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Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts

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Hybrid wage-and-hour class actions, which combine a Fair Labor Standards Act ("FLSA") opt-in collective action and a Federal Rule of Civil Procedure Rule 23 opt-out class action in a single civil action, demonstrate the unusual interplay of opt-in and opt-out rules. The hybrid class action, and its viability as a mechanism for wage law enforcement, raises fundamental questions as to who participates in lawsuits, how we should hold employers accountable for wage-and-hour noncompliance, and the role of the federal courts in enforcing public rights. An opt-in rule tends to produce low participation rates, while an opt-out rule tends to produce high participation rates. This means that employers are typically confronted by a larger number of state claims in the Rule 23 class action than federal claims in the FLSA action. The substantive consequences of dual certification, along with related jurisdictional and policy issues, have created division within the federal courts regarding whether FLSA opt-in collective actions and Rule 23 opt-out class actions may consistently coexist. While wage laws have historically been undermined by persistent underenforcement, the hybrid class action has the potential to expand enforcement. This Article examines the relevance of the FLSA opt-in action and its opt-in rates to Rule 23 class certification and federal jurisdiction for

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state wage claims. This Article engages in critical evaluation of the reasons for low FLSA opt-in rates by providing a comprehensive collection of empirical data on opt-in rates, analyzing reasons for low opt-in rates, and articulating the implications for wage law enforcement. This Article argues that FLSA section 216(b) and Rule 23 are consistent procedural enforcement mechanisms, and advances approaches to Rule 23 class certification and federal jurisdiction that integrate an understanding of low opt-in rates. Ultimately, this Article proposes that dual certification of FLSA collective actions and Rule 23 class actions is an appropriate response to the unusual interplay of opt-in and opt-out rules in hybrid class actions.

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I.

INTRODUCTION

Throughout the United States, workers are routinely denied their rights to a minimum wage and overtime pay. The widespread business practice of wage-and-hour violations victimizes the most vulnerable workers in the low-wage economy and increasingly affects employees in moderate-income positions. Noncompliance takes many forms: employers simply pay less than the minimum wage, fail to permit or to pay for meal or rest breaks, fail to pay for walking-time or donning and doffing activities, mandate ‘off-the-clock’ work without pay, or misclassify workers as independent contractors or as employees that are exempt from wage-and-hour protections. These practices indicate a continuum of noncompliant behaviors by employers that range from denying workers are covered under the employment laws, as in the case of misclassification, to outright defiance of the law as when an employer intentionally pays less than the

1. The federal government’s definition of “working poor” refers to a person that spends twenty-seven weeks in the labor force but whose income falls below the poverty-line. BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, A PROFILE OF THE WORKING POOR, 2003 1 (2005). Low-wage workers, however, are a broader social group that include persons that work and live in poverty by all accounts, notwithstanding that they may live above the government’s poverty-line. See Sharon M. Dietrich, When Working Isn’t Enough: Low-Wage Workers Struggle to Survive, 6 U. PA. J. LAB. & EMP. L. 613, 614 n.4 (2004). Low-wage workers are disproportionately black or Latino, current or former welfare recipients, undocumented workers, or engage in “contingent” work (the non-traditional jobs performed by day laborers, temporary employees, or independent contractors). Id. at 614-19.


minimum wage or refuses to compensate employees for overtime.\textsuperscript{7}

Worker protection requires both adequate labor standards and rigorous enforcement. Stagnant for nearly ten years, the federal minimum wage of $5.15 per hour was widely recognized as an inadequate wage floor that failed to provide working people with the basic income necessary to achieve a decent standard of living or to rise out of poverty. In 2007, Congress finally enacted an increase of the minimum wage from $5.15 to $7.25, to occur in three phases over two years.\textsuperscript{8} Without strict wage law enforcement, the benefits of this belated but welcome minimum wage increase will be undermined by noncompliance with wage-and-hour laws.

Historically, the wage-and-hour protections of the Fair Labor Standards Act and similar state laws have been limited by persistent underenforcement.\textsuperscript{9} When the costs outweigh the benefits, workers are less likely to enforce their rights. Workers are discouraged from litigating their claims by fear of retaliation, the inaccessibility of the legal system, and the significant effort and expenses required to recover a frequently small unpaid wage.\textsuperscript{10} Accordingly, private enforcement, in the form of individual lawsuits, is an insufficient vehicle for challenging wage-and-hour violations. Public enforcement, suffering from a lack of budgetary resources and political will, has also failed to reduce the gap between violations and claims.\textsuperscript{11}

Significantly, the sheer breadth of wage-and-hour noncompliance renders wide-scale enforcement all the more daunting. Chronic underenforcement provides incentive for employers to engage in systematic wage-and-hour violations. Employers will choose noncompliance if the risk of enforcement is low or if accepting the penalties is cost-effective.\textsuperscript{12} This convergence of noncompliance and underenforcement entrenches a culture in which lack of accountability further widens the gap between workers’ rights and the remedies for violations.

Currently, government agencies, public interest lawyers, and workers’ rights groups are utilizing several strategies to combat wage-and-hour


\textsuperscript{11} See id. at 62.

\textsuperscript{12} Id. at 61-62. The Employer Policy Foundation estimates that employers would owe workers $19 billion annually if they complied with wage laws. See Craig Becker, A Good Job for Everyone: Fair Labor Standards Act Must Protect Employees in Nation’s Growing Service Economy, LEGAL TIMES, Sept. 6, 2004, Vol. 27, No. 36.
This Article focuses on the emerging litigation strategy of class action lawsuits. Wage-and-hour class actions are on the rise in the federal courts. Many recent wage-and-hour class actions have resulted in large damage settlements and have forced employers to remedy their violations. The threat of litigation and substantial damage awards sends the important message that violating wage-and-hour laws does not pay, and demonstrates to employers that compliance is the best strategy to avoid litigation and liability. The explosion in wage-and-hour filings, and the potential that such actions will mitigate the problem of underenforcement,


14. This is not to imply that class-based litigation is a substitute for a larger movement to reform the workplace. There has been a substantial critique of litigation as a vehicle for social change. Overall, litigation tends to be ineffective at changing underlying social structures. See, e.g., William P. Quigley, Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations, 21 OHIO N.U. L. REV. 455, 468 (1995); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 341 (1991); JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 232-33 (1978). A well-intentioned litigation strategy also can have the collateral consequence of disempowering clients or undermining organizing efforts. See, e.g., Quigley, supra, at 468; Steve Bachmann, Lawyers, Law and Social Change, 13 N.Y.U. REV. L. & SOC. CHANGE 31-32 (1984). Apart from political mobilization, public education, and policy advocacy, wage-and-hour litigation will have only limited impact and indeed, may even be counterproductive. See, e.g., Jennifer Gordon, We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change, 30 HARV. C.R.-C.L. L. REV. 407, 438-39 (1995); GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 74-78 (1992).


16. In 2006, the largest wage-and-hour settlements tended to be against large companies and numbered in the tens of millions of dollars: Citigroup Global Markets ($98 million), UBS Financial Services ($89 million), United Parcel Service ($87 million), IBM ($65 million), Morgan Stanley ($42.5 million), 24 Hour Fitness ($38 million), Merrill Lynch ($37 million), Siebel Systems ($27.5 million), Sears Roebuck ($27.5 million), and Electronic Arts ($14.9 million). See SEYFARTH SHAW LLP, ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT (2007 ed.). Other lawsuits have resulted in more modest recovery for workers. Steven Greenhouse, Two Restaurants to Pay Workers $164,000, N.Y. TIMES, Jan. 12, 2005, at B3; Ron Howell, Gristedes in $3.25 Million Deal With Workers, NEWSDAY Dec. 18, 2003, at A03.
suggest the need for examination of the legal and policy issues involved in wage-and-hour class actions.

Important is an unusual "hybrid" wage-and-hour class action that arises in these cases, one that combines an opt-in collective action under the Fair Labor Standards Act ("FLSA") and a Federal Rule of Civil Procedure Rule 23 ("Rule 23") opt-out class action for state wage claims. Rule 23's opt-out rule normally applies to both federal and state statutory claims that are concurrently filed in federal court. However, in a hybrid wage-and-hour class action, the state law wage claims may be brought as an opt-out class action pursuant to Rule 23, but FLSA section 216(b) permits only opt-in collective actions for the FLSA claims. Because employees do not usually take affirmative steps to opt in or opt out of a class lawsuit, Rule 23's opt-out rule tends to produce high participation rates, whereas Rule 23's opt-out rule tends to produce low participation rates. Consequently, the interplay of opt-in and opt-out rules in hybrid class actions results in differing class sizes for the FLSA and state law claims.

Hybrid class actions, therefore, require courts to resolve the question of dual certification, that is, whether to certify both an opt-in class for the FLSA claims and an opt-out class for the state claims. Additionally, courts must decide whether to exercise jurisdiction over the state law claims. Whether to grant dual certification is a procedural decision that has substantive consequences for rights enforcement. If dual certification is granted, Rule 23's significantly higher participation rates result in a larger number of state wage claims against an employer, as opposed to federal claims. If not granted, a court is effectively limiting an action to the claims of those persons who affirmatively opted into the FLSA collective action, resulting in a considerably smaller number of wage claims against an employer. A court's decision whether to grant dual certification implicates the extent of liability facing employers, the scale of employee participation, and the power of the class action as a mechanism for wage law

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18. An opt-out rule presumes participation in a class lawsuit unless a person affirmatively dissents from membership. An opt-in rule, on the other hand, requires that a person affirmatively consent to membership in a class lawsuit.


20. See, e.g., Deborah R. Hensler & Thomas D. Rowe, Jr., Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform, 64 LAW & CONTEMP. PROB. 137, 146 (2001) (discussing the underinclusive nature of the opt-in regime, generally).

21. See infra Part IV.

22. See Hensler & Rowe, Jr., supra note 20, at 145-47 (explaining that an opt-in rule is likely to "screen out" many individuals that wish to participate in class litigation, and may thereby inhibit the pursuit of legitimate claims and limit an employer's liability).
enforcement.

Courts are divided on the question of dual certification. This division is apparent in the vast number of district court rulings on hybrid class actions. These decisions apply Rule 23 and supplemental jurisdiction doctrines to address concerns with low FLSA opt-in rates, the compatibility of FLSA opt-in and Rule 23 opt-out actions, and most importantly, the substantive effects that flow from allowing hybrid class actions to go forward. Under Rule 23, courts have considered whether low opt-in rates support or disfavor numerosity of the class and superiority of the class action. In addressing supplemental jurisdiction, courts have considered the significance of the typically larger ratio of state claims to FLSA claims for class treatment of those claims.

The jurisdictional inquiry has generated two circuit court opinions, *De Asencio v. Tyson* and *Lindsay v. Government Employees Insurance Company*, which reached different outcomes. *De Asencio* held that a large disparity between the FLSA opt-in rate and potential opt-out class size created a substantial predominance of state law claims over federal claims under 28 U.S.C. § 1367(c). The court, therefore, did not exercise supplemental jurisdiction. However, in *Lindsay*, the court found no substantial predomination. The court exercised supplemental jurisdiction because both the FLSA and state law actions advanced similar legal theories and factual issues.

The divergent approaches in *De Asencio* and *Lindsay* are reflected in the district courts, which are also divided on the question of supplemental jurisdiction in hybrid class actions. This Article explores the apparent tension between the opt-in and opt-out systems in hybrid wage-and-hour class actions, as well as the normative implications of low opt-in rates for hybrid class actions. A relevant consideration in the analysis is the federal judiciary’s role in ensuring that adequate procedural mechanisms are available for enforcing employment

23. See infra Part III.
25. 342 F.3d 301 (3d Cir. 2003).
27. *De Asencio*, 342 F.3d at 311-12.
29. See infra Part III.A.2.
laws. This Article argues that dual certification is an appropriate response to the barriers that prevent workers from exercising their FLSA opt-in rights. This position is clearly guided by the empirical premise that wage-and-hour violations are a significant, broad-based social problem in the American economy, and that workers often face significant costs and obstacles that prevent them from affirmatively pursuing wage claims. This position is further informed by the view that legal principles should support rigorous enforcement. The ultimate conclusion in favor of dual certification rests on the recognition that the strength of wage law enforcement as a stimulus to workplace reform fundamentally depends on courts' interpretations of the procedural mechanisms for enforcement.

Surprisingly, although the hybrid class action has received some attention in legal scholarship, critical inquiry into the reasons for low opt-in rates and the implications for wage law enforcement has been notably absent. This Article provides a Table with data on low opt-in rates and documents the effect of these rates on case outcomes. This Article indicates that low opt-in rates give reason for pause before acceptance of an opt-in system that could seriously undermine the enforcement potential of class actions.

This Article further examines the policy basis for the existence of hybrid class actions and the meaning of low opt-in rates for doctrinal

30. See supra note 2.
31. See, e.g., Weil & Pyles, supra note 10, at 82-84.
32. The hybrid wage-and-hour class action has tended to receive only passing attention. Scholarship has concentrated on the difference between FLSA's "similarly situated" standard for certification of a collective action and Rule 23 standards for certification of a class action, a difference summarized infra Part II.C.1. See, e.g., Scott Edward Cole & Matthew R. Bainer, To Certify or Not to Certify: A Circuit-By-Circuit Primer on the Varying Standards for Class Certification in Actions Under the Federal Labor Standards Act, 13 B.U. PUB. INT. L.J. 167 (2004); David Borgen & Laura L. Ho, Litigation of Wage and Hour Collective Actions Under the Fair Labor Standards Act, 7 EMP. RTS. & EMP. POL'Y J. 129 (2003); 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 (2005); James M. Fraser, Comment, Opt-in Class Actions Under FLSA, EPA, and ADEA: What Does It Mean to be "Similarly Situated"?, 38 SUFFOLK U. L. REV. 95 (2004); Cf. Janet M. Bowemaster, Two (Federal) Wrongs Make a (State) Right: State Class-Action Procedures as an Alternative to the Opt-In Class-Action Provision of the ADEA, 25 U. MICH. J.L. REFORM 7, 41-42 (1991). Defense lawyers wrote both of the two previous articles that focused on hybrid class actions. Those articles, aimed at defeating class certification, did not critically analyze the implications of low opt-in rates for maintenance of Rule 23 opt-out class actions. 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. LAWYER 311, 313-16 (2005); Noah A. Finkel, State Wage-and-Hour Law Class Actions: The Real Wave of "FLSA" Litigation?, 7 EMP. RTS. & EMP. POL'Y J. 159, 166-81 (2003). A recent article argues that FLSA section 216(b)'s opt-out rule limits wage enforcement and proposes that Congress should amend the FLSA section 216(b) to bring it into conformity with the opt-out rule that governs most class actions. Craig Becker & Paul Strauss, Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards, 92 MINN. L. REV. 1317, 1325-47 (2008). The authors provide an insightful discussion, and there is much to recommend removing the opt-in rule for FLSA collective actions. This Article, however, analyzes the issues implicated in hybrid class actions based on existing law that provides an opt-in rule for FLSA collective actions and an opt-out rule for state law class actions.
analysis of hybrid class actions. First and foremost, the FLSA collective action and the Rule 23 class action are consistent procedural enforcement mechanisms as a matter of federal policy.\(^{33}\) Doctrinally, a court properly exercises supplemental jurisdiction when federal and state wage claims exhibit substantially similar issues, and should not decline jurisdiction solely on the basis that low opt-in rates result in a larger number of state claims before the court.\(^{34}\) Finally, this Article proposes two possible approaches to Rule 23 class certification in hybrid actions: one which identifies Rule 23 class certification for state law rights as independent from certification of a FLSA opt-in action for federal rights, and another which recognizes Rule 23 as a doctrinal filter that allows courts to address the relative merits of alternative mechanisms of enforcement, including the FLSA's limitations on employee participation, and to determine whether the inadequacies of other mechanisms require the maintenance of an opt-out class action.\(^{35}\)

Part II of this Article discusses the doctrinal background for hybrid wage-and-hour class actions. Part III articulates the dispute between courts with respect to hybrid class actions, focusing on Rule 23 certification standards, supplemental jurisdiction, and policy concerns. Part IV provides a Table with data on low opt-in rates. It then analyzes the reasons for low opt-in rates and describes the implications of these rates for wage law enforcement. Part V examines the legal and policy justifications for dual certification in hybrid wage-and-hour class actions. Finally, the Article concludes with a discussion of the role of hybrid class actions in advancing wage law enforcement and, more generally, broader efforts to reform the workplace.

II.
THE ORIGINS OF HYBRID WAGE-AND-HOUR CLASS ACTIONS

This Part introduces the substantive and procedural law relevant to hybrid wage-and-hour class actions. First, this Part discusses the substantive provisions of the Fair Labor Standards Act and state wage-and-hour laws. Next, it explains the history of FLSA section 216(b) and Rule 23. This Part then identifies the procedural and jurisdictional doctrines that apply in hybrid class actions.

A. The Fair Labor Standards Act and State Wage-and-Hour Laws

The Fair Labor Standards Act of 1938 governs wage and hour practices throughout the country. The FLSA was designed to “aid the unprotected,
unorganized, and lowest paid of the nation’s working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.” Specifically, the FLSA establishes a minimum hourly wage and overtime provisions.

The FLSA’s wage-and-hour protections apply to an “employee” as defined under the Act. Although the Supreme Court has interpreted employee status under the FLSA broadly, many workers fall outside its protections. Some workers are exempt from coverage altogether, including many service and agricultural workers. For example, under an exemption for “companionship services,” the FLSA does not cover home health aides. Others are exempt from overtime protection, perhaps the largest group being “executive, administrative, or professional” workers under the so-called “white-collar” exemption. Notably, FLSA protection does not extend to independent contractors, who are not considered employees under the statute.

A FLSA violation makes an employer “liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.” The FLSA provides for public enforcement by the Secretary of Labor, and for private enforcement by workers through either individual claims or collective actions. Generally, FLSA claims have a two-year statute of limitations period, except that a three-year statute of limitations applies when the employer commits a “willful violation.”

In addition to the FLSA, state wage-and-hour laws protect workers.

42. 29 U.S.C. § 213(a)(1). It has been argued that final regulations defining the “executive, administrative, or professional” exemptions, issued in 2004, eliminated overtime coverage for six million workers. See Becker, supra note 12, at 54.
43. The Supreme Court has explained that courts must determine whether, as a matter of “economic reality,” an individual is an employee covered by the FLSA or an independent contractor in business for himself and exempt from coverage. Rutherford Food Corp., 331 U.S. at 727; see also Bartels v. Birmingham, 332 U.S. 126, 130 (1947) (describing the “economic reality test” used to determine which workers are “employees” under the FLSA).
44. 29 U.S.C. § 216(b).
Similar to the FLSA, state wage-and-hour laws establish minimum wage and overtime protections, and provide for enforcement of those protections. A state wage claim is often functionally identical to a federal claim, in that it challenges the same practice of underpayment of wages, and raises similar legal and factual questions. Nevertheless, federal and state wage-and-hour laws differ in some important respects. The FLSA does not preempt more protective state wage-and-hour laws, allowing states, for example, to provide a higher minimum wage than is required by federal law. This not only results in higher wages within those states, but potentially greater liability when an employer violates a higher state wage floor. Some state laws also provide a longer statute of limitations for enforcement of workers' rights, and impose greater penalties on violating employers than does the FLSA.

**B. FLSA Section 216(b)’s Opt-In Rule and Rule 23’s Opt-Out Rule**

Hybrid wage-and-hour class actions are the product of different procedural rules for class treatment of federal and state wage claims: the FLSA collective action is formed by an opt-in procedure and the Rule 23 class action is formed by an opt-out procedure. There was a time, however, when both FLSA section 216(b) and Rule 23 provided for opt-in actions. The FLSA and Federal Rules of Civil Procedure were both enacted in 1938. At that time, while Rule 23 provided for an opt-in action, FLSA section 216(b) was silent on procedures for participation in a collective action. Consistent with Rule 23, courts interpreted section 216(b) as implying an opt-in rule for FLSA actions.

In 1947, Congress amended FLSA section 216(b) by enactment of the...
Portal-to-Portal Act. The Portal-to-Portal Act responded directly to a set of Supreme Court decisions that expanded coverage of compensable “work” under the FLSA. Insofar as the Supreme Court expanded coverage to include walking-time, the Act aimed to limit employer liability and clarify the FLSA’s substantive requirements. At the same time, the Act eliminated an agency action provision that had allowed entities such as labor unions to bring lawsuits on behalf of similarly situated employees. It also explicitly incorporated the opt-in requirement for FLSA collective actions.

Addition of the opt-in rule brought FLSA section 216(b) into conformity with the Rule 23 opt-in requirement in effect at the time, and made explicit what courts at the time had already implied from the statute. Unlike the Act’s limiting definition of compensable “work,” the amendment to section 216(b) does not appear to have been concerned with limiting the possibility of extensive employer liabilities resulting from collective actions per se. Rather, as the Supreme Court explained in Hoffman-La Roche, Inc. v. Sperling, the opt-in provision “was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right.” This rationale for the Act’s amendment of section 216(b) was consistent with the prevailing opt-in rule of the day.

53. The Portal-to-Portal Act draws its name from the Supreme Court’s decision in Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123, 321 U.S. 590 (1944), where the Court held that compensable “work” included the time that a miner walked from the mine’s entrance, known as the “portal,” to the work-site and the time returning to the “portal.” The Supreme Court subsequently extended this holding to factories in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690-94 (1946).
54. Portal-to-Portal Act of 1947, 61 Stat. 84. Congress’s concern appeared to be the “unexpected liabilities” that resulted from the Supreme Court’s broad definition of compensable “work.” Id. at § 1(a), 61 Stat. at 84. The Act clarified that that an employer would not be liable for failure to compensate employees’ walking-time, “preliminary” or “postliminary” activities, in the absence of an express contract or custom covering those activities. Id. at § 4, 61 Stat. at 86-87.
55. Congress’s concern with the agency action provision was its potential to promote a flood of litigation by “outsiders.” See, e.g., Spahn, supra note 50, at 129 n.56.
56. The 1947 amendments thus established 216(b) in its modern form: “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.” 29 U.S.C. § 216(b).
57. See Spahn, supra note 50, at 129.
58. 493 U.S. 165, 173 (1989). The Court declared: In enacting the Portal-to-Portal Act of 1947, Congress made certain changes in [FLSA] procedures. In part responding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added. The relevant amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions. Congress left intact the “similarly situated” language providing for collective actions... The broad remedial goal of the statute should be enforced to the full extent of its terms. Id.
59. See, e.g., Bowermaster, supra note 32, at 30-35 (making this argument to counter the alternative view that the opt-in requirement was added with the express purpose of limiting employer
In 1966, Rule 23 was amended to remove the opt-in requirement from the Federal Rules of Civil Procedure. The 1966 amendments also established an opt-out regime for monetary damages class actions. However, in a parenthetical note to the amendments, the Advisory Committee that drafted Rule 23 noted that the amendments did not apply to FLSA section 216(b)'s opt-in rule. As a result, distinct procedural mechanisms emerged for Rule 23 opt-out class actions and FLSA section 216(b) opt-in collective actions. Along with Congress's enlargement of district courts' ability to exercise supplemental jurisdiction, Rule 23's opt-out regime and FLSA section 216(b)'s opt-in regime established the conditions for litigation of hybrid class actions in federal court.

C. Hybrid Class Actions: The Legal Doctrines

1. Class Certification Standards

In hybrid cases, the Rule 23 requirements govern certification of state law opt-out class actions. The certification standards for FLSA claims have been less clear. Although section 216(b) allows employees to bring collective actions on behalf of "similarly situated" employees, the statute is silent with respect to certification standards. Initially, some courts simply

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liability. The legislative history is not contrary to this position. Senator Donnell, in discussing the opt-in provision, stated that "[i]t is certainly unwholesome to allow an individual to come into court alleging that he is suing on behalf of 10,000 persons and actually not have a solitary person behind him . . ." 93 Cong. Rec. 2182 (daily ed. Mar. 18, 1947). While Donnell certainly may have personally desired to limit employer liability, see Marc Linder, Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947, 39 BUFF. L. REV. 53, 167-75 (1991), Donnell's remarks were consistent with the prevailing opt-in system in place at the time.

63. In 1963, the Equal Pay Act was passed as an amendment to the FLSA and thus shares its enforcement mechanism. In 1967, Congress further incorporated Section 216(b)'s opt-in regime into the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.
64. See infra Part II.B.2.
65. Rule 23(a) provides a set of class certification standards for class action lawsuits:
1) Numerosity—the class must be "so numerous that joinder of all members is impracticable."
2) Commonality—"there are questions of law or fact common to the class."
3) Typicality—"the claims or defenses of the representative parties are typical of the claims and defenses of the class."
4) Adequacy of representation—"the representative parties will fairly and adequately protect the interests of the class."

Rule 23(b)(3) contains two additional elements for certification of an opt-out class action: "predominance" ("questions of law or fact common to the members of the class predominate over any questions affecting only individual members") and "superiority" ("a class action is superior to other available methods for the fair and efficient adjudication of the controversy"). FED. R. CIV. P. 23(b)(3).
applied Rule 23 requirements to FLSA collective actions. The majority of courts, however, have rejected that approach. The FLSA's "similarly situated" standard differs from Rule 23's standards, and addresses certification through a two-stage, "ad hoc" approach: the conditional certification stage and the ultimate certification stage. At the conditional certification stage, the court certifies the FLSA collective action for purposes of providing employees with notice of the action and the opportunity to opt into the action. At the ultimate certification stage, the court makes a final determination about whether the employees are "similarly situated" such that their claims should proceed as a FLSA collective action.

2. Federal Court Jurisdiction Over State Wage-and-Hour Class Actions

In hybrid wage-and-hour cases, federal courts may have jurisdiction over the state law claims of a Rule 23 class action based on supplemental jurisdiction or provisions of the Class Action Fairness Act of 2005 ("CAFA").

To date, jurisdictional issues in hybrid actions have primarily concerned supplemental jurisdiction and, specifically, whether a court should exercise supplemental jurisdiction over the state claims of a prospective Rule 23 class action. The broad federal power of supplemental jurisdiction partly explains the rise of hybrid wage-and-hour class actions in federal court. Before the Judicial Improvements Act of

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68. See generally Cole & Bainer, supra note 32, at 172 (collecting cases).
70. In addition to facilitating notice, the earlier conditional certification is important because tolling of the statute of limitations in a FLSA collective action occurs when an individual opts into the lawsuit. See Cole & Bainer, supra note 32, at 169.
71. Plaintiffs have a "fairly lenient" burden at the conditional certification stage. Many courts grant conditional certification on the basis of plaintiff's allegations and supporting affidavits. Plaintiffs confront stricter standards at the ultimate certification stage. See Cole & Bainer, supra note 32, at 169-72. Some commentators maintain that Rule 23 standards are generally applied at the second, ultimate certification stage. See id. at 172. For a set of factors used at the ultimate certification stage that are somewhat different from Rule 23, see, e.g., Thiessen v. GE Capital Corp., 267 F.3d 1095, 1103 (10th Cir. 2001).
74. When a federal court has federal question jurisdiction, as it does over FLSA claims, supplemental jurisdiction gives a court the authority to adjudicate "all claims that are so related to claims in the action within [a court's] original jurisdiction that they form part of the same case or controversy..." 28 U.S.C. § 1367(a) (1990).
1990 ("the Act"), federal courts had supplemental jurisdiction over pendent claims, but not pendent parties. This meant that a hybrid class action was not possible before the Act because federal courts could have supplemental jurisdiction only over the state claims of individuals that opted into the FLSA action. The Act's extension of supplemental jurisdiction over pendent parties enabled district courts to exercise jurisdiction over the state claims of individuals that do not opt into the FLSA collective action. Nevertheless, district courts retain discretion about whether to exercise supplemental jurisdiction.

While many hybrid class actions will continue to raise questions of supplemental jurisdiction, jurisdiction in hybrid class action cases will increasingly be decided under CAFA. CAFA signified Congress's support for greater federalization of class actions. Before CAFA, a federal court lacked diversity jurisdiction unless all named plaintiffs satisfied "complete diversity" of citizenship from defendants and the $75,000 amount in controversy. To open the federal courts to large-scale state law class actions, CAFA eased the rules for diversity jurisdiction, requiring only "minimal diversity" between the parties and a five million dollar amount in controversy for the claims of all class members. The parties in many hybrid class actions will meet the less stringent requirement of minimal diversity, and the wage claims will often generate an amount in controversy

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77. Pendent-claim jurisdiction was established in United Mine Workers v. Gibbs, 383 U.S. 715 (1966), allowing a court to hear concurrent federal and state claims when those claims derive from "a common nucleus of operative fact," id. at 725. Initially rejected by the Court in Finley v. United States, 490 U.S. 545, 549 (1989), but later adopted by Congress in the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990), pendent-party jurisdiction allows a court to decide the state claims of persons that do not have federal claims before the court, so long as those claims implicate factual or legal issues similar to the federal questions before the court, see Finley, 490 U.S. at 549.
79. Under 28 U.S.C. § 1367(c), a court "may decline to exercise supplemental jurisdiction . . . if 1) the claim raises a novel or complex issue of state law; 2) the claim substantively 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) (2007).
80. S. Rep. No. 109-14, at 5 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 6 (explaining that "interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit," and consequently, arguing that "such cases properly belong in federal court.").
82. See 28 U.S.C. § 1332(d)(2). Minimal diversity exists when only one plaintiff and one defendant have diversity of citizenship. Id. CAFA also made it easier for defendants to remove class actions that meet the jurisdictional requirements to federal court. See 28 U.S.C. §1453(b).
in excess of five million dollars. Accordingly, an increase in the number of hybrid class actions in federal court can be expected under CAFA.\textsuperscript{83}

Nonetheless, CAFA does not mandate federal jurisdiction over all class actions. For example, CAFA contains an exception from federal jurisdiction if “the number of members of all proposed plaintiff classes in the aggregate is less than 100.”\textsuperscript{84} Additionally, CAFA established a local controversy exception that exempts certain cases from its jurisdictional requirements.\textsuperscript{85} Instances will remain for courts to review state claims in Rule 23 class actions under principles of supplemental jurisdiction.\textsuperscript{86} Jurisdictional issues in hybrid class actions will continue to be addressed under both CAFA and supplemental jurisdiction.

III. HYBRID WAGE-AND-HOUR CLASS ACTIONS IN THE FEDERAL COURTS

A. Hybrid Class Actions: Doctrinal and Policy Concerns

This Part turns to the substance of the current division within the federal courts on approaches to dual certification of hybrid wage-and-hour class actions. Essentially, courts address three underlying concerns when faced with hybrid class actions: (1) the relevance of low FLSA opt-in rates to Rule 23 class certification and federal jurisdiction over state law claims; (2) the co-existence of a Rule 23 class action and a FLSA collective action from a FLSA policy perspective; and (3) the manageability of opt-in and opt-out actions in a single civil action.

\begin{footnotesize}
\begin{enumerate}
\item The general consensus is that CAFA’s expansion of federal jurisdiction over class actions will result in a larger number of class action lawsuits being brought in or removed to the federal courts. See, \textit{e.g.}, Robert H. Klonoff, \textit{Class Action Symposium: The Twentieth Anniversary of Phillips Petroleum Co. v. Shutts: Introduction to the Symposium}, 74 U.M.K.C. L. REV. 487 (2006) (noting the shared view of scholars at the conference that CAFA will lead to more class actions in federal court).
\item When more than two-thirds of all plaintiffs and the primary defendants are both citizens of the state in which suit was originally filed, it must be remanded to state court. 28 U.S.C. § 1332(d)(4)(B). When between 1/3 and 2/3 of all plaintiffs and the primary defendants are both citizens of the relevant state, a court has discretion whether to remand based on several statutory factors. 28 U.S.C. § 1332(d)(3). Jurisdiction must be denied when more than 2/3 of plaintiffs, and at least one principal defendant, are from the relevant state. 28 U.S.C. § 1332(d)(4). See generally Stephen J. Shapiro, \textit{Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Approach}, 59 BAYLOR L. REV. 77 (2007); Anna Andreeva, \textit{Class Action Fairness Act of 2005: The Eight-Year Saga is Finally Over}, 59 U. MIAMI L. REV. 385 (2005).
\item See Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 572 (2005) (“The CAFA . . . does not moot the significance of our interpretation of § 1367, as many proposed exercises of supplemental jurisdiction, even in the class-action context, might not fall within the CAFA’s ambit. The CAFA, then, has no impact, one way or the other, on our interpretation of § 1367.”).
\end{enumerate}
\end{footnotesize}
1. The Relevance of Low FLSA Opt-In Rates

Hybrid class actions are unique because of the interaction of opt-in and opt-out rules in a single case. Courts recognize that an opt-in or opt-out rule largely determines the scope of participation in class actions with opt-in rates being significantly lower than opt-out rates. Courts differ, however, in interpreting the relevance of low FLSA opt-in rates for certification of a Rule 23 opt-out class action and jurisdiction over state law claims.

Some courts reason that a low FLSA opt-in rate implies that employees do not want to participate in the action. This lack of participation is viewed as cutting against satisfaction of the Rule 23 numerosity requirement. For these courts, it makes sense to deny Rule 23 class certification, since the alternative would bring many more workers before the court than have expressed an interest in participation. Similarly, the superiority of a Rule 23 class action is evaluated by reference to the available FLSA opt-in mechanism. As workers have the option to participate in the FLSA collective action, it is argued there is no need for a class action including those who lack a personal stake in the outcome.

Other courts draw different inferences. Although the FLSA opt-in procedure limits membership to individuals who affirmatively consent, "membership in [a] proposed [Rule 23] class is independent of whether the FLSA action is joined." This view suggests that low FLSA opt-in rates

88. *See FED. R. CIV. P. 23(a).
89. For example, in Thiebes v. Wal-Mart Stores, where 425 of 15,000 potential class members filed FLSA opt-in consents, the court held that Rule 23 numerosity could not be satisfied. The court in Thiebes reasoned that a state class "would bring in many more employees than those who believe they were actually aggrieved by Wal-Mart's alleged conduct." The court thus inferred a desire of nonparticipation from the low opt-in rates. Thiebes, 2002 U.S. Dist. LEXIS 664, at *7-9.
90. FED. R. CIV. P. 23(b)(3). Rule 23(b)(3) asks whether "the class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Id.
91. *See Marquez v. Partylite Worldwide, Inc., No. 07 C 2024, 2007 U.S. Dist. LEXIS 63301, at *16 (N.D. Ill. Aug. 27, 2007) (denying employer’s motion to strike the plaintiff’s state law class action allegations pursuant to Federal Rule of Civil Procedure 12(f) but noting that under Rule 23(b)(3)’s superiority requirement, Congress’s “addition of the written consent requirement to the FLSA” suggests that “an opt-out class action is not likely to be the superior method for resolving [the plaintiff’s] state-law claims that [the defendant] failed to make overtime payments”); Muecke v. A-Reliable Auto Parts and Wreckers, Inc., No. 01 C 2361, 2002 U.S. Dist. LEXIS 11917, at *6-7 (N.D. Ill. June 21, 2002) (finding that due to the availability of the FLSA opt-in mechanism, “it makes no real sense to the Court to certify a class that will automatically include all of the employees unless they opt out”); see also De La Fuente v. FPM Ipsen, No. 02 C 50188, 2002 U.S. Dist. LEXIS 24040 (N.D. Ill. Dec. 13, 2002).
are simply irrelevant to Rule 23 class certification. Some courts, however, have considered the lack of participation in FLSA collective actions to support Rule 23 class certification. The FLSA opt-in procedure is viewed as an obstacle to participation for individuals who lack understanding of the legal system, do not speak English, or fear retaliation by employers. Just as many employees are prevented from bringing individual FLSA claims for such reasons, these obstacles to participation indicate that employees will be unlikely to opt into a FLSA collective action. Low opt-in rates thus indicate that joinder through the FLSA opt-in regime is impracticable, a factor that supports the Rule 23 requirement of numerosity. Similarly, low opt-in rates suggest that a Rule 23 class action is superior to the FLSA action as a mechanism for fair and efficient adjudication of wage claims.

2. Hybrid Class Actions and Federal Policy

A conceptually distinct, but related, question is whether hybrid class actions conflict with federal policy. This question usually manifests itself when courts apply principles of supplemental jurisdiction. Some courts question the operation of a Rule 23 opt-out class action as an "end run"
around the FLSA opt-in requirement for collective actions.99

When hybrid class actions were first being filed, most courts held that the broad federal power of supplemental jurisdiction supported bringing state claims into those cases.100 In De Asencio v. Tyson Foods, Inc.,101 however, the Third Circuit reversed a district court’s exercise of supplemental jurisdiction over state wage claims. De Asencio was the first circuit court decision pertaining to the peculiar certification and jurisdictional issues raised by hybrid wage-and-hour class actions. The case involved federal and state wage claims of production-line employees at a poultry processing plant.102 In reversing the district court, the Third Circuit addressed the state wage claims from a FLSA policy perspective. The court described Congress’s purpose in adopting the FLSA opt-in rule as aiming to limit FLSA litigation.103 The court then mistakenly stated that the “Portal-to-Portal Act amendment changed participation in a FLSA class from ‘opt-out’ to ‘opt-in’. . .”.104 Before turning to the issue of supplemental jurisdiction, the court noted that “mandating an opt-in class or an opt-out class is a crucial policy decision,” and that “Congress has selected an opt-in class for FLSA actions.”105

After its review of FLSA policy, the court held that novel issues of state law supported a rejection of supplemental jurisdiction.106 Moreover, pointing to the disparity between the FLSA opt-in rate of 447 employees and potential opt-out class of 4100 employees,107 the Third Circuit held that state claims predominated over FLSA claims.108 Although the court

99. De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 307 (3d Cir. 2003) (noting the defendant’s argument that state law claims brought as a Rule 23 opt-out class action would serve as an “end run around the Portal-to-Portal Act’s clear congressional mandate in favor of collective opt-in actions,” a position ultimately adopted by the court in the opinion).


101. De Asencio, 342 F.3d at 311.

102. Id. In exercising supplemental jurisdiction, the district court noted that Tyson’s production workers were mostly Spanish-speaking immigrants, and that failure to certify a class action “would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants.” De Asencio v. Tyson Foods, Inc., No. 00-CV-4294, 2002 U.S. Dist. LEXIS 13038, at *9-10 (E.D. Pa. July 17, 2002) (quoting Weeks v. Bareco, 125 F.2d 84 (7th Cir. 1941)).

103. De Asencio, 342 F.3d at 306.

104. Id. at 306. As the history discussed earlier indicated, Congress’s adoption of the opt-in rule was consistent with the Rule 23 provisions in effect at the time of the Portal-to-Portal Act. See supra Part II.B.

105. Id. at 311.


107. Id. at 310.

108. De Asencio, 342 F.3d at 311. According to the 28 U.S.C. § 1367(c) factors, a court is permitted to decline supplemental jurisdiction when “the [state] claim substantively predominates over
acknowledged that “[p]redomination under section 1367 generally goes to the type of claim, not the number of parties involved,” the court explained that this rule was trumped by the “end run” concern. The court characterized the hybrid class action as “causing the federal tail represented by a comparatively small number of plaintiffs to wag what is in substance a state dog.” While framing its reasoning in terms of jurisdiction, the court was clearly questioning the policy of allowing a large number of state claims into federal court through supplemental jurisdiction, where the FLSA provided for opt-in actions that involve a smaller number of claimants.

While De Asencio appeared to signal a shift against hybrid wage-and-hour class actions, the D.C Circuit in Lindsay v. Government Employees Insurance Company took a different position, reversing a district court’s denial of supplemental jurisdiction. In unmistakable language, the D.C Circuit rejected the “end run” concern, declaring that “while there is unquestionably a difference—indeed, an opposite requirement between opt-in and opt-out procedures, we doubt that a mere procedural difference can curtail section 1367’s jurisdictional sweep.”

The D.C. Circuit then stressed that a court’s discretion to deny supplemental jurisdiction is “circumscribed.” In explaining why the district court could not find a substantial predomination of state claims, the D.C. Circuit reasoned that “[p]redomination under section 1367(c)(2) relates to the type of claim and here the state law claims essentially replicate[d] the FLSA claims—they plainly do not predominate.” The D.C. Circuit declined to expressly disagree with the Third Circuit’s view in De Asencio that predomination may be predicated on the disparity between the opt-in and opt-out classes, choosing instead to distinguish De Asencio on its facts. Specifically, the D.C. Circuit explained that De Asencio was inapplicable in Lindsay because there were no novel issues of state law, the federal and state claims raised essentially the same issues, and the opt-in rate in Lindsay, a substantial 204 out of a potential class of 228, created a negligible disparity in class sizes between the opt-in and opt-out actions.
Since De Asencio, some lower courts have echoed the "end run" concern and declined supplemental jurisdiction, basing their decisions upon a significant disparity between membership in a FLSA opt-in collective action as opposed to a Rule 23 opt-out class action. Other district courts, like the D.C. Circuit in Lindsay, have found that FLSA policy does not bar Rule 23 opt-out actions, and articulated the principle that the disparity between opt-in and opt-out class sizes is largely irrelevant to the jurisdictional question of predominance. At the same time, some courts eschew jurisdictional analysis altogether, and dismiss state wage claims within hybrid class actions on the basis that Rule 23 opt-out actions and FLSA opt-in actions are "inherently incompatible."

3. Management of Hybrid Class Actions

In addressing hybrid class actions, courts have focused primarily on the first two concerns, rather than on case management. Nevertheless, hybrid class actions pose the unique procedural challenge of managing two classes that are not coextensive. The manageability concerns center on provision of notice. Specifically, courts must be able to effectively apprise potential members of the different opt-in and opt-out mechanisms for FLSA and Rule 23 state law actions. This poses a potential risk of confusion in provision of class notice, as a potential class member will be informed both of the need to express an affirmative desire to participate in the FLSA action and that no action is required to become a member of the state law class action. However, many courts have touted the ability of judges to control any confusion arising from concurrent opt-in and opt-out actions through carefully crafted notice to class members and effective management of the litigation process. When addressing dual certification, the significance of manageability concerns has varied according to a particular court's views.


120. See, e.g., Salazar, 527 F. Supp. 2d at 885-86 (collecting cases expressing this concern).

121. See id.
on the institutional competence of the federal judiciary and on the value of judicial economy.

B. Hybrid Class Actions and the Politics of Division

Hybrid class actions raise the question of whether low opt-in rates are troubling from a Rule 23 class certification perspective. They also raise the question of whether Rule 23 class certification is troubling from a FLSA policy perspective. Yet both courts that have rejected and certified hybrid class actions have not sufficiently engaged the reasons for low FLSA opt-in rates and their influence on Rule 23 decisions. Neither have they offered a thorough analysis of the relationship between the FLSA and Rule 23. De Asencio and Lindsay, moreover, do not explicitly identify a principle for determining whether the number of opt-ins relative to potential opt-out class members warrants finding a substantial predomination of claims, and if so, under what circumstances.

A review of the case law might suggest that a neutral application of doctrine and policy can resolve the dispute. However, the matter is not so simple. Legal realism’s critique of the myth of “discretion-free judging” is instructive on this point. In hybrid cases, as in other areas of constitutional and statutory decisionmaking, judges are not engaged in pure application of legal rules that inevitably require particular outcomes. A judge’s values, predispositions, and political preferences influence outcomes. This observation is consistent with legal realism’s recognition that the law is “politics by other means.”

Courts divide on the appropriateness of hybrid class actions precisely because there are substantive consequences to acceptance or rejection of hybrid class actions. As stated in the Introduction, a Rule 23 class action advanced concurrently with a FLSA action means adjudication of a larger number of wage claims and potentially greater employer liability. Allowing a hybrid class action, as opposed to individual litigation or a FLSA action by itself, puts a thumb on the scale in favor of more expansive enforcement. Knowing this, courts do not approach hybrid class actions from a clean slate: the hybrid class action is a specific iteration of the divide between viewing the class action as vehicle for expanding rights enforcement or as a device that oppresses defendants with excessive liability. The division over hybrid actions is also very much a reflection of larger debates regarding the role of the federal courts, including whether their mission should be the


narrow goal of settling private disputes between parties with a personal stake in the outcome, or the broader one of enforcing public rights.

In the following Part, this Article seeks to engage the substantive consequences of hybrid class actions. To do so will require a deeper understanding of the significance of low opt-in rates and the importance of aggregating claims for purposes of wage law enforcement. The Article then revisits whether dual certification is appropriate.

IV. UNDERSTANDING OPT-IN / OPT-OUT PARTICIPATION RATES

Procedural rules have substantive effects. This Part aims to document the low participation rates produced by an opt-in rule, to analyze the reasons for the low opt-in rates, and to address how low opt-in rates impact the scope and effectiveness of wage law enforcement. The problem of persistent underenforcement and low opt-in rates are intertwined. An understanding of low opt-in rates suggests the need for alternative mechanisms of wage law enforcement.

A. The Meaning of Low Opt-In Rates

1. Empirical Data on Opt-In Rates

Little empirical data has been collected that documents the existence of low opt-in rates. This may be because the vast majority of class action lawsuits in federal court are governed by Rule 23’s opt-out rule. Since the 1940s, however, FLSA collective actions have been governed by an opt-in rule. The ADEA and Equal Pay Act, both enacted in the 1960s, also provide for collective actions governed by FLSA’s opt-in rule. So the lack of data cannot be attributed to a lack of opt-in collective actions.

By contrast, a recent study documented a 1% opt-out rate for opt-out class actions. Considering that class action scholars and practitioners continue to debate the value of opt-in and opt-out rules, the lack of a similar study for opt-in rates is surprising indeed. While a systematic study is beyond the scope of the Article, this section collects the opt-in rates for a

124. *See, e.g.*, Hensler & Rowe, Jr., *supra* note 20, at 146.

125. Practitioners estimate that 15% to 30% of eligible workers opt into FLSA collective actions. Borgen, *supra* note 17. A Federal Judicial Center study does contain opt-in percentages, but only for three cases: 39%, 61%, and 73%. THOMAS E. WILLGING ET AL., FEDERAL JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 54 (1996).

number of hybrid wage-and-hour class actions.

The Table below reports collected data on opt-in rates for FLSA collective actions and identifies the outcomes for Rule 23 state law class actions in those cases. When available, the number of potential class members eligible to opt-in and the opt-in rates were obtained from court decisions. Alternatively, some of the data were gathered from practitioners. The holdings section provides the particular court’s decision on supplemental jurisdiction and Rule 23 class certification. For supplemental jurisdiction, the court may have exercised supplemental jurisdiction over all potential class members’ state claims (“SJ”), over only individuals that opted into the FLSA collective action (“SJ opt-ins only”), or not at all (“No SJ”). When a court exercised supplemental jurisdiction only over state claims of opt-ins and certified the state class for those claims, the Table indicates with “Certified for opt-ins only.” For Rule 23 class certification, the court certified, did not certify, or did not reach a decision.

<table>
<thead>
<tr>
<th>CASES</th>
<th>POTENTIAL CLASS MEMBERS</th>
<th>OPT-IN RATE</th>
<th>HOLDING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scott v. Aetna, Inc.</td>
<td>281</td>
<td>22/281 (7.8%)</td>
<td>1. SJ</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2. Certified</td>
</tr>
<tr>
<td>Thiebes v. Wal-Mart Stores</td>
<td>15,507</td>
<td>425/15,507 (2.7%)</td>
<td>1. SJ opt-ins only, Certified opt-ins only</td>
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</tbody>
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<table>
<thead>
<tr>
<th>Case Name</th>
<th>Parties</th>
<th>Rebuttal Requests</th>
<th>SJ/Class certification</th>
</tr>
</thead>
<tbody>
<tr>
<td>O'Brien v. Encotech Constr. Servs., Inc.</td>
<td>40</td>
<td>6/40 (15%)</td>
<td>1. SJ</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2. Certified</td>
</tr>
<tr>
<td>Ladegaard v. Hard Rock Concrete Cutter, Inc.</td>
<td>68</td>
<td>11/68 (16.2%)</td>
<td>1. SJ</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>2. Certified</td>
</tr>
<tr>
<td>De Asencio v. Tyson Foods Operating Corp.</td>
<td>4100</td>
<td>447/4100 (10.9%)</td>
<td>1. No SJ</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>2. N/A</td>
</tr>
<tr>
<td>Ansoumana v. Gristede's Concrete Cutter, Inc.</td>
<td>1000</td>
<td>350/1000 (35%)</td>
<td>1. SJ</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2. Certified</td>
</tr>
<tr>
<td>Bartleson v. Winnebago Indus., Inc.</td>
<td>500</td>
<td>21/500 (4.2%)</td>
<td>1. SJ opt-ins only</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2. Not certified</td>
</tr>
<tr>
<td>Jackson v. City of San Antonio</td>
<td>2000</td>
<td>190/2000 (9.5%)</td>
<td>1. No SJ</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>2. N/A</td>
</tr>
<tr>
<td>Goldman v. RadioShack Corp.</td>
<td>533</td>
<td>168/533 (31.5%)</td>
<td>1. SJ</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>2. Certified</td>
</tr>
<tr>
<td>Chavez v. IBP, Inc.</td>
<td>3909</td>
<td>1136/3909 (29.1%)</td>
<td>1. SJ</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2. Certified</td>
</tr>
<tr>
<td>Jankowski v. Castaldi</td>
<td>40</td>
<td>40/450 (8.9%)</td>
<td>1. SJ</td>
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<td></td>
<td></td>
<td></td>
<td>2. Certified</td>
</tr>
<tr>
<td>McLaughlin v. Liberty Mut. Ins.</td>
<td>51</td>
<td>13/51 (25.5%)</td>
<td>1. SJ</td>
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<td></td>
<td></td>
<td></td>
<td>2. Certified</td>
</tr>
<tr>
<td>Hasken v. City of Louisville</td>
<td>1000</td>
<td>20/1000 (2%)</td>
<td>1. No SJ</td>
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<td></td>
<td></td>
<td></td>
<td>2. N/A</td>
</tr>
<tr>
<td>Lindsay v. Government Employees Ins., Co.</td>
<td>228</td>
<td>204/228 (89.5%)</td>
<td>1. SJ</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2. N/A</td>
</tr>
<tr>
<td>Scholtisek v. Eldre Corp.</td>
<td>140</td>
<td>40/140 (28.5%)</td>
<td>1. SJ</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>2. Certified</td>
</tr>
<tr>
<td>Hogan v. Allstate Ins. Co.</td>
<td>6500</td>
<td>2300/6500 (35.4%)</td>
<td>N/A</td>
</tr>
<tr>
<td>Ramirez v. RDO-BOS Farms, LLC</td>
<td>100</td>
<td>26/100 (26%)</td>
<td>1. SJ</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2. Certified</td>
</tr>
<tr>
<td>Bamonte v. City of Mesa</td>
<td>700</td>
<td>75/700 (10.7%)</td>
<td>1. SJ</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2. Dismissed on pleadings. Moot.</td>
</tr>
<tr>
<td>Duchene v. Michael L. Cetta, Inc.</td>
<td>180</td>
<td>60/180 (33.3%)</td>
<td>1. SJ</td>
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<tr>
<td></td>
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<td>2. Certified</td>
</tr>
<tr>
<td>Williams v. Trendwest Resorts, Inc.</td>
<td>1578</td>
<td>194/1578 (12.3%)</td>
<td>1. No SJ</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>2. N/A</td>
</tr>
<tr>
<td>Evans v. Lowe's Home Ctrs., Inc.</td>
<td>1317</td>
<td>499/1317 (37.9%)</td>
<td>1. No SJ</td>
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The average opt-in rate for the twenty-one cases analyzed in the Table is 15.71%. This data shows that an opt-in regime results in far lower participation rates than an opt-out regime. The Table also demonstrates a connection between potential class size, FLSA opt-in rates, and case outcomes. A comparison between the calculated opt-in rates and court holdings indicates that higher opt-in rates may support supplemental jurisdiction over state claims and Rule 23 class certification. Courts exercised supplemental jurisdiction and certified Rule 23 classes for all cases in the Table with opt-in rates over 15%. Scott v. Aetna Services, Inc. (7.8%), Jankowski v. Castaldi (8.9%), and Bamonte v. City of Mesa (10.7%) were the only cases where the opt-in rate was less than 15%, but the courts exercised supplemental jurisdiction. On the other hand, in Williams v. Trendwest Resorts, Inc. (12.3%), De Asencio v. Tyson Foods, Inc. (10.9%), Thiebes v. Wal-Mart (2.7%), Bartleson v. Winnebago (4.2%), and Hasken v. City of Louisville (2%), the courts denied supplemental jurisdiction or limited supplemental jurisdiction to individuals who opted into the FLSA action. Of course, these observations are simply a product of comparison of the limited number of cases included in the Table and do not obviate the need for a systematic study of FLSA opt-in rates. Still, the Table's data indicates that FLSA opt-in rates are low relative to opt-out rates and seem to influence court decisions regarding concurrent Rule 23 class actions.

2. Explaining Low Opt-In Rates

The default rule—opt-in or opt-out—largely determines the scope of participation in class lawsuits. Although empirical data on low opt-in rates has been scarce, the literature on class action practice and internet privacy link opt-in default rules to low opt-in participation rates. This commentary, while useful, has not considered the particular relevance of an opt-in rule for class actions lawsuits that aggregate workers' employment

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129. The 15.71% figure was calculated by dividing the total number of opt-ins for the twenty-one cases in the Table and the total number of potential class members. If the Thiebes and Lindsay cases are removed from the calculation, that is, the two cases with the lowest and highest opt-in rates respectively, then the average opt-in rate is 23.34%.

130. See supra text accompanying note 121.

131. A default rule is "[the] option that will obtain if the chooser does nothing." RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 83 (2008).

law claims. When articulating the reasons for low opt-in rates in FLSA actions, it is important to understand the particular barriers that limit worker participation.

Fundamentally, the reason for low opt-in rates is inaction. Individuals tend to do nothing in response to class notices. On the one hand, mere inadvertence can explain inaction, as people fail to opt into a lawsuit by treating a class notice as junk mail. Alternatively, class notices may not reach their intended recipients due to a number of contingencies; for example, a class member may change her address or have a common name. This problem may be especially acute among low-wage workers, who often experience high job turnover, frequent relocations, and generally reside in impoverished areas.

Inaction, on the other hand, directs attention to human psychology, individual responsibility, and choice. One group of commentators on class actions explains that "[c]ommon sense tells us when little is known about the consequences of joining a lawsuit, smaller numbers of individuals will come forward than would appear later in the litigation when more is known about the defendant's behavior and when the consequences for the individuals are clearer." On this view, the failure to opt-in reflects uncertainty about the value of participation. Similarly, an aversion to the adversarial nature of the legal system or confusion over technical information may limit the number of people willing to affirmatively participate in a class lawsuit. The failure to opt into a lawsuit can also be explained as a product of inertia, lack of interest, or a conscious decision not to join the lawsuit.

We take a one-sided approach to low opt-in rates, however, if non-

133. See Muecke v. A-Reliable Auto Parts & Wreckers, Inc., No. 01 C 2361, 2002 U.S. Dist. LEXIS 11917, at *7 n.2 (N.D. Ill. June 21, 2002) (identifying this possibility while hypothesizing that most individuals simply do not respond to class notices).


135. Cf Thiebes v. Wal-Mart, No. 98-802-KI, 2002 U.S. Dist. LEXIS 664, at *3 (D. Ore. Jan 9, 2002). In Thiebes, the court noted that 3000 notices were returned as undeliverable for a potential class of 15,507 persons. See id.

136. HENSLER ET AL., supra note 134, at 476.

137. Edward H. Cooper, The (Cloudy) Future of Class Actions, 40 ARIZ. L. REV. 923, 936 (1998); see also Thomas E. Willging et al., An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. REV. 74, 134 (1996) ("Many, perhaps most, of the [class] notices present technical information in legal jargon. Our impression is that most notices are not comprehensible to the lay reader.").

participation is viewed simply as a matter of individual mistake, incapacity, or preference. Several studies have found that various social circumstances influence the ability of individuals to affirmatively exercise their rights. For instance, one set of studies concluded that opt-in rules tend to “screen out” low-income people of color from participation, accounting for this effect by reference to the inadequate educational systems and dire socioeconomic circumstances in low-income communities of color. It has similarly been documented that workers’ abilities to enforce labor and employment rights are a function of the costs and benefits that accompany exercise of those rights. This indicates the value of a holistic approach to understanding low opt-in rates, one that does not ignore the role of individual choice, but rather situates it within the proper institutional context.

Workers do not pursue rights claims in a vacuum; there are risks to participating in rights enforcement because one must decide whether to challenge employer practices from within the employment relationship. Due to the presumption of at-will employment, employers have substantial discretion to fire workers who do not have contracts. The decline in union membership that once served as a counterweight to employers’ broad discretion has further weakened workers’ bargaining power and has left many workers on their own to handle complaints against employer practices. Workers are thus confronted with a reasonable fear that exercising their rights may subject them to employer retaliation, notwithstanding statutory prohibitions against retaliation for rights enforcement.

139. When parents were asked to enroll children for standardized tests, they failed to consent in the opt-in system. But, after failing to opt-in, the majority of parents in the study explained that they favored their children’s participation. See Phyllis Ellickson, Getting and Keeping Schools and Kids for Evaluation Studies, J. OF COMM. PSYCH. 102 (CSAP Special Issue 1994). See also Hensler ET AL., supra note 134, at 476 (discussing such studies); Hensler & Rowe Jr., supra note 20, at 146-47 (discussing the same studies).


141. Other than Montana, every state follows the at-will employment rule. This rule, while subject to exceptions such as wrongful termination laws, remains a significant indicator of the employer’s power to set the terms of the employment relationship. See Daniel J. Libenson, Leasing Human Capital: Toward a New Foundation for Employment Termination Law, 27 BERKELEY J. EMP. & LAB. L. 111, 112-30 (2006) (discussing the history of the at-will employment rule, including defenses and critiques). Workers mistakenly believe that they have substantial legal protections from at-will termination. See Pauline T. Kim, Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World, 83 CORNELL L. REV. 105, 133-47 (1997).

142. The decline of unionism and its causes has been widely discussed. See, e.g., Stephen F. Befort, Labor and Employment Law at the Millenium: A Historical Review and Critical Assessment, 43 B.C. L. REV. 351, 361-77, 394 (2002). Union decline and underenforcement may go hand in hand. Workers are more likely to enforce rights when they have the support of the knowledge, resources, and organizing capacity of a third-party intermediary. See Weil & Pyles, supra note 10, at 86-91.

143. See, e.g., Steven G. Zieff, Advanced Issues in Collective Actions, 10 EMP. RTS. & EMP. POL’Y J. 435, 437 (2006). This is a rational fear in a FLSA action since employers are more easily able to
raise the costs of participation in legal action, especially when those consequences threaten a worker's livelihood and family security. The fear that by taking action one may lose their job, suffer other adverse treatment, or hurt their reputation in the workplace, is a powerful incentive for inertia.

Poverty and immigration status compound the barriers to participation. Low-wage workers not only fear reprisal for taking action, but also face the challenge of obtaining legal representation. Even if low-wage employees are brave enough to opt into a collective action, lawyers are less likely to seek back-pay for workers who were receiving very low wages to begin with. Undocumented workers fear that participation in wage law enforcement will reveal their immigration status and lead to deportation. Language and educational barriers further limit the ability of members of these groups to understand class notices, access the legal system, and participate in enforcement.

The risk of employer reprisal, the obstacles to understanding notice, and other concerns discussed above raise serious doubt that lack of interest or individual choice account for the failure to opt into a collective action. Whatever one's view of these explanations, however, there is widespread agreement that an opt-in regime results in fewer workers advancing wage claims than under an opt-out regime. Whether this outcome is considered problematic depends in part on the normative perspective used to evaluate low opt-in rates. The tendency of an opt-in regime to limit workers' claims creates a collective action problem with far-reaching consequences for the remedial goals of wage law enforcement. The next section examines the implications of low opt-in rates from the normative perspective of wage law enforcement.

identify employees that opt into an action as a result of discovery. See Borgen & Ho, supra note 32, at 151-53.

144. See, e.g., Bowermaster, supra note 32, at 29 n.145 (suggesting former employees are more likely to opt into FLSA actions since they no longer fear reprisal).

145. See Thaler & Sunstein, supra note 131, at 33-34 (explaining generally that "loss aversion" encourages people to do nothing if they think it will prevent the loss).

146. Dietrich, supra note 1, at 623-24; Befort, supra note 142, at 394.

147. See Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064-66 (9th Cir. 2004) (discussing the "chilling effect" of discovery on undocumented workers' ability to pursue claims against their employers due to a fear of having their immigration status revealed); Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002) (denying defendant's request to discover plaintiff's immigration status due to the "danger of intimidation, the danger of destroying the cause of action, and [the risk that discovery] would inhibit plaintiffs from pursuing their rights"). See also Rebecca Smith & Catherine Ruckelshaus, Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 555, 565 (2006 / 2007).

B. The Implications of Low Opt-in Rates for Wage Law Enforcement

When workers' claims are outpaced by the number of wage-and-hour violations, the result is a gap between violations and remedies that undermines the central goals of wage law enforcement. Clearly, workers should be paid for their work in accordance with the law, and employers should be held accountable to those standards. Wage-and-hour violations not only deprive workers of earned wages, but also create unfair competition. A violating employer obtains an illegal cost-savings unavailable to law-abiding employers in the same industry, thereby increasing its profits or allowing for additional investment. Furthermore, wage-and-hour noncompliance is a form of tax evasion, as underpayment to employees equals underpayment to the government in taxes on employee earnings. A violating employer also drains public resources when expenditures are made to monitor and enforce compliance, and when unpaid workers seek public assistance benefits. To overcome these problems, mechanisms that maximize wage claims and thereby promote employer compliance are necessary. Because profit-motivated employers will commit wage-and-hour violations if violating the law is cost-effective, a strong collective enforcement mechanism that subjects employers to payment of wages and penalties will be more likely to promote compliance than will a weak enforcement mechanism that limits employer liability.

The FLSA opt-in regime creates perverse incentives for employers' noncompliance, because FLSA's limits to employee participation insulate employers from more expansive liability. Where wage law enforcement depends on maximization of valid employee complaints, the more expansive Rule 23 opt-out class action provides an alternative avenue for enforcement that maximizes adjudication of state claims. To be sure, wage-and-hour violations are the kind of social wrong for which class action treatment was intended. As the Supreme Court has observed:

The policy at the very core of the class action mechanism is to overcome

149. See Powell v. U.S. Cartridge Co., 339 U.S. 497, 509-10 (1950) (identifying the FLSA's primary purpose as the elimination of substandard labor conditions).
150. See 29 U.S.C. § 202(a) (articulating FLSA's purpose by stating that substandard labor conditions "constitutes an unfair method of competition"); U.S. v. Darby, 312 U.S. 100, 115 (1941) (finding that the "distribution of goods produced under substandard labor conditions, which competition is injurious to ... competition").
151. See Lora Jo Foo, The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation, 103 YALE L.J. 2179, 2180 (1994). As an indication of the scope of unpaid taxes that can result from wage-and-hour noncompliance, the Internal Revenue Service recently ruled that FedEx owed $319 million dollars in taxes because it misclassified workers as independent contractors rather than employees. FedEx Ordered to Pay $319 Million, N.Y. TIMES, Dec. 23, 2007, at A33.
152. See Weil & Pyles, supra note 10, at 61-62.
153. See id. at 61-62; Estlund, supra note 9, at 361-62 (arguing that underenforcement undermines labor and employment regulations); Linder, supra note 59, at 167 (arguing the same).
the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.154

Wage-and-hour violations are often broadly applied to a workforce, rather than isolated instances limited to a few employees. Such violations tend to give rise to a “negative value” claim, which involves minimal damages on an individual basis that are large when workers’ claims are aggregated.155 By aggregating claims, the class action device enables aggrieved employees to obtain legal representation. Private attorneys have a greater incentive to bring employee complaints, because the class action offers the possibility of larger damage awards and a more efficient method of adjudication.156

This aggregation is more significant under Rule 23’s opt-out system because membership in the class is presumed unless a person affirmatively dissents. Rule 23(b)(3)’s opt-out default mitigates some of the barriers to participation apparent in an opt-in regime. Except for the class representatives, the majority of workers are not required to take any action to participate in the lawsuit. This reduces the problem of non-responsiveness to class notice, as well as the likelihood of retaliation by employers. The Rule 23 class action overcomes the inadequacies of the opt-in regime by enabling greater aggregation of claims and, ultimately, by facilitating stronger wage law enforcement and deterrence of noncompliance.157 From the perspective of wage law enforcement, the opt-out class action is superior to the opt-in collective action.

However, the low opt-in rates observed in FLSA actions also highlight a larger point regarding the effectiveness of class-based enforcement mechanisms. Due to the various barriers that limit individuals’ ability to affirmatively exercise their rights, an opt-in or opt-out default rule is determinative of who participates in class-based lawsuits, the scope of potential employer liability, and the capacity of class actions to advance rights enforcement. The opt-in rule places the onus on individuals to come forward to affirmatively exercise their rights, leaving them out of a class-based lawsuit when barriers prevent their participation. Conversely, the opt-out rule represents a choice to vindicate individual claims through a

155. John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 COLUM. L. REV. 370, 431-32 (2000) (discussing the rationale for “negative value class actions” where the class action overcomes the transaction costs of individually prosecuting small claims).
156. See Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 266 (1972) (“Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.”).
157. See, e.g., Geoffrey P. Miller, Class Actions, in I NEW PALGRAVE DICTIONARY OF ECONOMICS AND LAW 257 (Peter Newman ed. 1998) (describing enforcement and deterrence as the goals of class actions).
procedural mechanism that does not allow participation barriers to prevent rights enforcement. From the perspective of rights enforcement, a default opt-out rule is preferable to an opt-in rule because the greater aggregation of claims deters wrongdoing and advances accountability.

Nevertheless, not all view the opt-in mechanism in a critical light. For employers, the opt-in mechanism minimizes potential liability since participation rates are lower than those in opt-out actions. The opt-in mechanism reduces potential damage awards, and makes it less likely that profit-motivated lawyers will bring strike suits that seek to force a settlement.\(^\text{158}\) At the same time, while requiring an act of consent, the opt-in regime would not prevent large-scale actions subjecting an employer to liability when significant groups of workers step forward to address a wrong.\(^\text{159}\)

Some also consider an opt-in rule to show respect for personal choice. An opt-out system binds individuals to any judgment unless they exercise their opt-out rights. The opt-in regime is preferable, it is argued, because only individuals that affirmatively opt into an action are bound by any judgment. On this view, the opt-in rule is preferred for its protection of personal autonomy; it is a more democratic system than the opt-out mechanism.\(^\text{160}\)

Workers' rights advocates and organizations also might find some benefit to the opt-in mechanism, as it has potential to advance employee voice. The opt-in mechanism has a close relationship to collective bargaining, in its requirement that workers agree to be represented.\(^\text{161}\) This parallelism to collective bargaining suggests that, despite its lack of enforcement potential, the opt-in regime is consistent with efforts to organize workers for non-legal collective action and worker empowerment. For those concerned with promoting worker empowerment, the opt-in rule has some affinity with the organizing strategies that are preferred to lawyer-driven initiatives. Workers may be more inclined to organize, and thus less reliant on litigation, if collective action is limited to opt-in participation.

The opt-out class action, however, cannot be abandoned without severely weakening the scope and effectiveness of statutory enforcement. In the context of wage law enforcement, the opt-in system effectively accepts an underenforcement regime, creating a higher risk that employers are not held accountable for, and will, in fact, benefit from, their violations. It is precisely because the opt-out class action confronts employers with

\(^{158}\) See, e.g., Hensler & Rowe, Jr., supra note 20, at 145-46.

\(^{159}\) See id.

\(^{160}\) Redish, supra note 132, at 101.

\(^{161}\) See Pentland v. Dravo Corp., 152 F.2d 851, 853 (3d Cir. 1945) (in describing a FLSA action and stating that "employees, if they wish, can join in their litigation so that no one of them need stand alone in doing something likely to incure the displeasure of an employer. It brings something of the strength of collective bargaining to a collective lawsuit.").
greater potential liability that it has the deterrent capacity to promote compliance.\textsuperscript{162} Furthermore, because many individuals do not have the incentive or ability to assert their rights through an opt-in regime,\textsuperscript{163} it is a reasonable policy choice to bind them to a judgment until they affirmatively express dissent. The opt-out system still preserves the value of personal choice as participation is not mandatory. Finally, even if the mode of participation does not follow the model of collective bargaining, the opt-out class action may actually offer a stronger position for workers to organize, bargain, and campaign for reform of the workplace, by expanding wage law enforcement.\textsuperscript{164}

That the opt-out class action may be preferable from the perspective of wage law enforcement, however, does not resolve whether hybrid class actions are an appropriate mechanism for redressing violations. Having articulated the causes of low opt-in rates and the implications of these low rates for wage law enforcement, I return to the ultimate question of whether hybrid class actions are an appropriate procedural mechanism for bringing wage claims in the federal courts.

V. \textbf{RETHINKING HYBRID CLASS ACTIONS}

A. \textit{FLSA Collective Actions and Rule 23 State Law Class Actions are Consistent Procedural Enforcement Mechanisms}

The history and purposes of FLSA section 216(b)'s opt-in rule and Rule 23's opt-out rule have been a central consideration in court decisions regarding hybrid class actions. Courts have not been uniform in their interpretation: some have found that FLSA section 216(b) does not bar a distinct Rule 23 class action, while others have found that Congress's intent would be undermined by allowing an opt-out class action in conjunction with a FLSA opt-in action. Upon review, however, it is clear that FLSA section 216(b) and Rule 23 are consistent procedural mechanisms that enforce separate substantive rights, and that there is nothing inherently improper about the existence of the hybrid wage-and-hour class action.

Congress appears to have intended for FLSA section 216(b) to be consistent with Rule 23 class actions.\textsuperscript{165} As discussed earlier, when the

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\textsuperscript{162} Further, Rule 23 certification standards and judicial management of class actions operate to limit class treatment to appropriately defined groups of workers that share common issues of law and fact.

\textsuperscript{163} See supra Part IV.A.2. Additionally, Rule 23 contains safeguards that accommodate these concerns, including requirements of notice and the opt-out opportunity itself. Fed. R. Civ. P. 23(c).

\textsuperscript{164} See Gordon, supra note 14, at 442; see also Benjamin I. Sachs, Employment Law as Labor Law, 29 Cardozo L. Rev. 2685, 2687 (2008) (exploring the capacity of employment law enforcement to "facilitate[] [workers'] organizational and collective activity").

\textsuperscript{165} See supra Part II.A.
Portal-to-Portal Act of 1947 added an opt-in requirement for FLSA actions, opt-in consents were the prevailing norm for Rule 23 class actions. At that time, Rule 23 had an opt-in requirement, and courts had already interpreted section 216(b) as an opt-in procedure, consistent with Rule 23. In 1966, when Rule 23 was amended to provide for opt-out class actions, Congress established a federal policy favoring opt-out class actions, aiming to enable the litigation of small-claims and promote judicial economy. While the 1966 amendments created a disjunction between section 216(b) and Rule 23 procedures, Congress has never expressly declared any inconsistency between concurrent FLSA opt-in and Rule 23 opt-out actions. If anything, Rule 23 was designed to address the problem of low opt-in rates by providing for opt-out class actions.

It is a fallacy to reject hybrid class actions by finding some "fundamental, irreconcilable difference" between FLSA opt-in and Rule 23 opt-out actions. This mistaken logic involves a leap from the unremarkable observation that Congress selected an opt-in rule for FLSA actions and an opt-out rule for most other class actions to the conclusion that Congress must also have intended to preclude dual certification. There is no indication that Congress intended to preclude dual certification, and if Congress wanted to do so it certainly may speak clearly to the matter. Notwithstanding the procedural anomaly of simultaneous opt-in and opt-out actions, the current structure of the FLSA and Rule 23 provide an opt-in mechanism for federal wage claims and an opt-out mechanism for state wage claims. The appropriate response to a party that seeks dual certification is to address class formation for the FLSA claims and state wage claims under their respective procedural rules.

This approach is not only the correct interpretation of federal law, but is further supported by principles of federalism, which recognize the "dual sovereignty" of the federal government and states. One of the bedrock federalist principles is respect for state experimentation with policy, including the right to develop measures that address social problems in a

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166. See Bowermaster, supra note 32, at 29-35.
168. See id. at § 16:15 (quoting the Rules Advisory Committee, which in criticizing an opt-in requirement, stated, "[R]equiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people. . . .").
169. See LaChapelle v. Owens-Ill., Inc., 513 F.2d 286, 289 (5th Cir. 1975) (identifying Rule 23 and section 16(b) as "irreconcilable" procedures).
170. See Kern ex rel. Estate of Kern v. Siemens Corp., 393 F.3d 120, 128 (2d Cir. 2004) ("If anything, the language of the FLSA suggests that, should Congress seek to authorize certification of 'opt in' classes, it can do so with unambiguous language.").
171. See, e.g., Grayson v. K Mart Corp., 79 F.3d 1086, 1096 n.12 (11th Cir. 1996) ("[I]t is clear that the requirements for pursuing a § 216(b) class action are independent of, and unrelated to, the requirements for class action under Rule 23 of the Federal Rules of Civil Procedure.").
more aggressive manner than the federal government. State wage laws are an example of federalism at work, as states have often adopted wage laws that are more protective than federal wage laws. Within the federalist system, just as states are obligated to enforce federal law, federal courts are regularly called upon to enforce state laws. It is consistent with federalist principles, therefore, that federal courts adjudicate state wage claims through Rule 23 opt-out actions.

There may remain lingering doubts regarding the presence of larger numbers of state claims in an opt-out action over federal claims in a FLSA opt-in action. This is the "end run" concern addressed earlier. Although several court decisions have been motivated by the end-run concern, it is a seriously flawed view of federal policy. Such a view ignores the powerful policy considerations that led to adoption of an opt-out rule for state law class actions in the first place. Rule 23's opt-out rule was a reaction to the inadequacies of an opt-in enforcement mechanism. Pejoratively calling Rule 23 opt-out class actions an "end run" ignores that current rules permit Rule 23 class actions to operate in this manner, allowing hybrid class actions as a device for wage law enforcement. Choosing an opt-in or opt-out rule is a "crucial policy decision" indeed, and Congress has settled on an opt-in rule for FLSA claims and an opt-out rule for state claims.

Courts should implement the federal policy favoring opt-out class actions, notwithstanding the presence of a concurrently filed opt-in action. The U.S. Supreme Court has indicated to district courts that departure from the Federal Rules should not occur on the basis of perceived policy considerations. Different courts may recognize substantial policy considerations that support either a prohibition on hybrid class actions, a complete return to an opt-in rule, or the streamlining of current rules to require that all class actions be formed through an opt-out rule. But it is not the role of the judiciary to impose these policy changes by judicial interpretation; amendment of the relevant procedural rules is required. A court cannot find FLSA and Rule 23 actions incompatible unless it overtly disregards existing procedural rules. Under those rules, opt-in and opt-out actions for independently raised federal and state wage claims can be

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173. See, e.g., New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

174. See supra Part II.A.


177. See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993).

178. See id; see also Artuz v. Bennett, 531 U.S. 4, 10 (2000) ("Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them.").
consistently advanced in a single civil action.

B. The Meaning of Low Opt-In Rates for Federal Jurisdiction

Congress has provided independent procedural mechanisms for FLSA and state wage claims, such that the “end run” concern is an impermissible basis to reject a hybrid class action in whole. Yet the “end run” argument has a distinct application in the context of determining federal jurisdiction. The simultaneous operation of opt-in and opt-out rules, along with the barriers to affirmative participation, result in significant disparities between the number of federal wage claims in FLSA actions and state wage claims in Rule 23 actions. The question is whether this disparity is an appropriate reason for a court to deny jurisdiction. This question will not arise, and low opt-in rates will have little significance for jurisdictional purposes, when jurisdiction is established under CAFA. However, when CAFA does not control, courts will have the discretion to exercise supplemental jurisdiction.

This discretion will focus on the doctrine of substantial predomination, which was discussed earlier in connection with the De Asencio and Lindsay decisions. The concept of substantial predomination, which is codified at 28 U.S.C. § 1367(c)(2), is derived from the Supreme Court’s decision in United Mine Workers v. Gibbs. There, the Court stated:

[I]f it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong.

In De Asencio, the Third Circuit cited this language in reasoning that a large disparity between FLSA opt-ins and Rule 23 opt-outs signified a “more comprehensive state action” that established substantial predominance of state claims. The D.C. Circuit in Lindsay also cited Gibbs in a footnote that distinguished De Asencio. The D.C. Circuit did not determine whether substantial predomination under § 1367(c)(2) could result from “the disparity in numbers” between opt-in and opt-out classes,

179. As discussed earlier, CAFA granted district courts original jurisdiction over class actions when there is minimal diversity between the parties and a five million dollar amount in controversy, subject to certain exceptions. There will be hybrid class actions where the court has original jurisdiction over the state law claims pursued as a Rule 23 class action, and the issue of supplemental jurisdiction will not be implicated. See supra Part II.C.2.


182. Id. (citations omitted).

because “the two classes [were] almost identical in size.”

As a practical matter, *De Asencio* has yet to be squarely disavowed by another circuit court. Plaintiffs would therefore be wise to seek maximization of the number of FLSA opt-ins as a means to argue that supplemental jurisdiction over state claims is appropriate. A higher opt-in rate will minimize the disparity that leads some courts to find substantial predomination. Yet the data on low opt-in rates demonstrates that the wisdom of this advice will be impractical under many circumstances. Even assuming that a court orders enhanced opt-in notice procedures resulting in a better than average response to class notice, a significant disparity between the class sizes in the opt-in and opt-out actions is to be expected. The lack of a disparity in *Lindsay* was an anomaly. In addressing substantial predomination, courts must approach the question from the perspective of the typical inevitability of low opt-rates.

Notwithstanding that *Lindsay* did not present the ideal facts to challenge the *De Asencio* holding, a central focus of the D.C. Circuit’s decision was the structural similarity of the FLSA and state law claims: “Predomination under section 1367(c)(2) relates to the type of claim and here the state law claims essentially replicate the FLSA claims—they plainly do not predominate.” The D.C. Circuit indicated that the qualitative substance of the claims, rather than quantitative difference in the number of state versus federal claims, is the primary consideration for analysis of substantial predomination. Implicit in *Lindsay* is a framework for analyzing substantial predomination in hybrid class actions: a general rule of no substantial predomination when federal and state wage claims primarily rise and fall on the basis of similar liability issues.

This approach contrasts with *De Asencio* in two respects. First, *De Asencio* construed predomination quantitatively in terms of the number of state claims versus federal claims, rather than in terms of the qualitative substance of the claims. Second, *De Asencio* implicated novel issues of state law. However, *De Asencio* does not foreclose the approach proposed here. If federal and state wage claims do not raise substantially

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184. Lindsay v. Gov’t Employees Ins. Co., 448 F.3d 416, 425 n.12 (questioning the principle of quantitative predomination expressed in *De Asencio*).
185. See Charles Tompkins, *Damages Issues in Fair Labor Standards Act Collective Action Litigation*, 10 EMP. RTS & EMP. POL’Y J. 475, 476-77 (advising that to maximize opt-in participation, plaintiff lawyers should “(1) work with any union representing members of the putative class; (2) make opting-in as simple as possible; (3) guard against efforts by defendant to discourage participation by potential class members; and (4) seek additional opportunities to communicate with class members”).
186. *Lindsay*, 448 F.3d at 425.
187. See id.
188. See *De Asencio*, 342 F.3d at 311 (finding that plaintiffs had to establish entitlement to unpaid wages based on an implied contract theory and had to show that Pennsylvania wage law applied to at-will employees that had not entered into a collective bargaining agreement, and because state courts were yet to rule on those novel state law issues, this weighed in favor of declining supplemental jurisdiction).
similar issues, as was the case in De Asencio, then perhaps the opt-in/opt-out disparity is an appropriate secondary factor to consider in determining substantial predominance of state claims. However, given that federal and state claims generally raise similar legal and factual issues, the scenario in which the disparity in number of claims becomes relevant should be limited.

When there are substantially similar federal and state claims, the broad power of supplemental jurisdiction supports maintaining jurisdiction over the state claims. The qualitative focus on the nature of the claims, rather than the number of claims, answers the “end run” concern. Although the state claims would not otherwise be in federal court without supplemental jurisdiction, it makes sense that the claims remain because federal and state wage claims usually “arise from the same nucleus of operative facts, are substantially related to each other, and naturally would be treated as one case and controversy.” A denial of supplemental jurisdiction over similar state claims needlessly duplicates litigation in state court, thereby creating a risk of inconsistent results and raising potential preclusion issues.

Furthermore, where “a federal court [addressing supplemental jurisdiction] should consider and weigh in every case, the values of judicial economy, convenience, fairness, and comity[,]” the opt-in / opt-out disparity deserves scrutiny as a function of the impact of opt-in and opt-out rules on participation rates. To decline supplemental jurisdiction solely on the basis of such disparity reinforces the systemic underenforcement arising from an opt-in regime. The proposed approach is reasonable because it recognizes the opt-in / opt-out disparity for what it is—the product of barriers to participation that limit membership within the opt-in regime.

C. Dual Certification

This brings us to the ultimate decision whether to certify a Rule 23 opt-out class as part of a hybrid class action. In describing hybrid class actions in the federal courts, I indicated that Rule 23 considerations focus on availability of the FLSA opt-in regime and the FLSA’s typically low opt-in rates. Here, I make two proposals for approaching Rule 23 certification in hybrid actions: one that considers the sense in which the FLSA opt-in regime is irrelevant to Rule 23 certification and another that addresses the sense in which it is relevant.

The first approach follows from the conclusion that FLSA section 216(b) and Rule 23 are consistent procedural enforcement mechanisms.

189. See id.
The two procedures, while consistent, are independent of one another and enforce separate rights. There is a difference between comparing two procedural routes for enforcement of a single substantive claim (for example class treatment versus a joinder action or individual lawsuit), and comparing two different substantive claims under federal and state law that may be enforced using distinct procedural mechanisms. Rule 23 is primarily concerned with the former. The relevant question under Rule 23 is whether class treatment is appropriate for a particular claim, as opposed to other non-class procedural mechanisms. The existence of a concurrent FLSA action for federal claims appears irrelevant to whether a procedural mechanism other than Rule 23 is appropriate for enforcement of independent state claims. Yet, both those courts which have certified hybrid actions and those which have rejected hybrid actions nonetheless evaluate the appropriateness of a Rule 23 class relative to the presence of a concurrent FLSA action.

The second approach follows from understanding low opt-in rates and the substantive consequences of default rules for class participation. Under this approach, Rule 23 certification remains intertwined with the FLSA action. Rule 23 class certification standards, particularly the numerosity and superiority requirements, provide courts with doctrinal categories to analyze the practical constraints of participation through the FLSA’s opt-in regime. Numerosity focuses on the impracticability of joinder. Superiority concerns the relative merits of alternative enforcement mechanisms. Both invite courts to certify an opt-out class to remedy barriers to participation. When an employer makes wage-and-hour violations a common practice, it is likely that significant number of workers will have claims. The barriers to participation, including fear of reprisal, problems with notice, and the small size of those claims, will limit the ability of workers to pursue claims within the FLSA opt-in regime. For these reasons, the FLSA opt-in regime will often be an impracticable device for workers seeking to bring their wage claims, thereby supporting

193. The numerosity inquiry has been described as “an impracticability of joinder requirement, of which class size is an inherent consideration . . . .” 1 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 3:3 (4th. ed. 2002). Generally, “40 class members [or more] should raise a presumption that joinder is impracticable . . . on that fact alone.” Id. at § 3:5. It is not unusual for courts to investigate barriers to participation. Small claims are often raised as evidence of joinder impracticability. Courts also may consider “judicial economy arising from avoidance of multiplicity of actions, geographic disbursement of class members, size of individual claims, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief involving future class members.” Id. at § 3:6.

194. Rule 23(b)(3) instructs courts to review the following factors when addressing superiority of the class action: “(A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the likely difficulties in managing a class action.” FED. R. CIV. P. 23(b)(3).

195. See supra Part IV.
numerosity and the conclusion that the Rule 23 class action is superior to the FLSA opt-in collective action.196

Accordingly, a court may consider the availability of the FLSA opt-in regime irrelevant under the first approach, or may address its adequacy under the second approach. One approach that should be off the table is treating the availability of the FLSA opt-in regime as itself sufficient to warrant rejection of Rule 23 class certification. Nevertheless, Rule 23 class certification does not inexorably follow from the general acceptance that dual certification of FLSA and Rule 23 actions is permissible. After all, courts have the ultimate responsibility to evaluate the propriety of class treatment by applying Rule 23 standards.197 For example, while wage-and-hour claims regularly implicate common questions of law and fact appropriate for class treatment, some issues of proof may be so individualized that a class-wide determination will not be possible.198

However, acceptance that hybrid class actions are permissible takes us beyond the division over questions of their viability, and focuses judicial inquiry on certification, case management, and the substantive merits of wage claims. The existence of common issues in federal and state wage claims will tend to support dual certification, as will the judicial economy of concentrating those claims in a single action. Once certified, the federal courts have the expertise to manage hybrid class actions, including any issues regarding notice of opt-in and opt-out rights, discovery matters, or trial.199 Federal courts have numerous grants of authority to exercise supervision and control over class action litigation.200 This authority enables judges to ensure a clear, fair presentation of substantive issues for jury deliberation and, when necessary, to separate individualized issues

196. The Rule 23 class additionally promotes economy and avoids the preclusion issues that may arise from duplicative litigation in both state and federal court. For discussion of these issues, see Rhonda Wasserman, Dueling Class Actions, 80 B.U. L. Rev. 461, 483-97 (2000).
197. See, e.g., Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.11 (1978) (noting this responsibility and that Rule 23(c)(1) provides "that an order involving class status may be 'altered or amended before the decision on the merits'" and that a class certification motion is "inherently tentative").
199. See Brickey v. Dolencorp, Inc., 244 F.R.D. 176, 179 (W.D.N.Y. 2007) ("[T]he complexities of Rule 23 and FLSA hybrid actions are a challenge that the federal judiciary, and properly instructed juries, are generally well-equipped to meet.").
200. Federal Rule of Civil Procedure 16(c)(12) authorizes a court to adopt "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." The parties to class action litigation, too, are involved in the management process by development of discovery plans, see FED. R. CIV. P. 26, and a plan for trial, see FED. R. CIV. P. 16.
from common issues appropriate for class-wide determination.\textsuperscript{201} Ultimately, the federal courts have the power to determine whether the hybrid class action will realize its potential as an important vehicle for wage law enforcement that enables the adjudication of wage claims and advances employer accountability.

VI. CONCLUSION

It is common to distinguish the "law on the books" from "law in action."\textsuperscript{202} As written, the law is an ideal, a standard to which we aspire. That ideal cannot be realized until the law is enforced in action. In other words, the policy of worker protection embodied in our employment laws cannot have its intended effect unless those laws are rigorously enforced. Hybrid class actions offer to bridge the gap in enforcement. Rule 23 opt-out actions overcome the barriers that prevent many workers from participation in FLSA opt-in actions. The bottom-line is that Rule 23 allows for more expansive enforcement of state wage laws, while the FLSA continues to limit collective action to opt-in participation and fails to adequately deter the practice of wage-and-hour violations. Through interpretation and implementation of procedural enforcement mechanisms, the federal courts are vitally important to the advancement of wage law enforcement. The approaches to hybrid class actions discussed in this Article propose that courts apply legal doctrine with an understanding of the barriers that discourage workers from affirmatively exercising their rights. That this approach invites courts to facilitate the adjudication of workers' claims does not compromise judicial neutrality, but insists that courts take on their proper institutional role of enforcing public rights.

Litigation is no substitute for a broader strategy of social change. Yet hybrid class actions still have a role in efforts to reform the workplace. Hybrid class actions are a strong mechanism to enforce wage laws that may lead employers to choose compliance, rather than being compelled to do so by the courts. Settlement discussions offer an opportunity to negotiate best

\textsuperscript{201} See Manual For Complex Litigation (Fourth) § 21.5 (2004). The judge is able to work with the parties on the presentation of evidence, the design of special verdict forms, and proper jury instructions. The judge further has the authority to order multiple phases of class action litigation, thereby preserving class treatment for common issues, although other issues may require individualized determination. For example, it is sometimes useful to bifurcate the liability and damages phases in class actions. See id.; see also Fed. R. Civ. P. 42(b). That said, some courts have designed methods to calculate damages on a class-wide basis, such as adopting formulas or extrapolating from a representative sample of employees. See, e.g., Chavez v. IBP, No. CT-01-5093-EFS, 2002 LEXIS 24598, at *11-12 (D. Wash. Oct. 28, 2002).

practices with employers, while the threat of litigation will deter unlawful conduct by others before the filing of any lawsuit. The mass enforcement of workers’ wage claims will address some of the significant number of claims that legal service organizations attempt to handle, and may have the additional benefit of attracting workers to join broader campaigns for workplace reform. Hybrid class actions also provide a frame for public education and media outreach that draws attention to the social problem of wage-and-hour violations.

These closing remarks are only intended to indicate that recognizing the limits of litigation is a path to realizing its ultimate potential. Hybrid class actions offer the concrete result of expanding wage claims and challenging employer wage-and-hour violations, but also an opportunity for conceptions of worker solidarity to coalesce around wage law enforcement. Wage law enforcement is not only a litigation strategy, but provides a basis for organizing and mobilizing workers to participate in creative approaches to workplace regulation. Viewed in this way, wage law enforcement is more than a discrete litigation objective—it is an element of the larger goal of reforming the workplace.

203. Public interest lawyers have increasingly used employment law to combat injustice in the low-wage workplace over the past ten years. See generally Rick McHugh, Recognizing Wage and Hour Issues on Behalf of Low-Income Workers, 35 CLEARINGHOUSE REV. 289 (2001); Sharon Dietrich et al., An Employment Law Agenda: A Road Map for Legal Services Advocates, 33 CLEARINGHOUSE REV. 541 (2000); Karl E. Klare, Toward New Strategies for Low-Wage Workers, 4 B.U. PUB. INT. L.J. 245 (1995). Today low-wage worker advocacy is central to public interest legal practice. Due to lack of resources and the substantial set of legal needs, that practice could benefit from the expansion of class action litigation aimed at enforcement of employment laws.

204. See, e.g., Gordon, supra note 14, at 442; Sachs, supra note 164, at 2687.

205. See, e.g., Gordon, supra note 14, at 442; Sachs, supra note 164, at 2687.