THE MISGUIDED SEARCH FOR CLASS UNITY

Robert G. Bone

ABSTRACT

This Article focuses on a conflict lying 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 an artificial device constructed by the judge to achieve the functional goals of Rule 23. The external view sees class as a group with a unity existing analytically prior to the certification decision. This unity or cohesiveness is not a product of design choices made at the certification stage. Instead it constrains those choices and might even scuttle certification when class treatment is desirable on functional grounds. While these two conflicting views are both influential, the external view has gained considerable ground over the past decade. This recent trend is troubling for those who see the class action as a valuable device, but it is hopeful for those who see the class action as a marginal device of questionable legitimacy.

The reason that the conflict produces such sharply divided views has to do with its connection at a deeper level to two competing normative models of the class action: an outcome-based model and a process-based model. The outcome-based model, to which the internal view is linked, focuses primarily on the benefits of class litigation for outcome quality, treats due process as a flexible constraint, and assumes that good outcomes go a long way toward satisfying due process values. The process-based model, to which the external view is linked, focuses on litigant autonomy and the day in court right, requires clear and strong outcome quality gains to justify class certification, and confines the class action to classes with an internal group cohesion that mitigates individual participation concerns and supports the legitimacy of representative adjudication.

This Article first traces the internal and external views through class action history and describes the growing influence in recent years of an externally-defined “cohesive class” requirement, especially in connection with interpretations of 23(b)(3) predominance and 23(a)(2) commonality. It then critically examines the normative case for the external view and the process-based model and finds the arguments 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 and misguided search for class unity.
INTRODUCTION

I. INTERNAL VERSUS EXTERNAL VIEWS
   A. An Illustration
      1. The Internal View
      2. The External View
   B. The Connection to Class Action Models
      1. Outcome-Based Model
      2. Process-Based Model
   C. Comparing Other Models

II. VIEWS OF THE CLASS IN HISTORICAL PERSPECTIVE
   A. Representative Suits in the Eighteenth and Nineteenth Centuries
   B. The Original Rule 23
   C. The 1966 Revision of Rule 23

III. THE MODERN INFLUENCE OF CLASS COHESIVENESS AND THE EXTERNAL VIEW
   A. 1967-1997: Hybrid (b)(2) Class Actions
   B. 1997-Present: The Impact on (b)(3), (c)(4), and (a)(2)
      1. 23(b)(3) Predominance and Class Cohesion
      2. Predominance, (c)(4) Issue Classes, and Class Cohesion
      3. 23(a)(2) Commonality, (b)(2) Indivisibility, and Class Cohesion

IV. PROBLEMS WITH AN EXTERNALLY-DEFINED CLASS AND THE PROCESS-BASED MODEL
   A. Due Process and the Day in Court
   B. Legitimacy

CONCLUSION

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. Any unity within the class is a constructed unity designed to serve those goals and therefore purely a product of the certification process. If efficiency requires common questions of law or fact, for example, the class must share enough common questions to justify class litigation on efficiency grounds. By contrast, the external view sees the class as a group with an internal 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 constrains those choices and might even scuttle certification when class treatment is otherwise desirable on functional grounds.

The conflict between these two views strongly influences the shape of modern class action law. Over the past fifteen years, the external view has gained considerable ground in cases like Amchem Products, Inc. v. Windsor\(^2\) and Wal-Mart Stores, Inc. v. Dukes,\(^3\) and as a result class certification has become more difficult to obtain. Judges and scholars divide sharply on the merits of this trend. Supporters emphasize how stricter certification requirements further values of due process and legitimacy and control for abuse. Critics emphasize how they undermine efficiency and substantive law enforcement goals.

The reason for the sharp difference of opinion has to do with a connection between differing views of the class and a deeper normative conflict between two competing models of the class action. The internal view is tied to an outcome-based model of the class action and the external view to 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 values. 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 an internal group cohesion that mitigates individual participation concerns and supports the legitimacy of representative adjudication.

---

\(^3\) 131 S.Ct. 2541 (2011).
Distinguishing between these two models not only helps to explain restrictive trends in class certification, but also clarifies key points in the debate over the desirability of class litigation more generally. The two sides of the debate often seem to talk past one another. Critics of restrictive class action developments tend to argue from an outcome-based perspective with an internally-defined class even when the restrictive decision or doctrine they target is supported by a process-based model. Emphasizing functional benefits and highlighting tools to reduce agency costs simply misses the point when the opposition is concerned about participation and legitimacy. To make headway, the two sides must join issue, and this means that class action proponents have to be prepared to challenge directly the process-based model and its commitment to an externally-defined class.

For example, some scholars criticize the Amchem Court for focusing on conflict within the class rather than conflicts between the attorney and the class. Because the attorney controls settlement, they argue, attorney-class conflicts are much more significant than intra-class conflicts. This is an important point, but it is oblique to the analysis of the Amchem Court. As Part III explains, Amchem focused on class cohesiveness not so much to avoid conflicts of interest that might impair outcome quality, but to assure the degree of intra-group 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

---

4 Cites.
5 See infra notes ** & accompanying text.
models of the class action. 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 the same spirit. The 1966 revision explicitly rejected the formalism of the 1938 Rule and substituted a pragmatic and functional approach. While the pragmatic approach invited an internal view of the class and an outcome-based model, the 1966 Advisory Committee was not prepared to embrace the internal view whole-heartedly, and so it structured 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 this trend has had important consequences for several areas of class action law. To illustrate these developments, Part III focuses on the predominance requirement of Rule 23(b)(3) and the commonality requirement of 23(a)(2). Predominance has shifted from a proxy for judicial economy benefits of class treatment to a test for class unity satisfying due process and legitimacy constraints. Similarly, commonality has shifted from a virtually useless certification requirement to a more robust limitation, also tied to class unity.

Part IV turns to the normative argument for a unity or cohesiveness requirement. The Supreme Court relies on due process and legitimacy to justify demanding unity, but the Court has never explained how class unity serves those values. Moreover, any connection is based mostly on intuition. An internally unified class might be easier to envision as a single litigating unit and thus a party in itself, and individual participation values might seem less seriously compromised when the substantive law treats the class as a unit. Intuition, however, is not the
same thing as justification. Any defense of the externally-defined class must be based on a rigorous account of day-in-court and legitimacy values. When those values are closely examined, however, it is clear that they do not support a process-based class unity or cohesiveness requirement. In fact, 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 internal and external views of the class with a concrete example, describes their connections to class action models, and explains how the internal-external distinction differs from other class action taxonomies.

A. An Illustration

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

1. The Internal View

Someone approaching the question from an internal perspective would ask whether the class, as defined, optimally serves class action goals. In our case, where injuries are severe enough to make individual litigation cost-justified, the class action serves two broad goals: (1) promoting judicial economy and decisional consistency, and (2) improving outcome quality by
reducing delay costs and equipping plaintiffs with economy-of-scale advantages. It follows that the class itself should be defined in the way that best serves these goals.

This approach has specific implications for how Rule 23 should be applied. From the perspective of an internally-defined class, Rule 23(a)(2)’s common question requirement does very little work independent of 23(b), and (a)(3)’s typicality requirement makes sense only as part of (a)(4) adequacy of representation. Moreover, in view of the realities of modern class litigation and the agency costs endemic to the attorney-class relationship, (a)(4)’s adequacy of representation analysis should focus mainly on potential conflicts of interest between the attorney and the class. In our hypothetical, for example, it might be desirable to carve out subclasses or certify a smaller class if agency costs are a serious risk.

Rule 23(b) looms large for someone subscribing to an internal view of the class. This is so because 23(b) focuses on the functional reasons for class treatment and functional reasons drive certification and class definition within the internal view. Subdivision (b)(3) is the key provision in our mass tort hypothetical. From an internal perspective, (b)(3)’s requirements should be construed to further judicial economy and outcome quality goals. Thus, whether to certify a nationwide class should depend primarily on the litigation cost savings from

---

6 See Robert G. Bone, Class Actions, in PROCEDURAL LAW AND ECONOMICS 67 (2012). Following the convention, I use “judicial economy” to refer to litigation cost savings. This is distinct from global efficiency.
7 See, e.g., Simer v. Rios, 661 F.2d 655 (7th Cir. 1981) (majority and dissent debate the propriety of the class definition in functional terms; majority focuses on judicial economy and compensating those actually harmed, while dissent focuses on enabling litigation to provide relief to class members).
8 For example, (b)(3) predominance subsumes (a)(2) commonality. The same is true for (b)(2). Its requirement that there be a class-based wrong and remedy guarantees that there will also be a common question of law or fact. And (b)(1)’s focus on avoiding unfair externalities also guarantees a common question—or makes the common question requirement irrelevant. As for typicality, even the Supreme Court recognized its confusing contribution to certification. See General Telephone Co. v. Falcon, 457 U.S. 147 (1982).
9 Issacharoff; Coffee.
10 However, agency problems do not necessarily increase with class size and heterogeneity. In fact, creating subclasses with separate attorney representation might do little to avoid a sweetheart settlement if the various attorneys simply cooperate in reaching a deal with the defendant. Multiple attorneys might make it more difficult to reach a settlement agreement, but that would be a bad result if the settlement was beneficial to the class.
adjudicating common questions, the additional management costs associated with class litigation, and the difference in expected recovery relative to individual suits.\textsuperscript{11}

It follows in particular that the (b)(3) “predominance” requirement is best understood as a rough measure of the judicial economy gains and outcome quality benefits from class treatment.\textsuperscript{12} On the one hand, as the number of common questions increases, the cost savings from aggregate treatment also increase, as 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 also increase and the beneficial effects of class adjudication on delay costs diminish.\textsuperscript{13} The requirement that common questions “predominate” over individual questions asks for a rough balance between benefits and costs.\textsuperscript{14}

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. This intra-class heterogeneity can be handled to some extent by creating issue classes pursuant to 23(c)(4) and subclasses pursuant to (c)(5). Redefining the class in these ways makes sense if it furthers the goals of judicial economy and outcome quality, taking both trial and settlement into account.

\textsuperscript{11} Cites...
\textsuperscript{12} I do not find the predominance requirement quite as mysterious as Professor Erbsen does. See Allan Erbsen, \textit{From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions}, 58 VAND. L. REV. 995, 1059-67 (2005). Erbsen is correct that litigating individual questions might be so intractable that class certification should be denied no matter how many common questions there are. But this is perfectly consistent with a balancing approach.
\textsuperscript{13} Professor Erbsen argues that claim heterogeneity can also distort trial and settlement values through cherry picking, claim fusion, and ad hoc lawmaking. See Erbsen, \textit{supra} note **, at 1007-23. However, the magnitude of these effects is unclear and there are ways to reduce it, such as by using random sampling.
\textsuperscript{14} From an internal class 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.
Issue classing is desirable, for example, as long as the certified issue is important enough so that the benefits of adjudicating it in a class context justify the additional costs that class treatment generates, and sub-classing 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 is very different. 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 quite 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 unity before any functional analysis is performed.

Rule 23’s requirements should be construed differently from an external perspective. For one thing, 23(a)(2) commonality and (a)(3) typicality make much more sense as separate requirements distinct from 23(b) than they do from within an internal view. In particular, (a)(2) serves as a check on intra-class unity and (a)(3) assures that class representatives share the same characteristics that unite the class.\textsuperscript{15} After these provisions are satisfied and some minimal level of class unity is demonstrated, then (a)(4) adequacy of representation steps in to assure that the

\textsuperscript{15} See infra notes ** & accompanying text. See Wal-Mart; Falcon.
class attorney is capable and class representatives have no idiosyncratic personal preferences that might compromise class member interests.\(^{16}\)

From an external perspective, 23(b)(3)’s predominance requirement makes sense as a metric for ensuring that the class has the type of unity a (b)(3) suit requires. Understood in this way, predominance is not about balancing the costs and benefits of aggregation. Instead, it is about assuring that there is enough intra-class homogeneity to qualify the class for representative adjudication. As we shall see in Part III below, this is how the Supreme Court construed predominance in *Amchem Products, Inc. v. Windsor*, and this reading of the requirement has implications for the strictness of the predominance analysis as well as for the suitability of issue classing as a solution to predominance problems.\(^{17}\)

Our hypothetical mass tort case is likely to fare poorly under an external view of the class. A judge might deny certification on the ground that the class action fails the (a)(2) commonality requirement, arguing that the common questions are not central enough to the claims of all class members to unify the class.\(^{18}\) Even if the judge finds that common questions are central enough, she might still deny certification on the ground that the class action fails the (b)(3) predominance requirement because individual questions undermine whatever cohesiveness the common questions supply. Moreover, issue classing is not likely to help when the judge demands unity for the litigation as a whole.

---

\(^{16}\) Rule 23(a)(4) is generally understood in a negative way, as requiring the absence of interest conflicts between the representative and the class rather than as requiring an affirmative commonality of interest between representative and class or within the class itself. *See Opiehenski v. Parfums Givenchy, Inc.*, 254 F.R.D. 489 (2008) (reading (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.)

\(^{17}\) *See infra* notes ** & accompanying text. For example, issue classes might improve manageability, but manageability is relevant only after the class has sufficient internal cohesiveness.

\(^{18}\) *See Robin J. Effron, The Shadow Rules of Joinder*, 100 GEO. L. J. 759, 798-804 (2012) (explaining that *Dukes* incorporates a centrality requirement into 23(a)(2), and also citing lower court cases requiring centrality of the common question to the class claims for a putative class to satisfy (a)(2)).
B. **The Connection to Class Action Models**

These two views of the class draw normative content from two competing models of the class action: the internal view draws on an outcome-based model, and the external view draws on a process-based model.¹⁹

1. **Outcome-Based Model**

Roughly, 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 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 as far as possible through thoughtful class action design.²⁰ Due process matters as well, but the outcome-based model views due process as a balance in which litigant autonomy is valued largely for its contribution to outcome quality.²¹ For some outcome-based proponents, the fact that parties

---

¹⁹ I refer to these as “models” rather than “theories” 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 that might not fit neatly into a more general theory that is internally consistent and complete.

²⁰ Coffee, etc..

²¹ See, e.g., Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996) (relying on the balancing test of *Mathews v. Eldridge* and *Connecticut v. Doehr* to justify the use of sampling on due process grounds); Wal-Mart Stores, Inc. v. Dukes, 603 F.3d 571, 627 (9th Cir. 2010) (quoting Hilao’s due process balancing analysis with approval), rev’d 131 S.Ct. 2541 (2011).
exercise little control over litigation means that party participation has little intrinsic value as a practical matter. 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. 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 is linked to 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 for its contribution to the quality of litigation outcomes. Participation has outcome value on this view because parties have strong incentives in an 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 non-instrumental dignity and legitimacy values. Individual participation is entailed in what it means to respect the dignity and autonomy of those persons who will be seriously affected, and it supports the legitimacy of the institution of civil adjudication. To be sure, the outcome-based model also cares about dignity and legitimacy, but it assumes that dignity is respected and legitimacy

---

22 See 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); Erbsen, *supra* note **, at 1008 n. 17 (questioning the value of litigant autonomy on practical grounds); Rosenberg, etc.

23 Cites to Mashaw, Solum, etc. *See generally* Bone, *Agreeing to Fair Process; Day in Court Ideal*. Just as an opportunity to vote personally in elections respects the dignity of citizens and legitimizes the electoral process, so too an opportunity to control one’s own lawsuit respects the dignity of litigants and helps to legitimize the adjudicative process.
assured when the litigation system does what it can to provide each litigant with a reasonably accurate decision. The process-based model insists on more. It understands these values to demand a broad right to a personal day in court that guarantees a large measure of individual control over one’s own litigation.24

The class action poses a serious challenge to the process-based model. Supporters must explain how litigating through a representative can ever substitute for a personal day in court. They respond by imposing three limitations on class litigation. First, a class action is permitted only when other alternatives that offer greater litigant control are highly undesirable or impractical. Second, the class itself must be sufficiently cohesive that it is possible to envision all class members as nearly identically situated from a legal perspective. Third, class members must be provided with as much opportunity to actually participate as is consistent with avoiding the serious problems that justify class treatment in the first place.

The first requirement conditions the class action on necessity rather than convenience. It is not enough that a class action confers marginal benefits over marginal costs compared to individual litigation; the gains must be more substantial to justify inroads on litigant autonomy. The second requirement, intra-class cohesiveness, implements an external view of the class. As I explain later, class cohesion gives the litigation a group character that is thought to weaken process-based participation values and the importance of day-in-court rights.25 The third requirement also tracks the strong presumption in favor of a personal day in court by providing participation opportunities, even limited ones, within the constraints of the class action structure.

24 See, e.g., Taylor v. Sturgell, 553 U.S. 880,892-95(2008) (noting the importance of the day in court right and defining limited exceptions to it); Richards v. Jefferson County., 517 U.S. 793, 798 (1996) (describing the “‘deep-rooted historic tradition that everyone should have his own day in court’” (citation omitted)). Bone, The Day in Court Ideal and ….
25 See infra notes ** & accompanying text.
These three requirements interrelate. When the reasons for class treatment are especially strong, intra-class homogeneity can be a bit weaker. And when homogeneity is stronger, fewer participation opportunities are needed.

C. Comparing Other Models

This framework is organized on three levels. Different participation theories inform different class action models, which in turn support different views of what constitutes a proper class. An outcome-based theory of participation is part of an outcome-based model of the class action, which supports an internal view of the class. Similarly, a process-based theory of participation is part of a process-based model of the class action, which supports an external view of the class.

This framework differs from other class action taxonomies. One common way to carve up the class action distinguishes between an aggregation model and an entity model.26 According to Professor David Shapiro’s account, the aggregation model views the class action as a device “for allowing individuals to achieve the benefits of pooling resources against a common adversary.”27 Class members retain strong autonomy claims in this model. They have a right to opt out at any time and a right to exercise broad control over their own suits if they choose to stay.28

The entity model, in 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

26 David L. Shapiro, Class Actions: The Class as Party and Client, 73 NOTRE DAME L. REV. 913, 918-19 (1998); see 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”).
27 Shapiro, supra note **, at 918.
28 Id.
Class members have greatly restricted autonomy in this model. As Professor Shapiro describes it, the entity model “severely limits such aspects of individual autonomy as the range of choice to move in or out of the class or to be represented before the court by counsel entirely of one's own selection.”

At first glance, the entity model might seem to parallel the external view and the aggregation model the internal view. But this correspondence misses an important distinction. Professor Shapiro’s two models focus primarily on the effects of class certification. They describe two different ways to conceive of a class after it has been certified. The internal-external dichotomy focuses instead on the conditions for class certification and in particular whether a class must qualify as an externally-defined group.

Moreover, Professor Shapiro evaluates his two models primarily through their impact on outcomes and in so doing misses the importance of the day-in-court right in process-based theory. For example, in defending an entity model, he discounts day-in-court values by noting that parties in fact exercise very little control as a practical matter. From a process-based perspective, however, the value of a personal day in court does not get weaker just because individuals are unable to take advantage of it. If a procedure seriously interferes with individual control, it is the procedure that must yield, even if the result is reduced efficacy in achieving deterrence and compensation goals. To be sure, outcome quality matters to process-based theory,

---

29 Id. at 919.
30 Id. (noting, however, that it “does not deny the class member the opportunity to seek private advice, or to contribute in some way to the progress of the litigation”).
31 Indeed, Professor Shapiro associates his entity model with expansive use of class actions and his aggregation model with more restricted use—exactly the reverse of what the external and internal views imply.
32 Id. at 927-34 (arguing for the entity model on the ground that it produces superior outcomes and better serves class action goals).
33 Id. at 934; see also id. at 925 (noting that due process is a balance that can include practical factors, and citing Mathews v. Eldridge in support).
but outcome quality gains must be very large to outweigh the autonomy and legitimacy values that support the day in court.\textsuperscript{34}

In a forthcoming history of the modern class action, Professor David Marcus carves at a different joint, distinguishing between a regulatory and an adjectival conception.\textsuperscript{35} The regulatory conception envisions the class action as a useful supplement to public enforcement and “prioritizes regulatory efficacy as a primary value.”\textsuperscript{36} The adjectival conception rejects private enforcement as an independent class action goal and prioritizes the efficiency and fairness values traditionally associated with individual litigation.\textsuperscript{37}

Professor Marcus’s primary purpose is to describe the debate over the regulatory function of the modern class action, and his regulatory-adjectival dichotomy serves that purpose well. I am more interested in exploring the structure of legal ideas and beliefs and their influence on the development of class action doctrine.\textsuperscript{38} As a result, my models do not neatly correspond to Professor Marcus’s. For example, my outcome-based model cuts across regulatory and adjectival categories. Someone committed to adjudication’s compensation goal and averse to using private litigation for purely regulatory ends might still subscribe to an outcome-based model with compensation as the outcome metric. It is even possible for someone committed to a

\textsuperscript{34} See, e.g., id. at 934 (“Thus the choice is not so much between two workable models as between a model that offers some hope of a reasonably prompt and fair disposition and one that does not.”). There is another approach to carving up the class action that is very similar. It distinguishes between joinder and representational models. See, e.g., Diane Wood Hutchinson, Class Actions: Joinder or Representational Device?, 1983 SUP. CT. REV. 459. The joinder model envisions the class action as a large-scale joinder device. Much like the aggregation model, it assumes that class members retain their jural independence and autonomy rights. The representational model, by contrast, envisions the class action as a group litigating through a representative. Much like the entity model, it assumes that the relevant jural entity is the class and that the court should focus on the representative rather than on individual class members. As is true for the aggregation-entity dichotomy, this dichotomy is concerned primarily with how a class action should be conceived after certification rather than with what kind of class can qualify for certification.


\textsuperscript{36} Id. at 7.

\textsuperscript{37} Id. at 7-8.

\textsuperscript{38} Thus, I assume that ideas and beliefs have independent force in shaping the law.
process-based model to accept a regulatory approach for small claim class actions if she
discourts participation rights when claims are small and places a high value on substantive law
enforcement. In short, my framework maps the normative terrain on a finer scale than Professor
Marcus’s.

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. In the eighteenth and nineteenth centuries, the representative suit—the
predecessor to the modern class action—precluded class members only when the class was
strongly unified by formal relationships among substantive legal rights, duties, and remedies.
The original version of Federal Rule 23 adopted in 1938 based class preclusion on a similar
theory: the class had to be united by asserting “joint, common, or secondary” rights or by making
claims to the same property. It was not until the 1966 revision of Rule 23 and the shift to a
pragmatic and functional approach that an internal view of the class became a possibility. The
following history briefly recounts these developments.

A. Representative Suits in the Eighteenth and Nineteenth Centuries

Professor Stephen Yeazell has written a well-known history of the class action. Yeazell’s account describes the class action as developing in response to the needs of particular
groups that were considered important from time to time because of the social and economic
functions they performed. These groups included privateers, joint stock companies, and friendly
societies, and courts of equity allowed them to litigate as groups and obtain group-wide remedies
in the face of a strong institutional commitment to litigant autonomy. The tension between group

litigation and individual control was mediated, albeit awkwardly, through consent and interest representation theories.

For example, privateers became a favored group in the eighteenth century when the English crown enlisted private ships to assist in military campaigns. These ships attacked and plundered enemy vessels and in return the captain and crew were allowed to split the prize. Disputes occasionally arose over the proper distribution of a ship’s prize, and courts of equity had to devise procedures to handle these disputes. They responded by adapting the representative suit to allow one crewman to sue on behalf of the entire crew, establish the total value of the prize in an accounting, and then invite other crew members to intervene and claim their shares. All were bound to the results of the accounting that determined the total prize, but each crewman had a chance to litigate his own share. Similarly, in the nineteenth century, friendly societies (mutual benefits associations of laborers) and joint stock companies (unincorporated associations of investors) became important groups in the shift to a capitalistic economy, and courts of equity used the representative suit to allow them to litigate as groups and obtain group-wide remedies.

Professor Yeazell argues that the modern class action follows much the same pattern. In his account, Rule 23 was designed with specific groups in mind. Its subdivisions were drafted with an eye to enabling litigation by racial groups important to the civil rights movement, environmental groups tied to the growing environmental movement, and consumer groups associated with the consumer rights movement. Importantly, all of these groups shared a common interest outside the litigation, and this shared interest made it easier to envision them actually litigating as unified groups in court.
I have written an intellectual history of the class action that supports somewhat different conclusions than Yeazell’s. However, both his and my accounts agree on a fact central to the argument of this Article: the representative suit of the eighteenth and nineteenth centuries relied on an external view of the class. Professor Yeazell’s classes are social and economic groups, whereas mine are legally-defined groups. In both cases, however, the class is defined independently of and analytically prior to the litigation. Yeazell’s classes are united by group membership and shared goals. My classes are united by formal relationships among substantive rights, duties, and remedies. The following briefly explains the connection between the substantive law and the internal unity of the class.

The modern class action is designed as a preclusion device, but the traditional representative suit was not primarily concerned with precluding class members. It functioned instead as an exception to necessary party joinder. The usual equity rule required the joinder of all persons with an “interest in the subject of the suit.” Sometimes there were too many people to join and chancellors looked for ways to allow the litigation to go forward despite the absence of necessary parties. The representative suit emerged as one of these exceptions. It applied to special cases where the interest that each absentee had in the subject of the suit qualified as a “common interest.” When this condition was satisfied, lawyers referred to the collection of persons with a “common interest” as a “class.”

The representative suit allowed a person to litigate alone by alleging that he sued “on behalf of” himself and all others identically situated. The chancellor checked whether the

---

41 Id. at 246.
42 Id. at
43 Bone, supra note **, at
conditions for a representative suit were satisfied only if the defendant challenged the suit on grounds of nonjoinder. Otherwise, the suit proceeded as a representative suit without any judicial inquiry into its representative status. Moreover, the representative suit designation expanded the remedial powers of a court of equity by facilitating the grant of a broader remedy.\footnote{Id. at . And in representative suits like privateer cases, creditor cases, and other actions involving determination and distribution of a definite fund or property, the representative suit designation removed formal obstacles to intervention and allowed absentees to come into the suit and litigate their individual claims to the fund once the class entitlement was established. \textit{See infra} notes ** & accompanying text.}

Today we are accustomed to conceiving of “interest” in terms of abstract goals or preferences. We say, for example, that currently injured victims have different “interests” than those not yet manifesting injury, meaning that the former prefer to maximize current recovery while the latter wish to preserve assets for future claims.\footnote{\textit{See Amchem.}} However, interest and common interest had a very different meaning in eighteenth and nineteenth century necessary party and representative suit law. “Interest” referred to a formal legal rights connection to the suit, and “common interest” referred to a particular type of structural relationship among rights connections.

Furthermore, not all types of “common interest” resulted in res judicata effect. Whether absentees were precluded depended on the nature of the relationship among the legal rights, duties, and remedies. The paradigmatic relationship that supported preclusion involved a melding of individual rights into a unitary right that attached to the class as such. In the seventeenth century, for example, tenants sued their lords to declare the legal rights of all tenants as a group to areas owned in common pursuant to longstanding custom. The tenants’ rights to the common area attached to tenants as an indefinite class, and each tenant had an individual
right simply by virtue of his status as a member that class. Thus, one tenant could adjudicate rights attaching to the status without joining others and with preclusive effects for all.

The cases changed in the nineteenth century but the same preclusion theory applied. The nineteenth century representative suit with preclusive effect usually involved a legal right that belonged to a class *qua* class and to each member simply by virtue of his occupying the legally-prescribed status that defined the class. The so-called “public right” cases illustrate the point.46 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. The legal right at issue was thought to attach to all taxpayers as an indefinite class, and each taxpayer had an individual right to enforce the class-based right. Moreover, the injunctive or declaratory relief that the plaintiff sought benefited the class *qua* class and individual taxpayers only because of their membership in the class. The “on behalf of” allegation allowed the suit to go forward without joining other taxpayers and also authorized a decree encompassing the entire class and automatically binding everyone.47

The paradigm of a binding representative suit had certain general features that supported giving the decree broad preclusive effect.48 Roughly, the lawsuit involved a legal right or duty that attached to a group defined by the substantive law and not by the litigation itself. Moreover, each member’s legal right was simply a clone of the group right and therefore *precisely identical* to every other such right. Finally, the remedy targeted the class as such and benefitted and

---

46 See Bone, supra note **, at 274-75.
47 This is just one of many examples. See Bone, supra note **, at . Another involved litigation over remainder interests created by conveyance or trust. A remainder interest subject to open created an indefinite class, and the rights of the class in the real property conveyed or placed in trust attached to the class *qua* class. So when a trustee sued for court approval of a sale that converted property in the trust to money but still preserved the same remainder interest in the proceeds, the trustee sued one or more of the existing remaindermen, denominated the suit a representative suit, and thereby bound all future remaindermen to the decree. See, e.g. Hale v. Hale, 146 Ill. 227, 256-61 (1893). In fact, the label “virtual representation” first appeared in these cases.
48 Bone, supra note **, at 279-81.
burdened each class member simply by virtue of his membership in the class. 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 the decree acted directly on that status rather than on any individual occupant. Because of this impersonal quality, no class member had a strong process-based right to a personal day in court.49

Over time, judges realized the benefits of class preclusion more broadly and as a result they expanded the types of representative suits that had preclusive effect. But the expansions hewed close to the status-based paradigm. Consider the limited fund cases exemplified by Gufanti v. National Surety Co.50 The defendant in Gufanti defrauded more than 150 people, who deposited money for steamship tickets that were never delivered, and the defendant’s bond was insufficient to compensate everyone in full.51 One of the ticket purchasers filed suit to recover against the bond on behalf of himself and all other ticket depositors as a class. The court allowed the suit as a representative suit in order to equitably distribute the limited fund.52

While the court did not explicitly address preclusion, there is no question that preclusion was essential to an equitable distribution.53 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

49 Id.
51 Id. at 456. The court’s summary provides a good description of how these representative suits worked: “This action is brought by the plaintiff in behalf of himself and all others similarly interested to prove their rights to participate in the proceeds of said bond and of any recovery thereon, and to compel the defendant to pay said sum of $15,000 with interest thereon ratably and pro rata to the plaintiff and to such other persons as may become parties to the action and exhibit and prove their claims and demands herein.” Id.
52 Id. at 457 (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”).
53 See id. (“A just and equitable payment from the bond would be a distribution pro rata upon the amount of the several embezzlements”). All the court did was to overrule the defendant’s demurrer insofar as it challenged the plaintiff’s ability to proceed with a representative suit. Id.
sufficiently united by the fixed fund and a common contract. The entitlement to recover from the bond was a right that attached to depositors by virtue of their status as depositors, and all these rights derived from the same contract and had an identical form.\textsuperscript{54} To be sure, the ultimate relief was individual—specific payments to each depositor—rather than class-wide and individual claimants had to appear to assert their claims, recover from the fund, and pay a portion of the costs of the action. However, the distributions were all pro rata and thus identical to one another and easily determined.\textsuperscript{55} Finally, it probably made a difference that all the claimants asserted rights to the same fixed property, the bond.\textsuperscript{56} In the late nineteenth and early twentieth centuries, courts were willing to give broad preclusive effect to in rem adjudications of property ownership. They reasoned that the decree acted directly on the property itself and only indirectly on persons with claims to the property. Indirect effects like these did not trigger strong participation rights.\textsuperscript{57}

The details of this history are complex. Binding representative suits took a variety of forms and served different purposes. But all were constructed by analogy to the status-based

\textsuperscript{54} Id. at 458 (noting that “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”).

\textsuperscript{55} In cases not involving a pro rata distribution, each claimant had to intervene to prove his individual entitlement, but everyone was still bound to the determination of the total proceeds available for distribution that had been established in the first stage. See, e.g., [creditor bill]

\textsuperscript{56} In Society Milion Athena, Inc., the court distinguished Gufanti and denied a representative suit on the ground that the bank depositors in the case “had no joint or common interest in any fund.” Society Milion Athena, Inc. v. National Bank of Greece, 281 N.Y. 282, 294 (1933). The court elaborated:

We search then for...possible ground why a court of equity should take jurisdiction of a representative action in which complete relief might be obtained by all who have claims against the defendants arising from their wrong. We fail to find such ground. Laudable desire to avoid multiplicity of actions by persons who have suffered wrong is insufficient unless those who would bring such actions are in some manner united in interest. 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.

\textsuperscript{57} See, e.g., Pennoyer v. Neff, etc. See generally Bone, supra note **, at 280 n. 158 (discussing the impact that the presence of property had and citing sources).
paradigm. The key point can be stated simply: the binding representative suit presupposed the existence of an externally-defined class. The chancellor did not construct the class; he 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.\(^58\)

B. **The Original Rule 23**

The original version of Rule 23 adopted in 1938 tracked this precedent. It defined the different types of class actions in terms of the formal nature of the legal rights at stake:

(a) **Representation.** If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

1. joint or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce;
2. several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
3. several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

Although the Rule itself said nothing about preclusion, its drafter, James William Moore, published an influential article in 1938 describing the preclusive effects he intended.\(^59\) Class actions under 23(a)(1)—known as true class actions—were supposed to have full preclusive

---

58 As in Gufanti, supra, courts sometimes made outcome-based arguments, noting that binding absentees was essential to an effective remedy. 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. But this was done not to monitor some fiduciary or similar relationship between the representative and absent class members; no such relationship was recognized. It was done to make sure that there was no obvious reason to question the quality of the advocacy.

59 See James Wm. Moore & Marcus Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 Ill. L. Rev. 555, 556-63 (1938); *see also* James Wm. Moore & Marcus Cohn, *Federal Class Actions*, 32 U. Ill. L. Rev. 307 (1937). Moore wanted these res judicata rules included in Rule 23, but the advisory committee, in part concerned about Rules Enabling Act problems, preferred to leave preclusion to judicial determination in later suits. Nevertheless, Moore’s tripartite scheme was extremely influential in the courts.
effect. Class actions under 23(a)(2)—known as hybrid class actions—had preclusive effect only with respect to the property involved in the action. And class actions under 23(a)(3)—known as spurious class actions—had no preclusive effect on absentees at all. In spurious class actions, preclusion attached only to those class members who chose to intervene.

Moore relied on representative suit precedent to construct and justify his three categories.\(^60\) The true class action was based on the paradigmatic form of binding representative suit in the nineteenth century exemplified by the public right cases. The hybrid class action was based on earlier suits that adjudicated rights to a definite fund or property, such as the limited fund cases. The spurious class action was a new creation. It functioned mainly as a device to facilitate joinder and intervention. Thus, the Rule 23 class actions that had preclusive effect all embodied an external view of the class. Even the hybrid class action involved a pre-existing group tied together by a definite fund or a specific piece of property and, as one would expect, its preclusive effect was limited to the fund or property that unified the class.

C. The 1966 Revision of Rule 23

Original Rule 23 was doomed to failure almost as soon as it was adopted. Legal realism was on the rise in 1938, and its pragmatic and functional philosophy had a powerful impact on judges, lawyers, and scholars. Realist judges resisted Rule 23’s rights-based categories and devised clever ways to twist the Rule to serve functional purposes.\(^61\) If a judge thought that

\(^60\) The labels “true” and “hybrid” were not new with Moore. See 1 T. STREET, FEDERAL EQUITY PRACTICE 547-49 (1909).

\(^61\) See ZECHARIAH CHAFFEE JR., SOME PROBLEMS OF EQUITY 244-73 (1950); Fed. R. Civ. P. 23, advisory committee’s note (1966).
there was a good functional reason to bind absentees, he might creatively stretch the facts to squeeze a spurious class action into the (a)(1) or (a)(2) category.\(^62\)

Despite these problems, original Rule 23 remained in effect for almost thirty years. In 1966, the Rule was thoroughly revised to eliminate the rights-based framework and replace it with a pragmatic and functional approach.\(^63\) This revision reconceived the class action as a preclusion device.\(^64\) In keeping with this change, the 1966 advisory committee drafted the new Rule 23 to identify situations where precluding a class would yield substantial functional benefits. For example, Rule 23(b)(1) was designed to avoid unfair externalities affecting class members or defendants. Rule 23(b)(2) aimed to promote remedial efficacy by facilitating the grant of class-wide injunctive relief.\(^65\) And Rule 23(b)(3) was meant to achieve judicial economy and decisional consistency benefits and enable private enforcement of the substantive law where individual suits were not cost-justified.\(^66\)

To preclude absentees, however, Rule 23 had to address due process rights. This was a difficult problem. Having rejected the rights-based framework that justified preclusion for the representative suit and the 1938 version of Rule 23, the committee had to fashion a new approach to deal with due process demands. It responded in several ways ways. First, it included subdivision (a)(4), which tracks the Supreme Court’s pivotal decision in *Hansberry v.*

---

\(^{62}\) See, e.g., Dickinson v. Burnham, 197 F.2d 973, 979-80 (2d Cir. 1952) (reversing the district judge’s (a)(3) classification and fitting the class action into (a)(2)): FED. R. CIV. P. 23, advisory committee’s note (1966).

\(^{63}\) See, e.g., Benjamin Kaplan, A Prefatory Note, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1968) (“The reform of Rule 23 was intended to shake the law of class actions free of the abstract categories contrived from such bloodless words as ‘joint,’ ‘common,’ and several,’ and to rebuild that law on functional lines responsive to those recurrent life patterns which call for mass litigation through representatives.”).

\(^{64}\) Rather than a device to excuse necessary party joinder, facilitate intervention, or overcome technical obstacles to broad relief.

\(^{65}\) See Fed. R. Civ. P. 23, advisory committee’s note, subdivision (b)(1) (1966); David Marcus, Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action, 63 FLA. L. REV. 657 (2011) (explaining that the 1966 committee drafted (b)(2) to facilitate broad injunctive relief in desegregation suits).

Lee, holding that due process of law is satisfied if the interests of absentees are adequately represented. See 5-23 Moore’s Federal Practice Civil § 23.25.

Second, it assigned responsibility to the district judge to look out for the interests of absent class members. In this regard, the new Rule created a novel certification process to verify the conditions for class treatment and equipped the trial judge with new procedural tools to safeguard absentee interests. See FED. R. CIV. P. 23(c)(1) (1966). Moreover, Rule 23(e) required judicial review and approval of all class action settlements. See also FED. R. CIV. P. 23(d) (1966).

The committee was content with this approach for (b)(1) and (b)(2) class actions, which had loose analogues in representative suit precedent. However, committee members felt the need to do more for the new (b)(3) class action, which raised more serious due process concerns. Accordingly, they supplemented representational adequacy and judicial supervision with individual notice and opt-out rights.

As the committee saw it, the special problem with (b)(3) had to do with weak intra-class unity. The (b)(3) class brought together suits for damages with an individualistic quality that triggered especially strong day-in-court concerns. For example, the Reporter, Professor Benjamin Kaplan, explained the inclusion of notice and opt-out rights for (b)(3) class actions as a response to potential constitutional problems where “the homogeneity or ‘solidarity’ of the class

---

68 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 FED. R. CIV. P. 23(d) (1966) (equipping the judge with procedural tools). Moreover, Rule 23(e) required judicial review and approval of all class action settlements. FED. R. CIV. P. 23(e) (1966).
69 Professor Benjamin Kaplan, the Reporter to the 1966 advisory committee, described the committee’s approach in the following way: “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.” Kaplan, supra note 66, at 386 (also noting that the committee looked for “factual situations or patterns that recurred in class actions and appeared with varying degrees of convincingness to justify treatment of the class in solido”).
70 Some committee members favored omitting (b)(3) altogether, but for most (b)(3)’s functional benefits were too substantial. See Marcus, supra note **, at
71 The Committee made clear that it thought (b)(3) classes were the least likely to be internally cohesive and the most likely to include members with strong interests in individual control. See FED. R. CIV. P. 23, advisory committee’s note, subdivision (b)(3), (c)(2) (1966); Marcus, supra note 65, at 698.
was open to some question.”\textsuperscript{72} Moreover, the Advisory Committee Note to the 1966 amendments observed that individual interests in conducting separate suits “may be theoretic rather than practical” when the class has “a high degree of cohesion.”\textsuperscript{73} And in discussing the relationship between due process and Rule 23(d) discretionary notice, the committee explained that “in 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.”\textsuperscript{74}

These passages, though brief, suggest that the committee was concerned with class cohesion. When cohesion was strong, as in the (b)(1) and (b)(2) class actions, adequate representation policed through judicial supervision would be enough alone. 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 that gave class members more personal control over their individual suits. 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. Thus, in the committee’s view, cohesion was distinct from representational adequacy; it had to be satisfied before representation was even a possibility.

As we shall see, the idea of class cohesion has been influential in shaping modern class action law. What is important for now, though, is to note 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 toward an externally-defined class.

\textsuperscript{72} Kaplan, supra note 40, at 380. And he emphasized the value of notice and opt out “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.” \textit{Id.} at 392.

\textsuperscript{73} FED. R. CIV. P. 23, advisory committee’s note, subdivision (b)(3) (1966) (discussing the superiority analysis under (b)(3)). \textit{See also} Marcus, supra note 65, at 698-99 (citing records of the advisory committee proceedings supporting this point although not in an unqualified way).

\textsuperscript{74} FED. R. CIV. P. 23, advisory committee’s note, subdivision (d)(2) (1966).
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 COHESIVENESS AND THE EXTERNAL VIEW

There is no explicit mention of class cohesion in the text of Rule 23, but courts have read cohesiveness into the Rule. These courts follow the same operative principles that the committee thought salient: representational adequacy is not enough to satisfy due process for all class actions; the class must have some minimal degree of internal cohesion before it can be a candidate for representative adjudication, and the demands of due process vary with the degree of intra-class cohesion.

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

In the thirty year period between 1967 and 1997, judges applied these principles primarily to analyze notice and opt-out rights. Rule 23(c)(2) already requires individual notice and a right to opt out for (b)(3) class actions, so the debate focused on (b)(2). The question had to do with whether notice and opt out should be extended to hybrid (b)(2) class actions. A hybrid (b)(2) class action is one in which plaintiffs seek backpay or other forms of monetary relief in addition to a class-wide injunctive or declaratory remedy.

---

75 See, e.g., Holmes v. Continental Can Co., 706 F.2d 1144, 1155-57 (11th Cir. 1983); Johnson v. General Motors Corp., 598 F.2d 432, 437-38 (5th Cir. 1979); Walsh v. Great Atl. & Pac. Tea Co., Inc., 726 F.2d 956, 962-63 (3d Cir. 1983) (evaluating the adequacy of pre-settlement and post-settlement notice in a class action certified under (b)(1) and (b)(2)); Elliott v. Weinberger, 1975 U.S. App. LEXIS 12532 *22-*25 (9th Cir. 1975); Handschu v. Soec. Serv. Div., 787 F.2d 828, 833 (2d Cir. 1986); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 254-57 (3d Cir. 1975). Although they were the focus of attention, notice and opt out were not the only matters that invited references to class cohesion. For example, in Wetzel, supra, the Third Circuit held that a Title VII suit could be maintained as a (b)(2) class action even after the defendant voluntarily complied with the plaintiffs’ injunction demands. Id. at 248-52. The court reasoned that “[t]he cohesive characteristics of the class are the vital core of a (b)(2) action” and “these characteristics...are still intact” even after the injunction claims are dismissed as moot. Id. at 251. Because of this cohesiveness, absentees can be bound without the additional procedural protections given to (b)(3) class actions. Id. at 248-49.

76 See Holmes, supra; Elliott, supra; Wetzel, supra; The Second Circuit also addressed objections under Rule 23(e) to the sufficiency of notice for a (b)(2) class settlement. Handschu, supra. Holding that notice by publication was sufficient, the court reasoned that the (b)(2) class is “cohesive by nature” and therefore notice to “a
Those courts that required notice or both notice and opt out reasoned that a mandatory (b)(2) class action required strong internal class cohesion, and the addition of monetary relief weakened that cohesion and undermined the justification for precluding absentees on the basis of adequacy of representation and judicial supervision alone. 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.”

For these courts, the weaker internal cohesion of a hybrid (b)(2) class implied that class members had to be given more individualized participation opportunities and this meant notice and perhaps an opt-out right as well.

In most other respects, however, Rule 23 was generously interpreted during the 1970s and 1980s and in ways that were consistent with an outcome-based model and an internally-defined class. For example, many courts took a liberal approach to certification of small claim representative class membership” was sufficient. Id. at 833. See also Walsh, supra, at 962-64 (holding that for a class action certified under (b)(1) and (b)(2), the pre-settlement and post-settlement publication and mail notice was sufficient as a matter of due process).

Walsh, supra, at 963; see also Elliott, supra, at 23 (noting that because (b)(2) classes are more cohesive and unified than (b)(3) class actions, once the court finds adequacy of representation under 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”).

See Holmes, 706 F.2d, supra, at 1155-57 (holding that notice and opt out are sometimes but not always required at the monetary relief stage of a hybrid (b)(2) class action); Johnson, 598 F.2d, supra, at 438 (holding that some form of notice is required in a hybrid (b)(2) class action in order to preclude class members from pursuing individual damages claims); Elliott, 1975 U.S. App. LEXIS, supra, 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 action). But see Wetzel, 508 F.2d, supra, 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). See also Eubanks v. Billington, 110 F.3d 87, 96 (D.C. Cir. 1997) (quoting homogeneity language from Holmes, supra, court holds that due process does not require opt out in a hybrid (b)(2) class action, but that district judges have discretion under 23(d) to permit opt outs when monetary relief is sought). 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), cert dismissed, 511 U.S. 117 (1994). However, the issue is not as salient as it used to be because the Supreme Court in Wal-Mart v. Dukes, 131 S.Ct. 2541 (2011), severely limited the circumstances under which monetary relief can be included in a (b)(2) class action. See infra notes ** & accompanying text.

For a nice overview of many of these developments, see Marcus, supra note **, at 39-56.
class actions and construed (b)(3)’s predominance requirement broadly in these cases.\textsuperscript{80} It was not uncommon for judges even to take explicit notice of the fact that a refusal to certify would likely doom the litigation and frustrate private enforcement goals.\textsuperscript{81} Also, before the Supreme Court’s 1982 decision in \textit{General Telephone Co. v. Falcon},\textsuperscript{82} courts were willing to certify across-the-board Title VII class actions under (b)(2). The across-the-board class action, by attacking the full range of an employer’s employment practices, facilitated the grant of broad systemic relief.\textsuperscript{83} Finally, despite the debate over notice and opt out, Title VII claims for injunctive relief and backpay were routinely certified as mandatory class actions, and courts relied on presumptions and even rough forms of sampling to adjudicate the individual backpay questions in the class context.\textsuperscript{84} Here too, the remedial efficacy goals of (b)(2) took center stage.

To be sure, there were also more restrictive decisions during this period.\textsuperscript{85} Some fit into an outcome-based model.\textsuperscript{86} But others were obviously inspired by a process-based model and its

\begin{footnotesize}
\textsuperscript{80} 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] factors are to be construed liberally”). Many courts noted that settlement would cure any predominance problems. And for securities fraud class actions, courts used presumptions and eventually the fraud-on-the-market theory 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). Similarly, 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 Co., 573 F.2d 309, 324 (5th Cir. 1978); Windham v. Am. Brands, Inc., 539 F.2d 1016, 1021-22 (4th Cir. 1976).

\textsuperscript{81} Cites.

\textsuperscript{82} Gen. Tel. Co. of S.W. v. Falcon, 457 U.S. 147 (1982).

\textsuperscript{83} 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. Cites.

\textsuperscript{84} See, e.g., Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 260-63 (5th Cir. 1974).

\textsuperscript{85} 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 (b)(3)’s predominance requirement in functional terms. See, e.g., Jenkins v. Raymark Industries, 782 F.2d 468, 472-73 (5th Cir. 1986); In Re School Asbestos Litigation, 789 F.2d 996, 1008-10 (3d Cir. 1986) (“the trend has been for courts to be more receptive to use of the class action in mass tort litigation”). Others resisted certification usually on the ground that individual questions were too prominent. Cites.

\textsuperscript{86} For example, concerns about the improper settlement leverage created by certification of frivolous or weak class actions clearly focused on outcome quality See, e.g., Milton Handler, \textit{The Shift from Substantive to Procedural}
concern with participation and legitimacy.\textsuperscript{87} Still, the spirit of the times supported broad interpretations of Rule 23 to promote class action goals.

However, as the debate over notice and opt out shows, the same tension between external and internal views that informed the advisory committee’s drafting of Rule 23 continued to shape the law, even though only weakly. Judges assumed that when a class lacks strong internal cohesion, day-in-court values weigh heavily and adequate representation must be supplemented with notice and also possibly opt-out rights.\textsuperscript{88}

B. 1997-Present: The Impact on (b)(3), (c)(4), and (a)(2)

The liberal attitude toward Rule 23 began to change in the 1980s and 1990s. There were two main reasons: the rise of the mass tort class action, and growing concerns about frivolous litigation. The mass tort class action challenged Rule 23 in two ways. First, these class actions generate serious agency and collective action problems, especially when they are certified for settlement only. Second, they pose a particularly difficult challenge to the idea of an internally unified class. Large mass tort class actions are often sprawling and legally fragmented, and this internal heterogeneity is especially troubling from a process-based perspective because class}

\textsuperscript{87} See Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (requiring individual notice to all class members reasonable identifiable in a small claim class action). It is difficult to classify other decisions. Some were probably driven by federalism or other extrinsic values. See Snyder v. Harris, 294 U.S. 332, 338 (1974) (holding that class members’ damages cannot be aggregated to meet Section 1332’s amount in controversy requirement); Zahn v. Int’l Paper Co., 414 U.S. 291, 300 (1974) (holding that class members cannot use pendent jurisdiction to avoid having to meet the amount in controversy requirement individually). But some are enigmatic. For example, the Supreme Court’s decision in General Telephone Co. v. Falcon, supra, rejecting the across-the-board Title VII class action, can be understood as process-based or outcome-based.

\textsuperscript{88} Several commentators challenged the assumption that (b)(2) classes were cohesive and homogeneous; they argued that class members could have very different preferences for the remedy and different interests in how the action is conducted. George Rutherglen, Notice, Scope, and Preclusion in Title VII Class Actions, 69 Va. L. Rev. 11, 26-27 (1983); Note, Due Process Rights of Absentees in Title VII Class Actions-The Myth of Homogeneity of Interest, 59 B.U. L. Rev. 661, 664-666 (1979). However, the courts did not focus on preferences or interests in this sense; they focused instead on the legal cohesiveness or homogeneity of the class. Rule 23(b)(2) requires that the defendant’s conduct challenged as wrongful be taken toward the class qua class without singling out individuals and that the remedy benefit the class qua class and therefore individuals only by virtue of their being members of the class.
members have large enough claims to support individual litigation. This makes day-in-court values particularly salient.

In response to these concerns, judges began to move away from an outcome-based model and toward a process-based model with its class cohesiveness requirement. Moreover, this shift raised questions about class actions more generally and has had effects beyond the mass tort. The following discussion describes the impact of these developments on two provisions of Rule 23: (b)(3) predominance and (a)(2) commonality. Courts have reinterpreted these requirements to implement a minimum cohesiveness requirement that imposes tighter restrictions on the availability of the class device. And in so doing, they have given new life to the idea of an externally-defined class.

1. **23(b)(3) Predominance and Class Cohesion**

   The story begins in 1997 with the Supreme Court’s watershed decision in *Amchem Products, Inc. v. Windsor*. Amchem involved certification of a (b)(3) settlement class action. The case had all the problematic mass tort elements. The class was huge and sprawling, consisting of almost everyone who had been exposed to asbestos products nationwide. The class was factually and legally fragmented. And the suit was a settlement-only class action with structural features that signaled the possibility of attorney self-dealing.

   The district judge analyzed the settlement from an outcome-based perspective. He found that class members received a fair and reasonable recovery relative to what they might have obtained from individual litigation. In deciding to certify the settlement class, the judge focused on class interests in the settlement rather than in the trial judgment, and on settlement-related

---

90 *Id.* at 624.
rather than litigation-related common questions. All of this seemed quite reasonable since certification avoided litigation altogether.

The Supreme Court rejected this approach. It held that a trial judge when certifying a settlement-only class action had to apply the relevant Rule 23 requirements just as they are applied to certify a litigating class.\(^91\) However, the Court also made clear that not all Rule 23 requirements were relevant: “there is no need to inquire whether the case, if tried, would present intractable management problems… for the proposal is that there be no trial.”\(^92\) But 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. The Amchem class action failed both.

The Court’s predominance analysis is particularly striking. Most authorities before Amchem read the requirement as a proxy for judicial economy and decisional consistency benefits from class treatment.\(^93\) This interpretation made sense from a functional perspective, and it also seemed to fit what the 1966 advisory committee had in mind. The Committee Note states that “[i]t is only when this predominance exists that economies can be achieved by means of the class-action device,” and goes on to illustrate the point with a mass accident involving lots

\(^{91}\) Id. at 620.

\(^{92}\) Id.

\(^{93}\) See, e.g., 3B MOORE’S FEDERAL PRACTICE § 23.45(2) (1972) (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); 7A C.A. WRIGHT & A.R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1778 (1972) (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). See generally supra note ** & accompanying text.
of individual questions in which a class action “would degenerate in practice into multiple lawsuits separately tried.” 94

The Amchem Court took predominance in an entirely different direction. It held that “[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” 95 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 the Court made clear that “[i]t is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place.” 96 And once again, “[i]f 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.” 97

Thus, the Court construed predominance as a safeguard for due process and adjudicative legitimacy values, and not as a proxy for judicial economy. The Court also made clear that class cohesiveness is distinct from adequacy of representation. Cohesiveness is a condition that must be satisfied before representational adequacy is relevant at all. Moreover, the distinction between cohesiveness and representational adequacy implies that the former is about something different than common interests in the sense of shared goals or preferences. 98 Even if the

94 Fed. R. Civ. P. 23, advisory committee’s note, 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 ** at 1053-54. Moreover, the predominance test has some odd features. For one thing, it ignores the enforcement goal of (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, one wonders why it is necessarily a problem when a class action degenerates 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. The committee’s concern makes sense only if it assumes that the class action must be litigated to final judgment as a class. But that constraint imposes external limitations on the type of class that can qualify and suggests an external view of the class.
95 Amchem, 521 U.S. at 623.
96 Id.
97 Id.
98 The Court focused on goals and preferences when it analyzed (a)(4) adequacy of representation. Id. at 625-28.
Amchem class was conflict-free, it would still be too sprawling and fragmented to qualify as a sufficiently cohesive unit to litigate through representatives.

This interpretation of Amchem points strongly to the influence of a process-based model with an externally-defined class. While there is no doubt that outcome concerns influenced the result, a purely result-oriented interpretation ignores the Court’s reasoning. In fact, the Court refused to pass judgment on the settlement’s fairness, which in any event was a matter properly left to the discretion of the trial judge.\textsuperscript{99} Perhaps the Court believed that cohesive classes in general present a lower risk of bad settlements or distorted litigation outcomes. But this is not what the Court said, and in any event, it is not obvious why such a belief is warranted.\textsuperscript{100}

In fact, it is Justice Breyer who, in dissent, takes an outcome-based approach and an internal view of the class.\textsuperscript{101} 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.\textsuperscript{102} Because the central issue in Amchem is the fairness of the settlement, common

\textsuperscript{99} As the dissent points out, the district judge took great pains to review the settlement carefully before finding that it was fair. Amchem, supra, at 630 (Beyer, J., dissenting).
\textsuperscript{100} The Court also held that the Amchem class failed (a)(4) adequacy of representation because currently injured class members had interests in conflict with those class members who had not yet manifested injury. Amchem, 521 U.S. at 625-28. In view of this conflict, the trial judge should have created two subclasses for settlement bargaining, each with its own representative and presumably its own attorney. The Court’s holding makes some sense as a way to guard against the currently-injured selling out the exposure-only group. Nevertheless, I believe that the holding has more to do with participatory fairness than with assuring outcome quality. Subclassing helps assure that the absentees have representatives who will keep their interests in mind—or as the Court puts it, who “operate under a proper understanding of their representational responsibilities.” Id. at 627. If I am correct, then both the (b)(3) and the (a)(4) holdings reflect the same core concern: that for a class action to be legitimate, the class must possess sufficient unity to litigate as a class. See id. at 621 (“Subdivisions (a) and (b) [in contrast to subdivision (e)] focus court attention on whether a proposed class has sufficient unity so that absent class members can fairly be bound by decisions of class representatives.”) The Court sees the (b)(3) predominance requirement as a test of unity for a type of class action where unity is especially suspect, and it sees the (a)(4) adequacy of representation requirement as policing internal conflicts of interest that weaken class unity.
\textsuperscript{101} He notes that the Amchem class settlement is very likely to generate substantial benefits for the class as well as for the judicial system as a whole and that the district judge found that the settlement “improved the chances of compensation” for class members and “reduced total legal fees and transaction costs by a significant amount.” Amchem, supra, at 632-34.
\textsuperscript{102} Id. at 634-35.
questions about the settlement’s fairness were pervasive and individual questions “are of diminished importance in respect to a proposed settlement in which the defendants have waived all defenses and agree to compensate all those who were injured.” In a passage that strikes to the core of the outcome-based model, Justice Breyer, referring to how a predominance analysis requires attention to “the legal proceedings that lie ahead,” says that “[s]uch guideposts help [the court] decide whether, in light of the common concerns and differences, certification will achieve Rule 23’s basic objective—‘economies of time, effort, and expense”\textsuperscript{105}

I am not suggesting that the Justices in \textit{Amchem} consciously considered outcome-based and process-based models. The majority likely started with the intuition that a class as huge, sprawling, and diverse as the \textit{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, but they probably viewed those problems as symptoms of a deeper infirmity that reinforced their initial intuition that the putative class was not sufficiently cohesive to be capable of litigating through representatives.

Two years after \textit{Amchem}, the Court dealt with another large and diverse class in \textit{Ortiz v. Fibreboard Corp}.\textsuperscript{106} Like \textit{Amchem}, \textit{Ortiz} involved a settlement class action, this one seeking approval of a global settlement that covered all future asbestos claims filed against Fibreboard. Instead of using (b)(3), the parties relied on (b)(1)(B) to certify a mandatory class action with no right to opt out. They used a limited fund theory, arguing that the amount available to satisfy the claims was insufficient to compensate class members in full. By locking everyone into the

\textsuperscript{103} Id. at 635-36 (“the settlement underscored the importance of (a) the common fact of exposure, (b) the common interest in receiving some compensation…., and (c) the common interest in avoiding large legal fees, transaction costs, and delays).
\textsuperscript{104} Id. at 636.
\textsuperscript{105} Id. at 634. In Justice Breyer’s view, these determinations require difficult cost-benefit tradeoffs that should be left to the discretion of district courts. \textit{Id.} at 639.
\textsuperscript{106} 527 U.S. 815 (1999).
settlement, the (b)(1)(B) strategy held out the hope of achieving global peace, and by using (b)(1)(B), the plaintiffs could circumvent the predominance obstacle that scuttled class certification in Amchem.\textsuperscript{107}

The district judge certified a (b)(1)(B) class action and approved the settlement, and the Fifth Circuit affirmed. 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. It also worried that such an ambitious use of Rule 23 might transgress Rules Enabling Act limits and run into constitutional problems.\textsuperscript{108} What is significant for our purposes is how the Court addressed these concerns. Instead of balancing the costs and benefits in light of the grim alternatives available to class members—as Justice Breyer did in his dissent\textsuperscript{109} and as any judge following an outcome-based model would do—the Court imposed strict constraints on the structure of a (b)(1)(B) limited fund class, constraints that the Ortiz class action failed to meet.\textsuperscript{110} 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.\textsuperscript{111}

\textsuperscript{107} Rule 23(b)(1)(B) does not include a predominance requirement. It requires only that “prosecuting separate actions by . . . individual class members would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.”

\textsuperscript{108} 527 U.S. at 842. The Court notes a potential Seventh Amendment obstacle, but devotes most of its discussion to due process. \textit{Id.} at 845-46.

\textsuperscript{109} \textit{Id.} at 865-84 (Breyer, J., dissenting).

\textsuperscript{110} \textit{Id.} at 847.

\textsuperscript{111} \textit{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” with equity presumptively a pro rata distribution and without any claimant receiving special treatment. \textit{Id.} at 838-41.
In *Ortiz*, the fund was created by the parties’ settlement agreement and not exogenously defined and delimited. It did not include all of Fibreboard’s assets to which plaintiffs, as judgment creditors, would have had claims. And it was not used to satisfy all the claims on a pro rata basis. Indeed, plaintiffs who were inventory clients of the class attorneys received separate and larger recoveries.

The Court’s constraints prevent the abusive use of (b)(1)(B) limited fund class actions in a blunderbuss way, by rendering the limited fund class virtually useless for large-scale torts. It is even possible that these constraints screen more desirable class actions on outcome quality grounds than abusive ones. But outcome quality was not at the forefront of the Court’s analysis. Legitimacy and day-in-court values were. Rather than analyzing the impact on legitimacy and participation directly, however, the Court took refuge in outdated representative suit precedent. In doing so, it imported into (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, in order to justify broad class preclusion, focused on classes that were united by shared claims to the same clearly defined and exogenously delimited fund. The fund, not the parties or the judge, defined the class, and everyone with claims to the fund automatically belonged to that class.

---

112 These constraints are not mandated by the text of Rule 23, as the Court itself concedes. *Id.* at 842.

113 *Ortiz* itself might well have been an example despite superficially troubling aspects of the settlement. *See, e.g.*, *id.* at 882 (“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”). Other cites.

114 *Id.* at 845-48 (noting “the inherent tension between representative suits and the day-in-court ideal”). It invoked the Due Process Clause and the Rules Enabling Act, and reasoned that Rule 23 should be construed to avoid conflicts. *Id.* The Court also briefly mentioned potential Seventh Amendment problems

115 *See supra* notes ** & accompanying text.
The Court tried to justify its holding by relying on advisory committee intent inferred from the committee’s citations to old precedents. However, it seems much more reasonable to suppose that the committee relied on the old cases for the broad equitable principles they implemented rather than the specific rules they applied. Nevertheless, these formal rules must have been attractive to the Ortiz Court. They limited the class action by insisting on a high degree of intra-class unity. It was the huge and sprawling nature of the Ortiz class, coupled with troubling features of the settlement, that drove the Court to draw limits. And it did so by anchoring certification to class cohesiveness through limitations borrowed from representative suit precedent.

Indeed, the Ortiz Court reaffirmed its holding and rationale in Amchem. Rejecting the argument that class members’ interests in securing recovery were so weighty as to overshadow any potential problems with the class action, the Court quoted Amchem for the proposition that

116 After noting that the committee must have intended the constraints imposed by the old cases to be sufficient conditions for certification, Ortiz, 527 U.S. at 838, the Court proceeded to make them necessary conditions as well: The question remains how far the same characteristics are necessary for limited fund treatment. While we cannot settle all the details of a subdivision (b)(1)(B) limited fund here...there are good reasons to treat these characteristics as presumptively necessary, and not merely sufficient...It is true, of course, that the text of Rule 23(b)(1)(B) is on its face open to a more lenient limited fund concept...But the greater the leniency in departing from the historical limited fund model, the greater the likelihood of abuse...The prudent course, therefore, is to presume that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model. As will be seen, this limiting construction finds support in the Advisory Committee's expressions of understanding, minimizes potential conflict with the Rules Enabling Act, and avoids serious constitutional concerns....

Id. at 842.

117 The Ortiz Court is correct that the 1966 Advisory Committee intended to codify precedent when it crafted 23(b)(1). Ortiz, 527 U.S. at 842. But the committee relied on precedent in a pragmatic way. It teased out what it thought were the policy reasons for class treatment embedded in the historical cases—to avoid serious unfairness to class members by virtue of individual litigation “as a practical matter...substantially impair[ing] or impede[ing] their ability to protect their interests”—and drafted a Rule to implement those policies. It seems plain that the committee’s purpose was to enable class treatment as a flexible response to collective action problems exhibiting the same general type of unfairness that the Committee believed motivated creation of the analogous representative suits historically. Indeed, the 1966 advisory committee did exactly this sort of functional revision for parallel Rule 19 and related Rule 24, and there is no reason to believe that it meant to do something different for Rule 23.

118 At times in its opinion, the Court seems to understand that the precedents involved formal relationships among legal rights, but it treats those aspects as welcome constraints on the limited fund class. See, e.g., Ortiz, 527 U.S. at 836 nn. 14, 15.
“the determination whether ‘proposed classes are sufficiently cohesive to warrant adjudication’ must focus on ‘questions that preexist any settlement.’”  

This passage is notable for its invocation of cohesiveness in the context of a (b)(1)(B) class action, a subdivision that does not even include a predominance requirement.

2. **Predominance, (c)(4) Issue Classes, and Class Cohesion**

While *Amchem* and *Ortiz* are about taming the settlement class, their focus on the need for intra-class unity has much broader implications. After *Amchem*, the number of judicial references to class cohesion exploded, and federal judges noted the presence or absence of cohesiveness for many different purposes.  

For example, cohesiveness continued to play a role in justifying the mandatory nature of the (b)(2) class, just as it did before *Amchem*.  

Although it is difficult to determine this sort of thing from reading cases, it seems that courts have required a stronger degree of cohesiveness for (b)(2) classes after *Amchem*. Some judges have even made cohesiveness the central (b)(2) inquiry, in effect importing a predominance requirement into (b)(2). In the medical monitoring...
cases, for example, courts tend to ignore (b)(2)’s express requirements and focus directly on how the presence of individual issues affects class cohesion.123

As for (b)(3), most courts after Amchem read predominance in terms of class cohesiveness for litigating as well as settlement classes, and they often quote Amchem in support. It is difficult to tell whether their predominance analysis is stricter, but it would not be surprising if it were.124 In fact, there is some evidence that courts have become stricter about predominance in two important ways.

First, according to some commentators, federal courts increasingly rely on what are in effect strong presumptions against certification. For example, Professor Klonoff, a leading class action scholar, 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.125 He also reports that “[n]umerous courts hold that when the laws of

123 See Linda S. Mullenix, No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives, 2003 U. CHI. L. REV. 177, 229-230. The best known example is Barnes v. American Tobacco Co., 161 F.3d 127 (3d Cir. 1998), denying (b)(2) certification of a smoker class seeking a medical monitoring remedy. Id. at 142-43. The court noted expressly that “while 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 action.” 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 Stores, Inc. v. Dukes to deny (b)(2) certification of a medical monitoring class action in an environmental toxic tort case on the ground that intra-class heterogeneity defeated cohesiveness). See generally PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04 reporter’s notes comt. b, at 126 (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 the requirements and safeguards are important in medical monitoring cases and they believe that because medical monitoring classes are not sufficiently cohesive to justify mandatory treatment.

124 In one case, a focus on class cohesiveness worked to facilitate rather than restrict class certification. In re Nassau County Strip Search Cases, 461 F.3d 219 (2d Cir. 2006). In Nassau County, The defendant stipulated to the common question and then argued that predominance was not satisfied for the remaining issues. This argument makes sense if predominance is a proxy for judicial economy, since the only issues left were individual. Citing Amchem and noting that predominance “tests whether the class is a ‘sufficiently cohesive unit,’” 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.

multiple states are involved and are not uniform, class certification is essentially *per se* inappropriate." He criticizes both trends from within an outcome-based model, stressing the importance of a case-specific cost-benefit analysis.127

Second, judges and commentators today disagree sharply about whether predominance problems can be addressed through issue-classing pursuant to 23(c)(4).128 This question generated little controversy before *Amchem*. Indeed, courts construed predominance generously enough to make issue classes largely unnecessary, except perhaps to sever liability from damages. However, the question of (c)(4)’s relationship to (b)(3) is of keen concern today. Some courts support issue-classing as long as the determination of common questions “materially advances” the litigation.129 Others reject issue-classing as inconsistent with the (b)(3) predominance requirement.130 The former argue in the way one would expect from courts applying an outcome-based model; they emphasize the efficiency and fairness benefits of issue

---

127 Id. at 49, 50-51.
129 See In re Nassau County 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”); 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); 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.”).
130 Castano, *supra*, at 745-46 n.21. See 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.”) Additional cites.
class certification. The latter assume, as one would expect from a court applying a process-based model, that predominance must be satisfied on a global level and that issue-classing should be limited to management details.

It is worth exploring in a bit more detail the connection between the process-based model and these restrictive trends. First, consider presumptions against certification. An outcome-based model should be averse to strong presumptions in the predominance context. Presumptions might make sense if they simplified the certification analysis so that the benefit of reduced decision costs exceeded the error costs of certifying too few (or too many) class actions. But the judicial economy gains for large class actions are likely to be so substantial that the cost of erroneously denying certification should exceed whatever decision cost savings a presumption generates. Thus, a court following an outcome-based model and an internal conception of the class should shun presumptions in favor of a more case-specific approach.

By contrast, a court like Amchem, following a process-based model with an external conception of the class, should find presumptions quite appealing. A presumptive rule fits the absolute and categorical nature of the cohesiveness determination. Class cohesiveness is not a balance of costs and benefits. It is a threshold degree of legal interconnection and overlap. The 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 presumptive rules.

Next let us examine issue-classing more closely. An outcome-based model should look favorably on the generous use of (c)(4) to carve up a putative class action into separate issue classes when predominance cannot be satisfied for the class as a whole. This makes sense as
long as there are no constitutional obstacles. The efficiency gains must be large enough to justify the costs of dealing with individual questions later on, and the common questions must be distinct enough so that they can be adjudicated accurately in isolation. If these conditions are satisfied, issue-classing serves functional goals.

The opposite is true for someone applying the process-based model and its externally-defined class. 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 must be cohesive over the entire suit, 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 an absolute limit to how far the carving process can go, or cohesiveness loses all 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. In that case, predominance would be useless as an instrument for safeguarding due process and legitimacy values.

131 For example, the Seventh Amendment reexamination clause can create some problems for issue classing. Cites. Other considerations might be relevant. See, e.g., McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 491 (7th Cir. 2012) (adding 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 whether issue classes are appropriate).

132 See, e.g., Castano v. Am. Tobacco Co., 84 F.3d 734, 745-46 n.21 (5th Cir. 1996) (“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”).

133 Still, it is important to be clear that, while courts cite to Amchem for the proposition that predominance assures cohesiveness, few clearly link cohesiveness to a stricter predominance analysis. Even so, one must wonder why predominance is given so much importance if it is not because it serves as a cohesiveness threshold for satisfying legitimacy and due process. See Laura J. Hines, The Dangerous Allure of the Issue Class Action, 79 Ind. L. J. 567, 594-98 (2004) (arguing that predominance should be analyzed prior to issue classing because a cohesive class is necessary to satisfy due process).
One notable example is *Gunnells v. Healthplan Servs., Inc.* The issue 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. 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 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.  

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. In addition, the increased involvement of appellate courts after the 1998 addition of subdivision (f) to Rule 23 has certainly made a difference. Yet the evidence is strong for the influence of a process-based model and its search for intra-class unity.

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

Perhaps the most striking example is the Supreme Court’s recent decision in *Wal-Mart Stores, Inc. v. Dukes*. Indeed, *Dukes* 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

---

135 348 F.3d 417 (4th Cir. 2003).
136 Id. at 451.
137 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 C.A. WRIGHT, A.R. MILLER, M.K. KANE & R.L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 1802.2 (2012). Before 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.
different ways with internal 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: “[t]he common contention…must be of such a nature that…determination of its truth or falsity will resolve an issue central to the validity of each one of the claims in one stroke.”\footnote{Id. at 2551. \textit{See also id.} (“Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury’”); \textit{id.} at 2552 (“Without some glue holding the alleged \textit{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 \textit{why was I disfavored}” (emphasis in original)).} 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 backpay.\footnote{Id. at 2558-59 (noting that (b)(2) is not available when “each individual class member would be entitled to a \textit{different} injunction or declaratory judgment against the defendant” or an individualized monetary award).} The following discusses each holding in turn.

a. The (a)(2) Holding

Most courts before \textit{Dukes} treated (a)(2) as a minimal threshold requirement.\footnote{See 7A C.A. WRIGHT, A.R. MILLER & M.K. KANE, \textit{FEDERAL PRACTICE AND PROCEDURE} § 1763 ( ).} A single nontrivial question of law or fact shared in common would usually suffice. The real constraints were imposed by Rule 23(b), which depend on the functional goals that the class action is meant to serve. For example, (b)(3) requires not just common questions but predominating common questions in order to serve judicial economy goals, and (b)(2) requires that the common questions coalesce around a unitary group wrong and remedy in order to serve remedial efficacy goals.

The \textit{Dukes} Court transformed (a)(2) into something much stricter.\footnote{Although exactly how much stricter is unclear. Some lower federal courts have managed to distinguish \textit{Dukes} and find a sufficiently central common question to certify a class action. \textit{See}, e.g., Ross \textit{v. RBS Citizens, N.A.}, 667 F.3d 900 (7th Cir. 2012); In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 678 F.3d 409 (6th Cir. 2012) Sullivan \textit{v. DB Investments, Inc.}, 667 F.3d 273 (3d Cir. 2011). Others have denied certification for lack of a sufficiently central common question. \textit{See}, e.g., M.D. ex rel Stukenberg \textit{v. Perry}, 675 F.3d 832 (5th Cir. 2012).} After \textit{Dukes}, a common question alone is not enough; the common question must lie at the core of all the
claims. The Court’s rationale for this stricter rule is not terribly clear. There are a few references in the opinion to judicial economy, 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. But it is hard to justify the Court’s exacting scrutiny of the plaintiffs’ evidence on economy and outcome quality grounds.

In fact, the Dukes opinion does not read like the opinion of a court concerned about outcome effects. Had the Court focused on outcomes, it would have recognized that judicial economy is not the reason for a (b)(2) class action. The primary goal of (b)(2) is remedial efficacy—facilitating systemic injunctive and declaratory relief targeting class-wide wrongs. Furthermore, (b)(3), which is about judicial economy, has a built-in screen in the form of predominance and does not need (a)(2) at all.

A more plausible explanation is that (a)(2) checks class cohesiveness for due process and legitimacy reasons. Admittedly, the Court does not mention cohesiveness when discussing (a)(2). However, it suggestively refers to the “glue” that holds the disparate reasons for class

---

143 See, e.g., Dukes, 131 S.Ct. at 2551 & n. 2 (referring to the importance of assuring that “claims can be productively litigated at once” and relying on Falcon for the proposition that (a)(2) and (a)(3) “serve as guideposts for determining…whether a class action is economical and the claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence”).

144 See id. at 2553.

145 In fact, the Court admits as much in the second part of its opinion discussing the (b)(2) issue. There it notes that the Advisory Committee modeled (b)(2) on civil rights cases and states that the classes certified under (b)(2) “share the most traditional justification…that the relief sought must perforce affect the entire class at once.” Id. at 2557-58.
member employment decisions together\textsuperscript{146} and demands not just that class members share common questions, but that they “have suffered the same injury.”\textsuperscript{147} It also demands strong evidence of a “specific employment practice” that “ties all [the] 1.5 million claims together.”\textsuperscript{148} Again, the reference is to tying claims together rather than deciding overlapping questions of law and fact.

The \textit{Dukes} class sought certification under (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 \textit{Dukes}, 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 due process and legitimacy constraints. And these constraints must have seemed particularly significant in \textit{Dukes}. That case, like \textit{Amchem} and \textit{Ortiz} before it, involved a huge, sprawling, and diverse class, which to someone following a process-based model would have seemed inappropriate for unitary treatment.\textsuperscript{149}

The \textit{Dukes} Court in effect collapsed (b)(2) into (a)(2) and thereby extended the strict commonality requirement to all class actions. For those who believe class cohesion is a fundamental requirement of due process and legitimacy, there is nothing surprising about this move. Since cohesiveness is required for all class actions, it makes sense to assume that a

\begin{itemize}
\item \textsuperscript{146} Id. at 2552.
\item \textsuperscript{147} Id. at 2551 (quoting \textit{Falcon}).
\item \textsuperscript{148} Id. at 2555-56.
\item \textsuperscript{149} 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 \textit{Dukes} dissenters find the plaintiffs’ showing of discrimination more than sufficient for class certification. The dissenters disagree with the majority about the likelihood of stereotype-influenced gender discrimination, note that “resolving [the class] claims would necessitate examination of particular policies and practices alleged to affect, adversely and globally, women employed at Wal-Mart,” and conclude that “Rule 23(a)(2), setting a necessary but not a sufficient criterion for class-action certification, demands nothing further.” 131 S.Ct. at 2561, 2565 (Ginsburg, J., dissenting).
\end{itemize}
universally applicable threshold requirement, like (a)(2), would embody it. Indeed, (a)(2) is the only 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 intra-class unity, and representational adequacy is relevant after Amchem only if cohesiveness is first satisfied.

b. The (b)(2) Holding

Before Dukes, lower federal courts allowed monetary relief in a (b)(2) class action as long as it did not “predominate” over injunctive and declaratory relief.\(^\text{150}\) Dukes imposed a much stricter requirement. The Court explicitly rejected the predominance test and required remedial indivisibility instead.\(^\text{151}\)

The opinion does not refer to cohesiveness expressly, nor does it equate indivisibility with class unity. Nevertheless, its analysis is clearly influenced by an external conception of the class and a process-based model of the class action. The indivisibility of the remedy ties 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 (b)(3)’s additional procedural protections.\(^\text{152}\)

Indeed, the Court’s proffered arguments are extremely weak without this additional element. The Court relies on the fact that the 1966 advisory committee modeled (b)(2) on civil

\(^{150}\) These courts inferred the predominance test from a passage in the 1966 advisory committee note, which stated that “[t]he subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.” 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-North Commuter Railroad, 267 F.3d 147, 164 (2d Cir. 2001) (adopting a more flexible balancing test).

\(^{151}\) Id. at 2557 (noting that (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).

\(^{152}\) This is especially true when the defendant has affirmative defenses to individual backpay claims, as Wal-Mart had in the Dukes case. See id. at 2558-59.
rights class actions. This is true, but it does not mean that the committee intended to limit (b)(2) to cases that mimic those precedents exactly.\textsuperscript{153} In fact, the reference in the Committee Note to monetary relief suggests otherwise. The Court also discusses practical problems with adding monetary relief to a (b)(2) class action.\textsuperscript{154} However, these practical problems, while relevant, hardly justify denying (b)(2) certification across-the-board.

Finally, the Court offers an argument based on the structure of Rule 23(b). It reasons that the differences between (b)(2) and (b)(3) make sense as long as one assumes that (b)(2) is limited to indivisible relief.\textsuperscript{155} In particular, the indivisible remedy automatically satisfies predominance and superiority, so these (b)(3) requirements are not needed, and indivisibility requires a mandatory class, which explains why (b)(2) has no notice or opt-out rights. The problem is that the Court’s interpretation is not the only one that comports with 23(b)’s structure. There is no apparent reason why indivisible \textit{plus} non-predominating-monetary relief would not also satisfy predominance and superiority, or why Rule 23 would shun mandatory class treatment just because incidental monetary relief is involved.\textsuperscript{156} In fact, the argument is logically flawed. The Court in effect assumes that (b)(3) imposes additional procedural protections because the remedy is individual, and concludes that those same procedural protections must apply whenever an individual remedy is sought even as incidental to class-wide relief. The conclusion simply does not follow from the premise.

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

\begin{itemize}
  \item \textsuperscript{153} \textit{Id.} at 2557-58.
  \item \textsuperscript{154} \textit{Id.} at 2559-60.
  \item \textsuperscript{155} \textit{Id.} at 2558-59.
  \item \textsuperscript{156} The Court suggests in dictum that there is a “serious possibility” that the Due Process Clause might require notice and opt out whenever monetary relief is involved. \textit{Id.} at 2559. This gets closer to the heart of the matter and strongly suggests that the Court’s interpretation of Rule 23 is parasitic on a view of due process that requires a strongly cohesive class for mandatory class treatment.
\end{itemize}
hence mandatory—class. But this does not follow as a logical matter. Just as the availability 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 demonstrated, individual relief is not likely to correct systemic wrongs.\footnote{See David Marcus, Flawed But Noble.} 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.\footnote{A class action facilitates intervention and also has heuristic advantages.} 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 (b)(2) for someone concerned about 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 is an important incentive for filing (b)(2) suits.\footnote{Cites. Note the possibility that monetary relief might supplement fee shifting.} However, indivisibility is 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.\footnote{It might seem strange that Justice Ginsburg and the other dissenters concurred in the Court’s (b)(2) holding. But recall that Justice Ginsburg wrote the majority opinion in Amchem that equated (b)(3) predominance with class cohesiveness on due process and legitimacy grounds. See supra notes ** & accompanying text. What is more puzzling is that Justice Breyer did not object to the (b)(2) holding.} In short, the Dukes Court applied a process-based model with an externally-defined class.

IV. PROBLEMS WITH AN EXTERNALLY-DEFINED CLASS AND THE 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, and ever since 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 linked to due process and legitimacy values is not the only factor responsible for more restrictive class action rules. Concerns about unjustified settlement leverage have led courts to tighten proof standards at the certification stage, and greater awareness of the risk of sweetheart settlements has prompted more careful attention to representational adequacy, settlement fairness, and fee requests. Concerns about settlement and agency problems in part motivated amendments to Rule 23 adopted in 2003 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 of national scope. See, e.g., 15 U.S.C. §§ 78u-4(b)(2) (PSLRA’s strict pleading requirement); 28 U.S.C. §§ 1711-1715 (CAFA’s regulation of class action settlements).

161 For examples of stricter proof standards, see In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008); Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 202 (2d Cir. 2008); In re IPO Securities Litigation, 471 F.3d 24 (2d Cir. 2006). But see Behrend v. Comcast Corp., 655 F.3d 182, 198, 199-200 (3d Cir. 2011) (construing Hydrogen Peroxide less strictly). Concerns about settlement and agency problems in part motivated amendments to Rule 23 adopted in 2003 giving judges more power to choose class attorneys and strengthening settlement review. Cites. Congress, too, has weighed in with stricter pleading standards for securities fraud cases and additional limitations on small claim class actions of national scope.
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 a process-based model, criticizing this trend with functional arguments derived from an outcome-based model misses the point. One must be prepared to challenge the process-based model on its own terms by probing the due process and legitimacy values at its core. The following discussion takes on this task. It argues that an external requirement of class unity is not obviously justified on normative grounds. Cohesion is not needed to respect 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 process-based model through narrow readings of Rule 23. If it decides to constitutionalize those readings, there will be little room left to implement a broader outcome-based approach. The discussion in this section argues against a restrictive interpretation of the Due Process Clause, but there are indications that the Court is inclined in that direction. Nevertheless, the advisory committee should proceed with its own best understanding of due process requirements even if it crafts a Rule that does not pass Supreme Court muster. As I have argued elsewhere, the committee can contribute to a dialogical interaction with the courts if it offers its best understanding of the fundamental values underlying the Rules.¹⁶²

A. Due Process and the Day in Court

As discussed in Part I, one must distinguish between two different theories of participation: an outcome-based theory and a process-based theory.¹⁶³ An outcome-based theory

---

¹⁶³ See supra Part I.B.2.
values participation for its beneficial impact on outcome quality. 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.

It is clear that a cohesion requirement cannot be supported by an outcome-based theory of participation. The participation opportunities litigants receive depend entirely on the extent to which additional participation is likely to improve outcome quality. To be sure, the analysis is different depending on whether one applies a rights-based or a utilitarian theory, but 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 social welfare maximization.\textsuperscript{164} It should be enough that class members have similar litigation goals and the class representative and attorney have incentives to litigate vigorously; there is no obvious reason why cohesiveness or remedial indivisibility is needed as well.\textsuperscript{165}

This means that the cohesion requirement can be justified, if at all, only within a process-based theory. But it is at this point that things become quite fuzzy. The rough intuition seems to be that the strength of the participation right somehow varies with the degree of individuality

\textsuperscript{164} A utilitarian theory of adjudication supposes that judges should decide cases to promote overall social welfare taking account of the social costs generated by the adjudicative process. The substantive law defines the parties’ entitlements and the procedural system should be designed to minimize the sum of expected error and process costs. See ROBERT G. BONE, THE ECONOMICS OF CIVIL PROCEDURE. A rights-based theory of adjudication supposes instead the judges should decide cases by finding and enforcing the rights of the parties rather than by maximizing overall social welfare. See Robert G. Bone, Rethinking the “Day in Court” Ideal and Nonparty Preclusion, NYU L. Rev.

within the class. The more individuality class members retain, the more individual participation they should receive. The problem is how to flesh out this intuition in a rigorous way.\(^{166}\)

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 could not possibly be paradigms of strong class cohesion. Individual members of a (b)(1)(B) limited fund class action, for example, have sharply conflicting preferences and goals. Competition over the limited fund creates an internally divisive class.\(^{167}\) 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 the desirability of suing at all.\(^{168}\)

In fact, the individuality that scuttles class cohesiveness has to do with how the substantive law treats class members, not what class members prefer. As we have seen, a class is strongly cohesive when the substantive law merges class members into an indivisible legal group. Otherwise, it is less cohesive—or not cohesive at all. However, there is a problem with this idea of legally-prescribed cohesiveness. It fits the (b)(2) class, but it does not fit (b)(1).

Members of a (b)(1) class seek individual monetary relief. It is true that all class members are connected by the fact that individual litigation imposes externalities on others, but the risk of externalities does not unite individuals. If anything, it divides them. Nor does the

\(^{166}\) In the somewhat different context of nonclass aggregations, Professor Burch has argued for a view of cohesiveness based on actual group member interactions that, she claims, trigger obligations of solidarity and membership. Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. Rev. 87, 106-11 (2011). Whatever the merits of this position, it does not translate well to the class action, since most class members participate only through representatives they do not choose.

\(^{167}\) The litigation preferences of early filers are in sharp conflict with those of later filers who might have no assets remaining to satisfy their claims.

\(^{168}\) See Marcus, *Flawed But Noble*, supra note, at 709-710; see also Burch, *supra* note, at 111. Indeed, preferences and goals are bound to conflict to some extent for virtually any actual group. See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 389-90 (2000) (noting that risk attitudes that affect litigation and settlement preferences are bound to vary across any group of claimants).
substantive law dictate a group-wide remedy to solve the externality problem. Each class member has a substantive entitlement to full compensation. If the substantive law itself limited the entitlement, there would be no need for a mandatory (b)(1) class at all.\textsuperscript{169} For example, if an applicable substantive rule required equitable apportionment whenever a fund was limited, there would be no need for a (b)(1)(B) limited fund class action; individuals could sue separately for their pro rata shares.\textsuperscript{170}

In fact, the only cohesion that a (b)(1) class possesses is the same as the common-question cohesion that supports a (b)(3) class. From a process-based perspective, this implies that a (b)(1) 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) 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) class, and evaluate its mandatory status on functional grounds from an outcome-based perspective.

There is another problem with requiring class cohesion. The Supreme Court’s insistence that cohesion is necessary to accommodate the class action to the day-in-court right misunderstands how the day in court actually works in civil litigation.\textsuperscript{171} If the day-in-court right were as strong as the Supreme Court seems to think it is, there should be few reasons compelling

\textsuperscript{169} One might still authorize a class action to save litigation costs, but then it would have to be certified under (b)(3).
\textsuperscript{170} At least if the total number of claimants is known or easily ascertainable. This condition was often satisfied in the historical limited fund cases and it still is in the traditional limited fund cases today. I am aware that my analysis implies that equitable apportionment is a procedural principle. It seems to me 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 our 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. \textit{See} Robert G. Bone, \textit{The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions}, 79 GEO. WASH. L. REV. 577, 614-24 (2011).
\textsuperscript{171} It is true that the Court has stated on numerous occasions that the Due Process Clause guarantees broad litigant control and a robust personal day in court. \textit{See}, e.g., Taylor v. Sturgell, 553 U.S. 880,892-95 (2008); Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996). But this guarantee is not borne out in practice.
enough to outweigh it. In practice, however, litigant control is routinely limited for lots of reasons, some of which are not terribly compelling.

I have discussed this point at length elsewhere. 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. Compulsory joinder and intervention-as-of-right require some form of unfairness, but permissive joinder and permissive intervention authorize the addition of parties simply for the sake of judicial economy. Admittedly, the 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 joined to cooperate in filing briefs, conducting discovery, and engaging in other pretrial activities. So too, impleader, counterclaims, and Rule 42 consolidation complicate the litigation in ways that adversely affect litigant control. And relatively uncontroversial applications of Rule 23, such as (b)(1) and (b)(2), drastically restrict control opportunities for fairness and remedial efficacy reasons.

Furthermore, judges have power to transfer cases “for the convenience of parties and witnesses,” even though a transfer interferes with the plaintiff’s freedom to choose the forum. For a particularly dramatic example, the Multidistrict Litigation Act allows the Judicial Panel on Multidistrict Litigation (JPML) to transfer cases for pretrial purposes, and the JPML has

---

172 See Martin Redish, Wholesale Justice.
174 Allowing the plaintiff to join additional defendants respects the plaintiff’s autonomy, but it reduces the defendant’s. So too, allowing intervention respects the autonomy of the intervenor but reduces the control opportunities for those who 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 ** § 1660, at 470 (noting that judges give great weight to the efficiency gains from joinder).
175 See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.02 reporters’ note to cmt. B(1)(A), at 17 (2010) (recognizing the possibility of permissive joinder of large numbers of defendants).
transferred hundreds and even thousands of related lawsuits pursuant to this authority.\(^{177}\) Here too, judicial economy is a sufficient reason, and even when the result is a litigation structure dominated by lead counsel and a litigation committee that strips most plaintiffs of any meaningful control at all.\(^{178}\)

I have argued elsewhere that 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.\(^{179}\) By an institutional right, I mean a right that is defined by a balance of factors that make for the best functioning of the institution within which the right operates. In the case of the day-in-court right, 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.

An institutional right adjusts more flexibly than a liberty right to institutional needs and constraints. A broad liberty right guarantees expansive individual control. It can be outweighed by other rights of comparable moral worth and practical concerns that are sufficiently compelling, but it still protects a large zone of litigant autonomy and yields to only a limited set of countervailing considerations. This kind of right cannot account for how flexibly procedural rules and practices deal with participation. An institutional right can.

Still, even an institutional right must limit the type of balancing it allows. Otherwise, it would not function as a right. If the balance defining the right were straightforwardly utilitarian, \(^{177}\) 28 U.S.C. § 1406
\(^{178}\) See MANUAL FOR COMPLEX LITIGATION (THIRD) § 20.22 (1995). As a purely formal matter, the parties in each of these situations have all hired their own lawyers whereas absent class members have not. However, having one’s own lawyer 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.
\(^{179}\) See Bone, supra note **, at 624 (concluding that “the day-in-court right is best understood as a right to control litigation insofar as relevant institutional considerations support personal control”).
for example, the day-in-court right would guarantee only the participation opportunities that maximize aggregate social welfare, and thus would be no right at all. 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.\footnote{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”).}

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 balance, and this 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 also improve each class member’s expected recovery. But there is no reason to deny certification just because the class is not united in some way outside the litigation.

B. \textbf{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.\footnote{See Lawrence Solum, etc.} However, legitimacy encompasses more than participation. In examining the broader constraints of legitimacy, 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.

Critiques based on perceived legitimacy are extremely weak. I have discussed their problems elsewhere.\textsuperscript{182} 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 that 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 that many people—those holding the belief—will perceive the procedure as illegitimate. Thus, normative legitimacy does all the work.

There are several possible arguments for cohesiveness based on normative legitimacy, but all have serious problems. One argument assumes that civil adjudication draws its normative legitimacy in large part from its pedigree.\textsuperscript{183} It is not at all clear why this should be so, but if it is, the pedigree that matters should 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 were rejected


\textsuperscript{183} The Supreme Court in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), made this argument. *See supra* notes ** & accompanying text.
in 1966 and replaced by a pragmatic and functional approach.\footnote{See supra notes ** & accompanying text.} Indeed, if legitimacy required following old models, much of contemporary civil procedure would have to be jettisoned.\footnote{See Robert G. Bone, Mapping the Boundaries. This is not to say that precedent is irrelevant, but precedent matters in a complicated way that privileges general principle, not lower-level principles or rules. See Bone, Geo. L. J. article.}

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. This argument is untenable. Ordinary civil adjudication serves regulatory (deterrence) as well as compensatory functions, and the private attorney general device has a long history. Moreover, 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 serves important compensatory goals.

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 an internally cohesive class can be assimilated to an individual litigant. But the argument lacks merit. For one thing, it is unclear why adjudication requires only 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. 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 reached. There is nothing intrinsic to the class action that is inconsistent with this reasoning process. 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.

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 powerful 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.

In the case of Rule 23, the Rules Enabling Act (REA) is the principal legal basis for addressing these concerns. The REA delegates power to the Supreme Court to make “rules of practice and procedure” for the lower federal courts. Section 2072(b)—the REA proviso—limits

---

186 Bone, Party Rulemaking, supra note **.
187 The settlement class action might be problematic on this ground because it asks the court to approve a bargain without an opportunity to reason about the merits. Settlement, however, is an accepted feature of the litigation landscape. To be sure, the settlement class is distinctive, but its legitimacy is a complicated matter. In any event, the fate of the settlement class has no bearing on ordinary litigating classes.
188 The leading legal process theorist, Lon Fuller, described a theory of adjudication that 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) (“the 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”). Some proceduralists rely on Fuller’s views to critique complex procedural structures and the public law regulation aspects of modern civil procedure. See generally Chayes, etc. However, nothing in Fuller’s theory 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 in the long run. Participation in an adversarial context assured 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.
that power by barring procedural rules that “abridge, enlarge, or modify any substantive right.”

As Professor Burbank has persuasively argued, Congress intended the proviso to enforce separation of powers principles by ensuring that procedural rules avoid regulating substantive matters more properly left to the political process. Thus, one might argue that a class action violates the REA if its effects are too substantive.

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. 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*. These class actions involved complicated global settlements establishing administrative schemes that provided scheduled recovery to future asbestos claimants. 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. To be sure, there are other ways to view these class actions that are more

---

192 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, although 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. P.A. L. REV. 17, 19 (2010) (“the possibility that the entire [Rule 23] endeavor may have unfolded in violation of the Enabling Act seems increasingly compelling, but the disruptive consequences of such a conclusion would be unacceptable”).
193 The REA is best understood to allow 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. Rule 23 was designed to and does serve these policies, and most of its applications do so as well.
194 Cites.
supportive of their legitimacy.\textsuperscript{196} 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.

However, it is not clear how class cohesiveness helps to deal with 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 this applies to (b)(2) class actions based on statutory claims, it does little for (b)(1) and (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.\textsuperscript{197} 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.\textsuperscript{198}

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 facts that do not correlate

\textsuperscript{196} One might view them more favorably as judicial responses to serious cost, delay, and outcome error problems under circumstances of congressional paralysis. Justice Breyer made a similar point in Ortiz:

[An 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.

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

\textsuperscript{197} Some might question the legitimacy of the legislature relying on the private attorney general device for regulatory enforcement. Perhaps one could argue that the legislature has assigned executive functions to the judiciary in violation of separation of powers limits. But this argument would be very difficult to make out both because private attorney general suits have some compensatory purpose and because they are quite common. See William Rubenstein, [Bill’s private attorney general article]

\textsuperscript{198} Products liability law serves a regulatory as well as a compensatory function and tort victims, like all consumers, are united as potential beneficiaries of the regulatory scheme.
well with cohesiveness, however cohesiveness is 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 these factors vary from case to case. However, if legitimacy is included in the certification analysis, it becomes part of the class definition from an internal perspective, 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 traced the influence of these views historically and argued that the modern class action embodies both of them as well as 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 extra-litigative unity. The effects of this shift can be seen in the interpretation and application of the (b)(3) predominance requirement, judicial willingness to handle predominance problems with issue classes, and the *Dukes* Court’s transformation of (a)(2) and its restrictive interpretation of (b)(2).199 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

---

199 It is difficult to predict the future, but the Court has signaled in *Dukes* and other cases that the Due Process Clause might require notice and maybe opt out whenever monetary claims are involved. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2559 (2011). This development would hardly be surprising for a Court committed to a process-based model of the class action and an external conception of the class.
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 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.\footnote{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 Robert G. Bone, \textit{Who Decides? A Critical Look at Procedural Discretion}, 28 CARDOZO L. REV. 1961 (2007).} In other words, they should apply an outcome-based model and an internal conception of the class.