperscript{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. \textit{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.” \textit{Id.} (emphasis added).

\textsuperscript{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. \textit{Fed. R. Civ. P. 23(c)} (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


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.”).


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. 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. 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. Most desegregation cases were brought as spurious class actions.


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 & Tugas, 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, argued that spurious class actions bound only, and were enforceable by only, the named parties. 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. 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. These judges did not explain their differing treatment of class action procedure in desegregation cases.

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. 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. This is precisely the kind of de facto class action, with only a weak tie to procedural rules, that the Court rejected in Taylor.

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”).

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).
192 485 F.2d 441 (5th Cir. 1973).
193 See supra notes 69–71.
194 See Bing, 485 F.2d at 446–47.
196 Id. at 900–01.
adequate representation. 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, 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. Further, granting preclusive effect to implied class actions would create, like virtual representation, a “diffuse balancing approach to nonparty preclusion” 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. Beard’s position is grounded in the traditional goal of expansive preclusion: to achieve finality. 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. 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.” 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

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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).
210 Id. at 250.
211 Id. at 247.
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

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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).


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, courts have not treated resegregation claims any differently than traditional segregation claims. 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.

This framework is ill-equipped to properly supervise school districts who have consistently, and particularly recently, demonstrated an interest in returning to segregation. 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 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.


\(^{225}\) 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.”).


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

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).