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The Failed Superiority Experiment

Christine P. Bartholomew
University at Buffalo School of Law

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Federal law requires a class action be "superior to alternative methods for fairly and efficiently adjudicating the controversy." This superiority requirement has gone unstudied, despite existing for half a century. This Article undertakes a comprehensive review of the superiority case law. It reveals a jurisprudence riddled with inconsistency as courts adopt diametrically opposed interpretations of the requirement. Originally crafted to encourage predictable, consistent class action decisions, superiority has mutated over the years into a dangerous wild card—subjectively used to stymie aggregate litigation. The solution is not adding a new requirement to the already onerous rules for class certification. Instead, judges should rely on existing yet currently underutilized case management tools and abandon the failed superiority experiment.

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INTRODUCTION

Class actions are under attack. Once lauded as powerful mechanisms to deter predatory business behavior and supplement regulatory enforcement, they are now targets for tort reformers and conservative jurists.[1] From the 2005 Class Action Fairness Act[2] to a string of recent Supreme Court decisions,[3] the trend is towards increasingly restrictive interpretations of Federal Rule of Civil Procedure 23(b)(3), the rule governing class certification of monetary claims.[4] The legal academy has already addressed many of these key assaults.[5] Yet one has gone virtually unnoticed. Unprincipled interpretations of Rule 23(b)(3)'s superiority requirement are an existential threat to the class action regulatory scheme.

Under the superiority requirement, courts can only certify a class when it is "superior to alternative forms of adjudication."[6] Congress adopted superiority to ensure the controlled growth of class

1. Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1475–76 (2005); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 731 (2013); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 314 (2013).

2. Class Action Fairness Act, 28 U.S.C. § 1332(d) (2012).

3. *E.g.*, Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

4. FED. R. CIV. P. 23(b)(3).

5. *E.g.*, Christine P. Bartholomew, *Saving Charitable Settlements*, 83 FORDHAM L. REV. 3241, 3242 (2015); Tyler W. Hill, *Financing the Class: Strengthening the Class Action Through Third-Party Investment*, 125 YALE L.J. 484, 487 (2015); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 488 (2012); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 296–300 (2014); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 81 (2011); Geoffrey C. Shaw, *Class Ascertainability*, 124 YALE L.J. 2354, 2356 (2015).

6. FED. R. CIV. P. 23(b)(3).

actions through "case-by-case experimentation."[7] Now fifty years later, judges are reaching diametrically opposed, irreconcilable interpretations of superiority even in analogous cases.[8]

Two recent false advertising actions in different circuits illustrate the problem.[9] Both involve nationwide classes. Both concern dietary supplements. Both share the same legal theories. Both cover purchasers unlikely to have kept receipts or other evidence of purchase. Despite these similarities, the circuits splinter on superiority.[10] The Seventh Circuit granted class certification;[11] the Eleventh Circuit denied it.[12]

These are not isolated examples.[13] Rather than consistently applying the requirement, courts infuse superiority with a conflicting assortment of factors, stripping away any cohesive screening function.[14] For example, some courts require plaintiffs to establish multiple factors, while others weigh them.[15] Some courts only consider judicial alternatives, while others consider administrative and legislative

7. *See* FED. R. CIV. P. 23 subcommittee completion notes Dec. 2, 1963 [hereinafter Completion Notes] (discussing how superiority would permit "case-by-case experimentation") (on file with author).

8. *Compare, e.g.*, *In re* ConAgra Peanut Butter Prods. Liab. Litig., 251 F.R.D. 689, 699–700 (N.D. Ga. 2008) (applying a restrictive superiority analysis), *and* Berther v. TSYS Total Debt Mgmt. Inc., No. 06-C-293, 2007 WL 1795472, at *2 (E.D. Wis. June 19, 2007) (same), *with, e.g.*, Quiroz v. Revenue Prod. Mgmt., Inc., 252 F.R.D. 438, 445 (N.D. Ill. 2008) (defining superiority generously), *and In re* Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450 (D.N.J. 1997) (same).

9. Mullins v. Direct Digital, LLC, 795 F.3d 654, 658 (7th Cir. 2015); Karhu v. Vital Pharms., Inc., 621 F. App'x 945, 947 (11th Cir. 2015).

10. *Compare Mullins*, 795 F.3d at 658 (affirming certification and finding superiority), *with Karhu*, 621 F. App'x at 947 (affirming denial of certification in part because of lack of superiority).

11. *Mullins*, 795 F.3d at 658.

12. *Karhu*, 621 F. App'x at 947.

13. *Compare, e.g.*, Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1090 (N.D. Cal. 2011) (defining superiority narrowly and declining certification), *with, e.g.*, Ortega v. Nat. Balance, Inc., 300 F.R.D. 422, 426 (C.D. Cal. 2014) (defining superiority broadly and granting certification).

14. *Compare, e.g.*, Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 535 (N.D. Cal. 2012) (allowing certification), *with, e.g.*, Rowden v. Pac. Parking Sys., Inc., 282 F.R.D. 581, 587 (C.D. Cal. 2012) (noting that in this case "it is simply not credible to argue that a class action is the 'superior' method").

15. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619 (1997).

options.[16] Still other courts decide superiority based on the individual amount at issue,[17] while others focus on the wealth of the plaintiffs.[18]

Additionally troubling are the judicial interpretations of superiority that foreclose class actions for small sum cases.[19] These cases are essential for private enforcement of consumer protection laws, ranging from the Sherman Act, to Truth in Lending, to consumer product defect and mislabeling claims.[20] Yet as a practical matter, few litigants have the financial wherewithal to bring individual suits, and often such cases are not worth the cost it takes to bring them.[21]

Given that significant and pervasive problems stem, in part, from Congress's mandate of "case-by-case experimentation,"[22] this Article argues the superiority experiment failed. Part I starts with the origin of superiority. Then, relying on over three hundred federal decisions, it summarizes the judicial inconsistency applying the requirement. Part II explores why this disagreement exists. It explains how courts' unfettered discretion allows them to define superiority by selecting from three conflicting policy goals—resulting in radically divergent interpretations. Part III proposes to cure the inferiority of superiority by eliminating the requirement.

I. SUPERIORITY: ORIGIN AND CHAOS

The superiority requirement was enacted as part of Congress's attempt to clarify and create more predictable class action decisions. The original 1933 version of Rule 23 "mean[t] different things to

16. *Compare In re* Aqua Dots Prods. Liab. Litig., 654 F.3d 748, 751 (7th Cir. 2011) (defining superiority to consider solely adjudicatory alternatives, not private recall efforts), *and In re* Hannaford Bros. Co. Customer Data Sec. Breach Litig., 293 F.R.D. 21, 34–35 (D. Me. 2013) (same), *with* Daigle v. Ford Motor Co., Civ. No. 09-3214 (MJD/LIB), 2012 WL 3113854, at *6 (D. Minn. July 31, 2012) (defining superiority to consider defendant's administrative private recall).

17. Smith v. Texaco, Inc., 263 F.3d 394, 416 (5th Cir. 2001), *withdrawn*, 281 F.3d 477 (5th Cir. 2002).

18. Walter v. Hughes Commc'ns, Inc., No. 09-2136 SC, 2011 WL 2650711, at *10 (N.D. Cal. July 6, 2011).

19. Mullins v. Direct Digital, LLC, 795 F.3d 654, 658 (7th Cir. 2015) ("[H]eightened ascertainability . . . gives one factor in the balance absolute priority, with the effect of barring class actions where class treatment is often most needed: in cases involving relatively low-cost goods or services . . . .").

20. *See* Sherman Act, 15 U.S.C. §§ 1–7 (2012); Truth in Lending Act, 15 U.S.C. § 1641 (2012).

21. Statement on Behalf of the Advisory Committee on Civil Rules 7 (1965) [hereinafter Statement].

22. *See* Completion Notes, *supra* note 7.

different persons."[23] In 1966, the Rule 23 Subcommittee, a division of the Civil Rules Committee, sought to remedy this uncertainty.[24] The Committee saw an "insistent demand and need" for class actions,[25] recognizing that without such mechanisms "access to the courts may be put out of reach for those whose individual stakes are low or who by reason of poverty or ignorance will not go it alone."[26] The Rule 23 amendments were enacted in response to this demand, outlining the criteria making a claim eligible for class certification; however, rather than clarifying, superiority has confused the certification inquiry. This Part details how. It first identifies deficiencies with the requirement's statutory language and legislative history then shows how they fuel judicial dissonance.

A. The Superiority Requirement

The 1966 Amendment created Rule 23(a), a set of prerequisites for all class actions.[27] Once met, the class must satisfy one of three distinct categories set out in Rule 23(b). A (b)(3) class, the most common category for certification and the only one at issue in this Article, permits monetary damages. Rule 23(b)(3) has only two requirements: predominance and superiority.[28] Predominance means "the questions of law or fact common to class members predominate over any questions affecting only individual members."[29] This is the primary battleground for certification decisions. Consequently, and perhaps not surprisingly,

23. Charles W. Joiner, Rule 23 Subcommittee Member, Proposed Amendments to the Federal Rules of Civil Procedure—A Step Forward at the Twenty-Seventh Annual Judicial Conference Third Judicial Circuit of the United States (Sept. 12, 1964) (transcript on file with author).

24. Statement, *supra* note 21, at 7.

25. *Id.*

26. *Id.*

27. FED. R. CIV. P. 23(a). These are (1) numerosity (a "class [so large] that joinder of all members is impracticable"), (2) commonality ("questions of law or fact common to the class"), (3) typicality (named parties' claims or defenses "are typical . . . of the class"), and (4) adequacy of representation (named plaintiffs and class counsel "will fairly and adequately protect the interests of the class"). *Id.*

28. *See id.*

29. *See id.*

scholars[30] and the Supreme Court[31] have actively shaped the contours of the predominance requirement. Additionally, every circuit court has weighed in to clarify predominance.[32]

Superiority is the oft-overlooked sibling of predominance. For superiority, the court must find "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[33] Like predominance, this requirement is reviewed solely for abuses of discretion.[34] However, unlike predominance, little scholarship comprehensively discusses superiority,[35] and Supreme Court guidance is scant. While the Roberts Court has actively reviewed class actions, those decisions address issues other than superiority.[36]

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30. *See, e.g.*, Sergio J. Campos, *Proof of Classwide Injury*, 37 BROOK. J. INT'L L. 751, 751 (2012); Alex Parkinson, Comcast Corp v. Behrend *and Chaos on the Ground*, 81 U. CHI. L. REV. 1213 (2014); Ryan Patrick Phair, *Resolving the "Choice-of-Law Problem" in Rule 23(b)(3) Nationwide Class Actions*, 67 U. CHI. L. REV. 835, 862 (2000).

31. *See, e.g.*, Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1196–97 (2013); Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013).

32. *See, e.g.*, *In re* Nexium Antitrust Litig., 777 F.3d 9, 18 (1st Cir. 2015); EQT Prod. Co. v. Adair, 764 F.3d 347, 366 (4th Cir. 2014); *In re* Johnson, 760 F.3d 66, 74 (D.C. Cir. 2014); Abdullah v. U.S. Sec. Assocs., Inc., 731 F.3d 952, 963–64 (9th Cir. 2013); Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 778 (8th Cir. 2013); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 814 (7th Cir. 2012); Williams v. Mohawk Indus., Inc., 568 F.3d 1350, 1357 (11th Cir. 2009); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008); Gene & Gene LLC v. BioPay LLC, 541 F.3d 318, 326 (5th Cir. 2008); *In re* Scrap Metal Antitrust Litig., 527 F.3d 517, 535 (6th Cir. 2008); McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 222 (2d Cir. 2008); Monreal v. Potter, 367 F.3d 1224, 1237 (10th Cir. 2004).

33. *See* FED. R. CIV. P. 23(b)(3).

34. *See, e.g.*, *In re* Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 316 (3d Cir. 1998); Muzuco v. Re$ubmitIt, LLC, 297 F.R.D. 504, 521 (S.D. Fla. 2013).

35. To date, class action scholars have focused narrowly on isolated superiority questions. *See, e.g.*, Michael P. Murtagh, *The Rule 23(b)(3) Superiority Requirement and Transnational Class Actions: Excluding Foreign Class Members in Favor of European Remedies*, 34 HASTINGS INT'L & COMP. L. REV. 1, 2 (2011) (focusing narrowly on transnational class actions); Andrea Joy Parker, *Dare to Compare: Determining What "Other Available Methods" Can Be Considered Under Federal Rule 23(b)(3)'s Superiority Requirement*, 44 GA. L. REV. 581, 583 (2010) (addressing superiority's alternative methods of adjudication language); Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(a)*, 2002 UTAH L. REV. 249, 250 (discussing how the superiority analysis applies in more rare issue, not damages, class actions). This Article is the first to undertake a comprehensive analysis of judicial interpretations for each of the five aspects of the superiority requirement.

36. *See, e.g.*, Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 666 (2016) (discussing effect of class action settlement); *Amgen Inc.*, 133 S. Ct. at 1188 (predominance); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365 (2011) (class action arbitration waivers); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011) ((b)(2) classes). The only recent mention of superiority was in dicta. *See Dukes*, 564 U.S. at 363 (noting cryptically that in monetary class actions superiority is not "self-evident" with respect to each class member's individualized claim for money).

Rule 23(b)(3) does not define superiority. Instead, courts consider five factors. The first, "alternative methods," considers "other available methods for the fair and efficient adjudication of the controversy."[37] The remaining four are from Rule 23(b)(3)(A)–(D): (b)(3)(A) the individuals' interests, (B) pending litigation, (C) forum, and (D) manageability.[38] This Section provides a rough primer, showing how each factor generates more questions.

Superiority decisions frequently begin with the "alternative methods" analysis.[39] The text of the statute and Committee Notes support comparing a class action to individual methods of "adjudicating the controversy."[40] Nonetheless, some courts consider non-litigation alternatives.[41] Further, neither the rule nor legislative history explains how superior a class action must be to available alternatives.

The four enumerated factors trigger more conflict. For "individuals' interests," courts consider "the class members' interests in individually controlling the prosecution or defense of separate actions."[42] While acknowledging such interests are minimal in cases involving "small" amounts of recovery, the Comments direct courts to consider individuals' interests in "carrying [their own litigation] on as they see fit."[43] The Comments offer no further guidance on what constitutes a "small amount" or the tipping point for when such interests preclude certification. They then blur the distinction between predominance and the individuals' interest analysis, noting these interests may be "theoretical rather than practical" in cases with "a high degree of cohesion."[44] Hence, what types of individuals' interests should be considered—separate and apart from predominance—are

37. FED. R. CIV. P. 23(b)(3).

38. *Id.* at (b)(3)(A)–(D).

39. *Id.* at (b)(3).

40. *Id.* ("[A] class action is superior to other *available methods* for fairly and efficiently *adjudicating the controversy*." (emphasis added)); FED. R. CIV. P. 23(b)(3) advisory committee notes to 1966 amendments ("[A]nother method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions."); *see also In re* Aqua Dots Prods. Liab. Litig., 654 F.3d 748, 752 (7th Cir. 2011) ("It is not as if the Supreme Court and other participants in the rulemaking process . . . used the word 'adjudication' loosely to mean all ways to redress injuries.").

41. *See infra* Part I.B.2.

42. *See* FED. R. CIV. P. 23(b)(3)(A).

43. FED. R. CIV. P. 23(b)(3) advisory committee notes to 1966 amendments.

44. *See id.*

unclear.[45] In application, courts consider a range of differing interests, from the amount in controversy to the wealth of individual class members.

The pending litigation factor's focus is two-fold and considers: (1) the "extent" of pending litigation and (2) the "nature" of such litigation.[46] For extent, the Comments state, "[T]he court should inform itself of any litigation actually pending by or against the individuals,"[47] but do not explain how that information affects certification. Similarly, for nature the Comments solely note: "Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought."[48]

Rule 23(b)(3)(C) switches the focus from pending litigation to the appropriate forum.[49] Courts consider "the desirability or undesirability of concentrating the litigation of the claims in the particular forum."[50] This forum factor invites a comparative analysis between the advantages of the pending forum and other courts where individual claims could be brought.[51] The purpose of this factor and the degree of comparative advantage needed is unstated.

The last factor in Rule 23(b)(3) is manageability, whereby courts consider "the difficulties likely to be encountered in the management of a class action."[52] This is the only aspect of superiority the Supreme Court has addressed—though giving the topic short shrift. In *Amchem v. Windsor*, the Court held that a settlement class need not satisfy manageability, though the Court never addressed the other superiority factors.[53] Even for manageability, though, *Amchem* leaves many unanswered questions. There are frequently "likely difficulties in managing a class action,"[54] begging the question at what point do such difficulties tip the scale towards denying an otherwise viable class

45. For example, the Committee Notes cite an essay by Professor Chaffee. The relevant pages discuss the challenges individualized issues pose to aggregate litigation—issues squarely relevant to predominance. ZECHARIAH CHAFEE JR., SOME PROBLEMS OF EQUITY 274 (1950).

46. *Id.*

47. Comment to FED. R. CIV. P. 23(b)(3).

48. *Id.*

49. FED. R. CIV. P. 23(b)(3)(C).

50. *Id.*

51. *See id.*

52. *Id.* at (b)(3)(D).

53. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619 (1997).

54. *See* FED. R. CIV. P. 23(b)(3)(D).

claim? Further, which difficulties count?[55] Should choice of law issues matter? What about the potential disproportionality of damages to harm or the challenges identifying potential class members (what some courts call ascertainability)?[56]

This general background only unmasks a fraction of the problems with defining superiority. The next Section delves more deeply into jurisprudence, exploring the judicial strife in answering the questions left by the superiority requirement's text and legislative history.

B. The Sordid Superiority Landscape

After enactment, the Subcommittee imposed a thirty-year moratorium on revising class action rules.[57] During that period, courts were left to sort out superiority. As detailed below, it was not long before they adopted different, often inconsistent, positions. These disagreements transcend simple factor-by-factor, temporal, or geographic groupings.[58] Instead, a cleaner approach is to group the jurisprudence as splits regarding: (1) financial considerations, (2) litigation options, and (3) judicial economy.

1. Money and Superiority

With money comes disagreement. As courts decide superiority, financial considerations generate the first area of judicial dissonance. Primarily, judges wrestle with the potential recovery by individuals and total payouts by defendants. Though not expressly mentioned in the requirement, judges import these issues into both individuals' interests under Rule 23(b)(3)(A) and manageability under Rule 23(B)(3)(D).

To begin, courts differ on whether the amount at stake should decide the individuals' interests factor. For some courts, individual financial gain is irrelevant: "the mere fact that claims *could* be asserted

55. *Id.*

56. *See infra* Part I.B.2.

57. *See* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 72, at 509 (5th ed. 1994); *Back to the Drawing Board: The Settlement Class Action and the Limits of Rule 23*, 109 HARV. L. REV. 828, 845 (1996).

58. Even in the same circuit, courts adopt notably different superiority analyses. *Compare, e.g.*, Xavier v. Philip Morris USA, Inc., 787 F. Supp. 2d 1075, 1090 (N.D. Cal. 2011) (defining superiority narrowly), *with, e.g.*, Ortega v. Nat. Balance, Inc., 300 F.R.D. 422, 426 (C.D. Cal. 2014) (defining superiority broadly).

independently is not a reason to defeat class certification."[59] These courts focus on collective action gains—such as avoiding disparate results and sharing litigation costs.[60] These gains outweigh individuals' interests, particularly given opt-out procedures.[61]

Other courts consider the amount at stake. These courts repeatedly acknowledge that small individual claims support certification[62] but reach sharply opposing conclusions about what counts as "small."[63] Some courts hold thousands of dollars in individual gross recovery are still best handled through class actions.[64] The question there shifts from whether the amount at issue is small to whether it is "not large."[65] These courts presume certification promotes an individual's interests and require some affirmative showing to the contrary to deny certification on superiority grounds.[66] For other courts,

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59. Dodona I, LLC v. Goldman, Sachs & Co., 296 F.R.D. 261, 271 (S.D.N.Y. 2014); Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co., 301 F.R.D. 116, 143 (S.D.N.Y. 2014) (same).

60. Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1196 (6th Cir. 1988) ("The procedural device of a Rule 23(b)(3) class action was designed not solely as a means for assuring legal assistance in the vindication of small claims but, rather, to achieve the economies of time, effort, and expense."); *see also* Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558 (S.D. Fla. 1973), *aff'd without opinion,* 507 F.2d 1278 (5th Cir. 1975); Buford v. Am. Fin. Co., 333 F. Supp. 1243, 1250 (N.D. Ga. 1971).

61. *See* FED. R. CIV. P. 23(c)(2)(A).

62. Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1175 (9th Cir. 2010); Pastor v. State Farm Mut. Auto. Ins. Co., 487 F.3d 1042, 1047 (7th Cir. 2007); Herkert v. MRC Receivables Corp., 254 F.R.D. 344, 353 (N.D. Ill. 2008) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (internal citation omitted)); *see also* Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 512 (1987) ("The desire of individual class members to control their own suits carries little weight in class actions involving small amounts of money.").

63. Class actions involving statutory caps are similarly split. *Compare, e.g.,* Jones v. CBE Grp., Inc., 215 F.R.D. 558, 570 (D. Minn. 2003) (lacking superiority because of the *de minimis* amount involved), *with, e.g.*, Warcholek v. Med. Collection Sys., Inc., 241 F.R.D. 291, 295–96 (N.D. Ill. 2006) (finding superiority despite a damages cap that meant *de minimis* individual recovery).

64. *See, e.g.*, Kohen v. Pac. Inv. Mgmt. Co. LLC, 244 F.R.D. 469, 480–81 (N.D. Ill. 2007), *aff'd*, 571 F.3d 672 (7th Cir. 2009) (granting certification of a class where class representatives had claims worth millions); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1196 (6th Cir. 1988) (certifying action involving six-figure and million-dollar recoveries); *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450 (D.N.J. 1997) (tens and hundreds of thousands of dollars in individual damages).

65. "Not large" individual damage amounts support superiority. *See, e.g.,* Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1190 (9th Cir. 2001); *In re* N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 856 (9th Cir. 1982) (*abrogated on other grounds by* Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996)).

66. *See, e.g.*, Michaud v. Monro Muffler Brake, Inc., No. 2:12-cv-00353-NT, 2015 WL 1206490, at *5 (D. Me. Mar. 17, 2015) (finding superiority satisfied because class members have not indicated "an interest in bringing separate actions").

only net-zero cases—where the cost of individual litigation exceeds the potential recovery—justify certification.[67]

Courts further splinter on the individuals' interests factor in claims involving mixed financial stakes. If a few class members' potential recoveries are large—even if the majority of the class's individual recoveries would be net-zero—some courts deny superiority. For example, in *Walter v. Hughes*, the Northern District of California denied certification for a class that alleged an Internet provider misrepresented download speeds.[68] In finding a lack of superiority, the court summarily concluded that while, "it is true that the settlement contemplates awards of $5 and $40 to class members . . . , the named Plaintiffs seek $5,000, a considerably higher amount [suggesting] the class's claims may be large enough to justify individual actions."[69]

Other courts take a contrary position on the individuals' interest factor. For example, the Southern District of New York found superiority in a putative class action where some but not all class members' recoveries would be significant.[70] The court explained, "[Plaintiff] has demonstrated that the small-size investments of some members of the Proposed Class would make individualized lawsuits impracticable for those investors."[71]

Whether to consider class members' personal wealth further divides courts. Some presume interest in individual suit when class members could potentially afford litigation.[72] Other courts reject class members' wealth as irrelevant. As one court explains, "Rule 23 has no restriction on wealth."[73] Consequently, the individuals' interests factor leads to contrary superiority findings, even in analogous cases.[74]

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67. Smith v. Texaco, Inc., 263 F.3d 394, 416 (5th Cir. 2001) (finding the absence of a negative value suit "a significant detraction from the superiority of the class action device"), *withdrawn*, 281 F.3d 477 (5th Cir. 2002). Other courts take an even more extreme stance. For example, in *Berther v. TSYS Total Debt Management*, the Eastern District of Wisconsin found a lack of superiority in a case involving a mere $1,000 recovery per class member. No. 06-C-293, 2007 WL 1795472, at *2 (E.D. Wis. June 19, 2007) ("[T]he court finds no reason to conclude that a maximum of $1,000 would be insufficient to motivate an individual plaintiff to pursue private litigation.").

68. Walter v. Hughes Commc'ns, Inc., No. 09-2136 SC, 2011 WL 2650711, at *10 (N.D. Cal. July 6, 2011).

69. *Id.*

70. Dodona I, LLC v. Goldman, Sachs & Co., 296 F.R.D. 261, 271 (S.D.N.Y. 2014).

71. *See id.*

72. *Walter*, 2011 WL 2650711, at *10.

73. *In re* Revco Sec. Litig., 142 F.R.D. 659, 669 (N.D. Ohio 1978).

74. *Compare In re* Cement & Concrete Antitrust Litig., 27 Fed. R. Serv. 2d (Callaghan) 1334, *3 (D. Ariz. 1979) (finding superiority in part because the price-fixing claim would benefit the

Different takes on potential financial recovery also cloud the manageability analysis under Rule 23(b)(3)(D). Shifting from class members' recovery to the defendant's potential payout, some courts use manageability to weigh the proportionality of statutory damages against the actual harm suffered.[75] Though neither the legislative history nor the text of the rule supports this analysis, it often arises in consumer protection cases involving statutory damages, such as the Truth in Lending Act's one hundred dollar fine per violation. In a class action, the per-person fine would be aggregated across the class up to a cap. Given the large potential exposure, some courts use superiority to screen out such claims.[76] For example, in *Ratner v. Chemical Bank of New York Trust Co.*,[77] the Southern District of New York denied class certification. It was undisputed the defendant in the case violated statutory law by failing to disclose the annual percentage rate on outstanding credit card account balances for approximately 130,000 clients.[78] Regardless, the court held a class action was not superior to individual lawsuits because of the large exposure the defendant faced for its admitted wrongdoing.[79]

In contrast, other courts reject proportionality arguments as outside the manageability evaluation.[80] They view Rule 23 simply as a procedural device, one that does not alter congressional intent.[81] These

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public at large), *with In re* Transit Co. Tire Antitrust Litig., 67 F.R.D. 59, 76 (W.D. Mo. 1975) (denying superiority due to how time consuming the price-fixing litigation would be).

75. *See, e.g.*, Katz v. Carte Blanche Corp., 496 F.2d 747, 776 (3d Cir. 1974); Ratner v. Chem. Bank N.Y. Tr. Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972); *see also* David B. Farkas, *Out of Proportion*, L.A. LAW., Sept. 2014, at 34 ("Judicial response to this issue in such cases has been anything but uniform.").

76. *See, e.g.*, Evans v. U-Haul Co. of Cal., No. CV 07-2097-JFW (JCx), 2007 WL 7648595, at *7 (C.D. Cal. Aug. 14, 2007) ("[P]otential for abuse is [one] reason why maintenance of a class action is not superior . . . in cases . . . where there is an enormous contrast between the huge liability suffered by Defendant and the lack of harm suffered by Plaintiff.").

77. 54 F.R.D. 412 (S.D.N.Y. 1972).

78. *See id.* at 413–14.

79. *See id.* at 416.

80. Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708 (9th Cir. 2010); Murray v. GMAC Mortg. Corp., 434 F. 3d 948, 953–54 (7th Cir. 2006).

81. United States v. Albertini, 472 U.S. 675, 680 (1985); *Murray*, 434 F.3d at 954 ("[I]t is not appropriate to use procedural devices to undermine laws of which a judge disapproves." (citation omitted)); Jaskolski v. Daniels, 427 F.3d 456, 461–64 (7th Cir. 2005). Instead, these courts consider proportionality after a full evaluation of the defendant's conduct. *See*, *e.g.*, Holloway v. Full Spectrum Lending, No. CV 06-5975 DOC (RNBx), 2007 WL 7698843, at *9 (C.D. Cal. June 26, 2007) ("Any constitutional infirmity stemming from a disparity between the actual harm and the amount of damages awarded is properly addressed if, and when, damages are awarded."); *see also* Parker v. Time Warner Entm't Co., L.P., 331 F.3d 13, 22 (2d Cir. 2003) ("[I]t may be that in a sufficiently serious case the due process clause might be invoked, not to prevent certification, but

courts reason that if Congress wanted to prohibit class actions, it would have either articulated such a prohibition in the statute or capped aggregate claims.[82]

This discord over financial considerations means superiority depends on the judge. This inconsistency grows over questions of litigant choice.

2. Litigation Options and Superiority

Superiority jurisprudence is further divided on how much to preserve diverse redress options for absent class members. Representative litigation necessarily compromises an individual's ability to control the adjudication of his legal rights.[83] Neither the history nor the text of superiority offers guidance on weighing a theoretical interest in control against the benefits of collective suit.[84] Struggles to find this balance splinter superiority's manageability and alternative methods analyses.

To begin, judicial concerns about adjudicating individuals' legal rights without their affirmative assent complicate the manageability factor. Some courts impose an "ascertainability" requirement onto manageability, though the term itself does not appear in Rule 23(b)(3)(D).[85] Ascertainability's meaning radically varies, with judges adopting contrary positions regarding what this assessment covers[86]

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to nullify that effect and reduce the aggregate damage award. . . . At this point in this case, however, these concerns remain hypothetical.").

82. *See, e.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(2)(B)(ii) (2012) (total recovery may not exceed "the lesser of $500,000 or 1 per centum of the net worth of the [defendant]"); Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B) (2012) (same).

83. *See, e.g.*, Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1654 (2008) (discussing autonomy issues in class actions). *But see* Joshua P. Davis et al., *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858, 870 (2014) (discussing how class actions promote autonomy by "putting in place the result that class members would be apt to choose").

84. FED. R. CIV. P. 23 advisory committee's note to 1966 amendment (stating courts would "consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit"); *see also* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 391 (1967) ("will and ability to take care of himself").

85. *See* Erin L. Geller, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 FORDHAM L. REV. 2769, 2778 (2013) (discussing this implicit requirement).

86. Stephanie Haas, *Class Is in Session: The Third Circuit Heightens Ascertainability with Rigor in* Carrera v. Bayer Corp., 59 VILL. L. REV. 793, 804 (2014) (describing ascertainability's "malleable" nature).

and how ascertainable class members need to be.[87] Ascertainability has assumed three meanings: (1) identifying class members "using objective criteria; (2) capturing all members necessary to resolve the action in a single proceeding; and (3) describing the main claims and defenses that apply to the class."[88] However, proof of class membership may be difficult to come by. Consumer cases are common examples, as class members may not retain proof of purchase, such as receipts.

Despite this difficulty, many courts treat administrative problems identifying class members as insurmountable,[89] while others grant certification. Preserving class members' potential options is less important to these latter courts. They either reject the ascertainability requirement or reframe the inquiry slightly: so long as the class definition is sufficiently clear to identify affected individuals, a class is ascertainable.[90] According to these courts, a contrary interpretation would mean "there would be no such thing as a consumer class action."[91]

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87. Ascertainability concerns first appeared in the 1980s. Simer v. Rios, 661 F.2d 655, 670 (7th Cir. 1981); *see also* Daniel Luks, *Ascertainability in the Third Circuit: Name That Class Member*, 82 FORDHAM L. REV. 2359, 2388–93 (2014) (discussing the policy considerations behind this split).

88. Haas, *supra* note 86, at 804.

89. *See, e.g.*, Stewart v. Beam Glob. Spirits & Wine, Inc., No. 11-5149 (NLH/KMW), 2014 WL 2920806, at *7 (D.N.J. June 27, 2014) (noting, in a suit alleging deceptive marking claims against the producers of Skinnygirl Margarita mix, that putative class members would almost certainly be incapable of recalling the details of every purchase, the price of purchases, or frequencies of purchases without relying on speculation); Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013) (noting that conducting "mini-trials" to ensure that every class member purchased WeightSmart dietary supplement would not be "administratively feasible"); Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742(DLC), 2010 WL 3119452, at *13 (S.D.N.Y. Aug. 5, 2010) ("Plaintiffs suggest that after certification, the Court could require that '[c]lass members produce a receipt, offer a product label, or even sign a declaration to confirm that the individual had purchased' a Snapple beverage within the class period. This suggestion, to say the least, is unrealistic."); *see also* Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012) (explaining the ascertainability requirement eliminates serious administrative burdens by "insisting on the easy identification of class members").

90. *See, e.g.*, McCrary v. Elations Co., No. EDCV 13–00242 JGB (OPx), 2014 WL 1779243, at *8 (C.D. Cal. Jan. 13, 2014) ("[I]t is enough that the class definition describes a 'set of common characteristics sufficient to allow' a prospective plaintiff 'to identify himself or herself as having a right to recover based on the description.' "); Astiana v. Kashi Co., 291 F.R.D. 493, 500 (S.D. Cal. 2013) (noting that it would be an insurmountable hurdle to consumer class action if class actions could be defeated at the class certification stage simply because membership is difficult to ascertain); *see also* Kinder v. Dearborn Fed. Sav. Bank, No. 10-12570, 2011 WL 6371184, at *4 (E.D. Mich. Dec. 20, 2011) ("Due process does not . . . require actual notice to each party . . . .").

91. Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 535 (N.D. Cal. 2012). Courts adopting this position also cite concerns about incentivizing defendants to limit recordkeeping. *See, e.g.*, Birchmeier v. Caribbean Cruise Line, Inc., 302 F.R.D. 240, 250 (N.D. Ill. 2014) ("[D]eclining to certify a class altogether, as defendants propose—would create an incentive for a person to violate

Similarly, potential redress options also muddle analyses of "available methods for . . . adjudicating the controversy."[92] Whether alternative methods include arbitration or other private compensation schemes depends on the judge.[93] Courts that see these alternatives as superior prefer individualized decisionmaking,[94] even when such alternatives provide lesser relief than a class claim. For example, in a recent putative class action against Ford for a defective torque converter, the District Court of Minnesota denied superiority, instead finding Ford's voluntary refund program sufficient.[95] The court openly acknowledged "that certain class members will not be fully reimbursed through the recall" as some class members paid for a full transmission, but the refund only covered the cost of a converter.[96]

At the same time, other courts treat refund programs and other private compensation schemes as outside the superiority analysis.[97] These courts strictly abide by the "adjudicative" language in the statute[98] and recognize that the existence of other options does not trump private rights of action.[99]

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the TCPA on a mass scale and keep no records of its activity, knowing that it could avoid legal responsibility for the full scope of its illegal conduct.").

92. FED. R. CIV. P. 23(b)(3).

93. *Compare In re* ConAgra Peanut Butter Prods. Liab. Litig., 251 F.R.D. 689, 699–701 (N.D. Ga. 2008) (finding refund for contaminated peanut butter a superior form of resolution), *with* Turner v. Murphy Oil USA, Inc., 234 F.R.D. 597, 610 (E.D. La. 2006) ("The analysis is whether the class action format is superior to other methods of adjudication, not whether a class action is superior to an out-of-court, private settlement program.").

94. *See, e.g.*, *ConAgra,* 251 F.R.D. at 699–700; *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 214 F.R.D. 614, 621–22 (W.D. Wash. 2003) ("To this day, defendants maintain refund and product replacement programs for individuals . . . . It makes little sense to certify a class where a class mechanism is unnecessary to afford the class members redress.").

95. Daigle v. Ford Motor Co., Civ. No. 09-3214 (MJD/LIB), 2012 WL 3113854, at *6 (D. Minn. July 31, 2012).

96. *Id.*

97. As one court explains, such programs require comparing the gains of a class action to such private options—a kind of "abstract economic choice analysis" precluded by the text of the rule and supporting legislative history. *In re* Hannaford Bros. Co. Customer Data Sec. Breach Litig., 293 F.R.D. 21, 34–35 (D. Me. 2013). To these courts, a contrary interpretation undermines the collective gains of classwide resolution. *See, e.g.*, *In re* Oil Spill by Oil Rig Deepwater Horizon, 910 F. Supp. 2d 891, 920 (E.D. La. 2012), *aff'd sub nom. In re* Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014) (rejecting the relevance of a private settlement fund, as it would "bar the possibility of any class-wide settlement"). For more on the problems with voluntary refunds, see generally Anita Bernstein, *Voluntary Recalls*, 2013 U. CHI. LEGAL F. 359, 390–96.

98. *See* Parker, *supra* note 35, at 599–600 (discussing how a textual reading supports focusing solely on adjudicative alternatives).

99. *See, e.g.*, White v. E-Loan, Inc., No. C 05-02080 SI, 2006 WL 2411420, at *9 (N.D. Cal. Aug. 18, 2006) (rejecting the argument that FTC enforcement would be superior to the putative class action); *see also* Amalgamated Workers Union v. Hess Oil V.I. Corp., 478 F.2d 540, 543 (3d

Thus, similar to financial concerns, how much to protect litigants' options clouds superiority. Instead of systematic, predictable interpretations, courts draw contrary conclusions based on judicial preference.

3. Judicial Economy and Superiority

A third divide in superiority jurisprudence forms around defining judicial economy, namely when certifying a class action achieves "economies of time, effort, and expense, and promote[s], uniformity of decision . . . without . . . bringing about other undesirable results."[100] Broadly construed, concerns about judicial economy threaten to preclude any class action, given such cases inherently use significant judicial resources. Delineating when to expend such resources impacts both the manageability and the pending litigation factors.[101]

First, as previously discussed, the manageability factor directs courts to consider "the likely difficulties in managing a class action."[102] Courts inconsistently calibrate the amount of difficulty they are willing to tolerate.[103] As Allan Erbsen notes, "Absent some principled guidance for determining whether a management device is substantively acceptable—which Rule 23 currently does not provide—analysis of manageability is as likely to create problems as it is to prevent them."[104]

For example, courts differ greatly on choice of law challenges. In cases with class members from multiple states, courts must identify the governing law.[105] While the predominance requirement addresses

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Cir. 1973) ("As we view it, it would appear that [Rule 23(b)(3)] was not intended to weigh the superiority of a class action against possible administrative relief.").

100. FED. R. CIV. P. 23(b)(3) advisory committee's notes to 1966 amendment.

101. Differing views on judicial economy also impact how courts define non-adjudicative alternatives. *See, e.g.*, Patton v. Topps Meat Co., No. 07-CV-00654(S)(M), 2010 WL 9432381, at *10 (W.D.N.Y. May 27, 2010); Berley v. Dreyfus & Co., 43 F.R.D. 397, 398–99 (S.D.N.Y. 1967).

102. FED. R. CIV. P. 23(b)(3)(D).

103. *See, e.g.*, Bertulli v. Indep. Ass'n of Cont'l Pilots, 242 F.3d 290, 295 (5th Cir. 2001); Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 630–31 (5th Cir. 1999) (Garza, J., dissenting) (analyzing the district court's failure "to consider the difficulties posed by the plaintiffs' . . . allegations"); Simon v. Philip Morris Inc., 200 F.R.D. 21, 30 (E.D.N.Y. 2001) (noting judges' reliance on "Rule 23(c)(4)(A)'s severance procedure to structure unwieldy class action lawsuits").

104. Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1070 (2005).

105. The Class Action Fairness Act of 2005 pushed more nationwide classes into federal courts without addressing the resulting choice of law issues. Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.); *see also* Elizabeth

choice of law, some courts revisit it under manageability. For some, claims involving the laws of multiple states automatically make a class unmanageable.[106] Other courts recognize class actions are necessarily challenging, so manageability "will rarely, if ever, be in itself sufficient to prevent certification of a class."[107] These courts use case management tools (subclassing, phased trials, bifurcation, or statistical sampling) or adopt choice of law approaches that minimize manageability concerns (such as an "interest analysis" or applying the law of the defendant's home state).[108] Often this broader definition of manageability is a

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Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667, 674 (2013); Miller, *supra* note 5, at 299.

106. *See*, *e.g.*, *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1018 (7th Cir. 2002) ("Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable."); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 674 (7th Cir. 2001) (discussing how a nationwide case presents manageability concerns); Lichoff v. CSX Transp., Inc., 218 F.R.D. 564, 574 (N.D. Ohio 2003) (noting application of six states' laws "would make it burdensome to instruct a jury on the legal standards for plaintiffs' claims"); *see also* James E. Pfander, *The Substance and Procedure of Class Action Reform*, 93 ILL. B.J. 144 (2005) (suggesting the prospect of differing state substantive laws "often persuades federal judges to reject nationwide class treatment as unwieldy").

107. Klay v Humana, Inc., 382 F.3d 1241, 1272 (11th Cir. 2004); *see also In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 140 (2d Cir. 2001) (noting "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored"); Glen v. Fairway Indep. Mortg. Corp., 265 F.R.D. 474, 482 (E.D. Mo. 2010) (stating that " 'dismissal for management reasons is never favored' because class actions are meant 'to permit plaintiffs with small claims and little money to pursue a claim otherwise unavailable.' " (quoting *In re* Workers' Comp., 130 F.R.D. 99, 110 (D. Minn. 1990))); DeLoach v. Philip Morris Cos., 206 F.R.D. 551, 567 (M.D.N.C. 2002) ("Though any case of such magnitude certainly poses problems of manageability . . . . dismissal for management reasons, in view of the public interest involved in class actions, should be the exception rather than the rule." (internal citations and quotations omitted)).

108. *See, e.g.*, *In re* Nigeria Charter Flights Contract Litig., 233 F.R.D. 297, 306 (E.D.N.Y. 2006) (discussing how differences in state law "should not deter certification of a class"); Simon v. Philip Morris Inc., 124 F. Supp. 2d 46, 77 (E.D.N.Y. 2000) (discussing courts use of subclasses and uniformity of state law in class actions); Graham v. Knutson Mortg. Corp., No. CT 94-11043, 1996 WL 407491, at *6 (D. Minn. June 18, 1996) (stating that applying the laws of various states would not be "a particularly unmanageable task"); *see also* Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 220 (1998) ("A thoughtful, reasoned analysis . . . could legitimately result in applying the law of the defendants' home state to determine liability for conduct-based claims . . . ."); Luke McCloud & David Rosenberg, *A Solution to the Choice of Law Problem of Differing State Laws in Class Actions: Average Law*, 79 GEO. WASH. L. REV. 374, 394 (2011) (arguing that the "use of average law . . . replicates the functional consequences and effects that would be obtained under the benchmark process of applying the differing laws separately, state by state"). For a thorough discussion of these different methods, see Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691 (2006).

comparative one.[109] As the Eleventh Circuit states, "[W]e are not assessing whether this class action will create significant management problems, but instead determining whether it will create relatively more management problems than any of the alternatives."[110]

Depending on the approach, the outcome of certification differs greatly. Take, for example, two notably similar antitrust cases, one in Tennessee and one in Florida.[111] Both involved state antitrust law claims. Both involved allegations of unlawful interference with the entry of a generic drug. Both were brought by indirect purchasers with multistate claims. In the Tennessee case, the court denied certification, holding a nationwide case would require application of the law of multiple states, thus "render[ing] this class simply unmanageable."[112] In the Florida case, though, the court granted certification, noting the variation "does not pose a manageability problem because the applicable substantive laws are virtually identical in their required elements."[113]

Different line-drawing regarding judicial economy also plagues the pending litigation factor.[114] While some courts only consider pending class actions that have not been consolidated,[115] others adopt a more granular approach, analyzing the status of the pending litigation. In these courts, only advanced litigation or those that adversely affect the pending case are relevant.[116] In direct conflict, other courts require

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109. *See*, *e.g.*, 2 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4.32, at 279 (4th ed. 2014) ("Rule 23(b)(3) permits a class denial for lack of superiority only when other available methods for the fair and efficient adjudication of the controversy actual exist.").

110. *Klay*, 382 F.3d at 1273.

111. *In re* Skelaxin (Metaxalone) Antitrust Litig., 299 F.R.D. 555 (E.D. Tenn. 2014); United Wis. Servs. v. Abbott Labs. (*In re* Terazosin Hydrochloride Antitrust Litig.), 220 F.R.D. 672 (S.D. Fla. 2004).

112. *See Metaxalone*, 299 F.R.D. at 588.

113. *Terazosin*, 220 F.R.D. at 700 n.45.

114. *See* FED. R. CIV. P. 23(b)(3)(B) (requiring judges to make certification determinations on "the extent and nature of any litigation concerning the controversy already begun by or against class members").

115. *See* Williams v. Lane, 96 F.R.D. 383, 385 (N.D. Ill. 1982). One court has gone further to only consider cases involving the same parties. Rosales v. El Rancho Farms, No. 1:09-cv-00707-AWI-JLT, 2012 WL 3763955, at *8 (E.D. Cal. Aug. 29, 2012) ("Though there are related actions pending, the parties have not identified any other actions involving the parties in this case.").

116. *See, e.g.*, Lopez v. Orlor, Inc., 176 F.R.D. 35, 41 (D. Conn. 1997) (finding superiority despite the existence of one other case and a companion state case because "[c]ertification here will not adversely affect these related cases"). This analysis looks at various factors, such as claims implicated, if the other litigation is also a putative class, and the status of any other litigation. *See, e.g.*, Parra v. Bashas', Inc., 291 F.R.D. 360, 396 (D. Ariz. 2013) (finding superiority despite pending EEOC claim for overlapping discriminatory misconduct because the EEOC case was in its infancy).

existing cases to ensure certification of the proposed class does not merely serve to create "lawsuits where none previously existed."[117] Still others require not just existing cases, but also prior tried class actions. Under this line of authority, for so-called "novel claims,"[118] the lack of similar prior litigation precludes superiority because of judicial economy concerns.[119] As one court stated:

> If there existed a prior track record of trials in these types of cases, the Court would be able to make a more accurate determination as to judicial efficiency. The Court could refer to the actual issues and problems that arise in these cases, instead of being forced to speculate as to what these issues and problems may be. Additionally, individual trials in these cases may winnow out many of the individual issues that are now before this Court. After individual trials are conducted in these cases, the courts will have the necessary information to make a thoughtful and logical superiority determination. At this time, however, plaintiffs cannot produce enough information to establish the superiority of a class action.[120]

Initially, this interpretation existed only in mass tort, but it has crept into other substantive areas.[121] In this creep, it is particularly difficult to reconcile courts' differing approaches. For example, *Carpenter v. BMW* involved alleged misrepresentations regarding certain models'

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117. Berley v. Dreyfus & Co., 43 F.R.D. 397, 398 (S.D.N.Y. 1967).

118. This approach is sometimes called the immature tort theory. *See, e.g.*, Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 579 (2004); William N. Reed & Bradley W. Smith, *HMO Class Actions: How to Kill a Gnat with a Howitzer*, 69 MISS. L.J. 1181, 1212 (2000).

119. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 747 (5th Cir. 1996) ("[C]ertification of an immature tort results in a higher than normal risk that the class action may not be superior to individual adjudication."); Neely v. Ethicon, Inc., No. 1:00-CV-00569, 2001 WL 1090204, at *12 (E.D. Tex. Aug. 15, 2001); *In re* Ford Motor Co. Bronco II Prod. Liab. Litig., 177 F.R.D. 360, 375 (E.D. La. 1997) (noting that "[if] the cause of action [is] immature in the sense that there is no real track record of resolution of similar claims, [an important question informing analysis is] will it create manageability problems"); *In re* Telectronics Pacing Sys., Inc., 168 F.R.D. 203, 212 (S.D. Oh. 1996) ("[prior] trials are imperative [for superiority]"). When a claim is no longer "novel" is unclear. As one scholar explains, "[N]o objective reference exists by which a court can ascertain the number of claims necessary to constitute maturity. This indeterminacy will needlessly complicate an already intricate inquiry." Recent Cases, *Class Actions—Class Certification of Mass Torts—Fifth Circuit Decertifies Nationwide Tobacco Class*, 110 HARV. L. REV. 977, 980 (1997).

120. Arch v. Am. Tobacco Co., 175 F.R.D. 469, 495–96 (E.D. Pa. 1997) (citation omitted).

121. Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 192 (3d Cir. 2001), (noting in a securities class action that "maturity alone is neither necessary nor sufficient for certification, but it may help to ensure that class certification is 'superior to individual adjudication.' "); Crutchfield v. Sewerage & Water Bd. of New Orleans, No. 13-4801, 2014 WL 346111, at *1 (E.D. La. Jan. 30, 2014) (finding lack of superiority based on no track record in case involving claims of damage from faulty construction). This creep is partly attributable to the Manual for Complex Litigation, which implies that some "appellate review of novel legal issues" must exist before a court can certify a case with "novel" claims. MANUAL FOR COMPLEX LITIGATION § 33.26 n.1057 (3d ed. 1995).

transmissions.[122] In denying class certification, the Eastern District of Pennsylvania relied in part on the lack of prior class actions adjudicating nationwide misrepresentations.[123] Yet, the very same year, a few states away, the Northern District of Illinois addressed an analogous nationwide class action also for alleged misrepresentations, this time involving car wax.[124] Without any track record discussion, the court granted certification, focusing instead on the lack of other pending litigation.[125]

Unfortunately, the divides continue in other aspects of the analysis, even beyond judicial economy and the prior two categories spelled out above.[126] As the next Part explains, the reasons for these divides show how deeply rooted the problems are with superiority.

II. DECONSTRUCTING THE SUPERIORITY CONFUSION

As Part I establishes, with each new superiority question, courts reach contrary interpretations. While this background is a precursor to rethinking the requirement, any remedy must also consider the sources of the strife: namely, why jurisprudence has metastasized into conflict.

This Part diagnoses what ails the superiority requirement. Some conventional answers do not work. For example, the divides do not match the amount at stake: even in small sum cases courts disagree.[127] Nor do the divides align by claim. Rather, courts adopt different superiority interpretations within a single area of law.[128] Political

122. Carpenter v. BMW of N. Am., Inc., No. CIV. A. 99-CV-214, 1999 WL 415390, at *1 (E.D. Pa. June 21, 1999).

123. *See id.* at *6–7.

124. Garner v. Healy, 184 F.R.D. 598, 599 (N.D. Ill. 1999).

125. *See id.* ("[T]here is no evidence that any other actions involving this controversy and these parties have been filed elsewhere.").

126. One such divide occurs in the forum factor, FED. R. CIV. P. 23(b)(3)(C). *Compare* Hanlon v. Chrysler Corp., 150 F.3d 1011, 1023 (9th Cir. 1998) (finding (b)(3)(C) satisfied since "[n]o particular forum stands out as a logical venue for concentration of claims"), *with* Haley v. Medtronic, 169 F.R.D. 643, 653 (C.D. Cal. 1996) ("Indeed, plaintiffs have not even established that the vast majority of the individual lawsuits that have been filed—or that will be filed—should be brought in the [forum].").

127. *Compare, e.g.*, Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 540–41 (N.D. Cal. 2012) (allowing certification), *with, e.g.*, Rowden v. Pac. Parking Sys., Inc., 282 F.R.D. 581, 587 (C.D. Cal. 2012) (noting that in this case "it is simply not credible to argue that a class action is the 'superior' method").

128. *Compare, e.g., In re* Skelaxin (Metaxalone) Antitrust Litig., 299 F.R.D. 555, 588 (E.D. Tenn. 2014) (interpreting superiority using conflict of laws analysis), *with, e.g.*, United Wis. Servs. v. Abbott Labs. (*In re* Terazosin Hydrochloride Antitrust Litig.), 220 F.R.D. 672, 700–01 (S.D. Fla. 2004) (interpreting superiority using manageability analysis).

affiliations also fail to explain the divides, as judges appointed by the same president diverge.[129]

Rather, other causes better account for the fractured superiority opinions. First, the requirement lacks sufficient contours to guide interpretation, inviting courts to define superiority as they choose. Second, the policy goals behind Rule 23(b)(3) conflict, allowing judges to reframe the analysis based on their opinions of class actions. Finally, one of these policies, efficiency, further splinters interpretations. Combined, these attributes go a long away to explain the current chaos in superiority jurisprudence.

A. The Problem with Abdication

This Section explains how the Rules Committee took an overly broad-brush approach to drafting—contrary to its intended goal in amending the rule. This abdication of rulemaking responsibility is then compounded by decades of minimal judicial review.

Ideally, superiority would facilitate predictability and certainty.[130] Rather than different rules for different claims, a procedural rule should generally work transsubstantively—applying equally regardless of the claims at issue.[131] These features minimize

129. For example, the Honorable Thomas W. Thrash Jr. and the Honorable Eldon E. Fallon, both Clinton appointees, define superiority differently. *Compare In re* ConAgra Peanut Butter Prods. Liab. Litig., 251 F.R.D. 689, 699–700 (N.D. Ga. 2008) (defining alternative methods broadly), *with* Turner v. Murphy Oil USA, Inc., 234 F.R.D. 597, 610 (E.D. La. 2006) (defining alternative methods narrowly). Thus, it is unsurprising that politics do not explain the divides. Most of the dissonance is at the district court level. *See* LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES 253 (2013) (discussing how political affiliation plays only a "small role at the district court level").

130. *See, e.g.*, CENTRIA v. Alply Architectural Bldg. Sys., LLC, No. 4:11-cv-00079-CWR-LRA, 2012 WL 73235, at *4 (S.D. Miss. Jan. 10, 2012) ("The Federal Rules of Civil Procedure exist to promote order and predictability in litigation . . . ." (citing Watkins Ludlam Winter & Stennis, P.A. v. DynaSteel Corp., No. 3:10-CV-00656-CWR-LRA, 2011 WL 976592, at *4 (S.D. Miss. Mar. 17, 2011))); Yitshak Cohen, *Issues Subject to Modification in Family Law: A New Model*, 62 DRAKE L. REV. 313, 333–34 (2014) (discussing "the general values of civil procedure, such as effectiveness, certainty, finality, and predictability").

131. *See, e.g.*, Ferland v. Conrad Credit Corp., 244 F.3d 1145, 1150 (9th Cir. 2001) (discussing how procedural rules "take a one-size-fits-all approach"); *see also* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 376 (2010) (describing the principle of trans-substantivity and noting that "[t]he vast majority of the Federal Rules are trans-substantive").

arbitrary decisionmaking[132] and allow the parties to evaluate *ex ante* the viability of pursuing claims.[133]

The 1966 Amendment was meant to serve these functions. Frustrated by the inconsistent interpretations riddling earlier class action rules, the Rules Committee enacted a revision aimed at more predictably shaping the controlled growth of class actions, as mentioned in Part I.[134] As Arthur Miller, an informal reporter for the Amendment, explains: "The Committee had an overarching theme—that the liberal joinder of parties and claims was desirable . . . ."[135] This is echoed by Benjamin Kaplan, the official reporter: "[I]t did not escape attention at the time that it would open the way to assertion of many, many claims that otherwise would not be pressed; so the rule would stick in the throats of establishment defendants."[136] While the Committee debated how far to liberalize class action procedures, it recognized the need for aggregate litigation. Such joinder advanced access to justice by "enabling small people with small claims to vindicate their rights when

132. *See* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 858 (1984) ("For the skeptics, consistency assuages anxiety about arbitrariness. Even if the result is not correct, at least everyone is treated the 'same.' Consistency promotes equal treatment of individuals, thereby expressing the rhetoric of democracy, of 'equality before the law.' ").

133. *See* Z.W. Julius Chen, *Following the Leader:* Twombly*, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1462–63 (2008) (explaining how predictable procedure rules provide the parties "gains from knowing the likely outcome of a potential claim because risk can be gauged ex ante, while the lawmaker necessarily intends a specific result when he grants a substantive right or promulgates a procedural rule to facilitate the realization of that right"); Richard A. Epstein, *The Political Economy of Product Liability Reform*, 78 AM. ECON. REV. 311, 313 (1988) (positing that litigation is not filed when clear law makes probable fate of claim known).

134. *See, e.g.*, Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 401 (2014) ("The modern American class action rule emerged during a period of celebrated liberal legislative initiatives intended to expand the civil rights and liberties of ordinary American citizens."). The motivation for this liberalizing intent has long since been debated, with some pointing to private redress goals and others emphasizing larger social benefits. *Compare* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem*,*"* 92 HARV. L. REV. 664, 669 (1979) ("[T]he draftsmen conceived the procedure's primary function to be providing a mechanism for securing private remedies . . . ."), *with* Charles Gibbs, *Consumer Class Actions After* AT&T v. Concepcion*: Why the Federal Arbitration Act Should Not Be Used to Deny Effective Relief to Small-Value Claimants*, 2012 U. ILL. L. REV. 1345, 1361 (discussing how the history of the amendment indicates larger goals than redress, including deterrence).

135. Miller, *supra* note 5, at 296 ("Perhaps it was inevitable since those who found themselves the object of large-scale class actions aggregating claims that previously were economically unviable and facing cases having monetary dimensions that hitherto were unthinkable mobilized, gained strength, and counterattacked.").

136. Benjamin Kaplan, *Comment on Carrington*, 137 U. PA. L. REV. 2125, 2126–27 (1989).

they could not otherwise do so."[137] The primary asterisk to this theme of liberalizing class action procedures was mass torts, which the Committee disfavored for class treatment.[138]

Unfortunately, the aim of the amendment and the text of the superiority requirement clash. The Committee elected a "case-by-case experimentation" approach to certification decisions.[139] The legislative history for Rule 23 notes, "In the present incubating stage of the development of methods to deal with multiple litigation, it would be unwise to introduce stiff rules excluding judicial discretion."[140] John P. Frank, one of the only members of the Rule 23 Subcommittee to express reservations about such unbridled discretion, cautioned, "[A]ll such judgments have to be made not by super men but by run of the mine [sic] lawyers who may in a particular instance be judges whose personal experience may fall far short of the judgment of this degree of sophistication."[141] His warning proved accurate: this abdication of rulemaking has allowed unpredictability and inequity to seep into judicial decisionmaking.[142]

Case-by-case experimentation does not necessarily spell disaster.[143] Ideally, the interpretations of superiority would "gradually close in," much as other aspects of the Rule 23 analysis have.[144] But how

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137. Statement, *supra* note 21, at 5.

138. *See* FED. R. CIV. P. 23(b)(3) advisory committee's notes to 1966 amendment ("A 'mass accident' resulting in injuries to numerous persons, is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability . . . would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.").

139. *See* Completion Notes, *supra* note 7; *see also* Wilcox v. Commerce Bank of Kan. City, 474 F.2d 336, 344 (10th Cir. 1973) (discussing how Rule 23 invites case-by-case determinations).

140. Completion Notes, *supra* note 7.

141. Letter from John P. Frank, Member, Advisory Comm. on Civil Rules, to Benjamin Kaplan, Reporter, Advisory Comm. on Civil Rules (Feb. 21, 1963) (on file with author).

142. Jennifer E. Spreng, *Failing Honorably: Balancing Tests, Justice O'Connor and Free Exercise of Religion*, 38 ST. LOUIS U. L.J. 837, 877 (1994) (discussing how granting unconstrained discretion is "unpredictable and occasionally even inequitable in practice"); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) ("[T]he trouble with the discretion-conferring approach to judicial law making is that it does not satisfy . . . justice very well. When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the latter case *be* different, but that *be seen to be so*.").

143. As Judge Aldisert explains: "Case-by-case development allows experimentation because each rule is re-evaluated in subsequent cases to determine whether it produces a fair result. If it operates unfairly, it can be modified." Hon. Ruggero J. Aldisert, *The Honorable Ralph Cappy: Distinguished Keeper of the King's Bench Tradition*, 47 DUQ. L. REV. 481, 482 (2009).

144. Rule 23(a)(1)'s numerosity requirement is a good example. Courts concur that "no definite standard exists as to the size of class that satisfies the numerosity requirement." Morrow

the Committee drafted the rule thwarts the evolution towards clarity. The problems begin with the structure of the requirement. Multifactor balancing tests invite contradictory weighing of relevant factors.[145] They also allow courts to selectively apply factors, thus producing inconsistent results—the very problem plaguing superiority jurisprudence.[146] This problem is then exacerbated by the lack of precision as to what each factor in Rule 23(b)(3)(A)–(D) means.[147] Finally, appellate courts have abdicated their responsibility to create uniform interpretations of superiority.

The Committee Notes only complicate the superiority requirement by adding further openings for contrary interpretations.[148] For example, the Notes state a class action under Rule 23(b)(3) is appropriate when certification is "convenient and desirable."[149] What is convenient, though, is a question of perspective.[150]

For an absent class member, a class action is more convenient than individual litigation, thus suggesting a generous definition.[151] Absent class members can wait until the case is resolved while their rights are asserted in a representative fashion. Their inconvenience is then limited to making a claim against any settlement or judgment.[152]

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v. Washington, 277 F.R.D. 172, 190 (E.D. Tex. 2011) (citing Garcia v. Gloor, 609 F.2d 156, 160 (5th Cir. 1980)). Nonetheless, over time, courts have reached an agreement on a general range that meets the requirement. *See, e.g.*, Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 624 (5th Cir. 1999) (100 to 150 members generally satisfies numerosity); Rex v. Owens, 585 F.2d 432, 436 (10th Cir. 1978) (numerosity satisfied in classes with as few as seventeen to twenty members); Chauvin v. Chevron Oronite Co., 263 F.R.D. 364, 368 (E.D. La. 2009) (numerosity satisfied with class well over 100 members).

145. *See* Sandra Day O'Connor, *Keynote Address—Conference on Compelling Government Interests*, 55 ALB. L. REV. 535, 544 (1992) (discussing how balancing tests can be unpredictable).

146. *See* Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1173 (2008) (explaining how multifactor tests that are not firmly anchored in concrete legal rules produce irregular interpretations).

147. *See infra* Part I.A.

148. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 98 (1969) ("Plans, policy statements, and rules are three facets of essentially the same thing; all are designed to clarify and to regularize the purpose of the governmental activity.").

149. FED. R. CIV. P. 23(b)(3) advisory committee's notes to 1966 amendment.

150. *Cf.* Ratner v. Chem. Bank N.Y. Tr. Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972) ("Students of the Rule have been led generally to recognize that its broad and open-ended terms call for the exercise of some considerable discretion of a pragmatic nature.").

151. *See* CONTE & NEWBERG, *supra* note 109, at § 18:22 (noting class actions benefit plaintiffs by allowing for sharing of expenses between other class members); Mullenix, *supra* note 134, at 409 (noting class actions benefit plaintiffs by allowing class members to aggregate claims).

152. As a RAND report on class action explained:

In contrast, though, for the assigned judge, a class action is less convenient than individual litigation, thus suggesting a more restrictive definition of superiority. Class actions require significant judicial oversight.[153] In the majority of putative class actions, few, if any, have filed individual suits.[154] Consequently, only in rare cases will the aggregate individual claims before a single judge alter the convenience calculation.[155] But at the same time, it may be more convenient for the judiciary as a whole for a single judge to hear related matters, again supporting a more generous definition of superiority.[156] The Notes provide no guidance on how to reconcile these competing perspectives and the resulting contrary interpretations.

The Committee Notes also ambiguously suggest superiority may vary with the substantive law at issue, though the hedging language only flirts with the idea without consummating its import.[157] For example, the Notes support certification of small stakes claims and antitrust cases. Yet, the Notes fail to reconcile this idea with the vague text of the superiority requirement.[158]

> Most individuals are too preoccupied with daily life and too uninformed about the law to pay attention to whether they are being overcharged or otherwise inappropriately treated by those with whom they do business. Even if they believe that there is something inappropriate about a transaction, individuals are likely just to "lump it," rather than expend the time and energy necessary to remedy a perceived wrong.

DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 68 (RAND Institute for Civil Justice 2000).

153. *See* Catherine A. Rogers, *When Bad Guys Are Wearing White Hats*, 1 STAN. J. COMPLEX LITIG. 487, 497 (2013) (discussing the role of judges in class actions). Class actions require judges to wear two hats: one judicial and one fiduciary—serving as arbiter while protecting the rights of absent class members. *See, e.g.*, Graham C. Lilly, *Modeling Class Actions: The Representative Suit as an Analytic Tool*, 81 NEB. L. REV. 1008, 1028–29 (2003) (analyzing examples of the Supreme Court providing close judicial scrutiny to protect the interests of absent class members).

154. *See, e.g.*, Kelen v. World Fin. Network Nat. Bank, 295 F.R.D. 87, 94 (S.D.N.Y. 2013) (no pending cases); Baghdasarian v. Amazon.com, Inc., 258 F.R.D. 383, 390 (C.D. Cal. 2009) (same).

155. Asbestos cases are a primary example. *See In re* Asbestos Prods. Liab. Litig., 771 F. Supp. 415, 422–24 (J.P.M.L. 1991); P.D. Carrington, *Asbestos Litigation in the United States: Delay in Court and Premature Adjudication, in* THE LAW'S DELAY: ESSAYS ON UNDUE DELAY IN CIVIL LITIGATION 69, 77–80 (C.H. van Rhee ed., 2004).

156. *See, e.g.*, *In re* Express Scripts, Inc., No. 4:05CV1064 HEA, 2010 WL 5149270, at *1 (E.D. Mo. Dec. 13, 2010) (focusing on the judiciary as a whole); U.S. *ex rel.* Hockett v. Columbia/HCA Healthcare Corp., 498 F. Supp. 2d 25, 38 (D.D.C. 2007) (same).

157. *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398–99 (2010); John B. Oakley, *Illuminating* Shady Grove*: A General Approach to Resolving* Erie *Problems*, 44 CREIGHTON L. REV. 79, 87 (2010).

158. Statement*, supra* note 21, at 5 (listing antitrust cases as illustrations of (b)(3) classes and discussing the Committee's interest in "enabling small people with small claims to vindicate their rights . . .").

Thus, textually, superiority leaves judges "free from the constraints which characteristically attach whenever legal rules enter the decision process."[159] This means that a key function for a civil procedure rule—maintaining the rule of law through predictability and consistency—is lost.

Unfortunately, superiority also suffers from a second level of abdication: a lack of review-restraining oversight.[160] By failing to draft clear rules, the Committee left the judiciary to sort out the mess.[161] Rather than accepting this responsibility, the Supreme Court and circuit courts have repeatedly taken passes during the last five decades—focusing more on questions of predominance than superiority.[162]

For other aspects of Rule 23, "review of class action determinations for abuse of discretion does not differ greatly from review for error."[163] However, for superiority, circuit courts adopt a

159. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 637 (1971); *see also* David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 941 (1990). Certainly, drawing the fine line between discretion and rigid rules is a problem beyond superiority. *See* ARISTOTLE, NICOMACHEAN ETHICS 141–42 (Martin Ostwald ed. & trans., Bobbs-Merrill 1962) (n.d.); *see also, e.g.*, DAVIS, *supra* note 148, at 25–26; RONALD DWORKIN, LAW'S EMPIRE 144–47 (1986) (striving to balance case law and legislation); JOEL F. HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY 143–44 (1986) (emphasizing individual considerations rather than abstract rules); H. L. A. HART, THE CONCEPT OF LAW 19 (1961); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 98 (1991).

160. *See* George C. Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747, 749; *see also* Scalia, *supra* note 142, at 1178 ("The common-law, discretionary-conferring approach is ill suited, moreover, to a legal system in which the supreme court can review only an insignificant proportion of the decided cases.").

161. The Rules Committee is responsible for drafting the rule (and thus revising it to cure deficiencies). *See* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1128–30 (2002) (explaining the Supreme Court only provides a pro forma review of draft rules).

162. This may be because predominance is more outcome determinative than superiority. *Paper Trail: Working Papers and Recent Scholarship*, 11 ANTITRUST SOURCE 1, 4 (June 2012) (describing predominance as "the most important requirement" for (b)(3) classes); William H. Page, *Introduction: Reexamining the Standards for Certification of Antitrust Class Actions*, ANTITRUST, Summer 2007, at 53, 54 n.2 ("[T]he requirement of predominance is most often decisive."). *But see* Daniel F. v. Blue Shield, 305 F.R.D. 115, 129–30 (N.D. Cal. 2014) (satisfying neither predominance nor superiority). Often cases that lack superiority have difficulty satisfying other aspects of Rule 23. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (denying certification for lack of both predominance and superiority); Mills v. Foremost Ins. Co., 269 F.R.D. 663 (M.D. Fla. 2010) (same).

163. Abrams v. Interco Inc., 719 F.2d 23, 28 (2d Cir. 1983).

particularly deferential variant of the abuse of discretion standard.[164] Circuit courts frequently reaffirm discretion rather than clarify the requirement.[165] In the rare instance when a circuit court does reverse, the guidance in the case is limited—noting the trial court's failure to consider some factor or addressing a minor aspect of a single factor rather than holistically discussing the requirement.[166]

Protecting discretion above clarity is particularly clear in a recent Fifth Circuit opinion.[167] There, the Court upheld a trial court's finding without addressing a circuit split in defining superiority for Fair and Accurate Credit Transaction Act ("FACTA") cases.[168] As the Court noted:

> Critically important here is the broad discretion enjoyed by district courts regarding certification. That discretion may lead to disparate results. In fact, the parties' briefs make clear that district courts have both allowed and refused certification of classes in the FACTA context. Nevertheless, we concur with the Tenth Circuit's conclusion that "inconsistent results" regarding certification are "no insurmountable objection" and must be permitted "until, if ever, some more acceptable and general solution by amendments to the Rules or clarification by statute emerges."[169]

This limited review is often coupled with unpublished or otherwise unciteable decision designations. Thus, when one court interprets a particular superiority factor in an unpublished opinion, another court cannot rely on that decision.[170] Instead, the court

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164. *See* Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 77 (2000) ("Clearly there is no such thing as *one* abuse of discretion standard . . . this standard of review more accurately describes a *range* of appellate responses." (emphasis added)); *see also* Rudolph F. Pierce, Esq. & Jennifer M. DeTeso, Esq., *A Lawyer's Lament: Unpredictability and Inconsistency in the Wake of the* Daubert *Trilogy*, 2 SEDONA CONF. J. 163, 170 (2001) (discussing how abuse of discretion standards perpetuate "inconsistencies and severely hamper[ ] the ability of appellate courts to develop guidelines of general applicability for trial courts and the trial bar"). Superiority differs from other procedural rules or statutes, where an abuse of discretion is statutorily defined. *See, e.g.*, 8 U.S.C. § 1252(e)(4)(D) (2012) (immigration rulings); 12 U.S.C. § 203(b)(1) (2012) (appointment of conservator); FED. R. CRIM. P. 23(b) (discretion of court to receive verdict from eleven-person jury after one juror has been dismissed). This contributes to the lack of rigorous review.

165. *See, e.g.*, Ticknor v. Rouse's Enters., L.L.C., 592 F. App'x 276, 277 (5th Cir. 2014) (affirming district court did not "abuse its broad discretion"); N.J. Carpenters Health Fund v. Rali Series 2006-QO1 Tr., 477 F. App'x 809, 813–14 (2d Cir. 2012) (same); Kamm v. Cal. City Dev. Co., 509 F.2d 205, 210–11, 213 (9th Cir. 1975) (same).

166. *See, e.g.*, Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1277 (11th Cir. 2009) (reversing "extremely cursory" finding of superiority); Gregory v. Finova Capital Corp., 442 F.3d 188, 191 (4th Cir. 2006) (reversing for not analyzing pending litigation).

167. *Ticknor*, 592 F. App'x at 277.

168. *Id.* at 279.

169. *See id.* (citations omitted).

170. *See, e.g.*, Shenoa L. Payne, *The Ethical Conundrums of Unpublished Opinions*, 44 WILLAMETTE L. REV. 723, 733–35 (2008) (noting that "most commentators, attorneys, and judges

reanalyzes the factor anew. This lack of review, plus the initial lack of a clear rule, undermine superiority's ability to predictably, consistently, guide the controlled growth of class actions.[171]

It is unrealistic, and perhaps undesirable, to eliminate all judicial discretion,[172] but rules should temper it.[173] While judges have significant freedom to decide many procedural aspects of a case, including case management or electing potential remedies,[174] such unchecked authority makes little sense for a "death knell" procedural rule—one that can make or break a case.[175] Unfortunately, this dual-level abdication is only one of multiple problems for the requirement. Superiority's conflicting goals also sustain judicial division, as discussed next.

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accept the proposition that unpublished opinions are not binding to any degree on the courts"); Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L.J. 621, 647 (2009) (noting that "[courts] may subsequently depart from the rules or holdings in those prior unpublished opinions").

171. Unpublished opinions hinder the growth of "coherent, consistent and intelligible body of caselaw." Hart v. Massanari, 266 F.3d 1155, 1179 (9th Cir. 2001); *see* David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 169 (2009) (describing survey where judges attributed inconsistencies in law to "inconsistency between published and unpublished opinions or a lack of circuit decisions on point"); Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217, 228 (2006) (discussing how non-precedential dispositions hinder decisionmaking). In this way, superiority is an example of the "habit of allowing discretionary power to grow which far exceeds what is necessary and which is much less controlled than it should be." DAVIS, *supra* note 148, at 20.

172. *See* Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1580–81 (2010) (discussing the benefits of judicial discretion); Anna B. Laakmann, *An Explicit Policy Lever for Patent Scope*, 19 MICH. TELECOMM. & TECH. L. REV. 43, 88 (2012) (same).

173. *See* DAVIS, *supra* note 148, at 42 (discussing the need "to confine, to structure, and to check necessary discretionary power").

174. *See, e.g.*, 35A C.J.S. *Federal Civil Procedure* § 580 (2016) ("The trial court has inherent authority to control and manage the litigation . . . including sound discretion to control discovery."); Doug Rendleman, *The Trial Judge's Equitable Discretion Following* Ebay v. Mercexchange, 27 REV. LITIG. 63, 72–74 (2007) (discussing judicial discretion in deciding between injunctive and monetary relief).

175. *See In re* Nat'l Football League Players Concussion Injury Litig., 775 F.3d 570, 577 (3d Cir. 2014) ("Denial of certification can toll the death knell in actions that seek to vindicate large numbers of individual claims." (citing COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 18 (1997))).

B. Conflicting Goals and Consequential Inconsistency

Abdication of rulemaking responsibility only partly explains opposing superiority interpretations. The rule's legislative history also reveals multiple, irreconcilable policy goals. At one point, the Committee identified three goals: to advance judicial economy, to promote the private enforcement of substantive law (particularly in cases involving small individual recovery), and to increase judicial consistency.[176] Elsewhere, the comments highlight themes of access to justice.[177] But the legislative history also indicates competing autonomy and efficiency concerns.[178] These conflicting policy goals are further complicated by superiority's twin references to efficiency and fairness[179]—concepts often at odds.

Multiple policy goals for a single rule are not facially problematic. However, competing goals invite interpretative problems.[180] The more policy goals, the more difficult it is to reconcile or prioritize such goals.[181] As this Section details, courts can arbitrarily select a particular policy justification to ground a particular conclusion. This reverse-engineering reaches its apex when courts decide superiority based on efficiency.

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176. Statement, *supra* note 21, at 5; *see also* Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 671 (2014); Kaplan, *supra* note 84, at 391.

177. Statement, *supra* note 21, at 7 ("If separate litigations are always required, then access to the courts may be put out of reach for those whose individual stakes are low or who by reason of poverty or ignorance will not go it alone.").

178. *See id.* at 4 ("The revision . . . also pays more attention to problems of management and procedural fairness . . . .").

179. FED. R. CIV. P. 23(b)(3) (requiring that "a class action [be] superior . . . for *fairly and efficiently* adjudicating the controversy" (emphasis added)).

180. *See, e.g.*, Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 53 (detailing the problems with generating clear proximate cause jurisprudence given conflicting policy goals); Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1314–15 (2000) (discussing the difficulty of remedying domestic violence policies because of conflicting policy goals).

181. *See* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 711–13 (2008) (discussing how multi-goal statutes require balancing multiple goals rather than prioritizing one).

1. Pick-a-Policy, Any Superiority Policy

Class actions trigger sentiments about regulation,[182] tort reform,[183] and trial attorneys.[184] As these larger debates rage through the courts of public perception, the same debates seep into superiority decisions.[185] Judges can select from one of the stated policies—allowing their own attitudes about class actions to chart the unmarked terrains of the requirement.[186]

By prioritizing different policies, courts can reach contrary superiority interpretations. Judges more supportive of class actions focus on effectuating legal rights, avoiding a multiplicity of suits, or enhancing private enforcement—goals that support generously defining superiority.[187] For judges more wary of class actions, autonomy and efficiency considerations offer a way to interpret superiority restrictively.[188]

Harkening back to Part I, the policy lens the court adopts explains the three chief areas of disagreement. For example, take conflicting judicial conclusions about monetary recovery.[189] Judges

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182. *See, e.g.*, J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1141–42 (2012) (discussing the intersection between class actions and private regulation).

183. Critics of tort reform often also take aim at class actions. *See, e.g.*, Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1903 (2008) ("CAFA was a direct product of the 'tort reform' movement.").

184. *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 670 n.3 (1986) (noting "the frequency with which judicial opinions favoring new restrictions on the availability of class actions or other remedies criticize the plaintiff's attorney"); *see also* Nicholas Lemann, *The Newcomer: Senator John Edwards is This Season's Democratic Rising Star*, NEW YORKER 58, 82 (May 6, 2002) (detailing the current trend of negatively depicting class action trial attorneys).

185. *See, e.g.*, Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 117–18 (2003) ("Additionally, the judiciary itself has, on more than one occasion, expressed disdain for plaintiff class action attorneys.").

186. Judge Posner uses the term "occasional legislators" to characterize the role judges play in the absence of clear rules. RICHARD A. POSNER, HOW JUDGES THINK 5 (2008).

187. *See, e.g.*, Romero v. La Revise Assocs., L.L.C., 58 F. Supp. 3d 411, 419 (S.D.N.Y. 2014); Phillips v. Phila. Hous. Auth., No. 00-4275, 2002 WL 34592201, at *3 (E.D. Pa. Jan. 29, 2002).

188. *See, e.g.*, Taddeo v. Am. Invsco Corp., No. 2:08-CV-01463-KJD-RJJ, 2011 WL 3957392, at *5 (D. Nev. Sept. 7, 2011); *In re* Relafen Antitrust Litig., 225 F.R.D. 14, 23 (D. Mass. 2004).

189. *Compare* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1196–97 (6th Cir. 1988) (certifying action involving six figure and million dollar recoveries, plus remand to determine punitive damages for absent class members), *with* Berther v. TSYS Total Debt Mgmt. Inc., No. 06-C-293, 2007 WL 1795472, at *2 (E.D. Wis. June 19, 2007) (finding "no reason to conclude that a

favoring autonomy narrowly define the individuals' interests factor: the amount of individual recovery that triggers inferiority is lower. For judges favoring private enforcement or access to courts, the amount is higher.

Judicial approaches to questions of choice similarly turn on policy decisions. For example, the alternative methods analysis hinges on whether judges select autonomy concerns over private enforcement and right to access. Judges focused on autonomy define relevant alternative methods more broadly, as such alternatives increase individuals' abilities to elect from different ways to resolve claims.[190] Judges favoring private enforcement define such alternatives narrowly, focusing more on the gains of collective action and the challenges of individual litigation against well-funded corporate defendants.[191]

Conflicting policy goals also explain the tension over judicial resources, particularly for manageability. If efficiency and autonomy concerns trump, case management options like bifurcation are less likely to overcome management difficulties—thus making superiority hard to establish.[192] For a judge basing the analysis on enforcement or right of access, though, the degree of unmanageability must be high to overcome the enforcement gain.[193] Thus, the tension between the aims of the superiority requirement explains each area of judicial dissonance.

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maximum recovery of $1,000 would be insufficient to motivate an individual plaintiff to pursue private litigation" and that individual litigation may be superior to class litigation where maximum class recovery is $10 per member).

190. *See, e.g.*, *In re* ConAgra Peanut Butter Prods. Liab. Litig., 251 F.R.D. 689, 700 (N.D. Ga. 2008).

191. *See, e.g.,* Allen v. Hyland's Inc., 300 F.R.D. 643, 671–72 (C.D. Cal. 2014). Similarly, for ascertainability, decisions splinter over efficiency and enforcement goals. *Compare* Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012) (explaining the ascertainability requirement eliminates serious administrative burdens by "insisting on the easy identification of class members"), *with* Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 535 (N.D. Cal. 2012) (rejecting a strict ascertainability requirement because otherwise "there would be no such thing as a consumer class action").

192. *See, e.g.*, Barry v. S.E.B. Serv. of N.Y., Inc., No. 11-CV-5089 (SLT)(JMA), 2013 WL 6150718, at *6 (E.D.N.Y. Nov. 22, 2013) (finding inefficiency challenges posed by individual issues make the certification inferior without consideration of management tools); Brinker v. Chi. Title Ins. Co., No. 8:10-CV-1199-T-27AEP, 2012 WL 1081182, at *7 (M.D. Fla. Mar. 30, 2012) (same); *cf.* Legge v. Nextel Commc'ns, Inc., No. CV 02-8676DSF(VNKX), 2004 WL 5235587 (C.D. Cal. June 25, 2004) ("Courts bear a significant responsibility to insure that the great power wielded by plaintiffs (or more accurately their counsel) carrying the cudgel of a class action is used only in appropriate cases.").

193. *See, e.g.*, Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1306 (9th Cir. 1990) (rejecting manageability challenges, given "enforcement, deterrence or disgorgement" functions of the pending class claim); *In re* Sugar Indus. Antitrust Litig., 73 F.R.D. 322, 356 (E.D.

Beyond the divides from Part I, indiscriminate policy selection also explains why superiority lacks intrasubstantive, let alone transsubstantive, application. Even within a single area of law, superiority depends on which policy goal a court selects. Perhaps the starkest example of this is in antitrust class actions.[194] Differing judicial ideologies on the role of private enforcement crop up, with some courts recognizing such actions as mechanisms for enforcement and deterrence.[195] This viewpoint often corresponds with a broader definition of superiority.[196] For example, the court in *In re Cement* focused on the benefits of price-fixing class actions.[197] As the court noted, "The public at large will likewise benefit from a class action and expeditious adjudication of the issues involved since class actions 'reenforce the regulatory scheme by providing an additional deterrent beyond that afforded either by public enforcement or by single-party private enforcement.' "[198]

In contrast, other courts view private enforcement as a questionable consequence of class actions. For example, *In re Hotel*

Pa. 1976) (finding certification furthers private enforcement, thus superiority exists "when only speculative manageability difficulties are perceived").

194. That said, this divide also applies in other substantive claims, such as in cases regarding the Electronic Fund Transfer Act, 15 U.S.C. § 1693 (2012). *Compare* Nadeau v. Wells Fargo Bank, N.A., No. 10-4356 (PAM/JSM), 2011 U.S. Dist. LEXIS 49648, at *12 (D. Minn. April 26, 2011) (defining superiority broadly), *with* Kinder v. Nw. Bank, 278 F.R.D. 176, 185–86 (W.D. Mich. 2011) (defining superiority narrowly).

195. *See, e.g.*, *In re* Cathode Ray Tube (CRT) Antitrust Litig., 911 F. Supp. 2d 857, 870 (N.D. Cal. 2012) (discussing "vigorous private antitrust enforcement" as a policy goal in antitrust class actions); Diamond Chem. Co. v. Akzo Nobel Chems. B.V., 517 F. Supp. 2d 212, 218–219 (D.D.C. 2007) (noting the "punitive and deterrence goals" of the Sherman Antitrust Act); *see also* Joshua P. Davis, Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1, 25 (2013) (providing an empirical case for antitrust class actions' deterrence and private enforcement efficacy).

196. *See, e.g.*, *In re* Processed Egg Prods. Antitrust Litig., 302 F.R.D. 339, 353 (E.D. Pa. 2014) (finding superiority because "a class action device enables individual direct purchasers to pursue their claims in an economically feasible manner, with greater efficacy in achieving enforcement and deterrence goals and with greater bargaining power for settlement purposes"); *In re* Relafen Antitrust Litig., 221 F.R.D. 260, 287 (D. Mass. 2004) ("The Advisory Committee's core concern [with the right to access] was particularly compelling here, where protection of the public depends upon vigorous private enforcement of state laws but the small size of individual claims renders such enforcement unlikely.").

197. *In re* Cement & Concrete Antitrust Litig., 27 Fed. R. Serv. 2d (Callaghan) 1334, *3 (D. Ariz. 1979).

198. *Id.* (quoting Hackett v. Gen. Host Corp., 455 F.2d 618 (3d Cir. 1972)); *see also In re Processed Egg*, 302 F.R.D. at 352–53 ("[W]hen 'each consumer has a very small claim in relation to the cost of prosecuting a lawsuit . . . , a class action facilitates spreading of the litigation costs among the numerous injured parties and encourages private enforcement of the statutes.' "(citation omitted)).

Telephone Charges involved nationwide class claims of price-fixing against hotel chains.[199] In finding a lack of superiority, the court focused on how time consuming litigation would be for the judiciary relative to the minimal individual recovery.[200] The court rejected deterrence benefits, stating: "[T]he Congressional scheme does not contemplate that private attorneys are to act as prosecutors to force antitrust violators to disgorge their illegal profits in the general interest of society at large."[201] While this conclusion directly contradicts *In re Cement*—and a great deal of other authority[202]—it also leads to a notably more restrictive superiority definition.

Thus, rather than a clear threshold that applies consistently—at a minimum in a single substantive area—superiority's contours ebb and flow with the particular ideology a judge imports. The resulting lack of consensus is unsurprising, though no less troubling.

2. Undefined Efficiency and the Superiority Problem

Just as judges focus on different policy goals, concepts of efficiency spur further divergent rule interpretation.[203] Rule 23(b)(3) instructs courts to evaluate if certification is a superior method for "fairly and efficiently adjudicating the controversy," though fails to define efficiency—a problem given the term's multiple meanings.[204] The meaning of efficiency varies by the decisionmaker: some apply a "rough

199. *In re* Hotel Tel. Charges, 500 F.2d 86, 88 (9th Cir. 1974).

200. *See id.* at 90–92.

201. *Id.* at 92.

202. *See, e.g.*, Assoc. Gen. Contractors, Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 546 (1983) ("Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations." (quoting Blue Shield v. McCready, 457 U.S. 465, 472 (1982))).

203. *See, e.g.*, Tardiff v. Knox Cnty., 365 F.3d 1, 7 (1st Cir. 2004) (recognizing that "the balance of cost and benefit doubtless varies from case to case"); *In re* Initial Pub. Offering Sec. Litig., 227 F.R.D. 65, 122 (S.D.N.Y. 2004) (recognizing that "[a]ny consideration of superiority . . . [is] subjective; it must weigh the benefits and costs of allowing the class action to proceed *versus* the benefits and costs of individual adjudication").

204. Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 516 (1994) (describing economic efficiency as a "notorious example" of ambiguity); James M. Buchanan, *Positive Economics, Welfare Economics, and Political Economy*, 2 J.L. & ECON. 124, 126 (1959) (" 'Efficiency' . . . is meaningless without some common denominator, some value scale, against which possible results can be measured.").

economic" analysis; others adopt a strict cost-benefit evaluation.[205] Both views tempt erratic superiority interpretations.

Even roughly defined, efficiency depends on perspective. Namely, efficiency for whom: (1) the judiciary facing years of complex and time-consuming litigation, (2) the plaintiffs depending on such litigation as the only realistic option for recourse, or (3) the defendant benefiting from any classwide preclusive effect though facing much greater exposure than in individual litigation?[206] If all three considerations should be balanced, how? The rule provides no key to answer these questions.

Hence, regardless of whether efficiency is defined broadly or narrowly, the term only adds to the confusion over superiority. Strict cost-benefit analyses generate different questions than rough efficiency.[207] Which variables count, and what trade-offs still align with fairness and justice? Should the judicial resources expended depend on the case's value? If so, how should value be defined: Do only monetary judgments count, or should other potential gains, such as information sharing, be included even if harder to quantify?[208] What about trade-

205. *Compare In re* Netbank, Inc., Sec. Litig., 259 F.R.D. 656, 667 (N.D. Ga. 2009) (noting that "[t]he key to certification of a class under Rule 23(b)(3) is whether the efficiency and economy of class adjudication outweighs the difficulties and complexity of individual adjudication" (citations omitted)), *and* Bone, *supra* note 176, at 657–58 (describing superiority and predominance as just "rough ways to measure the benefits of class treatment"), *with* Lane v. Page, 272 F.R.D. 558, 580 (D.N.M. 2011) (noting that class action certification is appropriate in cases like securities fraud actions where "the costs of litigation would likely outweigh any benefit obtained" (quoting *In re* Ribozyme Pharms., Inc., Sec. Litig., 205 F.R.D. 572, 579 (D. Colo. 2001))). This approach revives a previously abandoned amendment to superiority from 1966 to (1) alter the requirement to consider if the putative class was "necessary" rather than "superior," (2) add a cost-benefit analysis, and (3) eliminate the (b)(3) inquiry for settlement classes. *See* PROPOSED REVISION OF THE CLASS ACTION RULE ADVISORY COMMITTEE ON CIVIL RULES (Published for Notice and Comment, Aug. 15, 1996); John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 364 (2005). After a groundswell of criticism of the cost-benefit amendment, the Subcommittee withdrew the proposal in its entirety. *See* Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damages Class Action Reform*, LAW & CONTEMP. PROBS., Summer 2001, at 137, 141.

206. This list may be underinclusive. *See* Katz v. Carte Blanche Corp., 496 F.2d 747, 760 (3d Cir. 1974) ("Superiority must be looked at from the point of view (1) of the judicial system, (2) of the potential class members, (3) of the present plaintiff, (4) of the attorneys for the litigants, (5) of the public at large and (6) of the defendant. The listing is not necessarily in order of importance of the respective interests. Superiority must also be looked at from the point of view of the issues.").

207. *See* Patrick A. Luff, *Bad Bargains: The Mistake of Allowing Cost-Benefit Analyses in Class Action Certification Decisions*, 41 U. MEM. L. REV. 65, 68 (2010) ("Opponents of the class action mechanism believe that the harms associated with class actions outweigh their benefits . . . . Conversely, proponents of class actions believe that the social benefits outweigh the costs.").

208. *See, e.g.*, Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 VAND. L. REV. 1109, 1189 (2011) ("[M]easuring deterrence and thus quantifying optimal deterrence is nearly

offs in terms of other cases the court cannot hear during the pendency of the claim?[209] Even if these initial hurdles are cleared, how much benefit must exceed cost is unclear: Is one cent enough?[210]

Given these unanswered queries, a cost-benefit approach requires courts to exercise value judgments.[211] For some courts, the only relevant variables are the cost of litigation versus the potential recovery,[212] while others include less quantifiable variables, such as balancing the efficiency of classwide determinations and right of access gains against manageability challenges.[213] This disagreement is compounded by superiority's instruction to consider efficiency and fairness coequally. Not only is fairness a concept as nebulous as efficiency,[214] the two are often inversely related.[215] Professor Brian Bix explains:

> It is fair enough to look back in wonder, and some disdain, at a time when legal rules were evaluated only in terms of some intuitive sense of fairness, with no regard to their instrumental value (and with certainly no reference to their "efficiency"). At the same

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impossible . . . ."); Luff, *supra* note 207, at 88 (discussing the difficulty of measuring non-monetary benefits).

209. *See* Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 CASE W. RES. L. REV. 961, 968–69 (1996) (discussing challenges with valuation subjectivity).

210. *See* Cass Sunstein, *Cost-Benefit Analyses and the Environment*, 115 ETHICS 351, 353, 376 (2005).

211. *See* Patrick C. Crawford, *The Utility of the Efficiency/Equity Dichotomy in Tax Policy Analysis*, 16 VA. TAX REV. 501, 534 (1997) (recognizing the flaws of the premise "that efficiency issues can be constructively decided wholly apart from subjective value judgments"); Zywicki, *supra* note 209, at 976–77.

212. *See, e.g.*, Allen v. Hyland's Inc., 300 F.R.D. 643, 671 (C.D. Cal. 2014); Lane v. Page, 272 F.R.D. 558, 580–81 (D.N.M. 2011).

213. *See, e.g.*, *In re* Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig., No. 10-2193-RWZ, 2013 WL 4759649, at *14 (D. Mass. Sept. 4, 2013). Still others go further, and narrowly focus on the amount of actual harm (as opposed to statutory harm) suffered versus the financial impact on the defendant of certification. *See, e.g.*, Azoiani v. Love's Travel Stops & Country Stores, Inc., No. EDCV 07-90 ODW (OPx), 2007 WL 4811627, at *1 (C.D. Cal. Dec. 18, 2007); Soualian v. Int'l Coffee & Tea LLC, No. CV 07-502-RGK (JCx), 2007 WL 4877902, at *3 (C.D. Cal. June 11, 2007).

214. *Cf.* Wheeler v. Montgomery, 397 U.S. 280, 283 (1970) (discussing "the vague and nebulous concept of 'fairness' "); Alan Strudler & Eric W. Orts, *Moral Principle in the Law of Insider Trading*, 78 TEX. L. REV. 375, 405 (1999) (stating that "an intuitive sense of fairness is too vague and unreliable to serve as a basis of legal decision making" (citations omitted)).

215. *See* Yishai Boyarin, *Court-Connected ADR—a Time of Crisis, a Time of Change*, 95 MARQ. L. REV. 993, 1032 (2012); Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 130 (2009). This tension exists generally in efficiency and fairness balancing, not just for procedural rules. For example, scholars have detailed this tension in the criminal justice arena. *See, e.g.*, Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 238, 239 (1966).

> time, one may wonder whether there has been an "overcorrection" . . . . Of course, if one acts, it should be with eyes open: aware of the costs (including efficiency costs) . . . . However, it is a basic point, long ago conceded by Calabresi and Melamed, that efficiency will only be one value among many, and that we should be conscious of actual and potential (and potentially desirable) tradeoffs of less efficiency for more fairness or justice.[216]

This struggle to balance fairness and efficiency provides an alternative explanation for the judicial divides set forth in Part I. In addressing judicial resources, different efficiency definitions cloud three factors: (1) pending litigation, (2) alternative methods, and most extensively, (3) manageability.

First, for the pending litigation analysis, some courts define efficiency as the absence of other cases, while others see the existence of such cases as proof that certification is superior. For example, in *Arch v. American Tobacco*, the court found a lack of superiority because of the paucity of tried individual claims.[217] In reaching that conclusion, the court hinged its analysis on potential inefficiencies: "Even assuming that the courts will be exposed to many more of these types of . . . cases, 'a conclusion that certification will save judicial resources is premature at this stage of the litigation.' "[218]

Yet, other courts have certified novel claims, finding a single resolution of related claims efficient. In *Klay v. Humana*, the court held the potential efficiency gains of consolidation made the class superior.[219] There, the court explained, if the claim "raises a variety of new or complicated legal questions, then those questions constitute significant common issues of law" and their "resolution in a single class-action forum would greatly foster judicial efficiency and avoid unnecessary, repetitious litigation."[220] There is no irrefutable, "correct" efficiency position—just arguments that generate incompatible superiority interpretations.

Second, for alternative methods of adjudication, efficiency complicates cases involving overlapping federal and state class actions, as is evident in two Fair Labor Standards Act ("FLSA") cases. In

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216. Brian Bix, *Epstein, Craswell, Economics, Unconscionability, and Morality*, 19 QUINNIPIAC L. REV. 715, 723 (2000) (emphasis omitted) (footnotes omitted).

217. Arch v. Am. Tobacco Co., 175 F.R.D. 469, 495 (E.D. Pa. 1997).

218. *Id.* (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 749 (5th Cir. 1996)).

219. Klay v. Humana, Inc., 382 F.3d 1241, 1272 (11th Cir. 2004), *abrogated in part on other grounds by* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008).

220. *Id.*; *see also In re* A.H. Robins Co., 880 F.2d 709, 726 (4th Cir. 1989) (coordinating novel claims provides "a mechanism for deciding expeditiously, efficiently and relatively inexpensively these actions without the delays of individual suits").

Ladegaard v. Hard Rock Concrete Cutters, Inc.,[221] the court found superiority: "[E]ven with the presence of the FLSA action, individual plaintiffs could bring an action in state court on the state claims. To avoid this result, and to further judicial economy, it is desirable to concentrate the litigation in one forum."[222] In contrast, in *Muecke v. A-Reliable Auto Parts & Wreckers*,[223] the court held a federal class inefficient—and thus lacking superiority—where, "[e]ach of those persons then will be able to pursue on his or her own behalf state law claims, which cover the very same conduct as the FLSA claim."[224]

Third, while efficiency is a thread in multiple superiority factors, it is at the forefront of manageability.[225] Efficiency considerations risk reverse engineering, much like the rule's differing policy goals.[226] For example, courts that add a strict ascertainability requirement to manageability frequently only focus on the heavy efficiency burden of identifying class members.[227] Such one-sided analyses mean a class is rarely superior.[228] Others balance such challenges against the gains of a class and the potential unfairness of precluding certification—leading to differing superiority decisions.[229]

Thus, superiority's reference to efficiency is a key piece to the interpretation puzzle. Judges cannot objectively define efficiency, let alone balance it against the equally elusive concept of fairness. This

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221. No. 00 C 5755, 2000 WL 1774091, at *7 (N.D. Ill. Dec. 1, 2000).

222. *Id.*; *accord* O'Brien v. Encotech Const. Servs., Inc., 203 F.R.D. 346, 350 (N.D. Ill. 2001) ("Were plaintiffs to file multiple claims under multiple laws in multiple fora, precious judicial resources would be wasted on duplicative lawsuits. This result would be inefficient.").

223. No. 01 C 2361, 2002 WL 1359411, at *2 (N.D. Ill. June 21, 2002).

224. *Id.*

225. *See supra* Part I.B (detailing judicial disagreement over (b)(3)(D)).

226. *See supra* Part I.A; *cf.* EPSTEIN ET AL., *supra* note 129, at 41 (2013) ("[P]rocedural doctrines that reduce workload have only a short-run effect in curbing ideological judging.").

227. *Accord In re* Worldcom, Inc., 343 B.R. 412, 423 (Bankr. S.D.N.Y. 2006); *see, e.g.*, Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp., 238 F.R.D. 679, 686 (S.D. Fla. 2006), *aff'd sub nom.* Boca Raton Cmty. Hosp., Inc. v. Tenet Health Care Corp., 582 F.3d 1227 (11th Cir. 2009). Overburdened dockets may also contribute to this narrow definition. *See, e.g.*, David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 322–24 (1977) (reporting statistics that confirm courts are overburdened, impacting the quality of justice).

228. *See, e.g.*, *In re* POM Wonderful LLC, No. ML 10-02199 DDP (RZx), 2014 WL 1225184, at *6 (C.D. Cal. Mar. 25, 2014); Franks v. MKM Oil, Inc., No. 10 CV 00013, 2012 WL 3903782, at *7 (N.D. Ill. Sept. 7, 2012) (denying superiority because identifying class members would be "burdensome" without balancing those burdens against gains of certification).

229. *Compare* Ackerman v. Coca-Cola Co., No. 09 CV 395(DLI)(RML), 2013 WL 7044866, at *21 (E.D.N.Y. July 18, 2013) (balancing judicial access gains against ascertainability challenges to find a lack of superiority), *with* Astiana v. Kashi Co., 291 F.R.D. 493, 500 (S.D. Cal. 2013) (balancing access and burden to find superiority despite ascertainability challenges).

only worsens the indifferent rule drafting, insufficient judicial review, and conflicting policy goals underlying the superiority requirement. Considered collectively, these explanations pave a clearer path to curing this troubled area of civil procedure doctrine.

III. THE ROAD AHEAD

While Parts I and II explored the extent and roots of the problems, Part III focuses on the needed fix: striking the superiority requirement from Rule 23.[230] Rewritten, Rule 23(b)(3) would read: "A class action may be maintained if Rule 23(a) is satisfied and if: . . . (3) the court finds that questions of law or fact common to class members predominate over any questions affecting only individual members. Adjudication of those questions shall be handled through case management tools."

This Part unpackages and defends this proposal. First, it makes the case for striking superiority in toto. Second, it discusses how other procedural rules can answer the policy concerns and legal questions that arise under superiority, offsetting the need for a second inquiry. Instead, courts can focus on strengthening existing case management tools. Third, this Part defends the proposal against the most anticipated criticism—the need for procedural screening. With the details spelled out and the counterarguments rebutted, this solution remedies the inferiority of superiority.

A. The Case for Rethinking Superiority

From its lack of a clear design to its conflicting purposes, the superiority requirement fails to clearly and consistently guide certification decisions. Eliminating the requirement is the only functional solution.[231] Existing interpretations raise concerns about judicial overreach and endanger judicial access.

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230. Perhaps recognizing some of these problems, the Rule 23 Subcommittee is reassessing superiority. Though in its infancy, a current proposal would only remove the superiority analysis for settlement classes. ADVISORY COMM. ON CIVIL RULES, RULE 23 SUBCOMMITTEE REPORT 11–20 (April 9–10, 2015). This Article argues the proposal should be broadened to remove the superiority requirement altogether.

231. While this Article does not focus on institutional choice, the Rules Committee, rather than the Supreme Court, should revise the Rule. First, the current rulemaking process for a federal civil procedure rule involves seven stages of comment and review, of which Supreme Court review is but one. This multi-stage process (authorized by the Rules Enabling Act, 28 U.S.C. § 2072 (2012)) "does not contemplate that the Court could [alter a rule] outside the rulemaking structure." Struve,

The Rules Enabling Act sets the outer limits of permissible interpretations of procedural rules.[232] While courts can design "a judicial process for enforcing rights and duties recognized by substantive law,"[233] they cannot construe procedural rules to "abridge, enlarge or modify any substantive right."[234] But existing interpretations of superiority, such as the presumption that novel claims are unmanageable, do abridge substantive law in two ways. First, if prior class actions must exist, the causes of action that can be certified become a closed universe. Such circular reasoning effectively adds a class action preclusion to abridge existing substantive law.

Second, superiority interpretations that preclude class actions outright for certain legal theories abridge plaintiffs' ability to enforce their substantive rights. Such interpretations limit plaintiffs to individual suits, thus foregoing the benefits of collective actions,[235] such as sharing costs, counsel, and information about the defendants' alleged wrongdoing.[236] Without such benefits, it is often unrealistic for

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supra note 161, at 1103–04, 1129 (summarizing the Court's limited role in the rulemaking process). Thus, this approach respects the democratic participatory process already in place. Second, when the Supreme Court has stepped into a quasi-legislating role to revise other procedural rules, the results have increased confusion, rather than predictability or clarity. *See, e.g.*, Jill Curry & Matthew Ward, *Are* Twombly *&* Iqbal *Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH. L. REV. 827, 831 (2013) (discussing how the Court's revised pleading requirements caused lower court confusion). Third, recent Supreme Court class action jurisprudence suggests the majority of the Court will not consider the countervailing gains class actions provide should it address superiority. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting) ("[T]o a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.").

232. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (explaining how neither Congress nor the federal courts have "power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts").

233. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407 (2010) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

234. 28 U.S.C. § 2072 (1970) (providing that the "Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts" and "[s]uch rules shall not abridge, enlarge or modify any substantive right").

235. *See* Christine P. Bartholomew, *Redefining Prey and Predator in Class Actions*, 80 BROOK. L. REV. 743, 784 (2015); Anne Bloom, *From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis*, 39 LOY. L.A. L. REV. 719, 719 (2006); Darren Carter, *Notice and the Protection of Class Members' Interests*, 69 S. CAL. L. REV. 1121, 1121 (1996).

236. *See* Bartholomew, *supra* note 235, at 784. Individual litigation is so unlikely for small sum cases that defendants have agreed to class action settlements that only preclude the right to participate in future class or aggregate claims, leaving open the potential for individual suit. *See, e.g.*, *In re* Trans Union Corp. Privacy Litig., 741 F.3d 811, 811 (7th Cir. 2014). As Professor Rave explains: "An ultimately cheaper route to resolving [defendant's] liability might be to purchase the class members' rights to proceed on an aggregate basis, allowing individual plaintiffs to go at it

individual consumers to take on large, well-funded corporate defendants.[237]

This judicial overreach disproportionately jeopardizes small sum cases—the very cases the Rules Committee sought to empower by adopting Rule 23(b)(3).[238] As Judge Posner notes, "only a lunatic or a fanatic" would bring such cases individually.[239] Nonetheless, some decisions deny certification specifically because the amount at stake is minimal. For example, in *Ramirez v. Dollar Phone Corp.*,[240] the Eastern District of New York denied class certification for a group of low-income, non-English-speaking immigrant calling-card consumers.[241] The court held that because consumers suffered small individual damages, a class was not superior to other avenues of redress, such as legislative action.[242]

Thus, more sweeping reform is needed to starve the growth of further interpretative dissonance. Any more modest approach will not suffice. Creating a hierarchy amid the various superiority factors or focusing on a sole factor would leave in place the morass of conflicting interpretations, including those that run afoul the Rules Enabling Act or place small stake claims at risk.

B. Reabsorbing Superiority

Eliminating superiority makes sense for a second reason. As it presently stands, the judiciary is unchecked, guessing at which interpretations to apply. Such guesswork is unnecessary. As detailed below, other procedural rules have matured during superiority's duration. Most notably, the two policy concerns behind the more restrictive definitions of superiority—efficiency and autonomy—are already addressed by current interpretations of the predominance requirement. As previously explained,[243] to satisfy Rule 23(b)(3) "questions of law or fact common to class members [must] predominate

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alone if they so choose, but knowing full well that most plaintiffs won't bother." D. Theodore Rave, *When Peace is Not the Goal of a Class Action Settlement*, 50 GA. L. REV. 475, 477 (2016).

237. Rave, *supra* note 236.

238. Statement, *supra* note 21, at 7.

239. Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004).

240. 668 F. Supp. 2d 448, 468 (E.D.N.Y. 2009).

241. *Id.*

242. *Id.* ("In the present case, the only adequate and appropriate way to protect the rights of the Rule 23(b)(3) class is through regulation and enforcement by a federal administrative agency.").

243. *See supra* Part I (explaining predominance).

over any questions affecting only individual members."[244] Efficiency—however defined—is at the core of this predominance inquiry.[245] When issues of law or fact are shared amongst class members, resolving the claims collectively is more efficient than a series of individual cases.[246] Inversely, a lack of shared issues necessarily means collective treatment does not preserve resources as compared to individual litigation, and thus is inefficient.[247] This relationship makes a second efficiency inquiry under superiority superfluous.

Similarly, predominance absorbs autonomy questions. Autonomy concerns parallel individual issues: the more individual issues, the more legitimate the worries about individuals wanting decisionmaking control.[248] But when collective issues predominate, such autonomy concerns are fewer.[249] They are offset by the gains of collective action.[250] This is particularly true for small-stakes cases.[251] As Professor David Marcus explains, claims that cannot realistically be litigated outside a class action "may not deserve or even enjoy the sort of due process protection that places a premium on individual autonomy."[252] In a case that satisfies predominance, individual choice

244. FED. R. CIV. P. 23(b)(3).

245. *See, e.g.*, FED. R. CIV. P. 23(b)(3) advisory committee's notes to 1966 amendment (explaining the goal of subdivision (b)(3) to "achieve economies of time, effort, and expense"); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615–16 (1997); Moore v. Stellar Recovery, Inc., No. 13 C 2294, 2014 WL 3509729, at *1 (N.D. Ill. July 14, 2014) ("Predominance is a question of efficiency."); CONTE & NEWBERG, *supra* note 109, at § 4:49.

246. *See* Bloom, *supra* note 235, at 719; Carter, *supra* note 235, at 1121.

247. *See, e.g.*, Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1006 n.12 (11th Cir. 1997) (discussing how predominance and efficiency are "intertwined"); Anderson Living Tr. v. WPX Energy Prod., LLC, 306 F.R.D. 312, 394 (D.N.M. 2015).

248. *See* Bartholomew, *supra* note 235, at 784; Bloom, *supra* note 235, at 719; Carter, *supra* note 235, at 1121.

249. *Cf.* Jon Romberg, *The Hybrid Class Action as Judicial Spork: Managing Individual Rights in a Stew of Common Wrong*, 39 J. MARSHALL L. REV. 231, 239 (2006) (discussing the relationship between predominance in (b)(2) classes and autonomy).

250. *See id.* at 288 (discussing how predominance balances questions of individual choice with efficiency). How much weight to afford autonomy concerns seems inversely related to the amount at issue. *See* Erbsen, *supra* note 104, at 1008 n.17 (discussing how autonomy interests carry little or no weight where "economic value of plaintiffs' claims is small relative to the defendant's aggregate stakes in the litigation, such that plaintiffs would likely be unable to litigate . . . outside of a class action").

251. *See* Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1082 (2012) ("A plaintiff with a small claim has no incentive to bring suit or, for that matter, to defect from a class action.").

252. David Marcus, *Some Realism About Mass Torts*, 75 U. CHI. L. REV. 1949, 1990 (2008).

is still preserved through notice and opt-out procedures,[253] further minimizing any lingering autonomy unease. With autonomy and efficiency accounted for, a second round of screening under superiority is unwarranted. Bringing this overlap to light further supports removing the troublesome superiority requirement.[254]

1. How Predominance Answers Superiority

In addition to addressing autonomy and efficiency concerns, the predominance analysis also subsumes superiority's individuals' interest factor and manageability inquiries. First, the individuals' interest analysis under Rule 23(b)(3)(A) frequently focuses on the amount at stake.[255] The greater the amount, the more courts presume such interests.[256] However, this is a false proxy.[257] Whether someone would actually sue is too dependent on individual whims.

Predominance removes some of this subjectivity. The quantum of shared issues of law and fact become the proxy for gauging individuals' interests.[258] The greater the degree of predominance, the more likely individuals' interests give way to the benefits of certification.[259] This is also why predominance intersects with autonomy.[260] Thus, there is no need for courts to rely on superiority's amount at stake or other equally questionable substitutes to evaluate individuals' interests.

Second, predominance also resolves manageability. Removing the manageability analysis cures the "largely unfounded belief that

253. *See, e.g.*, Spann v. J.C. Penney Corp., 307 F.R.D. 508, 532 (C.D. Cal. 2015) (discussing opt-out options); Klamberg v. Roth, 473 F. Supp. 544, 559 (S.D.N.Y. 1979) (same).

254. As an important clarification, courts should carefully conscribe the interpretations of these other procedure rules. Otherwise, eliminating superiority would just shift the existing strife onto other factors.

255. *See, e.g.*, Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield, 654 F.3d 618, 628 (6th Cir. 2011) (focusing (b)(3)(A) analysis on whether class members are able to pursue claims individually); *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 523 (D.N.J. 1997) (same); *In re* Tetracycline Cases, 107 F.R.D. 719, 732 (W.D. Mo. 1985).

256. FED. R. CIV. P. 23(b)(3) advisory committee's notes to 1966 amendment.

257. *See* Herkert v. MRC Receivables Corp., 254 F.R.D. 344, 352–53 (N.D. Ill. 2008).

258. *Accord* Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1196 (2013); *see* FED. R. CIV. P. 23(b)(3) (requiring common questions "predominate over any questions affecting only individual [class] members").

259. *See* WRIGHT, *supra* note 57, at 518–19 ("[T]he predominance test really involves an attempt to achieve a balance between the value of allowing individual actions to be instituted so that each person can protect his own interests and the economy that can be achieved by allowing a multiple party dispute to be resolved on a class action basis."); Romberg, *supra* note 249, at 288.

260. *See infra* Part III.A.

district courts cannot handle . . . [complex] class actions . . . [recognizing instead that it] takes some elbow grease and some creativity, but it is not impossible" to manage such claims.[261] Any complex litigation undoubtedly will generate judicial hardship, but that alone is a faulty basis for denying judicial access.[262] Predominance sets limits on the potential challenges a court must address in a class action.[263] When a putative class action satisfies the requirement,[264] the resulting manageability challenges should be tolerated. Conversely, when common issues do not predominate, courts generally agree manageability is a problem.[265]

This Article's proposal seeks to expand and to codify this relationship.[266] In doing so, it builds on the approach already taken by

261. Anderson Living Tr. v. WPX Energy Prod., LLC, 306 F.R.D. 312, 461 (D.N.M. 2015).

262. *See, e.g.*, James D. Hinson Elec. Contracting Co. v. BellSouth Telecomms., Inc., 275 F.R.D. 638, 648 (M.D. Fla. 2011) (explaining that manageability issues are "intrinsic in large class actions" and thus not enough to deny superiority when predominance is satisfied); John Conyers, Jr., *Class Action "Fairness"—A Bad Deal for the States and Consumers*, 40 HARV. J. ON LEGIS. 493, 493 (2003).

263. *See, e.g.*, Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 604 (5th Cir. 2006); Stalley v. ADS All. Data Sys., Inc., 296 F.R.D. 670, 686 (M.D. Fla. 2013) ("the predominance analysis has a tremendous impact on the superiority analysis" (citation omitted)); Bevrotte *ex rel.* Bevrotte v. Caesars Entm't Corp., No. CIV.A. 11-543, 2011 WL 4634174, at *5 (E.D. La. Oct. 4, 2011) ("predominance and superiority . . . are intertwined"); Shelley v. AmSouth Bank, No. CIV.A.97-1170-RV-C, 2000 WL 1121778, at *8 (S.D. Ala. July 24, 2000), *aff'd*, 247 F.3d 250 (11th Cir. 2001) ("superiority analysis is 'intertwined' with predominance analysis"). Even the Supreme Court fused the two, suggesting a more careful predominance inquiry in cases where "individual stakes are high and disparities among class members great." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997).

264. FED. R. CIV. P. 23(b)(3).

265. Ginsburg v. Comcast Cable Commc'ns Mgmt. LLC, No. C11-1959RAJ, 2013 WL 1661483, at *8 (W.D. Wash. Apr. 17, 2013) ("[B]ecause of the individualized issues on which class members' claims would ultimately depend, a class action would be unmanageable.").

266. Using predominance to evaluate the underlying concerns of superiority is analogical to the approach advocated in Professor Jay Tidmarsh's work. Jay Tidmarsh, *Superiority as Unity*, 107 NW. U. L. REV. 565, 566–67 (2013). This essay advocates for an alternative framework for evaluating certification based on what Tidmarsh coins the "superiority principle." This principle is a means for assessing class cohesion and is distinct from the superiority factors analyzed in this Article. Rather than the current multi-factor Rule 23 analysis, he argues certification should turn on whether the claims asserted are sufficiently cohesive. *See id.* at 585. Interestingly, though, the proposed principle is akin to predominance, not superiority. As Tidmarsh points out, a unity of interests exists when "all classes . . . possess a unity of interest along one of the three elements of a claim (facts, law, or remedy) and a substantial overlap of interest along the other two elements." *See id.* This abbreviated summary gives short shrift to Professor Tidmarsh's more provocative discussion of how to balance individual autonomy concerns and judicial redress goals. However, the endpoint of his argument matches this Article's reframing of superiority.

some courts.[267] Revising Rule 23(b)(3)'s language to focus on predominance and foregoing a separate manageability analysis checks outlier district courts that deny certification simply because such cases are time-consuming.[268]

Take, for example, the judicial splits over whether choice of law questions preclude manageability, as discussed in Part I. Predominance determinations already overlap with choice of law questions.[269] When the law governing the claims asserted is too diffuse, predominance will not be satisfied. Eliminating manageability avoids a second forum for duplicative, potentially conflicting analysis.

That said, using predominance to absorb superiority poses some issues. Courts differ on just how many common questions are necessary, as well as how to define class cohesion.[270] However, in resolving these open questions, district courts have recent Supreme Court guidance[271]—something missing in superiority.[272] Further, appellate courts to date have weighed in on predominance more than superiority.[273] This guidance restrains the range of possible predominance interpretations, unlike the ever-splintering superiority analyses. It also supports this Article's proposal to eliminate the

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267. At least eight circuits already have such a presumption. Fraser v. Wal-Mart Stores, Inc., No. 2:13-CV-00520-TLN-DAD, 2014 WL 7336673, at *8 (E.D. Cal. Dec. 24, 2014); *see also* MANUAL FOR COMPLEX LITIGATION, Part I § 1.43 n.72 (1977) ("[D]ismissal for management reasons, in view of the public interest involved in class actions, should be the exception rather than the rule.").

268. *See, e.g.*, *In re* Gen. Motors Corp. Dex-Cool Prods. Liab. Litig., 241 F.R.D. 305, 314 (S.D. Ill. 2007) (recognizing the value of certifying an issue class but denying certification in part because of its "crowded docket").

269. *Compare In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1015–19 (7th Cir. 2002) (holding that plaintiffs must be governed by one state law), *with In re* Nigeria Charter Flights Contract Litig., 233 F.R.D. 297, 305–06 (E.D.N.Y. 2006) (holding that courts may apply the laws of multiple states in one class action).

270. *See, e.g.*, Claire E. Bourque, *Liability Only, Please—Hold the Damages: The Supreme Court's New Order for Class Certification*, 22 GEO. MASON L. REV. 695, 708 (2015) (discussing the current confusion over how to define predominance).

271. *See, e.g.*, Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013); Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1191 (2013).

272. *See supra* Part II.A (discussing the lack of judicial review for superiority).

273. *See, e.g., In re* Nexium Antitrust Litig., 777 F.3d 9, 18 (1st Cir. 2015); EQT Prod. Co. v. Adair, 764 F.3d 347, 366 (4th Cir. 2014); *In re* Johnson, 760 F.3d 66, 74 (D.C. Cir. 2014); Abdullah v. U.S. Sec. Assocs., Inc., 731 F.3d 952, 963–64 (9th Cir. 2013); Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 778 (8th Cir. 2013); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 814 (7th Cir. 2012); Williams v. Mohawk Indus., Inc., 568 F.3d 1350, 1357–59 (11th Cir. 2009); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008); Gene & Gene LLC v. BioPay LLC, 541 F.3d 318, 326 (5th Cir. 2008); *In re* Scrap Metal Antitrust Litig., 527 F.3d 517, 535 (6th Cir. 2008); McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 222 (2d Cir. 2008); Monreal v. Potter, 367 F.3d 1224, 1237 (10th Cir. 2004).

requirement and to remove a second round of questioning about individuals' interests and manageability.

2. Remaining Inquiries and Procedural Alternatives

While predominance absorbs much of the superiority requirement, other procedural rules—including other parts of Rule 23—also abrogate the remaining superiority factors. To begin, the Judicial Multidistrict Litigation Proceeding ("MDL") process makes the pending litigation and forum factors unnecessary.[274] Two years after adding the superiority requirement, Congress created the MDL process, under which civil actions sharing common questions are coordinated and then transferred to a single judicial district for pretrial purposes.[275] The MDL process only applies to federal cases. By expanding federal diversity jurisdiction in 2005,[276] the Class Action Fairness Act effectively enlarged the reach of the MDL process.[277] The MDL decision intersects with the "pending litigation" factor: it results in fewer pending cases and provides an analysis of consolidation. The superiority analysis can question that decision, inviting inconsistent MDL and trial court rulings.

Similarly, the MDL process addresses the appropriate forum.[278] Trial courts undertake this second-guessing under superiority without sufficient guidance on how to evaluate pending litigation or the

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274. 28 U.S.C. § 1407 (2012).

275. *See id.*; *see also* Scott Paetty, *Classless Not Clueless: A Comparison of Case Management Mechanisms for Non-Class-Based Complex Litigation in California and Federal Courts*, 41 LOY. L.A. L. REV. 845, 848 (2008) (describing the MDL process).

276. Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

277. *See* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1751 (2008) (finding seventy-two percent overall increase in class action activity in the eighty-eight district courts studied); Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1617, 1642 (2006) (discussing the intersection between the MDL process and CAFA's expanded jurisdiction). For any parallel state claims, courts can analyze the impact of such cases through predominance and manageability.

278. *See* Anderson Living Tr. v. WPX Energy Prod., LLC, 306 F.R.D. 312, 406 n.56 (D.N.M. 2015) (stating "the court should respect [the MDL] decision and exclude the possibility of multidistrict litigation from its superiority analysis"); *In re* Energy Sys. Equip. Leasing Sec. Litig., 642 F. Supp. 718, 752 (E.D.N.Y. 1986) ("Factors such as those set forth in Rule 23(b)(3) have already been considered by the Judicial Panel on Multidistrict Litigation in determining whether to transfer the various pending federal cases involving the Systems to this Court . . . ."); *In re* S. Cent. States Bakery Prods. Antitrust Litig., 86 F.R.D. 407, 423 (M.D. La. 1980) (recognizing overlap between MDL decision and superiority).

forum.[279] Though many courts apply principled approaches to these questions,[280] some have adopted interpretations that spell the realistic end for a case.[281] Collapsing the superiority analysis and the MDL process resolves these inconsistencies.

As for the remaining superiority question, alternative methods, Rule 23 currently addresses this.[282] Rule 23(a)(4) requires a showing that "the representative parties will fairly and adequately protect the interests of the class."[283] Some courts already use this requirement to analyze private methods of resolving a putative claim. For example, in *In re Aqua Dots Products Liability Litigation*, the trial court denied superiority for purchasers of a toxic toy.[284] While the trial court found the defendant's limited recalls superior to litigation, the Seventh Circuit reversed.[285] Chief Judge Easterbrook held private remedies were better addressed under Rule 23(a)(4) than under superiority.[286]

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279. Neither the MDL rules nor Rule 23 provide guidance on the interaction—if any—between this process and these factors. *See* 28 U.S.C. § 1407; FED. R. CIV. P. 23(b)(3).

280. *See In re* Plywood Antitrust Litig., 76 F.R.D. 570, 587 (E.D. La. 1976) (recognizing that post-MDL consolidation, the forum factor is irrelevant).

281. The mere existence of other litigation weighs against superiority, without analysis of the case's status or the scope of the claims asserted. *See, e.g.*, Vassalle v. Midland Funding LLC, 708 F.3d 747, 758 (6th Cir. 2013); Real Estate Alliance, Ltd. v. Sarkisian, No. CIV. A. 05-CV-3573, 2007 WL 2814591, at *5 (E.D. Pa. Sept. 24, 2007).

282. Predominance also address alternative methods of adjudication. If a defendant has already provided an extensive variety of private refunds, this impacts whether there are too many individualized defenses. *See, e.g.*, Vaccariello v. XM Satellite Radio, Inc., 295 F.R.D. 62, 74 (S.D.N.Y. 2013) (finding lack of predominance because of individualized defenses based on rebate program). Likewise, if the relief from a concurrently pending administrative action creates individualized damages issues, that, too, impacts predominance. *See, e.g.*, *In re* Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 347 (D.N.J. 1997) (discussing how potential administrative action impacts predominance and superiority).

283. FED. R. CIV. P. 23(a)(4).

284. 654 F.3d 748, 749 (7th Cir. 2011).

285. *See id.* at 751–52.

286. *Id.* This is not to say, however, that courts should find a class representative inadequate merely because she did not participate in a defendant's private remedy offering (such as a recall). To the contrary, such private recalls often forego the benefits of collective action, such as information sharing. *See* Bartholomew, *supra* note 235, at 784–86; *see also* D. Theodore Rave, *Settlement, ADR, and Class Action Superiority*, 5 J. TORT L. 91, 116 (2012) (discussing the risks associated with private remedies including "less robust" bargaining process though approving of the ADR program in *Aqua Dots*). Instead, the point here is subtler: courts are already considering how to address private remedies under aspects of Rule 23. A second discussion of such offers under superiority currently serves no consistent screening function, thus making such an analysis not only unnecessary but problematic.

Other private alternatives, such as arbitration, are now a basis for dismissal under Federal Rule of Civil Procedure 12(b)(6).[287] Further, motions to stay capture overlapping pending government or administrative actions.[288] Such stays require the actual existence of pending actions, unlike the superiority analysis by which courts deny certification based on little more than the hypothetical potential for such cases.[289] After the resolution of such government or administrative action, the court can decide whether remaining issues, if any, predominate.[290] If no such issues exist, a motion to dismiss can then be granted.[291]

Hence, between the predominance requirement and the procedural rules above, superiority questions will still be addressed. Eliminating superiority just cures the problems posed by the requirement without foregoing judicial resolution of these superiority questions.

C. Strengthening Case Management

With the superiority factors absorbed elsewhere, only one more piece is needed to nix superiority: stronger case management tools. Class actions challenge courts and litigants alike.[292] The manageability factor could provide the judiciary and the parties an opening to chart the litigation's course.[293] However, the adversarial posture of manageability hinders planning efforts. Plaintiffs are incentivized to downplay the challenges of litigating a putative class action while defendants amplify such potentialities. For the generalist judge, this

287. *See, e.g.*, Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

288. Such stays based on pending government action are required for securities class actions. *See* 15 U.S.C. § 78u-4(b)(3)(B) (2012).

289. *See, e.g.*, Martin v. Ford Motor Co., 292 F.R.D. 252, 283 (E.D. Pa. 2013) (finding lack of superiority based on the mere potential for NHTSA to investigate the faulty rear axle design).

290. *See, e.g.*, Cnty. of Stanislaus v. Pac. Gas & Elec. Co., No. CV-F-93-5866-OWW, 1994 WL 706711, at *5 (E.D. Cal. Aug. 25, 1994) (granting certification despite public utility administrative agency's hearing since it did not fully address the antitrust claims).

291. *See, e.g.*, Wechsler v. Se. Props., Inc., 63 F.R.D. 13, 16 (S.D.N.Y.), *aff'd*, 506 F.2d 631 (2d Cir. 1974) (dismissing class claims after resolution of Attorney General action that obtained sufficient relief).

292. *See* Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1692 (1992).

293. *See* FED. R. CIV. P. 23(b)(3)(D) (directing courts to also make determinations on "the likely difficulties in managing a class action" when considering class certification).

means the factor invites faulty information about how potential procedural tools could streamline litigation.

Rather than tinkering to redefine manageability, a better course of action is to sharpen existing case management tools. Federal Rule of Civil Procedure 16 already requires a trial plan[294] and empowers courts to generate "special procedures" for complex cases.[295] The proposal, here, is to fortify such existing case management tools and require partial trial plans in advance of class certification.[296] These plans must be detailed, addressing the utility and limits of case management tools, ranging from multi-phased trials to subclassing to bifurcation.[297] They should also address staying or coordinating any pending parallel state cases.[298] If the parties fail to reach consensus, the court can appoint a

294. FED. R. CIV. P. 16(a)(4). Courts should use their power to sanction those who fail to generate trial plans in bad faith. *See* Hon. Craig B. Shaffer, *"Defensible" by What Standard?*, 13 SEDONA CONF. J. 217, 227 (2012) ("[A]n attorney or party that does not participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f) can be required to pay the other party's reasonable fees and costs caused by that failure. The same sanctions can be imposed on a party or attorney who is substantially unprepared to participate in the Rule 16(b) scheduling conference." (footnote omitted)).

295. FED. R. CIV. P. 16(c)(2)(L) (authorizing judges to adopt "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems").

296. *See, e.g.*, Wachtel *ex rel.* Jesse v. Guardian Life Ins. Co., 453 F.3d 179, 186 n.7 (3d Cir. 2006) ("[W]e note that . . . the pre-certification . . . trial plans . . . could be used . . . by the parties [to] aid[ ] trial courts in defining the precise parameters of a given class for certification purposes."). The remainder of the topics covered in a Rule 16 trial plan would still be submitted pretrial.

297. *See, e.g.*, *In re* Live Concert Antitrust Litig., 247 F.R.D. 98, 149 (C.D. Cal. 2007) (discussing potential case management tools available in class actions). Ascertainability would not be part of this joint trial plan. Numerosity, notice requirements, and Rule 23's requirement that a certification order "define the class and class claims, issues, or defenses" negate the need for a separate ascertainability inquiry. *See* FED. R. CIV. P. 23(c)(1)(B). Numerosity already ensures there is a clear definition of the class. *See, e.g.*, Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 357 (3d Cir. 2013) (illustrating the intersection between ascertainability and numerosity); Knutson v. Schwan's Home Serv., Inc., No. 3:12-CV-0964-GPC-DHB, 2013 WL 3746118, at *1 (S.D. Cal. July 15, 2013) (same). Unlike superiority, the requirements for class notice are well-defined. *See* FED. R. CIV. P. 23(c)(2)(B); FED. R. CIV. P. 23(e).

298. *See* Carlough v. Amchem Prods., Inc., 10 F.3d 189, 203 (3d Cir. 1993) (discussing how impending settlements in federal actions justify staying duplicative state actions); Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222, 223 (6th Cir. 1988) (staying pending resolution of parallel state case informally); *see also* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 (2010) (promoting judicial communication to resolve manageability issues in parallel state and federal class actions); *cf.* William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1732–33 (1992) (stating "intersystem coordination has proven effective in accomplishing the[ ] goals" of promoting economy, efficiency and consistency).

special master to assist.[299] Further, if unanticipated issues arise during the litigation, such plans should be revised accordingly.

Parties already have the information necessary for such planning.[300] Class action attorneys—both for plaintiffs and defendants—often have significant expertise and understanding of the frequently encountered issues in such cases.[301] In fact, these attorneys already use this knowledge to generate joint pre-trial case management and discovery plans.[302] Using this expertise to overcome the challenges of managing a class action expands current collaboration, with the hope of increasing the efficacy and the quality of judicial decisions.[303] Shared trial manageability strategies could generate a body of creative solutions to guide the judiciary through class action challenges.

A critic might oppose this proposal, arguing instead for a more limited approach, such as a presumption of manageability or making the manageability test less rigorous for small-stake cases. The problem would remain, however, that such approaches would once again devolve into arbitrary line-drawing—this time not for what is manageability but for when the presumption is rebutted. Is it unmanageable if a case would take years to adjudicate? If so, how many years is too many? Similarly, is it unmanageable because the case involves the laws of multiple states? If so, how many states is too many? Courts have already tried to identify the tolerable quantum of manageability for class action certification. Just how polarized courts are in defining that

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299. *See, e.g.*, Jack Ratliff, *Special Master's Report in* Cimino v. Raymark Indus., Inc., 10 REV. LITIG. 521, 521 (1991).

300. Counsel often already generate various plans for clients. *See* Perry Elizabeth Pearce, *What In-House and Outside Counsel Should Tell Each Other*, PRAC. LAW., April 1995, at 29, 30. Further, some courts already require trial plans, but only from the plaintiff. *See* Barnes v. District of Columbia, 278 F.R.D. 14, 19 (D.D.C. 2011) (describing plaintiffs' trial plans); Ancar v. Murphy Oil, U.S.A., Inc., 2008 WL 2951794, *2 n.8 (E.D. La. July 25, 2008) (same); *In re* Paxil Litig., 212 F.R.D. 539, 542 (C.D. Cal. 2003) (same); *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 334–35 (S.D.N.Y. 2002) (same).

301. *See, e.g.*, Wallace v. Powell, 288 F.R.D. 347, 374 (M.D. Pa. 2012) (detailing how the counsel has "extensive experience" litigating class actions); *In re* Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig., 263 F.R.D. 226, 235 (E.D. Pa. 2009) (same); J. Douglas Peters & David R. Parker, *The History, Law, and Future of State Class Actions in Michigan*, 44 WAYNE L. REV. 135, 200 (1998) (noting how "the complexity and length of some class actions, together with the financial risk and up-front costs required to maintain class litigation" generate class action specialists).

302. FED. R. CIV. P. 26(f)(3) (describing joint discovery plans); *see also* Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?"*, 46 HASTINGS L.J. 679, 725 (1995) (describing joint discovery plans).

303. These decisions should be published and kept in a repository for use in subsequent cases. Such a repository already exists for mass torts. *See, e.g.*, LITIGATING MASS TORT CASES § 10:32.

baseline shows why even a presumption or a sliding scale of rigor is unworkable.

Thus, eliminating manageability and instead fortifying case management tools ensures courts will not screen cases based on generalized class action hostility.[304] With this last piece of the revised (b)(3) analysis explained, the next step is to debunk the false need for more class action gatekeeping.

D. Answering Critics: The Questionable Superiority Screen

The most likely criticism of this proposal is that it might make class certification easier.[305] Such criticism overlooks the challenges of proving predominance. Further, as previously discussed, other procedural mechanisms will still explore superiority questions. What the proposal does is clarify the certification analysis while minimizing the redundant, inconsistent analyses superiority currently affords.

More critically, though, the arguments of those who would bemoan the loss of superiority's screening potential rest on faulty premises. First, this potential concern assumes superiority actually is a serviceable screen.[306] However, the problems detailed at length in Parts I and II prove the requirement lacks sufficient beacons to guide when access to justice should give way to efficiency.[307] For a screen to properly function, it must first be applied consistently.[308]

Second, and perhaps most disconcerting, is the underlying assumption that more class action screening is needed.[309] This

304. *See* Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1375–76 (D. Minn. 1985) ("We have now seen that many judges openly and on the record have suspicion and disdain for class actions as a means of redress. . . . Such actions have already gone a long way toward sounding the 'death knell' for class actions.").

305. Critics argue class actions force blackmail settlements, though the hyperbolic nature of the attack has already been exposed. *See* Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681, 693–96, 704 (2005) (demonstrating that "actual settlement rates among certified class actions as well as the availability of dispositive motions both undermine the accuracy of the hydraulic pressure claim"). Thus, this Article focuses more on generalized screening arguments.

306. *See supra* Part II.B.1 (detailing the convoluted state of superiority screening).

307. *See supra* Part II.B.2 (listing varying efficiency interpretations).

308. *Cf.* John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW. 335, 345–46 (1996) (explaining the PSLRA is a faulty screen because of its inconsistent application).

309. The rationale for more screening through superiority also overlooks how such screening is not the cost-saving panacea those seeking judicial efficiency might hope for. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1329 (2002)

assumption overlooks the last three decades of increased screening in many key areas of law commonly brought as class actions.[310] Such changes began in the 1980s with the overhaul of Rule 11, followed by increased summary judgment requirements in 1985.[311] In the 1990s, heightened screening came in different forms, such as the Private Securities Litigation Act.[312] Since 2000, the screening mantra led to more radical procedural changes, both legislatively with CAFA and through a series of Supreme Court decisions.[313] These decisions now shut out a wide swath of class actions by forcing such claims into private arbitration.[314] For those that remain, such cases are screened through heightened pleading[315] and class certification requirements.[316] The cumulative impact of these procedural screens has not yet been fully felt, though empirical evidence and qualitative analyses suggest the effects are significant.[317] There is no evidence further screening is needed.

(explaining how early screens generate costs of their own, including error costs and increased process costs).

310. *See* Bartholomew, *supra* note 5, at 3244 ("Procedural gatekeeping in class actions is on the rise."); Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1261 (2014) ("[Justice] Roberts['s] Court decisions have also restricted access to class action litigation.").

311. Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 521–22 (1997) (detailing the increasing procedural screening of the 1980s and 1990s); Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 456–57 (2014) (noting the general increase in procedural hurdles across time).

312. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).

313. *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–50 (2011); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

314. *See* Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (enforcing arbitration provision with class waiver); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (same).

315. *Twombly*, 550 U.S. at 562; *cf.* Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of* Twombly *and* Iqbal, 51 WM. & MARY L. REV. 1997, 2005 (2010) (discussing how screening through motions to dismiss is particularly questionable given the purpose of Rule 8).

316. *See, e.g.*, Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1428–29 (2013); *Dukes*, 564 U.S. at 349–50.

317. *See* Miller, *supra* note 1, at 318 (2013) (discussing how restrictive interpretations of Rule 23 have "chilled much of its innovative application").

Third, even assuming class actions need more screening,[318] superiority is not the appropriate mechanism.[319] As discussed at length in Part II.B, screening under superiority depends on the interpretation a particular judge adopts.[320] Screening mechanisms that employ such value judgments lack accuracy. One need only consider the recent change to pleading standards to prove this point.[321] Under *Twiqbal*, the Supreme Court heightened the pleading requirement to filter potentially unmeritorious claims.[322] If this were an effective screen, one would have expected a corresponding drop of summary judgment motions after *Twiqbal*: if more cases were screened out on motions to dismiss, fewer questionable cases would need to be screened under Rule

318. Such an assumption is questionable. *See* Robert G. Bone, *Walking the Class Action Maze: Toward A More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1119 (2013) ("Insofar as this strict pleading standard already performs a screening function, there might be no need for—and it might not be a good idea to adopt—a strict certification standard as well."). This is particularly true given superiority is part of Rule 23. *See* Steig D. Olson, *"Chipping Away": The Misguided Trend Toward Resolving Merits Disputes As Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935, 939 (2009) ("Lawmakers did not intend courts to use Rule 23 as a screening device; they provided other, superior, screening mechanisms instead.").

319. For example, take courts that use superiority to screen out cases based on arguments that the resulting damages are disproportionate to the actual harm suffered. *See supra* Part I.B.1 and accompanying notes. The quantum of damages in such cases is defined statutorily. *See, e.g.*, Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B) (2012) (setting a statutory violation rate of no more than the lesser of $1,000,000 or one percent of the creditor's net worth). Thus, if the damages as aggregated are disproportionate (a debatable point), the appropriate fix is the substantive statutory law giving rise to those damages—not through Rule 23. *See, e.g.*, Murray v. GMAC Mortgage Corp., 434 F.3d 948, 954 (7th Cir. 2006) ("Maybe suits such as this will lead Congress to amend the Fair Credit Reporting Act; maybe not. While a statute remains on the books, however, it must be enforced rather than subverted."). Any contrary approach invites the very problems that exist with superiority, namely judicial application of a procedural rule that lacks consistent transsubstantive application. *See supra* Part II.A. (explaining why a procedural rule should apply equally across different substantive claims) and Part III.A. (discussing the Rules Enabling Act and limits on procedural rule interpretation). Thus, using superiority as a screen creates more problems than it solves.

320. *See supra* Part II.B.; *see also* Roger J. Traynor*, La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223, 234 (1962) (discussing the difficulty of judicial decisionmaking).

321. *See* Effron, *supra* note 315, at 2000 ("For nearly fifty years, courts and commentators viewed the pleading stage as a relatively weak point for the exercise of gatekeeping.").

322. *See* Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562 (2007). *Twiqbal* replaced the "notice pleading" standard previously in place for the prior fifty years. *See* Conley v. Gibson, 355 U.S. 41, 47 (1957). Under *Twiqbal*, a plaintiff must show not just a legally conceivable claim for relief but a factually "plausible" one. *See Iqbal*, 556 U.S. at 679–81; David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1248 (2013).

56.[323] Instead, there was no reduction in summary judgments.[324] Rather, the new standard has created grave concerns about false-positives, striking out cases not based on their potential merit but rather on a given judge's definition of plausibility.[325]

In contrast, merit-based determinations evaluate whether the evidence supports the substantive claim, unlike procedural mechanisms which focus on unevenly defined questions of efficiency.[326] Merit-based determinations allow judges to evaluate whether a particular claim is frivolous based on more than conjecture about what the evidence might someday prove. This in turn offsets the risk of chilling potentially legitimate claims.

Thus, even after nullifying superiority, class actions will still be sufficiently screened. Not every putative class will automatically be certified. Courts will continue to preclude many claims, just through other procedural rules or based on merit determinations. These determinations, though, provide a type of gatekeeping that comes closer to balancing access and fairness than superiority: plaintiffs have the potential to air their grievances, and defendants have the benefit of class-wide issue preclusion should the claims prove meritless.[327] Hence, this Article's proposal to eliminate the superiority requirement is both workable and defensible.

CONCLUSION

The superiority experiment has failed. After fifty years, the judiciary is no closer to deciding when a putative class action is sufficiently superior to certify under Federal Rule of Civil Procedure

323. *See* JONAH B. GELBACH, MATERIAL FACTS IN THE DISPUTE OVER *TWOMBLY* AND *IQBAL*: USING DEFENSE SUMMARY JUDGMENT WIN RATES TO MEASURE THE QUALITY OF CASES AFFECTED BY HEIGHTENED PLEADING (CELS Version, Nov. 2012) (undertaking an empirical examination of the extent to which *Twiqbal* has affected the merit of cases that proceed past the 12(b)(6) stage).

324. *See id.* at 9–10.

325. *See, e.g.*, Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 556–57 (2010) (discussing how *Twiqbal* is a seemly transubstantive procedural rule that works like a substantive one, impacting some causes of action more than others).

326. *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 12–14 (2010) (discussing how the current trend towards rising procedural gatekeeping based on efficiency limits judicial access).

327. *See* Antonio Gidi, *Loneliness in the Crowd: Why Nobody Wants Opt-Out Class Members to Assert Offensive Issue Preclusion Against Class Defendants*, 66 SMU L. REV. 1, 11–12 (2013); Debra J. Gross, *Mandatory Notice and Defendant Class Actions: Resolving the Paradox of Identity Between Plaintiffs and Defendants*, 40 EMORY L.J. 611, 616 (1991) (discussing the benefits of certification).

23(b)(3). Instead, jurisprudence is plagued with inconsistent interpretations. The full scale of the problem is only evident after uncovering how deep these divides run. Each aspect of the superiority analysis draws more inconsistency, thus threatening not only the rule of law, but also the ability of parties to predict and plan litigation strategies. For putative class members, the risks are more pernicious: inconsistent superiority decisions mean certification depends on the assigned judge rather than the particularities of a given case. It is difficult to reconcile such inconsistency with basic principles of fairness, let alone the predictability aims of the Federal Rules of Civil Procedure more generally.

Left untreated, the superiority requirement's afflictions will likely fester. Superiority's interpretative divides are a result of deeply embedded problems with the crafting of the requirement. Not only does it lack concrete textual guidance, its underlying, conflicting policy goals allow courts to define superiority as they please.

Hence, the best treatment for this ailment is eliminating the requirement and fortifying case management tools. Superiority is an inferior method for exploring the variety of issues that arise in a class certification analysis. In place of forcing legal questions into this faulty framework, courts can instead rely on alternative procedural rules, as well as other aspects of Rule 23, to resolve these issues. This approach maintains the rigor of the class certification analysis while starving the growth of further paradoxical superiority jurisprudence. In doing so, the botched superiority experiment can finally end.