IN DEFENSE OF THE CY-PRES-ONLY CLASS ACTION

by
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Cy pres is frequently used to dispose of class action settlement funds, yet it is one of the most controversial aspects of class action practice. Perhaps the most contested use of cy pres is what I call the "cy-pres-only class action": a settlement class action in which the judge certifies a class and approves a settlement that expressly provides for a third-party charity to receive all the settlement funds. In these cases, the judge exercises her judicial power to enable a lawsuit that compensates a third party who does not have legal rights at stake and does so without providing any direct compensation to class members who do.

The strongest argument against this use of cy pres is based on legitimacy, and the most compelling critique rests on a particular conception of civil adjudication, which I call the "legal rights view." The legal rights view holds that courts are strictly limited to producing case outcomes that match the parties' substantive legal rights as those rights are defined by the best interpretation of the substantive law. From this perspective, the problem with a cy-pres-only class action is that it fails to enforce class members' substantive legal rights to compensation, and does so in order to promote the values and policies that underlie the substantive law.

One way to respond to the legitimacy challenge posed by the legal rights view is to dispute the coherence and validity of the legal rights view itself. This Article takes a different path. It responds from within the logic of the legal rights view. It shows that the cy-pres-only class action is in fact consistent with the legal rights view when that view is modified to account for the practical limitations of litigation, and in particular the inevitability of outcome error. When outcome error is factored into the analysis, the cy-pres-only class action can be justified as a device to secure a fair and efficient distribution of error risk across different cases and litigants.

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INTRODUCTION

Cy pres is frequently used to dispose of class action settlement funds.[1] Yet it is one of the more controversial features of class action practice.[2] The cy pres doctrine allows a court to distribute all or a portion of the proceeds of a class settlement to a third-party charity when the funds cannot be distributed to members of the class. Many judges and commentators find cy pres quite troubling, and their concerns focus on one rather striking fact about the doctrine. It sends at least a portion of the relief secured through a lawsuit to an entity that has suffered no harm from the defendant's activities, has no legal rights at stake, and can assert no legal claims.[3]

It is important to distinguish between two different ways that courts use cy pres.[4] In the typical case, cy pres applies to leftover funds that remain after a distri-

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[1] Cy pres has been a feature of class actions since roughly the mid-1970s, but its use appears to have increased markedly since 2000. *See* Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 634–38, 653 (2010) (finding, in reliance on a data set of published opinions, that "[f]rom 1974 through 2000, federal courts granted or approved cy pres awards to third party charities in thirty class actions, or an average of approximately once per year" and "[s]ince 2001, federal courts granted or approved cy pres awards in sixty-five class actions, or an average of roughly eight per year").

[2] *See, e.g.*, 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 12:32 (5th ed. 2012) (noting that "[p]erhaps more than any other distribution method except reversion, *cy pres* has its critics" and that even though it is "likely the most prevalent method for disposing of unclaimed funds," "there is something of a trend away from *cy pres*" and "appellate courts have increasingly put restrictions" on its use).

[3] *E.g.*, Redish et al., *supra* note 1, at 641–43.

[4] *See In re* Google Inc. Cookie Placement Consumer Privacy Litig., 934 F.3d 316, 326 (3d Cir. 2019) (noting that "[i]n the usual *cy pres* case, money from a class settlement fund remains after distributions to class members" and also that "[w]e have never addressed whether a class action settlement's monetary award may be given solely to *cy pres* recipients"); Diaz v. Lost Dog Pizza, LLC, No. 17-cv-2228-WJM-NYW, 2019 WL 2189485, at *3 n.3 (D. Colo. May 21, 2019) (marking a distinction between the two types of cy pres and noting that a cy-pres-only distribution that redirects all settlement funds might be more problematic); *see also* 4 RUBENSTEIN, *supra* note

bution to the class. To illustrate, consider a case in which the defendant sells a product and is alleged to have misrepresented its quality. One consumer brings a class action on behalf of all the others, alleging state fraud and deceptive practices claims and seeking damages in the amount of the purchase price. The parties settle and the court approves the settlement.[5] Notice is sent to the class informing them that they can file claims to the settlement fund by submitting a proof of purchase. Some consumers do so and receive payments, but many do not. The latter group includes consumers who lack any evidence of purchase as well as consumers who do not bother to file because of the small amounts they would receive.

As a result, a substantial portion of the settlement fund remains undistributed. At this point, the court must decide how to dispose of the leftover funds. Many courts choose cy pres for this purpose. They give the funds to charitable organizations that perform activities indirectly benefitting the class. In our hypothetical case, the court might order that the leftover funds be contributed to an organization that monitors for consumer fraud.[6]

The second use of cy pres is much less common.[7] In these cases, the entire settlement fund is distributed to a cy pres beneficiary without any attempt to distribute it to the class. This is frequently referred to as a "cy-pres-only" distribution.[8]

2, § 12:26 (distinguishing between a "full cy pres" distribution and a cy pres distribution of residual funds).

[5] Cy pres is not limited to settlements. It can be used to distribute the proceeds of a trial judgment. *See* Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1303–04, 1307, 1312 (9th Cir. 1990). However, most of the cases involve settlements.

[6] There are several variations on this scenario. The judge might first certify a litigating class which settles sometime later, or she might certify a settlement class at the same time as reviewing the settlement. The settlement agreement might include a clause that provides for a cy pres distribution, or it might say nothing at all about cy pres, leaving it to the judge to decide whether to use it. The agreement might name one or more cy pres beneficiaries, or the judge might ask the parties to choose a beneficiary—or even choose the beneficiary herself. *See In re* Pharm. Indus. Average Wholesale Price Litig., 588 F.3d 24, 34 (1st Cir. 2009) (noting that court-mandated cy pres is more controversial than settlement-mandated cy pres); Marshall v. Nat'l Football League, 787 F.3d 502, 510 (8th Cir. 2015) (noting that "we deal not with the *court's authority* to distribute unclaimed funds to a third party . . . but the *parties' ability* to decide how to best distribute funds"). Moreover, there are some cases in which the settlement provides an amount for the class and a separate amount to be distributed to a cy pres beneficiary. *E.g.*, Poertner v. Gillette Co., 618 F. App'x 624, 625–26 (11th Cir. 2015).

[7] *See* Brief of Professor William B. Rubenstein as Amicus Curiae in Support of Respondents at 11–12, Frank v. Gaos, 139 S. Ct. 1041 (2019) (No. 17-961) (reporting that cy-pres-only cases—what the author refers to as "full *cy pres*" cases—"rarely ever arise" and occur in federal court at a rate of roughly one case per year).

[8] *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting) (referring to the distribution as "*cy-pres*-only"); *In re Google Inc. Cookie Placement Privacy Litig.*, 934 F.3d at 327 (distinguishing between ordinary cy pres and "*cy-pres*-only" distributions).

A judge might use a cy-pres-only distribution after approving a settlement of a litigating class action. But the more common, and more challenging, scenario is one when the judge is asked to certify a settlement class action in which the settlement provides explicitly for a cy-pres-only distribution. I shall refer to this as a "cy-pres-only class action" because the judge knows with certainty at the time of certification that all the settlement proceeds will go to a cy pres beneficiary and none will end up in the hands of class members. In effect, she exercises her judicial power to enable a lawsuit that compensates a third party without providing any compensation to class members who possess the legal rights.

This Article focuses exclusively on the cy-pres-only class action.[9] Using cy pres to distribute residual funds is much less problematic. In those cases, the court certifies the class with the understanding that a serious effort will be made to deliver the proceeds of a settlement to class members. Cy pres enters the scene only as a remedial tool when there are leftover funds to distribute. To be sure, this use of cy pres is still controversial, but it raises fewer problems than the cy-pres-only class action and it is easier to justify.

In a cy-pres-only class action, the court empowers a form of litigation that is constituted from its inception not so much to provide relief for rights violations, but rather to deter wrongdoing by forcing the defendant to pay for the harm it causes. The benefits class members receive are the indirect result of the funded activities of the cy pres beneficiary. I argue that the cy-pres-only class action is justified nevertheless, but it is more difficult to make the case than it is for the use of cy pres to distribute residual funds.

The following discussion is divided into four parts. Part I provides some background on cy pres and cy-pres-only class actions. Part II addresses standard criticisms of cy pres and shows that they all rely on assumptions, often implicit, about the limits of legitimate adjudication. Part III examines the legitimacy critique more closely and identifies the conception of legitimacy lying at its core—the "legal rights view." The legal rights view implicates a normative question with profound consequences for procedural law: Is it ever proper for a court to adopt procedures that aim to promote the values and policies underlying the substantive law when those procedures produce outcomes that diverge systematically from what substantive legal rights guarantee? The cy-pres-only class action poses this question in a particularly striking way. Proponents of the device argue that it is needed to promote the deterrence policies underlying the substantive law, while opponents argue that it illegitimately sacrifices the substantive legal rights of class members.

Part IV then takes on the legitimacy critique directly. It explains how the legal

[9] I have examined the cy pres doctrine in previous work, but without addressing the specific issues raised by the cy-pres-only class action. *See* Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres*, 65 KAN. L. REV. 913, 944–62 (2017) [hereinafter Bone, *Justifying Class Action Limits*].

rights view must be modified to account for the practical limitations of litigation, and in particular the inevitability of outcome error. And it shows that once modified in this way, it makes room for the cy-pres-only class action.

I. BACKGROUND

Many commentators have described cy pres and its history, and I will only briefly summarize this background here. Cy pres is an abbreviated form of the Norman French phrase "*cy près comme possible*," which means "as near as possible."[10] The cy pres doctrine was originally developed as part of the law of testamentary charitable trusts, where it allowed courts to direct a testamentary disposition to a second-best charity when the testator's choice of charity failed.[11] Starting in the 1970s, courts adapted the idea to the class action setting and used it to distribute class recovery to a charity when it was not feasible to distribute it to the class.[12] Under current doctrine, the charity chosen for the distribution must have a close nexus with the lawsuit so that class members might benefit indirectly from the projects that the charity undertakes.[13]

Until about 2010, courts made regular use of cy pres without generating much controversy. In 2010, however, Professor Martin Redish and his co-authors launched a scathing attack on cy pres, citing possible constitutional, statutory, and policy defects.[14] Since then, criticism of the device has become more pronounced. In 2013, Chief Justice Roberts added a statement to a denial of certiorari in a case raising cy pres issues, in which he noted serious questions about cy pres that the Court should address in a future case.[15] Many lower courts and commentators have also expressed reservations, and even some supporters, including the authors of the American Law Institute's *Principles of the Law of Aggregate Litigation*, recommend relatively strict limits on its use.[16]

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[10] *See* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 114 (2014).

[11] *Id.* at 114–15.

[12] Redish et al., *supra* note 1, at 634–38 (tracing the use of cy pres in class actions back to the mid-1970s).

[13] The American Law Institute's (ALI) highly influential *Principles of the Law of Aggregate Litigation* recommends that "[t]he court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class." PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.07(c) (AM. LAW INST. 2010).

[14] Redish et al., *supra* note 1.

[15] Marek v. Lane, 134 S. Ct. 8, 9 (2013) (asking questions such as "when, if ever, [cy pres] relief should be considered" and "how to assess its fairness as a general matter").

[16] For sources, see Bone, *Justifying Class Action Limits*, *supra* note 9, at 942, 948. The ALI recommends that cy pres be used only after an unsuccessful attempt to distribute leftover funds to class members who have already filed claims and received distributions in the first round. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.07 cmt. b. In other words, the ALI prefers to

Of all the different uses of cy pres, the cy-pres-only class action is the most controversial. To illustrate, consider the facts of *In re Google Referrer Header Privacy Litigation*,[17] which reached the Supreme Court restyled as *Frank v. Gaos*.[18] Plaintiffs, who used Google's search engine, complained that it revealed users' private information in violation of a federal statute, the Stored Communications Act, and state law.[19] They sought damages as well as injunctive and declaratory relief.[20] In particular, the Stored Communications Act gives plaintiffs a right to recover actual damages and defendant's profits in an amount not less than $1,000.[21]

The parties entered into a global settlement. Google agreed to pay $8.5 million and provide "information on its website disclosing how users' search terms are shared with third parties."[22] The settlement specified that the $8.5 million would be paid to six cy pres beneficiaries after deductions for attorneys' fees, administrative costs, and incentive payments.[23]

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reward class members with a windfall than distribute to a charity that might indirectly benefit everyone in the class. This preference is based on the assumption that "funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members." *Id.* § 3.07 cmt. b.

[17] *In re* Google Referrer Header Privacy Litig., 869 F.3d 737 (9th Cir. 2017).

[18] Frank v. Gaos, 139 S. Ct. 1041 (2019) (per curiam). Five class members filed objections to the settlement. Theodore Frank, whose name appears in the restyled caption, was one of those objectors. *In re Google Referrer Header Privacy Litig.*, 869 F.3d at 740.

[19] *In re Google Referrer Header Privacy Litig.*, 869 F.3d at 739–40. As the Supreme Court summarized it in *Frank v. Gaos*, the Stored Communications Act:

> prohibits "a person or entity providing an electronic communication service to the public" from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service." [18 U.S.C.] § 2702(a)(1). The Act also creates a private right of action that entitles any "person aggrieved by any violation" to "recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate." § 2707(a).

Frank, 139 S. Ct. at 1044.

[20] *In re Google Referrer Header Privacy Litig.*, 869 F.3d at 740.

[21] 18 U.S.C. § 2707(c) (2012) ("The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000.").

[22] *In re Google Referrer Header Privacy Litig.*, 869 F.3d at 740.

[23] *Id.* ("[A]pproximately $3.2 million was set aside for attorneys' fees, administration costs, and incentive payments to the named plaintiffs. The remaining $5.3 million or so was allocated to six *cy pres* recipients, each of which would receive anywhere from 15 to 21% of the money, provided that they agreed 'to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet.'"). The beneficiaries included "AARP, Inc.; the Berkman Center for Internet and Society at Harvard University; Carnegie Mellon University; the Illinois Institute of Technology Chicago-Kent College of Law Center for Information, Society and Policy; the Stanford Center for Internet and Society; and the World Privacy Forum," each of which had provided "a detailed proposal for how

The parties sought judicial approval of the settlement and certification of a settlement class consisting of about 129 million users nationwide.[24] The district judge held a fairness hearing, approved the settlement, and certified the class.[25] The judge specifically addressed the cy-pres-only aspect of the settlement, concluding that distribution of the settlement fund to the class was impractical[26] and that projects proposed by the cy pres beneficiaries would indirectly benefit the class.[27]

This case is typical of those involving cy pres distributions in one important respect. The individual claims of class members were too small to support separate suits. In cases like these, the class action enables litigation that promotes private enforcement of the substantive law.[28] Problems arise, however, when it is not possible to distribute any of the aggregate class recovery to class members.[29] If the distribution problem is apparent at the certification stage and there is no way to solve it, the judge would have to seriously consider denying certification.[30] Cy pres solves

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the funds would be used to promote Internet privacy." *Id.*

[24] *Id.* (noting that the class consists of "approximately 129 million people who used Google Search in the United States between October 25, 2006 and April 25, 2014 (the date the class was given notice of the settlement)").

[25] *In re* Google Referrer Header Privacy Litig., 87 F. Supp. 3d 1122, 1138 (N.D. Cal. 2015).

[26] *Id.* at 1132–33 ("Since the amount of potential class members exceeds one hundred million individuals, requiring proofs of claim from this many people would undeniably impose a significant burden to distribute, review and then verify. Similarly, the cost of sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class."). Indeed, the district judge estimated that $5.3 million dollars would remain for class members after deductions. This amount spread over 129 million class members yields about four cents per class member.

[27] *Id.* at 1133. Two objectors then appealed the district judge's decision, and the Ninth Circuit affirmed, holding that a cy-pres-only distribution is proper in some circumstances and concluding that the district judge did not abuse his discretion in approving it on the facts of the case. *In re Google Referrer Header Privacy Litig.*, 869 F.3d at 739. The Supreme Court in a per curiam opinion vacated and remanded for the Ninth Circuit to consider whether the plaintiffs had standing in light of the Court's earlier decision in Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016). Frank v. Gaos, 139 S. Ct. 1041, 1043–44 (2019) (per curiam).

[28] *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d at 1128.

[29] In class actions with very small individual recoveries, relatively few class members bother to file claims to the settlement fund. *See* FED. TRADE COMM'N, CONSUMERS AND CLASS ACTIONS: A RETROSPECTIVE AND ANALYSIS OF SETTLEMENT CAMPAIGNS 1 (2019) (reporting an overall claims rate for a sample of consumer class actions of less than 10%); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 119–20 (2007) ("It is not unusual for only 10 or 15% of the class members to bother filing claims."). It is worth noting, however, that modern technology might make it easier to distribute small amounts to class members in some class actions. *See* Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & BUS. 767, 788–91 (2015).

[30] This is precisely what Professor Redish and his co-authors recommend for any case in which the court anticipates substantial unclaimed funds. *See* Redish et al., *supra* note 1, at 665

the distribution problem by giving the monetary relief to third parties who indirectly benefit the class. Thus, cy pres enables certification of a class action, which in turn enables private enforcement of the substantive law, when individual distribution of class recovery is impractical.

Still, there is something puzzling about the cy pres solution. The substantive law gives each class member a legal right to compensation for harm, yet a cy-pres-only distribution provides no compensation at all to the class. Worse yet, it directs the funds to a third party who has suffered no harm and has no legal rights at stake. How can it be proper for a court to certify a class on the ground that it enables enforcement of the substantive law when the judge knows with certainty that substantive rights to compensation will not be enforced? Of course, the standard answer is that certification serves the deterrence *policies* underlying the substantive law. Deterrence is achieved when the defendant pays for the harm it has caused even if class members receive none of that payment. But the individual legal rights at stake are rights to compensation for harm suffered, not rights to deterrence of future harm.[31] Hence the central question: Is it ever legitimate for a court to promote substantive values and policies when doing so fails to deliver on substantive rights as those rights are defined by the relevant substantive law? This is a challenging question. I shall argue for an affirmative answer, but it takes some work to defend it.

II. STANDARD CRITICISMS OF CY PRES

The standard criticisms of cy pres vary. Some raise functional concerns, some are based on Rule 23, and some invoke Article III, separation of powers, and Rules Enabling Act limitations. But they share one feature in common. They assume strict limits on what courts can legitimately do in civil adjudication. The following discussion reviews these criticisms briefly and explains the connection to judicial legitimacy.

A. Functional Objections

In *Justifying Class Action Limits*, I discussed three of the most common functional criticisms of cy pres.[32] The following briefly sketches that analysis.

First, many critics claim that cy pres exacerbates attorney-class agency problems

("We conclude that the proper way to deal with a situation in which there remain significant unclaimed funds in a class action is to avoid the situation in the first place, by simply not certifying the class.").

[31] In fact, the idea of a "right" to deterrence is conceptually and normatively problematic. But there is no need to address those issues here.

[32] Bone, *Justifying Class Action Limits*, *supra* note 9, at 944–51.

by making it easier for class attorneys to enter into sweetheart settlements with defendants.[33] This objection is extremely weak. A class attorney, who receives a fee that depends on the settlement amount, has no reason to reduce the total settlement just because some of it will be directed to a cy pres beneficiary.[34] To be sure, cy pres directs settlement proceeds away from class members, but it does so only when a distribution to the class is not practically feasible.

The only way to make sense of the argument that cy pres exacerbates agency problems is to assume that a class attorney has a duty to maximize relief for each class member individually consistent with her substantive legal right.[35] If that were so, then a class attorney who agreed to a cy pres distribution might be thought to renege on her duty in order to maximize her fee. But if class attorneys are limited to seeking individual relief for class members, it must be because adjudication is similarly limited, in other words, because courts should only provide relief strictly in accordance with class members' individual legal rights. Thus, the agency critique depends on an assumption about the proper limits of civil adjudication, an assumption that is far from obviously true.[36]

The second criticism is that cy pres allows attorneys and judges to choose their favorite charities.[37] This is a legitimate concern, but it is not clear how serious it is. There are notable examples of judicial and attorney self-dealing, but I am not aware of any reliable empirical study showing that it is a widespread problem. Moreover, if there is a problem, the solution is obvious: bar judges from choosing beneficiaries with which they or any of the lawyers have had a relationship.[38]

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[33] *Id.* at 944–47.

[34] Although fees are calculated in different ways, *see* Theodore Eisenberg et al., *Attorneys' Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. REV. 937, 944–45 (2017) ("Attorneys' fees are calculated using the lodestar method, a percentage method, a mix of the two methods, or by leaving the fee to judicial discretion."), the empirical evidence is strong that, regardless of calculation method, fee awards increase with settlement amount, although at a declining rate. *See id.* at 946 ("[I]n general, attorneys' fees increase in direct proportion to increases in recovery amounts[;] as recoveries become very large, however, the fee increases at a slower pace."); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 248 (2010); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 811 (2010).

[35] And this seems to be what Professor Redish and his co-authors have in mind. *See* Redish et al., *supra* note 1, at 650–51 (objecting to cy pres because it weakens attorney incentives to maximize individual class member recovery).

[36] It is worth noting that some commentators compare cy pres to coupon settlements, which are rife with agency problems. However, the comparison is flawed because in cy pres the defendant pays the full settlement regardless of the amount of unclaimed funds. *See* Bone, *Justifying Class Action Limits*, *supra* note 9, at 945.

[37] *Id.* at 947–48.

[38] There is another potential cost of cy pres. Charitable institutions might compete for cy

The third objection is that cy pres misappropriates property belonging to the class.[39] This objection is also not convincing. For one thing, the class is not an entity capable of owning property. Moreover, while individual class members can own shares of a settlement fund, what they own is defined by the settlement agreement. If the settlement agreement includes a cy pres provision, their ownership rights are conditioned on that distribution.

However, if for some reason cy pres provisions are invalid—perhaps because judges act outside their legitimate sphere of power when they approve cy pres—then class members might insist that their substantive legal rights entitle them to a share of the settlement fund. Thus, the force of the misappropriation critique depends on a conception of judicial legitimacy, one that strictly limits courts to producing outcomes that closely match substantive legal rights.

B. Constitutional and Statutory Objections

Another set of objections focuses on limits imposed by Rule 23, Article III, and the Rules Enabling Act. For example, Justice Thomas, in his *Frank v. Gaos* dissent, argued that certification of a cy-pres-only class action and approval of a cy-pres-only settlement violated Rules 23(a)(4), 23(b)(3), and 23(e).[40] As for Rule 23(a)(4), adequacy of representation, he argued that the named plaintiffs and class attorneys cannot be adequate representatives if they agree to a settlement that serves their own interests and provides no meaningful relief to the class.[41] Also, in his view, a cy-pres-only class action is not superior to other methods of adjudication and thus cannot

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pres awards and the competition can lead to wasteful expenditures. *See* Shay Lavie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 GEO. WASH. L. REV. 1065, 1098 (2011). However, it is not clear how serious a problem this is, especially as competition of this sort can also produce benefits if it provides information to the court that helps in selecting the best recipient.

[39] Bone, *Justifying Class Action Limits*, *supra* note 9, at 948–51.

[40] Frank v. Gaos, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting).

[41] *Id.* at 1048 ("[B]ecause the class members here received no settlement fund, no meaningful injunctive relief, and no other benefit whatsoever in exchange for the settlement of their claims, I would hold that the class action should not have been certified, and the settlement should not have been approved."). The settlement gave the class attorneys a fee award of $2 million and provided incentive payments to the named plaintiffs. The class did receive injunctive relief requiring Google to disclose information, but in Justice Thomas's view, that relief was not sufficiently valuable. *Id.* at 1047 n.* ("[N]o party argues that these disclosures were valuable enough on their own to independently support the settlement."). Indeed, it is difficult to tell whether the injunctive relief offered any substantial benefit to the class, or was included just to improve the prospects of obtaining judicial approval. *See generally* Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 874–78 (2016) (discussing the inclusion of "spurious injunctive relief" as a strategy for obtaining judicial approval of an otherwise suspect settlement).

meet Rule 23(b)(3)'s superiority requirement.[42] And he suggested that a cy-pres-only settlement is not "fair, adequate, and reasonable," as required by Rule 23(e), when it offers nothing significant to the class.[43]

None of these objections is convincing. There is no reason to condemn a settlement merely because it includes a cy-pres-only distribution, nor is there any reason to question the loyalty of class representatives just because they agree to such a settlement. A cy-pres-only settlement makes sense on functional grounds when the substantive law aims at deterrence and the claims are too small to support individual distributions. Under these circumstances, the cy-pres-only distribution makes class certification possible and in so doing promotes the substantive law's deterrence policies by forcing the defendant to pay for the harms it causes.[44] Moreover, cy pres gives class members some benefit through the funded activities of the cy pres beneficiary when there might otherwise be no way for class members with small claims to receive anything at all.[45] Given these benefits, it is not clear why attorneys fail the class when they agree to a cy-pres-only distribution or why a settlement should be questioned just because it includes a cy pres provision.

Nor is it clear why a cy-pres-only distribution renders a putative settlement class incapable of satisfying the (b)(3) superiority requirement. The superiority requirement directs the judge to determine whether a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy."[46] When claims are small, however, individual litigation is not an "available method" as a practical matter because individual suits are infeasible.[47] Smaller class actions might be possible, but they are likely to face the same distribution impediments and thus the same need for cy pres.[48] A cy-pres-only class action can be "superior" under (b)(3).

Justice Thomas's objections make more sense when read against a background assumption that civil adjudication is supposed to provide relief that tightly fits the

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[42] *Frank*, 139 S. Ct. at 1047–48 (Thomas, J., dissenting).

[43] *Id.* at 1047.

[44] The distribution might be important to deterrence if it somehow affects the class attorney's litigation investment or settlement incentives.

[45] Indeed, class members with small claims have little interest in receiving a distribution, which is why the claiming rate is extremely low in these cases. *See, e.g.*, FED. TRADE COMM'N, *supra* note 29, at 1; Leslie, *supra* note 29, at 119–20. Thus, the compensation goal is not all that important.

[46] FED. R. CIV. P. 23(b)(3).

[47] Justice Thomas cites Rule 23(b)(3)(A), which directs courts to consider "the class members' interests in individually controlling the prosecution . . . of separate actions." But class members with small claims have no practical interest in controlling their own suits, since they are unable to bring individual suits.

[48] When the size of the class is smaller, presumably the settlement is smaller too, so the amount per class member should still be very small.

substantive legal rights class members assert. On this assumption, the court can certify a class and approve a settlement *only* if the settlement includes individual compensation for class members matching what the substantive law guarantees them. Since class members in *Frank v. Gaos* assert legal rights to individual compensation, the court is limited, on this account, to providing compensation that corresponds to those rights. If that is not possible, then adjudication is not an appropriate way to resolve the dispute.[49] The substantive law might seek to deter wrongful conduct—and a cy-pres-only class action might further that deterrence policy—but if the substantive law chooses to effectuate deterrence by granting individual rights to compensation, the court is limited to providing compensation that fits those rights.[50]

A similar assumption underlies the objections to cy pres advanced by Professor Redish and his co-authors.[51] They argue that cy pres "inescapably contravenes Article III's case-or-controversy requirement" when it puts courts in the position of "ordering . . . the transfer of money from one private actor to another private actor whose rights have in no way been violated."[52] This objection has force only on the assumption that Article III strictly limits courts to providing remedies that closely fit substantive legal rights as defined. If instead courts can sometimes adjust remedies in the face of obstacles to legal rights enforcement, in order to promote the values and policies underlying the substantive law, it is hard to see how Article III would pose an obstacle.

The same is true for Professor Redish's other objections. He argues that cy pres transforms a substantive legal right to compensation into a "civil fine" and thereby "alter[s] the essence of the underlying substantive right being enforced"—all in violation of the Rules Enabling Act and separation of powers.[53] This argument depends as well on the assumption that courts are strictly limited to producing outcomes that

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[49] There might be other alternatives, such as administrative agency enforcement.

[50] The fact that the substantive law gives individual rights to compensation for harm is perfectly consistent with a deterrence policy. *See* Bone, *Justifying Class Action Limits*, *supra* note 9, at 957–58. While a compensatory right can serve moral purposes, such as it does in a corrective justice theory, it can also serve utilitarian purposes. In the latter case, the goal of providing a right to compensation is to force wrongdoers to internalize the costs of their wrongdoing, which helps to deter them from engaging in future wrongdoing.

[51] Redish et al., *supra* note 1, at 641–48.

[52] *Id.* at 643. Professor Redish believes the same problem exists whenever a judge approves a class action settlement that includes a cy pres provision; it is the judge's involvement that creates the Article III problem. *Id.* at 643–44.

[53] *Id.* at 644–47. Indeed, on this view, when cy pres is essential to the viability of a class action and its use is easily foreseeable at the time of certification, a judge's decision to certify a class in effect uses Rule 23 "to radically alter the compensatory remedial model invariably embodied in the underlying substantive law being enforced in the class proceeding." *Id.* at 648.

match substantive legal rights as the lawmaker defines them. Without this assumption, one can argue that cy pres does not alter substantive rights but rather enforces those rights more effectively by enabling litigation where suits would not otherwise be possible. Professor Redish makes all of this crystal clear when he argues that cy pres should not be employed even when it promotes deterrence:

> [A]s a normative matter, it is clear that a Federal Rule of Civil Procedure—even a rule as important as the one authorizing class actions—is a legally inappropriate device through which to solve the problem [of deterrence]. In a democracy, if the existing remedial model provided for in the governing substantive law has proven unsatisfactory, any alterations must come from the same government organs that promulgated the substantive law in the first place.[54]

III. THE LEGITIMACY OBJECTION AND THE LEGAL RIGHTS VIEW

Thus, the key question for the viability of the cy-pres-only class action is one of legitimacy. Critics assume that courts are limited to enforcing substantive legal rights and argue that cy pres transgresses this limit. I shall call this the "legal rights view." The legal rights view holds that courts are strictly confined to producing outcomes that closely match the parties' substantive legal rights as those rights are defined by the best interpretation of the substantive law. In theory, the best interpretation might take account of the values and goals underlying the substantive law in the way a purposive interpretation of a statute does (although many critics of cy pres probably favor more textually-focused interpretive methods). But once the court defines the legal right, it must enforce that right exactly as defined—and employ procedures strictly tailored to that end—even if doing so undermines effective vindication of the values and policies that the right was meant to serve.[55]

The following discussion focuses on cases involving statutory rights. This focus is not strictly necessary; it is possible to extend the legal rights view to cases involving

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[54] *Id.* at 650. The democratic principle invoked here assumes a conception of separation of powers that assigns a limited role to the judiciary. It is not obvious, for example, why it offends democratic principles for a court to do what is necessary to promote the policies the legislature meant to serve under circumstances where practical limitations make it impossible to enforce the statutory scheme exactly as the legislature laid it out.

[55] *See* Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 329–34 (2008) (contrasting a "legal rights approach" to the procedure-substance relationship with a "policy approach"). I assume here that the best interpretation of the relevant substantive law does not itself authorize cy-pres-only distribution and that there is no other statute approving its use. *See* Gerson H. Smoger, *The Importance of* Cy Pres *in Modern Class Action Jurisprudence and the Myths Concerning Its Use*, 24 LEWIS & CLARK L. REV. 595, 597 (2020) (identifying some state rules and statutes that authorize cy pres of residual funds). One more point: although a cy-pres-only class action involves a settlement, it still counts as an adjudicative resolution because judicial approval is necessary for the settlement to bind all class members.

common law, constitutional or other rights. However, most cy-pres-only class actions involve statutory rights.[56] And it is easier to work with the legal rights view in cases where substantive rights are created by a separate lawmaking body.

The legal rights view is not tied to any specific form of litigation or any particular procedural model. It calls for whatever procedures are needed to enforce the legal rights at stake. In particular, it has no necessary connection to a "private law model" of litigation.[57] The private law model, as set out by Professor Abram Chayes in his famous 1976 article, focuses on resolving private, dyadic disputes and granting individualized relief.[58] The public law model is more expansive. It makes room for complex cases involving public law disputes with many affected individuals, complex party structures, and broad injunctive relief.[59] The legal rights view fits both models.[60] If the best way to enforce the substantive legal rights at stake is through a complex litigation structure and a complex remedy, then it should be permissible for a court to employ a complex litigation structure and grant complex relief. More generally, if the substantive legal rights at stake are group-based, the litigation and remedy can be group-based as well.

The legal rights view cannot be easily dismissed. For one thing, it has intuitive appeal. Indeed, the general idea that courts are supposed to enforce parties' legal rights rather than implement social policy or pursue collective goals is a familiar theme in jurisprudence. Moreover, the legal rights view informs criticisms of procedural innovations in other areas other than cy pres.[61] Yet the legal rights view has

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[56] *See* Brief of Professor William B. Rubenstein, *supra* note 7, at 14–15 (reporting that most cy-pres-only class actions involve claims under the Fair Debt Collection Practices Act and the Stored Communications Act).

[57] Professor Abram Chayes famously distinguished between a private law model and a public law model of litigation. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–84 (1976); *see also* Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 122–25 (1982) (parsing the "dispute resolution model" and the "structural reform" model).

[58] *See* Chayes, *supra* note 57, at 1282–84.

[59] *See id.* at 1284, 1302.

[60] In fact, the private-law/public-law dichotomy is not a particularly helpful way to think about civil adjudication or litigation. *See* Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1274–75 (1995).

[61] *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011) (condemning the use of sampling to adjudicate small backpay claims on the ground that it alters defendant's legal rights under Title VII in violation of the Rules Enabling Act); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 158 (2003) (arguing for a preexistence principle that holds that a class settlement cannot alter unilaterally the preexisting substantive rights of class members and noting that "[t]he power to alter rights in a manner that individuals may not avoid generally rests with democratic institutions, not class counsel and courts by way of a judgment approving a class settlement"); *see also* Cimino v. Raymark Industries, Inc.,

problems, especially in the simple form that cy pres critics apply it, and there are other plausible normative accounts of civil adjudication and procedure that can much more easily accommodate cy pres.[62]

However, I want to put aside any doubts and assume, for sake of argument, that some version of the legal rights view applies. This assumption lets us focus on a narrower question: Is the legal rights view, as properly understood, actually at odds with the cy-pres-only class action? I shall argue that it is not. A sophisticated understanding of the legal rights view makes room for enforcing substantive values and policies when it is not possible to enforce substantive rights as defined. This is important because it means that the case for the cy-pres-only class action does not depend on the status of the legal rights view.

Defending this conclusion is no easy matter.[63] One cannot simply cite the deterrence benefits of using cy pres because the legal rights view excludes deterrence as a justification. Nor is it enough that class members receive some benefit from the litigation, for the benefit they receive must match the substantive rights they assert. In *Frank v. Gaos*, for example, Google agreed to disclose its information-sharing practices to Google users, and many, if not all, class members probably received an indirect benefit from the projects funded through the cy pres distribution.[64] Still, none of these benefits fit the legal rights to compensation that class members asserted. In short, Google paid a substantial sum to settle class members' damages claims, yet class members received none of that settlement.

One might be tempted to draw on the equity origins of the cy pres doctrine to justify judicial creativity in fashioning cy pres solutions to class action problems. Perhaps a class action judge can be likened to a trustee with discretion to redirect settlement proceeds treated as assets held in trust. However, this analogy cannot

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151 F.3d 297, 311–19 (5th Cir. 1998) (relying on the Erie Doctrine to bar the use of sampling to adjudicate state-created claims on the assumption that federal courts must enforce state substantive rights as defined).

[62] The law-and-economics version of utilitarianism, for example, assumes that civil adjudication enforces the substantive law in order to create optimal incentives and minimize aggregate social costs. On this view, it can be legitimate for a court to use procedures that improve deterrence or avoid high social costs even if those procedures systematically produce outcomes that undercompensate some plaintiffs relative to their substantive entitlements. A number of features of American civil procedure fit a utilitarian approach, but others, such as restrictions on class actions and the limited availability of nonparty preclusion, do not. The best normative account is probably some hybrid of a rights-based and utilitarian theory.

[63] Class members with small claims might rationally consent to a cy-pres-only class action if they had the opportunity. With a cy-pres-only distribution, they obtain whatever indirect benefits flow from the activities of the cy pres beneficiary, whereas without such a distribution, there is a good chance they will receive nothing at all. However, consent cannot cure a legitimacy problem that does not itself depend on consent. The legal rights objection is that the cy-pres-only class action exceeds the proper limits of judicial power whether parties consent to the procedure or not.

[64] *See supra* notes 22–27 and accompanying text.

carry the weight of the argument.[65] It is one thing for a probate judge charged with administering an estate to redirect a charitable bequest in order to serve testator intent when the alternative is to give the bequest to residuary legatees whom the testator chose not to benefit. It is quite a different thing when a court certifies a class by directing a settlement or judgment to a cy pres beneficiary that the legislature never contemplated rewarding.

One might try to confine the legal rights view to the liability stage and argue that judicial flexibility at the remedial stage justifies cy pres.[66] However, it is not clear that the legal rights view supports severing right from remedy in this way.[67] In any event, whether separating right from remedy makes sense depends on whether it comports with the best interpretation of the substantive law. Consider *Frank v. Gaos*.[68] On the one hand, the legal right each plaintiff asserts might be conceived as a right to privacy that exists independently of any remedy for its violation.[69] On the other hand, the fact that the Stored Communications Act guarantees a minimum recovery of $1,000 strongly suggests that the legal right should include this remedial component as well.

In *Justifying Class Action Limits*, I argued that the legitimacy of the Rule 23(b)(2) class action for injunctive relief supports the legitimacy of a Rule 23(b)(3) small-claim class action with a cy pres remedy and unascertainable class members.[70] I reasoned that the two different class devices share the same critical features—a group character and a deterrence focus—and that those two features form the core of a justification.[71] However, this argument assumes that it is proper for a court to

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[65] For sharp criticism of using the equity origins of cy pres to justify the doctrine, see Redish et al., *supra* note 1, at 624–38.

[66] Traditionally courts have been given considerable flexibility at the remedy stage. Injunctive relief is subject to equitable balancing, and courts have wide latitude to accept reasonable methods of approximating damages when more precise methods are impractical. *See, e.g.*, Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 688 (1946).

[67] Professor Redish and his co-authors, for example, assume that right and remedy are inseparable—the substantive law does not just define the legal right; it also defines the legal remedy that the right guarantees. Indeed, one of their main objections to cy pres and small-claim class actions more generally is that they alter the "remedial model" created by the substantive law. *See* Redish et al., *supra* note 1, at 649.

[68] Frank v. Gaos, 139 S. Ct. 1041 (2019) (per curiam).

[69] In the language of the Stored Communications Act (SCA), it would be a right that Google not "knowingly divulge . . . a communication while in electronic storage." 18 U.S.C. § 2702(a)(1) (2012). Indeed, the SCA prescribes remedies in a separate section from the section creating the duty. *See id.* § 2707(c). But that is hardly decisive.

[70] Bone, *Justifying Class Action Limits*, *supra* note 9, at 913.

[71] The modern 23(b)(2) class action has a lengthy pedigree; it traces back to the general-right suits of the eighteenth century and the public-right representative suits of the nineteenth century. *See* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 249–50, 272–75, 297–98 (1990).

enforce deterrence policies when the legislature grants legal rights to compensation primarily for deterrence reasons, and it is this assumption that the legal rights view challenges.

In sum, none of these arguments can reconcile the cy-pres-only class action with the legal rights view. But this does not mean there is no way to do so, and it is worth searching for an alternative. For if the cy-pres-only class action is incompatible with the legal rights view, there might be no hope of securing a judicial remedy in many cases involving claims of widespread injury to lots of individuals in small amounts. The reason is that none of the distribution alternatives to cy pres fare any better under the legal rights view than cy pres itself, and without some acceptable way to distribute the proceeds of a class action, the court cannot certify a class.

For example, one option is to return unclaimed funds to the defendant.[72] From a legal rights perspective, however, this option is no different than giving the funds to a cy pres beneficiary. After a class is certified and the settlement approved, the fund no longer belongs to the defendant and distributing it to anyone other than class members fails to enforce those members' legal rights. Another possibility is to allow unclaimed funds to escheat to the state, just as abandoned property does. But escheat still does not compensate class members. Moreover, a settlement fund does not qualify as abandoned property when class members never have a chance to claim their shares.

A third possibility is to use a lottery to distribute the settlement proceeds to the class.[73] The objectors in *Frank v. Gaos* proposed this approach.[74] They would have had the court distribute the settlement to 50,000 class members chosen at random from the 129 million in the class.[75] Each class member would then have had a 0.000388 chance of receiving $170, which is more than enough to cover the cost of distribution.[76] The lottery approach, if feasible, has some attractive features.[77] It achieves deterrence, treats all class members equally, and provides a benefit to each

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[72] Professor Redish and his co-authors favor this option when the court certifies a class without anticipating the distribution problem in advance. Redish et al., *supra* note 1, at 665 ("[A] strong argument can be made in favor of retention of unclaimed funds by defendant."). This alternative undermines deterrence, of course, but deterrence is not a concern for legal rights proponents.

[73] For an early article proposing a lottery distribution, see Lavie, *supra* note 38, at 1066–69.

[74] *See* Brief for Petitioners at 44–45, Frank v. Gaos, 139 S. Ct. 1041 (2019) (No. 17-961).

[75] *See id.* at 44–45.

[76] *See id.* at 44. Since 50,000 would be chosen out of 129 million, the likelihood of being chosen is 50,000/129,000,000 = 0.000388. Of course, some of the $8.5 million was slated for attorneys' fees and incentive payments, leaving only $5.3 million to distribute, but even that lower total yields $106 for each of the 50,000 class members selected by lottery.

[77] There are practical problems with implementing a lottery of this sort. For example, it must be possible to randomly select class members and identify the lottery winners, and this is likely to present a serious impediment for a very large class with members who are not easily identifiable.

in the form of a lottery ticket.[78] However, it is not consistent with the legal rights view as strictly understood. The legal right is a right to compensation, not a right to a lottery ticket promising some chance at compensation.[79]

IV. RECONCILING THE CY-PRES-ONLY CLASS ACTION WITH THE LEGAL RIGHTS VIEW

There is something paradoxical about the results that the legal rights view seems to mandate. When claims are too small to justify individual suits, the class action is the only way to enforce the legal rights at stake, but the court cannot certify a class without some way to distribute the settlement proceeds. Thus, strictly insisting on a close match between case outcomes and legal rights as defined scuttles the class action, which ends up leaving legal rights completely unenforced. Hence the paradox—a court cannot enforce the parties' legal rights as defined because it must enforce the parties' legal rights as defined.

Proponents of the legal rights view do not see a paradox here. For them, the result simply follows from a proper understanding of adjudication's limits. However, the problem remains. It seems implausible that courts would be barred from using tools necessary to enforce the substantive law when the result is to deny enforcement altogether.

Moreover, there are features of our procedural system that are difficult to justify other than as promoting substantive values and policies when strict enforcement of substantive legal rights is not possible. One example is the small-claim class action itself.[80] While this device has its detractors, it is generally accepted as a paradigmatic use of the class action.[81] Many try to justify it on compensation grounds—a result,

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[78] *See* Lavie, *supra* note 38, at 1098–100.

[79] It also enriches some class members at the expense of others with equal rights. *See* Brief of Professor William B. Rubenstein, *supra* note 7, at 23–24.

[80] Another example is the limited-fund class action certified under Rule 23(b)(1)(B). *See* 2 RUBENSTEIN, *supra* note 2, § 4:19 (describing restrictions on and uses of the limited-fund class action). The limited-fund class action forces plaintiffs to accept less than what their substantive legal rights guarantee to ensure that all plaintiffs receive a fair share of a limited fund. In these cases, the class device falls short of enforcing substantive legal rights *as defined* in order to promote equitable allocation principles. It is also possible to view the declaratory judgment as another counterexample to the legal rights view. The declaratory judgment action enlists the judicial process not to compensate or to provide injunctive relief, but rather to declare legal rights and obligations. However, declaratory relief at least aims to satisfy substantive legal rights as defined even though it stops short of doing so completely. The small-claim class and limited-fund class actions aim at deterrence and equitable allocation instead.

[81] *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights" (quoting Mace v. Van Ru Credit Corp., 109 F. 3d 338, 344 (1997))); 2 RUBENSTEIN, *supra* note

most likely, of misplaced fidelity to a superficial understanding of the legal rights view—but it is clear that the small-claim class action is mainly about deterrence.[82] And justifying it in these terms requires one to access the policies underlying the substantive law.[83]

Thus, there is reason to look more closely at the status of the cy-pres-only class action within the legal rights view. The key to making space for the cy-pres-only class action is to focus on the practical constraints of litigation, and in particular, on the fact of outcome error. The legal rights view, in its superficial form, assumes, implicitly, that there is no outcome error, that courts are able to enforce legal rights with perfect accuracy. This assumption is what makes a myopic focus on substantive legal rights seem plausible. If rights can be enforced with perfect accuracy, then it is possible to imagine enforcing everyone's legal rights without any tradeoffs by strictly enforcing the substantive law as defined.

But there is no such thing as perfect accuracy. Mistakes are inevitable. This obvious fact presents serious problems for the legal rights view. When a court makes a mistake, it produces an outcome that fails to enforce legal rights, and a failure to enforce legal rights as defined amounts to an illegitimate exercise of judicial power under a strict version of the legal rights view.[84] The same is true for all errors produced by a procedural system, not just those that infect trial outcomes. Thus, an erroneous dismissal raises legitimacy concerns, as does a plaintiff's failure to file a meritorious suit due to impediments that a procedural system could remove and a plaintiff's filing of a frivolous suit that a procedural system could prevent. But this makes no sense. If a procedural system is illegitimate just because it creates errors that fail to enforce legal rights, all procedural systems are illegitimate because all procedural systems generate errors.

This means that the legal rights view must be modified to take account of outcome error. Perhaps random errors due to human fallibility can be ignored, but that does not go far enough to account for the error risks a well-functioning procedural system creates.[85] For example, judges limit discovery even when they believe that

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2, § 4:47 ("One of the core purposes of the class action is to enable the pursuit of such 'negative value' cases, lest a wrong-doer escape liability by doing lots of little wrongs.").

[82] *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2069–70 (2010); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 131–39 (2006).

[83] For this reason, strict adherents to the legal rights view reject the small-claim class action despite its pedigree. *See* Redish et al., *supra* note 1, at 649 (referring to small-claim class actions as "'faux' class action[s]" and a "class action patholog[y]" that implements a "bounty hunter remedial model").

[84] Bear in mind that plaintiffs are not the only ones with legal rights. Defendants have legal rights, too.

[85] An obvious example is the burden of persuasion, which is designed to balance error costs—the costs of an erroneous determination that the defendant is liable versus the costs of an erroneous

there is some chance that additional discovery might reveal useful information.[86] Also, a judge who dismisses a complaint under Rule 12(b)(6) for failure to meet the plausibility standard knows that there is some risk that the suit is meritorious and dismissal is erroneous. This error risk is justified, among other things, by the goal of screening meritless suits.[87]

These procedural choices depend not only on the risk of error, but also on the harms that errors create. An error is not a problem in itself. It is a problem only because it produces harm. Moreover, the harms that matter are harms to the interests that the applicable substantive law aims to promote. For example, an error in failing to vindicate a plaintiff's rights under the Stored Communications Act creates harm to the privacy interests that the statute means to protect. It might do so by undermining the statute's goal of deterring privacy intrusions, or it might do so by failing to compensate for the moral harm of a privacy invasion. Either way, the seriousness of the error risk depends not only on the magnitude of that risk, but also on the seriousness of the efficiency losses and moral harms associated with it.

Most procedures—pleading standards, discovery rules, summary judgment rules, and so on—reduce the error risk for some litigants and cases while increasing the error risk for others. It follows that any rule must be evaluated by how well it balances the two effects, and an optimal balance requires a comparison of error-related harms as well as risks. The goal should be to reduce the risk of the more harmful error to the point where the increased risk of the other type of error causes more serious harm.

For example, in a world of scarce resources, where hard choices must be made about how much procedure to provide for different types of cases, it makes sense to invest more in reducing the risk of error for constitutional rights cases than for cases involving compensation for minor property damage. This is because the legal system as a whole values the substantive interests protected by constitutional rights more highly—so errors that fail to protect those interests are more serious—and this value choice supports more accurate enforcement. For another example, consider again the choice of a stricter pleading standard. Such a choice reflects a decision to tolerate more errors that harm plaintiffs (by screening meritorious suits) in order to produce fewer errors that harm defendants (by screening meritless suits). And this decision must be based on a judgment, explicit or implicit, about the relative importance of the harms produced by the two types of error, which are measured in terms of the

determination that the defendant is not liable. However, some people view burdens as more "substantive" than "procedural." So I have chosen examples in the text—discovery and pleading—that are unambiguously procedural.

[86] *See* FED. R. CIV. P. 26(b).

[87] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557–58 (2007). The plausibility standard reflects a judgment that avoiding the costs of meritless suits justifies a marginal increase in harm from erroneously dismissed meritorious suits.

values and policies the substantive law aims to promote.

This Article is not the place to delve into these issues with care. I have discussed many of them in other writing.[88] For our purposes, it is enough to note that an essential function of a procedural system is to distribute the risk of error in a fair and efficient way. Moreover, a fair and efficient distribution depends both on the relative magnitude of the error risks associated with different cases and litigants and on the harms that those different errors create. And the harms from errors are cashed out in terms of the values and policies that substantive legal rights promote.[89]

It follows that no procedural system can focus exclusively on substantive legal rights and ignore the substantive law's values and policies. Indeed, a procedural system can be faulted for distributing error risk in a way that conflicts with or undermines the goals of the substantive law.[90] In short, in a system like ours where a lower error risk for some means a higher error risk for others, the lower risk should be associated, roughly speaking, with cases involving more important substantive interests and thus more serious harms to avoid.[91]

This analysis has important consequences for cy-pres-only class actions within the legal rights view. To start with, it shows that the legal rights view must be able to distribute error risk in a normatively acceptable way, in keeping with the relative importance of different legal rights. Moreover, for a distribution to be normatively

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[88] *See, e.g.*, Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1012 (2010) [hereinafter Bone, *Procedure, Participation, Rights*]; Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 510–16 (2003) [hereinafter Bone, *Agreeing to Fair Process*]; *see also* RONALD DWORKIN, A MATTER OF PRINCIPLE 72 (1985).

[89] I focus here only on expected error cost or harm. However, litigation and decision costs are also relevant. *See* Bone, *Agreeing to Fair Process*, *supra* note 88, at 510–16. It might be better, for example, to choose a procedure that generates a larger error risk if the alternative procedure is very costly to implement. However, it is a complicated matter deciding exactly how process costs fit into the analysis. *Id.* I do not need to consider them to make the point I wish to make here.

[90] Those goals can be utilitarian or moral, and the distinction can make a difference to how the error risk distribution is evaluated. On the utilitarian side, for example, if the substantive law aims to promote efficiency, the optimal error risk distribution is one that minimizes social costs. On the moral side, if the substantive law aims to protect moral rights or prevent moral harms, the optimal distribution of error risk is one that treats all litigants as equals deserving of equal concern and respect. *See* DWORKIN, *supra* note 88, at 80–81, 89, 95–96. *See generally* Bone, *Procedure, Participation, Rights*, *supra* note 88 (discussing Dworkin's theory).

[91] I am not suggesting that judges should evaluate the importance of substantive interests in each and every case. There are good reasons for treating large classes of cases the same and for leaving distinctions of this sort to the rule-makers when they adopt general procedural rules. There might be no differences to draw, the differences might be too difficult to ascertain, or we might not want judges trying to mark the distinctions in individual cases. The important point is that the substantive interests valued by the substantive law, and not just the substantive legal rights as defined, matter to procedural choice.

acceptable, plaintiffs with small claims must have some way to sue. From an efficiency perspective, an inability to sue generates errors that produce serious harms by undermining the deterrence goals of the substantive law. From a fairness perspective, denying plaintiffs with small claims the opportunity to sue when similarly situated individuals with large claims are able to do so treats equal right holders unequally. This inequality might not be unfair if error-related harm always correlated positively with the damages at stake. But it does not. The magnitude of harm depends on the importance of the values underlying the substantive law, not the amount of individual damages. For example, the Stored Communications Act protects important privacy interests, yet the claims it supports are usually too small to justify individual suits.

The next step involves recognizing that, in the American litigation system, the class action is the principal device aimed at addressing the error risk problem for small claims.[92] It permits the aggregation of small claims into a lawsuit with large enough stakes to attract an attorney. To certify a small-claim class action, however, a court must have some way to distribute settlement funds when distribution to the class is not practical. The cy-pres-only distribution fills this need. Thus, a cy-pres-only distribution is justified as enabling class litigation—the cy-pres-only class action—that helps to produce a fair and efficient error risk distribution.

Still, cy pres is not the only way to distribute class recovery. The court might use a lottery instead.[93] Of course, there must be some way to include all class members in the lottery and identify lottery winners, and this might rule out use of a lottery for very large classes. But assuming distribution by lottery is administratively feasible, the choice between it and cy pres should depend on which does a better job of respecting class member rights and promoting the values and policies underlying the substantive law. Since the lottery offers some compensation for harm suffered—by giving everyone a lottery ticket—it might be superior to cy pres when the defendant's violation causes significant moral harm.[94] On the other hand, if the violation has not produced significant harm, the focus should be on preventing future

[92] One might argue that the error risk problem can be addressed through small-claims courts. However, many of the claims that concern us are too small to justify any individual suits, even in small claims court, especially as the costs of litigating can be quite high when proof requires extensive discovery and expert evidence. Moreover, if the procedures are truncated, as they usually are in small claims court, the outcomes will be prone to significant error. And a high error risk can undermine deterrence, especially if it is skewed in favor of the more powerful defendant, and it can fail to treat plaintiffs as equal right holders, especially when there is a feasible and superior alternative—the small claim class action.

[93] The lottery option is inconsistent with the simple version of the legal rights view that assumes perfectly accurate enforcement of substantive rights. *See supra* notes 74–79 and accompanying text. However, it might be compatible with the more sophisticated version that takes account of error risk.

[94] *Cf. In re* Google Inc. Cookie Placement Consumer Privacy Litig., 934 F.3d 316, 324–25

harm, and a cy pres distribution does a better job of that insofar as it funds projects of cy pres beneficiaries that promote compliance.

CONCLUSION

We began with the question of how a cy-pres-only class action can be justified when it contemplates a monetary settlement that provides no monetary relief to class members. We saw that this question poses a serious challenge only if it is understood in terms of legitimacy and then only if it assumes a particular conception of legitimacy—the legal rights view. The legal rights view, however, cannot be applied strictly. When it is modified to take account of outcome error, it can accommodate the cy-pres-only class action as a device to enable small-claim class action litigation.

There is a more general point here. A superficial application of the legal rights view impedes much more than the cy-pres-only class action. It challenges small-claim class actions in general, blocks the use of sampling procedures to adjudicate large-scale aggregations, and makes it more difficult for judges to adopt innovative procedures that serve compensation and deterrence goals. It is past time to take a careful look at this conception of procedural legitimacy. Making sensible progress with procedural reform depends on it.

(3d Cir. 2019) (arguing that plaintiffs have standing under *Spokeo* to sue under the Stored Communications Act (and other statutes) because they suffered injury to privacy interests and privacy interests have traditionally been strictly protected). For more on the idea of moral harm, see DWORKIN, *supra* note 88, at 80–81.