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Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act

DANIEL C. LOPEZ*

This Note explores the procedural contours of hybrid actions: Combined state law opt-out Rule 23 class actions and Fair Labor Standards Act opt-in collective actions in one lawsuit. The Note contains four parts. Part I examines the history of the FLSA, the Portal-to-Portal Act of 1947, and Rule 23. Part II provides a brief procedural guide to the collective action and class action certification processes. Part III surveys published federal court cases and ultimately posits that hybrid actions violate the Rules Enabling Act. Finally, Part IV urges Congress to abolish collective actions by repealing § 216(b) of the FLSA. In short, § 216(b) was drafted during the infancy of group litigation and is an antiquated vestige. If Congress excises this vestige, federal courts could readily employ updated class action and supplemental jurisdiction rules to more efficiently adjudicate FLSA and state wage and hour claims in one action.

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INTRODUCTION

The recent boom of wage and hour litigation is one of the most striking developments in modern legal history. Federal court filings alone have increased nearly threefold since 2000.[1] For some, this trend makes

1. In 2000, 1854 suits were filed pursuant to the Federal Labor Standards Act in federal court. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 46 tbl. C-2 (2001), *available at* http://www.uscourts.gov/caseload2001/tables/c02mar01.pdf. Filings reached an all-time high of 6786 in 2007 then dropped to 5302 in 2008. *See* OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 45 tbl. C-2 (2008), *available at* http://www.uscourts.gov/caseload2008/tables/C02Mar08.pdf. These statistics do not account for

for an economic and logistical nightmare. Unlike isolated discrimination suits, wage and hour group litigation strikes a devastating blow to the unsuspecting employer's bottom line.[2] Small businesses and large corporations alike must navigate a statutory minefield of New Deal–era federal statutes[3] and rapidly changing state laws.[4] Nonetheless, for others, the wage and hour groundswell helps protect low-wage employees and generate business for the plaintiffs' bar. Non-unionized minimum wage employees can pool resources in group litigation,[5] recover hard-earned overtime pay, and send a powerful message to employers. Plaintiffs' attorneys secure a steady stream of clients[6] and recover staggering settlement amounts with contingency fees.[7]

With so much at stake, one would expect federal courts to have solved the major procedural problems surrounding wage and hour group litigation. Surprisingly, this is not so. The primary source of confusion stems from a deceptively simple difference between the Fair Labor Standards Act (FLSA)[8] and Federal Rule of Civil Procedure 23 ("Rule 23"). FLSA claims are governed by an "opt-in" mechanism in § 216(b).[9] In these "collective actions," litigants who do not affirmatively file notice and *join* the litigation *are not bound* by the judgment.[10] Conversely, the

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removals from state to federal court. *See id.*

2. Estimates place total wage and hour settlement and judgment values at over $1 billion annually in recent years. *See* Michael Orey, *Wage Wars*, BUS. WK., Oct. 1, 2007, at 50, *available at* http://www.businessweek.com/magazine/content/07_40/b4052001.htm.

3. "About 115 million employees—86% of the workforce—are covered by federal overtime rules . . . ." *Id.* Employers' statutory risk exposure is often deceptive because several types of businesses with sophisticated employees, such as stockbrokers, may be protected under wage and hour laws. *Id.* This anomaly is caused by outmoded New deal–era job classifications, which are frozen into many federal labor laws. William J. Kilberg, *The Fair Labor Standards Act: Forcing 1938 Job Categories on the Modern Economy*, BRIEFLY . . . PERSP. ON LEGIS. REG. & LITIG., Jan. 2001, at 17–19.

4. *See generally* Rosalind M. Gordon et al., *Deductions, Recoupments or Repayments from Payroll: Survey of State Wage Laws*, *in* 2 37TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 1000 (PLI Litig. & Admin. Practice, Course Handbook Series No. H-782, 2008).

5. In some respects, wage and hour laws have proven to be a true leveling tool for the lowest end of the workforce. Many suits involve large retail chains (e.g., Starbucks and Wal-Mart) in typically non-union states, such as Texas and Florida. Orey, *supra* note 2; *see also* Brian R. Gates, Note, *A "Less Stringent" Standard? How to Give FLSA Section 16(b) a Life of Its Own*, 80 NOTRE DAME L. REV. 1519, 1541 (2005) (citing Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989)).

6. *See generally* Federal Judicial Caseload Statistics, http://www.uscourts.gov/caseloadstatistics.html (last visited Oct. 4, 2009) (recording annual FLSA filling data from 2000 to 2008).

7. Orey, *supra* note 2.

8. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006).

9. 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."). Notably, collective actions are not limited to FLSA claims: both the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(d), and the Equal Pay Act (EPA), 29 U.S.C. § 206(d), cross-reference § 216(b). *See* Elizabeth K. Spahn, *Resurrecting the Spurious Class: Opting-In to the Age Discrimination Employment Act and the Equal Pay Act through the Fair Labor Standards Act*, 71 GEO. L.J. 119, 120 (1982).

10. 29 U.S.C. § 216(b).

Rule 23 "opt-out" device governs all other claims: *class action* litigants who do not affirmatively file notice and *exit* the litigation *are bound* by the judgment.[11] Increasingly, plaintiffs file state-law wage and hour claims alongside the FLSA claims.[12] Regardless of the specific wage statute involved, when an FLSA collective action and Rule 23 class action are joined together in one suit, the result is a *hybrid action*.[13]

The determination of how to handle these hybrid actions has left lower federal courts divided. Some district courts, the antijoinder camp, dismiss hybrid actions for a variety of reasons. These courts sometimes hold that the FLSA substantively preempts certain state wage and hour laws altogether.[14] Antijoinder courts also dismiss the state-law claims on procedural grounds such as fact-based deficiencies in supplemental jurisdiction or the failure to meet class certification requirements.[15] Additionally, these courts deny joinder due to Rules Enabling Act violations or the "inherent incompatibility" of 216(b) and Rule 23.[16] Conversely, projoinder courts do not dismiss hybrid actions outright. These courts either reject the antijoinder arguments or downplay the inconsistencies between collective actions and class actions.[17] Remarkably, no unified rationale guides either camp and approaches vary even within the same federal district.

This Note surveys the district court struggle with hybrid actions and guides readers around recurring procedural obstacles. Part I examines the sociopolitical roots and legislative history of the FLSA, the Portal-to-Portal Act of 1947,[18] and Rule 23. Part II provides a brief procedural guide to the collective action and class action certification processes. Part III surveys published federal court cases and ultimately posits that hybrid actions violate the Rules Enabling Act. Finally, Part IV urges Congress to abolish collective actions by repealing § 216(b). In short, § 216(b) was

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11. FED. R. CIV. P. 23(c)(3).

12. *See* Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 LAB. LAW. 311, 315 (2005).

13. Even though courts do not follow a hard and fast rule, an explanation of terminology is helpful. This Note will refer to "collective actions," "class actions," "hybrid actions," and "group litigation." "Collective actions" are § 216(b) opt-in actions. While issues relating to Rule 23(b)(1) and (2) occasionally arise, "class actions" and "Rule 23" will be shorthand for Rule 23(b)(3). "Hybrid actions" describe the joinder of a collective action and class action in one suit. Finally, "group litigation" refers to any or all of the above.

14. Rachel K. Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions*, 58 AM. U. L. REV. 515, 548–58 (2009). While this Note will survey the procedural inconsistencies of hybrid actions, a substantive preemption analysis is helpful as well. *See id.*

15. *See infra* Part III.A–B.

16. *See infra* Part III.C.

17. *See infra* Part III.A–C.

18. Pub. L. No. 80-99, 61 Stat. 84, 87 (1947) (codified as amended in scattered sections of 29 U.S.C.).

drafted during the infancy of group litigation and is an antiquated vestige. If Congress excises this vestige, federal courts could readily employ updated class action and supplemental jurisdiction rules to more efficiently adjudicate FLSA and state wage and hour claims in one action.

I. THE HISTORY OF THE FLSA, THE PORTAL-TO-PORTAL ACT, AND RULE 23

The FLSA, the Portal-to-Portal Act, and Rule 23 each arose out of inimitable sociopolitical and historical circumstances. All three enactments illustrate the meandering development of American group litigation and contain pieces to the puzzle of hybrid actions. Section A examines the drive to enshrine wage and hour regulations into the FLSA. Section B analyzes the FLSA backlash and creation of the collective action in the Portal-to-Portal Act. Lastly, section C charts the transformation of Rule 23 and emergence of interest-based class actions.

A. THE FLSA

The FLSA was enacted during a defining moment of American history. In his first term, Franklin D. Roosevelt was locked in a struggle with the United States Supreme Court over several key pieces of New Deal legislation.[19] The Court rebuked early attempts to regulate wages in federal labor laws.[20] In 1935, the Court held in *A.L.A. Schechter Poultry Corp. v. United States*[21] that the wage regulation portions of the National Industrial Recovery Act (NIRA) of 1933[22] violated the Commerce Clause.[23] President Roosevelt publicly lamented this decision because he had personally lobbied to include the NIRA wage-regulation segments.[24] Just one year after the *Schechter* case, which dealt exclusively with federal law, the Court decided that wage and hour regulation fell entirely outside the scope of state legislative authority in *Morehead v. New York ex rel. Tipaldo*.[25] After these blunt rejections of federal and state wage statutes, the Democratic Party and labor unions responded in unparalleled fashion.[26] In 1936, an election year and just months on the heels of the *Morehead* decision, Democrats capitalized on the Court's

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19. John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 464 (1939).

20. *Id.*

21. 295 U.S. 495, 550 (1935).

22. 15 U.S.C. § 703 (2006).

23. U.S. CONST. art. I, § 8, cl. 3.

24. Forsythe, *supra* note 19, at 464.

25. *See* 298 U.S. 587, 618 (1936) (striking down the New York wage and hour statute); *see also* Adkins v. Children's Hosp. of the Dist. of Columbia, 261 U.S. 525, 562 (1923) (invalidating the District of Columbia's minimum wage law).

26. Forsythe, *supra* note 19, at 464–65.

unpopularity by campaigning for a constitutional amendment to eliminate poor working conditions and child labor.[27] Roosevelt and the Democrats secured a pro–New Deal mandate with a landslide victory.[28] The constitutional amendment never transpired but the administration took a different approach to fighting the Court.[29] With the guidance of then-Senator Hugo Black,[30] Roosevelt introduced the Court-packing plan in early 1937.[31] Sensing a loss of institutional legitimacy, the Court tempered its stance on New Deal legislation[32] and upheld state wage and hour regulation in *West Coast Hotel Co. v. Parrish*.[33] This set the stage for comprehensive federal wage and hour reform.

Many agreed that the FLSA was vital but few knew how to take on the daunting task of drafting an effective wage and hour law.[34] Union leaders questioned whether they should help set wage and hour levels or instead leave the specifics to lawmakers.[35] Legislators debated over flexible versus rigid wage and hour rates and disputed the mode of administrative implementation.[36] After 397 days and ten drastically revised bills, Roosevelt signed the FLSA into law on June 25, 1938.[37] In its final form, the FLSA embodied a workable compromise between sparring factions of the Democratic Party and the labor unions.[38] The Act borrowed much from labor laws developed over the preceding seventy years.[39] Minimum wage levels, the forty-hour workweek, child labor prohibitions, and the all-important coverage definitions such as "employee" and "employer" were codified in one omnibus federal statute for the first time.[40] Section 216(b) conferred a private cause of action upon aggrieved employees.[41] If encountered with an FLSA

27. *Id.* at 464.

28. WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932–1940, at 196 (1963).

29. Forsythe, *supra* note 19, at 465.

30. *Id.*

31. *See* Judicial Reorganization Bill of 1937, S. 1392, 75th Cong. (1937).

32. Forsythe, *supra* note 19, at 465; *See* Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 562–63 (1937) (validating the Railway Labor Act of 1926, 45 U.S.C. § 152); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937) (upholding the National Labor Relations Act of 1935, 29 U.S.C. § 151).

33. 300 U.S. 379, 400 (1937). *West Coast Hotel* upheld a state law but more importantly overruled *Adkins*. *See id.* Congress could pass wage laws to ensure the "protection of health and safety." *Id.* at 393. In turn, these laws could abrogate employers' alleged "freedom of contract." *Id.* at 391.

34. Even against the backdrop of the New Deal, the FLSA was one of the most contentious pieces of legislation to date. Forsythe, *supra* note 19, at 489–90.

35. *Id.* at 467–70.

36. *Id.* at 474.

37. *Id.*

38. *Id.* at 473.

39. THE FAIR LABOR STANDARDS ACT 3–9 (Ellen C. Kearns et al. eds., 1999).

40. *Id.* at 15–16.

41. James M. Fraser, *Opt-In Class Actions Under the FLSA, EPA, and ADEA: What Does it Mean to be "Similarly Situated"?*, 38 SUFFOLK U. L. REV. 95, 99 (2004).

violation, employees could sue in federal or state court in one of three ways: (1) individually, (2) on their own behalf and on behalf of other employees similarly situated, or (3) by designating an outside agent or representative to sue on behalf of all similarly situated employees ("representative actions").[42]

The overriding public policy ethos behind the FLSA was the primacy of federal labor laws.[43] It was believed that a nationwide statutory floor was needed to ensure humane working conditions for workers on the lowest rung of the socio-economic ladder[44] and that state laws would be toothless without this federal floor.[45] Large employers would suppress wages, lower the price of their goods, and ultimately find a market for those cheap goods in states that attempted to maintain high labor standards.[46]

B. THE PORTAL-TO-PORTAL ACT

After its enactment, employers generally acquiesced to the FLSA minimum wage provisions, but fervent debate arose regarding the definition of "hours."[47] Unions and businesses could not agree when an employee's work began.[48] These seemingly innocuous distinctions greatly impacted premium pay: work in excess of forty hours per week was compensable at time and a half.[49] Miners brought FLSA suits to recover the uncompensated time spent preparing for work and traveling to and from the mines. On two occasions, the Court held that such time was indeed compensable because it fell under the FLSA statutory definition of "work."[50] Since these decisions were limited to extreme working situations such as mining and logging, few employers paid notice.[51] However, in *Anderson v. Mt. Clemens Pottery Co.* the Court found that

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42. *Id.* (citing Fair Labor Standards Act, Ch. 676, § 16(b), 52 Stat. 1060, 1069 (1938) (current version at 29 U.S.C. § 216(b) (2006))).

43. THE FAIR LABOR STANDARDS ACT, *supra* note 39, at 12–13 (citing H.R. REP. No. 75-2182, at 6 (1937)).

44. *Id.* at 13.

45. *Id.*

46. *Id.*

47. *See* Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 61 (1991).

48. *Id.*

49. *Id.* at 64 n.48.

50. Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 603 (1944) ("It is sufficient in this case that the facts relating to underground travel in iron ore mines leave no uncertainty as to its character as work."); Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers, 325 U.S. 161, 170 (1945) ("We are dealing here solely with a set of facts that leaves no reasonable doubt that underground travel in petitioner's two bituminous coal mines partakes of the very essence of work."); *id.* ("This travel must therefore be included within the workweek for purposes of § 7(a) of the Fair Labor Standards Act regardless of any custom or contract to the contrary at the time in question.").

51. Linder, *supra* note 47, at 95.

the same work preparation time applied to ordinary factory workers.[52] Employees could recover for the time spent preparing for work and walking between the time clock and workstation ("portal pay").[53] Most importantly, *Anderson* opened the possibility of retroactive FLSA suits for previous unpaid travel and preparation time.[54] This retroactive aspect was alleged to pose a grave threat to the economy[55] and Congress sought to reduce employer liability. In the months following *Anderson*, portal pay suits garnered nation-wide media attention and prompted fervent debate about unionized labor.[56]

The Portal-to-Portal Act amended pertinent sections of the FLSA and illustrated the legislature's pro-employer response to the increasing amount of portal suits.[57] Initial drafts of the Portal-to-Portal Act made it clear that the pro–New Deal impetus behind the FLSA was gone. The Republican Party now controlled both houses of Congress.[58] A rift in the Democratic Party pitted pro-union Northerners against Southerners, and pro-business forces gained a stronger lobbying foothold in Washington.[59] An early House bill aimed to effectively repeal the FLSA by voiding its statutory regulations and favoring purely private contractual standards.[60] The more limited Senate bill cut off retroactive portal claims in response to *Anderson* but preserved existing and future FLSA suits.[61] On April 29, 1947, the House met in conference and accepted the restrained Senate version of the bill.[62] President Truman considered the bill for ten days and signed the Portal-to-Portal Act on May 14, 1947,[63] issuing a then-unheard-of signing statement.[64] In doing so, he interpreted the primary purpose of the Portal-to-Portal Act to be to "eliminate the immense potential liabilities which have arisen as the result of the portal-to-portal

52. 328 U.S. 680, 690–94 (1946).

53. *Id.*

54. Gates, *supra* note 5, at 1528.

55. THE FAIR LABOR STANDARDS ACT, *supra* note 39, at 18–19.

56. *See* Linder, *supra* note 47, at 116–17. Portal pay suits were allegedly being used "as a lever for one of the largest mass wage demands in the nation's history." *Id.* (quoting Editorial, *The Portal-to-Portal Issue*, N.Y. TIMES, Dec. 24, 1946, at 16).

57. *See* Portal-to-Portal Act of 1947, Ch. 52, 61 Stat. 84 (1947) (codified as amended in scattered sections of 29 U.S.C.).

58. *See* Linder, *supra* note 47, at 142.

59. ROBERT J. DONOVAN, CONFLICT AND CRISIS: THE PRESIDENCY OF HARRY S. TRUMAN 1945–1948, at 229–30 (1996).

60. Linder, *supra* note 47, at 156 ("Violations of FLSA would then have been reduced to something akin to common-law breaches of contract.").

61. *Id.* at 147.

62. H.R. REP. NO. 80-326, at 1 (1947) (Conf. Rep.). "By adopting the language of the Senate provision virtually intact, the conference salvaged FLSA." Linder, *supra* note 47, at 156.

63. HARRY S. TRUMAN, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING HIS APPROVAL OF H.R. 2157, THE PORTAL-TO-PORTAL ACT OF 1947, H.R. DOC. NO. 247, at 1 (1947).

64. *Id.*

claims."[65] While signing statements are of questionable legal significance,[66] Truman's flatly pro-business reading of the Portal-to-Portal Act elucidates the policy pushback against the FLSA.[67] Evidently, the wage and hour debate did not center on "if" Congress should reduce employer liability but rather on "how much."

The substantive portions of the Portal-to-Portal Act embody the Eightieth Congress's pro-business leaning. The Act totally barred retrospective FLSA portal pay claims and greatly limited prospective suits.[68] Importantly, the Act eliminated "representative actions" in 216(b) by banning non-employee "agents" or "representatives."[69] The amended version of § 216(b) created the modern day collective action:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.[70]

Under this new language, only aggrieved employees may represent a class of fellow co-workers.[71] Those who wish to join the suit must opt-in to the collective action by giving their consent "in writing."[72] This scheme reduces class sizes because litigants must take the extra step of notifying similarly situated employees and awaiting their response.[73] Senator Forrest C. Donnell pushed for the revision of § 216(b) in order to "ban

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65. *Id.*

66. Malinda Lee, Comment, *Reorienting the Debate on Presidential Signing Statements: The Need for Transparency in the President's Constitutional Objections, Reservations, and Assertions of Power*, 55 UCLA L. REV. 705 (2008).

67. One historian suggests:

> [T]he issue was not one on which substantial public opinion demanded a veto. Unorganized workers were politically inarticulate, and a large part of the population, forgetting about the unorganized workers whom the bill affected, viewed the extravagant portal claims as another attempt by powerful unions to line their pockets at the expense of consumers. Thus, Truman found no compelling reason to abandon his conciliatory posture.

Linder, *supra* note 47, at 160 (quoting SUSAN M. HARTMANN, TRUMAN AND THE 80TH CONGRESS 45–46 (1971)).

68. THE FAIR LABOR STANDARDS ACT, *supra* note 39, at 19–20.

69. Under the original version of § 216(b), a claim could be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees *may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated*." Fair Labor Standards Act, Ch. 676, § 16(b), 52 Stat. 1060, 1069 (1938) (emphasis added).

70. 29 U.S.C. § 216(b) (2006).

71. THE FAIR LABOR STANDARDS ACT, *supra* note 39, at 21.

72. *Id.* at 22.

73. *See* Andrew C. Brunsden, *Hybrid Actions, Dual Certification, and Wage Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269, 294 (2008).

all actions on behalf of employees who had no knowledge or involvement in the litigation."[74] Even though Senator Donnell did not fully articulate his reasons for promoting the amendment, he likely targeted union-backed suits.[75] Indeed, before the amendment of section 216(b), unorganized workers rarely brought any kind of FLSA suit, let alone representative actions.[76] However genuine, Senator Donnell also questioned the theoretical underpinnings of representative actions.[77] He deplored the idea of an uninterested party suing on behalf of thousands of unaware employees.[78] In his view, it would be "unwholesome" if these employees suddenly appeared in droves to collect a favorable judgment well after the statute of limitations had passed.[79] This underlying fear of potentially infinite liability (along with anti-union animus) drove Senator Donnell to lobby against representative actions.[80] As a result, the amended § 216(b) facilitated the core policy aims of the Portal-to-Portal Act because it eliminated representative actions and restricted the potential for FLSA claims against employers.

C. RULE 23

While brief, this section will examine the history of class actions and illustrate the stark contrast between the current Rule 23 and the original 1938 version which was applicable when the original FLSA and Portal-to-Portal Act were enacted. An important theoretical distinction bears mention. Most broadly, group litigation is based on either *consent* or *interest*.[81] Section 216(b) embodies the consent theory because litigants must affirmatively approve of the class representative. Rule 23 exemplifies the interest theory because the representative need only show a shared legal or remedial interest with the rest of the class.

1. Class Actions: 1938 Through 1965

Before 1938, representative litigation was relegated to the obscure Federal Equity Rules and a few isolated cases.[82] No single procedure guided court decisions[83] or academic opinion.[84] The Federal Rules of Civil

74. *Id.* at 21 (citing 93 CONG. REC. 2182 (1947) (remarks of Sen. Donnell)).

75. Linder, *supra* note 47, at 172–73.

76. *Id.* at 172 n.681.

77. *Id.* at 173 (citing 93 CONG. REC. 2182 (1947) (remarks of Sen. Donnell)).

78. *Id.*

79. *Id.*

80. *Id.*

81. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 229–30 (1987).

82. *Id.* at 225.

83. *Id.* at 223–25 (citing Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Am. Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3, 90 F. 598 (C.C.N.D. Ohio 1898)); *see also* Christopher v. Brusselback, 302 U.S. 500, 505 (1938).

84. Joseph Story, Christopher Langdell, and Zechariah Chafee reached divergent conclusions on

Procedure were codified in September 1938, just one month before the passage of the FLSA.[85] The original version of Rule 23 was a bewildering amalgamation of existing theory and sparse precedent.[86] The Rule divided class actions into three groups: "true," "hybrid," and "spurious" suits.[87] "True" suits required joinder because all parties shared a joint, common, or secondary right at stake in the action.[88] "Hybrid" suits arose when numerous litigants shared a right in specific property.[89] "Spurious" suits arose when "the rights of the individual plaintiffs are separate causes of action and they have no right to a common fund or to common property."[90] Courts had tremendous difficulty applying Rule 23 in practice and the ill-fated trichotomy drew constant criticism throughout its twenty-eight-year existence.[91] Significantly, the binding effect of class actions hinged on the court's classification: true actions potentially bound all class members, hybrid suits bound only members found to hold an interest in the property in question, and spurious suits bound only parties before the court.[92]

2. *Class Actions: 1966 to the Present*

Rule 23 was entirely rewritten in 1966.[93] The new Rule bore little resemblance to the original version because the rulemakers wisely shied away from defining classes in terms of rigid property-law relationships among members.[94] Instead, the amended Rule 23 sets out four threshold prerequisites in subdivision (a) and requires that the prospective class fit into one of three categories in subdivision (b).[95] The newly-drawn Rule

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topics such as res judicata and equitable jurisdiction over multiple suits involving common questions. *See* YEAZELL, *supra* note 81, at 216–20, 228–30.

85. *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1004, at 31 (3d ed. 2002).

86. YEAZELL, *supra* note 81, at 229–30.

87. The "true," "hybrid," and "spurious" terminology was coined by James Moore. *See* James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 571–76 (1937).

88. 7A CHARLES ALAN WRIGHT ET AL., PRACTICE AND PROCEDURE § 1752, at 21–23 (3d ed. 2005).

89. *Id.* at 28.

90. 7A WRIGHT ET AL., *supra* note 88, § 1752, at 28 (quoting Pa. Co. for Ins. on Lives & Granting Annuities v. Deckert, 123 F.2d 979, 983 (3d Cir. 1941).

91. *See* Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 822–23 (1946) (noting that the three groups "baffled both courts and commentators" (footnote omitted)). "[J]udges charged with distinguishing them went home with headaches for the twenty-eight years of the rule's operation." YEAZELL, *supra* note 81, at 230 (citing CHARLES ALAN WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 349 (3d ed. 1976)).

92. *See* 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1789, at 548 (3d ed. 2005). Furthermore, the original Rule 23 failed to provide notice requirements and courts never satisfactorily defined the extent of the binding effects of true or hybrid action judgments. Note, *Binding Effect of Class Actions*, 67 HARV. L. REV. 1059, 1061–63 (1954).

93. 7A WRIGHT ET AL., *supra* note 88, § 1753, at 42.

94. YEAZELL, *supra* note 81, at 229.

95. FED. R. CIV. P. 23(a)–(b).

23(b) categories consist of two specific class action examples and a third catchall residual category.[96] Though rarely used, Rule 23(b)(1) is a "mass production version of . . . the necessary-parties rule."[97] Rule 23(b)(2) is designed for classes seeking injunctive or declaratory relief. Rule 23(b)(3) covers all other classes seeking monetary relief.

Rule 23(c)(2) covers notice procedures for each of the three categories and provides that Rule 23(b)(1) and (2) classes are usually not required to send notice to absent class members but Rule 23(b)(3) classes must do so. These notices must inform potential class members of the lawsuit and give them the opportunity to "opt-out" of the class. If the recipients do not respond, they will be bound by the judgment and barred from bringing their own suit.[98] Theoretically, the shift to interest-based representative litigation is clear. Rule 23(b)(3) actions assume that the lead plaintiff represents the group's interest unless members affirmatively opt-out. Judgments in Rule 23(b)(1) and (2) suits simply bind the entire class.

The modern Rule 23(b) sections contain great historical significance and key public policy compromises. The injunctive relief vehicle of Rule 23(b)(2) facilitated civil rights lawsuits in the late 1960s and 1970s.[99] Following *Brown v. Board of Education*,[100] several pro–civil rights lawmakers grew impatient with the slow process of desegregation and strove for a simplified group litigation procedure.[101] In turn, injunctive suits are relatively easy to file because plaintiffs are not burdened with the onerous task of sending opt-out notices to potential class members.[102] Conversely, Rule 23(b)(3) classes must send costly notice mailings to hundreds or thousands of potential class members. In addition to the notice requirement, Rule 23(b)(3) also includes stricter standards for class certification.[103] The asymmetries between Rule 23(b)(2) and 23(b)(3) illustrate the drafters' hesitance to bind potential class members to monetary judgments.[104] Rule 23(b)(3)'s personal notice requirement, heightened certification prerequisites, and opt-out right protect the due process rights of absent class members and give them control over their monetary claims.[105]

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96. YEAZELL, *supra* note 81, at 238 n.2.

97. "The subsection envisions a situation in which a court would ordinarily require the joinder of parties under Rule 19 but cannot because the parties involved are too numerous to be joined individually; Rule 23(b)(1) permits their joinder as a class." *Id.* at 246.

98. *See* 7AA WRIGHT ET AL., *supra* note 92, § 1789, at 550–51.

99. YEAZELL, *supra* note 81, at 247.

100. 347 U.S. 483, 494–95 (1954).

101. YEAZELL, *supra* note 81, at 247.

102. *Id.*

103. *Compare* FED. R. CIV. P. 23(b)(2), *with* FED. R. CIV. P. 23(b)(3).

104. *Cf.* YEAZELL, *supra* note 81, at 247.

105. 7AA WRIGHT ET AL., *supra* note 92, § 1784.1, at 359–60.

II. CERTIFICATION OF COLLECTIVE ACTIONS AND CLASS ACTIONS: A PROCEDURAL GUIDE

Before moving to the case survey of hybrid actions, one must first understand the mechanics of class actions and collective actions. This section furnishes a rubric for Rule 23 and § 216(b) certification procedure.

A. CLASS ACTION CERTIFICATION

Rule 23 mandates a two-step classification procedure: threshold 23(a) prerequisites and 23(b)(3) requirements.[106] In the first step, Rule 23(a) requires that

> (1) the class is so numerous that joinder of all members is impracticable ["numerosity"];
>
> (2) there are questions of law or fact common to the class ["commonality"];
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ["typicality"]; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class ["adequacy"].[107]

For numerosity, the class size must be so large that joinder of all litigants would be impracticable.[108] Commonality is often met because courts often superficially analyze Rule 23(a)(2) when certifying a (b)(3) class.[109] Typicality is usually ensured "if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory."[110] Adequacy tests whether the representative will sufficiently represent the class members.[111] Serious due process concerns arise in this prerequisite because final judgments bind the absent class members unless they have opted out.[112] For that reason, courts carefully scrutinize this prerequisite and may deny certification for want of adequacy.[113] Additionally, two uncodified prerequisites are universally

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106. FED. R. CIV. P. 23(a)–(b). This Note covers Rule 23(b)(3) certification because nearly all hybrid actions demand exclusively monetary relief.

107. FED. R. CIV. P. 23(a).

108. While one should not rely on class size precedent, few cases with classes smaller than thirty-five members satisfy the numerosity requirement. *See* 7A WRIGHT ET AL., *supra* note 88, § 1762, at 188–93.

109. *Id.* § 1763, at 219. ("This superficial treatment of Rule 23(a)(2) may reflect the fact that the common-question requirement may be a superfluous provision . . . since the existence of common questions can be viewed as an essential ingredient of a finding that the case falls within one of the three categories of class actions described in subdivision (b).").

110. *Id.* § 1764, at 270–71 (footnote omitted).

111. *Id.* § 1765, at 313–15.

112. *Id.* at 317.

113. *Id.* at 317–19.

followed in practice: the presence of an actual class is required and representatives must be members of the class.[114]

In the second step, Rule 23(b)(3) tests predominance of common questions and superiority of class treatment over other means of resolving the controversy.[115] For predominance, plaintiffs must show that common questions of law or fact unite the representative and class members.[116] This factor ensures that the class is "sufficiently cohesive to warrant adjudication by representation."[117] Plaintiffs satisfy the superiority requirement if they prove that the class action device is the most effective means of prosecuting the claim.[118] While Rule 23 does not require certification at any particular time, courts are often required to hold several hearings and discovery may be necessary to determine whether class requirements are satisfied.[119] In sum, a court will certify a class if the plaintiffs prove the four threshold prerequisites in Rule 23(a) and the two additional requirements in Rule 23(b)(3).

B. Collective Action Certification

Unlike Rule 23, the vague language of § 216(b) gives scarce guidance on how or when to certify collective actions. Certification procedures are not universal and some courts fashion different schemes.[120] However, a majority of jurisdictions employ a two-step certification method.[121] First, the "conditional certification" step examines the size and nature of the proposed class and determines if all members are "similarly situated."[122] The court imposes a low burden of proof at this stage and plaintiffs need only show that they abstractly share common questions of fact with the rest of the class.[123] If conditional certification is granted, the plaintiff sends opt-in notices to prospective class members.[124]

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114. *Id.* § 1759, at 117.

115. Fed. R. Civ. P. 23(b)(3).

116. 7AA Wright et al., *supra* note 92, § 1777, at 116–17.

117. *Id.* at 116 n.12 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997)).

118. *Id.* at 117.

119. *See generally id.* §§ 1785–1785.4.

120. *See* 7B Charles Alan Wright et al., Federal Practice and Procedure § 1807, at 484–85 (3d ed. 2005).

121. *Id.* at 487–88.

122. *Id.* at 488–90. The "similarly situated" certification standard has been the subject of considerable debate. *See generally* Fraser, *supra* note 41, at 95; Gates, *supra* note 5, at 1519.

123. 7B Wright et al., *supra* note 120, § 1807, at 489–92.

124. Unlike Rule 23 class actions, courts have discretion to oversee the mode and content of opt-in notice. Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 174 (1989). Importantly, few potential class members actually reply to the opt-in notices. Brunsden, *supra* note 73, at 292–94 (compiling quantitative data on low opt-in rates in collective actions).

The court then advances to the second step of certification after the class members respond.[125] Armed with more detailed information about the class, the court uses a heavier burden of proof and again asks if class members are "similarly situated."[126] Upon closer inspection, the court often finds that common questions of fact do not unite the class: opt-in class members and the original plaintiff might have different job types, employer locations, or working conditions.[127] Consequently, few classes survive this onerous final certification step and courts dismiss the opt-in plaintiffs without prejudice.[128] However, if the court grants the final motion for certification and the collective action proceeds to trial, the opt-in litigants will enjoy all the same rights, privileges, and benefits as the original plaintiff.[129]

III. CASE SURVEY

Now that the historical and procedural foundation has been laid, this Part surveys published federal court cases and highlights the confusion surrounding hybrid actions in which collective actions and class actions are joined in one lawsuit. While litigants regularly file hybrid actions, this survey is limited to cases with a dual FLSA-Rule 23 component; cases analyzing certain issues in isolation (such as stand-alone FLSA conditional certification motions) are not included. Sections A, B, and C group cases by their holding rationale and divide courts into anti- and projoinder camps. Finally, section D argues that hybrid actions violate the Rules Enabling Act.[130]

A. SUPPLEMENTAL JURISDICTION

Courts often grapple with supplemental jurisdiction when plaintiffs bring hybrid actions. While novel challenges have been put forth under the § 1367(a) requirements of Title 28,[131] most courts analyze defendants' motions to defeat hybrid actions under § 1367(c). In this analysis, judges

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125. 7B WRIGHT ET AL., *supra* note 120, § 1807, at 495–96.

126. *Id.* at 496.

127. *Id.* at 498.

128. *Id.* at 503.

129. Allan G. King & Camille C. Ozumba, *Strange Fiction: The "Class Certification" Decision in FLSA Collective Actions*, 24 LAB. LAW. 267, 268 n.6 (2009) ("[B]y referring to them as 'party plaintiff[s]' Congress indicated that opt-in plaintiffs should have the same status in relation to the claims of the lawsuit as do the named plaintiffs.") (alteration in original) (quoting Prickett v. DeKalb County, 349 F.3d 1294, 1297 (11th Cir. 2003))); *see also* 29 U.S.C. § 216(b) (2006).

130. 28 U.S.C. § 2072.

131. Some defendants have averred that federal courts lack supplemental jurisdiction because hybrid actions are not "the type of claims expected to be tried in one proceeding." *See infra* Part III.A.2; *see also* 28 U.S.C. § 1367(a).

have wide discretionary latitude to decline supplemental jurisdiction for a number of reasons.[132]

1. Antijoinder Camp

The Third Circuit provides the only appellate guidance on the question of supplemental jurisdiction in hybrid suits. Several courts follow this rationale and decline jurisdiction over state-law class claims. In *De Asencio v. Tyson Foods, Inc.*, the defendant took an interlocutory appeal after the district judge certified both a collective action and a class action.[133] Notably, the plaintiff amended his complaint to include a unique implied-contract argument just before a motion to certify the Rule 23 state-law class.[134] At the time, the highest court of Pennsylvania had not yet addressed the implied-contract theory.[135] As a result, the Third Circuit reversed the lower court's approval of supplemental jurisdiction because the unresolved state-law issue might "substantially predominate" over the entire matter.[136] Additionally, the court found that the history of the FLSA and the Portal-to-Portal Act evinced the legislature's favor of the more limited opt-in device.[137] Finally, the court encouraged district judges to weigh the comparable class sizes and decline jurisdiction if the Rule 23 state-law class is much larger than the FLSA class.[138]

Several district courts seized the *De Asencio* arguments and began denying supplemental jurisdiction of state-law claims in hybrid actions. Using the "novel or complex" state-law argument, the court in *Neary v. Metropolitan Property & Casualty Insurance Co.* declined supplemental jurisdiction due to sheer multi-jurisdictional complexity: several state

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132. Judges may decline supplemental jurisdiction if:

> (1) the claim raises a novel or complex issue of State law,
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> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

133. 342 F.3d 301, 305 (3d Cir. 2003).

134. *Id.* at 305.

135. *Id.* at 309–10.

136. *Id.* at 311. Section 1367(c)(1) discourages exercise of supplemental jurisdiction when "novel or complex" state-law issues are at stake. *Id.*

137. *Id.* ("Congress's interest in these matters is manifest. For policy reasons articulated in the legislative history, Congress chose to limit the scope of representative actions for overtime pay and minimum wage violations.")

138. *Id.* ("[D]isparity in numbers of similarly situated plaintiffs may be so great that it becomes dispositive by transforming the action to a substantial degree, by causing the federal tail represented by a comparatively small number of plaintiffs to wag what is in substance a state dog."). The FLSA class contained 447 parties while the Rule 23 state-law class had 4100 persons. *Id.* at 305.

wage and hour law issues would overshadow the FLSA claims.[139] Weighing comparable class sizes, the court in *Molina v. First Line Solutions* dismissed state-law claims because allowing class certification "would likely result in there being more members of the Rule 23 class than persons with FLSA claims."[140] *Jackson v. City of San Antonio* combined two *De Asencio* rationales and declined supplemental jurisdiction due to contrary legislative intent and incongruent class size.[141]

District courts do not universally follow *De Asencio*, and other distinctive supplemental jurisdiction analyses also exist. Oftentimes, courts utilize the discretionary catchall provision in § 1367(c)(4) to deny supplemental jurisdiction for "exceptional circumstances."[142] In *Chase v. AIMCO Properties, L.P.*, the district court found that adjudicating FLSA opt-in and Rule 23 opt-out classes in one action would be "plainly at odds with Congress's intent to allow workers to preserve FLSA claims by declining to opt in."[143] The court in *Woodard v. FedEx Freight East, Inc.* framed its "exceptional circumstance" argument in a similar manner: Rule 23 would circumvent the FLSA opt-in procedure and frustrate legislative intent.[144] Unlike *Chase* and *Woodard*, *De Luna-Guerrero v. North Carolina Grower's Ass'n*, found no pressing legal issues but instead declined supplemental jurisdiction due to logistical complications.[145] In that case, hundreds of potential class members were

139. 472 F. Supp. 2d 247, 252–53 (D. Conn. 2007) (citing the potential for "violations of fifty states' wage and hour statutes" as justification for declining jurisdiction under § 1367(c)(1)) (emphasis omitted)); *see also De Asencio*, 342 F.3d at 310. Five years after *De Asencio*, another Third Circuit district court held that the Pennsylvania courts had not yet decided the "novel and complex" issue of whether the state wage and hour law covered "at-will, non-collective bargaining employees." *See* Woodard v. FedEx Freight E., Inc., 250 F.R.D. 178, 184 n.4 (M.D. Pa. 2008) (basing part of its decision on § 1367(c)(1) discretion).

140. 566 F. Supp. 2d 770, 789–90 (N.D. Ill. 2007).

141. Jackson v. City of San Antonio, 220 F.R.D. 55, 60 (W.D. Tex. 2003) (noting that the total class size would swell from 190 to over 2000 if the state-law class was certified); *see also De Asencio*, 342 F.3d at 311. "The heft of the claims before the Court, then, would dramatically favor the state law claim, assuming that not all thousands of Rule 23 plaintiffs would opt-in to the FLSA claim. This reality would flaunt the Congressional intention that FLSA claims proceed as an opt-in scheme." *Jackson*, 220 F.R.D. at 60.

142. *See* 28 U.S.C. § 1367(c)(4) (2006).

143. 374 F. Supp. 2d 196, 202 (D.D.C. 2005) (citing Lindsay v. Gov't Employees Ins. Co., 355 F. Supp. 2d 119, 121 (D.D.C. 2004), *rev'd*, 448 F.3d 416 (D.C. Cir. 2006)). The court alternatively refused supplemental jurisdiction because the state claims could potentially predominate over the action. *Id.* (citing 28 U.S.C. § 1367(c)(3)).

144. 250 F.R.D. at 182–84 (granting defendant's motion to strike state-law claims). In *Woodard*, 250 F.R.D. at 184–89, the court relied heavily on the exhaustive legislative history survey in *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 446–47 (W.D. Pa. 2007). Notably, *Ellis* did not hinge on a supplemental jurisdiction inquiry because the court had original jurisdiction under the newly-enacted Class Action Fairness Act of 2005. *See id.* at 448; *see also* 28 U.S.C. § 1332(d).

145. 338 F. Supp. 2d 649, 653 (E.D.N.C. 2004).

spread out over multiple foreign countries, few spoke English, and even fewer could obtain legal advice.[146]

Other courts have determined that supplemental jurisdiction does not exist under § 1367(a).[147] Unlike the § 1367(c) criteria, § 1367(a) is not a discretionary inquiry but rather a statutory limitation: courts can only hear "the type of claims expected to be tried in one proceeding."[148] In *Zelaya v. J.M. Macias, Inc.*, the court decided that FLSA and Rule 23 claims could not proceed in one action because of this § 1367(a) requirement.[149] Finally, in *Bartleson v. Winnebago Industries, Inc.*, the judge used a non-FLSA Eighth Circuit decision to reach a middle-ground conclusion not found in previous antijoinder case law.[150] Interestingly, the court extended supplemental jurisdiction to parties who affirmatively opted in to the FLSA collective action but dismissed the state-law claims of parties who failed to opt-in.[151] In fashioning this solution, the judge explained that the non–opt-in plaintiffs could not bring a state-law cause of action because they each lacked a federal FLSA anchor claim.[152] However, the opt-in plaintiffs possessed this FLSA anchor so the court could exercise supplemental jurisdiction over their state-law claims.[153] This morass of lower court rationales and the single Third Circuit decision fail to provide a unified antijoinder supplemental jurisdiction analysis.

2. *Projoinder Camp*

Despite the plethora of antijoinder arguments, other courts routinely exercise supplemental jurisdiction over hybrid actions. Just as the antijoinder courts lack decisive appellate guidance, projoinder courts rely on a sole circuit court case. In *Lindsay v. Government Employees Insurance Co.*, the D.C. Circuit overturned the lower court's decision to bar supplemental jurisdiction on § 1367(a) grounds.[154] The appellate

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146. *Id.*

147. *De Asencio* rejected this formulation and found that supplemental jurisdiction should be declined under the discretionary § 1367(c) categories, not § 1367(a). *See* 342 F.3d 301, 308 (3d Cir. 2003).

148. Zelaya v. J.M. Macias, Inc., 999 F. Supp. 778, 783 (E.D.N.C. 1998).

149. *Id.* at 782–83 ("As the ... defendants point out, even assuming that the FLSA and NCWHA claims arise from the same case or controversy, they are not the type of claims expected to be tried in one proceeding, as they would involve two different and distinct sets of plaintiffs."). The court alternatively based dismissal on § 1367(c)(4). *Id.* at 783.

150. 219 F.R.D. 629, 637 (N.D. Iowa 2003) (citing *Fielder v. Credit Acceptance Corp.*, 188 F.3d 1031, 1036–37 (8th Cir. 1999), which analyzed supplemental jurisdiction over federal and state lending laws).

151. *Id.*

152. *Id.* at 636 ("[W]here federal jurisdiction is premised on a federal class claim, supplemental jurisdiction over a companion state-law class claim extends only to those members of the state-law class who also have the federal class claim." (emphasis omitted) (citing *Fielder*, 188 F.3d at 1036–37)).

153. *Id.* at 637.

154. 448 F.3d 416, 421–22 (D.C. Cir. 2006).

court stated that nothing in the FLSA expressly prohibits supplemental jurisdiction.[155] Thus, no major jurisdictional hurdle prevents courts from hearing hybrid actions because they are "the type of claims expected to be tried in one proceeding."[156] Although it is a fairly recent decision, lower courts outside the D.C. Circuit have embraced *Lindsay*'s rejection of the § 1367(a) argument against jurisdiction.[157]

While *Lindsay* relied on subsection (a) of the supplemental jurisdiction statute, most defendants in the surveyed cases urged courts to exercise their discretion and deny supplemental jurisdiction under § 1367(c). As in the antijoinder cases discussed above, defendants argue that class size differences, unique state-law issues, and "exceptional circumstances" should prompt the judge to dismiss the Rule 23 state-law claims.[158] But these arguments have not been found persuasive in projoinder courts. Thus, for example, upon rejecting the § 1367(c)(2) class size disparity argument, the judge in *Iglesias-Mendoza v. La Belle Farm, Inc.* went so far as to say that "courts in this district . . . have unflinchingly certified FLSA and New York Labor Law claims together without so much as noting the inherent size disparities."[159] Similarly, in *Beltran-Benitez v. Sea Safari, Ltd.*, the court concluded that the opt-in/opt-out difference between the FLSA and Rule 23 was not an "exceptional circumstance" under § 1367(c)(4).[160] In *Brickey v. Dolencorp, Inc.*, the judge rejected defendant's combined § 1367(c)(2) and (4) challenge and briefly stated that courts are well equipped to handle hybrid actions.[161]

Yet not all projoinder courts follow the same supplemental jurisdiction script. In a relatively early hybrid action decision, the court in *Brzychnalski v. Unesco, Inc.* fielded defendant's jurisdictional objection without even mentioning § 1367.[162] Instead, the court simply noted that the presence of an opt-in and opt-out class would not present any

155. *Id.* at 422.

156. *Id.*

157. *See, e.g.*, Salazar v. Agriprocessors, Inc., 527 F. Supp. 2d 873, 880–81 (N.D. Iowa 2007).

158. *See* 28 U.S.C. § 1367(c)(1)–(4) (2006).

159. 239 F.R.D. 363, 375 (S.D.N.Y. 2007). Similarly, a court in the same district earlier held that a longer limitations period would not cause state claims to "predominate" over the FLSA claims. *See* Ansoumana v. Gristede's Operating Corp., 201 F.R.D. 81, 90 (S.D.N.Y. 2001); *see also* McLaughlin v. Liberty Mut. Ins. Co., 224 F.R.D. 304, 313 (D. Mass. 2004) (holding that the fifty-one-person state-law class would not "substantially predominate" over the thirteen-person FLSA class).

160. 180 F. Supp. 2d 772, 773–74 (E.D.N.C. 2001).

161. 244 F.R.D. 176, 178–79 (W.D.N.Y. 2007). Instead of undertaking a fresh § 1367(c) analysis, the court in *Nerland v. Caribou Coffee Co.* simply distinguished antijoinder cases to hold that supplemental jurisdiction was proper. 564 F. Supp. 2d 1010, 1028–29 (D. Minn. 2007) (holding that the class sizes were balanced, unlike *De Asencio*, and that no extraordinary logistical difficulty would inhibit notice procedures, unlike *Zelaya*); *see also* De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 311 (3d Cir. 2003); Zelaya v. J.M. Macias, Inc., 999 F. Supp. 778, 783 (E.D.N.C. 1998).

162. 35 F. Supp. 2d 351, 353–54 (S.D.N.Y. 1999).

difficulty.[163] Notably, one projoinder case rejected the middle-ground "opt-in plaintiffs only" solution formulated in *Bartleson*, the outlier antijoinder case. In *Carnevale v. GE Aircraft Engines*, the defendant argued that, under § 1367(a), supplemental jurisdiction could not extend over plaintiffs that lacked an FLSA anchor claim.[164] The judge rejected this theory and emphatically stated that the defendant "fundamentally misapprehends section 1367(a) and the nature of supplemental jurisdiction."[165] The court exhaustively analyzed the legislative history of § 1367 and held that Congress aimed to accommodate joinder of additional parties who lacked federal anchor claims.[166] Since § 1367 usurped mechanical plaintiff-by-plaintiff analyses and instead favored streamlined adjudication, the court reasoned, nothing in the statute would bar supplemental jurisdiction over Rule 23 claims.[167] In sum, projoinder courts have favored judicial economy and a broad exercise of supplemental jurisdiction but lack a harmonized approach for meeting those goals.

B. Class Action Certification

Class action certification is the second setting where anti- and projoinder courts adopt different approaches. As with supplemental jurisdiction questions, courts have broad discretion to grant or deny certification because the inquiry hinges on the unique facts of each case. However, even though judges utilize the same two-step Rule 23 certification rubric,[168] they often reach different conclusions, even when faced with comparable factual circumstances. Additionally, since hybrid actions contain both FLSA and state-law classes, it is worth noting *when* plaintiffs bring Rule 23 certification motions in relation to the collective action, as they are not always treated simultaneously. Rule 23 certification motions may occur at four junctures: (1) simultaneously with the initial FLSA conditional certification motion, (2) after conditional certification has been granted and opt-in notices are sent to potential FLSA claimants, (3) simultaneously with the final FLSA certification motion, or (4) after the entire collective action has been certified.[169]

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163. *Id.* at 354. *But see* Brown v. Money Tree Mortgage, Inc., 222 F.R.D. 676, 683 (D. Kan. 2004) (dismissing state-law claims without prejudice because plaintiff did not brief supplemental jurisdiction issues).

164. 492 F. Supp. 2d 763, 767 (S.D. Ohio 2003).

165. *Id.*

166. *Id.* at 769–70.

167. *Id.* at 770.

168. *See supra* Part II.A.

169. *See supra* Part II.B.

1. Antijoinder Camp

Some antijoinder courts deny class action certification due to Rule 23(a) deficiencies. Of the four 23(a) prerequisites, most surveyed cases denied certification due to insufficient commonality or typicality. In *Morisky v. Public Service Electric & Gas Co.*, the plaintiffs sought Rule 23 certification along with the final motion to certify the collective action.[170] Claimants had already responded to the opt-in notices at this point, so the court had a relatively clear picture of the FLSA class's characteristics.[171] In denying the FLSA motion, the court held that the class and its representatives were not "similarly situated" because they had varying job responsibilities.[172] For the Rule 23 state-law class action, the court found that the plaintiffs failed to prove commonality and typicality.[173] Both elements were lacking, the court stated, because the state-law labor violations were "individual" in nature and "unique to each [plaintiff]."[174]

Other courts apply the *Morisky* rationale at an earlier stage in the litigation. For example, in *Bishop v. Petro-Chemical Transport, LLC*, the plaintiff concurrently moved for Rule 23 certification and FLSA conditional certification.[175] Despite the supposedly lenient collective action first step, the court held that the FLSA class was not "similarly situated" because plaintiff did not provide sufficient proof that defendant denied the class overtime pay.[176] As for the Rule 23 motion, the court found that plaintiff's insufficient evidentiary showing also defeated commonality and typicality: he did not prove a "class wide policy of failure to pay overtime wages" that affected every single member of the proposed 150-person class.[177]

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170. 111 F. Supp. 2d 493, 494 (D.N.J. 2000).

171. *Id.* at 498–99.

172. *Id.* at 496–97. This case illustrates the strictness of the second collective action certification step. The proposed class consisted of roughly 100 persons "whose work impacts upon the production process at defendant's nuclear generating plants" against a single employer in one New Jersey county. *Id.* at 496. Despite this seeming congruity, the court held that the class and representatives were not "similarly situated" under § 216(b). *Id.* at 498.

173. *Id.* at 500.

174. *Id.* Curiously, plaintiffs' state-law pleadings were relatively straightforward: "[P]laintiffs assert that defendant has failed to pay them overtime compensation, . . . misclassifying them as exempt 'administrative' employees . . . when in fact they are non-exempt 'production' workers and, therefore, entitled to such overtime compensation." *Id.* at 494.

175. 582 F. Supp. 2d 1290, 1292 (E.D. Cal. 2008).

176. *Id.* Recall that the initial FLSA collective action step is deliberately lenient because the court lacks sufficient facts to make a final certification determination. *See supra* Part II.B. Collective certification exists so that the plaintiff may send opt-in notice and later convince the court that the collective action is the proper litigation vehicle. *See* Vengurlekar v. Silverline Techs., Ltd., 220 F.R.D. 222, 229–32 (S.D.N.Y. 2003) (denying certification of state-law claims due to lack of typicality and dismissing FLSA claims *sua sponte* because the claimants did not meet the lenient "similarly situated" standard in the initial conditional certification step).

177. *Bishop*, 582 F. Supp. 2d at 1307–08.

Other antijoinder courts refuse class certification because of insufficient predominance[178] or superiority as required by Rule 23(b)(3).[179] Judges who find deficient superiority primarily emphasize two problems: contrary Congressional intent regarding collective actions and class actions and potential supplemental jurisdictional issues under § 1367(a). In *Hasken v. City of Louisville*, the court articulated the supplemental jurisdiction concern.[180] There, the judge feared that certifying the much larger Rule 23 state-law class alongside the smaller collective action would "be akin to the minnow swallowing the whale."[181]

One year after *Hasken*, the court in *McClain v. Leona's Pizzeria, Inc.* examined superiority in light of Congressional intent.[182] The court explained that Congress created the more arduous collective action "to ensure that parties with wage and hour claims under the FLSA take affirmative steps to become members of a class seeking redress of those claims in federal court."[183] In essence, the class action was not the superior means of litigation because numerous state-law claimants could enjoy the federal forum but side step the more demanding FLSA opt-in scheme.[184] Other antijoinder courts employ this formulation with varying levels of emphasis on jurisdiction and Congressional intent.[185]

Notably, the courts in all of the cases denying superiority *granted* plaintiffs' motions to conditionally certify the FLSA collective actions. This result is hardly unexpected: it would be quite hypocritical if the judge first stated that collective actions are the "superior" means for trying wage and hour claims and then dismissed those very FLSA claims. In short, even if plaintiffs satisfy the Rule 23(a) prerequisites, they likely face certification denial under 23(b) due to a finding that class treatment is not superior.

2. *Projoinder Camp*

When faced with class certification motions on the state-law claims, projoinder courts place a premium on judicial economy and case

178. Only one reported case bases its certification denial on inadequate predominance. *See* O'Donnell v. Robert Half Int'l, Inc., 250 F.R.D. 77, 81 (D. Mass. 2008). There, plaintiff twice failed to conditionally certify the collective action in earlier motions. *Id.* at 79–80. For the state-law claims, the court found insufficient predominance because the plaintiff vaguely described a statewide group of employees "regardless of job title or office." *Id.* at 80–81.

179. *See supra* Part II.A.

180. 213 F.R.D. 280, 282–83 (W.D. Ky. 2003) (citing Zelaya v. J.M. Macias, Inc., 999 F. Supp. 778, 782 (E.D.N.C. 1998)).

181. *Id.* at 283.

182. 222 F.R.D. 574, 577 (N.D. Ill. 2004).

183. *Id.*

184. *Id.*

185. Two district courts in the Ninth Circuit found that denial of class action certification would give plaintiffs greater control over the remaining collective action, avoid supplemental jurisdiction problems, and further the policy of the FLSA. *See* Edwards v. City of Long Beach, 467 F. Supp. 2d 986, 992–93 (C.D. Cal. 2006); Leuthold v. Destination Am., Inc., 224 F.R.D. 462, 470 (N.D. Cal. 2004).

consolidation.[186] Some courts certify the class action and conditionally certify the collective action. Others allow an intact hybrid action to proceed to the merits: all Rule 23 requirements and collective action steps are met. Since all of these cases ultimately certify both classes in one way or another, this subsection chiefly examines how projoinder courts handle defendants' objections to Rule 23 certification elements and the final collective action certification step.

Unlike their antijoinder counterparts, projoinder judges have little trouble rebuffing objections to Rule 23(a) prerequisites. In *O'Brien v. Encotech Construction Services, Inc.*, defendant challenged numerosity because the proposed state-law class was comprised of only thirty persons.[187] The court rejected defendant's contention and held that this small group could proceed as a class action.[188] In the judge's eyes, class members could not afford to sue individually[189] and, more troubling, might face reprisal from the employer if they chose to file separate claims.[190] Additionally, projoinder judges frame commonality in a plaintiff-friendly manner. In *Mentor v. Imperial Parking Systems, Inc.*, the court rebuffed defendant's assertion that the class lacked commonality.[191] Instead of closely scrutinizing the class members' individual job tasks, the court asserted that commonality was met simply because all class members were denied overtime pay by the employer.[192] Finally, for the adequacy prerequisite, projoinder courts consistently reject defendants' argument that some other entity, such as a union[193] or a seasoned attorney,[194] is actually controlling the litigation.

In moving through the class action requirements, projoinder courts face heavy resistance to the Rule 23(b) elements. No courts certify classes seeking injunctive relief under Rule 23(b)(2) because judges deem wage and hour claims as inherently monetary in nature.[195]

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186. *E.g.*, Musch v. Domtar Indus., Inc., 252 F.R.D. 456, 462 (W.D. Wis. 2008) (granting motions to certify class action and conditionally certify collective action).

187. 203 F.R.D. 346, 350–51 (N.D. Ill. 2001).

188. *Id.*

189. *Id.*; *see also* Duchene v. Michael L. Cetta, Inc., 244 F.R.D. 202, 203 (S.D.N.Y. 2007) (finding numerosity because of employees' inability to sue individually).

190. *O'Brien*, 203 F.R.D. at 351–52; *cf.* Noble v. 93 Univ. Place Corp., 224 F.R.D. 330, 342 (S.D.N.Y. 2004) (certifying an estimated "several hundred" person state-law class even though only three persons opted in to the collective action due to employer intimidation).

191. 246 F.R.D. 178, 183 (S.D.N.Y. 2007).

192. *Id.* One case concisely sums up this flexible ethos: "[T]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Romero v. Producers Dairy Foods, Inc., 235 F.R.D. 474, 485 (E.D. Cal. 2006) (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998)).

193. Spoerle v. Kraft Foods Global, Inc., 253 F.R.D. 434, 441 (W.D. Wis.2008) (finding adequacy despite defendant's argument that the union actually controlled the litigation).

194. Lee v. ABC Carpet & Home, 236 F.R.D. 193, 204 (S.D.N.Y. 2006) (rejecting defendant's assertion that the attorney controlled the litigation).

195. *In re* Wells Fargo Home Mortgage Overtime Pay Litig., 527 F. Supp. 2d 1053, 1069–70 (N.D.

However, projoinder courts regularly find superiority[196] and predominance[197] under 23(b)(3). The judge in *Duchene v. Michael L. Cetta, Inc.*, for example, found superiority in spite of defendant's Congressional intent argument.[198] In contrast to the antijoinder rationale, the court found that the dominant trend was to hear both state-law and FLSA claims in one action, not multiple suits.[199] Other defendants claim superiority is insufficient because of confusing notice forms: a hybrid action notice form would require FLSA litigants to opt-in but also automatically include state-law class members unless they opt-out. In *Scholtisek v. Eldre Corp.*, the judge discarded this argument and plainly stated, "such confusion can be adequately minimized through a carefully crafted notice."[200] Clearly, projoinder courts favor class certification and expediency and believe all procedural protests can be addressed in other ways.

Finally, a few projoinder courts have fully certified hybrid actions: both steps of collective action certification and all requirements of Rule 23 were met. These cases are useful because they illustrate the stringency

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Cal. 2007) (denying Rule 23(b)(2) certification in FLSA hybrid action); Scholtisek v. Eldre Corp., 229 F.R.D. 381, 393 (W.D.N.Y. 2005) (same). Notably, courts handling ADEA hybrid actions sometimes certify Rule 23(b)(2) classes. *Compare* Rodolico v. Unisys Corp., 199 F.R.D. 468, 478 (E.D.N.Y. 2001) (denying certification under 23(b)(2) but granting certification under 23(b)(3)), *with* Krueger v. N.Y. Tel. Co., 163 F.R.D. 433, 444 (S.D.N.Y. 1995) (certifying state-law claims under both 23(b)(2) and (b)(3)). While § 216(b) and Rule 23 govern both types of claims, the discrepancy between FLSA and ADEA hybrid actions is not unexpected. After all, ADEA claims closely mirror the classic discrimination claims that Rule 23(b)(2) was designed to facilitate. *See supra* Part I.C.2.

196. Antijoinder courts deny superiority based partly on potential supplemental jurisdiction problems. *See supra* Part II.A. Intuitively, a projoinder court would dispense with this objection because such courts always exercise supplemental jurisdiction over the entire action. Indeed, many projoinder cases in the previous supplemental jurisdiction section also certified the state-law class action. *See generally* Lindsay v. Gov't Employees Ins. Co., 251 F.R.D. 51 (D.D.C. 2008); McLaughlin v. Liberty Mut. Ins. Co., 224 F.R.D. 304 (D. Mass. 2004); Nerland v. Caribou Coffee Co., 564 F. Supp. 2d 1010 (D. Minn. 2007); Iglesias-Mendoza v. La Belle Farm, Inc., 239 F.R.D. 363 (S.D.N.Y. 2007); Ansoumana v. Gristede's Operating Corp., 201 F.R.D. 81 (S.D.N.Y. 2001); Brzychnalski v. Unesco, Inc., 35 F. Supp. 2d 351 (S.D.N.Y. 1999).

197. Since the predominance and commonality inquiries are similar, defendants often posit similar theories to defeat both elements. 7AA WRIGHT ET AL., *supra* note 92, § 1777, at 116. For example, projoinder courts usually reject defendants' urging that varying job categories among class members should defeat commonality or predominance. *See Wells Fargo*, 527 F. Supp. 2d at 1065 ("In the context of overtime pay litigation, courts have often found that common issues predominate where an employer treats the putative class members uniformly with respect to compensation, even where the party opposing class certification presents evidence of individualized variations.").

198. 244 F.R.D. 202, 203–04 (S.D.N.Y. 2007).

199. *Id.* "[T]here appears to be no sound policy reason why a New York State action should not be permitted to proceed as a class action along with the FLSA proceeding." *Id.* at 204 (stating that *Leuthold v. Destination America, Inc.*, 224 F.R.D. 462, 470 (N.D. Cal. 2004), hinged on hostility between class members in that case rather than congressional intent).

200. 229 F.R.D. 381, 394 (W.D.N.Y. 2005); *see also* O'Brien v. Encotech Constr. Servs., Inc., 203 F.R.D. 346, 351–52 (N.D. Ill. 2001) (disregarding the potential for confusing opt-in/opt-out notice).

of the second collective action certification step.[201] In *Scott v. Aetna Services, Inc.*, the court certified a class action of roughly 280 persons and a collective action of only twenty-two litigants.[202] Before ultimately concluding that the opt-in class was "similarly situated," the court exhaustively analyzed the twenty-two employees' job types, work locations, salary grades, and substantive FLSA claims.[203] While not all courts delve into the same thorough analysis as *Scott*, collective action certification typically occurs either in a one-location plant setting[204] or when opt-in plaintiffs perform similar, skilled job tasks.[205] Outcomes are obviously fact-dependant, but these cases demonstrate how even liberal projoinder courts must carefully scrutinize the final "similarly situated" collective action step.

C. The Rules Enabling Act and "Inherently Incompatible" Theories

In the final group of hybrid cases, the courts examine whether the Rules Enabling Act[206] (REA) or the "inherently incompatible" nature of the FLSA and Rule 23 prevent hybrid actions from being heard in federal court. For both theories, defendants contend that the incongruent FLSA and Rule 23 schemes should *dispositively* result in dismissal. Notably, the "inherently incompatible" argument closely mirrors prior antijoinder arguments in supplemental jurisdiction and class certification contexts: courts should not allow plaintiffs to use the more liberal Rule 23 to circumvent the arduous requirements of § 216(b). Unlike the fact-specific inquiry used by courts in the previous two sections, the REA and "inherently incompatible" theories hinge on questions of law. Nonetheless, lower courts lack a coherent approach for handling these joinder theories as well.

1. *Antijoinder Camp*

As previously discussed, defendants often point out that the FLSA and Rule 23 have divergent schemes regarding whether other employees must opt in or opt out in order to defeat supplemental jurisdiction or class action certification.[207] In *Otto v. Pocono Health System*, the court held that this incongruity alone was sufficient to dismiss the state-law

201. *See supra* Part II.B.

202. 210 F.R.D. 261, 266–68 (D. Conn. 2002).

203. *Id.* at 264–65.

204. Kasten v. Saint Gobain Performance Plastics Corp., 556 F. Supp. 2d 941, 956–57 (W.D. Wis. 2008) (156 employees from the same plastics manufacturing plant).

205. *See* Mendez v. Radec Corp., 232 F.R.D. 78, 81, 91–92 (W.D.N.Y. 2005) (seventy-six electricians with similar job duties and pay).

206. 28 U.S.C. § 2072 (2006 & supp. 2007).

207. *See supra* Parts III.A.1, III.B.1.

claims.[208] There, the judge noted that Congress specifically created § 216(b) to shrink class sizes and limit employer liability.[209] Thus, in the court's view, allowing the hybrid action to proceed would "essentially nullify Congress's intent in crafting Section 216(b) and eviscerate the purpose of Section 216(b)'s opt-in requirement."[210] While the case contained a cursory overview of the FLSA's history and policy, *Otto*'s "inherently incompatible" approach opened the door to an alternative mode of defeating hybrid actions.[211]

The latest and perhaps most intricate antijoinder theory builds on *Otto*'s Congressional-intent rationale and posits that hybrid actions violate the REA. In *Ellis v. Edward D. Jones*, the court outlined the REA argument for the first time: (1) the REA gives the Supreme Court the power to promulgate rules of practice and procedure, such as Rule 23; (2) such rules cannot "abridge, enlarge or modify a substantive right"; (3) § 216(b) contains substantive rights; (4) the use of Rule 23 in hybrid actions "abridges or modifies" those rights; and (5) Rule 23 should defer to § 216(b)'s scheme and the state-law claims should be dismissed.[212]

The first REA step is gauging § 216(b)'s "substantiveness" and scope: if § 216(b) embodies substantive rights, then state-law claims under Rule 23 could potentially be dismissed.[213] After a comprehensive survey of the FLSA and Portal-to-Portal Act's history, the judge in *Ellis* explained that § 216(b) embodied two substantive rights: "the right of employers not to be sued in representative actions and the right of employees not to have their rights litigated without their knowledge and express consent."[214] In discussing the employer's limited-liability right, the court described § 216(b) as an "immunizing" law because "its greater goal is the furtherance of Congressional policies rather than just the

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208. 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006).

209. *Id.* at 523–24.

210. *Id.*

211. *Id.* Other courts are beginning to follow *Otto*'s reasoning. *See, e.g.*, Warner v. Orleans Home Builders, 550 F. Supp. 2d 583, 587–88 (E.D. Pa. 2008) ("FLSA collective actions for overtime pay are 'inherently incompatible' with Rule 23 state-law class actions for overtime pay and . . . allowing the two types of actions to proceed in federal court in a single suit would undermine Congress's intent in implementing an opt-in requirement for FLSA collective actions."); *see also Otto*, 457 F. Supp. 2d at 524 (noting that the "inherently incompatible" approach follows the United States District Court for the District of New Jersey and other circuits).

212. 527 F. Supp. 2d 439, 455–56 (W.D. Pa. 2007). *Ellis* is based on two rationales: substantive preemption of state wage and hour law and the REA argument. *Id.* at 449–52. This Note focuses only on the REA argument. *Cf.* Woodard v. FedEx Freight E., Inc., 250 F.R.D. 178, 185–87 (M.D. Pa. 2008) (examining *Ellis* and ultimately declining supplemental jurisdiction under 1367(c)(4) due to a potential preemption issue). For a detailed discussion of preemption, see generally Alexander, *supra* note 14.

213. *Ellis*, 527 F. Supp. 2d at 456.

214. *Id.*; *see also Otto*, 457 F. Supp. 2d at 524 ("It is clear that Congress labored to create an opt-in scheme when it created Section 216(b) specifically to alleviate the fear that absent individuals would not have their rights litigated without their input or knowledge.").

management of the litigation process."[215] Conversely, the court deemed Rule 23 *procedural* because its main purpose was to manage the litigation process, unlike § 216(b).[216] In explaining the employees' claim-retention right, the court noted that Congress aimed to allow employees only to sue "in their own right," rather than through representative actions.[217]

After the crucial substantiveness analysis, the judge in *Ellis* then went on to determine if Rule 23 "abridges, enlarges or modifies" the employer's or employees' rights.[218] First, the court explained, hybrid actions violate the employer's right because it is no longer insulated from liability.[219] Congress purposefully constructed § 216(b) so employers would not face large representative actions.[220] Similarly, the employees' right is abridged because of the class action's res judicata effects: employees who do not respond to notice will lose their FLSA claim even though they did not affirmatively opt in to the collective action.[221] As a result, the court dismissed the Rule 23 state-law claims and concluded that hybrid actions eliminate the two substantive rights that Congress created in § 216(b).[222]

2. *Projoinder Camp*

Projoinder courts disagree that the "inherently incompatible" opt-in and opt-out schemes or the REA bar hybrid actions. Most of these cases roundly reject the two arguments: judges either point to a lack of precedent or simply gloss over defendants' objections. For example, in *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, the judge rejected defendant's "inherently incompatible" argument by simply string-citing three projoinder cases and stating that the opt-in procedure applies only to FLSA claims.[223] Similarly, other cases simply point to a lack of precedent as the reason to reject the REA argument.[224]

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215. *Ellis*, 527 F. Supp. 2d at 457–58; *see also* 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4509, at 268–69 (3d ed. 2005) (citing John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 724–25 (1974)) (describing substantive rights as "rights granted for non-procedural reasons.").

216. *Ellis*, 527 F. Supp. 2d at 457–58.

217. *Id.* at 451 (citing Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 173 (1989)).

218. *Id.* at 457–58.

219. *Id.*

220. *Id.*

221. *Id.* at 457. The court described how most potential class members usually just throw away notice requests because they think it is junk mail. *Id.* at 445–46.

222. *Id.* Of course, the REA violation applied only "where the state law claims merely parallel those made under the FLSA." *Id.* at 460–61.

223. *See* 589 F. Supp. 2d 1026, 1032–33 (E.D. Wis. 2008).

224. Lehman v. Legg Mason, Inc., 532 F. Supp. 2d 726, 730–32 (M.D. Pa. 2007) ("[Defendant] does not provide a single case citation in support of its contention that this suit violates the Act. Indeed, on the rare instance when it has been raised, the argument has been rejected by the courts." (citing Neary v. Metro. Prop. & Cas. Ins. Co., 472 F. Supp. 2d 247, 250–51 (D. Conn. 2007))). *Neary*, 472 F. Supp. 2d

Damassia v. Duane Reade, Inc. is the only projoinder case that presents a detailed counter-argument to the REA theory set out in *Ellis*.[225] First, the judge in *Damassia* stated that the FLSA's opt-in provisions should be viewed "simply as procedural mechanisms for vindication of the substantive rights provided by the FLSA."[226] Next, even assuming that § 216(b) conferred substantive rights, the judge claimed that neither of the two rights established in *Ellis* would be "abridged, enlarged or modified" by Rule 23.[227] The court reframed the employees' right by noting that § 216(b) only gave employees the right not to "be a party plaintiff to [a collective] action unless he gives his consent in writing to become such a party."[228] Thus, the judge reasoned, Rule 23 certification in no way impedes the employees' ability to opt in or not to a collective action.[229] In regards to the employer's right, the judge stated that § 216(b) insulated employers from FLSA claims, but in no way impacted their liability for state-law claims.[230] In turn, since § 216(b) did nothing to reduce state-law claim exposure, Rule 23 certification was wholly unrelated to the employer's substantive right.[231] In sum, unlike *Ellis*, the *Damassia* case stands for the proposition that hybrid actions do not violate the REA because Rule 23 and its corresponding state-law claims do not collide with any of § 216(b)'s purported substantive rights.

D. Case Survey Assessment: Why the REA Theory Prevails

The previous three sections charted how lower courts negotiate the hurdles of supplemental jurisdiction, class certification, and "inherently incompatible" statutes or REA challenges. This section gauges these arguments in the order they would be addressed in a lawsuit:

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at 251, rejects defendant's REA argument due to a lack of precedent.

225. 250 F.R.D. 152, 164–65 (S.D.N.Y. 2008); *see also* Bouaphakeo v. Tyson Foods, Inc., 564 F. Supp. 2d 870, 886–89 (N.D. Iowa 2008) (recognizing lack of controlling authority in the REA argument).

226. 250 F.R.D. at 164–65. Additionally, the court also noted that it was "counter-intuitive" to view § 216(b) as substantive and Rule 23 as procedural. *Id.*

227. *Id.* at 164.

228. *Id.* (alteration in original) (quoting 29 U.S.C. § 216(b) (2006)).

> The right conferred by the opt-in requirement on an employee is not, as [Defendant] contends, to have his or her FLSA claims litigated "only with his or her express written consent;" rather, it is the right not to "be a party plaintiff to [a collective] action unless he gives his consent in writing to become such a party."

Id. (second alteration in original) (quoting 29 U.S.C. § 216(b)).

229. *Id.*

230. *Id.* at 165. ("The FLSA guarantees merely that all collective actions brought pursuant to it be affirmatively opted into. It does not guarantee that employers will never face traditional class actions pursuant to state employment law." (quoting Klein v. Ryan Beck Holdings, Inc., No. 06 Civ. 3460, 2007 WL 2059828, at *6 (S.D.N.Y. July 13, 2007))).

231. *Id.*

chronologically from pleadings on. After assessing the supplemental jurisdiction, "inherently incompatible" statutes, and REA theories, this section posits that the antijoinder-REA-*Ellis* approach must prevail.[232] Under this analysis, the class certification inquiry will be moot because the ultimately successful REA analysis would compel courts to dismiss the state-law claims at the pleading stage.

As for the threshold supplemental jurisdiction inquiry, the projoinder camp has made more convincing arguments than the antijoinder camp. First, the few antijoinder cases denying jurisdiction under § 1367(a) missed the mark.[233] Section 1367(a) extends to all claims arising from the same "case or controversy" as the underlying federal claims.[234] Since the "case or controversy" standard expands the courts' jurisdiction to its Constitutional limits, judges should recognize that they "shall" confer supplemental jurisdiction over transactionally related claims.[235] In the wage and hour context, § 1367(a) should naturally be read to cover all claims relating to the employer's alleged malfeasance. Similarly, *Bartelson*'s "opt-in plaintiffs only"[236] middle ground formulation is impermissibly narrow. As the judge in *Carnevale* noted, § 1367 does not require every single litigant to possess a federal anchor claim and, in fact, it abrogated the primary case that *Bartelson* cited as support.[237] Thus, the projoinder camp's interpretation should be followed and courts should not deny supplemental jurisdiction under § 1367(a).[238]

Aside from the few § 1367(a) cases, most supplemental-jurisdiction antijoinder cases use the discretionary function of § 1367(c) to deny jurisdiction. Section 1367(c)'s discretionary latitude is indeed broad, but antijoinder judges tend to use it as a convenient dumping ground for potentially difficult legal questions. For example, when judges treat an

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232. Ellis v. Edward D. Jones & Co., 527 F. Supp. 2d 439, 455–56 (W.D. Pa. 2007).

233. *See, e.g.*, Bartleson v. Winnebago Indus., Inc., 219 F.R.D. 629, 637 (N.D. Iowa 2003) (1367(a) only allows supplemental jurisdiction of FLSA opt-in plaintiffs' state-law claims); Zelaya v. J.M. Macias, Inc., 999 F. Supp. 778, 782–83 (E.D.N.C. 1998) (1367(a) bars Rule 23 state-law claims outright).

234. 28 U.S.C. § 1367(a) (2006).

235. *See id.*; 32A AM. JUR. 2D *Federal Courts* § 604 (2007).

236. 219 F.R.D. at 637.

237. Carnevale v. GE Aircraft Engines, 492 F. Supp. 2d 763, 769–70 (S.D. Ohio 2003). "[T]he statements upon which the *Fielder* court based its holding, that the claims of the absent class members are distinct cases and controversies and that each must separately support federal jurisdiction, are simply wrong." *Id.* (noting that *Fielder* heavily relied on *Finley*, which was abrogated by the passage of § 1367). *See generally* 28 U.S.C. § 1367; Finley v. United States, 490 U.S. 545 (1989); Fielder v. Credit Acceptance Corp., 188 F.3d 1031 (8th cir. 1999).

238. Recall that both *Lindsay v. Government Employees Insurance Co.*, 448 F.3d 416, 421–22 (D.C. Cir. 2006), and *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 308 (3d Cir. 2003), the only appellate authority on point, agree that § 1367(a) does not bar supplemental jurisdiction of hybrid actions. Additionally, as noted in *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 448 (W.D. Pa. 2007), many supplemental jurisdiction problems might be ameliorated for large class actions due to the emergence of 28 U.S.C. § 1332(d).

apparent "contrary Congressional intent" between Rule 23 and the FLSA as an "exceptional circumstance" under § 1367(c)(4),[239] they essentially replace a thorough legal analysis with a cursory one; the court should examine the potential statutory conflict rather than avoid it. Furthermore, the comparison of potential FLSA and Rule 23 class sizes under § 1367(c)(2) is irrelevant: the *number* of class members does not necessarily impact the complexity of the *legal issues* at bar.[240] For instance, if employees attack the employer's firm-wide overtime wage policy, the raw number of litigants in each class hardly affects the court's inquiry if that pay policy was indeed illegal under state or federal law. Instead, courts should follow the lead of the projoinder courts and the liberal spirit of § 1367. Supplemental jurisdiction should be freely granted unless truly unmanageable logistical problems[241] or matters of unanswered state law arise.[242] As for matters of statutory clashes or inconsistent legislative intent, courts should analyze those intrinsic questions of law under a substantive preemption,[243] "inherently incompatible," or REA analysis.

The remaining "inherently incompatible" and REA approaches both discuss the inconsistencies of Rule 23 and 216(b) as pure questions of law. However, under both anti- and projoinder rationales, the "inherently incompatible" analysis is incomplete. In *Otto*, the source of the "inherently incompatible" theory, the judge merely imported the brief "contrary Congressional intent" argument from the supplemental jurisdiction discussion.[244] The court did not fully outline the history and policy behind § 216(b), but instead halted its analysis and dismissed the state-law claims due to the apparently "incompatible" opt-out scheme of Rule 23.[245] The projoinder courts did little to respond to this reasoning and simply deemed *Otto* "unpersuasive."[246] On balance, the "inherently

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239. Woodard v. FedEx Freight E., Inc., 250 F.R.D. 178, 184–89 (M.D. Pa. 2008); Chase v. Aimco Props., L.P., 374 F. Supp. 2d 196, 202 (D.C.C. 2005).

240. Molina v. First Line Solutions LLC, 566 F. Supp. 2d 770, 789–90 (N.D. Ill. 2007) (basing decision on incongruent class size); *see also* Jackson v. City of San Antonio, 220 F.R.D. 55, 60 (W.D. Tex. 2003).

241. De Luna-Guerrero v. N.C. Grower's Ass'n, 338 F. Supp. 2d 649, 653 (E.D.N.C. 2004) (large non-English-speaking class spread out around multiple countries).

242. *De Asencio*, 342 F.3d at 309–10 (implied contract theory not answered by Pennsylvania courts). *Neary v. Metropolitan Property & Casualty Insurance Co.*, 472 F. Supp. 2d 247, 253 (D. Conn. 2007), highlights an improper use of the "novel and complex" state-law exception of § 1367(c)(1): there, the court denied jurisdiction because fifty state laws could be implicated by the class action.

243. Alexander, *supra* note 14, at 553–55.

244. Otto v. Pocono Health Sys., 457 F. Supp. 2d 522, 523–24 (M.D. Pa. 2006) (citing McClain v. Leona's Pizzeria, Inc., 222 F.R.D. 574, 577 (2004) (denying supplemental jurisdiction due to contrary Congressional intent)).

245. *Id.*

246. *See, e.g.*, DeKeyser v. Thyssenkrupp Waupaca, Inc., 589 F. Supp. 2d 1026, 1031–32 (E.D. Wis. 2008).

incompatible" theory fails to explain what policies are embedded in § 216(b) and, importantly, *how* the opt-out scheme of Rule 23 undercuts those policies. For that reason, the REA theory contains a more complete explanation of the § 216(b) and Rule 23 asymmetries.

While only two cases fully discuss the REA theory, the reasoning of *Ellis* is most convincing for several reasons.[247] First, *Ellis* provides perhaps the best historical survey of the FLSA and the Portal-to-Portal Act.[248] With this crucial background in mind, the judge realized that the opt-in provision was not just a case-management provision, but instead a deliberate tool to limit liability for employers.[249] In turn, the "substantiveness" portion of the opinion is bolstered by this historical reality.[250] The liability-shielding impetus of § 216(b) meets even a conservative conception of a "substantive" right because it eliminates representative group litigation from the FLSA.[251] It is clear from the Portal-to-Portal Act's legislative history that Senator Donnell sought to replace the representative action portion of § 216(b), a pro-labor New Deal byproduct, with the pro-employer opt-in scheme.[252] In doing so, Congress did not aim to facilitate the "fairness or efficiency of the litigation process," but instead injected a substantive prophylaxis to shield employers.[253]

Moreover, *Ellis*'s conception of the employees' right to retain their FLSA claims is linked to § 216(b)'s elimination of representative actions.[254] The opt-in scheme confers a substantive right on employees because, unlike representative actions, they must affirmatively join the collective action and litigate their claim.[255] The reward for this consent-based form of group litigation is a closer ownership of FLSA claims and increased control in the lawsuit—recall that collective action opt-in claimants enjoy the full privileges of a named plaintiff at trial, unlike Rule 23 class members.[256] Evidently, *Ellis*'s formulation of the substantive rights at stake is well reasoned and backed by the storied history of § 216(b).[257] Apparently, in *Damassia*, the judge mischaracterized the opt-in provision as a "procedural mechanism for

247. Ellis v. Edward D. Jones & Co., 527 F. Supp. 2d 439, 443–47 (W.D. Pa. 2007).

248. *Id.*

249. *See supra* Part I.B.

250. *Ellis*, 527 F. Supp. 2d at 457–58.

251. 19 WRIGHT & MILLER, *supra* note 215 (citing Ely, *supra* note 215, at 724–25).

252. *See supra* Part I.B.

253. 19 WRIGHT & MILLER, *supra* note 215 ("[A] substantive right is 'a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.'" (quoting Ely, *supra* note 215, at 724–25)).

254. 527 F. Supp. 2d at 456.

255. *See supra* Part I.B.

256. *See supra* Part I.B.

257. *Ellis*, 527 F.Supp.2d at 456; *see supra* Part I.B.

vindication of the substantive rights provided by the FLSA" because he failed to recognize that § 216(b) embodied a clear pro-employer pushback to the FLSA.[258]

The largest difference between the anti- and projoinder groups is the debate over the "abridge, enlarge or modify" portion of the REA analysis. With respect to the employees' substantive right to retain their FLSA claims, *Damassia*'s criticism of the *Ellis* conception is off base.[259] The judge in *Damassia* stated that the presence of a class action does not "abridge, enlarge or modify" an employee's right to opt in to a collective action.[260] This assertion is shortsighted because it parries *Ellis*'s warning of the res judicata danger.[261] Even if a lower-court judge devised a simple and understandable notice form, the preclusive effects of Rule 23 essentially eliminate the employee's FLSA claim in all but one far-fetched situation: where the employee affirmatively *opts out* of the class action and *does not opt in* to the collective action.

However, in the more realistic circumstance that the employee ignores the notice form (effectively joining the class action but not the collective action), he or she might be bound by the entire hybrid action judgment even though he or she did not opt-in to the collective action.[262] In a large-scale hybrid action, this very real "inertia" risk could potentially result in countless employees losing their once-protected FLSA opt-in claims.[263] Alternatively, even if res judicata does not wholly bar subsequent suits as *Ellis* predicts, collateral estoppel could foreclose future claims. For example, if the state law and FLSA wage regulations were identical in the initial hybrid action, collateral estoppel would likely bar decisive overtime pay issues in a subsequent FLSA suit. Crucially, either preclusion scenario potentially threatens plaintiffs' due process rights: their statutorily guaranteed FLSA opt-in claims are jeopardized by the state-law class action. If courts choose to allay these problems and simply allow plaintiffs to bring FLSA claims after a hybrid action was decided on the merits, Rule 23 would be stripped of its preclusive power and the class action's judicial economy would be lost.[264] In sum, *Ellis*

258. Damassia v. Duane Reade, Inc., 250 F.R.D. 152, 164 (S.D.N.Y. 2008).

259. *Compare Ellis*, 527 F. Supp. 2d at 455, *with Damassia*, 250 F.R.D. at 164–65.

260. *Damassia*, 250 F.R.D. at 165.

261. *Ellis*, 527 F. Supp. 2d at 455.

262. *Id.* (citing Brief for the United States Secretary of Labor as Amicus Curiae Supporting Respondents, Long John Silver's Rest., Inc. v. Cole, 409 F. Supp. 2d 682 (D.S.C. 2006) (No. 6:06-cv-3039) [hereinafter DOL Amicus Brief], *available at* http://www.dol.gov/sol/media/briefs/ljsbrief-12-13-2005.pdf; *see also* Robinson v. Sheriff of Cook County, 167 F.3d 1155, 1157 (7th Cir. 1999), *cited in* DOL Amicus Brief, *supra*. If a class action is properly certified, a decision on the merits binds class members who did not affirmatively opt out of the suit. 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4455, at 448 (2d ed. 2002).

263. *Ellis*, 527 F. Supp. 2d at 444–45.

264. "Preclusion by representation lies at the heart of the modern class action . . . ." 18A WRIGHT ET AL., *supra* note 262.

correctly holds that hybrid actions "abridge or modify" the employee's substantive right but *Damassia* glosses over the res judicata and collateral estoppel risks.[265]

Finally, *Damassia* also holds that the employer's right of reduced liability is not "abridged, enlarged or modified" by hybrid actions because the FLSA does not insulate employers from liability for state-law claims.[266] At first blush, this argument is appealing because the bare terms of § 216(b) mention nothing of state-law class actions. However, the operative REA inquiry should center on whether a concurrent class action will affect the rights embodied in the FLSA. The employer's right of reduced liability under the FLSA is "modified" by the previously-mentioned "inertia" problem. In the past, if an opt-in plaintiff decided not to join a collective action, the employer faced a smaller class and a smaller potential judgment. However, modern hybrid actions allow plaintiffs to lump Rule 23 and collective-action notices into a single form. Now, when potential class members discard the notice form, the opt-out default of Rule 23 causes the employer to face a much larger plaintiff class than before.[267]

In essence, the risk of "inertia" resurrects the representative actions that Congress sought to eradicate in § 216(b).[268] The employer's right to reduced liability is at worst "modified" because it will now face a much larger plaintiff class and potential judgment. Despite *Damassia*'s argument, the state and federal claims are not in two separate vacuums: plaintiffs realize the benefit of a federal forum and a unified notice form. Despite the clear legislative purpose to the contrary, employers pay for this convenience in the end. However unsavory the pro-employer protections may be, courts cannot disregard § 216(b) and hear hybrid actions. In short, hybrid actions violate the REA because Rule 23 "abridges or modifies" both the substantive rights of the employee to retain their claim and of the employer to be free "of the burden of representative actions."[269]

IV. A CALL FOR CONGRESSIONAL ACTION

Practitioners and judges alike should take note of the REA theory because it gives defendants a weapon to eliminate large state-law class actions at the pleading stage. If this became routine practice, plaintiffs would be continually rebuffed in their attempts to bring hybrid actions. From a policy standpoint, federal law would become an afterthought:

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265. *Ellis*, 527 F. Supp. 2d at 455; *Damassia*, 250 F.R.D. at 164.

266. *Damassia*, 250 F.R.D. at 165.

267. *Ellis*, 527 F. Supp. 2d at 454–55 (citing DOL Amicus Brief, *supra* note 262); *see also* Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 173 (1989)).

268. *See supra* Part I.B.

269. *Ellis*, 527 F. Supp. 2d at 457 (quoting *Hoffmann-La Roche*, 493 U.S. at 173).

plaintiffs would either (1) bring small-scale collective actions, (2) bring large state-law class actions and omit FLSA claims from their pleadings altogether, (3) rely entirely on state courts, or (4) file parallel claims in state and federal court. This unappealing result would cause innumerable "race to judgment" scenarios and raise a plethora of questions about cross-jurisdictional res judicata and collateral estoppel effects.

To avoid even the potential of such a chaotic judicial landscape, Congress should take action and eliminate the collective action. Courts cannot simply choose to ignore the history and purpose of § 216(b), but Congress can deracinate the outmoded provision in light of modern reality. In all respects, § 216(b) was created in a bygone era and was designed to address two policy concerns that are fundamentally moot today. First, federal practice has evolved greatly since the Portal-to-Portal Act. Section 216(b) is atavistic because it stands as a consent-based opt-in island in a sea of interest-based representative class actions. For better or worse, representative interest-based group litigation is firmly ingrained in both state and federal courts: the "unwholesome" prospect of representatives litigating on the behalf of others is now an everyday occurrence.[270] Additionally, the protections in Rule 23(b)(3)[271] greatly insulate employers from liability, and certification is far from guaranteed for plaintiffs. Second, Senator Donnell's fear of rising unionism and helpless embattled employers is simply inapplicable in modern times: a paltry 12.4% of the workforce is unionized today, unlike 33.9% in 1945.[272]

If the collective action is abolished, the FLSA will achieve its paramount goal of providing a federal floor for the poorest and most vulnerable employees. Presently, collective actions are only fully certified in two narrow instances: single-location production plants or a group of employees with nearly identical job classifications.[273] These scenarios are rare because most low-wage workers find work in chain companies such as Wal-Mart or fast food restaurants, not factories or high-skilled blue-collar jobs. As a result, few of these chain company employees can ever hope to litigate a certified collective action through the merits: their varying job duties, work locations, and managers would undoubtedly cause their class to flunk the strict "similarly situated" test.[274] Ideally, if this unforgiving certification hurdle was eliminated, countless minimum wage workers could vindicate their overtime and minimum wage rights through streamlined class action and supplemental jurisdiction practice.

270. *See supra* Part I.B.

271. *See supra* Part I.C.2.

272. LEO TROY & NEIL SHEFLIN, U.S. UNION SOURCEBOOK—MEMBERSHIP, FINANCES, STRUCTURE, DIRECTORY (1985).

273. *See supra* Part III.B.2.

274. *See supra* Part II.B.

Finally, this unified wage and hour class action solution would have a positive impact on employers as well. Rather than face waves of small collective actions, disjointed state-law class actions, or parallel combinations of the two, employers could defeat meritless claims in one convenient suit. Alternatively, if their odds for success were poor, employers could more easily negotiate a single settlement instead of an endless string of claims. Perhaps most importantly, employers would take preventive front-end measures to avoid litigation entirely by following FLSA and state-law regulations.

CONCLUSION

Wage and hour litigation impacts employees' rights, employers' bottom lines, and federal court dockets. Unfortunately, lower courts lack a guiding rationale to effectively handle hybrid actions. The REA theory offers the most effective reconciliation between § 216(b) and Rule 23's incongruent group-litigation schemes. No matter how misguided or anachronistic, § 216(b) confers substantive rights on employers and employees. Rule 23 eviscerates these rights by morphing the intentionally-narrow collective action into a much larger and inclusive hybrid action. Unfortunately, this is an unavoidable hindrance for plaintiffs and an effective defense for employers. Courts cannot rewrite or ignore the history of the Portal-to-Portal Act and § 216(b). However, Congress can and should abolish collective actions once and for all.

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