RESPONSE

Diagnosis and Treatment of the "Superiority Problem"

*Jay Tidmarsh**

Christine Bartholomew has provided a brilliant diagnosis of the "superiority problem" in class-action law,[1] although I am not convinced that her plan to treat the disease—to resect the superiority requirement from Rule 23—will cure the patient. As judges, scholars, and practitioners in the class-action world know, every class action must meet certain requirements under Federal Rule 23 and comparable state-law counterparts. Most of these requirements—such as "numerosity,"[2] "commonality,"[3] "typicality,"[4] "adequacy,"[5] "predominance,"[6] and "superiority"[7]—go by single-word descriptors that mask the complexity of the case law and scholarship that has accreted over generations to give these terms their meanings.

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1. Christine P. Bartholomew, *The Failed Superiority Experiment*, 69 VAND. L. REV. 1295 (2016).

2. *See* FED. R. CIV. P. 23(a)(1) (requiring as a condition of class certification that "the class is so numerous that joinder of all members is impracticable").

3. *See* FED. R. CIV. P. 23(a)(2) (requiring as a condition of certification that "there are questions of law or fact common to the class").

4. *See* FED. R. CIV. P. 23(a)(3) (requiring that "the claims or defenses of the representative parties are typical of the claims or defenses of the class").

5. *See* FED. R. CIV. P. 23(a)(4) (requiring that "the representative parties will fairly and adequately protect the interests of the class"), -(g)(1)(B) (requiring the court to consider various matters pertinent to a potential class counsel's "ability to fairly and adequately represent the interests of the class"), -(g)(2) (requiring, when more than one attorney seeks to become class counsel, that the court "appoint the applicant best able to represent the interests of the class").

6. *See* FED. R. CIV. P. 23(b)(3) (requiring, as one of the two conditions of certifying a (b)(3) class action, that "the questions of law or fact common to class members predominate over any questions affecting only individual members").

7. *See* FED. R. CIV. P. 23(b)(3) (requiring, as the second conditions of certifying a (b)(3) class action, that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy").

Among these terms, none is slipperier to understand than "superiority." Professor Bartholomew's exegesis of this second requirement of Rule 23(b)(3) class actions is the most analytically rigorous analysis of the term to date. Although many of us have taught our students and written about the amorphousness of and inconsistencies in the term "superiority,"[8] Professor Bartholomew's article demonstrates the extent of the incoherence in present-day superiority analysis with greater precision and rigor than any prior work. After reading her analysis, which points out that the same policies, doctrinal factors, or facts are sometimes used to support class certification and sometimes used to deny it, everyone should understand that the superiority emperor has no clothes. Her article is invaluable if we are to make headway in building a better class-action rule.

Without in any way diminishing the importance of this analysis, I want to focus on why the best solution to the "superiority problem" is not to excise the requirement—or at least not to excise it in the fashion that Professor Bartholomew suggests.

The heart of Professor Bartholomew's proposal is her recommendation to retain the predominance requirement of Rule 23(b)(3) and replace Rule 23(b)(3)'s superiority requirement with a general admonishment that courts use their case-management powers to adjudicate a certified class action.[9] In effect, the "predominance-and-

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8. For a couple of my poor efforts to catalog a few of the issues, ambiguities, and inconsistencies in courts' handling of the superiority requirement, see JAY TIDMARSH, CLASS ACTIONS: FIVE PRINCIPLES TO PROMOTE FAIRNESS AND EFFICIENCY § 2.03, at 55–56 (2013); JAY TIDMARSH & ROGER H. TRANGSRUD, MODERN COMPLEX LITIGATION 479–80 (2d ed. 2010).

9. Bartholomew, *supra* note 1, at 1332–43. At present, Rule 23(b)(3) permits a class action to be maintained when:

> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
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> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
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> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
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> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
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> (D) the likely difficulties in managing a class action.

FED. R. CIV. P. 23(b)(3). Under Professor Bartholomew's proposal, Rule 23(b)(3) would allow class certification when:

> (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.

Bartholomew, *supra* note 1, at 1332.

superiority" requirements of the present Rule 23(b)(3) convert into a single predominance element, albeit one informed by the case-management concerns that, under present Rule 23(b)(3)(D), form part of the present superiority requirement.

If superiority is as gnarly a concept as Professor Bartholomew suggests—and it is—its replacement with a simpler rule should be a cause for celebration. But let me suggest a few reasons, beginning with the architecture and theory of Rule 23 and then moving to more particular issues with the specifics of the proposal, that this move would not achieve the desired outcome of making Rule 23 work more effectively.

I

The concept of superiority lies at the very heart of Rule 23. On the one hand, class actions have the potential to create substantial benefits: preventing under-deterrence through full cost internalization, lowering transaction costs per claim when individual cases would otherwise be filed, equalizing plaintiff and defendant incentives to invest in litigation so that more accurate outcomes are possible, and ensuring the equal and fair treatment of similarly situated litigants.[10] On the other hand, class actions raise a host of potential policy problems that to some extent are the mirror images of these benefits: over-deterrence (leading to "legalized blackmail"[11] as defendants must settle meritless cases to avoid the risk of a catastrophic judgment), increasing transaction costs when individual claims would not be filed, agency costs, loss of autonomy, and questions of democratic legitimacy.[12] Class actions also raise concerns of constitutional significance, including the basis on which a court can bind class members to a judgment that the class representative obtains on their behalf.[13]

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10. For a fuller discussion of these benefits, see TIDMARSH, *supra* note 8, § 1.03.

11. This term for class actions was coined by Professor Handler, *see* **Error! Main Document Only.**Milton Handler, *The Shift from Substantive to Procedural Innovation in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971), and later incorporated by some courts into the Rule 23 analysis, *see*, *e.g.*, *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784–85 (3d Cir. 1995) ("Another problem is that class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the threat of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth.").

12. For a fuller discussion of these costs, see TIDMARSH, *supra* note 8, § 1.04.

13. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985) (holding that a "forum State [that] wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law . . . must provide minimal procedural due process protection," including notice and a right to opt out, when the forum State does not have jurisdiction over the absent class member);

The entire architecture of Rule 23 is geared toward ensuring that the benefits of using a class action outweigh the costs: in other words, the class action is superior to available alternatives. This work begins in Rule 23(a), where doctrines of commonality, typicality, and adequacy are designed to "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."[14] But Rule 23 does not proceed on the belief that the fairness and efficiency of a class action under Rule 23(a) is a sufficient reason to certify a class. Rule 23(b) requires that a class action meet at least one of the four criteria in Rule 23(b)(1)(A), –(b)(1)(B), –(b)(2), and –(b)(3). Put differently, Rule 23(b) specifies four situations in which a class action that Rule 23(a) has determined to be fair and efficient is *superior* to non-class alternatives despite the evident costs of class actions.

The first three of the Rule 23(b) criteria cash out this superiority requirement in three specific factual contexts: (1) when separate non-class judgments pose a risk to a defendant who might be whipsawed by inconsistent non-class judgments;[15] (2) when separate non-class judgments threaten to substantially upset the interests of class members who would not have been party to those non-class judgments;[16] and (3) when the class action seeks injunctive or declaratory relief applicable to the entire class regarding conduct affecting the class.[17] The third context—the injunctive class action—can perhaps be teased out of the first two, whose roots lay in traditional

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Hansberry v. Lee, 311 U.S. 32, 42–43 (1940) (holding that the Due Process Clause requires that "members of a class not present as parties to the litigation may be bound by the judgment [only when] they are in fact adequately represented by parties who are present").

14. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982).

15. *See* FED. R. CIV. P. 23(b)(1)(A) (authorizing a class action when the requirements of Rule 23(a) are met and when separate judgments that might be obtained by class members in individual litigation create a risk of "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class").

16. *See* FED. R. CIV. P. 23(b)(1)(B) (authorizing a class action when the requirements of Rule 23(a) are met and when separate judgments that might be obtained by class members in individual litigation create a risk of "adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests").

17. *See* FED. R. CIV. P. 23(b)(2) (authorizing a class action when the requirements of Rule 23(a) are met and when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole").

equity practice;[18] but the drafters of the 1966 amendment that gave us the present Rule 23(b) thought it important to be clear that the class device was available—and highly desirable—for use in then-nascent civil rights litigation.[19] The common theme among class actions in these three contexts is that, if individual suits are allowed to proceed, a serious injustice might occur either to those repeatedly caught up in individual lawsuits or those left out of the individual lawsuits; and the best solution to the injustice is to preclude individual prosecution of the claims once Rule 23(a)'s requirements of economy and adequate representation are established. Indeed, the superiority of certification in these three contexts is so high that Rule 23 does not afford the members of these classes a right to opt out.[20]

The fourth context—Rule 23(b)(3)—is different. It is a catch-all provision, designed (as the first three are not) principally for cases seeking monetary relief.[21] Serial prosecution of individual claims in this context may be inefficient, but it is hardly unjust. The first stated requirement—predominance of common issues over individual issues—is an important part of the reason why these class actions deserve to be certified. But the drafters thought that predominance of common issues alone did not make a fair and efficient class action worth certifying—in other words, did not make it superior to non-class alternatives given the many costs of class actions and the value of individual autonomy. More was necessary, and rather than trying to specify precisely what that "more" was, Rule 23(b)(3) reverted to the basic principle underlying all of Rule 23(b)—superiority—as the second requirement. Recognizing the amorphous nature of the inquiry, the drafters of Rule 23(b)(3) then tried to put some meat on the bones with four factors[22] that were

18. On the equitable origins of the modern class action, see Ortiz v. Fibreboard Corp., 527 U.S. 815, 832–37 (1999); Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998).

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

20. The right to opt out is afforded only to members of a (b)(3) class action. *Compare* FED. R. CIV. P. 23(c)(2)(A) (not requiring notice of an opt-out right for (b)(1) and (b)(2) class actions) *with* FED. R. CIV. P. 23(c)(2)(B)(v) (requiring that class members in a (b)(3) class action be given notice "that the court will exclude from the class any member who requests exclusion"). Some courts have held that, in exceptional circumstances, a class member can opt out of a (b)(1) or (b)(2) class action. *See* **Error! Main Document Only.**Eubanks v. Billington, 110 F.3d 87 (D.C. Cir. 1997); Cnty. of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990).

21. The Rule 23(b)(1)(B) class action can be used for cases involving monetary recovery, but the circumstances to which it applies—often referred to as "limited fund" cases—are rare. *See Ortiz*, 527 U.S. at 841 (permitting a limited-fund class action when three conditions are met: a fund "with a definitely ascertained limit"; the distribution of the entirety of the fund "to satisfy all those with liquidated claims based on a common theory of liability"; and "an equitable, pro rata distribution").

22. *See* FED. R. CIV. P. 23(b)(3)(A)–(D). For the text of these factors, see *supra* note 9.

unfortunately open ended enough to cause the interpretive morass that Professor Bartholomew so ably describes. Even when superiority is shown, however, Rule 23(b)(3) regards the right to choose whether and how to pursue a legal claim as so valuable that class members are afforded the right to opt out.[23]

This description of the role of Rule 23(b)(3)'s superiority requirement is not in itself a sufficient defense of the requirement. But this description suggests that simply deleting the requirement from Rule 23, while leaving behind the very pliable predominance requirement,[24] is potentially dangerous. Even when common issues predominate, a class action may not be superior to other methods for resolving a dispute.

It might be argued that other joinder devices such as Rule 20 contain no superiority element,[25] so there is no reason to require it of Rule 23. But Rule 23 is different, generally precluding the right of class members to bring common claims once a judgment or settlement is reached regardless of the class member's consent to, or even knowledge of, the class action. Under Rule 20, each joined plaintiff must consent to joinder, thus preserving litigant autonomy. There is no similar requirement of consent from class members. Our system's respect for party autonomy, as well as the class action's potential to create other costs, establish a *grundnorm* for any class action: class treatment must be better than non-class options.

Moreover, the fact that other joinder or preclusion rules do not include a superiority principle in explicit terms is not a reason to remove the requirement from Rule 23. Instead, it might be an indictment of the other rules, or at least a frank acknowledgment that measuring superiority can be a tricky business. Demanding superiority across all joinder and preclusion alternatives would also mean that a court would be able to choose only the best technique to resolve each dispute, a theoretically attractive proposition that would be very difficult to implement in practice.[26] Nonetheless, given the strong constitutional and policy concerns with the broad use of class actions,

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23. *See* FED. R. CIV. P. 23(C)(2)(B)(v).

24. *See infra* Part II.

25. *See* FED. R. CIV. P. 20(a)(1) (allowing two or more plaintiffs to join together when "they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences" and "any question of law or fact common to all plaintiffs will arise in the action").

26. Moreover, other joinder devices use other rough-and-ready surrogates for superiority—such as individual consent of each plaintiff in Rule 20, *see id.*, or convenience and the "interests of justice" in multidistrict litigation, *see* 28 U.S.C. § 1407(a)—in much the way that Rules 23(b)(1) and –(b)(2) use surrogates, *see supra* notes 15–19 and accompanying text.

the fact that the superiority concept might not work easily in other joinder contexts is not a reason to eliminate it from Rule 23.

II

The difficulty, therefore, is not with the idea of superiority as a theoretical matter but rather with, as Professor Bartholomew has shown, a superiority rule that is so open textured that it leads to unpredictable results. Professor Bartholomew correctly points out that courts have handled several superiority-oriented factors inconsistently: for instance, whether (b)(3) status should be reserved for small-stakes class actions (ones which are not worth prosecuting on an individual basis);[27] whether the identities of individual class members must be ascertainable at the time of class certification;[28] whether a court should consider non-litigation alternatives for resolving a mass dispute in its superiority analysis;[29] whether the manageability issues presented by the choice-of-law difficulties in multistate state-law class actions should bar class certification;[30] and whether individual litigation by class members (or the lack thereof) should influence class certification.[31] One of the difficulties of her proposal, however, is that, if superiority were eliminated, courts could just as easily pour the same doctrinal inconsistencies into other vessels. For instance, rather than treating ascertainability as a Rule 23(b)(3) superiority issue, some courts already consider it as part of Rule 23(a)'s requirement that there be a "class."[32] Similarly, when choice-of-laws concerns generate a cacophony of legal and factual issues within a purported class, some courts treat the presence of multiple laws as a question of superiority; but others analyze the issue as a question of predominance.[33] Because Professor Bartholomew's proposal retains the predominance element,

27. Bartholomew, *supra* note 1, at 1303–07. Professor Bartholomew also points out that different courts draw the line for the individual viability of claims at different points. *Id.* at 1304–05.

28. *Id.* at 1307–08.

29. *Id.* at 1309.

30. *Id.* at 1310–12.

31. *Id.* at 1312–14. This list of inconsistencies in courts' interpretation of Rule 23(b)(3)'s superiority requirement is not intended to be exhaustive; Professor Bartholomew's analysis, as I have said, is wonderfully deep and rich. I have picked off a few of the high points.

32. *See*, *e.g.*, Reyes v. City of Rye, No. 13–CV–051 (NSR), 2016 WL 4064042, at *4 (S.D.N.Y. July 28, 2016) (listing ascertainability as an "[i]mplied [r]equirement" of Rule 23(a)); Herrera v. LCS Fin. Servs. Corp., 274 F.R.D. 666, 672 (N.D. Cal. 2011) ("While Rule 23(a) is silent as to whether the class must be ascertainable, courts have held that the rule implies this requirement.").

33. *See*, *e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 742 n.15 (5th Cir. 1996) ("We find it difficult to fathom how common issues could predominate in this case when variations in state law are thoroughly considered.").

certification of multistate class actions involving choice-of-law considerations would simply shift the debate—with all its inconsistencies—from one term in Rule 23(b)(3) (superiority) to another term (predominance) without changing or improving the analysis on the effect of multiple state laws on class certification.

The concerns that drive other inconsistencies that the article identifies likewise would not end; like the Whack-a-Mole game, the same concerns would pop up in one or more of the remaining doctrinal categories. For instance, I could easily craft an argument that consideration of two of the other superiority factors that Professor Bartholomew discusses—non-litigation alternatives and the effect of other litigation—could be subsumed within Rule 23(a)(3)'s typicality and Rule 23(a)(4)'s adequacy requirements.

The issue of whether large-stakes cases are suitable for class treatment is less easily shoehorned into one of the other doctrinal categories in the remainder of Rule 23. Eliminating the superiority requirement *might* lead to less debate on this issue, but lawyers—in their ceaseless creativity—will still exploit the existing terms of Rule 23 to make arguments about doctrinal caveats, exceptions, and limitations. More importantly, Professor Bartholomew's proposal to stamp out the small-stakes debate creates its own costs. Disagreement about the wisdom of using the small stakes in the litigation as a marker for class certification exposes basic divisions among judges, lawyers, and scholars about the fundamental purpose(s) of class actions. From the viewpoint that class actions are at best a necessary evil—an aberration from the ideals of litigant autonomy and individualized justice—then class actions should be limited just to those cases that would never be filed individually because of the economic irrationality of doing so. In other words, only small-stakes cases deserve class-action treatment.[34] From the viewpoint that class actions act as a valuable deterrence mechanism to prevent and punish mass wrongdoing, class actions in small-stakes cases are necessary, but there is also room for large-stakes class actions.[35] Other theories about the role of class actions similarly find either more or less room for the use of class actions in large-stakes cases. In recent years, the first argument has tended to win out, making large-stakes class actions difficult to certify.[36] But this debate over the role of class actions in large-stakes

34. For an excellent exposition of this view, see MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009).

35. For an excellent exposition of this view, see David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002).

36. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the

litigation remains open and valuable, because it is a debate about first principles and the normative commitments of those who establish the rules for the American civil-justice system.

The debate will not disappear merely because the word "superiority" is lopped out of Rule 23(b)(3). Nor should it disappear. In my view, both sides of this issue have merit. Like Professor Bartholomew, I dislike the way in which some courts have used the fact that a case is not "small stakes" as a near-automatic disqualifier for class treatment.[37] On the other hand, the view that litigants with "large enough" cases should have the freedom to decide whether, when, with whom, and against whom to bring suit—and not to have their claims swept up in a lawsuit not of their making run by lawyers not of their choosing—is valid. Class actions promote certain values (like global deterrence) while they compromise others (like litigant autonomy). In attempting to balance these concerns, one of the present fulcrums is the superiority requirement of Rule 23(b)(3), and one of the present balancing points is small-stakes versus large-stakes litigation. Some inconsistency in case outcomes is unsurprising as different judges, often operating with different views of the strength of the competing values, try to strike the right balance. To throw out the superiority requirement entirely, however, is to upset the ongoing effort to achieve a proper balance among litigant autonomy, efficiency, and deterrence in favor of much broader class certification for large-stakes cases.

Rather than relying on a single, and still amorphous, predominance requirement to control class certifications under Rule 23(b)(3), Rule 23(b)(3) would be better served by reducing the superiority element to a clear and certain rule—as in Rules 23(b)(1) and 23(b)(2)—or at least by reducing the superiority element to strong

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advisory committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.' " (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969))).

37. From my viewpoint, the division between small-stakes and large-stakes litigation is a rough marker for the critical question, which is whether there is sufficient cohesion within the class that class treatment is better than alternatives. In some large-stakes cases seeking monetary recovery, this cohesion exists, so an automatic rejection of certification due to large stakes misses the point. It is far more likely, however, that this cohesion exists in small-stakes cases, in which the individual interest in pursuing theories of recovery unique to that individual are overborne by the reality that the case makes no economic sense to bring on an individual basis. The Advisory Committee that drafted Rule 23 held a similar view:

> The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable.

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

presumptions about when class treatment is appropriate and when it is not. Abandoning the commitment to superiority in Rule 23(b)(3), while leaving in place only an equally open-textured predominance requirement, invites the use of class actions whose costs are likely to exceed their benefits—thus generating even more controversy about a controversial device.

III

Professor Bartholomew was kind enough to mention my own proposal to change the present predominance-plus-superiority elements of Rule 23(b)(3) into a clearer form,[38] suggesting that its emphasis on the cohesion of class claims shares a common core with her proposal to jettison superiority in favor of a simple predominance requirement.[39] Indeed, I favor replacement of Rule 23(b)(3)'s open-textured predominance and superiority requirements with a rule that has more clarity and certainty. Taking account of the benefits and costs of class actions, I have tried to craft a rule that is likely to lead to certification of classes that are socially beneficial (i.e., the benefits of class treatment exceed the costs). My proposal might be described as "superiority on steroids"; it requires a high degree of cohesion among the claims of class members. Unlike the amorphous concept of "predominance" found in present Rule 23, however, my proposal is specific in its terms and easy to apply to most factual circumstances. It is also designed to accommodate within its terms the standards presently found in Rules 23(b)(1) and 23(b)(2).

Most importantly, my proposal does not exist in a vacuum. It is one of a series of linked proposals—including the creation of (1) a clear standard for adequacy of representation, (2) a simple measure of attorneys' fees that gives class counsel an incentive to create class actions of optimal size and to align the interests of class with counsel, and (3) methods to check the fairness of settlements and achieve a fair trial of individual damages claims—that were designed collectively to minimize the costs of class actions, including agency costs and (by making the conditions for class certification stringent) the loss of litigant autonomy.[40]

My goal in mentioning my own work is not to persuade anyone that I was correct but rather to suggest that Rule 23 is a complex

38. I introduced my theory in Jay Tidmarsh, *Superiority as Unity*, 107 NW. U. L. REV. 565 (2013), and further refined it in TIDMARSH, *supra* note 8, ch. 2.

39. *See* Bartholomew, *supra* note 1, at 1337 n.266.

40. For a summation of these proposals, which I further worked out in a series of articles, see TIDMARSH, *supra* note 8, ch. 3–5.

system. Changes in one part of the rule may require compensating changes elsewhere in order to keep the compromises struck by Rule 23 in balance—in other words, to ensure that a class action is truly superior to other alternatives. Professor Bartholomew is well aware of this: her compensating change for the elimination of superiority is to remind judges of their ability to use their case-management powers to adjudicate the dispute.[41] In one sense, this proposal does not seem to compensate for the loss of superiority: judges already enjoy the ability to exercise case-management powers in class actions by virtue of Rule 16. But to the extent that judges read this exhortation to use their case-management tools as adding something new to Rule 23, the addition is subject to the same critique of vagueness that Professor Bartholomew levied against the present superiority requirement. The breadth of judges' case-management powers and the significant discretion that these powers give judges to affect the outcomes of disputes are well-known.[42] If the problem of superiority is the capaciousness of its doctrine—a capaciousness so great that different judges might choose to certify or not certify a class action on nearly identical facts[43]—then relying on the capaciousness of case-management principles to correct the problem seems a cure ill suited to the disease.

If superiority is to be eliminated, predominance must also be abandoned. Some new formula must replace Rule 23(b)(3) in its entirety. The impulse behind Rule 23(b)(3) is laudable: to give judges discretion to create socially desirable class actions that escape easy reduction to a clear and simple rule of the types found in Rules 23(b)(1) and –(b)(2). The problem of Rule 23(b)(3) is that the factors (especially superiority) give too much power to courts to get the results they want. Unless the ills that Professor Bartholomew documents are to be repeated in a new form, any replacement for Rule 23(b)(3) must be far more specific and concrete in its terms than the present Rule. Moreover, its terms must be crafted with an eye to the rest of Rule 23, in particular the interlinked fairness and efficiency requirements of Rule 23(a) and

41. For the text of Professor Bartholomew's proposal, see *supra* note 9.

42. *See*, *e.g.*, Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 417–31 (1982) (describing the breadth and potential costs of pretrial case management, including the potential for biased decision-making); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking* 137 U. PA. L. REV. 1969, 1995 (1989) (arguing sympathetically for judicial discretion, but noting that "[d]iscretion can be quite dangerous . . . when it is unbounded. Judges are human and humans tend to abuse power when they have it . . . ."). *Cf.* Elizabeth Warren & Jay Lawrence Westbrook, *Searching for Reorganization Realities*, 72 WASH. U. L.Q. 1257, 1285 (1994) (noting that, in certain bankruptcy cases, "different forms of judicial case management may significantly affect outcomes").

43. *See* Bartholomew, *supra* note 1, at 1303–14 (describing similar class actions in which different judges made contrary decisions on the issue of class certification).

the provisions in Rule 23(b)(1) and –(b)(2). Professor Bartholomew's proposal may not bring us to the promised land, but her article shows us why the effort to craft a better Rule 23 is both necessary and worthwhile.