The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules

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INTRODUCTION

Wal-Mart Stores, Inc. v. Dukes heightened the degree of “commonality” required in a class action and thereby rejected a nationwide sex discrimination class action. Because of a decades-old misapplication of class action law, Wal-Mart may undercut not only class actions, but also the procedurally distinct “collective actions” that let masses of workers sue for unpaid wages.

Plaintiffs with similar claims need not bring a class action, of course; joinder rules let them just file one joint complaint. But with too many plaintiffs, joinder

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1 131 S. Ct. 2541 (June 20, 2011).
2 Fed. R. Civ. P. 23(a) (requiring “questions of law or fact common to the class”).
3 131 S. Ct. 2541, 2551 (June 20, 2011) (finding plaintiffs lacked “commonality” because “claims must depend upon a common contention,” like violations by “the same supervisor,” or another issue “capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke”).
is infeasible, so a few named plaintiffs can file a class action for a large group. Rule 23 compels class plaintiffs to file a motion for “class certification” applying the seven-part test of Rule 23(a)-(b); a certified class automatically includes all within the class definition, with no need for each individual to join affirmatively.5

But Rule 23 is trumped by the special procedure 29 U.S.C. § 216(b) establishes for certain employment claims6 – mainly for unpaid minimum or overtime wages, but also for age discrimination and gender wage discrimination.7 For those claims, § 216(b) authorizes not automatic-inclusion class actions, but opt-in collective actions: “No employee shall be a party” without filing a “consent in writing” and being “similarly situated” to the others.8

The § 216(b) “similarly situated” language would seem to demand less than the substantial commonality of Rule 23 – but courts subject § 216(b) collective actions to rules largely paralleling Rule 23. Courts require plaintiffs to move for collective action “certification” paralleling the Rule 23 class certification motion.9 On that motion, courts impose on plaintiffs a “burden of proof” of a “stricter” degree of commonality than Rule 20 joinder, under which plaintiffs must show there are not “disparate factual and employment settings” or “individual[ized] . . . : defenses.”10 Courts thus disallow collective actions even by workers claiming the same employer violated the same wage rule, if for example workers had different supervisors, worksites, or pay schemes.11

This Article argues that courts handle § 216(b) cases fundamentally incorrectly. After Part I details how courts apply Rule 23 and § 216(b), Part II(A) then details the many problems with the § 216(b) jurisprudence.

First, no collective action “certification motion” is authorized by rule, statute, historical practice, or the logic under which such motions exist in class actions. Because § 216(b) lacks the motion requirement of Rule 23, collective actions should be filed freely, just as the original version of Rule 23 featured no certification motion for “spurious” opt-in class actions closely paralleling § 216(b) cases.12 Moreover, whereas Rule 23 covers all class members

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4. Plaintiffs must satisfy the four elements of Rule 23(a)(1)-(4), plus any one of the three requirements of Rule 23(b)(1)-(3). Fed. R. Civ. P. 23(a)-(b).
6. See infra note 37.
7. Wage claims are the most common claim type, comprising nearly one in five of all federal class or collective actions. Daniel Dorris, Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims, 76 U. Chi. L. Rev. 1251, 1251 (2009) (citation omitted).
9. See infra Part I(B).
11. See infra notes 65-74 and accompanying text.
automatically, § 216(b) collective actions adjudicate the claims of only those opting in, so they lack the key “principal-agent” problem13 justifying courts’ role as gatekeepers scrutinizing Rule 23 classes: that class actions adjudicate the claims of even those unaware of the case, an “asymmetric information” problem14 leaving absent class members at the mercy of class counsel.15

Second, on § 216(b) certification motions, courts wrongly demand strict Rule 23 commonality, not the more liberal Rule 20 joinder requirement of one common issue. Enacted in 1938 and amended in 1947,16 § 216(b) was not a tightened opt-in version of Rule 23; it was a liberalized version of simple Rule 20 joinder, which allows joint suits by plaintiffs with just one common issue. By allowing “similarly situated” plaintiffs to join, § 216(b) aimed to facilitate, not restrict, joinder of presumptively similar coworker wage claims.

Part II(B) then explains how Courts’ improperly high § 216(b) threshold imposes troubling consequences, starting with rejection of meritorious collective actions. Where wage violations go unremedied, the law goes unvindicated, and the cost is substantial, especially for low-income workers. But even when courts allow collective actions, the evidentiarily complex certification motion, and the necessary preliminary discovery, generate cost and delay. The delay eliminates the claims of workers whose statutes of limitations keep running until they can opt in; the cost means fewer claims are prosecuted, with large cases litigated by only a few major class action firms, not a broad range of smaller or nonprofit firms. Courts’ misstep in applying Rule 23 to § 216(b) cases is all the more troubling with Wal-Mart Stores heightening Rule 23 “commonality” in largely limiting employment class actions to uniformly imposed unlawful policies.

Part III offers a prescription for how courts should handle § 216(b) collective actions without any “certification motion” or strict commonality standard. Properly interpreted, § 216(b) should let claims proceed as collective actions presumptively, on a simple prima facie showing that workers press (a) the same statutory claim (e.g., a minimum wage violation, not wage claims mixed with discrimination claims) by (b) the same employer. With no “certification motion”

13 ROBERT PINDYCK & DANIEL RUBINFELD, MICROECONOMICS 609 (5th ed. 2001) (defining principal-agent problem as “agents pursu[ing] their own goals even when doing so entails lower profits for . . . principals”).
14 Id. at 596.
proper, defendants should bear the burden of challenging collective actions in either a Rule 21 misjoinder or a Rule 12 dismissal motion, paralleling practice in closely analogous “spurious” opt-in class actions under old Rule 23.

With the opt-in rule lessening the asymmetric information and principal-agent problem of unaware class members, courts should not wield intrusive Rule 23-style powers over plaintiffs’ litigation choices. Rather, courts simply should grant or deny defense misjoinder or dismissal motions, and supervise any court-ordered notification to potential plaintiffs that is requested. Still, collective actions are complex, and the same counsel represents plaintiffs of varied engagement levels, so some asymmetric information and principal-agent problems remain, though not much more than in much non-class litigation. To police such problems in § 216(b) cases, courts should carefully apply ethics rules requiring attorneys to keep clients informed, respect client decision-making autonomy, avoid client conflicts of interest, and competently represent clients.

Part IV concludes by discussing how the § 216(b) caselaw ended up so wrong. Part of the answer is that collective actions are much less known and studied than class actions – the few publications on § 216(b) collective actions are mainly litigators’ practice pieces or student notes – because although the statute is old, § 216(b) actions were obscure until a 1990s proliferation of high-impact cases: one in five aggregate (class or collective) lawsuits now is a wage case, typically a multi-million-dollar action by hundreds or thousands claiming years of unpaid minimum or overtime wages, and challenging entire industry pay practices. With § 216(b) a complex, once-obscure field of law, a small body of precedent, particularly one misconstrued decision, initially got it wrong – and the American legal system’s respect for precedent yields “path dependence” that “locked in” that erroneous case. But a second, less charitable, explanation

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17 See, e.g., Allan King & Camille Ozumba, Strange Fiction: The “Class Certification” Decision in FLSA Collective Actions, 24 LAB. LAW. 267 (2009); David Borgen & Laura Ho, Litigation of Wage and Hour Collective Actions under the FLSA, 7 EMPLOYEE RTS. & EMP. POL’Y 129 (2003).


19 See infra note 139 and accompanying text.

20 See supra note 7.

21 See, e.g., Acevedo v. Allsup’s Convenience Stores, 600 F.3d 516, 518 (5th Cir. 2010); Zivali v. AT&T Mobility, No. 08-10310, 2011 WL 1815391, *1 (S.D.N.Y. May 12, 2011).


for this erroneous caselaw is federal courts’ hostility to individual rights litigation: especially as to procedural matters, courts display an agenda of limiting rights litigation, with rulings expanding dispositive motions, compelling arbitration, pre-empting state court litigation – and, as this article discusses, erecting misguided barriers to major aggregate litigation.

I. HOW § 216(B) COLLECTIVE ACTIONS DIFFER FROM RULE 23 CLASS ACTIONS

A. Rule 23 Class Actions: Close Scrutiny to Guard Against Agency Problems in Automatic-Inclusion Classes

Class actions under Rule 23 cover varied subject matter, from common-law consumer fraud and mass torts claims to federal statutory antitrust and civil rights claims. Rule 23(a) imposes four conditions for a class action:

(1) the class is so numerous that joinder of all members is impracticable,
(2) there are questions of law or fact common to the class,
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
(4) the representative parties will fairly and adequately protect the interests of the class.

A class also must qualify as one of the three Rule 23(b) types defined mainly by the relief sought. The least common, (b)(1), applies when separate actions risk multiple court orders inconsistent with each other or the rights of non-parties; Section (b)(2) applies when members seek mainly injunctive or declaratory relief against a party who acted “on grounds that apply generally to the class,” as in lawsuits against segregation or pollution, while (b)(3) applies to money damages claims, making it most similar to § 216(b) wage collective actions. A (b)(3) class requires that common issues “predominate” over individual ones and that a class action be “superior to other” options such as many individual suits.

Courts on class certification motions serve as gatekeepers undertaking a

24 Edward Sherman, Class Actions after the Class Action Fairness Act of 2005, 80 Tul. L. Rev. 1593, 1594 (2006) (“[Rule 23(b)(2)] led to the civil rights and institutional reform class actions of the 1970s and 1980s that resulted in significant changes in . . . governmental institutions and private businesses. [Rule 23(b)(3) led] initially to class actions based on . . . antitrust, securities fraud, and employment discrimination, but, by the 1980s and 1990s, . . . commercial, consumer protection, environmental, product liability, and mass tort cases.”).


26 Fed. R. Civ. P. 23(b)(1); see Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) (applying 23(b)(1) where party must treat “members of the class alike (a utility acting toward customers; a government imposing a tax)”).


28 See supra note 24.

“rigorous analysis” of whether evidence establishes each Rule 23 element.\textsuperscript{30} Wal-Mart Stores, Inc. v. Dukes stressed this in holding that a class of 1.5 million plaintiffs failed to prove sufficiently “common issues” and suggesting that the tougher requirements of 23(b)(3) rather than 23(b)(2) are more proper for a class seeking substantial damages rather than just injunctive relief.\textsuperscript{31} Certification receives close scrutiny because a Rule 23 class automatically includes, and litigates with finality, all members’ claims. Members must affirmatively opt out to be excluded, and they are guaranteed opt-out rights only in 23(b)(3) damages classes.\textsuperscript{32} Whether or not opting out is possible, most members participate little if at all in the case, as class counsel and the few named plaintiffs litigate the case with finality, yielding the major criticism of class actions: the “agency problem” that the few decision-makers can neglect or “sell out” the interests of the class.\textsuperscript{33} 

B. Collective Actions: Opt-In Required by Statute, Certification Motion Required by Judicial Practice – and Certification Frequently Denied

For minimum or overtime wage claims under the Fair Labor Standards Act (FLSA),\textsuperscript{34} age discrimination claims under the Age Discrimination in Employment Act (ADEA),\textsuperscript{35} and gender wage discrimination claims under the Equal Pay Act (EPA),\textsuperscript{36} 29 U.S.C. § 216(b) trumps Rule 23,\textsuperscript{37} authorizing

\begin{itemize}
  \item \textsuperscript{30} Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982); see Amchem Prods., 521 U.S. at 613-14.
  \item \textsuperscript{31} Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2556-57 (June 20, 2011).
  \item \textsuperscript{32} See, e.g., Martens v. Smith Barney, Inc., 181 F.R.D. 243, 260 (S.D.N.Y. 1998) (collecting cases noting that 23(b)(1) or (b)(2) members enjoy mandatory notice or opt-out rights but “it is within judicial discretion to . . . [grant] such rights,” under circuit holdings in 23(b)(1) limited fund and (b)(2) employment discrimination class actions) (collecting cases).
  \item \textsuperscript{33} See infra Part II(A)(4)(b).
  \item \textsuperscript{34} 29 U.S.C. §§ 201-219.
  \item \textsuperscript{37} Arguments that Rule 23 trumps § 216(b), a federal statute, consistently have failed. See Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 862 (9th Cir. 1977) (“The clear weight of authority holds that Rule 23 procedures are inappropriate for the prosecution of class actions under s 216(b).”) (collecting cases); Schmidt v. Fuller Brush Co., 527 F.2d 532, 536 & n.4 (8th Cir. 1975) (“Rule 23 cannot be invoked to circumvent [§ 216(b)] consent . . . . [Courts] have uniformly ruled that . . . Rule 23 is not applicable to [§ 216(b) cases].”) (collecting cases); LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288-89 (5th Cir. 1975) (finding “fundamental, irreconcilable difference between” Rule 23 and § 216(b), and because § 216(b) “is unambiguous, . . . we must apply the law as it has been written.”); Wright v. U.S. Rubber Co., 69 F. Supp. 621, 624 (S.D. Ia. 1946) (holding § 216(b) “supersedes” federal rules as “a statement by the ‘supreme power of the state’ as to who is entitled to be made parties”).
\end{itemize}
“collective actions” very different from Rule 23 classes.

1. Early § 216(b) History: Facilitating Aggregation of Wage Claims

Enacted in 1938 as part of the FLSA, and applicable to later employment laws codified in the same statutory chapter, § 216(b) provides that “an action . . . may be maintained . . . by any one or more employees for . . . other employees similarly situated.” Under the initial statutory language, “collective actions” let employees have third parties, mainly labor unions, file their wage suits – which drew colorful denouncements that such lawsuits filed by “an outsider, perhaps someone who is desirous of stirring up litigation without being an employee at all . . . may result in very decidedly unwholesome champertous situations.” To eliminate third-party suits, Congress in 1947 amended § 216(b) by requiring workers themselves to be the plaintiffs and requiring anyone other than an original plaintiff to affirmatively “opt in” by filing a written consent – a codification of the opt-in rule already prevailing among the courts.

Enacted before modern class actions existed, § 216(b) does not mention any judicial gatekeeping power over whether a case can proceed as a collective action. The sole § 216(b) requirement is that members be “similarly situated” and opt in individually. One of the first § 216(b) cases adopted a liberal definition of “similarly situated,” denying a motion to dismiss because workers joining a collective action “stand or fall along with” the named plaintiff, so if their claims fail, it will be at the later stage when the evidence does not “sustain the allegation that . . . [all] are similarly situated.” The “similarity” required was modest in other early decisions allowing § 216(b) collective actions, such as McNorrill v. Gibbs, which found “no serious question” about employees being similarly situated when “both worked for the same employer during substantially the same period of time, and as stated in the complaint they ‘performed similar

43 See Pentland v. Dravo Corp., 152 F.2d 851, 853-856 (3d Cir. 1945) (noting, before 1947 opt-in statute, that most courts let § 216(b) cases cover only those affirmatively opting in).
44 On June 25, 1938, when the FLSA was enacted, the Federal Rules of Civil Procedure were pending before Congress, not yet effective, and modern Rule 23 class actions would not exist until 1966. See Fed. R. Civ. P. 23 (1966 Amendment).
duties and were paid wages at the same time.”

Other early cases noted the importance of “liberally administer[ing]” § 216(b) to avoid “multiplicity of suits” and because of the importance of collective actions to workers:

[E]mployees . . . can join in their litigation so that no one . . . [is] alone in something likely to incur the displeasure of an employer. It brings something of the strength of collective bargaining to a collective suit.

Some early courts, though, did not accept that the § 216(b) similarity standard was any broader than then-existing Rule 23 class action requirements. *Sinclair v. United States Gypsum* struck a complaint alleging wage claims on behalf of plaintiffs and others “similarly situated,” reasoning that the § 216(b) suit failed Rule 23 elements, including that the class be “so numerous as to make [joinder] impracticable” – even though § 216(b) had no numerical threshold.

2. Modern § 216(b) Caselaw: Split Authority but a Common Theme – and Many Collective Actions Rejected

With the number of FLSA cases dramatically increased as of the 1990s, the modern § 216(b) caselaw is far more extensive than, and quite contrary to, the early cases detailed above. Courts now apply to collective actions a certification process paralleling Rule 23. Whether or not expressly citing Rule 23, courts perform an essentially similar analysis, requiring of plaintiffs an evidentiary motion proving a substantial degree of commonality, as Rule 23 does.

Under one approach, courts explicitly apply the Rule 23(a) class action requirements to determine whether employees in a § 216(b) collective action are “similarly situated”: whether the members are sufficiently numerous (as in Rule 23(a)(1)); whether common claims predominate (Rule 23(a)(2)-(3)); and whether there are conflicts of interest among the plaintiffs of their counsel (Rule 23(a)(3)-(4)).

While conceding that § 216(b) differs from (and cannot be trumped by)

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47 Barrett v. Nat’l Malleable Steel Castings, 68 F. Supp. 410, 416 (W.D. Pa. 1946) (“[§ 216(b)] should be liberally administered . . . . [When] other persons interested in the same common question . . . might desire to join, . . . a litigious situation would be corrected.”).
50 See infra note 139 and accompanying text.
51 For case docket with scheduling orders requiring collective action certification motions, see, e.g., Calibuso v. Bank of Am., No. 10-413 (S.D.N.Y.) (case management plan and scheduling order) (on file with authors); Capsolas v. Pasta Resources, Inc., No. 10-5595 (S.D.N.Y.) (scheduling order) (on file with authors); Clarke v. JP Morgan Chase & Co., No. 08-2400 (S.D.N.Y.) (stipulation and order of discovery and briefing schedule) (on file with authors).
that of Rule 23, these courts have applied to collective actions all Rule 23 elements not flatly inconsistent with § 216(b): the four Rule 23(a) requirements (detailed above), plus the 23(b)(3) rule for damages claims that common questions must “predominate” over individual ones.\(^{53}\) Some courts similarly require collective actions to establish the substantial commonality required of damages class actions under the original, pre-1966 version of Rule 23 – because that rule, like § 216(b), required each plaintiff with damages claims to “opt in.”\(^ {54}\)

Most courts, however, do not expressly apply Rule 23, instead taking an “ad hoc” approach to whether workers are “similarly situated” enough for a § 216(b) collective action. These courts apply a two-stage certification process that, though unique to § 216(b), still parallels key Rule 23 requirements, particularly that class members must share strict commonality and that a collective action would be superior to multiple individual suits.\(^ {55}\)

First, plaintiffs must file a motion, as under Rule 23, seeking court “certification” of the collective action. Often called the “notice stage,” at this step the court decides whether a collective action is sufficiently proper to justify notifying potential members they can opt into a collective action.\(^ {56}\) Court approval of notice derives from the Supreme Court decision *Hoffmann-La Roche v. Sperling*,\(^ {57}\) which mentioned no “certification” process but held that to serve the “broad remedial goal” of the FLSA, and in light of the “wisdom and necessity for early judicial intervention,” courts can manage the notice and opt-in process.\(^ {58}\) Courts call the burden of proving plaintiffs “similarly situated” at this stage “minimal,” just a “modest factual showing,”\(^ {59}\) but discovery is necessary\(^ {60}\) because courts require evidentiary proof (employee affidavits, corporate

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\(^{54}\) See *Lusardi v. Xerox Corp.*, 855 F.2d 1062, 1078-79 (3d Cir. 1988); Equal Emp’r Opportunity Comm’n v. Sandia Corp., 639 F.2d 600, 602 (10th Cir. 1980).


\(^{58}\) *Hoffmann-La Roche*, 493 U.S. at 171-73.


\(^{60}\) E.g., *Lusardi v. Xerox Corp.*, 99 F.R.D. 89, 93 (D.N.J. 1983) (“[T]he Court set up a 45 day discovery period for . . . establishing the number of persons similarly situated . . . . [P]laintiffs may [then] move to certify a . . . class to whom notice will ultimately be sent.”).
documents, etc.) members are “similarly situated,”61 challenge the same conduct,62 and faced “a common policy or plan that violated the law.”63 After discovery is a second-stage certification motion, typically a defense motion to decertify; the court makes an even more searching evidentiary inquiry into whether members are similarly situated,64 decertifying the case if they are not.65

Courts deny certification when they find insufficient evidence of, for example, common facts among members,66 a common policy affecting all members,67 or a common employment setting of all members.68 For example, on claims that the same employer denied many workers minimum and overtime

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62 Gjurovich, 282 F. Supp. 2d at 104.
wages, Sheffield v. Orius Corp.\textsuperscript{69} denied collective action certification because “members held different job titles, enjoyed different payment structures (piece-rate, hourly, and salaried), and worked at nine different job sites”; with each claim entailing individualized issues, the alleged violations arose differently among subdivisions, so members were “not related as victims of a uniform, national policy.”\textsuperscript{70} Similarly, in Bishop v. Petro-Chemical Transportation, a claim that an employer did not pay truck drivers required overtime,\textsuperscript{71} the plaintiff truck driver testified that he and other members were identical in key respects:

(a) held the same job (truck drivers), (b) hauled similar products (bulk petroleum products), (c) were based within the State of California and (d) regularly worked in excess of forty hours per week without overtime . . .

Bishop denied certification, deeming plaintiff’s “declaration . . . entirely deficient” because certification requires “evidentiary support” of worker similarity,\textsuperscript{72} and at this early stage – before discovery completed – plaintiff had “no strong evidence of company-wide policies and corporate structure.”\textsuperscript{74}

A common thread is that many courts deny certification where alleged wrongs were decentralized among different managers, different sites, and different job categories – paralleling the Wal-Mart Stores rejection of a Rule 23 class claiming sex discrimination among varied employees and managers.\textsuperscript{75} As detailed below, Rule 23-style inquiry in § 216(b) collective action is misplaced; it neglects the very different text, history, and nature of each provision.

II. HOW COURTS ARE WRONG

The prevailing § 216(b) collective action certification process is excessive in many ways – in its importation of Rule 23 standards, in requiring evidentiary support on an early procedural motion, and in the complexity of the two-stage inquiry. But there is a far more fundamental problem: \textit{there should be no collective action “certification” inquiry at all because there is no statutory or rule authority for requiring any such motion of plaintiffs.}

Subpart (A) explains that applicable statutory and rule text does not support judicial authority to deny § 216(b) plaintiffs the right to file actions others similarly situated can join. It also elaborates that the historical development of Rule 23 and § 216(b) confirms that § 216(b) is no analogue of modern Rule 23.

\textsuperscript{69} 211 F.R.D. 411 (D. Or. 2002).
\textsuperscript{70} Id. at 413.
\textsuperscript{71} (E.D. Cal. 2008).
\textsuperscript{72} Id. at 1296.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 1307.
\textsuperscript{75} Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2555-57 (June 20, 2011).
Rather, §216(b) and the old form of Rule 23, both enacted in 1938, were liberalizations of joinder, allowing easy consolidation of similar damages claims. The idea of courts scrutinizing the propriety of aggregation was an innovation that arose only in 1968, when modern Rule 23 established modern class actions. Rule 23 classes, unlike §216(b) actions, allow named plaintiffs and class counsel to dispose of absent class members’ claims—an agency problem absent from collective actions, in which all participants affirmatively choose to participate.

Subpart (B) then notes how this is not a harmless error or mere procedural technicality: improper judicial scrutiny of collective actions prejudices the rights of workers claiming violations, leaving substantial violations unremedied.

A. Why No Certification Inquiry: The Text, History, and Nature of §216(b)

1. Statutory Text and Purpose: No Judicial Authority in §216(b) to Veto Plaintiffs’ Litigation Choices

Normally, courts have little say in plaintiffs’ choice of counsel, choice to file jointly with others, or choice among permissible procedures (e.g., using diversity jurisdiction to choose federal over state court). Plaintiffs pursuing a class action, however, face judicial inquiry into whether a class action is proper, and they must file a motion proving it proper, because Rule 23 expressly so requires: “the court must determine by order whether to certify the action as a class action” (Rule 23(c)(1)(A)); and it is the court’s role to “appoint class counsel,” who must make an “application” to the court showing that they meet rule-delineated criteria focusing on their experience, resources, and skill (Rule 23(g)(1)-(2)).

But §216(b) specifies a different procedure for a collective action, one lacking any judicial “certification” or plaintiffs’ “application” process: “An action . . . may be maintained . . . [by] one or more employees for . . . other employees similarly situated. No employee shall be a party plaintiff . . . unless he gives his consent in writing to become such a party and such consent is filed in the court.” This text does not give courts the power to scrutinize the matters Rule 23 regulates, such as the case’s status as aggregate litigation and plaintiffs’ choice of counsel. There is, in §216(b), no provision for a “certification” inquiry as in Rule 23(c)(1); no provision for scrutiny of plaintiffs’ counsel as in Rule 23(g); and more generally, no requirements analogous to the Rule 23(a)(1)-(4) and Rule 23(b)(1)-(3) seven-subsection labyrinth. Rather, §216(b) requires only two criteria: members must be “similarly situated” and must press one of the types of employment claims covered by §216(b) (minimum or overtime wage, age discrimination, or gender pay discrimination).

Accordingly, regardless of whether judicial gatekeeping of collective actions is good policy, it is unauthorized. In an adversarial legal system (like that of the United States) rather than inquisitorial system (like most of Europe), parties can file and end lawsuits as they please, absent a specific rule granting judges authority over parties’ decisions. Judicial scrutiny of a settlement in a non-class
action is unauthorized: lawsuits can be settled and dismissed on mutual consent under Rule 41(a), and because that rule “does not . . . empower . . . court[s] to attach conditions to the parties’ stipulation of dismissal,” judges are uniformly reversed on rare occasions when they force parties to disclose settlement terms.77

Courts do have one modest power over § 216(b) actions: to control “notice” of opt-in rights sent to potential members. The one Supreme Court case on courts’ procedural powers in § 216(b) actions, *Hoffmann-La Roche Inc. v. Sperling*,78 was a narrow holding: § 216(b) implicitly grants courts “managerial responsibility” over the opt-in process, and “[b]y monitoring preparation and distribution of the notice, a court can ensure that it is timely, accurate, and informative.”79 The Court called “inevitable” such “trial court involvement in the notice process,” at least in cases with “numerous plaintiffs.”80

But a court’s notice decision is not a “certification” decision. A notice order, *Hoffman-La Roche Inc.* held, is not a Rule 23 certification analogue, but a simple case management order under the modest Rule 83(b) provision that district judges “may regulate their practice in any manner consistent with federal law [and] rules.”81 Notice will not even be necessary in all cases. Plaintiffs can sue alone; the opt-in requirement means those who have not joined have no rights at stake in the case.82 Notice is more powerful and comprehensive when court-ordered, but plaintiffs can use informal notice methods: ethics rules against soliciting clients do not apply to counsel strengthening clients’ cases by inviting co-plaintiffs; plaintiffs’ counsel can contact potential class members without court approval.83 The lack of universal need for court notice further confirms that judicial power over notice does not imply power to reject the entire collective action.

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79 Id. at 171-72.
80 Id. at 171.
81 Id. at 172 (quoting FED. R. CIV. P. 83(b)).
82 See 29 U.S.C. § 216(b) (“No employee shall be a party plaintiff . . . unless he gives his consent in writing”).
83 Gulf Oil Co. v. Bernard, 452 U.S. 89, 90-90, 101-02 (1981) (holding that order barring plaintiffs’ counsel from inviting potential class members’ participation “interfered” with “inform[ing]” potential class members and “obtain[ing]” information about the merits, and that any “order limiting communications between parties and potential class members” must base on “specific findings . . . [of] potential abuses . . . [and] limit[ing]” speech as little as possible”). *Gulf Oil Co.* was a Rule 23 class action but “[t]he same justifications apply in the context of a [§ 216(b)] action.” *Hoffman-La Roche Inc.*, 493 U.S. at 171.
Thus, plaintiffs can request notice and defendants can oppose it, just as the parties did in *Hoffman-La Roche Inc.*; and arguably the “inevitable” language of *Hoffman-La Roche* lets courts *sua sponte* require sending court-approved notice. Upon a contested motion on notice, likely the defendant contemporaneously would make its motion challenging the entire collective action, as detailed below. But neither judicial power over notice, nor plaintiffs’ motions for such notice, provides any support for a collective action “certification” inquiry.

2. **No Motion and Just One Common Issue Required by Rules Most Closely Paralleling § 216(b): Rule 20 Joinder and Original Rule 23(a)(3)**

   a. **Collective Actions as Liberalized Joinder, Not Rule 23-Style Class Actions**

   As detailed above, most courts appear to view § 216(b) as an opt-in-only variation on modern Rule 23. But § 216(b), a 1938 and 1947 statute, was never created as a variant on modern Rule 23, which was enacted in 1966. Rather, § 216(b) closely parallels a different aggregate litigation device: as originally understood, § 216(b) is a *joinder* rule – and a liberalizing one, with a streamlined process for more plaintiffs to join a case by filing a simple “written consent.”

   The one Supreme Court case on collective actions, *Hoffmann-La Roche Inc. v. Sperling*, does not address whether such cases require “certification” motions, nor the standard for such motions – but it repeatedly uses the word “joinder” for the process of similarly situated workers opting into the case. 84 A worker filing a “consent form . . . fulfill[s] the statutory requirement of *joinder*,” 85 the Court noted; its decision on court supervision of worker notification was based on courts’ “managerial responsibility to oversee the *joinder* of additional parties.” 86

   Perhaps *Hoffmann-La Roche* used the word “joinder” in only a general sense, but even more informatively, the caselaw contemporaneous with enactment of § 216(b) constantly described § 216(b) opt-in as “joinder.” *Pentland v. Dravo Corp.*, 87 in allowing a § 216(b) suit in 1946, summarized the early 1940s caselaw on § 216(b): “all think in terms of permissive *joinder* of parties.” 88 Many of the cases *Pentland* cited did not actually use the word “joinder,” 89 but a survey of 1940s cases using the term confirms that *Pentland* was right: many of the early cases viewed § 216(b) as a form of joinder, not as a form of class action:

   • “[D]istinction between a true class action . . . [under] Rule 23 . . . and

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85 Id. at 168 (emphasis added).
86 Id. at 170-71 (emphasis added).
87 152 F.2d 851 (3d Cir. 1946).
88 Id. at 855 (emphasis added).
89 *Pentland* cannot be faulted; no Westlaw search for the word “joinder” was possible in 1946.
joinder of suits by employees ‘similarly situated’ . . . is clear.’’ 90

- “[T]his is not a true class suit but is merely a unique representative action permitted by Section 16(b) of the Fair Labor Standards Act, which section provides for permissive joinder of claims of other employees similarly situated.” 91

- “Congress . . . by Section 16(b) . . . intended to permit a joinder of such suits by employees ‘similarly situated.’” 92

- “[T]he intention of Congress [was] to authorize the joinder of [wage] actions into one proceeding to prevent . . . separate actions.” 93

Caselaw through the 1970s continued to describe § 216(b) as a “joinder” device. 94 The view of § 216(b) as joinder apparently ended only after, in the decades following the 1966 enactment of modern Rule 23, modern class actions became the predominant form of aggregate litigation 95 – leaving the misimpression that § 216(b) collective actions are a tighter version of class actions (because of the opt-in requirement) rather than a liberalized version of joinder.

Plaintiffs joining claims under Rule 20 need not do anything like what courts require of a § 216(b) collective action. Under Rule 20, plaintiffs suing together need not file any motion to allow joinder; they merely state all plaintiffs’ names together on the caption of their complaint. If more plaintiffs want to join after suit commences, Rule 24(b)(1) in express terms requires a motion to intervene as a plaintiff. 96 The text of § 216(b) requires no motion for opt-in, requiring only

95 See, e.g., Adam Steinman, What Is The Erie Doctrine? (And What Does It Mean For The Contemporary Politics Of Judicial Federalism?), 84 NOTRE DAME L. REV. 245, 287 (2008) (“During the 1970s and 1980s, federal courts interpreted . . . Rule 23(b)(3) to allow . . . large-scale class actions.”); Edward A. Purcell, The Class Action Fairness Act In Perspective: The Old and the New in Federal Jurisdictional Reform, 156 U. PA. L. REV. 1823, 1851 n.98 (2008) (“From the late 1960s into the early 1980s, the federal courts were unwilling to certify even relatively simple ‘single event/single situs’ mass accident torts as class actions, but by the late 1980s they were certifying far more complicated and multifaceted [classes] . . . . The next decade brought a growing number of such cases.”).
96 FED. R. CIV. P. 24(b)(1).
that the new plaintiff “gives his consent in writing” and “file[] [it] in the court.”

More importantly, the standard under Rules 20 (the joinder rule) and Rule 24 (the intervention process) is far more liberal than a class action-style seven-part inquiry. Joinder requires only that the parties sue about “the same transaction, occurrence, or series of transactions or occurrences,” and share just “any question of law or fact common to all plaintiffs.” Both requirements are permissive: only one “common question” is required, even if plaintiffs differ in other ways or seek different relief; and the “transaction or occurrence” rule requires only “logically related events,” not the same events. This liberal joinder standard dates to 1938, when the original Federal Rules of Civil Procedure eliminated “the old formalistic approach” of strict common law and code pleading, in favor of broadly joining multiple parties. Courts ever since have granted joinder broadly to serve “principles of trial convenience and efficiency.” Accordingly, joinder extends to broad patterns, such as mass tort claims about defects or practices affecting many, or discrimination claims flowing from a company practice negatively impacting an entire group.

98 FED. R. CIV. P. 20(a)(1); see also FED. R. CIV. P. 24(b)(1)(B) (identically requiring for intervention motion, a claim “that shares . . . a common question of law or fact”).
100 FED. R. CIV. P. 20(a)(3) (providing that each party need not seek “all the relief demanded [because] [i]n the court may grant judgment to one or more” separately).
101 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1653 (3d ed. 2004 & 2011 Update); Montgomery v. STG Intern., Inc., 532 F. Supp. 2d 29, 35 (D.D.C. 2008) (noting that requirement that “claims arise from the same transaction or occurrence or series [there]of” is met “if the claims are logically related”).
102 See Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1333 (8th Cir. 1974).
103 Richard Freer, Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit, 50 U. PITT. L. REV. 809, 815 (1989).
106 See Mosley, 497 F.2d 1330 (holding that court abused its discretion in severing joint action where, though members suffered different effects, sufficient evidence of pattern of conduct
If Rule 20 requires so little to aggregate plaintiffs’ claims into one suit, then how can § 216(b), a statute liberalizing joinder procedure, be seen as requiring an evidentiary showing of greater commonality than traditional joinder? It does not, and it should not be misinterpreted in that manner.

b. Collective Actions as Parallel to Original Rule 23(a)(3) “Spurious” Opt-In Classes Requiring No “Certification” Motion

The modern Rule 23(b), enacted in 1966, establishes three types of class actions, but the original Rule 23(a) from 1938 established three different types:

(a) If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, . . . one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue . . . when the character of the right sought to be enforced [is:] . . .

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.107

The two most common types paralleled the two main joinder categories. If plaintiffs sued on shared “joint” interests, under 23(a)(1) the class automatically included all members – paralleling Rule 19 mandatory joinder. But if plaintiffs sued on “several” interests, like distinct damages claims, (a)(3) authorized what courts called a “spurious class action”108 covering only named plaintiffs and those affirmatively opting in109 – paralleling Rule 20 permissive joinder and §

and common issue existed regarding discriminatory policy); Diaz v. Allstate Ins., 185 F.R.D. 581 (C.D. Cal. 1998) (finding sufficient evidence of conspiracy to join insurer and contractors, on allegations that contractors, at insurer's behest, collusively overcharged or used inadequately cheap materials); Puricelli v. CNA Ins., 185 F.R.D. 139 (N.D.N.Y. 1999) (allowing joinder of former employees’ claims of age discrimination pattern); Kuechle v. Bishop, 64 F.R.D. 179 (N.D. Ohio 1974) (allowing joinder because defendant allegedly scheming with others to defraud plaintiff raised common question of duties defendant and conspirators owed).


108 See, e.g., Martinez v. Maverick Cty., 219 F.2d 666, 672 (5th Cir. 1955) (noting 23(a)(3) “is termed the spurious class suit.”); Weeks v. Bareco Oil Co., 125 F.2d 84, 84 n.5 (7th Cir. 1941) (calling 23(a)(3) case “the type denominated a ‘spurious’ class suit”).

109 See, e.g., Martinez, 219 F.2d at 672 (noting 23(a)(3) judgment “does not bind the class, . . .
216(b) collective actions. Hence early giants of civil procedure such as Harry Kalven and James William Moore,\textsuperscript{110} and early courts applying Rule 23(a)(3),\textsuperscript{111} expressed the view that “spurious class suit . . . is a permissive joinder device.”

Thus, Rule 23(a)(3) spurious class actions and § 216(b) collective actions were contemporary 1938 creations courts viewed as similar: both aggregated damages claims for only those who opted in and both were joinder liberalizations. Some courts expressly linked § 216(b) collective actions to 23(a)(3) spurious class actions: Pentland v. Bravo Corp.,\textsuperscript{112} in 1946 one of the first appellate § 216(b) decisions, “classify[ed] the proceeding as a spurious class suit”\textsuperscript{113} and noted that the early district court § 216(b) cases also “classify themselves as spurious class actions.”\textsuperscript{114} Numerous other decisions, mostly from the era when original Rule 23 was in place, similarly cast § 216(b) collective actions as “spurious” class actions analogous to those of original Rule 23(a)(3).\textsuperscript{115}

\textsuperscript{110} Harry Kalven, Jr., & Maurice Rosenfeld, The Contemporary Function of the Class Suit, 8 U. CHI. L. REV. 684, 703 (1941) (quoting 2 William Moore, Federal Practice § 23.11(5), at 3472 (2d ed. 1947) (noting that “spurious class action, Rule 23(a)(3),” is “conclusive upon only the parties”).

\textsuperscript{111} See, e.g., Lipsett v. United States, 359 F.2d 956, 959 (2d Cir. 1966) (“Rule 23(a)(3) is merely a device for permissive joinder”); Martinez, 219 F.2d at 672 (5th Cir. 1955) (noting that 23(a)(3) class, “formed solely by the presence of a common question, . . . is in reality a permissive joinder device”); Weeks v. Bareco Oil, 125 F.2d 84, 84 (7th Cir. 1941) (“[A]s the Federal Rules provide for permissive joinder . . . [they] provide for the counterpart, the [23(a)(3)] class action based on a common question.”); Hunter v. S. Indem. Underwriters, 47 F. Supp. 242, 243 (E.D. Ky. 1942) (deeming 23(a)(3) “merely a joinder device” allowing “participation” by those with “common interest in the questions of law or fact”).

A few courts disagreed, but only in viewing Rule 23(a)(3) more liberally, as allowing automatic-inclusion, opt-out damages class actions, as under modern Rule 23(b)(3). E.g., Union Carbide Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961) (surveying whether unnamed, non-opted-in plaintiffs can participate in 23(a)(3) spurious class).

\textsuperscript{112} 152 F.2d 851 (3d Cir. 1946).

\textsuperscript{113} Id. at 853 (emphasis added).

\textsuperscript{114} Id. at 855 (emphasis added).

\textsuperscript{115} E.g., Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 862 (9th Cir. 1977) (“A FLSA class action under § 216(b) is ‘spurious,’ wherein the res judicata effect extends only to the named parties, while in a ‘true’ Rule 23 class action, the . . . judgment extends to the entire class.”); Kainz v. Anheuser-Busch, Inc., 194 F.2d 737, 740 (7th Cir. 1952) (“[S]purious class actions . . . have been approved where separate employees join to recover compensation under the Fair Labor Standards Act.”); McComb v. Frank-Scerbo & Sons, 177 F.2d 137, 140 (2d Cir. 1949).
The most critical point about § 216(b) and original Rule 23(a)(3) is this: 

*neither required a “certification” motion of any kind.* The text of original Rule 23 required no such motion, and judicial practice at the time was that a case filed as a spurious class action, or a § 216(b) collective action, could so proceed freely, unless and until the defendant filed a motion challenging it. Such a motion might be styled a “motion to strike” the complaint’s class allegations or a “motion to dismiss” the allegations – but either way, the defendant had to make the motion and carry the burden. That was true in early § 216(b) collective actions:

- *McNichols v. Lennox Furnace Co.*\(^{116}\) denied a motion to dismiss the “allegation in the complaint that the employees in whose behalf the action is maintained are ‘similarly situated’”\(^{117}\).

- *Pentland v. Dravo Corp.*\(^{118}\) reversed the grant of a motion “for judgment on the pleadings” against plaintiff’s lawsuit seeking to include others similarly situated who were not yet plaintiffs.\(^{119}\)

- *Kam Koon Wan v. E.E. Black, Ltd.*\(^{120}\) granted the defendant’s motion for partial summary judgment but without questioning the propriety of adjudicating the claims of “[t]he 313 persons similarly situated in whose behalf the original plaintiff also sued” and who under § 216(b) “sought to and succeeded in becoming parties plaintiff.”\(^{121}\)

Identically in the larger body of spurious class action caselaw, it was up to the defendant to move to dismiss or strike the class allegations:

- in *Lipsett v. United States*,\(^{122}\) the defendant filed a “motion to strike the allegations of a class action,” which the district court granted,

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\(^{117}\) 7 F.R.D. at 42 (“The allegations of the complaint are sufficient . . . [for] maintenance of this action . . . . [They] recite[] in some detail the nature of the work performed at the defendant’s place of business by the employees, and specific recurring instances where . . . employees are required to perform services for which they have not been compensated”).

\(^{118}\) 152 F.2d 851 (3d Cir. 1945).

\(^{119}\) Id. at 852.

\(^{120}\) 75 F. Supp. 553 (D. Haw. 1948).

\(^{121}\) Id. at 564.

\(^{122}\) 359 F.2d 956 (2d Cir. 1966).
before the Second Circuit reversed the dismissal;\textsuperscript{123}

- in \textit{Zahn v. Transamerica Corp.},\textsuperscript{124} it was in deciding a “motion to dismiss” that the Third Circuit approved the securities class action;\textsuperscript{125}

- in \textit{Kainz v. Anheuser-Busch, Inc.},\textsuperscript{126} the “motion to dismiss” targeted the class allegations and joinder of plaintiffs, with defendants moving only “that the class action be dismissed . . . [and] other plaintiffs named in the complaint be dropped.”\textsuperscript{127}

In none of the above cases did any court question the procedural posture of leaving the defendant to file a motion challenging the propriety of a class action.

Original Rule 23 drew criticism for letting plaintiffs sue without judicial scrutiny of whether class actions were proper. Wright and Miller advocated judicial oversight: “the court always should be free to strike . . . references to the representation of the absent persons, and confine the litigation to those actually present, when the individual questions loom so large that convenient judicial administration will not be served by . . . a class action.”\textsuperscript{128} Yet Wright and Miller noted the lack of original Rule 23 authority for such oversight: “It is not clear that this course could be followed . . . under the original rule.”\textsuperscript{129} And \\textit{Lipsett}, one of the last appellate class action decisions under original Rule 23, noted there was less rationale for judicial supervision of \textit{spurious} class actions because they bind only those who opt in, not absent class members unaware of the case.\textsuperscript{130}

In sum, courts incorrectly view § 216(b) collective actions as akin to modern Rule 23 classes requiring judicial oversight. Rather, § 216(b) originated at a time when Rule 23 authorized no such oversight and the similar 23(a)(3) spurious class actions were particularly free of oversight. Thus the 1966 amendment to Rule 23 creating judicial oversight of true \textit{automatic-inclusion} class actions is no grant of authority for judicial oversight of \textit{opt-in} § 216(b) actions.


If collective action “certification” was a mistake from the start, whose bad

\begin{itemize}
  \item \textit{Zahn v. Transamerica Corp.}, \textsuperscript{124} 162 F.2d 36 (3d Cir. 1947).
  \item \textit{Zahn v. Transamerica Corp.}, \textsuperscript{125} Id. at 38, 49-50.
  \item \textit{Kainz v. Anheuser-Busch, Inc.}, \textsuperscript{126} 194 F.2d 737 (7th Cir. 1952).
  \item \textit{Kainz v. Anheuser-Busch, Inc.}, \textsuperscript{127} Id. at 739.
  \item WRIGHT & MILLER, supra note 101, § 1752.
  \item Lipsett v. United States, 359 F.2d 956, 959 (2d Cir. 1966); see Pirrone v. N. Hotel Assocs., 108 F.R.D. 78, 82 (E.D. Pa. 1985) (“[B]ecause potential plaintiffs who do not opt in to an FLSA class action will not be bound by the court’s judgment, due process does not require notice to potential plaintiffs.”).
\end{itemize}
idea was it? What case was the “patient zero” infecting later courts with this now-pandemic error? Often there is no clear “first” case in a line of authority: several contemporaneous cases may hold similarly; or the first case may not be the most influential. But here, a clear answer exists.

For the first several decades of § 216(b), there generally were no certification motions; the only collective action certification inquiries seem to be erroneous conflations of Rule 23 and § 216(b) occurring when plaintiffs pled both. Some plaintiffs just got it wrong, seeking a Rule 23 class for a § 216(b)-covered claim, and the court failed to correct the error. In Lusardi v. Xerox Corp., plaintiffs sued “under the ADEA only on behalf of a Rule 23 class.” The court required plaintiff to replace Rule 23 with § 216(b) in the complaint, but it still ruled on “certification” of the § 216(b) collective action after plaintiffs filed a certification motion: “[Plaintiffs] seek certification under . . . § [2]16(b) as an alternative to Rule 23 . . . Under this authority a class action can go forward.”

Other § 216(b) “certification” inquiries come in “hybrid” actions when plaintiffs bring one § 216(b)-covered claim (e.g., EPA wage discrimination) and another to which Rule 23 applied (e.g., Title VII gender discrimination). A hybrid can be a Rule 23 class action on for one claim (e.g., Title VII) and § 216(b) collective action opt-in action for the other (e.g., EPA), but some courts improperly require “certification” for both. In Hubbard v. Rubbermaid, Inc., an EPA and Title VII hybrid, the court declared it would decide the propriety of a § 216(b) EPA collective action (on the EPA claim) on the same “certification motion” plaintiffs filed for the Rule 23 Title VII class: “[O]n plaintiff's ability to maintain a class . . . under 29 U.S.C. § 216(b)[,] the court will reach these questions when it considers the pending class certification motion.”

Despite oddities like Lusardi and Hubbard, § 216(b) “certification” inquiries were rarities for decades. A search for § 216(b) certification motions is telling: of 751 cases, only twelve were before 1990, but there were 29 cases in the 1990s, and 705 cases since 2000. This sharp uptick only partly reflects the increased

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132 Id. at 93.
133 Id.
136 Id. at 1187.
137 Id.
138 The search on Westlaw, last updated August 7, 2011, had the following string:

\[( motion mov!) /s (class collective) /s certif! ) /p ( "216(b)" "626(b)" (flsa /s "16(b)" ) \]
number of FLSA suits, which increased 348% from 1997 to 2007\textsuperscript{139} for reasons that include “economic pressures [and] the increased number of plaintiffs’ [employment] lawyers.”\textsuperscript{140} But the 1990s spike in certification inquiries also reflects the creation by the Supreme Court in Hoffman-La Roche v. Sperling of a judicial role supervising § 216(b) “notice”—an invitation first taken up by an appellate court in a 1995 Fifth Circuit decision. Mooney v. Aramco Services Co.\textsuperscript{141} upheld, and delineated, a use of the now-standard two-step certification approach premised on a need for a ruling on Hoffman-La Roche notice:

The first determination is made at the so-called ‘notice stage’ . . . [as to] whether notice of the action should be given to potential class members. . . . [T]his determination is made using a fairly lenient standard, and typically results in ‘conditional certification’ . . . [and] putative class members [being] given notice . . . to ‘opt-in.’” . . . . The second determination is typically precipitated by a [defense] motion for “decertification” . . . after discovery is largely complete.\textsuperscript{142}

Mooney really is the first precedent for the two-stage certification process; it cited only two district court decisions as support, both weak precedents. One spoke of certification only at the moment of “notice,” not as two stages.\textsuperscript{143} The other did use a two-stage analysis but had especially little precedential value due to a tortured procedural history: different judges had the case at each “stage”; and the opinion adopting a two-stage process was reversed on other grounds.\textsuperscript{144}

\begin{footnotes}
\item[140] Ruan, Facilitating Wage Theft, supra note 40, at 735.
\item[141] 54 F.3d 1207 (5th Cir. 1995).
\item[142] Id. at 1213-14.
\item[144] Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987), mandamus granted sub nom., Lusardi v. Lechner, 855 F.2d 1062 (3d Cir. 1988), modified sub nom., Lusardi v. Xerox Corp., 122 F.R.D. 463 (D.N.J. 1988). Mooney stated that Lusardi used the “two-step analysis,” 54 F.3d at 1213, but in Lusardi, different district judges handled each “stage,” and the declaration of a two-stage process came only in the second judge’s opinion—leaving unclear whether the analysis was purposely “two-stage” or simply a second judge reversing the first. 118 F.R.D.
Oddly, *Mooney* is the leading precedent for a two-stage approach it “specifically [did] not endorse”: “[T]he ‘opt-in’ plaintiffs were not similarly situated. In so holding we specifically do not endorse the methodology employed by the district court, and do not sanction any particular methodology.” Yet *Mooney* still became the leading precedent for the two-stage approach. The two others, *Hipp v. Liberty National Life Insurance* and *Thiessen v. General Electric Capital Corp.*, in the Eleventh and Tenth Circuits, simply follow *Mooney*:*Hipp* cited only *Mooney* as circuit authority,*Thiessen* then cited *Mooney* and *Hipp*. In circuits lacking relevant appellate decisions, district courts cite *Mooney*, and sometimes *Hipp* and *Thiessen* too, in the First, Second, Third, Sixth, Eighth, and Ninth Circuits.

at 353 (1987) (Judge Lechner’s decertification decision, noting that Judge Stern’s certification decision was in 1983). Also, the *Lusardi* decertification decision declaring a two-stage process was reversed and remanded on other grounds, 855 F.2d 1062 (3d Cir. 1988); the brief decision on remand held simply, “this case is not suitable for class treatment” based on fact differences among plaintiffs, without further discussion of a two-stage inquiry. 122 F.R.D. 463, 467 (D.N.J. 1988).

145 54 F.3d at 1216 (emphases in original).

146 252 F.3d 1208, 1218-19 (11th Cir. 2001).

147 267 F.3d 1095 (10th Cir. 2001).

148 252 F.3d at 1218-19 (“*[Mooney] described the two-tiered approach, . . . an effective tool for . . . these often complex cases, and we suggest that district courts in this circuit adopt it.”).

149 *Thiessen*, 267 F.3d at 1102, 1105 (citing *Mooney* and *Hipp* as sole circuit authority holding: “Arguably, the ad hoc approach is the best” while other courts’ Rule 23-based analyses were incorrect because in § 216(b) cases, “Congress clearly chose not to have the Rule 23 standards apply, . . . adopt[ing] the ‘similarly situated’ standard.”).

150 See, e.g., *Kane v. Gage Merch. Servs.*, 138 F.Supp.2d 212, 214 (D. Mass. 2001) (citing *Mooney* as primary authority, and sole circuit authority, holding that although First Circuit had not addressed the issue, “this Court is persuaded . . . it will apply the ‘two-step’ method”).


153 See, e.g., *Murtzon v. Measurecomp*, LLC, No. 07-3127, 2008 WL 5725631, at *2 (N.D. Ohio 2008) (citing *Mooney*, *Thiessen*, and *Hipp*, holding that although Sixth Circuit had not addressed the issue, “for certifying a collective action under the FLSA, the clearly prevailing approach involves a two-stage process”).

154 See, e.g., *Koren v. SUPERVALU*, Inc., No. 00-1479, 2003 WL 1572002, at *15 (D. Minn. Mar. 14th 2003) (citing *Mooney* as primary authority, and sole circuit authority, holding that courts first “conditionally certif[y]” to allow notice, then conduct a “second stage . . . factual
Notably, the Eleventh Circuit got it partly right, before getting it wrong. 

Grayson v. K Mart Corp.\textsuperscript{156} held that “216(b)’s ‘similarly situated’ requirement is less stringent than that for joinder under Rule 20.”\textsuperscript{157} Yet Grayson still required a certification motion where “plaintiffs bear the burden of demonstrating . . . detailed allegations supported by affidavits.”\textsuperscript{158} Then the Eleventh Circuit in Anderson v. Cagle’s\textsuperscript{159} joined the Tenth Circuit in rejecting a liberal joinder standard for a “stricter . . . burden of proof” plaintiffs will fail if “disparate factual and employment settings” or “individual[ized] . . . : defenses” exist:

\[\text{The lenient standard we adopted in Grayson . . . [applies to] a certification decision early in the litigation before discovery . . . The “similarly situated” standard at the second stage is less “lenient” . . . , as is the plaintiffs’ burden . . . [S]imilarly situated” at the second stage [is] “stricter” . . . . [F]actors courts consider include[e] “(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant[s] . . . individual to each plaintiff; [and] (3) fairness and procedural considerations” . . . . [S]imilarities . . . must extend “beyond the mere facts of job duties and pay provisions.”}\textsuperscript{160}

The premise of the two-stage process, as elaborated by Mooney and repeated frequently since, is plausible enough: to order Hoffman-La Roche notice, the court must deem the collective action proper; but that “notice stage” comes early in the case, so the court should revisit certification later, after discovery supports or undercuts the “similarly situated” allegations. However, this logic is not enough; courts wield only those powers granted by statute or rule. As detailed above: given that § 216(b) was a \textit{liberalization} of basic joinder, courts cannot disallow joinder of plaintiffs by requiring an evidentiary motion meeting a \textit{heightened} joinder standard. While courts properly supervise “notice,” that simple exercise of Rule 83 case management powers is no authority for rejecting an entire collective action. Thus, the only proper scrutiny a collective action faces is a Rule 12 dismissal or Rule 21 misjoiner motion, to either of which only the basic joinder requirement of a single common issue would apply.

\textsuperscript{156} See, e.g., Wynn v. National Broadcasting Co., 234 F. Supp. 2d 1067, 1082 (C.D. Cal. 2002) (applying two-stage certification approach, noting, “the majority of courts prefer the ad hoc, two-tiered approach, as described in Mooney,” and also citing Hipp).

\textsuperscript{157} 79 F.3d 1086 (11th Cir. 1996).

\textsuperscript{158} Id. at 1096.

\textsuperscript{159} Id. at 1097.

\textsuperscript{159} 488 F.3d 945 (11th Cir. 2007).

\textsuperscript{160} 488 F.3d at 952-53 (11th Cir. 2007) (quoting Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1103 (10th Cir. 2001)).
4. Less Need for Judicial Scrutiny under § 216(b) than Rule 23: Claims Are Presumptively Similar, and Opt-In Lessens “Agency” Concern

a. The Presumptively Similar Nature of § 216(b) Claims Lessening Need for Judicial Scrutiny of Commonality

The typical § 216(b) collective action is limited in subject-matter scope, seeking unpaid wages by workers at the same employer. While § 216(b) includes two other types of claims – age discrimination and gender equal pay claims – § 216(b) as enacted applied only to wage claims; the other two were added in the 1960s, and wage claims are by far the most common and most significant type of § 216(b) action. Unlike Rule 23, which can apply to anything from mass tort to racism to bank fraud, § 216(b) applies only to a narrow range of subject matter, decreasing the odds that workers filing claims together are not “similarly situated” enough. Accordingly, § 216(b) is a legislative determination that courts presumptively should allow aggregation into one lawsuit of claims filed under the same statute against the employer.

Occasionally, workers’ § 216(b) claims may vary too widely for a collective action. While the typical § 216(b) collective action alleges that a certain pay practice affected all workers in a certain job category, conceivably a lawsuit could claim an adventurously wide array of FLSA violations. An early § 216(b) opinion gave a dated example of claims that might vary too much: “the claims of a plumber or a window washer or a scrub woman, each based on a separate contract of employment, might involve differing questions.” For an example with claims commonly brought today: there may be too many differences between delivery workers’ claims of sub-minimum wages, store salespeople’s claims that managers “manipulate employee time cards so as to avoid paying for wages earned during rest breaks or overtime,” and white-collar human resources or financial planning officers’ claims of being denied overtime under the FLSA “administrative” employee exemption. Less conceivably, wage plaintiffs might file jointly with age discrimination plaintiffs, though no such bizarre efforts are known to have ever occurred.

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161 See, e.g., Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1274 (11th Cir. 2008); Archuleta v. Wal-Mart Stores, Inc., 543 F.3d 1226, 1233 (10th Cir. 2008).
162 See supra note 7.
The “similarly situated” requirement allows for denial of collective action status when plaintiffs’ claims vary too widely; however, as detailed above, the possibility of a too-broad § 216(b) action does not justify a Rule 23-style judicial scrutiny that courts are not authorized to undertake and that was never envisioned to be part of § 216(b) adjudication. Rather, as detailed in Part IV below, courts can redress too-broad § 216(b) actions on defense motions arguing misjoinder or seeking to dismiss collective action allegations.

b. Lack of Agency Problems Because § 216(b) Requires Opt-In, Not Automatic Inclusion

Ultimately, the key question is whether § 216(b) actions feature the “principal-agent problem” that justifies close judicial scrutiny of class actions: that class counsel, with the named plaintiffs’ collusion or indifference, can sell out or neglect the interests of the masses of unnamed class members. Jonathan Macey and Geoffrey Miller give a classic summary of the agency problem:

plaintiffs’ class . . . attorneys function essentially as entrepreneurs who bear a substantial amount of the litigation risk and exercise nearly plenary control . . . . The absence of client monitoring raises the specter that the entrepreneurial attorney will serve her own interest at the expense of the client . . . . Existing regulations are extraordinarily ineffective at aligning the interests of attorney and client.

Such agency problems may arise innocently, as class members defer to counsel for various reasons: counsel’s greater expertise and cultivation of the client relationship; named plaintiffs’ receipt of court-authorized “incentive payments” making them disproportionately pleased with the case outcome; and the disparity between counsel’s heavy stake and each member’s modest stake. Less innocently, unlawful “kickbacks” from attorneys can make named plaintiffs allow high legal fees, such as those paid by the now-notorious, but once-well respected, plaintiff-side class action firm Milberg Weiss.

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168 See supra note 13 (defining principal-agent problem).
169 Macey & Miller, supra note 15, at 3-5; see e.g., Coffee, supra note 15, at 292 (class actions “confer[ing] vast discretion on plaintiffs’ attorneys[,] . . . creat[ing] principal-agent problems that remain intractable despite repeated efforts by Congress and the courts to curb highly visible abuses.”); Beisner, supra note 15, at 1451; Alexandra Lahav, Fundamental Principles for Class Action Governance, 37 Ind. L. Rev. 65, 65 (2003) (criticizing class actions as “governed by [plaintiffs’] attorneys with limited judicial oversight”).
171 Lahav, supra note 169, at 126 n.283 (2003) (noting infeasibility of “direct and active class member participation” in class actions seeking small per-person recoveries; “participation is too expensive in relation to the interests at stake”).
172 See Jonathan Glater, Class-Action Lawyer Given a 30-Month Prison Term for Hiding
Rule 23 always has granted judges unusual powers to police the decisions of class members and attorneys on matters courts normally have no authority to scrutinize. Even original Rule 23’s modest requirements included judicial scrutiny of settlements; the far stricter modern Rule 23 requires the class certification motion with which plaintiffs must prove that their class is numerous enough to make joinder impractical, that members’ claims are similar enough, and that class counsel are sufficiently qualified. But academics persuaded of agency problems propose yet more class action restrictions:

- using opt-in for Rule 23 classes, because opt-in cases create “competition” as multiple firms “litigate opt-in class(es) . . . with the same defendants” and are “less likely to overwhelm defendants”;
- creating “guardians ad litem to represent the interest[s]” of small-claims class members, to assure scrutiny of settlements and fees;
- stressing class member “exit” rights (i.e., opt-out) more than “voice” rights (i.e., lead plaintiffs’ influence), because exit “encourages a competition that directly benefits the class member,” while “voice . . . cause[s] counsel to curry favor with a limited number” of plaintiffs;
- requiring more detailed class disclosures so members can police counsel better as to settlements – or, in the view of other critics, requiring less disclosure because its cost risks the competing agency problem of under-incentivizing attorneys; and


174 Macey & Miller, supra note 15, at 3-5 (“We propose revising the regulatory system in a number of ways . . . to control agency costs . . . [including] use of guardians ad litem to represent the interest of the class in large-scale, small-claim cases . . . [and] auction[s] for plaintiffs’ claims, under which attorneys (and others) could bid for the right to bring the litigation.”); see also, e.g., Beisner, supra note 15, at 1451; Lahav, supra note 169.
176 Id. at 338.
177 Coffee, supra note 15, at 344.
178 Macey & Miller, supra note 15, at 6; Lahav, supra note 169, at 128 (proposing judicial appointment of a “devil’s advocate” to scrutinize settlements otherwise lacking adversarial scrutiny).
180 Lahav, supra note 169, at 123.
181 Macey & Miller, supra note 15, at 4 (“[The] cost of notifying absent class members when potential recovery is very small deters entrepreneurial attorneys from bringing meritorious suits. Thus, the rule harms, rather than protects, absent class members.”).
holding court-run “auction[s] for plaintiffs’ claims, under which attorneys . . . bid for the right to bring the litigation and gain the benefits,” to create a more competitive market for serving classes.\textsuperscript{182} Others see agency cost fears as overblown, or insufficient to justify restrictions that can stifle reform-minded class actions.\textsuperscript{183} But arguments for restricting class actions have the upper hand, with politicians blasting class action lawyers for betraying their clients\textsuperscript{184} and Congress enacting still more restrictions.\textsuperscript{185}

But in two critical ways, § 216(b) collective actions lack the key agency concerns that justify judicial scrutiny of Rule 23 class actions. First, under § 216(b), only those who affirmatively opt in are participants; only opt-ins are bound by any judgment, are party to any settlement, or otherwise have rights at stake in the decisions of class counsel. Second, § 216(b) opt-ins are actual “party plaintiffs,” not just unnamed class members. Each not only made an individualized decision about joining, but typically must personally participate in discovery. \textit{Krueger v. New York Telephone Co.},\textsuperscript{186} for example, noted that because “each” of the 156 opt-in plaintiffs “freely chose[ ] to participate and . . . has relevant information,” the court required all to participate in written discovery (including interrogatory questions and document demands) and one-quarter of them to give deposition testimony.\textsuperscript{187} Where the plaintiffs number under 100, courts have allowed not only written discovery, but also depositions of each individual opt-in plaintiff.\textsuperscript{188} Indeed, on certification motions, plaintiffs

\begin{itemize}
\item \textsuperscript{182}Macey & Miller, supra note 15, at 6.
\item \textsuperscript{183}See, e.g., Merritt Fox, \textit{Why Civil Liability for Disclosure Violations When Issuers Do Not Trade?}, 2009 Wis. L. Rev. 297, 331-32 (defending controversial “fraud-on-the-market class-action lawsuit[s]” despite concerns about attorney overcompensation; “Despite the weakness of its compensatory justification, the cause of action serves important deterrence functions that are unlikely to be equally well performed by public enforcement.”); Gilles & Friedman, \textit{supra} note 15, at 104-105 (2006); Ruan, \textit{Bringing Sense to Incentives}, \textit{supra} note 170 (defending incentive payments to named plaintiffs, at least in public interest litigation, where collusion risk is lower while benefit of litigation is higher).
\item \textsuperscript{184}See \textit{Sen. Orrin Hatch, The Class Action Fairness Act of 2003, S. Rep. No. 108-123}, at 16 (2003) (“Abusive class action settlements in which plaintiffs receive promotional coupons or other nominal damages while class counsel receive large fees are all too commonplace.”).
\item \textsuperscript{185}The Class Action Fairness Act, Pub. L. 109-2, 119 Stat. 4, codified at 28 U.S.C. § 1332(d) (2005) (codifying a “consumer class action bill of rights” and expanding federal diversity jurisdiction to take many class actions out of state courts, based on concerns with forum-shopping, unscrupulous class action attorneys, and so-called professional plaintiffs).
\item \textsuperscript{186}163 F.R.D. 446 (1995).
\item \textsuperscript{187}\textit{Id.} at 449 (requiring 39 of the 156 to plaintiffs appear for depositions).
regularly offer sworn testimony from opt-ins on their individual claims. 189

Because § 216(b) collective actions litigate the rights of only named plaintiffs and those who affirmatively opt in, there simply are no § 216(b) class members unknown to the court, unaware of the case, or unwilling to participate. To be sure, in a large collective action, some of the hundreds or thousands of opt-ins pay little more attention than the average Rule 23 class member. But the absent-plaintiff problem in Rule 23 classes occurs when a plaintiff is unaware of the case or, though nominally aware, too uninformed to make a decision about participation. In contrast, “opt-in class members, having elected to participate, are unlikely to be so indifferent” as unnamed Rule 23 class members190 and typically face individualized discovery.

A § 216(b) opt-in plaintiff who pays little attention to the case is no different from a plaintiff in a one-party case who defers to counsel rather than actively attending hearings, reviewing filings, etc. Federal rules do not require personal participation by plaintiffs, nor do they protect those who remain uninformed; only Rule 23 so protects, and only as to unnamed class members at risk of having rights abrogated in lawsuits they neither filed nor affirmatively joined.

When claims are aggregated only by affirmative opt-in, rather than by automatic inclusion in a class action, “[t]here is really no question of adequacy of representation.”191 Lipsett v. United States, along with a few other old Rule 23(a)(3) spurious class action cases, so explained – that more judicial scrutiny is unnecessary when a class includes only those who affirmatively opt into the case:

because Rule 23(a)(3) is merely a device for permissive joinder, there should be little, if any, inquiry into whether the class is of appropriate size . . . . Unlike the ‘true’ class action, . . . non-party members are not bound by the judgment . . . . There is really no question of adequacy of representation, for . . . there is no representation at all, of non-part(ies).192

At least one § 216(b) decision has made the same point. Pirrone v. North Hotel Associates193 addressed a narrower issue, but it held “notice to potential plaintiffs” unnecessary based on the same rationale that opt-in actions pose no threat to class members who did not affirmatively join: “because potential


190 Coffee, supra note 15, at 333.

191 Lipsett v. United States, 359 F.2d 956, 959 (2d Cir. 1966).

192 Id.

plaintiffs who do not opt into an FLSA class action will not be bound . . . due process does not require notice to potential plaintiffs.\(^{194}\)

Courts and commentators who think Rule 23 safeguards applicable to § 216(b) collective actions thus are missing a key distinction: § 216(b) actions do not feature the rationale for such safeguards in class actions – the agency problem of class counsel selling out unaware members. Agency problems certainly may exist to some degree in a § 216(b) case when clients have low stakes, low education, or unethical attorneys – but such problems, always possible in individual and multi-party litigation alike, can and should be redressed by existing ethics and court rules, as detailed below.\(^{195}\)

B. **Serious Consequences of the Erroneous Certification Motion Process**

It is no mere ministerial error of procedure when, on a § 216(b) collective action, courts require a collective action “certification” motion and apply a heightened Rule 23 analysis rather than the simple joinder inquiry into one common issue. These stricter requirements have serious consequences for the collective actions. Without rehashing the entire debate over whether procedure should, or even can, be kept separate from claim substance or merits,\(^{196}\) the § 216(b) collective action procedure is a procedural device predominantly for FLSA minimum and overtime wage rights – so courts’ procedural errors are inextricably linked with the wage rights they prevent from being vindicated.

1. **The High Stakes: Widespread, High-Dollar Wage Violations**

Studies and reported cases alike show workers are routinely denied statutory workplace rights,\(^{197}\) especially low-wage workers’ wage rights. Workers in construction,\(^{198}\) garment factories,\(^{199}\) nursing homes,\(^{200}\) agriculture,\(^{201}\) poultry

\(^{194}\) Id. at 82.

\(^{195}\) Infra Part III(B)(3).


\(^{198}\) See, e.g., Strouse v. Kinson Cook, Inc., 634 F.2d 883, 886 (5th Cir. 1981) (granting construction workers attorneys’ fees on winning FLSA claims); Marroquin v. Canales, 236 F.R.D. 257, 262 (D. Md. 2006) (certifying FLSA action by day laborers denied daily wages
processing, and restaurants have suffered systematic unlawful wage losses. One survey of workers in low-wage industries in the three largest United States cities found 26 percent were paid below minimum wage, and over 75 percent were not paid overtime due the previous week. The magnitude of violations shown by that study is substantial: the workers lost, and the employers illegally retained, an average of $56.4 million dollars per week. Another study reports similarly: annually, “billions of dollars in wages are being illegally stolen from millions of workers.” In short, workers who can ill-afford wage loss are losing a great deal. As detailed below, such wage violations, primarily affecting low-wage workers, go unremedied when courts disallow collective actions.

2. Aggregate Litigation as the Sole Feasible Enforcement for Masses of Individually Small Claims

Aggregating claims can be the only realistic redress for a multiplicity of claims too small for individual litigation, as the Supreme Court has noted repeatedly in Rule 23 cases. Employment claims typically seek modest

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201 See generally Reich v. Tiller Helicopter Servs., 8 F.3d 1018, 1024-27 (5th Cir. 1993) (discussing history and scope of FLSA agricultural exemption).


204 The survey of 4,387 workers in Chicago, Los Angeles, and New York City captured violations often going underreported in a variety of low-wage jobs, including in the garment industry, domestic work, restaurants, and retail. See Bernhardt, supra note 197.

205 Id. at 21-22, 33.

206 Id. at 50.

207 KIM BOBO, WAGE THEFT IN AMERICA 6 (2009).

208 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (“[Class actions] overcome the problem that small recoveries do not provide incentive for any individual to bring a solo action . . . by aggregating the relatively paltry potential recoveries into something worth . . . [the] labor.”); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (“Class actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually.”); Deposit Guar. Nat’l Bank, Jackson v. Roper, 445 U.S. 326, 339 (1980) (“Where it is not economically feasible to . . . [file] a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class
individual damages,209 especially wage claims alleging that hundreds or thousands each were underpaid a small amount per hour.210 The modest damages make most wage claims prohibitively costly to prosecute individually:211 an individual case worth a few thousand dollars is not worth the attorney time necessary for the required discovery and motions;212 it hardly is worth even the out-of-pocket costs of thousands of dollars for witness deposition transcripts alone.213 A chance at statutory attorneys’ fees provides insufficient incentive in

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209 Even employment discrimination claims, typically about terminations from five-figure jobs rather than just wage underpayments, yield modest recoveries. A 2001 study showed that of the small fraction (3.8%) of cases proceeding to trial verdicts, plaintiffs lost 61.9%; when they won, the median verdict was just $130,500. Laura Nielson & Robert Nelson, Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System, 2005 Wis. L. Rev. 663, 705-06 (2005). Employment discrimination settlements, far more common than trials, yield even less, a median of $30,000, well below the personal injury case median ($181,500). Minna Kotkin, Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements, 64 WASH. & LEE L. REV. 111, 144 (2007).


212 A survey of federal cases in 2008 showed “median litigation costs, including attorneys’ fees, of $15,000 for plaintiffs and $20,000 for defendants” – showing discovery and legal fees less costly than commonly assumed, but still well above what is feasible for individual wage claims. Emery G. Lee III & Thomas E. Willging, Defining The Problem Of Cost In Federal Civil Litigation, 60 DUKE L.J. 765, 770 (2010).

213 A one-day deposition rarely costs under a thousand dollars for court reporter transcription...
individual cases; the typically modest settlement amounts do not leave much for fees, and courts routinely reduce even prevailing attorneys’ fees.\(^{214}\)

Moreover, individual litigation requires one plaintiff to shoulder all litigation costs and risks herself – not only out-of-pocket litigation expenses attorneys are reluctant to bear for modest claims, but also, especially for low-wage workers, a risk of employer retaliation\(^{215}\) and costly time off hourly-paying work (often involving a job with long or inflexible hours) to help craft allegations, review facts, etc.\(^{216}\) Due to the limited prospect of individual litigation, employers inclined to violate wage laws face little financial incentive to comply.

Neither is government enforcement widespread or aggressive enough for substantial deterrence. The agencies enforcing employment laws lack the resources to prosecute many individual cases.\(^{217}\) Even when filed, government actions rarely achieve full damages or industry-wide relief. For example, investigators at the federal Department of Labor Wage and Hour division are instructed not to include the double damages permitted by law in negotiations with employers, and to seek backpay for just two years of the three the statute of

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\(^{214}\) See, e.g., Arbor Hill Concerned Citizens Neighborhood Ass’n v. Albany, 522 F.3d 182, 184 (2d Cir. 2007) (noting on attorney fee motion: “[The] court (unfortunately) bears the burden of disciplining the market, stepping into the shoes of the reasonable, paying client, who wishes to pay the least amount necessary”).

\(^{215}\) See supra note 11.


limitations allows. Also, because most government investigations are driven by a particular claim, investigators are not required to expand their investigations to include a claimant’s similarly-situated coworkers, even though employers typically subject all workers in a job category to the same pay practices.

Wage claims thus make far more economic sense to litigate in aggregate rather than individual private lawsuits. Collective actions limit the above detailed burdens on any one worker and increase the amount in controversy, justifying an attorney’s investment of time and out-of-pocket expense, especially because litigation cost does not increase proportionately with the number of workers participating. Courts may assess back wages based on statistical or representative evidence, because liability evidence (e.g., that a certain job is not exempt) typically does not require testimony from every worker, and because sample testimony suffices for the estimates needed in wage violation cases.

3. Importance of Notification for Workers Unaware of Violations

Employees are often unaware their rights have been violated, especially the low-wage, often immigrant workers disproportionately comprising the pool of workers paid sub-minimum wages. Employers may declare workers exempt

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218 See NAT’L EMP’T LAW PROJECT, supra note 213 at 9-10.

219 See id.

220 See, e.g., Grochowski v. Phoenix Const., 318 F.3d 80, 88 (2d Cir. 2003) (“[N]ot all employees need testify in order to prove FLSA violations or recoup back-wages.”); Reich v. Gateway Press, Inc., 13 F.3d 685, 701 (3d Cir.1994) (22 of 70 employees testified); Martin v. Tony & Susan Alamo Found., 952 F.2d 1050, 1052 (8th Cir. 1992) (back pay to be awarded “to the nontestifying employees based on the fairly representative testimony of the testifying employees”); McLaughlin v. Ho Fat Seto, 850 F.2d 586, 589 (9th Cir.1988) (5 of 28 employees testified); Donovan v. Simmons Petroleum Corp., 725 F.2d 83, 86 (10th Cir. 1983) (testimony of 12 employees supported award to all); Donovan v. New Floridian Hotel, 676 F.2d 468, 472 (11th Cir. 1982) (23 employees’ testimony supported award to 207).


222 See Gentry v. Sup. Ct., 165 P.3d 556, 565-67 (Cal. 2007) (“[I]ndividual employees may not sue because they are unaware that their legal rights have been violated.”); Muhammad v. Cty. Bank of Rehoboth Beach, 912 A.2d 88, 100 (Del. 2006) (“[W]ithout . . . a class-action mechanism, many consumer-fraud victims may never realize . . . [they] have been wronged”.

223 Poverty law scholars have noted the “dissonance between the rhetoric of supporting work and the reality of denying work’s rewards.” Julie Nice, Forty Years of Welfare Policy Experimentation: No Acres, No Mule, No Politics, No Rights, 4 NW. J.L. & SOC. POL’Y 1, 1-2 (2009) (explaining that policy efforts since 1990s to reduce welfare dependence did not address the need for livable wages); JOEL F. HANDLER & YEHESKEL HASENFELD, BLAME WELFARE, IGNORE POVERTY AND INEQUALITY 6-7 (2007) (arguing that America demonizes welfare while those who “play[] by the rules” cannot make it because of stagnant wages in the low-wage labor market); Peter B. Edelman, Changing the Subject: From Welfare to Poverty to a Living Income, 4 NW. J.L. & SOC. POL’Y 14 (2009) (documenting history of America’s
from minimum and overtime wage rules by misinterpreting FLSA exemptions\textsuperscript{224} or misclassifying even full-time workers as independent contractors.\textsuperscript{225} Some wage violations can be hidden from even sophisticated workers: gender wage discrimination often is proven only by statistical analysis comparing workers’ pay data;\textsuperscript{226} and irregular commissions may be payable only if the employer receives the customer payment, not when the employee makes the sale.\textsuperscript{227} Collective actions increase awareness of workplace abuses, whether through court-supervised employee notification or through plaintiffs’ attorneys’ own efforts to find and to notify additional workers – efforts that become more cost-effective when counsel has assurance that the case will qualify as a collective action.\textsuperscript{228} Timely notification also helps workers who might not otherwise become aware their wage rights were violated until too late: Unlike in Rule 23 class actions, where all statutes of limitations are tolled until grant or denial of class certification, the FLSA expressly states that limitations periods keep running, and possibly expiring, for each individual until he or she opts in as a plaintiff.\textsuperscript{229} The notice process also points workers to class counsel for legal simultaneous rhetoric against welfare and lack of support for higher wages).\textsuperscript{224} Misra v. Decision One Mortg. Co., 673 F. Supp. 2d 987, 991 (C.D. Cal. 2008) (defendants misrepresented to employees that they were exempt and not entitled to overtime pay); Kamens v. Summit Stainless, Inc., 586 F. Supp. 324, 328 (E.D. Pa. 1984) (plaintiffs alleged affirmative misrepresentations by employer sufficient to toll statute of limitations for their claims); \textit{Gentry}, 165 P.3d at 461 (“The likelihood of employee unawareness is even greater when, as alleged in the present case, the employer does not simply fail to pay overtime but affirmatively tells its employees that they are not eligible for overtime.”).\textsuperscript{225} See, e.g., Ling Nan Zheng v. Liberty Apparel Co., 556 F. Supp. 2d 284 (S.D.N.Y. 2008) (denying defendants’ motion for summary judgment against garment workers claiming employers misclassified them as independent contractors to allow unlawful wage deductions); Ansoumana v. Gristede’s Operating Corp., 255 F. Supp. 2d 184 (S.D.N.Y. 2003) (granting delivery workers partial summary judgment on unpaid minimum and overtime wage claims); Lopez v. Silverman, 14 F. Supp. 2d 405 (S.D.N.Y. 1998) (finding as a matter of law that garment industry “jobber” and garment manufacturer jointly employed plaintiffs).\textsuperscript{226} See, e.g., Velez v. Novartis Pharm. Corp., 244 F.R.D. 243, 259-62 (S.D.N.Y. 2007).\textsuperscript{227} See, e.g., Dwyer v. Burlington Broadcasters Inc. 295 A.D.2d 745, 745, 744 N.Y.S.2d 55, 56 (App. Div. 2002) (noting that by contract plaintiff was entitled to commissions on her sales only “when the customer paid,” not as soon as she made the sale).\textsuperscript{228} Cuzco v. Orion Builders, Inc., 477 F. Supp. 2d 628, 635 (S.D.N.Y. 2007) (“[F]or the intended benefits of the collective action[,] including allowing plaintiffs to pool resources and enabling courts to efficiently resolve multiple similar claims . . . . employees must receive accurate and timely notice . . . [to] make informed decisions about whether to participate.”).\textsuperscript{229} See 29 U.S.C. § 256 (providing that opt-in plaintiff’s claim “commences” for limitations purposes not on lawsuit’s filing but “on the subsequent date . . . written consent is filed”).
advice and lets them know they are not alone in challenging violations.\textsuperscript{230}

Plaintiffs need not file collective actions, of course; they can sue alone, or in a small group, in which case § 216(b) opt-in, notification, and certification processes are irrelevant. But when plaintiffs choose to broaden their wage cases into opt-in collective actions, they typically need to notify others potential members – notice that is hindered by courts’ restrictive “certification” standards.

4. The Impact of Certification Motions: Litigation Cost; Delay as Limitations Periods Run; and Fewer Attorneys Available

Even where courts grant certification, the motion process imposes substantial costs. First, with courts demanding substantial evidentiary showings, the motion requires substantial attorney time: procuring dozens of worker affidavits; taking multiple depositions; requesting and reviewing discovery documents; and writing a substantial briefing. Second, as with any major motion, briefing and argument can take months, plus more months of waiting for the court’s decision – and all the while, the statute of limitations period “clock” keeps ticking until each potential member joins.\textsuperscript{231} Third, with the certification process both increasing litigation cost and the risk of lost claims due to delay, the pool of plaintiffs’ lawyers narrows,\textsuperscript{232} yielding the dominance of a few private law firms in wage collective actions, to the exclusion of small-firm and non-profit lawyers who may be the closest advocates to, and best advocates for, the workers.\textsuperscript{233}

In short, denials of certification, and the cumbersome process even in cases granted certification, come at a substantial cost to the vindications of statutory rights – consequences especially troubling because, as discussed below, the entire endeavor of scrutinizing cases for collective action certification is misguided.


\textsuperscript{231} See supra note 229.

\textsuperscript{232} See Macey & Miller, supra note 15, at 4 (“[C]ost of notifying absent class members when potential recovery is very small deters entrepreneurial attorneys from bringing meritorious suits. Thus, the rule harms, rather than protects, absent class members.”).

III. HOW COURTS SHOULD ALLOW PLAINTIFFS TO FILE COLLECTIVE ACTIONS FREELY, WITHOUT CERTIFICATION MOTIONS

Part II having argued against courts’ prevailing two-step, Rule 23-style “certification” process for collective actions, this Part details a different way courts should handle collective actions. Subpart A begins by surveying existing scholarship critiquing § 216(b): some commentaries argue for broader willingness to certify collective actions; others call for tighter application of Rule 23 standards, perhaps even a repeal of § 216(b); but no scholarship argues that requiring an evidentiary “certification” motion lacks the textual authorization or agency-cost rationale that justifies requiring certification of Rule 23 class actions.

Subpart B details this Article’s prescription in three parts, one for each player in a collective action lawsuit – the plaintiff, the defendant, and the court. In short, plaintiffs could file and opt into collective actions freely without any certification motion, while defendants would bear the burden of challenging collective actions in Rule 21 misjoinder or Rule 12 dismissal motions. Courts, lacking Rule 23 gatekeeping powers, still would wield three more basic powers: deciding defense motions; supervising requested notice to potential opt-ins; and policing whatever modest asymmetric information and principal-agent problems may arise in multiple-plaintiff representation, by enforcing ethics rules on avoiding conflicting interests and keeping clients informed decision-makers. Subpart C notes that this prescription would not only bring judicial practice into compliance with federal statutes and rules, but also decrease litigation cost, speed up litigation, and facilitate vindication of important rights in collective actions.

A. Existing Calls for Reform: Stricter Scrutiny versus Broader Certification – But No Questioning of the Premise

The academic commentary on § 216(b) is sparse but features varied calls for reform. Many commentators dislike § 216(b) entirely, preferring the tougher Rule 23 criteria. One “urges Congress to abolish collective actions by repealing § 216(b),” leaving wage actions governed by Rule 23, arguing that § 216(b) “was drafted during the infancy of group litigation and is an antiquated vestige.” Another argues that the prevailing “two-stage, ad hoc approach” to certification “fails . . . [at] determining whether plaintiffs . . . [are] similarly situated,” and that courts should apply Rule 23 standards to § 216(b) collective actions.

Another, though noting that § 216(b) originated as a mere joinder device, believes courts should undertake a more “rigorous analysis” more “routinely”

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234 Lopez, supra note 18, at 278-79.
235 Fraser, supra note 18, at 122 (“While Congress has failed to amend § 216(b) in accordance with the modern class action, . . . [to assess] whether plaintiffs are similarly situated, [courts] should . . . apply[] the standards of Rule 23.”).
236 King & Ozumba, supra note 17, at 300.
rejecting collective actions even where workers are “similarly situated.” That commentator argues that unless the plaintiffs’ common issues are substantial enough to “expressly permit common answers” for each, “the court must . . . determine if it is fair and efficient to try the case in one proceeding, notwithstanding that those initially joining the action may be ‘similarly situated.’” This view parallels the Wal-Mart Stores holding that the class action commonality requirement is stricter than the joinder requirement of one common issue.

Others call for broader permission for § 216(b) collective actions but still assume a judicial power to condition such cases on an evidentiary motion for certification. One commentator believes the “opt-in feature raises a presumption of active, informed” class members, an argument with three implications: it “sav[es] courts from . . . detailed inquiries into whether each . . . member’s interests are adequately represented”; it “better justif[ies] conditional certification”; and it justifies “plac[ing] the burden upon any party . . . challenging class certification on grounds of insufficient plaintiff protection.” Yet that commentator still accepts courts’ “managerial responsibility” to scrutinize “evidence opt-in members’ interests are not being adequately represented or protected.”

Two others believe courts should more liberally certify collective actions even where workers’ claims vary, by using sampling techniques: “select[ing] a test group of plaintiffs . . . and opt-ins” for limited discovery and early dispositive motions; or “a representative trial as in a class action,” with a defense victory ending the case or a plaintiff’s victory allowing a plaintiffs’ motion for partial summary judgment on the basis of non-mutual offensive issue preclusion . . . [to] extend the trial rulings” to other plaintiffs.

Surprisingly, no commentary appears to argue that a requirement of proving “certification” lacks the textual authorization or agency-cost rationale that exists for Rule 23 class actions. The difficult question is what would replace the current scheme; following is what this Article offers as a viable alternative.

B. The Prescription: Allow Plaintiffs to File Together, Leaving the Burden on Defendants to Challenge Similarity, without Judicial “Gatekeeping” Power

This Article’s prescription is that courts should apply the following streamlined way to assess the propriety of collective actions – or, put differently, that they should not assess collective action propriety at all, except under certain circumstances. Following is a three-part elaboration of the proper roles of

237 Id. at 273.
238 Id.
239 See supra note 3.
240 Gates, supra note 18, at 1554-1555.
241 Id.
242 Borgen & Ho, supra note 17, at 156.
plaintiffs, defendants, and courts as to the propriety of collective action status.

1. **Plaintiff’s Role: File at Will, As in Cases with Multiple- Plaintiff Captions under Joinder Rules**

   Plaintiffs should have a recognized right to bring a collective action upon pleading that other workers are similarly situated; and those other workers should have a recognized right to file an opt-in consent — without any motion seeking judicial approval. Such a rule would be a vast departure from existing practice, but one district court so held in 1946 — that § 216(b) grants

   [a] right to intervene . . . [that] appears to be unconditional because the statute expressly indicates that one or more employees similarly situated can jointly originate such an action . . . regardless of the ordinary requirements of law as to proper joinder . . . . [I]t would be an excessively strict construction which would say that parties who have an absolute right to join as plaintiffs have less than an absolute right . . . to become plaintiffs after its commencement.\(^{243}\)

   No courts have cited this decision in decades, but its approach is correct: plaintiffs pressing claims as “similarly situated” could opt in freely, absent the sort of motion, detailed below, challenging the propriety of their joinder.

2. **Defendant’s Role: Filing Misjoinder or Dismissal Motions, with the Burden of Disproving Sufficient Commonality for Joinder**

   A defense motion is the proper redress for plaintiffs trying to aggregate § 216(b)-covered claims that vary too widely for the workers to be “similarly situated.” Some § 216(b) claimants may well be too varied for a collective action,\(^ {244}\) but that does not mean the plaintiffs must be the ones filing motions or held to heightened evidentiary proof of commonality. With Rule 20 far more relevant to § 216(b) cases than Rule 23, courts should handle challenges to § 216(b) collective action status like they handle challenges to Rule 20 joinder of multiple plaintiffs’ claims. Specifically, the two rules allowing challenges to Rule 20 joinder apply equally well to § 216(b) collective action status.

   First, Rule 21 “misjoinder”: a court may declare parties “misjoined” under the Rule 21 provision that “[o]n motion . . . , the court may at any time . . . drop a party” — an order that would wholly undo the Rule 20 joinder by dividing the plaintiffs’ claims into independent cases, such as if discovery undercuts the allegations that justified the initial joinder.\(^ {245}\)

   Second, Rule 42(b) “severance”: a court may keep the parties joined but order separate trials for each plaintiff, or for various groups of plaintiffs, under


\(^{244}\) See supra notes 164-167 and accompanying text.

\(^{245}\) E.g., Great Am. Ins. Co. v. Louis Lesser Enters., Inc., 353 F.2d 997 (8th Cir. 1965).
the Rule 42(b) provision that “[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues [or] claims.”246 One 1946 decision, though not citing Rule 42, noted that plaintiffs may be “similarly situated” enough to satisfy § 216(b) but still need separate trials: “while the claims . . . are similar in certain respects and enough . . . [to be] similarly situated, still . . . it will be necessary for the cases to be tried separately to determine whether . . . [each] particular person . . . [is] within the [FLSA] provisions.”247 That decision has drawn no citations for decades, but it is exactly the result many modern courts denying “certification” should reach: plaintiffs sharing FLSA claims against the same employer are amply “similarly situated” even if their claims vary enough for each plaintiff, or subgroups of plaintiffs, to need separate trials under Rule 42.

Waiting for defendants to challenge aggregation is not the modern practice, but as detailed above, it was how courts entertained challenges to original Rule 23(a)(3) spurious class actions, the closest analogue to § 216(b) cases:

the striking of the allegations of a spurious class action ought generally to be improper unless the court knows no intervention is possible. . . . Since the spurious class action is a mere device for permissive joinder, the proper procedure is to leave the allegation standing to facilitate . . . intervention. “If it shall later appear that the plaintiffs are not able within a reasonable time to obtain others . . . it may properly be dismissed as a class action.”248

3. Court’s Role: Deciding Parties’ Motions and Policing Ethics Violations

By requiring each member to opt in, § 216(b) collective actions avoid the substantial agency problems of Rule 23 class actions. An opt-in action is little different from a standard case with five or thirty plaintiffs in the caption: whether each is well-informed, or actively involved, depends on education level, language barriers, attorney honesty, etc. So the threat of plaintiffs’ lawyers neglecting opt-ins is not different in kind from ethical concerns arising in any case, individual or aggregate. Accordingly, courts in collective actions not only lack the authority Rule 23 grants over the decisions of plaintiffs and counsel; courts also lack the agency rationale that would make such powers a normatively sound idea.

That collective actions threaten less agency concern, however, does not mean

246 Fed. R. Civ. P. 42(b); see, e.g., Gaffney v. Riverboat Servs., 451 F.3d 424, 442 (7th Cir. 2006). See generally Wright & Miller, supra note 101, § 1660 (“The general philosophy of the joinder provisions . . . [is] virtually unlimited joinder at the pleading stage but to give the district court discretion to shape the trial.”); see, e.g., Kedra v. Philadelphia, 454 F. Supp. 652, 662 (E.D. Pa. 1978) (letting plaintiffs proceed through discovery with joined claims despite potential prejudice, with court “retain[ing] flexibility to sever portions of [claims] or to take other remedial actions, if necessary,” later in case).


248 Lipsett v. United States, 359 F.2d 956, 959 (2d Cir. 1966) (emphasis added) (quoting Oppenheimer v. F.J. Young Co., 144 F.2d 387, 390 (2d Cir. 1944)).
courts have no role. Courts do have two critical roles to fulfill in collective actions, each detailed below: (a) deciding parties’ motions on the propriety of collective actions and of court-ordered notice; and (b) policing violations of ethics rules on jointly representing multiple plaintiffs.

   a. Deciding Parties’ Motions on the Propriety of Collective Actions and Court-Ordered Notice

Despite lacking the power to “certify” a collective action, and to require plaintiffs to file motions seeking such certification, courts remain empowered to decide the propriety of a § 216(b) collective action. As subpart (2) above details, courts would decide whether workers are “similarly situated” on defendants’ motions for Rule 12 dismissal or Rule 21 misjoinder – but the standard would be simple joinder, not the more searching “commonality” inquiry.

Further, courts would decide whether court-ordered notice is proper – but the inquiry would extend only to the propriety and contents of the notice, not to the whether the entire collective action should proceed. Should the court wish to address the “similarly situated” issue contemporaneously with its “notice” decision, the joinder rules remain the proper vehicle: Rule 21 allows a court “on its own,” to consider whether there is “misjoinder”; the court simply must apply the joinder standard, not the current heightened commonality standard.

   b. Policing Violations of Ethics Rules on Jointly Representing Multiple Plaintiffs

As detailed above, collective actions lack the agency problems of class actions\(^{249}\) – but not completely. First, especially in large cases, many opt-in plaintiffs participate little if at all: they may lack voice in major decisions like classwide settlements; and attorneys may not fully apprise opt-ins of case events. Second, plaintiffs may have conflicting interests, such as if a group of assistant managers seeks overtime pay, while a second group worked off-the-clock because their timesheets were altered by the first group. Third, clients may be unaware when their attorneys lack the experience or resources for major § 216(b) collective actions. Legal ethics rules\(^{250}\) address these three problems:

\(^{249}\) See supra Part II(A)(4)(b).

\(^{250}\) While no one binding set of attorney ethics rules exists, the ABA Model Rules of Professional Conduct (“Model Rules”) are “the primary model for the ethics rules governing . . . the overwhelming majority of American lawyers.” Lucian Pera, Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct, 30 OKLA. CITY U. L. REV. 637, 637-38 (2005). The Model Rules were adopted by over 40 states and “influential . . . in states that had chosen not to adopt them.” Id. at 640. Discussion herein thus will cite the Model Rules and state cases based on those rules.
• attorneys must allow each client decision-making authority over major decisions like filing suit, responding to a settlement offer, or ending the case on other terms,\textsuperscript{251} which requires keeping clients informed;\textsuperscript{252}

• where attorneys represent multiple clients, they must procure informed consent if the clients’ interests conflict\textsuperscript{253} and must withdraw if the interests conflict too deeply;\textsuperscript{254} and

• attorneys should not litigate cases in fields in which they are insufficiently experienced or competent.\textsuperscript{255}

\textsuperscript{251} “[A] lawyer shall abide by a client’s decisions concerning the objectives . . . [and] consult with the client as to the means . . . . A lawyer may take such action on behalf of the client as is impliedly authorized . . . [and] shall abide by a client’s decision whether to settle a matter.” \textit{Model Rule of Prof’l. Conduct} 1.2(a); \textit{see also} id. R. 1.2 cmt. 1 (“Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation . . . . The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client”).

\textsuperscript{252} “A lawyer shall . . . reasonably consult with the client about the means by which the client’s objectives are to be accomplished; keep the client reasonably informed about the status of the matter; [and] promptly comply with reasonable requests for information.” \textit{Model Rule of Prof’l. Conduct} 1.4(a)(2)-(4); id. R. 1.4 cmts. 1-2 (“Reasonable communication . . . is necessary for the client effectively to participate in the representation . . . . the lawyer [must] keep the client reasonably informed about . . . significant developments.”); \textit{see, e.g.}, In re Grievance Proceeding, 171 F. Supp. 2d 81, 84 (D. Conn. 2001) (“Implicit in Rule 1.2(a)’s requirement that a lawyer ‘shall abide by a client’s decision . . . ’ [is] a requirement to communicate all settlement offers to the client.”); Carranza v. Fraas, 763 F. Supp. 2d 113, 125-26 (D.D.C. 2011) (applying D.C. Rule adopting Model Rule 1.2 verbatim; “Withholding . . . information [regarding settlement offers] precludes a client's ability to participate . . . in decisions that go to the core of the attorney-client relationship.”).

\textsuperscript{253} Unless the client gives informed consent, “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest . . . [which] exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another.” \textit{Model Rule of Prof’l. Conduct} 1.7(a)-(b).

\textsuperscript{254} \textit{See, e.g.}, F.D.I.C. v. U.S. Fire Ins. Co., 50 F.3d 1304, 1314 (5th Cir. 1995) (affirming disqualification of lawyer for conflict of interest under Model Rule 1.7).

\textsuperscript{255} “A lawyer shall provide competent representation . . . [and] the legal knowledge, skill, thoroughness and preparation reasonably necessary.” \textit{Model Rule of Prof’l. Conduct} 1.1.

Factors include the relative complexity and specialized nature of the matter, . . . training and experience in the field[,] . . . preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

With collective action motions not as presumptively posing agency problems as Rule 23 class actions, courts need not impose a “collective action certification” motion as a prophylactic measure. Rather, they could police ethics problems on motions filed by defendants or sua sponte court orders.

As a limited prophylactic measure, however, courts should require plaintiffs’ counsel to provide opt-ins notice and opportunity to participate in major case events, under the ethics rules requiring counsel to “keep the client reasonably informed” and “reasonably consult with the client” on significant tactics. The “reasonably” qualifier leaves to attorney and court judgment what measures are practical, which will depend on both the number of plaintiffs and the substantiality of the particular decision in question.

If courts apply the ethics rules requiring plaintiffs’ counsel to consult with clients and keep them reasonably informed, that would suffice to assure adequate representation – as much as it can be assured in any case. A fuller Rule 23(a)(4) inquiry into plaintiffs’ counsel is not justified by the agency and asymmetric information problems that justify it for Rule 23 class actions. Without such express authority as Rule 23(a)(4) provides for class actions, courts cannot claim a power over choice of counsel because of the principle that “a party’s right to representation by the attorney of its choice . . . is a valued right and any restrictions must be carefully scrutinized.

C. Ramifications of the Prescription: Fewer Costly Motions and Improper Denials; Minimal Risk of Excessive Collective Actions

Is there much difference between maintaining the current § 216(b) certification practice and, instead, presumptively allowing collective actions while permitting defendants the option to challenge collective status? The difference is in the details, but it is quite substantial.

First, there is a significant difference between a motion about one common issue – the joinder standard that this Article argued should apply – and the seven-part Rule 23 certification motion. Especially after Wal-Mart Stores, the once-modest Rule 23(a) commonality requirement is strict, demanding that “claims must depend upon a common contention,” defined as not just any common issue, but an issue so fundamental that “determination of its truth or falsity will resolve an issue that is central to the validity of each . . . claim[] in one stroke.

256 MODEL RULE OF PROF’L CONDUCT 1.4(a)(2)-(4) & cmts. 1-2, supra note 149.
257 For example: with 100,000 plaintiffs, notification of every motion is impractical unless as easy as an email or website upload of a filing; but with twenty plaintiffs, ethical representation would entail as full a range of attorney-client communications as in a single-plaintiff case.
258 S&S Hotel Ventures Ltd. P’ship v. 777 S.H. Corp., 69 N.Y.2d 437, 443, 508 N.E.2d 647, 650, 515 N.Y.S.2d 735, 738 (1987) (“Disqualification denies a party’s right to representation by the attorney of its choice…. [I]t is a valued right and any restrictions must be carefully scrutinized.”).
259 131 S. Ct. 2541, 2551 (June 20, 2011).
Virtually all collective actions courts reject because of differing job duties or supervisors\textsuperscript{260} amply meet the proper joinder standard, so long as plaintiffs share a single common issue of law or fact. Any claims that the same employer violated the same statutory provision (e.g., the overtime pay requirement) would meet the joinder requirement, absent extenuating circumstances like identical statutory claims relying on entirely different fact evidence and legal doctrines.\textsuperscript{261}

Second, if the applicable standard is the simple joinder requirement of one common issue, some defendants would choose not to make a motion against collective action status. Where a motion would be futile, some lawyers might be ignorant or unethical enough to file one anyway, but experience with dispositive motions shows defendants may decline to make even high-stakes motions when doing so would be futile. Despite the increased prevalence and success of dispositive motions in recent decades, as the Supreme Court broadened the grounds for both Rule 12 dismissal and Rule 56 summary judgment,\textsuperscript{263} defendants sometimes decline to make Rule 12 or 56 motions.\textsuperscript{264} Not all, but many, wage cases are ideal for aggregate treatment because of the obvious, substantial similarity of the claims;\textsuperscript{265} in such cases, defense motions challenging collective action status would be unsuccessful under this Article’s proposal.

Third, even if there is a defense motion, it likely would be one motion rather than two as under existing practice – a halving of motion costs and motion-

\textsuperscript{260} See supra notes 65-74 and accompanying text.

\textsuperscript{261} See supra notes 164-167 and accompanying text.

\textsuperscript{262} “[The] Supreme Court revolutionized the law on pleading” starting in 2007, “add[ing] a requirement for claimants that goes above and beyond having to give notice[,] . . . [a] requirement that at the pleading stage the plaintiff has the burden of establishing . . . plausibility as to liability.” Kevin M. Clermont & Stephen C. Yeazell, Inventing Tests, Destabilizing Systems, 95 IOWA L. REV. 821, 830 (2010) (citing Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2009)).

\textsuperscript{263} “[D]ocket pressures on the federal judiciary have prompted dramatic revisions in federal procedure,” including a 1986 “trilogy of cases . . . significantly expand[ing] the applicability of summary judgment under Rule 56.” Samuel Issacharoff & George Loewenstein, Second Thoughts about Summary Judgment, 100 YALE L.J. 73, 74 (1990) (collecting cases).

\textsuperscript{264} There are of course no citations to judicial decisions on summary judgment motions never filed, but the docket reports in various cases show an absence of a summary judgment motion. See, e.g., Clark v. Ecolab, Inc., No. 07-8623 (S.D.N.Y.) (docket reflecting no dispositive motions, with final approval of settlement 5/19/2010) (on file with authors); Hens v. ClientLogic Operating Corp., No. 05-00381 (W.D.N.Y.) (docket reflecting no dispositive motions, with final approval of settlement 12/21/2010) (on file with authors); Mohney v. Shelly’s Prime Steak, Stone Crab & Oyster Bar, No. 06-4270 (S.D.N.Y.) (docket reflecting no dispositive motions, with final approval of settlement 12/08/2009) (on file with authors).

\textsuperscript{265} See, e.g., Shain v. Armour & Co., 40 F. Supp. 488, 490 (W.D. Ky. 1941) (“The evident purpose of the [FLSA] is to provide one law suit . . . [for] claims of different employees, different in amount but all arising out of the same character of employment, . . . regardless of the fact that they are separate and independent.”).
imposed delay. To be sure, some defendants could try to file one motion early (e.g., on the complaint) and one later (e.g., on evidence adduced in discovery) – but not always, and even so, such motions would likely merge with dismissal or summary judgment motions the defendant already was filing.

Fourth, federal courts try to weed out hopeless motions in advance, such as by requiring short pre-motion letters, typically no longer than three pages, before the filing of certain types of motions. Were this Article’s proposal adopted, defense decertification motions likely would be the sort courts would want summarized in pre-motion letters. Many courts’ rules requiring pre-motion letters for Rule 12 dismissal and Rule 56 summary judgment motions already would cover decertification motions filed under those rules.

Finally, as a policy matter, this is an area where false negatives are more worrisome than false positives. False negatives – improper rejections of collective actions – are a major problem because, as detailed above, disallowing a collective action is a death knell for the vindication of important statutory rights. In contrast, false positives – allowing collective actions when doing so is too costly or unfair to defendants – is less of a concern. Most collective actions are wage claims, which, even if borderline as to commonality, are simple enough to litigate together; for example, where four different job categories each saw different wage violations, that just requires evidence of the four fact patterns, not a full individual trial for each member.

Age or equal pay claims more often may lack sufficient commonality than wage claims, but many age collective actions do focus on a single common retirement or reduction-in-force decision applicable to all plaintiffs, as some of the leading ADEA collective actions illustrate. Ultimately, where claims vary

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266 As detailed earlier, avoiding delay is particularly important for workers whose claims diminish under the statute of limitations until they opt in, especially low-wage workers with great need for all wages they earn. See supra Part II(B)(3).

267 E.g., E.D.N.Y. Loc. Civ. R. 37.3 (requiring that before any discovery motion, party must file “letter not exceeding three pages in length outlining the nature of the dispute and attaching relevant materials,” which may yield a “Decision of the Court” before any formal motion).


269 See supra Part II(B).

270 See Hoffman-La Roche v. Sperling, 493 U.S. 165, 167 (1989) (ADEA § 216(b) claim of discrimination in a single “reduction in work force [that] discharged or demoted some 1,200”); Thiessen v. Gen’l Elec. Capital Corp., 267 F.3d 1095 (10th Cir. 2001) (ADEA § 216(b) claim that new management said older workers were “‘blocking’ advancement of younger, newly recruited employees” and asked in writing for a plan to “‘remove blockers,’” so human resources “prepare[d] severance worksheets” and terminated older employees).
too much for collective adjudication, whether FLSA, ADEA, or ERA claims, defendants should prevail on their misjoinder or dismissal motions. This Article’s proposal still lets courts reject collective actions for too-varied claims—so long as courts do so on properly filed defense motions, rather than by imposing on plaintiffs the current improper requirements of evidentiary motions and heightened commonality standards.

IV. WHY COURTS MAKE THESE ERRORS: INNOCENT AND LESS INNOCENT EXPLANATIONS

When courts err, why do they err? Two possible explanations exist for courts’ misinterpretations of § 216(b), one relatively innocent the other less so. While some may credit one over the other, likely each carries some truth.

A. Path Dependence: In a Complex, Once-Obscure Field, Relying on Precedent That Proves Misguided

As detailed above, there is a curious history to the now-prevailing idea that § 216(b) collective actions require a certification motion by plaintiffs and a two-stage judicial inquiry. In 1995, the Fifth Circuit in Mooney v. Aramco Services Co. detailed the two-stage certification process, but based on weak precedent and without actually endorsing it. Tenth and Eleventh Circuit decisions then purported to follow Mooney in endorsing that process; and district courts nationwide cite those three circuit decisions in applying that process.

The stare decisis doctrine of adhering to precedent “provides both continuity and predictability,” but comes with a downside on vivid display in the § 216(b) caselaw. Basing decisions on precedent, rather than de novo analysis, can lock in past error by making law “path-dependent.” Each “precedent influences subsequent legal decisions [that] . . . ‘when decided, . . . become, in turn, a part of the legal framework.’” With decisions basing on precedent, “the evolution of the doctrine will depend, to a large extent, upon the order in which cases are

271 54 F.3d 1207 (5th Cir. 1995).
273 On how stare decisis yields path-dependence and lock-in, see, e.g., Robert Scharff & Francesco Parisi, The Role of Status Quo Bias and Bayesian Learning in the Creation of New Legal Rights, 3 J.L. ECON. & POL’Y 25, 37 (2006) (noting that while “stare decisis is not rigidly adhered to, . . . [w]here stare decisis is the rule, path dependence is the inevitable result”); Daria Roithmayr, Barriers to Entry: A Market Lock-In Model of Discrimination, 86 VA. L. REV. 727, 742 (2000) (“even small historical events, particularly those that occur early . . . can have unexpectedly long-lasting effects . . . [and] produce a path far different from the one taken in the absence”).
presented or, in the language of social choice, will be ‘path dependent.’”

Thus when early caselaw gets something wrong, the status of that erroneous decision as precedent can perpetuate its holding in future caselaw. A party certainly can argue against, or a judge can reject, a bad precedent, but the doctrine of stare decisis places a thumb on the scale in favor of a precedent-supported argument over a new argument. In sum, the tendency of path dependence to lock in the sub-optimal is an information market failure: what prevails is not the best idea among a marketplace of freely competing ideas, but the idea enjoying a privileged status because of its early adoption.

Further, collective action procedure since the mid-1990s is a prime area in which judges would be strongly disposed to place a thumb on the scale in favor of following precedent. Even if courts have over-interpreted Hoffman-La Roche “notice” as supporting complex certification processes, that case certainly changed matters, forcing courts to innovate. That need to innovate arose in a field where courts had little experience because § 216(b) was a unique process, varying the joinder and class action rules judges applied far more frequently. A rarely-faced issue imposes high information costs, making reliance on path-dependent shortcuts, like following precedent, entirely rational, but it can lead to missteps like relying on weak precedents such as Mooney.

Furthering judges’ path-dependent reliance upon precedent is that judicial decision-making is short on big-picture theory. Some judges blast academics for being disengaged, focusing on big-picture theory, and neglecting the nuts and bolts of how law really works. Merits of this criticism aside, judges certainly can err the other way, not spending time contemplating the big picture because of their docket pressures and case-specific focus. Judges’ understandable

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275 See Charles Yablon, Judicial Drag: An Essay on Wigs, Robes and Legal Change, 1995 Wis. L. Rev. 1129, 1149 (noting that path-dependence can arise when “seemingly rational actors [can] adopt arguably suboptimal behaviors which they continue to follow because moving to a better system would involve unacceptable expense in terms of transition costs, information costs, and/or risk”); Scharff & Parisi, supra note 273, at 28 (“[W]hen an individual is faced with a new situation (such as . . . a new legal right), . . . [t]he rational desire to avoid these adjustment costs can result in an exaggerated preference for the status quo.”).


277 See, e.g., Pierre Schlag, Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art), 97 Geo. L. J. 803, 816 (2009) (noting that judges are “may be interested in ‘truth’ or ‘edification’ . . . but not as an end itself . . . only to the extent that these serve the end of reaching a decision, a holding, an order and decree” because their focus must be “the resolution of disputes, the rendition of decisions, . . . and the clearing of dockets”).

Or as Judge Constance Baker Motley told one of us (Moss) when, as a law clerk, he handed her unreasonably long draft judicial opinion (roughly 15,000 words) that took far too long to write: “We decide cases here; we don’t write law review articles.”
aversion to big-picture theory may explain how they follow readily available, on-point precedent like Mooney, rather than critically analyze how varied aggregate litigation types relate and differ – such as how one type (collective actions) presents less principal-agent difficulty than another (class actions).

But path dependence may not be a complete explanation of how early § 216(b) precedents established a locked-in bad practice. Stare decisis is just a thumb on the scale in favor of the argument precedent supports, but precedents erode when judges are sufficiently convinced. That is why “stare decisis is a tendency rather than a rule[,] if it were a rule, one would get strict path dependence, which no one wants.”279 So the question is why erroneous § 216(b) precedents are the sort that remain followed; it could be just unfortunate coincidence, or the following additional explanation may provide the answer.

B. Hostility to Litigation As a Tool of Dispute Resolution and Social Reform

As Andrew Siegel argues in constitutional law, the organizing theme of the modern Supreme Court is not federalism, originalism, textualism, or judicial restraint, but hostility to litigation as a tool of dispute resolution and social reform.280 A generally pro-states’ rights Court aggressively reins in state litigation by broadly preempting state law with federal law;281 originalist and textualist Justices reject those methods when ahistorical, atextual Eleventh Amendment interpretations eliminate a range of employment lawsuits.282

One of us has argued similarly that hostility to litigation explains certain statutory and rule, rather than constitutional, interpretation.283 In discretionary interpretations of matters not detailed in statutory text, such as how to apply vicarious liability or limitations periods, the Court makes pro-defense rulings premised on inconsistent policy arguments, requiring plaintiffs to delay suit in some cases (on penalty of dismissal for failing to use internal dispute

280 Andrew M. Siegel, The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence, 84 TEX. L. REV. 1097 (2006).
281 “One might expect a Court committed to protecting state autonomy and limiting federal regulatory authority” to believe “state laws should not easily be overridden by federal” – but the modern Court “has consistently rejected” that approach, “overwhelmingly sid[ing] with . . . invalidation of state regulation.” Id. at 1166-67. In opinions joined by Justices “who have in other contexts been the champions of state autonomy,” the modern Court is “finding preemption in over two-thirds of the cases . . . [and] even more likely to find preemption” where “federal law expressly or impliedly preempts state common law” litigation. Id.
282 See Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000) (holding that though Eleventh Amendment text bars only citizens’ suits against other states, it also bars citizens from suing their own states, because the Court has “‘understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . it confirms’”) (citation omitted).
resolution\textsuperscript{284}, but requiring immediate lawsuits in others (on penalty of dismissal under strictly construed limitations periods\textsuperscript{285}). Further evidencing hostility to litigation are decisions disallowing consumer\textsuperscript{286} or employee\textsuperscript{287} suits against companies that inserted mandatory arbitration clauses in preprinted materials, and the Wal-Mart Stores decision that, “[b]y critically examining and rejecting the employees' statistical, anecdotal, and social science evidence, . . . raised the bar for [commonality] evidence.”\textsuperscript{288}

Federal district and appellate courts are all the more hostile to litigation; the Supreme Court issued several unanimous rulings for employment plaintiffs in the 2000s\textsuperscript{289} not because it is so pro-plaintiff, but to reverse adventurously pro-defense circuits. For example, Desert Palace v. Costa reversed as “inconsistent with the text” cases imposing a “heightened showing” of “direct” rather than circumstantial evidence for certain claims.\textsuperscript{290} In Ash v. Tyson Foods, the Court had to inform the Eleventh Circuit that even if the term “boy” could be nondiscriminatory, “it [is] not . . . always benign” given “local custom, historical usage,” and “context”: a white Alabama poultry plant supervisor calling “boy” the same African-Americans he rejected for jobs.\textsuperscript{291}

In sum, courts’ hostility to litigation, shown by their pattern of pretrial dismissals, may be the most powerful explanation for the problem this Article diagnoses: judges’ improper self-empowerment to dismiss collective actions by requiring a high-threshold evidentiary motion unauthorized by statute, rule, historical practice, or agency theory.

\textsuperscript{286} AT&T v. Concepcion, 131 S. Ct. 1740 (2011) (rejecting applicability of state-law unconscionability defense to arbitration provision).
\textsuperscript{287} 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009) (holding that arbitration could bar federal lawsuit on statutory rights).
\textsuperscript{288} Cathleen Yonahara, Landmark Supreme Court Ruling Blocks Class-Action Discrimination Suit, 21 CAL. EMP. L. LETTER 1, 1 (July 11, 2011).
\textsuperscript{290} Desert Palace, Inc., 539 U.S. at 98 (quoting 42 U.S.C. § 2000e-2(m)).
\textsuperscript{291} Ash, 546 U.S. at 456 (emphasis added).
CONCLUSION

This Article has attempted to explain how and why courts’ handling of § 216(b) collective actions has been fundamentally incorrect, from various perspectives. As a matter of textual interpretation, courts are unauthorized to impose in § 216(b) cases the sort of certification motion requirement and strict commonality inquiry that only Rule 23 requires. As a matter of economic theory, § 216(b) cases do not feature the asymmetric information and principal-agent problems that justify the Rule 23 provisions empowering judges as gatekeepers of the filing, representation, and counsel decisions parties ordinarily make themselves. As a policy matter, the certification motion and strict commonality requirements prevent vindication of important statutory rights regularly violated but rarely litigated individually. And as a matter of pragmatism, the labyrinthine two-stage procedure is no necessary evil, given this Article’s offer of a feasible alternative. From all these perspectives, the caselaw is equally wrong, regardless of whether it arose from innocent path-dependent lock-in of erroneous precedent or whether it arose from judicial hostility to individual rights litigation. Either way, § 216(b) collective actions have risen from a once-obscure field to a major area of high-impact litigation, making courts’ mishandling of them a troubling error warranting correction.