

RULE 23(b) (2) COHESIVENESS AND INDIVISIBILITY

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Class actions under Federal Rule of Civil Procedure 23(b) (2) were designed to seek injunctive relief from federal courts.¹ This rule was implemented in 1966 to protect civil rights and anti-discrimination cases by providing a less burdensome and repetitive path for plaintiffs to have their “day in court.”² The rule itself has only two requirements: that the challenged conduct “appl[ies] generally to the class,” and that “final injunctive relief” is an appropriate remedy for the class.³ But as the landscape and attitude towards class actions evolved towards the end of the twentieth century, judges began adding additional requirements for 23(b) (2) certification. One notable requirement is that the class members must be “sufficiently cohesive to warrant adjudication by representation.”⁴ Cohesiveness is not found in the text of Rule 23 itself, yet the United States Supreme Court has consistently

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1 See FED. R. CIV. P. 23(b) (2). While courts may grant injunctive relief for other classes, *see, e.g.*, FED. R. CIV. P. (23) (b) (1) (B), Rule 23(b) (2) classes are “intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate.” FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

2 See FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (“Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.”); *see also* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 661 (2011) (“Until 1966, judgments could bind and benefit absent class members only in specific, narrow instances, an infirmity that made class action practice largely a backwater. Desegregation litigation, in which black plaintiffs invariably relied on Rule 23, was an exception.” (footnote omitted)).

3 See JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION AND ITS ALTERNATIVES* 186 (2d ed. 2018) (quoting FED. R. CIV. P. 23(b) (2)).

4 *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142 (3d Cir. 1998) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

“imported” cohesiveness “into no less than three parts of the Rule.”⁵ It has done so without providing an adequate definition or workable standard, which has left lower courts both guessing at what cohesiveness means and approximating what the Supreme Court would consider in a 23(b)(2) cohesiveness analysis.⁶ Unsurprisingly, the lack of guidance has not only produced varying standards both amongst and between circuits,⁷ but also led some courts to flat out reject cohesiveness as an element for 23(b)(2) certification.⁸

This Note will first review the 1966 revisions to Rule 23 and identify the practical and theoretical implications that led to the cohesiveness doctrine. Next, it will examine how courts have applied and modified the doctrine over the last fifty years. These developments reveal that cohesiveness can be categorized into two groups: the pre-*Amchem* era and the post-*Amchem* era. Prior to the landmark decision in *Amchem Products, Inc. v. Windsor*,⁹ courts used cohesiveness to ensure that absent class members’ interests were adequately represented, particularly when the class sought monetary damages. But following *Amchem*, courts used cohesiveness to ensure that present class members shared similar characteristics and suffered a common injury to warrant class treatment and a properly tailored injunction. This Note will demonstrate that cohesiveness has evolved from a procedural safeguard that excused further notice and opt-out requirements to a limiting principle that mirrors predominance to find dissimilarities amongst class members.

To further complicate the issue, in the seminal decision of *Wal-Mart Stores, Inc. v. Dukes*, the Court made no mention of cohesiveness as a (b)(2) requirement.¹⁰ Rather, the Court maintained that (b)(2) certification required an “indivisible injunction” that benefits all class

5 Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1872 (2015).

6 See Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 686 (2014).

7 *Contrast In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 75 (S.D.N.Y. 2002) (suggesting that because 23(b)(2) exists to remedy “group” injuries, the type of injury suffered by 23(b)(2) class members must be cohesive), *with* *DDMB, Inc. v. Visa, Inc.*, No. 05-MD-1720, 2021 WL 6221326, at *42–44 (E.D.N.Y. Sep. 27, 2021) (holding that 23(b)(2) contains no cohesiveness requirement); *contrast also* *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 165 (2d Cir. 2001) (holding that 23(b)(2) classes can be certified when they request compensatory damages alongside their claim for non-monetary relief), *abrogated on other grounds by* *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), *with* *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 414–17 (5th Cir. 1998) (holding that 23(b)(2) classes cannot be certified when they request compensatory damages).

8 See, e.g., *Walters v. Reno*, 145 F.3d 1032, 1045 (9th Cir. 1998); *Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918, 937 (9th Cir. 2019).

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

10 See generally *Dukes*, 564 U.S. 338.

members.¹¹ After reviewing the source and meaning of indivisibility, this Note will consider how indivisibility relates to cohesiveness. It will first examine whether indivisibility was a mere rebranding of cohesiveness or whether there are substantive differences between the two. Next, it will consider whether the two doctrines can be read harmoniously or if there is too much overlap to warrant separate requirements. Finally, it will identify any issues with abandoning either doctrine. This Note will conclude that (b)(2) certification should always start with indivisibility and then supplement its analysis with pre-*Amchem* cohesiveness when damages are claimed. This structure would both support the Advisory Committee's professed goals for (b)(2) class actions and allow for a proper scope of judicial inquiry. Indivisibility protects due process, maintains class unity, and preserves the Advisory Committee's intended goals for a (b)(2) class without resorting to individual inquiries. And when damages are claimed alongside injunctive relief, pre-*Amchem* cohesiveness will assure courts that additional notice and opt-out requirements are not needed.

I. DEVELOPMENT OF COHESIVENESS

A. *Advisory Committee Notes*

While the terms “cohesion” or “cohesiveness” are not found in any part of the text of Rule 23, courts have not introduced these terms organically. Class cohesion was certainly on the mind of the 1966 Advisory Committee when it revised Rule 23.¹² In its note to the Rule 23 amendment, the Committee used a form of the word “cohesion” twice: first in its notes on Rule 23(b)(3) when considering the balance among the individual interests of class members, the impracticability of pursuing separate negative-value suits, and the burden on the defendant of having to appear before each individual suit;¹³ and second in its notes on Rule 23(d)(2) when considering whether notice or opt-out rights for class members were appropriate.¹⁴ Both considerations are part of the Committee's more general focus of maintaining adequate due process for parties both present and absent

11 *Id.* at 362.

12 *See* Bone, *supra* note 6, at 672.

13 *See* FED. R. CIV. P. 23 advisory committee's note to 1966 amendment (“[T]he class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered.”).

14 *See id.* (“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.”).

to the litigation. This focus was imperative as the Committee attempted to systematically reform and modernize the entire infrastructure of aggregative litigation.

In his influential article *The Misguided Search for Class Unity*, Professor Robert Bone explained that the Committee did not just clarify the language of Rule 23 with its amendment, but paradigmatically altered the attitude and jurisprudence towards class actions.¹⁵ Prior to the 1966 amendments, class actions were divided into three categories: true, hybrid, and spurious class actions.¹⁶ These categories were not grouped by the function or remedy sought by the class, but rather by a formalistic, rights-based approach that defined each class action by how preclusive the suit would be towards other claims.¹⁷ In amending Rule 23, the Committee shifted its focus towards subcategories that reflected the most frequent claims and remedies. First, Rule 23(b)(1)(A) allowed defendants to seek class certification when it was faced with multiple claims that could result in “incompatible standards of conduct” if decided separately.¹⁸ Second, Rule 23(b)(1)(B) protected the fair and equitable distribution of assets when the defendant had claims against it that exceeded the amount of available funds.¹⁹ Third, as already discussed, Rule 23(b)(2) provided the opportunity to seek final injunctive relief.²⁰ Finally, Rule 23(b)(3) created the opportunity for litigants to seek monetary damages for related claims that would otherwise not be pursued on an individual basis.²¹

Each of the different subcategories were designed to “yield functional benefits.”²² Rule 23(b)(1) promoted fairness for the parties, 23(b)(2) promoted “remedial efficacy by facilitating the grant of class-wide injunctive relief,” and 23(b)(3) promoted judicial economy, consistency, and a “day in court” for low-value claims.²³ These specific goals embodied a larger ideological shift that Professor Bone described as a change from an external class unity to an internal class unity.²⁴ Internal class unity embraces the functional goals of judicial economy, efficiency, and consistency by asking “whether the class, as

15 See Bone, *supra* note 6, at 670.

16 *Id.* at 669.

17 See *id.* at 669–71.

18 2 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 4:5 (6th ed. 2022) (quoting FED. R. CIV. P. 23(b)(1)(A)).

19 See *id.* § 4:16.

20 See *supra* notes 1–3 and accompanying text.

21 See 2 RUBENSTEIN, *supra* note 18, § 4:47.

22 Bone, *supra* note 6, at 670, 670–71.

23 *Id.* at 671.

24 See *id.* at 652–55.

defined, optimally serves class action goals.”²⁵ Alternatively, “the external view requires class unity before any functional analysis is performed.”²⁶ Under the external view, a class cannot be burdened with individual issues or require extensive factual analysis in order to determine whether the class is homogenous. The external model flourished prior to the 1966 revisions because representative suits required that “the class had to be unified in some way independent of the litigation.”²⁷ This meant that the suits “involved a melding of individual substantive rights into a unitary right that attached to the class as a whole.”²⁸ As such, representative suits under the external model “presupposed the existence of an externally defined class.”²⁹

But as the Committee aimed to move from an external model to an internal model, the transition proved difficult because of challenges surrounding due process.³⁰ In the external system, there were no issues with due process because the external approach, by definition, ensured sufficient class unity through its independent class homogeneity requirements. The internal model, on the other hand, rejected this rights-based approach and thus had to find its due process footing elsewhere. According to Professor Bone, 23(b)(1) and (b)(2) class actions met the due process requirements with the adequacy requirement in Rule 23(a)(4) and the judicial oversight of absent member interests through mechanisms such as review of settlements.³¹ 23(b)(3) classes, however, introduced the opportunity for individual incentives, associated damages, and other financial awards.³² Thus, the Committee determined that 23(b)(3) certification needed additional protections of notice and opt-out rights.³³ From these doctrinal developments, it is clear that the Committee wanted to embrace the functionalism of the modern era, but was unable to completely depart from the external view because of due process concerns. It had to ground part of the new Rule 23 in the external era, which left an “uneasy tension” that courts had to sort out over the following decades.³⁴ Subsequent use and understanding of cohesiveness embodied this tension.

25 *Id.* at 656.

26 *Id.* at 659.

27 *Id.* at 666.

28 *Id.*

29 *Id.* at 669.

30 *See id.* at 671.

31 *See id.* at 671 & n.72.

32 *See id.* at 672.

33 *See id.* at 671–73.

34 *Id.* at 673.

While the Committee did not explicitly mention this shift from external to internal class unity in its notes, it did articulate certain internal goals for the judiciary to embody. First, it wanted to clean up class action categories for the sake of consistency. The Committee recognized that the previous designations led to frequent misclassification and failed to function as an “adequate guide to the proper extent of the judgments in class actions.”³⁵ It sought to, as Professor Benjamin Kaplan remarked, remove the “bloodless words [of] ‘joint,’ ‘common,’ and ‘several,’ and to rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties.”³⁶ Second, the Committee wanted to ensure that class actions were the correct vehicle to generate the proper remedy.³⁷ Professor Kaplan was the committee reporter for the 1966 amendments, and his insights reflect the Committee’s vision to give Rule 23 broad enforcement effects.³⁸ For example, during discussions on 23(b)(2), the Committee considered a plaintiff in a school desegregation case that was unable to certify the class due to procedural rules.³⁹ If that plaintiff had to proceed as an individual, it became “very likely the relief will be confined to admission of the individual to the school and will not encompass broad corrective measures—desegregation of the school.”⁴⁰ Thus, the revised Rule 23 was motivated, at least in part, in ensuring the opportunity for optimal justice with a comprehensive, sweeping framework.

Rule 23(b)(2) was intended to be particularly functional and designed to avoid repetitive litigation when courts could issue a single, uniform remedy. In his watershed review of the Advisory Committee’s notes, drafts, and correspondence, Professor David Marcus explained that Rule 23(b)(2) was primarily concerned with providing a proper vehicle for civil rights litigation.⁴¹ All of the drafters “worked actively for civil rights” and recognized the obstacles that litigants faced in pursuing their claims.⁴² This included defendants who “wanted nothing more than to litigate desegregation claims repeatedly in individual actions.”⁴³ It also included judges who were eager to “seek

35 See FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

36 Bone, *supra* note 6, at 670 n.66 (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)).

37 See Kaplan, *supra* note 36, at 498.

38 See *id.* at 497.

39 Maureen Carroll, *Class Actions, Indivisibility, and Rule 23(B)(2)*, 99 B.U. L. REV. 59, 79 n.119 (2019).

40 See *id.* (quoting Marcus, *supra* note 2, at 700).

41 See Marcus, *supra* note 2, at 702–08.

42 *Id.* at 702.

43 *Id.* at 701.

cover in imprecise rule terminology.”⁴⁴ Cognizant of the judicial climate, the Committee had to craft a rule that was technically sound enough to avoid judicial hair splitting, yet complete enough to “ensure ‘that unintended categories do not come in.’”⁴⁵ For example, one committee member suggested adding the term “willful” in order to “[m]ake it clear that this only applies to . . . a segregation policy or an exclusion policy based on discrimination.”⁴⁶ This recommendation was rejected because the Committee anticipated judges equivocating on the meaning of willful, and “tossing [complaints] right out, with glee.”⁴⁷ As such, the authors took no word for granted when drafting the rule.

This careful attitude towards Rule 23(b)(2) certainly helped accomplish the primary goal of equipping civil rights litigants with a proper means of challenging discriminatory conduct, but its precision has also left many questions unanswered in the years following the amendments. As Professor Marcus identified, the Committee “never indicated why Rule 23(b)(2) classes did not also need notice to rest preclusive judgments on a solid due process foundation.”⁴⁸ Additionally, courts have struggled to resolve conflicts of interest arising between (b)(2) class members. For “sympathetic” judges who began to “dominate the southern federal bench,” that question might not pose any issue even “where class members likely had deep and fundamental conflicts of interest.”⁴⁹ But as Rule 23(b)(2) gained traction in employment, mass torts, and securities claims, judges were left to “resort to a form of speculation or reverse engineering in order to hypothesize possible rationales for such treatment.”⁵⁰ With minimal guidance or definitions,⁵¹ and an “uneasy tension” between internal, functional goals and external, due process concerns,⁵² judges needed to elucidate the principles identified by the Advisory Committee. One of the first places they looked was cohesiveness.

44 *Id.* at 707.

45 *Id.* at 705 (quoting Letter from Benjamin Kaplan to John P. Frank (Jan. 21, 1963), *microformed on* CIS No. CI-6312-31 (Jud. Conf. Recs., Cong. Info. Serv.)).

46 *Id.* at 707 (alteration in original) (quoting Transcript of Session on Class Actions 60 (Oct. 31, 1963–Nov. 2, 1963) (statement of George Doub), *microformed on* CIS No. CI-7104-53 (Jud. Conf. Recs., Cong. Info. Serv.)).

47 *Id.* at 707 (quoting Transcript of Session on Class Actions, *supra* note 46, at 61).

48 *Id.* at 708.

49 *Id.* at 661.

50 See Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1605 (2007).

51 See Burch, *supra* note 5, at 1871 (“The crux of preclusion and adequate representation often hinges on whether a class is cohesive, a term that lacks a clear definition despite its central importance.”).

52 See Bone, *supra* note 6, at 673.

B. *Pre-Amchem Cohesiveness*

Less than a decade after the 1966 amendments, the Third Circuit examined the possibility of cohesiveness as a (b)(2) certification requirement in *Wetzel v. Liberty Mutual Insurance Co.*⁵³ The proposed class sought both injunctive relief and back pay for claims of sex discrimination, and the district court determined that (b)(2) was the proper vehicle and declined to require notice of opt-out rights.⁵⁴ In recognizing that the class was properly certified under (b)(2), the panel considered three elements: the general applicability of the challenged conduct, the appropriateness of the relief sought, and the cohesiveness of the class.⁵⁵ In its analysis, the panel cited to the Advisory Committee multiple times, including its specific references to cohesion.⁵⁶ Identifying cohesiveness as the “vital core of a (b)(2) action,” the panel determined that the class was properly certified because its members were “all sharing a common characteristic subjected to discrimination.”⁵⁷ The discriminatory policy itself and the class’s goal of “[elimination] of, and relief from” the defendant’s conduct guided the cohesiveness analysis.⁵⁸ Additionally, the common characteristic of being subjected to discriminatory policies also guided the panel’s adequacy analysis contained in the decision not to require subclasses.⁵⁹

Moreover, the panel unknowingly articulated the aims of the internal class view: “Any resultant unfairness to the members of the class was thought to be outweighed by the purposes behind class actions: eliminating the possibility of repetitious litigation and providing small claimants with a means of obtaining redress for claims too small to justify individual litigation.”⁶⁰ This is not to say that the panel disregarded external concerns of fairness and due process, but rather that it considered such concerns to be both outweighed by efficiency and judicial economy considerations, and also unnecessary because the class was adequately represented under 23(a)(4).⁶¹

53 *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 248 (3d Cir. 1975).

54 *See id.* at 244.

55 *See id.* at 250–51; *see also* TIDMARSH & TRANGSRUD, *supra* note 3, at 187–88.

56 *See Wetzel*, 508 F.2d at 249 (“Because of the cohesive nature of the class, Rule 23(c)(3) contemplates that all members of the class will be bound.” (footnote omitted)); *id.* at 255 (“In the degree that there is cohesiveness or unity in the class . . . the need for notice to the class will tend toward a minimum.” (alteration in original) (quoting FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment)).

57 *Id.* at 250–51.

58 *Id.* at 253, 250–51.

59 *Id.* at 253.

60 *Id.* at 249.

61 *See id.* at 256.

The panel also considered two objections to class certification raised by the defendants. First, the panel examined whether damages were permissible in a (b)(2) claim and maintained that (b)(2) class actions were not limited to injunctive relief.⁶² While the rule required that plaintiffs establish that equitable relief was necessary to prevent the defendant's conduct, there was "no limitation on the power of the court to grant other relief to the established class, especially where it is required by Title VII."⁶³ Second, the panel considered whether both former and present employees could exist in a single class.⁶⁴ The defendant argued that former and present employees had incompatible interests and pursued different remedies, but the panel determined that "the interests of the former and present employees in this class action are congruent: the [elimination] of, and relief from, Liberty Mutual's discriminatory policies."⁶⁵ The panel then issued a general statement that "former employees can adequately represent the interests of the present employees."⁶⁶ Thus, the first seminal reading of the Advisory Committee's revisions provided an overview of both how cohesiveness functions as an element of Rule 23(b)(2) and what factors into a cohesiveness analysis. Former and present employees must share a common injury and seek similar relief without individual conflicts, and cohesiveness is not vacated by claims for damages or class representatives with different employment status.

Following *Wetzel*, different circuits started to import cohesiveness into the class certification analysis. In particular, the Third, Fifth, Eleventh, and D.C. Circuits explored the doctrine and its impact on certification. While the understanding of cohesiveness and the results on certification varied amongst circuits, the circumstances leading to or triggering cohesiveness were notably similar. Courts introduced cohesiveness as a response to two common challenges raised by the defendants: when plaintiffs sought monetary damages along with injunctive relief or when defendants emphasized the interests of absent class members. While the decisions following *Wetzel* were not uniform in *how* cohesiveness was used, they were uniform in *when* cohesiveness was introduced.

Third Circuit decisions following *Wetzel* provided the most thorough review of cohesiveness. This is perhaps unsurprising given *Wetzel*'s mandatory authority, and courts used the doctrine to address both claims for monetary damages and absent class members. Just six

62 *Id.* at 251.

63 *Id.* (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 257 (5th Cir. 1974)).

64 *See id.* at 253.

65 *Id.*

66 *Id.*

months after *Wetzel*, the Eastern District of Pennsylvania started to use “the *Wetzel* analysis” to confirm that “[t]he class, all sharing a common characteristic subjected to discrimination, is cohesive as to the claims alleged in the complaint.”⁶⁷ The next year, cohesiveness started to blossom. In *Dickerson v. United States Steel Corporation*, the defendant challenged class cohesion under the theory that “each class member’s claim must rest on the exact same issues.”⁶⁸ The defendant attempted to define cohesion as “each member of the class must have the same cause of action, including similar (if not identical) factual and legal bases for recovery.”⁶⁹ Additionally, class members must “only challenge particular acts or practices which similarly affect all members of the class.”⁷⁰ The court rejected this interpretation, maintaining that “the term ‘cohesive’ was meant to refer to the fact that each class member has an identical interest in the outcome of the litigation, not that each has suffered discrimination based on the exact facts.”⁷¹ The court also concluded that there were no “mutually antagonistic interests” amongst the class to warrant decertification.⁷² Injunctive relief could be applied “across the board” and protect all employees’ interests without notice, so long as “representation is adequate and faithful.”⁷³

Next, in *Santiago v. City of Philadelphia*, plaintiffs brought claims for monetary damages and injunctive relief, and the defendants claimed “that damages are barred under all circumstances in a 23(b)(2) class action.”⁷⁴ Citing *Wetzel*, the court stated that “the cohesiveness of the claims distinguishes a 23(b)(2) class from a 23(b)(3) one.”⁷⁵ If cohesive, according to the *Santiago* court, class representatives could claim damages that were general and “with respect to the class as a whole.”⁷⁶ Thus, cohesiveness served as a bridge that could bring plaintiffs from injunctive relief to damages. Here, that bridge could not be built because of individual “collateral liability and defense issues,” but the class was still allowed to seek injunctive relief.⁷⁷ Finally, in *Presseisen v. Swarthmore College*, defendants challenged cohesiveness on similar grounds, claiming that “each member of the

67 *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 22 (E.D. Pa. 1975) (quoting *Wetzel*, 508 F.2d at 250).

68 *Dickerson v. U.S. Steel Corp.*, No. 73–1292, 1976 WL 13297, at *2 (E.D. Pa. Apr. 8, 1976).

69 *Id.*

70 *Id.*

71 *Id.* at *3, *2–3.

72 *Id.* at *3.

73 *Id.* at *2–3.

74 *Santiago v. City of Philadelphia*, 72 F.R.D. 619, 626 (E.D. Pa. 1976).

75 *Id.* at 627.

76 *Id.* (quoting *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 250 (3d Cir. 1975)).

77 *Id.* at 628, 629.

class must have the same cause of action, *i.e.*, *identical* fact situations.”⁷⁸ Defendants claimed that the cause of action was not similar “since numerous subjective factors enter into each employment decision in question here.”⁷⁹ The court maintained that the “flaw in defendants’ argument is . . . it improperly focuses upon their anticipated defense to the alleged discriminatory practices.”⁸⁰ Whether or not the “defendant used *only* objective criteria in its employment decisions”⁸¹ affects whether the defendant is liable for discrimination, but not whether there was a “common characteristic subjected to discrimination.”⁸²

The court concluded its (b)(2) analysis by considering the decision’s impact on absent class members. It recognized that the “practical effect of defendants’ argument would be to insulate all businesses and academic institutions from class action suits so long as management or professional personnel are involved.”⁸³ This policy implication demonstrates the early understanding of cohesiveness: that a (b)(2) remedy will, by necessity, implicate parties outside of the class. Cohesion confirms that it is “proper for all class members to be bound by a judgment without notice”⁸⁴ because the defendant’s conduct is “generally applicable to the class.”⁸⁵ Thus, cohesiveness must consider both those present to the litigation and absent to the litigation. By allowing the defendant to challenge cohesiveness because it used certain hiring personnel or subjective criteria in its hiring decision, the court recognized that it would be narrowing its analysis to comparing the factual similarities amongst present parties.⁸⁶ This narrowing, as the court noted, “improperly focuses” on whether the defendant’s conduct can be vindicated, when cohesiveness instead focuses on whether the defendant’s conduct applies to present and absent parties.⁸⁷ In the jigsaw puzzle of class certification, the Third Circuit in this era used cohesiveness to roughly sort the pieces and locate the corner pieces. This meant considering who was present, who was absent, and what relief was sought. It was not until later that the individual pieces would be compared and combined.

78 *Presseisen v. Swarthmore Coll.*, 71 F.R.D. 34, 46 (E.D. Pa. 1976).

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.* (quoting *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 250 (3d Cir. 1975)).

83 *Id.* at 46–47.

84 *Id.* at 46.

85 *Id.* (quoting *Wetzel*, 508 F.2d at 250).

86 *Id.* at 46–47.

87 *Id.* at 46.

Different circuits followed *Wetzel's* lead and introduced cohesiveness as an element for (b) (2) certification. While the Fifth, Eleventh, and D.C. Circuits did not explore the doctrine as thoroughly, they followed the Third Circuit's developments and used cohesiveness as a situational answer to challenges against monetary damages and absent class members. In *Johnson v. General Motors Corp.*, the Fifth Circuit considered cohesiveness when plaintiffs brought a claim for both monetary and injunctive relief.⁸⁸ Reviewing the Advisory Committee's notes, the panel recognized that "[w]hen only equitable relief is sought in an action involving a cohesive plaintiff group such as a class of black employees at an assembly plant, the due process interests of absent members will usually be safeguarded by adequate representation alone."⁸⁹ Similar to *Santiago*, when individualized monetary claims become part of the remedy sought, more cohesiveness is required to build the bridge between injunctive relief and monetary damages.⁹⁰ If that bridge cannot be built, some form of notice will be required.⁹¹ This idea was adopted at the district level in *Celestine v. Citgo Petroleum Corp.*,⁹² which specifically cited to *Santiago* for the proposition that individualized monetary claims weaken cohesiveness, and raise concerns about absent class members.⁹³

The Eleventh Circuit confronted the "horns of a dilemma" between cohesiveness and individualized damage awards in *Holmes v. Continental Can Co.*⁹⁴ There, the panel considered a proposed settlement where class representatives had "unique, atypical claims" that resulted in a "disparate distribution of the back pay award."⁹⁵ After considering both *Wetzel* and *Johnson*, the panel determined that the notice and opt-out rights were required because the size of the settlement and number of class members "may generate antagonistic interests and conflicting concerns."⁹⁶ At the district level, the court in *Battle v. Liberty National Life Insurance Co.* applied both *Johnson* and *Holmes* to "casket policies" held by class members.⁹⁷ Because each policy was "virtually identical in [its] terms and conditions," class cohesiveness was not weakened by "differing amounts of money involved."⁹⁸ This "convinced" the court "that the interests of the absent

88 *Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 437–38 (5th Cir. 1979).

89 *Id.* at 437.

90 *See id.* at 438.

91 *See id.*

92 *Celestine v. Citgo Petroleum Corp.*, 165 F.R.D. 463, 471 (W.D. La. 1995).

93 *Id.* at 469.

94 *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1159 (11th Cir. 1983).

95 *Id.*

96 *Id.* at 1160, 1157–60.

97 *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499, 1519 (N.D. Ala. 1991).

98 *Id.*

policyholders . . . , both with respect to each other and the named plaintiffs, were extremely cohesive.”⁹⁹ Finally, the D.C. Circuit in *Larionoff v. United States* compared the interests of absent class members in (b)(2) and (b)(3) claims.¹⁰⁰ The panel explained that in (b)(2) claims, “each member will be affected as a practical matter by a judgment obtained by another member if individual actions were instituted.”¹⁰¹ Therefore, “there is less reason to be concerned about each member of the class having an opportunity to be present.”¹⁰²

Cohesion cases following *Wetzel* continued to focus on the extent of the relief sought and whether it applied to the class generally. Courts were less concerned about the physical characteristics or individual composition of the present class members and more concerned about the proposed interests of the class to ensure that congruent, consistent relief was possible for both present and absent class members. This analysis generally consisted of three steps: First, the court would consider whether the class was aligned in its interests; second, the court would consider whether absent class members were protected; and third, the court would focus on the conduct of the defendant to determine whether relief is appropriate. This relationship has been fractured through some sort of injury, and the role of the court is to fix that injury through a properly tailored remedy. In order to provide such relief and restore the relationship, the court has to ensure that the injury actually applies to the class as a whole, which requires a review of the defendant’s conduct and its impact on class members. As Professor Elizabeth Burch explained, cohesion should not be tied to “artificial proxies” such as physical appearance or factual details but should look to “what truly connects the plaintiffs: the defendant’s conduct towards them and plaintiffs’ shared interest in holding the defendant accountable.”¹⁰³

Additionally, if there were concerns that class members sought remedies beyond injunctive relief, courts could use cohesiveness to determine whether the class had laid the proper foundation to bridge injunctions and damages. If damages were claimed, then the court would require a more cohesive class. If this elevated cohesiveness was not present, then the court would require additional notice and opt-out protections. In other words, cohesiveness became important when a (b)(2) class started to take the shape and form of a (b)(3) class. It was not so much of a prerequisite for a (b)(2) class only seeking

99 *Id.* at 1518–19.

100 *Larionoff v. United States*, 533 F.2d 1167, 1186 n.44 (D.C. Cir. 1976).

101 *Id.*

102 *Id.*

103 Burch, *supra* note 5, at 1873.

injunctive relief, but more of a due process justification that courts could rely on if the class pursued remedies that waded into other subcategories. Pre-*Amchem* cohesiveness was not a check on the class or a roadblock to injunctive relief; rather, it was a check on the factfinder to ensure that the defendant's conduct was able to be corrected, the correction did not forget about anyone, and no additional protections were required.

This theory of cohesiveness is related to the theory of internal class unity. An internal class is less concerned about the individual rights of each participant and more focused on "welfare maximization."¹⁰⁴ So long as class members have similar, non-conflicting preferences, the class should be certified because it provides the optimal vehicle for remedying the injury.¹⁰⁵ Similarly, this version of cohesiveness focuses on providing an optimal remedy and is less concerned about individual characteristics of class members such as whether they were former or present employees. But while the internal class theory is solely focused on the outcome or remedy, this cohesiveness theory considers *both* the injury and the remedy. Where the internal view only looks at the class's goals, pre-*Amchem* cohesiveness seeks to ensure that such goals can be accomplished because the injury applies to the class as a whole, including absent class members. Class members do not have to be physically or temporally similar but, as seen from this line of cases, must be subject to a similar characteristic or pattern of the defendant's conduct and request a remedy that is not a bridge too far from injunctive relief.¹⁰⁶

C. *Post-Amchem Cohesiveness*

By the end of the twentieth century, federal courts were facing some of the largest, most complicated class actions in history. Rule 23 was becoming more than a platform for civil rights cases or large-scale joinder and was being used to litigate nationwide mass tort and injury claims resulting from tobacco, asbestos, and other toxic products that had become common in American society.¹⁰⁷ Early nationwide mass tort claims were not well received by the courts,¹⁰⁸ and cases did not

104 Bone, *supra* note 6, at 706.

105 See *id.*

106 See *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 250 (3d Cir. 1975).

107 See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1344 n.2 (1995).

108 See Tladi Marumo, *Settlement Class Actions for the Global Resolution of Mass Personal Injury Claims in South Africa: Lessons from the United States* 210 (2022) (J.S.D. Dissertation, University of Notre Dame) (on file with author) ("Although the creation of Rule 23(b)(3) under the 1966 revision of the Federal Rules suggested the potential use of class actions for litigating mass tort claims, many courts during the 1960s and 1970s refused

start making it past certification until the 1980s.¹⁰⁹ This change was more about pragmatism than preference, for courts were practically drowning in the “elephantine mass”¹¹⁰ of cases and needed to find a solution to clear their dockets. The solution was to mold 23(b)(3) to accompany mass tort claims.¹¹¹ This first happened in 1986 with the Fifth Circuit certifying a class under (b)(3) in *Jenkins v. Raymark Industries*,¹¹² and other circuits quickly followed suit.¹¹³

From certification came settlements, and courts were again put in a difficult position of determining under what conditions Rule 23 was an appropriate vehicle to settle cases involving thousands of claimants and millions of dollars. Just as the Advisory Committee criticized certifying “mass accident” cases, judges again were swimming upstream and against the tide of academic commentary.¹¹⁴ In its *Manual for Complex Litigation*, the Federal Judicial Center “strongly discouraged the use of a settlement class action.”¹¹⁵ Drawing from the remaining external class unity goals advanced by the Advisory Committee, the Federal Judicial Center recognized that plaintiffs’ attorneys could easily negotiate away an individual’s rights for the sake of a “sweetheart settlement[]”¹¹⁶ that resulted in extensive attorney’s fees and reduced individual payouts.¹¹⁷ But this did not stem the tide of courts certifying settlements or certifying classes formed solely for the purpose of settlement with no intention of having a “day in court.”¹¹⁸ It was at this point that the Supreme Court intervened.¹¹⁹

In *Amchem Products, Inc. v. Windsor*, the parties submitted a proposed settlement class of claimants suffering injuries related to asbestos exposure, both present and future, under Rule 23(b)(3).¹²⁰ The class was conditionally certified in the Eastern District of

certification. The basis for their refusal was the 1966 Advisory Committee Notes to the rule, which stated that a “‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action.” (footnote omitted) (quoting FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment)).

109 See *id.* at 210–11, 211 n.82.

110 *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); see also Coffee, *supra* note 107, at 1363 (“In some courts, mass tort claims accounted for over twenty-five percent of the entire civil caseload.”).

111 See Marumo, *supra* note 108, at 222.

112 *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 475 (5th Cir. 1986).

113 See Coffee, *supra* note 107, at 1357–58.

114 See *id.* at 1356, 1356–58 (quoting FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment).

115 See *id.* at 1379–80.

116 See Bone, *supra* note 6, at 672.

117 See Coffee, *supra* note 107, at 1367.

118 See Marumo, *supra* note 108, at 223–24.

119 See *id.* at 250–52.

120 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

Pennsylvania in 1993 and after extensive pretrial motions, hearings on fairness, and a significant notice campaign, finally certified in 1994.¹²¹ Certification was appealed to the Third Circuit, where the panel rejected class certification because of, among other issues, “apparent conflicts of interest between exposure-only class members who were interested in preserving as large a fund as possible, while those presently injured sought to maximize immediate benefits.”¹²²

In affirming the panel’s decision, the Supreme Court issued an extensive opinion that has become a guidepost for modern 23(a)(4) adequacy analysis and 23(b)(3) predominance analysis. Starting with adequacy, the Court recognized that class members were not uniform in their injuries.¹²³ While some class members were already experiencing symptoms related to asbestos exposure and receiving treatment, others were exposed to asbestos but “had not yet suffered an injury. Of this latter group, some were likely to suffer injury in the near future, others would suffer injury in the more distant future, and still others would escape any injury. It was impossible to tell which individuals fell into which category.”¹²⁴ Upon reviewing the terms of the settlement, the Court determined that the settlement goals for those receiving treatment were “not aligned” with the goals of those who have only been exposed.¹²⁵ The Court explained that “for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.”¹²⁶ As Professors Tidmarsh and Trangsrud explained, “*Amchem* held that these internal conflicts were sufficient to doom the class under Rule 23(a)(4).”¹²⁷

But the Court did not end its inquiry with adequacy. It also maintained that the predominance requirement was not minimized or diluted by the fact that this case was never going to trial—the element still had to be established, and it must “preexist any settlement.”¹²⁸ “[S]hared experience of asbestos exposure” by itself is insufficient to satisfy predominance, which must probe the factual similarities and circumstances surrounding each class member.¹²⁹ This includes considerations of “differences in time and periods of exposure, asbestos products, medical conditions, work histories, and cigarette

121 See Marumo, *supra* note 108, at 260–62.

122 *Id.* at 266, 265–66.

123 *Amchem*, 521 U.S. at 626.

124 TIDMARSH & TRANGSRUD, *supra* note 3, at 166.

125 *Amchem*, 521 U.S. at 626.

126 *Id.*

127 TIDMARSH & TRANGSRUD, *supra* note 3, at 166.

128 *Amchem*, 521 U.S. at 623, 622–23.

129 *Id.* at 622, 622–23.

smoking as contributory cause[s] that complicated the causation inquiry.”¹³⁰ For the Court, predominance “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.”¹³¹ Individual factors such as the ones listed above “undermin[e] class cohesion” because “individual stakes are high and disparities among class members are great.”¹³² There was no cohesiveness, and thus no “genuine controversy” when individual class members are affected in different ways and injured under different circumstances.¹³³

Amchem is where “[t]he modern story begins.”¹³⁴ Prior to this decision, courts were “read[ing] predominance as a proxy for the judicial economy and decisional consistency benefits from class treatment.”¹³⁵ But now, the Court “read predominance as a measure of class cohesion and treated cohesion as a condition for the legitimacy of representative litigation.”¹³⁶ Now functioning as a “safeguard for due process,” cohesiveness took a different form.¹³⁷ Courts were no longer surveying “the absence of interest conflict within the class,”¹³⁸ but the “relationships among individuals within the class.”¹³⁹

But the Court did not confine this elevated standard to proposed (b)(3) classes. Two years after *Amchem*, the Court in *Ortiz v. Fibreboard Corp.* “reinforced the necessity of extralitigative unity.”¹⁴⁰ Like in *Amchem*, class members were divided between “present and future claims.”¹⁴¹ But this case provided another variable related to the defendant’s insurance coverage. Prior to 1959, Fibreboard was insured by its Continental policy, which “provided the bulk of the insurance funds for the settlement.”¹⁴² Because the insurance companies had more extensive resources than Fibreboard itself, “[p]re-1959 claimants accordingly had more valuable claims than post-1959 claimants.”¹⁴³ In an attempt to avoid the Court’s new perspective on predominance, the class sought certification under Rule 23(b)(1)(B) by “arguing that

130 Marumo, *supra* note 108, at 268.

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

132 *Id.* at 624, 625.

133 *Id.* at 623.

134 Bone, *supra* note 6, at 677.

135 *Id.* at 678.

136 *Id.* at 679.

137 *Id.* at 680.

138 *Id.*

139 *Id.* at 681.

140 *Id.* at 716; see *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

141 *Ortiz*, 527 U.S. at 856.

142 *Id.* at 857.

143 *Id.*

there was a limited fund out of which everyone had to be paid.”¹⁴⁴ The Court again found the settlement insufficient, recognizing that the terms “made no distinctions among class members in terms of representation, and it provided no greater settlement amounts to those exposed before 1959.”¹⁴⁵ By refusing to certify the 23(b)(1)(B) class, the Court signaled that “the use of mandatory classes, with fewer procedural protections, demanded even greater scrutiny.”¹⁴⁶

Just a year after the *Amchem* decision was issued, and one month before oral arguments in *Ortiz*, the Third Circuit denied 23(b)(2) certification in *Barnes v. American Tobacco Co.*¹⁴⁷ In its discussion on certification, the panel’s very first sentence quoted *Amchem*.¹⁴⁸ When it turned to Rule 23(b)(2), the panel continued to use *Amchem* as a guide, including the specific proclamation that:

While *Amchem* involved a Rule 23(b)(3) class action, the cohesiveness requirement enunciated by both this court and the Supreme Court extends beyond Rule 23(b)(3) class actions. Indeed, a (b)(2) class may require *more* cohesiveness than a (b)(3) class. This is so because in a (b)(2) action, unnamed members are bound by the action without the opportunity to opt out.¹⁴⁹

The panel’s cohesiveness analysis was not limited to the proposed interests of the class, but rather considered the “disparate factual circumstances”¹⁵⁰ such as “addiction, causation, the defenses of comparative and contributory negligence, the need for medical monitoring and the statute of limitations.”¹⁵¹ From these individual considerations, the panel recognized that “a determination for each plaintiff augurs that a class action will devolve into a lengthy series of individual trials and therefore makes a class action an improper method for resolving these claims.”¹⁵² *Barnes* ushered in a new understanding of cohesiveness, which “mirrors 23(b)(3)’s predominance inquiry” to reject class certification if class members are

144 Pankaj Venugopal, *The Class Certification of Medical Monitoring Claims*, 102 COLUM. L. REV. 1659, 1663 (2002).

145 TIDMARSH & TRANGSRUD, *supra* note 3, at 184.

146 Venugopal, *supra* note 144, at 1663. Mandatory classes are required for 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2). See Carroll, *supra* note 39, at 64 n.21.

147 *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 130 (3d Cir. 1998).

148 *Id.* at 140 (“To be certified, a class must satisfy the prerequisites of Rule 23(a) and the ‘parties seeking [class] certification must also [sic] show that the action is maintainable under Rule 23(b)(1), (2), or (3).’” (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997))).

149 *Id.* at 142–43 (emphasis added).

150 *Id.* at 143 (quoting *Geraghty v. U.S. Parole Comm’n*, 719 F.2d 1199, 1206 (3d Cir. 1983)).

151 *Id.*

152 *Id.* at 149.

too factually dissimilar.¹⁵³ Cohesiveness was no longer about absent class members or whether anything could be claimed beyond an injunction—it was now a tool to control mass torts and settlement classes by identifying factual differences. Courts were no longer piecing together a puzzle; they were making sure every piece looked the same.

As seen in *Barnes*, courts started to become increasingly concerned with efficiency. If individual issues predominated, the class action would become a litany of individual trials. This concern rose to the top in *Allison v. Citgo Petroleum Corp.*¹⁵⁴ There, the Fifth Circuit created a bright-line rule that a (b)(2) class claiming damages can only be certified when the damages are incidental to the injunction.¹⁵⁵ The panel came to this conclusion based on the various procedural protections contemplated by the Advisory Committee for each category of 23(b) class actions, with specific attention on “the cohesiveness and homogeneity of interests among members.”¹⁵⁶ Because class members “might wish to pursue their claims for money damages in individual lawsuits and to not be bound by membership in a class action,” the panel determined that (b)(3) class actions were the proper vehicle for monetary damages given the additional notice and opt-out requirements.¹⁵⁷ But protection of individual claims for damages is not the sole justification for the rule: The panel also explained that its new requirement “preserves the legal system’s interest in judicial economy.”¹⁵⁸ To the panel, the “chief purpose behind the class action device is to achieve a significant measure of judicial economy,”¹⁵⁹ and this goal is furthered when (b)(2) is read with a narrow scope by “concentrating the litigation on common questions of law and fact.”¹⁶⁰ Inherent in the concept of judicial economy is a temporal element—both on behalf of the courts and the plaintiffs. Courts want to avoid repetitive litigation, both to save time and avoid inconsistent standards. And plaintiffs seeking an injunction will want their “day in court” as soon as possible because they either want the adverse action to stop or to have their rights restored. A (b)(2) class without separate, individualized damage calculations will be able to accomplish both goals because liability can be determined both efficiently and on a larger scale. In not allowing individualized

153 2 RUBENSTEIN, *supra* note 18, § 4:34; see *Barnes*, 161 F.3d at 142–43.

154 *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998).

155 *Id.* at 415.

156 *Id.* at 412.

157 *Id.* at 412, 412–13.

158 *Id.* at 415.

159 *Id.* at 414.

160 *Id.*

damages, the panel reasoned that (b)(2) classes would experience extreme delays and cause class members' interests to intersect.¹⁶¹ Post-*Amchem* cohesiveness, guided by concerns of adequate representation and efficiency, restricted both the likelihood of certification and the ability to seek damages.

As explained in *Newberg and Rubenstein on Class Actions*, courts quickly adopted this new perspective on cohesiveness.¹⁶² In surveying the federal circuits, the authors found that courts in every circuit except the First and Ninth have used cohesiveness as a mirror of predominance, "often relying on *Barnes* itself in doing so."¹⁶³ While it would be needlessly cumulative to explain the similar reasoning employed by each circuit, it is worth considering *when* cohesiveness was used. While *Amchem*, *Ortiz*, and *Barnes* all featured national, "elephantine"¹⁶⁴ mass tort claims involving critical diseases that required extensive treatment and close monitoring, later applications involved much more circumscribed cases. For example, in *Shook v. Board of County Commissioners of County of El Paso*, the Tenth Circuit denied (b)(2) certification for a "class comprised of '[a]ll persons with serious mental health needs who are now, or in the future will be, confined in the El Paso County Jail.'"¹⁶⁵ The panel determined that the class lacked cohesiveness because individual circumstances were needed to define "adequate mental health staff, adequate screening, or an adequate system for delivering medication."¹⁶⁶ In *Lemon v. International Union of Operating Engineers, Local No. 139, AFL-CIO*, the Seventh Circuit denied (b)(2) certification for a "class of more than 400 minority and female members" against a Wisconsin "heavy-equipment operators" union.¹⁶⁷ Relying on *Allison*, the panel concluded that even if injunctive relief was warranted, damages would require a "fact-specific inquiry into [each] plaintiff's circumstances."¹⁶⁸ Strict cohesiveness was not solely reserved for nationwide classes, and courts started to elevate the standard for any (b)(2) case seeking certification.

No matter the size of the class, post-*Amchem* cases examined the relationship between each class member to determine whether certification was proper. While early cases used cohesiveness to review

161 *See id.*

162 2 RUBENSTEIN, *supra* note 18, § 4:34.

163 *Id.*

164 *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

165 *Shook v. Bd. of Cnty. Comm'rs of El Paso*, 543 F.3d 597, 602 (10th Cir. 2008) (Gorsuch, J.) (quoting Appellants' App. at 193, *Shook*, 543 F.3d 597 (No. 06-1454)).

166 *Id.* at 606.

167 *Lemon v. Int'l Union of Operating Eng'rs, Loc. 139*, 216 F.3d 577, 579 (7th Cir. 2000).

168 *Id.* at 581.

the defendant's conduct and consider whether absent class members would be protected or additional notice requirements would be needed, later cases looked at the class as its own ecosystem. Using individualized facts and circumstances to compare how fellow class members were related for the purposes of adequacy and efficiency, courts no longer used cohesiveness as a tool to allow the class to cross the bridge from injunctions to damages. Rather, it was used as a tool to disqualify certification altogether.

Not all circuits followed this trend, and some decisions still used a pre-*Amchem* understanding of cohesiveness. In *Robinson v. Metro-North Commuter Railroad Co.*, the Second Circuit considered whether monetary damages could be claimed along with injunctive relief under 23(b)(2) class actions.¹⁶⁹ Similar to *Wetzel*, the panel determined that damages could be included, so long as the injunction was the predominant relief sought by the class.¹⁷⁰ In its analysis, the panel also considered whether the class maintained cohesion when damages were present.¹⁷¹ It determined that the “presumption of cohesion and unity continues where incidental damages are also sought because entitlement to such damages does not vary based on the subjective considerations of each class member’s claim.”¹⁷² It also explained that this presumption of cohesion “falters” when non-incidental damages are claimed, and if damages are in fact non-incidental, the court can send notice of opt-out rights when it reaches “the damages phase of the proceedings.”¹⁷³

Additionally, the panel recognized that there was no reason to send notice, even if damages were non-incidental, prior to the damages phase because the class was sufficiently cohesive and due process rights were protected through adequate representation.¹⁷⁴ Such stages include the “liability phase of the pattern-or-practice suit and the class-wide phases of the disparate impact claim.”¹⁷⁵ The panel arrived at this conclusion because, during those stages, “the interests of the class members are essentially identical.”¹⁷⁶ In other words, the panel did not look for a physical or temporal nexus between individual members, but whether the plaintiffs had a shared interest in seeking an injunction to prevent the defendant’s discriminatory conduct. Once

169 *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 162–67 (2d Cir. 2001), *abrogated on other grounds by* *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

170 *See id.* at 164.

171 *Id.* at 165.

172 *Id.*

173 *Id.* at 166.

174 *See id.* at 166 n.10.

175 *Id.*

176 *Id.*

that element of cohesiveness was met, the bridge to incidental damages could be crossed and any due process or fairness concerns were suppressed through adequate representation.

While some courts refused to adopt post-*Amchem* cohesiveness, other courts refused to adopt cohesiveness altogether. In *Walters v. Reno*, the Ninth Circuit upheld certification for a class alleging due process violations for the fraud provisions of the Immigration and Naturalization Act.¹⁷⁷ During its 23(b)(2) analysis, the panel considered the government's challenge that "the individual proceedings that will result from the district court's injunction [are] evidence that judicial efficiency will actually be undermined by the class action."¹⁷⁸ For the panel, this "dogged focus on the factual differences among the class members appears to demonstrate a fundamental misunderstanding of the rule. Although common issues must predominate for class certification under Rule 23(b)(3), no such requirement exists under 23(b)(2)."¹⁷⁹ In 2019, the Ninth Circuit again considered challenges to (b)(2) certification in *Senne v. Kansas City Royals Baseball Corp.*¹⁸⁰ There, a class of minor league baseball players sought certification for unpaid wages for time worked at "training facilities in Arizona and Florida."¹⁸¹ The lower court maintained that choice-of-law issues prohibited cohesiveness, and the panel reversed under *Walters*.¹⁸² It explained that "[a]lthough we have never explicitly addressed whether 'cohesiveness' is required under Rule 23(b)(2), courts that have imposed such a test treat it similarly to Rule 23(b)(3)'s predominance inquiry—something we have previously rejected in no uncertain terms."¹⁸³

Finally, in *DDMB, Inc. v. Visa, Inc.*, the Eastern District of New York issued an extensive opinion that reviewed many of the cases cited above.¹⁸⁴ This consolidated action had an "extensive procedural history" related to claims of anticompetitive and supracompetitive conduct by Visa and Mastercard charging fixed fees for merchants.¹⁸⁵ The defendants claimed that because the class consisted of various groups of plaintiffs, certification would provide unequal benefits, as Visa's and Mastercard's rules and practices affected the groups differently and caused varying degrees of harm, thereby altering of the

177 *Walters v. Reno*, 145 F.3d 1032, 1036 (9th Cir. 1998).

178 *Id.* at 1047.

179 *Id.*

180 *Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918, 937 (9th Cir. 2019).

181 *Id.*

182 *Id.* at 937–38.

183 *Id.* (footnotes omitted) (citing *Walters*, 145 F.3d at 1047).

184 *DDMB, Inc. v. Visa, Inc.*, No. 05-MD-1720, 2021 WL 6221326, at *41–44 (E.D.N.Y. Sept. 27, 2021).

185 *See id.* at *2, *1–2.

proposed injunctive relief for each group.¹⁸⁶ Thus, defendants claimed that the class lacked cohesiveness.¹⁸⁷ In its thorough review of the history of cohesiveness, the court explained that the term has had different meanings in different courts at different times.¹⁸⁸ After reviewing *Wetzel*, *Senne*, *Robinson*, *Allison*, and *Dukes*, the court concluded that “to the extent ‘cohesion’ is required in Rule 23(b)(2) class actions, the Court understands it to refer to the requirements of Rule 23(b)(2) itself, rather than an additional requirement beyond the rule’s text.”¹⁸⁹ While cases like *DDMB* and *Senne* are certainly in the minority when it comes to cohesiveness, their attitude towards cohesiveness as a principle lacking guidance and established definitions reflects a similar antipathy echoed throughout the legal academy.¹⁹⁰

Post-*Amchem* courts understood cohesiveness to require a thorough examination of the relationship between each class member, no matter the size of the class. While early cases used cohesiveness to review the defendant’s conduct and consider whether absent class members would be protected or additional notice requirements would be needed, later cases looked at the class as its own ecosystem. Using individualized facts and circumstances to compare how fellow class members were related for the purposes of adequacy and efficiency, courts no longer used cohesiveness as a tool to allow the class to cross the bridge from injunctions to damages. Rather, it was used as a tool to disqualify certification altogether.

186 *See id.* at *41.

187 *See id.*

188 *See id.* at *42–44.

189 *Id.* at *44.

190 *See, e.g.,* Burch, *supra* note 5, at 1872; Carroll, *supra* note 39, at 72–73.

II. INDIVISIBILITY REQUIREMENT

A. Wal-Mart v. Dukes

As Professor David Marcus explained, the seminal case of *Wal-Mart Stores, Inc. v. Dukes* “hardened” the “doctrinal chill” against class actions.¹⁹¹ In 2011, the Supreme Court reviewed the Ninth Circuit’s certification of a class of over 1.5 million current and former employees alleging gender discrimination.¹⁹² This class challenged Wal-Mart’s “tap on the shoulder” hiring and promotion system,¹⁹³ where Wal-Mart’s corporate office designated all decisions to regional and local management, which allowed for the possibility of “biases [to] taint employment decisions.”¹⁹⁴ The class was certified as a (b) (2) class seeking injunctive relief and extensive back pay damages.¹⁹⁵

The Court provided two central holdings: a 5–4 holding that the class could not be certified under Rule 23(a)(2)’s commonality requirement,¹⁹⁶ and a unanimous holding that the class could not allege successful claims for back pay.¹⁹⁷ Starting with commonality, the Court relied on the language of *General Telephone Co. of Southwest v. Falcon* to advance a new “[s]ignificant proof” standard for commonality.¹⁹⁸ In *Falcon*, the Court maintained that “sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.”¹⁹⁹ The *Dukes* Court interpreted this language to mean that, in the context of commonality, the standard is not whether common *questions* are prevalent, but whether common *answers* are advanced by the class at the certification stage, and such answers must be supported by significant proof.²⁰⁰ This does not mean significant proof that one or even all of the class members on an individualized basis have been discriminated against, but that plaintiffs need to show a “specific employment practice” that

191 David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 790 (2016).

192 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 342–43 (2011).

193 *Id.* at 371 (Ginsburg, J., concurring in part and dissenting in part) (quoting *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 148 (N.D. Cal. 2004)).

194 *See* Marcus, *supra* note 191, at 790.

195 *See Dukes*, 564 U.S. at 342.

196 *Id.* at 359–60 (Scalia, J.).

197 *Id.* at 360.

198 *Id.* at 353 (alteration in original) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)).

199 *Falcon*, 457 U.S. at 160.

200 *See Dukes*, 564 U.S. at 352 (“Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored*.”).

impacted the class as a whole.²⁰¹ These new requirements ushered in a “new, more restrictive era” for plaintiffs, who now have to practically present a successful case on the merits at the certification stage.²⁰²

Turning to the claims for back pay under Rule 23(b)(2), the Court began with an ominous declaration that previous cases “expressed serious doubt about whether claims for monetary relief may be certified under that provision. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.”²⁰³ The Court further explained that “at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule.”²⁰⁴ But this opinion did more than resolve the incidental damage question raised by *Robinson* and *Allison*.²⁰⁵ The Court dug to the core of Rule 23(b)(2) and examined the fundamental elements of a (b)(2) class. It cited Professor Richard Nagareda’s influential article *Class Certification in the Age of Aggregate Proof* and maintained that “[t]he key to the (b)(2) class is ‘the *indivisible* nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.’”²⁰⁶ For the Court, this meant that Rule 23(b)(2) requires a “single injunction or declaratory judgment” that “would provide relief to each member of the class.”²⁰⁷ Individualized damages or entitlement to a “*different* injunction or declaratory judgment” would prevent certification.²⁰⁸

Notably missing from Justice Scalia’s opinion is cohesiveness. The term appears once in Justice Ginsburg’s opinion, which quoted *Amchem*’s explanation that 23(b)(3) predominance requires cohesion to “warrant adjudication by representation.”²⁰⁹ But just as pre-*Amchem* cohesiveness confirmed that additional notice and opt-out requirements would not be needed, Justice Scalia explained that:

Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3). The procedural protections

201 See *id.* at 357 (quoting *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994 (1988) (plurality opinion)).

202 See Marcus, *supra* note 191, at 793.

203 *Dukes*, 564 U.S. at 360.

204 *Id.*

205 See *supra* notes 154–61, 169–76 and accompanying text.

206 *Dukes*, 564 U.S. at 360 (emphasis added) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

207 *Id.*

208 *Id.*

209 *Id.* at 376 (Ginsburg, J., concurring in part and dissenting in part) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary to a (b)(2) class. When a class seeks an *indivisible* injunction benefiting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident.²¹⁰

Because indivisibility provides the same assurances as cohesiveness against requiring additional procedural protections, this raises the obvious question: Did the Court intend to replace cohesiveness with indivisibility? Or was this a new, additional requirement? The origins of indivisibility answer these questions.

B. *Nagareda and ALI Draft*

“Indivisibility” does not appear in the text of Rule 23 or any of the Advisory Committee notes. As Professor Carroll explained, prior to *Dukes*, indivisibility “had never before appeared in a published federal opinion as a Rule 23(b)(2) requirement.”²¹¹ Rather, this was a term that the *Dukes* Court adopted directly from Professor Nagareda’s article, which he attributed to a 2008 draft of the American Law Institute’s (ALI) *Principles of the Law of Aggregate Litigation*.²¹² In the final 2009 draft, the ALI distinguished divisible remedies that are “typically handled under Rule 23(b)(3)” from indivisible remedies that are “handled primarily under Rules 23(b)(1) and (b)(2).”²¹³ It defined divisible remedies as “those that entail the distribution of relief to one or more claimants individually, without determining in practical effect the application or availability of the same remedy to any other claimant.”²¹⁴

Conversely, “[i]ndivisible remedies are those such that the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants.”²¹⁵ As Professor Nagareda explained, judicial application of

210 *Id.* at 362–63 (majority opinion) (emphasis added and omitted).

211 Carroll, *supra* note 39, at 63.

212 See Nagareda, *supra* note 206, at 132 n.123 (citing PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 2.04 cmt. a (A.L.I., Council Draft No. 2, 2008) [hereinafter A.L.I. 2008 Draft]).

213 PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 2.04 cmt. a (A.L.I., Proposed Final Draft, 2009) [hereinafter A.L.I. 2009 Draft].

214 *Id.* § 2.04(a).

215 *Id.* § 2.04(b); see also Transcript of Oral Argument at 14–15, *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025) (No. 24A884) (explaining that an indivisible remedy “necessarily has collateral consequences to many others,” *id.* at 15).

Rule 23(b)(2) falters when courts base class certification analysis on “conduct that is similar at some unspecified level of generality.”²¹⁶ This type of analysis is a “backward formulation” that “obscures the crucial line between dissimilarity and similarity within the class.”²¹⁷ Class certification must focus on the “dissimilarity that has the capacity to undercut the prospects for joint resolution of class members’ claims through a unified proceeding.”²¹⁸ Indivisibility, or “the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them,” is the crucial element that courts must look to determine whether a class is too dissimilar to certify.²¹⁹ Questions of “fatal similarit[ies]” or an “absence of a triable issue concerning an element of the plaintiffs’ cause of action” should have already been decided at the summary judgment stage.²²⁰ The certification stage must accordingly consider whether there are “disabling dissimilarities” that would fail to produce common answers amongst the class.²²¹

The next question, then, is what counts as a dissimilarity that prohibits class certification? This question is incredibly difficult to answer in the abstract, and mercifully the ALI provided three illustrations of when relief is considered divisible and when it is considered indivisible. First, the authors provided an example of beneficiaries of a retirement plan, where the administrator applied the formula governing benefits incorrectly.²²² The authors explained that any declaratory judgment would be considered indivisible because “[a]ny resulting change in the method for calculating plan benefits would inevitably affect all beneficiaries, because the retirement plan could not realistically be administered so as to apply different calculation methods to beneficiaries similarly situated in relevant terms.”²²³

Next, the authors considered an example where class members were injured by exposure to defendant’s product and suffer “elevated risk of future disease.”²²⁴ If the connections between exposure and risk are not contingent on the individual circumstances of each consumer, the authors determined that a medical monitoring program beyond what would be prescribed by a regular physician would be indivisible

216 Nagareda, *supra* note 206, at 132.

217 *Id.* at 131, 133.

218 *Id.* at 131.

219 *See id.* at 132.

220 *Id.* at 133.

221 *Id.*

222 A.L.I. 2009 Draft, *supra* note 213, § 2.04 illus. 1.

223 *Id.*; *see also* A.L.I. 2008 Draft, *supra* note 212, § 2.04 illus. 1.

224 A.L.I. 2009 Draft, *supra* note 213, § 2.04 illus. 2.

because “the required program could not be administered so as to provide the specified medical monitoring to only some of the exposed consumers among those situated similarly.”²²⁵ But if the monitoring does not differ from what a regular physician would prescribe, or if the new monitoring program would not succeed in identifying proper medical intervention, or if there are individual circumstances influencing likelihood of exposure, then the relief would be divisible because it would either operate as a form of conventional damages or fail to advance the resolution of the claims.²²⁶ The authors explained that:

The indivisible character of medical monitoring—its injunctive character—rests, in part, on its capacity to be the first step in implementing medical intervention to forestall prospectively the emergence of disease among exposed consumers in the aggregate, in contrast to divisible remedies, like damages, that compensate particular consumers for wrongful losses in the past.²²⁷

The final example parallels many of the cases discussed thus far: A class sought certification for a discriminatory pattern or practice in the workplace and claimed injunctive relief and back pay.²²⁸ The authors explained that the claim for injunctive relief would be indivisible if the employees could demonstrate that “the allegations of pattern-or-practice discrimination are otherwise suited for aggregation.”²²⁹ Moreover, the claim for damages constitutes a divisible remedy, and if the class can demonstrate that the defendant’s liability will reveal “the availability and method for the distribution of back pay,” then “the employees’ claims for back pay may be treated on an aggregate basis.”²³⁰

This employment discrimination example is critical to understanding the relationship between indivisibility and cohesiveness. Indivisible and divisible remedies are not mutually exclusive, and the existence of a divisible remedy does not, to borrow language from Professor Nagareda, “undercut the prospects for joint resolution of class members’ claims through a unified proceeding.”²³¹ Rather, as explained in this example, claims for injunctive relief and damages can be claimed simultaneously in an aggregate proceeding, but are subject to different standards.²³² In the (b)(2) context, this

225 *Id.*

226 *See id.* § 2.04 illus. 4, 6–8; *see also* A.L.I. 2008 Draft, *supra* note 212, § 2.04 illus. 4, 6–8.

227 A.L.I. 2009 Draft, *supra* note 213, § 2.04 illus. 6.

228 *See id.* § 2.04 illus. 10; A.L.I. 2008 Draft, *supra* note 212, § 2.04 illus. 9.

229 A.L.I. 2009 Draft, *supra* note 213, § 2.04 illus. 10.

230 *Id.*

231 Nagareda, *supra* note 206, at 131.

232 *See* A.L.I. 2009 Draft, *supra* note 213, § 2.04 illus. 10.

means that injunctive relief must be indivisible. As Professor Nagareda explained and the *Dukes* Court confirmed, indivisibility means a single judgment that must impact all class members.²³³ The case cannot devolve into a series of individually tailored injunctions to accompany different interests or conditions. Rather, the injunction must remedy the injury that affects the entire class. As the medical monitoring example explains, this cannot be a mere backdoor for damages—it needs to take an affirmative step to either remove injurious conduct or start the path towards rehabilitation.²³⁴ The simplest way to consider whether an injunction would be indivisible is to ask the question posed by the retirement plan example: Would the injunction “inevitably affect all beneficiaries[?]”²³⁵ Or, as Professor Marcus explained, would the injunction produce inconsistent results such that a “school should be segregated as to one applicant and not as to another[?]”²³⁶ If an injunction is capable of producing such an absurd result, that is a strong indication that the injunction is divisible.²³⁷ This analysis is similar to the post-*Amchem* method of using cohesiveness to predict whether the litigation would break down in the future because of individual circumstances, but is fundamentally different because the focus is not on the similarities or physical characteristics of each class member. Rather, the focus is on the defendant’s conduct and whether it can be corrected with a single injunction that could provide universal relief. Where cohesiveness focuses on the class, indivisibility focuses on the remedy.

Though this might seem like splitting hairs, consider this example. Suppose a restaurant fails to provide overtime wages for all its employees, including hosts, servers, bussers, cooks, bartenders, and managers. The restaurant staff seeks (b) (2) certification including an injunction to eliminate the restaurant’s violative overtime policy, along with back pay damages. Under post-*Amchem* cohesiveness, a court would likely look to the factual dissimilarities between class members, including the different regulatory standards governing conduct for different positions in the restaurant. A court would find that a class was

233 See Nagareda, *supra* note 206, at 132; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011).

234 See A.L.I. 2009 Draft, *supra* note 213, § 2.04 illus. 4.

235 See *id.*, § 2.04 illus. 1.

236 Marcus, *supra* note 2, at 706 (alteration in original) (quoting Letter from John P. Frank to Benjamin Kaplan (Mar. 22, 1963), *microformed on* CIS No. CI-6315-49 (Jud. Conf. Recs., Cong. Info. Serv.)).

237 See, e.g., Transcript of Oral Argument, *supra* note 215, at 108–11 (distinguishing indivisible remedies, where “there’s just a unitary on/off switch . . . and either something happened or it didn’t happen,” from “totally unfair” remedies with conflicting results between states that cause “chaos on the ground” where “third parties will suffer as negative externalities of court orders,” *id.* at 109–10).

not cohesive because of the differences in hourly and salary work, the prevalence of tips, the existence of various overtime exemptions for certain work, and the method for recording and calculating hours worked. Under an indivisibility analysis, the conduct could not be declared unlawful to every employee, because resolution would require different injunctions for the different positions. It would not produce an absurd result to say that some employees, for example servers, were entitled to overtime wages, while other employees, for example managers, were not. The administration of an overtime policy would apply differently to each group of workers, and thus the case cannot be remedied by a single injunction. So far, the results feel the same.

But imagine if that same restaurant deducted wages for unemployment insurance and embezzled the money. The staff seeks (b) (2) certification including an injunction to compel the employer to pay to the unemployment office and create a new policy unemployment insurance, and again back pay for impermissible deductions. Under post-*Amchem* cohesiveness, courts would look at the factual dissimilarities between class members including the different positions, employment status, reasons for separation, tenure, qualifications for unemployment insurance, and amounts deducted. The court would hold that this would devolve into a series of individual trials and deny (b)(2) certification. But under an indivisibility standard, the class would be certified because the conduct can be corrected with a single injunction that could apply equally to all employees. Maintaining compliance with the unemployment office while developing an accountable deductions practice would benefit all class members, both past and present, and can be issued with a single order.

Though this difference is subtle and often provides the same outcome, a cohesiveness analysis that looks to the class and its similarities as a prerequisite for certification would, to borrow Justice Ginsburg's famous critique in *Dukes*, "disqualif[y] the class at the starting gate" merely because class members do not look the same on paper.²³⁸ But (b) (2) certification is more than a "spot the difference" exercise. It is an honest assessment of whether relief is possible with one judicial action. This assessment requires careful consideration of class interests, including whether the injunction is merely seeking compensation or a benefit that would have no effect on other class members. But indivisibility is not identity. Different class members can have different backgrounds and perspectives while pursuing a similar interest. And focusing on the former forecloses the opportunity

238 *Dukes*, 564 U.S. at 368 (Ginsburg, J., concurring in part and dissenting in part).

for substantive change. Just as the Advisory Committee feared that courts in the segregated South could manufacture conflicts between class members,²³⁹ courts today can easily differentiate one worker from another based on a variety of factors. By examining the indivisibility of the remedy, as opposed to individual homogeneity, courts can continue to effectuate the goals of Rule 23(b)(2) without sacrificing fundamental fairness and due process concerns. In a sense, indivisibility is a heightened standard compared to fifty years ago. Courts must wrestle with the absence of dissimilarities instead of relying on similarities, and plaintiffs' attorneys must craft a remedy that benefits all class members uniformly. While tedious, this exercise is ultimately fairer because it no longer resolves the case on individual class members' physical characteristics. Indivisibility reprioritizes interests over traits.

That said, cohesiveness still has a function in the (b)(2) landscape. Going all the way back to *Wetzel*, courts have continually struggled with the issue of damages.²⁴⁰ Prior to *Amchem*, cohesiveness was used as a procedural safeguard that allowed the class to seek both injunctive relief and damages without additional notice and opt-out requirements.²⁴¹ The scope and extent of damages within a (b)(2) class has caused havoc in the class action space, with cases like *Allison* and *Robinson* taking significantly different positions.²⁴² While the more liberal reading of damages in *Robinson* and *Wetzel* has been foreclosed by *Dukes*, the Court did not pronounce an end to damages arising in a (b)(2) claim.²⁴³ Rather, a fair reading of *Dukes* supports the idea that damages are in no way a natural result of injunctive relief, but are possible when they arise in a way that is "incidental to the injunctive or declaratory relief."²⁴⁴ This is where cohesiveness can flourish.

As the ALI explained, courts do not have to choose between an indivisible and divisible remedy when aggregating cases.²⁴⁵ Indivisibility should be the core of any (b)(2) analysis, but an additional divisible remedy does not weaken the injunction, and an injunction does not prevent additional divisible remedies. Rather, the proper inquiry is whether the indivisible remedy is a mere placeholder to get to damages or whether an injunction will simply devolve into damage payments. As demonstrated, a sound indivisibility analysis

239 See *supra* notes 41–47 and accompanying text.

240 See *supra* notes 53–66 and accompanying text.

241 See *supra* Section I.B.

242 See *supra* notes 154–61, 169–76 and accompanying text.

243 See *supra* Section II.A.

244 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011).

245 See A.L.I. 2009 Draft, *supra* note 213, § 2.04 illus. 10; A.L.I. 2008 Draft, *supra* note 212, § 2.04 illus. 9.

protects against this concern by circumscribing injurious conduct and either eliminating the conduct or establishing a mechanism to restore class members to where they stood before the injury. But once that indivisible injunctive relief is established, courts are free to consider whether damages would be a byproduct of such restoration. That link between injunctions and damages is what cohesiveness originally sought out to secure. The jurisprudence developed by pre-*Amchem* cases is readily available to bridge the space between an indivisible injunction and incidental damages. As such, indivisibility has replaced post-*Amchem* cohesiveness as the starting pitcher, and rightfully so. But cohesiveness is available in the bullpen and readily available once the starter has done its job and the question of damages is up to bat. It does not have to be used every game, for indivisibility will frequently sort out whether the proposed (b) (2) injunction is a mere placeholder for damages. But once the court determines that injunctive relief is warranted, and the injunction creates the possibility for damages, the court will have to ask whether additional due process protections are required to issue a ruling on damages. Cohesiveness will provide an answer to that question. By using the cohesiveness analysis established pre-*Amchem*, courts can look to the internal unity of the class, absence of antagonistic class interests, and preservation of absent class members to determine whether damages can apply to the class as a whole. Indivisibility is what defines a (b) (2) class, and cohesiveness is what allows a (b) (2) class to retain its shape.

CONCLUSION

While the standard for (b)(2) certification can only be characterized by uncertainty, this Note has set out to provide an adequate definition and workable standard for courts to adopt. As shown, the development of cohesiveness can be categorized by the landmark decision in *Amchem*, which represented a paradigm shift in the way courts reviewed the proposed interests and composition of classes seeking certification. Prior to *Amchem*, cohesiveness functioned as a due process assurance that additional notice and opt-out requirements were not needed when the class sought both injunctive relief and damages. Courts could build the bridge from injunctions to damages because absent class members' interests were adequately represented and present class members' interests were not antagonistic or individualistic. Following *Amchem*, cohesiveness examined whether present class members shared similar characteristics and suffered a common injury to warrant class treatment and a properly tailored injunction. This limiting principle mirrored predominance to find dissimilarities amongst class members and restrict class certification.

Then came *Dukes*, which made no mention of cohesiveness as a (b)(2) requirement and instead created an indivisibility standard. This standard was adopted from a scholarly restructuring of class action remedies, which mandated a single, universal injunction that would benefit all class members. This remedy requires courts to affirm the absence of class dissimilarities, rather than focus on the physical characteristics and traits that each member possesses. While indivisibility still requires courts to look into the future, it requires a prospective review of the remedy itself instead of class members' homogeneity. This review ensures that class interests are adequately unified and maintains the core goals of a (b)(2) class.

But cohesiveness should not be abandoned, for it still has a role when incidental damages are alleged to result from an injury warranting injunctive relief. This Note offers the following framework: (b)(2) certification should always start with indivisibility and then supplement its analysis with pre-*Amchem* cohesiveness when damages are claimed. This structure would both support the Advisory Committee's professed goals for (b)(2) class actions and allow for a proper scope of judicial inquiry. Indivisibility protects due process, maintains class unity, and preserves the primary focus of class members' interests. Then, on the issue of damages, pre-*Amchem* cohesiveness will assure a factfinder that absent class members are adequately protected, that present class members are not antagonistic in their interests, and that additional notice and opt-out requirements are not needed. With this framework, Rule 23(b)(2) can continue to flourish as a fair and efficient instrument for structural reform.

