A BETTER WAY TO CY PRES: A PROPOSAL TO REFORM CLASS ACTION CY PRES DISTRIBUTION

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This Article proposes requiring a binding voting mechanism for class members to ratify the recipients of a cy pres distribution as a solution to growing concerns surrounding cy pres distributions in class actions. Unlike alternative reforms, which focus on ensuring loyalty from class counsel, this proposal enhances class member voice and exit rights to ensure organizational legitimacy and relies on voting rights to compensate class members. As a result, this proposal is not only rooted well within modern class action doctrine, but also compensates all class members, something other proposed reforms are unable to do.

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INTRODUCTION

The class action device is necessary to facilitate the resolution of small claims by large numbers of people.[1] It provides a necessary deterrent effect for potential wrongdoers[2] by reducing litigation costs for the parties and administrative costs for the judiciary, and by allowing most class members to be absent from the proceedings.[3] However, when a plaintiff class wins money at trial or receives a monetary settlement, this absence requires courts to approve a procedure for distributing the funds to absent class members.[4] When the plaintiff class is readily identifiable—as for example when the defendant can provide a list of plaintiff class members—and direct distributions can be cheaply made—for instance, through direct deposit—the required procedures are straightforward.[5] However, when individual plaintiff class members cannot be identified, or the cost of getting compensation to individual class members exceeds the funds available, courts are faced with a dilemma of what to do with the funds that remain.[6]

Often, the members of the plaintiff class are not known to the defendant or to anyone else.[7] Even if the defendant has historical contact information for the plaintiff class members, members may have moved, or errors may exist in the contact database. While courts can order notice to try to encourage members of a successful plaintiff class to come forward and submit claims, notice programs rarely have the

1. *See generally* Janet Cooper Alexander, An Introduction to Class Action Procedure in the United States (June 21, 2000), http://www.law.duke.edu/grouplit/papers/classactionalexander.pdf.

2. *See generally* George Rutherglen, *Wal-Mart, AT&T Mobility, and the Decline of the Deterrent Class Action*, 98 VA. L. REV. 24, 26-27, 31 (2012) (discussing that making class actions harder to certify would undercut deterrence since a type of immunity for widespread harm could result).

3. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (giving protections to absent class members).

4. *See generally* Francis E. McGovern, *Distribution in Class Actions-Claims Administration*, 35 J. CORP. L. 123 (2009).

5. *See* Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & BUS. 767, 790 (2015) (discussing the advantages of direct distribution).

6. *See* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 102 (2014) (noting the problem when "class members cannot be identified or it costs too much to process their claims relative to their size"); *see also* Thomas D. Rowe Jr., *State and Foreign Class Action Rules and Statutes: Differences From—and Lessons For?—Federal Rule 23*, 35 W. ST. U. L. REV. 147, 170–71 ("Problems arise when damage awards in class actions cannot be fully distributed to the class members who suffered losses.").

7. *See* Wasserman, *supra* note 6, at 103 (listing examples such as purchasers of Milli Vanilli albums, Cuisinart food processors, or taxicab patrons in Los Angeles).

resources sufficient to identify 100% of class members.[8] The cost of notice alone is significant in many actions, so much so that the question of whether the cost should be borne by a successful plaintiff class or the defendant has been the subject of extensive litigation.[9] Furthermore, the distribution costs of the procedures to notify, audit, and remit compensation to members of the plaintiff class often exceed the funds available from a judgment or a settlement.[10] The process of reviewing claims that are submitted, even when it is not extensive, is expensive.[11] The process of remitting funds, often including printing and mailing checks, is also expensive.[12] Even when some funds are able to be distributed to class members, there are still unclaimed funds which can exceed the cost of further distributions.[13] Thus, it is not difficult to imagine circumstances where the costs of distribution may be worth more than the claims themselves, turning a successful claim into one with negative value for each individual class member.[14]

If wrongdoers are absolved from paying damages to unidentified class members, or if plaintiffs are disincentivized from bringing claims that have a negative value (once distribution costs are included), the deterrent effect of class actions would be undermined, and a type of immunity would be conferred on the wrongdoers. To avoid this result, courts have allowed lawyers to bring class actions, even when distribution to the class is not practicable.[15] But this in turn creates a dilemma for courts, since even if some funds can be distributed

8. *See id.* (discussing the "genuine risk in such cases that the absentees will not learn of the settlement").

9. *See* Comment, *Allocation of Identification Costs in Class Actions:* Sanders v. Levy, 91 HARV. L. REV. 703, 708 (1978) (discussing the cases and summarizing current law).

10. *See id.* (noting that "claims may be so small that it is not economically feasible to calculate individual damages or to cut individual checks and mail them to the absentees").

11. *See generally* Fitzpatrick & Gilbert, *supra* note 5.

12. *See* Wasserman, *supra* note 6, at 104.

13. *See id*. (noting that even after distribution has occurred "a portion of the settlement fund often remains unclaimed and the court must decide what to do with the unclaimed funds").

14. *See, e.g.*, *id.* at 99 (noting a $9.5 million settlement was "economically infeasible" to distribute to the class "given how small their pro rata shares are relative to the cost of administration" to all affected users of Facebook).

15. *But see* Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres*, 65 U. KAN. L. REV. 913, 914–15 (2016) (noting that a commitment to use cy pres does not overcome the requirement of ascertainability); Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 320 (2010) (noting that courts that have sought to use cy pres distribution to overcome ascertainability problems at the certification stage where the class is not identifiable have been overruled).

to class members, other funds will still go unclaimed, either because class members cannot be identified or because the cost of distributing any remaining funds is too great.

Cy pres distributions, where the monetary relief is given to a charitable organization for the benefit of the class, instead of to individual class members, have long been used to solve this dilemma.[16] The theory of cy pres is that since the plaintiff class cannot be directly compensated in certain cases, giving money to a charitable organization that benefits class members "as nearly as possible" is superior to other options for distributing the funds remaining.[17] For example, following a consumer data privacy breach where it was impractical to distribute any funds to the class because distribution costs were greater than the settlement amount, the court approved distribution to organizations that "work to create more secure payment-card technology that will help prevent data breaches, and work to help financial institutions minimize the consequences if such breaches occur."[18] In a class action involving overcharging for prostate cancer medication, after distribution to the class, unclaimed funds were distributed to an organization that funded research into diseases and conditions treated by the drug at issue.[19]

Cy pres distributions are now common and are becoming increasingly more prevalent in class actions.[20] The stakes are high, in the tens of millions of dollars, and sometimes can comprise the entire amount of compensation the class receives.[21] As a result, for almost as long as these distributions have been used, courts have been uneasy with a

16. *See* Fraley v. Batman, 638 F. App'x 594, 599 (9th Cir. 2016) (Bea, J., dissenting) (arguing cy pres should be allowed in these situations but only when these conditions are met).

17. *See generally* McGovern, *supra* note 4.

18. *In re* Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig., 851 F. Supp. 2d 1040, 1076–77 (S.D. Tex. 2012).

19. *In re* Lupron Mktg. and Sales Practices Litig., 677 F.3d 21, 24, 27–28 (1st Cir. 2012) (upholding the distribution).

20. *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, 653 (2010) (noting the increasing use of cy pres distributions especially after 2000). A sign of their prevalence is that in twenty-five percent of all distribution plans, cy pres recipients were designated in advance, anticipating a remainder would exist. *Id.* at 656.

21. AM. BAR ASS'N, CY PRES, https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/atjresourcecenter/ls_sclaid_atj_cy_pres_final_draft.pdf (last visited Feb. 27, 2019) (noting an award of $40 million). The amounts are significantly higher when the entire settlement is a cy pres award, and lower when a distribution has occurred and unclaimed funds are being distributed (though this amount can still be large, for instance $830,000 remained in *Klier v. Elf Atochem N. Am., Inc*., 658 F.3d 468, 475 (5th Cir. 2011)).

remedy that does not directly compensate class members. Cy pres distributions have recently come under increased criticism from both commentators and the courts. These criticisms will only grow as the chief judicial concern over class actions continues to shift, from gaining efficiency to a duty to ensure the class action device provides organizational legitimacy by providing some combination of loyalty, voice, and exit to class members.[22] Chief Justice Roberts expressed concerns in a recent statement accompanying a denial of certiorari,[23] and the Supreme Court has recently heard argument in a case in order to examine whether a settlement that includes no direct compensation to class members meets the requirements of Rule 23(e) that settlements be "fair, reasonable, and adequate."[24]

The concern for organizational legitimacy has guided the vast majority of criticisms of, and reform proposals for, cy pres, with a specific focus on ensuring organizational legitimacy through greater loyalty from class counsel and on creating a defined doctrine that allows judges to police that loyalty.[25] However, instead of solely focusing on loyalty, this Article proposes a reform to the cy pres doctrine that answers critics' concerns through the establishment of a binding voting system, which relies on giving class members a greater voice over, and greater exit rights from, cy pres distributions to enhance organizational legitimacy.[26] As technology has advanced, the class action device has the capacity to become more participatory by lowering the transaction costs for class members to exercise their voice and exit rights.[27] Furthermore, such a voting mechanism answers the central critiques of cy pres by providing class members compensation (through voting rights) and ensuring organizational legitimacy.[28] Courts are capable of establishing a voting mechanism,[29] and reforming cy pres through such a mechanism would resolve the remaining funds dilemma in a superior manner to other proposals.[30]

22. *See infra* Section I.B.

23. *See* Marek v. Lane, 571 U.S. 1003 (2013).

24. Frank v. Gaos, 138 S. Ct. 1697 (2018) (challenging a settlement where Google provided no direct compensation to class members as part of a settlement for a privacy breach).

25. *See infra* Section I.C.

26. *See infra* Section II.A.

27. *See infra* Section II.B.

28. *See infra* Section III.C.

29. *See generally* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1019 (2004) (discussing public law litigation and the broad availability to include procedures including "ongoing stakeholder participation and measured accountability").

30. *See infra* Part III.

Section I.A of this Article provides background on the compensation dilemma cy pres is designed to address, the existing alternatives to cy pres, and why the alternatives are insufficient to answer this dilemma. Section I.B addresses the judicial concerns with class actions in general and discusses how these concerns shape existing cy pres doctrine. Section I.C establishes the basis for the growing criticism of cy pres. Section II.A proposes a binding voting mechanism as a solution to these criticisms and explains how this mechanism fits within the larger class action doctrine. Section II.B shows that such a voting mechanism is technologically possible, and Section II.C shows how this proposed mechanism answers the criticisms of cy pres. Part III addresses potential criticisms of the proposal and establishes why this proposal is superior to other solutions.

I.
Cy Pres and Class Actions

A. Cy Pres and Alternatives

Courts have long used cy pres mechanisms to resolve the dilemma surrounding unclaimed or impracticable-to-distribute funds. Borrowed from the law on charitable trusts, the term cy pres means "as nearly as possible": when a decedent left money to a charitable organization that no longer existed, the money would be given to the next best existing organization.[31] A 1972 student note first proposed applying this doctrine to class actions,[32] and since the California Supreme Court endorsed the practice in 1986,[33] courts have relied on this doctrine, using their "broad discretionary powers in 'shaping equitable decrees'"[34] to distribute unclaimed or impracticable-to-distribute funds to charitable organizations. Under the cy pres doctrine, the funds are the property of the class members but are given to a charitable organization to be used for the class members' benefit,[35] instead of directly compensating the class.

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31. *See* Wasserman, *supra* note 6, at 114–17 (2014) (providing a brief history of cy pres).

32. Stewart R. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448, 452–53 (1972).

33. *See generally* State v. Levi Strauss & Co., 715 P.2d 564, 576 (Cal. 1986).

34. 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, 282 (2013).

35. *See* Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468 (5th Cir. 2011) ("the settlement funds are the property of the class"); *In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1064 (8th Cir. 2015) (agreeing with the Fifth Circuit).

Before the use of cy pres, courts had limited options for how to treat these funds, and funds often reverted to the defendant or were given to the state (escheat),[36] both of which are far from ideal solutions. The first option, reversion to the defendant, compensates class members neither directly nor indirectly, and reduces the deterrent effect of class action litigation.[37] There is also a normative objection to reversion since "funds should not be retained by an entity that obtained them through illegal acts."[38] In addition, concerns about collusive settlements surround reversion, since a claims process could be designed to ensure maximum funds revert to the defendant in exchange for overcompensation of class counsel. As a result of these objections, courts have largely rejected this treatment of remaining funds.[39]

While escheat, unlike reversion to the defendant, would "preserve[ ] the deterrent effect of class actions,"[40] and while sending remaining funds to the government may broadly benefit the community, neither option particularly benefits class members who were wronged.[41] While some scholars have argued that escheat properly compensates for the *ex ante* average risk of being harmed, even those scholars admit that escheat does not reflect actual loss.[42] Thus, while some judges are open to escheat,[43] generally "courts have rejected it because it results in no . . . compensation to injured class members."[44]

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36. *See generally* Wasserman, *supra* note 6, at 106-11 (discussing these options).

37. *See, e.g.,* Vanessa K. Fulton, *Beware of Cy Pres Bearing Gifts*, 56 ARIZ. L. REV. 925, 930 (2014) ("a particularly troubling outcome in cases where the court has already determined the defendant violated the law.").

38. James R. McCall et al., *Greater Representation for California Consumers—Fluid Recovery, Consumer Trust Funds, and Representative Actions*, 46 HASTINGS L.J. 797, 808 (1995).

39. *See e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013) ("Reversion to the defendant risks undermining the deterrent effect of class actions by rewarding defendants for the failure of class members to collect their share of the settlement").

40. In cases where the government itself is the defendant, of course, this would not be the case. While the political process could serve as a deterrent, it is unlikely sufficient.

41. *Id.* at 172.

42. *See, e.g.*, Goutam U. Jois, *The Cy Pres Problem and the Role of Damages in Tort Law*, 16 VA. J. SOC. POL'Y & L. 258, 261 (2008).

43. *See, e.g., In re* Pet Food Prods. Liability Litig., 629 F.3d 333, 359 (3d Cir. 2010) (Weis, J., concurring and dissenting) ("Moreover, I am not persuaded that application of the *cy pres* doctrine is appropriate in the class action setting. I would hold that any funds remaining at the conclusion of the claims process should be distributed to class members where possible or should be escheated to the government.").

44. Fulton, *supra* note 37, at 931 (2014).

Another possible approach would be to escheat the funds to the government for a specific purpose, such as to fund legal services,[45] or to direct them to a specific organization, such as a consumer trust fund.[46] This approach would eliminate judicial discretion and "require that the funds be used in specific ways."[47] For example, states have passed legislation mandating that a share of the remaining funds escheat to fund legal services.[48] However, "[a]ny indirect benefit that the class members may arguably receive from directing residual funds to a legal aid organization is too attenuated to be considered the 'next best' alternative to direct compensation."[49] There are also concerns about the political branches taking money from those harmed in order to fund pet projects.[50] Cy pres distributions, on the other hand, have the "advantage of neither providing a windfall to the defendant nor overcompensating some victims, while also ensuring that the unclaimed funds will be turned toward some purpose generally advantageous to the victims' litigation interests."[51] Thus, cy pres is preferable to the historic alternatives of reversion or escheat.

More recently, courts have entertained other potential treatments of the remaining funds. One possibility eliminates the need to distribute remaining funds at all by using fluid recovery to compensate class members. "A fluid recovery is one in which the case's proceeds

45. *See generally* Cecily C. Shiel, *A New Generation of Class Action Cy Pres Remedies: Lessons from Washington State*, 90 WASH. L. REV. 943 (2015). For example, Arizona considered an amendment to Rule 23 where "at least fifty percent of all residual class action funds be distributed to a state legal aid organization that provides legal services for low-income individuals." Fulton, *supra* note 37, at 925.

46. Natalie A. DeJarlais, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L.J. 729, 731–32 (1987) (examining "the use of the consumer trust fund as a distribution mechanism," and arguing that it "provides the best long-term results to class members of all socioeconomic groups, without disruption of the marketplace and with a minimum of judicial involvement," while acknowledging that it would confer "windfall benefits on unaggrieved individuals.")

47. Daniel Blynn, *Cy Pres Distributions: Ethics & Reform*, 25 GEO. J. LEGAL ETHICS 435, 436 (2012).

48. *See* Shiel, *supra* note 45 (discussing Washington State's reform to cy pres, which allocates 25% of unclaimed funds to legal services organizations).

49. Fulton, *supra* note 37, at 935.

50. *See* Keepseagle v. Perdue, 856 F.3d 1039, 1058 (D.C. Cir. 2017) (Brown, J., dissenting) (expressing concern that this could be an end run around the appropriations process). In fact, the Justice Department has halted allowing settlement funds to be given to outside groups. *See* Karen Freifeld & David Shepardson, *U.S. Justice Dept Halts Settlements Funding Outside Groups*, REUTERS (June 7, 2017, 8:09 AM), https://www.reuters.com/article/usa-justice-settlements/u-s-justice-dept-halts-settlements-funding-outside-groups-idUSL1N1J40G0.

51. Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 GEO. WASH. L. REV. 767, 769 (2014).

are directed not [indirectly] to a charity but [directly] to a class of individuals that closely approximates the plaintiff class,"[52] such as by discounting future taxi fares to future riders to compensate taxi riders who were overcharged.[53] The most common fluid recovery is a price reduction, where "an amount equal to the unclaimed funds portion of the award is 'distributed' by ordering a reduction of the price of defendant's product for a period of time in the future."[54] "This approach is particularly effective for remedying overcharges on items which are repeatedly purchased by the same individuals."[55] However, while the previously injured are sometimes encompassed in the recovery class, i.e. repeat riders, some do not receive any benefit from the distribution.[56]

Fluid recovery, like cy pres and escheat, serves the deterrent function, but unlike in cy pres, those injured must use a product or service again to receive compensation under the fluid recovery mechanism. In that way, fluid recovery is similar to the provision of coupons to injured customers, a remedy of which courts and Congress have been skeptical.[57] There is hostility toward providing coupons to consumers as a remedy, and class counsel is not allowed to recover fees based upon the value of the coupons.[58] More importantly, fluid recovery cannot be used to compensate classes where consumers do not pay for goods, such as in class actions based on violations of consumer privacy, or where there are not continuing sales. Fluid recovery has

52. *See* 4 WILLIAM R. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 12:27 (5th ed. 2014) (speaking favorably of fluid recovery).

53. *See id*. (describing the settlement of Daar v. Yellow Cab. Co., 433 P.2d 732 (Cal. 1967)).

54. McCall et al., *supra* note 38.

55. *See* Democratic Cent. Comm. of D.C. v. Wash. Metro. Area Transit Comm'n, 84 F.3d 451, 455–56 (D.C. Cir. 1996) (citations omitted) (endorsing approach to lower prices for future riders in class action against Metro).

56. *See* McCall et al., *supra* note 38, at 808-9 (noting that fluid recovery is an effective remedy at benefitting the class only if affected consumers continue to buy the defendant's product or services).

57. Courts have generally been hostile to compensating class members with coupons unless the class members' loss was itself a coupon. *See generally In re* Sw. Airlines Voucher Litig., 799 F.3d 701, 705-06 (7th Cir. 2015) (discussing the general rule against compensating attorneys for the value of coupons given to class members). Congress has also been skeptical; it limited plaintiffs' lawyers' compensation in class action settlements that utilize coupons for compensation in the Class Action Fairness Act. 28 U.S.C. § 1712 (2005).

58. *But see id.* (holding that coupons would be a complete remedy subject to attorney fees when the injury plaintiffs suffered was the expiration of drink coupons).

sometimes been warmly received in courts—though only when individual proof of injury is provided[59]—but it cannot replace cy pres.

The American Law Institute ("ALI") has proposed another treatment for remaining funds: additional pro-rata distribution to class members who have already been compensated. After all, "direct distributions to the class are preferred . . . [because t]he private causes of action aggregated . . . were created by Congress to allow plaintiffs to recover compensatory damages for their injuries."[60] However, courts are skeptical of this option since it provides a windfall to some class members at the expense of other, still absent, class members.[61] Furthermore, even the ALI believes additional pro-rata distribution should only be a presumption, not a requirement, that is able to be overridden if further distribution is not economically viable.[62] Sometimes it simply costs too much to make any additional distribution,[63] and sometimes no plaintiff class member is able to be identified.[64] Furthermore, even when pro rata distribution is possible, it risks overcompensating already compensated class members.[65] Thus, not even the ALI believes additional pro-rata distribution can fully replace

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59. *See, e.g.*, Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1255 (E.D.N.Y. 2006), *rev'd sub nom.* McLaughlin v. Am. Tobacco. Co., 522 F.3d 215 (2d Cir. 2008) (noting that fluid recovery "is sometimes the only practicable way to implement the goals of the substantive law under which a federal mass litigation case is prosecuted"). *Compare* State v. Levi Strauss & Co., 715 P.2d 564, 575 (Cal. 1986) (aggregate damages sufficient), *with* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1014 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974) (claim could not proceed without proof of individual damages). Courts also have concerns that fluid recovery might violate the Due Process Clause, or the Rules Enabling Act. *See Eisen*, 479 F.2d at 1014 (both); Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43, 55 (D. Del. 1974) (due process).

60. *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013).

61. *See* Fulton, *supra* note 37, at 931 ("Courts have rejected [a broad adoption of] this option because it results in a huge windfall to the class members who did file claims, at the expense of the other, albeit silent, class members who are entitled to compensation.").

62. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07(b) (AM. LAW INST. 2010) (noting the challenge when "the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair").

63. *See* Lessard v. City of Allen Park, 470 F. Supp. 2d 781, 783 (E.D. Mich. 2007) (discussing situation where administrative costs involved with second round of payments to all claimants would be prohibitive).

64. *See* Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1312 (9th Cir. 1990) (noting silent class members). Of course, the problem of a completely unidentified class would likely be solved by unlimited, or at least sufficient, resources for notice.

65. Though if a settlement is a compromise, then class members are not fully compensated for their injury by the initial distribution.

cy pres, and even in instances when it could, courts continue to view cy pres as superior.[66]

Another alternative advanced by Shay Lavie would be to essentially give class members a lottery ticket, and "pay . . . more money to fewer, randomly sampled claimants."[67] This solution would "funnel . . . the money back to the group of victims, achieve . . . deterrence, and maintain . . . administrative efficiency."[68] It also solves many of the loyalty concerns present with cy pres distributions.[69] But while Lavie argues that since "all class members are equally treated . . . the use of lotteries in this context raises no legitimacy concerns,"[70] his proposal risks turning the judicial system into a game as opposed to a serious process. In addition, there are potential concerns both about whether designing a reverse sampling procedure is a role that judges should fill and about the loyalty of counsel. Class counsel may be too quick to propose the reverse sampling method, as opposed to more thorough notice, to avoid administrative costs of which counsel do not receive a percentage. There are also compensation concerns. While Lavie argues "reverse sampling equally compensates the victims, as each member of the class is entitled to an expected sum that is similar to his or her loss,"[71] and this is true mathematically in terms of expected payment, it may not be true in practice. After all, is ownership of a losing lottery ticket one did not even know one had really something of value? Intuitively we know that the value of a lottery ticket, at least for those who lose, is to dream about winning, which one cannot do unless one knows one has played. Lavie's proposal does not require class members to opt in to the lottery, and members cannot opt out. Thus, while there are alternatives to cy pres, none is an adequate replacement.

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66. *See In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013) ("Although we agree with the ALI that *cy pres* distributions are most appropriate where further individual distributions are economically infeasible, we decline to hold that *cy pres* distributions are only appropriate in this context.").

67. *See* Shay Lavie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 GEO. WASH. L. REV. 1065 (2011) ("the lottery method for dispersing small-claims class action proceeds is superior to all existing alternatives.").

68. *Id.*

69. *Id.* at 1100 ("Where the cy pres doctrine fails to remunerate class members and creates unfettered judicial discretion, the reverse sampling method mandates courts to transfer the proceeds to the victims. Where the cy pres doctrine wastes judicial time and encourages charities to compete for windfalls, reverse sampling avoids beneficiaries' perverse incentives.").

70. *Id.* at 1065.

71. *Id.* at 1099.

B. Cy Pres Within the Doctrinal Theory of Class Actions

The initial justification for the class action device was judicial efficiency,[72] and it is easy to see how cy pres makes distribution more efficient. However, among scholars, concerns over judicial efficiency have given way to concerns over organizational legitimacy,[73] and to judicial concern over agency problems.[74] As Judge Posner has stated, "courts have gone so far as to term the district judge . . . a fiduciary of the class," responsible for protecting class members' interests.[75] Organizational legitimacy is ensured "between institutions [class actions] and their constituents [class members] along a spectrum of exit, voice, and loyalty."[76] While exit, voice, and loyalty often compete with each other, by balancing the three, members are properly served by the organization.[77] These concerns have dominated class action doctrine since *Amchem Products Inc., v. Windsor*,[78] where the Court prioritized organizational legitimacy over the efficiency of resolving the asbestos litigation clogging the judicial system.[79] As judicial concern continues to focus more on ensuring a class has exit, voice, and loyalty, concerns

72. *See* John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L. REV. 1222, 1226 (1995) (noting that the modern analysis of the class action "proceeded under a cloud of rhetoric, much of which spoke of judicial efficiency"); *see also* Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 IND. L.J. 301, 336–37 (1989) ("The rationale given for . . . the American class action, was an efficiency rationale: The device prevents multiplicity of suits, thereby benefiting the plaintiffs, who can pool their resources; the defendant, who can save considerable time and money by litigating the issues only once; and the judicial system itself, which has limited ability to handle an influx of cases.") (citations omitted).

73. *See* Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 847 (2017) ("Concern over representational legitimacy permeates the development of modern class action law.").

74. *See* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 47 (2003) ("In class action practice it is agency problems, rather than partisanship problems, that have driven most departures from the traditional judicial role.").

75. Reynolds v. Beneficial Nat. Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) (discussing the need to protect class members in settlement cases).

76. *See* Cabraser & Issacharoff, *supra* note 73, at 862 (discussing the "pioneering work" of Albert O. Hirschman); *see also* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 376 (2000) (discussing "the reduction of agency costs" as "a standard goal in organizational design" and noting a focus "on 'exit,' 'voice,' or 'loyalty'").

77. *See generally* Coffee, *supra* note 76, at 370, 376-77.

78. 521 U.S. 591 (1997). *See* Coffee, *supra* note 76, at 375 ("[A]s *Amchem* appropriately realized, a broader theory of representation is ultimately necessary before the class action can rest on any normatively satisfactory foundation."); *see also* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 807 (1997) (discussing how ensuring efficiency is no longer the chief judicial concern).

79. *See Amchem*, 521 U.S. 591; *see also* Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. 785, 795 (2017) ("[P]re-*Amchem*, lower federal courts did not rigor-

about cy pres will only continue to grow, since a class member has no voice in where funds are distributed, no ability to exit, and little assurance of the loyalty of counsel or judges in deciding which nonprofit organizations receive the leftover funds. These concerns are especially present when cy pres is used to distribute settlement funds.[80] Thus, in order to protect class members, outside of limiting the use of cy pres as a whole, courts have prioritized loyalty at the expense of exit and voice to ensure organizational legitimacy.[81]

Therefore, courts and scholars have worked to ensure loyalty through adequate representation.[82] After all, cy pres poses a special risk to class counsel loyalty, since the distribution could lead to collusive settlements, where opposing counsel agree to a preferred cy pres distribution that does not serve the interest of the class but rather the interest of the defendant in extinguishing plaintiffs' claims or in good press coverage for making a charitable "gift".[83] To protect against this, current cy pres doctrine mandates that distributions to charitable organizations must still target the plaintiff class and must ideally provide "reasonable certainty" that the entire class will benefit from the distribution.[84] Thus, cy pres distribution is improper if there is "no reasonable certainty" that any class member would benefit from it.[85] A distribution can be held improper if the organizations chosen either provide benefits too broadly, and thus do not target class members, or if the organization too narrowly targets a specific geographic area that

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ously review to see if the class was sufficiently cohesive for counsel to be loyal to it and instead focused on counsel's experience, knowledge, and resources.").

80. *See In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 174 (3d Cir. 2013) ("Barring sufficient justification, *cy pres* awards should generally represent a small percentage of total settlement funds.").

81. *See* Coffee, *supra* note 76, at 378 ("[T]he Supreme Court has focused principally on the loyalty component and ignored the possibility that 'exit' and 'voice' may sometimes be partial substitutes for ideal representational adequacy.").

82. *See* Cabraser & Issacharoff, *supra* note 73, at 848 ("Indeed, agency costs imposed by class representatives, specifically class counsel, have been the mainstay of critical scholarship on class actions for decades, and have even led to a broad-scale indictment of settlement classes altogether.") (citations omitted).

83. *See* Wasserman, *supra* note 6, at 123 (noting the "perennial risk of collusion between the defendant and class counsel"). Professor Wasserman has also noted that "it looks good when a company makes a sizeable 'donation' to charity." *See id.* at 101; *see also* Tidmarsh, *supra* note 51, at 781–82 (noting that while in theory cy pres distributions are essential to incentivize class counsel to negotiate the optimal class settlement, in practice this is not the case).

84. Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1308 (9th Cir. 1990).

85. *See* Dennis v. Kellogg Co., 697 F.3d 858, 865 (9th Cir. 2012).

excludes some class members.[86] To ensure the class is protected, courts must record proof, reviewable on appeal for abuse of discretion, that the distribution targeted the class.[87] As a further protection against class counsel disloyalty, courts do not give cy pres distributions their full value in setting attorneys' fees.[88]

However, within these parameters there is still vast discretion for where remaining funds can be distributed. Class counsel often select the organizations that will receive the funds, often in consultation with the defendant. Settlements have created new nonprofit organizations to receive the remaining funds.[89] While the Fifth Circuit has a rule whereby the parties make the initial selection, which is then subject to review by the judge,[90] other courts do not. Furthermore, while objectors can intervene to oppose distributions, they lack a strong interest in doing so and are often unsuccessful.[91] Thus, it is not surprising that the practice has received recent criticism, or that the Supreme Court has recently heard a challenge to the doctrine.[92]

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86. *See, e.g.*, Schwartz v. Dallas Cowboys Football Club, Ltd., 362 F. Supp. 2d 574, 576 (E.D. Pa. 2005) (noting in determining a cy pres award "(1) the objectives of the underlying statute(s), (2) the nature of the underlying suit, (3) the interests of the class members, and (4) the geographic scope of the case") (citations omitted).

87. *See* Lane v. Facebook, Inc., 696 F.3d 811, 834 (9th Cir. 2012) (Kleinfeld, J., dissenting) ("We require an established record of performance by the charity of acts beneficial to people in the wronged class.") (citations omitted); *see also In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1071 (8th Cir. 2015) (Murphy, J., dissenting); Nachshin v. AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011); Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 474 (5th Cir. 2011).

88. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13 cmt. a (AM. LAW INST. 2010) ("[B]ecause cy pres payments . . . only indirectly benefit the class, the court need not give such payments the same full value for purposes of setting attorneys' fees as would be given to direct recoveries by the class."); *see also* FED. R. CIV. P. 23(h) advisory committee's note to 2003 amendment ("Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class."). In fact, one suggested fix to cy pres is to "presumptively reduce attorneys' fees in cases in which cy pres distributions are made." Wasserman, *supra* note 6, at 98.

89. *See* Marek v. Lane, 571 U.S. 1003 (2013).

90. *See In re* Lupron Mktg. and Sales Practices Litig., 677 F.3d 21, 38 (1st Cir. 2012) ("the [cy pres] choice would have been better made by the parties initially and then tested by the court").

91. *See, e.g.*, Gary M. Pappas, *Cy Pres Standard Dispute Settled with Reasonable Approximation*, CLASSIFIED: THE CLASS ACTION BLOG (Sept. 8, 2016), http://classifiedclassaction.com/cy-pres-standard-dispute-settled-reasonable-approximation/ (discussing the challenges for objectors contesting cy pres awards).

92. Frank v. Gaos, 138 S. Ct. 1697 (2018).

C. Growing Criticisms of Cy Pres

The criticisms of cy pres reflect the general criticism of consumer class actions: they provide little to no compensation for class members, but lots for lawyers.[93] Closely tied to this is criticism that cy pres exacerbates the agency problems inherent in class actions, especially the loyalty of class counsel and the judicial role to ensure it.[94] A poster child for critics of cy pres is *Lane v. Facebook*, where the court approved a cy pres distribution to compensate for Facebook's privacy violations against its users.[95] Not only was the entire settlement a cy pres distribution, no direct compensation was given and no true injunctive relief was granted. Furthermore, the distribution was given to an organization specifically created for the settlement with two out of three board members being employees of Facebook. When objectors challenged the proposed distribution, it was upheld by the Ninth Circuit. The Supreme Court denied certiorari, but did so with a rare accompanying statement from Chief Justice Roberts raising questions about whether the entire model of cy pres should be reconsidered and whether the existing rules governing the "respective roles of the judge and parties . . . in shaping a cy pres remedy" ensure loyalty to the class.[96] While Chief Justice Roberts believed the case was not the appropriate vehicle for considering these questions, his willingness to question the doctrine requires proponents of cy pres to respond to these concerns.[97] Now, an appropriate vehicle exists.[98]

Other judges have already echoed Justice Roberts's two main concerns: whether cy pres distributions can ever be proper as compensation, and whether adequate safeguards exist to ensure loyalty of the class action to its members.[99] After all, as Judge Posner stated, "[t]here is no indirect benefit to the class from the defendant's giving

93. *See* Fitzpatrick & Gilbert, *supra* note 5, at 768 ("Consumer class actions are under broad attack in the United States. The principal charge against them is that they provide little compensation to class members, yet provide outsized compensation to the lawyers who bring them.").

94. *See* Bone, *supra* note 15, at 914 ("Critics argue that it exacerbates agency costs, invites judicial abuse, deprives class members of their property, and violates due process.").

95. Lane v. Facebook, Inc., 696 F.3d 811, 822 (9th Cir. 2012).

96. Marek v. Lane, 571 U.S. 1003 (2013).

97. Chief Justice Roberts agreed with the denial of certiorari since this particular challenge was narrowly focused, but stated that "in a suitable case, this court may need to clarify the limits on the use of such remedies". *Id*.

98. Frank v. Gaos, 138 S. Ct. 1697 (2018).

99. *See, e.g.*, *In re* Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig., 851 F. Supp. 2d 1040, 1076–77 (S.D. Tex. 2012) ("Cy pres distributions have been criticized for 'violating the ideal that litigation is meant to compensate individuals who were harmed.'") (internal citation omitted).

the money to someone else."[100] Judges have called out cy pres as an "indirect benefit that is at best attenuated and at worst illusory."[101] Even judges not concerned with the practice in general have grave concerns when no compensation for class members is present in settlements.[102] Many share the Third Circuit's concern that cy pres "settlements offer very little in the way of relief to the class members whose injury brought about the litigation in the first place."[103] Thus, for some, even if cy pres serves a deterrent function, it is inappropriate.[104]

The second concern is that lawyers and judges still control where the money goes, and neither may be loyal to the class. First, lawyers may not be loyal to the class they are supposed to represent.[105] Thus, "the recovery of generous fees for plaintiffs' attorneys and large cy pres awards with little money going to actual class members call into question the integrity of the class action process for resolving lawsuits."[106] This is especially true when the resolution is a settlement.[107] The Ninth Circuit has, in one case, stated that "cy pres distributions present[ed] 'a particular danger' that 'incentives favoring pursuit of

100. Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004).

101. Nicole D. Bearce & Joseph A. Fischetti, *Generous to a Fault*, 2015 N.J. LAW. 66, 67 (2015) (quoting *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013)).

102. *In re* Hydroxycut Mktg. and Sales Practices Litig., Nos. 09md2087 BTM (KSC), 09cv1088 BTM (KSC), 2013 WL 6086933, at *2–3 (S.D. Cal. Nov. 19, 2013) (holding cy pres is not appropriate when "providing no additional benefit to the personal injury claimants and no benefit at all to the class members who suffered no personal injury"); *see also* Hoge v. Parkway Chevrolet, Inc., No. H-05-2686, 2007 WL 3125298, at *19–20 (S.D. Tex. Oct. 23, 2007) (rejecting cy pres as a substitute for distributing statutory damages to individual class members who could not be identified as "at odds with the damages scheme Congress provided in the FCRA").

103. Bearce & Fischetti, *supra* note 101, at 68.

104. *See In re* Hydroxycut Mktg. and Sales Practices Litig., Nos. 09md2087 BTM (KSC), 09cv1088 BTM (KSC), 2013 WL 6086933, at *2–3 (S.D. Cal. Nov. 19, 2013) ("The biggest problem with the proposed *cy pres* distribution in this settlement is that it simply does not benefit the class."); *see also* Alison Frankel, *By Restricting Charity Deals, Appeals Courts Improve Class Actions*, 22 WESTLAW J. CLASS ACTION 5, 2015 WL 558162 at *2 (2015) ("[U]ltimately, class actions are supposed to be vehicles for compensating people whose injuries aren't big enough to prosecute individually.").

105. *See, e.g.*, Lane v. Facebook, Inc., *supra* note 88, at 835 (Kleinfeld, J., dissenting) ("The majority approves ratification of a class action settlement in which class members get no compensation at all. They do not get one cent. They do not get even an injunction against Facebook doing exactly the same thing to them again. [But t]heir purported lawyers get millions of dollars.").

106. *In re* Hannaford Bros. Co. Customer Data Sec. Breach Litig., 293 F.R.D. 21, 26 (D. Me. 2013).

107. *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013) ("*Cy pres* distributions also present a potential conflict of interest between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class.").

self-interest rather than the class's interests in fact influenced the outcome of negotiations.'"[108] For instance, when in *Dennis v. Kellogg Co*., class counsel negotiated a deal including a $5.5 million distribution of Kellogg food items to charity, the Ninth Circuit reversed over concerns that the distribution "was a ploy to make the settlement appear large for purposes of justifying the attorneys' sizable fee request."[109] Judges are concerned cy pres invites a conflict of interest for class counsel to sell out the class.[110]

Second, judges themselves may not be well suited to police this activity. Judges are not experts in deciding which nonprofits are better recipients of funds,[111] but have tremendous discretion to approve distributions.[112] There are concerns judges are exceeding their judicial power, and are instead usurping legislative power[113] and might even be violating Article III.[114] While these particular arguments have not gained traction yet, the concern that judges are not acting as a fiduciary for the class is prevalent. "The ugliest cy pres settlements are those that direct funds to organizations with which class counsel or the judge is affiliated."[115] While not a class action, in the fen-phen mass tort litigation settlement a cy pres distribution included $20 million for

108. Lane v. Facebook, Inc., 696 F.3d 811, 833 (9th Cir. 2012) (Kleinfeld, J., dissenting) (quoting Dennis v. Kellogg Co., 697 F.3d 858, 867 (9th Cir. 2012)).

109. Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 886–87 (2016).

110. *See* Creative Montessori Learning Ctrs. v. Ashford Gear LLC, 662 F.3d 913, 918 (7th Cir. 2011) (". . .the incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judges approve a settlement involving a meager recovery for the class but generous compensation for the lawyers . . .").

111. *In re* Compact Disc Minimum Advertised Price Antitrust Litig., 236 F.R.D. 48, 53 (D. Me. 2006) ("Federal judges are not . . . accustomed to deciding whether certain nonprofit entities are more 'deserving' of limited funds than others; and we do not have the institutional resources and competencies to monitor that 'grantees' abide by the conditions we or the settlement agreements set.").

112. *See* Jois, *supra* note 42, at 263 ("[C]ourts are free to do almost anything with undistributed class funds. This leads to a system that is ad hoc, unpredictable, unguided by any normative principle, and open to the possibility of abuse.").

113. *See* Keepseagle v. Perdue, 856 F.3d 1039, 1071 (D.C. Cir. 2017) (Brown, J., dissenting) ("Even in class actions where *cy pres* distributions are not made from the public fisc—and the comingling of legislative and judicial power is not implicated—*cy pres* is problematic for judicial power.").

114. *See id.* ("A court risks violating Article III justiciability requirements should it adjudicate disputes between *cy pres* recipients and would-be recipients, as none would possess an injury-in-fact."); *see also* Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 480 (5th Cir. 2011) (Jones, J., concurring) (suggesting that cy pres distributions may violate Article Ill standing requirements).

115. Erichson, *supra* note 109, at 885.

an organization that used part of the funds to pay an annual salary to the judge and plaintiff counsel as directors of the organization.[116]

Commentators have similar objections. Scholars have many concerns regarding whether class members are receiving compensations,[117] the large amount of judicial discretion,[118] and the loyalty of counsel to the class:[119] "if a judge and lawyers want to help a worthy organization, they are free to donate their own money; they are not free to donate other people's claims."[120] The press has concerns that lawyers are taking advantage of the class,[121] and that cy pres allows "judges to choose how to spend other people's money."[122] Organizations even lobby judges for cy pres distributions with apparent success, raising further questions.[123] Thus, it is not surprising that most of

116. *Id*. The involvement with the organization, "Kentucky Fund for Healthy Living," resulted in the lawyer's disbarment, criminal charges, and the judge being removed from the bench. *Id*.

117. *See* Gilles, *supra* note 15, at 320-21 ("What is noteworthy is that cy pres survives at all. Given the supremacy of the private law conception of class actions . . ."); *see also* Christine P. Bartholomew, *Saving Charitable Settlements*, 83 FORDHAM L. REV. 3241, 3257–58 (2015) ("Some courts and scholars take issue with this result, arguing charitable settlements are per se invalid because they do not directly compensate class members."); James M. Beck, *More Cy Pres Abuse in California Class Actions Litigation*, DRUG & DEVICE LAW (Feb. 8, 2017), https://www.druganddevicelawblog.com/2017/02/more-cy-pres-abuse-in-california-class-action-litigation.html ("[T]here's nothing more "substantive" than taking money supposedly owed to absent class members and giving it to non-litigant charities.").

118. *See* Lavie, *supra* note 67, at 1096–97 ("The unfettered judicial discretion to dole out money through the cy pres mechanism is troubling. As Professor Samuel Issacharoff—the reporter for the ALI's *Principles of the Law of Aggregate Litigation* project–warns, '[i]t is . . . an invitation to wild corruption of the judicial process.'") (citation omitted).

119. *See* Wilbur H. Boies & Latonia Hanley Keith, *Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, 21 VA. J. SOC. POL'Y & L. 267, 275 (2014) (citation omitted) ("Cy pres, as the argument goes, 'creates an insidious incentive for class counsel to shirk their responsibility' and therefore 'encourages exorbitant fees for class counsel at the expense of the absent class members, who are left with zero compensation.'"); Tidmarsh, *supra* note 51, at 772 ("[C]y pres relief creates the risk that class counsel will sell out the class when the defendant dangles the prospect of a large attorneys' fee that is calculated (and justified) in part on cy pres recovery."); Wasserman, *supra* note 6, at 101 (noting class counsel may suffer a conflict of interest).

120. Erichson, *supra* note 109, at 886–87.

121. *See* Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES: SIDEBAR (Aug. 12, 2013), http://www.nytimes.com/2013/08/13/us/supreme-court-may-hear-novel-class-action-case.html?mtrref= ("The settlement's central innovation was to cut Mr. Kamber's clients out of the deal.").

122. Adam Liptak, *Doling Out Other People's Money*, N.Y TIMES (Nov. 26, 2007), http://www.nytimes.com/2007/11/26/washington/26bar.html (quoting Samuel Issacharoff).

123. *See, e.g.,* LOS ANGELES REG'L FOODBANK, CLASS ACTION CY PRES AWARD FACT SHEET, https://www.lafoodbank.org/wp-content/uploads/Mar-2016-Cy-Pres-Up

the proposed reforms to cy pres have focused on ensuring loyalty to the class and putting in place judicial enforcement standards. Scholars have advocated for courts to take notice of particular red flags,[124] to require stricter review for settlements that include cy pres, and to require—not merely favor—additional pro-rata distribution to class members, turning cy pres distributions into a last resort.[125] However, the doctrine endures. "Cy pres has largely been accepted as a necessary evil in the class action context".[126] Even after Chief Justice Roberts made his concerns public, cy pres distributions continue to be used frequently. But efforts should be made to fix cy pres, especially since the Supreme Court is evaluating the issue this term.[127]

II.
THE PROPOSAL TO REFORM CY PRES

A. A Proposal for a Voting Mechanism in Cy Pres Distribution

Loyalty-based reforms would improve the existing doctrine, but exclusively targeting loyalty ignores the evolving nature of class actions. Scholars have long argued that relying on loyalty alone, at the expense of exit and voice, is not enough to ensure organizational legitimacy.[128] However, those scholars generally have preferred greater re-

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date.pdf ("[T]he Food Bank is an effective recipient for using Cy pres settlements to help the community."); Sam Yospe, *Cy Pres Distributions in Class Action Settlements*, 2009 COLUM. BUS. L. REV. 1014, 1035–36 (2009) ("[G]roups have begun lobbying for cy pres awards.").

124. *See* Erichson, *supra* note 109, at 883 ("Courts should be on the lookout for three types of red flags: cy pres remedies in settlements where class members could have been compensated directly, cy pres remedies that flow to organizations with which class counsel or the judge is affiliated, and cy pres remedies that fail to benefit class members or that serve the defendant's self-interest."); Wasserman, *supra* note 6 (advocating for reforms to ensure loyalty of class counsel including the appointment of a Devil's Advocate).

125. *See* Bartholomew, *supra* note 117, at 3245, 3252-53 (explaining that the concern is greater when the entire settlement is a cy pres distribution).

126. Chris J. Chasin, *Modernizing Class Action Cy Pres Through Democratic Inputs: A Return to Cy Pres Comme Possible*, 163 U. PA. L. REV. 1463, 1474 (2015).

127. *See e.g.,* Harlan v. Transworld Systems, Inc., No. 13-5882, 2015 WL 505400, at *10 (E.D. Pa. Feb. 6, 2015) (acknowledging criticism but approving cy pres award for financial literacy organization); *In re* Citigroup Inc. Sec. Litig., 199 F. Supp. 3d 845, 846, 854 (S.D.N.Y. 2016) (finding cy pres designees appropriate and approving settlement). Appellate courts have also upheld cy pres settlements as well. *See, e.g.*, *In re* Google Referrer Header Privacy Litig., 869 F.3d 737 (9th Cir. 2017) (finding cy pres-only settlement appropriate for privacy violation). However, the Supreme Court has granted certiorari and heard oral argument in the latter case to review the propriety of the approval of the cy pres settlement. *See* Frank v. Gaos, 138 S. Ct. 1697 (2018).

128. *See* Coffee, *supra* note 76, at 378 ("Because some low-level, less visible conflicts will necessarily escape judicial detection, the loyalty of the agent to the principal can never be absolute.").

liance on exit, since while proposing reforms to give class members greater voice is easy, such reforms are costly to execute[129] and could result in only a vocal minority of the class gaining power.[130] The latter concern has recently gained traction. It has led courts to limit the class representatives' ability to have a disproportionate voice by fashioning rules that allow a class settlement to proceed even if the named representative objects.[131] It has also spurred commentators' concern about potential objectors to settlements gaining a disproportionate voice in the process simply by the act of threatening to object.[132] In both of these instances, however, the concern is about individual class members gaining a disproportionate voice and not with a general increase in class member voice.

As recent work by Elizabeth Cabraser and Samuel Issacharoff argues, not only have technological changes lowered the costs of reform tremendously, these changes also have the capacity to democratize voice, consequently empowering all class members.[133] Thus, while previously loyalty, and to a certain extent exit, were "guarantors of systemic legitimacy," the class action is now capable of being "participatory" with "voice emerg[ing] as a critical element."[134] "Increasingly, 'absent' class members may not actually be absent," because it is easier to identify, contact, receive feedback.[135] Voice is now capable of being used to ensure organizational legitimacy, and the participatory class action offers a potential solution to reform cy pres: a voting mechanism for class members. Such a reform would be cost effective, and would increase all class members' voices, as opposed to disproportionately empowering certain individual class members.

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129. *Id*. at 438 (advocating a greater focus on exit).

130. *Id*. at 417 ("Thus, not only will these small claimants be hard to identify or contact, but they have little reason to respond to any solicitation. In turn, this implies a low turnout and referenda that might be decided by only a small percentage (say two to three percent) of the potential electorate.").

131. *See* Lazy Oil Co. v. Witco Corp., 166 F.3d 581 (3d Cir. 1999).

132. *See generally* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (advocating a quick-pay provision and barring objectors from settling as solutions to the problem).

133. *See* Cabraser & Issacharoff, *supra* note 73, at 854 (2017) ("Fast forward to 2017: Communication is instantaneous and cheap, if not free—courtesy of the internet, email, Facebook, Twitter, and forms of electronic discourse as yet unimagined. . . With the marginal cost of additional communication approaching zero, class notices may be transmitted electronically, without the former logistical and cost inhibitions of mass mailings.").

134. *Id.* at 852.

135. *Id.* at 849.

Courts should require that class members vote to decide which organizations, if any, receive cy pres distributions. Not only does this ensure organizational legitimacy, but since voting rights themselves have value, it also ensures class members receive compensation from cy pres distributions. Class members may still not recover money, but they are getting another form of compensation. Furthermore, the online voting form could also allow class members to exit the settlement should they choose. While a similar idea was briefly considered by a previous student note, it suggested only a voluntary vote to inform judicial decisions regarding beneficiaries.[136] Nothing is stopping judges from doing this already,[137] and there is nothing stopping class counsel from polling their clients, but there is no evidence either does so. In contrast, a binding voting system would confer far greater advantages. While a voluntary system has been dismissed for "not remov[ing] concerns of bias," by class counsel,[138] a binding voting system could provide sufficient organizational protections to the class through voice and exit. A binding system also creates voting rights, which regardless of whether they are used, provide compensation to the class.

Under this proposal, class counsel would select a number of charities to be included in the vote. Then, class members would have a number of voting options. They would be able to vote for recipient charities, vote against distribution to any of the charities, or click a check box to exit the settlement entirely. Online voting would clearly allow class members voices to be heard, and would also ensure exit rights.[139] Furthermore, the opportunity for low cost notice, a simple registration process (replacing the burdensome claims process), and an efficient online system would make such a voting mechanism effective.

136. *See* Chasin, *supra* note 126, at 1487 (discussing the possibility of allowing votes of identified class members or of similarly situated stand-ins to provide discretionary guidance for judges). The proposal here is superior since it focuses on voting rights, not an informal process, and also constrains the judge's discretion since the results are binding.

137. *See id*. ("By incorporating such guidance discretionarily, perhaps managed through a special master").

138. *See id*. at 1490 ("By cabining the class's ability to suggest recipients, the resulting award's accuracy would depend entirely on the quality of proposals suggested").

139. Loyalty could also be increased through this process by penalizing class counsel if a certain percent of class members voted against distribution to all of the selected charities.

B. Technological Changes Have Made Implementation Possible

There is no doubt that technology is changing commerce. Today, fewer than fifteen percent of Americans do not use the internet.[140] E-commerce now accounts for nearly twelve percent of retail sales and is growing,[141] and "consumers are now buying more things online than in stores."[142] This change means corporations have more information about their customers and more means to contact them. Other commerce is moving online as well. For instance, sixty-two percent of U.S. adults now bank online, and "U.S. consumers pay approximately 14.7 billion bills annually" online.[143]

These changes mean companies are much more likely to know who their consumers are, and to have a cost-effective means of contacting them. The amount of consumer email continues to grow,[144] and up to ninety-nine percent of consumers are willing to share personal information with companies when making purchases.[145] Ninety-two percent of adults use email,[146] and ninety percent of email gets delivered to the intended recipient's inbox.[147] Fifty-eight percent of

140. Kathryn Zickhur, *Who's Not Online and Why*, PEW RESEARCH CTR. (Sept. 25, 2013), http://www.pewinternet.org/2013/09/25/whos-not-online-and-why/.

141. *See* Amy Gesenhues, *Report: E-Commerce Accounted for 11.7% of Total Retail Sales in 2016, up 15.6% over 2015*, MARKETING LAND (February 20, 2017, 12:40 PM), https://marketingland.com/report-e-commerce-accounted-11-7-total-retail-sales-2016-15-6-2015-207088 (citing United States Census Reports).

142. *See* Madeline Farber, *Consumers Are Now Doing Most of Their Shopping Online*, FORTUNE (June 8, 2016), http://fortune.com/2016/06/08/online-shopping-increases/ (citing a survey by comScore and UPS).

143. Jamie Gonzalez-Garcia, *Online and Mobile Banking Statistics*, CREDITCARDS.COM (Mar. 20, 2017), https://www.creditcards.com/credit-card-news/online-mobile-banking.php.

144. *See* THE RADICATI GRP., EMAIL STATISTICS REPORT, 2015-2019 (2015), *available at* https://www.radicati.com/wp/wp-content/uploads/2015/02/Email-Statistics-Report-2015-2019-Executive-Summary.pdf (indicating a six percent annual growth in consumer emails received per day).

145. *See* Greg Sterling, *Survey: 99 Percent of Consumers Will Share Personal Info For Rewards, But Want Brands to Ask Permission*, MARKETING LAND (June 2, 2015, 6:00 AM), https://marketingland.com/survey-99-percent-of-consumers-will-share-personal-info-for-rewards-also-want-brands-to-ask-permission-130786 (in exchange for rewards).

146. Kristen Purcell, *Search and Email Still Top the List of Most Popular Online Activities,* PEW RESEARCH CTR. (Aug. 9, 2011), http://www.pewinternet.org/2011/08/09/search-and-email-still-top-the-list-of-most-popular-online-activities/.

147. Kim Stiglitz, *70 Email Marketing Stats Every Marketer Should Know*, CAMPAIGN MONITOR (Jan. 6, 2016), https://www.campaignmonitor.com/blog/email-marketing/2016/01/70-email-marketing-stats-you-need-to-know/ (citing Forrester Research). This despite thirty percent of subscribers changing their email addresses annually. Jay Baer, *15 Email Statistics That Are Shaping the Future*, CONVINCE & CONVERT, http://www.convinceandconvert.com/convince-convert/15-email-statistics-that-are-shaping-the-future/ (last visited Feb. 3, 2018).

Americans research products and services online,[148] and this activity is often tracked by cookies. Even offline purchases can now often be tracked, and companies continue to grow the amount of data they have on offline purchasers.[149] Seventy percent of all offline credit and debit card transactions may now be linked to online consumers.[150] Thus, while not every class member will be easily or cheaply reachable online (especially for certain causes of action), many will.[151] Thus, more and more class actions will have a cheap and easy method of identifying and providing notice to class members.

Even unknown class members are becoming easier to locate. There are databases listing class actions, allowing unknown class members to seek out class actions they are eligible to join.[152] Furthermore, it is more cost effective for class actions to advertise to potential members. Online polling, through using statistical sampling, has proven to be "accurate, efficient, and cheap".[153] While using poll results, as opposed to voting results, to determine cy pres beneficiaries would undermine the substantive rights class members would gain through this reform, an electronic notice plan to promote the vote could use sampling to make notice more cost effective. In a settlement, notice costs are negotiated, so lowering these costs would have the additional benefit of reducing class counsel's conflict of inter-

148. JIM JANSEN, PEW RESEARCH CTR., ONLINE PRODUCT RESEARCH (2010), http://www.pewinternet.org/wp-content/uploads/sites/9/media/Files/Reports/2010/PIP-Online-Product-Research-final.pdf.

149. *See* April Glaser, *Google Is Matching Your Offline Buying With Its Online Ads, but It Isn't Sharing How*, SLATE: FUTURE TENSE (Aug 1, 2017, 7:16 PM), http://www.slate.com/blogs/future_tense/2017/08/01/google_tracks_people_offline_to_see_if_online_ads_work.html (discussing a lawsuit by the Electronic Privacy Information Center alleging that Google is using credit card data to track whether online ads lead to in-store purchases without providing an easy opt-out or clear information about how the system works); *see also* Dann Albright, *How Marketers Track Your Behaviors When You're Offline*, MUO (Mar. 15, 2016), https://www.makeuseof.com/tag/marketers-track-even-youre-offline/ (discussing the growth of loyalty cards, QR codes, and data brokers who "are in the business of connecting online and offline data points, and they're really good at it.").

150. Niraj Dawar, *Has Google Finally Proven That Online Ads Cause Offline Purchases?*, HARV. BUS. REV. (June 1, 2017), https://hbr.org/2017/06/has-google-finally-proven-that-online-ads-cause-offline-purchases ("The company claims it will be able to track about 70% of all credit and debit card transactions and link them to online consumer behavior.").

151. For instance, civil rights actions.

152. *See, e.g.*, *Class Action Database*, CONSUMER ACTION, https://www.consumer-action.org/lawsuits/ (last visited Nov. 7, 2018); CLASS ACTION REBATES, http://www.classactionrebates.com/ (last visited Nov. 7, 2018).

153. Walter Hickey, *The Old Model Is Over: 2012 Proved That Online Polling Is Accurate, Efficient, and Cheap*, BUS. INSIDER (Nov. 26, 2012, 1:35 PM), http://www.businessinsider.com/surveymonkey-election-online-poll-2012-11.

est.[154] Furthermore, the dilemma posed by unknown class members may itself be solved, since a more cost-effective notice program can locate class members.

Technology has also lowered the cost of a class member voting mechanism. Taking proxy voting by shareholders, the Securities and Exchange Commission's e-proxy reform used the internet to lower costs and facilitate better communication with shareholders.[155] By eliminating printing and postage over six dollars and fifty cents is saved per vote,[156] and billions have been saved overall.[157] Voting participation has increased too.[158] Companies often now receive ninety percent of votes "without the need of special solicitation efforts."[159] Democratic voting would benefit from similar cost savings. A study in the United Kingdom estimated electronic voting in political elections would reduce the cost per vote by twenty-six percent.[160] Thirty-seven states and the District of Columbia already offer online voter registration to save costs.[161] Arizona, for instance, reduced registration costs to three cents from eighty-three cents by moving to electronic voting.[162] Online polling, while different than online voting, also high-

154. *See* Fitzpatrick & Gilbert, *supra* note 5, at 781 (noting that while "defendants usually agreed to pay the cost of notice and settlement administration on top of the settlement fund" it is part of the negotiated settlement so paying either way).

155. *See* Fabio Saccone, *E-Proxy Reform, Activism, and the Decline in Retail Shareholder Voting*, DIRECTOR NOTES (The Conference Bd., New York, N.Y.), Dec. 2010, at 1-2, https://ssrn.com/abstract=1731362 ("The recent e-proxy reform by the SEC was designed to expand the use of the Internet to lower costs of solicitations and improve communications.").

156. Maxwell Murphy, *Mailing Proxy Statements Costs Companies Big Bucks*, WALL ST. J. (Feb. 21, 2012, 6:52 PM), https://blogs.wsj.com/cfo/2012/02/21/mailing-proxy-statements-costs-companies-big-bucks/ (noting a $4.82 per proxy statement plus $1.70 for envelope and postage).

157. *See* BROADRIDGE, 2017 PROXY SEASON KEY STATISTICS & PERFORMANCE RATING (2017), https://www.broadridge.com/_assets/pdf/key-statistics-and-performance-ratings-for-the-2017-proxy-season.pdf (noting a single company saved issuers over $1.4 billion).

158. *See id*. (noting ninety-five percent shares were e-voted).

159. *Electronic Proxy Voting Is a Reality*, IRGR MONTHLY BULL. (IR Glob. Rankings, New York, N.Y.), Jan. 2009, at 1, http://www.shareholdercoalition.com/sites/default/files/IR%20Global%20Rankings%20Newsletter%201-09.pdf.

160. Ben Pearson, *Cost of Voting: Report Launch*, WEBROOTS DEMOCRACY (Nov. 9, 2017), https://webrootsdemocracy.org/2017/11/09/cost-of-voting-report-launch/.

161. *See Online Voter Registration*, NAT'L CONF. ST. LEGISLATURES, (Dec. 6, 2017), http://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx (discussing the situation as of December 6, 2017). An additional state, Oklahoma, is currently phasing in online registration. *Id*.

162. *Id*.

lights the potential cost savings, since it is essentially free to record individuals' selections.[163]

Of course, potential class members would still need to take the time to click through and vote. Some class members that receive checks do not cash them,[164] and so it is fair to ask whether class members would actually take the time to vote. However, we know people click on links online that they would disregard in paper form, clickbait being the prime example. Furthermore, we do not know why class members do not cash checks. Perhaps individuals could think it is a scam or be offended by a small amount. That being said, an effort to encourage voting should less likely be viewed as a scam, since the class member would not be told they are getting pecuniary gain, and a larger amount to charity could be less likely to be seen as offensive. More importantly, individuals who are not currently cashing a check are not compensated at all, whereas individuals who do not click through and vote are still compensated in the form of voting rights.

An online voting mechanism would greatly reduce the cost of administering settlements. Settlement funds can cost millions to administer.[165] Furthermore, a claims process ensures that plaintiffs' claims are legitimate, and thus any remedy is going to parties actually injured.[166] Courts have held that a claims process is not always necessary,[167] so a claims process would not be necessary before conferring voting rights. In fact, the ALI encourages direct distribution of settlement proceeds without a claims process when feasible.[168] Courts already simplify the claims process in order to allow more funds to go to

163. *See* Hickey, *supra* note 153 (according to SurveyMonkey CEO Dave Goldberg, while "Gallup spends a ton of money talking to a few thousand people, SurveyMonkey polled millions, essentially for free").

164. *See, e.g.*, Fitzpatrick & Gilbert, *supra* note 5, at *775*.

165. *See, e.g.*, Huyer v. Buckley, 849 F.3d 395, 397 (8th Cir. 2017) (allocating $3,250,000 for administrative costs).

166. *The Role of the Claims Administrator in Securities Class Action Settlements*, BATTEA CLASS ACTION SERVS. (Feb. 17, 2015), https://www.battea.com/role-claims-administrator-securities-class-action-settlements/ (discussing the process and the "number of audits and data integrity checks that are performed by . . . Claims Administrator[s]).

167. *See, e.g.*, Laguna v. Coverall N. Am., Inc., 753 F.3d 918, 934–35 (9th Cir. 2014), *vacated*, 772 F.3d 608 (9th Cir. 2014) ("Here, the necessity of a claims process is not apparent from the record" though that was because "No proof of claim was needed to identify class members because Defendants already had within their possession information identifying the former franchisees.").

168. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.05 (AM. LAW INST. 2010) (noting this is feasible when there are up to date and accurate records and is desirable "even if the parties have proposed a traditional claims process.").

plaintiffs.[169] Individual claim forms do not even need to always be submitted.[170] Thus, a voting mechanism where potential class members certify their eligibility before being allowed to vote would suffice.

C. *A Voting Mechanism Answers the Central Critiques of Cy Pres*

Including a voting mechanism in the cy pres distribution process both provides compensation to class members and ensures organizational legitimacy for the class action. Currently as few as fifteen percent of class members actually receive any compensation.[171] Vast remainders can exist even after direct distribution to class members, as not all class members participate in the claims process[172] and not all class members who are mailed checks cash them.[173] By conferring voting rights on class members, *every* member of the class receives compensation. Scholars have noted the idea of a vote having value is intuitive.[174] More important, there is a longstanding legal tradition that voting rights have value in election law, corporate law, and organizational management law.

In the electoral context, social science has proven that while the exact value of voting rights differs, a monetary value can in fact be given to voting rights.[175] Offering prices to sell electoral voting rights have been as high as one hundred and twenty-two dollars.[176] Courts

169. *See* S. ELIZABETH GIBSON, FED. JUDICIAL CTR., CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS (2000) (discussing a case where such "efforts succeeded in distributing virtually all of the settlement fund to its intended beneficiaries; less than 0.5% was spent on administration.").

170. *See, e.g.*, Pfizer, Inc. v. Lord, 449 F. 2d 119, 120-21 (2d Cir. 1971).

171. *See* Fitzpatrick & Gilbert, *supra* note 5, at 774 (discussing two studies, the Gramlich Study and the Pace Study which showed a median recovery percentage of fifteen percent even with a median payout of $411.)

172. *See e.g.*, Boyd v. Bell Atl.-Md., Inc., 887 A.2d 637, 650 (Md. 2005) (noting Bell Atlantic had collected $64 million in unlawful charges but claims were filed only for $227,000).

173. Fitzpatrick & Gilbert, *supra* note 5, at 775. Even when electronic payments are possible, some class members have switched financial institutions, so distribution is still not possible.

174. *See* Paul Lee, *Protecting Public Shareholders: The Case of Google's Recapitalization*, 5 HARV. BUS. L. REV. 281, 287 (2015) ("Intuitively, there must be some value to voting rights.").

175. *See* Stephan Tontrup and Rebecca Morton, *The Value of the Right to Vote* (N.Y. Univ. Sch. of Law, Pub. Law Research Paper Series, Working Paper No. 15-52, 2015), https://ssrn.com/abstract=2692760 (discussing results of study evaluating how much people are willing to pay to give up the right to vote at fifteen euros).

176. *See* Sascha Segan, *Internet Sites Try to Sell Votes*, ABC NEWS (Aug. 20, 2016), https://abcnews.go.com/Politics/story?id=123069&page=1 (discussing voteauction.com; sales efforts are of course illegal).

agree: it is long-standing historical practice to award damages when voting rights have been denied or infringed.[177] In fact, damages are presumed.[178] When a voting rights claim is successful, even when there is not monetary compensation given to plaintiffs, attorneys' fees are appropriate.[179] Furthermore, exchanging one person's vote for another is seen as criminal since it is exchanging a 'thing of value' for one's vote.[180] The Supreme Court has also held voting rights in an election is a valid compensatory remedy as well.[181]

In addition, deprivation of voting rights constitutes the concrete injury necessary for standing. In fact, standing based on an individual's right to vote is stronger than standing based on an individual's role as a taxpayer.[182] Unlike standing jurisprudence guiding other non-monetary interests, voting rights standing is expansive.[183] In *Baker v. Carr*, the Supreme Court held that even the deprivation of a fraction of a vote is enough to confer standing and that there was no need to show any other direct injury.[184] In general, any obstacle to voting

177. *See Palmer v. Bd. of Educ. of Cmty. Unit Sch. Dist. 201–U,* 46 F.3d 682, 686 (7th Cir. 1995) (stating "[m]ost voting-rights cases seek equitable relief, but damages too are available for a racially motivated deprivation of the right to vote."). *But see* Santana v. Registrars of Voters of Worcester, 502 N.E.2d 132, 136 (Mass. 1986) ("Federal law does not support an award of presumed damages based upon a deprivation of voting rights.").

178. *See, e.g.*, Nixon v. Herndon, 273 U.S. 536, 540 (1927); Wayne v. Venable, 260 F. 64, 66 (8th Cir. 1919).

179. *See, e.g.,* Dillard v. City of Foley, 995 F. Supp. 1358, 1377 (M.D. Ala. 1998) ($121,439 in fees for class counsel); *see also* ALBA CONTE, 4 ATTORNEY FEE AWARDS § 30:1 (3d ed. 2018) (listing total hours allowed by specialty). *See also* ALBA CONTE, 3 ATTORNEY FEE AWARDS § 14:3 (3d ed. 2018) (listing fees given for voting rights cases).

180. *See* Marc J. Randazza, *The Constitutionality of Online Vote Swapping*, 34 LOY. L.A. L. Rev. 1297, 1316 (2001) (discussing an aborted action to prosecute those who swap votes, the practice of voting for a fringe candidate in a safe state in exchange for a vote for a major party candidate in a swing state, in Oregon).

181. *See, e.g.*, Gray v. Sanders, 372 U.S. 368, 380 (1963) (upholding injunction of election which would have been conducive to weighting rural votes more heavily, and postponing the election).

182. FEC v. Akins, 524 U.S. 11, 22–23 (1998) (distinguishing "taxpayer standing" from "voter standing" and stating that the "legal logic" critical to the former is "beside the point" in the latter); *see also* Schulz v. New York State Legislature, 676 N.Y.S.2d 237, 239 (App. Div. 1998) (finding standing as voters but not as taxpayers).

183. Brandon Garrett, *Standing While Black: Distinguishing* Lyons *in Racial Profiling* Cases, 100 COLUM. L. REV. 1815, 1841 (2000) ("[T]he expansive approach to standing in voting cases is contrasted to the restrictive approach to standing in *Lujan v. Defenders of Wildlife*.").

184. 369 U.S. 186, 206-08 (1962) (showing that voter was deprived of right to an equal vote sufficient for standing).

rights is sufficient for a concrete injury.[185] More recently, getting information to educate a vote was deemed sufficient for an injury in fact,[186] as were unreliable voting equipment,[187] using punch card ballots,[188] and implementing a Voter ID requirement (even for voters who possessed valid IDs).[189] A legislative vote is also a "thing of value,"[190] which the Supreme Court has held is sufficient for standing in order to "[maintain] the effectiveness of their vote."[191] Even a committee vote is sufficient for standing.[192]

In the corporate context, shareholder voting rights also have value. After all, control premiums are paid to "[compensate] the minority stockholders for their resulting loss of voting power."[193] While the percentage of a stock's overall value derived from voting rights is not high,[194] there is some monetary value.[195] Even though marginal voting rights are unlikely to influence corporate control or behavior, and many shareholders do not exercise their voting rights, the rights

185. *See* Judge v. Quinn, 612 F.3d 537, 545 (7th Cir. 2010); *(*"Where a plaintiff's voting rights are curtailed, the injury is sufficiently concrete to count as an 'injury in fact.'"). But voters do not suffer an injury in fact for violations of campaign finance law. *See* Mallof v. D.C. Bd. of Elections and Ethics, 1 A.3d 383, 399 (D.C. 2010).

186. *See, e.g.*, FEC v. Akins, 524 U.S. at 21 (holding right to information in FEC filing sufficient for standing).

187. *See* Jason B. Binimow, *Challenges to Punch Card Ballots and Punch Card Voting Systems*, 103 A.L.R. 5th 417 § 7 (2002).

188. *See, e.g.*, Stewart v. Blackwell, 444 F.3d 843, 855 (6th Cir. 2006), *vacated* (July 21, 2006), *and superseded*, 473 F.3d 692 (6th Cir. 2007).

189. *See, e.g.*, Common Cause/Ga. v. Billups, 554 F.3d 1340, 1351-52 (11th Cir. 2009).

190. *See, e.g.*, State v. Neufeld, 926 P.2d 1325, 1331 (Kan. 1996) ("a legislative vote, which is a thing of value.").

191. *See* Coleman v. Miller, 307 U.S. 433, 438 (1939); *see also* Raines v. Byrd, 521 U.S. 811, 822 (1997).

192. Michel v. Anderson, 14 F.3d 623, 625 (D.C. Cir. 1994) ("[C]ongressmen's standing to assert that their voting power has been diluted" by giving territorial delegates power to vote in Committees).

193. Morgan White-Smith, Comment, *Revisiting Revlon: Should Judicial Scrutiny of Mergers Depend on the Method of Payment?*, 79 U. CHI. L. REV. 1177, 1186 (2012) (noting though that economically a stock's price is largely comes from expected future cash flow and not voting rights.).

194. *Id*. at 1191 ("While the value of voting rights for a share are estimated at 1.58% of the underlying stock price, that is still monetary value.").

195. Robert F. Reilly, *Quantifying the Valuation Discount for Lack of Voting Rights and Premium for Voting Rights*, 24 AM. BANKR. INST. J. 54 (2005) ("Empirical evidence indicates that the stock market price for publicly traded voting common shares is generally greater than the stock market price for comparable publicly traded nonvoting common shares. . . . Accordingly, these empirical data indicate that shareholders pay a price premium for voting privileges related to the common shares of a public corporation.").

themselves have value.[196] Courts agree that voting rights also have value in the corporate context. The Delaware Supreme Court requires "at least . . . an award of nominal damages" where directors have impaired the voting rights of stockholders.[197] A shareholder has standing to sue to enforce her voting rights.[198] Furthermore, courts treat voting shares as worth more than substantially similar non-voting shares.[199] The Internal Revenue Service also treats stock with voting rights as worth more than substantially similar stock without voting rights attached.[200]

In other legal settings voting rights also have value. In labor law, voting rights in new elections are often the remedy granted by courts for an injury.[201] In housing law, courts frequently grant voting rights in new elections in co-op board disputes,[202] and hear suits involving voting rights even if those elections results have been rendered moot.[203] In the complex litigation context, Rule 1.8(g) does not allow attorneys to bind clients by a weighted majority vote of the plaintiffs

196. Lee, *supra* note 174, at 288 ("[S]hareholders are collectively willing to pay $2.6 billion more to own Class A shares with votes than to own Class C shares with no votes, despite the fact that their votes may be largely meaningless due to the presence of controlling shareholders.").

197. *See* Chatham Asset Mgmt., LLC v. Papanier, No. 2017-0088-AGB, 2017 WL 6550428, at *6 (Del. Ch. Dec. 22, 2017) (citing *Loudon v. Archer–Daniels-Midland Co.*, 700 A.2d 135, 142 (Del. 1997)); *see also* duPont v. Del. Tr. Co., 364 A.2d 157, 161 (Del. Ch. 1975) ("I accordingly conclude that plaintiff is entitled not only to such damages as may be attributable to his being deprived of voting rights").

198. *See* Robert I. Weil et al., California Practice Guide Civil Procedure Before Trial Ch. 2-A Section Standing to Sue—"Real Party in Interest" Requirement (2017) ("A corporate shareholder may also have standing to bring a direct action . . . to enforce shareholder voting rights").

199. *See, e.g.*, *In re* Marriage of Kollman, 96 P.3d 884 (Or. Ct. App. 2004) (in distribution of marital assets in a divorce, voting and non-voting shares had to be equally distributed).

200. Thomson Reuters Checkpoint, Federal Tax Coordinator ¶ P-6337 (2d ed. 2018) ("IRS's view is that voting stock is worth more than nonvoting stock.").

201. *See, e.g.,* McLaughlin v. Sys. Council, T-6, Int'l Bhd. of Elec. Workers, No. 85-4719-S, 1988 WL 235910 at *6 (D. Mass. June 17, 1988) ("In my opinion, the court is required to declare the election of Kiley as chairman void and to order a supervised election.").

202. *See, e.g.,* 13315 Owners Corp. v. Kennedy, 782 N.Y.S.2d 554, 568 (Civ. Ct. 2004) (holding board's improper election led to a revised election as the remedy); Mishaan v. 1035 Fifth Ave. Corp., 4 N.Y.S.3d 834, 842-843 (Sup. Ct. 2015) (deciding that a recount which interfered with voting rights on co-op board was sufficient to set aside results of election).

203. *See* Tiemann Place Realty, LLC v. 55 Tiemann Owners Corp., 33 N.Y.S.3d 174, 177 (App. Div. 2016) (voting rights dispute not rendered moot by later election since sponsor "could continue to violate the plain meaning of the stipulation by claiming that those who purchase shares directly from the sponsor and do not live in their apartments are not holders of unsold shares.").

for mass torts.[204] But, unlike in that scenario, this proposed voting mechanism contains exit rights and the court would be mandating the vote, as opposed to counsel attempting to use a vote to bind clients to a yet to be proposed settlement.

III.
The Voting Mechanism Is Superior to Other Reforms and Is Still Necessary

The proposed voting mechanism is superior to additional pro-rata distribution. Critics might argue that, like further pro-rata distribution, the proposed voting mechanism will result in overcompensating some class members at the expense of others. But, while giving voting rights to class members who have been fully compensated would overcompensate them, fully compensated class members could be excluded from voting. While the ALI believes that since settlements are compromises with class members rarely receiving full compensation, additional pro-rata distributions carry a very low risk of overcompensation,[205] the proposed voting mechanism can be designed to carry *no* risk of overcompensation. Furthermore, while pro-rata distribution generates a conflict of interest between known and unknown class members, since if fewer claims are filed individual recovery will be higher,[206] the proposed voting mechanism avoids that conflict.

The proposed voting mechanism is also superior to Lavie's lottery proposal. Even Lavie acknowledges that the need for his lottery proposal would be different if class members were given a voice,[207] which the voting mechanism provides. While there is no imperial data on the value class members assign to empowered participation in a class action, we can imagine it provides at least some value. Furthermore, while the thrust of Lavie's argument is that under current cy pres doctrine no class members are compensated,[208] and under his proposal some are, the proposed voting mechanism goes further and provides compensation to all class members. Furthermore, Lavie's

204. *See, e.g.*, Tax Authority, Inc. v. Jackson-Hewitt, Inc., 898 A.2d 512 (N.J. 2006).

205. *See* Principles of the Law of Aggregate Litigation § 3.07, cmt. b (Am. Law Inst. 2010) ("[F]ew settlements award 100 percent of a class member's losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery for those class members.").

206. *See* Wasserman, *supra* note 6, at 113 (noting named representatives "would have an interest 'in keeping the other class members uninformed' ") (citation omitted).

207. *See* Lavie, *supra* note 67, at 1096 ("[T]ransferring the money to charity is supposed to fulfill class members' preferences, but who knows what class members want? Attorneys and courts do not survey the class before deciding where to funnel the money on its behalf.").

208. *See id*. at 1095–96.

proposal, unlike the proposed voting mechanism, does not give class members the opportunity to exit the lottery process, meaning those class members who do not "win the lottery" receive no compensation but are still subject to preclusion. Thus, Lavie's lottery proposal does not give class members a voice or an exit. While his proposal does stop class counsel or judges from handpicking recipients of funds, it lowers the incentive of objectors to police potential conflicts of interest over the design of the lottery drawing. Critics might argue that, similar to a lottery ticket, voting rights only have value if one knows one has them, but the right to vote has value even if one does not know there is an election occurring. In fact, each year millions of Americans do not know certain elections are occurring,[209] but would not think of sacrificing their voting rights.

It is fair to ask, given growth in technology, whether cost-free direct distribution to class members is now possible, making cy pres unnecessary. There is a broad consensus that "damage awards are ideally distributed to the class members whose claims are being compromised by the class action judgment."[210] For the ALI, if distribution is possible, a cy pres remedy is always inappropriate,[211] and technology may make it so that direct distribution is always possible. Shrinking notice costs could end the unknown class member dilemma,[212] and shrinking remittance costs could end the dilemma surrounding distribution of a remainders. There is already significant research proving that consumer class actions can provide meaningful compensation when they use automatic distributions and direct deposits,[213] and as the amount of consumer data increases, the ability to directly deposit

209. *See* Brad Plumer, *Why More Than 80 Million Americans Won't Vote on Election Day*, VOX (Nov. 8, 2016, 3:02 PM), https://www.vox.com/policy-and-politics/2016/11/7/13536198/election-day-americans-vote (noting that people forget elections are occurring especially given the high number of elections in the United States).

210. RUBENSTEIN, *supra* note 53, § 12:14.

211. *See In re* Airline Ticket Comm'n Antitrust Litig., 307 F.3d 679, 683-84 (8th Cir. 2002) (reversing a decision ordering cy pres distribution and ordering further distribution to the class); *see also* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 (AM. LAW INST. 2010).

212. For a discussion of Twitter's impact to find more claimants and double the claims rate see Alison Frankel, *The Class Action Claim Bots Are Coming! (Actually, They're Already Here)*, REUTERS (Jan. 18, 2018, 4:23 PM), https://www.reuters.com/article/us-otc-bots/the-class-action-claim-bots-are-coming-idUSKBN1F7331.

213. *See* Fitzpatrick & Gilbert, *supra* note 5, at 767 ("[U]nder certain circumstances, consumer class actions can indeed serve a meaningful compensatory role: when they eschew claim forms in favor of automatic distributions. . .and especially direct deposits to make those distributions. We believe these circumstances will only grow in the future as the "big data" revolution continues to unfold and electronic banking continues to evolve.").

funds into class member's accounts only becomes less expensive. But, despite these advances, cost-free notice, remittance, and claims processes are not possible, so a remainder, even if an exceedingly low percentage of the overall distribution, will always exist.[214]

Technology has drastically reduced the cost for notice.[215] Currently, settlements with the highest compensation rates "largely d[o] not require class members to file claim forms," since the class members are known.[216] The growth in technology may create "realistic opportunities to distribute settlements automatically," and thus fully, especially by retailers "who sell online, where the trail is more often preserved," including through the use of third parties like Amazon.[217] However, this excludes class members with smaller digital footprints from compensation. While large numbers of individuals now bank online, some do not. Others switch accounts, and as a result, their information will not be known, and costs would need to be incurred to locate them. This is analogous to the current regime where some checks are returned to the sender, even though those class members filled out claim forms, because class members move as remittance is occurring.[218] Thus, while the same initial notice costs exist for pro-rata and for the voting proposal, additional notice costs exist for each layer of pro-rata distribution, even as developing technology lowers these costs.

Even when all class members are known, it can still be cost prohibitive to distribute funds. To be sure, remittance costs are decreasing. While "[c]lass members who receive unsolicited checks in the mail do not negotiate them in significant numbers,"[219] direct distribution to class members' accounts is now possible. Eighty-two percent of U.S. workers are already paid by direct deposit.[220] The costs for

214. *See In re* Citigroup Inc. Sec. Litig., 199 F. Supp. 3d 845, 848, 850 (S.D.N.Y. 2016) (noting 99.9% of funds had been distributed, but further pro rata not possible). Even if costless distribution is possible at some point the number of pennies left to be distributed is less than the number of class members.

215. *See* McGovern, *supra* note 4, at 126 (discussing how electronic outreach is more efficient and effective).

216. Fitzpatrick & Gilbert, *supra* note 5, at 770 ("parties were often able to use account information from the defendants to automatically calculate each class member's share . . . and deposit it into an existing bank account").

217. *Id.* at 788–89 (arguing "these opportunities will only become more common in the future: as the so-called "big data" phenomenon washes over more and more of the economy").

218. *See* Wasserman, *supra* note 6, at 105 (providing examples where "some (or many) of the checks are returned as undeliverable or are never cashed").

219. Fitzpatrick & Gilbert, *supra* note 5, at 790.

220. *New NACHA Survey Shows Adoption and Awareness of Direct Deposit via ACH Continues to Build*, NACHA (Apr. 18, 2016), https://www.nacha.org/news/new-

these transactions can be as little as a fraction of a cent to execute.[221] Banks often do not charge their customers for transfers,[222] and debit card transactions can cost as little as twenty cents.[223] Peer to peer providers Venmo and Zelle both do not charge a fee to send money at all.[224] However, these providers still rely on the same existing back-end system to transfer money, so it is not cost-free to send money, and these fees are simply not passed onto consumers.[225] PayPal, who owns Venmo, charges a flat fee when using a debit or credit card of "2.9% plus $0.30,"[226] and similar fees would be likely for a large settlement distribution. Thus, some costs will be necessary, even for direct deposits, for the foreseeable future. Another possibility for cost-free pro-rata distributions would be to place a credit in class members' online retail accounts. Twenty-three percent of purchases online are from return customers.[227] Funds could even be directly sent to class members' Amazon accounts, since sixty-four percent of households have a Prime account, and even more have basic Amazon accounts.[228] However, both options are only available for distribution in consumer actions, not other class actions, and raise the concern that the plaintiff

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nacha-survey-shows-adoption-and-awareness-direct-deposit-ach-continues-build (as of April 19, 2016, up from seventy-four percent in 2011).

221. *See* Keith Evans, *Difference Between Wire Transfer & Electronic Transfer*, POCKET SENSE, https://pocketsense.com/difference-wire-transfer-electronic-transfer-8537474.html (last updated June 29, 2018) ("Cost for an electronic transfer varies . . . but can be as little as a fraction of a cent per transfer.").

222. *See* Margarette Burnette & Spencer Tierney, *What It Costs to Transfer Money Between Banks*, NERDWALLET (Feb. 9, 2018), https://www.nerdwallet.com/blog/banking/ach-transfers-costs-send-money-banks-online/ (noting many banks charge $0-$3 for transfers).

223. Chelsea Allison, *How Venmo Does P2P Without Fees*, FIN, https://fin.plaid.com/articles/how-venmo-does-p2p-without-fees (last visited Feb. 7, 2019).

224. *See* Ruth Reader, *How Peer-To-Peer Payment Pioneer Venmo Grew Up and Got Serious*, FAST COMPANY (Apr. 18, 2017), https://www.fastcompany.com/40400786/how-peer-to-peer-payment-pioneer-venmo-grew-up-and-got-serious ($18 billion was sent by Venmo alone last year.); ZELLE, *Are there any fees to send money using Zelle®?* ZELLE, https://www.zellepay.com/support/are-there-any-fees-to-send-money-using-zelle (last visited Feb 12. 2019), ("*Zelle* doesn't charge a fee to send or receive money.").

225. *See* Allison, *supra* note 223 ("It simply chooses to absorb these costs.").

226. *What Are the Fees for Paypal Accounts?*, PAYPAL, https://www.paypal.com/kh/selfhelp/article/what-are-the-fees-for-paypal-accounts-faq690 (last visited Feb. 12, 2018).

227. *See* Arthur Zaczkiewicz, *Data Analysis Shows Online Return Customers Account for 23% of Total Sales*, WWD (Apr. 15, 2016), http://wwd.com/business-news/retail/amazon-stitch-online-return-shoppers-spend-more-10411075/ ("Data Analysis Shows Online Return Customers Account for 23% of Total Sales").

228. Shep Hyken, *Sixty-Four Percent of U.S. Households Have Amazon Prime*, FORBES (June 17, 2017, 9:07 AM), https://www.forbes.com/sites/shephyken/2017/06/17/sixty-four-percent-of-u-s-households-have-amazon-prime/#6cd8311c4586.

class needs to make a further purchase in order to gain relief. In this way, such a distribution method would be akin to fluid recovery and would lead to similar objections to that potential solution.[229]

Furthermore, even if a cost-free remittance method were possible, there would still be instances where pro-rata distribution would not be possible because of the expense of the claims process. Technology has the capacity to lower the cost and increase the response rates of claim forms,[230] and in certain cases eliminates the need for a claims form. Already, ninety-nine percent of claims do not require proof; an affidavit will suffice,[231] especially for "class actions involving low-cost consumer products for which purchasers are unlikely to save receipts."[232] However, "[c]laims processes that are open to public always present a risk of fraud," and without a claim form, concerns about fraud increase greatly.[233] This is only exacerbated with the growth of technology. In fact, bots have already been used to submit fraudulent claims, in one instance 5,400 fraudulent claims were filed from the same IP address.[234]

Of course, bots could also be programmed to vote for certain charities. However, charities have strong disincentives from doing so: the risk of detection hurting the charity's reputation and other giving. Furthermore, there is no indication the risk of fraud is greater for vot-

229. See *supra* notes 57-60 and accompanying text. If such an approach were taken, and class counsel were not compensated for credits that required additional purchase to redeem, class counsel would be entirely disincentive from bringing such suits in the first place, undercutting the deterrent benefit of class actions. However, crediting a third-party account may be different. *See* Fitzpatrick & Gilbert, *supra* note 5, at 790-91 ("Although in many instances class members will not have active accounts with the defendants, they may, again, have them with third-parties, and there is nothing to prevent courts and counsel from crediting third-party accounts.").

230. *See* McGovern, *supra* note 4, at 125 (discussing the benefits of "electronic forms, web forms, pre-populated forms . . . and many others to reduce the burden of filing and claim processing").

231. *See* Kelly Tyko, *Want Free Money? Sign up for Class-Action Lawsuit Settlements*, USA TODAY (Sept. 8, 2017, 7:00 AM), https://www.usatoday.com/story/money/personalfinance/2017/09/08/want-free-money-sign-up-class-action-lawsuit-settlements/612795001/ ("The settlement administrators are dealing with tens of thousands, if not millions, of claims and 99% of people don't submit any proof at all," quoting Scott Hardy, founder and CEO of Top Class Actions).

232. *See* Alison Frankel, *3rd Circuit Appeal Throws Light on Shadowy Class Action Claims Process*, REUTERS (Oct. 8, 2013), http://blogs.reuters.com/alison-frankel/2013/10/08/3rd-circuit-appeal-throws-light-on-shadowy-class-action-claims-process/ (discussing that administrators also sometimes ask for information that will weed out fake claims).

233. Frankel, *supra* note 212.

234. *See id*. (discussing how bots are already helping commit fraud in the claims process and giving an example of 6,000 total out of 46,000 claims being fraudulently generated by bots).

ing. Voter fraud in political elections "is vanishingly rare, and does not happen on a scale even close to that necessary to "rig" an election,"[235] and while not a perfect analogy given the strong feelings surrounding politics, there is no reason to believe individuals would be any more likely to commit vote fraud for a charity. Thus, while there might be concerns about fraud in the voting mechanism as well, with fraudulent voting by those outside of the class, the risk of fraud is even greater when direct pecuniary gain is possible.

Furthermore, similar safeguards to those in political elections could easily be adopted. For instance, the cy pres voting mechanism could guard against fraud by applying the penalty of perjury, as the national voter registration form does.[236] States already use such penalties to deter in person voter fraud and could be applied to the cy pres voting mechanism.[237] A more stringent process than that may not even be effective. Voter ID laws, the political equivalent of a more thorough claims process, have had little impact in stopping the few ineligible votes that occur.[238] Finally, just as in political elections, a spot check could be conducted to ensure the integrity of the process.[239] The fact that the voting is online, and not in paper, does not increase the chances of fraud. Online voting in political elections has already been

235. BRENNAN CTR. FOR JUSTICE, DEBUNKING THE VOTER FRAUD MYTH (2017), https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Debunking_Voter_Fraud_Myth.pdf (finding only six cases out of 84 million votes analyzed, 0.00000017 percent fraud rate.). *But see* Kelly Riddell, Opinion, *No Voter Fraud Isn't a Myth: 10 Cases Where It's All Too Real*, WASH. TIMES (Oct. 17, 2016), https://www.washingtontimes.com/news/2016/oct/17/no-voter-fraud-isnt-myth-10-cases-where-its-all-to/ (noting examples of voter fraud); Alan Blinder, *North Carolina Operative Indicted in Connection with Election Fraud*, N.Y. TIMES (Feb. 27, 2019), https://www.nytimes.com/2019/02/27/us/mcrae-dowless-indicted.html (reporting on fraud in North Carolina's 9th Congressional District as a 'rare instance of election fraud').

236. Carmen Hicks, *What's the Matter with Kansas and the National Voter Registration Form*, HARV. J. ON LEG. ONLINE (July 26, 2016), http://harvardjol.com/2016/07/26/whats-the-matter-with-kansas-and-the-national-voter-registration-form/#_ftnref16 (discussing state's acceptance of the national voter registration form).

237. *See, e.g.*, CONN. GEN. STAT. § 9-360 (2006) (criminal penalty for voting when not qualified or for voting more than once is a fine of $300 to $500 and one to two years in prison).

238. Editorial, *Now We Finally Know How Bad Voter Fraud Is in North Carolina*, CHARLOTTE OBSERVER (Apr. 24, 2017 5:52 PM), http://www.charlotteobserver.com/opinion/editorials/article146486019.html (discussing an audit by the State Board of Elections that found one vote out of 4.8 million would have been stopped with voter ID).

239. Bev Harris, *Audits or Fraudits*, BLACKBOXVOTING.ORG (Nov. 18, 2016), http://blackboxvoting.org/audits-or-fraudits/ (arguing that a spot check cannot prove an election was sound or that its results were accurate).

adopted without increased fraud.[240] Furthermore, online payments are now safer that offline payments,[241] and identity theft, similar in action to claiming to be a class member when one is not, is "more prevalent offline than online."[242] Thus, while technology may shrink the value of the remaining funds dilemma, cy pres is still needed to resolve that dilemma.

CONCLUSION

As the Supreme Court prepares to evaluate the cy pres doctrine, it is important to keep in mind that cy pres serves a valuable role in encouraging both the deterrence and compensation functions of the class action. While judges, scholars, and commentators have raised concerns that cy pres does not provide compensation to every class member and produces concerns about the loyalty of class counsel, these concerns are answered by introducing class member voting to cy pres distributions. The voting system proposed in this Article is firmly rooted in the theory dominating the modern class action and guarantees class members both voice and exit, while also helping to ensure loyalty. The remaining funds dilemma will always exist for class actions, but modern technology has created the opportunity for judges to introduce voting rights for class members into the cy pres mechanism, and they should do so. Should the Supreme Court hold that the existing cy pres model cannot be used for settlements where no compensation is given to class members, the proposed voting mechanism presents a reform that would maintain the deterrent effects of those class actions by making it possible for settlements to occur when distribution is not possible while compensating class members.

240. Though not in the United States. Estonia for example has used electronic voting for years, and there are no allegations of increased voter fraud which there surely would be. *See* ANDREW BARNES, CHRISTOPHER BRAKE & THOMAS PERRY, DIGITAL VOTING WITH THE USE OF BLOCKCHAIN TECHNOLOGY, https://www.economist.com/sites/default/files/plymouth.pdf.

241. Marc Summe, *Have Online Payments Become Safer Than Offline?*, WIRED https://www.wired.com/insights/2014/12/have-online-payments-become-safer-than-offline/ (last visited Feb. 2, 2017) (asking about credit card transactions and favorably commenting on the safety of online payments).

242. *Identity Theft More Prevalent Offline Than Online*, ACCOUNTING WEB (Feb. 1, 2005), https://www.accountingweb.com/aa/law-and-enforcement/identity-theft-more-prevalent-offline-than-online.