These two pairs of procedural safeguards/preclusive effects correspond to the two stages that comprise the tiered-certification proposal. Practically, if under the tiered-certification proposal the court decides that the class survives the preliminary stage, class members would no longer have the right to litigate collectively. Of course, if the class survives the second, full certification, its members would not have the right to litigate either individually or collectively. By contrast, if the court decides that the class did not reach the threshold for preliminary certification, class members are free to litigate in subsequent forums both individually and as a collective.

Recall that the first, preliminary certification should provide, in principle, the same procedural safeguards — but to a lower extent. Given the lower interest at stake at this stage — the elimination of procedural rather than substantive (and procedural) rights — the safeguards are lower, i.e., a more lenient judicial inquiry and scaled-back notice to class members should suffice. Like the full notice, the preliminary notice should inform class members of their capacity to opt-out. To demonstrate, in case the second, full certification is denied, those who did not opt-out at the preliminary certification would be bound by the denial; they would only be able to bring their individual claims. By contrast, class members who did opt-out at the preliminary stage would not be precluded by a denial of full certification, and they would be free to reinitiate class proceedings on behalf of similarly situated plaintiffs (e.g., who likewise opted-out at the preliminary certification stage).[120] Of course, similarly to current practice, should the case pass the second certification,

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class members from litigating collectively but allowed them to bring their individual cases. *In re* Trans Union Corp. Privacy Litig., 741 F.3d 811 (7th Cir. 2014). Apparently, such a settlement, that

> purports to leave class members' substantive rights untouched . . . does not trigger all of the cumbersome protections (e.g., individualized notice, the right to opt out, searching inquiries into predominance, etc.) that the class action rules and due process require before absent class members can be precluded from bringing individual damages claims.

Rave, *supra* note 50, at 508; *see also* Wolff, *supra* note 90, at 2076 (arguing that the required "degree of procedural due process in class proceedings . . . varies with the extent to which a court proposes to place class members at risk of an alteration in their legal position").

120 *Cf.* Bay Area Injury Rehab Specialists Holdings, Inc. v. United Serv. Auto. Ass'n, No. 2D14-786, 2015 Fla. App. LEXIS 8772 (Fla. 2d Dist. Ct. App. June 10, 2015) (an example of a class action that comprises those who opted-out of a previous class); Morgan v. Deere Credit, Inc., 889 S.W.2d 360, 366 (Tex. App. 1994) (same).

those who did not opt-out at the first certification, but chose to opt-out at the second certification, are free to litigate their individual claims.

The tiered-certification process seems to be a reasonable solution to the relitigation problem, balancing the need to preclude relitigation and the desire to respect individual rights. Specifically, with the provision of notice and opportunity to opt-out at the first stage, together with a minimal guarantee of adequate representation, the doctrinal hurdles that prevented preclusion dissipate.

The tiered-certification solution is not devoid of difficulties. First, it should be noted that the proposal would not eliminate relitigation — members of putative classes that did not pass the first, preliminary certification would be free to mount future certification attempts. However, the defendant's harm from prospective relitigation following a denial of preliminary certification would plausibly be smaller than under the current regime.[121] Moreover, given the costs of filing a class action, and the incentives of class counsel to pass the preliminary stages, I expect that many cases will cross the preliminary threshold and avoid relitigation.[122] Hence, at the least the proposal seems to reduce the relitigation problem relative to current practice.

The most salient concern regarding the tiered-certification solution, perhaps, lies at its core: precluding absent class members from litigating collectively, in subsequent forums, where the class at F_1 passed the first certification but failed the second. While class members in those cases retain their right to litigate individually, it should be significantly harder for them to vindicate their rights without collective proceedings. Relatedly, the concept of tiered certification as a means to bind the members of the class to a decision to deny full certification seems fictitious. Most class members, even in case they are individually notified, do not bother.[123] The odds that class members would opt-out after the first certification, and then relitigate as a class, are slim.

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121 Prospective relitigation presses the defendant to settle, as the judge in F_2 might certify although the judge in F_1 denied certification. *Supra* notes 73-74 and accompanying text. It is very unlikely, however, that a judge in F_2 would fully certify a case that did not even pass the preliminary certification threshold in F_1. Hence, the prospect of relitigation following a denial of preliminary certification is less threatening to defendants.

122 Indeed, given its preclusive repercussions, one may expect that in many cases the defendant would not vigorously resist preliminary certification.

123 The individual stakes are often too low relative to the costs of intervening in a class action. *See generally* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529 (2004) (providing empirical evidence for the

There are, however, mitigating factors. First, the scaled certification proposal is as much a contrived concept as the current full certification is. In general, class members tend to be oblivious to notices, and if they fail to opt-out they often receive a miniscule portion of their actual injury.[124] Moreover, substantive rights are typically deemed more important than the procedure for vindicating those rights.[125] Of course, the procedure-substance distinction has a formalistic flavor. But it is important to emphasize that the stakes in the preliminary certification are perforce lower — it bars only procedural rights, as class members are free to litigate individually, whereas full certification binds the right to litigate both collectively and individually. Therefore, due process requirements at the preliminary certification stage are presumably weaker. As a side note, even without the right to litigate collectively, with advances in technology it now seems easier for class members who are aware of their rights to bring those rights to court.[126]

Second, as Part II shows, the tiered-certification proposal is designed to improve early monitoring of class counsel, which is all the more important given the trend to frontload efforts. The better monitoring that the proposal seeks to achieve minimizes the infringement of class members' rights to litigate collectively. In this respect, better monitoring can be achieved even if the vast majority of class members ignore the preliminary notice: a few vigilant

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proposition that opt-outs and class members' objections are uncommon in class litigation).

124 Redish & Kiernan, *supra* note 69, at 1673 ("[C]lass proceeding will never reach, much less compensate, the overwhelming majority of the victims.").

125 *Cf.* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013) (rejecting class litigation and determining that the law does "not guarantee an affordable procedural path to the vindication of every claim."); HCJ 2171/06 Cohen v. Knesset Speaker ¶ 34 (Dec. 13, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (the Israeli Supreme Court holding that the constitutional right to access courts does not guarantee the right to class litigation); Rave, *supra* note 50, at 540 (concluding that "as long as a settlement . . . leaves the claimants' substantive claims intact . . . there does not appear to be a due process violation."); Freer, *supra* note 67, at 95-96.

126 *E.g.*, Manuel A. Gómez, *Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as A Litigation Financing Tool*, 49 U.S.F. L. Rev. 307 (2015) (describing the blossoming crowd litigation-funding sector); Rave, *supra* note 50, at 496 (showing that although precluded from bringing another class action due to a prior class action settlement, *In re* Trans Union Privacy Litig., 741 F.3d 811 (7th Cir. 2014), more than 100,000 plaintiffs brought their small claims individually as "lawyers solicited class members who retained their rights to sue . . . individually" "[p]rimarily through Internet advertising").

plaintiffs should suffice to alert the court and provide useful information to competing law firms.[127] Moreover, recall that opting-out at the preliminary stage, according to the proposed tiered certification, maintains the right to litigate collectively anew. Thus, one can envision "proxy fights," in which competing law firms would attempt to sway class members to opt-out during the preliminary certification phase and join a new class action.[128] More aggressive competition among plaintiffs' lawyers should provide more information to the court and eventually improve representation.

Finally, the tiered-certification proposal should be judged against the alternatives. The main alternatives under the current regime are open relitigation after certification denials, a practice that is unfairly harmful to the defendant, or a presumption of preclusion of collective litigation, through comity, without notifying class members and allowing them to voice their concerns. The tiered-certification proposal is a balanced solution that is superior to both alternatives.

IV. Toward Semi-Class Actions

In addition to addressing the relitigation problem, the idea of tiered certification can open up new ways to handle certain types of class actions. While the axiomatic, single certification stage creates a "discontinuity" between certified and uncertified classes, tiered certification offers a richer view of class litigation. In particular, the tiered-certification regime anticipates a new category: cases that pass the preliminary certification but fail the second. This category can include cases that merit some, but not complete, collective treatment — cases that can be referred to as semi-class actions. While a complete treatment of semi-class actions is beyond the scope of the current Article, this Part relies on two unique procedures under the Israeli Law, which resemble preliminary certification, to illustrate this idea.

A. A Richer View of Class Actions

1. Illustrative Procedures

"Ceasing" admissions and litigation against governmental bodies. The Israeli Law creates a unique procedure to handle class actions against governmental

127 Indeed, some class members do regularly intervene in class actions. Eisenberg & Miller, *supra* note 123 (providing empirical evidence).

128 *Cf.* Rave, *supra* note 50, at 506 (showing that in the *Trans Union* settlement class members did not have the option to opt-out, hence there was no "threat of exit to discipline class counsel").

bodies for overcharges.[129] Upon a motion to certify an overcharge class, governmental bodies, typically municipalities, can file a "ceasing admission" in which they commit to stopping overcharging. In such case, the collective proceedings end (and class counsel typically receive a modest fee). However, class members retain their rights to file individual lawsuits.[130] This process can be looked at from a tiered-certification perspective. The class, in essence, passed the preliminary stage, but the municipality's willingness to stop its wrongful behavior renders a second certification superfluous.

Is this unique process valuable, from a policy perspective? On the one hand, the lenient procedure saves the costs of a full-blown class action. In particular, complete class actions would presumably affect the ability of governmental bodies to operate. On the other hand, without collective redress individuals are less likely to vindicate their rights. In this sense, the provisions that shield ceasing governmental bodies from class litigation enable them to pay less than the harm they inflicted, presumably resulting in lower deterrence. In short, the benefits of the "ceasing" procedure, as well as its costs, are lower than a full-blown process.

However, to the extent that governmental bodies generally act in good faith, and the overcharge is an honest mistake, the absence of collective redress would not lead to substantial under-deterrence. Therefore, a second, full certification — a costly process — becomes counterproductive relative to the option of a lenient certification that does not preclude class members' individual rights. In more familiar doctrinal terms, complete class litigation is not a superior method of adjudication.[131]

Voluntary dismissals and food labeling litigation. Another unique procedure in Israel is voluntary dismissals of petty claims, manifested by a wave of food-labeling class actions. In a typical case, the plaintiff claims that the defendant-manufacturer violated relevant food-labeling regulations. The violation often seems small, even trifling.[132] Nonetheless, the defendant may well respond to the certification motion with a commitment to complying, from now on, with the regulation. In that case, the plaintiff (and her lawyer)

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129 Class Action Law, 5776-2016, App. B, § 11, SH No. 2054 p. 264 (Isr.). To demonstrate, consider a municipality that charged local taxes with no proper authorization.

130 *Id.* § 9 (specifying the framework for this arrangement).

131 *See also infra* note 137.

132 Consider the claim that the defendant violated the law because it manufactured granola with nuts without providing a warning that the product is not appropriate for children under the age of five. For this and other representative examples, see CA (TA) 39176-07-13 Levy v. Pasta Nona ¶ 3(e) (Nov. 26, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

may decide that pursuing the remaining claims is not profitable — the damages that class members suffered are questionable, and, in case they exist, causation is at best tenuous. Relatedly, any procedure to adjudicate the class, should the court certify, seems highly cumbersome. The Israeli Law enables a quick resolution. The class's representatives voluntarily dismiss the case and ask the court for a modest award for the induced change in the defendant's behavior; importantly, voluntary dismissals do not bind the members of the class, and they are free to later pursue their individual claims.[133]

This type of cases raises a heated debate.[134] On the one hand, the plaintiff created some social value — it forced the defendant to comply with the relevant regulation. On the other hand, if these cases were to proceed to full-blown class litigation, they would likely lose. Given the difficulty of proving damages, a complete class action seems too heavy a tool to handle these petty violations. Against the backdrop of this binary, this Article suggests a third perspective. These cases pass preliminary certification, but they should fail the regular, comprehensive certification. The parties can structure a settlement along these lines, binding future class actions but leaving class members free to litigate their individual claims. Such a settlement should be judged by the more relaxed standard of preliminary certification. To guarantee minimal procedural safeguards, the court should verify that the more lenient standards, including adequate representation, are met, notify class members, and provide them an opportunity to voice concerns and opt-out of the deal.[135]

2. Modest Procedures for Modest Class Actions

The foregoing two unique procedures can be generalized to a wider group of cases.[136] To better appreciate this group, at least in the abstract, one can

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133 Class Action Law § 16. The court has discretion to reject the voluntary dismissal, and it can decide not to remunerate the representatives for their efforts. Alon Klement & Keren Weinshall-Margel, *Cost-Benefit Analysis of Class Actions: An Israeli Perspective*, 172 J. Inst. & Theoretical Econ. 75 (2016).

134 *E.g.*, CA (TA) 39176-07-13 *Levy*.

135 This perspective bears implications for the Israeli practice of stipulations to voluntarily dismiss in exchange for an agreed award. While the tiered-certification approach precludes subsequent collective proceedings, current remunerated dismissal agreements cannot bind future collective litigation, as the class was not certified (though in actuality subsequent collective litigation in this type of claims is rare). Moreover, contrary to the current practice, tiered certification calls for a public, general notice plus an opportunity to challenge the incumbent representatives (and opt-out of the deal).

136 Rave, *supra* note 50, at 488-93, discusses a unique settlement that reached a somewhat similar solution — class members, who had claims for statutory

denote the costs of certification as C (these costs can represent, for example, the legal expenses of both sides and the costs to the judiciary of having the class certified). The benefits of certification given this process — e.g., in terms of improving defendants' behavior and compensating victims — could be denoted as B. In simplistic terms, judges should certify whenever B>C, or only when it is worth triggering the complex apparatus of class actions.[137] With the recurrent complaints regarding the costs of class litigation,[138] we should expect that many cases would not pass this threshold.

Suppose, however, that courts have at their disposal a more lenient certification process. The costs of employing this process, which can be denoted C_0, are lower than the usual process — for instance, because it entails narrower repercussions for defendants. Likewise, the benefits B_0 of the simpler process are more modest than those of its counterpart, full process (i.e., $C_0<C$ and $B_0<B$). For instance, the new procedure does not fully compensate victims.

The simpler procedure mitigates the one-size-fits-all nature of the regular procedure. While some cases do not justify a comprehensive class treatment (because B<C), it may be that for these cases the benefits of the simpler procedure are higher than its costs (i.e., $B_0>C_0$). There is, then, a group of cases that deserves a lenient certification treatment, but not a full one. In the foregoing stylized terms, this group of cases — semi-class actions — can be defined by $C>B>B_0>C_0$. A court that has the option should, then, certify according to the more lenient terms.

Tiered certification demonstrates one option for conducting such a procedure. Suppose that a given case was preliminarily but not fully certified. Class members in this example cannot litigate collectively, so the benefits of preliminary certification are lower than the benefits of full certification. However, the costs are also smaller — as the repercussions of preliminary certification are narrower than those of full certification, and it is simpler for courts to employ. The foregoing Israeli examples demonstrate this argument.[139]

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violations against the defendant in the range of a hundred to a thousand dollars, were given an in-kind relief with a retail value of sixty dollars. In exchange, class members waived their procedural right to bring a class action — but were free to file their individual claims. *In re* Trans Union Corp. Privacy Litig., 741 F.3d 811 (7th Cir. 2014).

137 This is, of course, a simplifying presentation. Nonetheless, the law loosely alludes to a similar, open-ended inquiry. Rule 23, for instance, guides courts to find, as a prerequisite for certification, "that a class action is superior to other available methods for . . . adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). For a similar provision, see Class Action Law § 8(a)(2).

138 *See, e.g.*, *supra* note 27 and accompanying text.

139 *See supra* Subsection IV.A.1.

These procedures avoid the costs of full-blown certification and class action; but they do not compensate the victims (victims are free to litigate individually but presumably will receive a lower amount — if at all — through individual proceedings). However, given the modest benefits of a full class action, e.g., in terms of deterrence, these more lenient procedures could be justified.[140] Small-claims courts provide a simpler track for petty claims that are nonetheless socially valuable — and lenient certification procedures could fulfill a similar role regarding some types of class actions.

In general, then, there are cases that are not worth a full class treatment. Some of these cases, though, deserve preliminary certification. These cases can be referred to as semi-class actions. The following Section illustrates the implementation of tiered certification with respect to semi-class actions, focusing on prospective injunction cases.

B. Applications: Prospective Injunction and Statutory Damages

The preceding discussion provided a general lesson: class actions can be socially valuable, but they implicate a costly apparatus. A class action that generates a modest social value may deserve a modest procedure. The modest procedure, e.g., preliminary certification, could involve minimal safeguards such as notice, opportunity to opt-out, and non-preclusion of individual rights.

This discussion pertains to issues that are currently debated in the United States. In a general and common category of cases, the class receives — through a settlement — an injunction in which the defendant commits to changing its wrongful practices. However, the defendant pays "zero dollars to the millions of absent class members" (beyond attorneys' fees).[141] Importantly, as the class is certified, its members are precluded from bringing their individual claims.[142] No-damages arrangements are a wide phenomenon.[143] They typically stem from regulatory violations that allegedly generated broad damages. However,

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140 *Cf.* Rave, *supra* note 50, at 480 (arguing that without "a realistic opportunity to bring" individual claims, a settlement that bars the right of the class to litigate collectively will not be approved). The foregoing suggests that preliminary certification without a realistic opportunity to bring individual claims may nonetheless be justified, e.g., when it generates some social value and full certification is counter-productive.

141 Erin L. Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 Harv. J.L. & Pub. Pol'y 769, 770 (2016).

142 Therefore, such settlements achieve "what even the [regulator] cannot: the preclusion of future claims by class members against [the defendant]." *Id.* at 802.

143 *See generally id.*

given the difficulties in certifying a damages class action, the parties settle only for prospective injunction. These settlements were heavily criticized. A prominent line of criticism is that the representing parties "sell" class members' rights to litigate collectively and in exchange receive no monetary compensation (but hefty fees).[144]

From an alternative perspective, injunction-only settlements embody the case for a more lenient procedure. The regulatory violation that the defendant committed is typically trivial, and the damages to the class are expected to be miniscule. Hence a full class action is counter-productive. However, a more modest procedure can achieve some social value. The previous discussion entails several practical lessons with regard to the implementation of such a procedure.

First, to justify a more lenient treatment, these settlements ought to have a smaller impact on class members' rights. As the tiered-certification example suggests, one alternative is a preliminary certification that would preclude class members' rights to litigate collectively, but retain their rights to litigate individually. With no preclusion of individual rights, a strong argument against prospective injunction settlements is eliminated. The capacity of class members to litigate individually also tempers the defendant's desire to strike a deal that "sells" class members' rights cheaply.[145] Of course, the capacity to litigate individually is in many cases nominal; nonetheless, it still improves upon the current practice of injunction-only settlements that completely preclude class members' individual rights.[146] Second, the tiered-certification process insists on notification to class members after the preliminary certification phase (through a scaled-back notice), and allowing them the opportunity to voice concerns and opt-out.[147] An obligation to inform class members and let them voice concerns could provide more information to the court. Particularly, class members who believe that the case for the class is strong could petition to replace the incumbent representatives at this preliminary stage. Third, the semi-class actions perspective should also affect the fees that are awarded in prospective injunction settlements. Semi-class actions, I suggest, require a modest procedure to handle cases of modest societal value. Hence, the fee should be relatively small, and be based, to the extent possible,

144 *E.g.*, *id.* at 808-16.

145 *Cf.* Trans Union Corp. Privacy Litig., 741 F.3d 811 (7th Cir. 2014) (settlement leaving intact the individual rights of the members of the class).

146 For a more detailed discussion, see *supra* notes 124-128 and accompanying text.

147 Recall that opting-out at the preliminary stage means having the right to litigate individually as well as collectively (together with others who opted-out).

on the social, regulatory value of the relevant settlement.[148] The prospect of lower fees through preliminary certification should chill at least some abusive injunction-only settlements.

Statutory damages seem to be a particularly good fit for prospective injunction and preliminary certification. In some instances, the law specifies a certain amount of damages, to be awarded without the need to prove actual damages. Statutory damages are typically aimed at "incentiviz[ing] private enforcement where actual damages are small or difficult to establish . . . most often . . . in the context of consumer protection and intellectual property regulation."[149] Class actions that demand (individual) statutory damages seem, on their face, inefficient, potentially resulting in "massive liability . . . and over-deterrence."[150] As statutory damages are detached from actual damages, even a trivial violation of the relevant regulatory scheme is vulnerable to extortionate liability through class litigation.

Given this reality, one would expect a pushback from courts. Some courts indeed refuse to certify statutory damages class actions, relying on the superiority requirement of Rule 23.[151] Others have raised the bar to adjudicating these cases in other ways. In a recent class action case that stemmed from seemingly trivial violations of the Fair Credit Reporting Act, *Spokeo v. Robins*, the Supreme Court held that there was no showing of "concrete" harm.[152] This harsher treatment of statutory damages cases is understandable given the fear of over-deterring class actions. However, it reflects the current, binary view of class actions — they can be either certified or not.

Alternatively, these cases can be approached from the tiered-certification perspective. A complete class action is simply a regulatory overkill, and it may be better to "unbundle" the individual claims from the collective case. This outcome could be achieved through a preliminary certification in which the defendant would cease its wrongdoing, without precluding absent class members from litigating their individual rights.[153] Such an injunction fulfills

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148 For similar, regulatory considerations in the context of approving the *Trans Union* settlement, see Rave, *supra* note 50, at 533-34.

149 Stephen B. Burbank et al., *Private Enforcement*, 17 Lewis & Clark L. Rev. 637, 678 (2013).

150 *Id.* at 678 n.171.

151 Fed. R. Civ. P. 23(b)(3). For a short discussion, see Richard A. Nagareda et al., The Law of Class Actions and Other Aggregate Litigation 66-69 (2d ed. 2013).

152 Spokeo v. Robins, 136 S. Ct. 1540 (2016). While *Spokeo* is a class action, the Court's analysis pertains to all statutory damages cases — individual and class actions alike.

153 *Cf.* Trans Union Corp. Privacy Litig., 741 F.3d 811 (7th Cir. 2014).

a socially desirable goal. Given the ability of individual class members to sue for statutory damages, and the expectation that a nontrivial number of victims would sue individually, due process concerns are minimized.[154]

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The foregoing discussion demonstrates the important features regarding the application of tiered certification to semi class-actions: (a) a relatively lenient scrutiny by the court throughout the preliminary certification stage; (b) preclusion of collective, but not individual, rights at that stage; (c) notice and opportunity to opt-out, such that informed and motivated class members (and their attorneys) have the ability to plead to replace class counsel and litigate collectively; and (d) lower attorneys' fees, which reflect the modest social value (and the weaker judicial scrutiny) of cases that are resolved at the preliminary certification stage.

Short of a structured, tiered-certification process, these principles could easily be integrated into a settlement under the current regime. Most explicitly, settling parties — class counsel and the defendant's attorneys — could choose the certification bar they desire for their settlement: preliminary or full. Preliminary certification offers a quick resolution, under lenient judicial scrutiny and fewer procedural safeguards, but with smaller fees; full certification would require a heavier involvement of the court, but it offers potentially generous fees.[155] Presumably, the settling parties are better positioned to choose the appropriate standard and break the one-size-fits all nature of class certification.[156]

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154 As Rave, *supra* note 50, at 505-06, describes, thousands of individuals with statutory damages for invasion of privacy brought an individual action following the *Trans Union* settlement that precluded them from litigating collectively. Note that under the proposed preliminary certification, class members would also have the right to opt-out and bring their own class action, contrary to the *Trans Union* case. This design further minimizes due process concerns.

155 To prevent the parties from structuring a settlement as a full rather than semi-class action, courts should rigorously ensure that the class, though the parties settle, met the high standard for full certification rather than the lower, preliminary certification standard. *Cf.* Alon Klement & Robert Klonoff, *Class Actions in the United States and Israel: A Comparative Approach*, 19 Theoretical Inquiries L. 151, 165 (2018) (discussing certification for settlement purposes in the United States).

156 Another option under the current regime is to delegate to judges the responsibility regarding the threshold for certification, on a case-by-case basis. It might be that judges already set lower standards for certification where the social value of the case seems low. In that case, the foregoing proposal could be useful to formalize this procedure and provoke an open discussion of these practices.

Currently, of course, the parties cannot agree to tailor the certification bar to the exigencies of the case.[157]

Tiered certification is not a panacea, and its application to semi-class actions further raises serious questions, beyond the scope of this Article. However, the foregoing adds another option for treating class actions, which could be better than the existing alternatives. Currently, a case that presents a small social value but relatively high adjudication costs could either be denied class treatment[158] or certified as a complete class. The first option misses the opportunity to adjudicate socially valuable cases. The second option is costly, to the parties as well as the judiciary. Sharing the same spirit as other reforms intended to break the uniform nature of the current rules,[159] the tiered-certification option offers a balanced solution, which could better fit certain cases.

Conclusion

The current conception of class actions is binary. Certification is a fact-intensive, tedious stage, and, in terms of precluding absent members, the class is either certified or not. This description calls for a richer view that "flattens" the procedural requirements and repercussions of certification. This Article offers such a thought-experiment, advancing the idea of a tiered certification — a first, preliminary certification, not precluding the right to litigate individually; and a second, complete certification. The tiered-certification mechanism could better address several class action dilemmas.

Relitigation of denials of class certification is one example. Relitigation is a problem, and the heightened certification standards that courts have demanded seem to aggravate it. Current solutions fall short of remedying the problem. They either refuse to relieve the burden of relitigation, due to adherence to the binary concept of class certification; or preclude the right of class members to litigate collectively without appropriate safeguards. The way out of the quandary lies elsewhere. The tiered-certification proposal invokes the same legal fiction that serves to bind absent members to the final outcome

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157 *Cf.* Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 620 (1997) (settlement-only class actions "demand undiluted, even heightened, attention in the settlement context").

158 *Cf.* Sheley & Frank, *supra* note 141, at 832 (suggesting "a presumption against approval of [prospective injunction] settlements").

159 *E.g.*, David Freeman Engstrom, *Jacobins at Justice: The (Failed) Class Action Revolution of 1978 and the Puzzle of American Procedural Political Economy*, 165 U. Pa. L. Rev. 1531 (2017) (describing an unsuccessful legislative attempt to create two tracks, for small- and large-claims class actions).

of class litigation — notice and opportunity to participate — to give denials a preclusive effect. Thus, it enables partial class actions for the purpose of denying subsequent class actions. True, the scaled-certification proposal is not devoid of difficulties. However, it uses familiar tools to balance the desire to avoid relitigation with the notion of protecting absent plaintiffs.

More generally, shedding the concept of a single certification stage suggests new directions for handling class actions. In particular, tiered certification envisions "semi-class actions": class actions that should pass a preliminary threshold but fail full certification. Semi-class actions are, in essence, situations in which collective proceedings entail some social value, but triggering the apparatus of modern class litigation is too onerous and not cost-effective. Trivial violations of regulatory schemes are an example. While there is some social value in rectifying the defendant's behavior, current certification requirements are too high to handle these regulatory violations. Instead of either certifying or denying class treatment, a middle ground could be a prospective injunction that forces the defendant to comply with the regulatory scheme without precluding individual proceedings. Tiered certification, then, breaks the one-size-fits-all nature of the current certification requirements and opens new opportunities to regulate class actions — a middle ground between precluding and not precluding, no class litigation and full-fledged proceedings.

The tiered-certification proposal also has some more immediate benefits in the current climate. Originally, the rules in the United States envisioned a process in which certification decisions are made early on, and, as a result, "certification notice [would be] sent to the class prior to the resolution of the case on the merits."[160] However, the trend both in the United States and Israel is front-loading, i.e., shifting efforts to pre-certification phases. As a corollary, pre-certification stages have become longer, and notice is sent later than it used to be. The proposal restores the original intention of Rule 23, as it guarantees minimal procedural safeguards early on. Therefore, it can also improve representation from the inception of a case, filling a gap in the current regime.

160 Rubenstein et al., *supra* note 9, § 8:2.