Articles

Socially-Driven Class Actions: The Legacy of *Briggs*

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I. THE EARLY DEVELOPMENT OF CLASS ACTIONS 3

II. THE MAIN CHANGES TO RULE 23 BETWEEN 1938 AND 1966 6

III. SOCIAL MOTIVATIONS: THE MAIN GOALS OF THE 1966 COMMITTEE 8

IV. STATUS AND THE STRUGGLE AGAINST RACIAL SEGREGATION 11

V. BETWEEN LAW-IN-BOOKS AND LAW-IN-ACTION: STRATEGIC USE OF THE SOCIAL SCIENCES 14

VI. ACKNOWLEDGING SOCIAL REALITIES: THE HISTORICAL CONTEXT OF *BRIGGS* 18

VII. ACKNOWLEDGING STATUS: PROCEDURAL LAW IN *BRIGGS* 21
- A. Grassroots Empowerment: Moving the Victim into Action . 22
- B. Inner Conflicts, Gradual Changes, and Compromises 23
- C. Adversarial Equality and Class Suits 24
- D. Courts' Legitimacy 25

VIII. CONCLUDING INSIGHTS 26

Judge Waring's dissent in *Briggs v. Elliott* was the first judicial opinion to reject *Plessy v. Ferguson* and declare that racial segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment.[1] The reasoning behind Waring's dissent clearly had an ef-

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fect on the court's decisions in *Brown*, and in that sense, it played an active part in opening the floodgates for class actions dealing with racial segregation and human rights violations. From a procedural standpoint, *Briggs*, just like the cases consolidated into *Brown*, was filed as a class action, and treated by the court as preclusive, despite falling into the 1938 category of "spurious class actions."[2]

The success of civil rights class actions in the 1950s led to growing attacks on their legal validity, and the role of the National Association for the Advancement of Colored People (NAACP) as their leading initiator. Both the success of civil rights class actions and the threats against that success had a profound impact on the deliberations of the 1966 advisory committee, which drafted Federal Rule of Civil Procedure 23(b)(2) regarding mandatory class actions.[3] Hoping to protect civil rights class actions, the committee moved away from James Moore's old categories, and guided by its legendary reporter, Benjamin Kaplan, decided that civil rights class actions like *Briggs*, asking for declaratory relief, would bind absent parties without notice, and without giving class members an opportunity to opt out.[4]

This presents a perplexing socio-legal dilemma. Human rights violations can be constitutionally challenged by an individual lawsuit, which can eventually affect every person similarly situated. It is therefore unclear what advantages a representative suit filed on behalf of a large, and mostly passive, crowd offers—this seems to render class actions redundant. Yet *Briggs*, and the cases consolidated into *Brown*, were quite different in both form and function from the typical modern class action.[5] At their core, the civil rights class actions of the 1950s successfully found a way to integrate the ideas, thoughts, feelings, and active participation of the community with the legal proceedings.[6]

While existing accounts regarding the evolution of class actions in civil rights litigation focus on the legal advantages of class actions in overcoming various legal obstacles, like mootness claims, this article shines a new light on class actions, by exploring the path of civil rights litigation leading to *Brown*. Focusing on the social-sciences strategy which shaped both the legal ideas and legal reasoning in *Briggs* and *Brown*, this article maintains that the desire to bridge the gap between "Law in Books" and "Law in Action" inevitably influenced and molded

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[1] Briggs v. Elliott, 98 F. Supp. 529, 538-48 (D.S.C. 1951) (Waring, J., dissenting).

[2] *See* James W. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo. L.J. 551, 570–76 (1937) (characterizing Rule 23(a)(3) as defining "spurious class actions").

[3] Federal Civil Rules Advisory Committee Meeting, November 1, 1963; Transcript of Session on Class Actions 10 (Oct. 31, 1963 – Nov. 2, 1963), microformed on CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.).

[4] *Id.*

[5] *See Briggs*, 98 F. Supp. at 529; Brown v. Bd. of Educ., 349 U.S. 294 (1955).

[6] *See id.*

civil procedure. The NAACP went to great lengths in order to bring together social realities and judicial rule making. With the help of testimonies, research, and interviews with leading social sciences experts like David Krech, Horace McNally, and Kenneth Clark, the NAACP challenged the "Separate but Equal" doctrine, presenting the court with the far-reaching repercussions of racial segregation. The innovative ways in which class actions were supported and made richer by communal participation stemmed from the same drive that motivated the inclusion of the social sciences in the proceedings—an interest in bringing social realities into the courtroom—and weakened communities into law making.

This article opens with a description of the history of class actions prior to the 1966 amendment to Rule 23, and goes on to explain how desegregation class actions, like *Briggs* and *Brown*, influenced the deliberations of the Federal Civil Rules Advisory Committee. Since the Committee did not say much about the characteristics and advantages of desegregation class actions, this article goes back to examine the constitutional challenges to the "Separate but Equal" doctrine prior to *Brown*.

Lastly, the article examines the substantive and procedural strategies that shaped *Briggs*, and ultimately *Brown*, focusing on the use of the social sciences in illustrating the social ramifications of racial segregation. The NAACP, which turned to these resources that eventually became part of the court decisions, also realized that a single plaintiff was not the right vehicle to influence and shape the lives of millions. Instead of one person carrying the whole process, a suit on another scale was necessary, part of a protracted socio-legal struggle, relying heavily on the support of the African-American community.

I. THE EARLY DEVELOPMENT OF CLASS ACTIONS

Filing multiple suits, all grounded in the same facts and questions of law, aside from being impractical, may also lead to conflicting judgments and overtaxed courts. The solution adopted by Rule 23(b)(3) of the Federal Rules of Civil Procedure (FRCP),[7] was to broaden the doctrine of *res judicata* and allow the collectivization of individual rights into a single representative suit, which would bind absent class members.[8]

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[7] According to Rule 23(b)(3), a class action may be maintained, if it satisfies the requirements of Rule 23(a) and "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3) (1966).

[8] "Although class actions always have been recognized as an exception to the general rule that only named parties to an action are bound, Rule 23, as amended in 1966, moved further yet—establishing that even in class actions in which members of the class are united in interest only by the presence of common questions in their claims, they are bound unless they affirmatively opt out of the suit. And courts appear ready to uphold this principle." Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 763 (1976).

Thus, instead of several suits with the same factual and legal basis, there would be one class action, and the dispositions of the court would bind the entire group.

While this may seem like a strictly procedural response to the impracticability of multiple individual suits, the truth is quite different. The decision to bind individuals through a collective process, in which they take no active part, is based on a substantive understanding of what makes an individual part of a class, and how his interests within the class can be protected—especially since the individual's consent to becoming part of the group is, more often than not, passive.[9] Yet, despite all good intentions, without necessary safeguards, class actions run the risk of infringing on liberal models of democracy and the moral precept of individual autonomy, as well as the rights of litigants for their "day in court."[10]

Group litigation is nothing new—it goes back to the equity courts of mid-seventeenth century England. In pioneering cases like *How v. Tenants of Bromsgrove*[11] and *Brown v. Vermuden*,[12] a single chancery suit settled the rights and duties of the parties of polygonal controversies.[13] Scholars like Zechariah Chafee, looking to the past for guidance, maintained that these cases were historical precedents of a natural process, in which group litigation evolved into representative suits.[14] According to Chafee, the Chancery allowed what are now called class actions because of economic concerns.[15]

Stephen C. Yeazell's historical analysis took a more critical perspective, which emphasized the social and political circumstances surrounding the Chancery's decisions.[16] Yeazell maintained that when considering the social context of seventeenth century England, the all too tidy patterns suggested by efficiency readings like Chafee's, simply do not hold up.[17] For one, placing the spotlight on the legal rights of individuals, like Chafee did, misses the central role that status played in agricultural communities with a non-market economy.[18] In other words, the

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[9] Being part of a class action is the result of not opting out of the class. *Id.*

[10] "[C]lass action procedure . . . permit[s] . . . the group adjudication of purely individually held rights, the stakes for both the political theory of liberal democracy and the constitutional theory of procedural due process were correspondingly altered in fundamental ways." MARTIN H. REDISH, WHOLESALE JUSTICE, CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 9 (2009).

[11] 23 Eng. Rep. 277 (Ch. 1681).

[12] 22 Eng. Rep. 802 (Ch. 1676).

[13] ZECHARIAH CHAFEE, SOME PROBLEMS OF EQUITY 200–01 (1950).

[14] *Id.* at 149–51.

[15] "In such situations each member of the multitude had the same interests at stake as every other member, so that it was an obvious waste of time to try the common question of law and fact over and over in separate actions . . . [i]t was much more economical to get everybody into a single chancery suit and settle the common questions once and for all." *Id.* (discussing whether hearing multiple suits with a similar factual and legal basis was wasteful).

[16] Stephen C. Yeazell, *Group Litigation and Social Context: Toward A History of the Class Action*, 77 COLUM. L. REV. 866 (1977).

[17] *Id.*

[18] "Seventeenth-century group litigation is not about the legal rights of aggregated individuals but

claim that class actions are based on the group litigation of the seventeenth century lacks a thorough understanding of the social structure of the time and its effects on the function of equity courts, and is therefore anachronistic.[19]

It is quite possible that the reason for the rise of group litigation was the need, created by the agricultural revolution, to facilitate the modernization of the village or parish communities, which were founded on rural agriculture.[20] This kind of adjudication is fundamentally different from that of today—class certification in modern class actions, unlike the group suits of the seventeenth century, transforms a mass of individuals into a legal entity seeking, by aggregating their claims, to increase their socioeconomic power. Thus, the aggregation of a multitude of low-expectancy suits ensures an investment in legal proceedings that would otherwise be neglected.[21] In this way, modern class actions can act as a remedy to socioeconomic inequalities. The group litigation in English courts, on the other hand, never catered to disparate individuals, but rather relied on existing social groups and categories.[22] In a world where the rights and liberties of the individual stemmed from their sociocultural status, [23] the binding effects of group litigation did not produce a new group with greater socioeconomic strength.[24]

One cannot, therefore, ignore the great disparity between the collective litigation of modern class actions, which binds together countless individuals of varying backgrounds,[25] and that of the English equity courts, which did not employ any procedural device to collectivize individual rights; back then, it was status that allocated individual rights, based on sociocultural categories.[26] These early representation suits were not based on association and empowerment of disparate parties,[27] but on

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about the incidents of status flowing from membership in an agricultural community not yet part of a market economy." *Id.* at 871.

[19] *Id.* at 873.

[20] *Id.* at 875.

[21] David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 848 (2002).

[22] Yeazell, *supra* note 16, at 877.

[23] *See id.* at 871 (on the importance of status in group litigation).

[24] *Id.* at 878.

[25] Accordingly, the case of *How v. Tenants of Bromsgrove*, involving a dispute between manorial tenants and the lord of the manor of Bromsgrove, was not perceived as dealing with legal rights of aggregated individuals, or with the empowerment of manorial tenants. It rather dealt with the proper limits of the lord's right to appropriate common lands at the expense of manorial tenants. In other words, the rights in this case stemmed from the status of the tenants. *See* How v. Tenants of Bromsgrove, 23 Eng. Rep. 277 (Ch. 1681); Yeazell, *supra* note 16, at 872, 874. Similarly, the case of *Brown v. Vermuden*, dealt with the entitlement of the priest of a parish of lead miners, to set the price and buy a tenth of the ore mined. *See* Brown v. Vermuden, 22 Eng. Rep. 802 (Ch. 1676). Both cases, despite what Chafee claims, cannot serve, at least at face value, as examples for the attributes of modern class actions, which tie together individuals that are in no way connected, but through the suit. *See* CHAFEE, *supra* note 13, at 202.

[26] Analyzing the history of the Chancery's jurisdiction over landowners, Yeazell explains that "equity had entered this field as an instrument of royal political and social policy rather than as a strictly 'adjudicative' tribunal." Yeazell, *supra* note 16, at 893.

[27] In "a typical case . . . 'tenants . . . exhibit a bill in the names of themselves and of five hundred

preexisting social groups and fixed social categories that have little to do with modern society.[28]

II. THE MAIN CHANGES TO RULE 23 BETWEEN 1938 AND 1966

Even though Rule 23, promulgated in 1938, was the first significant step in the development of representative suits[29] disparate individuals who did not belong to any pre-organized group could not be part of a binding class action suit without their active involvement before the 1966 Amendment.[30] Under the Rules Enabling Act of 1934, the U.S. Supreme Court appointed an advisory committee for drafting the Federal Rules of Civil Procedure.[31] Professor Moore, the chief draftsman of Rule 23,[32] divided class actions into three types of representative suits[33] based on the nature of the right asserted.[34] These included: "true" class actions;[35] "hybrid" class actions;[36] and "spurious" class actions.[37]

The judicial classification of class suits determined their binding effects.[38] "True" class actions were mandatory because they bound all ab-

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more.'" *Id.* at 872–73.

[28] In seventeenth century England, *status* played the dominant role in determining whether a person belonged to a pre-organized group, and consequently it demarcated the boundaries of group litigation. *Id.* at 870–71.

[29] The 1938 version of Rule 23(a) of the Federal Rules of Civil Procedure provided: "[r]epresentation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued . . . ." Fed. R. Civ. P. 23(a) (1938).

[30] *See* REDISH, *supra* note 10, at 8.

[31] The Rules Enabling Act authorized the court to set procedural rules that did not "abridge, enlarge or modify any substantive right." Act of June 19, 1934, ch. 651, § 1, 42 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072(a), (b) (1990)).

[32] Moore was influenced by the work of Joseph Story. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 377 (1968).

[33] On the division of class action categories set by Moore, who took an active role in drafting Rule 23 of 1938, *see* 3A JAMES MOORE, FEDERAL PRACTICE 23.08–.10 (2d ed. 1968).

[34] On the classification of these categories and the jural relations they represent, see James Wm. Moore & Marcus Cohn, *Federal Class Action*, 32 ILL. L. REV. 307, 309–10 (1937).

[35] In "true" class suits, the rights in question, held by members of a particular group, are joint, common, or secondary rights—such as the rights of the members of an unincorporated association. According to Rule 23(a)(1), a class action can be filed "when the character of the right sought to be enforced for or against the class is (1) Joint or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it." Fed. R. Civ. P. 23(a)(1) (1938).

[36] Hybrid class suits dealt primarily with individually held rights towards the same property—such as the claims of creditors in a receivership process. In the words of Rule 23(a)(2) (1938) "hybrid" class actions dealt with rights that were "[s]everal, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action." Fed. R. Civ. P. 23(a)(2) (1938).

[37] Spurious class suits were based on several rights held by individuals with the same factual or legal claims. Rule 23(a)(3) created the "spurious" class action, which was based on rights that are "[s]everal and there is a common question of law or fact affecting the several rights and a common relief is sought." Fed. R. Civ. P. 23(a)(3) (1938).

[38] Prof. Moore intended for the binding effects of judgments to be based on the nature of the right

sent parties, and class members could not exclude themselves from the proceedings.[39] "Hybrid" class actions bound only "privies" (parties) to the proceedings and were conclusive in regards to claims against specific property.[40] "Spurious" class actions did not possess a *res judicata* effect on absent parties.[41] Moore's view regarding binding effects was not embodied in Rule 23,[42] but it affected legal practice as though it had been.[43] According to Rule 23 of 1938, the binding effects on absent parties of judgments that did not relate to a specific property[44] were limited to "true" class suits, which dealt with the enforcement of rights held by a pre-organized group.[45]

Then, some thirty years later, came a radical shift in the evolution of group litigation in the form of the 1966 Amendment to Rule 23. In it, the Federal Rules Advisory Committee decided to relinquish the old distinctions between "joint rights" and "several rights,"[46] which stood at the core of the division into different class action categories and dictated the suit's binding effects. The committee also relinquished the informal prerequisite for pre-litigation relations in an organized group as a condition for the suit's preclusive effect.[47] Instead, the major concerns of the committee, and in turn those of class action law, included such issues as the impracticability of individual joinder when the class is numerous,[48] the existence of common questions of law and fact,[49] fairness in the employment of a class action,[50] and the remedy sought by the plaintiffs.[51]

According to the 1966 Amendment, in order for a class action to be certified, it must satisfy the requirements of Rule 23(a) and at least one of the three criteria of Rule 23(b). This was a radical departure from the class action requirements of 1938. Rule 23(b)(2) allows for class certifi-

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sought to be enforced. See Kaplan, *supra* note 32, at 377–379.

[39] *See* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 673 (2011).

[40] Accordingly, Rule 23(a)(2) was "conclusive upon all parties and privies to the proceeding, and upon all claims, whether presented in the proceeding or not, insofar as they do or may affect specific property, unless such property is transferred to or retained by the debtor affected by the proceeding." Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 705 (1941) (quoting 2 JAMES W. MOORE, FEDERAL PRACTICE 2294–95 (1938)).

[41] *See* REDISH, *supra* note 10, at 8.

[42] *See* Kaplan, *supra* note 32, at 377–379.

[43] Chafee explains that "so great is the deserved respect of his treatise, that his scheme about binding outsiders has had almost as much influence as if it had been embodied in Rule 23." CHAFEE, *supra* note 13, at 251.

[44] This is the limited binding effect of "hybrid" class actions.

[45] Namely, the rights adjudicated in "true" suits were impersonal, since they belonged to a class member "solely because of his undifferentiated status or membership in a particular group." Marcus, *supra* note 39, at 671.

[46] *See* Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 5, 8–9 (1991) (on the makeup of the Advisory Committee).

[47] *See* REDISH, *supra* note 10, at 10.

[48] See the numerosity requirement in Rule 23(a)(1). Fed. R. Civ. P. 23(a)(1) (1938).

[49] *See* Fed. R. Civ. P. 23(a)(2) (1966) (the commonality requirement); FED. R. CIV. P. 23(b)(3) (1966) (the predominance requirement).

[50] Protected by the adequacy of representation requirement. Fed. R. Civ. P. 23(a)(4) (1966).

[51] *See* Fed. R. Civ. P. 23(b)(2) (1966).

cation when the party opposing the class acted or refused to act in a manner that affected the class as a whole, making declaratory or injunctive relief appropriate remedies.[52] Rule 23(b)(3) allows for class action certification when common questions of law and fact are shared by the class members and predominate over other legal or factual issues, and the class action is superior to other methods, as far as fair and efficient adjudication of the dispute is concerned.[53]

While one may claim that class actions submitted under Rule 23(b)(1) are concerned with pre-litigation groups and their binding effects on absent parties therefore precede the 1966 Amendment,[54] class actions submitted under Rule 23(b)(2) and (3) clearly represent a departure from the 1938 Rule,[55] if not a radical move away from the history of group litigation that came before it.[56] This change, however, did not appear out of thin air, and relied heavily on revolutionary desegregation class actions, most famous among them being *Brown v. Board of Education*,[57] and the following desegregation cases that sought to compel compliance with *Brown*.[58]

III. SOCIAL MOTIVATIONS: THE MAIN GOALS OF THE 1966 COMMITTEE

Benjamin Kaplan, the Reporter to the 1966 Advisory Committee,[59]

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[52] Class actions in which injunctive or declaratory relief are sought under Rule 23(b)(2) are also called mandatory class actions, since they bind absent parties and do not demand notifying class members or giving them a chance to opt out. *See* Fed. R. Civ. P. 23(b)(2), (c)(3) (1966).

[53] Rule 23(b)(3) is preclusive, but at the same time it bolsters the notice requirement, by demanding that class members be given the best possible notice, and when reasonable even an individual notice. It also grants class members the right to explicitly ask for their exclusion from the collective suit. *See* Fed. R. Civ. P. 23(b)(3), (c)(2) (1966).

[54] In a meeting of the 1966 committee, John Frank maintained that: "[i]f I may say so, I think we've got it in parts
(b)(1)(A) and (B), that is to say if we reviewed the great bulk of the cases – and I'm now speaking of 95% of the cases which have been true class actions in the past, i.e. have been regarded as binding – they fall into those categories." *See* Advisory Committee Meeting, *supra* note 3.

[55] *See* REDISH, *supra* note 10, at 10.

[56] Historically, group litigation in English equity courts generated dispositions that bound absent parties only when class representatives came from groups with established social relations. *Id.* at 6–7.

[57] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[58] Despite *Brown*, local school district boards in Kent and Sussex Counties, Delaware, operated a segregated school system. Consequently, children who were not admitted to schools because of their race submitted seven class actions on their own behalf, and "on behalf of all children similarly situated." *See* Evans v. Buchanan, 256 F.2d 688, 689–90 (3d Cir. 1958).

[59] Among the members of the Advisory Committee were: the chair of the Committee, Dean Acheson (a lawyer at the law firm Covington and Burling); Benjamin Kaplan of Harvard Law School (the Reporter); Albert M. Sacks of Harvard Law School (Associate Reporter); Shelden Elliot of New York University; Charles Joiner of the University of Michigan; David Louisell of the University of California – Berkeley; George Doub (Assistant Attorney General); John Frank (practicing lawyer from Phoenix, Arizona); Albert Jenner (practicing lawyer from Chicago); Judge Charles Wyzanski (of the District of Massachusetts); and Chief Judge Roszel Thomsen (of the District of Maryland). *See* Resnik, *supra* note 46, at 8.

argued that one of the main reasons for the reworking of Rule 23 was the need to provide a procedural means for the vindication of the rights of groups that would otherwise have no viable recourse.[60] Though the plaintiffs in modern class actions are typically tort claimants, in 1966 Benjamin Kaplan explicitly excluded such suits from Rule 23. He had desegregation class actions in mind and believed that individual desegregation suits would not end well. For example, in a public school case, a suit might lead to the admission of a single plaintiff without a general order to desegregate the school.[61]

During the deliberations of the Advisory Committee, Kaplan declared that if judges did not entertain desegregation cases as class actions, "we would of course be in a very, very bad way."[62] Similarly, John P. Frank, a member of the committee, emphasized the vital importance of segregation cases to the reworking of Rule 23, stating that "the energizing force which motivated the whole rule . . . was the firm determination to create a class action system which could deal with civil rights."[63] The committee designed Rule 23(b)(2) for civil rights class actions in which injunctive or declaratory relief was sought,[64] hoping to encourage the use of class actions in civil rights cases. This is why the rule did not require notice and denied class members the right to opt out of the class.[65]

While today most class actions are submitted through the flexible category of Rule 23(b)(3), the committee perceived this bracket as negligible.[66] Benjamin Kaplan explained that "[m]ass torts would and should be typically excluded from class suits,"[67] and his plan was that Rule 23(b)(3) be used in rare cases, when the definition of the class and the remedy sought are relatively clear—for example, in private antitrust cases or those of trust beneficiaries who claim against a common fraud.[68]

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[60] *See* Benjamin Kaplan, *A Prefatory Note*, 10 B.C. L. REV. 497 (1969) (adding that the other reason was "to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions").

[61] Kaplan explained that "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 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." Letter from Benjamin Kaplan to John P. Frank (Feb. 7, 1963) (cited in Marcus, *supra* note 39, at 700–01).

[62] Kaplan then said: "So if there be any question about it, (2) ought to remain in." *See* Advisory Committee Meeting, *supra* note 3.

[63] *See* Patricia A. Seith, *Civil Rights, Labor, And the Politics of Class Action Jurisdiction*, 7 STAN. J. C. R. & C. L. 83, 89–90 (2011).

[64] Class actions under Rule 23(b)(2) are also known as mandatory class actions. Interestingly, in Kaplan's first draft of Rule 23, he did not distinguish between injunctive and monetary reliefs clearly civil rights litigation had a great effect on his Rule 23. Marcus, *supra* note 39, at 704.

[65] *See* Fed. R. Civ. P. 23(c)(3) (1966).

[66] Benjamin Kaplan asserted that Rule 23(b)(3) "would rarely be used for mass torts." *See* Advisory Committee Meeting, *supra* note 3.

[67] Indeed, Kaplan, the author of the 1966 amendment to Rule 23, asserted in the advisory meeting that "Mass torts would and should be typically excluded from class suits." *Id.*

[68] In the words of Kaplan, Rule 23(b)(3) was expected to include: "cases . . . like . . . Common

There were, however, serious objections to Rule 23(b)(3), which were based on the fear that down the line, courts and lawyers would take advantage of its flexible language to broaden its use, and ultimately rewrite it altogether.[69] Committee member John Frank, for example, feared that lawyers and even defendants would file class actions under Rule 23(b)(3) in hope of pursuing quick and lucrative settlements.[70]

Albert M. Sacks had made it clear that the main objective of the Advisory Committee was to adopt a progressive judicial interpretation of Rule 23.[71] Though there had been considerable confusion in determining the scope of Moore's 1938 categories,[72] desegregation cases clearly should have fallen under the category of a non-binding, "spurious" class action,[73] to which class members could join. Only "true" class actions, which dealt with rights held in common, could bind absent parties.[74] Since constitutional rights were enforced on an individual basis, desegregation cases, which were mostly based on the Equal Protection Clause of the Fourteenth Amendment, should not have bound absent parties.[75] Nevertheless, some courts considered antidiscrimination cases as "true" class actions,[76] and therefore binding, while other courts decided the actions were binding without giving any regard whatsoever to legal categories.[77]

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fraud cases claimed by beneficiaries of a trust . . . or . . . private antitrust claims arising from a corporate dealing." *Id.*

[69] Mr. George Doub believed that Rule 23(b)(3) left "an open door, and [it is] not clear where that door is going to take us." *Id.*

[70] In Frank's words, "I think ever to allow a mass accident . . . just plain bribery on counsel to go a little soft and take it a little easy is just too frightening to contemplate. It's just not necessary." *Id.* Moore supported these observations, and Judge Roszel Thomsen maintained that judges might overuse the instrument of class actions due to local pride. *Id.*

[71] Albert M. Sacks, who later became Dean of Harvard Law School, stressed 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." *See* Marcus, *supra* note 39, at 696.

[72] Due to the confusion around determining the boundaries of the old categories, some courts relaxed the conditions of the "true" suit, deciding that the mere existence of common legal questions met its requirements. *See* Sys. Fed'n No. 91 v. Reed, 180 F.2d 991, 996–97 (6th Cir. 1950) (in which the court entertained a civil right class action by simply determining that under the circumstances the right was joint or common). On courts' confusion in implementing Rule 23's categories, *see* Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 630 36 (1965); Kaplan, *supra* note 32, at 380-86.

[73] Indeed, the court explained that in the case of a class action based on the deprivation of civil rights, "If a class action at all, it is what Professor Moore in his Federal Practice calls a Spurious Class Suit, which is a permissive joinder device. This is based on Rule 23(a)(3)." Jinks v. Hodge, 11 F.R.D. 346, 347 (D. Tenn. 1951).

[74] Accordingly, "Rule 23(a)(3) has become merely a permissive joinder device or a procedural means of intervention." Note, *Class Actions Classifications under Rule 23 of the Federal Rules*, 2 HOWARD L.J. 111, 119 (1956).

[75] *See* Comment, *The Class Action Device in Antisegregation Cases*, 20 U. CHI. L. REV. 577, 581, 589 (1952).

[76] *See* George M. Strickler, Jr., *Protecting the Class: The Search for the Adequate Representative in Class Action Litigation*, 34 DEPAUL L. REV. 73, 111 12 (1985) ("In order to allow the class members to enforce judgments intended to prohibit further discrimination, it was generally agreed that the actions should be classified as true class suits.").

[77] *See* CHARLES ALAN WRIGHT, FEDERAL COURTS 271 (1963) (explaining that "[w]here the case is such that a class suit can be brought, some courts have thought it 'true,' others have thought it 'spurious,' while most have simply called it a class action without further identification.") (cited by

Legal scholars and federal courts took into account policy considerations in defining the boundaries of class actions,[78] and racial equality was an especially dominant factor in the progressive judicial interpretation of Rule 23.[79] As Kaplan explained, "right answers should not depend on the mere preservation of the categories or terminology of Rule 23, but rather on the play of the intrinsic policies."[80] Thus, what was in theory a non-binding, "spurious" class action gained a binding effect due to policy considerations, and the Advisory Committee adopted this innovative judicial application of Rule 23.[81] However, in order to fully grasp the policy concerns and their impact, it is necessary to go back to the constitutional cases leading to *Briggs*, the first class action in which a judge rejected *Plessy*'s separate but equal rule.

IV. STATUS AND THE STRUGGLE AGAINST RACIAL SEGREGATION

Never was the gap between "law in books" and "law in action" as great or as noticeable as in the case of the "separate but equal" doctrine, which shaped the racial reality of the time and was promulgated in *Plessy v. Ferguson*.[82] In the real world, Jim Crow laws never stood for equal separation between the races,[83] but rather for hierarchy and subordination. Blacks and whites could live together, as long as it was not on equal footing. Racially restrictive covenants were employed to enforce racial separation in housing, but an exception allowed for residence of domestic servants and butlers.[84] Similarly, black nannies raised, fed, and took care of white children, while they could not visit all-white restaurants, or walk through segregated parks with their own children.[85] Even the name

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Kaplan, *supra* note 24, at 380–83).

[78] See Comment, *supra* note 67, at 577–78.

[79] *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 243 (1987) ("The Supreme Court seemed willing to reverse a half-century of Constitutional Law in the name of racial equality.").

[80] *See* Kaplan, *supra* note 32, at 384.

[81] *See* Marcus, *supra* note 39, at 697.

[82] State laws and constitutions, and even court decisions of the time, did not reflect racial reality. A famous example is the disenfranchisement of African-Americans' right to vote. Despite written laws and court decisions against grandfather clauses, like in Guinn v. United States, 238 U.S. 347 (1915), the right of African-Americans to vote was prevented through other devices, like poll taxes and literacy tests.

[83] In his dissent in *Plessy*, Justice Harlan explained what was clearly true, that "the statute in question had its origin in the purpose . . . to exclude colored people from coaches occupied by . . . white persons . . . under the guise of giving equal accommodation for whites and blacks." 163 U.S. 537, 557 (1896) (Harlan, J., dissenting).

[84] Typical restrictive covenants provided that "No person of . . . African or Negro blood . . . be permitted to occupy a portion of said property, or any building thereon except a domestic servant or servants who may actually and in good faith be employed by white occupants of such premises." *See* Robin Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1557 (2010).

[85] This exception to racial segregation was explained as "paradoxically helpful for refining segregation. What was prohibited in public was often permitted in private, especially in whites' homes

Jim Crow, associated with segregation laws, originated in an offensive show character of a minstrel, which captured the way whites thought of slaves—as dim-witted, lazy, and perennially jovial.[86]

The law created by *Plessy v. Ferguson* had little to do with the day-to-day reality of race relations in the states, and it undermined the faith of African-Americans in their ability to enforce their civil liberties and human rights using the law. After all, when the law is based on false assumptions regarding social reality, and misguided propositions that benefit the powerful at the expense of the weak, it falls short as a source for social reform. As a result, the NAACP, which took upon itself to challenge and tear down the Jim Crow laws' constitutionally in court, had only limited success before *Brown*.

In 1930, the NAACP decided to concentrate its attacks against Jim Crow segregation in public schools, using the Equal Protection Clause of the Fourteenth Amendment.[87] Thurgood Marshall, one of the NAACP's leading counselors, alongside his mentor, Charles Hamilton Houston,[88] were the first to constitutionally challenge racial segregation at the University of Maryland, after Donald Murray, who was African-American, applied to law school there and was rejected.[89] In *Murray v. Pearson*, Marshall accused the state of Maryland of violating the *Plessy* rule, for while some scholarships were given to blacks as part of an out-of-state program, the law school itself was all-white.[90] He argued in court that the case was about more than the rights of his client or the specific circumstances of the case.[91] On June 25, 1935, the Baltimore City Court ordered the admission of Donald Murray to the University of Maryland Law School.[92] The Court of Appeals affirmed this ruling, but mentioned that another possible remedy was to order the establishment of a separate school for blacks, as long as there had been "a legislative declaration of a purpose to establish one."[93] The decision to admit Murray was limited—it did not attack segregation head on,[94] and the University of Maryland Law School remained segregated for many years.[95] It did, however, pave

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and especially when it came to black maids." *See* MARK M. SMITH, HOW RACE IS MADE: SLAVERY, SEGREGATION AND THE SENSES 91–92 (2006).

[86] The term Jim Crow had a dual meaning: "[f]or whites Jim Crow meant fun, laughter, and amusement. In African American homes the name meant humiliation, degradation, and cowardice." *See* LESLIE V. TISCHAUSER, JIM CROW LAWS 2 (2012).

[87] Daniel T. Kelleher, *The Case of Lloyd Lionel Gaines: The Demise of the Separate but Equal Doctrine*, 56 THE J. OF NEGRO HIST. 262 (1971).

[88] Charles Hamilton Houston was the Dean of Howard Law School and the NAACP litigation director. *See* Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* 83, 89–90 (1983) (discussing his contribution to the struggle against Jim Crow).

[89] Pearson v. Murray, 169 Md. 478, 480 (1936).

[90] *Id.*

[91] LISA ALDRED, THURGOOD MARSHALL: SUPREME COURT JUSTICE 44-45 (2005).

[92] *Pearson*, 169 Md. 478, at 480.

[93] ALDRED, *supra* note 91.

[94] *Id.* Marshall argued that "What's at stake here is more than the rights of my client."

[95] *See* John K. Pierre, *History of De Jure Segregation in Public Higher Education in America and the State of Maryland Prior to 1954 and Equalization Strategy*, 8 Fla. A&M U. L. Rev. 81, 90–92 (2012).

the way strategically for the next desegregation suits.

The NAACP used the Maryland victory to increase public awareness and participation in the efforts to dismantle Jim Crow, and called for potential plaintiffs of similar lawsuits to come forward and take part in actions financed by the NAACP.[96] Many approached the NAACP, asking for legal aid, but Lloyd Gaines, who had an excellent scholastic record, was ultimately selected.[97] The state of Missouri practiced racial segregation in education, but it did not provide a law school for blacks.[98] When Gaines submitted his application, S.W. Canada, the law school's registrar, directed him to the all-black Lincoln University, which offered out-of-state scholarships for African-Americans.[99] When the NAACP petitioned for a writ of mandamus, the university's formal response was that it would not admit a student of African descent to a white school.[100] The Missouri state courts rejected the NAACP's constitutional challenge, emphasizing that there were liberal scholarships for out-of-state studies, and a legislative authority to establish separate schools for blacks, neither of which existed in the Maryland case.[101]

When the case reached the U.S. Supreme Court, the Court determined that the out-of-state scholarships did not meet the requirement of "separate but equal," since it was the responsibility of the state to provide equal privileges within its borders.[102] This decision forced the courts to consider whether separate facilities were really congruous with equality.[103] The Court reversed the Missouri Supreme Court's decision and instructed the University of Missouri to admit Gaines, while leaving open the possibility of admitting him to a new, segregated school within the state.[104] When Missouri established an all-black law school that had only nineteen students, an academic staff of four, and poor learning conditions, the case returned to court to determine whether this met the demand of "separate but equal."[105]

Oklahoma adopted a similar tactic for preserving racial separation in *Sipuel v. Board of Regents*.[106] The U.S. Supreme Court, citing *Gaines*, ordered the state to meet its constitutional obligation by providing Ada Sipuel with a legal education equal to that offered to whites.[107] The state responded by establishing Langston Law School, which Professor Henry

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[96] Kelleher, *supra* note 87, at 263.

[97] Sarah Riva, *The Coldest Case of All? Lloyd Gaines and the African American Struggle for Higher Education in Missouri*, WESTERN LEGAL HISTORY 1, 6–7 (2010).

[98] *Id.* at 5.

[99] *Id.* at 7.

[100] Kelleher, *supra* note 87, at 264.

[101] *Id.* at 266.

[102] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 350 (1938).

[103] MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 77 (1987).

[104] *Canada*, 305 U.S. at 352; Kelleher, *supra* note 87, at 267.

[105] Riva, *supra* note 97, at 14.

[106] 332 U.S. 631 (1948).

[107] *Id.* at 633.

H. Foster of the University of Oklahoma characterized as "a fake, fraud, and deception."[108]

In Gaines's case, the NAACP could potentially challenge the adequacy of the new, hastily established all-black school. However, in October 1939, NAACP lawyers had to inform the court that despite advertisements and a nationwide search, Gaines had gone missing under mysterious circumstances. Therefore, the case ended by January 1940.[109]

Charles Houston decided to follow the Gaines case with another Missouri admission case.[110] Lucile Bluford, a journalist who knew Gaines personally,[111] agreed to file a lawsuit after her application to the Missouri School of Journalism was rejected for the eleventh time because of her race.[112] The Missouri Supreme Court ordered the state to either admit Bluford to the University of Missouri or open a journalism school in Lincoln University within a reasonable time.[113] Missouri chose the latter, but Bluford, despite having wanted to go to the University of Missouri, refused to attend the new school, because her basic motivation had been not education, but desegregation.[114] The Journalism School at Lincoln University eventually closed its gates in February of 1944.[115]

V. BETWEEN LAW-IN-BOOKS AND LAW-IN-ACTION: STRATEGIC USE OF THE SOCIAL SCIENCES

Trying to achieve social reform through legal action is hard, time consuming, and expensive work. A years-long legal process challenging racial segregation in state schools could very well end with the admission of a single plaintiff, and have very little influence over the law or day-to-day social reality. In the meantime, defendants had time to find innovative ways to circumvent the court's decisions and maintain racial segregation. They opened new schools, closed public schools, exerted socioeconomic pressure on plaintiffs or their communities, and focused on individuals rather than the collective character of race. In such a setting, it was hard to be sure whether legal action was the right path for bringing about social change, and some indeed argued that this miscalculation led to the reinforcement of social inequalities, and, like in *Gaines*, exposed plaintiffs to socioeconomic backlashes and even mortal danger.

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[108] Jonathan L. Entin, *Sweatt v. Painter, the End of Segregation, and the Transformation of Education Law*, 5 REV. LITIG. 3, 22 (1986).

[109] Kelleher, *supra* note 87, at 268.

[110] Riva, *supra* note 97, at 19.

[111] *Id.* at 15.

[112] *Lucile Bluford Blazed Trail in Civil Rights: Former Editor of Newspaper Dead at 91*, COLUM. DAILY TRIB., June 15, 2003, at 1; Bluford v. Canada, 153 S.W.2d 12 (Mo. 1941).

[113] Riva, *supra* note 97, at 20.

[114] Kelleher, *supra* note 87, at 270.

[115] Riva, *supra* note 97, at 21.

And yet, in *Sweatt v. Painter*,[116] the NAACP successfully employed an innovative strategy, which incorporated social sciences studies into substantive law and mitigated the gap between the "law in books" and the "law in action." Heman Marion Sweatt's application to the University of Texas Law School was rejected solely on racial grounds,[117] even though at the time, Texas, much like Missouri, did not have a comparable law school for blacks.[118] As in *Gaines*, the trial court allowed Texas to establish an all-black law school, while denying the plaintiff any relief for a period of more than six months.[119] When Sweatt refused to attend the new, all-black law school,[120] which occupied a couple of rented rooms and had only two part-time instructors, the trial court examined the curriculum, the courses, and other tangible features of the new school, and determined that it reasonably met the constitutional requirement of "separate but equal."[121]

Though Sweatt's constitutional right to equal protection of the laws had clearly been infringed, the decision of the trial court was affirmed by the court of appeals, and Sweatt's application for a writ of error was denied by the Texas Supreme Court.[122] It did not matter that the newly established and smaller law school, with only twenty-three students, could not compare to the renowned University of Texas Law School, with its superior prestige, learning conditions, and longtime experience. This pattern of legal evasion soon became all the rage, with other states engaging in numerous strategies to resist integration of their higher education institutions.[123]

The U.S. Supreme Court eventually reversed the ruling of the Texas Supreme Court, and declared that Sweatt's constitutional rights under the Equal Protection Clause had indeed been violated.[124] The court did not focus on technical issues such as the facilities and resources offered by the new law school, but instead opened the door to social sciences experts, like Robert Redfield, who shined a light on the social repercus-

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[116] 339 U.S. 629 (1950).

[117] According to the Constitution of the State of Texas of the time, "[s]eparate schools shall be provided for the white and colored children, and impartial provision shall be made for both." TEX. CONST. of 1876, art. 7, § 7 (repealed 1969).

[118] The Texas Constitution authorized the establishment of a comparable "branch university" for blacks. However, the provision was not implemented. Alton Hornbsby, Jr., *The "Colored Branch University" Issue in Texas Prelude to Sweatt vs. Painter*, 61 THE J. OF NEGRO HIST. 51, 55–58 (1976).

[119] *Sweatt*, 339 U.S. at 632.

[120] The new school, which was part of Prairie View University, consisted of two rented rooms in Houston, and two part-time instructors. Entin, *supra* note 108, at 9.

[121] Sweatt v. Painter, No. 74,945 (126th Dist. Ct., Travis County, Tex., Dec. 17, 1946).

[122] The legal proceedings, however, exerted pressure on the legislature to establish the Texas State University for Negroes, and repeal the statute that authorized the establishment of Prairie View Law School. Entin, *supra* note 108, at 9 (what was then the Negro School of Texas is now known as Thurgood Marshall Law School).

[123] Entin, *supra* note 108, at 66 67.

[124] The court ruled in favor of Sweatt, but decided not to reexamine *Plessy*. *Sweatt*, 339 U.S at 636–37.

sions of racial segregation.[125] The court realized that dwelling on such details as the size of the school, its geographic location, or the number of available courses, would lead to endless and unhelpful comparisons. As the vast majority of lawyers, judges, and officials were white, segregation could never bring about equality. The court explained that the newly established school existed in an academic vacuum, and that its students were not instructed by the best minds in the legal profession. Such a scholastic environment, cut off from the dialogue and exchange of ideas of the field in question, could not compete with the setting provided by the University of Texas School of Law.[126]

The NAACP, in its interpretation and application of substantive law, turned to the social sciences in order to expose the reality of racial dehumanization.[127] After *Plessy v. Ferguson*, it was quite clear that "separate but equal" had little to do with either separation or equality.[128] The struggle that waged in the courts regarding proper out-of-state scholarships, the existence of comparable facilities, the size of classrooms, and types of courses taught enabled judicial analysis to disengage and distance itself from the reality of racial subordination and dehumanization. The role of the social sciences in this regard was to shine a light on the complex façade created by "objective" legal terminology, and to show how it allowed the judiciary, thus far, to dodge the reality of race relations in America.[129] This helped the court diminish *Plessy*'s scope and declare that segregation was inherently unequal.[130] And yet, the court did not overrule *Plessy* altogether, and its decision remained limited to the specific circumstances of Sweatt's case.[131]

On the same day the U.S. Supreme Court issued its decision in

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[125] Robert Redfield was the chairman of the Anthropology Department at the University of Chicago. In his testimony, he explained that segregation prevented students from meeting and learning directly from other group members. Furthermore, segregation left suspicion and prejudice-based distrust unchallenged. The NAACP also presented the testimony of Donald G. Murray, who completed his studies at the all-white University of Maryland following the court's ruling in his case. These testimonies were meant to move beyond technicalities, and shed light on the social repercussions of racial segregation. *See* Entin, *supra* note 108, at 36–38.

[126] *Sweatt*, 339 U.S. at 633–35.

[127] Marshall also submitted an amicus brief against segregation, signed by 188 people, among them seven distinguished professors from leading universities. Entin, *supra* note 108, at 46.

[128] This was especially evident in Justice Harlan's dissent. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896).

[129] Entin, *supra* note 108, at 38. Regarding the NAACP's strategy, it was maintained that "this novel approach harkened back to the point of Justice Harlan's dissent . . . whites had imposed segregation because they regard blacks as subhuman beings who were unfit to participate in civilized society. The equality of the separate facilities was entirely irrelevant to this overriding precept."

[130] *Id.* at 39. The testimony of social sciences experts "on the harmful effects of separate schools likewise addressed the wisdom rather than the constitutionality of the state's policy of segregation."

[131] Limiting the scope of his decision, Justice Vinson explained that "[b]roader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the case before the Court. We have frequently reiterated that this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible." Because of this traditional reluctance to apply constitutional interpretations to situations or facts which were not before the Court, a great deal of the research and detailed arguments presented by the plaintiffs was not strictly relevant to these specific cases, and was meant to confront the court's reluctance. *Sweatt*, 339 U.S. at 636.

Sweatt, it issued another closely related decision, which was also shaped by the NAACP's use of the social sciences. In *McLaurin v. Oklahoma State Regents*, an African-American student pursuing a Doctorate in Education was instructed to use separate facilities, which effectively excluded him from any interaction with the rest of the student body.[132] He had a separate desk in the anteroom outside the classroom, designated by a rail and a sign reading "Reserved for Colored," and a separate table in the school cafeteria, which he was to use at a different time than the rest of the students.[133] Much like in the *Sweatt* case, the Supreme Court held that a dialogue with other students—being able to exchange views and learn from other students—was an essential part of an effective academic experience, and therefore the restrictions imposed by the state hampered McLaurin's education and violated his Fourteenth Amendment right to equal protection.[134] And yet, once again, the ruling remained limited to the facts of McLaurin's case.

Justice Marshall said in *Murray* that there was more at stake than merely the rights of a single plaintiff—this was equally true in *Gaines*, *Bluford*, *Sweatt*, and *McLaurin*. State-imposed segregation inevitably limited the ability of individuals to grow by voicing their thoughts, learning from others, and exchanging ideas, views, and experiences. In this regard, segregation was a way to subjugate and control minds and perceptions, excluding weakened communities from access to knowledge, experience, and dominant traditions of the profession they wished to join. Nevertheless, the Supreme Court adhered to the principle that constitutional interpretation should be limited to the specific context and circumstances of the case before it.[135] Though inequality was part of the daily life of African-Americans, and their human rights were violated as a matter of course, the Supreme Court did not reexamine *Plessy*, and in so doing preserved the offensive exclusion it criticized in its decisions.

These rulings had a minimal, if not detrimental, impact on the lives of African-Americans. This fact, together with the social risks involved, the financial costs, and the lengthy proceedings—which in many cases ended with the admission of a single person into an institution where he was met with hostility—were all factors that could have deterred individuals from trying to enforce their rights in court.[136] The legal avenue for constitutional challenges against racial inequalities had therefore become ineffective, or at least insufficient as a single path for achieving social reform. Social and legal activists needed a different strategy that would be able to convince the courts to move beyond the boundaries of a specific case. It was the class action that was about to present the most

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[132] McLaurin v. Okla. St. Regents for Higher Educ., 339 U.S. 637, 640 (1950).

[133] *Id.* Following his lawsuit, the requirements were altered and he could eat at the same time as the rest of the students, though in a different, designated table.

[134] *Id.* at 640–41.

[135] *Sweatt*, 339 U.S. at 632 (citing *McLaurin*, 339 U.S. 637 at 642) (referring to its ruling in *Sweatt* in describing McLaurin's rights as personal).

[136] Sweatt left the university because of social pressures at the school.

suitable legal mechanism for this kind of massive social and legal reform. While many other factors shaped history at the end of War World II, the NAACP's class suits of the time were certainly of great historical significance. Therefore, examining the theories underlying those suits can present a new and important angle on how civil rights were defended in cases like *Briggs*.

VI. ACKNOWLEDGING SOCIAL REALITIES: THE HISTORICAL CONTEXT OF *BRIGGS*

Though in Clarendon County, South Carolina, seventy percent of the population was African-American, strict racial separation was observed, and whites dominated the social, economic, and political scene. Thus, thirty school buses were provided for white children, and none for blacks.[137] A petition regarding bus transportation, signed by more than a hundred African-Americans, was sent to R.W. Elliott, the school board chairman, and was rejected.[138] As a result of this protest, African-Americans were excluded from many businesses, and their children, many of whom were illiterate, were left with only two options: stay home and receive no education, or walk nine miles every day to get to school.[139] Moreover, the conditions in black schools were very different from those in the all-white schools, as the outhouses in the former had no running water, and the drinking water was kept outside in germ-infested buckets.[140]

Despite these obvious human rights violations, African-Americans were afraid to openly challenge the status quo, let alone file a lawsuit and enforce their constitutional rights in court.[141] A third of the African-American community was illiterate, and most of the property in Clarendon County was owned by whites.[142] African-Americans also knew from experience that challenging racial separation did not go unpunished—socioeconomic reprisals as well as death threats against plaintiffs and

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[137] Wade Kolb III, Briggs v. Elliott *Revisited: A Study in Grassroots Activism and Trial Advocacy from the Early Civil Rights Era*, 19 J. S. LEGAL HIST. 123, 124 (2011).

[138] Elliott's response was: "[w]e ain't got no money to buy a bus for your nigger children." Darlene Clark Hine, *The* Briggs v. Elliott *Legacy: Black Culture, Consciousness, and Community Before Brown*, 2004 U. ILL. L. REV. 1059, 1062 (2004). The petitioners suffered from various socioeconomic backlashes, including the realization of debts and mortgages. Kolb, *supra* note 137.

[139] On their way to school, pupils also had to cross a treacherous lake, where a young person had lost his life. Kolb, *supra* note 137.

[140] *Id.* at 152-53. Many believed that black schools were a disgrace. Buildings in white schools were made of bricks and mortar, while black schools were little more than shacks. The state invested ten times more in the education of white children than black children, and in more than ninety percent of black schools not a single library book could be found. *See* Steven J. Crossland, *Brown's Companions: Briggs, Belton, and Davis*, 43 WASHBURN L.J. 381, 385 (2004); Mark Tushnet, *Lawyer Thurgood Marshall*, 44 STAN. L. REV. 1277, 1282 (1992); Hine, *supra* note 138, at 1062.

[141] *See* Kolb, *supra* note 137, at 129.

[142] *Id.* at 126.

their families and friends were to be expected.[143] And the problem was only made worse by the growing distrust of African-Americans in the judicial system, which sustained and protected dehumanizing racial segregation for over half a century. This excluded African-Americans, along with their experiences and perceptions, from the process of judicial decision-making.[144]

As a rule, legal actions do not require public awareness or participation, but the NAACP did things differently when it tried to reshape substantive and procedural law through desegregation lawsuits. Reverend J. A. DeLaine, a pastor, teacher, civil rights activist, and the Secretary of the NAACP branch in Clarendon County, was determined to spur victims into action, with minimal socioeconomic backlashes. Therefore, he selected Levi Pearson, whom he believed could endure potential reprisals. The lawsuit, in which Pearson asked for a school bus to be provided for African-American children, was rejected on procedural grounds, but retaliation against him followed anyway.[145] DeLaine lost his teaching position, and Pearson was isolated both socially and financially. Shots were fired at DeLaine's home,[146] and Pearson lost his credit at white-owned institutions and could not obtain the equipment necessary for harvesting his crops.[147] Many of Clarendon County's business owners, who did not appreciate what they perceived as an awakening of the African-American community, placed signs in front of their businesses, forbidding entry to blacks.[148]

These socioeconomic circumstances, and the need to confront them in court, led to the development of a legal mechanism first introduced by the NAACP in *Briggs*.[149] The NAACP, which since the time of Charles Houston pushed for community awareness and participation,[150] asked DeLaine to find twenty people courageous enough to serve as plaintiffs.[151] As a result, several community meetings were held concerning the legal process, its purposes, and its risks, which helped rally support

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[143] After a petition signed by 107 people was sent to the school board, many of the petitioners were fired and their credit was cancelled. *Id.* at 138.

[144] There were not any black judges at the time, and very few black lawyers. African-Americans also had little influence on the legislative process due to their disenfranchisement.

[145] Kolb, *supra* note 137, at 131 (discussing *Pearson v. Clarendon County* in which Pearson lacked standing because the suit dealt with bus transportation in District 26, while he paid taxes in District 5).

[146] Stephen E. Gottlieb, *Brown v. Board of Education and the Application of American Tradition to Racial Division*, 34 SUFFOLK U. L. REV. 281, 282 (2001).

[147] Kolb, *supra* note 137, at 131.

[148] *Id.* at 138.

[149] Erica Frankenberg, *The Authority of Race in Legal Decisions: The District Court Opinions of Brown v. Board of Education*, 15 U. PA. J. L. & SOC. CHANGE 67 (2012); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 400 (1975).

[150] *See* Ogletree, Jr., *From Dred Scott to Barack Obama*, 25 HARV. BLACKLETTER L.J. Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 347 48 (2005).

[151] Kolb, *supra* note 137, at 133.

for social reform litigation.[152] The support of the African-American community complemented the efforts of the NAACP to find a place for the social repercussions of racial segregation within relevant constitutional doctrines by turning to the social sciences.

In *Briggs v. Elliott*, the NAACP brought forth a class suit with sixty-six plaintiffs, on behalf of the entire African-American community.[153] A cadre of social scientists were invited to present to the court evidence of the social reality of racial segregation.[154] Among them was Matthew Whitehead,[155] who examined school facilities, and described to the court the fundamental differences between the educational opportunities enjoyed by black and white pupils because of the difference in facilities.[156] Kenneth Clark,[157] who together with his wife Mamie, created the famous "doll tests," tested sixteen students from Clarendon County a few days before the trial[158] and presented his findings in court. The results showed the detrimental effects of racial segregation on the psychological development of black children.[159] David Krech maintained that racial segregation communicated the message that race was a relevant, if not dominant, factor in education, and this, he argued,[160] programmed people to believe that blacks were inferior.[161] Finally there was James Hupp,[162] who testified regarding the success of racial integration in his school.[163]

Realizing that these social scientists were planning to testify, Robert Figg, the defendants' attorney, conceded at the beginning of the trial that there were inequalities between whites and African-Americans.[164] The purpose of this admission was to prevent some of these testimonies from being heard in court, as Figg feared they might adversely affect the position of the judges regarding racial segregation.[165] In other words, Figg wished to conceal the dehumanization, which was part and parcel of

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[152] *Id.* at 135.

[153] *Briggs v. Elliott*, 98 F. Supp. 529, 538 (E.D.S.C. 1951). The plaintiffs included twenty parents and forty-six students. The action was brought by the plaintiffs "and on behalf of many others . . . and the suit is denominated a class suit . . . ." *Id.* at 538. The initial action was brought to court in order to equalize educational opportunities. However, Judge Waring, who appreciated the magnitude of this lawsuit, suggested that the NAACP dismiss the case, and file a new one that directly attacked the separate but equal doctrine. Kolb, *supra* note 137, at 137.

[154] Among these experts were: Matthew Whitehead, Kenneth Clark, Harold McNalley (a Professor of education at Columbia University), Ellis Knox (a professor of education at Howard University), James Hupp, David Krech, Helen Trager (a lecturer and educational consultant), and Robert Redfield. *Id.* at 145–60.

[155] Assistant Professor at Howard University. *Id.* at 145.

[156] *Id.* at 145.

[157] Assistant Professor of Social Psychology at the City College of New York. *Id.* at 145.

[158] Kolb, *supra* note 137, at 146, 155.

[159] His tests concluded that black children suffered from low self-esteem, and feelings of rejection and inferiority. *Id.* at 146, 155.

[160] Professor of Psychology at the University of California. *Id.* at 145.

[161] Kolb, *supra* note 137, at 159.

[162] Dean of Students and Professor of Education at West Virginia Wesleyan College. *Id.* at 145.

[163] Kolb, *supra* note 137, at 156.

[164] *Id.* at 150.

[165] *Id.*

the legal system of racial separation.[166] Both Judge Parker's majority opinion in *Briggs*, which upheld the *Plessy* ruling, and Judge Waring's dissent, which declared that racial segregation was per se unequal, were strongly affected by these testimonies. Judge Parker emphasized the "overwhelming authority" of *Plessy* and minimized the "theories advanced by a few educators and sociologists."[167] Judge Waring, on the other hand, maintained that many of these educators had a national reputation and that their studies and tests showed beyond any doubt that racial separation was humiliating and that it ineradicably influenced the minds of black and white children alike.[168]

When *Briggs* was later consolidated with four other cases into *Brown*,[169] there were distinct echoes of Judge Waring's dissent.[170] The dissent first declared that racial segregation in education, which was supported for more than half a century by the United States Congress and approved by the Supreme Court,[171] violated the Equal Protection Clause of the Fourteenth Amendment.[172] Eventually, the NAACP's attempt to bridge the gap between socio-economic realities and legal doctrines played an important role in the transformation of substantive law and in the realization that legal procedure could serve as a platform for political and social empowerment.

VII. ACKNOWLEDGING STATUS: PROCEDURAL LAW IN *BRIGGS*

As mentioned above, status was the driving force behind group litigation in seventeenth century English courts. Many years later, in desegregation class suits, the court was compelled once again to acknowledge, in overcoming individual differences, that the status of race demanded class treatment. While constitutional rights are personal, hundreds of African-Americans congregated outside the courtroom, and a great many

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[166] His attempt was partially successful, as it shortened the proceedings and caught the plaintiffs by surprise. There were other experts scheduled to appear in court, who could not do so prior to closing arguments. *See Briggs v. Elliott*, 98 F. Supp. 529, 535-36 (E.D.S.C. 1951); Frankenberg, *supra* note 149, at 76.

[167] *Briggs*, 98 F. Supp. at 537.

[168] *See id.* at 547.

[169] The consolidated cases of Brown, commonly known as the "school segregation cases" included *Bolling v. Sharpe*, from Washington, DC; *Gebhart v. Belton* and *Gebhart v. Bulah*, from Delaware; *Briggs v. Elliott*, from South Carolina; *Davis v. County School Board*, from Virginia; and *Brown v. Board of Education*, from Kansas. All of these constitutionally challenged the racial segregation in public schools. Brown v. Bd. of Educ., 347 U.S. 483; 486 n.1 (1954).

[170] On the substantial impact of Judge Waring's dissent in *Brown*, *see* Harold R. Washington, *History and Role of Black Law Schools*, 18 HOWARD L.J. 385, 413 (1975).

[171] Judge Parker emphasized the wide support enjoyed by racial segregation: "the Congress of the United States have for more than three-quarters of a century required segregation . . . . [when] this has received the approval of . . . Chief Justice Taft and Justices Stone, Holmes and Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights." *Briggs*, 98 F. Supp. at 537 (Parker, J.).

[172] *Id.* at 548 (Waring, J., dissenting).

people participated in the legal proceedings of *Briggs*. The African-American community realized that this suit was about more than the specific circumstances of the individual plaintiff—status still defined their destiny. The need, formerly discussed, to face and bring to light the socioeconomic reality in desegregation cases, affected procedural law as much as it did substantial legal doctrines. There was an underlying theory behind the procedural decision to file all five cases that were consolidated into *Brown* as class actions. The NAACP had years of experience with constitutional cases challenging state-ordained racial segregation. Its decision to employ class actions and testimonies by social scientists was the result of an evolution in civil rights litigation—an inevitable response to the difficulties that arose during individual suits.

A. Grassroots Empowerment: Moving the Victim into Action

Though the suits were expected to bring about backlashes against the African-American community, the plaintiffs had to face a deeper problem that went to the heart of their status in society. They were born, raised, and educated in a country that separated the races as a matter of law. Plaintiffs had to defy their way of life, and the age-old social and legal system that perpetuated racial segregation. African-Americans belonged to a weakened community. The daily reality of racial separation, which shaped their lives, was meant to make them understand that they were inferior and could not participate in the judicial, political, and academic spheres. This caused many African-Americans to embrace passivity and internalize their subordinate role. And so, the first step to enforcing their constitutional rights had to be through social and psychological empowerment.[173] Court rulings alone could not break down old stereotypes and prejudices—not unless local African-American communities organized against ongoing discriminatory practices.[174] An important part of the process was training and mentoring African-American lawyers, who then litigated desegregation cases as equals with white lawyers. In fact, twenty-eight out of the thirty lawyers who represented the plaintiffs in the *Brown* cases, including Thurgood Marshall,[175] were taught and mentored by Charles Hamilton Houston.[176]

The NAACP realized that if the community remained mobilized and active throughout the legal process and after its completion, it could

[173] Charles Houston believed that "lawsuits mean little unless supported by public opinion.'" The purpose of litigation was therefore to "arouse and strengthen the will of the local communities to demand and fight for their rights." Courts were used by civil rights lawyers as a "medium of public discussion [attempting] to activate the public into organized forms of protest and support behind these cases." Mack, *supra* note 150, at 347–48.

[174] Ogletree, *supra* note 150, at 16.

[175] *Id.* at 6.

[176] *Id.* at 16.

better cope with the social and economic turmoil that was bound to accompany desegregation suits, as well as the groundbreaking decision that might come. After all, it was one thing to make a single plaintiff like Lloyd Gaines vanish without a trace, and in so doing bring an end to his suit, but that simply was not practical with sixty-six plaintiffs and thousands of people who took part in the class action suits. Eventually, the struggle against racial segregation could not be boiled down to a single court decision, and a continued concentrated effort, both social and legal, was necessary to achieve success.

The participation of many African-Americans in the class suit—in community meetings and gatherings of hundreds of people outside the federal courtroom[177]—emboldened and empowered the weak in their legal struggle against state law,[178] and the social norms and practices that separated the races.[179] Even the extreme backlashes to *Briggs*, like the shooting and arson committed against J.A. DeLaine,[180] did not deter the community, nor the legal proceedings, which would eventually change American race relations.

B. Inner Conflicts, Gradual Changes, and Compromises

The limited influence of decisions like *Sweatt* and *McLaurin*, as well as the fact that constitutional rights were, early on, thought of as personal, reflect the view that declaratory and injunctive relief can produce different results in different circumstances. At the other end of the spectrum are modern class actions, in which a single plaintiff can represent millions of individuals. The NAACP, in the desegregation class actions, encouraged thousands to participate in the suit—though this was not strictly necessary—because it understood the importance of that participation. In *Briggs*, community meetings emboldened sixty-six plaintiffs to lead the class suit, and hundreds to gather outside the courthouse. This strategy was crucial to the success of *Briggs*, since there were inner conflicts within the African-American community, and overall support of the collective goal was essential.[181]

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[177] Kolb, *supra* note 137, at 148.

[178] On the empowerment of weakened communities through their involvement and active participation in legal proceedings, *see* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1064 (1989).

[179] Kolb, *supra* note 137, at 163 (emphasizing the importance of community involvement, explaining that "[a]t the grassroots level the change of the Clarendon County plaintiffs looms large. They were the great actors in this drama, not the lawyers in the courtroom or the experts that came to testify.").

[180] These violent acts were supported by state officials. When DeLaine's home was set on fire, the fire department decided not to extinguish it, and when his house was shot at and he fired back in self-defense, a warrant was issued for his arrest. DeLaine had to leave South Carolina and settle in New York. *Id.* at 147, 163; *see also* Gottlieb, *supra* note 146, at 282.

[181] *See* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 437 (2000) (discussing the importance of giving

Neither declaratory nor injunctive relief could resolve these inner conflicts. There are many examples of this: investment in integrated schools in all-white neighborhoods often times came at the expense of schools in black neighborhoods; black teachers in previously all-black schools feared for their jobs;[167] and many African-Americans were worried that complete integration would mean sending their children into a hostile environment.[182] But the participation of the community was helpful in setting priorities and reaching a consensus regarding the purpose of the class suit and the necessary compromises, which were an inevitable part of the piecemeal process of equalizing the socioeconomic status of African-Americans. As such compromises sometimes adversely affected certain groups in the community, the process had to be gradual—the community's involvement in the process helped legitimize it and alleviate its negative repercussions.[183] This process was especially important in *Briggs*, when defendants tried to expose these inner conflicts, but as a result of community participation, they could not find a single black leader to defend segregation in court.[184]

C. Adversarial Equality and Class Suits

In his dissent, Judge Waring emphasized the efforts and financial expenditures of the plaintiffs.[185] After all, an individual who challenges social norms and practices in court, which have been supported for years by laws and state officials, is at an extreme disadvantage. The state possesses virtually unlimited funds, which it can invest in research as well as the judicial proceedings, while in most cases, the individual plaintiff does not have much money, or access to the information or manpower necessary to conduct serious research and examine state acts and their repercussions. The class suit was meant to rectify this imbalance between the individual and the state—that was the role of the sixty-six plaintiffs, the community meetings, and the gatherings outside the courtroom. One person alone could likely not gather public support, raise the funds for bringing forth witnesses with national reputations, or conduct legal research and analysis. The class action leveled the playing field in that it allowed for the aggregation of investments and efforts. This proved vital

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voice to inner conflicts within the class in desegregation cases).

[182] *See* Ronald R. Edmonds, *Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits*, 3 BLACK L.J. 176, 177 (1973); Jessica Davis, *The Historical Convergence in the Desegregation Policy of Education in the United States*, 7 J. RACE GENDER & POVERTY 37, 50 (2016).

[183] *See* Edmonds, *supra* note 180, at 177, 178 81 (stating "[m]ore than any other category of litigation, the fashioning of relief in desegregation litigation goes to the core of community . . . . Effective community requires the power to make choices . . . .").

[184] Kolb, *supra* note 137, at 142.

[185] Briggs v. Elliott, 98 F. Supp. 529, 540 (E.D.S.C. 1951).

for the success of desegregation suits.[186]

D. Courts' Legitimacy

Social reform litigation made things difficult for both the court and the plaintiffs, as upsetting the status quo of race relations and challenging state laws and practices inevitably provoked anger and resistance. The class suit in *Briggs* gave the plaintiffs tools to cope with possible white retaliation, as a part of a cohesive African-American community. Judges also suffered from this socioeconomic turmoil, though they did not necessarily enjoy the benefits of this communal support.[187] The important thing was that the African-American community let the court understand that it supported the litigation and would do what was necessary to enforce and implement its ruling after the proceedings ended. That made this legal procedure suitable for groundbreaking decisions.[188]

Judge Waring was aware of the effect his liberal rulings would have on his judicial career, and in time, he became gradually isolated as he predicted.[189] He realized that if he were about to undergo such hardships, the case should be a deserving one. The civil rights class action served this purpose. Judge Waring was the only judge who stated that *Briggs* was a class suit. In his decision, he discussed the magnitude of this class suit, the large number of plaintiffs and witnesses, and the energy and resources spent on research, conducting interviews, and gathering data. He also expressed his belief that a case of this magnitude was the only viable opportunity to overcome judicial evasion and provide the plaintiffs with an adequate remedy.[190]

While the Court in *Sweatt* and *McLaurin* limited its ruling to the circumstances before it, Waring believed that such a restrictive view overlooked the collective repercussions of racial segregation and would force the plaintiffs to take part in endless court battles.[191] The procedure

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[186] Collective collaboration in desegregation cases made raising necessary funds for the legal proceedings possible. *See* David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 393 94 (2000) (explaining the economics of scale in class action litigation).

[187] Crossland, *supra* note 140, at 389 n.80 (detailing the substantial pressures Judge Waring faced following his dissent in *Briggs*, and that "[l]ess than a year later, socially ostracized from the Charleston Community, Judge Waring abruptly retired from the federal bench and left for New York, never again to live in his native state.").

[188] "Individual plaintiffs asking relief from discriminatory practices might be viewed by the court and by the community as malcontents or eccentrics. The reception given to the commencement of such an action would probably be much better if it were brought in the name of and on behalf of the entire group affected by the segregation. Class representatives would appear not so much as a few plaintiffs with a grudge, but as part of a group with a justifiable claim." Comment, *supra* note 67, at 581.

[189] *See* Gottlieb, *supra* note 146, at 282 (discussing Judge Waring's social isolation); *see also* Kolb, *supra* note 137, at 136; Frankenberg, *supra* note 149, at 85.

[190] *Briggs*, 98 F. Supp. at 540.

[191] *Id.* at 540.

of a class action allowed him to step away from the specific circumstances and address the societal suffering caused by racial segregation, but this was only made possible by the magnitude of the class suit, and by its commitment to the community it represented.

VIII. CONCLUDING INSIGHTS

The civil rights class actions of the 1950s and '60s, which called for a progressive judicial expansion of the boundaries of Rule 23, and inspired the 1966 Advisory Committee, presented a unique model of representation. Since the time of Charles Houston and the lead-up to *Brown*, the NAACP showed a strong commitment towards class members, and worked towards creating community awareness and participation. This took many forms: arranging community meetings, preparing petitions, and gathering hundreds of signatures; maintaining contact with dozens of plaintiffs, orchestrating public demonstrations, and getting hundreds of people to attend trials. In other words, the civil rights class actions of the 1950s gave weakened communities a voice, let them share their knowledge and experiences, and allowed them to entertain the possibility of gradual change and compromise.

One person alone cannot challenge socially accepted norms and state power, especially when that individual belongs to a weakened community in which members have learned through painful experience to keep their heads down and accept the social reality. In much the same way, a court decision by itself cannot change social perceptions, beliefs, and prejudices.[192] The need for a procedural answer like that of the class actions of the 1950s arose from this realization as well as from the difficulties raised by individual suits. It integrated social activism and legal action, allowing one to complement the other. The greatest struggles of the civil rights movement—the Montgomery bus boycott and the march from Selma to Montgomery, both headed by civil rights activist Martin Luther King, Jr.—were based on a synergy between legal class actions and social participation and empowerment.[193]

The purpose of mass protests and demonstrations against the segregation in municipal buses or the violation of the voting rights of African-Americans was to serve as "a tool for reaching out and activating the victim and challenging the victimizer."[194] In reality, the socio-legal actions did not eliminate racial segregation, and in certain cases they even made things worse for African-American pupils. The states involved adopted

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[192] *See* Mack, *supra* note 150, at 348–49 (quoting Charles Houston, "a court demonstration unrelated to supporting popular action is usually futile and a mere show.").

[193] *See* Browder v. Gayle, 352 U.S. 903 (1956); Williams v. Wallace, 240 F. Supp. 100 (1965).

[194] Winston P. Nagan, *Struggle for Justice in the Civil Rights March from Selma to Montgomery: The Legacy of the Magna Carta and the Common Law Tradition*, 6 FAULKNER L. REV. 1, 14 (2014).

varied strategies for evading *Brown*,[195] some of which were so effective they managed to prevent its implementation for decades. Moreover, the use of class actions was not the only reason for *Brown's* admittedly limited success. Yet, these proceedings did live up to Martin Luther King Jr.'s words: they empowered the weak, broke old stereotypes of passivity, and gave birth to a collective struggle against human rights violations.[196] *Brown* may have had limited impact, but because of it the weak had gained active collaborators in their fight for racial equality.[197]

In the English courts of the seventeenth century, status stood at the heart of group litigation. Yet in a democracy grounded on equality and liberal rights, basing litigation on status goes against the very nature of the constitutional rights of the individual. In 1950s America, there existed a fundamental clash between constitutional rights and racial segregation. In response to this discord, class actions like *Briggs* and *Brown* sought reform by moving away from individual circumstances and technicalities to emphasize the dehumanizing collective wrong of racial segregation. Putting the collective purpose of racial equality above the individual context helped mobilize African-Americans and transform class actions into a platform for political empowerment that went on to make a real change in people's lives.

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[195] *See* Washington, *supra* note 170 (stating that one form of states' resistance was legal attacks against the NAACP).

[196] Mack, *supra* note 150, at 347–48 (clarifying that courts were used by civil rights lawyers as a "medium of public discussion [attempting] to activate the public into organized forms of protest and support behind these cases.").

[197] See Paul R. Dubinsky, *Justice for the Collective: The Limits of the Human Rights Class Action*, 102 MICH. L. REV. 1152, 1158–59 (2004) (stating that in human rights class actions, "[t]he ties among class members are more likely to predate the litigation and to be lasting and deep . . . victims can be expected to form tight bonds to one another and to the persecuted group . . . .").