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The *Cy Pres*-Only Class Action and Adjudicative Legitimacy

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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. Despite limitations on the doctrine, 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.

It is important to distinguish between two different ways courts use cy pres.[3] In the typical case, cy pres applies to left-over funds only after a distribution to the class. To illustrate,

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1 Cy pres has been a feature of class actions since roughly the mid-1970s, but it appears that its use has increased markedly since 2000. *See* Martin H. Redish, Peter Julian, & Samantha Zyontz, *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.*, NEWBERG ON CLASS ACTIONS, *supra* note 48, § 12:32 (noting that "perhaps 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 *See* In re Google Inc. Cookie Placement Privacy Litig., 2019 WL 3559113 (3d Cir. 2019) (noting that "[i]n the usual *cy pres* case, money from a class settlement fund remains after distributions to the class" and also that "[w]e have never addressed whether a class action settlement's monetary award may be given solely to cy pres

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. 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 amount 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 left-over 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 left-over funds be contributed to an organization that monitors for consumer fraud.[4]

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recipients."); Diaz v. Lost Dog Pizza, LLC, 2019 WL 2189485 n. 3 (D. Colo. 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 Newberg on Class Actions § 12:26 (5th ed. 2019) (distinguishing between a "full cy pres" distribution and a cy pres distribution of residual funds).

[4] There are variations on this scenario. Cy pres might be used to distribute the proceeds of a final judgment for damages after certification and trial. *See* Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1312 (9th Cir. 1990). But this is very rare; most of the cases involve settlements. Still, there are variations in the settlement cases. The court might first certify a litigating class, which settles only sometime later, or certify a settlement class at the same time as reviewing the settlement. Moreover, the settlement agreement might include a clause that provides for a cy pres distribution of any left-over funds and names the cy pres beneficiary. Or, alternatively, the court might decide to use cy pres on its own only after it becomes apparent that there are left-over funds, and then ask the parties to choose the beneficiary or choose the beneficiary herself. *See* In Re Pharmaceutical, 588 F.3d 24, 33-35 (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, 509 (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" (emphasis in original)). 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. See, e.g., Poertner v. Gillette Co., 618 Fed. Appx. 624 (11th Cir. 2015).

The second use of cy pres is less common and more problematic.[5] 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 commonly referred to as a "cy pres-only" distribution.[6] A judge might use a cy pres-only distribution after approving a settlement in a litigating class action. But the more common, and more challenging, scenario is one in which the judge is asked to certify a settlement class action featuring a settlement that provides explicitly for a cy pres-only distribution. I shall refer to this a "cy pres-only class action" because the judge who certifies knows with certainty 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 adjudicative power to enable litigation that compensates a third party without providing any compensation to class members who possess the legal rights.

This Article focuses on the cy pres-only class action.[7] It first addresses standard criticisms and then turns to objections based on legitimacy. The legitimacy objection is the most challenging. It implicates a normative question with profound consequences for procedural law: Is it proper for a court to adopt procedures that aim to promote the 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 presents this issue in a particularly striking way. Proponents of the procedural device argue that it is needed to promote

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[5] *See* Brief of Professor William B. Rubenstein as Amicus Curiae in Support of Respondents, in Frank v. Gaos, at 11-12 (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).

[6] Frank v. Gaos, 139 S. Ct. 1041, 1046 (2019) (Thomas, J., dissenting) (referring to the distribution as "cy pres-only"); In re Google Inc. Cookie Placement Privacy Litig., 2019 WL 3559113 (3d Cir. 2019) (distinguishing between ordinary cy pres and "cy pres-only" distributions).

[7] I have examined the cy pres doctrine in general in previous work. Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates Over Ascertainability and Cy Pres*, 65 Kansas L. Rev. 914 (2017) [*Justifying Class Action Limits*].

the deterrence goals of the substantive law, while opponents argue that it illegitimately sacrifices class members' legal rights.

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 adjudicative legitimacy. Part III then engages the legitimacy critique directly. It shows that a cy pres-only class action is a normatively legitimate procedure under some circumstances. Part IV concludes.

I. Background

Many commentators have described cy pres and its history, and I will only briefly summarize this background here. Cy pres is short for "cy pres comme possible," which translates from the Norman French to as "as near as possible."[8] The doctrine was developed originally 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. 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.[9] Under current doctrine, the charity chosen for the distribution must have a close nexus with the lawsuit, so that class members benefit indirectly from the projects that the charity undertakes.[10]

Until about 2010, courts used cy pres regularly without much controversy. In 2010, however, Professor Martin Redish and his co-authors launched a scathing attack on cy pres, citing supposed constitutional, statutory, and policy defects.[11] Since then, criticism of the device

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[8] Wasserman, *supra* note **, at 114-15.
[9] Redish et al., *supra* note **, at 634–38 (tracing the use of cy pres in class actions back to the mid-1970s).
[10] The American Law Institute's highly influential *Principles of the Law of Aggregate Litigation* recommends that "the court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class." AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 (2010) [hereinafter ALI PRINCIPLES].
[11] Redish et al., *supra* note 9.

has spread. 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 should be addressed by the Court in a future case.[12] Many lower courts and commentators have also expressed reservations, and even some supporters of cy pres, including the authors of the ALI's *Principles of the Law of Aggregate Litigation*, recommend relatively strict limits on its use.[13]

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 Litig.*,[14] which reached the Supreme Court restyled as *Frank v. Gaos*.[15] Plaintiffs, who used Google's search engine, complained that the search engine revealed users' private information in violation of the Stored Communications Act and state law.[16] They sought damages as well as injunctive and declaratory relief. In particular, the Stored Communications Act gave them a right to recover actual damages and defendant's profits in an amount not less than $1000.[17]

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

[13] For sources, see Bone, *Justifying Class Action Limits*, *supra* note **, at 942. The ALI Principles of Aggregate Litigation recommends that cy pres be used only after trying to distribute any left-over funds to class members who have already filed claims and received distributions in the first round. ALI Principles, *supra* note **, § 3.07, cmt. b. In other words, the ALI prefers to 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.*

[14] 869 F.3d 737 (9th Cir. 2017).

[15] Frank v. Gaos, 139 S.Ct. 1041 (2019). Five class members filed objections to the settlement and Theodore Frank was one of those objectors. 869 F.3d, *supra*, at 740.

[16] 869 F.3d, *supra*, 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 v. Gaos, 139 S.Ct. 1041, 1044 (2019).

[17] 18 U.S.C. §2707(b): "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."

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."[18] 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.[19]

The parties sought judicial approval of the settlement and certification of a settlement class consisting of about 129 million users nationwide.[20] The district judge held a fairness hearing, approved the settlement, and certified the class.[21] The judge specifically addressed the cy pres-only aspect of the settlement, noting that distribution of the settlement fund to the class was impractical[22] and that projects proposed by the cy pres beneficiaries would indirectly benefit the class.[23]

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,

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[18] 869 F.3d, *supra*, at 740.

[19] *Id*. (noting that "approximately $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" all of whom had provided "a detailed proposal for how the funds would be used to promote Internet privacy." *Id*.

[20] *Id*. at 740 (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).").

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

[22] *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 4 cents per class member.

[23] *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 in the case. 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 decision in *Spokeo v. Robins*.

the class action enables litigation and thus private enforcement of the substantive law.[24] Problems arise, however, when it is not possible to distribute class relief to the class.[25] 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 class certification. Cy pres solves this distribution problem by giving monetary relief to third parties who indirectly benefit the class. Thus, cy pres enables class certification, which in turn enables private enforcement of the substantive law.

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 cy pres provides no compensation at all, and worse yet, directs the funds to a third party with 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 legal rights will not be enforced? Of course, the answer is that certification enables enforcement of 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 legal rights at stake are rights to compensation, not rights to deterrence. Hence the central question: Is it legitimate for a court to enforce substantive policies when doing so fails to deliver on substantive rights? As we shall see, this is not an easy question to answer.

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

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[24] See *id*. at 1128.

[25] It is worth noting 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).

constraints. But they all 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 their ties to judicial legitimacy.

A. Functional Objections

In *Justifying Class Action Limits*, I discussed three of the most common functional criticisms of cy pres.[26] The following briefly sketches this analysis.

First, many critics claim that cy pres exacerbates attorney-class agency problems by making it easier for class attorneys to enter into sweetheart settlements with defendants.[27] 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.[28] 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 cy pres could possibly create an agency problem is if class attorneys are obligated to seek relief that matches each class member's substantive legal right—even if doing

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[26] Bone, *supra* note 7, at 944-51.

[27] *Id*. at 944-47.

[28] Of course, fees are calculated in different ways. *See* Theodore Eisenberg, Geoffrey P. Miller, & Roy Germano, *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"). However, the empirical evidence is strong that no matter how they are calculated, fee awards increase with settlement amount, although at a declining rate. *See id*. at 946 ("in 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 Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEG. STUD. 248 (2010); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEG. STUD. 811 (2010). Some commentators compare cy pres to coupon settlements. *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 178 (3d Cir. 2013); Wasserman, *supra* note **, at 136–49; Jennifer Johnston, *Cy Pres Comme Possible to Anything is Possible: How Cy Pres Creates Improper Incentives in Class Action Settlements*, 9 J. L. ECON. & POL'Y 277, 291-92 (2013). But the two are different. In a problematic coupon settlement, the defendant ends up paying much less than the actual settlement amount because many class members do not redeem their coupons, but the class attorney still receives a fee based on the total value of the coupons regardless of the number redeemed. In a cy pres distribution, by contrast, the defendant reaps no benefit when class members fail to claim their shares. It pays the full settlement amount regardless of cy pres.

so scuttles private enforcement of the substantive law.[29] In that case, a class attorney who agreed to a cy pres distribution would renege on her duty in order to maximize her fee. But if class attorneys are limited in this way, it must be because adjudication is similarly limited, in other words, because courts can only provide relief strictly in accordance with legal rights.

The second criticism is that cy pres allows attorneys and judges to choose their favorite charities.[30] This is a legitimate concern, although 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.[31]

The third objection is that cy pres misappropriates property belonging to the class.[32] This objection is also not convincing. For one thing, the class is not an entity capable of owning property. Individual class members can own shares of a settlement fund, but 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 limits courts to enforcing substantive legal rights. On this view, a cy pres distribution is

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[29] Redish et al., *supra* note **, at 650-51 (objecting to cy pres because it weakens attorney incentives to maximize individual class member recovery).

[30] Bone, *supra* note 7, at 947-48.

[31] Potential beneficiaries often compete for cy pres awards, which can lead to wasteful expenditures. However, the competition can also produce benefits if it provides information to the court that helps in selecting the best recipient.

[32] *Id*. at 948-51.

illegitimate even if it promotes the policy goals of the substantive law because courts have no power to promote substantive law policies directly.

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).[33] As for Rule 23(a)(4), 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.[34] Also, in his view, a cy pres-only class action is not superior to other methods of adjudication and thus cannot meet Rule 23(b)(3)'s superiority requirement.[35] And he insisted 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.[36]

None of these objections is convincing. There is no reason to condemn a settlement merely because it includes a cy pres-only distribution or to question the loyalty of class representatives just because they agree to such a settlement. It makes sense on functional grounds to use cy pres when the substantive law aims at deterrence and the claims are too small

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[33] Frank v. Gaos, 139 S. Ct. 1041, 1046 (2019) (Thomas, J., dissenting).

[34] 139 S. Ct. at 1047-48 ("because 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*. ("no party argues that these disclosures were valuable enough on their own to independently support the settlement).

[35] *Id*. at 1047-48.

[36] *Id*. at 1047.

to support individual distributions.[37] Deterrence is achieved by the defendant paying the settlement amount regardless of who receives it.[38] Moreover, when the amount at stake for each class member is very small, most class members have little interest in receiving a distribution—which is why the claiming rate is extremely low in these cases[39]—and a cy pres distribution at least gives them some benefit.

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."[40] When claims are small, individual litigation is not an "available method" as a practical matter because individual suits are infeasible.[41] Smaller class actions might be possible, but they are likely to face the same distribution impediments and thus the same need for cy pres.[42]

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

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[37] The fact that the substantive law gives individual rights to compensation for harm is perfectly consistent with a deterrence policy. While a compensatory right can serve moral purposes, such as 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 and thereby deter socially harmful conduct.

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

[39] *See, e.g.*, Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 119–20 (2007).

[40] Fed. R. Civ. P. 23(b)(3).

[41] 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, because they are unable to bring individual suits.

[42] 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.

rights to individual compensation, the court is limited to providing compensation that corresponds to those rights. If that is not possible, then adjudication is not an appropriate way to resolve the dispute.[43] 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.

A similar assumption underlies the objections to cy pres advanced by Professor Redish and his co-authors.[44] 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."[45] This objection has force, however, only on the assumption that Article III strictly limits courts to providing remedies that closely fit substantive legal rights as defined. If instead courts have the power to enforce the policies underlying the substantive law, Article III would not 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 "alters the essence of the underlying substantive right being enforced"—in violation of the Rules Enabling Act and separation of powers.[46] This argument also depends on the assumption that courts are strictly limited to enforcing substantive legal rights as the lawmaker defines them. Without this

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

[44] Redish et al., *supra* note **, at 643-648.

[45] *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.

[46] *Id*. at 646. 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.

assumption, one can argue that cy pres does not alter substantive rights, but rather enforces those rights more effectively by enabling class action litigation where suits would not otherwise be possible. Professor Redish makes this point 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.[47]

III. The Objection from Legitimacy

A. The Legal Rights View

Thus, the key question for the viability of the cy pres-only class action is one of legitimacy, not functional efficacy. Critics assume that courts are limited to enforcing substantive legal rights and argue that cy pres transgresses this limit. I shall call this view of adjudicative legitimacy the "legal rights view." The legal rights view holds that courts are limited to enforcing substantive legal rights as those rights are defined by the best interpretation of the substantive law. 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—but once the court defines the legal right, it must enforce that right without regard to the values and goals the right is meant to serve.[48]

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.

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[47] *Id*. at 650.

[48] It is theoretically possible that the best interpretation of a statute would authorize the use of a cy pres-only distribution. In that case, the legitimacy question would focus on whether Congress has the power to authorize this use, and the answer to that question would depend on Article III constraints.

In particular, it has no necessary connection to a "private law model" of litigation.[49] The private law model, first set out by Professor Abram Chayes in his famous 1976 article, focuses on resolving private, dyadic disputes and granting individualized relief.[50] 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.[51] The legal rights view fits both models.[52] If the best way to enforce the substantive legal rights at stake is through a complex litigation structure and a complex remedy, then it is 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 is quite influential in procedural law. Indeed, it underlies judicial resistance to many innovative procedures for adjudicating large-scale aggregations. The Supreme Court, for instance, held that a federal judge cannot use case sampling to adjudicate Title VII claims for backpay because doing so alters the defendant's substantive legal rights under Title VII.[53] It did not matter to the Court that the defendant's aggregate liability for

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[49] Professor Abram Chayes famously distinguished between a private law model and a public law model. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–84 (1976). *See also* Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 COLUM. L. REV. 1, 1–7 (1985) (highlighting differences between the "arbitration model" and the "regulation model"); Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 L. & HUM. BEHAV. 121, 122–25 (1982) (parsing the "dispute resolution model" and the "structural reform" model); Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 937–39 (1975) (distinguishing the "Conflict Resolution Model" and the "Behavior Modification Model").

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

[51] *See id.* at 1282–84, 1302.

[52] In fact, the private-law/public-law dichotomy is not a terribly 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 (1995).

[53] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011) (concluding that sampling in this manner altered defendant's legal rights in violation of the Rules Enabling Act). In a Title VII case like *Wal-Mart*, each class member has a presumptive entitlement to backpay once the class succeeds in proving a pattern and practice of discrimination, but Title VII then gives the employer the right to rebut the presumption for each employee if it can show lawful reasons for the employee's particular treatment. *Id.* at 366-67. The Ninth Circuit had suggested that the district court might use a sampling procedure to determine an aggregate backpay award for the class by appointing a special master to depose a random sample of class members and extrapolating from the sample results. The Supreme Court rejected this approach on the ground that it altered the defendant's substantive legal rights under

backpay would be roughly the same with sampling as without, or that sampling, by making a class action viable, enabled vindication of small backpay claims and thus promoted the policies underlying Title VII.[54]

Moreover, the idea that courts determine legal rights while other institutions, such as legislatures and agencies, make and enforce policy is deeply rooted in conventional understandings of separation of powers. Indeed, many of the key theorists of civil adjudication have subscribed to some version of this thesis.[55]

I do not mean to suggest that the legal rights view is the only, or the best, account of adjudicative legitimacy. One alternative is a utilitarian theory. 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 litigation methods that improve deterrence or avoid high social costs even if those methods systematically produce outcomes that undercompensate some plaintiffs relative to their substantive rights. For this reason, the cy pres-only class action is relatively easy

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Title VII by depriving Wal-Mart of its right "to litigate its statutory defenses to individual claims." *Id*. at 367. To be sure, the Court relied on the limitations imposed by the Rules Enabling Act, but its interpretation and its application of the Rules Enabling Act reflect a legal rights view.

[54] *See* Robert G. Bone, Tyson Foods *and the Future of Statistical Adjudication*, 95 N. CAR. L. REV. 607, 629-31, 637, 643-49 (2017). The amount of backpay for most class members in the *Wal-Mart* case was probably too small to justify the cost of litigating their backpay entitlements individually. Moreover, extrapolating an aggregate backpay award from a random sample of cases (say, by averaging the sample results and then multiplying by the total number of class members) would yield a total backpay award that closely approximates the total arrived at through individual litigation. Thus, sampling would promote Title VII policies much better than individual litigation. Yet the Court rejected it because it altered the defendant's substantive legal rights.

[55] For example, Professor Ronald Dworkin argued for a rights-based theory of adjudication in which judges decide cases by determining the legal rights of the parties according to the best interpretation of the substantive law. *See* Ronald Dworkin, LAW'S EMPIRE 276-399 (1985) (describing how his interpretive theory applies to common law, statutes, and the Constitution). In Dworkin's theory, when a legislature adopts a statute that gives individuals certain rights, those individuals have a "claim of right" that exists independently of the policy reasons for the statute and one they can assert even if those policy reasons are unwise. RONALD DWORKIN, *Principle, Policy, Procedure*, *in* A MATTER OF PRINCIPLE 72, 73-74 (1985) (giving this example). Professor Dworkin's theory is more complex than the simple account of the legal rights view in the text, but there is no question that it counts as a version of a legal rights view. *See also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 367-70 (1978) (explaining that adjudication ends up deciding claims of right and accusations of fault based on arguments of principle).

to justify. If a class action is an efficient way to enforce the substantive law, it makes sense to allow a cy pres-only distribution when it supports class certification, unless the use of cy pres itself generates social costs that outweigh its benefits.[56] However, as attractive as this utilitarian theory is for justifying cy pres, it has problems as a general account of adjudicative legitimacy. It cannot account for many well-established features of the American system of civil litigation.[57]

Later in this essay, I show that a strict version of the legal rights view, one that limits courts exclusively to rendering outcomes that closely match legal rights, is not convincing. I expect that a hybrid theory, combining elements of a sophisticated legal rights view with elements of a utilitarian approach, perhaps with other values mixed in, is likely to be the best candidate for a theory of adjudicative legitimacy that fits American civil adjudication.[58] However, for purposes of the following discussion, I shall assume that some version of the legal rights view holds and explore the question whether it can accommodate the cy pres-only class action.

B. Failed Attempts

There is no easy answer to this question. One cannot simply cite the deterrence benefits of the procedure because the legal rights view excludes reliance on the deterrence policy to justify procedural choice. Nor is it enough that class members receive some benefit from the litigation; the benefit they receive must match the substantive rights they assert. In *Frank v.*

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[56] For a discussion of possible adverse incentive effects created by cy pres, see Shay N. Lavie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 GEO. WASH. L. REV. 1065, 1095-98 (2011). It is hard to imagine that these costs could be serious enough to condemn cy pres-only class actions across the board.

[57] Such as restrictions on class actions, the aversion to sampling in large-scale aggregations, and the limited availability of nonparty preclusion. Nor do I think it accurately describes the way most judges make procedural decisions in most cases. It also has normative problems accommodating substantive legal rights based on moral values.

[58] Any such mix is bound to be normatively messy since it combines two incommensurable theories. But adjudication is a complex legal and social institution that serves multiple purposes, and complex institutions are often normatively messy.

Gaos, for example, Google agreed to disclose its information-sharing practices to Google users, and the district judge, in approving the settlement, entered an injunction to that effect.[59] Also, many, if not all, class members received an indirect benefit from projects funded through the cy pres distribution. Still, none of these benefits fit the legal rights to compensation that class members asserted.[60] In short, Google paid a substantial sum to settle class members' damages claims, yet class members received none of that settlement.[61]

Some commentators propose using alternatives to cy pres to dispose of settlement funds, but none of these alternatives fares any better than cy pres under the legal rights view. For example, Professor Redish and his co-authors favor returning the unclaimed settlement funds to the defendant.[62] From a legal rights perspective, however, this approach 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 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 had a chance to claim their shares.

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[59] *See supra* notes ** and accompanying text.

[60] The parties might have tried to settle the case with only injunctive relief, but the judge would almost certainly have rejected that settlement. See Frank v. Gaos, 139 S. Ct. 1041, 1047 & n.* (2019) (Thomas, J., dissenting) (noting that "the settlement agreement provided members of the class no damages and no other form of meaningful relief" and specifically that "no party argues that these disclosures were valuable enough on their own to independently support the settlement").

[61] If this were an individual suit and not a class action, the parties presumably could have settled on terms requiring the defendant to pay a sum to a third party, but in that case the court would not be involved. *See* Redish et al., *supra* note **, at *.

[62] Redish et al., *supra* note **, 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.

A third possibility is to use a lottery to distribute the settlement proceeds to the class.[63] The objectors in *Frank v. Gaos* proposed this approach. They would have had the court distribute the settlement to 50,000 class members chosen at random from the 129 million in the class.[64] Each class member would then have a 0.000388 chance of receiving $170, and $170 is more than enough to cover the cost of distributing to the lottery winner.[65] There are practical problems with implementing a lottery of this sort,[66] but assuming those problems can be solved, the lottery approach has some attractive features. It achieves deterrence, treats all class members equally, and provides a benefit to each in the form of a lottery ticket.[67] However, it is not consistent with a legal rights view, strictly applied. The legal right is a right to compensation, not a right to some probability of receiving a payment.[68]

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.[69] However, it is not clear that the legal rights view supports severing right from remedy in this way.[70] 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*. On the one hand, the legal right each plaintiff asserts might be conceived as a right to privacy that exists independently of any remedy given for its

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

[64] *See* Petitioner's Brief in *Frank v. Gaos*, at 44-45.

[65] *See id*. at 44. Since 50,000 are 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 attorney's fees and incentive payments to the named plaintiffs. Even if one distributed only the $5.3 million left after deductions, that would still be $106 for each of the 50,000 class members selected by the lottery.

[66] For example, it must be possible to randomly select class members and identify the lottery winners.

[67] *See* Lavie, *supra* note **, at 1098-1100.

[68] And it enriches some class members at the expense of others who have equal rights. *See* Rubenstein, *supra* note **, at 23-24. [amicus brief]

[69] 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).

[70] And it is worth noting that a legal realist would balk at drawing any distinction of this sort.

violation.[71] On the other hand, the fact that the Stored Communications Act guarantees a minimum recovery of $1000 strongly suggests that the legal right should include this remedial component as well.

Finally, in *Justifying Class Action Limits*, I argued that the legitimacy of the Rule 23(b)(2) class action for injunctive relief supports, by analogy, the legitimacy of a Rule 23(b)(3) small-claim class action with a cy pres remedy and unascertainable class members. 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.[72] However, this argument does not deal adequately with the legal rights objection. It relies in part on the deterrence policy underlying the substantive law. The legal rights view, strictly applied, forbids this move.

C. A More Promising Approach

Still, there is something odd about the legal rights view. When claims are too small to justify individual suits, insisting that courts enforce legal rights as defined ends up leaving legal rights completely unenforced. After all, the class action is the only way to enforce the legal rights at stake, but the court cannot certify a class action because it cannot authorize a cy pres-only distribution. This creates a 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. Yet it seems odd that courts would

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

[72] 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-rights 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).

be barred from using tools necessary to enforce the substantive law when the result is to deny enforcement altogether. The primary purpose of civil adjudication is to enforce the substantive law, and the obligation of courts to do so does not run out just because substantive legal rights cannot be enforced *as defined*.

There is a way to resolve this paradox. The legal rights view focuses on situations where substantive legal rights *can be* enforced in the ordinary course. It cautions courts adjudicating those cases not to alter rights in order to better promote underlying substantive policies. However, this caution is irrelevant to situations where legal rights *cannot be* enforced. In those cases, the core obligation of courts to enforce the substantive law takes priority, and judges have some flexibility to adopt procedures that make enforcement possible even if those procedures aim at substantive policies and not substantive rights.

This more flexible approach fits many aspects of litigation practice in the United States. One example is the small-claim class action. While many try to justify this device on compensation grounds—a result, most likely, of misplaced fidelity to the legal rights view—it is clear that the small-claim class action is mainly about deterrence.[73] This is troubling for strict adherents to the legal rights view,[74] but it is perfectly fine under the more flexible approach. Courts can craft special procedures, like the small claim class action, that enforce the policies underlying the substantive law when strict enforcement of legal rights is not feasible.[75]

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[73] *See* 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); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2069–70 (2010).

[74] *See* Redish et al., *supra* note **, at 649 (referring to small claim class actions as "faux class actions," and a "class action patholog[y]" that implements a "bounty hunter remedial model").

[75] Another example is the limited-fund class action certified under Rule 23(b)(1)(B). The limited-fund class action forces plaintiffs to forego perfectly feasible individual litigation and accept less than what their substantive legal rights guarantee in order to ensure that all plaintiffs receive a fair share of a limited fund. In these cases, the class device fails to enforce substantive legal rights *as defined* under circumstances where it is not possible to enforce everyone's legal rights. If individual suits are allowed, some plaintiffs with legal rights to compensation receive no

There is an even deeper problem with the legal rights view. It does not have a satisfactory account of outcome error. It assumes that courts can accurately enforce legal rights as defined. But mistakes are inevitable, and when a court makes a mistake, it fails to enforce a party's legal rights, which is illegitimate under a strict legal rights view.[76] One might excuse random errors due to human fallibility, but that does not go far enough to account for the error risks a well-functioning procedural system creates. There are many situations in which rulemakers and courts choose procedures knowing that they will generate error risks well above an irreducible minimum in order to avoid high litigation costs or further other goals. For example, judges limit discovery even when they believe that there is a chance, though slim, that additional discovery would reveal useful information.[77] 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 the dismissal erroneous. This error risk is justified by the goal of screening meritless suits.

This essay is not the place to examine these complicated issues with care. I have analyzed them in previous writing.[78] Briefly, given the inevitability of outcome error, the best a procedural system can do is distribute the risk of error optimally across litigants and cases. In utilitarian theory, an optimal distribution minimizes social costs. But in a rights-based theory—and the legal rights view is a rights-based theory—an optimal distribution is one that treats all litigants as equal rightholders. To satisfy this requirement, the error risk distribution must vary

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compensation at all. The flexible approach to the legal rights view allows aggregation through the class action so that a court can allocate the limited fund equitably.

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

[77] *See* FED. R. CIV. P. 26(b)(1).

[78] *See, e.g.*, Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. Rev. 1011 (2010); Robert G. Bone, *Agreeing to Fair Process: The Problem With Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 510-16 (2003). *See also* RONALD DWORKIN, *Principle, Policy, Procedure*, *in* A MATTER OF PRINCIPLE 72 (1985).

with the importance of the substantive interests at stake.[79] For example, a plaintiff suing for violation of a constitutional right should bear a lower error risk than a plaintiff suing in tort for minor property damage, and procedures available to the parties in these two cases should reflect this difference.[80]

This means that the strict legal rights view is normatively indefensible insofar as it ignores the values and policies underlying the substantive law and focuses exclusively on enforcing legal rights as defined. For one thing, procedures can promote substantive law policies when enforcing substantive legal rights is not otherwise feasible. Moreover, procedural design must take account of substantive values in order to fairly distribute the risk of outcome error.

This insight has important consequences for cy pres-only class actions. To begin with, it makes room for the small claim class action. Not only does this device promote the substantive law's deterrence goal when individual rights enforcement is otherwise not feasible, but it also facilitates a fair distribution of error risk. Equal concern and respect for all rightholders requires some procedure to enable litigation by plaintiffs with small claims when others with more at stake can sue. But certification of a small claim class action requires some way to distribute settlement funds when distribution to the class is not feasible. The cy pres-only distribution is a way to do that. Thus, the cy pres-only distribution can be justified as enabling class action litigation necessary to enforce the substantive law and to distribute error risk fairly.

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[79] Dworkin, *supra* note **, at ; Bone.

[80] I am not suggesting that judges evaluate the importance of substantive interests in each individual case. There are good reasons for treating large classes of cases the same and for leaving distinctions of this sort to the rulemakers 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 individual cases. The important point is that the substantive interests valued by the substantive law matter to procedural choice, not just the substantive legal rights as defined.

Still, a cy pres-only distribution is not the only option. The court could also distribute funds to the class by means of a lottery.[81] As we saw, a lottery distribution is inconsistent with a strict legal rights view, but it is not inconsistent with the modified approach we have developed here. Of course, the court must have some way of including all class members in the lottery and identifying 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 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 caused significant moral harm.[82] On the other hand, if the violation did not cause significant harm, the focus should be on preventing future harm, and a cy pres distribution does a better job of that insofar as it funds projects that promote compliance.

IV. 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 adjudicative legitimacy—the legal rights view. The legal rights view, however, cannot be applied strictly. When it is limited to the cases that fit it best and when it is modified to take account of outcome error, the legal rights view can accommodate the cy pres-only class action, at least in some cases.

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[81] *See supra* notes ** and accompanying text.

[82] *Cf.* In re Google Inc. Cookie Placement Privacy Litig., 2019 WL 3559113 *12-*14 (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 been strictly protected traditionally). For more on the idea of moral harm, see Dworkin, *supra* note **, at 80-81.

There is a more general point here. A strict 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. Thus, it is vital that we examine the legal rights view critically and engage questions of adjudicative legitimacy directly. Making sensible progress with procedural reform depends on it.