The Misguided Search for Class Unity

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ABSTRACT

This Article focuses on a conflict at the core of federal class action law between an "internal" and an "external" view of the class. The internal view sees the class as a device constructed by the judge to achieve the functional goals of Rule 23. The external view sees the class as a group with a unity existing prior to the certification decision. The conflict is connected at a deeper level to competing normative models of the class action. The outcome-based model, linked with the internal view, focuses on the benefits of class litigation for outcome quality and assumes that good outcomes go a long way toward satisfying due process values. The process-based model, linked with the external view, focuses on litigant autonomy, requires clear and strong outcome quality gains to justify class treatment, and confines the class action to classes with sufficient group cohesion to support the legitimacy of representative adjudication.

While these two views have both contributed to the shape of modern class action law, the external view has gained considerable ground over the past fifteen years. This Article first traces the two views through class action history and describes the growing influence of an externally defined "cohesive class" requirement. The Article then examines the normative case for the external view and the process-based model and finds it seriously wanting. Two conclusions emerge from this analysis. First, if we are to make progress with the class action, the debates must be informed by a more rigorous account of due process and adjudicative legitimacy. Second, problems with the class action should be confronted directly rather than addressed indirectly through a cohesiveness requirement that sends courts on a hopeless, misguided search for class unity.

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INTRODUCTION

The federal class action contains a conceptual and normative conflict at its core. The conceptual conflict is between two different views of what constitutes a certifiable class: an internal view and an external view. The internal view sees the class as an artificial device created by the judge to serve efficiency, remedial efficacy, fairness, and other Rule 23 goals.[1] From this perspective, class unity is exclusively a by-product of the certification process. It is simply the result of defining the class in whatever way best serves class action goals and it imposes

[1] FED. R. CIV. P. 23.

no independent constraint on the certification decision. For example, if efficiency is the reason for class treatment, the class must share enough common questions to make class litigation efficient. If the class action instead is justified for reasons of remedial efficacy, the class must share a common legal theory that supports class-wide relief. In both cases, the only unity the class must have is the commonality that the justification requires.

By contrast, the external view sees the class as a group with unity existing independently of the certification decision. This unity or cohesiveness—whether it consists of shared interests, identical legal rights, or predominating common facts—is not a product of design choices made at the certification stage. Rather, it exists prior to and constrains the certification decision. Indeed, it might even scuttle certification when class treatment is otherwise desirable on functional grounds. For example, a judge committed to the external view might deny certification because individual questions fragment the class too much for it to qualify as a litigating unit or entity, even though common questions are prominent enough to warrant certification on efficiency grounds. To be sure, this result depends on the judge's conception of class unity—a point I explore in some detail later—but the important thing to note is that the external view of class unity, however conceived, does not turn on the functional goals served by class treatment.

These two views of the class are associated at a deeper level with two competing normative models of the class action. The internal view fits an outcome-based model, and the external view fits a process-based model. The outcome-based model focuses primarily on the benefits of class litigation for outcome quality and assumes that good outcomes go a long way toward satisfying due process and legitimacy concerns. The process-based model focuses on individual litigant autonomy and the day-in-court right, requires clear and very strong outcome quality gains to justify class certification, and confines the class action to classes with sufficient group cohesion to mitigate individual participation concerns and to support the legitimacy of representative adjudication.

These models and their corresponding conceptions of a proper class exert a powerful influence on the shape of modern class action law. Over the past fifteen years, the external view, along with the process-based model, has gained considerable ground through cases

like *Amchem Products, Inc. v. Windsor*,[2] *Ortiz v. Fibreboard Corp.*,[3] *Wal-Mart Stores, Inc. v. Dukes*,[4] and perhaps less obviously, *Comcast Corp. v. Behrend*.[5] The result is that class certification has become more difficult to obtain.

Judges and scholars divide sharply on the merits of this trend.[6] This is hardly surprising given the major impact class actions have had on litigation. What is surprising, and rather troubling, is that the two sides frequently talk past one another. Critics of restrictive class action developments tend to argue from an outcome-based perspective and assume an internally defined class.[7] They emphasize functional benefits and propose reforms to manage agency costs while still preserving a robust class action option. However, arguments of this sort fail to join issue when the opposition is concerned about participation and legitimacy. To make headway, both sides must engage each other's views on their own terms. In particular, class action proponents must be prepared to challenge directly the process-based model and its commitment to an externally defined class. And to do that, they have to develop a clearer understanding of due process, legitimacy, and participation values in the class context.

For example, some scholars criticize the *Amchem* Court for focusing on conflicts within the class rather than conflicts between the attorney and the class.[8] Because the attorney controls settlement, they argue, attorney-class conflicts are much more significant than intraclass conflicts. This is an important point, and it captures one strand of the *Amchem* opinion. But it also misses another central concern of the Court. As Part III explains, the *Amchem* Court focused on

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2 Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

3 Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

4 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

5 Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).

6 For examples of judges disagreeing about the best approach to class certification, one need only compare the majority with the dissenting opinions in *Amchem*, 521 U.S. 591, *Ortiz*, 527 U.S. 815, *Wal-Mart*, 131 S. Ct. 2541, *Comcast*, 133 S. Ct. 1426, and *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013). For disagreement among scholars, compare Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (highly critical of restrictive certification decisions), with MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009) (arguing that the class action broadly conceived is unconstitutional, contrary to the Rules Enabling Act, and normatively illegitimate).

7 *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 436–38 (2000); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 391–92; Klonoff, *supra* note 6, at 830–31.

8 *See, e.g.*, Issacharoff, *supra* note 7, at 383–85.

intraclass cohesion not so much to avoid conflicts of interest that might impair outcome quality, but to assure the degree of intraclass homogeneity necessary for due process and legitimacy. In short, *Amchem* reflects the influence of an external conception of the class and a process-based model of the class action. To criticize the decision on its own terms, therefore, one must be prepared to challenge the Court's process-based analysis directly.

The body of this Article is divided into four parts. Part I describes the difference between internal and external views and their connection to outcome-based and process-based models. With this conceptual and normative background in place, Part II then briefly traces the influence of external and internal views on the development of the class action historically. The representative suit of the eighteenth and nineteenth centuries was based on an external conception tied to a formalistic theory of the class action, and the original version of Rule 23 was drafted in much the same spirit. The 1966 revision explicitly rejected the formalism of the 1938 Rule and substituted a pragmatic and functional approach. The pragmatic approach called for an internal view and an outcome-based model, and the 1966 Advisory Committee went some distance in that direction. It stopped short of embracing the internal view completely, however, and chose to structure some provisions of the new Rule to reflect an external view instead.

Part III describes the post-1966 class action world and focuses in particular on developments over the past fifteen years. It argues that an external view of the class has become more influential in recent years and that this trend, in turn, has had a significant impact on several areas of class action law. For example, the predominance requirement of Rule 23(b)(3), once understood mainly as a proxy for judicial economy, has become a test for class unity satisfying due process and legitimacy constraints. Similarly, 23(a) commonality has shifted from a virtually useless certification requirement to a potentially important limitation aimed at assuring a sufficiently unified class.

Part IV turns to the normative argument for a unity or cohesiveness requirement. The Supreme Court seems to rely more on intuition than rigorous analysis in this area, and it has never explained how class unity actually serves due process and legitimacy values. Part IV shows that the day-in-court right and the conditions for adjudicative legitimacy, as properly understood, do not support an externally defined unity requirement. Instead, they support an internal view of the class and an outcome-based model of the class action.

I. INTERNAL VERSUS EXTERNAL VIEWS

The following discussion illustrates the difference between internal and external views using a concrete example and then describes the relationship between these views and competing models of the class action. The framework I develop here is organized on three levels: views about a proper class, models of the class action, and theories of participation. The two different *views* of what constitutes a proper class are each connected to a particular *model* of the class action, which in turn depends on a *theory* of participation. An internal view of the class, for example, fits most comfortably with an outcome-based model of the class action, which depends on an outcome-based theory of participation. Similarly, an external view of the class fits a process-based model, which depends on a process-based theory of participation.

Before proceeding, I should make clear that I am not suggesting that jurists actually think about all the analytic and normative distinctions described here and consciously choose one view/model/theory combination over the other. I do assume, quite sensibly I believe, that most jurists hold some general beliefs, even if only partially formed, about the limits of adjudication and the proper structure of lawsuits and litigation. These beliefs need not be organized into a general theory or even be fully consistent in order to predispose a jurist toward a restrictive or a generous approach to class certification. My view/model/theory combinations are useful for identifying which beliefs push in which directions and explaining why they do so.

A. An Illustration

Consider a mass tort involving a drug used by thousands of people, who now complain of injuries. Suppose that the plaintiffs seek to certify a nationwide class. The internal and external views approach the certification decision very differently and with quite different implications for Rule 23's certification requirements.

1. The Internal View

Someone approaching the certification decision from an internal perspective would ask whether the class, as defined, optimally serves class action goals. In our mass tort example, where injuries are severe enough to make individual litigation cost-justified, the class action serves two broad purposes: (1) it promotes judicial economy and decisional consistency, and (2) it improves outcome quality by reducing delay costs and equipping plaintiffs with economy-of-scale advan-

tages.[9] It follows that the class itself should be defined in whatever way best serves these goals.[10]

This approach has specific implications for how Rule 23 should be applied. Rule 23(b) is the key provision for the internal view because it focuses on the functional reasons for class treatment, and functional reasons drive certification and class definition within the internal view. As for Rule 23(a), (a)(1)'s numerosity requirement expresses a preference for nonclass litigation and (a)(4) plays the important role of assuring adequate representation. But (a)(2) commonality and (a)(3) typicality make little sense as independent certification requirements. From an internal perspective, Rule 23(a)(2)'s common question requirement adds nothing that is not already covered by 23(b), because the only commonality a class must share is that which serves 23(b)'s class action goals.[11] And Rule 23(a)(3)'s requirement that the claims of representatives be typical of the claims of the class collapses into (a)(4) adequacy of representation, because the main reason for typicality is to assure that the class representative and class attorney vigorously litigate in the interests of the class.[12] Moreover, given the realities of modern class action litigation and the agency costs endemic to the attorney-class relationship, the internal view, concerned as it is with achieving outcome goals, focuses mainly on potential conflicts of interest between the class attorney and the class when analyzing adequacy of representation under Rule 23(a)(4).[13]

As for Rule 23(b), the crucial provision for our mass tort hypothetical is 23(b)(3). From an internal perspective, (b)(3)'s predominance and superiority requirements are understood as rough ways to

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9 *See* Robert G. Bone, *Class Action*, *in* PROCEDURAL LAW AND ECONOMICS 67, 68–70 (Chris William Sanchirico ed., 2d ed. 2012). In keeping with the general approach in the class action literature, "judicial economy" here refers to litigation-related cost savings. This is distinct from overall efficiency, which also counts incentive effects. I consider the latter when I analyze outcome error, the impact of delay on meaningful recovery, and so on.

10 *See, e.g.*, Simer v. Rios, 661 F.2d 655 (7th Cir. 1981) (debating the propriety of the class definition in functional terms, with the majority focusing on judicial economy and compensating those actually harmed and the dissent focusing on enabling litigation to provide relief).

11 For example, (a)(2) commonality is subsumed by (b)(3) predominance and by the (b)(2) requirement of a class-based wrong and remedy. Moreover, if the common question requirement is relevant at all for 23(b)(1), it should be satisfied by the same conditions that generate the unfair externalities supporting (b)(1) treatment.

12 *See* Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982) (noting that the commonality and typicality requirements of Rule 23(a) tend to merge with the adequacy-of-representation requirement).

13 *See, e.g.*, Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1390–93 (2000); Issacharoff, *supra* note 7, at 383–85.

measure the benefits of class treatment. In particular, predominance serves as a proxy for judicial economy gains and litigation parity benefits.[14] On the one hand, as the number of *common* questions increases, the cost savings from aggregate treatment also increase, and so do the outcome quality benefits from equalizing economy-of-scale advantages across the party line. On the other hand, as the number of *individual* questions increases, the additional management costs of class treatment increase and the beneficial effect of class adjudication on delay costs diminishes.[15] The requirement that common questions predominate over individual questions asks the judge to balance these benefits and costs.[16]

Returning to our mass tort hypothetical, a nationwide class creates serious predominance problems when choice of law rules require the application of different state substantive laws and the tort claims raise individual factual questions that vary across the class.[17] This intraclass heterogeneity can be handled to some extent by creating issue classes pursuant to Rule 23(c)(4) and subclasses pursuant to 23(c)(5). Redefining the class in these ways makes sense within the internal view if it furthers the goals of judicial economy and outcome quality for both trial and settlement. Issue classing is desirable, for example, as long as the certified issue is important enough that the benefits of

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14 Thus, I do not find the predominance requirement quite as mysterious as Professor Erbsen does. *See* Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1059–67 (2005). For an excellent example of a certification analysis from the internal perspective, see Judge Posner's opinion in *Butler v. Sears, Roebuck & Co.* ("*Butler I*"), 702 F.3d 359, 362 (7th Cir. 2012) ("Predominance is a question of efficiency."), *vacated and remanded*, 133 S. Ct. 2768 (2013), *reinstated*, 727 F.3d 796 (7th Cir. 2013). For more on *Butler I*, see *infra* note 172.

15 Professor Erbsen argues that claim heterogeneity can also distort trial and settlement through cherry-picking, claim fusion, and ad hoc lawmaking. *See* Erbsen, *supra* note 14, at 1007–23. This makes it harder for the trial judge to manage the class action so as to ensure a fair outcome. The magnitude of these effects is unclear, however, and there are ways to mitigate them short of denying certification, such as by the use of random sampling and bellwether trials. *See generally* Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008).

16 From an internal perspective, Rule 23(b)(3)'s superiority requirement overlaps with predominance. Its separate work includes checking whether there are other ways of adjudicating the cases that might better serve economy and outcome quality goals, or other ways that provide better participation opportunities for class members without sacrificing functional benefits.

17 *See, e.g.*, Cole v. Gen. Motors Corp., 484 F.3d 717, 724–30 (5th Cir. 2007) (cataloging the variations in state law that showed the plaintiffs had not met their burden of demonstrating predominance and reversing (b)(3) certification of a nationwide class action); Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1189–90 (9th Cir. 2001) (affirming district court's refusal to certify a nationwide class in part on the ground that the varying tort laws of forty-eight states and individual factual issues scuttle (b)(3) predominance).

adjudicating it in a class context justify the additional costs that class treatment generates. And subclassing is a good idea as long as each subclass is large enough and the common questions substantial enough to justify the additional costs of managing multiple classes.

I have described the process of class definition at some length to illustrate the core point. The internal view does not assume any prior constraints. The class is just whatever set of parties and claims best serves Rule 23's goals.

2. *The External View*

The external view of the class has quite different implications. It demands that the class be unified in some way before it can be a candidate for certification. Our mass tort class consisting of all drug users nationwide would be vulnerable on this view. While there are certainly common questions, there are also important individual questions that divide the class. Moreover, even common questions do not exactly unite the class. They support the functional reasons for class treatment, but the external view requires class unity before any functional analysis is performed.

Rule 23's requirements are construed differently from an external perspective. For one thing, (a)(2) commonality and (a)(3) typicality make much more sense as separate requirements distinct from 23(b). In particular, (a)(2) serves as a check on intraclass unity and (a)(3) assures that class representatives share the same characteristics that unite the class.[18] If the class satisfies these provisions, and thus possesses a minimum degree of required unity, (a)(4) adequacy of representation steps in to assure that the class attorney is capable and class representatives have no idiosyncratic personal preferences that might compromise class member interests.[19]

From an external perspective, Rule 23(b)(3)'s predominance requirement is not necessarily about judicial economy or outcome quality; instead it can serve as a metric for ensuring that the class has the type of unity a (b)(3) suit requires. Understood in this way, predominance is about assuring that there is enough intraclass homogeneity to qualify the class for representative litigation. As we shall see in Part

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18 On Rule 23(a)(2) and the significance of *Wal-Mart*, see *infra* text accompanying notes 200–11.

19 *See* Oplchenski v. Parfums Givenchy, Inc., 254 F.R.D. 489, 498 (N.D. Ill. 2008) (reading Rule 23(a)(4) to require that the representative have no conflicting or antagonistic interests; that he be interested enough to assure vigorous advocacy; and that the class attorney be experienced, competent, and qualified).

III below, this is how the Supreme Court construed predominance in *Amchem*, and the *Amchem* Court's interpretation has had an important effect on class action jurisprudence.[20]

Our hypothetical mass tort case is likely to fare poorly under an external view of the class. If class members took different doses of the drug at different times and suffered different kinds of injuries and if the applicable state tort laws varied across class members, it is possible that a judge would deny certification on the ground that the class action fails the (a)(2) commonality requirement. She would argue in this case that the remaining common questions are not central enough to the claims of all class members to properly unify the class.[21] Alternatively, the judge could deny certification for failing the (b)(3) predominance requirement. She would argue that the diversity of relevant tort laws and the variety of individual facts relevant to causation, breach of duty, and damages undermine whatever cohesiveness common questions supply. Moreover, issue classing is not likely to help when the judge demands unity for the litigation as a whole. Part III discusses some of these points in more detail.

B. The Connection to Class Action Models and Participation Theories

These two views of the class fit most comfortably with, and draw normative content from, two competing models of the class action: the internal view fits an outcome-based model, and the external view fits a process-based model.[22]

1. Outcome-Based Model

Roughly speaking, an outcome-based model views the class action as a device for reducing litigation costs and producing good litigation outcomes. If the class action serves judicial economy and decisional consistency goals, the class must share enough common

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20 *See infra* text accompanying notes 98–120. For example, issue classes might improve manageability, but manageability is relevant only after the class has sufficient cohesiveness. *See infra* text accompanying notes 180–94 (discussing some of the implications of cohesiveness for issue classing).

21 *See* Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759, 798–802 (2012) (explaining that *Wal-Mart* incorporates a centrality requirement into (a)(2) commonality, and also citing lower court cases requiring centrality of the common question to the class claims for a putative class to satisfy Rule 23(a)(2)).

22 I refer to these as "models" because they are not general or rigorous enough to be treated as "theories." They are collections of concepts and ideas that make sense together and cohere normatively but do not necessarily fit neatly into a more general theory that is consistent and complete.

questions so that aggregation saves more in litigation costs than it adds in judicial management and coordination costs. If the class action serves remedial efficacy goals, the class must share a common legal interest in obtaining a unitary remedy. And when the class action serves to avoid unfair externalities, the class need share only the commonality that inheres in avoiding the particular unfairness.

The costs of class litigation are also relevant to the outcome-based model. The class action, like any other form of collective activity, is susceptible to agency costs, free riding, adverse selection, and the like. The outcome-based model tries to manage these risks, insofar as possible, through thoughtful class action design.[23] Due process matters as well, but this model views due process as a balance in which litigant autonomy is valued largely for its contribution to outcome quality.[24] As a result, due process is normally satisfied if the class action is designed to achieve quality outcomes reliably, the class attorney provides reasonably effective representation, and class members have some, if only limited, opportunities to participate and present their views on important matters.[25] In short, the outcome-based model focuses mostly on outcome quality and conceives the class action as a functional instrument to adjudicate cases fairly and efficiently.

2. *Process-Based Model*

The external view fits most naturally with a process-based model of the class action. The process-based model is not as relentlessly instrumental as the outcome-based model. The core distinction lies in how the two models value individual participation in litigation. The outcome-based model values participation primarily for its contribution to the quality of litigation outcomes: private parties, when allowed to participate individually, have strong incentives in an

23 *See, e.g.*, Coffee, Jr., *supra* note 7, at 370.

24 *See, e.g.*, Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 627 (9th Cir. 2010) (quoting *Hilao*'s due process balancing analysis with approval), *rev'd*, 131 S. Ct. 2541 (2011); Hilao v. Estate of Marcos, 103 F.3d 767, 785–87 (9th Cir. 1996) (relying on the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Connecticut v. Doehr*, 501 U.S. 1 (1991), to justify sampling on due process grounds).

25 For some outcome-based proponents, the fact that parties exercise little control over litigation implies that party participation has little intrinsic value as a practical matter. *See, e.g.*, Erbsen, *supra* note 14, at 1008 n.17 (questioning the value of litigant autonomy on practical grounds); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 925, 934 (1998) (noting the weak practical value of individual participation and observing that due process is a balance that can include practical factors, citing *Mathews v. Eldridge* in support).

adversarial setting to provide information to the court and test the accuracy of factual and legal assertions.

In contrast, the process-based model values participation in terms of noninstrumental dignitary and legitimacy values. It sees a right to participate personally as entailed in what it means to respect the dignity and autonomy of those persons who are seriously affected by litigation, and, in addition, as important to the institutional legitimacy of civil adjudication.[26] The outcome-based model also cares about dignity, autonomy, and legitimacy, of course, but it assumes that dignity and autonomy are respected and legitimacy assured when the litigation system does what it can to provide each person with a reasonably good outcome. The process-based model demands more—a broad right to a personal day in court that guarantees a large measure of individual control over one's own lawsuit.[27]

The process-based model has considerable difficulty with the class action, for it is hard to see how litigating through a representative can ever substitute for a personal day in court. For this reason, class treatment is limited by three requirements. First, a class action must be justified by necessity rather than convenience.[28] It is not enough that class certification confers marginal benefits over marginal costs compared to individual litigation; the gains must be more substantial to justify inroads on litigant autonomy. Second, the class itself must be sufficiently cohesive so that it can be conceived as a litigating unit with its members (nearly) identically situated from a legal point of view.[29] As I explain below, class cohesion implements an external view of the class; it gives the litigation a group character that weakens process-based participation values and the importance of day-in-court rights.[30] Third, class members must be provided with as much opportunity to actually participate as is consistent with avoiding the serious

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26 *See* Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. Rev. 485, 509–10 (2003) (distinguishing process-based from outcome-based theories of participation).

27 *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 892–95 (2008); Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996); Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 203–06 (1992) [hereinafter Bone, *Rethinking the "Day in Court" Ideal*].

28 *See* Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 Wash. U. L. Rev. 753, 804, 807 (2007) (advocating a strong process-based view of the class action and stating that "the normative force of process-based individualism requires that the class action procedure be supported by a showing of a truly compelling justification").

29 The analysis in the rest of this Article shows how key recent cases and class action trends reflect this assumption.

30 *See infra* Part IV.A.

problems that justify class treatment in the first place.[31] These three requirements interrelate. When the reasons for class treatment are especially strong, intraclass homogeneity can be a bit weaker. And when homogeneity is stronger, fewer participation opportunities are needed.[32]

3. *A Brief Note on the Role of Models*

It is important to clarify one point before proceeding. My two models, together with their corresponding views of the class and supporting theories of participation, are not meant to be comprehensive accounts of all possible approaches to the class action. Rather, they are meant to be analytic devices, useful for understanding why someone might take a particular position on a class action issue and what beliefs are likely to push this person in one direction or the other. Some jurists hold views that fit one or the other of my two models rather closely—indeed, I argue below that a majority of the current Supreme Court takes a position on the class action that is very close to

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31 *See* Redish & Berlow, *supra* note 28, at 807–13 (arguing for a very sparing use of mandatory class actions on the ground that locking class members into the class denies them their process-based autonomy to conduct the litigation as they please and also justifying a preference for opt-in classes rather than opt-out classes on the ground that opt-in classes give litigants more freedom to choose how to litigate their claims).

32 It is worth mentioning that my internal-external dichotomy is different from the aggregation-entity dichotomy that others have proposed. *See* Shapiro, *supra* note 25, at 918–19; *see also* Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1940 (2011) (describing the aggregation and entity models as the "two dominant views of the class action"). The aggregation model views the class action as a device "for allowing individuals to achieve the benefits of pooling resources against a common adversary." Shapiro, *supra* note 25, at 918. Class members retain strong autonomy claims, can opt out at any time, and exercise broad control over their own suits if they choose to stay in. *Id.* The entity model, by contrast, views the class as an entity in which each member is forced to "tie his fortunes to those of the group with respect to the litigation, its progress, and its outcome." *Id.* at 919. Class members have greatly restricted autonomy in the entity model, and they cannot move easily in or out of the class. *Id.*

The aggregation and entity models describe two different ways to conceive of a class *after* certification. My internal-external dichotomy focuses instead on whether a class must qualify as an exogenously defined group *before* certification. There is another important difference. Professor Shapiro, at least, evaluates the two models by focusing primarily on outcome quality. *Id.* at 927–34. For example, he discounts the value of a personal day in court on the ground that parties exercise very little control as a practical matter. *Id.* at 934. From a process-based perspective, however, it does not matter that parties exercise little control in practice. The point is to give them an opportunity to do so. In fact, it is the procedure that must yield if it seriously interferes with individual control, even if the result is reduced efficacy in achieving deterrence and compensation goals. To be sure, outcome quality matters to process-based theory, but the gains in outcome quality must be very large to outweigh the autonomy and legitimacy values that support the day in court.

the process-based model—but other jurists hold more complicated views that cross over or borrow elements from both models. No matter how complicated these views get, however, they are still amenable to analysis using my two models.

My models are analytically useful in this way because they pull together beliefs that, while not always perfectly consistent, cohere normatively and fit together in a mutually reinforcing way. A hybrid or intermediate view can be perfectly serviceable, but it is also likely to be normatively unstable, at least to some degree, and the resulting tension can lead the person holding it to take positions on class action issues that are difficult to reconcile on normative grounds. My models help to identify the source of this tension, which, in turn, can help explain why the person takes the positions and makes the decisions she does.

For example, someone who strongly favors class actions for outcome-quality reasons might advocate stricter due process constraints than I attribute to the outcome-based model. These constraints might even include a requirement that the class have some preexisting unity. When pressed for a justification, the person holding this view might argue that dignity or process-based legitimacy requires an externally defined class. But this mix of a strong outcome-quality focus with process-based dignity and legitimacy is likely to be unstable. It might work tolerably well in many cases, but it is bound to come under strain when certification issues arise for very large-scale aggregations, such as those involving mass torts. In some of these cases, outcomes are likely to be much better with a class action than with any of the other feasible litigation alternatives—a fact that supports certification on outcome-quality grounds—but the class can also be highly heterogeneous and thus lack the unity thought necessary to support certification on dignitary and legitimacy grounds. The resulting normative tension will affect the certification decision and might even push the person holding a hybrid position closer to one or the other of the two poles.

Our hypothetical outcome-quality proponent might try to argue instead that requiring class unity will help prevent class action abuse. The problem with this argument is not that it generates normative tension in the way the argument from dignity and legitimacy does. Indeed, requiring unity to prevent abuse is perfectly consistent with an outcome-based model and its internal view of the class because it treats class unity as an element of the class definition imposed to better serve outcome goals. The problem with this argument, as I explain

in Part III below, is that an across-the-board unity requirement applicable to *all* class actions, or even just to all Rule 23(b)(3) class actions, is hard to defend on outcome-based grounds.[33]

Thus, my two models help to explain the varying positions jurists take on class action issues and their differing attitudes toward class certification. Because of the relative stability and coherence of these models, they exert pressure on hybrid sets of beliefs and push them toward one of the two models, as judges, lawyers, and scholars holding hybrid views struggle with actual certification decisions. There might be other class action models that share these same properties, but I believe that my two models account for much of what has happened with the class action over the past forty years. The discussion in Parts II and III shows how.

II. VIEWS OF THE CLASS IN HISTORICAL PERSPECTIVE

The external view of the class has figured prominently in the development of the class action historically. As the following discussion explains, the representative suit in the eighteenth and nineteenth centuries—which was the predecessor of the modern class action—bound class members to the judgment and precluded future litigation only when the class was strongly unified outside the lawsuit. The original version of Federal Rule 23, which became effective in 1938, based class preclusion on a similar theory: the class had to be united by asserting "joint, or common, or secondary" rights or by making claims to the same property.[34] It was not until the 1966 revision and the shift to a pragmatic and functional approach that an internal view of the class became conceivable. The following briefly recounts these developments.

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33 *See infra* Part III. Of course, it makes sense on outcome-based grounds to require that class members not have seriously conflicting interests that create a substantial risk of bad settlements or trial outcomes. If this is all class unity entails, it is a perfectly reasonable requirement, but it is too weak to account for the pattern of Supreme Court decisions discussed in Part III. Moreover, even if a stronger unity requirement reduced the risk of abuse in some cases, applying it as a general rule to all cases, as the Court does, is bound to scuttle promising class actions that improve outcome quality but lack a properly unified class. This result might be acceptable on outcome-based grounds if the benefits of deterring abuse exceed the costs of forgoing promising class actions in some cases and if a general rule is superior to case-by-case determination. But it is not at all clear that the cost-benefit balance comes out this way, given the huge judicial economy and outcome quality benefits of adjudicating many large-scale and internally heterogeneous class actions and given the many tools judges have to manage abuse without requiring class unity.

34 FED. R. CIV. P. 23(a), 308 U.S. 663, 689 (1939) (amended 1966).

A. *Representative Suits in the Eighteenth and Nineteenth Centuries*

The history of the class action in the eighteenth and nineteenth centuries is extremely complex, and this is not the place to delve into the details. The predecessor of the modern class action, known as the representative suit, was developed in the courts of equity.[35] While historians disagree to some extent about the details, the following discussion shows that they agree on one important point: for a representative suit to bind class members, the class had to be unified in some way independent of the litigation.

Professor Stephen Yeazell, in his well-known history of the class action, argues that the representative suit developed as a judicial response to the needs of specific groups that happened to be economically or socially salient at particular times.[36] These groups—for example, privateers in the eighteenth century and joint-stock companies and friendly societies in the nineteenth—were all externally defined groups united by common membership or shared goals outside the litigation.[37] According to Yeazell, the presence of group unity helped the chancellors mediate, if only awkwardly, between group litigation and litigant autonomy.[38]

I have written an intellectual history of the class action that, though telling a somewhat different story and supporting different conclusions, nevertheless agrees with Professor Yeazell that class unity was essential to a representative suit having preclusive effect.[39] The unity that matters in my account, however, has to do with formal relationships among legal rights, duties, and remedies rather than shared goals or group membership.[40] The paradigmatic relationship that supported preclusion involved a melding of individual substantive rights into a unitary right that attached to the class as a whole.[41] The

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35 STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 175 (1987).

36 *Id.* at 174–78, 186–87, 194–96.

37 *See id.* at 166–73, 182–95.

38 *See id.* at 161, 175–79, 187, 198–228 (arguing that the chancellors used both consent and interest representation theories).

39 *See* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 279 (1990) [hereinafter Bone, *Personal and Impersonal Litigative Forms*] (reviewing YEAZELL, *supra* note 35).

40 *Id.* at 245–54.

41 It is important to bear in mind that not all representative suits bound absentees. *Id.* at 257. In fact, the traditional representative suit, unlike the modern class action, was not primarily concerned with preclusion. It functioned instead as an exception to necessary party joinder. *Id.* at 242. If there were too many necessary parties to join easily, a plaintiff could proceed in equity without joining them when they all shared a "common interest" in the suit. *Id.* at 245. It was a

nineteenth century "public right" cases are illustrative. For example, when a taxpayer sued a municipality to enjoin unlawful public action affecting the municipality as a whole, he had to sue on behalf of all taxpayers.[42] The legal right at issue, a so-called "public right," was conceived as attaching to taxpayers as an indefinite class.[43] In addition to being a class-based right, it also spawned individual rights that allowed each taxpayer to enforce the class-based right. Moreover, the injunctive or declaratory relief that the plaintiff sought benefited the class as a whole and the individual taxpayers only as members of that class.

As the public right example shows, the key to a binding representative suit was the fact that the substantive rights at stake attached to a legally prescribed class defined by a group status, such as the status of taxpayer, and that the plaintiff sought a remedy targeting the class as such and not directly targeting individual members of the class.[44] Over time, the chancellors recognized the benefits of class preclusion more broadly and expanded the types of representative suits that had preclusive effect. But these expansions hewed close to this status-based paradigm.[45]

To illustrate, consider the limited fund case exemplified by *Guffanti v. National Surety Co.*[46] The defendant in *Guffanti* defrauded more than 150 people, all of whom had deposited money for steamship tickets that were never delivered.[47] The defendant had posted a bond to cover this type of liability, but the bond was not large enough to compensate everyone in full.[48] One of the ticket purchasers filed suit to recover against the bond, on behalf of himself and all other ticket depositors as a class.[49] The court held, over the defendant's de-

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separate matter, decided in a subsequent suit, whether the decree would bind all of those with the common interest. Sometimes it did, and sometimes it did not. *Id.* at 257. Moreover, the idea of a common interest was conceived not in terms of shared litigation goals or preferences, but rather in terms of formal relationships among legal rights, duties, and remedies. *Id.* at 245–54.

42 *See id.* at 274–75. This is just one of many examples. For others, see *id.* at 275–82.

43 *Id.* at 275.

44 *Id.* at 279–82. This combination of features meant that neither the litigation nor the judgment singled anyone out in a *personal* way. The suit was thought to focus on the legally defined status, and because of this impersonal quality, no class member had a strong process-based right to a personal day in court.

45 *Id.* at 272–74, 279–82.

46 Guffanti v. Nat'l Sur. Co., 90 N.E. 174 (N.Y. 1909). I choose *Guffanti* partly because the Supreme Court features it as a classic limited fund precedent in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 836–37 (1999). *See infra* notes 122–44 and accompanying text.

47 *Guffanti*, 90 N.E. at 175.

48 *Id.*

49 *Id.*

murrer for nonjoinder, that the suit could properly proceed as a representative suit and justified its holding as the only way to equitably distribute the limited fund.[50]

While the *Guffanti* court did not explicitly address the question, there is no doubt that preclusion was essential to an equitable distribution. Moreover, preclusion made sense because the case closely resembled the status-based paradigm, even though it involved separate and individual rights that were not melded into a unitary class right. The class of depositors in the case was sufficiently united by the fixed fund and a common contract. The right to recover from the bond was a right that attached to each depositor by virtue of his status as a depositor, and all of these separate rights derived from the same contract and had an identical form.[51] To be sure, the ultimate relief was individual—specific payments to each depositor—and individual claimants had to appear to assert their claims, recover from the fund, and pay a portion of the costs of the action. The distributions, however, were all pro rata based on deposit amount, and thus were easily determined.[52] Finally, it likely made a difference that all the claimants asserted rights to the same fixed and limited property—the bond.[53] In the late nineteenth and early twentieth centuries, courts were willing to give broad preclusive effect to in rem adjudications of property ownership.[54] They reasoned that the decree acted directly on the property itself and only indirectly on those persons with claims to the property.[55]

Binding representative suits took a variety of forms and had different purposes during this period. Nevertheless, the key point can be stated simply: those representative suits that bound class members

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50 *Id.* at 176 (noting that proceeding by individual suits would "necessarily result in a scramble for precedence in payment, and the amount of the bond may be paid to the favored, or to those first obtaining knowledge of the embezzlements").

51 *Id.* ("The contract with the defendant stated in the bond underlies the claims of each of the depositors as against the defendant surety company, and only the amount of the deposit with [the defendant] and his default is separate and independent.").

52 *Id.* ("A just and equitable payment from the bond would be a distribution pro rata upon the amount of the several embezzlements.").

53 In *Society Milion Athena, Inc. v. National Bank of Greece*, 22 N.E.2d 374 (N.Y. 1939), the court distinguished *Guffanti* and denied a representative suit on the ground that the bank depositors in the case "ha[d] no joint or common interest in any fund." *Id.* at 377 ("By the exercise of diligence any creditor may obtain a preference over other creditors at least until the court takes over the property of the debtor and administers it for the equal payment of all creditors. None of them has any lien or interest, legal or equitable, against the property transferred or against any other assets of the defendants.").

54 *See* Bone, *Personal and Impersonal Litigative Forms*, *supra* note 39, at 280 n.158.

55 *See id.* (discussing the impact of the presence of property and citing sources).

presupposed the existence of an externally defined class. The chancellor identified a class already defined by formal relationships among legal rights, duties, and remedies, and the preclusive effect depended on the structure of those relationships.[56]

B. Original Rule 23

The original version of Rule 23, promulgated in 1938, tracked this precedent.[57] It defined three distinct types of class action by the formal nature of the legal rights at stake. Rule 23(a)(1) recognized the so-called "true class action," where "the character of the right sought to be enforced for or against the class is joint, or common, or secondary." Rule 23(a)(2) recognized the "hybrid class action," where the right is "several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action." And Rule 23(a)(3) recognized the "spurious class action," where the right is "several, and there is a common question of law or fact affecting the several rights and a common relief is sought."[58]

Although the Rule itself said nothing about preclusion, its drafter, James William Moore, published an article in 1938 describing its preclusive effects,[59] and many courts followed Moore's lead. True class actions were supposed to have full preclusive effect, hybrid class actions had preclusive effect only with respect to the property involved in the action, and spurious class actions had no preclusive effect unless absent class members chose to intervene.[60]

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56 I do not mean to suggest that the courts ignored outcome altogether. The court in *Guffanti*, for example, took note of outcome quality when it stressed the need for a representative suit in order to equitably distribute the limited fund. *Id.* at 176. It did so, however, within the formal structure of rights, duties, and remedies. Furthermore, the importance of assuring that the representative suit would produce a quality outcome sometimes prompted judges to check whether the party to the first suit had litigated vigorously and in good faith. *See* Bone, *Personal and Impersonal Litigative Forms*, *supra* note 39, at 286–87. But this was not done to monitor some fiduciary or similar relationship, for no such relationship was recognized. It was done to make sure that there was no obvious reason to question the quality of the advocacy. *Id.*

57 *See* FED. R. CIV. P. 23 advisory committee's note to subdivision (a) (1937) ("This is a substantial restatement of [former] Equity Rule 38 (Representatives of Class) as that rule has been construed." (brackets in original)).

58 FED R. CIV. P. 23(a)(1)–(3), 308 U.S. 663, 689 (1939) (amended 1966); *see also* James William Moore & Marcus Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 555 (1938) (labeling the three types of class actions recognized in Rule 23 as "true," "hybrid," and "spurious" class actions, respectively).

59 *See generally* Moore & Cohn, *supra* note 58.

60 *Id.* at 556–63.

Moore crafted Rule 23 to track his best understanding of the then-existing representative suit precedent.[61] The true class action was based on the paradigmatic nineteenth-century representative suit with binding effect. The hybrid class action was modeled on cases, like the limited fund example, that adjudicated rights to a definite fund or property.[62] The spurious class action was an entirely new creation, and it functioned mainly as a device to facilitate joinder and intervention.[63] Thus, the two Rule 23 class actions that had preclusive effect embodied an external view of the class. Even the hybrid class action involved a preexisting group tied together by a definite fund or piece of property, and, as one might expect, its preclusive effect was limited to the fund or property that unified the class.

C. The 1966 Revision

Original Rule 23 was doomed almost from the beginning. Legal realism was on the rise in 1938, and the growing number of legal-realist judges resisted Rule 23's rights-based categories.[64] In fact, the categories were quite malleable in the hands of a realist judge. If a judge believed that there was a good functional reason to bind absentees in a particular case, he might creatively stretch the facts to squeeze a spurious class action into the (a)(1) or (a)(2) category.[65]

Despite these problems, original Rule 23 remained in force for almost thirty years. In 1966, however, the Rule was thoroughly revised to eliminate the rights-based framework and replace it with a pragmatic and functional approach.[66] This revision reconceived the class action as a preclusion device. In keeping with this goal, the 1966 Advisory Committee drafted the Rule to identify situations where precluding a class would yield functional benefits and where the un-

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61 *See id.* In fact, the labels "true" and "hybrid" were not new with Moore. For an earlier source using the same labels, see 1 THOMAS ATKINS STREET, FEDERAL EQUITY PRACTICE 547–49 (1909).

62 Moore & Cohn, *supra* note 58, at 562.

63 *Id.* at 561–62, 566.

64 *See* FED. R. CIV. P. 23 advisory committee's note (1966); ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 251 (1950).

65 *See, e.g.*, FED. R. CIV. P. 23 advisory committee's note (1966); Dickinson v. Burnham, 197 F.2d 973, 978–80 (2d Cir. 1952) (reversing the district judge's (a)(3) classification and fitting the class action into (a)(2)).

66 *See, e.g.*, Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) [hereinafter Kaplan, *Note*] ("The reform of Rule 23 was intended to shake the law of class actions free of abstract categories contrived from such bloodless words as 'joint,' 'common,' and 'several,' and to rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties.").

derlying facts "appeared with varying degrees of convincingness to justify treatment of the class *in solido*."[67] For example, Rule 23(b)(1) was designed to avoid certain kinds of unfairness. Rule 23(b)(2) aimed to promote remedial efficacy by facilitating the grant of class-wide injunctive relief.[68] Rule 23(b)(3) was meant to achieve judicial economy, promote decisional consistency, and enable private enforcement of the substantive law where individual suits were not cost-justified.[69]

To preclude absentees, however, it was not enough just to identify practical aggregation benefits; the Committee also had to address due process rights. This was no easy matter. Having rejected the rights-based framework, the Committee could no longer rely on the old formalistic approach. Instead, it developed a two-pronged strategy. First, it included subdivision (a)(4), which tracks the Supreme Court's pivotal decision in *Hansberry v. Lee*,[70] holding that due process of law is satisfied if the interests of absentees are adequately represented.[71] Second, it assigned responsibility to the district judge to look out for the interests of absent class members. To do this, the new Rule created a novel certification procedure and equipped the trial judge with new tools to safeguard absentee interests.[72]

The Committee was more or less content with this approach for (b)(1) and (b)(2) class actions, which had loose analogues in representative suit precedent. But members felt the need to do more for the new (b)(3) class action, which they thought raised more serious due

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67 Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 386 (1967) [hereinafter Kaplan, *Continuing Work*] ("They [the Advisory Committee members] perceived, as lawyers had for a long time, that some litigious situations affecting numerous persons 'naturally' or 'necessarily' called for unitary adjudication.").

68 *See* FED. R. CIV. P. 23 advisory committee's note to subdivision (b)(1), (b)(2) (1966); David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 660 (2011) (explaining that the 1966 committee drafted (b)(2) to facilitate broad injunctive relief in desegregation suits).

69 *See* Kaplan, *Continuing Work*, *supra* note 67, at 390; Kaplan, *Note*, *supra* note 66, at 497.

70 Hansberry v. Lee, 311 U.S. 32 (1940).

71 *Id.* at 42–43. The Committee also followed previous practice in codifying in Rule 23(a)(1) a presumption favoring nonclass litigation by limiting the class action to situations where joinder is impracticable. In addition, it included two rather mysterious requirements, (a)(2) common question and (a)(3) typicality, discussed below.

72 At the time, Rule 23(c)(1) provided that "the court shall determine by order whether [the suit] is to be . . . maintained [as a class action]." FED. R. CIV. P. 23(c)(1) (1966); *see also id.* 23(d) (listing some procedural tools). Moreover, Rule 23(e) required judicial review and approval of all class action settlements. *Id.* 23(e).

process concerns.[73] Accordingly, they supplemented representational adequacy and judicial supervision with individual notice and opt-out rights.[74]

As the Committee saw it, the special due process problem with (b)(3) had to do with weak intraclass unity. The (b)(3) class brought together suits for money damages that, because of their individualistic quality, triggered especially strong day-in-court concerns. For example, the Reporter, Professor Benjamin Kaplan, explained that the inclusion of notice and opt-out rights for (b)(3) class actions was a response to potential constitutional problems where "the homogeneity or 'solidarity' of the class was open to some question."[75] Moreover, the Advisory Committee's Note to the 1966 amendments emphasized the relationship between cohesion and litigant control. It observed that individual interests in conducting separate suits "may be theoretic rather than practical" when the class has "a high degree of cohesion."[76] And in discussing the relationship between due process and Rule 23(d) discretionary notice, the Committee Note explained that "[i]n the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum."[77]

These passages, though brief, suggest that the Committee was concerned with class cohesion. It did not actually define cohesion or explain how it should be measured or evaluated. But as the previous discussion indicates, the Committee seems to have assumed that cohesion was about due process and legitimacy rather than the functional benefits from class treatment or safeguards against sweetheart settlements or other forms of abuse. When cohesion was strong, as in the (b)(1) and (b)(2) class actions, adequate representation policed through judicial supervision was sufficient for due process. When cohesion was weaker, as in the (b)(3) class action, adequate representation and judicial oversight had to be supplemented with measures like notice and opt-out rights that gave class members more personal con-

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73 *See* FED. R. CIV. P. 23 advisory committee's note to subdivision (b)(3), (c)(2) (1966); Marcus, *supra* note 68, at 698.

74 Kaplan, *Continuing Work*, *supra* note 67, at 391–94.

75 *Id.* at 380. He also emphasized the value of notice and opt-out rights "in helping to justify the ultimate extension of the judgment in (b)(3) cases to all members of the class, except those who requested exclusion from the action." *Id.* at 392.

76 FED. R. CIV. P. 23 advisory committee's note to subdivision (b)(3) (1966) (discussing the superiority analysis under (b)(3)); *see also* Marcus, *supra* note 68, at 698–99 (citing records of the Advisory Committee proceedings supporting this point, although not in an unqualified way).

77 FED. R. CIV. P. 23 advisory committee's note to subdivision (d)(2) (1966).

trol over their individual suits.[78] And presumably when the class fell short of the required minimum degree of cohesiveness, there could be no representative adjudication at all, regardless of the functional benefits. Construed in this way, cohesion was distinct from representational adequacy; the former had to be satisfied before the latter was relevant at all.

As we shall see, the idea of class cohesion has been influential in shaping modern class action law. What is important to note for now is that Rule 23 was drafted with two conflicting views in mind. The Rule's pragmatic and functional approach invited an internally defined class, but due process concerns drove the Committee in the opposite direction, toward an externally defined class. The Rule embodies both views in uneasy tension. The history of the modern class action is, in significant measure, the story of how courts have grappled with this tension.

III. THE MODERN INFLUENCE OF CLASS COHESION AND THE EXTERNAL VIEW

There is no explicit mention of class cohesion in the text of Rule 23, but courts have read a cohesion requirement into the Rule. They follow the same operative principles that the 1966 Advisory Committee thought salient. Representational adequacy is not enough to satisfy due process by itself. The class must have some minimal degree of intraclass cohesion, and the demands of due process vary with the degree of cohesion a class possesses.

A. 1967–1997: Hybrid (b)(2) Class Actions

In the thirty-year period from 1967 to 1997, judges applied these cohesion-based principles primarily to the question of notice and opt-out rights.[79] Because Rule 23(c)(2) already required individual notice

78 FED. R. CIV. P. 23(b)(1)–(3) (1966).

79 *See, e.g.*, Handschu v. Special Servs. Div., 787 F.2d 828, 833 (2d Cir. 1986) (determining that the cohesive nature of a 23(b)(2) class makes providing notice sufficient for due process purposes); Walsh v. Great Atl. & Pac. Tea Co., 726 F.2d 956, 962–63 (3d Cir. 1983) (evaluating the adequacy of presettlement and postsettlement notice in a class action certified under Rule 23(b)(1) and 23(b)(2)); Holmes v. Cont'l Can Co., 706 F.2d 1144, 1155–57 (11th Cir. 1983) (noting that differing levels of procedural protection "reflect the respective assumptions of cohesiveness underlying the two types of classes"); Johnson v. Gen. Motors Corp., 598 F.2d 432, 437–38 (5th Cir. 1979) (citing the Advisory Committee's Note on Rule 23 for the proposition that the nature of unity in a class's representation governs the degree of procedural protection); Elliott v. Weinberger, Nos. 74-1611, 74-3118, 1975 U.S. App. LEXIS 12532, at *22–25 (9th Cir. Oct. 1, 1975) (concluding that due process principles counsel against compulsory notice in every (b)(2) action because the group's cohesiveness minimizes such a need); *see also* Wetzel v. Liberty Mut.

and opt-out for (b)(3) class actions, the debate focused on Rule 23(b)(2). No one seems to have had a problem with denying notice and opt-out in ordinary (b)(2) class actions seeking exclusively injunctive or declaratory relief.[80] The problems arose for hybrid (b)(2) class actions in which plaintiffs sought to recover back pay or other monetary remedies in addition to class-wide equitable relief.[81]

Those courts that required notice—or both notice and opt-out—reasoned that a mandatory (b)(2) class action presupposes strong intraclass cohesion and that the addition of monetary relief weakens that cohesion and thus the justification for precluding absentees. As one court put it, "Rule 23(b)(1) and (b)(2) classes are cohesive in nature" and "[b]ecause of this cohesiveness, an adequate class representative can, as a matter of due process, bind all absent class members by a judgment."[82] It followed from the weaker cohesion of a hybrid (b)(2) class that class members had to have more individualized participation opportunities, and this meant giving them individual notice so they could choose whether to intervene and litigate the issues relevant to their monetary claims, and perhaps also a right to opt out and pursue those claims individually.[83]

Ins. Co., 508 F.2d 239, 248–52, 254–59 (3d Cir. 1975) (holding that a Title VII suit properly certified as a (b)(2) class action could continue to proceed under Rule 23(b)(2) after the defendant voluntarily complied with the injunction demand because the class does not lose its "cohesiveness" just because the claims for injunctive and declaratory relief become moot).

80 *See, e.g.*, *Holmes*, 706 F.2d at 1155–57 (contrasting Rule 23(b)(2)'s primary purpose of facilitating actions involving homogeneous classes seeking injunctive and declaratory relief—resulting in less need for and practical effect of individual notice—with cases involving monetary relief as well).

81 *Compare id.* ("Because the monetary relief stage of this . . . case is functionally more similar to a (b)(3) class than to a (b)(2) class, the opt out protection of (b)(3) must be applied."), *and Elliott*, 1975 U.S. App. LEXIS 12532, at *24–25 ("When . . . there are no money damages involved, . . . notice to the class serves no apparent purposes."), *with Wetzel*, 508 F.2d at 247–48, 257 (holding that there was no denial of due process in failure to send notice to absent members of a (b)(2) class in case involving possible monetary damages). The Second Circuit also addressed objections under Rule 23(e) to the sufficiency of notice for a (b)(2) class settlement. *Handschu*, 787 F.2d at 832–33. Holding that notice by publication was sufficient, the court reasoned that the (b)(2) class is "cohesive by nature" and therefore notice to "a representative class membership" was sufficient. *Id.* at 833; *see also Walsh*, 726 F.2d at 962–64 (holding that for a class action certified under Rule 23(b)(1) and Rule 23(b)(2), the presettlement and postsettlement publication and mail notice was sufficient as a matter of due process).

82 *See Walsh*, 726 F.2d at 963; *see also Elliott*, 1975 U.S. App. LEXIS 12532 at *23 (noting that because (b)(2) classes are more cohesive and unified than (b)(3) classes, it follows that once the court finds adequacy of representation under Rule 23(a)(4), "it is reasonably certain that the named representatives will protect the absent members and give them the functional equivalent of a day in court").

83 *See Holmes*, 706 F.2d at 1155–57 (holding that notice and opt-out are sometimes required at the monetary relief stage of a hybrid (b)(2) class action); *Johnson*, 598 F.2d at 438

In most other respects, however, Rule 23 was interpreted generously during the 1970s and 1980s and in ways that were consistent with an outcome-based model and an internally defined class.[84] For example, many courts took a liberal approach to certification of small-claim class actions and construed Rule 23(b)(3)'s predominance requirement broadly in those cases.[85] Also, before the Supreme Court's 1982 decision in *General Telephone Co. of the Southwest v. Falcon*,[86] courts were willing to certify across-the-board Title VII class actions under Rule 23(b)(2).[87] The across-the-board class action, by attacking the full range of an employer's practices, facilitated the grant of broad systemic relief.[88] Finally, despite the debate over notice and opt-out, Title VII claims for injunctive relief and back pay were routinely certified as mandatory class actions, and courts relied on presumptions and even rough forms of sampling to adjudicate the individual back pay

(holding that some form of notice is required in a hybrid (b)(2) class action); *Elliott*, 1975 U.S. App. LEXIS 12532 at *22–25 (holding that notice is required in a (b)(2) class action only under certain limited circumstances in which the intervention of absent class members might benefit the suit); *see also* Eubanks v. Billington, 110 F.3d 87, 96 (D.C. Cir. 1997) (quoting homogeneity language from *Holmes* and holding that due process does not require opt-out in a hybrid (b)(2) class action, although district judges have discretion under Rule 23(d) to permit opt-outs when monetary relief is sought). *But see Wetzel*, 508 F.2d at 256 (holding that because the (b)(2) class is "cohesive" and "homogeneous without any conflicting interests," class members can be bound as long as representation is adequate even if no notice is given). It is still an open question whether the Due Process Clause mandates notice and opt-out in hybrid (b)(2) class actions. *See, e.g.*, Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992).

84 For a nice overview of many of these developments, see David Marcus, *The History of the Modern Class Action, Part I:* Sturm und Drang, *1953–1980*, 90 WASH. U. L. REV. 587, 626–43 (2013) [hereinafter Marcus, *History of the Modern Class Action*].

85 *See, e.g.*, Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 179 (2d Cir. 1990) ("In light of the importance of the class action device in securities fraud suits, [Rule 23's] factors are to be construed liberally."). For example, some courts discounted (b)(3) predominance problems due to the presence of individual questions by arguing that settlement was likely and would obviate any such problems. Moreover, for securities fraud class actions, courts used presumptions to deal with individual questions of reliance and eventually adopted the theory of fraud on the market to resolve reliance issues on a class-wide basis. *See, e.g.*, Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988); Blackie v. Barrack, 524 F.2d 891, 906 (9th Cir. 1975). Finally, courts used a number of techniques in antitrust class actions to avoid the (b)(3) obstacle to certification created by individualized inquiries into antitrust injury. *See, e.g.*, Alabama v. Blue Bird Body Co., 573 F.2d 309, 324 (5th Cir. 1978); Windham v. Am. Brands, Inc., 539 F.2d 1016, 1021–22 (4th Cir. 1976).

86 Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147 (1982).

87 *See* Marcus, *History of the Modern Class Action*, *supra* note 84, at 641.

88 For example, a Mexican-American employee alleging discrimination in promotion could bring a class action representing all Mexican-American employees suffering discrimination in *all* facets of the defendant's employment practices, including hiring, promotion, pay, and working conditions. *See, e.g.*, Falcon v. Gen. Tel. Co. of the Sw., 626 F.2d 369, 377 (5th Cir. 1980), *rev'd*, 457 U.S. 147 (1982).

questions in a group setting.[89] Here too, the remedial efficacy goals of Rule 23(b)(2) took center stage.

To be sure, there were judges and commentators who expressed more restrictive views.[90] Although some objected on outcome quality grounds,[91] others were obviously inspired by a process-based model and its concern for participation and legitimacy.[92] Still, the spirit of the times supported broad interpretations of Rule 23 to promote class action goals.

Even so, the same tension between external and internal views that informed the Advisory Committee's drafting of Rule 23 continued to shape the law, though only weakly. Judges assumed that when a class lacked strong cohesion, day-in-court values weighed heavily and adequate representation must be supplemented with notice and possibly opt-out rights.[93]

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89 *See, e.g.*, Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 260–63 (5th Cir. 1974) (finding that the method of calculating class-wide back pay awards need not be rigid, and that interest, benefits, and overtime can be included in an average).

90 Courts during this period took a mixed view of (b)(3) mass tort and mass accident class actions. Especially during the 1980s, as mass tort litigation became more prominent, some courts focused on the judicial economy benefits of avoiding multiple litigation of core common questions and construed Rule 23(b)(3)'s predominance requirement in functional terms. *See, e.g.*, *In re* Sch. Asbestos Litig., 789 F.2d 996, 1008–10 (3d Cir. 1986) ("[T]he trend has been for courts to be more receptive to use of the class action in mass tort litigation."); Jenkins v. Raymark Indus., 782 F.2d 468, 472–73 (5th Cir. 1986). Others resisted certification usually on the ground that individual questions were too prominent. *See* McCarthy v. Kleindienst, 741 F.2d 1406, 1416 (D.C. Cir. 1984).

91 For example, concerns about the improper settlement leverage created by the certification of frivolous or weak class actions clearly focused on outcome quality. *See, e.g.*, Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 8–9 (1971).

92 I believe *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), fits this category because the Court's strict reading of Rule 23(c)(2) was not mandated by the text of the Rule itself.

93 Several commentators challenged the assumption that (b)(2) classes were cohesive by pointing out that class members might have different remedial preferences and different interests in how the action is conducted. *See* George Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11, 26–27 (1983); Leo Crowley, Note, *Due Process Rights of Absentees in Title VII Class Actions—The Myth of Homogeneity of Interest*, 59 B.U. L. REV. 661, 664–66 (1979). These observations, while correct, miss the point of (b)(2) cohesiveness. Classes certified under Rule 23(b)(2) are considered cohesive not because class members share the same preferences for the outcome or the process, but because *the law* defines the wrong and the remedy by reference to the group as a unit.

B. *1997–Present: The Impact on Rule 23(b), Rule 23(c)(4), and Rule 23(a)(2)*

The liberal attitude toward Rule 23, characteristic of the Rule's early period, began to change in the 1990s.[94] Two developments influenced this change: the rise of the mass tort class action and growing concerns about frivolous litigation.[95] Mass tort class actions challenge Rule 23 in a number of ways. First, they generate serious agency and collective action problems, especially when they are certified for settlement purposes only.[96] Second, they often involve sprawling and legally fragmented classes that pose a particularly difficult challenge to the idea of class unity.[97] And to make matters worse, class members normally have large enough claims to support individual litigation and potentially strong interests in litigant control.

As the mass tort class action, and especially the settlement class, became more common, judges began to embrace the cohesiveness requirement as a way to control it. This development elevated the importance of process-based values and strengthened the influence of a process-based model. The following discussion recounts these developments and describes the impact on Rule 23. By construing the Rule with class cohesiveness in mind, these judges have given new life to the idea of an externally defined class.

1. *Rule 23(b)(3) Predominance, (b)(1)(B) Limited Funds, and Cohesion*

a. Amchem Products, Inc. v. Windsor

The modern story begins in 1997 with the Supreme Court's landmark decision in *Amchem Products, Inc. v. Windsor*.[98] *Amchem* involved certification of a (b)(3) settlement class action. The case had all the problematic elements of a mass tort. The class was huge and sprawling, consisting of almost everyone who had been exposed to as-

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94 *See generally* Klonoff, *supra* note 6, at 736–47.

95 *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (noting that special caution should be exercised in certifying mass tort class actions in which "individual stakes are high and disparities among class members great"); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1297–1300 (7th Cir. 1995) (noting the settlement pressure class certification can create for low value claims).

96 *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1373–84 (1995) (describing the agency and collective action problems with the mass tort class action).

97 *See infra* Part III.B.1 (describing the Court's reaction to *Amchem* and *Ortiz* in these terms).

98 Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

bestos products nationwide.[99] It was also factually and legally fragmented and class members had substantial individual claims.[100] And it was a settlement-only class with structural features that signaled the possibility of attorney self-dealing.[101]

The district judge found that class members received a fair and reasonable recovery under the settlement relative to what they might have obtained from individual litigation.[102] In deciding to certify the settlement class, the judge focused on class interests in the settlement rather than the trial judgment and on settlement-related rather than litigation-related common questions.[103] All of this seemed quite reasonable because certification would have avoided litigation altogether.

The Supreme Court rejected this approach. It held that a trial judge must apply relevant Rule 23 requirements just as they are applied to certify a litigating class.[104] At the same time, the Court made clear that not all the requirements of Rule 23 are relevant to settlement-only classes. In particular, "a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial."[105] However, those provisions of Rule 23 "designed to protect absentees by blocking unwarranted or overbroad class definitions" had to be followed strictly, and these included (a)(4) representational adequacy and (b)(3) predominance.[106] The *Amchem* class action failed both provisions.[107]

The Court's predominance analysis is particularly striking. Most authorities before *Amchem* read predominance as a proxy for the judicial economy and decisional consistency benefits from class treatment.[108] This interpretation made sense from a functional perspective,

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99 *Id.* at 600–10.

100 *Id.* at 624.

101 *Id.*

102 Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 334–36 (E.D. Pa. 1994).

103 *Id.* at 314–18.

104 *See Amchem*, 521 U.S. at 620.

105 *Id.* (citation omitted).

106 *Id.* at 620–21.

107 *See id.* at 625.

108 *See, e.g.*, JAMES WM. MOORE, 3B MOORE'S FEDERAL PRACTICE ¶ 23.45(2) (2d. ed. 1996) (noting that in determining predominance, among the most salient factors are the efficiency of class litigation and the distorting effect of certification, bearing in mind, however, that issue classing can address some of the problems); 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1778 (3d ed. 2005) (noting that when common questions are a significant aspect of the case and can be resolved in a single adjudication, there is "a clear justification for handling the dispute on a representative . . . basis," even if resolving common questions does not end the lawsuit).

and it also seemed to fit what the 1966 Advisory Committee had in mind. The Advisory Committee's Note states that "[i]t is only where this predominance exists that economies can be achieved by means of the class-action device," and it goes on to illustrate the point with a mass accident involving lots of individual questions in which a class action "would degenerate in practice into multiple lawsuits separately tried."[109]

Equating predominance with judicial economy in *Amchem*, however, would have relegated predominance to the same fate as manageability. The Court's reason for ignoring manageability—that settlement obviates the need for trial—applies with equal force to predominance if predominance is understood as a proxy for judicial economy. After all, settlement itself generates all of the desired economy gains by avoiding the need for litigation. Perhaps for this reason, the *Amchem* Court took predominance in a completely different direction. It read predominance as a measure of class cohesion and treated cohesion as a condition for the legitimacy of representative litigation: "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[110]

Contrasting Rule 23(a) and (b) with 23(e), the Court reinforced the connection between class unity and res judicata: "Subdivisions (a) and (b) [in contrast to subdivision (e)] focus court attention on whether a proposed class has sufficient *unity* so that absent members can fairly be bound by decisions of class representatives."[111] The plaintiffs had argued that judicial review of the fairness and reasonableness of the settlement under Rule 23(e) should be enough for certification, but, as the Court explained, "it is not the mission of Rule

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109 FED. R. CIV. P. 23 advisory committee's note to subdivision (b)(3) (1966). These brief comments, however, still leave considerable uncertainty about the meaning of the concept. The Committee did not define predominance, and apparently there is no clear guidance in the Committee records or the contemporaneous literature. *See* Erbsen, *supra* note 14, at 1053–54. Moreover, the predominance test has some odd features. For one thing, it ignores the enforcement goal of Rule 23(b)(3). This goal depends on the feasibility of individual litigation given the individual amounts at stake, a factor that bears no obvious relationship to the predominance of common over individual questions. In addition, it is not clear why the Committee thought it was a problem when a class action degenerated into multiple lawsuits. After all, the fact that the common questions are resolved for all class members at once should have obvious benefits for subsequent suits.

110 *Amchem*, 521 U.S. at 623.

111 *Id.* at 621 (emphasis added).

23(e) to assure the class cohesion that legitimizes representative action in the first place."[112]

In short, the *Amchem* Court construed predominance as a safeguard for due process and adjudicative legitimacy rather than as a proxy for judicial economy. It also suggested that class cohesiveness is distinct from adequacy of representation: cohesiveness is a condition that must be satisfied before representational adequacy is at all relevant. That these requirements are distinct suggests, too, that cohesiveness is about something different than the shared goals or preferences that occupy the representational adequacy analysis.[113] And for the same reason, cohesiveness cannot refer simply to the absence of interest conflict within the class. Conflicting interests are relevant to (a)(4) representational adequacy, but not to (b)(3) predominance. Indeed, the *Amchem* Court addressed interest conflicts in its (a)(4) analysis, not in its discussion of Rule 23(b)(3).[114]

This interpretation of *Amchem* points to the influence of a process-based model and an externally defined class. While there is no doubt that outcome-related concerns influenced the result, the Court's reasoning does not fit an outcome-based approach at all well. In fact, the Court refused to pass judgment on the settlement's fairness explicitly, which in any event is a matter mostly left to the discretion of the trial judge.[115] Perhaps the majority believed that requiring a cohesive class would reduce the risk of sweetheart settlements and other forms of abuse. But the Court did not justify its cohesiveness requirement in those terms. To be sure, an outcome-based view requires that the

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112 *Id.* at 622–23; *see also id.* at 623 ("If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context.").

113 The Court focused on goals and preferences when it analyzed (a)(4) adequacy of representation. *Id.* at 625–28 (observing that currently injured plaintiffs' "critical goal" of generous immediate payments "tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future").

114 The Court held that the *Amchem* class failed (a)(4) adequacy of representation because currently injured class members had interests in conflict with those members who had not yet manifested injury. *Id.* at 625–28. In view of this conflict, the trial judge should have created two subclasses, each with its own representative and presumably its own attorney. This part of the Court's holding makes some sense as a way to guard against the currently injured selling out the exposure-only group. It also promotes process-based values by helping to assure that absentees have representatives who keep their best interests in mind—or as the Court puts it, who "operated under a proper understanding of their representational responsibilities." *Id.* at 627. But it is separate and distinct from the Court's predominance analysis.

115 As the dissent points out, the district judge took great pains to review the settlement carefully before finding that it was fair. *Id.* at 630 (Breyer, J., concurring in part and dissenting in part).

class be free of intraclass conflicts of interest that create serious risks of bad settlements or trial outcomes. But as discussed above, the *Amchem* Court addressed this type of interest conflict under Rule 23(a)(4)'s adequacy-of-representation requirement without relying on Rule 23(b)(3) or class cohesiveness at all.

Moreover, it is very difficult to defend a general cohesiveness requirement on the ground that it guards against abuse. Such a requirement focuses on relationships among individuals within the class. As such, it is likely to serve, at best, as only a weak check on abuse in large-scale class actions, where the risk has more to do with agency problems that affect the relationship between the attorney and the class. In addition, it is difficult to justify an across-the-board rule, like the one *Amchem* imposes on all (b)(3) suits, from an outcome-based perspective, even assuming that cohesiveness deters abuse. An across-the-board rule is bound to scuttle some class actions that are otherwise promising on outcome-based grounds but lack sufficient intraclass unity to satisfy the rule. Given the substantial judicial economy and enforcement benefits of the class action in many large-scale aggregations and the availability of other tools to deal with abuse, it is highly questionable that the social benefits of a general rule in guarding against abuse would exceed the social costs associated with scuttled class actions.

In fact, it is Justice Breyer who, in his separate opinion concurring and dissenting in part, takes an outcome-based approach and an internal view of the class.[116] Criticizing the majority's analysis, he argues that predominance cannot be determined "in the abstract," but only in the context of the actual issues that will arise in the case.[117] Because the central issue in *Amchem* is the fairness of the settlement, common questions about the settlement's fairness loom large.[118] Individual questions, such as differences in state law, "are of diminished importance in respect to a proposed settlement in which the defendants have waived all defenses and agreed to compensate all those who were injured."[119] In a passage that strikes to the core of the outcome-

116 For example, Justice Breyer cited the district judge's finding that the *Amchem* settlement "improved the plaintiffs' chances of compensation and reduced total legal fees and other transaction costs by a significant amount." *Id.* at 633.

117 *Id.* at 634–35.

118 *Id.* at 635–36 ("[T]he settlement underscored the importance of (a) the common fact of exposure, (b) the common interest in receiving *some* compensation for certain rather than running a strong risk of *no* compensation, and (c) the common interest in avoiding large legal fees, other transaction costs, and delays.").

119 *Id.* at 636.

based model, Justice Breyer, referring to how a predominance analysis requires attention to "the legal proceedings that lie ahead," states that "[s]uch guideposts help [the court] decide whether, in light of common concerns and differences, certification will achieve Rule 23's basic objective—'economies of time, effort, and expense.'"[120]

I do not mean to suggest that the Justices in *Amchem* consciously considered outcome-based and process-based models. The majority likely started with an intuition that a class as huge, sprawling, and diverse as the *Amchem* class simply had no business litigating as a class, and then proceeded to read Rule 23 to implement that intuition. These Justices were doubtless influenced by the range of practical problems a class action of this sort can create, and they clearly worried to some extent about the absence of structural protections for class members in the bargaining process.[121] But practical problems and bargaining deficiencies seem to have influenced the decision as much through reinforcing the initial intuition as providing independent grounds for denying certification.

b. Ortiz v. Fibreboard Corp.

Two years after *Amchem*, the Court dealt with another large and diverse class in *Ortiz v. Fibreboard Corp.*[122] *Ortiz* also involved a settlement class action, this one seeking approval of a global settlement that covered all future asbestos claims filed against Fibreboard.[123] Instead of using Rule 23(b)(3), the parties relied on a (b)(1)(B) limited fund theory, arguing that the amount available to satisfy the claims was insufficient to compensate all class members in full.[124] This (b)(1)(B) strategy had two advantages if successful: (1) it supported a mandatory class action that held out the hope of achieving global peace by locking everyone into the settlement without any chance to opt out, and (2) it avoided the predominance obstacle that had scuttled class certification in *Amchem*.[125]

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120 *Id.* at 636, 634 (quoting FED. R. CIV. P. 23 advisory committee's note to subdivision (b)(3) (1966)). In Justice Breyer's view, these determinations require difficult cost-benefit tradeoffs that should be left to the discretion of district court judges. *Id.* at 639.

121 *See, e.g., id.* at 627 (majority opinion) (finding settlement achieved compromise "with no structural assurance of fair and adequate representation for the diverse groups and individuals affected").

122 Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

123 *Id.* at 827.

124 *Id.* at 829.

125 Rule 23(b)(1)(B) requires only that "the prosecution of separate actions by . . . individual members of the class would create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other

The district judge certified a (b)(1)(B) class action and approved the settlement, and the Fifth Circuit affirmed.[126] The Supreme Court reversed. The majority worried that the settlement might be a sweetheart deal benefiting class counsel, Fibreboard, and Fibreboard's insurers at the expense of the class.[127] They also worried that such an ambitious use of Rule 23 might transgress Rules Enabling Act ("REA")[128] limits and run into constitutional problems.[129] What is significant for our purposes, however, is how the Court addressed these concerns. Rather than balancing the costs and benefits in light of the grim alternatives available to class members—as Justice Breyer did in his dissent[130] and as any judge following an outcome-based model would do—the Court instead imposed formal constraints on (b)(1)(B) limited fund class actions, constraints that the *Ortiz* class action failed to meet.[131] Notably, it found those constraints in the old representative suit precedents:

> In sum, mandatory class treatment through representative actions on a limited fund theory was justified with reference to a "fund" with a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution.[132]

The *Ortiz* settlement fell short on all counts. The fund was created by the parties' settlement agreement and not exogenously defined and delimited.[133] Moreover, the fund failed to include all of Fibreboard's assets to which plaintiffs, as judgment creditors, would have had claims.[134] And it was not used to satisfy all the claims on a

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members not parties to the adjudications or substantially impair or impede their ability to protect their interests." FED. R. CIV. P. 23(b)(1)(B).

126 *Ortiz*, 527 U.S. at 825–28.

127 *Id.* at 852–53.

128 Rules Enabling Act, 28 U.S.C. § 2072 (2012).

129 *Ortiz*, 527 U.S. at 842. Although the Court briefly notes a potential Seventh Amendment obstacle, it devotes most of its discussion to due process. *Id.* at 845–46.

130 *Id.* at 865–84 (Breyer, J., dissenting).

131 *Id.* at 847 (majority opinion).

132 *Id.* at 841. More precisely, the Court derived three (b)(1)(B) requirements: first, that the inadequacy of the fund be determined by comparing the total of all the claims with the fund set at its maximum; second, that "the whole of the inadequate fund . . . be devoted to the overwhelming claims" without any of it being held back to benefit the defendant or give the defendant "a better deal than *seriatim* litigation would have produced"; and third, that all the claimants must be "treated equitably among themselves," presumptively with a pro rata distribution and without any claimant receiving special treatment. *Id.* at 838–41.

133 *Id.* at 848–53.

134 *Id.*

pro rata basis; indeed, plaintiffs who were inventory clients of the class attorneys received separate, and larger, recoveries.[135]

One would have little basis to object to these constraints if Rule 23(b)(1)(B) clearly mandated them. But it does not. As the Court itself admits, the Rule on its face is open to a "more lenient" interpretation.[136] The Court infers from language in the Advisory Committee's Note identifying 23(b)(3) as the innovative provision that the Committee must have intended 23(b)(1) to be a traditional provision.[137] But the conclusion does not follow. The Advisory Committee's Note identifies (b)(3) as innovative not to limit the scope of other 23(b) pigeonholes, but only to emphasize the novelty of the (b)(3) class.

The Court also argues that the 1966 Committee did not contemplate use of the (b)(1)(B) limited fund concept for tort claims like those in *Ortiz*.[138] But this is hardly surprising. The Committee could not have contemplated such a use because it could not have anticipated the mass tort phenomenon and the extraordinary transaction and delay costs that mass tort litigation would create. Indeed, the fact that the Committee drafted Rule 23(b)(1)(B) in general terms rather than in a narrowly specific way is a strong indication that it meant for courts to apply the provision in light of the general fairness principle it expresses. The point is that Rule 23 could have been interpreted more broadly, but the Court chose not to do so.[139]

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135 *Id.* at 855.

136 *Id.* at 842.

137 *Id.* at 842–44.

138 *Id.* at 842–45. At times, the Court seems to think that the Committee's citation of old cases implies that it meant to incorporate the formal limitations those cases applied. *See id.* at 838, 842. But this does not follow at all. Citing old cases to illustrate factual scenarios for possible application of a new rule is not the same thing as endorsing the limiting doctrines that those cases applied. Indeed, it would be highly implausible for a Committee bent on making Rule 23 a more functional and pragmatic rule to embrace formalistic rights-based limits to the Rule's application.

139 In his concurring opinion, Justice Rehnquist, joined by Justices Scalia and Kennedy, suggested that he would have supported a settlement class action if only Rule 23 had authorized it. *Id.* at 865 (Rehnquist, J., concurring). This statement is rather strange given the frank admission in the Court's opinion that Rule 23(b)(1)(B) was open to a more generous interpretation. One might conclude from this concurrence that three of the seven Justices in the majority believed that Rule 23 could be easily revised to allow the *Ortiz* settlement class despite the Due Process and Rules Enabling Act concerns. But this would be a mistake. The best reading is that these concurring Justices would approve the settlement class on the merits *if* Rule 23 could be drafted to allow it, but that they take no position on whether this is possible given the constitutional and statutory hurdles the committee would have to surmount. In other words, it would be a mistake to conclude that these concurring Justices subscribe to an outcome-based model and

So why did the Court construe Rule 23(b)(1)(B) so narrowly? One reason was to prevent abuse of the (b)(1)(B) class action.[140] But if this was the Court's only goal, it chose an especially bad way to achieve it. The holding in *Ortiz* prevents abuse only by rendering the limited-fund class virtually useless for mass torts. Indeed, there is no reason to believe—and the majority gave none—that the constraints on the use of 23(b)(1)(B) will screen more abusive class actions than desirable ones on outcome quality grounds.[141]

In fact, preventing abuse for outcome quality reasons does not appear to be the majority's chief concern. Rather, the Court seems more concerned with legitimacy and day-in-court values. In particular, it relies heavily on due process and REA limits and emphasizes the tension between class treatment and the day-in-court right.[142] But rather than analyze these constitutional and statutory constraints explicitly, the Court instead invokes outdated representative suit precedent to limit the reach of Rule 23(b)(1)(B). And in doing so, it imports into 23(b)(1)(B) the same external conception of the class that those precedents embodied. As we have seen, in the nineteenth and early twentieth centuries, the limited fund cases focused on classes that were united by shared claims to a clearly defined and exogenously delimited fund.[143] The fund—not the parties or the judge—defined the class and *everyone* with claims to that fund automatically belonged to that class.

The *Ortiz* Court at one point refers to the cohesiveness requirement explicitly. It relies on *Amchem* for the proposition that a class must be cohesive before any settlement-related benefits can be considered: "[T]he determination whether 'proposed classes are sufficiently cohesive to warrant adjudication' must focus on 'questions that preexist any settlement.'"[144] This passage is notable, among other things, for its reference to class cohesion in the context of Rule 23(b)(1)(B), a pigeonhole that does not require predominance. But

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an internal conception of the class in general just because they approve of the settlement in the *Ortiz* case.

140 *Id.* 842 (majority opinion) ("[T]he greater the leniency in departing from the historical limited fund model, the greater the likelihood of abuse . . . .").

141 *Ortiz* itself might have been an example of just a desirable class action made impossible by the Court's limitations. *See id.* at 882 (Breyer, J., dissenting) ("There is no doubt in this case that the settlement made far more money available to satisfy asbestos claims than was likely to occur in its absence.").

142 *Id.* at 845–48 (majority opinion).

143 *See supra* notes 46–55 and accompanying text.

144 *Ortiz*, 527 U.S. at 858 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 622–23 (1997)).

this should not be surprising. It is exactly what one would expect from a court applying an external view to all class actions and requiring a minimum degree of cohesiveness before class members can be legitimately bound.

For the proponent of an outcome-based model, it might be tempting to interpret the references to cohesiveness in *Ortiz* and *Amchem* as just the Court's way of expressing the type of commonality that generates outcome benefits from class treatment. If judicial economy is the goal, for example, saying that a class is "cohesive" would simply mean that the class members share sufficient common questions to make aggregation efficient. However, this interpretation does not fit *Amchem* or *Ortiz*. We saw that cohesiveness in *Amchem* could not possibly have been about judicial economy because no litigation would have taken place had the settlement class been certified. Moreover, cohesiveness in *Ortiz* was not about the unfair externalities individual litigation would create. Indeed, the Court did not even consider whether the settlement would produce a fairer outcome for all plaintiffs than individual litigation.[145] In both cases, the Court treated cohesiveness as a due process and legitimacy constraint that had to be satisfied before any outcome benefits from class treatment could be considered at all.

Still, the Court has never clearly defined cohesiveness, nor explained how to determine whether a class is sufficiently cohesive to warrant representative litigation. Nevertheless, there are some clues in the opinions to what cohesiveness is *not* about. For example, it seems not to be about shared goals or preferences or group-wide benefits from class treatment. Moreover, cohesion is relatively weak when class members assert individual claims for monetary relief and particularly strong when, as in the (b)(2) class action, substantive legal rights and remedies treat the class as a unit. Beyond this, however, the Court offered little guidance.[146] In Part IV below, I analyze differ-

145 In any event, it is difficult to imagine how externalities that pit one plaintiff against another can possibly create a cohesive group. *See infra* notes 230–34 and accompanying text.

146 It is worth mentioning in this regard that the Justices themselves appear to be confused (or conflicted) about the meaning of cohesiveness at times. For example, the dissent in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), co-authored by Justices Ginsburg and Breyer and joined by two others, suggests that predominance is about judicial economy right after quoting *Amchem* for the proposition that it means cohesiveness. *See id.* at 1437 (Ginsburg & Breyer, JJ., dissenting) ("[W]hen adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate.").

ent conceptions of cohesiveness and explore their connections to due process and legitimacy values.

2. *Rule 23(b)(3) Predominance, (c)(4) Issue Classes, and Cohesion*

Although *Amchem* and *Ortiz* were concerned mainly with taming the settlement class action, their focus on class unity has had much broader consequences. After *Amchem*, the number of judicial references to class cohesion exploded and federal judges noted the presence or absence of class cohesion for many different purposes.[147]

For example, cohesiveness continued to play a role in justifying the mandatory nature of the (b)(2) class, just as it did before *Amchem*.[148] Though it is hard to determine this sort of thing from reading cases when judges do not state expressly what they are doing, it appears that courts have required a stronger degree of cohesiveness for (b)(2) classes after *Amchem*.[149] Some judges have even made cohesiveness the central (b)(2) inquiry, in effect importing a predominance requirement into Rule 23(b)(2). In the medical monitoring cases, for example, courts tend to ignore Rule 23(b)(2)'s express requirements and focus directly on how the presence of individual issues affects class cohesion.[150]

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147 I did a simple LEXIS search for the thirty-year period from January 1, 1967, to January 1, 1997, and then for the sixteen-year period from January 1, 1998, to January 1, 2014. I searched the "Federal Court Cases, Combined" database for opinions that referred to cohesion, homogeneity, or solidarity. I first used the search "Rule 23 and atleast2(cohes!) or atleast2(homogene!) or atleast2(solidarity)." This search retrieved 118 cases for the first period and 1069 cases for the second period. I then increased the number of references from two to four, searching with "Rule 23 and atleast4(cohes!) or atleast4(homogene!) or atleast4(solidarity)." This search retrieved 34 cases for the first period and 274 for the second. Not all of these opinions have to do with class certification, but it seems reasonable to suppose, confirmed by a cursory look, that most do. No doubt part of this increase is due to the greater availability of interlocutory appeals after the adoption of Rule 23(f) in 1998. *See* FED. R. CIV. P. 23, advisory committee's note to subdivision (f) (1998). However, Rule 23(f) alone cannot account for the sharp increase in district court opinions.

148 *See supra* notes 79–83 and accompanying text.

149 *Compare* Shook v. Bd. of Cnty. Comm'rs, 543 F.3d 597, 604 (10th Cir. 2008) (affirming the denial of (b)(2) certification of a prisoner class action alleging an Eighth Amendment cruel and unusual punishment claim and seeking broad-based injunctive relief, relying on the district court's conclusion that class heterogeneity defeated cohesiveness), *with In re* Monumental Life Ins. Co., 365 F.3d 408, 415–21 (5th Cir. 2004) (reading (b)(2) cohesiveness broadly to enable class litigation). Moreover, the Fifth Circuit spearheaded a stricter approach to certifying hybrid (b)(2) class actions and justified its stricter approach as necessary to preserve (b)(2) cohesiveness. *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 412–15 (5th Cir. 1998).

150 *See* Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 229–230. The best-known example is *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), which denied (b)(2)

As for Rule 23(b)(3), most courts have extended *Amchem*'s cohesiveness requirement to litigating as well as settlement classes, a result perfectly consistent with the central importance of cohesion to preclusion. Moreover, it would not be surprising if the predominance analysis became stricter with due process and legitimacy on the line, and this appears to be what is happening.[151] The following discussion first analyzes the recent Supreme Court decision in *Comcast Corp. v. Behrend*,[152] which, depending on how the case is interpreted, could require a stricter approach to predominance—one that demands commonality for damages as well as for liability. The discussion then examines two trends that seem to be linked to a demand for class unity: the emergence of per se rules against class certification and the resistance to using issue classes to satisfy (b)(3) predominance.

a. Comcast Corp. v. Behrend

In *Comcast*, subscribers to Comcast cable television services in the Philadelphia area sued Comcast for monopolization in violation of federal antitrust laws.[153] The plaintiffs alleged four theories of antitrust injury.[154] The district judge held that only one of those theories—the so-called "overbuilder-deterrence theory"—could be proved

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certification of a smoker class seeking a medical monitoring remedy. *Id.* at 142–43. The court noted expressly that "[w]hile *Amchem* involved a Rule 23(b)(3) class action, the cohesiveness requirement enunciated by . . . the Supreme Court extends beyond Rule 23(b)(3) class actions" and a "(b)(2) class may require more cohesiveness than a[ ](b)(3) class." *Id.* at 142; *see also* Gates v. Rohm & Haas Co., 655 F.3d 255, 262–64 (3d Cir. 2011) (relying on *Barnes* and the Supreme Court's decision in *Wal-Mart* to deny (b)(2) certification of a medical monitoring class action in an environmental toxic tort case on the ground that intraclass heterogeneity defeated cohesiveness). *See generally* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04 reporters' notes cmt. b (2010) (noting that "after *Barnes*, courts often have withheld class certification for medical monitoring due to the presence of individual issues"). To be sure, judicial reticence in the medical monitoring cases has to do with concerns that class attorneys use medical monitoring to bypass (b)(3) requirements and notice and opt-out safeguards. But this is a concern because courts believe that medical monitoring classes are not sufficiently cohesive to justify mandatory treatment, and that (b)(3) requirements and safeguards are therefore important.

151 In one case, a focus on class cohesiveness worked to facilitate rather than restrict certification. *See In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219 (2d Cir. 2006). After stipulating to the only common question, the defendant argued that predominance was not satisfied because all that remained were individual questions. This argument makes sense if predominance is a proxy for judicial economy. However, citing *Amchem* and noting that the "key question" predominance seeks to answer is "whether the class is a legally coherent unit of representation by which absent class members may fairly be bound," *id.* at 228, the court held that certification was appropriate despite the stipulation, because the stipulated common question was still relevant to class cohesion. *Id.* at 227–29.

152 Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).

153 *Id.* at 1430.

154 *Id.* at 1430–31.

on a class-wide basis.[155] The judge certified a (b)(3) class action limited to that theory, and the Court of Appeals affirmed.[156]

The Supreme Court reversed. It held that the class was improperly certified because the plaintiffs' evidence "[fell] far short of establishing that damages are capable of measurement on a classwide basis" and therefore that "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class."[157] The plaintiffs' evidence in the case consisted of the testimony of an expert who presented a regression model to show what prices would have been in the absence of Comcast's allegedly anticompetitive conduct.[158] The majority criticized the model for combining the effects of all four theories of antitrust injury and not singling out damages caused by the overbuilder-deterrence theory alone.[159] The district judge did not consider this an obstacle to certification of the class as defined, nor did two of the three appellate judges. They were all satisfied, based on the plaintiffs' model, that the plaintiffs could figure out some way to measure damages and that nothing more certain was needed at the certification stage.[160]

The Supreme Court demanded a more rigorous analysis. It criticized the Court of Appeals for shunning the merits inquiry required for certification, and in particular for not doing a rigorous enough analysis of whether damages could be measured on a class-wide basis.[161] As the majority explained: "In light of the model's inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class."[162] And in a footnote that is particularly telling, the Court demanded rather strong commonality for damages:

> We might add that even if the model had identified subscribers who paid more solely because of the deterrence of overbuilding, it still would not have established the requisite commonality of damages unless it plausibly showed that the extent of overbuilding (absent deterrence) would have been

155 *Id.* at 1431.

156 *Id.*

157 *Id.* at 1433.

158 *Id.* at 1431.

159 *Id.* at 1434–35.

160 *Id.* at 1431.

161 *Id.* at 1433.

162 *Id.* at 1435.

> the same in all counties, or that the extent is irrelevant to effect upon ability to charge supra-competitive prices.[163]

The majority did not explain why plaintiffs must show this degree of damages commonality in order to satisfy (b)(3) predominance. It justified its holding as a "straightforward application of class-certification principles" and framed the problem with the decisions below as simply one of lower courts failing to examine the plaintiffs' model carefully enough.[164] As the dissent points out, however, courts routinely certify class actions—or at least they did before *Comcast*—based on commonality at the liability stage without much regard, if any, for commonality in measuring individual damages, and they even certify based on predominance for liability issues alone, leaving damages for measurement and calculation in separate proceedings.[165] Against this background, *Comcast* can be read broadly to alter the predominance requirement by making commonality as to damages a more central part of the certification inquiry. After all, a rigorous analysis of the plaintiffs' model is necessary only if lack of commonality as to damages measurements would scuttle certification even when predominance is otherwise satisfied with respect to liability issues.[166] The dissenters were clearly concerned about this broad reading, which could greatly impede (b)(3) certification, and this concern led them to try to confine the Court's holding to the *Comcast* case itself.[167]

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163 *Id.* at 1435 n.6.

164 *Id.* at 1433. The Court purported to simply apply the "rigorous analysis" standard of proof for class certification that *Wal-Mart* endorsed, which includes a serious merits review. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011). However, because a merits review is appropriate only when the merits are relevant to a certification requirement, the Court must be assuming that commonality at the damages stage is necessary to satisfy (b)(3) predominance, at least for this case.

165 *Comcast*, 133 S. Ct. at 1437 (Ginsburg & Breyer, JJ., dissenting) ("Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal.").

166 *See id.* at 1433 (majority opinion) ("Without presenting another methodology . . . [q]uestions of individual damage calculations will inevitably overwhelm questions common to the class."). It is possible to read the Court's decision as applying only to certifications that encompass both liability and damages and not to issue-class certifications limited to liability alone. *See, e.g.*, *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig. (*Whirlpool II*), 722 F.3d 838, 860 (6th Cir. 2013) (distinguishing *Comcast* on the ground that the *Comcast* class action was certified for both liability and damages whereas the *Whirlpool II* class action was certified only for liability), *cert. denied*, 134 S. Ct. 1277 (2014); *see also* Butler v. Sears, Roebuck & Co. (*Butler II*), 727 F.3d 796, 800 (7th Cir. 2013) (distinguishing *Comcast* in part on the same ground), *cert. denied*, 134 S. Ct. 1277 (2014). But if that was all the Court had in mind, one might have expected more discussion of the point in the opinion itself.

167 The dissent argued that because the *Comcast* plaintiffs never contested the need to

Thus, the precise meaning of *Comcast* is unclear.[168] It might be construed narrowly to hold only that courts must take a close look at the plaintiff's methodology for measuring individual damages on a class-wide basis in those cases where, for some reason, damages commonality is relevant to certification. Or it might be construed broadly to require greater attention to damages commonality in the predominance analysis of *any* (b)(3) damages class action. Although both interpretations are difficult to square with an outcome-based model, the latter is especially problematic. Damages commonality is not often needed to justify class action treatment on judicial economy grounds, and it is hardly necessary to measure individual damages at the specific level contemplated by the footnote passage quoted above. In fact, judicial economy can be satisfied by sufficiently predominating common questions at the liability stage alone, especially when, as in *Comcast*, the defendant's allegedly unlawful conduct is identical across the class and likely to be a major contested issue.[169]

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prove damages on a class-wide basis, the Court's holding should be construed to apply only to the case at hand:

> The oddity of this case, in which the need to prove damages on a classwide basis through a common methodology was never challenged by respondents is a further reason to dismiss the writ as improvidently granted. The Court's ruling is good for this day and case only. In the mine run of cases, it remains the "black letter rule" that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.

Comcast, 133 S. Ct. at 1437 (Ginsburg & Breyer, JJ., dissenting) (citation omitted). However, this reading is hard to square with the fact that the Court, after *Comcast*, vacated and remanded three cases for reconsideration in light of the *Comcast* decision. *See infra* note 170 and accompanying text. For an application of *Comcast* to deny certification of a (b)(3) class action, see Roach v. T.L. Cannon Corp., No. 3:10-CV-0591, 2013 WL 1316452, at *3–4 (N.D.N.Y. Mar. 29, 2013) (relying on *Comcast* to deny (b)(3) certification in a wage and hour case because plaintiffs failed to show individual damages were capable of measurement on a class-wide basis, and explicitly rejecting plaintiffs' contention that certification is appropriate even if damages "might be highly individualized"). *But see* Leyva v. Medline Indus. Inc., 716 F.3d 510 (9th Cir. 2013) (holding that individual damages do not necessarily prevent class certification and reading *Comcast* to require plaintiffs to show a causal link between the basis for liability and the damages of individual class members, a link that the court thought could be demonstrated in the case by using the defendant's records).

168 *See* Klonoff, *supra* note 6, at 800 (noting that lower courts are "divided on what the impact of [*Comcast*] will be" and that if they require a "methodology for proving damages on a classwide basis," it will seriously impede class certification).

169 Issue classing makes this point even more compelling. Courts in antitrust, securities fraud, and other similar cases often certify issue classes under Rule 23(c)(4), limited to liability. One might view *Comcast* as an effort to screen frivolous and weak class actions and thus to further the outcome-based goal of preventing distorted settlements due to improper settlement leverage. *See generally* Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1110–14 (2013) [hereinafter Bone, *Walking the*

Shortly after its *Comcast* decision, the Court granted certiorari, vacated, and remanded ("GVR") in three cases involving common liability issues in which lower courts had certified (b)(3) classes for outcome-based efficiency reasons notwithstanding differences at the damages stage.[170] It is tempting to read these GVR decisions as further evidence that *Comcast* is not primarily an outcome-based decision, since the vacated cases used strongly outcome-oriented reasoning. Nevertheless, one must be careful not to read too much into a GVR. It is quite possible that the Supreme Court vacated and remanded only in order to give the lower courts an opportunity to work out the implications of its *Comcast* decision. Moreover, the Court denied certiorari in two of these three cases after the courts of appeals on remand reaffirmed certification by limiting *Comcast*'s application.[171] Even so, these GVR decisions are at least consistent with what one would expect from a Court hostile to a dominantly outcome-based approach.[172]

Class Action Maze] (arguing that this concern underlies many of the decisions that adopt a stricter standard of proof for certification). But this interpretation fits the opinion rather poorly. To see why, start by noting that a "frivolous" class action can mean two different things. It can mean (1) that the case in fact does not meet existing certification requirements (so certification is meritless even if individual suits have merit), or (2) that the individual claims in the class are substantively meritless. The goal of preventing frivolous class actions in the first sense is not advanced by changing certification requirements because frivolousness is defined by whatever certification requirements happen to be in place. Moreover, it is difficult to see how the goal of preventing frivolous class actions in the second sense would be furthered by requiring strong commonality for damages when the liability case is otherwise sound and there is good reason to believe that a large fraction of the class actually suffered damages as a result of the alleged wrongdoing.

170 The three GVR cases are *Butler I*, 702 F.3d 359 (7th Cir. 2012), *vacated*, 133 S. Ct. 2768 (2013); *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation* ("*Whirlpool I*"), 678 F.3d 409 (6th Cir. 2012), *vacated*, 133 S. Ct. 1722 (2013); and *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012), *vacated*, 133 S. Ct. 1722 (2013). Each involved a (b)(3) class action that was certified despite differences among class members relating to the degree of harm and the extent of damages.

171 The Sixth Circuit in *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation* ("*Whirlpool II*"), 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014), and the Seventh Circuit in *Butler v. Sears, Roebuck & Co.* ("*Butler II*"), 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014), responded to the GVR by reinstating the affirmance of class certification. Both opinions distinguish *Comcast*, at least in part, on the ground that the class action in the *Comcast* case was certified for liability and damages, whereas the class actions in *Butler II* and *Whirlpool II* were certified only for liability. *Butler II*, 727 F.3d at 800; *Whirlpool II*, 722 F.3d at 860. Petitions for certiorari were filed and denied in both cases. *See* Sears, Roebuck & Co. v. Butler, 134 S. Ct. 1277 (2014) (denying certiorari); Whirlpool Corp. v. Glazer, 134 S. Ct. 1277 (2014) (denying certiorari).

172 This is particularly true for *Butler I*, 702 F.3d 359 (7th Cir. 2012), *vacated*, 133 S. Ct. 2768 (2013). The Seventh Circuit in *Butler I* held that a class of washing machine buyers should have been certified on the strength of common liability issues even though class members sustained

In any event, it is difficult to understand the *Comcast* decision other than as a reflection of the majority's commitment to an externally defined class influenced by a process-based model. Damages have long been considered a quintessentially individual remedy that triggers particularly strong claims to an individual day in court.[173] It should hardly be surprising that a Court bent on limiting certification to cohesive classes for day-in-court reasons would demand cohesiveness at the damages stage. Understood in this way, the *Comcast* decision harkens back to the Court's interpretation of (b)(3) predominance as a test for class cohesiveness in *Amchem*.[174]

b. Per Se Rules and Issue Classes

Some commentators report restrictive class action developments that fit what one would expect from courts concerned with class unity or cohesiveness for process-based reasons. This section discusses two

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different amounts of economic damage. *See id.* at 361. Judge Posner wrote an opinion with a thoroughgoing outcome-based and functional approach to (b)(3) predominance. Declaring that "[p]redominance is a question of efficiency," *id.* at 362, he proceeded to find that predominance was satisfied in the case because class litigation was efficient given the non-cost-justified nature of individual suits and the virtual certainty of settlement, *id.* The fact that the Supreme Court granted certiorari in *Butler I* only to vacate and remand is at least somewhat suggestive of a possible hostility to the heavily outcome-based approach that the *Butler I* court used. Still, it is also important to note that the Court declined certiorari the second time around after another heavily outcome-based opinion by Judge Posner on remand. *Sears, Roebuck & Co.*, 134 S. Ct. at 1277 (denying defendant's petition for a writ of certiorari).

173 *See* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (emphasizing that "Rule 23(b)(3), as an adventuresome innovation, is designed for situations in which class-action treatment is not as clearly called for" and noting that this fact explains the additional procedural safeguards, such as opt-out (internal quotation marks omitted)).

174 *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), decided the same term as *Comcast*, muddies the waters a bit. *Amgen* holds that plaintiffs in a securities fraud class action need not prove materiality at the class certification stage even though materiality is a required element of a fraud-on-the-market theory used to support (b)(3) predominance. *See id.* at 1197. At first glance, this might seem inconsistent with an externally defined class. If the fraud-on-the-market theory is necessary to establish sufficient legal homogeneity to make a class cohesive, then the absence of materiality should be fatal. *Amgen* was an unusual case, however, in that materiality was not only relevant to certification but also pivotal to liability. This created a different kind of class unity. As the majority saw it, the class necessarily must succeed or fail as a unit. If materiality is proved later on, certification will have been proper, and if is not proved, the class will lose on the merits anyway. Even so, the Court's holding does not fit a process-based model all that well. The majority argues that proof of materiality is not needed for certification because nothing significant turns on it. *See id.* From a process-based perspective, however, something significant does turn on it—preclusion. An insufficiently cohesive class cannot be bound by any factual determinations, including determinations about the materiality of misrepresentations. Thus, if predominance assures the minimal cohesiveness necessary to make class adjudication legitimate, it follows that class members cannot be bound to an adverse judgment if materiality is not demonstrated at the certification stage.

such developments: the use of per se rules against (b)(3) certification, and resistance to using issue classes to satisfy the (b)(3) predominance requirement. While judges are not explicit about the reasons behind these developments, it seems highly plausible, given the way the rules work, that they are strongly influenced by an external conception of the class.

First, consider per se rules. Professor Klonoff, a leading class action scholar, gives several examples.[175] He notes a trend toward a "per se view that fraud suits involving questions of individual reliance are not suitable for class certification" notwithstanding the presence of common questions.[176] And he also notes that "[n]umerous courts hold that when the laws of multiple states are involved and are not uniform, class certification is essentially per se inappropriate."[177]

These trends are very difficult to square with an outcome-based model. It is hard to imagine how a focus on outcome benefits would support presumptive rules against certification. If the class action is meant to promote judicial economy, for example, the presence of a substantial individual question, like reliance, should not bar certification by itself—not without also considering the relative importance of common questions and the balance of benefits and costs. A presumption might make sense if the benefits of avoiding case-by-case decisionmaking, including the risk of erroneous certifications and bad class action outcomes, exceeded the costs of improperly denying certification due to the presumption. But the judicial economy gains for large class actions are likely to be so substantial that the cost of erroneously denying certification should often exceed whatever savings a presumption might generate, especially considering the other tools available to judges to check for class action abuse. Per se rules might be appropriate if there were readily identifiable categories of cases with recurring fact patterns in which individual questions almost always rendered certification undesirable on judicial economy grounds. But different class action cases present quite different fact patterns with different degrees of factual and legal overlap, and it is not at all

175 Klonoff, *supra* note 6, at 793–97.

176 *Id.* at 793–96. Among Klonoff's examples are *Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 434 (4th Cir. 2003); *McManus v. Fleetwood Enterprises, Inc.*, 320 F.3d 545, 549–50 (5th Cir. 2003); *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co.*, 319 F.3d 205, 211 (5th Cir. 2003); and *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996). Klonoff, *supra* note 6, at 68–72; *see also* Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 252.

177 Klonoff, *supra* note 6, at 796–97.

clear that there is sufficient clustering to make a per se approach sensible.[178] Given this, it is not surprising that Professor Klonoff, himself an outcome-based proponent, is highly critical of the per se approach and supports a case-specific analysis instead.[179]

However, someone following a process-based model and insisting on class cohesion should readily accept the per se approach. A presumptive rule against certification fits the absolute and categorical nature of the cohesiveness determination. From a process-based perspective, class cohesiveness is not about balancing costs and benefits. It is about determining whether the class possesses a threshold degree of legal interconnection and overlap. This threshold cannot be defined with precision, but it can be given content negatively by identifying paradigmatic situations that fall short. And these situations lend themselves to formulation in terms of per se presumptions.

My second example is the debate over the proper relationship between the (b)(3) predominance analysis and issue classing under Rule 23(c)(4).[180] Coordinating Rule 23(b)(3) and Rule 23(c)(4) generated little controversy before the mid-1990s.[181] Courts either ignored Rule 23(c)(4) altogether or applied it without worrying too much about whether predominance should be analyzed first.[182] The matter became much more controversial after the Fifth Circuit's 1996 opinion in *Castano v. American Tobacco Co.*,[183] which criticized the

178 Indeed, the use of issue classing makes a per se approach even more inappropriate on outcome-based grounds.

179 Klonoff, *supra* note 6, at 796, 798–99. To be sure, a case-specific balancing approach might not be optimal if judges are prone to get certification decisions wrong. But in that case, an outcome-based analysis might well support presumptions in favor of, rather than against, certification because of the large economy and enforcement benefits associated with class treatment.

180 *See* Klonoff, *supra* note 6, at 807–15 (discussing the sharp split among courts and commentators). *Compare* Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709 (2003) (criticizing the use of issue classes as undermining the class certification requirements of Rule 23(b)(3)), *with* Romberg, *supra* note 176 (advocating expanded use of issue classes). *See generally* Jenna G. Farleigh, Note, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585, 1598–1602 (2011).

181 See Hines, *supra* note 180, at 724–41 (separating the earlier history of (c)(4) into two stages: 1966–1980 when (c)(4) was largely ignored, and 1980–1995 when it was applied to certify mass tort class actions without much controversy).

182 *Id.*

183 Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996). It is important to note that the recent decision in *Comcast Corp. v. Behrend*, 131 S. Ct. 1426 (2013), might make issue classing more difficult if it requires commonality for damages as well as for liability. *But see Butler II*, 727 F.3d 796, 800 (7th Cir. 2013) (arguing that because *Comcast* involved a class action certified for both liability and damages, it has limited application to a case where the class action is certified pursuant to Rule 23(c)(4) for liability issues alone), *cert. denied*, 134 S. Ct. 1277 (2014); *Whirlpool II*, 722 F.3d 838, 860 (6th Cir. 2013) (same), *cert. denied*, 134 S. Ct. 1277 (2014).

use of issue classing to satisfy predominance. Today, some courts support certifying issue classes without first analyzing predominance when the determination of the common questions would "materially advance" the litigation.[184] Other courts, including the Fifth Circuit in *Castano*, reject this approach and insist that common questions must predominate over individual questions for the lawsuit or each cause of action taken as a whole before any issue classes can be certified.[185] They argue that if an issue class consisting only of common questions could be created first and the certification analysis performed for the issue class on its own, (b)(3) predominance would be an empty requirement because it could always be satisfied.[186]

The proponents of a generous use of issue classes defend their position in the way one would expect from someone favoring an outcome-based model: they emphasize the efficiency and fairness of issue-class certification.[187] Indeed, issue classing makes great sense within an outcome-based model—assuming no constitutional obstacles[188]—as long as the gains from adjudicating the common questions exceed the additional costs of managing an issue class action and the common questions are distinct enough from individual questions to be adjudicated accurately in isolation.[189]

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184 *E.g.*, McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 234 (2d Cir. 2008) (recognizing that (c)(4) issue classes can be used when predominance is not satisfied for the lawsuit as a whole, but decertifying the class because issue certification would not "materially advance" the litigation given the number of individual questions); *see also In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 227 (2d Cir. 2006) ("[A] court may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement."); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues . . . and proceed with class treatment of these particular issues.").

185 *See Castano*, 84 F.3d at 745 n.21; Arch v. Am. Tobacco Co., 175 F.R.D. 469, 496 (E.D. Pa. 1997); *cf. In re* Baycol Prods. Litig., 218 F.R.D. 197, 209 (D. Minn. 2003) (arguing that issue certification was not appropriate, because "individual trials will still be required to determine issues of causation, damages, and applicable defenses").

186 *See Castano*, 84 F.3d at 745 n.21; *In re Baycol*, 218 F.R.D. at 209; *Arch*, 175 F.R.D. at 496.

187 *See, e.g.*, McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 492 (7th Cir. 2012) (concluding, after explaining the efficiency gains of issue-class treatment, that "[w]e have trouble seeing the downside of the [issue-class] treatment that we think would be appropriate in this case"); Klonoff, *supra* note 6, at 812 (endorsing issue classes where they "materially advance" the litigation); Romberg, *supra* note 176, at 294–96, 334 (same).

188 For example, the Seventh Amendment Reexamination Clause can create problems for issue classing. *See, e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995).

189 *See McReynolds*, 672 F.3d at 491 (noting that there must be no reason to believe that repeated litigation of the common questions is likely to improve outcome accuracy); Gates v. Rohm & Haas Co., 655 F.3d 255, 273 (3d Cir. 2011) (listing a number of factors relevant to

The opposite is true for someone strongly influenced by the process-based model. On this view, predominance assures class cohesion, and the requisite degree of cohesion limits how finely the lawsuit can be subdivided before a predominance analysis is done. If the class has to be cohesive over the entire suit, for example, common questions must predominate for all the claims taken together. If cohesion need only exist at the level of a claim, it should be enough that common questions predominate for each claim taken separately. But there must be some absolute limit to how far the carving process can go, or cohesiveness loses all of its meaning. If common questions could be grouped into separate issue classes before undertaking a predominance analysis, predominance would always be satisfied no matter how heterogeneous the class.[190] In that case, predominance would be useless as an instrument for safeguarding due process and legitimacy values.[191]

One example of the conflict between outcome-based and process-based approaches to issue classing is found in *Gunnells v. Healthplan Services, Inc.*[192] The question in that case had to do with whether predominance must be satisfied for the entire suit taken as a whole or only for individual claims taken separately. Stressing the outcome benefits of issue classing, the majority held that predominance need only be satisfied for individual claims.[193] Judge Niemeyer, in dissent, argued that a global assessment was necessary to assure the class cohesion that *Amchem* required:

> Just as it is not the mission of Rule 23(e) to supply the cohesion that legitimizes a settlement-only class action, neither is it the mission of Rule 23(c)(4)(A) to supply the cohesion to legitimize an issue-only class action. In both situations, the cohesion essential to legitimize a 23(b)(3) class action can be shown only when the action as a whole satisfies

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whether issue classes are appropriate); *In re* St. Jude Med., Inc., 522 F.3d 836, 841 (8th Cir. 2008) (refusing to certify an issue class because it would not promote the efficiency of the litigation).

190 *See, e.g.*, *Castano*, 84 F.3d 734, 745 n.21 ("Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.").

191 *See, e.g.*, Hines, *supra* note 180, at 594–98 (arguing that predominance should be analyzed prior to issue classing because a cohesive class is necessary to satisfy due process). Still, it is important to be clear that, while courts cite to *Amchem* for the proposition that predominance assures cohesiveness, few explicitly link cohesiveness to a *stricter* predominance analysis.

192 Gunnells v. Healthplan Servs., Inc., 348 F.3d 417 (4th Cir. 2003).

193 *Id.* at 446.

> the predominance requirement of Rule 23(b)(3). The principle of *Amchem* is that every Rule 23(b)(3) class action must satisfy all of the provisions of Rule 23(a) and (b)(3), and the other provisions of the Rule, including Rule 23(e), cannot be used to dilute the requirement that each proposed class must satisfy the predominance requirement to merit certification. In my view, the majority's reading of Rule 23(c)(4) allows for a diluted application of Rule 23(b)(3) by removing from the predominance calculus most of the individualized issues in the case.[194]

To be sure, many factors have contributed to the tightening of certification requirements over the past fifteen years, including concerns about impermissible settlement leverage and high agency costs.[195] In addition, the increased involvement of appellate courts after the 1998 addition of subdivision (f) to Rule 23 has certainly made a difference.[196] Yet the evidence is strong for the influence of a process-based model and its search for intraclass unity.

3. *Rule 23(a)(2) Commonality, (b)(2) Indivisibility, and Cohesion*

Perhaps the most striking example of this trend is the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*.[197] Indeed, *Wal-Mart* might be the high water mark of the process-based model and the externally defined class. The Court addressed two issues, both of which have to do in different ways with class unity. First, the Court held that to satisfy the (a)(2) commonality requirement, a common question of law or fact must be *central* to all the claims: "That common contention . . . must be of such a nature that . . . determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[198] Second, the Court held that a (b)(2) class action can include only claims for "indivisible" relief, such as a decree that benefits all class members at once, and cannot include claims for "individualized" relief, such as damages or

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194 *Id.* at 451.

195 *See, e.g.*, Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251 (2002).

196 Rule 23(f) gives the court of appeals power to permit an interlocutory appeal from an order granting or denying certification. FED. R. CIV. P. 23(f); *see also* 7B WRIGHT ET AL., *supra* note 108, § 1802.2. Before the adoption of Rule 23(f), it was very difficult to get immediate review of a class certification decision. As a result, district judges had wide latitude to apply Rule 23 as they saw fit.

197 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

198 *Id.* at 2551.

back pay, unless those claims are "incidental" to the indivisible relief sought.[199] The following discusses each holding in turn.

a. The Rule 23(a)(2) Holding

Most courts before *Wal-Mart* treated (a)(2) commonality as a minimal threshold requirement.[200] A single nontrivial question of law or fact shared in common would usually suffice, and it was not always necessary for the common question to be shared by absolutely everyone in the class.[201] The *Wal-Mart* Court made Rule 23(a)(2) into something much stricter.[202] After *Wal-Mart*, a common question alone is not enough; the common question must lie at the core of all the claims.[203]

The Court's rationale for this stricter rule is not terribly clear. There are a few references in the opinion to judicial economy.[204] But it is difficult to justify the holding on economy grounds. After all, a determination of whether Wal-Mart had a company-wide discriminatory policy would have reaped substantial economy benefits in future suits asserting the same legal theory. No doubt concerns about wasted judicial resources and unjustified settlement leverage played a role, especially in the Court's insistence that the common question have merit.[205] Still, it is hard to justify the Court's exacting scrutiny of the plaintiffs' evidence on outcome quality grounds.

In fact, the *Wal-Mart* opinion does not read like the opinion of a court worried about outcome effects. Had the Court focused on out-

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199 *Id.* at 2557–59.

200 *See* 7AA WRIGHT ET AL., *supra* note 108, § 1763.

201 *Id.*

202 Although exactly how much stricter is unclear. Some lower federal courts have distinguished *Wal-Mart* or found a sufficiently central common question. *See, e.g.*, *Whirlpool I*, 678 F.3d 409 (6th Cir. 2012), *vacated*, 133 S. Ct. 1722, *reinstated*, 722 F.3d 838 (6th Cir. 2013); Ross v. RBS Citizens, N.A., 667 F.3d 900 (7th Cir. 2012), *vacated*, 133 S. Ct. 1722 (2013); Sullivan v. DB Invs., Inc., 667 F.3d 273 (3d Cir. 2011). The Supreme Court vacated in *Ross* and *Whirlpool I* and remanded for reconsideration in light of *Comcast*. *See supra* note 170 and accompanying text. The Sixth Circuit in *Whirlpool II* responded to the GVR by reaffirming class certification and holding once again that the plaintiffs had satisfied *Wal-Mart*'s common question requirement. *Whirlpool II*, 722 F.3d 838, 852–55 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014). Others courts, however, have denied certification on (a)(2) grounds. *See, e.g.*, Maryland *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 840 (5th Cir. 2012) (denying certification of a § 1983 class for failing (a)(2) and (b)(2) cohesiveness because plaintiffs did not show that class litigation would resolve an issue "'*central to the validity* of each one of the [class member's] claims in one stroke'" (alteration in original) (quoting *Wal-Mart*, 131 S. Ct. at 2551)).

203 *Wal-Mart*, 131 S. Ct. at 2541.

204 *See id.* at 2551 & n.2.

205 *See id.* at 2553.

comes, it would have recognized that judicial economy is not the reason for a (b)(2) class action. The primary goal of Rule 23(b)(2) is remedial efficacy—facilitating systemic injunctive and declaratory relief targeting class-wide wrongs—and for this reason Rule 23(b)(2) requires that common questions coalesce around a unitary group wrong and remedy.[206] Furthermore, Rule 23(b)(3), which is about judicial economy, has a built-in screen in the form of a predominance requirement that is much more demanding than Rule 23(a)(2).

A more plausible explanation is that (a)(2) commonality checks class cohesiveness for due process and legitimacy reasons. Admittedly, the Court does not mention cohesiveness when discussing (a)(2). It does, however, suggestively refer to the "glue" that holds the disparate reasons for the various employment decisions together[207] and demands not just that class members share common questions, but that they "have suffered the same injury."[208] It also demands strong evidence of a "specific employment practice" that "ties all [the] 1.5 million claims together."[209] Again, the reference is to tying claims together rather than deciding overlapping questions of law and fact.

The *Wal-Mart* class sought certification under Rule 23(b)(2), and as we have seen, courts associate (b)(2) class actions with cohesive classes and demand strong cohesion to justify a mandatory class. In *Wal-Mart*, it is the company-wide discriminatory policy that supplies the necessary cohesion; without it, there is no group wrong and no basis for a group remedy. Thus, serious doubts about the existence of Wal-Mart's policy implicate much more than judicial economy. They implicate class unity and thus due process and legitimacy constraints. And these constraints must have seemed particularly significant in *Wal-Mart*. That case, like *Amchem* and *Ortiz* before it, involved a huge, sprawling, and diverse class, which to someone influenced by a process-based model would likely have seemed inappropriate for unitary treatment.[210]

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206 In fact, the Court admits as much in the part of its opinion discussing the (b)(2) issue, where it acknowledges Rule 23(b)(2)'s roots in civil rights cases seeking systemic injunctive relief. *Id.* at 2557–58.

207 *Id.* at 2552 ("Without some glue holding the alleged *reasons* for all those [employment] decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*").

208 *Id.* at 2551 (internal quotation marks omitted).

209 *Id.* at 2555–56 (internal quotation marks omitted).

210 *Id.* at 2555 ("In a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction.") By contrast, the *Wal-Mart* dissenters find the plaintiffs' showing of

The *Wal-Mart* Court in effect reads Rule 23(b)(2)'s strong version of commonality into Rule 23(a)(2) and thereby extends it to all class actions.[211] For those who believe class cohesion is a fundamental requirement of due process and legitimacy, there is nothing surprising about this move. Because cohesiveness is required for all class actions, it makes sense to assume that a universally applicable threshold requirement, like Rule 23(a)(2), would embody it. Indeed, Rule 23(a)(2) is the only Rule 23(a) requirement that fits the bill. Numerosity has nothing to do with cohesiveness, typicality focuses on similarities between class representatives and the class rather than on intraclass unity, and representational adequacy is relevant only after cohesiveness is satisfied.

b. The (b)(2) Holding

Before *Wal-Mart*, lower federal courts allowed monetary relief in a (b)(2) class action as long as it did not "predominate" over injunctive and declaratory relief.[212] *Wal-Mart* imposed a much stricter requirement. The Court explicitly rejected the predominance test and focused on remedial indivisibility instead.[213] It held that claims for monetary relief cannot be certified under Rule 23(b)(2), except perhaps when the monetary relief is, in some undefined but extremely narrow sense, "incidental" to the indivisible injunctive or declaratory relief that supports (b)(2) certification.[214]

The opinion does not refer to cohesiveness expressly, nor does it equate indivisibility with class unity. Nevertheless, its analysis seems to be influenced by an external conception of the class and a process-based model of the class action. The indivisibility of the remedy ties

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discrimination more than sufficient for class certification. *Id.* at 2561, 2565 (Ginsburg, J., dissenting).

211 A recent opinion, *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), takes what seems to be a mild jab at *Wal-Mart*. *Amgen* addressed (b)(3) predominance rather than (a)(2) commonality, but some of the Court's language seems intended to moderate the strictness of *Wal-Mart*. *See, e.g.*, *id.* at 1191 (stressing that (b)(3) predominance focuses on common "questions," not "answers"). For more on *Amgen*, see *supra* note 174.

212 Lower courts disagreed, however, about the appropriate test for determining whether monetary relief predominated. *Compare* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415–18 (5th Cir. 1998) (adopting a strict incidental test), *with* Robinson v. Metro-N. Commuter R.R., 267 F.3d 147, 164 (2d Cir. 2001) (adopting a more flexible balancing test).

213 *Wal-Mart*, 131 S. Ct. at 2557 (noting that Rule 23(b)(2) is not available when "each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant" or an individualized monetary award).

214 *Id.* at 2557, 2561. Actually, the Court did not have to decide the question whether monetary claims could ever be certified under Rule 23(b)(2) because it found that plaintiffs' back pay claims could not.

the class together and gives it the strong unity needed for mandatory class treatment. Adding monetary relief dilutes that unity, which triggers the need for Rule 23(b)(3)'s additional procedural protections.[215]

Indeed, the Court's proffered arguments are extremely weak without this additional element. The Court is correct that the 1966 Advisory Committee modeled Rule 23(b)(2) on civil rights class actions, but this fact does not mean that the Committee intended to limit (b)(2) to cases that mimic those precedents exactly.[216] In fact, the reference in the Committee Note to monetary relief suggests otherwise.[217] The Court also cites practical problems with adding monetary relief to a (b)(2) class action, but these problems, while relevant, hardly justify denying (b)(2) certification across the board.[218]

Finally, the Court relies on the structure of Rule 23(b). It infers a committee intent to restrict 23(b)(2) to indivisible relief from the fact that (b)(2) is mandatory and does not include 23(b)(3)'s predominance and superiority safeguards.[219] The Court argues that the indivisible nature of the relief in a (b)(2) class action accounts for these special features: remedial indivisibility demands a mandatory class and automatically satisfies predominance and superiority.[220] The Court's interpretation, however, is not the only one that fits Rule 23(b)'s structure. For example, 23(b)(2) might be understood to include indivisible *plus* nonpredominating monetary relief, leaving 23(b)(3) for class actions that have no indivisible remedy. Indeed, there is no apparent reason why predominance and superiority must be satisfied for *all* class actions, or why Rule 23 would shun a mandatory class just because nonpredominating monetary relief is involved.

There is another problem with the Court's reasoning. To justify the mandatory nature of the (b)(2) class, the Court assumes that indivisible relief necessarily entails an indivisible and hence mandatory class. But this does not follow as a logical matter. Just as the availa-

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215 This is especially true when the defendant has affirmative defenses to individual back pay claims, as was the case in *Wal-Mart*. *See id.* at 2558–59.

216 *Id.* at 2557–58.

217 The 1966 Advisory Committee Note includes a passage that states, "The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." FED. R. CIV. P. 23 advisory committee's note to subdivision (b)(3) (1966). There would have been no need to mention this limitation if Rule 23(b)(2) were intended only for injunctive and declaratory relief.

218 *Wal-Mart*, 131 S. Ct. at 2559–60.

219 *Id.* at 2558–59.

220 *Id.* at 2558.

bility of a class-wide injunction is not an inevitable consequence of a class-wide wrong, so too the availability of a mandatory class action is not an inevitable consequence of class-based relief. Whatever rules there are result from policy choices. For example, the substantive law might have allowed only individual injunctions, but as the experience with civil rights litigation in the 1960s demonstrates, individual relief is not likely to correct systemic wrongs.[221] So too, procedural law might have allowed only individual suits for class-wide relief. However, relying on individual suits would have risked conflicting injunctions and made it harder for the judge to learn what she needed to know to craft a broad-based remedy.[222] In other words, the (b)(2) class exists for functional reasons; it is not inevitable, natural, or dictated by indivisibility.

Thus, indivisibility is not a very helpful guide to Rule 23(b)(2) for someone focused on outcome quality. From an outcome-based perspective, what matters most is (b)(2)'s remedial efficacy goal, and this means that (b)(2) should include claims for back pay if back pay awards are an essential component of Title VII's make-whole remedial scheme or if the prospect of monetary relief coupled with fee-shifting is an important incentive for filing (b)(2) suits.[223] Indivisibility

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221 *See* Marcus, *supra* note 68, at 688–91, 700–01.

222 A class action facilitates intervention and has heuristic advantages for conceiving of the wrong in group terms.

223 *See, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998) (noting that back pay is "an integral component of Title VII's 'make whole' remedial scheme"); George Rutherglen, Wal-Mart, AT&T Mobility, *and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24, 26 (2012) (arguing that a diminished opportunity to recover monetary relief alongside injunctive relief is likely to reduce the expected attorney's fee award and with it the incentives to bring class actions). Also, most class members in *Wal-Mart* probably had too little back pay at stake to justify litigating costly individual suits. Under these circumstances, there is no strong outcome-based reason to exclude them from a mandatory class action or to give them a useless opt-out right.

Shortly after the *Wal-Mart* decision, Judge Posner construed the Court's (b)(2) holding in a way that, not surprisingly for Judge Posner, reflects an outcome-based approach. Johnson v. Meriter Health Servs. Emp. Ret. Plan, 702 F.3d 364 (7th Cir. 2012). For one thing, he interpreted the Court's reference to "individualized" awards to mean "awards based on evidence specific to particular class members," and he read "incidental" monetary relief to include any award that results from a calculation that is "mechanical, formulaic, a task . . . for a computer program." *Id.* at 370, 372. This interpretation ignores language in *Wal-Mart* suggesting that the adjective "individualized" modifies remedy, not evidence, and that class unity is about the unitary or indivisible character of the remedy. *Wal-Mart*, 131 S. Ct. at 2557 ("Rule 23(b)(2) . . . does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."); *see also id.* at 2558 (noting that Rule 23(b)(2) is based on one of the "most traditional justifications for class treatment," namely, that "the relief sought must perforce affect

is, however, highly relevant from a process-based perspective. The indivisible nature of the remedy assures the cohesiveness and homogeneity required for a (b)(2) mandatory class. The *Wal-Mart* Court in effect assumes that a class must be strongly unified before a mandatory class action is appropriate and that remedial indivisibility provides the necessary unity. These assumptions fit most comfortably with a process-based model and an external conception of the class.[224]

IV. Problems with an Externally Defined Class and a Process-Based Model

To recap so far, we have seen that the early representative suit and the original Rule 23 class action reflected an external view of the class tied to a formalistic rights-based theory of necessary party joinder and preclusion. In 1966, when Rule 23 shed its formalistic baggage, it became possible for the first time to envision a thoroughly pragmatic, outcome-based model of the class action and an internal conception of the class. The Advisory Committee, however, stopped short of fully embracing this new vision. Ever since then, the class action has been shaped by the tension between outcome-based and process-based models. In particular, restrictive class action developments over the past fifteen years reflect the growing influence of an externally defined class tied to a process-based model of the class action that focuses on class cohesiveness.

To be sure, heightened attention to class cohesiveness is not the only factor responsible for more restrictive class action rules. Concerns about unjustified settlement leverage have led courts to tighten

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the entire class at once"); *id.* at 2559 (suggesting that a mandatory class action might be unconstitutional whenever monetary relief is involved). Even more important, rather than stating categorically that (b)(2) certification should be denied for a hybrid class action with individualized monetary damage awards, Judge Posner instead suggested certifying under Rule 23(b)(2) and giving discretionary notice and opt-out. Moreover, he even recommended this alternative over a divided certification when issues overlap between liability and damages, raising potential Seventh Amendment problems. *Johnson*, 702 F.3d at 371. This is a rather bold proposal. Not only did the *Wal-Mart* Court not mention this option, but it emphasized Rule 23(b)(3)'s "greater procedural protections" while noting that the back pay portion of the suit would have to be certified, if at all, under Rule 23(b)(3). *See Wal-Mart*, 131 S. Ct. at 2558. The difference between Judge Posner and the Supreme Court majority in *Wal-Mart* is a difference in perspective. The Court sees class treatment of damage claims as implicating serious due process and individual participation concerns, whereas Judge Posner sees it as offering substantial efficiency benefits in appropriate cases.

224 Indeed, the Court in dictum notes a "serious possibility" that the Due Process Clause might require notice and opt-out whenever monetary relief is involved. *Wal-Mart*, 131 S. Ct. at 2559. This suggests that the Court's interpretation of Rule 23 is premised on a view of due process that requires a strongly cohesive class for mandatory class treatment.

proof standards at the certification stage, and greater awareness of the risk of collusion has prompted more careful attention to representational adequacy, settlement fairness, and fee requests.[225] These concerns, however, can also feed due process and legitimacy critiques. As problems with the class action multiply, it would not be surprising for judges to question whether such a problematic device that deprives class members of control and participation really belongs in civil litigation at all.

There is an important lesson to draw from this history. If the restrictive trend over the past fifteen years is due, at least in part, to the influence of a process-based model, those who favor a broader and more generous Rule 23 must be prepared to challenge this model on its own terms. The following discussion takes on this task. It argues that an external requirement of class unity is not obviously justified on due process or legitimacy grounds. Cohesion is not needed to respect individual dignity or to reconcile the class action with the requirements of adjudicative legitimacy.

Before proceeding, it is important to clarify a possible limitation on the arguments in this section. So far, the Supreme Court has implemented its restrictive view of the class action primarily through narrow readings of Rule 23, but if it decides to constitutionalize those readings—and there are some indications that it might—there will be little room left to implement a broader outcome-based approach. Nevertheless, the Advisory Committee should still proceed with its own best understanding of due process requirements even if it crafts a rule that fails to obtain Supreme Court approval. As I have argued elsewhere, the Committee can contribute to a dialogic interaction with the courts if it offers its best understanding of the fundamental values underlying the Rules.[226]

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225 For examples of stricter proof standards, see *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008); *Teamsters Local 445 Freight Division Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir. 2008); and *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24 (2d Cir. 2006). Concerns about settlement and agency problems in part motivated the 2003 amendments to Rule 23 giving judges more power to choose class attorneys and strengthening settlement review. Congress, too, has weighed in with stricter pleading standards for securities fraud cases and additional limitations on small claim class actions with national scope. *See, e.g.*, 15 U.S.C. § 78u-4(b)(2) (2012) (setting forth the Private Securities Litigation Reform Act's strict pleading requirement); 28 U.S.C. §§ 1711–1715 (2012) (setting forth the Class Action Fairness Act's regulation of class action settlements).

226 *See* Bone, *Walking the Class Action Maze*, *supra* note 169.

A. *Due Process and the Day in Court*

As discussed in Part I, it is important to distinguish between two different theories of participation: an outcome-based theory and a process-based theory.[227] An outcome-based theory values participation for its beneficial impact on outcome quality. The assumption is that party control in an adversarial setting promotes outcome accuracy by harnessing strong private incentives to present evidence and argument and test the accuracy of factual and legal contentions. By contrast, a process-based theory values participation for its own sake. More precisely, it views a personal day in court as essential to respect the autonomy and dignity of those who are seriously affected by litigation.

An outcome-based theory of participation does not support the Court's across-the-board cohesion requirement. Because the participation opportunities that litigants receive in this theory depend entirely on the extent to which additional participation is likely to improve outcome quality, the class should be designed and the representational nexus constructed in whatever way optimally serves outcome goals, whether those goals are defined in terms of rights enforcement or welfare maximization.[228] In general, it should be enough if class members have similar litigation preferences, or at least preferences that do not strongly conflict, and the class representative and attorney have incentives to litigate vigorously.[229] There is no obvious reason why cohesiveness or remedial indivisibility is needed as well. One might refer to a class consisting of individuals with roughly similar litigation preferences as "cohesive," but as we have seen, the Court's cohesiveness requirement is much more demanding.

Thus, a strong cohesion requirement can be justified, if at all, only within a process-based theory. It is at this point, however, that things

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227 *See supra* Part I.B.

228 A utilitarian (or efficiency-based) theory of adjudication holds that judges should decide cases in whatever way maximizes social welfare, whereas a rights-based theory of adjudication holds that judges should decide cases by finding and enforcing the rights of the parties. *See generally* Bone, *Rethinking the "Day in Court" Ideal*, *supra* note 27, at 237–39, 256–58 (describing the difference between the two theories).

229 *See* Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 580–89 (2011) [hereinafter Bone, *The Puzzling Idea of Adjudicative Litigation*]. One might argue that a cohesiveness requirement reduces the risk that class members with high-value claims will receive less than their entitlements due to the inevitable averaging that accompanies settlement. But averaging of this sort is not always bad, and a threshold cohesiveness requirement is bound to do a poor job sorting between the good and the bad cases. In any event, this risk has nothing to do with participation as such.

become quite fuzzy. The rough intuition seems to be that the strength of the participation right somehow varies with the degree of individuality within the class. The more individuality class members possess, the more individual participation they should receive. The problem is how to flesh out this intuition in a rigorous way.

One thing is clear: the individuality that counts cannot be a function of subjective preferences or goals. If it were, the (b)(1) and (b)(2) class actions would not qualify as strongly cohesive. In a (b)(1)(B) limited fund class action, for example, competition over the limited fund necessarily creates an internally divisive class with sharply conflicting class member preferences and goals. The same is true for the (b)(2) class, although in a less dramatic way. Even a civil rights class action can include class members with different preferences about the scope of injunctive relief and different views on the desirability of suing at all.[230]

In fact, the individuality that scuttles class cohesiveness has to do with how the substantive law treats class members, not with what class members prefer. As we have seen, class cohesion is strong enough to justify a mandatory class action when, as in Rule 23(b)(2), the substantive law treats class members as a unitary group. As I have argued elsewhere—and as fits the history recounted in Part II—this type of cohesion satisfies due process requirements by homogenizing class members and thereby reducing the force of the day-in-court right.[231] But if this is what the Court has in mind, there is a problem: this approach to defining cohesiveness does not fit Rule 23(b)(1)(B).

Rule 23(b)(1)(B) authorizes a mandatory class action, but unlike Rule 23(b)(2), it aggregates claims for individual monetary relief. All class members are connected by the fact that individual litigation that benefits one imposes harmful externalities on others. These externalities, however, create a situation of intraclass conflict that divides rather than unifies the class.[232] The substantive law might provide a basis for class unity if it adjusted each class member's right and remedy so as to take account of the externality problem. But it does not. In the limited fund class action, for example, each class member's substantive right and remedy is quintessentially individual. The substan-

230 *See* Marcus, *supra* note 68, at 709–10. Indeed, preferences and goals are bound to conflict to some extent in virtually all class actions. *See, e.g.*, Coffee, Jr., *supra* note 7, at 389–90 (noting that risk attitudes affecting litigation and settlement preferences are bound to vary across any group of claimants).

231 Bone, *The Puzzling Idea of Adjudicative Litigation*, *supra* note 229, at 610–13.

232 *Id.* at 623–24. What unites the class is the policy reason for class treatment, and that makes it an internally defined class.

tive right is to *full* compensation, not just an equitable share.[233] Indeed, if the right were only to an equitable share, there would be no need for a mandatory (b)(1) class action at all.[234]

It follows that the cohesion of a (b)(1)(B) class is the same as (or perhaps even less than) the cohesion of a (b)(3) class. From a process-based perspective, this means that a (b)(1)(B) class must have notice and opt-out rights, just as a (b)(3) class does. But notice and opt-out would make it impossible for the (b)(1)(B) class to serve its fairness goals. The only way out of this dilemma is to abandon the requirement of cohesion, adopt an internal view of the (b)(1)(B) class, and evaluate its mandatory status on functional grounds from an outcome-based perspective.

In fact, cohesion is not required at all to satisfy the day-in-court right, as properly understood. In the nonparty preclusion setting, the Supreme Court treats the day-in-court right as extremely strong.[235] It justifies the right mainly by reference to "deep-rooted historic tradition."[236] If the right is as strong as the Supreme Court seems to think it is, however, there would be few reasons compelling enough to outweigh it and thus little room for a class action or other type of collective adjudication.[237] As it turns out, the Court's understanding of "historic tradition" is mistaken. Traditional practice actually supports significant limits on litigant control.

I have discussed this point at length elsewhere.[238] To mention just a few examples, the rules of permissive joinder, compulsory joinder, and intervention limit control opportunities by forcing parties to share the litigation stage with others. Although compulsory joinder and intervention-as-of-right are intended to address potential unfairness, permissive joinder and permissive intervention authorize the addition of parties simply for the sake of judicial economy.[239] Admittedly, the

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233 This assumes that equitable apportionment is a procedural principle, and it seems perfectly reasonable to treat it that way. The principle serves procedural purposes: it aims to solve a collective action problem created by the individualistic nature of the procedural system. In effect, it implements a principle of fair regard for other litigants that limits litigant control when individual litigation creates a serious risk of unfair externalities. *See id.* at 614–24.

234 At least if the total number of claimants is known or readily ascertainable. One might still authorize a class action to save litigation costs, but in that case it would have to be certified under Rule 23(b)(3).

235 *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 892–95 (2008); Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996).

236 *Taylor*, 553 U.S. at 892–93 (internal quotation marks omitted).

237 *See* REDISH, *supra* note 6, at 135–37.

238 *See* Bone, *The Puzzling Idea of Adjudicative Litigation*, *supra* note 229, at 614–24.

239 Allowing the plaintiff to join additional defendants furthers the plaintiff's autonomy but

effect on control is small when only one person is added, but it becomes much more significant as more parties are joined, especially if the judge also requires those who are joined to cooperate in filing briefs, conducting discovery, and engaging in other pretrial activities.[240] So too, impleader, counterclaims, and Rule 42 consolidation complicate the litigation in ways that adversely affect litigant control. And the relatively uncontroversial applications of Rule 23(b)(1) and (b)(2) drastically restrict control opportunities for fairness and remedial efficacy reasons.

Furthermore, judges have power to transfer cases "[f]or the convenience of parties and witnesses," even though a transfer interferes with the plaintiff's freedom to choose her own forum.[241] For a particularly dramatic example, the Multidistrict Litigation Act[242] allows the Judicial Panel on Multidistrict Litigation ("JPML") to transfer thousands of cases for pretrial purposes, and the JPML can do so simply to reap judicial economy gains.[243] Often the result is a litigation structure dominated by lead counsel and a litigation committee that strips most plaintiffs of any meaningful control at all.[244]

In view of this extensive practice, the best account of the day in court—the account that fits these rules and practices and embodies a workable and attractive theory of participation—conceives of individual participation as an institutional right rather than a broad liberty right.[245] By an institutional right, I mean a right that is defined by a balance of factors that makes for the best functioning of the institution within which the right operates. In the case of the day-in-court right,

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restricts the autonomy of the defendant. So too, allowing intervention respects the autonomy of the intervenor but reduces the control opportunities for those who are already parties. While Rule 42(b) allows a judge to carve up a large lawsuit into smaller and more manageable units, judges often decide to keep a large lawsuit intact when there are significant efficiency gains to be had. *See* 7 WRIGHT ET AL., *supra* note 108, § 1660 (noting that judges give great weight to the efficiency gains from joinder).

240 *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 150, § 1.02 reporters' notes cmt. b(1)(A) (recognizing the possibility of permissive joinder of large numbers of defendants).

241 28 U.S.C. § 1404(a) (2012).

242 *Id.* § 1406.

243 *Id.*

244 *See* MANUAL FOR COMPLEX LITIGATION, THIRD § 20.22 (1995). As a purely formal matter, the parties in each of these situations have hired their own lawyers, whereas absent class members have not. Having one's own lawyer, however, is not enough to satisfy the process-based value of respect for individual dignity. That value is about more than choosing a lawyer; it is about the lawyer having a robust opportunity to control litigation choices on behalf of his client.

245 *See* Bone, *The Puzzling Idea of Adjudicative Litigation*, *supra* note 229, at 624.

the relevant institution is civil adjudication, and the salient factors include respect for litigant autonomy, avoiding serious unfairness to other litigants, assuring remedial efficacy, and, to some uncertain extent, promoting judicial economy and litigation efficiency.

Still, even an institutional right must limit the type of balancing that gives it content, for otherwise it would not function as a right capable of constraining an ordinary utilitarian calculus. It follows that for the day in court to have traction as a right, litigant autonomy must receive enough weight in the balance that it resists or constrains reasons for limiting control based exclusively on saving aggregate litigation costs or maximizing social welfare in some other way.[246]

The central point can be simply stated: an externally defined cohesiveness requirement does nothing to serve an institutional day-in-court right. Whether a class action is compatible with the day in court depends on what the right guarantees, which in turn depends on a balance of factors, including the reasons for class treatment. It follows that the definition of the class must be internal to the certification process. Litigant autonomy gets significant weight in the analysis and constrains the types of reasons that can support certification. Although ordinary judicial economy gains might not be enough, relieving serious unfairness and assuring remedial efficacy surely are. And even large enough economy gains might be sufficient, especially if the aggregate cost savings improve each class member's expected recovery as well. But there is no reason to deny certification just because the class is not united in some way outside the litigation.

B. Legitimacy

Adjudicative legitimacy overlaps with the day-in-court right insofar as legitimacy depends on individuals having an opportunity to participate in their own lawsuits.[247] If this is what the Court means by legitimacy, the previous discussion applies. However, legitimacy can encompass more than participation. In analyzing the broader constraints legitimacy imposes, it is important to distinguish between perceived legitimacy and normative legitimacy. Perceived legitimacy has to do with whether the public perceives adjudication as legitimate. Normative legitimacy has to do with whether adjudication is actually legitimate regardless of public perceptions.

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246 *Id.* (noting that the day in court is a right "insofar as it resists or constrains reasons for limiting control that sound exclusively in improving aggregate welfare or achieving collective social goals").

247 *See, e.g.*, Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 275–84 (2004).

Criticisms of the class action based on perceived legitimacy are extremely weak.[248] For one thing, public perceptions are malleable. If people believed that a massive class action like *Amchem* saved hugely on judicial resources and improved the chances of recovery for class members, I doubt they would conclude that it does not belong in adjudication or think any less of adjudication for entertaining it. Public perceptions are also circular. The more frequently a procedure takes place, the more comfortable people are likely to become with it and the less likely they are to think it is illegitimate. Most importantly, perceived legitimacy is often a cloak for normative legitimacy. The critic believes that the procedure in question is normatively illegitimate, assumes that others must share the same belief, and then concludes from this that everyone is likely to perceive the procedure as illegitimate.

With respect to normative legitimacy, there are several possible arguments for cohesiveness, but all have serious problems. One argument assumes that civil adjudication draws its normative legitimacy in large part from its pedigree and that the pedigree of the class action features cohesive classes.[249] It is not at all clear, however, why pedigree ought to matter to legitimacy. Moreover, even if it does matter, the pedigree that counts should surely be consistent with well-settled principles that inform current practice. The representative suit pedigree for the class action fails this condition. As we have seen, the rights-based formalism that supported the representative suit historically was rejected in 1966 and replaced by a more pragmatic and functional approach.[250] Indeed, if legitimacy required following old models, much of contemporary civil procedure would have to be jettisoned.[251]

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248 *See* Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1378–80 (2012) [hereinafter Bone, *Party Rulemaking*] (discussing the deficiencies at length).

249 The Supreme Court in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), made this argument. *See supra* notes 122–43 and accompanying text.

250 *See supra* notes 66–69 and accompanying text.

251 For example, the permissive joinder rules, made more functional in 1938, would have to be restored to their previous formalistic and restrictive code and common law forms. Moreover, we might have to reinstate the formalistic compulsory joinder and intervention rules that prevailed before the 1966 reforms. *See* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 98–107 (1989); *see also* FED. R. CIV. P. 19, 24, advisory committee's notes (1966). This is not to say that precedent is irrelevant. Precedent does matter but in a complicated way that privileges general principle, not lower level principles or rules. *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 940–47 (1999) [hereinafter Bone, *Process of Making Process*].

Another possibility assumes that civil adjudication, at its core, is about resolving private disputes. According to this view, the class action has doubtful legitimacy whenever it is enlisted primarily to serve regulatory goals. The problem with this argument is that ordinary civil adjudication serves regulatory (deterrence) as well as compensatory functions. Moreover, the private attorney general idea is pervasive and firmly entrenched.[252] Even if the argument had merit, it would present problems only for some class actions, and not for the most controversial ones at that. For example, the mass tort class action is in major respects about providing compensation to injured parties.

A third possibility assumes that the paradigmatic form of civil adjudication involves suits between individuals. Some deviations from the paradigm are permissible, such as suits by or against corporations and other formal legal entities, but too radical a departure threatens legitimacy. This argument might call for a cohesiveness requirement to the extent that a cohesive class can be assimilated to an individual litigant. But the argument lacks merit. For one thing, it is unclear why adjudication necessarily favors individuals as parties. More importantly, the unitary nature of a cohesive class is only metaphorical, and metaphor is not the same thing as justification. In fact, the class remains an aggregation of individuals with distinct legal claims no matter how cohesive it is.

Nor is it apparent that the class action threatens anything else that is fundamental or essential to civil adjudication. I have argued elsewhere that the core feature of civil adjudication is its distinctive mode of principled reasoning.[253] Judges interpret the law as they apply it. They do so by moving back and forth between the judge's best understanding of the law and whatever moral and practical intuitions are generated by the facts, fitting law to intuition until a reflective equilibrium is achieved. There is nothing intrinsic to the class action that is inconsistent with this reasoning process.[254] Judges decide issues in the usual way, and parties have as strong, if not stronger, incentives to litigate those issues than in an individual suit.[255]

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252 *See* William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2133–37 (2004).

253 Bone, *Party Rulemaking*, *supra* note 248, at 1385–91.

254 One might argue that the settlement class action is problematic because it asks the court to approve a bargain without an opportunity to reason about the merits. But settlement is a pervasive feature of litigation and settlements conclude cases without reasoned decisions on the merits. In any event, the fate of the settlement class has no bearing on ordinary litigating classes.

255 The leading legal process theorist, Lon Fuller, described a theory of adjudication that

A more serious legitimacy problem arises when the court intrudes on the legislative or administrative domain. The class action creates this risk because of its key role in implementing substantive policy and the strong impact it can have on the distribution of power outside as well as inside the courtroom. Indeed, particularly serious problems can arise when a class settlement creates a broad-based compensation scheme that closely resembles what an administrative agency would ordinarily implement.[256]

In the case of Rule 23, the Rules Enabling Act ("REA") is the principal legal basis for addressing these concerns.[257] The REA delegates power to the Supreme Court to make "rules of practice and procedure" for the lower federal courts.[258] Section 2072(b)—the REA proviso—limits that power by barring procedural rules that "abridge, enlarge or modify any substantive right."[259] As Professor Burbank has persuasively argued, Congress intended the REA proviso to enforce separation of powers principles by ensuring that procedural rules avoid the types of regulation more properly left to the political process.[260] Thus, one might take the position that a class action violates the REA if its purpose or effect is too substantive—where "too substantive" is understood to mean that the problem is more appropriately handled through legislation.[261]

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featured individual participation and principled reasoning at its core. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364, 366 (1978) ("[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation[,] . . . that of presenting proofs and reasoned arguments for a decision in his favor."). Nothing in Fuller's theory, however, is necessarily inconsistent with the class action. Fuller was committed to personal participation because he believed it had instrumental value in developing sound legal principles over the long run. He believed that participation in an adversarial setting assured a vigorous presentation of the competing arguments and helped the judge maintain detachment and sympathetic engagement at the same time. Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1303–08 (1995). Nothing about the class action is necessarily incompatible with these goals.

256 *See generally* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007) (arguing that complex mass tort settlements have more in common with administration than adjudication).

257 28 U.S.C. § 2072 (2012).

258 *Id.* § 2072(a).

259 *Id.* § 2072(b).

260 Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106–12 (1982).

261 Some commentators have suggested that Rule 23 might violate the REA proviso on its face because of the substantive effects it creates and the way it redistributes power, though even these critics recognize that the Rule is too firmly entrenched to invalidate at this point. *See, e.g.*, Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 19 (2010) ("[T]he possibility that the entire [Rule 23] endeavor

The REA analysis is too complex to undertake in detail here. In my view, a proper understanding of the REA proviso would allow most applications of Rule 23.[262] But this hardly means that *all* applications are acceptable. For example, the Supreme Court expressed REA and separation of powers concerns in *Amchem* and *Ortiz*.[263] These class actions involved complicated global settlements establishing administrative schemes that provided scheduled recovery to future asbestos claimants.[264] And they did so in spite of the fact that Congress on several occasions had chosen not to adopt legislation that would have created an administrative solution. Given this context, one might view these class actions as strategies to circumvent the political process and produce a privately created solution to a public problem without public input and accountability.[265] To be sure, there are other ways to view these class actions that are more supportive of their legitimacy.[266] My purpose is not to debate the merits. My point is that there are some class actions that raise serious questions of legitimacy on separation of powers grounds.

It is not clear, however, how class cohesiveness helps to address this concern. Perhaps it is reasonable to assume that use of the class action is consistent with congressional intent whenever a statute creates substantive rights and remedies with a group character. While

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may have unfolded in violation of the Enabling Act seems increasingly compelling, but the disruptive consequences of such a conclusion would be unacceptable.").

262 My view is that the REA permits Federal Rules of Civil Procedure that have major substantive effects as long as those Rules are justified as serving core procedural policies, such as distributing the cost of error in a fair and efficient manner and managing the process costs of litigation. *See* Bone, *Process of Making Process*, *supra* note 251, at 950–54. Rule 23 was designed to and does serve these policies and most of its applications do so as well.

263 Ortiz v. Fibreboard Corp., 527 U.S. 815, 845, 864 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613, 629 (1997).

264 *See* NAGAREDA, *supra* note 256.

265 For a similar critique of a class settlement in another context, see Judge Denny's opinion denying certification of a global settlement class in the Google Book Search litigation. Authors Guild v. Google, Inc., 770 F. Supp. 2d 666, 677–78 (S.D.N.Y. 2011).

266 One might view them more favorably as judicial responses to serious cost, delay, and outcome error problems in the face of congressional paralysis. Justice Breyer made this point in *Ortiz*:

> [A]n individual asbestos case is a tort case, of a kind that courts, not legislatures, ordinarily will resolve. It is the number of these cases, not their nature, that creates the special judicial problem. The judiciary cannot treat the problem as entirely one of legislative failure, as if it were caused, say, by a poorly drafted statute. Thus, when "calls for national legislation" go unanswered, judges can and should search aggressively for ways, within the framework of existing law, to avoid delay and expense so great as to bring about a massive denial of justice.

Ortiz, 527 U.S. at 867 (Breyer, J., dissenting) (citation omitted).

this approach might help justify (b)(2) class actions based on statutory claims, it does little for (b)(1) or (b)(3). One might argue that Congress intends (b)(3) class litigation whenever the main purpose of a statute is regulatory, the statute authorizes private suits to implement that purpose, and a class action is necessary for private litigation given the small individual stakes.[267] But this line of reasoning has nothing to do with class cohesion. To be sure, the class is united by the regulatory objective, but that is true for virtually any substantive claim. Products liability law, for example, serves a regulatory as well as a compensatory function and, from the regulatory point of view, all consumers are in a sense united as potential beneficiaries of the regulatory scheme.

This last observation leads to a second point. The best way to address potential legitimacy problems is to consider them in the certification analysis, along with all the other relevant factors. It makes no sense to deal with legitimacy by imposing cohesiveness or other external constraints on the class. Legitimacy depends on case-specific factors that do not correlate well with cohesiveness, however defined. The nature of the substantive law and the policies underlying it, the type of remedy sought, and the suit's practical impact are all relevant to the analysis, and all of these factors vary from case to case. The implication is clear: when legitimacy is included in the certification analysis, it becomes part of the class definition from an internal point of view, and this supports an internal conception of the class and an outcome-based model of the class action.

CONCLUSION

This Article began by noting the conflict between internal and external views of the class and linked it to a deeper conflict between outcome-based and process-based models of the class action. It then

267 *But see* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013) (refusing to infer a congressional policy in favor of class action arbitration of antitrust claims based on the importance of class treatment to cost-justified arbitrations, and holding that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim"). Professors Burbank and Wolff offer a related view of the proper relationship between the class action and the REA proviso. *See* Burbank & Wolff, *supra* note 261, at 21. They argue that Rule 23 should be understood as simply a "mechanism for carrying an aggregate proceeding into effect" when the "substantive liability and regulatory regimes of state and federal law" support aggregation to serve the goals of the substantive law. *Id.* To determine whether the relevant substantive policies support class action aggregation requires judicial interpretation: the exercise of a federal common lawmaking power in the case of federal law, and careful interpretation of the substantive scheme in the case of state law. *Id.* at 66–68. Again, class cohesion adds nothing to this approach.

traced the influence of these views historically and argued that the modern class action is influenced by both views, as well as by the models to which they are linked. In particular, the Supreme Court's 1997 opinion in *Amchem* elevated the importance of class cohesiveness, and its opinion two years later in *Ortiz* reinforced the necessity of extralitigative unity. The effects of this shift can be seen in the interpretation and application of the (b)(3) predominance requirement, the debate over whether to handle predominance problems through issue classes, and the *Wal-Mart* Court's transformation of Rule 23(a)(2)'s common question requirement and restrictive interpretation of Rule 23(b)(2). The Article then critically examined the normative case for an externally defined class and found the arguments seriously wanting.

There are two lessons to draw from this discussion. The first has to do with the importance of developing a more rigorous understanding of individual participation and adjudicative legitimacy. Class action critics and defenders alike seem content with general appeals to these values, but general appeals are not enough. The only way to develop an attractive and defensible approach to the class action is to first construct a rigorous normative theory of due process and adjudicative legitimacy that can guide debates about participation, class legitimacy, and functional efficacy.

The second lesson is more substantive. Cohesiveness limits the availability of the class action and does so in a crude way that correlates poorly with the values that the limits are supposed to serve. This is a serious problem because the class action is an essential component of civil adjudication in the modern world. Mass marketing produces mass harms, which in turn generate massive numbers of suits that can impose huge burdens on the court system as well as on the victims themselves. When the number of cases gets very large, class aggregation, though imperfect, can offer the only realistic hope of meaningful recovery at reasonable cost. Moreover, when the substantive law relies on private enforcement but small stakes make individual litigation impractical, the class action can be the only way to promote the underlying substantive goals. And when statutes like Title VII furnish group remedies to redress class-based violations of right, the class action makes it possible to craft relief that targets the causes and not just the symptoms of wrongdoing.

At the same time, class actions generate problems of their own. But the way to address these problems is not to engage in a misguided search for class unity. Rulemakers and courts should confront the

problems directly, assess their costs, and shape class procedures to strike a reasonable balance between costs and benefits.[268] In other words, they should apply an outcome-based model and an internal conception of the class.

268 This does not mean that the cost-benefit balance should be struck for each case separately. General rules have a role to play, and federal rulemakers should determine the optimal mix of general rule and case-specific discretion. *See generally* Robert G. Bone, *Who Decides?: A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961 (2007).