A Kick in the Class: Giving Class Members a Voice in Class Action Settlements

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I. INTRODUCTION

Now more than ever, Americans are familiar with the age-old class action. Whether consumers are litigating over the deceptive advertising of Nutella, a Honda hybrid that achieves the fuel efficiency of a jalopy, or the sale of their pictures on Instagram after a drunken stupor, class actions can offer an opportunity for relief.

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1. *In re Ferrero Litigation* 278 F.R.D. 552, 556 (S.D. Cal. 2011) (A San Diego mother Athena Hohenberg sued Ferrero USA on behalf of a nationwide class of people who, on or after January 1, 2000, purchased Nutella 2000.).
2. *See Paduano v. Am. Honda Motor Co., Inc.*, 88 Cal. Rptr. 3d 90, 96-97 (Ct. App. 2009), where the plaintiff alleged his 2004 Civic Hybrid only received half of the gas mileage reported by the EPA.
However, many scholars argue that the intended beneficiaries of these class actions—the class members themselves—have little to no control over the litigation. Even class representatives, who are often cherry-picked by attorneys looking to start a class action, have little control over the litigation process. This lack of control by both the class representatives and class members necessitates a need for reform. Class action settlements in particular have long been decried as unfair and are seen as generally pro-defendant and therefore unfavorable to the plaintiff class members. The lack of transparency among settlements fuels the idea that class actions are not fair.

Some argue that class members more or less prefer to remain in the background. Specifically scholars point to the infrequency of class members objecting to and opting out of settlements as evidence that class members do not want to participate in the litigation. However, this conclusion confuses the effects with the causes. Lack of participation by class members should be seen as the effect of class actions being inaccessible to class members rather than a reflection of class members' unwillingness to participate in class actions. For example, in cases that make national news, like the Nutella class action case, objectors are more likely to attend fairness hearings. Other cases like the Honda Hybrid case, which also made headlines,

5. Id.
6. Robert H. Klonoff & Mark Herrmann, The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements, 80 Tul. L. Rev. 1695, 1720-21 (2006) (arguing that The Class Action Fairness Act did little to fix the problems associated with class action settlements and ultimately fails to "avoid unfairness"). Congress's concern with the potential problems settlement class actions create is further evidence that class action settlements are perceived as unfair. See also Margaret H. Lemos, Aggregate Litigation Goes Public: Representative Suits by State Attorneys General, 126 Harv. L. Rev. 486, 525 (2012) ("[T]he settlement may be structured in a way that puts money in the pockets of class counsel while leaving the class members with near-worthless coupons or the like; or the settlement may provide for a financial award but direct the money to easily identifiable groups rather than the injured individuals.").
7. See Jeffrey L. Roether, Interpreting Congressional Silence: Cafa's Jurisdictional Burden of Proof in Post-Removal Remand Proceedings, 75 Fordham L. Rev. 2745, 2761 (2007) ("By broadening federal jurisdiction over class actions, CAFA naturally expanded a class action defendant's opportunities to remove a state class action to federal court. Additionally, CAFA eliminated several long-standing barriers to removal through the creation of a new removal statute."). See also 28 U.S.C.A. § 1453 (West 2013) ("A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply.").
8. See Nicholas M. Pace & William B. Rubenstein, How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data, at v (RAND Inst. For Civil Justice, Working Paper No. WR-599-ICJ, 2008), available at http://www.rand.org/content/dam/rand/pubs/working_papers/2008/RAND_WR599.pdf ("[A] veil of secrecy can fall over class action litigation the moment the judge signs off on the agreement and ultimately, little information is available about how many class members actually received compensation and to what degree."). Scholars have attempted to study the final settlement agreements, but due to public unavailability of information regarding final settlement agreements, the final agreements are nearly impossible to analyze.
10. Id.
The increased involvement of class members in high-profile cases shows that class members may want a voice with which to influence class action proceedings, but may be deprived of this voice through a lack of awareness or procedural opportunities for involvement. Providing the class members with a voting option to approve or deny a proposed settlement would give the class members the "voice" they have been lacking.

This Article proposes a solution to the potential for unfairness under the current procedures for approving settlements in the class action context. Section II discusses the current procedures for judicial oversight of class action settlements, and the problems these procedures often create. These include agency and collective action problems, judicial estimation of value problems, and the overall undemocratic system of deciding class actions. Section III describes several class action voting mechanisms that could potentially eliminate the unfairness arising under current law, and addresses the costs and benefits of each. Different versions include: one class member to one vote, representative voting, and weighted voting. Section IV addresses and responds to potential critiques of the proposal.

II. POTENTIAL PROBLEMS UNDER CURRENT LAW: CLASS ACTION SETTLEMENTS TODAY

Class actions serve an important role in our society because they allow: 1) increased efficiency by allowing cases with large aggregate damages to proceed even where individual damages are small, and 2) lowered cost of litigation because courts are saved from hearing multiple smaller claims, and instead can hear one consolidated cause of action. Despite the attempts to fix class actions over the years the same problems that plagued class actions during its inception continue to haunt the field. The most common criticisms of class action by scholars include agency problems, collective action problems, judicial estimation of value problems, and an overall undemocratic system of litigation.

See generally Paduano, 88 Cal. Rptr. at 96-97. The objections to the Nutella settlement may be explained in part by the prominence of the Nutella case in the news. See Paduano, 88 Cal. Rptr. at 96-98.

See Coffee, supra note 9, at 371.

See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (citing Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 7th Cir. (1997))).

See Coffee, supra note 9, at 371; see also Ortiz v. Fireboard Corp., 527 U.S. 815 (1999); see also Amchem, 521 U.S. at 591.


The agency problem in class actions occurs when the class members' interests do not align with the class representatives' or attorneys' interest.\(^9\) Because class members "usually have very little capacity to monitor their agents," there is a high potential for the agents' interest to overcome the principals' interest.\(^20\) Class actions are designed in a way to eliminate the difficulty and responsibility associated with class members monitoring of the litigation, and in many ways this lack of monitoring is what makes class actions work.\(^21\) Consolidating cases to create a more efficient way of litigating cases is one of the primary goals of class actions.\(^22\) Each individual class member having to monitor a complex litigation would be burdensome and inefficient. A perfect class action system would retain the benefits of current class actions, while creating a close alignment between the interests of the class members and the actions of their representatives. In practice, however, the lack of class member oversight fuels the misalignment between the class members and their agents.\(^23\)

The agency problem can be described in terms of either the class against the attorneys, or the class members against the class representatives. Each of these problems is discussed in turn.

1. Agency Problems: Attorneys

In many ways, "class action lawyers are agents without principals."\(^24\) Like any rational actor, attorneys might also follow their own interests at the expense of their client's interests.\(^25\) This problem may be especially acute in class actions, because class members have little to no oversight over the actions of the attorneys.\(^26\) John Coffee describes the clash between the class member and attorneys:

[R]ational class members and rational class counsel are likely to evaluate a proposed settlement very differently. Although rational class members should only settle based on the litigation odds and will

\(^{19}\) See Coffee, supra note 9, at 371.

\(^{20}\) John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. CHI. L. REV. 877, 884 (1987); see also Alon Klement, Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers, 21 REV. LITIG. 25, 45 (2002) ("Common to all agency problems is their correlation with the asymmetry of information between the principal and the agent. The less the principal is informed, the higher the agency costs will be.").


\(^{22}\) See Coffee, supra note 9.

\(^{23}\) See id. at 371 (John Coffee argues that class actions have "become dysfunctional because the principals cannot effectively monitor their agent").

\(^{24}\) Rubenstein, supra note 21, at 1442.

\(^{25}\) See Klement, supra note 20, at 41-44 (arguing that "whether in litigation or in settlement, class attorneys are almost bound to appropriate part of class members' rightful share, to work less than they should, and to give undue weight to their own welfare").

\(^{26}\) Coffee, supra note 9, at 393.
compare the proposed settlement with their discounted estimate of the probable outcome at trial, rational plaintiffs’ attorneys will need to consider also the prospect that a competitor may emerge, thereby inclining them to accept a cheaper settlement. This may not be the same phenomenon as actual collusion, but the results can look very similar. Hence . . . one cannot realistically expect the plaintiffs’ attorney to be as loyal to the class members’ interests as the classic fiduciary can be to its beneficiary. The guardian or trustee neither has the same personal stake in the matter nor faces the same risks. Hence, other approaches—in particular, enhancing “exit” and “voice”—must be considered in addition to “loyalty.”

The potential for class attorneys to pursue actions not in the best interests of the class members is enhanced because attorneys typically initiate the class actions, and often select the class representatives. While attorneys may receive a fair amount in legal fees compared to the final settlement, there are other agency problems between the class members and attorneys. For example, attorneys could give into a lower settlement amount if they are running out of resources to litigate a case or if they are eager to move to a more lucrative case instead of investing time and money on a case that might not be as profitable.

In other instances, the attorneys might simply be unaware of the true interests of the class members, due to a general lack of communication with the class representatives. Moreover, class representatives are not necessarily more in tune with the average class member than any other member of the class. In a situation where the financial damages to each individual class member are low but the aggregate harm to class members is high, class members might be less interested in receiving a monetary award and more interested in an overall deterrence of defendant’s actions and future defendant’s action. In such a situation, the class members would want the settlement not necessarily to include a large amount of damages, but rather to take the

27. See Rubenstein, supra note 21, at 1443 (“Class counsel typically identify class actions, select the class representatives from among their client pool or potential client pool and then largely ignore the class representative thereafter. . . . Worse, class counsel’s selection of class representatives is generally not based on any special expertise particular class members might possess that would enable them to monitor effectively. . . .”) (footnotes omitted); see also Fed. R. Civ. P. 23(a)(3).

28. See Coffee, supra note 20, at 883 (“The principal-agent relationship also encourages subtler forms of opportunism such as “shirking”—where the attorney fails to expend the effort she otherwise would have put forth had the client been capable of actively monitoring the litigation.”); see also Rubenstein, supra note 21, at 1441-42 (explaining that “class counsel may do too little, settling the class members’ claims for less than their real value in exchange for quick and substantial fees”).

29. See Klement, supra note 20, at 30-31 (“The less lawyers are supervised, the more they tend to slack off, misrepresent facts, and collude with defendants. This does not imply that lawyers are immoral or unethical by nature. It only means that they are human.”).
form of a *cy pres* (making payments to a third-party usually a charity that relates to the damages made by the defendant)\(^3\) or injunction. Because attorneys might think that the main issue is to give back damages and not to deter or punish defendants, the attorney might not push for an injunction or *cy pres* contribution from the defendant. Instead, the attorneys might—contrary to the desires of the class—focus their efforts in creating a larger settlement fund for damages.

2. **Agency Problems: Class Representatives**

Class representatives fall under many of the same criticisms as the attorneys.\(^3^4\) While the adequacy requirement of the Federal Rules is relatively easy to meet,\(^3^5\) class representatives nonetheless will tend to act in their best interest, even if this interest is contrary to the class members as a whole. Like the attorneys, class representatives must incur costs class members do not incur such as the time invested in meeting with defendant’s counsel and the class’s own attorneys.\(^3^6\) Another similarity between class representatives and attorneys is that representatives receive compensation for their efforts.\(^3^7\) As a result of class representatives looking out for their own interest, there is a significant potential for collusion of the class representatives against the class members as a whole.\(^3^8\)

More astonishing is that class representatives are usually not the ones to seek out attorneys, but rather attorneys often cherry-pick representatives.\(^3^9\) The “fact that the agent creates the principal, and not vice versa, immediately suggests the agency problem that will follow.”\(^4^0\)

The power the attorney has over the representative is therefore stronger than if the representative had picked the attorney because the representative may feel as though the attorney, rather than the class, has true ownership of the case.\(^4^1\) The class

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33. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1368 (1995) (“Another recent variation, known as a ‘cy pres settlement,’ involves making a payment in kind of goods or services, not to the plaintiff class but to a third party (often a charity) for the indirect benefit of the class.”).

34. *See*, e.g., Coffee, *supra* note 9, at 388 (“Although class action conflicts usually involve the interests of class counsel, the class representative can also have its own conflicts with the other class members.”).

35. *See* Robert H. Klonoff, *The Judiciary’s Flawed Application of Rule 23’s “Adequacy of Representation” Requirement*, 2004 MICH. ST. L. REV. 671, 678 (2004) (“The most pervasive error is the holding by 228 courts (about 30% of the cases ruling on adequacy) during the 10-year period studied that class representatives were per se adequate because their claims did not conflict with those of the class. Thus, as long as the representatives do ‘not have antagonistic or conflicting interests with the unnamed members of the class,’ they necessarily satisfy Rule 23(a)(4).”) (footnotes omitted).

36. *See* Coffee, *supra* note 9, at 370; *see also* Adam Ackerman, *Pirates, Blackmailers - And Rule 20*, 15 TEX. REV. ENT. & SPORTS L. (forthcoming 2014) for a discussion regarding the pressures on defendants to settle.


38. *Id.*


40. *Id.*

representatives might be persuaded by the attorneys or one another to settle a case even though it would not necessarily be beneficial for the class as a whole. In fact, representatives are often merely basing their decisions off the attorneys' advice because they lack knowledge on the subject being litigated, or of their duties as class representatives.  

In addition to being heavily influenced by attorneys, class representatives may also have their own interests—rather than the interests of the class as a whole—in mind when deciding on settlements. For example, when the class is deciding to settle a case, the class representatives might be more likely to take a deal that involves a relatively low payout to the class as a whole, but a relatively high payout to each class representative. A multitude of additional factors could play into the class representatives' decision to accept a settlement that is not in the class members' best interests. Such factors include growing weary of the litigation process as a result of the high burden placed on representatives to make decisions and help structure the settlement, and not truly understanding the settlement in terms of the class members' perspective because they are unlikely to have interests that align perfectly with the rest of the class.

Fueling the misalignment between the class members and the class representative is the lack of oversight on the part of the class members. Class members lack resources and time in monitoring the class representatives' actions. The costs to the class members are high since many of the important decisions in the litigation process have low visibility and require an understanding of legal knowledge. Moreover, class members have little incentive to stay abreast of the latest developments in the litigation, because they have little opportunity to influence the proceedings. It is only at the final settlement stage where class members have the ability to evaluate the fruits of their class representative's labor, and even then, the law provides only three options for the class members. First, the class members can stay in the class and therefore give up his or her right to file a lawsuit involving any claim

42. Black v. Rhone-Poulenc, Inc., 173 F.R.D. 156, 162 (S.D.W. Va. 1996) (In one relatively extreme example, class representatives "did not know they were class representatives until shortly before or during their depositions," did not understand "the duties of a class representative," and had "never read the amended complaint").

43. Rubenstein, supra note 21, at 1447 ("[D]efendants have an interest in ensuring that a class is adequately represented so that they may reasonably rely on the preclusive effect of a class judgment; inadequate representation renders the global relief that the defendants have purchased open to collateral attack.").

44. See Enter. Energy Corp. v. Colum. Gas Transmission Corp., 137 F.R.D. 240, 250 (S.D. Ohio 1991) (The U.S. District court considers: "(1) the action taken by the Class Representatives to protect the interests of Class Members and others and whether these actions resulted in a substantial benefit to Class Members; (2) whether the Class Representatives assumed substantial direct and indirect financial risk; and (3) the amount of time and effort spent by the Class Representatives in pursuing the litigation.").

45. See Coffee, supra note 20, at 884 (noting that "information costs tend to be higher because the critical decisions in litigation typically have lower visibility and require greater expertise to understand. . . .").
similar to those in the class action case. Although this option may not be particularly attractive in the case of an unfavorable settlement, it is the path of least resistance to the class member, and is the most likely outcome of someone involved in a class action. Second, class members can opt out of the settlement. While this option would preserve the class members' right to file their own individual lawsuit, class members rarely opt out because the time, effort, and cost in bringing an individual lawsuit is unlikely to be outweighed by the possibility of a better outcome. Third, class members can take on the burdensome task of objecting to the settlement, which requires that the class members either attend a fairness hearing or submit a lengthy objection in writing. While this option is not as costly on the class member as opting-out and pursuing a separate litigation, it still presents a huge hurdle to class members.

Some may argue that where the class representatives' interests misalign, the class members can remedy the situation by protesting "adequacy of representation." However, "once a potential settlement of complex litigation is in view, federal trial courts tend to tolerate almost any conflict in order to achieve a settlement that brings litigation peace but at a cost paid by the class members." Courts and hornbooks alike have been unable to come to terms with what exactly constitutes adequate representation. Nonetheless, this notion of class representatives favoring the settlement, even against the interests of the class members, is most likely not what the creators of the class action system had in mind.

Because these agency costs are created by the misalignment between the interests of the decision makers (the class attorneys and representatives) and the intended beneficiaries of the litigation (the class members), reconciling the class members' interest with those of the class representative will help to reduce the agency problem. While agency costs cannot be eliminated, they can be reduced by giving the class members more power to direct the litigation.
B. Collective Action

The collective action problem is when an individual fails to contribute to a group activity even though all of the members of the group would benefit if everyone contributed. The individual abstains from acting because the cost to the individual exceeds her benefit. However in the aggregate, the benefits of the individual’s action on the group would exceed the cost to the individual. An individual unwilling to bear the costs might go to other members who could also benefit, but she may run into trouble influencing others to share the costs. Class actions attempt to counter the collective action problem by allowing a culmination of small claims that would otherwise not be litigated to have their day in court. Individuals may now aggregate their claims thereby making the litigation process worth the effort.

However, class actions as currently implemented create a collective action problem on their own (a collective action problem within a collective action problem). Opportunities are given for class members to object to the proposed settlement at fairness hearings where a judge is present. This is the first, and often the only chance that a class member will be able to participate in the class action litigation. Therefore, this objection stage is critical to the judge’s on whether or not a settlement is “fair, reasonable, and adequate” for the class members.

Because class members’ costs will generally exceed the benefit of objecting, many unfair settlements can be approved by a judge who is relying on information from attorneys who want the settlement to be accepted. In reality, only about 1% of a class ends up objecting, and many proposed settlements have zero objectors.

55. Pollution is one example of a collective action problem. If adjacent towns A, B, and C each pollute into each other’s borders, their collective welfare might be worse off due to the pollution. However, if each town derives an benefit from its own polluting that is greater than the aggregate cost resulting from its own pollution, the towns may continue to inefficiently pollute. A more efficient solution would be for each town to enter into an agreement to cease pollution, but such an agreement might not be reached due to the transaction costs involved.


57. See Leslie, supra note 16, at 73 (“For the same reason that class members may not find it worth their time to bring individual suits in the first place, they may also rationally decide not to monitor the class counsel’s activities or the terms of any proposed settlement.”).


59. See id.

60. FED. R. CIV. P. 23.(e)(2). The Southern District of New York noted objectors’ importance by explaining “[i]t is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.” Maley v. Del Global Techs. Corp., 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002).

61. See Janet Cooper Alexander, The Agency Problem: Some Procedural Suggestions, 41 N.Y.L. SCH. L. REV. 359, 359-61 (1997) (Objecting can be time consuming and burdensome, requiring involvement such as researching the issue relevant legal and factual issues, missing work to spend a day in court, and speaking with counsel).

62. See Eisenberg & Miller, supra note 48, at 1532 (showing that only about 1% of a class objects to a proposed settlement).
Without class members reigning in the interests of the attorneys and the class representatives, the class as a whole may suffer reduced compensation. Additionally, society as a whole may suffer, because the defendant’s actions might not be adequately deterred if the defendant is able to enter into a settlement that is substantially less than the social harm caused by the defendant’s actions. In such cases, a defendant may find it cheaper to continue its socially harmful actions and pay out settlement damages, rather than change its behavior.

Class members can only object once the settlement agreement is made. At this stage, class members would have to incur a multitude of costs in order to disagree with a settlement. For example, it may be difficult for an objector to obtain adequate information about the facts of the case because the court system and the attorneys do not generally have a way for the class member to easily access the information. Some class actions post information online which would make the process easier, but even if the class members could get across the hurdle of information gathering they would still need to figure out how to write an objection. The requirements for a written objection are tedious and can even rival the complexity of a formal legal brief. Class objectors do not receive an extra benefit, unlike class representatives who receive a fee for their work. The lack of benefit to objecting is in stark contrast to the significant effort that must be invested to properly object, such as researching the issue and filing objection claims. In addition to not receiving any compensation, objectors who often times hire attorneys due to the complexity of objecting are generally not entitled to attorney’s fees. Even if an objector can get over these hurdles, the act of objecting is usually futile because a court is unlikely to decide that the settlement is unfair unless there are numerous objectors to the settlement. Considering these obstacles, it is no wonder that the number of objectors is low.

Courts generally interpret the absence of objectors as a sign that class members endorse the proposed settlement because courts weigh the reaction of the class in determining whether or not a particular settlement is fair. However, equating

64. Id.
65. Robert H. Klonoff et al., Making Class Actions Work: The Untapped Potential of the Internet, 69 U. Pitt. L. REV. 727, 734 (2008) ("In addition to internet notice programs, a growing number of websites provide information and links about specific class action lawsuits.").
66. See, e.g., Northrup v. Sw. Bell Tel. Co., 72 S.W. 3d 1, 4 (Tex. App. 2001) ("The objection was required to include a written statement of the objector’s position and grounds therefore and copies of any supporting papers, briefs or other documents.").
69. See Leslie, supra note 16, at 113 (explaining that “it takes a large number of class members to object to a proposed settlement before the court will pay sufficient attention to the objections”) (footnote omitted).
70. See Eisenberg & Miller, supra note 48, at 1532 (less than 1% of a class opts out of a class action settlement).
71. See, e.g., In re Am. Bank Note Holographics, Inc., 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001) ("[M]ore than 5,000 notices were sent...[and] not a single objection...has been received. In addition, only five stockholders have sought exclusion from the proposed Settlement."); see also 4
silence to acceptance is questionable. In a case involving thousands or even millions of class members, a small number of objectors or even a small percentage of objectors may not mean that the members are satisfied with the settlement. Rather, a lack of objectors merely indicates that class members are not sufficiently dissatisfied with the settlement to undertake a time-consuming and burdensome process that has little chance of succeeding.

There is also a collective action problem on the part of the class representatives, because the representative might not see the effort of researching the issues in question as worth their time. Even though the extra research and general participation would benefit the class as a whole, the class representatives only recoup a portion of that benefit. Thus, many representatives may view the costs of adequately monitoring the litigation as too high.

C. Judicial Estimation of Value

Rule 23(e) seeks to curb the agency and collective action problems by requiring that proposed settlements be approved by a judge. Judges also approve the final settlement and review objections by class members. Additionally, judges play a role in certifying the class and approving the adequacy of the class representative and class counsel. Despite this allowance of discretion on the part of the judges, judges rarely reject a proposed class action settlement. Adding to the judges' difficulty of deciding on a settlement is the Federal Rules' failure to specify guidelines in determining whether a settlement is "fair, reasonable, and adequate." Instead, courts draw their guidance from the common law, which may be inconsistent from district to district.

Factors under the common law may include: settlement terms and conditions; number of objectors and nature of objections; and the presence of good faith and absence of collusion.

Additionally, in the absence or only slight presence of objectors, judges may not be in the best position to determine such a fact-laden problem of deciding whether

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Newberg On Class Actions § 11:48 (4th ed.) ("Courts have taken the position that one indication of the fairness of a settlement is the lack of or small number of objections.") (footnote omitted). But see Hammon v. Barry, 752 F. Supp. 1087, 1092 (D.D.C. 1990) ("[A] relatively small percentage of . . . [objections] . . . is not dispositive . . . .")

72. See Fed. R. Civ. P. 23(e); see also Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co., 834 F.2d 677, 682 (7th Cir. 1987) (The district court judge is supposed to "conduct a careful inquiry into the fairness of a settlement to the class members before allowing it to go into effect and extinguish, by the operation of res judicata, the claims of the class members who do not opt out of the settlement.").


76. See Rubenstein, supra note 21, at 1444 ("If class action attorneys sell out their clients, the judge should perceive that the settlement does not live up to the value of the claims and reject it accordingly. Conversely, if class action attorneys file a frivolous case, the judge should perceive that the settlement is merely a nuisance payment, reject it for that reason, and dismiss the case. In practice, neither of these events happens often.").

77. See 4 Newberg On Class Actions § 11:43 (4th ed.).

78. Id.
the settlement is fair and adequate. In making such a determination, judges primarily look to the class representatives, who could be colluding with the other representatives, attorneys, and/or defendant to settle.79 Since the "the plaintiff class and the defendant share an interest in obtaining court approval of the settlement, judges are unlikely to receive information that could be relevant to the fairness of the settlement from the parties themselves."80 While Rule 23(e) seeks to get around this problem by having the judge determine this issue, it will be difficult for the judges to determine collusion if they are only familiar with the damages to the representatives, rather than the damages to the class a whole.

Judges have the ability at the preliminary settlement stage to "have a court-appointed expert or special master review the proposed settlement terms, gather information necessary to understand how those terms affect the absent class members, and assist the judge in determining whether the fairness, reasonableness, and adequacy requirements for approval are met," but this is option is also rarely exercised by the judge.81 And at the final settlement stage, judges again have the ability to "retain a special master or a magistrate judge to examine issues regarding the value of nonmonetary benefits to the class and their fairness, reasonableness, and adequacy," but this, like the other powers of the judge, is also infrequently used.82

D. An Undemocratic System

In order for a democracy to work there must be action by the citizens. Like a democracy, class actions also require participation by class members since there are competing interests.83 Framing the class action problem as more than just a problem about inefficiency and economic models is important since it shows that the effects of unfair settlements can have broader implications. The current state of class action litigation leaves class members without a voice, leaving attorneys to more easily seek out their own interests.84 More recently, class actions have even been attacked as unconstitutional.85
Aside from undemocratic actions being created within the class action systems, the effect of unfair class action settlements has also been attacked as a threat to democracy at large. Because individuals “resort to the judicial process for the purpose of protecting private interests” and a democracy depends on those who feel wronged to turn to the judicial process, class actions should properly reflect the interests of the people. If the court system is an agent of democracy, and if class members are unable to be properly represented, then a flawed class action system can be considered to be a crack in democracy. Although this crack is most likely a hair-line fracture that will not necessarily lead to the demise of American democracy, a system that largely overlooks the will of those it intends to benefit should give some cause for concern.

Some argue that even the class representatives have no real voice when it comes to making important decisions within the litigation process. Coffee notes that “[o]n the policy level, the choice is between the uninformed democracy of class members versus the often self-interested professionalism of plaintiffs’ attorneys.” Indeed, many times in class action cases it is the counsel who finds the client rather than the client who seeks out the counsel. This leads to a disconnect between the goals of the attorneys who essentially create and direct the litigation, and the clients the litigation is supposed to benefit. In many ways it is difficult to discern whether a lawsuit belongs to the attorneys or to the class. If class members are not able to have a role in the litigation until after the settlement has been offered and if class representatives are sitting on the sidelines while the attorneys are crunching numbers to see what move benefits the law firm, the class is at risk. Compromising the competing needs of the attorneys, class representatives and class members is difficult. There is no doubt that attorneys already have power and that this power must be curbed by the class.

Adding to these undemocratic aspects of class actions is the inability of class action awards to be studied and properly assessed, because much of the data is inaccessible. Rubenstein argues that there is “a veil of secrecy” when it comes to

the class action rule. If the class action is to be reformed, it will be on a policy basis, not a constitutional one.”.

86. See Redish, supra note 4.
87. Id.
88. Judith Resnik, Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers, 125 Harv. L. Rev. 78, 169 (“Do courts in democracies remain legitimate if their doors are shut to many potential claimants? And what are the risks of doors’ being open too wide, permitting strategic exploitation of opponents?”).
89. Edward H. Cooper, The (Cloudy) Future of Class Actions, 40 Ariz. L. Rev. 923, 927 (1998) (noting that “class representatives often . . . play no client role whatsoever, and—when deposed . . . commonly show no understanding of their litigation.”); see Lazy Oil Co. v. Witco Corp., 166 F.3d 581 (3d Cir. 1999) (holding that a settlement was fair despite have three out of the four representatives and 384 class members object).
90. Coffee, supra note 9, at 406.
91. Id.
92. Id.
93. Pace & Rubenstein, supra note 8.
class action settlements. In his search to find data about class action settlements he found "virtually nothing." Public reporting of how a settlement fund was actually distributed is infrequently required by a judge, and non-disclosure agreements are liberally invoked at the conclusion of class actions. Rubenstein goes on to argue that "class actions can result in aggregate payments constituting a mere fraction of the compensation fund extolled by the parties at the time of settlement review." Because judges may be unaware of the likely result of a settlement, they may be overly inclined to approve class action settlements that may, in practice, substantially undercompensate class members.

III. PROPOSAL: CLASS ACTION VOTING MECHANISMS

Many of the current problems discussed above may be alleviated by a system in which class members vote to exercise control over litigation decisions. John Coffee first introduced a voting mechanism in 1987, but quickly dismissed the idea. Coffee felt transaction costs would be too high for the class member and that class members did not desire a voice. However, Coffee's voting idea was before the popularity of the internet, a tool that dramatically lowers the cost of finding out information about a case. Coffee also confused the effect of class members not having a voice with the cause. For example, Coffee concluded that class members who do not respond to a settlement agreement did not want a voice. Coffee's primary criticisms of a voting system are addressed in Section IV of this Article.

A voting mechanism would be helpful because it would give more power directly to class members. Because class members have the most at stake collectively, it is important that they have power over the class action. Where class members view objecting to a class or opting out and hiring their own lawyer as too much of a burden, the alternative of voting would be much more feasible. In particular, a voting mechanism could allow class members to vote to approve or reject the terms of a proposed settlement. Under the simplest version of such a system, if more votes are cast in favor of the settlement than are cast against it, the settlement would be approved. Otherwise, the settlement would be rejected, and the parties would be required to seek a new settlement proposal or continue the litigation without settlement.

94. Id.
95. Id.
96. Id.
97. Id.
98. Coffee, supra note 20, at 920.
99. Id.
100. Id.
101. It could be argued that the defendant and attorneys also have much at stake. The attorneys put a great deal of time and money into litigating the class actions, and a low settlement amount could significantly undercompensate the attorneys. The defendant is at risk as well, because the defendant will ultimately have to pay any settlement or damages, and potentially incur a public relations loss.
Courts could also use their discretion to determine when a given voting system would be most appropriate, keeping in mind the benefits and drawbacks of each system. For example, when there is a securities class action the best systems would be either the representative voting system or the weighted voting system. Although this approach still leaves a large amount of discretion with judges, the discretion would merely be how to best provide class members with a means of participating in the settlement decision.

Where the voting method fails, the class members who truly feel wronged could still fall back on the current alternatives. Class members have a few avenues to have their voice heard in the current system. A disgruntled high stakes member who feels they did not receive a fair settlement could opt-out and carry on with their own litigation. They also still have the ability to object to the class settlement if they view the costs of objection as exceeding the benefit.

One of the largest problems with class actions is that members simply do not care enough about becoming involved since they view the burdens as outweighing the costs. The voting mechanism would also have the effect of making the class members feel like they have more power over the class action. This would motivate class members to opt out or object more than they would have had the voting system not been in place. For example, a class action member who elected to decline the settlement terms and sees that the revised settlement terms did not reflect her views may be motivated to object, even if she may not have been sufficiently informed to object in the absence of a class voting system. For example, the Nutella class action had a higher than average number of objectors because it attracted the attention of both international and national news, thereby bringing the case to consumers’ attention. The voting scheme could help to mobilize class members and make them feel more involved, thereby raising class member participation in procedures other than simply voting on a settlement.

The voting model would also deter collusion between class representatives, attorneys, and defendants because attorneys and representatives know they will be subject to additional scrutiny by the class members. If collusion is currently taking place, a class voting system would likely result in settlements becoming more favorable to class members than in the past. It would also likely reduce the total number of settlements, as classes decide to reject inadequate settlements and take a greater number of cases to trial. Both of these outcomes are positive, because they

102. Class members really only have three real choices: remain silent and accept the terms, opt-out of the class, or object to the settlement. See Manual for Complex Litigation (Fourth) § 13.14 (2004).
103. Id.
104. Id.
105. Coffee, supra note 9, at 406 ([T]he real issue is whether the majority of class members . . . truly want such a voice. On the policy level, the choice is between the uninformed democracy of class members versus the often self-interested professionalism of plaintiffs’ attorneys.").
would help to avoid collusive settlements that under-deter defendants and/or overcompensate lawyers, to the detriment of class members.

A. Benefits Over Past Proposals

A number of proposals have been introduced in order to curb the unfair nature of class action settlements; however, these proposals fall short for a variety of reasons. Most proposals revolve around reorganizing the incentives and responsibilities of judges, attorneys, and representatives, while the class members’ role has largely been ignored.

One of the more popular proposals scholars have introduced is to change the way judges decide if a settlement is fair. A fairness hearing assists the judge in deciding whether or not a settlement is fair. William Rubenstein has proposed changing the way fairness hearings are conducted and believes that the judge must review “the process by which the settlement was achieved and the content of the settlement in light of the strengths or weaknesses of the plaintiffs’ claims” in fairness hearings.\(^\text{107}\) However, this type of proposal would ignore the desires of the vast majority of class members because the class member input would be limited to the arguments raised by a limited number class members who object at the fairness hearing. First, there is no reason that objectors to a class settlement should be presumed to represent the will of the class members as a whole. For example, it is entirely possible that the majority of class members would want to accept a proposed settlement, but under Professor Rubenstein’s proposal the will of a lone objector would be considered by the judge while the will of the majority would go unheard.\(^\text{108}\) Moreover, simply changing the criteria by which a judge evaluates class action settlements will not necessarily lead to better or more efficient results. Rather, it would be preferable for the class members, who have a financial interest in the settlement, to approve or deny a settlement, rather than to keep this power with the judges who have no financial interest in the outcome and are “constrained by their limited resources, full dockets, and scarce personnel.”\(^\text{109}\)

Other systems have argued that government agencies comment on the fairness of the settlement, but to the extent that this system already exists judges have “rarely taken advantage” of this option.\(^\text{110}\) Changing the system to impose more accountability on the attorneys representing the class members is also problematic because it would be extremely difficult to determine, on a case-by-case basis, whether

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\(^{107}.\) See Rubenstein, \textit{supra} note 21, at 1439.

\(^{108}.\) \textit{Id.} at 1475-76.

\(^{109}.\) See Klement, \textit{supra} note 20, at 47.

\(^{110}.\) Rubenstein, \textit{supra} note 21, at 1447-48 ("Judges have always had the discretion to involve public agencies in class cases by requesting that a government agency knowledgeable in the relevant area of law, such as the Securities and Exchange Commission (SEC) in securities class actions, file a brief 'to comment on the fairness and adequacy of the proposed Decree.' Judges have rarely taken advantage of this opportunity. Occasionally, state or federal agencies have voluntarily sought to participate in class action settlements to register their views with a court.") (footnotes omitted).
an attorney was attempting to act in the best interest of the class members. Moreover, even an attorney who is, in fact, earnestly attempting to act in the best interest of the class members may not make decisions that reflect the will of the class as a whole. For example, an attorney might feel that the class members merely want to be reimbursed for their harm, when the class members might actually want an injunction against the defendant to prevent similar harms in the future.

B. Why the Voting System Helps to Alleviate Problems Typically Associated With Class Actions

The agency problem would be tempered with regard to the final settlement since the class members, the principle, will be making the final decision. Depending upon which voting model is being considered, the extent of the agency problem will differ. This will be explained further when the different voting models are presented.

The collective action problem would not be entirely avoided under a voting system; however, it would likely be reduced. The costs to the class member to participate are much lower and therefore class members will be more likely to play a part in making decisions on the proposed class settlement. This would shift the focus away from representatives who are currently the primary voice of the class. The class representative would therefore assume a “less prominent and controlling role in the litigation.” Class members will then be more likely to view the benefits of voting as exceeding the costs. Class actions tend to create a collective action problem because class members do not view the costs of opting out or objecting as worth their time. However, since the costs of voting are minimal, class members will be more likely to participate, thereby making the settlement more in line with the interests of the class member. While there may still be class members who choose not to vote, those class members who do vote will make up for the inaction of others. Because those that do end up voting will generally have similar interests as the other class members who do not vote, the overall class will not be in a worse position as a result of the members who choose not to vote.

The flaws associated with the judge’s role will be less of a factor since the class action will be able to vote for a more fair settlement. Because the class members will make their own decisions about what is or is not fair, there is less of a risk that a judge will approve a settlement based on a misunderstanding of the goals of the class members. For example, although a judge may not know how much class members value injunctive relief relative to monetary damages, but class members are well-equipped to make this decision for themselves.

111. Klonoff et al., supra note 35, at 763 (The internet, a tool the voting model would incorporate, “has the potential to reduce transaction costs in ways that permit smaller claims to be pursued as class actions. The inability to obtain economically feasible relief has long been a primary concern in class action litigation. This has been particularly true when class members seek small amounts in damages.”).

112. Id. at 764.
The judge’s role of having the ability to sign off on a class action settlement would stay in place, but the judge would have the extra benefit of being able to see how the class voted on a particular settlement and balance this against the information presented by counsel. There is a danger that the class members may favor a settlement because they would be biased by the attorneys who would be providing them with information.

A voting mechanism also allows a more democratic system because class members will play a more direct role in the class action settlement. This would also curb some of the more recent concerns of commentators that suggest that class actions are unconstitutional.113 Class action members would no longer have massive roadblocks, such as the burdens of objecting, in order to participate in the class action. This increase in input by class members would allow class lawyers, defendants, and courts to gain a better understanding of the motivations and desires of class members as a group. Attorneys would also be incentivized to act more in line with the class members’ interest because the class members would have more of a direct say on whether or not a proposed settlement is fair. The monitoring of attorneys’ actions as a whole would still be weak, but at least in regards to the proposed settlement there would be more oversight by the class members.

Under a voting model, judicial acceptance of the settlement would look only to the votes actually cast for or against the proposed settlement.114 Thus, even if only 6% of class members vote in favor of a settlement, the settlement could be approved if only 4% of the class members voted against the settlement because 60% of the total votes cast would have been cast in favor of the settlement. This would make it so that those who truly have a stake in the litigation would be more likely to vote and those who do not view even the slightest bit of work in voting as being less likely to participate. In order to spur participation by class members, courts could take steps to make the voting process easier. Such steps would involve pre-paid postage,115 sending out with the voting card a quick summary of the issues that all fits on one-postcard,116

113. See Lahav, supra note 18, at 1009 (criticizing Martin Redish’s contention that class actions violate the Rules Enabling Act and separation-of-powers principles by arguing that “[n]either separation of powers nor the principle of democratic accountability calls for judicial invalidation of the class action rule. If the class action is to be reformed, it will be on a policy basis, not a constitutional one”) (reviewing MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009)).

114. Additionally, a minimum percentage of class member votes could be required before the votes are given weight (say, 5%), in order to prevent a scenario in which only a handful of voting class members determine the outcome of a multitude of litigants. However, in arriving at a minimum number of votes, one must be careful to avoid setting the threshold too high, as it is possible that only a relatively small proportion of class members will be take the time and effort to vote.

115. The postage would be paid for by the defendant so as to not incur any costs on the courts.

116. A postcard is better than an envelope since even opening up an envelope is burdensome versus just have the information accessible. Cf. Rubenstein, supra note 16, at 1460 (“[T]he public agency could simply mandate or approve a label that would be attached to the settlement, setting forth in straightforward language the terms of the settlement. This would be the equivalent of the Department of Agriculture’s nutrition labels, commonly attached to food products in the United States. These labels provide information, with the private market—through, for instance, diet books—then instructing consumers how to use that information.”) (footnotes omitted).
and allowing an online option that allows the voter to both vote and get more information.\textsuperscript{117} The internet is a cheap and accessible way for class members to receive information.\textsuperscript{118} This makes participation much more likely, and although there are still some transaction costs involved, these costs would be significantly lower than the costs involved in objecting or opting-out. Since class members already receive notice of proposed class action settlements, adding information about how to vote would not be too difficult.

\section*{C. Feasibility of Implementing Model}

Changing the class action mechanism to have a voting mechanism would not be as administratively difficult as many other proposed alternatives.\textsuperscript{119} First, lawmakers could point to the constitutional and policy concerns class actions create in order to garner support for changing the law. The Class Action Fairness Act of 2005 is a good example of how Congress has the power to change class actions.\textsuperscript{120} Additionally, the Supreme Court has the power to create the rules of procedure for the federal courts and it too would be able to change the procedures involved for class actions.\textsuperscript{121}

\section*{D. Alternative Systems}

\subsection*{1. One Class Member, One Vote}

The first voting scheme would be to treat all votes equally. This scenario would be beneficial where the class members' damages are more or less the same since the proposed settlement would affect everyone equally. In situations where the damages are unequal, such as where class members who have $100 in damages are in the same situation of those who have $10 in damages, other voting methods might be more beneficial in representing the interests of all class members.\textsuperscript{122} Aside from

\textsuperscript{117} The information online would also be paid for by the defendant's counsel as to not take any resources away from the court. Additionally, the attorneys on both sides could add information as they see fit and the class representatives can also participate in determining what information to add to the website.

\textsuperscript{118} Jordan S. Ginsberg, \textit{Class Action Notice: The Internet's Time Has Come}, 2003 U. CHI. LEGAL. F. 739, 741 (2003) ("The internet is a particularly affordable way to connect with a wide group of potential class members. Some courts have already held that the internet is an ideal forum for distributing public information for certain types of class actions and have approved the posting of class action notice on the internet.") (footnotes omitted).

\textsuperscript{119} See supra Section II.A.


\textsuperscript{121} 28 U.S.C. §§ 2071-72 (West 2006) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.").

\textsuperscript{122} The problem with treating everyone's vote equally in the context of the class action is that even though damages are similar in some class actions other class actions such as mass tort and securities class actions have different degrees of damages and therefore more or less at stake. See Coffee,
members wanting to recuperate monetary damages, some class members might seek to teach the defendant a lesson while also deterring other companies from preying on consumers. Those class members who may not necessarily have a great amount of monetary damages might nonetheless might want to vote since they might feel a duty to help others or have a sense of justice.

The current class action scheme in large part already acts under the philosophy that each class member is created equal regardless of her stake in the class action litigation. This can be shown through how the court views objectors when evaluating a proposed settlement as fair. Courts tend to look at the overall number or percentage of objectors rather than evaluating the magnitude of each objector's stake in the litigation itself. Another example includes the court treating each class member as equal by viewing those class members who remain silent on the issue as accepting the class settlement. Thus, the court already usually views a class member who does nothing when a proposed settlement is presented as a sort of "vote" to accept the settlement. Essentially, one class member's silence is not more important than another class member's silence. For instance, a judge would not view a class member's silence who had more at stake in the litigation as having more weight than another class member who only had less at stake.

Treating all votes equally is beneficial because it would prevent higher stakes class members from taking advantage of the lower stakes class members. Moreover, under an equally-weighted voting scheme, high stakes class members should be more likely to vote precisely because they have more at stake in the class outcome. The high stakes class members would thus be more likely view the benefits of voting as exceeding the costs. Accordingly, high stakes members would almost certainly have more of an influence per capita on the vote than lower stakes class members, even in the absence of a weighted voting scheme. This might cause the lower stake class members to become a minority voting block even if the class primarily consists of low stakes class members, and the high stakes class members could end up being the majority. For example, if there are 100 people in a class, and only 20 find their damages high enough to vote, then the 20 class members end up speaking for the other 80 class members who decided that voting was not worth their time. While silence of

supra note 9, at 384 (noting that, "in securities class actions, it can be safely assumed that the class shares a common preference for more money rather than less. More importantly, because the damages will be calculated on a per-share basis, an automatic allocation formula exists, thereby usually reducing intra-class tensions."). (footnote omitted).

123. Leslie, supra note 16, at 87 ("In weighing the reaction of the class as part of the fairness determination, courts focus on the number and intensity of these objections.").

124. See id. at 99-90 ("[I]f the class members are largely silent, courts take this to mean that the vast majority of the class has 'deemed the [proposed settlement] unobjectionable.' Not all courts view silence as acceptance."); see also In re Ford Motor Co. Bronco II Prods. Liab. Litig., Civ. A. MDL-991, 1995 WL 222177, at *6 (E.D. La. Apr. 12, 1995) ("The fact that a . . . small number of objections were lodged [should not be used] to rebut the conclusion that the terms of the settlement [were] inadequate.").
the other 80 class members does not necessarily mean acceptance,\textsuperscript{125} it does in part speak to the other 80 class members' stake in the litigation.

Mass tort actions would also benefit from a one class, one vote system since there are often times a wide range of injuries. A class with sufficiently disparate injuries could lead to internal conflict within the class members, because different class members will have different interests.\textsuperscript{126} While the Supreme Court in \textit{Amchem} has limited those who can be in certain groups within the same litigation, there nonetheless remain class actions where damages can vary.\textsuperscript{127}

A potential criticism of the one vote to one class member approach is that members might still not vote even if there are fewer roadblocks and even if it is relatively effortless to vote. Currently, all class members have power in their ability to remain silent, however a one vote to one member system would give all class members power by action versus inaction instead of inaction. While it is most likely true that a majority of class members would choose not to vote, it would not mean that no class members would vote and the ultimate goal of class members general having their voice heard in class actions would be accomplished.

\textbf{2. Representative Voting}

\textit{a. The Basics Explained}

Since participation by all or most class members might be a problem, selecting a small set of class members to vote for the other class members could temper the collective action problem that might arise if every class member is given a vote, but not incentivized to vote. In a class action with literally millions of class members, getting even half of the class to vote might prove extremely difficult. A major advantage of the representative voting model is that those members who choose to remain silent would still be able to have their voice heard by a member who closely resembles their circumstances.

Incentivizing all class members to vote aside from just having the incentive of a fair settlement might be too expensive so having only a portion of the class representatives be involved could be more efficient. Having voter representatives would be better than having solely class representatives because many times there are less than a handful of class representatives who are chosen by the class counsel.\textsuperscript{128} Additionally, there would be more voter representatives than class representatives, allowing the class members to be more adequately represented. The role of the voter representative would be different from the role of the class representative because the

\textsuperscript{125} \textit{See Coffee, supra} note 9, at 406.
\textsuperscript{126} Coffee, \textit{supra} note 9, at 386 (arguing that "there predictably will be disputes both as to the relative value of these claims and as to their priority for payment" in mass tort class actions).
\textsuperscript{127} \textit{See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 (1997) ("[T]he interests of those within the single class are not aligned" because "named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses.").}
\textsuperscript{128} Class representatives usually only comprise two class members.
voter representatives would only be involved in approving the final settlement, and not in deciding other substantive issues.

\[ b. \textit{Choosing the Voter Representative} \]

The first way representatives can be chosen is through a random sampling of the class members. Class members would be given a notice in the mail that announces that they have been specially chosen to participate as a voter representative. Class members could then choose whether or not they want to become a voter representative. In order to incentivize people to be voter representatives they, like the class action representative, could receive additional compensation for being a representative voter. Voter representatives could also be the first people to receive their settlement, which may be a large incentive in mass tort class actions where the funds are often limited.\(^{129}\)

This incentive would help garner participation in the representative voting scheme, and having voter representatives who disagree with one another could help to spur debate among the voters' representatives and possibly force them to research the issue more in order to ensure that the class settlements are fair.\(^{130}\)

Additionally, the idea of being "specially chosen" will make the class member feel special and would also incentivize them to respond since being chosen as a voter representative would sound like a great honor rather than a burden on the class member.

The voter representative helps to alleviate the collective action problem that would be present in a non-voting model as well as in the one-vote one-member model. Voter representatives would view the benefits as outweighing the costs and therefore decide to vote. No longer would the class as a whole suffer as a result of not having a fair settlement agreement because voter representatives would function as the voice of the other class members. The agency problem would also be reduced because the representative would have more or less the same interest as the class member.

Where only an extremely small amount of money is at stake per person (such as only two dollars per person or less), a class voting system would probably be inefficient, because the transaction costs would likely outweigh any benefits from increased accuracy. Nonetheless, in this situation a representative class action voting system might apply in low-stakes cases. For example, where there are three million class members and each have two dollars in damages, one could select 1,000 voter representatives. If these voter representatives were paid $20 to participate, then this would only cost $20,000 to increase the accuracy of a $9M settlement.

One problem with the voter representative model is that it is not truly democratic since each class member does not have a vote.\(^{131}\) While a democratic approach is desirable, it may not be feasible in all situations.
system may allow representatives to vote for constituents, the representative is elected by the people. However, in the voter representative model class members are not electing a representative. Electing a representative could be an option, but this alternative is likely to be inefficient and create little benefit. First, class members will have little incentive to vote for a representative, as they will have little information about the qualifications of a voter representative absent a costly and time-consuming campaign process. Second, potential representative voters will have little incentive to engage in a campaign process, because they may have little to gain by being selected as a voter representative. Third, unless the number of potential voter representatives is very small, a campaign process would be practically unworkable due to a large number of representatives to elect. But if the number of voting representatives is small, then they would be less likely to represent the potentially broad and varied range of interests that may be shared by class members as a whole.

3. Weighted Voting

This system of voting would weigh each class member’s vote according to the stakes the class members have in the litigation. This would be an option more in a mass tort or securities class action where class members would be able to pass the certification yet differ significantly on the amount of damages incurred. For example, class members who have the potential to lose $500 would be able to have their vote count more than class members who might lose $5. In securities class actions, members often differ in the amount of shares owned therefore differing on the amount of damages incurred. Even in a small consumer class action case a weighted voting scheme could be possible. For example, in the Nutella case different people had bought different amounts of Nutella, and the proposed settlement was at $4 a jar of Nutella up to $20. In this scenario, voters could have gotten one vote per jar of Nutella they purchased during the relevant time period.

The weighted voting system offers relief in securities class actions, because the transaction costs involved in determining what proportion of the vote to give each individual will not be as difficult as other class actions. This is because it will be diverge from those of their constituents, and, more problematically, representatives are not always able or willing to advocate for all of their constituents’ preferences.”); see also David B. Spence, Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control, 14 YALE J. ON REG. 407, 440 (1997) (discussing incongruence of interests in representative government).

132. It is likely that the campaign process would consist of slogans such as “a vote for me is a vote for settlement,” which would focus on the intended vote of the representative. Such a process would accomplish little more than a direct vote for or against the settlement, but would introduce additional complexity and costs.


134. Janet Cooper Alexander, The Value of Bad News in Securities Class Actions, 41 UCLA L. REV. 1421, 1423 (1994) (“Although there is agreement, at a high level of generality, on the measure of damages, the parties’ calculations of damages typically are far apart, even (or perhaps especially) in well-lawyered cases.”) (footnote omitted).
easy for most investors to provide transaction records to prove how many shares of stock they purchased. Other transactions may not be as well documented, such as how many jars of Nutella a consumer purchased during a certain time period. Additionally, because damages in securities class actions are generally proportional to the number of owned shares, even low-stakes class members should have their interests aligned with the high-stakes class members. In this scenario, the weighted voting system serves as an additional guarantee that the most informed and most interested members play the largest role in directing the litigation.

The weighted voting scheme is suspect in that the transaction costs of figuring out damages to each individual could be high. In securities class actions there is already a problem in determining per-share damages accurately. Additionally, in mass tort and small consumer class actions, analyzing who has what damages could be a problem. However, this process has to be done regardless after the settlement is approved. Figuring out the damages would then just have to occur before the final approval stage.

E. Judicial Administration: Determining the Appropriate Voting Mechanism

A judge will ultimately make the decision on what voting mechanism is proper. When considering what voting mechanism to use the judge should look at a number of factors. The first factor a judge should look at is the variation of damages between class members. If there is a great deal of variation in damages, then a weighted voting system should be preferred. In contrast, if there is little variation in damages, then a one member, one vote system would be preferable. This is because it would not be worth the additional time and effort to determine the precise weight to give to each member’s vote if the weighting is only likely to vary by a minimal amount.

A second factor for the judge to consider is the amount at stake per class member. Where each individual class member has a low amount at stake even though the aggregate damages are substantial, there might be difficulty in getting a large number of members to vote. In such a case, each class member has a low incentive to make an informed vote even though the class collectively has a great deal at stake. In this situation, giving certain class members a greater stake in the litigation would provide an incentive for the voters to come to an informed decision about whether or not to approve a settlement agreement.

135. Id. at 1460 (Determining damages for securities class actions is “done through a mathematical model based on assumptions about the trading pattern in the shares. In the ‘proportional trading’ or ‘proportional decay’ model used by plaintiffs’ experts (which has also been adopted in several studies), each share is assumed to be equally likely to trade.”) (footnote omitted).

136. See Koslow, supra note 17, at 842 (“It is important to recognize the complications and limitations in formulating damages estimates . . . .”); see also Janet Cooper Alexander, Rethinking Damages in Securities Class Actions, 48 STAN. L. REV. 1487, 1488 (1996) (“It is difficult for the parties to estimate the size of the potential jury award with any degree of confidence, because the amount of damages is a complex and intractable issue at trial.”).
The final factor judges should look to is a weighting of the administrative costs and benefits of establishing a voting mechanism. Not all cases would be appropriate for a voting mechanism. A judge might determine that setting up a voting mechanism might not be worth their efforts based on the individual facts of the case. In this situation a judge should not be forced to adopt a voting mechanism. For example, in cases with a low aggregate amount at stake, the accuracy benefits of a voting system are unlikely to outweigh the judicial delay caused by establishing and overseeing a class vote. In contrast, where several million dollars are at stake, the aggregate costs of an inaccurate settlement are much higher, and a voting mechanism is likely to be significantly more beneficial and worth the investment.

IV. RESPONSES TO POTENTIAL CRITICISMS

The main problem with the current state of the law is that class members incur high costs in order to object to a settlement. While the voting method seeks to lower these costs along with lowering the potential for other problems commonly associated with class actions, there are a few general criticisms to the voting scheme that should be addressed. Some have dismissed the voting system since they have miscalculated the information costs and have failed to compare the voting system’s transaction costs with that of the current system’s transaction costs. While there is no doubt that transaction costs exists, one must look at the alternatives. The current option includes class members either objecting to a proposed settlement or opting out of a settlement. These methods are quite burdensome and are rarely used by the class member. A voting mechanism is easier because class members would only need to go online, an activity that most Americans likely do every day, or simply mail in a pre-paid postage card. This is much less of a hassle of having to hire an attorney and then proceed to attend litigation hearings because the class member wants to opt-out of the class or even object to the proposed settlement.

John Coffee rejects the voting scheme because he feels that claimants would “have little incentive to vote.” He argues that the real issue is whether the class members even want a voice. However this confuses the cause with the effect. If class members were to have fewer roadblocks it is most definitely possible for class members to want to speak out more. Additionally, objectors have shown up in record

137. Coffee, supra note 9, at 406 (“For example, class votes could be taken on important questions (such as on any proposed settlement); class steering committees could be formed; and class member participation could be maximized at every stage. But such reforms are costly.”).

138. Kathryn Zickuhr & Aaron Smith, Digital Differences, Pew Research Center, (April 13, 2012) http://pewinternet.org/-/media//FilesReports/2012/PIPDigital_differences_041312.pdf (“One in five American adults does not use the internet. Senior citizens, those who prefer to take . . . interviews in Spanish rather than English, adults with less than a high school education, and those living in households earning less than $30,000 per year are the least likely adults to have internet access.”).

139. Coffee, supra note 9, at 417; see also Rubenstein, supra note 21, at 1442 (arguing that “[c]lass members’ passivity and absence is expected; indeed it provides much of the justification for aggregate treatment of their claims in the first place.”) (footnote omitted).

140. Coffee, supra note 9, at 406.
numbers where the case receives more attention by the media. Coffee points to a collective action problem in a voting model since “someone has to have sufficient incentives to organize the opposition,” and that “only a rival team of plaintiffs’ attorneys seem likely to have the incentives to undertake this task.” This might be true in the context of certain small claims where the voter would only benefit a few dollars, however, Coffee fails to look at the voting scheme in the context of mass torts or even where the settlement value per class member could be a few hundred dollars. Because the costs to the class member would be dramatically lowered, relative to objecting under the current system, Coffee’s collective action concerns are likely overstated.

The costs to the class member would also be lowered if the court and attorneys were to make the settlement information available online. Some courts already practice this and those who do not have a system in place could easily establish a website that lists the most relevant information for the class members. Indeed, many class action cases are already being posted online. With easy access to class action information the class members will be more likely to participate and reach an informed decision.

Class members may be also motivated to participate in a voting system due to a sense of justice or civic participation, even if taking the time to participate may not make economic sense for the members. For example, class members may want to avoid allowing a defendant to underpay for harms caused to the class, even if this underpayment may only be a small amount per class member. Similarly, other class members may view class settlement voting as a civic duty akin to jury duty or political voting, because by voicing their viewpoints through a voting mechanism, class members can help the legal system come to more fair and accurate outcomes.

Additionally there is a problem of the majority of class members overriding the voice of the minority class member. This is the problem that the framers had in mind when creating a democracy in America and it is also a problem in a democratic approach to class actions: the tyranny of the majority infringing on the minority. Class members who have lost $100 would most likely vote against a proposed settlement.

141. Less than 1% of the class actually ends up objecting, many times only having one or two objectors. However in the Nutella case, which received national attention, at least three objectors were present. See Shook, Hardy & Bacon, LLP, *Objections Filed to Settlement of Nutella Misleading Ad Claims*, FOOD & BEVERAGE LITIGATION UPDATE 3, (June 22, 2012), available at www.shb.com/newsletters/FBLU/FBLU444.pdf.
143. Klonoff et al., *supra* note 35, at 754 (explaining that court-administered class action coverage already exists through “MDL transferee court Web sites” which provide comprehensive information about cases). Putting the information online is also more beneficial than mailing the information since it would be cheaper than mailing, people move, and editing a website is much easier than having to constantly send out changes to a class of possibly millions. “A major source of difficulty is that people move: across town, across the country, and to a lesser extent, throughout the world.” *Id.* at 731.
that only leaves them with $10. However, class members who lost $10 will view the proposed settlement as fair. Since the class members with the $100 dollar damages have more voting power than the class member with just $10, the proposed settlement would likely fail. This means that the class member who had only lost $10 would have to wait longer to receive their settlement. Nevertheless, waiting longer to receive only a small settlement is a relatively low burden. This is especially problematic in securities class action where shareholders who have a lot to gain end up being seasoned investors whose interests are not entirely aligned with the smaller investors. ¹⁴⁵

The voting method can also fall subject to outside forces that will try to sway people’s votes. Just like the judge who is influenced by both the plaintiff and defense counsel to settle, ¹⁴⁶ voters could also be persuaded to settle a claim that might not be fair. Since the voting scheme relies on informed voters, the information that is being presented to the voters could be written in a way that makes the settlement appear as if it is fair on its exterior but really does little to compensate the class members. Additionally, this concern could be reduced by allowing a judge to reject a class settlement, even if it is approved by the voters, if there is evidence that the class members were misled by the attorneys or defendant. This discretion would help protect class members from collusion, while still allowing class members to voice their opinions of the settlement. In contrast, judicial discretion would not be necessary if the class members rejected a proposed settlement, because there is no risk that such a result would have been caused by misleading information from the class attorneys or defendant.

V. CONCLUSION

For too long, class members have lacked a true voice in the litigation. Under current law, this void has been filled by defendants, attorneys for the class, and to a lesser extent, class representatives. A class action voting system would allow class members to exercise their collective voice in an effective and relatively easy manner to influence settlements. This approach would reflect this country’s democratic values, and would help to prevent settlement outcomes that are contrary to the collective will of the class.

¹⁴⁵. Alexander, supra note 61, at 1448 (“Another reason why the litigation put may be reflected in the stock price is that the return from litigation, and thus the value of the right to share in a litigation recovery, may be greater for institutional investors, who play a primary role in setting the market price, than it is for the ‘average share.’”) (footnote omitted).
¹⁴⁶. See supra II.A.2.