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COMMENT

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MODERNIZING CLASS ACTION CY PRES THROUGH  
DEMOCRATIC INPUTS: A RETURN TO  
*CY PRES COMME POSSIBLE*

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## INTRODUCTION

*“When selection of cy pres beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self interests of the parties, their counsel, or the court.”*

– Judge N. Randy Smith<sup>1</sup>

Forty-five years ago, the ancient doctrine of “cy pres” was lifted from the pages of trust law and applied, for the first time, to the class action context. Cy pres stood for the proposition that, when the explicit purpose of a charitable trust became impossible, the court should look to the testator’s<sup>2</sup> intent and apply the trust to its next best use. In the class action context, cy pres was an equitable “patch” necessitated by the expanding scope of the class action mechanism at the state and federal levels. Generally, the concept has come to mean that when distributing damages to an individual class member is impossible or impractical, the court should use those damages for the benefit of the class at large.

However, the current class action litigation system does not consistently follow this standard. Cy pres awards lack the procedural and adversarial protections needed to ensure their fairness and accuracy. Courts, even when trying to apply cy pres for the benefit of the member class, are poorly suited to decide how best to benefit the class. And, unfortunately, cy pres awards are all too often diverted to general charity or directed to charitable projects of interest to the judge or lawyers involved in the case. These outcomes deprive class members of the benefits of their suit and cast a pallor of impropriety on the class action mechanism.

Fortunately, a remedy exists and can be deployed discretionarily without legislation or amendment to the Federal Rules. Because cy pres aims to approximate the benefit that individual damages would provide to class members, courts should ask the class how best to utilize cy pres awards. Through a crowdsourced, democratic voting process, courts could seek the

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<sup>1</sup> *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011).

<sup>2</sup> “One who makes or has made a testament or will; one who dies leaving a will.” BLACK’S LAW DICTIONARY 1475 (6th ed. 1990).

input of identified class members at low marginal cost. This mechanism would add a democratic element to the cy pres process and largely obviate potential or perceived ethical violations. Moreover, it would improve judicial accuracy in awarding cy pres funds, enabling more of their compensatory value to flow to the injured class. This proposal modernizes class action cy pres while honoring its ancient origins by returning to cy pres's core goal: adhering as closely as possible to the intended outcome.

## I. INCORPORATING CY PRES INTO THE CLASS ACTION

### A. *Cy Pres in Trust Law*

Although legal historians dispute the origins of the term,<sup>3</sup> the principle of cy pres can be traced back at least as far as the sixth-century Roman Empire.<sup>4</sup> The close relation between law and religion during the Middle Ages, especially at the time of death, likely gave rise to cy pres in English law.<sup>5</sup> In medieval England, the deceased's estate was commonly divided, with one third ("the dead's part") applied by the administrators "for the good of his soul in such pious works as they shall think best according to God and good conscience."<sup>6</sup> The courts recognized that the public benefit of charitable acts, and the value to the testator's soul, would be lost if such charitable donations reverted to the heirs when the gift intended could not be completed.<sup>7</sup> To avoid this outcome, the courts would rededicate the gift

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<sup>3</sup> It has been theorized that the phrase "cy pres" has its origins in the Norman French "*cy pres comme possible*" ("as near as possible"), EDITH L. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES 1 (1950), or the Anglo French "*si-près*" ("so near" or "as near"), *Cypres*, OXFORD ENG. DICTIONARY, <http://www.oed.com/view/Entry/46668> (last visited Mar. 21, 2015), *archived at* <http://perma.cc/A5TX-R2YQ>. Alternatively, the term may well have originated independently in Law-French. See L. A. SHERIDAN & V. T. H. DELANY, THE CY-PRES DOCTRINE 5 (1959) (noting the difficulty of determining the meaning of the phrase in Anglo-Norman Law-French).

<sup>4</sup> In a case that appears in the *Digest of Justinian*, the Roman courts were confronted with a legacy left to a city for the purpose of preserving the donor's memory through yearly games, which had since been rendered illegal. The jurist Modestinus, recognizing that allowing the funds to revert to the heirs would be unjust, instead proposed that "an investigation be made to ascertain how the trust may be employed so that the memory of the deceased may be preserved in some other and lawful manner." SHERIDAN & DELANY, *supra* note 3, at 7-8 (citing DIG. 33.2.16 (Modestinus, Responsorum 9)).

<sup>5</sup> See Hamish Gray, *The History and Development in England of the Cy-Près Principle in Charities*, 33 B.U. L. REV. 30, 32-33 (1953) (noting the close association between the last will and the last confession, the Ordinary's role in administering the estates of the deceased, and the church's role as the dominant recipient of charity).

<sup>6</sup> *Id.* at 33 (quoting 4 RICHARD DE KELLAWE, REGISTRUM PALATINUM DUNELMENSE 369 (Thomas Duffus Hardy ed., London, Longman & Co. 1878)).

<sup>7</sup> *Id.* at 34-35. It has been hypothesized that the rise of cy pres was a result of "piety and greed," because the chancellor simultaneously served as a church official and thus had the "twin

to an alternative use in line with the donor's intentions. These early principles of cy pres were adopted and codified in the Statute of Charitable Uses,<sup>8</sup> a broad statute with "such medicinal qualities in it, as to heal every imperfection in a charitable disposition, provided the party had a legal capacity to give at all."<sup>9</sup>

In England, cy pres took on two distinct forms: judicial cy pres and prerogative cy pres. While judicial cy pres arose from the king's equitable powers, prerogative cy pres originated in the king's protective powers over his subjects as "parens patriae" (or "parent of the nation"), making him the constitutional trustee of all gifts devoted to the public or to "charity" generally.<sup>10</sup> With time, these prerogative powers transferred to the chancellor as proxy for the king, while the judicial cy pres powers simultaneously resided in the chancellor in his judicial capacity.<sup>11</sup> The chancellor's judicial cy pres powers eventually became part of the Chancery Court's inherent jurisdiction.<sup>12</sup> The remainder, in the form of prerogative cy pres, were retained by the crown.<sup>13</sup>

Judicial cy pres evolved as an "intent-enforcing doctrine"; the chancellor or the courts could act only when the donor manifested a specific charitable intention that could be effectuated.<sup>14</sup> The crown retained its prerogative cy pres powers in situations when the testator's intent was too broad to guide the courts, such as gifts to "charity" generally or when the testator's intent was illegal.<sup>15</sup> Although multiple theories abound as to why these specific powers were retained, the best explanation is that illegal donations revert to

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incentives of saving the person's soul *and* keeping the funds within the church." Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 626 (2010).

<sup>8</sup> The Charitable Uses Act, 1601, 43 Eliz. I, c. 4 (Eng.), reprinted in GARETH JONES, HISTORY OF THE LAW OF CHARITY 1532–1827, at 224–28 (1969).

<sup>9</sup> Attorney Gen. v. Downing, (1767) 97 Eng. Rep. 1 (K.B.) 5; Wilm. 1, 11.

<sup>10</sup> *A Reevaluation of Cy Pres*, 49 YALE L.J. 303, 304 (1939). This power thus rested at the heart of the powers that became modern equity jurisprudence.

<sup>11</sup> See *id.* (describing the historical evolution of cy pres powers in English jurisprudence).

<sup>12</sup> See SHERIDAN & DELANY, *supra* note 3, at 10 (stating that "their rules in this matter were taken over by the Court of Chancery").

<sup>13</sup> See *A Reevaluation of Cy Pres*, *supra* note 10, at 304 ("[C]y pres could still be exercised only by the crown . . . where a gift was void for being devoted to a purpose illegal or contrary to public policy, or where a gift was made to charity generally.").

<sup>14</sup> *Id.* at 305.

<sup>15</sup> *Id.* at 304–05; see also FISCH, *supra* note 3, at 57 ("The Crown . . . retained the power to designate a charitable purpose . . . where the object of the gift was illegal or void as contrary to public policy, and where a gift was made to charity generally without the interposition of a trustee.").

a broad charitable intent, which is the core of prerogative cy pres.<sup>16</sup> When such a general charitable intent existed, the king (as *parens patriae*) was better situated than a court to decide how the gift could best serve the public good. Prerogative cy pres thus operated at the crown's discretion, "without regard for the donor's intended purpose."<sup>17</sup>

The United States was slow to adopt cy pres principles. The colonists feared that prerogative cy pres would trump individual rights<sup>18</sup> and confused prerogative and judicial cy pres because the English case law did not distinguish between the two.<sup>19</sup> They therefore feared that the principle's adoption would vest too much power in the judiciary, allowing judicial efficiency to override the testator's intent.<sup>20</sup> Early American decisions also confused the legal status of cy pres, mistakenly concluding that it was not part of the common law prior to its codification.<sup>21</sup> Despite this initial reluctance, many states later affirmed the use of cy pres by the courts, and

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<sup>16</sup> *A Reevaluation of Cy Pres*, *supra* note 10, at 304 ("[W]hen a gift . . . was declared void, there remained only the broad charitable intent which characterizes a general gift to charity."). It has also been posited that the retention of crown jurisdiction over illegal gifts resulted from the overwhelmingly political nature of such gifts, the majority of which were illegal because they involved donations to religious orders other than the Church of England. *Id.*

<sup>17</sup> *Id.* at 305. An excellent illustration of the prerogative power can be found in *Da Costa v. De Pas*, (1754) 27 Eng. Rep. (Ch.) 150; Amb. 228, 228, wherein the decedent left assets for the establishment of a yeshiva in England. At that time, no gift could be given to any religious institution other than the Church of England, rendering the gift impossible by illegality. *Id.*; Amb. 228. The chancellor, as the king's proxy, saved the charitable intent of the gift—but not the donor's sectarian intent—by donating the gift to a foundling hospital for the purpose of instructing boys in the Christian religion. *Id.* at 152; Amb. 228.

<sup>18</sup> See FISCH, *supra* note 3, at 60-61 ("Such far fetched and arbitrary applications of the prerogative cy pres prejudiced some of the American courts against the application of cy pres in any form . . ."). Even contemporary English judges were wary of the doctrine. Chief Justice Lord Kenyon, in the 1801 case of *Brudenell v. Elwes*, cautioned that "[t]he doctrine of cy pres goes to the utmost verge of the law, even in the construction of wills; and we must take care that it does not run wild." (1801) 102 Eng. Rep. 171 (K.B.) 174; 1 East, 442, 451.

<sup>19</sup> See FISCH, *supra* note 3, at 56-57 (explaining that confusion resulted from the chancellor's failure to distinguish between prerogative and judicial cy pres).

<sup>20</sup> See *id.* at 60 (discussing America's unease in adopting cy pres based on England's "unrestricted application of the prerogative power sometimes result[ing] in donating . . . property to purposes which were not in accord with the desires of the donor").

<sup>21</sup> See *id.* at 9-12 (noting the misconception among American courts that jurisdiction over charitable trusts derived solely from an English statute that the colonial legislatures had repealed); see also *Trs. of the Phila. Baptist Ass'n v. Hart's Ex'rs*, 17 U.S. (4 Wheat.) 1, 7 (1819) ("[T]he Court of Chancery in England exercises [cy pres] solely in virtue of the statute of the 43d Eliz. All ancient precedents of the exercise of such powers, to effect such charitable uses, are expressly stated to be founded on that statute.").

judicial cy pres has since been codified in an overwhelming majority of states.<sup>22</sup>

### B. *Importing Cy Pres into Class Actions*

Throughout its extensive history and into the twentieth century, the concept of cy pres was limited to the law of trust and estates. There was no need to invoke cy pres in the remedies context because the existing legal structure did not allow for many situations in which damages could arise without a clear recipient. The framework, however, shifted dramatically in the 1960s. At the federal level, Federal Rule of Civil Procedure 23 was revised to expand the class action mechanism.<sup>23</sup> The expanded rule allowed the inclusion of absent class members in mandatory class actions.<sup>24</sup> The amendments thus enabled substantial funds to remain unclaimed, either because the class members were too difficult to identify, the administrative costs of reaching the individual class members were prohibitively burdensome, or the class members failed to receive or respond to notifications of their inclusion in the class award.<sup>25</sup> At the state level, courts have also grappled with whether to allow and how to conduct class actions on behalf of unidentifiable injured parties.<sup>26</sup>

One of the many academic works inspired by this shift was a comment by University of Chicago law student Stewart R. Shepherd, which proposed using the cy pres doctrine to guide the distribution of unclaimed class action damages.<sup>27</sup> Shepherd argued that “[w]hen distribution problems arise . . . , courts may seek to apply their own version of cy pres by effectuating as closely as possible the intent of the legislature in providing the legal

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<sup>22</sup> See Redish, *supra* note 7, at 628 & n.59 (“Currently forty-six states and the District of Columbia have codified judicial cy pres.”).

<sup>23</sup> See FED. R. CIV. P. 23 advisory committee’s notes to the 1966 amendments (summarizing the intended solutions to the problems with the earlier versions of the class action rules).

<sup>24</sup> See FED. R. CIV. P. 23(b)(1)(B).

<sup>25</sup> It was already possible for class actions to result in unexpected remainders after distributions had been completed as a result of unresponsive class members or interest accrued during litigation, but the changes to Rule 23 greatly increased the likelihood of unclaimed funds remaining at the end of a class action. For further discussion of the reasons that class action litigation may result in unclaimed funds, see Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. (forthcoming 2015) (manuscript at 7-10), available at <http://ssrn.com/abstract=2413951>.

<sup>26</sup> See, e.g., *Daar v. Yellow Cab Co.*, 433 P.2d 732, 736, 747 (Cal. 1967) (en banc) (allowing a class action to proceed on behalf of all of the patrons who used a Los Angeles taxicab company within a four year time period).

<sup>27</sup> See Stewart R. Shepherd, Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 452 (1972) (“This procedure of finding a next-best recipient for [unclaimed class action] funds is analogous to the doctrine of cy pres.”).

remedies on which the main cause of action was based.”<sup>28</sup> This solution responded to the problems posed by class members’ failure to act, preserving the equity of the class action mechanism and the deterrent value of the damages.<sup>29</sup>

Shepherd proposed three forms of cy pres distribution: (1) redistribution of uncollected damages to collecting class members; (2) distribution to the state, unconditionally or with restrictions, to benefit the class; and (3) distribution through the free market.<sup>30</sup> Shepherd retained the cy pres doctrine’s core: each proposed alternative sought to find a “next best” means of compensating class members who could not be compensated directly.<sup>31</sup> It was, furthermore, heavily based on existing case law, rendering it as much an objective study as a theoretical exercise.<sup>32</sup> Nonetheless, Shepherd also allowed that “[a]s it becomes more difficult, or even impossible, to ascertain which alternate recipients the legislature would prefer, it may be appropriate to devote the funds to a broader public service in order to maximize the benefit to society.”<sup>33</sup> Later scholarship built on Shepherd’s work and extended his logic to justify the use of charitable trusts, sometimes in lieu of direct distributions.<sup>34</sup> Although critics contend that this line of scholarship led cy pres astray,<sup>35</sup> cy pres’s rapid growth and expansion more likely resulted from

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<sup>28</sup> *Id.*

<sup>29</sup> *See id.* at 448 (noting some of the problems that result when class members fail to collect their share of damages).

<sup>30</sup> *Id.* at 453-63.

<sup>31</sup> Redish, *supra* note 7, at 633.

<sup>32</sup> All of the mechanisms Shepherd described as cy pres were in fact already in use previously. *See* Jennifer Johnston, Comment, *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) (describing how, “[p]rior to the use of charitable cy pres, the residual funds often reverted back to the defendant or escheat to the state” as fluid recoveries); *see also, e.g.*, Shepherd, *supra* note 27, at 454 (finding that the state could claim the uncollected damages in a class action (citing *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972))); *id.* at 457 (“The concept of utilizing the state as a mechanism for damage distribution to the class as a whole . . . is not entirely new to the courts.” (citing *Mkt. St. Ry. Co. v. R.R. Comm’n*, 171 P.2d 875 (Cal. 1946))); *id.* at 458-60 (discussing a well known case suggesting a market distribution cy pres remedy (citing *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971), *rev’d*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974))).

<sup>33</sup> Shepherd, *supra* note 27, at 453.

<sup>34</sup> *See, e.g.*, Kerry Barnett, Note, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L.J. 1591, 1600 (1987) (favoring the use of equitable trusts as a cy pres mechanism for damages in small claim consumer class actions); Natalie A. DeJarlais, Note, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L.J. 729, 765 (1987) (arguing for the addition of the “consumer trust fund” to other established forms of cy pres and calling it “the best method of achieving the ultimate goals of the cy pres doctrine”).

<sup>35</sup> Martin Redish argues that after these notes, cy pres “was no longer focused wholly on finding an alternative means of indirectly compensating victims who could not feasibly be

the realities of judicial administration and the difficulty of crafting accurate, effective cy pres remedies.<sup>36</sup>

### C. Judicial Importation of Cy Pres

The courts quickly adopted cy pres in class actions. The earliest nominal use came in 1974 in a shareholder suit against the Baldwin-Lima-Hamilton Corporation (BLH).<sup>37</sup> The court, “applying a variant of the cy pres doctrine at common law,” and finding no contrary precedent, approved a class settlement that paid the settlement fund to the Trustees of the BLH Retirement Plan, concluding that the modest size of the settlement fund and the large number of outstanding shares rendered direct compensation of the impacted shareholders unviable.<sup>38</sup> Since then, cy pres has become commonplace in class actions. Although individual applications of the doctrine may be challenged on their facts, the doctrine’s use has become routine for state and federal courts.<sup>39</sup>

In the class action context, the cy pres nearness requirement has been interpreted in a number of ways. As Stewart Shepherd originally conceived class action cy pres, the nearness requirement was meant to effectuate the “intent of the legislature in providing the legal remedies on which the main cause of action was based.”<sup>40</sup> This intent, Shepherd recognized, usually would be “to compensate only the injured parties.”<sup>41</sup> Unsurprisingly, courts seeking to satisfy the nearness requirement often use approximations based on the compensatory value of damages or the notion of optimizing the

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compensated directly, but rather simply on seeking a beneficial use of the compensatory funds exacted from the defendant.” Redish, *supra* note 7, at 634.

<sup>36</sup> See Stephen B. Burbank et al., *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 23 (2012) (“In the four decades since 1970, the number of civil and criminal dispositions by the federal district courts has increased enormously.”).

<sup>37</sup> Redish, *supra* note 7, at 635.

<sup>38</sup> *Miller v. Steinbach*, No. 66 Civ. 356, 1974 WL 350, at \*1-2 (S.D.N.Y. Jan. 3, 1974).

<sup>39</sup> Anthony J. Anscombe, *Cy Pres: ‘As Close As Possible’ Is Not Good Enough*, LAW360 (Oct. 7, 2013, 12:25 PM), <http://www.law360.com/articles/478314/cy-pres-as-close-as-possible-is-not-good-enough>, archived at <http://perma.cc/JB4W-SX99> (“[C]y pres is routinely invoked by courts and counsel to redirect money to charities when class members do not claim it.”).

<sup>40</sup> Shepherd, *supra* note 27, at 452.

<sup>41</sup> *Id.* But see AM. LAW. INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07(c) (2009) (recognizing that the interests of a cy pres recipient should “reasonably approximate those being pursued by the class”). The ALI approach implies that the proper focus for the nearness inquiry should be on the nature of the harm and not the compensatory value of damages.

benefit to the entire class.<sup>42</sup> In the current system, pursuing nearness is not an absolute. When benefit to the class becomes unattainable, Shepherd argued, it could “be appropriate to devote [cy pres] funds to a broader public service in order to maximize the benefit to society.”<sup>43</sup> Numerous courts have adopted this reasoning, applying the nearness requirement less rigidly when the nature of the harm or the passage of time complicates its application.<sup>44</sup>

Courts have also standardized the nearness requirement in a four part test considering (1) the objectives of the underlying statute, (2) the nature of the underlying suit, (3) the interests of the class members, and (4) the geographic scope of the case.<sup>45</sup> Yet, this analysis is sufficiently vague to facilitate multiple interpretations of the nearness requirement.<sup>46</sup> Thus, despite the nearness requirement and contrary guidance,<sup>47</sup> some courts have even awarded cy pres when distribution of individual damages was not entirely foreclosed.<sup>48</sup> Judge Jan E. DuBois, describing current cy pres practice, observed that:

In applying the *cy pres* doctrine to distribute remaining class funds, many courts choose charitable organizations based on consideration of whether

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<sup>42</sup> See, e.g., *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (“To ensure that the settlement retains some connection to the plaintiff class and the underlying claims, however, a *cy pres* award must qualify as ‘the next best distribution’ to giving the funds directly to class members.” (citation omitted)).

<sup>43</sup> Shepherd, *supra* note 27, at 453.

<sup>44</sup> See, e.g., *Jones v. Nat’l Distillers*, 56 F. Supp. 2d 355, 357 (S.D.N.Y. 1999) (“Distribution of th[e] fund residue outside the class thus is entirely proper, so long as the choice of recipient is appropriate under the circumstances.”); *Superior Beverage Co. v. Owens-Illinois, Inc.*, 827 F. Supp. 477, 479 (N.D. Ill. 1993) (“[W]hile use of funds for purposes closely related to their origin is still the best *cy pres* application, the doctrine of *cy pres* and courts’ broad equitable powers now permit use of funds for other public interest purposes by educational, charitable, and other public service organizations . . . .”); 3 NEWBERG ON CLASS ACTIONS § 10.24 (4th ed. 2002) (“[W]here the parties have not agreed as part of a settlement for the disposition of . . . unclaimed balance, the court . . . may order the residual monies to be distributed to a use completely unrelated to the injured class members, such as to an educational institution, to a recognized charity or public service organization, or to the . . . government.” (footnotes omitted)).

<sup>45</sup> See *Schwartz v. Dall. Cowboys Football Club, Ltd.*, 362 F. Supp. 2d 574, 576 (E.D. Pa. 2005) (citing *In re Airline Ticket Comm’n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002)).

<sup>46</sup> See, e.g., *Diamond Chem. Co. v. Akzo Nobel Chems. B.V.*, Nos. 01-2118, 02-1018, 2007 WL 2007447, at \*1-2, \*4 (D.D.C. July 10, 2007) (applying the four part standard and approving a *cy pres* award in a chemical price-fixing case to the George Washington University School of Law in order to develop a Center for Competition Law, on the grounds that the Center would “benefit the plaintiff class and similarly situated parties by . . . protect[ing] them from future antitrust violations and violations of other competition laws” (citation omitted)).

<sup>47</sup> See AM. LAW INST., *supra* note 41, § 3.07(c) (allowing *cy pres* only when individual distributions are not viable).

<sup>48</sup> See, e.g., *infra* note 52.

the distribution furthers the objectives underlying the original lawsuit. Other courts, however, have expanded the *cy pres* doctrine to permit distributions to charitable organizations whether or not such organizations have any direct or indirect relationship to the specific law or subject matter of the litigation.<sup>49</sup>

Although some commentators allege that the courts “seem to feel no need to find a form of relief that will ultimately have the effect of indirectly compensating as-yet uncompensated class members,”<sup>50</sup> indirect compensation of uncompensated class members remains a key part of many courts’ *cy pres* standards.<sup>51</sup> Some courts have even recognized potential due process violations when the need to benefit the class as a whole is not sufficiently weighed.<sup>52</sup> Nonetheless, deviation from the nearness requirement occurs with sufficient frequency that one federal judge has warned that “in practice, *cy pres* remedies often stray far from the ‘next best use’ for the undistributed funds and turn courts into a grant giving institution doling out funds.”<sup>53</sup>

Courts employ various methods to determine where to direct *cy pres* distributions. Often, parties settling class actions identify proposed *cy pres* beneficiaries in the settlement agreement, subject to judicial approval.<sup>54</sup> When a recipient is not specified, courts often solicit proposed *cy pres*

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<sup>49</sup> *In re Linerboard Antitrust Litig.*, Nos. 98-5055, 99-1341, 2008 WL 4542669, at \*3 (E.D. Pa. Oct. 3, 2008) (citations omitted).

<sup>50</sup> Redish, *supra* note 7, at 634.

<sup>51</sup> See, e.g., Order on *Cy Pres* Provision of Settlement Agreement at 4, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. 00-1361 (D. Me. June 10, 2005), available at [http://www.med.uscourts.gov/Opinions/Hornby/MDL/MDL1361\\_2005\\_06\\_10\\_ORDER28.pdf](http://www.med.uscourts.gov/Opinions/Hornby/MDL/MDL1361_2005_06_10_ORDER28.pdf) (considering, inter alia, “the degree to which the *cy pres* proposal will benefit class members; the degree to which it will promote the purposes of the underlying cause of action that has been settled; [and] the minimization of administrative costs”).

<sup>52</sup> See, e.g., *Coppolino v. Total Call Int’l, Inc.*, 588 F. Supp. 2d 594, 605 n.6 (D.N.J. 2008) (speculating that a *cy pres* award to two churches and Pepperdine University raised due process concerns because “it is not clear how the donations . . . benefitted class members” and the defendant “has produced no findings of the Tennessee court that it would not be feasible to distribute the money to the class or otherwise use the money for a purpose that would benefit the class”).

<sup>53</sup> *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 414 (S.D.N.Y. 2009).

<sup>54</sup> See, e.g., *Miller v. Steinbach*, No. 66 Civ. 356, 1974 WL 350, at \*1 (S.D.N.Y. Jan. 3, 1974) (directing the funds from a securities class action by BLH shareholders to the Trustee of the BLH Retirement Plan); cf. *In re Janney Montgomery Scott LCC Fin. Consultant Litig.*, No. 06-3202, 2009 WL 2137224, at \*11 (E.D. Pa. July 16, 2009) (allowing the court to choose the *cy pres* recipient in a class action settlement from three potential beneficiaries identified by counsel); Order on *Cy Pres* Provision of Settlement Agreement, *supra* note 51, at 1-2 (allowing the *cy pres* distribution of any remaining funds at the court’s discretion).

recipients from counsel.<sup>55</sup> A few courts, seeking to eliminate potential biases and to ensure the best possible slate of recipients, publically advertise cy pres distributions and allow potential recipients to submit their own proposals.<sup>56</sup> Other courts, when faced with remainders, deposit the funds in the court registry for later distribution.<sup>57</sup> Some courts have even outsourced much of the legwork involved in cy pres by appointing special masters or cy pres committees to advise the court on the most appropriate recipient.<sup>58</sup> In all these mechanisms, however, the judge retains the ultimate power and obligation to decide on the proposed distributions. And although most courts require that potential cy pres beneficiaries have no relationship to counsel or the court,<sup>59</sup> others lack or do not enforce such provisions, facilitating ethically dubious cy pres awards.<sup>60</sup>

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<sup>55</sup> See, e.g., *In re Nortel Networks Corp. Sec. Litig.*, No. 01 Civ. 1855, 2010 WL 3431152, at \*7 (S.D.N.Y. Aug. 20, 2010) (inviting plaintiffs' counsel to submit at least six proposed cy pres recipients in line with the ALI Draft Principles of Aggregate Litigation); Order on *Cy Pres Provision of Settlement Agreement*, *supra* note 51, at 2 (considering four proposed cy pres recipients, three nominated by counsel and one nominated by an objector).

<sup>56</sup> See, e.g., *Superior Beverage Co. v. Owens-Illinois, Inc.*, 827 F. Supp. 477, 478 (N.D. Ill. 1993) (describing how the court, after publishing notice inviting applications for cy pres awards, held hearings with representatives of fifteen applicant organizations).

<sup>57</sup> In one noteworthy case, a federal judge held the remainder from a baby-formula price-fixing class action for five years before finally donating the majority of the remainder to the Red Cross's Hurricane Katrina relief efforts. *In re Infant Formula Multidistrict Litig.*, No. 91-878, 2005 WL 2211312, at \*2 (N.D. Fla. Sept. 8, 2005).

<sup>58</sup> For examples of the use of a special master, see *Bellows v. NCO Fin. Sys., Inc.*, No. 07-1413, 2009 WL 35466, at \*1 (S.D. Cal. Jan. 5, 2009), where the special master's report and recommendation proposed fifteen cy pres recipients, and Referral to Special Master for Development of Plan to Allocate and Distribute Settlement Proceeds at 2-3, *In re Holocaust Victim Assets Litig.*, No. 96-4849 (E.D.N.Y. Mar. 31, 1999), in which the settlement agreement required a special master to develop a court-approved plan of allocation and distribution. For an example of the use of a cy pres committee, see Order, *Turner v. Murphy Oil USA, Inc.*, No. 05-4206 (E.D. La. Sept. 18, 2009), where the court invited counsel to recommend committee members for a cy pres committee that was formed to make recommendations to the court on geographically related uses of remaining class funds. See also CAL. CONSUMER PROT. FOUND., FORUM ON THE CY PRES DOCTRINE 6 (2010) (recounting strong support for the use of professional administration of cy pres awards to provide a "fair, efficient process" while "relieving [the] burden on the court and attorneys"); BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, FED. JUDICIAL CTR., MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 33 (2009) (encouraging the use of special masters in complex class actions).

<sup>59</sup> See *infra* note 99 (presenting an example of a court rejecting a proposed cy pres award because counsel were interested in the beneficiaries).

<sup>60</sup> See generally *infra* Section II.C. According to congressional testimony, plaintiffs' lawyers and courts have directed cy pres awards to their alma maters and charities run by family members. *Examination of Litigation Abuses: Hearing Before the Subcomm. on the Constitution & Civil Justice of the H. Comm. on the Judiciary*, 113th Cong. 30-31 (2013) [hereinafter *Litigation Abuses*] (statement of Theodore H. Frank, Adjunct Fellow, Manhattan Institute for Legal Policy, President, Center for Class Action Fairness).

#### D. Academic Responses

Cy pres has largely been accepted as a necessary evil in the class action context. Cy pres is one of few mechanisms with the potential to benefit unidentified class members. Without cy pres or a similar doctrine, due process considerations might severely reduce the number of viable class actions.<sup>61</sup> Abandonment of class action cy pres would also leave the substantial question of what to do with leftover funds. The reversion of the remainder to the defendant would partially undermine the deterrent effect of the damages.<sup>62</sup> Escheat to the state offers a better resolution because it preserves the deterrent purposes of the underlying law; however, general escheat all but sacrifices the compensatory purpose of the underlying statute by diluting the benefit among the general population.<sup>63</sup> Reversion of the remainder to identified class members offers a better solution, although it leaves unidentified class members without any benefit and overcompensates participating class members with an undeserved windfall.<sup>64</sup> In light of these alternatives, courts routinely conclude that cy pres, even to general charity, is the only viable outcome.<sup>65</sup>

Despite cy pres's clear benefits, it also confronts serious and substantial criticism. Cy pres awards introduce nonparty actors into litigation, transforming "an adversar[ial] bilateral dispute . . . into a less-than-fully-adversarial trilateral process, wholly unknown to the adjudicatory structure

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<sup>61</sup> Shepherd, *supra* note 27, at 448-49. Alternatively, classes could be redefined to include only responsive class members, although this would undermine the value of the global peace that a class action can promise for defendants. *Id.* at 449-50.

<sup>62</sup> See AM. LAW INST., *supra* note 41, § 3.07 cmt. b (suggesting that returning remaining funds to the defendant "would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer").

<sup>63</sup> See *id.* (favoring cy pres awards to recipients whose interests benefit the class over general escheat, which benefits "all citizens equally, even those who were not harmed by the defendant's alleged conduct"); cf. *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 363 (3d Cir. 2010) (Weis, J., concurring and dissenting) (contending that "repayment to the government to defray some of the costs of the court system would be in the nature of a user fee"). But see Wasserman, *supra* note 25 (manuscript at 16) (questioning the equity of "imposing [the escheat] 'fee' on settling class members when no other litigants have to pay to have their claims adjudicated in court").

<sup>64</sup> This phenomenon could conceivably incentivize named plaintiffs to bring class actions in which the majority of the class would be unidentifiable in the hopes that the unidentified members' shares would be redirected to the identifiable class members. Shepherd, *supra* note 27, at 453 ("[T]he deficiencies of this method of distribution make it a generally unacceptable alternative."). But see AM. LAW INST., *supra* note 41, § 3.07 cmt. b ("[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.").

<sup>65</sup> Cf. *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting the denial of certiorari) (arguing the need for "an opportunity to address more fundamental concerns surrounding the use of [cy pres] in class action litigation, including when, if ever, such relief should be considered").

contemplated by Article III.”<sup>66</sup> Indeed, the prospect of a cy pres award can generate interested parties without the knowledge of counsel or the court.<sup>67</sup> Cy pres is also alleged to function as an “illegitimate transformation,” converting compensatory substantive law into the equivalent of a punitive civil fine, at least when cy pres is applied without regard to the benefit of the class.<sup>68</sup> And cy pres raises concerns about the due process rights of unrepresented class members. These concerns arise because class counsel receive the same compensation whether they distribute individual damages or secure a cy pres award and regardless of the cy pres distribution’s actual benefit to the class.<sup>69</sup>

Despite these flaws, no viable alternative to cy pres exists. Although some scholars have offered recommendations to improve the integrity of the cy pres process, existing proposals would impose significant transaction costs and depend on action by the Federal Rules Committee or Congress, rendering their enactment difficult.<sup>70</sup> Conversely, without cy pres, unidentified class members would receive neither damages nor benefits from the litigation that supposedly represents them. That outcome would only exacerbate due process concerns and undermine the class action litigation system. But more robust procedural standards to govern the cy pres process can mitigate, though perhaps not eliminate, many of these concerns.

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<sup>66</sup> Redish, *supra* note 7, at 641.

<sup>67</sup> Once a charitable entity becomes aware that it is being considered as a potential cy pres recipient, it has an incentive to attempt to intervene and influence the outcome in its favor.

<sup>68</sup> *Id.* at 644-48. Notably, Judge Richard Posner espoused this view in *Mirfasihi v. Fleet Mortgage Corp.*, explaining that

[i]n the class action context the reason for appealing to cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement . . . to the class members. There is no indirect benefit to the class from the defendant’s giving the money to someone else. In such a case the “cy pres” remedy . . . is purely punitive.

356 F.3d 781, 784 (7th Cir. 2004).

<sup>69</sup> Redish, *supra* note 7, at 650 (discussing the possibility of conflicts of interest for plaintiffs’ lawyers in cy pres award cases).

<sup>70</sup> Rhonda Wasserman, for instance, has offered a reform agenda based around four recommendations: (1) reducing attorneys’ fees presumptively in cases where cy pres distributions are made, (2) requiring disclosures from class counsel supporting the need for and propriety of cy pres distributions, (3) using devil’s advocates to ensure closer scrutiny of cy pres proposals, and (4) requiring courts to make written findings in their review of class action settlements including cy pres awards. Wasserman, *supra* note 25 (manuscript at 1-2). Professor Wasserman’s proposal, unlike this Comment, focuses on the interaction between courts and counsel and not on the interaction between courts and class members. Thus, while her proposal could improve the integrity of the process, it would not resolve the informational problems addressed herein.

## II. WHY CY PRES GETS IT WRONG

Courts and critics agree that something is wrong with class action cy pres as it is practiced today. Increasingly, courts have given substantial cy pres awards to charitable causes unconnected to the underlying suit that provide negligible benefits to the class. Such awards do not achieve the underlying goals of class action cy pres and they raise substantial questions of fairness. When courts award cy pres without considering legislative intent or benefit to the class, their actions come to resemble prerogative cy pres, a variant of cy pres with no basis in American law.

### A. Inequitable Outcomes

Modern cy pres often yields inequitable outcomes. Courts routinely award cy pres to organizations that have no rational ties to the underlying class action, with no expectation that the funds will benefit absent class members. Consider some common cy pres award recipients: bar foundations,<sup>71</sup> law schools,<sup>72</sup> law professors,<sup>73</sup> the National Association of Public Interest Law,<sup>74</sup> and other public interest law organizations.<sup>75</sup> Awards to

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<sup>71</sup> See, e.g., *In re Linerboard Antitrust Litig.*, Nos. 98-5055, 99-1341, 2008 WL 4542669, at \*5 (E.D. Pa. Oct. 3, 2008) (awarding the \$126,832.82 remainder in an antitrust case against the makers of cardboard box components to the Philadelphia Bar Foundation); *Nienaber v. Citibank* (S.D. N.A., No. 04-4054, 2007 WL 752297, at \*3 (D.S.D. Mar. 7, 2007) (distributing cy pres funds to the South Dakota Bar Foundation, the Minnesota Chapter of the Federal Bar Foundation, the Philadelphia Bar Foundation, the National Consumer Law Center, and the South Dakota Community Foundation); *In re Scouring Pads Antitrust Litig.*, No. 93 Civ. 6594, 1995 WL 290242, at \*2-3 (N.D. Ill. May 11, 1995) (awarding a \$50,000 cy pres distribution in an antitrust litigation to the nonprofit Illinois Lawyer's Assistance Program and over \$4000 to support a Chicago Bar Foundation symposium on Legal Services for the Poor).

<sup>72</sup> See, e.g., *Superior Beverage Co. v. Owens-Illinois, Inc.*, 827 F. Supp. 477, 481-83 (N.D. Ill. 1993) (awarding \$125,000 to the University of Illinois College of Law's Minority Access Program and \$750,000 to the Loyola University of Chicago School of Law to establish an Institute for Consumer Antitrust Studies); *In re Corrugated Container Antitrust Litig.*, M.D.L. 310, 53 Antitrust & Trade Reg. Rep. (BNA) 711 (S.D. Tex. Oct. 6, 1987) (awarding \$242,195.89 to both the University of Texas Law School Foundation and the University of Houston Law Foundation, \$103,062.07 to the Texas Tech University Law School Foundation, and \$61,837.25 to the Texas Southern University Foundation, Stanford Law School, and the University of Pennsylvania Law School for use "to teach advocacy skills, principles, and ethics" on the grounds that the awards "will immeasurably assist in the preparation of lawyers with expertise in complex consumer-oriented litigation").

<sup>73</sup> See, e.g., *Superior Beverage Co.*, 827 F. Supp. at 484-85 (providing a \$50,000 grant to two legal ethics professors proposing to develop "a series of short videos consisting, for the most part, of interviews with attorneys who have faced ethical dilemmas").

<sup>74</sup> See, e.g., *In re Folding Carton Antitrust Litig.*, No. MDL 250, 1991 WL 32867, at \*3 (N.D. Ill. Mar. 6, 1991) (awarding a multi-million dollar reserve fund to the National Association for Public Interest Law (NAPIL) for the creation of the National Public Interest Fellowship

medical and educational charities also occur frequently, are rarely relevant to the underlying suit, and are often local to the awarding court, even when the underlying class has a national scope.<sup>76</sup> Cy pres awards can even sometimes end up benefiting the defendant. Courts have granted cy pres awards to charities created, managed, or promoted by defendants,<sup>77</sup> and defendants can subsequently publicize cy pres awards as charitable giving without disclosing the reason behind the gift.<sup>78</sup> Even admirable awards, such as one judge's timely effort to use a cy pres award to support the Red Cross's Hurricane Katrina relief efforts, often confer no real benefit to the class.<sup>79</sup>

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Program); *see also Superior Beverage Co.*, 827 F. Supp. at 486-87 (awarding \$350,000 plus income held in trust to NAPIL's fellowship program, contingent on NAPIL raising an additional \$700,000 in the next year).

<sup>75</sup> *See, e.g., Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194, 2010 WL 4877852, at \*5-6 (S.D.N.Y. Nov. 30, 2010) (distributing \$23,500 cy pres awards to the Employee Rights Advocacy Institute for Law and Policy, the Impact Fund, and the National Women's Law Employment Project, among other recipients); *Rosenau v. Unifund Corp.*, 646 F. Supp. 2d 743, 748, 755 (E.D. Pa. 2009) (designating the Senior Law Center and Legal Aid of Southeastern Pennsylvania as the cy pres recipients of any unclaimed funds); *Parker v. Time Warner Entm't Co.*, 631 F. Supp. 2d 242, 250 (E.D.N.Y. 2009) (distributing cy pres awards of \$250,000 each to the Samuelson Law, Technology & Public Policy Clinic at Boalt Hall Law School and the Center for Democracy and Technology's Ronald Plesser Fellowship); *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1395-98 (N.D. Ga. 2001) (distributing \$250,000 cy pres awards from a NASCAR merchandise class action to nine charitable organizations, including the Atlanta Legal Aid Society, the Georgia Legal Services Program, and the Lawyers Foundation of Georgia).

<sup>76</sup> *See, e.g., Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d at 1395-98 (providing awards to the Make-A-Wish Foundation, the American Red Cross, Race Against Drugs, Children's Healthcare of Atlanta, Kids' Chance, Duke Children's Hospital and Health Center, and the Susan G. Komen Foundation).

<sup>77</sup> *See, e.g., Lane v. Facebook, Inc.*, 696 F.3d 811, 817, 820-22 (9th Cir. 2012) (affirming the award of \$6.5 million in a class action against Facebook for privacy violations in which individual distributions were not feasible to a newly created charity to be run by three named directors, including Facebook's own Director of Public Policy), *reh'g & reh'g en banc denied*, 709 F.3d 791 (9th Cir.), *cert. denied sub nom. Marek v. Lane*, 134 S. Ct. 8 (2013); *Park v. Thomson Corp.*, No. 05 Civ. 2931, 2008 WL 4684232, at \*1 (S.D.N.Y. Oct. 22, 2008) (proposing that the remainder in a class action alleging unfair pricing practices by BAR/BRI be used by BAR/BRI to establish a scholarship fund for lawyers entering public service); *Schwartz v. Dall. Cowboys Football Club, Ltd.*, 362 F. Supp. 2d 574, 577 (E.D. Pa. 2005) (awarding the \$436,000 remainder in a class action brought on behalf of purchasers of the NFL Sunday Ticket satellite TV package to the NFL's Youth Education Town Centers, youth centers sponsored and funded in large part by the NFL).

<sup>78</sup> *See SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) ("[C]y pres distributions often stray even further from the 'next best use' to a use that actually benefits the defendant rather than the plaintiffs. In general, defendants reap goodwill from the donation of monies to a good cause.").

<sup>79</sup> In the baby formula price-fixing case, for instance, the judge reasoned that

one of the challenges faced by rescue workers in the areas affected by Hurricane Katrina is providing essential food and drink to the victims of the storm. In fact, the provision of infant formula is one of the chief priorities of rescue officials. Thus, a donation to the American Red Cross, which coordinates the delivery of such essential products to

This is not to suggest that any of these causes are unworthy of charitable gifts; but it seems unlikely that they are the most relevant choice of potential cy pres recipients.<sup>80</sup>

If cy pres awards are meant to give effect to the legislative intent behind a cause of action by compensating the victims of wrongdoing, these cases represent failings of the doctrine. Although these awards may have broad societal impact, the benefit they confer on class members is *de minimis*. This outcome raises substantial equity concerns by transforming class actions into a tax which converts damages theoretically owed to individual plaintiffs into general societal benefit at the expense of the individuals' recovery.<sup>81</sup> And it affects the parties whose interests are least likely to be represented in the proceeding—those class members who are unaware of the litigation or are unable to represent their interests in court.<sup>82</sup>

### B. Courts Are Poorly Suited to Direct Cy Pres Awards

Even when courts try to apply the nearness standard, they are ill-suited to reach the correct result. In class action cy pres, the courts must answer two questions: (1) what is the cause of action's underlying legislative intent, and (2) what cy pres awards would best fulfill that intent. The first question is within the core competency of the judiciary and is simple to answer because the legislative purpose is almost always to make the injured parties whole. But the courts, as one federal judge put it, "are often not in the best position to choose a charitable organization that would best approximate the unpaid class members' interests."<sup>83</sup>

Class members, as a group, often have unique interests or preferences related to the criteria that bind them as a class. Judges, as outsiders to the class without special knowledge or expertise, are poorly equipped to determine what would best benefit unrepresented class members (short of receiving

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the victims of the hurricane, will be geared toward "combatting harms similar to those that injured the class members."

*In re* Infant Formula Multidistrict Litig., No. 91-878, 2005 WL 2211312, at \*3-4 (N.D. Fla. Sept. 8, 2005) (citations omitted).

<sup>80</sup> See Sam Yospe, Note, *Cy Pres Distributions in Class Action Settlements*, 2009 COLUM. BUS. L. REV. 1014, 1027 ("[I]t seems unlikely that legal aid societies are a strong choice [for cy pres awards], given the many worthwhile charitable organizations that exist.").

<sup>81</sup> This concern only exists when the alternative recovery, whether direct or in the form of an alternative cy pres recipient, would not itself be *de minimis* in nature.

<sup>82</sup> It is unreasonable to expect the named plaintiff to represent the interests of absent class members since their interests do not fully align (and may be adverse, if there is a potential of redistribution to identified class members).

<sup>83</sup> *Lane v. Page*, 862 F. Supp. 2d 1182, 1231 (D.N.M. 2012).

damages).<sup>84</sup> And even plaintiffs' attorneys, who usually speak for the class, cannot be fully trusted to do so in this context because their compensation is connected to the size—not the success—of any cy pres awards distributed.<sup>85</sup>

By way of example, consider *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, an antitrust case brought by CD purchasers alleging price fixing by the record industry.<sup>86</sup> The court, left with \$271,000 in excess funds, solicited proposals from the parties for possible cy pres recipients.<sup>87</sup> WKCR, Columbia University's FM radio station, received \$107,000 to furnish a studio with equipment to digitize Columbia's analog recording collection and subsequently distribute it online.<sup>88</sup> The court concluded that this proposal would benefit class members because "they can access these recordings and listen to them in a superior audio quality" and the proposal would promote the interest of the underlying cause of action by "preventing these funds from reverting to the defendants."<sup>89</sup> Of the remaining three proposals, all of which focused on music education, the court donated the remaining \$156,000 to support the National Guild of Community Schools of the Arts's development of a website to support local community schools of the arts.<sup>90</sup> The court, applying previously established criteria, found that "[c]lass members will indirectly benefit from the development of future musical artists, can participate in programming available to adults in their particular geographic area, and can benefit from performances at community arts schools."<sup>91</sup> The court considered only four options, proposed by class counsel and a single objector. Of those options, the court selected beneficiaries based on possible trickle-down benefits to class members. But the court did so without knowing the identities of class members, their ability to access a computer to listen to WKCR-FM's digitized music collection, or the likelihood that they would attend and enjoy Community School of the Arts performances. Courts can try to guess at best outcomes, but they will

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<sup>84</sup> Notably, to the author's knowledge, no court has ever sought to consult an expert witness in an effort to identify a cy pres award that would best serve the interests of the class.

<sup>85</sup> See Wasserman, *supra* note 25 (manuscript at 28-30) (explaining class counsel's incentives to pursue cy pres awards instead of maximizing distributions to class members).

<sup>86</sup> Order on *Cy Pres* Provision of Settlement Agreement, *supra* note 51, at 1.

<sup>87</sup> *Id.* at 1 & n.2. The proposed potential recipients included Jazz at Lincoln Center, the Music for Youth Foundation, the National Guild of Community Schools of the Arts, and radio station WKCR-FM of Columbia University. *Id.* at 1.

<sup>88</sup> Order on *Cy Pres* Distribution of Excess Settlement Funds at 2-4, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. 00-1361 (D. Me. Aug. 9, 2005), available at [http://www.med.uscourts.gov/Opinions/Hornby/MDL/MDL1361\\_2005\\_08\\_09\\_ORDER32.pdf](http://www.med.uscourts.gov/Opinions/Hornby/MDL/MDL1361_2005_08_09_ORDER32.pdf).

<sup>89</sup> *Id.* at 3.

<sup>90</sup> *Id.* at 5.

<sup>91</sup> *Id.* at 5-6.

ultimately rely on mere conjecture about what *might* be beneficial to class members.

These concerns about the qualifications of the court to determine what would “benefit the class” are especially troubling when it comes to geography. “Although many class actions are national in scope, . . . there is a tendency for charities located near the district in which the class action was filed to benefit disproportionately from *cy pres* distributions.”<sup>92</sup> Trial courts are inherently local. Judges can be expected to have some level of knowledge of the charities within their jurisdictions, but they cannot be aware of every charity from every jurisdiction in which class members reside.<sup>93</sup> As such, *cy pres* awards often favor local charities over geographically distant charities,<sup>94</sup> thereby disserving the interests of the class as a whole.

*Cy pres* also contains an intangible element. Individuals have preferences, even between two nearly identical outcomes. Such preferences, although trivial to the outside observer, may be nonetheless quite important to the individual.<sup>95</sup> This is especially true in the charitable context, in which the means used to attain an end can often be as important as the end itself.<sup>96</sup> Class members can receive both direct and indirect benefits from the organization selected. Therefore, selection of an organization disfavored by the class might lead to underutilization of the benefits provided. It is thus important, although admittedly difficult, for courts to consider the intangible preferences of class members in awarding *cy pres*.

Beyond problems predicting what would best benefit the class lies a deeper issue: courts are not institutionally competent to oversee charitable donations. As one judge cautioned,

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<sup>92</sup> Yospe, *supra* note 80, at 1030.

<sup>93</sup> This difficulty is compounded by the fact that cases distributed by the Judicial Panel on Multidistrict Litigation have the potential to end up before courts without significant local connections to the litigation.

<sup>94</sup> See, e.g., *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1395-99 (N.D. Ga. 2001) (awarding *cy pres* to ten organizations—seven of which were located in Georgia—in a class action involving merchandise sold nationwide).

<sup>95</sup> See Richard L. Oliver, *Whence Consumer Loyalty?*, 63 J. MARKETING 33, 38-39 (1999) (describing consumer preferences and brand loyalty as a “love-type” attachment of great personal importance to the individual consumer).

<sup>96</sup> Consider, for instance, the backlash in 2012 against the Susan G. Komen Foundation after it withdrew its funding for Planned Parenthood’s breast cancer screenings. Commentators predicted that supporters of the Foundation would withdraw their support not because they disagreed with the organization’s goals, but because they had come to disagree with the means it was using to pursue them. See Julie Rovner, *Planned Parenthood Vs. Komen: Women’s Health Giants Face Off Over Abortion*, NPR (Feb. 1, 2012, 6:13 PM), <http://www.npr.org/blogs/health/2012/02/01/146242621/planned-parenthood-vs-komen-womens-health-giants-face-off-over-abortion>, archived at <http://perma.cc/95GT-Y8WN> (discussing the dispute between the two organizations, its causes, and the possible repercussions).

[f]ederal judges are not generally equipped to be charitable foundations: we are not accountable to boards or members for funding decisions we make; we 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.<sup>97</sup>

Courts are designed to adjudicate conflicts, not to decide what uses of charitable funds would best benefit a class. The judiciary lacks the mechanisms to facilitate factual determinations about what uses would best benefit the class. What little knowledge and qualification a judge has to decide these questions is often cabined to his or her jurisdiction. And even if the mechanisms for this kind of searching inquiry did exist, courts would lack the time necessary to avail themselves of these resources. The courts simply are not designed to handle this kind of searching administrative judgment and long-term management. When they try to act in the capacity of a “charitable foundation,” they are flying blind.

### C. Ethical Dilemmas

Current class action cy pres excels in one area: creating the appearance of impropriety.<sup>98</sup> Some jurisdictions forbid cy pres awards to entities in which the court or counsel is interested,<sup>99</sup> but others do not.<sup>100</sup> And even in those that do ban such awards, limits on judicial resources and the defendants’

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<sup>97</sup> Yospe, *supra* note 80, at 1021-22 (quoting *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 236 F.R.D. 48, 53 (D. Me. 2006)).

<sup>98</sup> See *Litigation Abuses*, *supra* note 60, at 21 (statement of Theodore H. Frank, Adjunct Fellow, Manhattan Institute for Legal Policy, President, Center for Class Action Fairness) (describing class action cy pres distributions as “one of the leading ways to abuse the settlement process to create the illusion of class recovery while diverting the true bulk of the settlement to the attorneys”); see also *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 38 (1st Cir. 2012) (“[H]aving judges decide how to distribute cy pres awards both taxes judicial resources and risks creating the appearance of judicial impropriety.”).

<sup>99</sup> See AM. LAW INST., *supra* note 41, § 3.07 cmt. b (“A cy pres remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits.”); see also, e.g., *In re Linerboard Antitrust Litig.*, Nos. 98-5055, 99-1341, 2008 WL 4542669, at \*5 (E.D. Pa. Oct. 3, 2008) (rejecting cy pres awards to the Public Interest Law Center of Philadelphia and the Camden Center for Law and Social Justice because attorneys associated with the case served in leadership roles or had partners who served in leadership roles in those organizations).

<sup>100</sup> See *infra* notes 119-23 and accompanying text (discussing a state supreme court ruling that a trial judge could grant a cy pres award to an organization of which he was a member).

lack of incentive to challenge specific cy pres recipients mean that improper awards are unlikely to be detected.

Plaintiffs' attorneys have strong incentives to maximize cy pres awards. Cy pres awards count toward the total damages from which class counsel draw contingent fees, even in cases where the cy pres does not benefit the class members.<sup>101</sup> Thus, class counsel's financial interests become "isolated from her efforts to compensate individual class members" and "[t]he focus becomes maximizing the total award, rather than the amount that goes directly to the class members."<sup>102</sup> From the perspectives of speed and efficiency, class counsel have incentives to favor cy pres over distributions to class members. Class counsel also seek to appease the judges reviewing class settlements and in some cases can do so by providing the judge with cy pres distributions that the judge can guide to recipients of his or her choosing, even when it is not in the class's best interests.<sup>103</sup>

Courts are equally susceptible. Cy pres awards require fewer judicial resources than further attempts at distributions to class members. Furthermore, cy pres gives courts the rare opportunity to allocate funds to outside entities and to have an impact beyond the courtroom. The literature on judicial reasoning shows multiple avenues through which the possibility of awarding cy pres can influence judicial decisionmaking.<sup>104</sup> Judges should, of course, award cy pres neutrally, without letting their personal views color their approval of cy pres awards.<sup>105</sup> But whether due to overt intentions or subconscious biases, judges are not always able to do so,<sup>106</sup> and neither party has an interest in challenging a judge's decision to award cy pres, which inevitably hastens the end of litigation.<sup>107</sup> In light of the lack of checks on

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<sup>101</sup> See Redish, *supra* note 7, at 640 (noting that cy pres awards are included when calculating attorneys' fees).

<sup>102</sup> Johnston, *supra* note 32, at 290-91.

<sup>103</sup> See *id.* at 286-87 (examining how cy pres awards can influence judicial decisionmaking).

<sup>104</sup> See *id.* at 287-88 for a more robust discussion of how cy pres interacts with existing theories of judicial reasoning.

<sup>105</sup> See *id.* ("[A]n impartial or unbiased judge should never award a *cy pres* distribution or approve a settlement with a distribution based on his own preferences for a charity or organization . . .").

<sup>106</sup> Again, consider how many cy pres awards go to legal institutions. See, e.g., *supra* notes 71-75 and accompanying text (providing examples of distributions to bar foundations, law schools, law professors, and public interest organizations); see also Yospe, *supra* note 80, at 1027 (arguing that "donating to legal aid societies seems to indicate the preference of the judge and the lawyers involved in the settlement").

<sup>107</sup> Perhaps unsurprisingly, the strongest challenges to cy pres awards originate in legal advocacy organizations uninterested in the litigation, such as the Center for Class Action Fairness.

judicial discretion, the sheer volume of funds being distributed creates room for an “appearance of impropriety.”<sup>108</sup>

Beyond these susceptibilities, the sizeable funds involved in cy pres rewards, the lack of adversarial process, and the deference of appellate review afforded cy pres awards<sup>109</sup> have facilitated genuinely unethical conduct. Both counsel<sup>110</sup> and courts have used cy pres to benefit themselves, their families, and their preferred charitable causes (often their law schools).<sup>111</sup> Such conduct violates professional ethics, disserves the injured class, and fuels attacks on the class action mechanism more broadly.

#### D. Systematic Bias

Beyond individual influences, cy pres awards are also subject to systematic biases. Most courts do not publicly advertise potential cy pres distributions, advantaging groups and entities with the resources and legal acumen to monitor pending class action proceedings. Likewise, organizations with high

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<sup>108</sup> See *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) (“[W]hile courts and the parties may act with the best intentions, the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety.”).

<sup>109</sup> See *Yospe*, *supra* note 80, at 1037-41 (describing some of the “few reported cases in which the federal courts of appeals have reversed a district court’s cy pres decision”).

<sup>110</sup> In *Diamond Chemical Co. v. Akzo Nobel Chemicals B.V.*, 517 F. Supp. 2d 212, 215 (D.D.C. 2007), the lead plaintiff’s attorney sought a \$5.1 million cy pres award to the George Washington University Law School. In a subsequent ruling, the judge granted the award. *Diamond Chem. Co. v. Akzo Nobel Chems. B.V.*, Nos. 01-2118, 02-1018, 2007 WL 2007447, at \*5 (D.D.C. July 10, 2007). The attorney, an alumnus of the recipient law school, was subsequently awarded membership in the “L’Enfant Society,” the “most prestigious of [George Washington University]’s gift societies” for donors giving over \$5 million in recognition of his “instrumental” role in the award. *George Washington University Leadership Donors*, GEO. WASH. U., [http://development.gwu.edu/pdfs/2007donor\\_program.pdf](http://development.gwu.edu/pdfs/2007donor_program.pdf) (last visited Mar. 21, 2015), *archived at* <http://perma.cc/7QHM-DTM4>; see also Johnston, *supra* note 32, at 292-93 (same). In another notable case in the Northern District of California, class counsel steered the cy pres award to a charity run by his ex-wife. See *Litigation Abuses*, *supra* note 60, at 31 (statement of Theodore H. Frank, Adjunct Fellow, Manhattan Institute for Legal Policy, President, Center for Class Action Fairness) (describing this award in the context of a general discussion of the problematic nature of such awards).

<sup>111</sup> For example, Chattahoochee Circuit Superior Court Judge Douglas C. Pullen stepped down from the bench amid a Judicial Qualifications Commission probe of his cy pres practices. Pullen, in the course of his time on the bench, approved a record \$33.8 million in cy pres awards, many of which went to his alma mater, Mercer University, where he taught part-time. Jim Mustian & Chuck Williams, *Judge Doug Pullen’s ‘Gifts’: Records Reveal Judge Directed Millions to Mercer and Morehouse, Gained Recognition*, LEDGER-ENQUIRER (Aug. 21, 2011), [http://www.ledger-enquirer.com/2011/08/21/1701279\\_pullens-gifts-records-reveal-judge.html](http://www.ledger-enquirer.com/2011/08/21/1701279_pullens-gifts-records-reveal-judge.html), *archived at* <http://perma.cc/62MX-U5AH>. For another example, see Nathan Koppel, *Proposed Facebook Settlement Comes Under Fire*, WALL ST. J., Mar. 2, 2010, at B8, recounting how Judge Christina Snyder approved a \$25,000 cy pres award to a Los Angeles legal aid organization for which her husband was a board member.

numbers of lawyers invested in their financial stability have an upper hand. Unsurprisingly, law schools (especially those with antitrust programs), legal aid organizations, and bar foundations often manage to leverage cy pres awards.<sup>112</sup>

Against this backdrop, a market is forming around the leveraging of cy pres funds. As “the search for new funding sources . . . becomes ever more imperative” for charitable organizations, cy pres is becoming “a source of funding for public interest and legal services organizations whose work can be said to further the interests of the class.”<sup>113</sup> Many law firms tout their cy pres victories as public service<sup>114</sup> and many cy pres recipients recognize the generosity of the plaintiffs’ firms securing those awards.<sup>115</sup> Some public interest legal organizations now offer content advocating why they are an ideal choice for cy pres awards in an effort to win the support of plaintiffs’ lawyers and judges.<sup>116</sup>

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<sup>112</sup> For instance, more than twenty years after the successful mass tort litigation relating to the fire at the San Juan Dupont Plaza Hotel, the Animal Legal Defense Fund “became aware that there may be some unclaimed funds” and expressed that it would appreciate the court’s “consideration of us as a cy pres award of such funds.” *In re San Juan Dupont Plaza Hotel Fire Litig.*, 687 F. Supp. 2d 1, 4 ex. A (D.P.R. 2010). The court, desiring to put the funds to good use, donated the remaining unclaimed funds to the ALDF despite the lack of any relation to the underlying cause of action. *Id.* at 2-3.

<sup>113</sup> BRAD SELIGMAN & JOCELYN LARKIN, FLUID RECOVERY AND CY PRES: A FUNDING SOURCE FOR LEGAL SERVICES 1 (2011), available at <http://www.impactfund.org/downloads/Resources/CyPres2011.pdf>.

<sup>114</sup> See, e.g., OHIO LAW. GIVE BACK, <http://www.ohiolawyersgiveback.org> (last visited Mar. 21, 2015), archived at <http://perma.cc/6G6U-ULLY> (encouraging the use of cy pres to benefit Ohio’s charitable organizations and highlighting the cy pres victories of the sponsoring law firm).

<sup>115</sup> See, e.g., 2012–2013 *Cy Pres Firms*, LEGAL AID SOC’Y EMP. L. CENTER, <http://www.las-elc.org/supporters/cy-pres-firms> (last visited Mar. 21, 2015), archived at <http://perma.cc/58HE-DG5Z> (acknowledging law firms that designated or helped to secure cy pres distributions for the Legal Aid Society-Employment Law Center); *Firms Recommending Cy Pres Awards*, EQUAL JUST. WORKS, <http://www.equaljusticeworks.org/support-us/cy-pres/firms> (last visited Mar. 21, 2015), archived at <http://perma.cc/357D-B5CS> (acknowledging law firms recommending the Equal Justice Works as a cy pres recipient).

<sup>116</sup> See, e.g., ASIAN AMS. ADVANCING JUST. L.A., CY PRES AWARDS, available at [http://www.advancingjustice-la.org/sites/default/files/Advancing\\_Justice-LA\\_cy\\_pres\\_2014.pdf](http://www.advancingjustice-la.org/sites/default/files/Advancing_Justice-LA_cy_pres_2014.pdf) (providing an eighteen page pamphlet to support courts and counsel considering Advancing Justice for cy pres awards); *Cy Pres Awards*, INNER CITY L. CENTER, <http://www.innercitylaw.org/cy-pres-awards/> (last visited Mar. 21, 2015), archived at <http://perma.cc/P6BY-HCNX> (“Because Inner City Law Center provides a broad range of service, almost every class is touched by our services.”); *Designate KGACLC as a Cy Pres Recipient*, SANTA CLARA L., <http://law.scu.edu/kgaclc/designate-us-a-cy-pres-recipient/> (last visited Mar. 21, 2015), archived at <http://perma.cc/V6YU-5S5U> (explaining why the Alexander Community Law Center is an optimal recipient of cy pres funds).

Although some would disagree,<sup>117</sup> nothing is inherently wrong with potential cy pres recipients seeking to inform the court of their appropriateness as recipients of such awards.<sup>118</sup> Yet when organizations actively lobby courts and counsel outside the limited scope of a specific litigation, such behavior has the potential to divert cy pres awards away from more deserving recipients. These practices further entrench systematic bias, as the majority of charities engaging in these aggressive legal lobbying efforts are legal charities. Thus, when a cy pres recipient is needed, legal charities are best positioned to leverage the award. Were this simply an issue of raising funds for charity, such proactive strategies might be praiseworthy. But in the cy pres context, they deprive more deserving, less savvy groups of cy pres awards, regardless of which entity is best suited to satisfying the nearness requirement.

A particularly telling illustration of this systematic bias appears in *Adams v. CSX Railroads*.<sup>119</sup> In *Adams*, a case concerning harm caused by “train car leakage,” the trial court appointed a special master to consider possible cy pres awards to benefit the impacted community.<sup>120</sup> The special master’s recommendation included a ten percent distribution to the Louisiana Bar Foundation, of which the trial court judge was a member.<sup>121</sup> At the trial court’s request, the Louisiana Bar Foundation filed a post-trial memorandum addressing the propriety of an award to the Louisiana Bar Foundation in light of potentially conflicting Louisiana Supreme Court precedent.<sup>122</sup> When the court denied the award, the Louisiana Bar Foundation appealed, and the matter ultimately came before the Louisiana Supreme Court.<sup>123</sup> The Louisiana Bar Foundation’s legal acumen allowed it to fight for and ultimately receive a cy pres distribution that a less skilled organization might not have secured.<sup>124</sup> These systematic biases threaten to divert cy pres awards away from their most efficient possible uses and compound existing problems with current use of cy pres in class actions.

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<sup>117</sup> See, e.g., Johnston, *supra* note 32, at 294 (arguing that such behavior constitutes improper lobbying of the courts).

<sup>118</sup> One potentially redeeming aspect of such behavior is that it creates a pseudo-adversarial process, better informing the courts of the merits of potential recipients.

<sup>119</sup> 80 So. 3d 1160 (La. Ct. App. 2011).

<sup>120</sup> *Id.* at 1162.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Adams v. CSX R.Rs.*, 84 So. 3d 1289 (La. 2012).

<sup>124</sup> *Id.* at 1291 (holding that the trial judge could disburse cy pres funds to the Louisiana Bar Foundation without violating ethics rules).

E. *Legal Flaws*

Although many current flaws in cy pres rest in the inequitable process and outcomes caused by cy pres awards, the doctrine is also legally problematic. The modern application of class action cy pres, although in line with the limits of Shepherd's original proposal,<sup>125</sup> is nonetheless constitutionally infirm. American cy pres is based on the equitable doctrine of judicial cy pres, which allowed the courts to repurpose charitable trusts to give effect to the testator's clearly established intent. When a court applies cy pres ungoverned by a nearness requirement, its actions fall outside the historical bounds of judicial cy pres. The decisions described above are thus clear applications, in principle, of prerogative cy pres, a power based in the king's ability to act as *parens patriae*.<sup>126</sup> Prerogative cy pres cannot be delegated to the courts; the power to act as *parens patriae* lies with the sovereign and so vests in the executive and legislative functions of state government.<sup>127</sup> Although the states do have the power to expressly delegate portions of their *parens patriae* powers to the federal government,<sup>128</sup> the Supreme Court has expressly disclaimed the existence of prerogative powers in the

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<sup>125</sup> See *supra* note 43 and accompanying text (noting that Shepherd proposed cy pres distributions targeting "broader public service" only when "benefit to the class becomes unattainable").

<sup>126</sup> FISCH, *supra* note 3, at 56-57 (describing the commonly accepted theory concerning the origins of prerogative cy pres).

<sup>127</sup> See *Fontain v. Ravenel*, 58 U.S. (17 How.) 369, 384 (1854) ("[W]hen this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactment. The State, as a sovereign, is the *parens patriae*."); see also *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 58 (1890) (same); *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 576 (1867) ("[Prerogative cy pres] has never, so far as we know, been introduced into the practice of any court in this country; and, if it exists anywhere here, it is in the legislature of the Commonwealth as succeeding to the powers of the king as *parens patriae*. It certainly cannot be exercised by the judiciary of a state whose constitution declares that 'the judicial department shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.'" (citations omitted)); 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 509 n.b (5th ed. 1844) ("In this country, the legislature or government of the state, as *parens patriae*, has the right to enforce all charities of a public nature, by virtue of its general superintending authority over the public interests, where no other person is intrusted with it."). For similar state decisions locating the locus of prerogative powers in "the several states" or in "the people," see FISCH, *supra* note 3, at 58 n.55. This outcome is appealing from a policy perspective: the legislative and executive branches of government are uniquely competent to determine what potential use of charitable funds would best optimize societal benefit.

<sup>128</sup> *Fontain*, 58 U.S. (17 How.) at 384 (describing how, at the time of independence, the prerogatives of the crown were delegated to the "people of the States . . . except so far as they have delegated a portion of it to the federal government").

federal courts.<sup>129</sup> Just as the use of class action cy pres to benefit unidentified class members is not so far removed from judicial cy pres, the use of cy pres to benefit “the public at large” is not so far removed from prerogative cy pres. In light of the clear disfavor toward prerogative cy pres and judicial exercise of the *parens patriae* role existing within our constitutional framework, courts should be wary of distributing class action funds in this manner.

### III. TOWARD A DEMOCRATIC CY PRES

The current cy pres system suffers from significant flaws. The nearness analysis too often proves difficult or impossible for courts to perform adequately. Yet cy pres is vital to the current structure of class actions under Rule 23, and eliminating or restricting cy pres could cause more problems than it would solve.

So how should courts determine what cy pres awards to make? Courts should ask what awards would actually benefit the class. Of course, cy pres awards are predominantly used when the individual class members cannot be identified for compensation. But through the use of approximations—in the form of the identified class members or, for unidentifiable classes, similarly situated stand-ins who are likely class members—courts stand to gain valuable insights into what awards would be appropriate. Such guidance would reduce the need for untargeted “public good” cy pres awards, increase the fairness of the mechanism, and promote democratic values within the judicial process. By incorporating such guidance discretionarily, perhaps managed through a special master, courts would avoid the need for a formal change to the rules of procedure. A formal shift, however, might be desirable in the future if incorporating class input improves the equity and outcomes of cy pres distributions.

This proposal is supported by existing scholarship recognizing the potential benefits gained from involving lay citizens in the cy pres process.<sup>130</sup> This quasi-democratic mechanism would be beneficial in two distinct circumstances.

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<sup>129</sup> *Id.* (“The courts of the United States cannot exercise any equity powers, except those conferred by acts of congress, and those judicial powers which the high court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the formation of the constitution of the United States. Powers not judicial, exercised by the chancellor merely as the representative of the sovereign, and by virtue of the king’s prerogative as *parens patriae*, are not possessed by the circuit courts.”). See generally Thomas E. Blackwell, *The Charitable Corporation and the Charitable Trust*, 24 WASH. U. L.Q. 1 (1938) (discussing the care that charitable corporations should take when receiving “bequests and deeds of gift”).

<sup>130</sup> See Yospe, *supra* note 80, at 1055 (positing that the use of independent committees consisting of “a broad mix of society” and “plaintiff class counsel and defense counsel” to determine cy pres awards could substantially reduce bias problems).

The first is when a class action involves unidentifiable or unresponsive class members that cannot be reached by damages. The second is when, after the settlement of all class claims, an unexpected remainder is left in the class fund. These circumstances could be addressed in the same manner: by seeking the input of the entire identified class on how they would like the cy pres award distributed in light of the purpose of the award. For the reasons discussed in Part II, identified class members are in a far better position than courts to identify the interests of the class and to assign cy pres distributions to causes that would substantially benefit the class. Although the cy pres distributions in these two scenarios have different purposes (benefiting the unidentified class members and benefiting the class as a whole), these two purposes merge into one in practice, given that no cy pres award can be crafted to benefit only unidentified class members.

#### A. *Distributions to Substantially Identifiable Classes*

##### 1. Crowdsourcing

The optimal solution to the cy pres problem is for courts to adopt a crowdsourcing model. Crowdsourcing is “[t]he practice of obtaining information or services by soliciting input from a large number of people, typically via the Internet and often without offering compensation”<sup>131</sup> and has become a major driver behind innovation in the commercial and charitable sectors over the last decade.<sup>132</sup> By leveraging modern commercial

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<sup>131</sup> *Crowdsourcing*, OXFORD ENG. DICTIONARY, <http://www.oed.com/view/Entry/376403> (last visited Mar. 21, 2015), *archived at* <http://perma.cc/Q4ZA-FZCQ>. For a more robust definition, see Enrique Estellés-Arolas & Fernando González-Ladrón-de-Guevara, *Towards an Integrated Crowdsourcing Definition*, 38 J. INFO. SCI. 189, 197 (2012), which defines crowdsourcing as

a type of participative online activity in which an individual [or] an institution . . . proposes to a group of individuals of varying knowledge, heterogeneity, and number, via a flexible open call, the voluntary undertaking of a task. The undertaking of the task, of variable complexity and modularity, and in which the crowd should participate bringing their work, money, knowledge and/or experience, always entails mutual benefit. The user will receive the satisfaction of a given type of need, be it economic, social recognition, self-esteem, or the development of individual skills, while the crowdsourcer will obtain and utilize to their advantage what the user has brought to the venture, whose form will depend on the type of activity undertaken.

<sup>132</sup> For crowdsourcing that drives production decisions, see, for example, KICKSTARTER, <http://www.kickstarter.com> (last visited Mar. 21, 2015), *archived at* <http://perma.cc/TR5P-49BB>, which allows consumers to fund product ideas that they would like to see brought to market, and LEGO IDEAS, <http://ideas.lego.com> (last visited Mar. 21, 2015), *archived at* <http://perma.cc/KSH3-KX5F>, which allows Lego purchasers to vote for fan-created Lego sets that they would like to see enter production. For crowdsourced product design, see, for example, LOCAL MOTORS,

crowdsourcing solutions, courts could create a system in which identified class members could not only vote on possible recipients but also could actively propose new recipients.<sup>133</sup> The system could even be designed to allow potential recipients the chance to participate by sharing information about themselves and their projects once they had initially been recommended as recipients. Guidance on the purpose of the distribution (benefiting the class as a whole) could be provided as a preliminary step to gaining access to the crowdsourcing portal. Of course, because the process is discretionary, the judge would have the power to review the proposed distributions and to dismiss any that she found to be clearly inappropriate in light of the purposes of cy pres.

To minimize administrative costs, crowdsourcing materials could be included with the distribution of damages or the notice of potential membership in the class.<sup>134</sup> In such a scenario, the court would not need to know the dollar amount of the distribution in advance. Ranking preferred uses for the funds would provide the court with valuable information to guide the division of funds. High participation rates could be expected so long as an estimate of the possible remainder value was provided because the substantial value of such remainders would likely offset the indirect nature of the benefits in the minds of the class.

The crowdsourcing model would have substantial benefits over the current system of cy pres distributions. By placing the initial selection of cy pres beneficiaries in the hands of the class, which can identify recipients whose selection will benefit its members, the need for general cy pres awards is eliminated. Concerns about accuracy will also be eliminated because the majority of the class members are well positioned to make judgments about what is in their best interests. Perhaps most important, the role of judges

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<http://localmotors.com> (last visited Mar. 21, 2015), *archived at* <http://perma.cc/UV8L-E483>, which uses crowdsourcing to design limited-production vehicles. See also Steve Lohr, *Pentagon Pushes Crowdsourced Manufacturing*, N.Y. TIMES (Apr. 5, 2012, 3:15 PM), <http://bits.blogs.nytimes.com/2012/04/05/pentagon-pushes-crowdsourced-manufacturing>, *archived at* <http://perma.cc/XG4B-TQXY> (describing the Defense Advanced Research Projects Agency's plans to use crowdsourcing to develop military vehicles). For crowdsourcing in the charitable sector, see, for example, INDIEGOGO, <http://www.indiegogo.com> (last visited Mar. 21, 2015), *archived at* <http://perma.cc/N6EN-8K8N>, which allows individuals to fund nonprofit activities that they would like to see brought to fruition.

<sup>133</sup> Although crowdsourcing is traditionally conducted over the Internet, it could also be conducted through paper mailings by soliciting proposed recipients at the time of the initial class mailing and providing voting materials at the time of the distribution of damages.

<sup>134</sup> Although determining cy pres recipients at the same time of the initial distribution may seem premature, it is already common practice to determine cy pres recipients ex ante. Redish, *supra* note 7, at 657 (noting that in 120 documented cases, federal courts awarded thirty cy pres awards ex ante).

and lawyers in cy pres would be substantially reduced, minimizing the risks of bias and unethical conduct in cy pres awards.

## 2. Pure Voting

A simpler alternative to crowdsourcing is a straight voting model, where the class chooses from preselected potential beneficiaries. Pure voting could be conducted by paper ballot distributed along with communications to the class; thus pure voting would be even easier to implement than crowdsourcing. Proposed recipients could be generated by the parties or by public solicitation of interested recipients, as in *Superior Beverage Co. v. Owen-Illinois, Inc.*<sup>135</sup>

Straight voting would improve current practice, but it would not solve the identified problems with cy pres because ethical concerns remain. Although opening the selection of the slate to recipient organizations would minimize ethical concerns about judges and lawyers choosing their preferred organizations, voting would not remove concerns of bias. By cabining the class's ability to suggest recipients, the resulting award's accuracy would depend entirely on the quality of proposals suggested, leaving substantial room for error. And the systematic biases favoring legal aid organizations and organizations geographically close to the court would persist, although the class's role in approving the award would lead to greater public awareness, and therefore greater public discontent with such awards.

### B. *Distributions to Unidentifiable Classes*

The second circumstance in which courts apply cy pres—and the one with which they struggle the most—is when virtually the entire class except for the named plaintiffs is unidentifiable. In such a case, the only identifiable class members would likely be the class representatives. Yet there are still avenues for soliciting democratic input to aid in distributing cy pres. Existing scholarship favors incorporating lay citizens into court-formed cy pres committees to reduce the potential for perceived abuse.<sup>136</sup> Such a solution, however, would not impact the accuracy of cy pres awards. Lay citizens are in no better position, and may be in a worse position, than judges and lawyers to determine the recipients that would best benefit the

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<sup>135</sup> 827 F. Supp. 477, 478-87 (N.D. Ill. 1993) (describing how the court “invited applications for cy pres grants and for suggestions as to how such cy pres distributions should be made”).

<sup>136</sup> Yospe, *supra* note 80, at 1055 (“As long as the members of the committee are independent and composed from a broad mix of society (including non-lawyers), the bias problems should be greatly diminished.”).

class.<sup>137</sup> But in almost all cases with an unidentifiable class, the class remains generally predictable and thus, the court could implement a crowdsourcing or direct voting process using a subset of “likely class members.”<sup>138</sup> A reasonable sample of likely class members would conceivably be sufficient to reach an impartial, balanced outcome and to represent the diverse interests of the class. This sampling approach would also keep costs down because the costs of finding and involving representative individuals would be greater than those associated with identifiable classes.

Although a body of “likely class members” would not be truly representative of the class, it would be more representative and better able to reach accurate results than any of the existing cy pres designation mechanisms.<sup>139</sup> Given the need to limit the body to a reasonably sized sample, concerns would arise about ensuring adequate diversity, especially in the geographic context. Courts could mitigate these concerns through the use of a diverse sample pool or through judicial override in situations where awards are limited to narrow geographic scopes.

### C. *Benefits and Costs*

Given that these proposals would operate voluntarily, the ultimate award of cy pres would remain within the judge’s wisdom and discretion. That discretion, however, would be cabined by the proposals put forward. Although judges would retain the power to overturn suspect awards, they would likely feel obligated to justify such deviations from the class’s preferred beneficial use. This system would lead to better-supported cy pres decisions and might facilitate more thorough appellate review of cy pres awards. By implementing these proposals, courts would improve the accuracy of cy pres awards in light of their purpose of benefiting the class. These suggestions would also lessen the bite of the procedural concerns about cy pres raised by critics.

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<sup>137</sup> A contrary argument could be made that an individual selected at random is far more likely to share points of commonality with a class member than with a judge or lawyer in the vast majority of class actions.

<sup>138</sup> A “likely class member” is an individual who identifies as possessing the traits that define class membership but who cannot be definitively confirmed as a part of the class. For instance, in a class action over diaper price fixing by Brand X, a “likely class member” would be someone who routinely purchases Brand X diapers or someone who routinely purchases diapers similar to those sold by Brand X.

<sup>139</sup> Assume, *arguendo*, that the class in the *Compact Disc* litigation was unidentifiable. A “sample” composed of those who had recently bought CDs, even if they may not have purchased the CDs at issue, nonetheless would have been better qualified than the judge to determine the class’s interests, given the specialized perspective and expertise of the class members as music aficionados.

This proposal is not without drawbacks. Any democratic or crowdsourced decisionmaking risks an outside group leveraging class members' votes for improper purposes. However, those directing cy pres awards are already the subjects of substantial lobbying.<sup>140</sup> Even if class members were subject to lobbying efforts by potential cy pres recipients,<sup>141</sup> the exponentially larger pool of decisionmakers involved in a democratic award process would likely diffuse the impact of these efforts. The discretionary nature of this exercise and the necessity of ultimate judicial approval would enable judges to veto improper awards, although it is unclear whether judges would feel comfortable overriding democratic input absent incontrovertible proof of impropriety.

Another risk is that the class might be wrong. Individual, self-interested, and potentially irrational actors might not be the best judges of what would serve the needs of the class as a whole. This problem is exacerbated if the most effective cy pres remedy involves complicated mechanisms that are beyond the scope of the class's perception of "benefit." But if the question becomes whether cy pres should be based on ultimate effectiveness or on the desires of the class, the desires of the class should surely prevail because cy pres is supposed to benefit the class. Besides, "efficiency" of benefit has never been a substantial part of courts' cy pres analyses, and this proposal does not seek to alter courts' standards for approving cy pres.

Perhaps the greatest risk is poor participation. Without substantial participation, a democratic input process would lead to outcomes with many of the same flaws as the current system. The specter of poor participation is especially a concern in light of the generally low levels of class-member participation in class actions.<sup>142</sup>

But there are reasons to expect that such a democratic input system of narrow scope would have far better participation rates than class actions as a whole. Although many factors shape class member participation, a few are

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<sup>140</sup> See *supra* text accompanying notes 113-16 (discussing specific examples of how public interest organizations can leverage cy pres distributions).

<sup>141</sup> Such efforts are unlikely due to the substantial cost they would entail and the limited (and unpredictable) nature of cy pres awards.

<sup>142</sup> One study found that, on average, less than 1% of class members opt out and about one percent of class members object to classwide settlements. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1546-59 (2004). A Federal Judicial Center study similarly found that the median percentage of class members who opted out was below 0.2% of the total membership of the class. THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 10* (1996). The same study also found that class members attended less than 15% of settlement hearings. *Id.* at 56-57.

critical here, such as (1) inadequate notice of the action,<sup>143</sup> (2) structural disincentives to meaningful participation,<sup>144</sup> (3) the high costs of participation,<sup>145</sup> and, perhaps most importantly, (4) the perception that participation is irrelevant.<sup>146</sup> All of these factors discourage individual participation in class actions but are mitigated or avoided in the present proposal.

The proposed democratic input methods require no special expertise or experience. Crowdsourcing, whether through internet portal or mass mailing, is not an inherently complicated or nuanced concept. Notice could be delivered in plain language, and clear instructions would ensure that almost all class members could participate.<sup>147</sup> Furthermore, while intervention in a class action requires substantial investment in exchange for potentially limited payout, participation in these mechanisms requires only a brief time commitment, no legal expense,<sup>148</sup> and the promise of a fairly substantial payout.<sup>149</sup> Perhaps most significantly, crowdsourcing and voting have a

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<sup>143</sup> In one study, the majority of class action notices (1) did not clearly inform class members of the binding effect of the settlement, (2) did not inform class members with an opt-out right that they could opt out of the litigation, (3) did not inform class members that they had a right to appear through counsel, and (4) did not satisfy the clear and concise language requirement of Federal Rule of Civil Procedure 23. See Shannon R. Wheatman & Terri R. LeClercq, *Majority of Class Action Publication Notices Fail to Satisfy Rule 23 Requirements*, 30 REV. LITIG. 53, 58 (2010). Class counsel actually has incentive to avoid effective notice because it “is expensive, and will likely lead to the discovery of class member preferences or internal class conflicts that class counsel would rather ignore.” Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 80 (2003).

<sup>144</sup> See, e.g., Lahav, *supra* note 143, at 89 (“Objectors’ counsel have a perverse incentive to drop legitimate objections or soft-pedal them in order to obtain remuneration from the settlement because, to the extent that they are paid, objectors’ counsel only receive payment if a settlement is approved.”). Courts, fearful that objectors will use their leverage to hold the litigation for ransom, have also begun imposing substantial sanctions against objectors. See, e.g., *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 711 (7th Cir. 2001) (reviewing a \$50,000 sanction against objectors).

<sup>145</sup> Opt-out and intervention are unrealistic in small claims classes where pursuing independent litigation is unrealistic. Lahav, *supra* note 143, at 81. Even in class actions with substantial damages at issue, the cost of retaining counsel to intervene might not be worth the perceived benefits of intervention. See, e.g., Joshua P. Davis, Eric L. Cramer & Caitlin V. May, *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858, 872 (2014) (observing that plaintiffs generally cannot afford to hire the attorneys and experts that are necessary to independently pursue a claim).

<sup>146</sup> See, e.g., Lawrence W. Schonbrun, *The Class Action Con Game*, 20 REG. 50, 51 (1997) (listing cases in which class action litigation resulted in no benefit or additional harm to class members).

<sup>147</sup> This contrasts starkly with an actual class action, wherein class notice is dense with legalese and intervention is challenging without advanced legal knowledge.

<sup>148</sup> As discussed in Part II, class members are uniquely situated to answer the question of what benefits them. Although class members could retain counsel, it is hard to see what benefit counsel would bring to the average case.

<sup>149</sup> See, e.g., MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 131 (2009) (positing an inverse

positive image that class action litigation lacks. Accordingly, democratic input methods would not be subject to the same participation problems that currently plague class actions.

Despite the potential flaws, voting-based mechanisms can improve the accuracy and responsiveness of cy pres awards. These mechanisms would address concerns about cy pres awards for the general good transgressing into prerogative cy pres because any award chosen by the class must be intended to benefit the class. These mechanisms could also rehabilitate the image of class actions. By deferring to democratic input, judges can remove the appearance of impropriety in selecting recipients and eliminate one of the primary grounds currently used to attack the class action process generally.<sup>150</sup> More important, democratic procedures would increase litigant involvement in class actions,<sup>151</sup> leading to greater awareness of the process and, with time, greater participation in class action proceedings.

#### CONCLUSION

American courts are predominately designed to excel at a single task: resolving disputes between parties. Once a court decides to award cy pres, the process of selecting optimal recipients becomes one of legislative inquiry, for which courts are neither designed nor suited. In trust and estate law, the courts' cy pres exercise is guided by the testator's intent manifested in their will. But in class actions, courts have no similar insight to help them best serve the interests of the class. Absent guidance, courts stumble in the dark, risking erroneous, inefficient, or even potentially unethical outcomes.

Seeking the input of the represented class is one way that courts, *sua sponte*, can remedy these informational and institutional shortcomings. By soliciting class input through crowdsourcing or simple democratic procedures, courts can simplify the information-gathering process as they seek to determine which recipients would most benefit the class. Technological advances render the marginal costs of implementing such information-gathering trivial compared to the benefits. Awards crafted in such a manner

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relationship between the size of a class member's claim and their willingness to participate in a class action).

<sup>150</sup> The current proposal conceives of democratic input only in the cy pres process. Although there are some compelling arguments for expanding democratic inputs to the management of class actions generally, cy pres is particularly well-suited to such methods, given that it is one of few matters in which class counsel lack any specialized knowledge or experience. For more on democratic governance of class actions, see generally Lahav, *supra* note 143, at 99-106.

<sup>151</sup> A crowdsourcing system, even one requiring only brief interactions, would generate increased interest in the suit and the class action process as compared to the limited communications that class members currently receive.

would be fairer and more accurate, would reduce the risks and appearance of potential impropriety, and would strengthen cy pres awards against challenge and reversal. Ultimately, these advances would constitute a first step toward a class action system that fosters individual participation in the class action process.