

2018

Ascertainability: Prose, Policy, and Process

Rhonda Wasserman

Follow this and additional works at: https://opencommons.uconn.edu/law_review

Recommended Citation

Wasserman, Rhonda, "Ascertainability: Prose, Policy, and Process" (2018). *Connecticut Law Review*. 382.
https://opencommons.uconn.edu/law_review/382

CONNECTICUT LAW REVIEW

VOLUME 50

AUGUST 2018

NUMBER 3

Article

Ascertainability: Prose, Policy, and Process

RHONDA WASSERMAN

One of the most hotly contested issues in class action practice today is ascertainability—when and how the identities of individual class members must be ascertained. The courts of appeals are split on the issue, with courts in different circuits imposing dramatically different burdens on putative class representatives. Courts adopting a strict approach require the class representative to prove that there is an administratively feasible means of determining whether class members are part of the class. This burden may be insurmountable in consumer class actions because people tend not to save receipts for purchases of low-cost consumer goods, like soft drinks and snacks, and have no other objective proof of their membership in the class. Thus, in circuits adopting the strict approach, class certification may be denied, whereas in other circuits, the same class may be certified. Notwithstanding the circuit split on this critical issue, the Supreme Court has denied several petitions for writs of certiorari raising the issue; the Senate has failed to act on a bill passed by the House to address it; and the Advisory Committee has placed the issue on hold. Given the current state of disuniformity and the resultant inequitable administration of the laws, the time is ripe to address the issue.

Ascertainability is not only of great practical importance, but it is interesting on three different levels. First, there is a question of prose: whether the text of the Rule supports the implication of the strict ascertainability requirement. Second, there is a question of policy: whether concern for the class action defendant, the absent class members, or the trial court overseeing the action justifies imposition of the strict requirement, notwithstanding its harsh impact on consumer class actions. Third, there is a process question: which governmental actor—the lower courts, the Supreme Court, the Advisory Committee on Civil Rules, or Congress—has the greatest institutional competency to resolve the policy issue and establish a uniform approach to ascertainability. This Article addresses each of these questions in turn.

ARTICLE CONTENTS

INTRODUCTION	697
I. PROSE: THE TEXT OF RULE 23	701
A. TEXTUAL CLUES THAT SUPPORT THE TRADITIONAL APPROACH TO ASCERTAINABILITY	702
B. TEXTUAL CLUES THAT UNDERMINE THE STRICT APPROACH TO ASCERTAINABILITY	703
II. POLICY: THE RELATIVE MERITS OF THE TRADITIONAL AND STRICT APPROACHES TO ASCERTAINABILITY	704
A. THE TRADITIONAL APPROACH	705
B. THE STRICT APPROACH	712
C. POLICIES UNDERLYING THE TRADITIONAL AND STRICT APPROACHES TO ASCERTAINABILITY	718
III. PROCESS: INSTITUTIONAL COMPETENCIES	731
A. UNITED STATES SUPREME COURT	731
B. THE LOWER FEDERAL COURTS	738
C. CONGRESS	744
D. ADVISORY COMMITTEE ON CIVIL RULES	754
E. TENTATIVE CONCLUSIONS	760



Ascertainability: Prose, Policy, and Process

RHONDA WASSERMAN *

INTRODUCTION

One of the most hotly contested issues in class action practice today is ascertainability—when and how the identities of individual class members must be ascertained. Rule 23 of the Federal Rules of Civil Procedure, which governs class action practice in federal court, does not explicitly impose an ascertainability requirement.¹ Nevertheless, federal courts have long required the plaintiff to demonstrate that a class exists² and some have required that it be “definite,” “ascertainable,”³ or “sufficiently identifiable”⁴

A split has emerged among the lower federal courts regarding the nature of, and policies underlying, this ascertainability requirement. The **traditional approach**, espoused by the Second,⁵ Seventh,⁶ and Ninth Circuit Courts of Appeals,⁷ requires only a precise class definition and

* Professor of Law and John E. Murray Faculty Scholar, University of Pittsburgh School of Law; Visiting Professor of Law, Harvard Law School (fall 2016). I would like to thank Ashley Blakeney (Pitt Law 2018) and Sarah McIntosh (Harvard Law LL.M. 2017) for their excellent research assistance. I dedicate this article with much love and great pride to my youngest son, Benjamin Wasserman Stern, on the occasion of his graduation from Johns Hopkins University and his selection as a Coro Fellow.

¹ FED. R. CIV. P. 23; *see infra* Part I (noting the absence of an express ascertainability requirement in the text of Rule 23); *see also* 1 WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 3:2 (5th ed. 2011 & Dec. 2017 Supp.) (“As a prerequisite to class certification, some courts require that plaintiffs propose a class that is ‘definite’ or ‘ascertainable.’ Because definiteness does not appear as one of the required certification elements in Rule 23(a) or (b), it is considered an ‘implicit’ requirement for class certification.”).

² *Bynum v. District of Columbia*, 214 F.R.D. 27, 31 (D.D.C. 2003); *White v. Williams*, 208 F.R.D. 123, 129 (D.N.J. 2002).

³ 1 RUBENSTEIN ET AL., *supra* note 1, § 3:1.

⁴ *White*, 208 F.R.D. at 129.

⁵ *In re Petrobras Secs.*, 862 F.3d 250, 264–66 (2d Cir. 2017), *petition for cert. filed sub. nom. Petroleo Brasileiro S.A. v. Universities Superannuation Scheme Ltd.* (U.S. Nov. 1, 2017) (17-664); *cf. Leyse v. Lifetime Entm’t Servs., LLC*, 679 Fed. App’x 44, 47 (2d Cir. 2017) (holding there was no abuse of discretion in finding that Leyse did not present a reliable method for proving class membership); *Brecher v. Rep. of Argentina*, 806 F.3d 22, 24–25 & n.2 (2d Cir. 2015) (holding that objective criteria can define an ascertainable class, but objective criteria alone cannot determine ascertainability when they do not “establish the definite boundaries of a readily identifiable class”).

⁶ *Mullins v. Direct Dig., LLC*, 795 F.3d 654 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016).

⁷ *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1123 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 313 (2017); *accord Bruton v. Gerber Prods. Co.*, 703 Fed. App’x 468 (9th Cir. 2017); *cf. Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1071 n.3 (9th Cir. 2014) (declining to address ascertainability).

objective criteria for determining membership in the class.⁸ The **strict approach**, adopted by the Third⁹ and Eleventh Circuits,¹⁰ imposes an additional requirement—an “administratively feasible” method of determining whether putative class members are part of the class and an opportunity for the defendant to challenge the evidence offered to establish class membership.¹¹ While acknowledging the potential utility of purchase records or databases to prove class membership,¹² courts applying the strict approach express deep skepticism about using affidavits to prove class membership or other methods that rely on potential class members’ “say so.”¹³ Since people rarely retain receipts for low-value purchases such as over-the-counter medications or food products (if they even receive them),¹⁴

⁸ See *infra* Part II.A. In an excellent Note in the Yale Law Journal, Geoffrey Shaw uses the phrase “minimally clear definition” to capture the “conceptual discreteness” required in defining a class; his term “does not speak to the practical difficulties involved in identifying class members or to the distinction between ‘objectively’ and ‘subjectively’ defined classes.” Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 YALE L.J. 2354, 2364 (2015); see also Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates Over Ascertainability and Cy Pres*, 65 U. KAN. L. REV. 913, 914 (2017) [hereinafter Bone, *Justifying Class Action Limits*] (explaining that “the traditional version of ascertainability . . . demands only that the boundaries of the class be reasonably clear” (footnote omitted)).

⁹ *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 439–41 (3d Cir. 2017); *Carrera v. Bayer Corp.*, 727 F.3d 300, 306–08 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012).

¹⁰ *Karhu v. Vital Pharm., Inc.*, 621 Fed. App’x 945, 947–48, 948 n.3, 950 & n.6 (11th Cir. 2015); *Bussey v. Macon Cty. Greyhound Park, Inc.*, 562 Fed. App’x 782, 787–88 (11th Cir. 2014); *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012); cf. *Ward v. EZCorp, Inc.*, 679 Fed. App’x 987, 987 (11th Cir. 2017) (*per curiam*). A recent decision by the Sixth Circuit Court of Appeals suggests that it, too, may favor the strict approach. See *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 466, 473 (6th Cir. 2017) (affirming denial of class certification where class members would have had to submit individual affidavits to establish class membership years after the challenged conduct); see also *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358–59 (4th Cir. 2014) (citing Third Circuit ascertainability case law); cf. *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015) (declining to follow *Carrera*).

¹¹ See *infra* Part II.B (describing the strict approach to ascertainability); see also, e.g., *Karhu*, 621 Fed. App’x at 948 (requiring plaintiff to “propose an administratively feasible method by which class members can be identified” and noting that “[a] plaintiff proposing ascertainment via self-identification” must avoid depriving defendants of “the opportunity to challenge class membership”); *Carrera*, 727 F.3d at 308 (requiring plaintiff to demonstrate that the “purported method for ascertaining class members is reliable and administratively feasible, and permits a defendant to challenge the evidence used to prove class membership”).

¹² See *Carrera*, 727 F.3d at 308 (“Depending on the facts of a case, retailer records may be a perfectly acceptable method of proving class membership.”).

¹³ *Id.* at 306; *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013); *Marcus*, 687 F.3d at 594; see *Karhu*, 621 Fed. App’x at 948 (describing the problems that may arise when individuals present uncorroborated claims that they belong to a class or used a product).

¹⁴ In many cases, such as purchases from vending machines, consumers do not even have the option of receiving a receipt. See, e.g., *Karhu*, 621 Fed. App’x at 954 (Martin, J., concurring) (discussing purchases of chewing gum, bottled soft drinks, and cigarettes from vending machines).

the strict approach to ascertainability threatens the viability of consumer class actions.¹⁵

The Third Circuit, which has advanced the strict approach most forcefully, argues that it is necessary to protect the interests of three different actors in class action litigation. First, the Third Circuit claims that the strict approach shields trial court judges from the otherwise laborious task of determining whether individuals qualify as class members.¹⁶ Second, according to the court, the strict ascertainability requirement protects the due process rights of would-be class members by facilitating notice, which enables them to exercise their right to opt out of the class action and, if they prefer, to sue the defendant in independent actions.¹⁷ The Third Circuit further maintains that the strict approach protects absent class members' property interests by ensuring that their claims to a portion of the recovery are not diluted by fraudulent or inaccurate claims by others who lack objective proof of class membership or a right to recover.¹⁸ Third, the court posits that the strict approach protects defendants by enabling them to challenge absentees' proof of class membership¹⁹ and to identify those who are precluded by a final judgment in the defendant's favor.²⁰

The principal controversy, then, is whether these policies justify the strict approach to ascertainability and its potentially devastating impact on consumer class actions. This substantive policy question has provoked a

¹⁵ See, e.g., *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 443 (3d Cir. 2017) (Fuentes, C.J., concurring) (arguing that the ascertainability requirement imposes a burden on consumer class actions); *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 657–58 (7th Cir. 2015) (holding that the ascertainability requirement disrupts the balance “that district courts must strike when deciding whether to certify classes”), *cert. denied*, 136 S. Ct. 1161 (2016); Rule 23 Subcomm. Report, at 31, *in* AGENDA BOOK FOR NOV. 5–6, 2015, MEETING OF THE ADVISORY COMM. ON CIVIL RULES [hereinafter NOV. 2015 AGENDA BOOK], at 117, tab 6A, <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-november-2015> [<https://perma.cc/FM2B-JJUJ>] (stating that “the most significant category of cases involving ascertainability problems are consumer class actions involving low-value products”).

¹⁶ See *infra* Part II.C.1 (identifying efficiency and administrative convenience as policies served by the ascertainability requirement); see also, e.g., *Marcus*, 687 F.3d at 593 (holding that one benefit of the ascertainability requirement is efficiency and the easy identification of class members).

¹⁷ See *infra* Part II.C.2 (identifying protection of absent class members as a policy purportedly served by the ascertainability requirement); see also, e.g., *Marcus*, 687 F.3d at 593 (noting that the ascertainability requirement “protects absent class members by facilitating the ‘best notice practicable’”).

¹⁸ See *infra* Part II.C.2; see also, e.g., *Carrera v. Bayer Corp.*, 727 F.3d 300, 310 (3d Cir. 2013) (detailing the harm to class members from fraudulent or inaccurate claims).

¹⁹ See *infra* Part II.C.3 (noting that courts adopting the strict approach invoke the need to protect defendants); see also, e.g., *Carrera*, 727 F.3d at 307 (holding that a defendant is protected by due process and can challenge a plaintiff's claim to class membership).

²⁰ See *infra* Part II.C.3; see also, e.g., *Marcus*, 687 F.3d at 593 (holding that the ascertainability requirement protects defendants by identifying the individuals who will be bound by the final judgment).

vigorous debate among the lower federal courts,²¹ academics,²² and the practicing bar,²³ and will be the focus of Part II of this article.

A related question that has received far less attention is the identity and institutional role of the actor that should resolve this normative policy question. At least since July 2015, when the Seventh Circuit Court of Appeals rejected the Third Circuit's strict approach to ascertainability,²⁴ the

²¹ The United States Courts of Appeals divided on this issue. *Compare, e.g., Carrera*, 727 F.3d at 301, with *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 655 (7th Cir. 2015) (the *Carrera* court held that class cannot be ascertained through retailer records or affidavits of class members, while the *Mullins* court held that there is no heightened ascertainability requirement). There are also disagreements among individual judges on the same appellate court. *Compare, e.g., City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 441 (3d Cir. 2017), with *id.* at 448–49 (Fuentes, C.J., concurring) (the majority imposed the strict ascertainability requirement, but Chief Judge Fuentes argued that the court should reject it). *Compare* *Byrd v. Aaron's Inc.*, 784 F.3d 154, 156 (3d Cir. 2015), with *id.* at 172 (Rendell, C.J., concurring). *Accord* *Shaw*, *supra* note 8, at 2360–61 (describing splits among judges on the same court).

²² *See, e.g., Bone, Justifying Class Action Limits*, *supra* note 8 (explaining that “the traditional version of ascertainability . . . demands only that the boundaries of the class be reasonably clear”); Erin L. Geller, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 *FORDHAM L. REV.* 2769, 2771 (2013) (arguing that the “fail-safe classes independently bar class certification due to their failure to satisfy the ascertainability requirement”); Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 *DEPAUL L. REV.* 305, 307–08 (2010) (analyzing class certification and its barriers); Stephanie Haas, *Class Is in Session: The Third Circuit Heightens Ascertainability with Rigor in Carrera v. Bayer Corp.*, 59 *VILL. L. REV.* 793, 795 (2014) (discussing the declining practicability of class actions since the decision of *Carrera*); Daniel Luks, *Ascertainability in the Third Circuit: Name That Class Member*, 82 *FORDHAM L. REV.* 2359, 2359 (2014) (describing the Third Circuit's imposition of a heightened ascertainability requirement); Tom Murphy, *Implied Class Warfare: Why Rule 23 Needs an Explicit Ascertainability Requirement in the Wake of Byrd v. Aaron's Inc.*, 57 *B.C. L. REV.* 34, 34 (2016) (arguing that Rule 23 needs to be amended to specifically include ascertainability as a requirement); *Shaw, supra* note 8, at 2388 (arguing that the ascertainability requirement frustrates the purpose of Rule 23).

²³ *See, e.g., Elizabeth J. Cabraser, Class Abides: Class Actions and the “Roberts Court,”* 48 *AKRON L. REV.* 757, 758, 761 (2015) (discussing the Court's “indifference to the structural constraints of Rule 23”); Perry Cooper, *Did the 8th Cir. Create Yet Another Class Member Test?*, *CLASS ACTION LITIG. REP. (BNA)* (May 13, 2016) (describing the circuit split on the ascertainability requirement); Perry Cooper, *Split Emerges on Class Ascertainability*, *CLASS ACTION LITIG. REP. (BNA)* (Aug. 14, 2015) (describing the circuit split on class ascertainability); Jamie Zysk Isani & Jason B. Sherry, *Trends in Recent Class Action Ascertainability Decisions*, *CLASS ACTION LITIG. REP. (BNA)* (Oct. 23, 2015) (summarizing the four policy concerns that motivated the heightened ascertainability standard); Edward Soto & Erica W. Rutner, *Circuit Split on Ascertainability Leads to Inconsistency and Uncertainty in the Certification of Class Actions*, *CLASS ACTION LITIG. REP. (BNA)* (April 8, 2016) (describing how the circuit split resulted in uncertainty and inconsistency in the certification of class actions).

²⁴ *Compare Mullins*, 795 F.3d at 655, with *Carrera*, 727 F.3d at 301 (the Third Circuit held that a strict ascertainability standard should apply, but the Seventh Circuit rejected it and held that the federal rules do not impose a heightened ascertainability requirement). Arguably, the circuit split developed slightly earlier. In *In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir. 2015), the First Circuit Court of Appeals cited the Third Circuit's ascertainability test, but concluded that affidavits by class members “would be sufficient” to exclude from the class those purchasers who had suffered no injury. *Id.* at 20. The majority purported to distinguish the Third Circuit precedents that had rejected affidavits by distinguishing “affidavits concerning the past purchase of the product in question (necessary for class membership), [from] affidavits concerning likely future purchases . . . as to which documents are not available.” *Id.* at 20 n.17 (citations omitted).

federal courts of appeals have been divided on the proper approach to ascertainability. Although the United States Supreme Court often accepts cases for review when a circuit split develops,²⁵ the Court has denied petitions for writs of certiorari in at least four recent cases addressing ascertainability.²⁶ The Advisory Committee on Civil Rules, which plays a central role in the promulgation and amendment of the Rules, has taken note of the circuit split on ascertainability, but it, too, has declined to act.²⁷ And while the House of Representatives has adopted the strict approach to ascertainability in the Fairness in Class Action Litigation Act,²⁸ the bill has stalled in the Senate.²⁹ Thus, the only governmental actors to take up the ascertainability issue have been the lower federal courts.

While leaving resolution of the substantive policy question to the lower federal courts has certain advantages, it undermines uniformity in the interpretation of the Federal Rules of Civil Procedure³⁰ and denies practicing attorneys and the broader public a voice in the resolution of this important policy issue. Thus, in addition to the principal policy question raised by ascertainability, there is an important and interesting process question: by what process and by which institutional actor should the substantive policy issue underlying ascertainability be resolved. Part III of this article addresses this process question.

Before addressing these pressing policy and process questions, however, in Part I we turn to a question of prose: whether the text or structure of Rule 23 supports an ascertainability requirement of any stripe.

I. PROSE: THE TEXT OF RULE 23

Rule 23(a) expressly requires that all class actions satisfy four prerequisites referred to colloquially as numerosity, commonality,

²⁵ See *infra* Part III.A (analyzing the Supreme Court's process in reviewing petitions for writs of certiorari).

²⁶ *ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313, 313 (2017); *Procter & Gamble Co. v. Rikos*, 136 S. Ct. 1493, 1493 (2016); *Direct Dig., Inc. v. Mullins*, 136 S. Ct. 1161, 1162 (2016); *Martin v. Pac. Parking Sys., Inc.*, 135 S. Ct. 962, 962 (2015).

²⁷ See *infra* Part III.D.2 (describing the Advisory Committee's consideration of the ascertainability requirement).

²⁸ H.R. 985, 115th Cong. (2017) (passed the House on Mar. 9, 2017 by a vote of 220 to 201).

²⁹ S. 1777, 115th Cong. (2017) (received in the Senate and referred to the Committee on the Judiciary on Mar. 13, 2017); see also *infra* Part III.C.3 (noting that the Senate has not taken up the Fairness in Class Action Litigation Act of 2017). Professors Coffee and Lahav conclude that the "legislation has gone nowhere in the Senate, and . . . it seems unlikely to pass." John C. Coffee, Jr. & Alexandra D. Lahav, *Class Actions in the Era of Trump: Trends and Developments in Class Certification and Related Issues*, 2017 ABA NAT'L INST. ON CLASS ACTIONS 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037564 [<https://perma.cc/YU2V-WCAJ>].

³⁰ See David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 949 (citing uniformity as a value that "counsels in favor of interpretation over discretion in the lower federal courts" and "[i]nterpretive restraint").

typicality, and adequacy of representation.³¹ Rule 23(b) further requires that a class conform to one of the types identified in that subsection.³² Courts and scholars have long conceded that the text of Rule 23 does not specifically mention ascertainability.³³ While some lower federal courts have “implied” an ascertainability requirement from the text of the Rule³⁴ or consider it an “implicit”³⁵ or “inherent”³⁶ requirement, the language and structure of the Rule are inconsistent with the strict approach to ascertainability.³⁷

A. *Textual Clues that Support the Traditional Approach to Ascertainability*

Courts have cited two textual clues to support the traditional ascertainability requirement. First, courts have relied upon Rule 23(a)’s use of the word “class,”³⁸ noting that “[c]lass certification presupposes the existence of an actual ‘class.’”³⁹ Unless the court can define the class and ascertain its members, it will be unable to determine whether Rule 23(a)’s requirements of numerosity, commonality, typicality, and adequacy of representation are satisfied.⁴⁰ Thus, as the Third Circuit put it,

³¹ FED. R. CIV. P. 23(a).

³² FED. R. CIV. P. 23(b).

³³ *See, e.g.,* Torres v. Mercer Canyons, Inc., 305 F.R.D. 646, 651 (E.D. Wash. 2015) (conceding there is no express ascertainability requirement in Rule 23); Jones v. ConAgra Foods, Inc., No. C 12-01633 CRB, 2014 WL 2702726, at *8 (N.D. Cal. June 13, 2014) (same); Grimes v. Rave Motion Pictures Birmingham, L.L.C., 264 F.R.D. 659, 663 (N.D. Ala. 2010) (recognizing that ascertainability is the “unofficial” first requirement); *see also* Murphy, *supra* note 22, at 35 (explaining the notable absence of ascertainability as a requirement in Rule 23); Shaw, *supra* note 8, at 2357–58 (describing how federal courts have recently begun reading an ascertainability requirement into Rule 23).

³⁴ *See, e.g.,* John v. Nat’l Sec. Fire & Cas. Co., 501 F.3d 443, 445 (5th Cir. 2007) (stating that ascertainability is implied in Rule 23).

³⁵ *See, e.g.,* Karhu v. Vital Pharm., Inc., 621 Fed. App’x 945, 946 (11th Cir. 2015) (noting the implicit ascertainability requirement); Byrd v. Aaron’s Inc., 784 F.3d 154, 162 (3d Cir. 2015) (same); Mullins v. Direct Digital, LLC, 795 F.3d 654, 657 (7th Cir. 2015) (same), *cert. denied*, 136 S. Ct. 1161 (2016).

³⁶ *See, e.g.,* Lilly v. Jamba Juice Co., 308 F.R.D. 231, 236 (N.D. Cal. 2014) (decided before *Briseno* and holding that ascertainability is an “inherent” requirement of Rule 23).

³⁷ *See, e.g.,* *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1126 (9th Cir. 2017) (holding no further requirements exist under Rule 23), *cert. denied*, 138 S. Ct. 313 (2017); *see also, e.g.,* Mullins v. Direct Digital, LLC, 795 F.3d 654, 658 (7th Cir. 2015) (noting that nothing implies any additional requirements under Rule 23), *cert. denied*, 136 S. Ct. 1161 (2016); Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1607–08 (2016) (predicting that the Supreme Court “will be sympathetic to the argument that the [strict ascertainability] requirement was invented out of whole cloth”).

³⁸ *See, e.g.,* Mullins, 795 F.3d at 659 (describing ascertainability in terms of a clear definition of the class based on objective criteria); Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981) (holding that in order for a class to be certified, a class must exist); Davoll v. Webb, 160 F.R.D. 142, 144 (D. Colo. 1995) (holding that the class description must be sufficiently definite); *see also* 1 RUBENSTEIN ET AL., *supra* note 1, § 3:2.

³⁹ White v. Williams, 208 F.R.D. 123, 129 (D.N.J. 2002) (citation omitted).

⁴⁰ 1 RUBENSTEIN ET AL., *supra* note 1, § 3:2 n.7.

“[a]scertainability . . . allows a trial court effectively to evaluate the explicit requirements of Rule 23.”⁴¹

Second, courts have relied upon Rule 23(c)(1)(B), which requires that a district court order certifying a class “define the class and the class claims, issues, or defenses”⁴² Added in 2003, this portion of the Rule speaks to the content of the certification order and does not itself impose a substantive ascertainability requirement.⁴³ The Advisory Committee note that accompanied the 2003 amendment to Rule 23 did not even mention Rule 23(c)(1)(B).⁴⁴ But in discussing Rule 23(c)(1)(A), which requires the district court to address class certification “at an early practicable time,”⁴⁵ the Advisory Committee note raised the “critical need . . . to determine how the case will be tried” and mentioned the common district court practice of requiring class counsel to present a trial plan that addresses whether the common issues “are susceptible of class-wide proof.”⁴⁶ Seizing upon this language, the Third Circuit concluded that Rule 23(c)(1)(B) requires a certification order that includes “a readily discernible, clear and precise statement of the parameters defining the class”⁴⁷ A number of other courts have also read Rule 23(c)(1)(B) to support an ascertainability requirement.⁴⁸

B. *Textual Clues that Undermine the Strict Approach to Ascertainability*

While language in Rule 23 lends modest support to the traditional ascertainability requirement, a number of textual clues and tools of statutory construction undermine the strict approach, which requires the class representative to demonstrate an administratively feasible mechanism for determining whether individuals qualify as class members at the time of certification and before, and independent of, the Rule 23(b)(3) superiority and manageability analyses. First, Rule 23(a) explicitly identifies four

⁴¹ *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 162 (3d Cir. 2015).

⁴² FED. R. CIV. P. 23(c)(1)(B); *see also* *Coffee & Lahav*, *supra* note 29, at 20 (describing the ascertainability requirement as “a gloss on the requirements of a class definition (found in Rule 23(c)(1)(B)) and of notice (found in 23(c)(2))”).

⁴³ *Accord* 1 RUBENSTEIN ET AL., *supra* note 1, § 3:2.

⁴⁴ FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment; *accord* *Wachtel v. Guardian Life Ins. Co.*, 453 F.3d 179, 184 (3d Cir. 2006).

⁴⁵ FED. R. CIV. P. 23(c)(1)(A) (requiring the court “[a]t an early practicable time after a person sues . . . as a class representative, . . . [to] determine by order whether to certify the action as a class action”).

⁴⁶ FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment (noting that, “an increasing number of courts require a party requesting class certification to present a ‘trial plan’ that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof” (citation omitted)).

⁴⁷ *Wachtel*, 453 F.3d at 187.

⁴⁸ 1 RUBENSTEIN ET AL., *supra* note 1, § 3:2, nn.9–10 (citing *Benito v. Indymac Mortg. Servs.*, No. 2:09-cv-001218, 2010 WL 2089297, at *2 (D. Nev. May 21, 2010); *Stanford v. Foamex L.P.*, 263 F.R.D. 156, 174–75 (E.D. Pa. 2009); *Riedel v. XTO Energy, Inc.*, 257 F.R.D. 494, 506 (E.D. Ark. 2009)).

prerequisites to class certification, but makes no mention of ascertainability or the need for an administratively feasible method of identifying class members. Under the *expressio unius est exclusio alterius* canon of construction, the express inclusion of these particular prerequisites in Rule 23(a) implies an intentional exclusion of other (unlisted) prerequisites, such as ascertainability.⁴⁹

Second, Rule 23(b)(3) states that, “The matters pertinent to [assessing predominance and superiority] *include*” but apparently are *not* limited to the four listed considerations.⁵⁰ As the Ninth Circuit Court of Appeals has noted, “[i]f the Rules Advisory Committee had intended to create a non-exhaustive list in Rule 23(a), it would have used similar language.”⁵¹ Thus, the difference in language used in Rules 23(a) and 23(b)(3) reinforces the conclusion that Rule 23(a)’s four express prerequisites constitute an exhaustive list, thereby freeing the class representative of any obligation to demonstrate an administratively feasible mechanism for determining whether individuals qualify as class members as an initial “free-standing” certification requirement.

Third, Rule 23(b)(3) explicitly requires the district court to consider “the likely difficulties in managing a class action” in assessing superiority.⁵² If Rule 23(a) were read to require an administratively feasible method of identifying class members, the manageability criterion in Rule 23(b)(3)(D) would be “largely superfluous.”⁵³ Such a result would be inconsistent with the canon that “[a]n interpretation that gives effect to every clause is generally preferable to one that does not.”⁵⁴ Thus, the text of Rule 23 appears to undermine the strong approach to ascertainability.

II. POLICY: THE RELATIVE MERITS OF THE TRADITIONAL AND STRICT APPROACHES TO ASCERTAINABILITY

The text of the current Rule does not resolve the more fundamental policy question, which is whether the class representative *should* be required to demonstrate that the class is ascertainable and, if so, the nature and timing

⁴⁹ See, e.g., *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1125 (9th Cir. 2017) (citing *Silver v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005)), *cert. denied*, 138 S. Ct. 313 (2017); cf. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (citing *expressio unius* and Rule 9(b)’s heightened pleading requirement to imply the lack of such a requirement in Rule 8(a)(2)).

⁵⁰ FED. R. CIV. P. 23(b) (emphasis added).

⁵¹ *Briseno*, 844 F.3d at 1126.

⁵² FED. R. CIV. P. 23(b)(3)(D).

⁵³ *Briseno*, 844 F.3d at 1126.

⁵⁴ See *Rep. of Ecuador v. Mackay*, 742 F.3d 860, 864 (9th Cir. 2014) (citation omitted); *Briseno*, 844 F.3d at 1126 (quoting *Mackay*); cf. *Coffee & Lahav*, *supra* note 29, at 24 (“In many cases, the predominance requirement does the analytical work that some courts are using the ascertainability requirement to do, but predominance has the benefit of being part of the Rule.”).

of the required showing. While lower federal courts have required a definite, clear, or ascertainable class for over fifty years,⁵⁵ in recent years some courts have imposed a far stricter ascertainability prerequisite, requiring (as an initial class certification prerequisite) an administratively feasible method for identifying the class members. Acknowledging that some courts eschew the term “ascertainability” altogether⁵⁶ and recognizing the difficulty of categorizing the approach taken by some courts,⁵⁷ this part of the article describes the two principal competing approaches to ascertainability and assesses them from a normative perspective. Section A describes the **traditional approach**, while Section B examines the **strict approach**. Section C, the heart of Part II, analyzes and assesses the policy rationales offered in support of these competing approaches to ascertainability.

A. *The Traditional Approach*

The traditional approach to ascertainability, advanced most thoughtfully by the Seventh Circuit in *Mullins v. Direct Digital, LLC*,⁵⁸ requires only “that a class must be defined clearly and that membership be defined by objective criteria, rather than by, for example, a class member’s state of mind.”⁵⁹ This approach focuses on the adequacy of the class definition itself, rather than on the potential difficulty of identifying class members.⁶⁰ In applying this traditional approach, courts require clarity and objectivity and reject overbroad class definitions or those that turn on success on the merits.⁶¹

⁵⁵ For early statements of the ascertainability requirement, see, for example, *DeBreaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam) (stating that the class must be defined and clearly ascertainable); *Giordano v. Radio Corp.*, 183 F.2d 558, 561 (3d Cir. 1950) (requiring that “members of the class . . . be capable of definite identification”); *Connell v. Higginbotham*, 305 F. Supp. 445, 449 (M.D. Fla. 1969) (holding that certification requires a proper representative and an ascertainable class), *aff’d in part and rev’d in part on other grounds*, 403 U.S. 207 (1971); *Baim & Blank v. Warren-Connelly Co.*, 19 F.R.D. 108, 110 (S.D.N.Y. 1956) (holding that there was no ascertainable class that could be certified).

⁵⁶ See, e.g., *Briseno*, 844 F.3d at 1124 n.3 (refusing to use the term ascertainability because of the varied meanings ascribed to it).

⁵⁷ While some courts, such as the Third and Seventh Circuit Courts of Appeals, typify one or the other of these two approaches, compare *Carrera v. Bayer Corp.*, 727 F.3d 300, 306–08 (3d Cir. 2013) (mandating a strict ascertainability requirement in rule 23), with *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016) (rejecting explicitly the idea that a heightened ascertainability applies to Rule 23), other courts’ approaches are more difficult to classify.

⁵⁸ *Mullins*, 795 F.3d at 657.

⁵⁹ *Id.*

⁶⁰ *Id.* at 659; see also NOV. 2015 AGENDA BOOK, *supra* note 15, at 117; Bone, *Justifying Class Action Limits*, *supra* note 8, at 923 (describing “weak” ascertainability as focused on the parameters of the class itself as opposed to the identities of the class members).

⁶¹ *In re Petrobras Sec.*, 862 F.3d 250, 266 (2d Cir. 2017), *petition for cert. filed sub. nom. Petroleo Brasileiro S.A. v. Univ. Superannuation Scheme Ltd.* (U.S. Nov. 1, 2017) (17-664); *Mullins*, 795 F.3d at 657, 659; NOV. 2015 AGENDA BOOK, *supra* note 15, at 31.

1. *Clarity*

Courts applying the traditional approach eschew class definitions that are vague, amorphous, or imprecise.⁶² Class definitions that incorporate inherently vague terms, such as “learning disabled,”⁶³ “nearby,”⁶⁴ “active in the peace movement,”⁶⁵ or “prompt,”⁶⁶ fail the traditional approach to ascertainability. Even if we knew a person’s IQ, physical distance from a stationary source of pollution, party affiliation, or time held in jail without a hearing, we would not know whether or not she were a member of any of these classes due to the inherent vagueness of the class definitions.⁶⁷ As Geoffrey Shaw notes, the problem here is not a lack of proof, but rather a lack of “conceptual discreteness.”⁶⁸

In addition to requiring conceptual clarity, courts applying the traditional approach often look for geographic or temporal delimiters.⁶⁹

⁶² *Mullins*, 795 F.3d at 659 (citations omitted); see also, e.g., Bone, *Justifying Class Action Limits*, *supra* note 8, at 923–24; JAMES W. MOORE ET AL., *MOORE’S FEDERAL PRACTICE—CIVIL* § 23.21 (2015); 7A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1760 (3d ed. 2015). For a sophisticated discussion of the epistemic and ontological forms of vagueness, see Shaw, *supra* note 8, at 2381–83.

⁶³ See, e.g., *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 495 (7th Cir. 2012) (identifying “indefiniteness” as an “obvious defect” in a class comprised of “disabled students who may have been eligible for special education but were not identified and remain unidentified” (emphasis omitted)); *Adashunas v. Negley*, 626 F.2d 600, 603–04 (7th Cir. 1980) (concluding that a proposed class of children with “learning disabilities” who were not properly identified or who did not receive special education was “so highly diverse and so difficult to identify that it is not adequately defined or nearly ascertainable”).

⁶⁴ See, e.g., *LaBauve v. Olin Corp.*, 231 F.R.D. 632, 663 (S.D. Ala. 2005) (concluding that, in a class action alleging mercury contamination, a subclass of owners of “‘nearby properties’ contaminated by surface water runoff” was too vague as there were no objective means of determining whether a property was “nearby” let alone “contaminated”); see also 1 RUBENSTEIN ET AL., *supra* note 1, § 3:3 (discussing *LaBauve*).

⁶⁵ See, e.g., *Hendrickson v. Phila. Gas Works*, 672 F. Supp. 823, 840–41 (E.D. Pa. 1987) (characterizing a proposed class of those “who have been or who in the future may be denied essential gas service for arbitrary and capricious reasons” as “so amorphous and broad as to defy definition”); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam) (concluding that a class defined as state residents who were “active in the peace movement does not constitute an adequately defined or clearly ascertainable class” (internal quotation marks omitted)).

⁶⁶ See, e.g., *Robinson v. Gillespie*, 219 F.R.D. 179, 183 (D. Kan. 2003) (rejecting a class definition that used the word “prompt” because it “is not an objective one which can be measured solely by reference to hours and minutes”).

⁶⁷ See, e.g., *Gonzalez v. Corning*, 317 F.R.D. 443, 505 (W.D. Pa. 2016) (decided by a court applying the strict approach and concluding that the terms “degranulation” and “deterioration” used to describe roof shingles in the class definition were too “subjective” and rendered the class “not ascertainable”), *appeal filed*, No. 16-2653 (3d Cir. June 2, 2016).

⁶⁸ Shaw, *supra* note 8, at 2381.

⁶⁹ See, e.g., *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 139 (1st Cir. 2012) (commenting on the relevance of “the class period” in assessing ascertainability); *Rodriguez v. Berrybrook Farms, Inc.*, 672 F. Supp. 1009, 1012 (W.D. Mich. 1987) (concluding that a class definition that “specifies a group of agricultural laborers during a specific time frame and at a specific location who were harmed in a specific way, satisfies the ‘precisely defined’ requirement”); cf. *Brecher v. Rep. of Argentina*, 806 F.3d 22, 25 &

Requiring specificity regarding geography, such as state residency or purchase of a product in a particular geographical area, may enable the district court to determine if the claims of all class members are governed by a single state's law, thereby reducing the likelihood that uncommon legal questions will predominate.⁷⁰ Likewise, imposing a temporal delimiter, such as a purchase within a particular time period, reduces the likelihood that some members of the class will be subject to individual statute of limitations defenses.⁷¹ In all events, temporal and geographic delimiters help define and clarify the scope of the class. As the Seventh Circuit put it in *Mullins*, “[t]o avoid vagueness, class definitions generally need to identify a particular group, harmed during a particular time frame, in a particular location, in a particular way.”⁷²

2. Objective Criteria

If courts applying the traditional approach to ascertainability require clarity and precision in class definitions, as a corollary they favor objective criteria in defining the class.⁷³ In lieu of vague and amorphous characteristics, such as “heavy” or “older” or “having supervisory responsibilities,” courts gauging ascertainability look for objective criteria, such as “weighing at least x pounds” or being “at least y years of age” or serving in positions with particular job titles.⁷⁴ As Geoffrey Shaw convincingly posits, while there may be challenges in identifying individuals who, for example, smoked x number of pack-years of a particular brand of

n.3 (2d Cir. 2015) (decided before *Petrobras* and focusing heavily on the lack of a temporal delimiter, while ostensibly requiring administrative feasibility).

⁷⁰ See, e.g., *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 538, 545 (C.D. Cal. 2012) (considering whether California law could govern the claims of nonresidents who had bought their cars outside the state, stating that the issue “affects the definition of the class and whether common issues predominate,” and certifying three different state-specific subclasses to avoid predominance problems).

⁷¹ See, e.g., *Brecher v. Rep. of Argentina*, 806 F.3d 22, 25 (2d Cir. 2015) (requiring “a defined class period or temporal limitation”); see also *Bynum v. Dist. of Columbia*, 214 F.R.D. 27, 32 (D.D.C. 2003) (stating that the temporal limits imposed in the proposed class definition make it easy for people to determine whether or not they fall within the scope of the proposed class).

⁷² *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 660 (7th Cir. 2015) (citations omitted); see also 1 RUBENSTEIN ET AL., *supra* note 1, § 3:3 (discussing *Mullins*).

⁷³ See, e.g., 1 RUBENSTEIN ET AL., *supra* note 1, § 3:3 (discussing courts’ preferences for objective criteria in class definitions); Bone, *Justifying Class Action Limits*, *supra* note 8, at 923 (describing the three constraints that the “weak ascertainability” approach places on class definitions).

⁷⁴ See, e.g., *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138–39 (1st Cir. 2012) (explaining that the objective standard of job titles makes the proposed class of “individuals . . . employed as baristas” during a given time period sufficiently defined); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 539 (6th Cir. 2012) (upholding plaintiff’s proposed class because of the objective criteria used to determine membership); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 640 (5th Cir. 2012) (holding that the use of the phrase “damaged thereby” does not pose an obstacle in establishing a class definition because it does not make class membership “not precise, objective, or presently ascertainable”).

cigarette, such an objective criterion is conceptually clear, whereas a class of “heavy smokers” is not.⁷⁵

Courts applying the traditional approach are particularly concerned with class definitions that turn on individuals’ states of mind,⁷⁶ such as individuals who were “discouraged” from applying for particular jobs or programs,⁷⁷ those who “fear[ed]” prosecution,⁷⁸ those who were “unaware” of particular risks,⁷⁹ or those who were “misled” or “deceived.”⁸⁰

Class definitions that incorporate subjective states of mind pose three distinct but related problems. First, many definitions that turn on state of mind lack the conceptual clarity and precision required in class definitions.⁸¹ Even the individuals themselves may not be able to tell whether they are class members because the subjective criteria employed—being “deceived” or “offended”—are simply too vague.⁸² Second, courts would have to undertake potentially time-consuming, individualized fact-finding to determine whether each prospective class member had the requisite state of mind, raising manageability concerns.⁸³ Third, since only the individual class member herself could know her thoughts and feelings, definitions that depend upon class members’ subjective states of mind may disadvantage defendants seeking to challenge class membership.⁸⁴

⁷⁵ Shaw, *supra* note 8, at 2382.

⁷⁶ See, e.g., 1 RUBENSTEIN ET AL., *supra* note 1, §§ 3:3, 3:5 (discussing the courts’ reluctance to allow class definitions that take into consideration a potential class member’s state of mind); 7A WRIGHT ET AL., *supra* note 62, § 1760 (listing cases in which courts rejected proposed class definitions based on the subjective state of mind inquiries they required).

⁷⁷ E.g., *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981).

⁷⁸ E.g., *Oldroyd v. Kugler*, 352 F. Supp. 27, 31 (D.N.J. 1972), *aff’d without op.*, 412 U.S. 924 (1973).

⁷⁹ E.g., *Kelecseny v. Chevron, U.S.A., Inc.*, 262 F.R.D. 660, 677 (S.D. Fla. 2009).

⁸⁰ E.g., *Oshana v. Coca-Cola Bottling Co.*, 225 F.R.D. 575, 580–81 (N.D. Ill. 2005), *aff’d*, 472 F.3d 506 (7th Cir. 2006).

⁸¹ See 1 RUBENSTEIN ET AL., *supra* note 1, § 3:5 (“So-called mental state classes may therefore frustrate fundamental due process tenets of class action litigation by making it difficult for a court to determine with any certainty who should receive notice, who will be bound by the judgment, and who should receive any relief obtained from the defendant.”).

⁸² *Accord id.* at § 3:5 (“Without sufficient objective criteria to rely upon, whether an individual is or is not a member of the class is left solely to their own desires and interests.”); Shaw, *supra* note 8, at 2379.

⁸³ See, e.g., *Mueller v. CBS, Inc.*, 200 F.R.D. 227, 233 (W.D. Pa. 2001) (“[D]etermining membership in the class would essentially require a mini-hearing on the merits of each class member’s case, which itself renders a class action inappropriate for addressing the claims at issue.”); Shaw, *supra* note 8, at 2380 (noting that courts sometimes tackle “subjective definitions under the heading of manageability”).

⁸⁴ This concern underlies the strict approach to ascertainability and will be explored more fully *infra* Parts II.B & C. See also 1 RUBENSTEIN ET AL., *supra* note 1, § 3:5 (discussing how mental state classes frustrate the abilities of courts to determine who should or should not be a member of a particular class).

3. *Breadth*

Courts applying the traditional approach to ascertainability seek to ensure that the class is not defined so broadly as to encompass individuals “who have little connection with the claim being litigated; rather, it must be restricted to individuals who are raising the same claims or defenses as the representative.”⁸⁵ Stated differently, courts are skeptical of overinclusive class definitions that encompass both those that have claims against the defendant and those that do not.⁸⁶ For example, in one case, the plaintiff sued video game manufacturers, claiming that a video game contained an animation defect that barred the player from progressing in the game.⁸⁷ The named plaintiff, who had experienced the defect only after 450 hours of play, alleged violations of state consumer protection statutes and common law claims. The plaintiff sued on behalf of all persons or entities residing in the United States who had purchased the game—“presumably from anyone, anywhere, at any time—whether or not they ever were injured by (or experienced) the alleged [a]nimation [d]efect.”⁸⁸ The class definition was overbroad in at least two respects. First, the proposed class definition included stores that purchased and then resold the game, at a profit, without ever having played the game.⁸⁹ Not only would such stores have suffered no financial loss, but they would have had no claim under the state consumer-protection laws.⁹⁰ Second, the class definition included individuals who may have purchased the game but had no complaints about it (while excluding those who received the game as a gift but who had experienced the alleged defect).⁹¹

In another example, a plaintiff filed a class action alleging that the state police were engaged in racial profiling on the New Jersey Turnpike.⁹² The proposed class definition included all persons of color “who were stopped,

⁸⁵ 7A WRIGHT ET AL., *supra* note 62, § 1760 (footnote omitted).

⁸⁶ *See, e.g.,* Oshana v. Coca-Cola Co., 472 F.3d 506, 514 (7th Cir. 2006) (expressing concern that the proposed class “could include millions who were not deceived [by Coca-Cola’s advertising] and thus had no grievance under [the state law]”); DeBreaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970) (questioning whether conduct by the Houston police could have chilled antiwar activism in other parts of the state and concluding that the class definition was therefore “overbroad” to the extent it included Texan peace activists outside of Houston); Vigus v. S. Ill. Riverboat/Casino Cruises, Inc., 274 F.R.D. 229, 234–35 (S.D. Ill. 2011) (expressing concern over a proposed class definition that would include all recipients of a prerecorded message because a number of them may have had no issues with receiving the messages and therefore would have had no cause of action individually).

⁸⁷ *Walewski v. Zenimax Media, Inc.*, 502 Fed. Appx. 857, 859 (11th Cir. 2012) (per curiam; not for publication).

⁸⁸ *Id.* at 861 (citing *Walewski v. Zenimax Media, Inc.*, No. 6:11-cv-1178-Orl-28DAB, 2012 WL 834125, at *4 (M.D. Fla. Jan. 30, 2012)).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *White v. Williams*, 208 F.R.D. 123, 125 (D.N.J. 2002).

detained, and/or searched” during a specified period by the state police.⁹³ The court deemed the class definition to be “amorphous,” “vague,” and “overly broad,” and as having “nearly no parameters.”⁹⁴ In terms of overbreadth, the court was particularly concerned that the definition did not “attempt to distinguish between persons who were breaking a traffic law when they were stopped and those who were not” or “between those who received citations and those who did not.”⁹⁵

Two further points should be made about overinclusiveness before moving on. First, in analyzing overbreadth, courts sometimes distinguish between classes whose members may ultimately fail to prove that they suffered harm on the one hand, and classes defined so broadly as to include large numbers of class members who could not have been harmed by the defendant’s conduct on the other.⁹⁶ In the former cases, the class may be sufficiently well defined but simply fail to prove the merits of its claim,⁹⁷ whereas in the latter cases, overinclusiveness may render the class unascertainable.⁹⁸ The overbreadth analysis should weed out only classes likely to include “a great many” who could not have been injured by the defendants’ conduct, not well-defined classes with potentially losing claims.⁹⁹

Second, while courts applying the traditional approach to ascertainability often examine class definitions for overinclusiveness, not all courts view the inclusion of some uninjured class members as fatal. As the First Circuit Court of Appeals explained,

[I]t is difficult to understand why the presence of uninjured class members at the preliminary stage should defeat class certification. Ultimately, the defendants will not pay, and the class members will not recover, amounts attributable to uninjured class members, and judgment will not be entered in favor of such members. Some number of uninjured class members will receive a class notice, but the district court can easily assure that defendants will not pay for notice to

⁹³ *Id.* at 129.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See, e.g.,* *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 823–24 (7th Cir. 2012) (concluding that “an argument that some class members’ claims will fail on the merits . . . [is] a fact generally irrelevant to . . . class certification”; distinguishing the argument that “the class . . . is fatally overbroad because it contains members who could not have been harmed by [defendants’ challenged conduct]” (citations omitted)); *see, e.g.,* *Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 455 (S.D. Cal. 2014) (holding that potential for presence of uninjured plaintiffs in the class “would not affect the Court’s analysis of *ascertainability*,” while “classes that have been found to be overbroad generally include members who were never exposed to the alleged [harm] at all”).

⁹⁷ *Messner*, 669 F.3d at 824 (quoting *Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010)).

⁹⁸ *Id.* (quoting *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009)).

⁹⁹ *Id.* at 825 (quoting *Kohen*, 571 F.3d at 677) (conceding that “[t]here is no precise measure for ‘a great many’”).

uninjured members. At worst the inclusion of some uninjured class members is inefficient, but this is counterbalanced by the overall efficiency of the class action mechanism. Moreover, excluding all uninjured class members at the certification stage is almost impossible in many cases, given the inappropriateness of certifying what is known as a “fail-safe class”—a class defined in terms of the legal injury.¹⁰⁰

4. Avoidance of Fail-Safe Classes

In an effort to avoid overbroad class definitions, class representatives sometimes err in the other direction by defining the class to include only those with meritorious claims against the defendant. In fact, as the First Circuit Court of Appeals has recognized, “there is an almost inevitable tension between excluding all non-injured parties from the defined class, and including all injured parties in the defined class.”¹⁰¹ But while courts applying the traditional approach often reject overinclusive class definitions, they also reject as “not properly defined”¹⁰² so-called “fail-safe” classes—those defined to include only persons with successful claims on the merits.¹⁰³ For example, in a class action filed against a title insurance company, the plaintiffs sought to represent all persons who had purchased title insurance from the defendant in connection with mortgage refinancings and *were entitled* to a reduced rate under state law but did not receive it.¹⁰⁴ Affirming a district court order that declined to certify the class, the Sixth Circuit Court of Appeals concluded that a class of purchasers “entitled to relief” was “an improper fail-safe class that shield[ed] the putative class members from receiving an adverse judgment. Either the class members win

¹⁰⁰ *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21–22 (1st Cir. 2015) (footnotes omitted); *see, e.g., In re Deepwater Horizon*, 785 F.3d 1003, 1015, 1018 (5th Cir. 2015) (upholding adequacy and ascertainability determinations for a class notwithstanding the court’s acknowledgement that it “may include persons who have not been injured by the defendant’s conduct”).

¹⁰¹ *In re Nexium*, 777 F.3d at 22.

¹⁰² *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 660 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016).

¹⁰³ *See, e.g., id.* (describing “fail-safe classes” as problematic because losing plaintiffs are necessarily defined out of the class); *In re Nexium*, 777 F.3d at 22 (expressing doubt that defining a fail-safe class “will be feasible in many cases”); *Young v. Nationwide Mut. Ins.*, 693 F.3d 532, 538 (6th Cir. 2012) (declaring impermissible those classes that “cannot be defined until the case is resolved on its merits”); *Messner*, 669 F.3d at 825 (describing fail-safe classes as “improper”); *see also* 1 RUBENSTEIN ET AL., *supra* note 1, § 3:6 (“Class definitions that require a court to decide the merits of prospective individual class members’ claims to determine class membership . . . run afoul of the definiteness requirement.” (footnote omitted)); 7A WRIGHT ET AL., *supra* note 62, § 1760 n.11 (explaining the requirement that “the proposed class definition must not depend on . . . the merits of the case”). *But see* *Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)*, 695 F.3d 360, 370 (5th Cir. 2012) (concluding that Fifth Circuit precedent “rejects the fail-safe class prohibition”).

¹⁰⁴ *Randleman v. Fid. Nat’l Title Ins. Co.*, 646 F.3d 347, 350 (6th Cir. 2011).

or, by virtue of losing, they are not in the class, and therefore, not bound by the judgment.”¹⁰⁵

Courts applying the traditional approach reject fail-safe classes for two principal reasons. First, a fail-safe class denies the defendant the opportunity to secure a judgment in its favor that is binding on the class. If the class proves its claims, all class members benefit; if the defendant prevails, no class members are bound because the class was defined to include only those with meritorious claims against the defendant.¹⁰⁶ Thus, courts view fail-safe classes as unfair to defendants.¹⁰⁷ Second and related, because a judgment in the defendant’s favor would not bind the absent class members in a fail-safe class, the litigation would fail to achieve one of the principal goals of class action litigation: the efficient and final resolution of the claims of all class members.¹⁰⁸

In sum, the principal requirements imposed by courts adopting the traditional approach to ascertainability are clarity, objective criteria, attention to breadth, and avoidance of fail-safe classes. Let us now turn to the strict approach, which imposes far more rigorous certification requirements.

B. *The Strict Approach*

The strict approach to ascertainability has been most forcefully advocated by the United States Court of Appeals for the Third Circuit. The strict approach not only requires that a class be defined with reference to “objective criteria”¹⁰⁹ (like the traditional approach does) but also that there

¹⁰⁵ *Id.* at 352 (footnote and citations omitted).

¹⁰⁶ *Messner*, 669 F.3d at 825; *see also, e.g., Young*, 693 F.3d at 538 (defining fail-safe classes as impermissible because losing defendants are not bound by the judgment (citing *Randleman*, 646 F.3d at 352)).

¹⁰⁷ *See, e.g., Mullins*, 795 F.3d at 660 (finding fail-safe class certification to “raise[] an obvious fairness problem for the defendant” because losing plaintiffs can “subject the defendant to another round of litigation” (citing *Geller*, *supra* note 22)); *Spread Enters. v. First Data Merch. Servs. Corp.*, 298 F.R.D. 54, 69 (E.D.N.Y. 2014) (holding that the proposed fail-safe class “should not be certified because it is unfair to defendants” (citation omitted)).

¹⁰⁸ *See* 1 RUBENSTEIN ET AL., *supra* note 1, § 3:6 (identifying problems with “fail-safe” classes and noting that they fail to finally resolve the claims of all class members, which is a goal of class action litigation). Courts may also reject fail-safe classes because class definitions that require them to determine the ultimate question of the defendant’s liability in order to determine whether a person qualifies as a class member may be “administratively infeasible, as the inquiry into class membership would require holding countless hearings resembling ‘mini-trials.’” *Id.* (footnote omitted). Courts applying the strict approach more typically raise this concern.

¹⁰⁹ *E.g., Byrd v. Aaron’s Inc.*, 784 F.3d 154, 163 (3d Cir. 2015); *Carrera v. Bayer Corp.*, 727 F.3d 300, 305 (3d Cir. 2013); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592–93 (3d Cir. 2012).

be “a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.”¹¹⁰

By imposing the second requirement—“administrative feasibility”—courts applying the strict approach heighten the ascertainability test in four related ways: (1) they require the plaintiff to offer evidence to prove that the proposed method of identifying class members will be successful; (2) they require such proof at the outset of the case, as a certification prerequisite, rather than later in the case, when devising the claims administration process; (3) they require proof of administrative feasibility as an independent certification prerequisite, rather than as part of the Rule 23(b)(3) superiority and manageability analysis; and (4) they reject class members’ affidavits, standing alone, as proof of class membership. Because the Third Circuit’s decision in *Carrera* exemplifies this approach, much of the discussion that follows is drawn from its opinion.

1. Heightened Ascertainability Requirements

According to the Third Circuit and other courts adopting the strict approach, to be administratively feasible, the method for identifying class members must be “a manageable process that does not require much, if any, individual factual inquiry.”¹¹¹ Class certification is “inappropriate” unless the class members can be identified “without extensive and individualized fact-finding or ‘mini-trials.’”¹¹² It is not enough that the plaintiff has a plan to identify the absent class members; the plaintiff must offer “*evidentiary support* that the [proposed] method will be *successful*.”¹¹³ While recognizing that the class representative does not actually have to identify the absent class members at the certification stage, courts adopting the strict approach require the representative “to show that class members *can* be identified.”¹¹⁴

Rather than defer resolution of the details and mechanics of class member identification until later in the litigation—for example, when the claims administration process is devised—courts adopting the strict approach require evidence of administrative feasibility at the outset of the litigation, as a certification prerequisite. The plaintiff must prove “the class is ‘*currently* and readily ascertainable’”;¹¹⁵ so the “trial court cannot take a wait-and-see approach to . . . any . . . requirement of Rule 23.”¹¹⁶ As the

¹¹⁰ *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 442 (3d Cir. 2017) (citation and internal quotations omitted); *Byrd*, 784 F.3d at 163 (citation omitted); *Hayes*, 725 F.3d at 355 (citation omitted).

¹¹¹ *Carrera*, 727 F.3d at 307–08 (quoting 1 RUBENSTEIN ET AL., *supra* note 1, § 3:3).

¹¹² *Id.* at 305 (quoting *Marcus*, 687 F.3d at 593).

¹¹³ *Id.* at 306–07 (emphasis added).

¹¹⁴ *Id.* at 308 n.2 (emphasis added).

¹¹⁵ *Id.* at 306 (quoting *Marcus*, 687 F.3d at 593) (emphasis added).

¹¹⁶ *See Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 358 (3d Cir. 2013) (discussing numerosity in particular).

Third Circuit has stated, “[a] critical need of the trial court *at certification* is to determine how the case will be tried, including how the class is to be ascertained.”¹¹⁷ Moreover, the strict approach appears to treat ascertainability as a freestanding requirement, considered before and independent of the Rule 23(b)(3) superiority or manageability analysis.¹¹⁸

While apparently open to reliance upon “company databases,”¹¹⁹ “the defendants’ records,”¹²⁰ third-party “retailer records,”¹²¹ or other “reliable, administratively feasible alternative[s]”¹²² to identify class members, courts adopting the strict approach are vigilant in protecting the defendant’s opportunity to “challenge the reliability of those records, perhaps by deposing a corporate record-keeper.”¹²³ They are particularly leery of affidavits offered to prove class membership, deriding methods

that would amount to no more than ascertaining [class membership] by potential class members’ say so. For example, simply having potential class members submit affidavits . . . may not be proper or just Forcing [defendants] to accept as true absent persons’ declarations that they are members of the class, without further indicia of reliability, would have serious due process implications.¹²⁴

Briefly elaborating, the Third Circuit explained that just as the “defendant in a class action has a due process right to raise individual challenges and defenses to claims,” so does the defendant have “a similar, if not the same, due process right to challenge the proof used to demonstrate class membership Ascertainability provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership.”¹²⁵

¹¹⁷ *Carrera*, 727 F.3d at 307 (citations and internal quotation marks omitted).

¹¹⁸ *See, e.g., id.* at 306–12 (discussing ascertainability independently, rather than as part of the Rule 23(b)(3) superiority or manageability analysis); *see also* *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 590–94 (3d Cir. 2012) (discussing ascertainability in a separate section entitled, “Preliminary Matters,” rather than as part of the Rule 23(b)(3) analysis).

¹¹⁹ *Marcus*, 687 F.3d at 593 (citations omitted); *accord* *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 437–38 n.1 (3d Cir. 2017) (emphasizing the court’s “own view of the centrality of the database”).

¹²⁰ *Carrera*, 727 F.3d at 306 (quoting *Marcus*, 687 F.3d at 594).

¹²¹ *Id.* at 308.

¹²² *Id.* at 304 (quoting *Marcus*, 687 F.3d at 594).

¹²³ *Id.* at 308 (footnote omitted).

¹²⁴ *Id.* at 306 (quoting *Marcus*, 687 F.3d at 594); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013) (quoting *Marcus*, 687 F.3d at 594); *see also Hayes*, 725 F.3d at 356 (concluding that the “petition for class certification will founder if the only proof of class membership is the say-so of putative class members”).

¹²⁵ *Carrera*, 727 F.3d at 307 (citation omitted).

2. *An Illustrative Case*

As an illustration of the strict approach and its heightened requirements, consider *Carrera v. Bayer Corp.*, the Third Circuit opinion that set the “high-water mark”¹²⁶ for the strict approach. In that case, Gabriel Carrera filed a class action against Bayer, alleging that it had falsely advertised its One-A-Day WeightSmart vitamin by claiming it had metabolism-enhancing effects.¹²⁷ Bayer had not sold the product directly to consumers; instead, it sold it to retail stores, which had sold it to consumers.¹²⁸ After the district court certified a class of Florida purchasers,¹²⁹ Bayer petitioned for interlocutory appeal, challenging the ascertainability of the class, given Bayer’s lack of consumer purchase records and the unlikelihood that the purchasers themselves had documentary proof of purchase.¹³⁰

Carrera argued that the class could be ascertained by examination of the sales records of retail stores, like CVS, that had sold the vitamin to consumers and by the submission of affidavits by the purchasers.¹³¹ Regarding retail records, Carrera argued that retail pharmacies track sales made with loyalty or rewards cards as well as online sales. While conceding that “retailer records may be a perfectly acceptable method of proving class membership,” here the court found “no evidence that a single purchaser [of the challenged product] could be identified using records of customer membership cards or records of online sales. There is no evidence that retailers even have records for the relevant period.”¹³² It is not clear from the opinion whether the plaintiff merely failed to proffer the records that would have identified purchasers of the defendant’s product, or whether the records had been examined but failed to reveal the identities of any purchasers.

The court also rejected reliance on affidavits from class members to determine class membership.¹³³ Even though the size of each class member’s claim would have been quite small—the vitamins at issue were much less expensive than the tires at issue in *Marcus*—and therefore class members had little incentive to submit fraudulent affidavits, the court nevertheless concluded that the defendant “must be able to challenge class membership.”¹³⁴ And even though the defendant’s total liability would not

¹²⁶ *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 662 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016).

¹²⁷ *Carrera*, 727 F.3d at 304.

¹²⁸ *Id.*

¹²⁹ *Carrera v. Bayer Corp.*, No. 08-4716 (JLL), 2011 WL 5878376 (D.N.J. Nov. 22, 2011), *vacated and remanded*, 727 F.3d 300 (3d Cir. 2013).

¹³⁰ *Carrera*, 727 F.3d at 304.

¹³¹ *Id.*

¹³² *Id.* at 308–09.

¹³³ *Id.* at 305.

¹³⁴ *Id.* at 309.

have depended upon the number or veracity of the affidavits submitted,¹³⁵ the court expressed concern that fraudulent claims could dilute the value of other class members' claims and expose the defendant to collateral attacks by absentees arguing that the class representative's lack of concern for dilution demonstrated a lack of adequate representation.¹³⁶ The court was also deeply skeptical that a model to screen out fraudulent claims could help render the class ascertainable because the trial court could not "actually see the model in action" at the time it had to determine ascertainability—i.e., at the certification stage.¹³⁷

3. *The Third Circuit's Modest Adjustments*

Since deciding *Carrera* in 2013, the Third Circuit has made several modest adjustments to the strict approach to ascertainability, recasting the inquiry as a "narrow" one.¹³⁸ First, in *Byrd v. Aaron's Inc.*, the Third Circuit clarified that a class action plaintiff need not actually *identify* all class members at the time of certification; instead she "need only show that 'class members *can* be identified.'" ¹³⁹ Thus, the court claimed that "there is no records requirement" that each class member's name be known at the time of certification.¹⁴⁰ Second, it declined to "engraft an 'under-inclusivity' standard onto the ascertainability requirement."¹⁴¹ In other words, the ascertainability requirement does not require the class to include *all* individuals potentially harmed by the defendant's conduct; any injured individuals excluded from the class would not be bound by the judgment.¹⁴² Third, the *Byrd* court acknowledged that "[t]here will always be some level of inquiry required to verify that a person is a member of a class . . ." ¹⁴³ Thus, a class may be ascertainable and hence certifiable even if the district court has to undertake *some* inquiry to determine whether individuals qualify as class members.¹⁴⁴ The court reinforced this point in *In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation*, where it

¹³⁵ The plaintiff argued that the defendant's liability under the Florida deceptive practices statute would "not increase or decrease based on the affidavits submitted," but rather would be based upon the amount of the product the defendant had sold in the state. *Id.* at 309–10.

¹³⁶ *Id.* at 310.

¹³⁷ *Id.* at 311.

¹³⁸ *Byrd v. Aaron's Inc.*, 784 F.3d 154, 165 (3d Cir. 2015).

¹³⁹ *Id.* at 163 (quoting *Carrera*, 727 F.3d at 308 n.2).

¹⁴⁰ *Id.* at 164; *see also* *City Select Auto Sales Inc. v. BMW Bank of N. Am., Inc.*, 867 F.3d 434, 441 (3d Cir. 2017) (stating that "[p]laintiff need not, at the class certification stage, demonstrate that a single record, or set of records, conclusively establishes class membership" (citing *Byrd*, 784 F.3d at 163)).

¹⁴¹ *Byrd*, 784 F.3d at 167.

¹⁴² *Id.*

¹⁴³ *Id.* at 170.

¹⁴⁴ *Id.* at 171 ("Certainly, *Carrera* does not suggest that *no* level of inquiry as to the identity of class members can ever be undertaken."); *accord* *City Select Auto*, 867 F.3d at 441.

affirmed a class certification order even though the district court would have to consult bank records, “and then follow a few steps to determine whether [each prospective class member were] the real party in interest.”¹⁴⁵

Finally, in *City Select Auto Sales Inc. v. BMW Bank of North America Inc.*, the Third Circuit’s most recent pronouncement on ascertainability,¹⁴⁶ the court explained that its “ascertainability precedents do not categorically preclude affidavits from potential class members, *in combination with [the defendant’s] database*, from satisfying the ascertainability standard,”¹⁴⁷ apparently conceding that “[a]ffidavits, *in combination with records* or other reliable and administratively feasible means, can meet the ascertainability standard.”¹⁴⁸ In particular, the court left open the possibility that the class *might* be ascertainable, depending upon “the level of individualized fact-finding” that would be required and the “amount of over-inclusiveness, if any,” of the defendant’s database.¹⁴⁹

Welcome though these modest adjustments to the Third Circuit’s approach may be, they do not limit the defining requirements of the strict approach: the court continues to require a “reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition”;¹⁵⁰ it continues to require the plaintiff to offer evidence that the class is “*currently* . . . ascertainable”;¹⁵¹ it continues to treat the requirement as a “prerequisite” to class certification, separate from Rule 23(b)(3)’s predominance requirement;¹⁵² and perhaps most significantly, despite its statement that “there is no records requirement,”¹⁵³ the Third Circuit continues to require “‘objective records’ that can ‘readily identify’ the[] class members.”¹⁵⁴ Notwithstanding its most recent concession

¹⁴⁵ *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 397 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1167 (2016).

¹⁴⁶ In a later decision, *Luppino v. Mercedes Benz USA*, the Third Circuit affirmed a district court’s denial of class certification. While the district court had “found the class was not ascertainable,” the Third Circuit affirmed on other grounds, declining to discuss ascertainability. *Luppino v. Mercedes Benz USA*, No. 16-3762, 2017 WL 6015698, at *2 (3d Cir. Dec. 5, 2017).

¹⁴⁷ *City Select Auto*, 867 F.3d at 440 (emphasis added).

¹⁴⁸ *Id.* at 441 (emphasis added) (citing *Byrd*, 784 F.3d at 170–71).

¹⁴⁹ *Id.* at 442 & n.4.

¹⁵⁰ *Byrd*, 784 F.3d at 170 (citation and internal quotation marks omitted); *accord City Select Auto*, 867 F.3d at 441; *In re Cmty. Bank*, 795 F.3d at 396.

¹⁵¹ *City Select Auto*, 867 F.3d at 439 (emphasis added) (citation and internal quotation marks omitted); *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 396 (3d Cir. 2015) (emphasis added) (citation and internal quotation marks omitted).

¹⁵² *Byrd*, 784 F.3d at 162, 164; *accord City Select Auto*, 867 F.3d at 439.

¹⁵³ *Byrd*, 784 F.3d at 164.

¹⁵⁴ *Id.* at 169 (citations omitted); *see id.* at 173 n.4 (Rendell, C.J., concurring) (maintaining that the very reason “the class in *Carrera* failed the ascertainability test [was] because there were no records from which the class members could be ascertained with certainty” (citation omitted)); *see also* Jonah M. Knobler & J. Taylor Kirklín, *City Select v. BMW: Ascertainability is Alive and Well in the Third Circuit*, BLOOMBERG BNA CLASS ACTION LITIG. REPORT (Sept. 22, 2017) (maintaining that notwithstanding its

regarding the potential use of affidavits “in combination with records” to demonstrate ascertainability, the Third Circuit continues to emphasize the “centrality of the [defendant’s] database,”¹⁵⁵ and maintain that “affidavits from potential class members, standing alone, without ‘records to identify class members or a method to weed out unreliable affidavits,’ will not constitute a reliable and administratively feasible means of determining class membership.”¹⁵⁶ Lower courts within the Third Circuit have denied class certification on ascertainability grounds if class members lacked receipts or other records of their purchases even after *Byrd* and *In re Community Bank*, demonstrating their understanding that the core requirements of the Third Circuit’s strict approach have not been eased significantly.¹⁵⁷

With this understanding of the principal differences between the traditional and strict approaches to ascertainability under our belts, let us now consider the policies underlying these different approaches.

C. Policies Underlying the Traditional and Strict Approaches to Ascertainability

1. Efficiency and Administrative Convenience

Virtually all courts that address ascertainability mention the need to minimize the administrative burdens associated with class action litigation. Courts applying the traditional approach to ascertainability thus require objective criteria for class membership to avoid time-consuming, individualized fact-finding to determine whether individuals qualify for class membership.¹⁵⁸ Likewise, courts adopting the strict approach require a

recent decision in *City Select*, “the ‘heightened’ ascertainability test is alive and well in the Third Circuit”).

¹⁵⁵ *City Select Auto*, 867 F.3d at 437–38 n.1.

¹⁵⁶ *Id.* at 441 (citing *Byrd*, 784 F.3d at 171). Moreover, “the *City Select* court did not hold that affidavits *would in fact* render the putative class ascertainable. It expressly left open the possibility that, even in combination with the database, affidavits might still flunk the test.” Knobler & Kirklín, *supra* note 154, at 3; see *City Select Auto*, 867 F.3d at 442 & n.4.

¹⁵⁷ See, e.g., *Jarzyna v. Home Props., L.P.*, 321 F.R.D. 237, at 244 (E.D. Pa. 2017) (discussing the difficulty of identifying tenants who were charged late fees); *Kotsur v. Goodman Glob., Inc.*, No. 14-1147, 2016 WL 4430609, at *6 (E.D. Pa. 2016) (concluding that the plaintiff’s proposed method of determining whether putative class members were within the class definition was not “reliable and administratively feasible”); *In Re Processed Egg Prods. Antitrust Litig.*, 312 F.R.D. 124, 138–39 (E.D. Pa. 2015) (discussing the difficulty of ascertaining the purchasers of eggs since there were no objective records).

¹⁵⁸ See, e.g., *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 495–96 (7th Cir. 2012) (discussing the indefiniteness of a class of disabled students who were “not identified and remain unidentified”); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538–39 (6th Cir. 2012) (positing that a court must be able to “resolve the question of whether class members are included or excluded from the class by objective criteria.”); *Bennett v. Hayes Robertson Grp., Inc.*, 880 F. Supp. 2d 1270, 1278 (S.D. Fla. 2012) (discussing permissible defining criteria); *Mueller v. CBS, Inc.*, 200 F.R.D. 227, 233 (W.D. Pa. 2001) (identifying problems with the plaintiffs’ proposed class definition); see also 1 JOSEPH M. MCLAUGHLIN,

reliable and administratively feasible means of identifying class members to avoid individualized fact-finding or “mini-trials.”¹⁵⁹ Since one of the principal goals of the class action is efficiency,¹⁶⁰ it would be counterproductive if courts had to conduct time-consuming, individualized hearings to determine whether each putative class member in fact qualified for class membership.

While courts applying both approaches consider efficiency and administrative convenience, they differ in terms of the *timing* and *independence* of the ascertainability analysis as well as the *weight* they accord it. The Third Circuit, which applies the strict approach, emphasizes that “[a]scertainability mandates a rigorous approach *at the outset*”¹⁶¹ In *Byrd v. Aaron’s Inc.*, decided less than two years after *Carrera*, the Third Circuit added that the ascertainability analysis should not be “infuse[d] . . . with other class-certification requirements.”¹⁶² Thus, the Third Circuit appears to treat ascertainability and administrative feasibility as questions to be addressed *prior to* and *independent of* the other Rule 23 requirements.¹⁶³

Unlike the Third Circuit, the Seventh Circuit, which follows the traditional approach, urges trial courts to defer analysis of administrative convenience until they assess superiority and manageability under Rule 23(b)(3).¹⁶⁴ Doing so offers several important benefits, according to the Seventh Circuit. First, it avoids rendering the manageability prong of Rule 23(b)(3) unnecessary. In the Seventh Circuit’s view, if a trial court

MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE § 4:2 (14th ed. 2017) (explaining that individualized scrutiny of a class is counter to “the requirement of objective ascertainability”).

¹⁵⁹ *Karhu v. Vital Pharm., Inc.*, 621 Fed. App’x 945, 949 (11th Cir. 2015); *Carrera v. Bayer Corp.*, 727 F.3d 300, 305 (3d Cir. 2013); *Marcus v. BMW N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012).

¹⁶⁰ MCLAUGHLIN, *supra* note 158. The class action vehicle fosters efficiency when “plaintiffs’ claims are large enough to justify individual lawsuits,” and Rule 23 “provid[es] a vehicle for the prosecution of many individual claims in a single positive-value class action” Rhonda Wasserman, *Tolling: The American Pipe Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 819 (2006). With respect to negative-value class actions, class actions under Rule 23 serve a different function—they provide access to court by permitting claimants to “pool their resources and spread litigation costs among a large group of claimants.” *Id.* (footnote omitted).

¹⁶¹ *Carrera*, 727 F.3d at 307.

¹⁶² 784 F.3d 154, 165 (3d Cir. 2015).

¹⁶³ *See id.* (Rendell, C.J., concurring) (chastising the Third Circuit majority for putting “the class action cart before the horse”); *see also* MCLAUGHLIN, *supra* note 158 (explaining the additional ascertainability requirement).

¹⁶⁴ *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 663 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016); *see also In re Petrobras Sec.*, 862 F.3d 250, 268 (2d Cir. 2017) (reiterating the Seventh Circuit’s ascertainability criteria), *petition for cert. filed sub. nom. Petroleo Brasileiro S.A. v. Universities Superannuation Scheme Ltd.* (U.S. Nov. 1, 2017) (17-664). Under Rule 23(b)(3), the court may certify a class if the Rule 23(a) requirements are met, the common questions predominate over the individual ones, and “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” FED. R. CIV. P. 23(b)(3). In assessing superiority, the district court should consider “the likely difficulties in managing a class action.” FED. R. CIV. P. 23(b)(3)(D).

were to assess administrative convenience as part of an independent ascertainability analysis and insist upon proof of a “reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition”¹⁶⁵ at the outset, it would render the manageability prong of Rule 23(b)(3) superfluous.¹⁶⁶

Second, deferral facilitates consideration of administrative convenience in the context of the other costs and *benefits* of the class action.¹⁶⁷ The order and separateness of its treatment have practical consequences:

When administrative inconvenience is addressed as a matter of ascertainability, courts tend to look at the problem in a vacuum, considering only the administrative costs and headaches of proceeding as a class action. But when courts approach the issue as part of a careful application of Rule 23(b)(3)’s superiority standard, they must recognize both the costs *and benefits* of the class device.

Rule 23(b)(3)’s superiority requirement, unlike the freestanding ascertainability requirement, is comparative: the court must assess efficiency with an eye toward “other available methods.” In many cases where the heightened ascertainability requirement will be hardest to satisfy, there realistically is no other alternative to class treatment.

This does not mean, of course, that district courts should automatically certify classes in these difficult cases. But it does mean that before refusing to certify a class that meets the requirements of Rule 23(a), the district court should consider the alternatives as Rule 23(b)(3) instructs rather than denying certification because it may be challenging to identify particular class members.¹⁶⁸

Negative-value consumer class actions are often not just “superior to other available methods for fairly and efficiently adjudicating the

¹⁶⁵ *Byrd*, 784 F.3d at 163 (citing *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013); *Marcus v. BMW N. Am., LLC*, 687 F.3d 583, 593–94 (3d Cir. 2012)).

¹⁶⁶ *Mullins*, 795 F.3d at 663 (citing Luks, *supra* note 22, at 2395); *supra* Part I.B.

¹⁶⁷ *Mullins*, 795 F.3d at 663; *see also, e.g.*, 7AA WRIGHT ET AL., *supra* note 62, at § 1780 (explaining that administrative problems must be “weighed against the benefits in maintaining the action under rule 23”); Bone, *Justifying Class Action Limits*, *supra* note 8, at 934 (stating that the management cost of class certification “must be balanced against the benefits of a class action”); Coffee & Lahav, *supra* note 29, at 25 (positing that courts “prefer considering these issues as part of the 23(b)(3) analysis rather than as a separate heightened ascertainability requirement [because] the structure of the Rule permits balancing . . . whereas the ascertainability requirement . . . does not”).

¹⁶⁸ *Mullins*, 795 F.3d at 663–64 (emphasis in original) (citations omitted); *accord City Select Auto Sales Inc. v. BMW Bank N. Am. Inc.*, 867 F.3d 434, 448 (3d Cir. 2017) (Fuentes, C.J., concurring) (rejecting a “separate manageability requirement within ascertainability”).

controversy”;¹⁶⁹ they are the *only* available method for resolving claims worth less, per claimant, than the costs of litigation.¹⁷⁰ Since a majority of federal class actions settle,¹⁷¹ and since the terms of the settlement agreements may alleviate some of the courts’ administrative concerns, it often will make sense for trial courts to “wait and see” how serious the administrative problems will be, in light of information gleaned during the pendency of the actions, including “available records, response rates, and other relevant factors.”¹⁷² Burdening the class representative with the cost of proving an administratively feasible method for identifying class members at the *outset* of the litigation may sound the death knell for certain class actions, thereby allowing some defendants to escape all liability for wrongdoing.¹⁷³

Courts applying the traditional and strict approaches to ascertainability not only assess administrative convenience at different *times* in the analysis; more importantly, they also assign it different *weight*. Under the Third Circuit’s strict approach, if the plaintiff lacks proof that an administratively feasible and reliable method exists to identify class members, the trial court should deny class certification, even if doing so denies class members their only hope of recourse.¹⁷⁴ As Judge Rendell of the Third Circuit plaintively acknowledged, the court’s heavy emphasis on administrative ease at the expense of the merits “effectively thwart[s] small-value consumer class actions by defining ascertainability in such a way that consumer classes will necessarily fail to satisfy for lack of adequate substantiation.”¹⁷⁵ The Second, Seventh, and Ninth Circuits, on the other hand, place less weight on administrative convenience, reminding trial courts that they “should not

¹⁶⁹ FED. R. CIV. P. 23(b)(3).

¹⁷⁰ *Mullins*, 795 F.3d at 664.

¹⁷¹ See Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full Year Review*, NERA ECON. CONSULTING 38 (Jan. 25, 2016) (stating that “[v]ery few securities class actions reach the trial stage and even fewer reach a verdict,” and “[n]o trials [in securities class actions] were held in 2015”), http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf [<https://perma.cc/89AZ-TT99>]; Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 102 n.18 (2014) [hereinafter Wasserman, *Cy Pres*] (explaining that fewer class actions settle than previously concluded); cf. Klonoff, *supra* note 37, at 1645 (citing “an important new trend” of class actions going to trial).

¹⁷² *Mullins*, 795 F.3d at 664 (citing *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

¹⁷³ Jessie Kokrda Kamens, *Certification Vacated for Weight Loss Pill Class; Ascertainability Must Be Shown on Remand*, CLASS ACTION LITIG. REPORT (BNA) (Sept. 13, 2013) (quoting Brian Wolfman); cf. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 359 (1978) (concluding that when trial courts order defendants to help identify class members entitled to notice, they “must not stray too far from the principle underlying *Eisen IV* that the representative plaintiff should bear all costs relating to the sending of notice”).

¹⁷⁴ *Carrera v. Bayer Corp.*, 727 F.3d 300, 308 (3d Cir. 2013).

¹⁷⁵ *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 174 (3d Cir. 2015) (Rendell, C.J., concurring).

refuse to certify a class merely on the basis of manageability concerns.”¹⁷⁶ Like Judge Rendell, who declined to assume that class members “burden the court” when they file claims,¹⁷⁷ the Seventh Circuit rejected administrative convenience as a justification for evasion of judicial responsibilities under Rule 23.¹⁷⁸

As a normative matter, the Second, Seventh, and Ninth Circuits surely have the better argument. Since the courts’ very purpose is to administer justice, concern for judicial convenience alone should not justify dismissal of claims that cannot be pursued outside the class action context. Likewise, since trial courts do not need to distribute funds to class members until much later in the litigation, it makes sense to delay consideration of administrability at least until the court undertakes the manageability analysis required by Rule 23(b)(3), if not until much later in the action, when it contemplates the claims administration process. At that time, armed with more information, including the availability of purchase records, response rates, and other data, the trial court will be in a better position to assess case management challenges and attempt to address them, or to decertify the class if the management problems prove insurmountable.¹⁷⁹

Even if the strict approach does not defeat a class action, it requires class counsel to take more discovery regarding class membership earlier in the litigation, thereby increasing the cost of bringing a class action.¹⁸⁰ That result is “ironic” if the goal of the ascertainability requirement is efficiency and administrative convenience.¹⁸¹

2. *Protection of Absent Class Members*

Courts employing both the traditional and strict approaches claim that the ascertainability requirement protects absent class members in at least two ways. First, courts claim the ascertainability requirement is needed to ensure that absent class members receive the best notice practicable, as required by

¹⁷⁶ *Mullins*, 795 F.3d at 663 (citations omitted); accord *In re Petrobras Sec.*, 862 F.3d 250, 268 (2d Cir. 2017), petition for cert. filed sub. nom. *Petroleo Brasileiro S.A. v. Universities Superannuation Scheme Ltd.* (U.S. Nov. 1, 2017) (17-664); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1128 (9th Cir. 2017), cert. denied, 138 S. Ct. 313 (2017).

¹⁷⁷ *Byrd*, 784 F.3d at 175 (Rendell, C.J., concurring).

¹⁷⁸ See *Mullins*, 795 F.3d at 663–64 (quoting 7AA WRIGHT ET AL., *supra* note 62, at § 1780) (“Viewing the potential administrative difficulties from a comparative perspective seems sound and a decision against class action treatment should be rendered only when the ministerial efforts simply will not produce corresponding efficiencies. In no event should the court use the possibility of becoming involved with the administration of a complex lawsuit as a justification for evading the responsibilities imposed by Rule 23.”).

¹⁷⁹ *Id.* at 664 (citation omitted).

¹⁸⁰ *Kamens*, *supra* note 173 (quoting Brian Wolfman).

¹⁸¹ *Id.*

Rule 23(c)(2)(B)¹⁸² and due process,¹⁸³ to enable them to exercise their respective rights to opt out of the class.¹⁸⁴ If class members can be readily identified, then they often can be notified by mail, a means of providing notice that the Supreme Court has lauded at least since *Mullane*,¹⁸⁵ or by email, a less expensive alternative often relied upon by courts today.¹⁸⁶ But if the class is unascertainable and class members' identities are unknowable, then service by mail or email will be impossible and only less certain means of providing notice will be available. Thus, courts stress the need for precision in class definitions to ensure that courts will "be able to identify who will receive notice"¹⁸⁷ One treatise makes the related point that class members must be able to tell if they are included in the class so they can decide whether or not to opt out.¹⁸⁸

Second, courts adopting both the traditional and strict approaches claim that the ascertainability requirement helps ensure that the amount recovered by absent class members with legitimate claims is not diluted by inaccurate or fraudulent claims. For example, the Seventh Circuit in *Mullins* acknowledged that "[v]agueness is a problem because a court needs to be able to identify who . . . will share in any recovery"¹⁸⁹ More specifically, the Third Circuit in *Carrera* stated that "ascertainability protects absent class members It is unfair to absent class members if there is a significant likelihood that their recovery will be diluted by fraudulent or inaccurate claims."¹⁹⁰

But while there may be agreement that a clear and objective class definition will facilitate notice and maximize recovery to deserving class members, there is profound disagreement on whether requiring an administratively feasible method of identifying class members at the outset of the litigation is necessary to achieve these ends. In fact, neither of these proffered rationales justifies the strict approach. After all, Rule 23(c)(2)(B),

¹⁸² FED. R. CIV. P. 23(c)(2)(B).

¹⁸³ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985).

¹⁸⁴ See *Carrera v. Bayer Corp.*, 727 F.3d 300, 305–07 (3d Cir. 2013) (stating that the ascertainability requirement "protects absent class members by facilitating the best notice practicable under Rule 23(c)(2)," and "allows potential class members to identify themselves for purposes of opting out of a class" (internal quotation marks and citation omitted)); see also, e.g., *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012); MANUAL FOR COMPLEX LITIGATION § 21.222 (4th ed. 2004).

¹⁸⁵ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318–19 (1950); see also *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974).

¹⁸⁶ For examples of cases accepting email as a sufficient mode of service to class members, see, for example, *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 81 (1st Cir. 2015); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947 (9th Cir. 2015); *Lane v. Facebook, Inc.*, 696 F.3d 811, 818, 826 (9th Cir. 2012); *Flynn v. Sony Electronics, Inc.*, No. 09-CV-2109-BAS (MDD), 2015 WL 128039 (S.D. Cal. Jan. 7, 2015), at *1–2; cf. FED. R. CIV. P. 5(b)(2)(E).

¹⁸⁷ *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 660 (7th Cir. 2015) (citations omitted).

¹⁸⁸ 1 MCLAUGHLIN, *supra* note 158, § 4.2.

¹⁸⁹ *Mullins*, 795 F.3d at 660 (citation omitted).

¹⁹⁰ *Carrera v. Bayer Corp.*, 727 F.3d 300, 310 (3d Cir. 2013).

which governs notice in Rule 23(b)(3) class actions, does not require that all absentees *receive* actual notice;¹⁹¹ rather, it requires only “the best notice that is *practicable under the circumstances*, including individual notice to members who can be identified *through reasonable effort*.”¹⁹² Nor does due process require actual notice to all class members in all cases.¹⁹³ The seminal notice case, *Mullane v. Central Hanover Bank & Trust Co.*, itself recognized that the type of notice required by due process would depend, in any given case, upon “practical matters,” including the difficulty of identifying interested parties and “the nature” of their interests.¹⁹⁴ Regarding “persons missing or unknown,” the *Mullane* Court concluded that “an indirect or even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.”¹⁹⁵ Thus, regarding absentees “whose interests or whereabouts could not with due diligence be ascertained,” the *Mullane* Court upheld the constitutionality of notice by publication in the back pages of a local newspaper.¹⁹⁶

Today, courts have at their disposal a wide range of alternate means of providing notice that are more likely than the means sanctioned in *Mullane* to reach absentees who cannot be identified. Courts have allowed notice by large advertisements in national newspapers¹⁹⁷ and magazines,¹⁹⁸ television and radio spots,¹⁹⁹ websites,²⁰⁰ social media posts,²⁰¹ and postings in

¹⁹¹ *Mullins*, 795 F.3d at 665.

¹⁹² FED. R. CIV. P. 23(c)(2)(B) (emphasis added).

¹⁹³ *Mullins*, 795 F.3d at 665; Bone, *Justifying Class Action Limits*, *supra* note 8, at 930.

¹⁹⁴ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317–18 (1950).

¹⁹⁵ *Id.* at 317.

¹⁹⁶ *Id.*

¹⁹⁷ *See, e.g., Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012) (allowing publication of the notice in the national edition of *USA Today*); 7AA WRIGHT ET AL., *supra* note 62, § 1786 (noting courts have allowed notice published in the *New York Times* and *Wall Street Journal*); *see also Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013) (holding notice in a principal Indianapolis newspaper to be adequate notice).

¹⁹⁸ *See Flynn v. Sony Elect., Inc.*, No. 09-cv-2109-BAS (MDD), 2015 WL 128039, at *4 (S.D. Cal. Jan. 7, 2015) (approving notice in *People* magazine).

¹⁹⁹ *See, e.g., In re Black Farmers Discrim. Litig.*, 856 F. Supp. 2d 1, 14 (D.D.C. 2011) (acknowledging notice was broadcast on two national radio stations); *see also* 7AA WRIGHT ET AL., *supra* note 62, § 1786 (stating it may be appropriate to publish notice as radio or television advertisements).

²⁰⁰ *See, e.g., In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947 (9th Cir. 2015) (holding notice was not deficient, in part, because the website it was posted on was updated promptly); *Hughes*, 731 F.3d at 677 (stating notice was published on a website in addition to other means); *Lane*, 696 F.3d at 818 (noting all forms of notice directed class members to a website); *Evans v. Linden Research, Inc.*, No. C-11-01078 DMR, 2013 WL 5781284, at *3 (N.D. Cal. Oct. 25, 2013) (approving notice publication on six websites).

²⁰¹ *See, e.g., Lane*, 696 F.3d at 818 (allowing Facebook to post notice on a section of members' online accounts); *Mark v. Gawker Media LLC*, No. 13-cv-4347 (AJN), 2015 WL 2330274, at *1 (S.D.N.Y. April 10, 2015) (describing the limitations on the planned notice via Twitter and Facebook but approving the notice method generally); *Evans*, 2013 WL 5781284, at *3 (allowing notice to appear on

conspicuous places.²⁰² A proposed amendment to Rule 23(c)(2)(B), approved by the Judicial Conference and slated to take effect on December 1, 2018, will clarify that class action notice in Rule 23(b)(3) class actions “may be by one or more of the following: United States mail, electronic means, or other appropriate means.”²⁰³

More fundamentally, in many consumer and other low-value class actions, the likelihood that class members would exclude themselves and pursue actions on their own behalf if they received notice is infinitesimal. As the Seventh Circuit put it, in such cases, “only a lunatic or a fanatic would litigate the claim individually, so opt-out rights are not likely to be exercised by anyone planning a separate individual lawsuit.”²⁰⁴ To insist upon an administratively feasible means of identifying class members to facilitate notice and enable opt-outs is to deny *all* class members the possibility of recovery to protect a null set of them. Thus, it is hard to justify the strict approach to ascertainability based upon a need to provide notice to absent class members so they may decide whether or not to opt out.

Likewise, the professed interest in preventing the dilution of the recovery of absentees with legitimate claims offers little, if any, support for the strict approach to ascertainability.

First, it is highly unlikely that many (if any) individuals would invest the time needed to complete a fraudulent claim form since the maximum recovery in these low-value consumer class actions is typically very low.²⁰⁵ Under a rational cost-benefit analysis, the potential recovery is not likely to outweigh the cost of completing the form and the risk (however small) of a perjury charge. Thus, the risk of dilution is likely quite low.

This conclusion is reinforced by the fact that participation rates in consumer and other low-value class actions are often so low that courts must devise strategies to distribute all of the settlement funds that defendants

Facebook); *see also* Klonoff, *supra* note 37, at 1650–51 (describing the use of social media to provide notice in class actions).

²⁰² *See, e.g., Hughes*, 731 F.3d at 677 (approving sticker notices on the defendant’s ATMs).

²⁰³ Chart Tracking Proposed Rules Amendments, in AGENDA BOOK FOR JAN. 4, 2018, MEETING OF COMM. ON RULES OF PRACTICE AND PROCEDURE [hereinafter JAN. 2018 AGENDA BOOK], at 105, 107, tab 1C (documenting approval by Judicial Conference of proposed amendment to Rule 23); Report of May 18, 2017, of Advisory Comm. on Civil Rules to Comm. on Rules of Practice and Procedure, at 18, 20, 28, 31 in AGENDA BOOK FOR JUNE 12–13, 2017, MEETING OF COMM. ON PRACTICE AND PROCEDURE [hereinafter JUNE 2017 AGENDA BOOK], at 432, 434, 442, 445 tab 4A (presenting proposed amendment of Rule 23(c)(2)(B) for approval); *see also* Rule 23 Subcomm. Report Containing the Text of Proposed Rule 23, in AGENDA BOOK FOR APRIL 25–26, 2017, MEETING OF ADVISORY COMM. ON CIVIL RULES [hereinafter APR. 2017 AGENDA BOOK], at 105, 108, 117, & 120, tab 4A.

²⁰⁴ *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 665 (7th Cir. 2015) (quoting *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)) (internal quotation marks omitted); *see also Hughes*, 731 F.3d at 667 (stating that “in practice, the risk of dilution based on fraudulent or mistaken claims seems low, perhaps to the point of being negligible”); Bone, *supra* note 8, at 931.

²⁰⁵ *Mullins*, 795 F.3d at 667 (citing *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 175 (3d Cir. 2015) (Rendell, C.J., concurring)).

commit to pay.²⁰⁶ In fact, in some cases, courts have distributed double or treble damages to class members submitting claims forms because participation rates were, or were expected to be, so low.²⁰⁷ Thus, in the many class actions in which unclaimed settlement funds remain, the unlikely prospect of some fraudulent or inaccurate claims is not likely to dilute the recovery of absentees with legitimate claims.²⁰⁸

Second, professional claims administration firms deploy a host of methods to discourage, identify, and reject fraudulent claims.²⁰⁹ In particular, they use programmatic audits, algorithms, screening methods based on product packaging descriptions, purchase time-frames, methods of purchase, and data matching and loading technologies to identify duplicate and fraudulent claims.²¹⁰

For example, by requiring a class member to provide information about which particular retail establishment they purchased the allegedly defective (or fraudulently marketed) product, a claims administrator could cross reference the class member's response against a list of known retailers and identify those claims with false information. Likewise, certain products are only sold in a particular geographic location so a class member who claimed, for example, to buy a product in a drug store in Tennessee when the defendant's product was only sold on the Eastern sea board, would be flagged and rejected.²¹¹

Thus, given the powerful tools in the hands of claims administrators to reduce the likelihood of, and to identify and screen out, inaccurate or fraudulent claims, it does not appear that concern for dilution of meritorious class members' claims justifies the strict approach.

²⁰⁶ *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1130 & n.8 (9th Cir. 2017) (citations omitted), *cert. denied*, 138 S. Ct. 313 (2017); *Mullins*, 795 F.3d at 667; *see also, e.g.*, Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 119–20 (2007) (noting that, “it is not unusual for only 10 or 15% of the class members to bother filing claims”; bemoaning “shockingly low participation rates,” sometimes lower than 1% (footnotes omitted)); Wasserman, *Cy Pres*, *supra* note 171, at 104–05, 117 (noting that “the cumbersomeness of the claims process” and the prospect of tiny awards may dissuade class members from submitting claims forms; noting that courts often resort to *cy pres* to distribute unclaimed settlement funds).

²⁰⁷ Wasserman, *Cy Pres*, *supra* note 171, at 111–12; *see also* A.L.I., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. b (2010).

²⁰⁸ *Mullins*, 795 F.3d at 667.

²⁰⁹ *Id.*; *see also* MANUAL FOR COMPLEX LITIGATION, *supra* note 184, § 21.66 (describing audit and review procedures, random sampling techniques, and field audits to screen out fraudulent or inaccurate claims).

²¹⁰ Brief for Angeion Group, LLC, as Amicus Curiae in Support of Pet. for Reh. or Reh. en Banc at 5–8, *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013) (No. 12-2621), 2013 WL 5606438 (filed Oct. 4, 2013).

²¹¹ *Id.* at 6–7.

Finally, even if these tools are imperfect and fail to screen out every possibly fraudulent claim, a rational absentee would prefer to receive a slightly smaller (diluted) award than to have the class action dismissed and therefore to be denied the opportunity to receive *any* award because the class representative was unable to satisfy the strict ascertainability requirement.²¹²

3. *Protection of Defendants*

Courts espousing the strict approach further maintain that an administratively feasible means of identifying class members at the outset of the action is needed to protect class action defendants in three ways.²¹³ They recognize class action defendants' "due process right to raise individual challenges and defenses to claims" and maintain that "class actions cannot be certified in a way that eviscerates this right or masks individual issues."²¹⁴ If defendants were required to accept class members' self-serving affidavits to prove class membership, they would lose the opportunity to test the reliability of evidence, thereby raising "serious due process implications."²¹⁵ Thus, courts maintain that "[a]scertainability provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership"²¹⁶ and ultimately the amount of its liability.²¹⁷

Moreover, some courts maintain that the strict approach protects the defendant from the risk of follow-up individual actions upon resolution of the class action. If the defendant prevails against the class, the judgment in its favor should shield it from follow-up suits by individual class members pressing the same claim.²¹⁸ But if class members' identities are not established because the class is unascertainable, then the defendant may be denied this important protection. "The class definition must be clear . . . so

²¹² See *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1130 (9th Cir. 2017) (noting that "if certification is denied to prevent dilutions, deserving class members will received nothing"), *cert. denied*, 138 S. Ct. 313 (2017); *Mullins*, 795 F.3d at 668 (noting "if class certification is denied, [absentees] will receive nothing, for they would not have brought suit individually in the first place" (internal quotation marks omitted)); *Byrd v. Aaron's Inc.*, 784 F.3d 154, 176 (3d Cir. 2015) (Rendell, C.J., concurring) (noting that dilution concerns are "unrealistic in modern day class action practice").

²¹³ See, e.g., *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) (explaining how ascertainability protects defendants' rights); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012) (noting that strict ascertainability ensures class members are bound by the final judgment).

²¹⁴ *Carrera*, 727 F.3d at 307 (citations omitted).

²¹⁵ *Id.* at 306 (quoting *Marcus*, 687 F.3d at 594 (footnote omitted)); *accord Karhu v. Vital Pharms., Inc.*, 621 Fed. Appx. 945, 948 (11th Cir. 2015).

²¹⁶ *Carrera*, 727 F.3d at 307.

²¹⁷ *Cf.* *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 669 (7th Cir. 2015) (conceding that "a defendant [certainly] has a due process right not to pay in excess of its liability and to present individualized defenses if those defenses affect its liability" (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366 (2011)), *cert. denied*, 136 S. Ct. 1161 (2016)).

²¹⁸ *Xavier v. Philip Morris USA, Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011) (decided before *Briseno*); see *Marcus*, 687 F.3d at 593 (quoting *Xavier*).

that it will be clear later on whose rights are merged into the judgement, that is, who gets the benefit of any relief and *who gets the burden of any loss*.”²¹⁹

If a court allowed unverified and potentially fraudulent claims by putative class members that reduced the recovery by those with legitimate claims, the latter might bring follow-up suits, arguing that the class action judgment did not preclude them because they were not adequately represented in the class action.²²⁰ Thus, the strict approach to ascertainability ostensibly protects the defendant by ensuring that losing class members are bound by the judgment.

Class action defendants are surely entitled to due process, but their respective rights to due process cannot justify the strict approach. The due process argument ignores the reality that most class actions are concluded by negotiated settlements approved by district courts.²²¹ Thus, in the majority of class actions (those that settle), knowing the class members’ *identities at the time of certification* is not needed to test the accuracy of the defendant’s overall liability; that figure will be negotiated, rather than litigated; and the defendant will waive its right, or negotiate the means, to challenge each class member’s entitlement to recover a portion of it.

Even in the class actions that do not settle, however, due process does not guarantee the defendant a right to identify the class members *at the certification stage*.²²² In some class actions, the defendant’s liability will be determined in the aggregate and therefore will be unaffected by the number of putative class members who eventually file claims.²²³ In these cases, too, whether an individual qualifies for class membership or not has no impact on the defendant’s total liability and therefore does not implicate the defendant’s due process rights.²²⁴ As a leading class action treatise explains, “courts have generally rejected the argument that a plaintiff’s ability to demonstrate only aggregate damages violates a defendant’s due process and/or jury rights to confront and contest each individual’s right to damages.”²²⁵ In yet other cases, where the defendant’s total liability cannot be determined in the aggregate, there may be a common method of determining individual damages that both protects the defendant’s due

²¹⁹ *Xavier*, 787 F. Supp. 2d at 1089 (emphasis added); see *Marcus*, 687 F.3d at 593 (quoting *Xavier*); see also 1 RUBENSTEIN, *supra* note 1, § 3:1.

²²⁰ *Karhu*, 621 Fed. Appx. at 948 n.3 (quoting *Carrera*, 727 F.3d at 310).

²²¹ See *Starykh & Boettrich*, *supra* note 171, at 38 (stating that “[v]ery few securities class actions reach the trial stage and even fewer reach a verdict”).

²²² See, e.g., *Mullins*, 795 F.3d at 669 (agreeing “with the due process premise but not the conclusion”).

²²³ *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1132 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 313 (2017); *Mullins*, 795 F.3d at 670.

²²⁴ *Mullins*, 795 F.3d at 670.

²²⁵ 4 RUBENSTEIN, *supra* note 1, § 12:2 (footnote omitted).

process rights and minimizes the need for time-consuming individual mini-trials on damages.²²⁶

Even where no common method of calculating individual damages is available, due process can be satisfied as long as the defendant is afforded an opportunity to present its defenses when the putative class members *eventually* submit their claims.²²⁷ As the Seventh Circuit put it, the Constitution does not entitle the defendant to a process that identifies class members “with perfect accuracy *at the certification stage*”;²²⁸ due process is satisfied “[a]s long as the defendant is given the opportunity to challenge each class member’s claim to recover *during the damages phase*.”²²⁹

While the potential need to conduct mini-trials on each individual class member’s entitlement to damages at the end of the litigation raises predominance and manageability concerns, federal district courts have a variety of means available, including the appointment of special masters, to help them “resolve individual damages issues in an efficient enough manner that such issues will not predominate over the common issues in the case.”²³⁰ If “truly insoluble” manageability problems arise during the claims administration process, “the court may decertify the class at a later stage of the litigation.”²³¹ Thus, the strict approach to ascertainability is not needed to protect the defendant’s right to raise defenses against individual class members or to challenge the amount of its overall liability.

Nor is the strict approach needed to ensure that a prevailing class action defendant can invoke the judgment to preclude follow-up claims by absent class members. As long as the class is defined by objective criteria, a class action defendant will be able to invoke the class action judgment in its favor to preclude follow-up litigation by class members.²³² By claiming a right to recover for the same conduct that was challenged in the class action, any

²²⁶ *Mullins*, 795 F.3d at 670; *see also* 4 RUBENSTEIN, *supra* note 1, § 12:4 (noting that “in many class actions . . . individual damages are easily calculable”); *id.* § 12:5 (describing “a variety of common methods for determining individual damages”).

²²⁷ *See Mullins*, 795 F.3d at 671 (“So long as the defendant is given a fair opportunity to challenge the claim to class membership and to contest the amount owed each claimant during the claims administration process, its due process rights have been protected.”); Bone, *Justifying Class Action Limits*, *supra* note 8, at 938–39.

²²⁸ *Mullins*, 795 F.3d at 670 (emphasis added).

²²⁹ *Id.* at 671 (emphasis added).

²³⁰ 4 RUBENSTEIN, *supra* note 1, § 12:5.

²³¹ *Mullins*, 795 F.3d at 664 (citing *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

²³² *See* 6 RUBENSTEIN, *supra* note 1, §§ 18:14 & 18:15 (discussing fundamental elements of claim preclusion and class action judgments); 18A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 4455 (2d ed. 2002 & Dec. 2017 Supp.) (stating that a “central purpose” of the class action “is to establish a judgment that will bind . . . all . . . members of the class”); Bone, *Justifying Class Action Limits*, *supra* note 8, at 932 (explaining that a clear class definition is essential to a court determining the preclusive effect of a class action judgment).

prospective follow-up plaintiff would essentially self-identify as a member of the class whose claim had been precluded by the class action judgment.²³³

Finally, the risk that the defendant will be subject to follow-up litigation by class members maintaining that they are not bound by the class action judgment because their claims were diluted by fraudulent claims and therefore their interests were not adequately represented is quite low. It assumes the coincidence of several events, each of which itself is quite unlikely. Because the value of individual claims pursued in consumer class actions is often very low—perhaps just a few dollars—few fraudulent claims are likely to be filed.²³⁴ Even if individuals were more inclined to file fraudulent or inaccurate claims, courts and claims administrators have effective tools to screen them out, thereby further reducing the risk of dilution.²³⁵ Especially if the defendant prevailed against the class, it would be unlikely that many (if any) class members would seek to press individual claims in follow-up litigation—because their individual claims would likely be worth so little, because a court would already have ruled against a class pressing the same or similar claims, and because the prospective follow-up plaintiffs would have the formidable burden of proving inadequate representation by the class representative.²³⁶ Thus, the theoretical risk of follow-up litigation by absent class members claiming inadequate representation does not justify the much greater risk that the strict approach would sound the death knell for the class action. Declining to certify class actions to protect against this risk is, in the words of Tobias Barrington Wolff (addressing a related issue), “abdication masquerading as diligence.”²³⁷

²³³ See, e.g., *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 446 (3d Cir. 2017) (Fuentes, C.J., concurring) (observing that objective class criteria make preclusion decisions regarding follow-up plaintiffs evident).

²³⁴ See *supra* note 205 and accompanying text (supporting the low incidence of fraudulent claims).

²³⁵ See *supra* notes 209–11 and accompanying text (examining safeguards).

²³⁶ Class action judgments are “presumptively entitled to full faith and credit,” *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 374 (1996), so presumably the party challenging the judgment has the burden of proof. Courts assess the strength of the arguments presented by the party seeking to *avoid* the preclusive effect of the class action judgment, thereby suggesting that such party bears the burden of proving inadequate representation. See, e.g., *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 257 (2d Cir. 2001), *aff’d in relevant part by an equally divided Court*, 539 U.S. 111 (2003) (accepting the plaintiffs’ argument that a class action judgment may be collaterally attacked if the absentees were not adequately represented); *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1435–37 (2d Cir. 1993) (rejecting the plaintiffs’ allegations that they were not adequately represented in the initial class action and that the class action settlement was collusive), *overruled on other grounds by Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28 (2002).

²³⁷ See Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 743–45 (2005) (chastising courts for declining to certify class actions due to a “vague apprehension of ‘risk’” that a class action judgment awarding purely injunctive relief could preclude class members from later pursuing individual claims for monetary relief).

As Part II demonstrates, the lower federal courts are deeply divided on the nature, scope, and timing of the ascertainability requirement and the policies that justify it.²³⁸ This division is of great practical significance as it affects consumers' access to justice and one of the few means of policing corporate compliance with the law. When putative class representatives cannot satisfy the ascertainability requirement, courts dismiss class actions, thereby depriving the class of any opportunity for compensation and eviscerating the only real hope for deterrence of wrongdoing.

This important policy debate has been conducted almost exclusively in the lower federal courts, where a split among the circuits has resulted in varying interpretations of a Federal Rule and concomitant differences in outcomes. Part III of this article moves from policy to process, seeking to identify the governmental actor best suited to resolve this important policy question and restore uniformity to the law governing class certification in federal court.

III. PROCESS: INSTITUTIONAL COMPETENCIES

At least four governmental actors have authority to address the issue of ascertainability: the United States Supreme Court, the Advisory Committee on Civil Rules, the United States Congress, and the lower federal courts. Part III will analyze their relative institutional competencies and processes and will consider the best process by which to resolve the policy issue framed above.

A. *United States Supreme Court*

The Supreme Court could address the ascertainability issue in one of two ways: it could grant a petition for a writ of certiorari in a case that presents the ascertainability issue and resolve the policy issue through adjudication; or it could defer to the rule-making/amending process codified in the Rules Enabling Act²³⁹ and wait to approve a Rule that emerges from that process. Thus, the Supreme Court has a choice regarding the “policymaking form”²⁴⁰ to deploy in resolving this issue. In exploring this choice, let us begin by establishing the Court's authority and competency to resolve interpretive issues through adjudication. We will then consider the factors that influence the Court's decision to grant a petition for a writ of

²³⁸ See *supra* Parts II.A–B.

²³⁹ 28 U.S.C. §§ 2071–77.

²⁴⁰ See Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1191 & n.9 (2012) (borrowing the “choice of policymaking form” language from administrative law (citing M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386–1403 (2004))).

certiorari—which signals its determination to resolve a particular issue through adjudication—and those that militate against such a grant.²⁴¹

1. *The Court's Authority and Competency to Adjudicate*

The Articles of Confederation did not authorize a national court system. Since “[l]aws are a dead letter without courts to expound and define their true meaning and operation,”²⁴² Article III of the United States Constitution created a Supreme Court²⁴³ and Article I authorized Congress to “constitute [federal] Tribunals inferior to the Supreme Court.”²⁴⁴ Article III identified the cases and controversies subject to federal judicial power and determined those over which the Supreme Court has original and appellate jurisdiction respectively (the latter being subject to such “Exceptions” and “Regulations as the Congress shall make”).²⁴⁵ The United States Code grants the Court significant discretion over its docket, authorizing it to review decisions of the federal courts of appeals by writ of certiorari.²⁴⁶

The Court's role as final interpreter of federal legislation is well accepted. In *The Federalist* No. 78, Alexander Hamilton stated, “[t]he interpretation of the laws is the proper and peculiar province of the courts It . . . belongs to [the judges] to ascertain . . . [the] meaning of any particular act proceeding from the legislative body.”²⁴⁷ In its pathbreaking opinion in *Marbury v. Madison*,²⁴⁸ the Court not only asserted the power of judicial review, but reiterated Hamilton's view that “[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule.”²⁴⁹

Several attributes of the Supreme Court as an institution make it particularly well suited to serve as final interpreter of federal law. If authority to interpret the laws were vested in a branch or division of the legislature (rather than in an independent Court), we could not expect “a body which had even a partial agency in passing bad laws . . . to temper and moderate them in the application.”²⁵⁰ Thus, the Court's structural independence from Congress helps secure an impartial and temperate

²⁴¹ In subsequent sections of the article, *infra* Parts III.B–III.E, we will turn to other reasons why the Court might decline to resolve a particular issue through adjudication, deferring to other lawmakers with potentially greater institutional competency.

²⁴² THE FEDERALIST NO. 22 (Alexander Hamilton).

²⁴³ U.S. CONST. art. III, § 1.

²⁴⁴ U.S. CONST. art. I, § 8, cl. 9.

²⁴⁵ U.S. CONST. art. III, §§ 1 & 2.

²⁴⁶ 28 U.S.C. § 1254(1).

²⁴⁷ THE FEDERALIST NO. 78 (Alexander Hamilton).

²⁴⁸ 5 U.S. (1 Cranch) 137 (1803).

²⁴⁹ *Id.* at 177.

²⁵⁰ THE FEDERALIST NO. 81 (Alexander Hamilton).

interpretation of federal legislation.²⁵¹ The lifetime tenure and secure compensation that the Constitution affords Article III judges²⁵² further ensures the Court's independence from Congress and protects it from political and financial pressures.²⁵³ Moreover, a single Court with final authority to review interpretations of federal law by all of the federal courts of appeals and the states' highest courts fosters uniformity, which the framers viewed as "indispensable."²⁵⁴

The Constitution does not specify the number of Justices to be appointed to the Court, and Congress has not focused on the Court's efficacy in fixing that number.²⁵⁵ Nevertheless, both the Court's size and its deliberative process increase the likelihood that it decides cases correctly.²⁵⁶ Affording a group of Justices the opportunity to engage with one another enables them to consider all available information and probe the strengths and weaknesses of all arguments before rendering a judgment.²⁵⁷ A Court with multiple Justices also permits greater demographic diversity, which may yield both better decisions (by ensuring the Justices consider a diversity of different viewpoints) and greater public confidence in those decisions.²⁵⁸

²⁵¹ See F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 651 (2009) (describing impartiality as "perhaps the most fundamental and least controversial requirement of a successful Supreme Court"); see also Marcus, *supra* note 30, at 939 ("Life-tenured judges can . . . counter dysfunctions in the political process that result in legislative underrepresentation for various classes of minorities." (footnote omitted)).

²⁵² U.S. CONST. art. III, § 1 (stating that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office").

²⁵³ THE FEDERALIST NO. 78 (Alexander Hamilton) (positing that "permanency in office" is essential to the independence of the judiciary, which "is peculiarly essential in a limited Constitution"); see also THE FEDERALIST NO. 81 (Alexander Hamilton) (viewing independent judges as necessary to preclude "the pestilential breath of [political] faction [from] poison[ing] the fountains of justice"); Hessick & Jordan, *supra* note 251, at 654 (explaining that lifetime tenure and salary protection "permit judges to resolve cases without being influenced by fear of reprisal from the parties, or by undue pressure from external sources" (footnotes omitted)).

²⁵⁴ THE FEDERALIST NO. 22 (Alexander Hamilton); see also *id.* ("[A]ll nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice.").

²⁵⁵ See Hessick & Jordan, *supra* note 251, at 646–47 (noting that when Congress has altered the number of Justices, "the motivation was something other than a judgment about which size would be best for the Supreme Court as an institution").

²⁵⁶ Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 97–98, 102 (1986) (positing that aggregation increases accuracy in adjudication and accepting as "reasonable" the assumption that deliberation does as well).

²⁵⁷ Hessick & Jordan, *supra* note 251, at 649 (positing that "a larger Court might improve the likelihood of reaching substantively correct decisions because additional Justices will increase the information available for making decisions"); cf. Kornhauser & Sager, *supra* note 256, at 102 (describing three ways in which deliberation may affect the behavior of judges and conceding that the authors "have not demonstrated that deliberation improves the accuracy of judicial decisions").

²⁵⁸ Hessick & Jordan, *supra* note 251, at 655.

In addition to these structural features of the Court designed to produce impartial, uniform, and accurate interpretations of federal law, the individual Justices themselves are selected and vetted to ensure they have the education, “skill in the laws,” integrity, and judgment to master an ever-expanding body of precedent and the analytical tools needed to interpret the laws fairly and accurately.²⁵⁹

The Court’s structural features and the Justices’ individual qualifications make the Supreme Court an appropriate institution to interpret not only federal statutes, but also the Federal Rules of Civil Procedure. The Federal Rules, like statutes, require a uniform and impartial interpretation by a group relatively free from political and financial pressure. In subsequent parts of the article, we will explore the debate about the proper approach the Court should take in interpreting the Federal Rules, the extent to which it should be guided (or bound) by the Advisory Committee notes, and the circumstances in which it should defer to other potential lawmakers.²⁶⁰ For present purposes, however, we accept the Court’s institutional competency to interpret Federal Rules and consider its process for choosing which cases to adjudicate.

2. *Factors Influencing the Decision to Grant a Petition for a Writ of Certiorari*

The Court may be well suited to interpret federal statutes and Federal Rules, but it cannot possibly hear appeals in all cases that present the opportunity to do so. In choosing the cases in which to grant a petition for a writ of certiorari, the Supreme Court views a split between or among the federal courts of appeals as the single most important factor.²⁶¹ Individual Justices have identified this factor as a principal consideration in candid conversations with researchers²⁶² and judicial opinions frequently note the salience of circuit splits in the certiorari calculus.²⁶³ Rule 10 of the Rules of the Supreme Court of the United States, too, notes that while “neither

²⁵⁹ See THE FEDERALIST NOS. 78, 82 (Alexander Hamilton) (favoring an independent court with knowledge of the laws acquired by “long and laborious study”).

²⁶⁰ See discussion, *infra* Parts III.B–III.E.

²⁶¹ See H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 246 (1994) (“Without a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or ‘split’ in the circuits.”); see also *id.* at 127, 217, 251 (noting the importance of circuit splits in grants of certiorari).

²⁶² *Id.* at 246–47 (quoting conversations with unnamed Justices).

²⁶³ E.g., *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017); *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1508 (2017); *Beckles v. United States*, 137 S. Ct. 886, 891–92 (2017); see also, e.g., *Plumley v. Austin*, 135 S. Ct. 828, 828 (2015) (Thomas, J., dissenting from denial of certiorari) (noting the different approaches taken by the courts of appeals and maintaining that the “Court should have granted this petition to resolve the confusion”); *Nunez v. United States*, 554 U.S. 911, 913 (2008) (Scalia, J., dissenting from a GVR (grant, vacate, and remand)) (“[T]he main purpose of our certiorari jurisdiction [is] to eliminate circuit splits.”).

controlling nor fully measuring the Court’s discretion,” a conflict between or among two or more of the courts of appeals “on the same important matter” is of “the character of reasons the Court considers.”²⁶⁴

A circuit split often draws the Court’s attention because it “is a proxy for or is indicative of other important criteria.”²⁶⁵ A conflict can arise only if litigants present the same issue in two or more courts, suggesting its importance—another salient factor in granting certiorari²⁶⁶—or at least its prevalence; and the lower courts’ division on the issue suggests that the answer is “not obvious.”²⁶⁷

While all of the Justices consider the presence of a conflict in deciding whether to grant certiorari²⁶⁸ and while some would presumptively accept cases presenting conflicts on important issues,²⁶⁹ the Court does not grant certiorari in every case in which a conflict arises. After all, of the seven or eight thousand petitions for writs of certiorari filed each year, the Court grants petitions and hears oral argument in only about eighty cases—approximately one percent.²⁷⁰ Thus, there is a presumption against a grant of certiorari,²⁷¹ even in cases in which a conflict exists.

In addition to the significant pressure imposed by the Court’s limited capacity, there are other reasons why the Court declines to grant writs of certiorari even in cases in which a split between or among the circuits exists (or is alleged to exist). Five such reasons deserve consideration here. First, it is not always easy to tell whether a circuit split actually exists.²⁷² The courts of appeals do not always announce when their decisions conflict with the decision of another court, and counsel for petitioners have an incentive to argue that a conflict exists, even if it is more apparent than real.²⁷³ Clerks for the Justices labor to distinguish cases that appear to reach opposite conclusions, citing differences in the facts of the cases that may explain the different results, thereby avoiding a “square conflict.”²⁷⁴

Second, even where a genuine split exists, the Court will sometimes refrain from accepting the case in the hope that “the conflict will work itself

²⁶⁴ SUP. CT. R. 10, 10(a).

²⁶⁵ PERRY, *supra* note 261, at 249.

²⁶⁶ *See id.* at 253 (noting that, in assessing the certworthiness of a case, Justices and clerks considered “if there were a circuit conflict, and . . . if the conflict involved an important issue”).

²⁶⁷ *Id.* at 249.

²⁶⁸ *Id.*

²⁶⁹ *See id.* at 247 (noting that certain Justices view conflicts on important issues as “intolerable”).

²⁷⁰ Supreme Court of the U.S., *FAQs—General Information*, https://www.supremecourt.gov/about/faq_general.aspx [<https://perma.cc/Y5DU-MGX6>] (last visited Jan. 4, 2018). The Court hears fewer cases now than at any other time in recent history. Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1224 (2012).

²⁷¹ PERRY, *supra* note 261, at 218.

²⁷² *See id.* at 249 (“Determining whether or not a conflict exists is often subjective.”).

²⁷³ *Id.*

²⁷⁴ *Id.*

out.²⁷⁵ This is most frequently possible if the split is *within* a circuit because the divided court of appeals can accept a case en banc and resolve its internal conflict.²⁷⁶ Even where a split between or among two or more circuits exists, the conflict may disappear if one of the courts accepts a case en banc and changes its approach, bringing it into line with the other courts of appeals.²⁷⁷

Third, even where a genuine split exists and there is little hope that the lower courts will resolve it, the Supreme Court may deny petitions for writs of certiorari to permit further consideration by the lower federal courts and others—an idea referred to as “percolation.”²⁷⁸ The Court puts off deciding until “lower court judges, law professors in law reviews, or various other commentators” have fleshed out the issues more fully, developing the arguments and counter-arguments and identifying the consequences and policy implications.²⁷⁹ Once the Supreme Court grants certiorari and decides an issue, it will not take it up again for some time—it allows its own decisions to percolate among the lower courts before taking up an issue again—so the Court waits to accept an issue until it is “well-percolated.”²⁸⁰

Fourth, if Congress has expressed interest in legislating on an issue, the Supreme Court may defer to the legislature on the theory that any interpretative issue would be rendered moot if Congress were to act²⁸¹ or because Congress may have greater institutional competency to resolve the particular issue.²⁸²

Finally, even if the Court declines to defer to Congress on a particular issue, it may deny a petition if it believes that the rule-making process envisioned by the Rules Enabling Act would be better suited for resolution of the issue on which the lower courts have split.²⁸³

At first blush and in light of these considerations, it may seem surprising that the Court has denied four petitions seeking review of the ascertainability

²⁷⁵ *Id.* at 233 (quoting an unnamed Justice).

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 249–50.

²⁷⁸ *See id.* at 230 (“Justices like the smell of well-percolated cases. A case that has not percolated through various courts will usually be considered uncertworthy.”).

²⁷⁹ *Id.* at 231; *see also, e.g.*, *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting) (stating that the Court “should not rush to answer a novel question about the application of a 1-year-old decision in the absence of a pronounced conflict among the circuits”); *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (“[W]hen frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.”).

²⁸⁰ PERRY, *supra* note 261, at 230–31, 233.

²⁸¹ *See, e.g.*, Brief in Opposition at 29 n.20, *ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313 (2017) (No. 16-1221) (suggesting that “[t]he Court should allow the legislative process to play out before intervening” on the ascertainability issue).

²⁸² *See infra* Part III.C.1 (discussing further the institutional competency of Congress).

²⁸³ *See infra* Parts III.C.2, III.E (detailing the origins of the Rules Enabling Act and the Court’s occasional deference to the act).

issue to date.²⁸⁴ After all, there is little doubt of the importance of the ascertainability issue, given its critical role in the certification analysis, and the petitions filed in recent years have all emphasized the circuit split.²⁸⁵ Several of the courts of appeals have commented upon the split in their opinions,²⁸⁶ as have prominent commentators.²⁸⁷ In my judgment, the split is real: the difference between the traditional approach, which requires a discrete class defined by objective criteria, and the strict approach, which requires proof of an administratively feasible means of ascertaining class members at the time of certification, likely has a profound impact on both trial courts' decisions whether or not to certify a class and on plaintiffs' decisions regarding choice of forum.²⁸⁸ Thus, it is unlikely that the Supreme Court has declined to address ascertainability because the split is uncertain or the issue unimportant.

While the Court initially may have declined to resolve the ascertainability issue to permit further "percolation," that explanation no longer seems apt. Four years have passed since the Third Circuit decided *Carrera*, during which the issue has been quite thoroughly analyzed. Eight of the courts of appeals have addressed the issue since *Carrera* and numerous law review articles have studied and critiqued these opinions and the textual and policy arguments underlying them. The Supreme Court

²⁸⁴ *ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313, 313 (Oct. 10, 2017) (Mem); *Procter & Gamble Co. v. Rikos*, 136 S. Ct. 1493, 1493 (Mar. 28, 2016) (Mem); *Direct Digital, Inc. v. Mullins*, 136 S. Ct. 1161, 1162 (Feb. 29, 2016) (Mem); *Martin v. Pac. Parking Sys., Inc.*, 135 S. Ct. 962, 962 (Jan. 12, 2015) (Mem).

²⁸⁵ See *Petition for a Writ of Certiorari at 2, 10, ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313 (2017) (No. 16-1221), 2017 WL 1353282 (describing the "disagreement" among the circuits as "intolerable" and citing an "important circuit split"); *Petition for a Writ of Certiorari at 29, Procter & Gamble Co. v. Rikos*, 136 S. Ct. 1493 (2015) (No. 15-835), 2015 WL 9591989 (citing a "deepening circuit split regarding the generally accepted 'ascertainability' requirement"); *Petition for a Writ of Certiorari at 9, Direct Digital, LLC v. Mullins*, 136 S. Ct. 1161 (2015) (No. 15-549), 2015 WL 6549672 (citing an "established circuit conflict"); *Petition for a Writ of Certiorari at 6, Martin v. Pac. Parking Sys., Inc.*, 135 S. Ct. 962 (2014) (No. 14-486), 2014 WL 5463365 (maintaining that the "decision below conflicts with . . . one or more other federal court of appeals decisions").

²⁸⁶ See, e.g., *In re Petrobras Sec.*, 862 F.3d 250, 265 (2d Cir. 2017), *petition for cert. filed sub. nom. Petroleo Brasileiro S.A. v. Universities Superannuation Scheme Ltd.* (17-664) (Nov. 1, 2017) (declining to follow the Third Circuit's ascertainability approach and, instead, following the example of a number of other circuits that disagree with the Third Circuit); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1127 (9th Cir. 2017) (discussing the Third and Seventh Circuits' divergent theories on ascertainability), *cert. denied*, 138 S. Ct. 313 (2017); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657-58 (7th Cir. 2015) (disagreeing with the Third Circuit's heightened ascertainability requirement), *cert. denied*, 136 S. Ct. 1161 (2016); *Byrd v. Aaron's Inc.*, 784 F.3d 154, 161 n.4 (3d Cir. 2015) (detailing the circuit split on this issue).

²⁸⁷ See, e.g., 1 MCLAUGHLIN, *supra* note 158, § 4:2 (describing the different approaches to ascertainability adopted by the different courts of appeals); 7A WRIGHT ET AL., *supra* note 62, § 1760 (comparing the different ascertainability requirements of the Third and Seventh Circuits).

²⁸⁸ See *Petition for a Writ of Certiorari at 19, 21, ConAgra Brands, Inc. v. Briseno* (No. 16-1221) (filed April 10, 2017), 2017 WL 1353282 (arguing that "certification decisions now turn on venue" and "geography").

recently declined yet another opportunity to take up the ascertainability issue this term, when it denied the petition filed in *Briseno*, the Ninth Circuit decision rejecting the strict approach.²⁸⁹ The need for further “percolation” does not seem a powerful reason for declining to address the issue at this time.

The three other reasons why the Court might decline to resolve a split in the circuits—the hope that the lower federal courts themselves will work out the conflict; deference to Congress; and deference to the rule-making process—all suggest that another governmental actor may be better suited to resolving the issue and therefore require closer examination. These reasons will be taken up in the sections that follow.

B. *The Lower Federal Courts*

The Supreme Court may decline to accept a case raising an interpretive issue of federal law on which the lower courts are split because it hopes the conflict will “work itself out.”²⁹⁰ The questions addressed here are the institutional competency of the lower federal courts, the efficacy and costs of the en banc process they employ to resolve conflicts between or among them, and the utility of deference to the lower courts specifically on the ascertainability issue.

1. *The Lower Courts’ Competency to Adjudicate*

Like the Supreme Court, the lower federal courts have certain institutional competencies that make them well suited to interpret federal legislation and Rules. The lower federal courts are structurally separate from Congress; like the Justices, the judges on the courts of appeals have lifetime tenure and salary protection, which shield them from political and financial pressures;²⁹¹ and they are hand-selected by the President’s advisors, appointed by the President, and vetted by the Senate to ensure they have the education, skill, integrity, and judgment to interpret federal laws fairly and accurately.²⁹² While the courts of appeals sit in three-judge panels only a

²⁸⁹ *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 313 (2017). Yet another petition for certiorari raising the ascertainability issue was recently filed, but a joint motion to defer consideration of the petition was granted on January 16, 2018, in light of the parties’ settlement of the dispute. *See* Petition for Writ of Certiorari, *Petroleo Brasileiro S.A. v. Universities Superannuation Scheme Ltd.* (No. 17-664) (U.S. 2017); *see also* *Petroleo Brasileiro S.A. – Petrobras v. Universities Superannuation Scheme Limited*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/petroleo-brasileiro-s-petrobras-v-universities-superannuation-scheme-limited/> [<https://perma.cc/RBN7-YF6H>] (last visited Mar. 19, 2018).

²⁹⁰ *See supra* notes 275–77 and accompanying text.

²⁹¹ U.S. CONST. art. III, § 1; *see also supra* notes 252–54.

²⁹² *See supra* note 259 and accompanying text.

third the size of the Supreme Court,²⁹³ the judges on each panel deliberate as a group, which increases the likelihood that they will consider all available information and debate the strengths and weaknesses of all arguments before rendering judgment.²⁹⁴ By definition, these three-judge panels are more diverse than single-judge courts and that diversity may yield better decisions and greater public confidence in those decisions. Moreover, when the courts of appeals sit en banc, the larger size of the en banc court should increase the likelihood of well-informed, accurate, and fair decisions.²⁹⁵

Since the Supreme Court's capacity to resolve splits between or among the circuits is low given the tiny number of cases it hears each year, it makes sense to defer to the lower federal courts if there is a reasonable likelihood that they can agree upon a uniform interpretation of a federal statute or Rule within a reasonable period of time. Because each of the courts of appeals is bound to follow prior precedential panel decisions within the circuit unless or until overruled by the court en banc (or reversed by the Supreme Court),²⁹⁶ however, en banc review is the only way the lower courts themselves can eliminate a conflict once a split between or among them has emerged, as it has regarding ascertainability.

2. *Efficacy and Costs of En Banc Review Process*

Under Federal Rule of Appellate Procedure 35, en banc review “is not favored.”²⁹⁷ It may be granted only to “secure or maintain uniformity of the court’s decisions” or to resolve “a question of exceptional importance”²⁹⁸

²⁹³ 28 U.S.C. §§ 46(b)–(c). For a brief history of the courts of appeals and their practice of sitting in three-judge panels, see, for example, 16AA CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3981.1, at 415–17 (4th ed. 2008); Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 *FORDHAM L. REV.* 2001, 2007–09 (2014).

²⁹⁴ See *supra* notes 256–58 and accompanying text.

²⁹⁵ See *supra* notes 255–58 and accompanying text. Ordinarily when a circuit court sits en banc, all of its judges participate; but courts with more than fifteen active judges may conduct en banc review by a division of the court if so authorized by the courts’ own rules. FED. R. APP. P. 35(c) & Pub. L. 95-486, § 6, 92 Stat. 1629, 1633 (1978). To date, only the Ninth Circuit has formally adopted this option. See Sadinsky, *supra* note 293, at 2014 n.119; 9th CIR. R. 35-3 (providing that “[t]he en banc court . . . shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court”).

²⁹⁶ See, e.g., 16AA WRIGHT ET AL., *supra* note 293, § 3981.1, at 427 (noting that “[o]nly the court sitting en banc can overrule the panel decision”).

²⁹⁷ FED. R. APP. P. 35(a).

²⁹⁸ *Id.* at (1)–(2). Rule 35(b) further provides that a petition for a hearing or rehearing en banc must state that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed . . . and consideration by the full court is therefore necessary to secure and maintain uniformity of the court’s decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it

and only if a “majority of the circuit judges who are in regular active service and who are not disqualified” assent.²⁹⁹ In order for a case to be heard or reheard en banc, a party must file a petition seeking en banc review or a judge on the court must request it;³⁰⁰ a judge on the court must call for a vote on the petition or request;³⁰¹ and a majority of the circuit judges in “regular active service and who are not disqualified” must order it.³⁰²

Counsel file petitions for rehearing en banc as a matter of course, but almost all such petitions are denied.³⁰³ In fact, en banc decisions make up less than one percent of the regional courts of appeals’ decisions on the merits,³⁰⁴ with that percentage declining in both absolute and relative terms between 2000 and 2010.³⁰⁵ One of the reasons why courts disfavor the en banc procedure is because it imposes significant costs—as much as five to six times the judicial resources expended in a standard panel decision.³⁰⁶ For example, all active judges, rather than only three, have to invest time and energy in preparing and hearing the case and opinion-writing is more time-consuming because more judges submit comments and suggestions, which the author of the en banc opinion must seek to address.³⁰⁷ Even after investing significant resources, it is possible that a majority of the full court

involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

FED. R. APP. P. 35(b)(1).

²⁹⁹ FED. R. APP. P. 35(a). Before the adoption of Appellate Rule 35 in 1967, both the Supreme Court and Congress had approved the en banc procedure. See *Textile Mills Sec. Corp. v. Comm’r*, 314 U.S. 326, 333–35 (1941); 28 U.S.C. § 46(c) (codifying *Textile Mills*); *W. Pac. R. Corp. v. W. Pac. R. Co.*, 345 U.S. 247 (1953) (interpreting 28 U.S.C. § 46(c)). Following the Court’s decision in *Western Pacific*, each of the courts of appeals enacted its own rules governing the en banc procedure. Sadinsky, *supra* note 293, at 2012.

³⁰⁰ FED. R. APP. P. 35(b); see also 16AA WRIGHT ET AL., *supra* note 293, § 3981.1, n.17 (stating that Rule 35 does not affect the power of the court of appeals to initiate en banc hearings on its motion) (citation omitted); *W. Pac. R. Corp.*, 345 U.S. at 257 (interpreting 28 U.S.C. § 46(c) as granting the courts of appeals authority to sit en banc and leaving it to the courts themselves “to establish the procedure for the exercise of the power”).

³⁰¹ FED. R. APP. P. 35(f).

³⁰² FED. R. APP. P. 35(a); see Sadinsky, *supra* note 293, at 2013.

³⁰³ Sadinsky, *supra* note 293, at 2005, 2022 (footnotes omitted).

³⁰⁴ *Id.* at 2004 (footnote omitted); see also *id.* at 2015 (noting that only forty-five of more than 30,914 cases heard in 2010 by the circuit courts were heard en banc); FED’L BAR COUNCIL, EN BANC PRACTICES IN THE SECOND CIRCUIT: TIME FOR A CHANGE? 4 (2011) [hereinafter Federal Bar Council Report]; Michael E. Solimine, *Ideology and En Banc Decisionmaking*, 67 N.C. L. REV. 29, 29–30, 41–42, 45–46 (1988). The Federal Circuit hears a larger fraction of cases en banc. Sadinsky, *supra* note 293, at 2016 (footnote omitted).

³⁰⁵ FEDERAL BAR COUNCIL REPORT, *supra* note 304, at 5.

³⁰⁶ Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1020 (1991); see Sadinsky, *supra* note 293, at 2017–18.

³⁰⁷ Ginsburg & Falk, *supra* note 306, at 1018.

fails to reach a consensus,³⁰⁸ the case becomes moot;³⁰⁹ or the en banc court agrees with the panel opinion in the end.³¹⁰ Given these significant costs, even if only *one* of the courts of appeals were out of sync with the others on a particular issue, the odds that the “outlier” court would grant en banc review, reconsider its position in light of the others’ decisions, and reach a decision consistent with them, thereby obviating the need for Supreme Court review, appear to be low.

If the courts of appeals were more evenly divided on an issue (or even if just two of the courts of appeals reached a result at odds with the others), then it would be even less likely that the lower courts would be able to work out the conflict on their own within a reasonable period of time. Two (or more) of the courts of appeals would have to be willing to hear or rehear cases en banc, notwithstanding the costs described above, and would have to be persuaded by the rationale of their sister courts. Since a court can address an issue en banc only if it arises in a case before it, years might pass before an “outlier” court had the opportunity to revisit an issue en banc. Thus, the more outlier courts there were, the longer the process of “working it out on their own” likely would take and the longer the split and the resulting disuniformity in the interpretation of a federal statute or rule would persist.³¹¹

Given the significant costs imposed by full en banc review, some of the courts of appeals employ an informal en banc review process, whereby a panel circulates to the full court a proposed opinion that would overrule a prior panel decision, seeking the full court’s acquiescence or affirmative approval of the opinion before it is published.³¹² Only the Seventh and D.C. Circuits have adopted formal rules authorizing such a process,³¹³ but seven other federal courts of appeals employ some type of informal en banc procedure.³¹⁴ Notable for our purposes, the Third Circuit has expressly disavowed an informal en banc review procedure in its local rules, barring

³⁰⁸ *Id.* at 1019.

³⁰⁹ *Id.* at 1020.

³¹⁰ *Id.*

³¹¹ For these reasons, even if the Third Circuit were to “reverse itself en banc in some future case” regarding ascertainability, Klonoff, *supra* note 37, at 1607, that action alone would not resolve the disuniformity among the courts of appeals on this issue.

³¹² Sadinsky, *supra* note 293, at 2024–29.

³¹³ *Id.* at 2025; see 7th Cir. R. 40(e); D.C. Circuit Policy Statement on En Banc Endorsement of Panel Decisions (Jan. 17, 1996), [https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Irons%20Footnote/\\$FILE/IRONS.PDF](https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Irons%20Footnote/$FILE/IRONS.PDF) [<https://perma.cc/4QLH-LJVM>].

³¹⁴ Sadinsky, *supra* note 293, at 2025 (citing Amy E. Sloan, *The Dog That Didn’t Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 *FORDHAM L. REV.* 713, 726–27 (2009)).

panels of the court from overruling prior precedential panel opinions and relying exclusively on the formal en banc procedure to achieve that result.³¹⁵

3. *Utility of Deference to the Lower Federal Courts on the Issue of Ascertainability*

With the lower federal courts' competency to interpret federal statutes and Rules established and the efficacy and costs of the en banc review process in mind, we now consider whether it makes sense for the Supreme Court to decline to grant certiorari, deferring instead to the lower federal courts to resolve the ascertainability issue on their own. Given the nature of the split—with the Third and Eleventh Circuits adopting the strict approach in 2013 and 2015, respectively (and with the Sixth Circuit appearing to align with them in 2017);³¹⁶ and the Second, Seventh, and Ninth Circuits rejecting that approach in the months and years that followed (with the Fifth³¹⁷ and Eighth³¹⁸ Circuits likely aligned with them)—at least two of the courts of appeals would have to reconsider their approach in order to resolve the split without Supreme Court intervention.

It is difficult to gauge the likelihood that they will do so and if so, in what period of time. A local Third Circuit rule cautions that en banc review

³¹⁵ See *id.* at 2025 n.220 (“It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so.” (quoting 3D CIR. I.O.P. 9.1)).

³¹⁶ While the Sixth Circuit appeared to reject the strict approach in 2012 in *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 539–41 (6th Cir. 2012), its more recent decision in *Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460 (6th Cir. 2017) is more sympathetic to the strict approach, rejecting “sole reliance on individual affidavits.” *Id.* at 466.

³¹⁷ While the Fifth Circuit has long required that the class be “adequately defined and clearly ascertainable,” see *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 (5th Cir. 2012) (quoting *DeBremacker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam)), in a far more recent (but nonprecedential and unpublished) opinion, it has stated that “the court need not know the identity of each class member before certification; ascertainability requires only that the court be able to identify class members at *some stage* of the proceeding.” *Frey v. First Nat’l Bank*, 602 Fed. Appx. 164, 168 (5th Cir. 2015) (quoting 1 RUBENSTEIN, *supra* note 1, § 3:3) (emphasis added); see also *id.* at 169 (appearing willing to accept class members’ (potentially self-serving) statements that their accounts were personal, rather than business). It also has concluded that “the possibility that some [claimants] may fail to prevail on their individual claims will not defeat class membership on the basis of the ascertainability requirement.” *In re Deepwater Horizon*, 785 F.3d 1003, 1018 (5th Cir. 2015) (internal citations and quotation marks omitted); *In re Deepwater Horizon*, 739 F.3d 790, 821 (5th Cir. 2014) (internal citation, footnote, and quotation marks omitted).

³¹⁸ See *Sandusky Wellness Center, LLC, v. MedTox Scientific, Inc.*, 821 F.3d 992, 996–97 (8th Cir. 2016) (declining to impose a “separate, preliminary [ascertainability] requirement,” but adhering to its prior understanding that Rule 23 requires the class to be “adequately defined and clearly ascertainable”; accepting fax logs as “objective criteria that make the recipient clearly ascertainable”); *Ihrke v. N. States Power Co.*, 459 F.2d 566, 573 n.3 (8th Cir. 1972) (requiring that the class “be adequately defined and clearly ascertainable”) (internal citation and quotation marks omitted), *vacated as moot*, 409 U.S. 815 (1972).

“is not favored” and urges counsel to exercise “restraint” in seeking it.³¹⁹ The Third Circuit denied a petition seeking en banc review of its strict approach in *Carrera*,³²⁰ notwithstanding some of its judges asking “how far we go in requiring plaintiffs to prove [the ability to identify class members] at the outset”³²¹ While the Third Circuit has walked its position back a bit in subsequent decisions,³²² it continues to require “evidentiary support” that an “economical and administratively feasible” means of identifying the class members “will be successful” as an “essential prerequisite” to class certification³²³ and to reject affidavits alone as sufficient proof of ascertainability.³²⁴ Under its own rules, no panel opinion can overrule *Carrera* and no informal en banc procedure is authorized.³²⁵

In the nearly three years since the Seventh Circuit rejected the heightened ascertainability approach in mid-2015,³²⁶ no party has sought en banc review of the issue in either the Third or Eleventh Circuits.³²⁷ Whether *both* of these courts will reconsider the strict approach in light of the growing number of courts of appeals rejecting it is unknown; but the opportunity to petition for en banc review of the Third Circuit’s most recent ascertainability

³¹⁹ 3D CIR. R. 35.4.

³²⁰ *Carrera v. Bayer Corp.*, No. 12–2621, 2014 WL 3887938 (3d Cir. May 2, 2014) (denying petition for rehearing by the panel and rehearing en banc).

³²¹ *Id.* at *1 (Ambro, C.J., dissenting from the denial of the petition for rehearing en banc; joined by Judges McKee, Rendell, and Fuentes) (maintaining that the issue “merits not only *en banc* review . . . but also review by the Judicial Conference’s Committee on Rules of Practice and Procedure”); *see also id.* at *2 (positing that “*Carrera* goes too far”).

³²² *See supra* Part II.B.3 (discussing the Third Circuit’s modest adjustments to the strict approach after *Carrera*).

³²³ *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 396 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1167 (2016) (citations and internal quotation marks omitted); *see also* *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 163 (3d Cir. 2015).

³²⁴ *See City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 441 (3d Cir. 2017) (quoting *Byrd*, 784 F.3d at 171) (“[A]ffidavits from potential class members, standing alone, without ‘records to identify class members or a method to weed out unreliable affidavits,’ will not constitute a reliable and administratively feasible means of determining class membership.”).

³²⁵ *See supra* text accompanying note 315 (explaining that the Third Circuit relies “exclusively” on the formal en banc procedure and disallows “panels of the court from overruling precedential panel opinions”).

³²⁶ *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016).

³²⁷ A petition for rehearing and rehearing en banc was sought in *In re Community Bank of Northern Virginia Lending Practices Litigation*, 795 F.3d 380 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1167 (2016), but the petition did not seek review of the court’s ascertainability approach. *See* Petition for Rehearing and Rehearing En Banc by Appellant at iii, 1–2, *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380 (3d Cir. 2015) (No. 13–4273) (opposing the panel’s decision to treat Rule 23 as a pleading standard and to ignore class certification issues, but declining to address ascertainability). In all events, it was denied on October 5, 2015. *Sur Petition for Rehearing, In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380 (3d Cir. 2015) (No. 13–4273). Moreover, the Sixth Circuit denied en banc review in its most recent ascertainability decision, in which it appeared to align with the Third and Eleventh Circuits. *See Sandusky Wellness Center, LLC v. ASD Specialty Healthcare Inc.*, 863 F.3d 460, 460 (6th Cir. 2017) (denying rehearing en banc on September 1, 2017).

opinion has passed.³²⁸ The split among the circuits and the resulting disuniformity in the interpretation of Rule 23 remain, inviting forum-shopping and threatening inequitable administration of the laws. In light of the significant costs that en banc review entails; the small number of cases heard en banc; and the need for at least two courts of appeals not only to grant en banc review but to reject their panel courts' opinions on the issue,³²⁹ one may question whether it continues to make sense for the Court to defer to the lower courts to resolve the ascertainability issue.

C. Congress

Since it may no longer make sense to defer to the lower federal courts on the ascertainability issue, we should examine other possible reasons the Supreme Court may have for declining to grant a writ of certiorari to resolve it. As suggested above, the Court sometimes defers to Congress rather than granting certiorari either because Congress has greater institutional competency to resolve the issue or because Congress has expressed interest in legislating on it and the interpretative issue presented for the Court's consideration would be mooted if Congress were to act.³³⁰ In this Section, we consider Congress's unique competency to make law, its authority to craft procedural rules governing the federal courts, its decision to delegate most of that authority to the judiciary, and its nascent efforts to address the ascertainability issue.

1. Congress's Competency to Make Law and Authority to Craft Procedural Rules

If the Court's principal role in our system of divided government is to interpret the law, then Congress's role is to enact it. The very first section of Article I of the Constitution vests "all legislative Powers" granted by the Constitution to "a Congress of the United States"³³¹ Congress is uniquely well suited to resolve the most pressing public policy issues of the day for several reasons.

First, our Senators and Representatives, elected in popular democratic elections, are politically accountable to the people. The Constitution guarantees each state a voice in the Senate while providing the people with

³²⁸ The Third Circuit decided *City Select Auto Sales Inc. v. BMW Bank of North America Inc.*, 867 F.3d 434, 434 (3d Cir. 2017) on August 16, 2017. Under Federal Appellate Rules, a petition for rehearing en banc would have had to have been filed within fourteen days of the judgment, or by August 30, 2017. See FED. R. APP. P. 35(c), 40(a)(1) (explaining the fourteen-day deadline). As of January 27, 2018, the docket revealed no filings after entry of the judgment and issuance of the mandate.

³²⁹ See *supra* Part III.B.2 (explaining the high costs and low incidence of en banc review).

³³⁰ See, e.g., Brief in Opposition, at 29 n.20, *ConAgra Brands, Inc. v. Briseno*, No. 16-1221 (U.S. June 16, 2017) (suggesting that "[t]he Court should allow the legislative process to play out before intervening" on the ascertainability issue).

³³¹ U.S. CONST. art. I, § 1.

proportional representation in the House,³³² the frequent elections of the Representatives ensures their “immediate dependence” upon and “intimate sympathy with the people” in their local communities.³³³ Americans accept the legitimacy of federal legislation because they choose the lawmakers who enact it.³³⁴

Second, the significant size of and geographical diversity within the House of Representatives and Senate ensure other types of diversity—lawmakers of different religions, races, ethnicities, national origins, and sexual orientations, from big cities and big sky country,³³⁵ ensuring greater public acceptance of the laws they enact.³³⁶

Third, Congress has the tools to gather information needed to make well-informed decisions—lawmakers can hold town hall meetings in their home states and issue subpoenas and conduct hearings in Washington.³³⁷

Finally, Congress is a deliberative body, which debates issues in committee and on the floor, ensuring that all views are aired and the strengths and weaknesses of proposed legislative solutions are considered. These strengths enable Congress to serve as the “forge and anvil of major public policy.”³³⁸

Congress has many powers in addition to the law-making power, including the authority to create new governmental units, as needed.³³⁹ Most notably, Congress has power, granted by Article I of the Constitution, “[t]o constitute Tribunals inferior to the supreme Court,”³⁴⁰ which it exercised by creating the federal district courts and the courts of appeals³⁴¹ and vesting them with some of the jurisdiction that Article III of the Constitution

³³² U.S. CONST. art. I, §§ 2–3.

³³³ THE FEDERALIST NO. 52 (James Madison).

³³⁴ See ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 371 (2d ed. 2002) (“[C]onsent and approbation are achieved through delegating lawmaking power to legislatures that consist of popularly elected representatives.”).

³³⁵ Big sky country refers to areas of flat, open land. *Big sky*, OXFORD DICTIONARIES, https://en.oxforddictionaries.com/definition/us/big_sky [<https://perma.cc/8TFN-J5E9>] (last visited Feb. 11, 2018).

³³⁶ See THE FEDERALIST NO. 10 (James Madison) (discussing the different factions and classes in America and explaining that the “great[] number of citizens and extent of territory which may be brought within the compass of republican . . . government” allows for greater diversity to prevent a majority from “inva[di]ng the rights of other citizens”).

³³⁷ See, e.g., *McGrain v. Daugherty*, 273 U.S. 135, 161, 174 (1927) (holding that “the power of inquiry,” or in other words, the power to investigate and hold hearings, is an “essential and appropriate” use of legislative power).

³³⁸ HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 700 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

³³⁹ See *id.* at 697–702 (describing the “major tasks” of the legislature, including constructing new governmental structures to manage new problems and needs).

³⁴⁰ U.S. CONST. art. I, § 8, cl. 9; see also U.S. CONST. art. III, § 1 (“The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

³⁴¹ 28 U.S.C. §§ 41, 43, 132(a) (2012).

allows.³⁴² While the authority to create the lower federal courts logically includes the authority to determine the procedures followed by those courts and attorneys practicing before them,³⁴³ in 1934 Congress delegated most of this authority to the judiciary, drawing a “sharp distinction between substance and procedure” and deferring to the judiciary on procedural matters.³⁴⁴

2. Congress’s Delegation in the Rules Enabling Act

Before Congress enacted the Rules Enabling Act in 1934 (the REA or the Act),³⁴⁵ procedure in the lower federal courts had to “conform as near as may be” to the procedure in the state court in which each federal court sat,³⁴⁶ resulting in “confusion” that made practice in the federal district courts “the most difficult and uncertain of the whole civilized world.”³⁴⁷ The REA model sought to eliminate that confusion by providing for centralized and uniform rules crafted by the judiciary.³⁴⁸

In adopting the REA and largely delegating responsibility over procedure to the judiciary, Congress hoped that procedural rules drafted by the courts would foster uniformity, simplicity, efficiency, and resolution of disputes on the merits, rather than on procedural technicalities.³⁴⁹ Congress reserved to itself exclusive authority to legislate on “what the courts may do,” while delegating to the judiciary the authority to determine “how [the courts] shall do it.”³⁵⁰

³⁴² U.S. CONST. art. III, §§ 1–2.

³⁴³ See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941) (“Congress has undoubted power to regulate the practice and procedure of federal courts” (footnote omitted)).

³⁴⁴ *Mulligan & Staszewski*, *supra* note 240, at 1202–03.

³⁴⁵ See Act of June 19, 1934, Pub. L. No. 73–415, 48 Stat. 1064, 1064 (giving the Supreme Court of the United States authority to adopt rules to govern actions at law) (codified as amended at 28 U.S.C. § 2072 (2012) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals.”)). While the initial session law did not have an official name, the act is known as the Rules Enabling Act. See, e.g., Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1023 n.33 (1982) (identifying the session law, an Act of June 19, 1934, Pub. L. No. 73–415, 48 Stat. 1064, as the Rules Enabling Act).

³⁴⁶ See Act of June 1, 1872, 17 Stat. 197, § 5 (providing that the practices and pleadings, except in equity, in the United States courts conform to those of state court) (codified as amended at 28 U.S.C. § 724 (1934)) (repealed 1940).

³⁴⁷ S. REP. NO. 69–1174, at 2 (1926).

³⁴⁸ See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 892–94 (1999) [hereinafter Bone, *The Process*] (identifying centralization and national uniformity as key elements for court-made rules).

³⁴⁹ See S. REP. NO. 69–1174, at 1–2, 6; see also *id.* at 12–13 (identifying a more complete list of intended benefits).

³⁵⁰ *Id.* at 12; see also Burbank, *supra* note 345, at 1052 (explaining that the REA allowed the Court to determine the “detailed machinery,” but allowed Congress to retain control over “all fundamental and jurisdictional matters” (quoting *Reforms in Judicial Procedure, American Bar Association Bills, Part 2: Hearing on H.R. 133 and H.R. 4545 Before the H. Comm. on the Judiciary*, 63d Cong. 22–23 (1914) (statement of Thomas Shelton))); Anthony Vitarelli, Comment, *A Blueprint for Applying the Rules Enabling Act’s Supersession Clause*, 117 YALE L.J. 1225, 1231 (2008) (summarizing the legislative

Proponents of the REA model assumed a sharp distinction between substance and procedure, viewing procedure as subordinate to substantive policy and law and instrumental in function.³⁵¹ While changes in public policy demanded a democratic process, the adoption of procedural rules did not because, in the words of Professor Robert Bone, procedure was then believed to “involve[] no substantive value choices.”³⁵² To ensure that the judiciary did not overstep its bounds and intrude upon Congress’s authority to enact substantive law, the REA barred the Rules from “abridg[ing], enlarg[ing], [o]r modify[ing] the substantive rights of any litigant.”³⁵³

In delegating responsibility to the judiciary to craft rules governing practice in the district courts, Congress viewed the courts as better suited to the task given their expertise in the “science of procedure” and their hands’ on experience with judicial administration.³⁵⁴ A 1926 report of the Senate Judiciary Committee acknowledged:

A legislative body immersed in questions of broad public policy only remotely related to the details of court procedure is ill adapted to the framing of court rules. On the other hand, judges daily engaged in administering justice ought to be equipped to determine the means by which that administration may be facilitated.³⁵⁵

Another institutional advantage was that the federal courts were protected from political pressure and special interests and therefore were better able than Congress to assume the rule-making responsibility.³⁵⁶ Because the rule-making task was perceived to involve “reasoned deliberation rather than interest accommodation,” the lack of political accountability on the part of those crafting the rules did not seriously undermine the legitimacy of the process or its product.³⁵⁷

history of the REA and the debate about “comparative institutional competence” between the Court and Congress).

³⁵¹ Bone, *The Process*, *supra* note 348, at 894–97; Mulligan & Staszewski, *supra* note 240, at 1202–03.

³⁵² Bone, *The Process*, *supra* note 348, at 896.

³⁵³ Act of June 19, 1934, Pub. L. No. 73–415, 48 Stat. 1064, 1064 (giving the Supreme Court of the United States authority to adopt rules to govern actions at law) (codified as amended at 28 U.S.C. § 2072 (2012)); *see also* Burbank, *supra* note 345, at 1025–26, 1036, 1106–07 (discussing the legislative history of the REA and the allocation of power between Congress and the Court).

³⁵⁴ Bone, *The Process*, *supra* note 348, at 896; *see also, e.g.*, Vitarelli, *supra* note 350, at 1231 (“When Congress passed the REA, it delegated some of its powers to the Supreme Court in recognition of the judiciary’s superior competence in establishing rules of procedure.”); *see generally* Burbank, *supra* note 345 (describing the legislative history of the REA).

³⁵⁵ S. REP. NO. 69–1174, at 7 (1926).

³⁵⁶ Bone, *The Process*, *supra* note 348, at 896 (footnote omitted); *see also supra* text accompanying notes 252–54 (discussing the lifetime tenure and secure compensation of federal judges as further protection against the political pressure).

³⁵⁷ Bone, *The Process*, *supra* note 348, at 899.

While reserving to Congress the right to revise the Rules crafted by the Court or to withdraw the delegation of power to it altogether, the 1926 Senate report suggested that the “rules [would] stand without amendment” by Congress because “it is convenient for the legislature to refer proposed changes to the courts[, which are] better equipped to consider them.”³⁵⁸ Congress never vetoed a Rule from 1934 to 1973.³⁵⁹

During the 1950s and 1960s, concerns about the legitimacy of the rule-making process were occasionally voiced by those who recognized that substance and procedure are “inextricably intertwined” and that procedural rules have “important substantive effects,” but these critiques were mild and few questioned that courts should retain primary responsibility for rule-making.³⁶⁰ With the rise of the civil rights movement and the advent of structural reform litigation in the 1960s and 1970s, however, the utility of litigation to achieve substantive policy ends became more obvious, as did the blurriness of the substance/procedure divide and the profound impact of procedural rules on substantive outcomes.³⁶¹

Over time, and with pressure mounting on several different fronts, critics challenged the judicial rule-making model—with its emphasis on expertise and insulation from political pressure—advocating instead a process that valued representation and accommodated competing interest groups.³⁶² The critics argued, in the 1970s and 1980s, that if practicing attorneys and representatives of interest groups were more involved in the rule-making process, the process would gain legitimacy and produce better rules.³⁶³ As interest groups claimed a more active role—by participating in hearings before the Advisory Committee and lobbying Congress to veto proposed rule changes—Congress amended the REA in 1988 by adopting the Judicial Improvements and Access to Justice Act of 1988 (the JIA) to open up the rule-making process in a number of ways.³⁶⁴ The JIA codified the role of the

³⁵⁸ See S. REP. NO. 69–1174, at 7 (1926) (citing experience with the Supreme Court’s rules governing equity, admiralty, and bankruptcy cases; experience in states that have delegated rule-making power to their courts; and experience in England).

³⁵⁹ Bone, *The Process*, *supra* note 348, at 893 (citation omitted).

³⁶⁰ *Id.* at 899 (citation omitted).

³⁶¹ See *id.* at 900 (“The resulting changes in the character of federal litigation gave rise to concerns about the adequacy of the existing procedural system to promote substantive values.”); Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1325–26 (2006) (describing the potential political nature and impact of many of the Federal Rules of Civil Procedure).

³⁶² See Bone, *The Process*, *supra* note 348, at 902, 904; Marcus, *supra* note 30, at 947, 949 (discussing “deliberative democracy” and “deliberative democratic pedigree”).

³⁶³ See Bone, *The Process*, *supra* note 348, at 904 (noting that the rule-making process did not have public participation).

³⁶⁴ Judicial Improvements & Access to Justice Act, Pub. L. No. 100–702, §§ 401–07, 102 Stat. 4642, 4648–52 (1988); see also H.R. REP. NO. 100–889, at 26–27 (1988), *reprinted in* 1988 U.S.C.A.N. 5982, 5986–87 [hereinafter 1988 House Report] (noting that before the 1988 amendment,

Advisory Committees and mandated that they include lower court judges, appellate court judges, and practitioners.³⁶⁵ More importantly, to enhance transparency and public participation in the rule-making process, the JIA required the Advisory Committees to conduct their business in meetings open to the public (with limited exceptions); to provide advance notice of their meetings; to publish the minutes of their meetings; and to provide longer periods for public comment on proposed rule changes.³⁶⁶ Congress also contemplated a greater role for itself by granting a longer window—a full seven months—in which to modify or veto a rule proposed by the Court.³⁶⁷ In doing so, Congress “contemplate[d] an arguably increased measure of congressional involvement in the rule revision process.”³⁶⁸

Congress’s enactment of the Civil Justice Reform Act of 1990 (the CJRA),³⁶⁹ which required each federal district court to create a plan to reduce expense and delay, further disrupted the original centralized, expert judicial rule-making model in a number of ways.³⁷⁰ First, the CJRA invited the proliferation of local rules, which threatened uniformity in federal civil

“Congress . . . frequently intervened either to delay the effective date of, disapprove, or modify rules and amendments promulgated under the Rules Enabling Acts”).

³⁶⁵ Judicial Improvements & Access to Justice Act, Pub. L. No. 100–702, § 401, 102 Stat. 4642, 4649 (1988) (adding 28 U.S.C. § 2073(a)(2)); *see also, e.g.*, Mulligan & Staszewski, *supra* note 240, at 1200 (noting that the 1988 Act mandates Advisory Committees composed of practitioners, trial judges, and appellate judges); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1109–10, 1136–37 (2002). At least since the mid-1980s, critics have advocated inclusion on the Advisory Committee of more practicing attorneys and representatives of user groups to foster greater representation. Bone, *The Process*, *supra* note 348, at 903. The current Advisory Committee includes not only federal district court judges, but also a federal bankruptcy judge, a court of appeals judge, a state supreme court justice, an attorney with the United States Department of Justice, private practitioners, academics who study and teach civil procedure, a clerk of a federal district court, and the secretary to the Standing Committee. *See* Membership of the Committee on Rules of Practice and Procedure and Advisory Rules Committees, Advisory Committee on Civil Rules (Oct. 1, 2016).

³⁶⁶ Judicial Improvements & Access to Justice Act, Pub. L. No. 100–702, § 401, 102 Stat. 4642, 4649 (1988) (adding 28 U.S.C. § 2073(c)); *see also, e.g.*, Bone, *The Process*, *supra* note 348, at 903; Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1062–63 (1993); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 830, 832 (1991) [hereinafter Mullenix, *Hope Over Experience*]; Procedures for the Judicial Conference’s Committee on Rules of Practice and Procedure and Its Advisory Rules Committees (Dec. 1, 2015), <http://www.uscourts.gov/rules-policies/about-rulemaking-process/laws-and-procedures-governing-work-rules-committees> [<https://perma.cc/G7JN-7245>]; Struve, *supra* note 365, at 1110–12.

³⁶⁷ Judicial Improvements & Access to Justice Act, Pub. L. No. 100–702, § 401, 102 Stat. 4642, 4649–50 (1988) (adding 28 U.S.C. § 2074(a)); *see also* Carl Tobias, *Congress and the 2000 Federal Civil Rules Amendments*, 22 CARDOZO L. REV. 75, 85 (2000).

³⁶⁸ Tobias, *supra* note 367, at 85; *see also* Struve, *supra* note 365, at 1115, 1119 (noting that Congress must receive both the text of the proposed Rule and the Advisory Committee note).

³⁶⁹ Civil Justice Reform Act of 1990, Pub. L. No. 101–650, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§ 471–82).

³⁷⁰ *Id.* at 5090.

procedure.³⁷¹ Second, the philosophy underlying the CJRA—that concern for unique local circumstances and involvement by local user groups would yield better rules and achieve greater legitimacy—was inconsistent with the philosophy underlying the original Federal Rules.³⁷² And third—perhaps most relevant—by enacting the CJRA, Congress evinced the view that procedural reform was a matter of legislative concern. As Professor Bone explained, “CJRA proponents defended congressional involvement by arguing that CJRA reforms were so intimately tied to substantive policies and effects that public participation and congressional control were essential.”³⁷³ In other words, access to the courts and their efficient operation were matters of concern to Congress, which could threaten judicial control over rule-making.³⁷⁴

Congress has flexed its muscle and decided several matters of judicial procedure in the years since it enacted the CJRA.³⁷⁵ In 1995, Congress enacted the Private Securities Litigation Reform Act³⁷⁶ to discourage the filing of, and reduce the costs of defending, abusive private securities lawsuits designed to extract settlements from nonculpable issuers of securities and others, including their accountants and underwriters.³⁷⁷ The legislation altered the procedures governing private securities litigation by imposing heightened pleading requirements³⁷⁸ and a stay of discovery during the pendency of motions to dismiss,³⁷⁹ establishing new procedures for the appointment of lead plaintiffs and lead counsel in securities class actions, including a presumption that the person with the “largest financial interest in the relief sought by the class” is the “most adequate plaintiff”;³⁸⁰ limiting attorneys’ fees and expenses to a “reasonable percentage of the amount actually paid to the class”;³⁸¹ and making sanctions for violations of

³⁷¹ See Bone, *The Process*, *supra* note 348, at 904–05 (identifying critics’ concerns for balkanization and fragmentation of federal civil procedure).

³⁷² See *id.* at 905 (“[T]he idea of fitting rules to local circumstances and involving user groups centrally in the drafting process would have made little sense [to the drafters of the original Federal Rules].”).

³⁷³ *Id.* (citing Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 432–34, 436–38 (1992) [hereinafter Mullenix, *The Counter-Reformation*]).

³⁷⁴ *Id.*; see also Mullenix, *The Counter-Reformation*, *supra* note 373, at 429.

³⁷⁵ Although Congress did not veto proposed amendments to the Federal Rules of Civil Procedure on discovery in 1993, the ABA and other interest groups lobbied Congress heavily and “almost succeeded in securing a congressional veto.” Bone, *The Process*, *supra* note 348, at 906.

³⁷⁶ Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

³⁷⁷ See H.R. CONF. REP. NO. 104–369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730 (“[S]eek[ing] to return securities litigation to [a] high standard.”).

³⁷⁸ Private Securities Litigation Reform Act of 1995, *supra* note 376, at 738, 743, 747 (codified as amended at 15 U.S.C. §§ 77z-1(a)(2)(A), 78u-4(a)(2), 78u-4(b)).

³⁷⁹ *Id.* at 741, 747 (codified as amended at 15 U.S.C. §§ 77z-1(b), 78u-4(b)(3)(B)).

³⁸⁰ *Id.* at 738–40, 743–45 (codified as amended at 15 U.S.C. §§ 77z-1(a)(3), 78u-4(a)(3)(B)).

³⁸¹ *Id.* at 740, 745 (codified as amended at 15 U.S.C. §§ 77z-1(a)(6), 78u-4(a)(6)).

Rule 11(b) in private securities litigation mandatory.³⁸² While the House's repeated efforts to amend Rule 11 to eliminate the safe harbor period and to make sanctions mandatory beyond the securities context³⁸³ have not garnered support in the Senate,³⁸⁴ Congress enacted the Class Action Fairness Act in 2005, making significant changes in class action practice beyond the securities context by greatly expanding the federal courts' jurisdiction to entertain class actions and requiring greater scrutiny of class action settlements.³⁸⁵ These Congressional forays into judicial procedure raised the Advisory Committee's awareness of the threat of congressional involvement and the need to accommodate interests groups to avoid that threat.³⁸⁶

This brief review of Congress's competency to make law and its authority to regulate judicial procedure suggests three tentative conclusions. First, while Congress has greater institutional competence to resolve major public policy questions, the Supreme Court and the Advisory Committee have training in the law and greater experience with federal court practice,³⁸⁷ which may make them better qualified to address many issues of judicial procedure and administration. Second, Congress is a highly political body, subject to lobbying and other forms of political pressure, while the Court and the rule-making committees are largely made up of judges and academics with lifetime tenure, who are insulated from much of that pressure and theoretically have greater concern for the "integrity of the procedural system as a whole."³⁸⁸ Third, Congress's principal comparative advantage in the rulemaking arena "stems from its greater democratic legitimacy."³⁸⁹ Given our current recognition of the significant political

³⁸² *Id.* at 742, 748 (codified as amended at 15 U.S.C. §§ 77z-1(c)(2), 78u-4(c)(2)).

³⁸³ H.R. 720, 115th Cong. (2017) (passed Mar. 10, 2017); H.R. 758, 114th Cong. (2015) (passed Sept. 17, 2015).

³⁸⁴ *See* S. 237, 115th Cong. (2017) (introduced on Jan. 30, 2017, and hearings held by Senate Judiciary Committee on Nov. 8, 2017, but not passed); S. 401, 114th Cong. (2015) (introduced on Feb. 5, 2015, but not passed).

³⁸⁵ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §§ 1332(d), 1453, 1711-15).

³⁸⁶ *See* Bone, *The Process*, *supra* note 348, at 906 & n.110 (citing minutes of Advisory Committee meetings that reflect awareness of the potential for congressional interference).

³⁸⁷ *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 884 (2010) [hereinafter Bone, *A Comment*] (explaining the advantages to the formal rulemaking process; stating that the rulemaking committee "has experience with and expertise in federal civil procedure"); Tobias, *supra* note 367, at 87 (discussing the "better institutional memory, broader expertise, greater appreciation of the relevant issues, and more resources to commit to the rule amendment than Congress has"); Vitarelli, *supra* note 350, at 1231 (analyzing the features of the Supreme Court that make it a more apt rule-maker than Congress).

³⁸⁸ Bone, *A Comment*, *supra* note 387, at 884; *see also* Marcus, *supra* note 30, at 939 (stating that, "[I]ife-tenured judges can use the canons to counter dysfunctions in the political process").

³⁸⁹ Vitarelli, *supra* note 350, at 1231-32 (citing Bone, *The Process*, *supra* note 348, at 907); *see also* Moore, *supra* note 366, at 1066 (discussing dissents by Justices Black and Douglas from the Court's

impact of the Civil Rules in general and the enormous impact the strict approach to ascertainability has on consumer class actions in particular, Congress's claim to greater democratic legitimacy should not be underestimated. On the other hand, when Congress legislates on discrete procedural issues (like ascertainability) in response to lobbying by political interest groups, it may disregard or devalue the needs of the procedural system as a whole.³⁹⁰

1. *Congress's Efforts to Address Ascertainability*

While the Court has declined repeated opportunities to address the ascertainability issue, the House of Representatives has passed a bill, called the Fairness in Class Action Litigation Act of 2017, which, among other changes, would codify the strict approach to ascertainability by barring certification of:

a class action seeking monetary relief unless the class is defined with reference to objective criteria and the party seeking to maintain such a class action affirmatively demonstrates that there is a reliable and administratively feasible mechanism (a) for the court to determine whether putative class members fall within the class definition and (b) for distributing directly to a *substantial majority* of class members any monetary relief secured for the class.³⁹¹

To date, the Senate has not taken up the proposed legislation.³⁹²

In passing the bill, the House described the overarching problem as “overbroad class actions” that disadvantage American companies competing in a global market, “force[American consumers] into lawsuits they do not want to be in,” and result in higher prices for consumer goods.³⁹³ In

approval of proposed Rule amendments, which they maintained substantially affected litigants' rights and should have been resolved through legislation by Congress).

³⁹⁰ See, e.g., Paul D. Carrington, “*Substance*” and “*Procedure*” in the Rules Enabling Act, 1989 DUKE L.J. 281, 282 (suggesting that “complex technical issues of judicial practice cannot sustain attention through the political process”); Moore, *supra* note 366, at 1057, 1059 (describing Congress's direct amendment of Rule 35 as “unnecessarily and improperly propell[ing] the legislative branch into a new role as a ‘quick fix’ for drawbacks of the Rules perceived by interested persons or groups,” and expressing concern that Congress “is reacting on occasion to isolated pressures and is not acting with a vision of the procedural system as a whole” (footnote omitted)).

³⁹¹ Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 103 (2017) (emphasis added) (adding, *inter alia*, 28 U.S.C. § 1718(a)) (passed in the House on Mar. 9, 2017).

³⁹² The bill was received in the Senate and referred to the Senate Judiciary Committee on March 13, 2017. No further action is listed on congress.gov. See H.R. 985 - Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/985> [<https://perma.cc/483R-MBA7>] (last visited Jan. 4, 2018).

³⁹³ H.R. REP. NO. 115-25, at 2, 4 (2017) [hereinafter 2017 House Report]; see also *id.* at 3 (stating that “[t]he fundamental problem is that far too many class actions and mass actions are initiated by

explaining the specific section that would codify the strict approach, the House Report stated that “the whole purpose of class actions is to redress the injuries sustained by class members” so “the system should ensure that any benefits obtained in such cases can actually be delivered to those class members.”³⁹⁴ Thus, class counsel should be required to demonstrate that the class action “would actually serve the purpose of compensating class members for their alleged injuries.”³⁹⁵

Bemoaning the circuit split on ascertainability, the House bill aims to establish “a *rule* that ensures class actions are used only where they will serve to actually get compensation to class members, where deserved.”³⁹⁶ By focusing exclusively on compensation, however, the House Report ignores the deterrent effect of class action litigation; and by requiring a mechanism for distributing the recovery to “a *substantial majority* of the class members,”³⁹⁷ the House bill risks denying compensation to *any* class member.³⁹⁸

A section of the House Report containing the “Dissenting Views” of sixteen House Judiciary Committee members openly asserted that the bill “aims to eliminate the use of class actions.”³⁹⁹ Not only did the dissenters challenge the proposed bill’s ends, but also its means: “the bill would . . . unnecessarily circumvent the careful and thorough Rules Enabling Act process for amending Federal civil procedure rules.”⁴⁰⁰ The dissent from the House Report quoted a letter submitted by the Chair of the Judicial Conference’s Standing Committee and the Chair of the Advisory Committee on Civil Rules to the Chair of the House Judiciary Committee, which “‘strongly urge[d] Congress not to amend the class action procedures found in Rule 23 outside the Rules Enabling Act Process’” and “‘ask[ed] that changes be entrusted to the proven and well-established procedures of the Act, rather than direct legislation.’”⁴⁰¹ The letter expressed concern that if

opportunistic lawyers, and litigated primarily for the benefit of those lawyers, with any actual victims being used as a means of garnering vast fee awards”).

³⁹⁴ *Id.* at 19.

³⁹⁵ *Id.*

³⁹⁶ *Id.* at 20 (emphasis added).

³⁹⁷ H.R. 985, 115th Cong. § 103 (2017) (emphasis added).

³⁹⁸ In many class actions, it is impossible to distribute the entire recovery or settlement fund, and requiring a plan for distribution to a substantial majority of class members as a certification requirement may doom many class actions. *See, e.g.,* Wasserman, *Cy Pres*, *supra* note 171, at 103–05 (explaining why settlement funds often go unclaimed).

³⁹⁹ 2017 House Report, *supra* note 393, at 45 (Dissenting Views); *see also id.* at 46 (citing the bill’s “impossible-to-meet certification . . . requirements”).

⁴⁰⁰ *Id.* at 46 (Dissenting Views) (footnote omitted).

⁴⁰¹ *Id.* (Dissenting Views) (quoting Letter from the Hon. David G. Campbell, Chair of the Judicial Conference’s Committee on Rules of Practice and Procedure, and the Hon. John D. Bates, Chair of the Advisory Committee on Civil Rules, to the Hon. Bob Goodlatte, Chair of the House Committee on the Judiciary, at 3 (Feb. 14, 2017), <http://lawprofessors.typepad.com/files/federal-rules-committee-letter-1.pdf> [<https://perma.cc/6GH4-5UEA>] [hereinafter Judicial Conference Letter]); *see also* Draft Minutes

the legislation passed by the House were enacted into law, it would short-circuit the REA's deliberative process.⁴⁰²

It is a challenge to determine the likelihood that the legislation will pass. GovTrack gives it only a thirty-six percent chance of passage.⁴⁰³ Given the gridlock and dysfunction in Congress and the long list of pressing issues on its plate—the debt ceiling, infrastructure, immigration reform, and health care—even these odds seem high. While it is possible that the Supreme Court has declined to take up the ascertainability issue because it believes that Congress has greater institutional competency to address it, or because legislation would moot any effort by the Court to resolve the issue through adjudication, it is at least as likely that the Court has deferred to the Advisory Committee on Civil Rules.

D. *Advisory Committee on Civil Rules*

As suggested in Part III.A above, the Supreme Court has a choice of policy-making forms to deploy in resolving procedural questions like ascertainability: it may resolve them through adjudication—by granting a petition for a writ of certiorari in a case that raises the issue and deciding the case—or it may defer to the rule-making/amending process codified in the REA and wait to approve a Rule or amendment that emerges from that process.⁴⁰⁴ Several lower court judges who have addressed ascertainability without guidance from either the Court or the Advisory Committee have urged the Committee to take up the issue.⁴⁰⁵ In this Section, we explore the Advisory Committee's institutional competency and its efforts to date to address the ascertainability issue.

of April 25, 2017, Meeting of the Advisory Committee on Civil Rules at 2, in JUNE 2017 AGENDA BOOK, *supra* note 203, at 596, tab 4B (identifying letters submitted to Congressional leaders “describing the importance of relying on the Rules Enabling Act to address matters of procedure”).

⁴⁰² See Judicial Conference Letter, *supra* note 401, at 2 (stating that “[t]he Judicial Conference has long opposed direct amendment of the federal rules by legislation rather than through the deliberative process of the [REA]” because it prefers “the thorough and inclusive procedures of the [REA]”).

⁴⁰³ *Advanced Search for Legislation*, GOVTRACK, <https://www.govtrack.us/congress/bills/browse?text=h.r.+985#sort=relevance> [<https://perma.cc/RBH9-57AN>] (last visited Mar. 3, 2018).

⁴⁰⁴ See *supra* text accompanying notes 239–40 (discussing the Supreme Court's choices in how to make policy).

⁴⁰⁵ See, e.g., *Byrd v. Aaron's Inc.*, 784 F.3d 154, 177 (3d Cir. 2015) (Rendell, C.J., concurring) (stating that “[u]ntil we revisit this issue as a full Court or it is addressed by the Supreme Court or the *Advisory Committee on Civil Rules*, we will continue to administer the ascertainability requirement in a way that contravenes the purpose of Rule 23 and, in my view, disserves the public” (emphasis added)); *Carrera v. Bayer Corp.*, No. 12-2621, 2014 WL 3887938 at *1 (3d Cir. May 2, 2014) (Ambro, C.J., dissenting, sur denial of petition for rehearing en banc) (maintaining that the ascertainability issue “merits . . . review by the Judicial Conference's Committee on Rules of Practice and Procedure”).

1. *The Advisory Committee's Competency to Adopt Procedural Rules*

The Advisory Committee has several qualities that make it well suited to address procedural issues for the federal courts. First, the Advisory Committee—made up of trial and appellate court judges, practitioners, and academics⁴⁰⁶—has subject matter expertise and experience, which many in Congress lack. The size of the Committee, its composition, and its deliberative process are likely to enhance the quality and thoughtfulness of its work product. While the Supreme Court also has subject matter expertise (and deliberates as a group), the Justices may lack recent or regular litigation experience in the federal district courts, which many Advisory Committee members have.⁴⁰⁷

Second, many members of the Advisory Committee are federal judges with constitutionally guaranteed job security or law professors with tenure.⁴⁰⁸ While other members of the Committee—such as practitioners and state court judges—may not have as much job security, few members of the Committee hold elected office or are otherwise susceptible to the types of political pressure that Congress members routinely face. While this relative insularity enables the Committee to consider rule amendments neutrally and without direct pressure from the electorate, the Advisory Committee no longer operates behind closed doors, as it once did.⁴⁰⁹ Greater public participation can be viewed as both a plus and a minus. On the one hand, the changes wrought by the JIA, including the greater opportunity for public comment, can put “unwelcome pressure” on the Committee,⁴¹⁰ which may exceed the political pressure faced by the Supreme Court. On the other hand, the Advisory Committee affords all who might be impacted by a proposed rule change an opportunity to participate in the process;⁴¹¹ and the resulting input from the public enables the Committee to consider all points of view and to anticipate potential unintended consequences of its actions.⁴¹² Moreover, the difference in political pressure on the Advisory Committee and the Court should not be exaggerated as the Court also faces pressure from interested nonparties in the form of amici curiae briefs, op-ed articles, and even political protests.

⁴⁰⁶ See *supra* note 365.

⁴⁰⁷ See Marcus, *supra* note 30, at 944 (citing the Committee’s “procedural expertise that far outstrips that of the Court”).

⁴⁰⁸ *Id.* at 931.

⁴⁰⁹ See *supra* note 366 and accompanying text.

⁴¹⁰ Mullenix, *Hope Over Experience*, *supra* note 366, at 833 (quoting Reporter, Memorandum to Civil Rules Committee re Questions About the Rulemaking Process, at 12 (Oct. 18, 1989)).

⁴¹¹ Mulligan & Staszewski, *supra* note 240, at 1208–09; Struve, *supra* note 365, at 1126.

⁴¹² Mulligan & Staszewski, *supra* note 240, at 1208; see also Judicial Conference Letter, *supra* note 401, at 2 (stating that the amended REA was “designed . . . to produce the best rules possible through broad public participation and review by the bench, the bar, the academy, and Congress”).

Third, the Advisory Committee can make multiple changes to a single Rule, or alter several Rules simultaneously, achieving a more comprehensive solution to a problem than the Court can by adjudicating a single case before it.⁴¹³ The Advisory Committee also has greater control over its agenda as well as the luxury of time. It does not have to wait for a party to present an issue for its consideration as the Court does; instead, it can set its own priorities.⁴¹⁴ Nor does it have to resolve an issue within a fixed period of time, whereas the Supreme Court ordinarily labors to decide cases by the end of the term in which it takes them up.

Finally, the Federal Judicial Center conducts empirical research for the Advisory Committee,⁴¹⁵ which allows the Committee to assess the severity of problems and the efficacy of potential solutions explored in pilot projects before adopting proposed rule changes.⁴¹⁶ Given these institutional competencies (and the failure of other governmental actors to resolve the ascertainability issue), one might have expected the Advisory Committee to take it up. We turn now to its efforts in that regard.

2. *The Advisory Committee's Consideration of Ascertainability*

During its April 2015 meeting, the Advisory Committee cited the issue of ascertainability as “the biggest topic not [then] on [its Rule 23 Subcommittee’s] list,”⁴¹⁷ which it then promptly added to the list.⁴¹⁸ In a Subcommittee conference call held soon thereafter, participants noted a high “level of interest” in the topic.⁴¹⁹ In a series of meetings, conference calls, and mini-conferences, the Rule 23 Subcommittee debated whether to propose an amendment to Rule 23 to address the ascertainability issue and, if so, how. Even as the Subcommittee acknowledged the “growing importance” of the issue, by November 2015 it had decided not to propose

⁴¹³ Marcus, *supra* note 30, at 945; Mulligan & Staszewski, *supra* note 240, at 1210–11; Struve, *supra* note 365, at 1140.

⁴¹⁴ See Mulligan & Staszewski, *supra* note 240, at 1209 (describing the “greater control over their own agendas” that rule-makers have, as compared to courts).

⁴¹⁵ E.g., Emery G. Lee III, *The Timing of Scheduling Orders and Discovery Cut-Off Dates: Report to the Judicial Conference Advisory Committee on Civil Rules* (Fed. Jud. Center Oct. 2011); Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis, Report to the Judicial Conference Advisory Committee on Civil Rules* (Fed. Jud. Center Mar. 2010); Emery G. Lee III & Thomas E. Willging, *National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* (Fed. Jud. Center Oct. 2009).

⁴¹⁶ See Judicial Conference Letter, *supra* note 401, at 2 (stating that the Advisory Committee “undertake[s] extensive study, including empirical research”); see also Marcus, *supra* note 30, at 944–45 (describing how empirical data add to the rule-making committees’ advantage); Struve, *supra* note 365, at 1140 (explaining that the structure of the rule-making process allows better access to empirical data).

⁴¹⁷ NOV. 2015 AGENDA BOOK, *supra* note 15, at 52.

⁴¹⁸ See *id.* at 286 (describing ascertainability as one of “the two additional topics that have been added to our list of potential subjects for consideration”).

⁴¹⁹ *Id.* at 281.

an amendment addressing it for a host of reasons,⁴²⁰ several of which mirror the reasons why the Supreme Court declines to grant certiorari even when a split among the circuits appears.

First, the Subcommittee often mentioned a lack of clarity on the meaning of ascertainability and uncertainty surrounding even the Third Circuit's treatment of the issue.⁴²¹ Members expressed doubt about *Carrera*'s import and the Third Circuit's efforts to clarify its doctrine in later opinions.⁴²² When one member suggested a modest change to the text of Rule 23 with an accompanying Advisory Committee Note explaining that *Carrera* was rejected, the reporter noted that "that would seem to depend on more confidence than presently exists about exactly what that approach is."⁴²³ Subcommittee members viewed the issue as "a moving target."⁴²⁴ The Third Circuit's most recent opinion in *City Select Auto* may reinforce this view.⁴²⁵

Second, in addition to uncertainty about the meaning of ascertainability and the Third Circuit's own jurisprudence, the Rule 23 Subcommittee expressed uncertainty about the existence and extent of a split between the circuits and the likelihood that the lower federal courts would themselves work through the doctrinal confusion. In June 2015, *before* the Seventh Circuit had rejected *Carrera* in the *Mullins* decision, the Rule 23 Subcommittee noted "a *clear division* among the circuits about how to address this problem."⁴²⁶ By September, it had toned down that observation, doubting whether the lower court decisions were "genuinely inconsistent"⁴²⁷ and citing "assertions that a circuit conflict *is developing* or has developed," even though the Seventh Circuit had by then decided *Mullins*, flatly rejecting *Carrera*.⁴²⁸ Noting the "rapid evolution" in the case law, the Subcommittee considered whether it would "be best to rely on the evolving jurisprudence to address these issues rather than attempt a rule change. . . . *If* the courts are genuinely split, is there a genuine prospect that the split will be resolved by judicial decisionmaking?"⁴²⁹ It even held out hope "that the Third Circuit

⁴²⁰ *Id.* at 89.

⁴²¹ *Id.* at 281; *see also id.* at 272 (observing that "it is not entirely clear what the Third Circuit's actual view is").

⁴²² *See id.* at 261 (discussing "the reality that we are somewhat uncertain what the Third Circuit's actual take on things is, and later Third Circuit cases have somewhat muddled the waters"); *id.* at 281 (stating that participants agreed with a comment that the Third Circuit's "most recent effort . . . to 'explain' that doctrine in the *Byrd* case is almost impossible to follow").

⁴²³ *Id.* at 283.

⁴²⁴ *See id.* at 290 (stating that "[t]he most recent Third Circuit decision suggests that court is still grappling with its ascertainability idea").

⁴²⁵ *See City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 440 (3d Cir. 2017) (attempting to synthesize the Third Circuit's approach to ascertainability).

⁴²⁶ NOV. 2015 AGENDA BOOK, *supra* note 15, at 282 (emphasis added).

⁴²⁷ *Id.* at 137.

⁴²⁸ *Id.* at 216 (emphasis added).

⁴²⁹ *Id.* at 219 (emphasis added); *see also id.* at 116, 118, 121 (noting that ascertainability was a topic "on hold" because "[t]he case law . . . appears fluid"); *id.* at 152 (stating "[t]he consensus was that, for

might look again at its handling of these issues, and might be influenced by the Seventh Circuit's *Mullins* decision."⁴³⁰ The Advisory Committee cited the fact that the issue is "percolating in the circuits" as a reason for declining to act in late 2015.⁴³¹

Third, while waffling on the existence of a split between the circuits and expressing hope that the lower federal courts would themselves resolve the issue, the Subcommittee also occasionally expressed hope that the Supreme Court would take up the issue. It noted the possibility that the Court would agree to hear *Mullins*⁴³² and raised the possibility of Supreme Court review as a reason for declining to "advance a rule provision" on the issue.⁴³³ The Advisory Committee agreed.⁴³⁴

Fourth, the Subcommittee recognized the "fact-bound nature" of the analysis,⁴³⁵ analyzing *Brecher v. Republic of Argentina*⁴³⁶ to demonstrate important factual differences between that case (involving beneficial interests in securities issued by the Republic of Argentina) and "ordinary consumer class actions."⁴³⁷ Class members' claims in *Brecher* were worth far more than in ordinary consumer cases,⁴³⁸ and the challenges of identifying those with beneficial interests in the bonds were "qualitatively different" from the challenges of identifying recipients of gift cards, for example.⁴³⁹ In the Subcommittee's view, the complexity and fact-bound nature of the analysis "suggest[ed] some of the challenges that framing an ascertainability rule might present."⁴⁴⁰

the present, it would be prudent to leave this topic to development in the case law"); *id.* at 177 (raising the "key question [of] whether a rule change should be pursued, or alternatively [whether] the committee should await a consensus in the courts").

⁴³⁰ *Id.* at 152 (referring to "the unsettled state of the law").

⁴³¹ Draft Minutes of Nov. 5, 2015, Meeting of the Advisory Comm. on Civil Rules, at 7, in AGENDA BOOK FOR APRIL 14-15, 2016, MEETING OF ADVISORY COMM. ON CIVIL RULES, at 47, tab 2 [hereinafter APR. 2016 AGENDA BOOK], <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2016> [https://perma.cc/ML25-JH46]; *id.* at 24, in APR. 2016 AGENDA BOOK, *supra*, at 64.

⁴³² See NOV. 2015 AGENDA BOOK, *supra* note 15, at 152 (adding that even if certiorari were denied, "the case law will likely continue to develop. Action by the Advisory Committee now does not seem likely to produce positive changes").

⁴³³ *Id.* at 121.

⁴³⁴ See APR. 2016 AGENDA BOOK, *supra* note 431, at 64 (stating that "[t]here is some prospect that the Supreme Court may address [the issue] soon").

⁴³⁵ See NOV. 2015 AGENDA BOOK, *supra* note 15, at 119.

⁴³⁶ *Brecher v. Rep. of Argentina*, 806 F.3d 22, 23 (2d Cir. 2015).

⁴³⁷ See NOV. 2015 AGENDA BOOK, *supra* note 15, at 119 (describing the circumstances in *Brecher* as "rather distinctive").

⁴³⁸ See *Brecher*, 806 F.3d at 23 (noting that "Argentina defaulted on between \$80 and \$100 billion of sovereign debt").

⁴³⁹ See NOV. 2015 AGENDA BOOK, *supra* note 15, at 119 (quoting *Brecher*, 806 F.3d at 25–26).

⁴⁴⁰ *Id.*

Finally, and most interestingly, the Rule 23 Subcommittee occasionally mentioned “the delicacy and difficulty” of the issue⁴⁴¹—by which the Subcommittee meant far more than the challenges of drafting a rule on an issue that is deeply intertwined with the facts of each case. The Subcommittee recognized that

the debate seems to be very merits related. On the one hand, the concern is that defendants have a right to defend against fraudulent claims. On the other hand, wholehearted embrace of the most aggressive versions of ascertainability could doom consumer class actions, as some judges have noted in declining to follow what they understand to be the *Carrera* view.⁴⁴²

Acknowledging (sometimes obliquely) the “merits related” nature of the debate,⁴⁴³ the Subcommittee appeared quite averse to entering the fray. It noted the value in “work[ing] hard to be nonpartisan in drafting. That means the effort should be to avoid taking a stance that embraces one side or the other.”⁴⁴⁴ For example, while noting that Judge Rendell’s concurring opinion in *Byrd* was “very thoughtful” and suggesting that Rendell be invited to the Subcommittee’s upcoming mini-conference, the reporter cautioned that “we need also to ensure an opportunity to be heard to those who favor a strong ascertainability requirement.”⁴⁴⁵ An Appendix containing sketches for discussion in a meeting asked plaintively, “is there anything more a rule amendment could do *without venturing into the center of controversy*?”⁴⁴⁶

In defending its decision not to propose an amendment on ascertainability to the Advisory Committee in November 2015, the Subcommittee highlighted the sensitivity of the issue, which

touch[es] on very basic principles of class-action jurisprudence. Any attempt to modify the handling of those basic principles will likely produce very considerable controversy. Although that prospect is not an argument

⁴⁴¹ *Id.* at 138. The Rule 23 Subcommittee also cited the “great difficulties” that would accompany efforts to propose a rule on the issue. *Id.* at 116.

⁴⁴² *Id.* at 282. This concern was reiterated again later in the notes of the call, where the Reporter stated, “something must assure that class actions cannot be used for legal extortion. It is hard to deny that this core concern is important. But the way in which it’s been employed in some cases shows that it can be a very blunt instrument. ‘This is a hard one.’” *Id.* at 283 (quoting an unnamed participant).

⁴⁴³ *Id.* at 282. The Subcommittee recognized that requiring receipts to prove purchases of consumer products “may sometimes be asking too much.” *Id.* at 218.

⁴⁴⁴ *Id.* at 281. Even as this comment was made, it provoked the response that “achieving that goal may prove very difficult. Almost any resolution of the issues at the heart of the ‘ascertainability’ debate will appear to take one side or the other.” *Id.*

⁴⁴⁵ NOV. 2015 AGENDA BOOK, *supra* note 15, at 273.

⁴⁴⁶ *Id.* at 261 (emphasis added).

against proceeding with needed rule amendments, it is a reason for caution about proceeding before the actual state of the law has become clear enough to make the consequences of rulemaking relatively predictable.⁴⁴⁷

Public comments submitted in writing and those made orally at public hearings and at a teleconference held in conjunction with (other) proposed amendments to Rule 23 confirm that the issue is contentious, with members of the defense bar strongly advocating an amendment that would adopt the strict approach.⁴⁴⁸

In light of the perceived uncertainty surrounding the Third Circuit's own position, the ongoing percolation among the lower courts, the prospect of Supreme Court intervention, and the diciness of the issue, the Rule 23 Subcommittee recommended placing the ascertainability issue "on hold" in late 2015,⁴⁴⁹ a recommendation that the Advisory Committee accepted⁴⁵⁰ and one that the Subcommittee has reiterated on several subsequent occasions.⁴⁵¹

E. *Tentative Conclusions*

The lower federal courts, the United States Supreme Court, Congress, and the Advisory Committee on Civil Rules all have had the opportunity to resolve the important question of ascertainability. The lower courts, which lack discretion to decline cases within their jurisdiction,⁴⁵² have attempted to resolve the issue, but are divided between the traditional and strict approaches to ascertainability. The Supreme Court, which has significant discretion over its docket, has declined to grant several petitions for writs of certiorari in cases raising the issue. The House of Representatives has passed a bill that would enact the strict approach, but the Senate has not acted upon

⁴⁴⁷ *Id.* at 121.

⁴⁴⁸ See JUNE 2017 AGENDA BOOK, *supra* note 203, at 504–06 (summarizing comments).

⁴⁴⁹ NOV. 2015 AGENDA BOOK, *supra* note 15, at 89.

⁴⁵⁰ See APRIL 2016 AGENDA BOOK, *supra* note 431, at 35 (Chair of Advisory Committee explaining to the Standing Committee that the Rule 23 Subcommittee continued to place ascertainability on hold "[b]ecause this issue is currently getting worked out by several circuit courts, is the subject of a few pending cert petitions to the Supreme Court, and may be affected by the class action cases already argued this term before the Court").

⁴⁵¹ See, e.g., Draft Minutes of April 14, 2016 Meeting of the Advisory Comm. on Civil Rules, at 2, in AGENDA BOOK FOR NOV. 3–4, 2016, MEETING OF THE ADVISORY COMM. ON CIVIL RULES [hereinafter NOV. 2016 AGENDA BOOK], at 56; APRIL 2016 AGENDA BOOK, *supra* note 431, at 112 (retaining the ascertainability issue on hold due to a pending petition for certiorari in the Supreme Court and the pendency of two cases "whose resolution might also bear on these issues"); see also Klonoff, *supra* note 37, at 1607 (article by member of Advisory Committee on Civil Rules noting that "the Committee has put the topic of ascertainability on hold and is not moving forward on a possible rule change to address the subject" (footnote omitted)).

⁴⁵² See, e.g., *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) (stating that "when a federal court has jurisdiction, it also has a 'virtually unflagging obligation . . . to exercise' that authority" (alteration in original) (quoting *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976))).

it. And the Advisory Committee on Civil Rules has taken a “wait-and-see” approach to ascertainability. As the issue continues to percolate within the lower federal courts, disuniformity prevails, which invites forum shopping and results in inequitable administration of the laws. While the system can tolerate disuniformity for a period of time—and in fact may demand it to ensure sufficient percolation—disuniform interpretations of a Federal Rule are problematic over the long haul. So what process should be deployed to resolve the issue?

The Supreme Court, the Advisory Committee, and Congress all have significant discretion over their respective “agendas,” and the courts of appeals have discretion to grant or deny en banc review. These actors often defer to other potential decision-makers, either because they believe the other body has greater institutional competency or for practical reasons—they do not want their work to be mooted by the action of another body—but they typically act with limited information. For example, when a circuit court is deciding whether or not to hear a case en banc, it does not know which way the Justices are leaning on a petition for certiorari raising the same issue; and vice versa. While the Court’s deliberations are confidential, and it is unlikely that the Court would share its “leanings” regarding certiorari with circuit court judges, one could imagine other information-sharing processes that might illuminate and improve allocation decisions in these circumstances.

The law already provides several opportunities for communication or signaling between different governmental actors. For example, 28 U.S.C. § 1292 directs district courts to inform the courts of appeals of their support for an interlocutory appeal on a “controlling question of law as to which there is substantial ground for difference of opinion.”⁴⁵³ Likewise, many states have enacted one of the Uniform Certification of Questions of Law Acts, which permit their appellate courts to certify questions of law to the highest courts of other states and permit their highest courts to answer questions of law certified to them.⁴⁵⁴ Many federal courts, including the Supreme Court, have taken advantage of these certification procedures to secure authoritative rulings on unresolved questions of state law that will or may affect their decisions.⁴⁵⁵

⁴⁵³ 28 U.S.C. § 1292(b).

⁴⁵⁴ See, e.g., UNIF. CERTIFIC. OF QUESTIONS OF LAW ACT §§ 2–3, 12 U.L.A. 51 & 53 (1995); UNIF. CERTIFIC. OF QUESTIONS OF LAW ACT §§ 1–3, 12 U.L.A. 66 & 72 (1967).

⁴⁵⁵ See, e.g., *Cline v. Okla. Coal. for Reprod. Justice*, 133 S. Ct. 2887 (2013) (Mem) (granting certiorari and certifying a question to the Supreme Court of Oklahoma); *Clay v. Sun Ins. Office*, 363 U.S. 207, 212 (1960) (declining to decide a constitutional question before it without first securing an authoritative ruling on an underlying question of state law); see also Moore, *supra* note 366, at 1056 (describing a 1991 request by federal judicial rule-makers that Congress enact a statute to fix a drafting error in a proposed amendment to a Federal Rule that had already been transmitted by the Supreme Court to Congress).

To facilitate better-informed allocations of authority regarding procedural issues, Congress could enable the courts of appeals to signal their support for petitions for writs of certiorari to the Supreme Court or allow the Court to defer resolution of cases before it and to request that the Advisory Committee address underlying issues through formal rule-making.⁴⁵⁶ Such communication would reduce the delay and guesswork that plague the current system and its efforts to allocate procedural business.

In the absence of opportunities for this kind of intergovernmental communication and signaling, the lower courts, the Supreme Court, Congress, and the Advisory Committee will each unilaterally decide whether and how to resolve the ascertainability question. We offer several tentative suggestions here. Regarding the question raised in Part I above—whether the text of the existing Rule 23 supports the implication of the strict approach to ascertainability—there is little doubt that the lower federal courts and the Supreme Court have the greatest institutional competency.⁴⁵⁷ They have subject matter expertise and experience in interpreting federal laws and rules; insulation from political pressure; and deliberative processes likely to yield accurate results. Indeed, their principal function in our system of government is interpretation of the laws. A split among the circuit courts on ascertainability has existed for nearly three years and at least two of the courts of appeals would have to change their approach in order to achieve national uniformity. Given the presumption against en banc review in the circuit courts and the significant costs that such review imposes, it may take an even longer period of time for *two* of the courts of appeals to accept en banc review and reverse their panels' approach. Rather than continue to wait for the issue to percolate or for the lower courts to work things out on their own, the Supreme Court should grant a writ of certiorari and resolve this interpretative issue soon.

If the Court accepts a case raising ascertainability, it will have to decide how much discretion it has in interpreting the current text of Rule 23. Judge

⁴⁵⁶ See Mulligan & Staszewski, *supra* note 240, at 1223 (discussing the text of the Rule and its history and purpose). A law review article written by Professor Robert Klonoff, a member of the Advisory Committee on Civil Rules, predicted that the strict approach to ascertainability “will be repudiated by the Supreme Court or by the Third Circuit itself.” Klonoff, *supra* note 37, at 1571; see also *id.* at 1607 (noting that the Committee has put the topic “on hold” and positing that the “Third Circuit could reverse itself en banc,” or, if it does not, “the Supreme Court is likely to grant review”). While explicitly not written on behalf of the Committee, *id.* at 1569 n.* (noting that the author “writes only in his personal capacity and not as a member of the Advisory Committee”), the article nevertheless may serve as a form of informal intergovernmental communication.

⁴⁵⁷ See, e.g., Mulligan & Staszewski, *supra* note 240, at 1215 (maintaining that “when the Court can decide a Rules case using traditional tools of statutory interpretation, efficiency and institutional advantages weigh in favor of resolution by adjudication”); Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 130 & 136 (2015) (positing that the Court should “use . . . traditional tools of statutory construction in Rules cases presenting pure questions of law”; describing “what appears to be a consensus that the Court will treat Rules the same as it does statutes”).

Karen Nelson Moore (while a professor) argued that the Court may have even “greater power [and flexibility] to interpret Rules than it does to interpret statutes” because Congress delegated authority to promulgate the Rules to the Court.⁴⁵⁸ Catherine Struve, on the other hand, has argued that the structure of the delegation of authority to the Court under the REA suggests that the judiciary “should have, if anything, *less* latitude to interpret the Rules than they do to interpret statutes.”⁴⁵⁹ Eschewing these “formal” approaches, David Marcus espouses an institutional approach that disavows “unfettered judicial discretion” in the application of the Rules and counsels courts “to defer to rulemaker intent and purpose” and “to resist the temptation to update rules through interpretation.”⁴⁶⁰

Thus, even if the Supreme Court is best positioned to determine whether the *current* text of Rule 23 requires the strict approach (giving due deference to the Advisory Committee notes),⁴⁶¹ that conclusion does not imply that the Court may, as a matter of *policy*, *impose* such a requirement if the current text does not already do so. Another institution may have greater institutional competency to address the policy question.

The lower courts seem least institutionally competent to resolve the policy question, although of course a number of them already have adopted the strict approach to ascertainability. *If* the policy issue were a matter for the judiciary (like the interpretive question is), then the Supreme Court would be better situated than the courts of appeals to adopt a uniform policy within a reasonable period of time. But the real question is whether the Court, Congress, or the Advisory Committee has the greatest institutional competency to resolve the policy question, assuming as I do that the current text of Rule 23 does *not* support the strict approach to ascertainability.⁴⁶²

⁴⁵⁸ Moore, *supra* note 366, at 1093; *see also id.* at 1040, 1085, 1092 (arguing that the “Supreme Court should take a more activist role in interpreting the Federal Rules by including an analysis of purpose and policy,” and maintaining that the “Court’s interpretation of the Federal Rules does not involve the same separation of powers issues inherent in cases involving normal statutory construction, because the Court is interpreting rules Congress empowered it to create, not statutes created by a coequal branch”).

⁴⁵⁹ Struve, *supra* note 365, at 1120 (emphasis added); *see also id.* at 1102 (arguing that “Congress’s delegation of rulemaking authority should constrain, rather than liberate, courts’ interpretation of the Rules”). *See generally supra* Parts III.C & III.D.

⁴⁶⁰ Marcus, *supra* note 30, at 930, 940.

⁴⁶¹ *See* Struve, *supra* note 365, at 1103 (drawing upon the Court’s deference to “agency interpretations of legislative rules” and concluding that “the Court should accord the [Advisory Committee] Notes authoritative effect”); *id.* at 1141–42 (advocating an interpretive approach “that gives authoritative weight to the Advisory Committee Notes”); *id.* at 1152 (discussing the Notes’ “distinctive claims to authority”); *see also* Marcus, *supra* note 30, at 965–66 (citing Advisory Committee Notes as “[f]irst tier materials” and the Committee’s reports to the Standing Committee as “[s]econd-tier materials”).

⁴⁶² *See supra* Part I.B.

While the Supreme Court sometimes concedes that changes to the Rules should be made through the rule-making process authorized by the REA,⁴⁶³ at other times the Court itself essentially amends the Rules by interpreting them to achieve policy ends.⁴⁶⁴ For example, scholars widely agree that the Court in *Twombly* and *Iqbal* went far beyond interpreting the text of Rule 8, instead making a policy judgment about access to the courts and the risks of abusive litigation.⁴⁶⁵ When the Court operates in this way—engaging in what Elizabeth Porter calls its “managerial mode”—the Court “is strategizing and innovating to achieve normative goals” and using “adjudication to re-set the rulemaking agenda.”⁴⁶⁶

Neither the Court nor the academy has developed a single consistent theory for distinguishing between those Rules-related issues within the Court’s adjudicatory authority and those on which the Court should defer to the Advisory Committee.⁴⁶⁷ Some scholars writing in the late 1980s and early 1990s, who were frustrated by the Court’s emphasis on textualism in

⁴⁶³ See, e.g., *Jones v. Bock*, 549 U.S. 199, 224 (2007) (reiterating that “adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts”); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (maintaining that “a [pleading] requirement of greater specificity for particular claims is a result that ‘must be obtained by the process of amending the Federal Rules, and not by judicial interpretation’” (citation omitted)); see also Porter, *supra* note 457, at 125–26 (using the phrase “‘statutory’ mode of Rules interpretation” to refer to the Court’s practice of “disclaim[ing] its power to influence the Rules” and requiring “that changes to the Rules must come through the rulemaking process and not through judicial adjudication” (footnote omitted)); Marcus, *supra* note 30, at 968 (positing that the Court ordinarily follows a “‘rulemaker primacy’ canon,” under which “significant changes to the procedural status quo come only from the rulemaking process”).

⁴⁶⁴ See, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (stating that, “[p]robably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in [questionable] cases”; expressing concern for the high cost of discovery, rather than relying on the text of the Rule or an Advisory Committee Note).

⁴⁶⁵ See, e.g., Marcus, *supra* note 30, at 972 (maintaining that the Court “illegitimately refashioned rule text” in *Twombly* and *Iqbal*); Mulligan & Staszewski, *supra* note 240, at 1196 (maintaining that “commentators almost universally recognized *Twombly* and *Iqbal* as statements regarding the policy underlying pleading requirements . . . not the legalistic interpretation of Rule 8”); see also Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 449 (2013) (citing Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 652–53 (2010)) (noting that some lament that “the Supreme Court engages in amendment by case law instead of through the REA process”); Porter, *supra* note 457, at 127, 138–39 (identifying *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) and *Scott v. Harris*, 550 U.S. 372 (2007) as additional “infamous” cases illustrating the Court’s managerial mode).

⁴⁶⁶ Porter, *supra* note 457, at 137; see also *id.* at 126 (describing the Court’s “managerial mode,” in which it “eschews the tools of statutory interpretation in favor of the hallmark rhetorical techniques of common-law decision-making”).

⁴⁶⁷ See, e.g., *id.* at 148–53 (describing various scholars’ “sharply different visions” of the Court’s role and responsibility regarding the Federal Rules); see also Marcus, *supra* note 30, at 928 (offering an “institutional” approach to Rule interpretation); Moore, *supra* note 366, at 1040 (advocating that the Supreme Court “take a more activist role in interpreting the Federal Rules by including an analysis of purpose and policy”); Struve, *supra* note 365, at 1102 (“Congress’s delegation of rulemaking authority should constrain, rather than liberate, courts’ interpretation of the Rules.”).

interpreting the Rules, maintained that the Court has “greater power to interpret Rules than it does to interpret statutes,” given its ultimate responsibility under the REA to promulgate the Rules.⁴⁶⁸ More recently, however, in light of the 1988 amendments to the REA⁴⁶⁹ and the Court’s apparent willingness to adopt its own policy preferences regardless of the language of the Rules, other scholars have maintained that the Court should defer to the rule-making process,⁴⁷⁰ or at least to the rule-makers’ intent and purpose.⁴⁷¹ Professors Lumen Mulligan and Glen Staszewski have analogized the Supreme Court to an administrative agency, arguing that like other agencies, the Court may set policy through adjudication *or* through a notice-and-comment rule-making process.⁴⁷² But Mulligan and Staszewski posit that the Supreme Court should *presumptively* adopt procedural policy through rule-making, and use adjudication only where “legal issues can be resolved through traditional tools of statutory interpretation.”⁴⁷³ Professor Struve, who quarrels with the agency analogy,⁴⁷⁴ maintains that the terms of Congress’s delegation of rule-making authority to the Court “constrain any subsequent interpretation of the Rules” and require “alterations to the Rules [to] undergo the process specified in the Enabling Act, rather than taking effect through judicial fiat in the course of litigation.”⁴⁷⁵ Other scholars, such as Robert Bone and David Marcus, who challenge the agency analogy,⁴⁷⁶

⁴⁶⁸ Moore, *supra* note 366, at 1093; Porter, *supra* note 457, at 148; *see also* Joseph P. Bauer, Schiavone: *An Un-Fortune-ate Illustration of the Supreme Court’s Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 727 (1988) (describing the Court’s role in promulgating the Rules).

⁴⁶⁹ *See supra* notes 364–69 and accompanying text.

⁴⁷⁰ *See, e.g.*, Marcus, *supra* note 30, at 946–47 (discussing deliberative democracy in the rule-making process and its effect on the Court’s application of Federal Rules); Mulligan & Staszewski, *supra* note 240, at 1190 (“[P]roposing that the Court create a presumption in favor of rulemaking over adjudication . . .”); Struve, *supra* note 365, at 1102 (“Rules should undergo the process specified in the Enabling Act, rather than taking effect through judicial fiat . . .”). Of course, the Court itself has a role in the rule-making process, but its precise nature is difficult to ascertain as its “deliberations on proposed rule changes are secret.” Moore, *supra* note 366, at 1064. Moore posited that the Court’s role is “essentially supervisory, with the Court only occasionally exercising a veto over submissions from the Judicial Conference.” *Id.* at 1065 (footnote omitted); *see also id.* at 1068–71 (describing the Justices’ view of the Court’s role in the rule-making process as “limited” and in the nature of a “conduit”).

⁴⁷¹ Marcus, *supra* note 30, at 929, 940.

⁴⁷² Mulligan & Staszewski, *supra* note 240, at 1190.

⁴⁷³ *Id.* at 1206, 1213.

⁴⁷⁴ Struve, *supra* note 365, at 1125 (noting that the REA “somewhat resembles statutes that delegate rulemaking authority to agencies,” but recognizing that the REA delegates authority to a “less politically accountable branch”).

⁴⁷⁵ *Id.* at 1102; *see also id.* at 1130 (noting that the REA “conditions the delegation of rulemaking power on the Court’s use of the prescribed procedures”).

⁴⁷⁶ *See* Bone, *The Process*, *supra* note 348, at 907–08 (rejecting the analogy between courts and administrative agencies because agencies are empowered by Congress to make substantive law, while the Court is not, and agencies are subject to political checks and balances through Congressional and executive branch oversight, while the end product of the REA process will rarely be vetoed by Congress); Marcus, *supra* note 30, at 942–43 (noting that practically speaking, “the Court does not ‘forge’ the

also support a “centralized, court-based, and committee-centered rulemaking process.”⁴⁷⁷

The Advisory Committee not only has subject matter expertise and access to empirical data, but it solicits and responds to input from the public, engaging in a more transparent, participatory, and politically accountable process than adjudication.⁴⁷⁸ The Committee has greater control over its agenda and the opportunity to craft a more comprehensive solution to procedural problems than the Supreme Court, which may adjudicate only the case or controversy before it.⁴⁷⁹ And the Committee’s work product—the Federal Rules—is more visible, better organized, and easier to find than rules announced in judicial decisions.⁴⁸⁰ While Congress, like the Committee, has access to empirical data and even greater, direct political accountability,⁴⁸¹ it is more likely to respond to interest group pressures and engage in inefficient “logrolling” than the judge-heavy Advisory Committee.⁴⁸² Thus, we recommend that the Advisory Committee take up the ascertainability issue and, for the reasons described in Part II, incorporate the traditional approach and explicitly reject the strict approach to ascertainability.

Federal Rules” itself, but merely acts as a “conduit,” as the Rules are “the product of others,” not the Court).

⁴⁷⁷ Bone, *The Process*, *supra* note 348, at 933; *see also* Marcus, *supra* note 30, at 944, 957 (maintaining that the Court’s interpretation of the Rules should “reflect rulemakers’ decisions” because of “their superior procedural competence,” and advocating an interpretive method that “inquire[s] into rulemaker intent and purpose”).

⁴⁷⁸ *See, e.g.*, Mulligan & Staszewski, *supra* note 240, at 1209 (describing the “participatory and transparency advantages” of the rule-making process); Struve, *supra* note 365, at 1136–37 (describing the involvement of practitioners and others in the rule-making process).

⁴⁷⁹ Mulligan & Staszewski, *supra* note 240, at 1209–10; *see also* Marcus, *supra* note 30, at 968 (recognizing that the “rulemakers designed the Federal Rules as an interconnected system”); Struve, *supra* note 365, at 1123 (describing a balance achieved by the Advisory Committee in the 1993 amendment to Rule 11).

⁴⁸⁰ *See* Mulligan & Staszewski, *supra* note 240, at 1211 (attributing these characteristics to agency regulations in general).

⁴⁸¹ *See, e.g.*, Redish & Amuluru, *supra* note 361, at 1326–27 (considering a larger role for Congress because procedural rules are political: “[T]hey may substantially affect the lives of the citizenry and implicate fundamental ideological choices about loss allocation and resource redistribution”).

⁴⁸² *See* Bone, *The Process*, *supra* note 348, at 922–25 (describing the “typical logrolling scenario” as “a deal between two legislators, each eager for the other to support a project that benefits politically powerful constituents,” and considering “vigorous logrolling” unlikely in the Advisory Committee because the rule-makers are not “strongly allied with distinct constituencies”).