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Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action

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FLAWED BUT NOBLE: DESEGREGATION LITIGATION AND ITS
IMPLICATIONS FOR THE MODERN CLASS ACTION

*David Marcus**

[I]f by any chance the desegregation case could be found by a judge not to be a class action after the adoption of the rule, we would of course be in a very, very bad way. If there is any doubt on the matter, we certainly ought to carry language which includes the desegregation suit. So if there be any question about it, [Rule 23(b)](2) ought to remain in.

*Benjamin Kaplan, Federal Civil Rules Advisory Committee Meeting, November 1, 1963.*¹

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I. INTRODUCTION

From the perspective of the present day, Rule 23 of the Federal Rules of Civil Procedure contains a difficult puzzle. After a court certifies a class pursuant to Rule 23(b)(3) in a money damages case, absent class members must receive notice and have a chance to opt out. Their counterparts in injunctive or declaratory relief suits prosecuted pursuant to Rule 23(b)(2) do not.² As long understood, the class certification decision essentially equals a determination to bind all class members to the eventual judgment.³ Class members seeking money damages therefore have some control over their rights to sue before these rights are finally extinguished. In contrast, injunctive relief class members must remain in the class.

This puzzling link between procedural rights and remedial choice has constitutional ramifications. Rule 23’s power lies in the expansive *res judicata* its judgments generate.⁴ Because a right to sue ostensibly belongs to

2. FED. R. CIV. P. 23(c)(2). For simplicity purposes, and because most Rule 23(b)(2) class actions seek injunctions, I refer to injunctive relief as the prototypical Rule 23(b)(2) remedy.

3. See Charles W. Joiner, Assoc. Dean, Univ. of Mich. Sch. of Law, Proposed Amendments to the Federal Rules of Civil Procedure—A Step Forward (Sept. 12, 1964), at 7 in CHARLES ALAN WRIGHT PAPERS, Tarlton Law Library, University of Texas, Box 257, Folder 4 [hereinafter WRIGHT PAPERS] (“[The proposed Rule 23] provides for an early court order as to whether it is to be maintained as a class action (in other words, whether it is to be considered as *res judicata* as to the class.) [sic]”); cf. Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1261–62 (2002) (describing the relationship between class certification and preclusion). Historically, this was not always so. See Tobias Barrington Wolff, *Geoffrey C. Hazard, Jr. and the Lessons of History*, 158 U. PA. L. REV. 1323, 1324 (2010).

4. See Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999

an individual class member as his or her property,⁵ however, this benefit also triggers a due process problem. A preclusive judgment amounts to a final sale of a right to sue.⁶ The exchange of property it entails means that an individual ordinarily must have her day in court before *res judicata* may constitutionally attach.⁷ As a nearly unique exception to this “deep-rooted historic tradition,”⁸ the class action requires some other source of legitimacy. Notice and opt-out rights, at least in theory if not so much in reality, help in this regard. The failure to opt out arguably indicates class members’ consent to a judgment pursued in their names. An alternate function departs from the idea that a judgment can extinguish a person’s right to sue without her actual participation in the litigation, so long as someone else represents her interests adequately.⁹ Notice and opt-out rights act as procedural safeguards to ensure that classes do not suffer from conflicts of interest. Either way, some form of notice (less controversially) and opt-out rights (more so) are arguably woven into Rule 23’s constitutional fabric.¹⁰ Yet, the rule eschews them for injunctive relief suits.¹¹

Decades after Rule 23’s modern reincarnation in 1966, a number of courts and commentators have ventured solutions to this puzzle, but, as I describe in Part I, none has wide acceptance. This disarray leaves class action doctrine remarkably unstable in a number of ways. The Supreme Court, for example, concluded in 1985 that due process requires notice and opt-out rights in Rule 23(b)(3) suits for money damages. With no explanation, it expressly declined to say whether the same is true in injunctive relief cases, which, if so, would render Rule 23(b)(2)

SUP. CT. REV. 337, 355.

5. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985); see also MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 5 (2009). *But cf.* David Marcus, *Some Realism About Mass Torts*, 75 U. CHI. L. REV. 1949, 1977–81 (2008) (reviewing RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* (2007)).

6. See NAGAREDA, *supra* note 5, at ix.

7. *Martin v. Wilks*, 490 U.S. 755, 761–62 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076, *as recognized in Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

8. *Taylor v. Sturgell*, 553 U.S. 880, 892–95 (2008) (quoting *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996)).

9. Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 977 (1993).

10. In this Article, I discuss notice and opt-out rights together, although I am aware that they do not necessarily stand on the same constitutional footing, and that the doctrinal and practical arguments for their inclusion or exclusion in different types of cases might vary. I do so because I believe the most conceptually defensible account of opt-out rights is that, assuming they have any value, they help ensure the adequacy of class member interest representation. See *infra* Part I.A. Notice does as well. But there are instances when it does not make sense to discuss them as if they function identically, and I have tried to note these instances.

11. A court in its discretion may order notice to class members in a Rule 23(b)(2) suit. FED. R. CIV. P. 23(c)(2)(A). Whether it can order opt-out rights in a (b)(2) suit is uncertain at present. Compare *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 620–21 (9th Cir. 2010) (approving district court’s decision to require notice and opt-out rights in a Rule 23(b)(2) suit), *with id.* at 648 (Ikuta, J., dissenting) (insisting that Rule 23(b)(2) does not permit opt-out rights).

unconstitutional.¹² Befuddlement at these rights' selective enjoyment likely contributed to this confusion.

In this Article, I excavate the historical answer to the Rule 23 puzzle, one that suggests that the rule's structure has little to do with theoretical distinctions between types of remedies. Far more important was the particular moment in American history during which the Federal Civil Rules Advisory Committee (the "1966 authors") undertook the revision of Rule 23. To capture this moment, I reconstruct a neglected chapter in procedural history that stretches from 1938, when the first Rule 23 went into force, to the early 1960s, when the 1966 authors labored.¹³ I pay particular attention to Rule 23's experience in desegregation litigation, which generated the sole doctrinal foundation for the class-wide *res judicata* that the remade Rule 23 would facilitate. Others have exhaustively chronicled the story of the legal campaign against Jim Crow, but until now, it has lacked this procedural chapter.¹⁴ Finally, I mine the surviving transcripts, memoranda, and letters the 1966 authors created as they revised Rule 23, in order to unearth their reasons for treating money damages and injunctive relief class members differently.¹⁵

This history yields an answer to the Rule 23 puzzle that roots modern class action doctrine in a moment of supreme nobility, but one that also

12. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 811–12 & n.3 (1985); see also Patricia Anne Solomon, Note, *Are Mandatory Class Actions Unconstitutional?*, 72 NOTRE DAME L. REV. 1627 (1997).

13. Others have offered quick and impressionistic histories of this period, but mine is the first thorough account of the doctrinal raw material with which the 1966 authors worked. See STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 228–37 (1987) (offering an account of class action doctrine post-1938 without much discussion of actual case law from the time); Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1937–46 (1998) (discussing mainly the 1940s); see also Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 287–90 (1990) (reviewing Yeazell's *From Medieval Group Litigation to the Modern Class Action* and devoting three pages of an article that focuses on 18th and 19th Century doctrine to the 1938–1966 period). I do not intend my observations in any sense as a criticism of these important works.

14. Professor James E. Pfander touches upon aspects of this story in three pages of a recent article but does not go into any detail to show how substance and procedure intertwined in desegregation litigation. James E. Pfander, *Brown II: Ordinary Remedies for Extraordinary Wrongs*, 24 LAW & INEQ. 47, 70–72 (2006).

15. The two commentators to have combed through the documentation of the 1966 authors' efforts addressed subjects quite different from what I treat here. See John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 333–44 (2005) (focusing mainly on Rule 23(b)(3)); Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5, 6–15 (1991) (describing the 1966 authors' positions with respect to mass torts). Professor Stephen Yeazell speculates (mostly accurately) as to the motives of the 1966 authors but without the benefit of this historical record. YEAZELL, *supra* note 13, at 259–61. Professor Robert G. Bone acknowledges that "[t]he paucity of source material and research bearing on the 1966 Advisory Committee's reasons for drafting Rule 23 in the way it did makes any inferences about Committee intent somewhat hazardous and necessarily tentative." Bone, *supra* note 13, at 292. He considers and rejects the answer to the Rule 23 puzzle I believe this documentation supports. *Id.* at 296.

presents some challenging implications for this doctrine going forward. Rule 23(b)(2) was written for a very specific purpose. Judicial sympathy for racial integration and the 1966 authors' political commitments, rather than some conception of what due process requires, best explain why Rule 23 requires the mandatory class treatment of injunctive relief claims.

Until 1966, judgments could bind and benefit absent class members only in specific, narrow instances, an infirmity that made class action practice largely a backwater.¹⁶ Desegregation litigation, in which black plaintiffs invariably relied on Rule 23, was an exception. Courts permitted class treatment of equal protection claims and issued broadly preclusive judgments. They did so first in a limited range of cases then, as judges sympathetic to integration began to dominate the southern federal bench, even in instances where class members likely had deep and fundamental conflicts of interest. I describe the general course of 1938–1966 class action doctrine and this desegregation anomaly in Parts II and III, respectively.

The 1966 authors expected and hoped that all judgments obtained pursuant to their revised rule would generate *res judicata* for absent class members. No trans-substantive explanation appears in available records for why they thought this expansion in preclusion required notice and opt-out rights for Rule 23(b)(3) class members but not for their Rule 23(b)(2) brethren. Indeed, these records contradict attempts in present-day case law and commentary to solve this puzzle in such terms.

The fact that the 1966 authors shaped Rule 23(b)(2)'s contours exclusively in response to the circumstances of early 1960s desegregation litigation suggests an answer, which I provide in Part IV. Casual observations of Rule 23(b)(2)'s connection to civil rights litigation are legion.¹⁷ The extent of its ideological design and how and why it came to be, however, have gone much less appreciated, particularly as the focus in class action commentary has shifted to mass torts and securities litigation in recent years. The conflicts of interest among class members that notice and opt-out rights might help highlight would have strengthened arguments against allowing desegregation cases to proceed as class suits. Rule 23(b)(2)'s champions ardently supported litigation-driven integration, and they believed class treatment of equal protection claims essential to its success. Relying on doctrine developed by integrationist federal judges at approximately the same time, the 1966 authors drafted a provision that could help judges ignore or bury such conflicts.

16. See Letter from Geoffrey C. Hazard, Jr., Professor of Law, to Benjamin Kaplan, Professor of Law, Harvard Law Sch. (Apr. 3, 1962), *microformed on* CIS-6310-28 (Jud. Conf. Records, Cong. Info. Serv.) (noting that Rule 23's "present [] murkiness has deterred widespread use of the class action").

17. *E.g.*, 7A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 1775 (3d ed. Supp. 2007). Professor Judith Resnik has situated Rule 23 in a broader trajectory of the purposeful, instrumental development of procedural doctrine to serve particular concerns of substantive justice. Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 650–52 (2011).

No theory of interest representation, or other trans-substantive theory for that matter, justified this selective provision of notice and opt-out rights. Rule 23's resistance to a cogent justification in purely procedural terms thus hardly surprises. Indeed, an observer of class action practice in the mid-1960s may not have bothered to try to explain Rule 23 accordingly, fully appreciating the substantive purpose lurking in Rule 23(b)(2)'s substance-neutral terms. In one sense, then, my ambition in this Article is modest. I simply want to recreate the historical milieu out of which Rule 23 emerged.

But the story I tell has profound implications for class action doctrine and even for the very ideal of trans-substantivity in civil procedure. The need for substantive context to explain Rule 23 means at the least that modern class action doctrine suffers from a noble flaw. Concerns of substantive justice relevant in a particular era provided part of the normative foundation for an ostensibly substance-neutral rule. But this substance-specificity destabilizes fundamental aspects of contemporary class action doctrine. This Article's heart lies with the historical connection between civil rights and Rule 23, but I also discuss some of these current implications in Part V.

I. THE RULE 23 PUZZLE

The Rule 23 puzzle has prompted a number of proposed solutions from courts and commentators bent on making sense of it without recourse to substantive context. The prominent ones share two features: they stress the functions notice and opt-out rights play, and they attempt to explain the connection between procedural rights and remedial choice in trans-substantive terms. None is necessarily wrong, although I have my doubts about each. What is interesting is their proliferation and divergence, disarray that indicates the wisdom in reverse-engineering Rule 23 to figure out why it developed the way it did.

A. *The Functions of Notice and Opt-Out Rights*

The present Rule 23 is pragmatic by design.¹⁸ The roles notice and opt-out rights play thus should have some connection to why the plaintiff's choice of remedy determines when Rule 23 requires these rights. By one account, they have an autonomy function, ensuring that individuals retain control over their claims and can dictate when and under what conditions they will attempt to vindicate them.¹⁹ Another account stresses their relationship to what legitimates class-wide *res judicata*.²⁰ Judgments take rights to sue away from absent class members without their participation or consent, an apparent usurpation of property that needs some justification.²¹

18. *E.g.*, Bone & Evans, *supra* note 3, at 1259.

19. *E.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 846–47 (1999).

20. Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 785–86 (2005).

21. Issacharoff, *supra* note 4, at 355–56.

Notice and opt-out rights can help. An unconvincing autonomy-based assertion that a class member who receives notice and fails to opt out consents to be bound persists.²² More plausibly, these rights serve as “procedural safeguards” of adequate representation.²³ Due process requires the adequate representation of interests to bind an absent class member to a judgment.²⁴ A class representative whose interests conflict with those he purports to represent cannot satisfy this adequacy requirement and obtain a judgment that extinguishes absent class members’ claims.²⁵ Although Rule 23(a)(4) requires a finding of adequate representation before class certification, notice and opt-out rights contribute to ensure the requisite harmony of interests in one of several ways. First, notice can force intraclass conflicts to the surface by inviting absent class members to weigh in. Second, those with conflicting interests can exit, removing fissures from the class.²⁶ Third, the threat that opt-outs would either diminish the value of the remaining aggregated claims or cause the court to question the quality of representation might incentivize representatives particularly to heed absent class members’ interests.²⁷

Several proposed solutions to the Rule 23 puzzle depart from the idea that notice and opt-out rights add to the due process ballast for class-wide preclusion. Injunctive relief classes either have an intrinsic harmony that itself guarantees the required interest representation, or the pragmatic benefit of mandatory class treatment outweighs any cost of foregone rights in the due process balance. Other proposed solutions explain their selective enjoyment in autonomy terms.

22. See YEAZELL, *supra* note 13, at 255–56; Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 580 (2011) (describing this idea as the “standard account”). As well documented, the consent-based justification for notice and opt-out rights is quite weak. *E.g.*, Geoffrey P. Miller, *Rethinking Certification and Notice in Opt-Out Class Actions*, 74 UMKC L. REV. 637, 642 (2006). Also, opt-out rights may provide litigants’ autonomy in theory but not so in practice. See Martin Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 618 (2010) (“In many class actions, the claims of the individual class members are extremely small. . . . Moreover, even when individual class members have received notification of their rights to compensation from a general fund, their claims will often be so small that their size fails to justify the effort and expense of pursuing those claims on an individual basis.”).

23. Fiss, *supra* note 9, at 977; Issacharoff, *supra* note 4, at 366–70.

24. Taylor v. Sturgell, 553 U.S. 880, 893–94 (2008); Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 BYU L. REV. 1079, 1089.

25. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625–26 (1997); Uhl v. Thoroughbred Tech. & Telecomms. Inc., 309 F.3d 978, 985 (7th Cir. 2002); Stephenson v. Dow Chem. Co., 273 F.3d 249, 260–61 (2d Cir. 2001), *aff’d in part, vacated in part per curiam*, 539 U.S. 111, 112 (2003).

26. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1021 (9th Cir. 1998).

27. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1536 (2004); see also John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 308–09 (2010); cf. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 164–74 (2003) (offering a richly theorized account in line with this explanation).

B. *Intrinsic Harmony*

Courts primarily justify mandatory participation of absent class members in injunctive relief suits on the ground that all in the class have intrinsically harmonious interests. The group cohesion this unity creates ensures that representatives necessarily represent absent class members adequately.²⁸ The fact that a 23(b)(2) class is an actual group that exists in the real world, not some assemblage cobbled together for the sake of expediency, motivates this presumption of cohesion. The Advisory Committee notes on Rule 23(b)(2) offer an illustrative example: a group of black children challenging segregation in their local school district. These students share common experiences with racism in a particular locality, not just a coincidental interest in the same type of relief from the same defendant. They identify strongly with the group to which they belong and arguably derive important aspects of their identity—aspects at issue in the litigation—from the group itself. Individuals' interests are intertwined and thus harmonious.²⁹ Notice and opt-out rights would merely gild the lily.

This presumption lacks any basis in fact. Conflicts of interest abound in Rule 23(b)(2) suits.³⁰ Many or even most absent class members might not want the injunctive relief ostensibly sought in their names.³¹ If anything, classes in suits for money damages likely have fewer and less entrenched fissures. A class member in a race discrimination case might care much more about how a court shapes injunctive relief than the amount or distribution of damages pursued in her name might worry a class member in a low-value consumer protection action.³²

C. *Pragmatism*

Commentators tend to favor more pragmatic solutions to the Rule 23 puzzle that eschew the sort of fictionalized assertions about intrinsic harmony that populate the case law. As two examples show, these proposed

28. *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121–22 (8th Cir. 2005); *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 447–48 (6th Cir. 2002); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 165 (2d Cir. 2001); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 412–13 (5th Cir. 1998); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 256 (3d Cir. 1975); see also Arthur R. Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 299, 313, 315 (1973).

29. *E.g.*, *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1155 n.8 (11th Cir. 1983).

30. *E.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 505–11 (1976); C. Douglas Floyd, *Civil Rights Class Actions in the 1980's: The Burger Court's Pragmatic Approach to Problems of Adequate Representation and Justiciability*, 1984 BYUL REV. 1, 18–31; Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1187–89 (1982); Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 366–68 (1988); Stephen C. Yeazell, *From Group Litigation to Class Action Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1111–14 (1980).

31. *Waters v. Barry*, 711 F. Supp. 1125, 1131–32 (D.D.C. 1989); *Messier v. Southbury Training Sch.*, 183 F.R.D. 350, 356–57 (D. Conn. 1998).

32. See, e.g., YEAZELL, *supra* note 13, at 253.

solutions ultimately if implicitly depart from the idea of procedural due process as a context-sensitive balancing test.

Perhaps due process does not require notice and opt-out rights in injunctive relief suits because they promise no practical benefit to absent class members and their eschewal comes at no practical cost. When a court enjoins a defendant who acts “on grounds that apply generally to the class,”³³ as 23(b)(2) requires, it often cannot individualize the remedy.³⁴ A court could not enjoin enforcement of a juvenile curfew ordinance on First Amendment grounds, for example, then craft an injunction that benefits only certain of the city’s teenagers. Remedial indivisibility means that individuals who sit on the sidelines in practical effect have their rights adjudicated, whether they are class members or not. The right to exclude themselves from the litigation would give absent class members no benefit.³⁵ They also suffer no harm from mandatory joinder.³⁶ Any individual plaintiff could obtain the same injunctive relief that a class representative could win and, even without class certification, practically (if not formally) resolve nonparties’ claims. Nonparties and absent class members share the same position, so whether the latter can opt out or not is academic.

This remedial indivisibility justification has difficulties. It fails as a descriptive account of Rule 23(b)(2) doctrine. The rule permits class certification in instances where relief is readily divisible.³⁷ Also, while the justification may make sense for opt-out rights—injunctive relief may well be indivisible and opting out futile—it does not explain why notice is not needed. Indeed, given the indivisibility of relief, one might expect more punctilious notice to ensure the best possible representation of the broadest spectrum of interests before a court necessarily decides the fate of all.

Even if Rule 23(b)(2) were limited to instances of remedial indivisibility, and even if Rule 23 required notice to injunctive relief class members, the justification is incomplete. The position of nonparties and absent class members differs in an important respect in indivisible relief cases. If an individual plaintiff loses after certification, nothing prevents subsequent plaintiffs from trying to obtain the relief. If the class plaintiff loses, in contrast, *res judicata* bars any further litigation by absent class members.³⁸ Individual and class litigation have similar implications for nonparties and absent class members only if the plaintiff prevails.

33. FED. R. CIV. P. 23(b)(2).

34. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 925–26 (1998); AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04, at 112 (Proposed Final Draft, Apr. 1, 2009) [*hereinafter* PRINCIPLES OF THE LAW].

35. PRINCIPLES OF THE LAW, *supra* note 34, § 2.072, at 156.

36. *Id.* § 2.04, at 112–14.

37. One example might be a suit to challenge a school district’s diversity plan. A white parent whose daughter was assigned to a school outside her neighborhood could bring a class action under Rule 23(b)(2) on behalf of all similarly situated parents, even if the child could have been made entirely whole had a court required the neighborhood school to admit her and her alone. See Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1609 (2007).

38. *Johnson v. Ga. Highway Express, Inc.*, 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J.,

Professor Richard Nagareda offers a different pragmatic answer to the Rule 23 puzzle.³⁹ Mandatory class treatment solves the problem created when two “preexisting” rights conflict. Rule 23(b)(2) encompasses cases that do not raise individual causation or damages issues. Because every prospective plaintiff’s claim is exactly the same, “it is not possible to ascertain the legality of the defendant’s conduct as to one affected claimant without necessarily doing so as to all others.”⁴⁰ The defendant has a right “to rely upon a judicial decision that its conduct is lawful”⁴¹ But existing *res judicata* doctrine gives subsequent plaintiffs “a preexisting right . . . to escape the issue preclusive effect of a losing lawsuit by one of their ilk.”⁴² Put differently, they can bring precisely the same claim over and over again. The preexisting right of the second plaintiff to sue conflicts with the preexisting right of the defendant to rely on the clean bill of health.⁴³ Mandatory class treatment is an “instrumentalism of *last resort*” that sacrifices the rights of individuals to control their own claims to the greater good of resolving the conflict between preexisting rights.⁴⁴

Nagareda’s pragmatic explanation prompts several objections. First, the Federal Rules more generally do not recognize harm caused by relitigation (in Nagareda’s terms, the infringement of the defendant’s preexisting right) as sufficient to displace an individual plaintiff’s control over her right to sue.⁴⁵ The harm that repetitive litigation causes to a defendant can require joinder but only when multiple suits might result in conflicting obligations that the defendant could not possibly fulfill.⁴⁶ Rule 23(b)(1)(A), not Rule 23(b)(2), handles this problem for class actions.⁴⁷ Also, if protection to

concurring); Timothy Wilton, *The Class Action in Social Reform Litigation: In Whose Interest?*, 63 B.U. L. Rev. 597, 603 (1983).

39. Nagareda, *supra* note 27, at 232; *see also* Redish & Larsen, *supra* note 37, at 1605–09.

40. Nagareda, *supra* note 27, at 232.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 230. For a different but related account of class treatment for injunctive relief claims, *see* OWEN M. FISS, *INJUNCTIONS* 487 (1972).

45. The Supreme Court in *Taylor v. Sturgell* apparently did not conclude that defendants’ interests in avoiding repetitive litigation supported a more broadly sweeping nonparty preclusion rule. *See* Brief of Respondent The Fairchild Corp. at 47–48, *Taylor v. Sturgell*, 553 U.S. 880 (2008) (No. 07-371).

46. Under Rule 19, for example, a defendant can force the joinder of a nonparty only when, absent joinder, the defendant might be “unable to comply with one court’s order without breaching another court’s order concerning the same incident.” *Delgado v. Plaza Las Ams., Inc.*, 139 F.3d 1, 3 (1st Cir. 1998). Rule 22 authorizes a party to file an interpleader action when the party may be liable to different claimants, but it applies in instances when the liabilities are inconsistent with each other. Otherwise, the Federal Rules contemplate purely permissive joinder under Rule 20. *See* Martin H. Redish & William J. Katt, *Taylor v. Sturgell, Procedural Due Process, and the Day-In-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1895–1900 (2009).

47. Rule 23(b)(1)(A) was intended to reach the same sort of situation as Rule 19 does. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 388–89 (1967). A situation where a plaintiff sues to obtain an injunction and the defendant believes that nonparties might sue for the same injunction,

defendants justifies the mandatory class treatment of injunctive relief claims, they do not seem particularly grateful for it. Far from happily agreeing to class certification in injunctive relief suits, or even moving for class certification themselves, defendants hardly ever support class certification.⁴⁸ Finally, Nagareda's account, like the remedial indivisibility justification, does not explain why absent class members do not at least receive notice.⁴⁹ Before a court issues an indivisible injunction and thereby resolves everyone's claim, it stands to reason that the court should order notice, provide some sort of mechanism to solicit others' opinions, and thereby probe for conflicts of interest. Indeed, courts in the exercise of their discretion on occasion do so, just not because Rule 23 requires them to.⁵⁰

D. *Autonomy*

A third approach to the Rule 23 puzzle recharacterizes the relationship between absent class members and rights to sue in injunctive relief cases to eliminate the due process challenge that mandatory class treatment poses. Two proposed solutions illustrate. For Professor Samuel Issacharoff, rights litigated in Rule 23(b)(2) cases belong primarily to groups. Because they do not have individually owned rights to sue at stake, absent class members warrant less of the due process protection that notice and opt-out rights afford.

Issacharoff argues that when "there is little realistic prospect for individual control of claims," an individual has standing to sue, but the right really belongs to the group as a whole.⁵¹ To rehearse his example, a school desegregation suit does not address a single student's personal right to attend a particular school.⁵² Rather, it cannot but resolve the problem for all

even after the defendant defeats the first plaintiff's claim, is not sufficient on its own to trigger Rule 19. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 976 (9th Cir. 2008). Arguably, Rule 23(b)(1)(A) doctrine, as it has evolved, applies more broadly than Rule 19 does—essentially to any instance in which the class action seeks exclusively injunctive or declaratory relief. *E.g.*, *Franklin v. Barry*, 909 F. Supp. 21, 31 (D.D.C. 1995). This evolution renders Rule 23(b)(1)(A) and Rule 23(b)(2) mostly duplicative. *E.g.*, PRINCIPLES OF THE LAW, *supra* note 34, § 2.04, at 121–22 (reporter's note to comment a). This merger in class action doctrine is at odds with what the 1966 authors intended for Rule 23(b)(2). *See infra* Part IV.C; *see also* YEAZELL, *supra* note 13, at 257–59.

48. Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1166 n.120 (2009).

49. In his defense, the chapter of the American Law Institute's *Principles of the Law of Aggregate Litigation* that Nagareda drafted recognizes that the enjoyment of notice should not depend formally on the type of remedy pursued. PRINCIPLES OF THE LAW, *supra* note 34, § 2.07, at 143.

50. *E.g.*, *Norwalk CORE v. Norwalk Bd. of Educ.*, 298 F. Supp. 210 (D. Conn. 1968) (invoking the discretionary notice provision of Rule 23(c)); *cf.* *Eubanks v. Billington*, 110 F.3d 87, 93–94 (D.C. Cir. 1997) (recognizing the court's discretion to allow opt-out rights under Rule 23 class actions).

51. Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1059 (2002). *But see* Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 792–93 n.174 (2007).

52. Issacharoff, *supra* note 51, at 1058–59; *see also* Owen M. Fiss, *Foreword: The Forms of*

similarly situated children. The uniformity of all children's claims means that the decision necessarily resolves all of them on the merits, and the indivisible nature of an integration injunction necessarily affects all children equally.⁵³ This indivisibility has ownership ramifications. Under such circumstances, "a claim cannot be thought to belong to an individual plaintiff,"⁵⁴ and an "individual cannot claim an autonomous right to separate control of the outcome of the legal challenge."⁵⁵

Professor Robert Bone's solution differs but, in due process terms, works similarly.⁵⁶ Representative suits in the 19th Century could bind absent class members (to use the term anachronistically) when the suit involved so-called impersonal rights, or rights "that belonged to an indefinite class qua class and to each class member simply by virtue of his occupying a legally prescribed and fixed status."⁵⁷ The suit adjudicated "the legal incidents of status that defined the class," a status that individuals shared incidentally and identically.⁵⁸ These individuals had weak autonomy-based claims to individual control over rights to sue "because the lawsuit and the judgment involved them in only an impersonal way."⁵⁹

Bone speculates that the 1966 authors drew on this notion of impersonal rights as a justification for the mandatory class treatment of injunctive relief claims.⁶⁰ Rule 23(b)(2) targets instances "when the defendant has acted toward a group qua group without singling out any individual for special treatment."⁶¹ In a civil rights case, for example, the defendant has targeted particular individuals only incidentally—the defendant "has acted or refused to act on grounds that apply generally to the class," to quote Rule 23(b)(2)⁶²—because they happen to be members of a particular race. No one has been singled out individually. Also, the remedy—"final injunctive relief" that is "appropriate respecting the class as a whole," as Rule 23(b)(2) provides⁶³—only benefits individuals indirectly "as a result of their possessing the general attributes of group membership."⁶⁴ It requires no individualized application. Individuals have marginal autonomy interests in controlling their rights to sue, particularly because "individuals have no unilateral power to affect the formal incidents of a legally defined

Justice, 93 HARV. L. REV. 1, 19 (1979).

53. Issacharoff, *supra* note 51, at 1059.

54. *Id.* at 1064.

55. *Id.* at 1058.

56. See Bone, *supra* note 22, at 607; Bone, *supra* note 13, at 296–99. It is important to note that Bone's account is primarily descriptive, in the sense that he tries to make sense of the sweep of class action history and current doctrine, and not normative, in the sense that he would design Rule 23 from scratch based on the same set of claims.

57. Bone, *supra* note 22, at 606.

58. *Id.* at 607.

59. *Id.*

60. Bone, *supra* note 13, at 292.

61. Bone, *supra* note 22, at 611.

62. FED. R. CIV. P. 23(b)(2).

63. *Id.*

64. Bone, *supra* note 22, at 611.

status”⁶⁵ In contrast, in damages cases, the defendant has singled each class member out differently, as evidenced by differing injuries, and the damages calculation for each is individualized. These strengthen the autonomy claim for some individualized mechanism, like notice and opt-out rights, to control one’s own litigation destiny.

These autonomy-based solutions raise concerns. Issacharoff’s falls short of a positive account of Rule 23(b)(2) because, as discussed, the provision permits class treatment when injunctive relief is divisible. The reconception of property interests also begs difficult normative questions. If rights to sue “cannot be thought to belong to an individual plaintiff,”⁶⁶ should their class-wide adjudication trigger any due process protections at all? Are absent class members’ preferences wholly irrelevant, such that a self-appointed private attorney could commandeer their claims solely to pursue his own policy goals?

Bone’s explanation also gives pause. As he recognizes, the pragmatically inclined 1966 authors intended their revision to jettison vestiges of 19th Century formalism.⁶⁷ Bone suggests that, rather than focus on abstract categories of rights and remedies, the 1966 authors stressed the nature of the defendant’s conduct and how relief would operate to distinguish on autonomy grounds between injunctive relief and money damages suits.⁶⁸ But a formalistic grain remains in this account. It is not obvious why litigant autonomy in the class action context hinges solely on the defendant’s *modus operandi* and the administration of relief. Put differently, why does autonomy kick in and require notice and opt-out rights just because the distribution of damages requires an individualized assessment of injury?⁶⁹ At any rate, the documentation of the 1966 authors’ efforts demonstrates little appreciation of the detailed history Bone marshals to support his account and at times conflicts with it.⁷⁰

65. *Id.*

66. Issacharoff, *supra* note 51, at 1064.

67. Bone, *supra* note 13, at 299–301.

68. *Id.* at 301.

69. Bone stresses that the “(b)(2) [class action] category applies when the defendant has acted . . . without singling out any individual for special treatment” Bone, *supra* note 22, at 611. Perhaps an explanation lies in this idea of “singling out.” If the defendant has treated individuals *qua* individuals, then they have an autonomy right to litigation control. If not, autonomy interests are weaker. This explanation makes perfect sense but is not self-evident and requires further moral philosophical grounding. Moreover, the claim that defendants in damages cases “single out” individual class members is only formally true. As a practical matter, no mass tort or consumer protection has any particular individual actually in mind when it embarks on its injurious behavior. To the (b)(2) and (b)(3) defendant, the class is just that—a class whose individual members matter not at all.

70. Professor Benjamin Kaplan appended a lengthy, thorough, and accurate memorandum summarizing the state of class action doctrine in early 1962 to his first draft of the revised Rule 23. His revised rule, however, did not distinguish between injunctive relief and money damages class suits at all, nor did it provide for opt-out rights. See Memorandum from Reporter Professor Benjamin Kaplan to the Advisory Committee on Civil Rules, *Tentative Proposal to Modify Provisions Governing Class Actions—Rule 23*, at EE-1 to EE-2, EE-5 to EE-6 (May 28–30, 1962), *microformed*

* * *

Although the proposed solutions to the Rule 23 puzzle differ, a situation that itself gestures to the value of a historical inquiry into its answer, they share one important trait. Each fits the idea that a trans-substantive rationale rooted in some account of interest representation provides class-wide res judicata with its normative foundation. If notice and opt-out rights are procedural safeguards of adequacy, a class's intrinsic harmony renders them unnecessary to support the due process bona fides of an injunctive relief judgment. The pragmatic justifications cite to generic, recurring features of injunctive relief suits to excuse the need to guarantee adequate representation in the due process balance; if individuals have little ownership interest in injunctive relief claims, then the need to guarantee interest representation is correspondingly weak. The history of class action doctrine between 1938 and 1966, which I turn to next, suggests that this trans-substantive assumption about Rule 23's normative foundation is not entirely correct. On the contrary, at least part of the rule's development was highly substance-specific.

II. EARLY CLASS SUITS AND THE PRECLUSION PROBLEM

If the modern class action and the preclusion it generates are striking exceptions to the individual day-in-court ideal, then the injunctive relief suit is particularly extreme. Notice and opt-out rights, after all, preserve at least a modicum of individual control over the right to sue in money damages cases. When the 1966 authors rewrote the law of class actions, they must have had some reason to believe that a class action could lawfully bind absent class members without their consent or participation. Statutory restrictions on their power meant that these rulemakers could not themselves remake preclusion law.⁷¹ This Part and the next thus explain where the

on CI-6309-44 (Jud. Conf. Records, Cong. Info. Serv.). If this rule were an attempt to codify existing threads of class action doctrine, or translate it into modern terms, it evinces little appreciation of the distinctions Bone makes.

This document and several others do not explicitly list Kaplan as their authors. They clearly were the sort written by the committee's reporter, and so it is appropriate to attribute authorship to Kaplan.

Also, Bone notes that, to the 1966 authors, the need for notice and opt-out rights hinged on the "homogeneity and 'solidarity' of the class." Bone, *supra* note 13, at 297. "Although it is not entirely clear," he writes, "I believe that when Committee members looked for 'homogeneity' and 'solidarity,' they thought in terms of whether the adjudication focused on the impersonal class as an aggregate or on class members as individuals, rather than in terms of whether the substantive goals of class members were likely to diverge or converge" *Id.* Kaplan's memorandum, however, suggests that solidarity or homogeneity existed when class member preferences were aligned. Memorandum from Reporter Professor Benjamin Kaplan to the Advisory Committee on Civil Rules, *Tentative Proposal to Modify Provisions Governing Class Actions—Rule 23*, at EE-22 (May 28–30, 1962), *microformed on* CI-6309-44 (Jud. Conf. Records, Cong. Info. Serv.) (noting that "solidarity" exists when "it is less likely that there will be dissension" or "sizeable discord" among class members); *id.* at EE-24 (speculating as to a divergence of class member preferences as a reason why the Court found inadequate representation in *Hansberry v. Lee*). For further discussion of *Hansberry v. Lee*, see *infra* note 100.

71. 28 U.S.C. § 2072(b) (2006); see also *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S.

broadly preclusive class judgment came from before the 1966 authors began their labors.

This evolution had two stages, the first of which I describe in this Part. Fairly soon after Rule 23's initial promulgation in 1938,⁷² an anachronistic rights-based formalism yielded to a functional inquiry into interest representation as the normative basis for preclusion in class actions. This shift could have licensed *res judicata* for absent class members in a much wider array of suits than what the authors of the 1938 rule contemplated. But federal courts prohibited class suits that might produce binding judgments to go forward anytime class members might have conflicting preferences for what to do with their rights to sue, provided that these preferences were legally relevant. The quite narrow limits on class-wide preclusion envisioned in 1938 persisted, albeit in modern guise. This general course of class action doctrine makes all the more interesting the second stage: the emergence of a class action that could generate class-wide preclusion, despite conflicting litigant preferences, in desegregation litigation in the early 1960s. This history comes in Part III.

A. *The First Rule 23 and Rights-Based Formalism in Preclusion Doctrine*

The authors of the first Rule 23 organized types of class suits around 19th Century understandings of rights and their ownership. The rule derived much of its original formulation from a 1937 article by Professor James William Moore.⁷³ Moore identified three categories of class actions based on the so-called jural relationships among class members.⁷⁴ Rule 23(a)(1) provided for the "true" class action, or a case in which the "character of the right sought to be enforced . . . is . . . joint or common, or secondary."⁷⁵ As Professor Bone describes them, such rights were "impersonal"; any particular plaintiff possessed them solely because of his undifferentiated status or membership in a particular group.⁷⁶ Members who sued on behalf

497, 503 (2001); Advisory Comm. on Fed. Rules of Civil Procedure, Minutes of Rules Committee Meetings 117 (May 18, 1953), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV05-1953-min-Vol1.pdf>.

72. A story of Rule 23's evolution that begins in the mid-1930s, with the drafting of the original class action rule, does so somewhat arbitrarily. The 1938 authors claimed merely to restate existing equity practice. AM. BAR ASS'N, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 66 (Edward H. Hammond ed., 1939) [hereinafter WASHINGTON PROCEEDINGS].

73. James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 571 (1937); see FED. R. CIV. P. 23 app. at 137–43 (including various versions of Rule 23 and proposed revisions 1938–1966); see also WASHINGTON PROCEEDINGS, *supra* note 72, at 66 (statement by Professor and committee reporter Charles Clark crediting Moore).

74. James Wm. Moore & Marcus Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 309–10 (1937); see also ZECHARIAH CHAFFEE, JR., SOME PROBLEMS OF EQUITY 246 (1950) (discussing Moore's terminology).

75. Moore & Cohn, *supra* note 74, at 309.

76. Bone, *supra* note 13, at 274–78.

of an unincorporated association vindicated “joint” rights.⁷⁷ The association’s interest was really at stake, and when states allowed suit in the association’s trade name, Rule 23(a)(1) was unnecessary.⁷⁸ The stockholder derivative suit involved derivative or “[s]econdary” rights.⁷⁹ The stockholder had no individual right but rather enforced the corporation’s cause of action.⁸⁰ “[C]ommon” rights were those class members held together.⁸¹ Rule 23(a)(3) in contrast provided for “spurious” class suits.⁸² These involved “several” rights and required “a common question of law or fact” and that class members seek “common relief.”⁸³ All class members personally owned their rights, which were similar but otherwise jurally independent.⁸⁴

Unlike the current Rule 23, the rights-based organization of the 1938 version had nothing to do with remedies. A plaintiff could bring a spurious class suit either for damages or an injunction. The requirement that the class seek “common relief” meant that all class members had to benefit from the same type of relief, or from relief emanating from a single source.⁸⁵

This rights-based organization should have struck the pragmatically minded members of the original Advisory Committee as a formalistic anachronism.⁸⁶ In Professor Zechariah Chafee’s words, Rule 23 “force[d]

77. Hiram H. Lesar, *Class Suits and the Federal Rules*, 22 MINN. L. REV. 34, 40–41 (1937); Moore & Cohn, *supra* note 74, at 314.

78. Moore & Cohn, *supra* note 74, at 314.

79. Lesar, *supra* note 77, at 43; Moore & Cohn, *supra* note 74, at 315.

80. Chester B. McLaughlin, *The Mystery of the Representative Suit*, 26 GEO. L.J. 878, 898–99 (1938); Moore & Cohn, *supra* note 74, at 315.

81. Moore & Cohn, *supra* note 74, at 316.

82. Rule 23(a)(2) created the “hybrid” class action. This category had little practical importance and was mostly obsolete by 1938. See 2 WILLIAM W. BARRON ET AL., *FEDERAL PRACTICE AND PROCEDURE, WITH FORMS: CIVIL AND CRIMINAL* § 562.3, at 275 (2d ed. 1961); 2 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* §23.04, at 2239 (1938).

83. FED. R. CIV. P. 23(a) (1938).

84. For example, a group of employees, each of whom was employed pursuant to a separate contract, had several rights. One employee could sue to vindicate her several right to overtime compensation and by no means had to tie herself to other similarly situated employees. *E.g.*, *Pentland v. Dravo Corp.*, 152 F.2d 851, 853 (3d Cir. 1945).

85. *Kainz v. Anheuser-Busch, Inc.*, 194 F.2d 737, 743 (7th Cir. 1952); *McGrath v. Abo*, 186 F.2d 766, 769–70 (9th Cir. 1951); *Tracy v. Robbins*, 40 F.R.D. 108, 113 n.17 (D.S.C. 1966); see also Irving A. Gordon, *The Common Question Class Suit Under the Federal Rules and in Illinois*, 42 ILL. L. REV. 518, 521 (1947); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 701 n.45 (1941). The Eighth Circuit disagreed. *Farmers Co-Op. Oil Co. v. Socony-Vacuum Oil Co.*, 133 F.2d 101, 105 (8th Cir. 1942); see also James A. Rahl, *The Class Action Device and Employee Suits Under the Fair Labor Standards Act*, 37 ILL. L. REV. 119, 127, 133 (1942). In a memorandum to the Federal Rules Advisory Committee written in May 1962, Benjamin Kaplan declared that the Eighth Circuit’s approach “is clearly not the prevailing law.” Memorandum from Reporter Professor Benjamin Kaplan to the Advisory Committee on Civil Rules, *Tentative Proposal to Modify Provisions Governing Class Action—Rule 23*, at EE-43 (May 28–30, 1962), *microformed on* CIS-6309-44 (Jud. Conf. Records, Cong. Info. Serv.).

86. *E.g.*, CHAFEE, *supra* note 74, at 245 (denouncing Rule 23’s classifications based on “outworn categories of rights”).

judges to decide cases by choosing labels, and not by reasoning the thing out,”⁸⁷ and it proved maddeningly difficult to apply in practice.⁸⁸ Nonetheless, this rights-based formalism had significant real-world implications, chiefly because it dictated the preclusive effect of a class judgment.⁸⁹ True class suits bound absent class members;⁹⁰ because Rule 23 did not provide for opt-out rights, these suits were thus mandatory. Spurious suits generated *res judicata* only for named plaintiffs and class members who affirmatively intervened.⁹¹ The Rules Enabling Act’s “substantive rights” limitation prevented Moore’s proposal that the original Rule 23 codify this preclusion doctrine, but it nonetheless prevailed in practice.⁹²

On one level, the link between preclusion and jural relationships made sense. The 1938 authors labored before the notion of interest representation as a constitutional justification for binding individuals to judgments obtained without their consent or participation had fully coalesced.⁹³ No doctrinal basis existed to extend the preclusive force of a class judgment to deny plaintiffs in spurious suits—that is, plaintiffs with “several” rights at stake—control over the disposition of their individually owned rights to sue.

The *res judicata* consequences of this rights-based formalism, however, drew nearly uniform criticism in the era’s commentary.⁹⁴ Among other ills, it made Rule 23(a)(3)’s spurious class suit provision nearly pointless.⁹⁵

87. *Id.* at 257; see also Arthur John Keefe et al., *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 334 (1948) (criticizing the “unthinking formalism” of Rule 23).

88. *E.g.*, *Sys. Fed’n No. 91 v. Reed*, 180 F.2d 991, 996 (6th Cir. 1950); DAVID W. LOUISELL & GEOFFREY C. HAZARD, JR., *PLEADING AND PROCEDURE: STATE AND FEDERAL* 723 (1962); Arthur John Keefe, *Federal Rules—Proposed Amendment: Two Comments*, 41 A.B.A. J. 42, 43 (1955).

89. See *Dickinson v. Burnham*, 197 F.2d 973, 979 (2d Cir. 1952) (Clark, J.) (complaining that, “The convenient use of the appellations ‘true,’ ‘hybrid,’ and ‘spurious’ for determining the effect of a judgment in a class suit under F.R. 23(a) has become rather general”); 2 MOORE ET AL., *supra* note 82, at 2283–95.

90. *E.g.*, *Knowles v. War Damage Corp.*, 171 F.2d 15, 18 (D.C. Cir. 1949).

91. *E.g.*, *Albrecht v. Bauman*, 130 F.2d 452, 455 (D.C. Cir. 1942); *Shipley v. Pittsburgh & L.E.R. Co.*, 70 F. Supp. 870, 874–75 (W.D. Pa. 1947). *But see Nat’l Hairdressers’ & Cosmetologists’ Ass’n, Inc. v. Philad Co.*, 41 F. Supp. 701, 709 (D. Del. 1941). See generally *Pa. R.R. v. United States*, 111 F. Supp. 80, 90–91 (D.N.J. 1953).

92. Moore & Cohn, *supra* note 74, at 556; cf. Advisory Comm. on Fed. Rules of Civil Procedure, Proceedings of Meeting 48 (Feb. 1–4, 1937), available at <http://www.uscourts.gov/USCourts/Rulesandpolicies/rules/minutes/cv02-1937-min.pdf> (describing Professor George Wharton Pepper’s motion that “the rules have no statement by us . . . respecting the effect of the judgment”).

93. Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 214–15 (1992). Moore rejected the idea that preclusion should depend on interest representation as “relegating the entire doctrine to the haphazardous concept of ‘fireside equity.’” Moore & Cohn, *supra* note 74, at 563. He did acknowledge that “[o]f course the representatives of a joint, common or derivative right must not be negligent or incompetent if the decree is to bind the entire class.” *Id.* at 559; see also Bone, *supra*, at 213 n.64 (1992); Hazard et al., *supra* note 13, at 1941.

94. *E.g.*, CHAFEE, *supra* note 74, at 251–58; Keefe et al., *supra* note 87, at 334–38.

95. Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 825 (1946); see also Note, *Classifications Under Rule 23 of the Federal Rules*, 2 HOW. L.J. 111, 118 (1956).

Since only absent class members who consented were bound, the spurious class action promised little beyond that which permissive joinder under Rule 20 could accomplish⁹⁶ and, in Professor Charles Alan Wright's words, was "not really a class action at all."⁹⁷ A district court in 1942 rightly recognized the implication of this enfeebled preclusive effect: the decision to let a case proceed as a spurious class action was not one of "any consequence."⁹⁸

B. *Interest Representation and Restrictive Preclusion*

The tenor of the times in the late 1930s and early 1940s all but guaranteed a shift in the normative foundation for class-wide preclusion. The rights-based formalism Rule 23 codified proved irksome to lawyers of a realist generation.⁹⁹ Also, just as Rule 23 went into force, interest representation as a basis for nonparty or absent class member preclusion, a doctrine much more attuned to actual characteristics and preferences of litigants, had begun to solidify.¹⁰⁰

96. WASHINGTON PROCEEDINGS, *supra* note 72, at 67 (including comments of Charles Clark, suggesting that Rule 23(a)(3) offered "merely a short cut to cases where joinder is permissive"); 2 BARRON ET AL., *supra* note 82, § 562.3, at 275; CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 63, at 406 (2d ed. 1947); Kalven & Rosenfield, *supra* note 85, at 705 (arguing that Rule 23(a)(3) "simply duplicates a task already performed by another section of the rules"). Rule 23(a)(3) promised a mild jurisdictional benefit in diversity suits. Diversity jurisdiction requires complete diversity among all the parties. Under *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 365–66 (1921), only the citizenship of the class representatives mattered for diversity purposes. See *Moreschi v. Mosteller*, 28 F. Supp. 613, 617 (W.D. Pa. 1939). Hence, the only concrete advantage of the spurious class suit over joinder of litigants through other rules was its jurisdictional effect. *E.g.*, *Shipley*, 70 F. Supp. at 874; *Hunter v. S. Indem. Underwriters, Inc.*, 47 F. Supp. 242, 243–44 (E.D. Ky. 1942).

97. Charles Alan Wright, *Proposed Changes in Federal Civil, Criminal, and Appellate Procedure*, 35 F.R.D. 317, 337 (1964).

98. *Hunter*, 47 F. Supp. at 244.

99. *E.g.*, *Gart v. Cole*, 263 F.2d 244, 248–49 (2d Cir. 1959) (Clark, J.); Keefe et al., *supra* note 87, at 342; Charles Alan Wright, *Amendments to the Federal Rules: The Function of a Continuing Rules Committee*, 7 VAND. L. REV. 521, 540 (1954).

100. *Dickinson v. Burnham*, 197 F.2d 973, 979 (2d Cir. 1952) (Clark, J.); *Battles v. Braniff Airways*, 146 F.2d 336, 339 (5th Cir. 1945); *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 91 (7th Cir. 1941); CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 63, at 278 (1928); Note, *Binding Effect of Class Actions*, 67 HARV. L. REV. 1059, 1060 (1954); Note, *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 936–38 (1958).

The confused treatment of res judicata in the 1940 *Hansberry v. Lee* decision perhaps best reflects this doctrinal flux. The issue in *Hansberry* was whether a judgment in an earlier case brought by a class of homeowners approving a racially restrictive covenant precluded a black homeowner, nominally a member of the earlier class, from challenging the covenant's validity in a second lawsuit. The Court began its analysis with adequate representation doctrine, noting that due process requires "the protection of the interests of absent parties" before res judicata can attach to a class judgment, and that preclusion is only appropriate when absent parties "are in fact adequately represented by parties who are present . . ." *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940). But, citing 19th Century authority, the Court then concluded that a class representative could not adequately represent absent class members' interests when, in contrast with class members who have "a sole and common interest," class members "are free alternatively either to assert rights or to challenge them." *Id.* at 44–

The 1938 version of Rule 23 required a showing of adequate representation before a class suit could proceed.¹⁰¹ The emergence of interest representation as a constitutional foundation for preclusion thus opened the possibility that once a court permitted a case to proceed as a class action, its judgment, regardless of the nature of the right, could bind absent class members.¹⁰² The decision to allow a case to proceed as a class suit took on increasing importance. But courts generally disallowed the dramatic empowerment of Rule 23 that this normative shift otherwise promised. They mostly found the requisite adequacy only in true class suits, in effect justifying in new terms the crabbed class action preclusion doctrine that developed under the old rights-based formalism. When an absent class member might have a different preference for what to do with her right to sue—an ever-present possibility—a class representative could not adequately represent her and procure a judgment on her behalf.¹⁰³ In true

45. This language refers to several rights and implies that when class members have such rights, adequate representation is not possible. For a similar reading of *Hansberry*, see Bone, *supra* note 93, at 215–16 n.73.

101. FED. R. CIV. P. 23(a) (1938).

102. See *Giordano v. Radio Corp. of Am.*, 183 F.2d 558, 560–61 (3d Cir. 1950) (refusing to describe a class action as true because of inadequate representation and suggesting that the res judicata force of the class judgment made the determination an important one); *Weeks*, 125 F.2d at 93 (“In making the decision as to plaintiffs’ ability to insure an adequate representation of all the members of the class, we have created a test, by stating the proposition in the reverse: Now assuming, as we do, that this is a proper class suit, then those of the class who are not plaintiffs will be bound by the judgment. That being the case, should this court permit the plaintiffs, on the showing before us, to bind the absent plaintiffs of this class, ‘for better or for worse?’”); cf. *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387, 390 (2d Cir. 1944) (declaring that a “stricter rule as to the adequacy of representation” would apply in order to bind class members who do not intervene than the rule that would apply to bind those who do intervene).

103. *Giordano*, 183 F.2d at 561; *Ky. Home Mut. Life Ins. Co. v. Duling*, 190 F.2d 797, 802 (6th Cir. 1951); *United States v. E. I. DuPont de Nemours & Co.*, 13 F.R.D. 98, 101 (N.D. Ill. 1952) (requiring that, “A representative . . . have an interest co-extensive and wholly compatible with the interest of those whom he would represent so as to insure fairly the adequate representation of all.”). The 1942 *Restatement of Judgments*, for example, acknowledged that “Due process . . . means only that the interests of a person should be adequately represented,” but it limited its assertion that class judgments precluded further litigation “only . . . to persons whose situation with reference to the matter involved in the suit is substantially identical with that of the person who represents them.” An identity of interests only existed when the “right or liability . . . is common to the class”—that is, when the suit involved the sort of rights that made it a true one. AM. LAW INST., *RESTATEMENT OF JUDGMENTS* § 86 cmt. b, cmt. f (1942). Some commentators argued that “it is clear that 100% agreement is not required” for a case, including a spurious suit, to enjoy the requisite adequacy. 2 BARRON ET AL. *supra* note 82, § 567, at 309; see also Joseph J. Simeone, *Procedural Problems of Class Suits*, 60 MICH. L. REV. 905, 913 (1962); Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 460 (1960); Comment, *Denial of Due Process Through Use of the Class Action*, 25 TEX. L. REV. 64, 72 (1946); Note, *Representative Actions—The Status of Rule 23(a)(3)*, 24 N.Y.U. L.Q. REV. 191, 194 (1949). These commentators cited true suits for this claim, not spurious ones. See *Redmond v. Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944) (cited in *Federal Practice and Procedure*, 2 BARRON ET AL., *supra* note 82, § 567, at 309, in *Denial of Due Process Through Use of the Class Action, Representative Actions—The Status of Rule 23(a)(3)*, and in Simeone’s *Procedural Problems of Class Suits*); *Matthies v. Seymour Mfg. Co.*, 23

suits, the group ownership of rights to sue made individual litigant preferences irrelevant,¹⁰⁴ but individual ownership of several rights made the picture different in spurious cases. Thus, as Charles Clark, then on the Second Circuit, commented in 1947, “truly adequate representation would be hard to attain” in a spurious class action.¹⁰⁵

In keeping with the pragmatic spirit of the day, courts did not merely invoke the several nature of the right at stake but also offered various functional reasons for why class representatives in spurious suits invariably failed the adequacy test. A class representative’s failure to “suppl[y] some proof that others in the class desired [the] suit to go on and that . . . few . . . members of the class were opposed to [its] prosecution,” for example, meant a finding of inadequate representation of interests.¹⁰⁶ Speculation, often with no basis in the record, that class members might have conflicting interests also justified a refusal to let a case proceed as a class action.¹⁰⁷ The number of class representatives in comparison to the size of the class proved a key determinant of adequacy during these years,¹⁰⁸ in significant measure because a small number of class representatives relative to the size of the class justified speculation as to a divergence of preferences.¹⁰⁹ Courts also invoked divergent litigant characteristics to reject class treatment, not because they created the sort of manageability concerns that might matter to present-day class certification inquiry, but because divergent litigant characteristics meant a higher likelihood of divergent litigant preferences. Thus, differences in the relationships individual class members had with the defendant or the nature or manner of their injuries tipped the adequacy calculus against class treatment.¹¹⁰

Class suits to enforce the Fair Labor Standards Act of 1938 (FLSA) nicely illustrate the judicial reluctance to extend preclusion in class actions in the 1940s, despite the normative shift to interest representation. FLSA, which established a minimum wage for many industries and required

F.R.D. 64, 77 (D. Conn. 1958) (cited in Simeone’s *Procedural Problems of Class Suits*).

104. Cf. *Redmond*, 144 F.2d at 151–52 (determining in a true class suit that, “The possible situation that the beneficiaries may have divergent views as to their several undivided rights . . . does not prevent this being a class action.”).

105. CLARK, *supra* note 96, § 63, at 406.

106. *Weeks*, 125 F.2d at 94; *see also* *Knowles v. War Damage Corp.*, 171 F.2d 15, 18 (D.C. Cir. 1948) (declaring that adequacy depends in part on whether “members desire . . . such representation”).

107. *E.g.*, *Ky. Home Mut. Life Ins. Co.*, 190 F.2d at 802; *Weeks*, 125 F.2d at 93 (speculating as to possible conflicts of interest among class members); *Conner v. Pa. R.R.*, 11 F.R.D. 112, 113 (D.D.C. 1950); *cf.* *McQuillen v. Nat’l Cash Register Co.*, 22 F. Supp. 867, 873 (D. Md. 1938) (applying Equity Rule 38, Rule 23’s predecessor).

108. 2 MOORE ET AL., *supra* note 82, § 23.03, at 2234–35; *see also* *United Pub. Workers of Am. v. Local No. 312*, 94 F. Supp. 538, 541 (E.D. Mich. 1950); *Knowles*, 171 F.2d at 19; *Pac. Fire Ins. Co. v. Reiner*, 45 F. Supp. 703, 708 (E.D. La. 1942).

109. *Weeks*, 125 F.2d at 91–92; *Pa. Co. for Ins. on Lives & Granting Annuities v. Deckert*, 123 F.2d 979, 984 (3d Cir. 1941).

110. *Weeks*, 125 F.2d at 93; *see also* *Pelelas v. Caterpillar Tractor Co.*, 30 F. Supp. 173, 176 (S.D. Ill. 1939).

payment for overtime work, had its own class action provision. Section 16(b) of the statute authorized employees to sue “for and in behalf of . . . [any] other employees similarly situated.”¹¹¹ Although courts described claims for unpaid wages or overtime as involving several rights,¹¹² FLSA’s statutory class suit provision prevented rote reference to the true/spurious distinction in Rule 23 to determine a judgment’s preclusive effect.¹¹³ Indeed, whether § 16(b) arguably provided statutory license for judgments binding on absent class members remained an open question for a few years after its enactment.¹¹⁴

Almost without exception, however, courts refused to invest FLSA class judgments with such force.¹¹⁵ The possibility that class members might have different preferences for the vindication of FLSA rights, several as they were, made adequate representation impossible.¹¹⁶ Divergent litigant characteristics indicated different and possibly conflicting interests. Hence differences in numbers of hours worked or types of job classification justified a refusal to find adequate representation and permit a suit to proceed as a class action.¹¹⁷

* * *

The shift to interest representation as a basis for nonparty preclusion made mandatory class treatment, regardless of the nature of the right, theoretically possible. But courts set a high bar for the requisite harmony of class member interests necessary to support a finding of adequate representation. A showing of 100% agreement was mostly impossible. Preclusion for the class was unlikely except in true suits, where class member preferences were legally irrelevant. In effect, the rights-based formalism that besmirched the 1938 version of Rule 23 remained in the

111. Fair Labor Standards Act of 1938, ch. 676, § 16(b), 52 Stat. 1069, 1069.

112. *Pentland v. Dravo Corp.*, 152 F.2d 851, 852–53 (3d Cir. 1945); *Saxton v. W. S. Askew Co.*, 35 F. Supp. 519, 521 (N.D. Ga. 1940).

113. *Shain v. Armour & Co.*, 40 F. Supp. 488, 490 (W.D. Ky. 1941) (noting that § 16(b) rendered the question of whether a suit is true or spurious “academic”).

114. *E.g.*, *Tolliver v. Cudahy Packing Co.*, 39 F. Supp. 337, 339 (E.D. Tenn. 1941) (avoiding this question but setting up a procedure whereby a judgment might afford preclusion in favor of absent class members); Recent Cases, *Labor Law—Fair Labor Standards Act—FLSA Class Action Limited to Employees Giving Assent*, 55 HARV. L. REV. 668, 688–89 (1942). With the Portal-to-Portal Act in 1947, Congress explicitly required that class members opt in to a FLSA class action. *E.g.*, Note, *Fair Labor Standards Under the Portal to Portal Act*, 15 U. CHI. L. REV. 352, 360 (1948).

115. *E.g.*, *Pentland*, 4 F.R.D. at 352; *Calabrese v. Chiumento*, 3 F.R.D. 435, 437 (D.N.J. 1944); *Shain*, 40 F. Supp. at 490; *Brooks v. S. Dairies, Inc.*, 38 F. Supp. 588, 588 (S.D. Fla. 1941); *Albert B. Gerber & S. Harry Galfand, Employees’ Suits Under the Fair Labor Standards Act*, 95 U. PA. L. REV. 505, 509 (1947). *But see* *Cissell v. Great Atl. & Pac. Tea Co.*, 37 F. Supp. 913, 914 (W.D. Ky. 1941).

116. *Shain*, 40 F. Supp. at 490 (finding adequate representation and thus res judicata impossible “where different members of a class are free to either assert rights or to challenge them as their individual judgments dictate”).

117. *Smith v. Stark Trucking, Inc.*, 53 F. Supp. 826, 828 (N.D. Ohio 1943); *Fink v. Oliver Iron Mining Co.*, 65 F. Supp. 316, 318 (D. Minn. 1941); *Lofther v. First Nat’l Bank of Chicago*, 45 F. Supp. 986, 988–89 (N.D. Ill. 1941); *Saxton*, 35 F. Supp. at 521.

general course of class action doctrine. As a result, the class action had little of the regulatory force it has today.¹¹⁸

III. DESEGREGATION LITIGATION AND THE ORIGINS OF THE MANDATORY CLASS SUIT

Class action doctrine remained in this enfeebled state until 1966, except in one substantive area.¹¹⁹ The so-called “race relations” class actions that civil rights advocates brought under Rule 23, beginning in the late 1930s, mostly involved several rights and were thus spurious suits.¹²⁰ But from the earliest days of this litigation under Rule 23, these suits generated dispositions that bound and benefited absent class members.¹²¹ This res judicata force meant that the key question in these cases was whether to allow them to proceed as class actions, a question that often boiled down to whether the class representative afforded adequate representation. By the mid-1960s, some southern federal courts permitted them to do so, even when individual litigant preferences as to the proper desegregation remedy may have conflicted quite fundamentally. The doctrine developed in these cases ultimately supported a much invigorated Rule 23.

I describe the emergence of this desegregation exception to the general course of mid-century class action doctrine in this Part. It occurred over three periods. The first encompassed the years right before *Brown v. Board of Education*, when black plaintiffs made significant but gradual strides toward equality. Courts took a modest step forward by letting class suits proceed despite the theoretical possibility of conflicting litigant interests, when in practical terms these conflicts were highly unlikely. The second period included the five or so years after *Brown*, when federal courts were

118. See generally Kalven & Rosenfield, *supra* note 85 (regretting that Rule 23’s limitations undercut the regulatory potential of class actions).

119. See 2 BARRON ET AL., *supra* note 82, § 572, at 347 (noting in the 1961 edition, the consensus among federal courts that this approach to res judicata was correct); *id.* § 562.1, at 268–71 (describing desegregation class suits as an anomaly).

120. *Jeffers v. Whitley*, 309 F.2d 621, 629 (4th Cir. 1962); *Evans v. Buchanan*, 256 F.2d 688, 690 & n.2 (3d Cir. 1958); see also *Class Actions: A Study of Group-Interest Litigation*, 1 RACE REL. L. REP. 991, 1001 (1956).

121. *E.g.*, *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 865 n.62 (5th Cir. 1966); *Lance v. Plummer*, 353 F.2d 585, 590–91 (5th Cir. 1965); *Wilson v. City of Paducah*, 100 F. Supp. 116, 117–18 (W.D. Ky. 1951); Memorandum Brief for Appellants in Nos. 1, 2 and 3 and for Respondents in No. 5 on Further Reargument with Respect to the Effect of the Court’s Decree, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (Nos. 1, 2, 3 and 5), 1954 WL 45731, at *5–10; *Developments in the Law*, *supra* note 100, at 935–36; Paul Hartman, *The Right to Equal Educational Opportunities as a Personal and Present Right*, 9 WAYNE L. REV. 424, 430 (1963); Robert B. McKay, “With All Deliberate Speed”: *A Study of School Desegregation*, 31 N.Y.U. L. REV. 991, 1085 (1956); Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 647 (1965); Note, *State Efforts to Circumvent Desegregation: Private Schools, Pupil Placement, and Geographic Segregation*, 54 NW. U. L. REV. 354, 362 (1959); Comment, *The Class Action Device in Antisegregation Cases*, 20 U. CHI. L. REV. 577, 578 (1953); *cf.* *Sys. Fed’n No. 91 v. Reed*, 180 F.2d 991, 996–97 (6th Cir. 1950); LOUISELL & HAZARD, *supra* note 88, at 718–19 (discussing *Reed*); *The Class Action Device in Antisegregation Cases*, *supra*, at 590–91 (discussing *Reed*).

hardly immune to the backlash the decision provoked. Class action doctrine stagnated. Southern state legislatures restructured discriminatory practices in a manner that emphasized class members' different characteristics, and reluctant or defiant federal courts denied class treatment because the several nature of the right at stake made litigant preferences relevant and their conflict theoretically possible. Class action doctrine again progressed in the early 1960s, the third period of this evolution, at a time when a cadre of federal judges refused to countenance southern foot-dragging any longer.¹²² Despite fundamental conflicts among black students as to the wisdom of school integration, courts allowed plaintiffs to prosecute class suits and obtain judgments that bound all absent class members.¹²³ The success of class allegations in the desegregation litigation of this third period did not hinge upon some theoretical, trans-substantive development that justified less concern for individual litigant preferences in the interest representation calculus. Rather, judges appear to have let these cases proceed as class suits because, given circumstances in the early 1960s, desegregation plaintiffs needed class treatment of their claims to have a hope of dismantling Jim Crow through litigation.

A. *Rule 23's Importance to Desegregation Litigation*

The significance of desegregation litigation to the evolution of class action doctrine begs a fundamental question: Why did black plaintiffs bring desegregation cases as class suits? Couldn't a single black plaintiff in an individual action, for example, have obtained a broadly sweeping injunction requiring an integrated school?¹²⁴

The answer lies in the several key advantages Rule 23 promised to civil rights plaintiffs.¹²⁵ A class action avoided the sort of mootness problems that, for example, an individual plaintiff's graduation might create.¹²⁶ Individual actions at least nominally triggered judgments only named parties

122. In addition to this growing impatience, the greater success black litigants enjoyed might reflect that the passage of time meant more of their cases were decided at the appellate level. Circuit judges were considerably more sympathetic to black plaintiffs during this time than were their district court colleagues. See Kenneth N. Vines, *The Role of Circuit Courts of Appeal in the Federal Judicial Process: A Case Study*, 7 *MIDWEST J. POL. SCI.* 305, 310 (1963).

123. *Id.*

124. 2 *BARRON ET AL.*, *supra* note 82, § 562.1, at 270; John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 *NOTRE DAME L. REV.* 1419, 1433 (2003); see also YEAZELL, *supra* note 13, at 260–61.

125. See generally Keith Jurow, *School Desegregation, Class Suits, and the Vexing Problem of Group Remedies*, 80 *W. VA. L. REV.* 25, 27–28 (1977).

126. Compare *McSwain v. Cnty. Bd. of Educ. of Anderson Cnty., Tenn.*, 138 F. Supp. 570, 571 (E.D. Tenn. 1956), and *Buckner v. Cnty. Sch. Bd. of Greene Cnty., Va.*, 332 F.2d 452, 453–54 (4th Cir. 1964), with *Becton v. Greene Cnty. Bd. of Educ.*, 32 F.R.D. 220, 221–22 (E.D.N.C. 1963), and *Hart v. Bd. of Educ. of Charles Cnty.*, 164 F. Supp. 501, 503 (D. Md. 1958); see also McKay, *supra* note 121, at 1085; Recent Cases, *Negro Plaintiffs Already Admitted to White School May Maintain Suit for Injunction Against Segregated School System*, 78 *HARV. L. REV.* 1667, 1669 (1965); *The Class Action Device in Antisegregation Cases*, *supra* note 121, at 578–80.

could execute;¹²⁷ because a desegregation class judgment benefited absent class members, in contrast, the pool of potential enforcers was much larger.¹²⁸

Most importantly, until 1963, when the Fifth Circuit decided the important case of *Potts v. Flax*,¹²⁹ courts doubted that they could issue broadly applicable injunctions in individual actions.¹³⁰ Those judges with segregationist tendencies stressed the fact that the plaintiff had only brought an individual action to justify the remarkably grudging relief *Brown* forced them to order.¹³¹ A district judge in 1962, for example, warned a student challenging Clemson University's all-white admissions policy that because he did not bring a class action, he could win no more than the right to attend the school as its sole black matriculant.¹³² A stalwart opponent of desegregation refused to permit a challenge to transportation segregation to proceed as a class suit and suggested that the three named plaintiffs alone could obtain an injunction to allow just them to travel on otherwise all-white buses.¹³³ A student-by-student approach to desegregation litigation posed enormous difficulties and all but nullified *Brown*.¹³⁴ To those invested in the

127. McKay, *supra* note 121, at 1085.

128. *Developments in the Law*, *supra* note 100, at 935.

129. 313 F.2d 284, 288–89 (5th Cir. 1963); *see also* FISS, *supra* note 44, at 484–86.

130. *Holland v. Bd. of Pub. Instruction of Palm Beach Cnty., Fla.*, 258 F.2d 730, 733 (5th Cir. 1958) (asking for additional briefing on the question of whether “there [are] any precedents for ordering general desegregation of the public schools, or for granting relief to a segregated class in cases which were not filed as class actions,” and claiming to be “in some doubt” as to the answer to the question); *see also* Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2185–86 & n.32 (1989).

131. *E.g.*, *Bailey v. Patterson*, 323 F.2d 201, 210 (5th Cir. 1963) (Cameron, J., dissenting) (quoting district court order declaring that three individuals have right to unsegregated service from a restaurant but refusing a class wide injunction for the same); *Jeffers v. Whitley*, 197 F. Supp. 84, 93–94 (M.D.N.C. 1961) (dismissing class allegations, allowing individuals to replead to seek injunctions for themselves).

132. S. C. Anderson, *Negro is Warned in Clemson Case: Judge Says Suit for Entry May Not Set a Rule*, N.Y. TIMES, Nov. 19, 1962, at 26.

133. *Bailey*, 206 F. Supp. at 69–70. Sidney Mize, the district judge involved, “fit the mold of southern federal judges who were bent on resistance” to desegregation. Fred L. Banks, Jr., *The United States Court of Appeals for the Fifth Circuit: A Personal Perspective*, 16 MISS. C. L. REV. 275, 278 n.15 (1996); *see also* FRANK T. READ & LUCY S. MCGOUGH, *LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH* 211–22 (1978).

134. *Cf.* Robert A. LeFlar & Wylie H. Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 422 (1954) (discussing some of these issues and why the class action remediated them). It meant that the success of desegregation depended on the willingness of individual black plaintiffs to come forward. Civil rights lawyers had a hard time finding suitable plaintiffs willing to subject themselves to the unpleasant consequences of challenging Jim Crow in the Deep South, so injunctions issued on a one-by-one basis could hardly dent segregation. Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 VA. L. REV. 1693, 1697 (2004). Relatedly, it meant that without Rule 23, civil rights lawyers would have to bring similar litigation repeatedly, a challenge for cash-strapped organizations. Third, it meant that, if successful, a plaintiff would find him- or herself the sole black student in an all-white school—hardly a pleasant prospect for the student, and hardly meaningful integration.

success of litigation-driven desegregation, class treatment of claims seemed essential.¹³⁵

B. *The Procedural Evolution of the Desegregation Class Suit*

1. The Pre-*Brown* Years

A group of black schoolteachers and principals seeking equal rates of pay brought a suit in Florida that, in 1941, generated the first published class action decision under Rule 23 in a civil rights case.¹³⁶ This case was somewhat anomalous, and other than true class suits challenging racism in unions, civil rights litigation before *Brown* amounted to a fairly small part of the federal courts' class action docket. Most of these early cases were brought either to desegregate higher education or to equalize teacher pay.¹³⁷ Some stand out because they met with success as a procedural matter, whereas similar spurious suits in other doctrinal areas might have failed on adequacy grounds.

Most of the pre-*Brown* suits that enjoyed class treatment challenged across-the-board, de jure policies of segregation.¹³⁸ The sole litigant characteristic to matter substantively was skin color, something all class members shared identically. The irrelevance of other, more individual litigant characteristics to plaintiffs' rights under the Fourteenth Amendment facilitated the prosecution of these cases as class suits. When defendants did not have such blanket policies, in contrast, the possibility that litigant characteristics might diverge imperiled class allegations.¹³⁹

Individual litigant preferences were theoretically relevant, even in cases challenging de jure, blanket policies because formally Fourteenth Amendment rights were several. But courts tended not to let abstract jural relationships alone hamstring class suits, taking a more realistic view of

135. See *infra* notes 279–83 and accompanying text.

136. *McDaniel v. Bd. of Pub. Instruction for Escambia Cnty.*, 39 F. Supp. 638, 638–39 (N.D. Fla. 1941). The NAACP began bringing teacher pay cases in 1939. See Comment, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 YALE L.J. 574, 586 n.84 (1949).

137. See Jeanne M. Powers & Lirio Patton, *Between Mendez and Brown: Gonzales v. Sheely (1951) and the Legal Campaign Against Segregation*, 33 LAW & SOC. INQUIRY 127, 137 (2008) (describing the NAACP's litigation strategy before *Brown*).

138. 2 BARRON ET AL., *supra* note 82, § 562.1, at 270–71 (surveying recent decisions and concluding that “cases challenging a policy discriminatory against an entire group” could proceed as class actions while those involving “a policy, nondiscriminatory on its face, [that] has been applied in a discriminatory manner to a particular individual or individuals” could not).

139. See *Mitchell v. Wright*, 62 F. Supp. 580, 582 (M.D. Ala. 1945) (disallowing blacks to sue as a class to challenge registrars' refusal to register them as voters because “whether a person is entitled to be registered or not is determined solely by weighing his qualifications and disqualifications” and “cannot be determined by groups or classes but must be determined as to each individual”); *Turner v. Keefe*, 50 F. Supp. 647, 652–53 (S.D. Fla. 1943) (holding that individualized assessment according to Board of Education plan defeats claim for discrimination, statistical disparity notwithstanding). *But see* *Davis v. Cook*, 80 F. Supp. 443, 446–47, 452 (N.D. Ga. 1948) (allowing a class action to go forward to challenge Atlanta's facially neutral system that set teacher pay on a case-by-case basis).

what these suits put at issue.¹⁴⁰ A Missouri district court, for example, refused to allow a case challenging the segregation of Kansas City parks to proceed as a class action.¹⁴¹ Following standard class action doctrine, the court, noting that the rights at stake were personal (i.e., several), insisted that “the individual alone may complain that his constitutional privilege has been invaded.”¹⁴² Reversing, the Eighth Circuit acknowledged that, while “[v]iolations of the Fourteenth Amendment are of course violations of individual or personal rights, . . . where they are committed on a class basis or as a group policy, such as a discrimination generally because of race, they are . . . entitled to be made the subject of class actions”¹⁴³

Courts may have worried less about conflicting class member interests because these suits did not implicate these interests in practical effect. The injunctive relief at issue either did not force absent class members to do anything or could not possibly have been controversial among them. Orders permitting blacks to use city parks,¹⁴⁴ for example, or orders allowing blacks to attend previously all-white colleges enabled but did not require African-Americans to engage in integrated activity.¹⁴⁵ It is hard to imagine why

140. *E.g.*, *Constantine v. Sw. La. Inst.*, 120 F. Supp. 417, 418 (W.D. La. 1954) (rejecting defendants’ argument that a class action could not proceed because the rights involved were “personal to the individual”).

141. *Williams v. Kansas City*, 104 F. Supp. 848, 857 (W.D. Mo. 1952).

142. *Id.*

143. *Kansas City v. Williams*, 205 F.2d 47, 52 (8th Cir. 1953).

144. *E.g.*, *id.*; *Lopez v. Seccombe*, 71 F. Supp. 769, 770, 772 (S.D. Cal. 1944).

145. *Johnson v. Bd. of Trs. of the Univ. of Ky.*, 83 F. Supp. 707, 710 (E.D. Ky. 1949); *see also Wichita Falls Junior Coll. Dist. v. Battle*, 204 F.2d 632, 635 (5th Cir. 1953); *Tureaud v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.*, 116 F. Supp. 248, 251 (E.D. La. 1953); *Gray v. Univ. of Tenn.*, 97 F. Supp. 463, 465, 468 (E.D. Tenn. 1951); *Wilson v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.*, 92 F. Supp. 986, 988 (E.D. La. 1950). As a district court noted, the end to discrimination in higher education still required black students to apply individually to be admitted. *Frasier v. Bd. of Trs. of the Univ. of N.C.*, 134 F. Supp. 589, 593 (M.D.N.C. 1955).

As I discuss *infra* Part III.C, school desegregation suits affected absent class members regardless of their preferences. Thurgood Marshall and his NAACP colleagues did not bring this litigation until 1950, and when they did, they began with the five “test” cases that eventually merged as *Brown v. Board of Education*. *See, e.g.*, Thurgood Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. NEGRO EDUC. 316, 322–24 (1952). Courts stayed other school desegregation cases pending the Court’s decision in *Brown*. *E.g.*, *Bush v. Orleans Parish Sch. Bd.*, 308 F.2d 491, 493 (5th Cir. 1962) (discussing procedural history of New Orleans school desegregation case). Prior to Marshall’s efforts, plaintiffs in two class suits brought to challenge the segregation of Mexican-Americans won injunctions in federal courts requiring an end to segregated schools. *Gonzales v. Sheely*, 96 F. Supp. 1004, 1009 (D. Ariz. 1951); *Mendez v. Westminster Sch. Dist. of Orange Cnty.*, 64 F. Supp. 544, 551 (S.D. Cal. 1946). In neither opinion did the court discuss the propriety of class allegations. I could find no other published opinion or reference to a case in the academic literature prior to 1954 that resulted in injunctive relief that would have imposed a course of action on class members regardless of their preferences. *Cf.* LeFlar & Davis, *supra* note 134, at 378 n.2 (giving flavor of extant desegregation litigation in the country circa 1953); *id.* at 388–89 n.37.

black teachers in suits for equal pay would have objected to an injunction ordering that they receive higher salaries.¹⁴⁶

These pre-*Brown* cases spurred an advance in class action doctrine. The fact that Fourteenth Amendment rights were considered to be several did not deter class treatment. But this step forward was modest. The cases did not raise the prospect of relief foisted on absent class members against their wishes. The doctrine they developed therefore remained roughly consistent with the idea that class members had to have perfectly harmonious interests to ensure adequate representation and thus the constitutional basis for class-wide *res judicata*.

2. *Brown*'s Immediate Wake

Class action doctrine stagnated and arguably retreated during the first few years after *Brown*, the second period in this procedural evolution. To defeat desegregation litigation, most southern state legislatures replaced *de jure* policies of segregation with mechanisms that purported to treat blacks as individuals but invariably produced the same segregated results. These mechanisms made individual characteristics nominally relevant to the entitlement of any particular black plaintiff to relief and highlighted the several nature of the right at stake. As they did in other substantive areas, courts emphasized the theoretical possibility, rather than the practical likelihood, that preferences among class members might diverge, and they refused class treatment on these grounds.

Judge John Parker's 1955 opinion in *Briggs v. Elliott*,¹⁴⁷ one of the cases joined in *Brown*, laid the foundation for this southern legislative response and the simultaneous judicial retreat. Parker, a one-time NAACP adversary,¹⁴⁸ and perhaps the most influential lower court judge in the South,¹⁴⁹ minimized *Brown*'s remedial force by interpreting it to mean, "The Constitution . . . does not require integration. It merely forbids discrimination."¹⁵⁰ This take provided invaluable legal cover to recalcitrant southern officials as they fought to maintain Jim Crow after *Brown*.¹⁵¹ Had

146. The NAACP had hoped that the cost of providing equal salaries to black teachers would have made the cost of segregated public schools too high and forced states to abandon them. Marshall, *supra* note 145, at 318. But this did not happen. The litigation quite successfully equalized wages. Bruce Beezer, *Black Teachers' Salaries and the Federal Courts Before Brown v. Board of Education: One Beginning for Equity*, 55 J. NEGRO EDUC. 200, 212 (1986).

147. 132 F. Supp. 776 (E.D.S.C. 1955).

148. Parker's nomination to the Supreme Court in 1930 failed in part due to opposition from the NAACP. See generally MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 101 (2004); *Sharp Protests Hit Parker as Justice*, N.Y. TIMES, Mar. 30, 1930, at 3; *May 7, 1930: The Senate Rejects a Supreme Court Nominee*, HISTORICAL MINUTE ESSAYS, http://www.senate.gov/artandhistory/history/minute/Judicial_Temp_est.htm (last visited Feb. 5, 2011).

149. Cf. Harold R. Medina, *John Johnston Parker 1885–1958*, 38 N.C.L. REV. 299, 303 (1959) (describing John Parker along with Learned Hand as, "[T]he two men in the United States best qualified in every way for membership on the [Supreme] Court . . .").

150. *Briggs*, 132 F. Supp. at 777.

151. Judge John Minor Wisdom called *Briggs* "[t]he principal legal obstacle southern courts had

Brown required integration, states would have had to treat blacks as indistinguishable members of groups, nameless percentages whose mixture into white populations would determine whether a state or local government met its Fourteenth Amendment obligations. In contrast, a mathematical possibility, however slight, existed that the one-by-one, wholly nondiscriminatory assignment of students to schools could result in perfect segregation. The existence of such segregation proved nothing—at least according to the story southern state legislatures told—and discrimination in any particular assignment would require a plaintiff-by-plaintiff determination.

Encouraged at least in part by *Briggs*,¹⁵² most southern states enacted so-called pupil placement laws,¹⁵³ to let local officials recreate de facto segregation that de jure policies had required before *Brown*. The more successful of these laws gave local school boards initial pupil assignment power. They would invariably send black students to black schools and white students to white schools.¹⁵⁴ A black student dissatisfied with her assignment could pursue an often laborious and at times dangerous appeal to the school board.¹⁵⁵ The board would then usually apply a host of considerations, facially nonracial but capacious enough to cloak discrimination, in order to dismiss it.¹⁵⁶ The student could then challenge this decision in state court and, only upon exhausting state appeals, file a federal suit.¹⁵⁷ A black plaintiff then bore the (nearly insurmountable)

to overcome” to issue effective desegregation orders. John Minor Wisdom, *A Federal Judge in the Deep South: Random Observations*, 35 S.C. L. REV. 503, 508 (1984); see also J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION 1954–1978, at 81–82 (1979); Frank M. Johnson, Jr., *School Desegregation Problems in the South: A Historical Perspective*, 54 MINN. L. REV. 1157, 1163 (1970).

152. See N.C. ADVISORY COMM. ON EDUC. ET AL., REPORT (1956), reprinted in 1 RACE REL. L. REP. 581, 584 (1956); REPORT OF THE LEGAL AND LEGISLATIVE SUBCOMMITTEE OF THE TEXAS ADVISORY COMMITTEE ON SEGREGATION IN THE PUBLIC SCHOOLS 21–22, (Sept. 1, 1956), in WRIGHT PAPERS, *supra* note 3, Box 102, Folder 2.

153. James M. Nabrit, Jr., *Legal Inventions and the Desegregation Process*, 304 ANNALS AM. ACAD. POL. & SOC. SCI. 35, 36–38 (1956); Note, *The Federal Courts and the Integration of Southern Schools: Troubled Status of the Pupil Placement Acts*, 62 COLUM. L. REV. 1448, 1452 (1962).

154. 2 U.S. COMM’N ON CIVIL RIGHTS, EDUCATION 25 (1961).

155. Nabrit, *supra* note 153, at 38.

156. The Florida law, for example, had boards consider:

[T]he available facilities and teaching capacity of the several schools within the county, the effect of the admission of new students upon established academic programs, the suitability of established curriculum to the students enrolled or to be enrolled in a given school, the scholastic aptitude[sic], intelligence, mental energy or ability of the pupil applying for admission and the psychological, moral, ethical and cultural background and qualifications of the pupil applying for admission as compared with other pupils previously assigned to the school in which admission is sought.

Florida Pupil Assignment Law, July 26, 1956, § 2, reprinted in 1 RACE REL. L. REP. 924, 925 (1956).

157. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME

evidentiary burden to show racial animus cloaked in the application of vague criteria.¹⁵⁸

Only 34 of North Carolina's 324,800 black students attended school with white children during the 1959–1960 school year,¹⁵⁹ evidence for the observation in a federal report that, “The pupil assignment acts have been the principal obstacle to desegregation in the South.”¹⁶⁰ The acts owed part of their success in this respect to their effect on class allegations. By design, these laws on their face did not lump black students together as indistinguishable members of a disfavored group. As Judge Parker concluded in an influential opinion affirming the constitutionality of North Carolina's pupil placement law, while black students have a right to admittance to schools without discrimination, “They are admitted . . . as individuals, not as a class or group; and it is as individuals that their rights under the Constitution are asserted.”¹⁶¹ This logic fit neatly with the idea that individuals in spurious suits controlled their own rights to sue, and that their preferences for what to do with these several rights required deference. Following Judge Parker's lead, several courts denied class treatment on grounds that individuals alone could choose when or how to vindicate their Fourteenth Amendment rights.¹⁶²

Individual characteristics of each black student, made nominally relevant to his or her claim of discriminatory school assignment by the pupil placement laws, also complicated adequacy determinations. The stated reasons why a school board denied a particular black student's petition to attend a white school varied from student to student. So too did the procedural posture of a particular student's case, given the byzantine appeals system each pupil placement law created. These individualized facts meant, as the North Carolina Supreme Court concluded in an opinion influential with federal judges, that a claim to challenge placement in a segregated school “necessitate[s] the consideration of the application of any child or children individually and not en masse.”¹⁶³ No such litigation could proceed

COURT, 1936–1961, at 242–43 (1994); Note, *Effect of School Assignment Laws on Federal Adjudication of Integration Controversies*, 57 COLUM. L. REV. 537, 542–46 (1957).

158. Paul Hartman, *The United States Supreme Court and Desegregation*, 23 MOD. L. REV. 353, 366 (1960); see also WILKINSON, *supra* note 151, at 82.

159. Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 NW. U. L. REV. 92, 132–33 n.186 (1994).

160. U.S. COMM'N ON CIVIL RIGHTS, PUBLIC SCHOOLS: SOUTHERN STATES 4 (1962); see also Robert J. Steamer, *The Role of the Federal District Courts in the Segregation Controversy*, 22 J. POL. 417, 419 (1960). Tennessee enacted its Pupil Assignment Law in 1957, and as of March 1960, not a single black student had been approved for transfer to a white school. *Northcross v. Bd. of Educ. of Memphis, Tenn.*, 302 F.2d 818, 820 (6th Cir. 1962). By 1959, Virginia had placed 450,000 students pursuant to its pupil placement law without letting a single black student attend an integrated school. *Beckett v. Sch. Bd. of the City of Norfolk*, 185 F. Supp. 459, 461 (E.D. Va. 1959).

161. *Carson v. Warlick*, 238 F.2d 724, 729 (4th Cir. 1956).

162. *E.g.*, *Brunson v. Bd. of Trs. of Sch. Dist. No. 1 of Clarendon Cnty., S.C.*, 30 F.R.D. 369, 372 (E.D.S.C. 1962); *Jeffers v. Whitley*, 197 F. Supp. 84, 91 (M.D.N.C. 1961); *Aaron v. Tucker*, 186 F. Supp. 913, 930–31 (E.D. Ark. 1960).

163. *Joyner v. McDowell Cnty. Bd. of Educ.*, 92 S.E.2d 795, 798 (N.C. 1956); see also

“collectively.” At most, a plaintiff could represent other students who had also exhausted administrative remedies and whose requests for assignment to integrated schools failed for identical reasons.¹⁶⁴

Not all attempts to bring desegregation class suits in the South failed in the period right after *Brown*. Black plaintiffs could group together as a class when the defendant retained a de jure, across-the-board policy of segregation.¹⁶⁵ But even these sorts of suits on occasion ran aground procedurally, for reasons not entirely consistent with class action doctrine from the pre-*Brown* period. For example, a 1955 case to desegregate Louisiana State University could not proceed as a class action because the class representative did not show that absent class members had expressed a desire to be represented, even though the suit challenged an outright ban on black students, and even though the relief requested would simply have given black students an opportunity to apply.¹⁶⁶ In a later opinion in the same case, a Fifth Circuit judge stressed that because the class representative did not identify any other class member who wanted to pursue the same course of study he could not represent all potential black applicants.¹⁶⁷ A divergence in preferences, formally possible any time several rights were involved, and not the explicit, real-world manifestation of differences among class members, precluded class treatment.

3. The Early 1960s

Some courts finally jettisoned this residue of rights-based formalism in desegregation decisions of the early 1960s and countenanced the sort of mandatory class suit that modern class action doctrine permits. Progressive judges reinterpreted *Brown* to require integration and not merely to prohibit discrimination—a substantive shift with important procedural ramifications. To implement this “systemic integration,” a court would have to order groups of students to change schools. This relief implicated individual litigant preferences in a very real way. But these possibly diverging preferences did not prove fatal to class allegations, even as analogous ones would remain so for class suits in other substantive contexts. By 1966, a class suit could proceed and bind absent class members even if the class representative or class counsel pursued a remedy that would resolve their claims against their wishes.

Covington v. Edwards, 264 F.2d 780, 782 (4th Cir. 1959).

164. Griffith v. Bd. of Educ. of Yancey Cnty., 186 F. Supp. 511, 516 (W.D.N.C. 1960).

165. E.g., Sharp v. Lucky, 252 F.2d 910, 912 (5th Cir. 1958); Sch. Bd. of the City of Newport News, Va. v. Atkins, 246 F.2d 325, 326–27 (4th Cir. 1957); Orleans Parish Sch. Bd. v. Bush, 242 F.2d 156, 162 (5th Cir. 1957); Willie v. Harris Cnty., Tex., 202 F. Supp. 549, 554–55 (S.D. Tex. 1962); Frasier v. Bd. of Trs. of the Univ. of N.C., 134 F. Supp. 589, 593 (M.D.N.C. 1955); see also Daniel J. Meador, *The Constitution and the Assignment of Pupils to Public Schools*, 45 VA. L. REV. 517, 543 (1959).

166. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll. v. Tureaud, 226 F.2d 714, 719 (5th Cir. 1955).

167. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll. v. Tureaud, 228 F.2d 895, 898–99 (5th Cir. 1956) (Cameron, J., dissenting).

As late as 1965, only a miniscule number of black students in the hardest core of the Deep South—0.43% in Alabama’s case, for example—attended integrated schools.¹⁶⁸ A number of the federal judges who supervised the great majority of desegregation suits by this point evinced considerable frustration with Jim Crow’s intransigence.¹⁶⁹ What passed for acceptable efforts to satisfy *Brown*’s remedial dictate in the late 1950s no longer met judicial muster. Class action doctrine began to evolve again as courts pushed more aggressively for the success of desegregation.

Divergent litigant characteristics proved less of a hurdle to class treatment. During this period, the patently obvious use of pupil placement regimes to keep schools segregated exhausted judicial patience.¹⁷⁰ Courts excused compliance with cumbersome administrative requirements when the pupil placement regimes could only promise inadequate relief, such as decisions on transfer petitions delayed well into the school year. Black students also successfully argued that school boards’ rigid practices of denying all applications to integrate white schools made the pursuit of relief through pupil placement systems futile.¹⁷¹ Proffered reasons to keep black students in black schools, courts recognized, merely veiled policies of segregation that made skin color the sole substantively relevant litigant characteristic to Fourteenth Amendment claims. Black students began to enjoy better luck with class allegations challenging these facially neutral regimes.¹⁷²

In addition to minimizing divergent litigant characteristics, class action doctrine that promised to bind absent parties required disregarding individual litigant preferences. This shift happened as the 1960s progressed.

168. U.S. COMM’N ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES 1965–66, at 30 (1966) (reporting also that 0.59% of black students in Mississippi and 0.69% of black students in Louisiana attend schools with white students in December 1965).

169. *E.g.*, *Kemp v. Beasley*, 352 F.2d 14, 20 (8th Cir. 1965) (“The time for delay of individual rights is past.”); *Singleton v. Jackson Mun. Separate Sch. Dist.*, 348 F.2d 729, 729 (5th Cir. 1965) (“The time has come for footdragging public school boards to move with celerity toward desegregation.”); *Davis v. Bd. of Sch. Comm’rs of Mobile Cnty.*, 318 F.2d 63, 64 (5th Cir. 1963).

170. *E.g.*, *Farley v. Turner*, 281 F.2d 131, 132 (4th Cir. 1960).

171. *The Federal Courts and the Integration of Southern Schools*, *supra* note 153, at 1460–63.

172. *See, e.g.*, *Potts v. Flax*, 313 F.2d 284, 288–89 (5th Cir. 1963); *Ross v. Dyer*, 312 F.2d 191, 196 (5th Cir. 1962); *Jeffers v. Whitley*, 309 F.2d 621, 629 (4th Cir. 1962); *Bush v. Orleans Parish Sch. Bd.*, 308 F.2d 491, 499 (5th Cir. 1962); *Green v. Sch. Bd. of the City of Roanoke, Va.*, 304 F.2d 118, 124 (4th Cir. 1962); *Flax v. Potts*, 204 F. Supp. 458, 466 (N.D. Tex. 1962); *Jackson v. Sch. Bd. of the City of Lynchburg, Va.*, 201 F. Supp. 620, 627 (W.D. Va. 1962); *cf. Franklin v. Parker*, 223 F. Supp. 724, 727 (M.D. Ala. 1963) (allowing class action to go forward on behalf of all black citizens of Alabama against Auburn University without requiring a showing that anyone other than the plaintiff had applied and was turned down on the basis of race). Other areas of civil rights litigation developed similarly. Some district courts had earlier insisted that black plaintiffs had to personally attempt to use segregated facilities in order to adequately represent classes of black litigants. *See, e.g.*, *Anderson v. Kelly*, 32 F.R.D. 355, 358 (M.D. Ga. 1963); *Clark v. Thompson*, 206 F. Supp. 539, 542 (S.D. Miss. 1962); *Bailey v. Patterson*, 206 F. Supp. 67, 69 (S.D. Miss. 1962). Several circuits rejected these decisions, noting, for example, that the defendant’s treatment of black plaintiffs would not vary with each attempted use of a park. *Anderson v. City of Albany*, 321 F.2d 649, 653 (5th Cir. 1963).

Judicial impatience with pupil placement regimes led southern states in the early 1960s to try a different tactic: the so-called freedom of choice plans.¹⁷³ These plans provided that students could attend any school they wanted, subject to availability of space, and they did not create the administrative hurdles that school boards had used as a subterfuge to preserve segregated schools.¹⁷⁴ They also passed muster under the *Briggs* interpretation of *Brown* and indeed took legal cover from Parker's decision.¹⁷⁵ After an initial school assignment, a student could simply transfer elsewhere if he or she wished. Hence no discrimination. Southern state legislatures expected that fear and harassment of black students who tried to attend racially mixed schools, transportation difficulties that school districts did nothing to solve, and other pressures would once again yield segregation.¹⁷⁶

Freedom of choice plans won tepid judicial approval in several southern courts in the early- to mid-1960s.¹⁷⁷ Individual black students choosing one-by-one to attend white schools, however, would never disassemble the segregation edifice. As the decade progressed, then, several circuits rejected *Briggs* and its interpretation of *Brown* head-on. They held that school boards had an affirmative obligation to achieve integrated schools by mixing groups of black and white students together.¹⁷⁸ A freedom of choice plan could be nondiscriminatory—an individual black student could choose his school—but fail as an integration measure since real integration needed more than one or two intrepid black students among hundreds of white faces.¹⁷⁹

Because it made individual litigant characteristics substantively irrelevant, the shift to the systemic integration interpretation of *Brown* facilitated the prosecution of desegregation suits as class actions.¹⁸⁰ But,

173. *The Supreme Court, 1967 Term—Constitutional Law, Equal Protection, Free Choice and Free Transfer Plans for School Desegregation*, 82 HARV. L. REV. 111, 112 (1968); see also 2 THOMAS I. EMERSON ET AL., *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1297–98 (2d ed. 1967).

174. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 168, at 12–13.

175. *E.g.*, The Gen. Assembly Comm. on Sch., *The Sibley Commission's Report on Georgia's Schools*, MINDSPRING.COM (Apr. 29, 1960), <http://www.mindspring.com/~sartor/gradyhs/sibley1960.html>.

176. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 168, at 35–42; WILKINSON, *supra* note 151, at 109–10.

177. *E.g.*, *Lockett v. Bd. of Educ. of Muscogee Cnty. Sch. Dist., Ga.*, 342 F.2d 225, 228 (5th Cir. 1965); *Stell v. Savannah-Chatham Cnty. Bd. of Educ.*, 333 F.2d 55, 65 (5th Cir. 1964).

178. *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 862–66 (5th Cir. 1966); *Kemp v. Beasley*, 352 F.2d 14, 21 (8th Cir. 1965); *Singleton v. Jackson Mun. Separate Sch. Dist.*, 348 F.2d 729, 730 n.5 (5th Cir. 1965); *Dowell v. Sch. Bd. of Okla. City Pub. Sch.*, 244 F. Supp. 971, 978–79 (W.D. Okla. 1965). See generally George W. Gillmor & Alan L. Gosule, Note, *Duty to Integrate Public Schools? Some Judicial Responses and a Statute*, 46 B.U.L. REV. 45, 51–64 (1966). But see *Bradley v. Sch. Bd. of City of Richmond, Va.*, 345 F.2d 310, 316 (4th Cir. 1965) (rejecting this reinterpretation).

179. *Jefferson Cnty. Bd. of Educ.*, 372 F.2d at 867–68 (“Acceptance of an individual’s application for transfer . . . may satisfy that particular individual; it will not satisfy the class.”).

180. 2 U.S. COMM'N ON CIVIL RIGHTS, *supra* note 154, at 24 (recognizing that the shift from antidiscrimination to affirmative obligation makes class actions possible because they minimize the

unlike in earlier class suits, in which the relief sought would have permitted but not forced absent class members to use integrated facilities, the relief at issue in a suit for integration directly implicated individual litigant preferences. Systemic integration required the wholesale reshuffling of black populations. If a case succeeded, absent class members would find themselves in an integrated school, whether they liked it or not.

Many blacks, however, did not prefer this result. As civil rights lawyers knew well, members of black communities in the South disagreed in significant ways as to the appropriate remedy in desegregation litigation, and even as to the wisdom of that litigation itself.¹⁸¹ Fear and intimidation played a role, but some black families affirmatively preferred segregated schools for other reasons.¹⁸² Black teachers and principals, who were pillars of the southern black middle class, had much to lose with school desegregation,¹⁸³ and a number of them refused to support civil rights lawyers' efforts ostensibly on behalf of them and their children.¹⁸⁴ Some rural black communities benefited from the influx of funds in the 1950s designed to make their separate schools more "equal," and some of their members opposed integration for fear of its financial consequences.¹⁸⁵ These conflicting preferences did not escape federal judicial attention.¹⁸⁶ To the

relevance of individual circumstances).

181. See CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW* 84 (1998). These recollections are inconsistent with assertions about class member harmony in these cases. See YEAZELL, *supra* note 13, at 261.

182. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 168, at 33–35; R. Scott Baker, *The Paradoxes of Desegregation: Race, Class and Education, 1935–1965*, 109 AM. J. EDUCATION 320, 322 (2001); Vanessa Siddle Walker, *Valued Segregated Schools for African American Children in the South, 1935–1969: A Review of Common Themes and Characteristics*, 70 REV. EDUC. RES. 253, 254 (2000).

183. *E.g.*, U.S. COMM'N ON CIVIL RIGHTS, *supra* note 168, at 34; REPORT OF THE U.S. COMM'N ON CIVIL RIGHTS 265–68 (1959); Adam Fairclough, *The Costs of Brown: Black Teachers and School Integration*, 91 J. AM. HIST. 43, 50–51 (2004); see also MOTLEY, *supra* note 181, at 111; John W. Smith & Betty M. Smith, *For Black Educators: Integration Brings the Axe*, 6 URB. REV. 7 (1973); Preston Valien, *The Status of Educational Desegregation, 1956: A Critical Summary*, 25 J. NEGRO EDUC. 359, 364–66 (1956); Tomiko Brown-Nagin, *Class Actions: The Impact of Black and Middle-Class Conservatism on Civil Rights Lawyering in a New South Political Economy, 1946–1979*, at 211, 237–39 (2002) (unpublished Ph.D. dissertation, Duke University) (on file with the author).

184. *E.g.*, Fairclough, *supra* note 183, at 52–53; Adam Fairclough, "Being in the Field of Education and Also Being a Negro . . . Seems . . . Tragic": *Black Teachers in the Jim Crow South*, 87 J. AM. HIST. 65, 86–87 (2000).

185. JEFF ROCHE, *RESTRUCTURED RESISTANCE: THE SIBLEY COMMISSION AND THE POLITICS OF DESEGREGATION IN GEORGIA* 98 (1998).

186. See, *e.g.*, *Brown v. Lee*, 331 F.2d 142, 143 (4th Cir. 1964) (refusing to allow a class member in a municipal facility desegregation suit who claimed that the class plaintiffs "did not represent his views" to intervene). In a different context, Justice John Marshall Harlan II in his dissent in *NAACP v. Button*, 371 U.S. 415, 462 (1963), noted that the NAACP and the plaintiffs it represented did not always share the same interests. Whereas the NAACP would want to take an unyielding stand in its litigation against segregation, clients might be willing to settle for less aggressive forms of integration and the like. *Id.* at 463 (assessing the constitutionality of Virginia's anti-barratry statute targeting the NAACP). See generally Bell, *supra* note 30, at 500–02 (discussing

contrary, defendants invoked them to argue against class treatment, on occasion successfully.¹⁸⁷

Judges dealt with the problem of conflicts in litigant preferences among class members by denying their relevance. Really at stake, they reasoned, were group rights, and individuals did not matter all that much. Thus, when defendants argued that Fourteenth Amendment rights were several and permitted only individuals to decide how and whether to vindicate them, the Fifth Circuit concluded that these rights really belonged to “Negro school children as a class . . . irrespective of any individual’s right to be admitted on a non-racial basis to a particular school.”¹⁸⁸

Judge John Minor Wisdom’s 1966 opinion in *United States v. Jefferson County Board of Education* reflected the culmination of this reconception of the rights at stake, at least for the Fifth Circuit, and revealed the full implications of the change in substantive doctrine for the procedural propriety of desegregation class litigation.¹⁸⁹ The harm *Brown* sought to remediate, as he saw it, targeted groups and not any particular individual. Judge Wisdom insisted that Parker’s reading of *Brown* in *Briggs* reflected “the narrow view that Fourteenth Amendment rights are only individual rights,” a view, he noted, that made impossible “class action suits to desegregate a school system.”¹⁹⁰ The problem with *Briggs*, Wisdom elaborated, was “that it drain[ed] out of *Brown* that decision’s significance as a class action to secure equal educational opportunities for Negroes by compelling the states to reorganize their public school systems.”¹⁹¹ The harm of desegregation “transcend[ed] in importance the harm to individual Negro children”; a “separate school system was an integral element in the Southern State’s general program to restrict Negroes as a class” to their proper “place.”¹⁹² “Adequate redress” of segregation, a “group phenomenon,” “calls for much more than allowing a few Negro children to attend formerly white schools.”¹⁹³ Wholesale social transformation for

Harlan’s dissent).

187. *Thaxton v. Vaughan*, 321 F.2d 474, 476 (4th Cir. 1963). One particularly vehement segregationist on the district bench in Mississippi refused to allow black plaintiffs challenging the segregation of municipal facilities in Jackson to represent all black residents of the city because the “isolated publicity stunts” the plaintiffs had engaged in to have standing to sue did not, in the judge’s mind, “represent the will or desire of the 50,000 Negro citizens of Jackson.” *Clark v. Thompson*, 206 F. Supp. 539, 541 (S.D. Miss. 1962). Obviously this judge’s extraordinary efforts to resist integration colored his perception of the will of Jackson’s black population. But he nonetheless teed up the issue of class member preference, which the Fifth Circuit simply ignored. *Clark v. Thompson*, 313 F.2d 637, 637–38 (5th Cir. 1963).

188. *Bush v. Orleans Parish Sch. Bd.*, 308 F.2d 491, 499 (5th Cir. 1962) (Wisdom, J.); *see also* *Bailey v. Patterson*, 323 F.2d 201, 207 n.7 (5th Cir. 1963); *Potts v. Flax*, 313 F.2d 284, 288–89 (5th Cir. 1963) (Brown, J.) (insisting that, “The peculiar rights of specific individuals were not in controversy.”).

189. 372 F.2d 836 (5th Cir. 1966).

190. *Id.* at 846 n.5.

191. *Id.* at 865.

192. *Id.* at 866.

193. *Id.*

classes of people is needed.¹⁹⁴ An affirmative duty to integrate means that relief to individuals alone “will not satisfy the class.”¹⁹⁵

C. *Substantive Policy and the Mandatory Class Suit*

Because class judgments in these cases bound and benefited absent class members—a fact Wisdom took pains to note in *Jefferson County*¹⁹⁶—they offered a singular pre-1966 example of an instance in which absent class members could have their rights adjudicated, regardless of their preferences and without their consent or participation. By the mid-1960s, the desegregation class suit was a mandatory class action, despite the formally several nature of Fourteenth Amendment rights. The reassignment of these rights from individuals to groups enabled the desegregation class suit to surmount the litigant preferences obstacle that thwarted class allegations in other areas.

Arguably, courts just redefined Fourteenth Amendment rights as “joint, common, or secondary” and thus as candidates for true class suits. But by the 1960s, a rationale rooted in some conception about the inherent nature of rights would have been wildly anachronistic. A more pragmatic explanation was in order. The Equal Protection Clause required systemic integration, so the preferences of individual class members were irrelevant as a substantive matter. But this shift does not explain why a self-appointed private plaintiff could assume for herself the power to enforce the substantive law.

The progressive federal judges who reassigned rights in this way did not offer a trans-substantive theory to explain when rights belonged to groups and not individuals. Put differently, they provided no substance-neutral metric to determine when litigant preferences, which otherwise thwarted class treatment and class-wide *res judicata*, would prove irrelevant to the question of whether a proposed class met the requisite interest representation threshold.

Most likely these judges remolded class action doctrine in these cases because they believed that integration needed the class treatment of claims. No direct evidence confirms that this was so. But the timing of Rule 23’s vicissitudes in desegregation suits, the tight link between developments in substantive law and class action doctrine, and the fact that until 1965 lawsuits were the only tools to pursue desegregation suggest the important role judges’ substantive commitments played in this procedural change.¹⁹⁷

Class action doctrine before *Brown* took its modest steps forward at a time of improving race relations,¹⁹⁸ in cases not particularly likely to galvanize a strong backlash.¹⁹⁹ Moreover, at this time, a significant gap

194. *Id.*

195. *Id.* at 867.

196. *Id.* at 865 n.62.

197. Cf. William VanDercreek, *The “Is” and “Ought” of Class Actions Under Federal Rule 23*, 48 IOWA L. REV. 273, 278–79 (1963) (noting that courts are more willing to make findings of adequacy when the litigation is socially desirable, citing to a desegregation case).

198. See KLARMAN, *supra* note 148, at 173. See generally *id.* at 3–4.

199. The NAACP brought teacher pay suits in the 1940s expressly to equalize salaries, not for

existed between what the law promised and social realities, with relief through litigation the only means to address the gap.²⁰⁰ Black teachers at the start of the NAACP's equal pay campaign earned half of what their white counterparts took home,²⁰¹ and despite NAACP victories in higher education cases starting in 1938,²⁰² southern universities and colleges remained overwhelmingly segregated into the 1950s.²⁰³ During this period, judges may well have shared the sympathies of the general public—that is, they may well have supported gradual desegregation—and their sole responsibility to implement the substantive law may have pressured them to liberalize class action doctrine slightly.

FLSA lawsuits of the 1940s, which produced case law emblematic of the highly restrictive general course of class action doctrine, offer a helpful contrast. They involved the opposite relationship between substantive conditions and procedural results. Even at the statute's inception in 1938, wages at the vast majority of businesses in the United States satisfied or surpassed its minimum wage requirement,²⁰⁴ and they would double over the next seven years.²⁰⁵ The U.S. Department of Labor vigorously and effectively enforced the statute,²⁰⁶ rendering private litigation very much an afterthought. Federal judges did not shoulder the same responsibility for law enforcement as they did in early race relations cases.

Desegregation class action doctrine retreated right after *Brown*, when the negative reaction to the decision galvanized an extreme southern backlash.²⁰⁷ At best, southern federal courts reluctantly accepted the decision and in many instances expressly repudiated it or significantly

desegregation. Risa Lauren Goluboff, "Let Economic Equality Take Care of Itself": *The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 U.C.L.A. L. REV. 1393, 1431 (2005); see also Beezer, *supra* note 146, at 204 (referring to this strategy as "cautious and conservative"). The higher education suits, at least in theory, were also consistent with "separate but equal," since the theory in these cases was not that segregation was per se unequal but that the segregated facilities blacks had to endure were not in fact equal to white ones. *E.g.*, *Wilson v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.*, 92 F. Supp. 986, 988 (E.D. La. 1950); *Johnson v. Bd. of Trs. of the Univ. of Ky.*, 83 F. Supp. 707, 710 (E.D. Ky. 1949); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954) (explaining the theory of these suits); cf. KLARMAN, *supra* note 148, at 210–11 (describing lack of opposition to higher education suits).

200. See *e.g.*, Herbert O. Reid, *Efforts to Eliminate Legally-Enforced Segregation Through Federal, State, and Local Legislation*, 20 J. NEGRO EDUC. 436, 436 (1951).

201. S. EDUC. REPORTING SERV., *SOUTHERN SCHOOLS: PROGRESS AND PROBLEMS* 142 (Patrick McCauley & Edward D. Ball eds., 1959).

202. See, *e.g.*, *Mo. ex rel. Gaines v. Canada*, 305 U.S. 337, 352 (1938).

203. KLARMAN, *supra* note 148, at 255.

204. *Joint Hearings Before the Committee on Education and Labor, United States Senate, and the Committee on Labor, House of Representatives on S. 2475 and H.R. 7200, Bills to Provide for the Establishment of Fair Labor Standards in Employments in and Affecting Interstate Commerce and for Other Purposes, Part II*, 75th Cong., 1st Sess., June 7–15, 1937, at 338–42 (providing wages in most American industries).

205. See WILLIS J. NORDLUND, *THE QUEST FOR A LIVING WAGE: THE HISTORY OF THE FEDERAL MINIMUM WAGE PROGRAM* 61–71 (1997).

206. *Id.* at 59–60.

207. KLARMAN, *supra* note 148, at 385.

clipped its wings.²⁰⁸ Many southern judges in the mid-1950s were Roosevelt or Truman appointees who rose to prominence through the white supremacist Democratic machines that ruled southern states. They often accepted transparently bad faith compliance, such as resistance strategies by which southern states individualized discrimination, as sufficient to meet *Brown's* “all deliberate speed” formulation.²⁰⁹ Challenges to pupil placement laws, which exemplified this individualization, provided the substantive milieu in which cautious or recalcitrant federal judges again invoked the formal nature of rights to deny class treatment. The social pressure and, in some instances, physical peril that judges more sympathetic to the NAACP faced may have left the judges less inclined to enforce *Brown's* mandate with vigor.²¹⁰ Historically lionized exceptions, like Judge J. Skelly Wright in New Orleans, prove the rule.

Several pertinent facts provided the backdrop for desegregation litigation during the third period of procedural development. First, at least until the 1964–1965 school year, when the U.S. Department of Health and Human Services began to take action pursuant to Title VI of the 1964 Civil Rights Act,²¹¹ judicial decree remained the sole mechanism to implement desegregation policy. *Brown's* fate hinged solely on litigation, rested in important part on judicial shoulders, and may have pressured judges to respond accordingly. Second, the shift from pupil placement laws to freedom of choice plans, less obviously pretextual mechanisms to maintain segregation, required the reconception of *Brown's* mandate as requiring integration if litigation would end monochromatic schools. For a suit seeking this systemic relief to proceed as a class action, doctrine had to evolve.

Third, a key set of federal judges who controlled the Fifth Circuit, which at the time included all of the Deep South except for the Carolinas and Virginia, favored desegregation by the early 1960s.²¹² A rough survey of case law during this period yields a tight correlation between a judge's sympathy for integration and his aggressiveness with respect to class action doctrine. Judge Frank Johnson—an “integratin’, carpethaggin’, scalawaggin’, baldfaced liar,” to quote his law school classmate (and former Alabama Governor) George Wallace²¹³—described class actions as “one of

208. *Id.* at 354; Kenneth N. Vines, *Federal District Judges and Race Relations Cases in the South*, J. POLITICS 337, 346 (1964); John Minor Wisdom, *The Frictionmaking, Exacerbating Political Role of Federal Courts*, 21 SW. L.J. 411, 420 (1967) (observing that, “District courts are understandably loathe to change local customs . . .”).

209. *Gibson v. Bd. of Pub. Instruction of Dade Cnty., Fla.*, 272 F.2d 763, 767 (5th Cir. 1959); *Shuttlesworth v. Birmingham Bd. of Educ. of Jefferson Cnty., Ala.*, 162 F. Supp. 372, 384 (N.D. Ala. 1958). See generally Alexander M. Bickel, *The Decade of School Desegregation—Progress and Prospects*, 64 COLUM. L. REV. 193, 203 (1964); Steamer, *supra* note 160, at 429.

210. *E.g.*, Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POLI. SCI. REV. 1017, 1030 (1959).

211. *E.g.*, GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 52–53 (2d ed. 2008).

212. JACK BASS, *UNLIKELY HEROES* 23–25 (1981).

213. Robert D. McFadden, *Frank M. Johnson, Jr., Judge Whose Rulings Helped Desegregate*

the most effective devices used by plaintiffs” in desegregation suits²¹⁴ and routinely let them proceed as such.²¹⁵ Fifth Circuit Judges John Minor Wisdom, John Brown, Richard Rives, and Elbert Tuttle—the Four Horsemen of the Apocalypse to their segregationist colleague Ben Cameron²¹⁶—each authored important opinions in desegregation cases pushing class action doctrine forward.²¹⁷ In contrast, Cameron, who described the South as a “conquered province” victimized by the “so-called Civil Rights Statutes,” insisted that desegregation claims could not satisfy Rule 23.²¹⁸ Arch-segregationist district judges like J. Robert Elliott,²¹⁹ George Timmerman,²²⁰ Sidney Mize,²²¹ and others²²² likewise refused to allow class allegations in race relations cases.

* * *

The connection between substance and procedure is often invoked but difficult to prove irrefutably. Several concluding observations, however,

the South, Dies at 80, N.Y. TIMES, July 24, 1999, at A12.

214. Johnson, *supra* note 151, at 1163.

215. *E.g.*, Harris v. Bullock Cnty. Bd. of Educ., 232 F. Supp. 959, 960 (M.D. Ala. 1964); Carr v. Montgomery Cnty. Bd. of Educ., 232 F. Supp. 705, 706 (M.D. Ala. 1964); Franklin v. Parker, 223 F. Supp. 724, 727 (M.D. Ala. 1963); Lee v. Macon Cnty. Bd. of Educ., 221 F. Supp. 297, 298 (M.D. Ala. 1963).

216. Armstrong v. Bd. of Educ. of the City of Birmingham, Jefferson Cnty., Ala., 323 F.2d 333, 353 n.1 (5th Cir. 1963) (Cameron, J., dissenting); *see also* Jack Bass, *The ‘Fifth Circuit Four’: How Four Federal Judges Brought the Rule of Reason to the South*, THE NATION, May 3, 2004, at 30, 30–32.

217. *E.g.*, United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 845 (5th Cir. 1966) (Wisdom, J.); Lance v. Plummer, 353 F.2d 585, 587 (5th Cir. 1965) (Tuttle, J.); Calhoun v. Latimer, 321 F.2d 302, 312 (5th Cir. 1963) (Rives, J., dissenting); Potts v. Flax, 313 F.2d 284, 286 (5th Cir. 1963) (Brown, J.); Bush v. Orleans Parish Sch. Bd., 308 F.2d 491, 492 (5th Cir. 1962) (Wisdom, J.); Sharp v. Lucky, 252 F.2d 910, 911 (5th Cir. 1958) (Tuttle, J.); Avery v. Wichita Falls Indep. Sch. Dist., 241 F.2d 230, 231 (5th Cir. 1957) (Rives, J.).

218. *E.g.*, Sharp, 252 F.2d at 919 (Cameron, J., dissenting).

219. Anderson v. Kelly, 32 F.R.D. 355, 358 (M.D. Ga. 1963); *see* Derrick A. Bell, Jr., *Civil Rights Lawyers on the Bench*, 91 YALE L.J. 814, 823 (1982) (reviewing Jack Bass’s *Unlikely Heroes* and referring to Judge Elliott as a “committed segregationist”).

220. Henry v. Greenville Airport Comm’n, 175 F. Supp. 343, 345 (W.D.S.C. 1959); *see* Henry v. Greenville Airport Comm’n, 191 F. Supp. 146, 146 (W.D.S.C. 1961) (Timmerman, J.) (accusing the Fourth Circuit of bias when forced to issue injunction in favor of black plaintiff); David W. Southern, *Beyond Jim Crow Liberalism: Judge Waring’s Fight Against Segregation in South Carolina, 1942–52*, 66 J. NEGRO HIST. 209, 220 (1981) (referring to Judge Timmerman as a “rigid segregationist”).

221. Chaffee v. Johnson, 229 F. Supp. 445, 446 (S.D. Miss. 1964); Clark v. Thompson, 206 F. Supp. 539, 540 (S.D. Miss. 1962); Bailey v. Patterson, 206 F. Supp. 67, 68 (S.D. Miss. 1962); *see supra* note 133 (describing Judge Mize’s views).

222. *E.g.*, Reddix v. Lucky, 148 F. Supp. 108, 109 (W.D. La. 1957) (Dawkins, J.); Sharp, 148 F. Supp. at 8 (Dawkins, J.); Watts v. Hous. Auth. of Birmingham Dist., 150 F. Supp. 552, 553 (N.D. Ala. 1956) (Lynne, J.); Browder v. Gayle, 142 F. Supp. 707, 719–20 (M.D. Ala. 1956) (Lynne, J., dissenting) (refusing to find *Plessy v. Ferguson* overruled); ADAM FAIRCLOUGH, RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA 1915–1972, at 311 (1995) (referring to Judge Dawkins as “distinctly unsympathetic to the civil rights cause”); Vines, *supra* note 122, at 317 (referring to Judge Lynne as “noted for his segregationist views”).

suggest that class action doctrine in the 1950s and early 1960s owed its ebbs and flows to the tides of substantive justice. In no other substantive area did courts in equitable relief cases disregard litigant preferences and treat class judgments as broadly preclusive. Supposed features of injunctive relief did not play a role in this evolution.²²³ Second, while interest representation justified class-wide preclusion more generally, courts did not explain the empowered *res judicata* force of civil rights judgments in its terms. Put differently, they offered no trans-substantive reason for why conflicts of interest did not thwart these nominally spurious suits the way they did elsewhere. Interest representation alone could not have provided the normative foundation for the mandatory class suit.

IV. THE 1966 AUTHORS AND DESEGREGATION

The 1966 authors appreciated that the decision to let a case proceed as a class action equaled the determination that a judgment should generate class-wide *res judicata*.²²⁴ Because their “rebuil[t]” Rule 23 had to lose its formalistic taint,²²⁵ class certification and the preclusive force of judgments could not depend on categories of rights. Interest representation doctrine, which by mid-century focused on real-world circumstances and not conceptual traits peculiar to particular abstractly conceived rights, made the class suit’s empowerment possible. Moreover, three of the four types of class suits the new Rule 23 would ultimately authorize required no departure from this precedent that had evolved before 1966. Rules 23(b)(1)(A) and (b)(1)(B) essentially continued the true class suit, one well-established in equity and then after the 1938 Federal Rules as broadly preclusive. At least in theory, notice and opt-out rights reconciled Rule 23(b)(3) with the requirement of perfect harmony. The possibility of exit could justify the conceit that remaining class members shared the representative’s interests.²²⁶ Mandatory class treatment of claims in Rule 23(b)(2) suits, without a notice requirement, is the hardest to explain in terms of the law with which the 1966 authors worked.

In this Part, I mine existing records of the Advisory Committee’s work in the early 1960s to find the answer to the Rule 23 puzzle most in line with what its members had in mind. I argue that substantive preferences, not any

223. I found a single pre-1966 source to assert that “cases in which injunctive relief is sought” represented an exception to the general rule against *res judicata* in spurious class suits. The comment cites an article about class actions in the desegregation context as its sole evidence for this claim. Comment, *The Spurious Class Suit: Procedural and Practical Problems Confronting Court and Counsel*, 53 NW. U. L. REV. 627, 628 (1958).

224. In a May 1962 memorandum to the Advisory Committee in which he summarized existing doctrine, Kaplan insisted that “the advantages of a class action are maximized when as a result of the action the class is legally bound.” He then asked, “What, then, are the requisites of such a model class action?” Memorandum from Reporter Professor Benjamin Kaplan to the Advisory Committee on Civil Rules, *Tentative Proposal to Modify Provisions Governing Class Action—Rule 23*, at EE-21 (May 28–30, 1962), *microformed on CIS-6309-44* (Jud. Conf. Records, Cong. Info. Serv.).

225. Benjamin Kaplan, *A Prefatory Note to “The Class Action—Symposium,”* 10 BOSTON C. INDUS. & COM. L. REV. 497, 497 (1968); *see also* Kaplan, *supra* note 47, at 380.

226. *See infra* Part IV.B.1.

trans-substantive re-imagining of the doctrine of interest representation, provided Rule 23(b)(2) with its normative foundation, for three chief reasons. First, the 1966 authors relied on desegregation class action case law, itself a product of substantive preference, to justify the new power they wanted Rule 23 to have. Second, none of the answers described in Part I, nor any other trans-substantive explanation, appears in these records. Third, Rule 23(b)(2)'s contours evolved solely in response to the circumstances of early 1960s desegregation litigation.

A. *Desegregation and the Basis for Expanded Res Judicata*

Expressing a sentiment shared by most committee members, Professor Benjamin Kaplan insisted that “[f]ull, ‘two-way’ binding effect” of class action judgments “should be the norm.”²²⁷ The source of procedural rulemaking power, the Rules Enabling Act, prohibits rules that “modify any substantive right,” and, as alluded to, the preclusive force of judgments is considered entwined with substantive rights.²²⁸ The 1966 authors thus needed a source exogenous to their own statutory license to justify preclusive judgments in what had previously been spurious (and thus non-preclusive) class suits.

Kaplan, the committee’s reporter, and Albert Sacks, who later joined his Harvard colleague as associate reporter, insisted that existing doctrine supported *res judicata* regardless of category of class suit.²²⁹ But they had difficulty identifying cases in which this was actually true. Kaplan referred to the so-called “‘one-way’ intervention” cases—cases in which absent class members could affirmatively intervene after some favorable determination in the case—as “foreshadow[ing]” this expansive *res judicata*.²³⁰ But in

227. Memorandum from Reporter Professor Benjamin Kaplan to the Advisory Committee on Civil Rules, *Tentative Proposal to Modify Provisions Governing Class Action—Rule 23*, at EE-31 (May 28–30, 1962), *microformed on* CIS-6309-44 (Jud. Conf. Records, Cong. Info. Serv.). An early version of the revised Rule 23 provided for this explicitly. See Preliminary Draft, *Proposed Amendments to the Federal Rules of Civil Procedure EE-2* (Mar. 15, 1963), *microformed on* CIS-8004-89 (Jud. Conf. Records, Cong. Info. Serv.) (providing that, “The judgment in an action maintained as a class action shall extend by its terms to the members of the class as defined, whether or not favorable to them.”).

228. See *supra* notes 71, 92 and accompanying text.

229. Memorandum from Benjamin Kaplan and Albert Sacks to the Chairman and Members of the Standing Committee on Practice and Procedure of the Judicial Conference of the United States (June 10, 1965), at 6–7, *in* WRIGHT PAPERS, *supra* note 3, Box 696, Folder 2 (“growing point in the law”); Transcript of Session on Class Actions 16 (Oct. 31, 1963–Nov. 2, 1963), *microformed on* CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.) (comments by Albert Sacks) (insisting that, “There have been some . . . which have been classified . . . as spurious . . . and yet judges have suggested that they be binding, so that . . . you have a developing law in the field.”).

230. Memorandum, *Modification of Rule 23 on Class Actions* EE-32 to EE-33 (Feb. 1963), *microformed on* CIS-6313-56 (Jud. Conf. Records, Cong. Info. Serv.). An earlier effort to strengthen Rule 23 similarly illustrates the paucity of case law to support the invigorated Rule 23 the Advisory Committee sought. In 1953, Charles Alan Wright, then a young professor and an assistant to Advisory Committee reporter Charles Clark, drafted a rule replacing the 1938 version with an approach based on adequacy of representation. See Assistant to the Reporter’s Suggested

these cases absent class members had affirmatively signaled their desire to be bound, an opt-in basis for res judicata quite ill-suited for the rule they wanted.

The sole doctrinal support came from desegregation case law. John P. Frank, by then one of the country's premier and most thoughtful practitioners, opposed the expansion of res judicata beyond its existing boundaries,²³¹ and he insisted that the new doctrine Kaplan and others sought would “work[] a plain revolution” for the law of class actions.²³² Kaplan, in response, noted that “desegregation suits . . . are theoretically spurious class actions, but there isn't a judge in the world that's treating them that way”²³³ The “classic example” of a class action generating a broadly preclusive judgment regardless of category of right, Kaplan continued, is “of course the desegregation cases.”²³⁴

B. Possible Trans-Substantive Answers

Under the 1938 rule, spurious class suits included money damages and injunctive relief cases and, regardless of remedy, pursued judgments did not preclude absent class members from further litigation. No doctrinal basis other than that found in desegregation case law supported the expansion of res judicata outside of true suits. No distinction based on type of remedy appears in the law of interest representation before 1966. The material the 1966 authors worked with, in other words, did not distinguish between money damages and injunctive relief suits. Why, then, did they provide for notice and opt-out rights in the former and not the latter? None of the proposed solutions discussed in Part I that explain the link between procedural right and remedial choice in trans-substantive terms appear in the historical record.

Amendments (May 13, 1953), at 7–8, in Wright Papers, *supra* note 3, Box 239, Folder 5. Clark then proposed something similar to Wright's suggestion. Advisory Comm. on Fed. Rules of Civil Procedure, *supra* note 71, at 106–07. He hoped that courts would take the hint and conclude that class judgments rigorously protected with various checks to ensure adequate representation would prove broadly preclusive. *Id.* at 128. Clark, however, could only invoke *Dickinson v. Burnham*, 197 F.2d 973 (2d Cir. 1952), one of his own opinions, to support this development. *Id.* at 109. But *Dickinson* was not a spurious class action, and in it, Clark could only muster citations to “leading text writers” to urge an approach to preclusion independent of Rule 23's rights-based formalism. *Dickinson*, 197 F.2d at 979 & n.4; *see also* All Am. Airways, Inc. v. Eldred, 209 F.2d 247, 249 (2d Cir. 1954) (Clark, J.) (discussing *Dickinson*); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 602–03 (10th Cir. 1961) (discussing *Dickinson* and noting that, “It might well be possible to devise a procedure which would bind non-intervening members of the ‘class,’ but the rule does not in its present form purport to accomplish this.”).

231. *E.g.*, Undated Memorandum from John P. Frank to Benjamin Kaplan, Professor, at 8, *microformed on* CIS-6310-17 (Jud. Conf. Records, Cong. Info. Serv.) (insisting that he “would consciously reject” a “res judicata effect on non-participants” as an “objective[] of a revised Rule 23”).

232. Transcript of Session on Class Actions 18 (Oct. 31, 1963–Nov. 2, 1963), *microformed on* CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.).

233. *Id.*

234. *Id.* at 27.

1. Intrinsic Harmony

To Kaplan, the adequate representation of class member interests meant that the requisite “solidarity” existed among class members to license a broadly preclusive judgment.²³⁵ As he understood it, notice served as a “procedural safeguard[]” to ensure this basis for class-wide preclusion;²³⁶ with notice to absent class members, Kaplan saw “no reason why the question of the adequacy of the representation may not be brought into the open.”²³⁷ (Opt-out rights, once they made it in the draft, enjoyed a different but related justification.) “[G]iving notice . . . may enable the court to render a judgment with full binding effect when otherwise it could not effectively do so,” he argued, but “the grand criterion” for a binding “class action” “remains the homogenous character of the class.”²³⁸

This functional account for notice would seem to indicate that Kaplan believed that cases where it was unnecessary must have involved classes enjoying intrinsic harmony.²³⁹ He did distinguish fairly early on between what would become Rules 23(b)(2) and (b)(3) in terms of the need for notice.²⁴⁰ Moreover, when the proposal for opt-out rights eventually surfaced, and when asked whether he could “imagine including in [a Rule 23(b)(2)] class somebody who specifically objects,” Kaplan answered (without explaining) that he did not “think the cases typically arising under [the provision] would present that problem at all.”²⁴¹

235. Memorandum from Reporter Professor Benjamin Kaplan to the Advisory Committee on Civil Rules, *Tentative Proposal to Modify Provisions Governing Class Action—Rule 23*, at EE-21 to EE-25 (May 28–30, 1962), *microformed on* CIS-6309-44 (Jud. Conf. Records, Cong. Info. Serv.) (reasoning that res judicata for the class is appropriate when class members enjoyed “solidarity” or “homogeneity”); *id.* at EE-11 n.5 (insisting that “the grand criterion for a class action,” by which Kaplan meant a binding class action, “remains the homogenous character of the class”); *id.* at EE-21 to EE-22 (explaining that solidarity exists when members have a “community of interest” or “some anterior bond of association”); *id.* at EE-9 (arguing that adequate representation would mean that class members “were in fact members of a unitary class”).

236. Memorandum from Reporter Professor Benjamin Kaplan to the Advisory Committee on Civil Rules, *Tentative Proposal to Modify Provisions Governing Class Action—Rule 23*, at EE-4 (May 28–30, 1962), *microformed on* CIS-6309-44 (Jud. Conf. Records, Cong. Info. Serv.) (“The question of the proper extent of the judgment . . . may be closely linked to the question of the procedural safeguards afforded to the class through notice . . .”).

237. *Id.* at EE-13.

238. *Id.* at EE-11 & n.5.

239. Preliminary Draft, *Proposed Amendments to the Federal Rules of Civil Procedure* EE-18 to EE-19 (Mar. 15, 1963), *microformed on* CIS-8004-89 (Jud. Conf. Records, Cong. Info. Serv.) (explaining that notice is unnecessary when “there is cohesiveness or unity in the class”).

240. In proposed notes to accompany an early draft of the revised Rule 23, Kaplan suggested that the res judicata force of “experimental” class judgments obtained under what would become Rule 23(b)(3) should depend in significant measure on “the question of the procedural safeguards afforded to the class through notice . . .” Memorandum, *Modification of Rule 23 on Class Actions* EE-3 to EE-4 (Feb. 1963), *microformed on* CIS-6313-56 (Jud. Conf. Records, Cong. Info. Serv.). That his notes did not recommend notice to injunctive relief class members suggests that he might have thought they necessarily had cohesive interests.

241. Transcript of Session on Class Actions 60 (Oct. 31, 1963–Nov. 2, 1963), *microformed on*

But neither in the extensive memoranda he drafted to lay the legal basis for the new rule nor in any other surviving documentation of his efforts did Kaplan explain why this intrinsic harmony existed in injunctive relief cases. Other hints indicate that he may not have believed that such solidarity was actually *de rigueur*. Frank particularly opposed the idea of binding judgments under Rule 23(b)(3) for fear that they would encourage defendants to enter into collusive litigation with pliant plaintiffs' lawyers.²⁴² Collusion is the textbook consequence of inadequate representation.²⁴³ In defense of Rule 23(b)(3), Kaplan argued (and Frank agreed) that the danger of collusion was no greater than in suits prosecuted under Rule 23(b)(2), a provision Frank had grudgingly accepted.²⁴⁴ This contention makes little sense if Kaplan thought that injunctive relief classes enjoyed intrinsic harmony.

Also, in his early drafts of Rule 23, Kaplan made notice discretionary and available as a "procedural safeguard" in any class action, regardless of type.²⁴⁵ Whether courts should order it would depend on "the degree that there is cohesiveness and unity in the class [and whether] the representation is effective."²⁴⁶ Kaplan believed that "notice has an important role to play in certain" of what would become Rule 23(b)(3) cases.²⁴⁷ But early drafts also indicated the wisdom of notice in "limited fund" cases and as a mechanism "to poll members on a proposed modification of a consent decree,"²⁴⁸ instances that would fall within the terms of Rule 23(b)(1)(B) and (b)(2) presently. These early discussions of notice do not evince any indication that the Advisory Committee believed as a categorical matter that Rule 23(b)(2)

CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.).

242. *E.g.*, Letter from John P. Frank to Benjamin Kaplan, Professor, Harvard Law Sch. 2 (Mar. 22, 1963), *microformed on* CIS-6315 (Jud. Conf. Records, Cong. Info. Serv.) ("The possibility of put-up jobs in strike suits is tremendous.").

243. *Cf.* TIDMARSH, *supra* note 48, at 1137.

244. Memorandum from Benjamin Kaplan and Albert Sacks to the Chairman and Members of the Standing Committee on Practice and Procedure of the Judicial Conference of the United States (June 10, 1965), at 8, *in* WRIGHT PAPERS, *supra* note 3, Box 696, Folder 2 ("growing point in the law"); *see also* Letter from John P. Frank to Benjamin Kaplan, Professor, Harvard Law Sch. (Jan. 16, 1964), *microformed on* CIS-7003-21 (Jud. Conf. Records, Cong. Info. Serv.) (insisting that "[t]he fraud potential" is just as great in other class suits as in Rule 23(b)(3) suits).

245. Memorandum, *Modification of Rule 23 on Class Actions* EE-5, EE-31, EE-33 (Feb. 1963), *microformed on* CIS-6313-56 (Jud. Conf. Records, Cong. Info. Serv.); Preliminary Draft, *Proposed Amendments to the Federal Rules of Civil Procedure* EE-3 (Mar. 15, 1963), *microformed on* CIS-8004-89 (Jud. Conf. Records, Cong. Info. Serv.); Transcript of Session on Class Actions 3 (Oct. 31, 1963–Nov. 2, 1963), *microformed on* CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.).

246. Preliminary Draft, *Proposed Amendments to the Federal Rules of Civil Procedure* EE-18 (Mar. 15, 1963), *microformed on* CIS-8004-89 (Jud. Conf. Records, Cong. Info. Serv.).

247. Memorandum, *Modification of Rule 23 on Class Actions* EE-5 (Feb. 1963), *microformed on* CIS-6313-56 (Jud. Conf. Records, Cong. Info. Serv.); Preliminary Draft, *Proposed Amendments to the Federal Rules of Civil Procedure* EE-19 (Mar. 15, 1963), *microformed on* CIS-8004-89 (Jud. Conf. Records, Cong. Info. Serv.).

248. Preliminary Draft, *Proposed Amendments to the Federal Rules of Civil Procedure* EE-18 (Mar. 15, 1963), *microformed on* CIS-8004-89 (Jud. Conf. Records, Cong. Info. Serv.).

classes would enjoy the sort of intrinsic qualities that would invariably obviate the need for procedural safeguards.

2. Pragmatism

Equally missing—perhaps more so—are either of the pragmatic solutions discussed in Part I for the absence of procedural safeguards in Rule 23(b)(2) suits. The remedial indivisibility justification explains mandatory class treatment on grounds that opt-out rights would be pointless because courts cannot tailor injunctions only to benefit specific plaintiffs. The drafting history of Rule 23(b)(2) poorly fits this account. Twice committee members considered and did not accept proposals explicitly motivated by remedial indivisibility. Quite early on, Frank suggested a revision of Rule 23 that would allow mandatory class treatment of claims “[i]f the practical effect of the relief granted . . . is to make it impossible or impractical to litigate the matter further.” In these cases, “the result should be binding” on the class because these cases would involve “a unitary course of action in which there is no divisibility.”²⁴⁹ Kaplan’s subsequent draft included no such language.²⁵⁰

Frank then proposed a version of Rule 23(b)(2) that would have allowed class treatment when “[t]he disposition of the subject matter . . . would make it impracticable to provide a different result in subsequent litigation of the same subject matter.”²⁵¹ Kaplan apparently wanted a more expansive rule, for his next stab at Rule 23(b)(2) would have allowed class treatment when separate actions “would create a risk of *unfair or impractical* differentiation of treatment among the members of the class.”²⁵² By “unfair,” Kaplan had in mind situations in which, because of readily divisible relief, a court could unjustly differentiate among similarly situated persons. He invoked desegregation litigation to explain his proposal to Frank:

If a school desegregation case, for example, is maintained by an individual on his own behalf, rather than as a class action, very likely the relief will be confined to admission of the individual to the school and will not encompass broad corrective measures—desegregation of the school. This would be unfortunate. . . . I may add that if the action is not

249. Undated Memorandum from John P. Frank to Benjamin Kaplan, Professor, at 9, *microformed on* CIS-6310-17 (Jud. Conf. Records, Cong. Info. Serv.). Frank insisted that “race relations” cases, which no one disputes Rule 23(b)(2) was chiefly designed for, should not satisfy this indivisibility metric. *Id.*; see also Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 648–49 (1965).

250. Memorandum from Reporter Professor Benjamin Kaplan to the Advisory Committee on Civil Rules, *Tentative Proposal to Modify Provisions Governing Class Actions—Rule 23*, at EE-5 to EE-6 (May 28–30, 1962), *microformed on* CI-6309-44 (Jud. Conf. Records, Cong. Info. Serv.).

251. Undated Memorandum from John P. Frank to Ben Kaplan, *in* WRIGHT PAPERS, *supra* note 3, Box 111, Folder 2.

252. Memorandum, *Modification of Rule 23 on Class Actions* EE-11 (Feb. 1963), *microformed on* CIS-6313-56 (Jud. Conf. Records, Cong. Info. Serv.) (emphasis added).

maintained as a class action, the contempt remedy would presumably not be available to anyone but the individual plaintiff, and others in similar position could be put to separate proceedings with ensuing delay.²⁵³

The notes Kaplan drafted for this Rule 23(b)(2) prototype explained its reach solely in terms of “unfairly differentiated treatment.”²⁵⁴ This stress is understandable, as a wholly separate provision (the prototype for Rule 23(b)(1)(A)) covered “situations where the judgment in a nonclass action . . . , while not technically concluding the other members, might do so as a practical matter.”²⁵⁵ To explain this prototype of Rule 23(b)(2) as motivated by indivisibility makes it redundant.

The historical backdrop against which the 1966 authors wrote Rule 23(b)(2) also militates against the second pragmatic answer described in Part I, the idea that mandatory class treatment of injunctive relief claims would spare a defendant from the burdensome relitigation of identical claims. As the strategy behind the pupil placement laws confirmed, southern states wanted nothing more than to litigate desegregation claims repeatedly in individual actions. Class treatment of these claims, which the 1966 authors obviously desired,²⁵⁶ would deny defendants this delaying tactic, not relieve them of an unwanted burden.

3. Autonomy

Part I also discusses autonomy-based answers to the Rule 23 puzzle. Briefly, they explain that classes, not individual class members, have rights to sue in injunctive relief cases. Individual class members thus have lesser autonomy interests at stake and therefore do not need notice or opt-out rights. Some of the 1966 authors, particularly Frank, cared deeply about class member autonomy and argued vigorously for robust opt-out rights on this ground.²⁵⁷ But no one offered any theory to explain why injunctive

253. Letter from Benjamin Kaplan to John P. Frank (Feb. 7, 1963), *microformed on* CIS-6312-31 (Jud. Conf. Records, Cong. Info. Serv.).

254. Memorandum, *Modification of Rule 23 on Class Actions* EE-25 (Feb. 1963), *microformed on* CIS-6313-56 (Jud. Conf. Records, Cong. Info. Serv.).

255. *Id.* at EE-22.

256. *See infra* notes 257–58 and accompanying text.

257. Undated Memorandum from John P. Frank to Benjamin Kaplan, Professor, at 9, *microformed on* CIS-6310-17 (Jud. Conf. Records, Cong. Info. Serv.); Letter from John P. Frank to Benjamin Kaplan, Professor, Harvard Law Sch. (Jan. 21, 1963), *microformed on* CI-6312-20 (Jud. Conf. Records, Cong. Info. Serv.) (fearing “the loss of individual liberty”). Few of the others most responsible for Rule 23’s present form cared as much about individual autonomy. None initially envisioned opt-out rights as part of class action practice. In the early 1950s, Wright and Clark suggested a revision of Rule 23 that would have let judges in their discretion order notice to ensure adequacy, but nothing suggests that either contemplated some mechanism to preserve a modicum of individual control over claims. *See* Assistant to the Reporter’s Suggested Amendments (May 13, 1953), at 7–8, *in* Wright Papers, *supra* note 3, Box 239, Folder 5; *see also* Advisory Comm. on Fed. Rules of Civil Procedure, *supra* note 71, at 105–39 (discussing Rule 23, making no mention of opt-out rights). Kaplan’s early drafts similarly included notice provisions but nothing remotely like opt-

relief class members had less of a personal stake in their claims than did their money damages counterparts. Indeed, Frank in the end “subordinate[d] [his] own doubts” as to Rule 23(b)(2) for political reasons, not because he had come up with some autonomy rationale for mandatory class treatment.²⁵⁸

C. Desegregation and the Origins of Rule 23(b)(2)

Even as they justified notice and opt-out rights in due process terms, none of the 1966 authors, at least as documented in the records of the Advisory Committee, explained those safeguards’ absence from Rule 23(b)(2) suits in terms of some autonomy or interest representation theory. The only recorded considerations to have shaped the provision involved concerns about desegregation litigation. This substance-specific motivation for Rule 23(b)(2)’s contours can explain the Rule 23 puzzle.

1. The Drafting of Rule 23(b)(2)

The men who championed Rule 23(b)(2) worked actively for civil rights.²⁵⁹ Kaplan, a veteran of human rights causes,²⁶⁰ assisted the NAACP with *Shelley v. Kraemer* in the late 1940s.²⁶¹ He also served as Thurgood Marshall’s chief source of law clerks during Marshall’s stint on the Second Circuit.²⁶² Sacks worked with the NAACP, and he marched on Washington

out rights. After the committee decided to include opt-out rights for Rule 23(b)(3) actions, Kaplan and Sacks argued that these rights’ enjoyment should depend on the case-specific determination as to whether absent class members’ “inclusion is essential to the fair and efficient adjudication of the controversy.” Memorandum on Completion of Work of Committee Meeting of Oct. 31–Nov. 2, 1963, at 7 (Dec. 2, 1963), *microformed on* CIS-7104-25 (Jud. Conf. Records, Cong. Info. Serv.). Even Charles Wyzanski, the prominent federal judge and committee member who had proposed opt-out rights in the first place, agreed to make opt-out rights contingent. Letter from Charles E. Wyzanski, Jr., Judge, to Benjamin Kaplan, Professor, Harvard Law Sch. (Dec. 4, 1963), *microformed on* CIS-7003-02 (Jud. Conf. Records, Cong. Info. Serv.). His opposition to an even weaker opt-out provision Kaplan and Sacks suggested was based on a “political consideration” as to which proposal would likely win the bar’s support, not concerns for individual autonomy. *Id.*

258. Letter from John P. Frank from Benjamin Kaplan, Harvard Law Sch. 8 (May 4, 1965), *microformed on* CI-6403-86 (Jud. Conf. Records, Cong. Info. Serv.).

259. Not just its champions. Frank, who only grudgingly accepted Rule 23(b)(2), also was a stalwart and powerful supporter of the civil rights cause. As a young professor at the University of Indiana in the late 1940s, he brought several civil rights suits in an effort to desegregate various places in Bloomington. See John P. Frank, *A Sort of Professional Autobiography* 8 (unpublished manuscript) (on file with the author). He also put together an amicus brief signed by many law professors on behalf of the plaintiffs in *Sweatt v. Painter*. *Id.* at 9; see also *Sweatt v. Painter*, 339 U.S. 629 (1950) (overturning as unconstitutional the University of Texas Law School’s denial of admission to a black student based on his race).

260. Kaplan had served as a Nuremberg prosecutor after World War II. See Allan Ryan, *Judgments on Nuremberg: The Past Half Century and Beyond—A Panel Discussion of Nuremberg Prosecutors*, 16 B.C. THIRD WORLD L.J. 193, 193–94, 199–202 (1995).

261. Constance Baker Motley, *Standing on His Shoulders: Thurgood Marshall’s Early Career*, 6 HARV. BLACKLETTER J. 9, 14 (1989); see also MOTLEY, *supra* note 181, at 68.

262. E-mail message from Owen Fiss, Professor, Yale Law Sch., to author (Sept. 9, 2010, 10:53

with Martin Luther King, Jr., in August 1963, two months before a key Advisory Committee meeting at which the modern Rule 23 took shape.²⁶³ Wright, the sole southerner among the 1966 authors, had worked to defeat Texas's legislative response to *Brown*, which included a pupil placement law.²⁶⁴ He also led a campaign to desegregate the Episcopal Church in Texas and his children's private school in Austin.²⁶⁵ An eloquent and embittered address Wright gave at the University of Texas's memorial service for Martin Luther King, Jr., in 1968 bespeaks a deep emotional commitment to the cause.²⁶⁶ Rule 23(b)(2)'s most ardent supporter, Wright knew intimately the progress and frustrations of desegregation litigation by the time the efforts to revise Rule 23 got underway.²⁶⁷

Although they gave Rule 23(b)(2) a public veneer of trans-substantivity,²⁶⁸ the 1966 authors described it solely in terms of desegregation.²⁶⁹ Virtually every effort to shape its terms, even before Kaplan's first draft of the revised Rule 23, reflected the circumstances of this litigation. Quite early on, Frank suggested a new Rule 23 that would not have covered "race relations" cases.²⁷⁰ Wright responded with a description

AM) (on file with the author).

263. William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in *THE LEGAL PROCESS* li, cvii & n.252 (revised ed. 1994); Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 577 (1997).

264. Charles Alan Wright, *Race Bills—A Constitutional Analysis*, *The Texas Observer*, Apr. 23, 1957, at 1, 4. Wright also supported federal civil rights legislation in 1960, and that year, he considered but ultimately turned down an offer to serve in the Civil Rights Division of the U.S. Department of Justice. See Letter to Jacob Javits from Charles Alan Wright, Feb. 3, 1960, in *WRIGHT PAPERS*, *supra* note 3, Box 125, Folder 2.

265. See e.g., Remarks of Charles Alan Wright at St. Andrew's Episcopal School Board Meeting, in *WRIGHT PAPERS*, *supra* note 3, Box 651, Folder 2.

266. Wright accused "[a]ll who opposed Dr. King" as "complicit[] for the tragedy in Memphis," and identified by name the dean of the Notre Dame Law School as particularly blameworthy. Remarks of Professor Charles Alan Wright, University of Texas Law School, at the Memorial Service at the University for Dr. Martin Luther King, Apr. 5, 1968, at 3, in *WRIGHT PAPERS*, *supra* note 3, Box 75, Folder 5.

267. Letter from Charles A. Wright to Benjamin Kaplan, Professor, Harvard Law Sch. (Feb. 16, 1963), *microformed on* CIS-7004-34 (Jud. Conf. Records, Cong. Info. Serv.) (describing himself as "keenly interested" in "desegregation actions as class suits").

268. FED. R. CIV. P. 23(b)(2) advisory committee's note ("Subdivision (b)(2) is not limited to civil-rights cases.").

269. Kaplan tried to quiet anxiety about Rule 23(b)(2)'s expansive terms by agreeing with James William Moore, who described it as "designed mainly for civil rights cases." Transcript of Session on Class Actions 64 (Oct. 31, 1963–Nov. 2, 1963), *microformed on* CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.). Moore was concerned about Rule 23(b)(2) permitting class suits for declaratory relief that might come accompanied with incidental damages. He indicated his willingness to go along with Rule 23(b)(2) if limited to civil rights litigation. *Id.* Wright agreed that Rule 23(b)(2) was "the integration section." *Id.* at 58. Frank called Rule 23(b)(2) cases, "the segregation cases." *Id.* at 36. George Doub, a committee member, believed "that [Rule 23(b)](2) is essential in the civil rights field." *Id.* at 15. Rossel Thomsen, another committee member, stated that Rule 23(b)(2) should "cover the segregation cases." *Id.* at 37.

270. Undated Memorandum from John P. Frank to Benjamin Kaplan, Professor, at 10–11,

of a lawsuit brought by three University of Texas students to desegregate dormitories. It would be “quite intolerable,” he argued, if their victory would nonetheless require the next year’s students to bring the same suit.²⁷¹ Frank continued to worry that the prototype for Rule 23(b)(2), designed “particularly [for] the civil rights cases,” would “include the universe and . . . exclude nothing.” But he admitted that his “good friends Charlie Wright and [Judge J.] Skelly Wright,” two stalwart proponents of desegregation litigation, “tell me [that] I am wrong, and this may well be a case in which two ‘[W]rights’ do make me wrong.”²⁷² He thus proposed a version of Rule 23(b)(2) that would cover class actions brought “to conduct an unsegregated school.”²⁷³ “As you see,” Frank wrote Wright, “you are making a believer out of me on civil rights.”²⁷⁴ Wright voiced his appreciation “that you have come to be a believer about the class action in segregation suits.”²⁷⁵

Kaplan’s first draft of Rule 23 did not distinguish between injunctive relief and money damages class suits.²⁷⁶ His second one included the first prototype of Rule 23(b)(2), which would have made class actions “presumptively maintainable” when “adjudication in separate action[s] . . . would create a risk of unfair or impractical differentiation of treatment among the members of the class.”²⁷⁷ Kaplan cited a single consumer protection case and five civil rights opinions as illustrations for how this nonspecific language would apply.²⁷⁸

The only apparent issues the Advisory Committee considered between this draft and the next, which phrased Rule 23(b)(2) essentially as it currently reads, related to desegregation cases. Wright was very “disturbed” that the provision made class treatment “only presumptively proper.”²⁷⁹ He described a recent case where a well-known segregationist judge had denied class treatment, then limited the injunction desegregating the defendant’s bus lines to the three named plaintiffs. Given how this judge manipulated

microformed on CIS-6310-17 (Jud. Conf. Records, Cong. Info. Serv.).

271. Letter from Charles A. Wright to Benjamin Kaplan, Professor, Harvard Law Sch. (May 7, 1962), *microformed on* CIS-6310-49 (Jud. Conf. Records, Cong. Info. Serv.).

272. Memorandum, from John P. Frank to Benjamin Kaplan, Professor, Harvard Law Sch. 3 (Jan. 21, 1963), *microformed on* CI-6312-20 (Jud. Conf. Records, Cong. Info. Serv.).

273. Undated Memorandum from John P. Frank to Ben Kaplan, *in* WRIGHT PAPERS, *supra* note 3, Box 111, Folder 2.

274. Memorandum from John P. Frank to Charles Alan Wright, (Feb. 9), *in* WRIGHT PAPERS, *supra* note 3, Box 111, Folder 2.

275. Letter from Charles A. Wright to John P. Frank (Feb. 12, 1963), *in* WRIGHT PAPERS, *supra* note 3, Box 111, Folder 2.

276. See Memorandum from Reporter Professor Benjamin Kaplan to the Advisory Committee on Civil Rules, *Tentative Proposal to Modify Provisions Governing Class Actions—Rule 23*, at EE-5 to EE-6 (May 28–30, 1962), *microformed on* CI-6309-44 (Jud. Conf. Records, Cong. Info. Serv.).

277. Memorandum, *Modification of Rule 23 on Class Actions* EE-10 to EE-11 (Feb. 1963), *microformed on* CIS-6313-56 (Jud. Conf. Records, Cong. Info. Serv.).

278. *Id.* at EE-25.

279. Letter from Charles A. Wright to Benjamin Kaplan, Professor, Harvard Law Sch. (Feb. 6, 1963), *microformed on* CIS-6312-65 (Jud. Conf. Records, Cong. Info. Serv.).

procedure to achieve an unjust end, Wright argued, “[i]t is absolutely essential to the progress of integration that such suits be treated as class actions, with the judgment binding on all members of the class.”²⁸⁰ Several days later, John Brown, one of the Fifth Circuit’s progressive judges, mailed Wright a slip copy of *Potts v. Flax*, a key 1963 opinion that, among other things, treated the rights at stake in a desegregation suit as group rights. Thanking Brown, Wright told him that “one of the principal issues” for the Advisory Committee “will be whether desegregation suits are properly class actions.”²⁸¹ He immediately wrote a letter to Kaplan, quoting at length from the decision.²⁸² When Kaplan redrafted the provision, he included language that provided simply that class suits could be “maintained,” expressly in response to Wright’s advocacy.²⁸³

Frank also responded to Kaplan’s second draft, suggesting that the language change was meant to or should cover desegregation litigation but not much else.²⁸⁴ Kaplan agreed to try for narrower language to ensure “that unintended categories do not come in” but repeated his earlier insistence that the provision cover “civil rights cases.”²⁸⁵ Perhaps one may appropriately read the next draft, which used terms quite similar to the current Rule’s, as intending a narrower application in line with their discussion. This prototype of Rule 23(b)(2) would have required class certification when “the questions of law and fact are substantially identical with respect to all members . . . and . . . [specific] relief may appropriately be given in the form of a judgment having general application to the class as a whole.”²⁸⁶ Further reflecting his exchange with Frank, Kaplan’s next draft of the committee notes cited only to civil rights cases as Rule 23(b)(2) exemplars.²⁸⁷

Rule 23(b)(2)’s supporters had to resist a final effort to eliminate the provision before its ultimate inclusion was assured. Frank worried that Rule 23(b)(2) would open a backdoor through which a would-be mass tort defendant could bring a declaratory judgment action and obtain a clean bill

280. *Id.* (referencing *Bailey v. Patterson*, 206 F. Supp. 67 (S.D. Miss. 1962)).

281. Letter from Charles Alan Wright to John Brown, Feb. 18, 1963, in WRIGHT PAPERS, *supra* note 3, Box 478, Folder 1.

282. Letter from Charles A. Wright to Benjamin Kaplan, Professor, Harvard Law Sch. (Feb. 16, 1963), *microformed on* CIS-7004-34 (Jud. Conf. Records, Cong. Info. Serv.).

283. Memorandum, *Modification of Rule 23 on Class Actions* EE-2 (Feb. 1963), *microformed on* CIS-6313-56 (Jud. Conf. Records, Cong. Info. Serv.) (noting that the subdivision was revised in light of Professor Wright’s texts).

284. Letter from Benjamin Kaplan to John P. Frank (Jan. 21, 1963), *microformed on* CIS-6312-31 (Jud. Conf. Records, Cong. Info. Serv.).

285. *Id.*

286. Memorandum, *Modification of Rule 23 on Class Actions* 2 (Feb. 1963), *microformed on* CIS-6313-56 (Jud. Conf. Records, Cong. Info. Serv.).

287. Preliminary Draft, *Proposed Amendments to the Federal Rules of Civil Procedure* EE-12 (Mar. 15, 1963), *microformed on* CIS-8004-89 (Jud. Conf. Records, Cong. Info. Serv.). The draft notes do insist that “(b)(2) is not limited to civil-rights cases” but does not cite any illustrative case to this effect. *Id.*

of health that bound all of its victims.²⁸⁸ No benefit that Rule 23(b)(2) might create, he argued, outweighed this possible harm. Rule 23(b)(1)(A), which licensed class treatment when the prosecution of separate actions could create the risk of inconsistent obligations for the defendant, could cover desegregation litigation. What were “more inconsistent results,” Frank wondered, “than a possible holding that a school should be segregated as to one applicant and not as to another[?]”²⁸⁹

Acutely aware of some of the machinations described in Part III that southern state legislatures and segregationist judges deployed, Wright and Kaplan defended Rule 23(b)(2) mostly on grounds that Rule 23(b)(1)(A) did not reach desegregation suits.²⁹⁰ A Rule 23 without (b)(2), Kaplan feared, would “leave open the distinct possibility that a Negro child may apply on his own behalf for admission to school and would be entitled to a decree in his favor alone. . . . There are plenty of Boards who would be very happy to be engaged in what you call ‘incompatible standards.’”²⁹¹ What Frank could hardly imagine²⁹²—“to tell a school board that it must accept Smith in a white school but need not accept Jones”²⁹³—was actually a key southern strategy to delay full-scale integration, as Wright explained:

It is simply torturing language to say that [the “segregation cases”] involve “incompatible standards of conduct” and come under [Rule 23(b)(1)(A)]. The proof of that I think is in the action of several Boards: the Fort Worth School Board . . . , which said Yes, we’ll take _____, but we don’t want the order to require us to take other Negroes. They found nothing incompatible. The Clemson Board of Trustees, after they had already admitted [Harvey] Gantt, petitioned for certiorari unsuccessfully to have the class action aspects stricken from the decree. Or you can look to the decree which the district judge actually entered in *Bailey v. Paterson* in Miss. after they had once won the case in the Supreme Court, and the decree was entered providing that the bus company must transport the three named plaintiffs without discrimination, but it could . . . refuse all other Negroes. These people opposing the class don’t

288. Transcript of Session on Class Actions 8–10 (Oct. 31, 1963–Nov. 2, 1963), *microformed on* CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.).

289. Letter from John P. Frank to Benjamin Kaplan, Professor, Harvard Law Sch. (Mar. 22, 1963), *microformed on* CIS-6315-49 (Jud. Conf. Records, Cong. Info. Serv.).

290. Transcript of Session on Class Actions 9 (Oct. 31, 1963–Nov. 2, 1963), *microformed on* CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.).

291. *Id.* at 10.

292. Letter from John P. Frank to Benjamin Kaplan, Professor, Harvard Law Sch. (Mar. 22, 1963), *microformed on* CIS-6315-49 (Jud. Conf. Records, Cong. Info. Serv.).

293. Letter from Charles A. Wright to Benjamin Kaplan, Professor, Harvard Law Sch. (Mar. 30, 1963), *microformed on* CIS-6315-55 (Jud. Conf. Records, Cong. Info. Serv.) (noting that, “This is exactly what the Fort Worth School Board wanted to be told . . .”).

find it incompatible. I don't think it is incompatible.²⁹⁴

"We must take care of these cases" in Rule 23(b)(2), Wright insisted, to make sure racist judges did not seek cover in imprecise rule terminology.²⁹⁵ Kaplan agreed: "(2) must remain in to make it absolutely clear that the desegregation cases . . . are covered."²⁹⁶

Frank yielded to this "belief that [Rule 23(b)(2) is] needed to be sure that we cover the segregation case . . . because certainly we want the segregation cases covered somewhere."²⁹⁷ But he tried to get the committee to tighten its text, expressly to exclude the feared declaratory judgment.²⁹⁸ Another committee member seconded the proposal to "[m]ake it clear that this only applies to the type of situation that it's directed to, namely, a segregation policy or an exclusion policy based on discrimination."²⁹⁹ One suggestion to this end would have required a defendant in a Rule 23(b)(2) suit to have acted "willfully." With the dispositions of some southern judges in mind, Sacks demurred:

The word "willfully" I think, would be a very regrettable inclusion because that word has 15 different meanings from 15 different courts, and I can think of any number of segregation cases in Southern courts today in which that word "willfully" would become the basis for tossing this right out, with glee.³⁰⁰

After this proposal's defeat, the record reflects no further discussion of Rule 23(b)(2)'s terms, which remained basically the same throughout the rest of the drafting process.³⁰¹

When the Advisory Committee decided to include opt-out rights for money damages class members as Rule 23 took its final shape, it gave no consideration to whether Rule 23(b)(2) suits merited the same or an analogous mechanism. Others have told the opt-out rights story, so its

294. Transcript of Session on Class Actions 13 (Oct. 31, 1963–Nov. 2, 1963), *microformed on* CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.); *see also* Letter from Charles A. Wright to John P. Frank (May 24, 1962), *in* WRIGHT PAPERS, *supra* note 3, Box 111, Folder 3 ("I do not think that your note [proposing that segregation cases fit in some other section of Rule 23] answers the problems of the race relations cases. If the cases are not properly class actions, the decree merely orders the defendant school to admit certain named plaintiffs without regard to race . . . and provides no basis for a contempt action if later Negroes are denied their rights.").

295. Transcript of Session on Class Actions 13 (Oct. 31, 1963–Nov. 2, 1963), *microformed on* CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.); *see also id.* ("On [Rule 23(b)](2) I feel so strongly that [Frank] is wrong that once you agree, as he does, that segregation cases must be prosecuted as class actions, (as certainly they must) [sic], you have to have (2) to take care of them.").

296. *Id.* at 11.

297. *Id.* at 36.

298. *Id.*

299. *Id.* at 60 (statement of George Doub).

300. *Id.* at 61.

301. *See Proposed Amendments to Rules of Civil Procedure for the United States District Courts with Advisory Committee's Notes* EE-3 (Feb. 25, 1964), *microformed on* CI-7003-32 (Jud. Conf. Records, Cong. Info. Serv.).

details do not need repetition here.³⁰² Briefly, opt-out rights addressed two concerns with Rule 23(b)(3). The idea that a person could be included in a class without her approval disquieted Frank on autonomy grounds.³⁰³ Rule 23(b)(3)'s defenders invoked notice and the right to opt out to dismiss this worry as unfounded.³⁰⁴ Judging by the stubbornness with which Frank and others voiced this objection, the more important problem with Rule 23(b)(3) was the concern that it would enable collusive class suits in "mass accident" cases.³⁰⁵ Class counsel and the defense counsel could "rig" a class action, settle it cheaply, and thereby preclude class members from litigating potentially valuable claims.³⁰⁶ Judge Wyzanski proposed the right to opt-out to deal with this possibility in a "mass accident" case,³⁰⁷ and, at least for a while, it put Frank's concern to rest.³⁰⁸ The 1966 authors then required notice—instead of recommending it strongly, as in earlier drafts of the rule and notes—in order to implement the opt-out right, and, even apart from this right, to ensure the requisite cohesiveness necessary for a constitutionally sound judgment.³⁰⁹ They did not seriously consider the prospect of collusion in injunctive relief suits during their discussion of opt-out rights, and they never indicated why Rule 23(b)(2) classes did not also need notice to rest preclusive judgments on a solid due process foundation.

302. Rabiej, *supra* note 15, at 333–45.

303. Memorandum from John P. Frank to Benjamin Kaplan, Professor, Harvard Law Sch. 3 (Jan. 21, 1963), *microformed on* CI-6312-20 (Jud. Conf. Records, Cong. Info. Serv.); Dissenting Memorandum from John P. Frank to the Advisory Comm. on Civil Rules 2 (May 28, 1965), *microformed on* CI-7107-01 (Jud. Conf. Records, Cong. Info. Serv.).

304. Statement on Behalf of the Advisory Committee on Civil Rules 9 (June 10, 1965).

305. *E.g.*, Rabiej, *supra* note 15, at 341–44; Transcript of Session on Class Actions 9–10 (Oct. 31, 1963–Nov. 2, 1963), *microformed on* CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.) (statement by Frank) ("I could not be persuaded, I think, ever to allow a mass accident to be treated as a straight class action, because the values are so tremendous, and the premium it puts on just plain bribery on counsel to go a little soft and take it a little easy is just too frightening to contemplate."); Dissenting Memorandum from John P. Frank to the Advisory Comm. on Civil Rules 2 (May 28, 1965), *microformed on* CI-7107-01 (Jud. Conf. Records, Cong. Info. Serv.) (mentioning mass torts and insisting that "the corruption potential . . . intimidates me"). For other opinions, see, for example, Transcript of Session on Class Actions 51 (Oct. 31, 1963–Nov. 2, 1963), *microformed on* CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.) (statement by Professor Moore) ("I can't think of anything nicer for the general counsel of . . . [a company recently sued in a mass accident case] than your class action rule.").

306. Dissenting Memorandum from John P. Frank to the Advisory Comm. on Civil Rules 2 (May 28, 1965), *microformed on* CI-7107-01 (Jud. Conf. Records, Cong. Info. Serv.).

307. Transcript of Session on Class Actions 51 (Oct. 31, 1963–Nov. 2, 1963), *microformed on* CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.).

308. *Id.* at 54.

309. *Proposed Amendments to Rules of Civil Procedure for the United States District Courts with Advisory Committee's Notes* EE-19 to EE-20 (Feb. 25, 1964), *microformed on* CI-7003-32 (Jud. Conf. Records, Cong. Info. Serv.).

2. Substance and Procedure and the Rule 23 Puzzle

In one sense, this history of Rule 23(b)(2)'s apparently exclusive concern for desegregation suits leads to a dead end. The 1966 authors were sophisticated lawyers, experienced judges, and able theorists. Yet they gave no explanation in terms of interest representation for why an injunctive relief class judgment could bind absent class members with possibly divergent preferences, while a money damages class suit required notice and opt-out rights to generate class-wide *res judicata*. Given their sophistication, one quite unlikely explanation is that, with opt-out rights and mandatory notice arriving at the eleventh hour to quell Frank's fears, the 1966 authors did not reflect on the justification for their inclusion and thus consider at least mandatory notice and perhaps some mechanism analogous to opt-out rights for other types of class suits. The deep sympathy Rule 23(b)(2)'s champions had for the civil rights cause and the formative influence the vagaries of civil rights litigation had on its terms suggest more plausible answers to the Rule 23 puzzle.

First, maybe the 1966 authors mistook the substantive irrelevance of class member preferences for procedural irrelevance. As they labored in 1962 and 1963, the systemic integration understanding of *Brown* was evolving in the Fifth Circuit. By this take on Equal Protection, once a court found the existence of unlawful segregation, the remedy—an integration injunction—required the reshuffling of school populations. Whether a particular black student wanted to attend an integrated school mattered not at all. Perhaps the 1966 authors, at least some of whom unquestionably knew of this development, believed that the substantive irrelevance of class member preferences made them procedurally irrelevant—or irrelevant to whether and under what conditions a named plaintiff could prosecute a class action in absent class members' names—as well. This belief would have been erroneous, for what the substantive law requires does not determine procedurally who may enforce it on behalf of whom.

A second possibility goes to a cultural disconnect. The men who revised Rule 23 were well-meaning white elites who may have underappreciated some of the complexities of desegregation in their zeal for the cause. Wright illustrates. A review of his voluminous papers from the era yields a portrait of a man earnestly committed to civil rights but lacking any meaningful relationship with a southern black community. There were certain “obvious truths,” Wright put it in a letter to the Advisory Committee, such as “motherhood is good, [and] segregation is bad.”³¹⁰ Perhaps he and his colleagues did not realize that some black children might not have wanted to attend integrated schools, even though they could have read about this prospect in the *New York Times Magazine*.³¹¹ They therefore might have failed to appreciate that the same sort of conflicts of interest that required

310. Letter from Charles A. Wright to Benjamin Kaplan, Professor, Harvard Law Sch. (Mar. 30, 1963), *microformed on* CIS-6315-55 (Jud. Conf. Records, Cong. Info. Serv.).

311. Hodding Carter, *Desegregation Does Not Mean Integration*, N.Y. TIMES MAG., Feb. 11, 1962, at 21, 71–72.

procedural safeguards of adequacy for Rule 23(b)(3) suits might also fester in injunctive relief litigation.

A third explanation gives the 1966 authors more credit. Given the interest representation doctrine of the time, notice and opt-out rights would have threatened integration litigation as Wright and Kaplan thought it had to be prosecuted, so perhaps they buried the problem of conflicting interests to ensure its success under Rule 23. As Wright understood, the effective vindication of Fourteenth Amendment rights required systemic integration, or the treatment of black students as groups regardless of their individual preferences.³¹² This result needed class treatment of claims. The Fifth Circuit did not sanction an integration injunction in an individual suit until 1963,³¹³ and regardless of this decision, recalcitrant district judges still cited a suit's nonclass status to justify meaningless, individual-by-individual injunctions. But by the early 1960s, the general course of class action doctrine required a perfect harmony of legally relevant interests to let a case proceed as a class action. If dissent surfaced among members of a proposed class, it could not proceed as such, and foot-dragging judges would have their procedural excuse to thwart *Brown* on the merits.

Notice and opt-out rights amount to both an awareness that class member preferences might conflict and a tool to make these conflicts known. If the new Rule 23 had required that desegregation class members receive notice, and certainly if it had required something akin to opt-out rights, it would have invited dissenting class members to make their disagreement known. This manifestation of conflicts, if frankly acknowledged by judges, would have required one of two equally unattractive responses. On one hand, consistency with the general course of interest representation doctrine would have meant the concession that desegregation suits could not proceed as class actions. This was a nonstarter to men like Kaplan, Sacks, and Wright, who feared the machinations of segregationists on the southern federal bench. Alternatively, a judge would have to ignore certain conflicts of interest, a change in doctrine at odds with the repeated insistence that the new Rule 23 merely codified evolving practice, and a tactic that lacked any principled limit or test.³¹⁴

312. In an analysis of segregation legislation pending in the Texas legislature in 1957, Wright commented critically on *Briggs* as follows:

It assumes that there is some third choice available other than segregation or integration. . . . It is worthy of note that not a single plan for dealing with the schools other than by integration has yet received approval of any court. Until a plan is found which ends segregation without requiring integration, it seems to me safer, as well as more logical, to assume that these are mutually exclusive alternatives.

Charles Alan Wright, *Race Bills—A Constitutional Analysis*, THE TEX. OBSERVER, Apr. 23, 1957, at 1, 4.

313. *Bailey v. Patterson*, 323 F.2d 201, 206–07 (5th Cir. 1963); see also *Flax v. Potts*, 204 F. Supp. 458, 465 (N.D. Tex. 1962).

314. See *infra* notes 324–28 and accompanying text.

Perhaps a more attractive solution would have been to pretend the problem did not exist. The progressive Fifth Circuit judges simply redefined the rights at stake to render potentially conflicting interests irrelevant. Kaplan, Sacks, and Wright may have similarly buried conflicts of interest by refusing either to invite this disagreement or to give class members an officially sanctioned mechanism like opt-out rights with which to express their conflicting preferences. They could better preserve the fiction that all black plaintiffs marched in lockstep and thereby ensure that Rule 23 lent this litigation as much help as possible.

If any of these explanations is correct, Rule 23 suffers from a noble flaw. Most simply, it was designed for a particular type of litigation at a particularly important point in its development, circumstances that in no sense are representative for injunctive relief litigation more generally. If the 1966 authors' zeal for civil rights blinded them to integration's realities, then the rule they authored erroneously eschews procedural safeguards for injunctive relief class members and veers toward unconstitutional territory. If they treated Rule 23(b)(2) class members differently to assist integration litigation, then no trans-substantive explanation justifies the lesser procedural rights these members enjoy. Interest representation, the modern class suit's constitutional license, cannot provide a complete normative foundation for Rule 23 as it presently exists.

V. IMPLICATIONS FOR CONTEMPORARY CLASS ACTION DOCTRINE

The substance-specific answer the history of Rule 23(b)(2)'s origins provides to the Rule 23 puzzle has a number of implications for present-day doctrine and theory. Most fundamentally, it calls into question a basic premise of the Federal Rules, that they operate as a trans-substantive procedural regime. If Rule 23(b)(2)'s origins are illustrative of purposeful motivations lurking behind the text of procedural rules more generally, this particular relationship between substance and procedure raises a host of questions. Can procedural reformers promulgating rules outside a legislative process act legitimately when concerns of substantive justice drive the drafting process so exclusively? What happens to the possibility of significant procedural reform when rulemakers disagree on where the substantively just result lies? To what extent do substantive motivations matter to a rule's legitimacy when its terms are formally, if not functionally, substance-neutral? More specifically, the historical answer to the Rule 23(b)(2) puzzle sheds light on difficult problems in class action doctrine. It helps explain, for example, why courts have failed so remarkably to grapple with conflicts of interest in injunctive relief suits.³¹⁵ The answer also yields insight for specific but recurrent issues, such as whether back pay claims in employment discrimination suits should proceed under Rule 23(b)(2).³¹⁶

315. *See supra* Part I.B.

316. Courts permit back pay claims to be certified under Rule 23(b)(2) in part on grounds that back pay is formally equitable. *E.g.*, *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 618 (9th Cir. 2010). The 1938 rule did not distinguish between legal and equitable relief as far as class treatment is concerned, and the 1966 authors did not intend to do so either. The fact that back pay is equitable,

Space does not permit me to analyze each problem and possibility this history raises. A general rumination on substantive motivations and their implications for the legitimacy of nominally trans-substantive procedural rules must remain for the future. In the remainder of this Article, I focus on two implications of the story I have told, one descriptive and the other normative, that go to some of the most basic issues in contemporary class action doctrine.

A. *A Unified Theory of Conflicts of Interest?*

The various proposed solutions to the Rule 23 puzzle described in Part I try to explain the link between procedural right and remedial choice as if modern class action doctrine accounted for conflicting interests coherently and comprehensively. That no such justification has become the accepted gospel since 1966 suggests that this assumption is wrong. So too does the fact that the contours of the injunctive relief class suit owe more to desegregation than any cogent theory of interest representation. Perhaps a single, grand explanation of when conflicts matter in class actions and when they do not is like the geocentric explanation of planetary motion: it does not work because the system's basic design is rooted in fundamentally different premises.

The mid-century shift to interest representation created both an opportunity and a problem. Unlike 19th Century rights-based formalism, which allowed broadly preclusive class judgments only in a narrow range of circumstances defined by abstract conceptions of rights, this new prerequisite could be satisfied in any case. But the degree of actual harmony among class members that this new basis required proved a vexing difficulty. Human nature meant that classes would inevitably include dissenting members, so a perfect harmony of interests threshold would make class-wide preclusion impossible anytime class member preferences were relevant. For this reason, the spurious class suit persisted in an enfeebled state until 1966. But to permit class treatment with anything less—that is, to accept a degraded interest representation threshold—would beg a host of hard questions about what sort of conflicts mattered and how much disharmony would be tolerable.³¹⁷

At least in theory, the 1966 authors avoided this dilemma elegantly for money damages suits. Notice and opt-out rights enable absent class members with divergent preferences to exit and leave only those perfectly aligned with the class representative subject to *res judicata*. Although the

therefore, is not a historically valid reason to allow class treatment pursuant to Rule 23(b)(2).

317. Recent commentary by Rule 23's most accomplished scholars underscores the difficulty of these questions. See, e.g., Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1676 (2008); Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1137 (2009). So too does the seemingly unprincipled treatment of the adequacy of representation requirement by the federal judiciary. See Robert H. Klonoff, *The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 MICH. ST. L. REV. 671, 674 (discussing incoherent application of Rule 23(e)(4) by federal courts).

court must certify that the proposed class meets the adequacy of representation requirement in Rule 23(a)(4), notice and opt-out rights arguably function as belt-and-suspenders guarantors that class-wide res judicata rests on a constitutionally sound foundation. The absence of such procedural safeguards in injunctive relief suits makes the Rule 23(a)(4) determination that the representative adequately represents the interests of absent class members all the more important.

It is ironic, then, that leading attempts to articulate a single threshold for adequate interest representation work markedly better for Rule 23(b)(3) suits than for their Rule 23(b)(2) equivalents. The American Law Institute's recently adopted *Principles of the Law of Aggregate Litigation* provides a prominent example. The ALI recommends that only "structural" conflicts matter,³¹⁸ not any possible divergence of class member preferences.³¹⁹ Conflicts are structural when, judged ex ante,³²⁰ a "significant risk" exists that a representative "might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims."³²¹ For example, a class including already-injured (present) claimants and exposed-but-unimpaired (future) claimants that sues an asbestos defendant suffers from an easily identified structural conflict. The present claimants want large damages immediately, but such payouts will deplete the funds the defendant has available to pay damages in the future.³²² In contrast, when representatives have no incentive to negotiate a settlement that systematically favors a subset of class members at the expense of others, no such structural conflict appears, even if in the end the settlement does just this.³²³

To identify such structural conflicts ex ante, before actual class members show up and voice their preferences, the court can only focus on objectively identifiable interests. The reasonable class member's, in other words, is whose perspective the court considers.³²⁴ When money damages are at stake,

318. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a)(1) (2010).

319. *Id.* § 2.07 cmt. d.

320. On the ex ante perspective, see AM. LAW INST., *supra* note 318, § 2.07 cmt. d; see also Issacharoff & Nagareda, *supra* note 317, at 1688; Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 297 (2003).

321. See AM. LAW INST., *supra* note 318, at § 2.07(a)(1)(B); see also Issacharoff & Nagareda, *supra* note 317, at 1684.

322. See *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 626 (1997); PRINCIPLES OF THE LAW, *supra* note 34, § 2.07 cmt. d.

323. In the settlement at issue in *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 253–54, 260 (2d Cir. 2001), the class representatives in 1984 accepted a settlement that would continue to pay victims of Agent Orange exposure as their injuries manifested up to 1994. After 1994, the defendant would have no remaining liability. The class ultimately included members whose injuries did not develop until after 1994 and were thus noncompensable. Nonetheless, at the time of its negotiation, the class did not suffer from a structural conflict, because its representatives had no idea when their injuries would develop and thus had no incentive to shortchange post-1994 victims to obtain more funds for pre-1994 victims. See PRINCIPLES OF THE LAW, *supra* note 34, § 2.07 cmt. d (discussing *Stephenson*); Issacharoff & Nagareda, *supra* note 317, at 1686–89.

324. Cf. AM. LAW INST., *supra* note 318, § 2.07, cmt. d (citing Geoffrey P. Miller, *Conflicts of*

a court can readily distinguish between reasonable class members and those who might have unreasonable, idiosyncratic preferences. It can justifiably assume that every class member wants to maximize her recovery, look for systematic fissures on that basis, and ignore as unreasonable the odd class member who for some reason wants something else.³²⁵ But this objective inquiry is much more difficult in some (if not all³²⁶) injunctive relief settings. Not infrequently a class divides into at least two camps, those who want an injunction to change the defendant's behavior and those who would prefer the defendant to continue unabated. Desegregation litigation of the 1970s presents the most famous example,³²⁷ but present-day examples abound.³²⁸ If both camps are reasonable, then the conflict is structural and the suit cannot proceed as a class action. The ALI's approach would either require courts to deny class certification to all such suits or dismiss one camp's preference as idiosyncratic and unreasonable. This latter option puts courts in the paternalistic and subjective position of telling people hauled before the court to be plaintiffs without their consent what is good for them.

The history discussed here explains why any such grand account likely will not work. While a theory of interest representation can make sense of Rule 23(b)(3) class suits, it alone provides an incomplete normative foundation for mandatory class treatment under Rule 23(b)(2). Injunctive relief class action doctrine as a historical matter owes a great deal to the imperatives of substantive justice in a context irrelevant to Rule 23(b)(3). A single threshold for the adequacy of representation requirement presumes a unified basis for Rule 23 that does not fit its original design.

B. *Class Certification and the Relationship Between Substance and Procedure*

The contribution of substance-specific political commitments to Rule 23's normative foundation also challenges a fundamental assumption about the substance-procedure boundary in contemporary class action doctrine. Class certification essentially involves a determination that class-wide res judicata is proper. Substantive justice at least partially justified class-wide preclusion in the minds of Rule 23(b)(2)'s champions. In other words, they designed a rule that makes substantive justice a potentially relevant input for the class certification decision. This history conflicts fundamentally with the interpretation of Rule 23 in *Amchem Products, Inc. v. Windsor* as refusing to permit the substantive results class treatment of claims might yield to affect the application of procedural requirements for class certification.³²⁹

Interest in Class Action Litigation: An Inquiry into the Appropriate Standard, 2003 U. CHI. LEGAL F. 581 (2003), which makes this objective perspective more explicit).

325. YEAZELL, *supra* note 13, at 252. *But see* Elizabeth Chamblee Burch, *Procedural Adequacy*, 88 TEX. L. REV. 55, 57–58 (2010).

326. *E.g.*, *Uhl v. Thoroughbred Tech. & Telecomm. Inc.*, 309 F.3d 978, 983–84 (7th Cir. 2002).

327. *E.g.*, *Bell*, *supra* note 30, at 474–75 n.18.

328. *See supra* note 31.

329. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619–22 (1997).

In *Amchem*, the Supreme Court rejected a global settlement of most of the country's asbestos litigation and decertified a class of future claimants. One issue was whether the class certification inquiry should account in some manner for the fact that the certain payouts the settlement promised compared favorably to the very real chance that the hopeless bog of asbestos lawsuits might prevent individual litigants ever from recovering.³³⁰ The Court answered in the negative. Wary of “gestalt judgment[s]” of fairness, the Court held that a settlement's substance could not justify a relaxed inquiry into whether the proposed class satisfied the certification prerequisites of Rule 23(a) and (b).³³¹ Policy reasons supported this holding,³³² but the Court at least formally based it on what it claimed is the correct interpretation of Rule 23's text.³³³

Generalizing from *Amchem*'s particulars, one can read the decision for the insistence that the likely substantive results of class treatment are irrelevant to the procedural determination at the certification threshold.³³⁴ Little of the standard material for the interpretation of legal texts supports this determination. Rule 23 admittedly does not explicitly provide that likely outcomes can affect class certification requirements, but the text does not disavow such a connection either. When plain meaning is not dispositive, interpreters may legitimately turn to historical sources, such as authorial intent and purpose, to unpack a rule of civil procedure.³³⁵ As intended and likely understood at the time, the architecture of Rule 23 makes little sense unless substantive justice affects in some manner the application of Rule 23's class certification requirements, in particular the adequacy of representation threshold in Rule 23(a)(4).

The 1966 authors wrote Rule 23 against a backdrop of interest representation doctrine that required a perfect harmony of interests to allow a suit with broad *res judicata* potential to proceed as a class action. As mentioned, notice and opt-out rights theoretically can reconcile money damages class suits with this doctrine. Unless they took seriously the notion that injunctive relief class members necessarily had harmonious interests, however, the 1966 authors must have understood that the eschewal of procedural safeguards would leave divergent preferences within putative Rule 23(b)(2) classes. Since they obviously wanted courts to certify such

330. *Id.* at 631–33 (Breyer, J., dissenting).

331. *Id.* at 621, 629 (majority opinion).

332. Issacharoff, *supra* note 4, at 339–41.

333. *Amchem*, 521 U.S. at 620; *see also* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999) (referring to *Amchem* and insisting that, “[W]e are bound to follow Rule 23 as we understood it upon its adoption, and . . . we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.”).

334. *Cf.* Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 778 (2002) (“The Court called for a strict separation of questions concerning the propriety of class certification from questions surrounding the fairness of the settlements themselves.”).

335. *E.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833–34, 841–42, 844–45 (1999). *But see* *Krupski v. Costa Crociere S. p. A.*, 130 S. Ct. 2485, 2499 (2010) (Scalia, J., concurring) (“But the Committee's *intentions* have no effect on the Rule's meaning.”).

classes nonetheless, the 1966 authors must have known that the application of Rule 23(a)(4) in injunctive relief cases would necessarily depart from pre-1966 interest representation doctrine. Those cases provided no trans-substantive explanation for why injunctive relief class members lack notice and opt-out rights, they undoubtedly believed that the substantive consequences of class treatment justified *res judicata*, and they understood that interest representation provided the constitutional footing for this preclusive effect. They thus likely believed that substantive consequences legitimated a more relaxed application of Rule 23(a)(4). This requirement for class certification permits two different adequacy thresholds, one consistent and the other inconsistent with a perfect harmony of interests. (The years after 1966 saw these thresholds emerge in practice, as courts seemed to accept a more disunity in injunctive relief cases than in money damages suits.)³³⁶

A rigid boundary between substance—the results of class treatment—and procedure—the requirements for class certification in Rule 23(a) and (b)—conflicts with this history. Lacking any clear textual support to the contrary, the Court’s interpretation of Rule 23 seems flawed, or at the least, much too glib. The 1966 authors desired, or at least tolerated, a more porous boundary.

Anything less than this rigid boundary, however, opens a Pandora’s box of seemingly intractable problems. If the application of class certification requirements can account for the anticipated substantive consequences of class treatment, wouldn’t the judge’s idiosyncratic preferences make the application of Rule 23 hopelessly subjective? How can anything less than *Amchem*’s rigid boundary square with the formal trans-substantivity of the Federal Rules? The Court may have erred as an interpretive matter, but perhaps the rigid boundary makes sense prudentially.

These difficulties warrant a much fuller treatment than is possible here. A very preliminary response somewhat ironically lies in the quite substance-specific history of Rule 23(b)(2). Abstracted away from desegregation and the early 1960s, its story suggests a principled way to mediate the substance-procedure boundary in Rule 23. What likely distinguished desegregation litigation from other substantive areas to a progressive lawyer in the 1960s was not just the obvious rightness of the plaintiffs’ cause. In addition, private litigation was the sole enforcement mechanism for the rights at stake, and the failure to let this litigation proceed in the aggregate stymied its effectiveness. Class treatment, in other words, seemed essential to the vindication of substantive rights. A standard rooted in this distillation of the lessons of desegregation might inform class certification decisions going forward. If substantive rights would go unenforced absent class treatment of claims, a court may relax the class certification requirements. This proposal would support a dual approach to adequacy that, while remaining consistent with the trans-substantive ethos of the Federal Rules, facilitates class

336. 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1771, at 663 (1972) (commenting on the “liberalized application of the Rule 23(a) prerequisites” in Rule 23(b)(2) cases involving civil and constitutional rights).

treatment of claims when most needed and makes class certification more difficult when not.

CONCLUSION

The authors of the 1966 Rule 23 were not plaintiffs' lawyers bent on fueling a nascent litigation explosion.³³⁷ Nor were they cloistered theorists untangling a purely procedural problem. They were mostly progressive lawyers to whom, at the moment of the civil rights movement's zenith, procedural rulemaking must have seemed an irresistible opportunity to work for the country's greater good. The result of their labors was a rule whose requirements cannot be explained in terms of procedure alone. The debt Rule 23 has to particular concerns of substantive justice renders it awkward and theoretically suspect. But these flaws are noble ones.

337. Letter from Charles Alan Wright to Abraham Freeman, Feb. 27, 1965, *in* WRIGHT PAPERS, *supra* note 3, Box 257, Folder 4 (noting that "incredible as it must seem," Wright "was the closest thing the committee had to being a plaintiffs' lawyer").

