Opt-in Class Actions Under the FLSA, EPA, and ADEA: What Does it Mean to be “Similarly Situated”?

“The language of section [216(b) of the Fair Labor Standards Act] clearly contemplates something in the nature of a class suit. When Congress stated that action may be brought for “employees similarly situated,” it employed the very words which give rise to an ordinary class suit when they are contained in the plaintiff’s pleadings. Hence it is inevitable that the question should arise whether such employee group actions were intended to be governed by the standing rules of class actions, or whether something different was intended.”

I. INTRODUCTION

In both modern and historical times, class action lawsuits have required plaintiffs to share a common interest when they proceed collectively in an action. When Rule 23 of the Federal Rules of Civil Procedure (Rule 23) went into effect in 1938, it reflected the common-interest requirement by requiring class action plaintiffs to share a common question of law or fact. That same year, when Congress enacted the Fair Labor Standards Act (FLSA), it drafted the common-interest requirement into § 216(b) of the statute, which allows employees to bring suit either individually or on behalf of others who are

2. DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 10-11 (2000) (tracing historical background of class action lawsuits). The class action device originated in England, and early American courts adopted class procedures in the form of Federal Equity Rules. Id. Under Equity Rule 38, courts allowed actions to proceed as class actions when numerous plaintiffs shared questions of “common or general interest” to the group. Id at 11.
3. See infra Part II.B (discussing 1938 version of Rule 23). The original version of Rule 23 provided, in relevant part:

(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, each of them, or more, as will fairly assure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced or against the class 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.

“similarly situated.” Yet it remains unclear whether Congress intended § 216(b) to serve as a separate procedural device, or whether Congress simply intended to reflect the common-interest requirement of a class action lawsuit.

The need for clarification of this issue took on greater significance in 1966, when the Supreme Court’s Advisory Committee revised Rule 23 to resemble its modern form. Prior to the revision, class action plaintiffs were not bound by a judgment unless they affirmatively opted into the suit. Like the pre-1966 version of Rule 23, § 216(b) also requires plaintiffs to opt in. When the Advisory Committee revised Rule 23, however, it replaced the “opt-in” requirement with Rule 23(b)(3), which provides that absent parties are automatically included in the suit unless they affirmatively opt out. As a result, Rule 23’s opt-out provision was directly at odds with the FLSA’s opt-in requirement. This distinction is central to the debate of whether courts should apply Rule 23’s certification requirements to collective actions under § 216(b).

Congress further complicated this issue when it enacted the Equal Pay Act of 1963 (EPA) and the Age Discrimination in Employment Act of 1967.

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4. Fair Labor Standards Act of 1938, ch. 676, §16(b), 52 Stat. 1060, 1069 (current version at 29 U.S.C. § 216(b) (2000)). The 1938 version of § 216(b) provided, in relevant part, that an “[a]ction to recover . . . may be maintained . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.” Id. (emphasis added).

5. Thiessen v. G.E. Capital Corp., 267 F.3d 1095, 1102-03 (10th Cir. 2001) (observing § 216(b) fails to define ‘similarly situated’); Michael W. Hawkins, Current Trends in Class Action Employment Litigation, 19 LAB. LAW. 33, 47 (2003) (noting § 216(b)’s failure to address whether Rule 23 certification standards apply to § 216(b) actions). The proper certification standards for “similarly situated” class actions continue to be a source of disagreement among the federal courts. Hawkins, supra, at 47; see infra Part V.A (arguing Congress intended § 216(b) to operate in conjunction with Rule 23).


8. 29 U.S.C. § 216(b) (2000) (requiring plaintiffs’ written consent to join collective action). The current version of § 216(b) provides in relevant part that “[n]o employee shall be a party plaintiff to [a § 216(b)] action unless he gives his consent in writing to become such a party.” Id.; infra Part II.C (discussing Portal-to-Portal Act and opt-in requirement of FLSA).

9. FED. R. CIV. P. 23(c)(2) (1966) (allowing putative plaintiffs in Rule 23(b)(3) class action to request exclusion).

10. LaChapelle v. Owens-Ill. Inc., 513 F.2d 286, 288 (5th Cir. 1975) (characterizing conflict between § 216(b) and Rule 23 as “fundamental, irreconcilable difference”); see also Bowermaster, supra note 6, at 7-9 (noting conflict between opt-in and opt-out provisions).

11. Infra Part IV.D (outlining courts’ varied approaches to certifying § 216(b) actions).

OPT-IN CLASS ACTIONS UNDER THE FLSA, EPA, AND ADEA

These anti-discrimination laws both allow for private enforcement through the procedural framework of § 216(b), and much of the case law on this issue has developed through ADEA actions. In *Hoffmann-La Roche v. Sperling*, the Supreme Court considered whether district courts have authority to facilitate notice to putative class members in an ADEA action, but left the issue of whether courts may apply Rule 23 to § 216(b) actions undecided.

Recently, there has been an increase in the number of employment class actions. Whether these actions proceed under Rule 23 or § 216(b) depends upon which statute the claim arises under. Discrimination claims under Title VII are governed by Rule 23, whereas claims under the FLSA, the ADEA, and the EPA—often referred to as “collective actions”—are governed by § 216(b).

These different procedural rules often lead to anomalous results. For example, plaintiffs in an age discrimination class action must affirmatively opt in, but plaintiffs in a race discrimination class action are automatically included unless they affirmatively opt out. Furthermore, when plaintiffs assert both

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13. *Id.* §§ 621-34 (prohibiting employment discrimination based on age).
17. *Id.* at 170 (holding district courts may exercise discretion in sending notice to putative plaintiffs in § 216(b) action); 8 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 24:3, at 62-63 (4th ed. 2002) (summarizing *Hoffman-La Roche* and noting court-facilitated notice permissible in § 216(b) actions); *infra* Part IV.C (discussing Supreme Court decision in *Hoffman-La Roche*).
21. *See infra* Parts III, IV (outlining class action procedures for claims under Title VII, FLSA, ADEA, and EPA).
22. *See* Bowermaster, *supra* note 6, at 7-9 (discussing procedural dichotomy between opt-in and opt-out class actions). A person alleging class claims based on race and age is required to opt in for one class and opt out for the other, thus creating a “procedural morass.” *Id.* at 8.
23. *Compare* 29 U.S.C. § 216(b) (2000) (requiring plaintiffs to opt in), *with* Fed. R. Civ. P. 23(c) (allowing class members to opt out). When plaintiffs in a Title VII class action seek injunctive relief, and monetary damages are incidental, the class proceeds under Rule 23(b)(2) and putative plaintiffs are not given an opportunity to opt out. 5 MOORE ET AL., *supra* note 3, § 23.43. When money damages predominate over the plaintiffs’ request for injunctive relief, however, the action is governed by Rule 23(b)(3), and the court will require that putative plaintiffs receive notice informing them of their right to opt out before being bound by the
federal and state claims in the same action, they may be required to opt in for one claim and opt out for the other, even though both claims arise from the same set of facts.24 Results such as these raise the question of whether Congress intended to segregate § 216(b) collective actions from Rule 23 procedures.25

While the distinction between Rule 23 and § 216(b) may seem largely procedural, their differences may have substantive effects.26 When courts apply less stringent certification standards under § 216(b), employers may be burdened with the expense of needless discovery and are more likely to be faced with so-called “blackmail” suits.27 These different procedural rules also affect the substantive rights of employees because the affirmative step of opting into a class action often serves a disincentive for plaintiffs to join.28 Therefore, employers with illegal employment practices may escape liability based on the fear, ignorance, or ambivalence of their employees, thereby undermining the remedial goals of the FLSA, ADEA, and EPA.29

In tracing the historical background of § 216(b) and Rule 23, this Note will explain the differences and similarities between the two.30 The principal theme of this Note is that the differences between Rule 23 and § 216(b) resulted largely by mistake.31 Nevertheless, we are left with two distinct class action procedures and this Note will argue that courts should apply Rule 23’s judgment. Id. § 23.45.


25. See Bowermaster, supra note 6, at 10, 42 (suggesting FLSA’s opt-in procedure retained unintentionally); David L. Biek, Note, The Scourge of Age Discrimination in the Workplace: Fighting Back with a Liberalized Class Action Vehicle and Notice Provision, 37 CASE W. RES. L. REV. 103, 114 (1986) (describing procedural differences between Rule 23 and § 216(b) as accidental); infra Part V (suggesting procedural differences between Rule 23 and § 216(b) resulted by mistake).


27. See Hawkins, supra note 5, at 45-46 (noting certification often leads to settlement regardless of defendant’s wrongdoing).

28. See HENSLER ET AL., supra note 2, at 476-77 (highlighting arguments for and against opt-in class actions).

29. See HENSLER ET AL., supra note 2, at 476-77 (observing opt-in class actions likely to result in lower participation rates). Individuals are less likely to join a lawsuit when doing so requires their active assent, even though the potential plaintiffs may otherwise agree with the basis for the suit. Id. at 476. In particular, the opt-in process has potential to disproportionately affect low-income and minority individuals. Id. Lower participation rates, in turn, serve as a disincentive for class counsel. Id. at 477.

30. Infra Part II (outlining history of § 216(b) and Rule 23); infra Parts III, IV (comparing and contrasting Rule 23 actions with § 216(b) actions).

31. Infra Part V.A (concluding differences between § 216(b) and Rule 23 resulted unintentionally).
requirements to determine whether plaintiffs are “similarly situated” for the purposes of § 216(b) actions. 32 Finally, this Note will suggest that legislative reform is necessary to once again harmonize § 216(b) with Rule 23. 33

II. THE FAIR LABOR STANDARDS ACT AND RULE 23

A. The 1938 Version of § 216(b)

Congress enacted the FLSA in 1938 to eliminate substandard working conditions by regulating wages and hours. 34 Since its inception, the FLSA has depended largely on private judicial enforcement to achieve its goals. 35 In its original form, § 216(b) of the FLSA provided for three types of private action. 36 Employees could bring suit in federal or state court (1) individually, (2) on their own behalf and on behalf of other employees similarly situated, or (3) by designating an outside agent or representative to sue on behalf of all similarly situated employees. 37 Although the original version of § 216(b) did not expressly require absent parties to opt into collective actions, early judicial interpretations held employees were not bound by a judgment unless they consented to joining. 38 The procedural practices of Rule 23 were largely responsible for influencing this requirement. 39

32. Infra Part V.B (arguing courts should apply Rule 23 when certifying § 216(b) actions).
33. Infra Part V.C (suggesting legislative reform to resolve procedural difficulties surrounding § 216(b)’s opt-in requirement).
35. See Rahl, supra note 1, at 119-20 (explaining importance of private civil suits in enforcing FLSA); see also Foster, supra note 34, at 296-97 (distinguishing public enforcement from private enforcement). As an alternative to private civil action, the FLSA also provides for public enforcement through the Department of Labor. Foster, supra note 34, at 296.
36. Fair Labor Standards Act of 1938, § 16(b), 52 Stat. 1060, 1069 (codified as amended at 29 U.S.C. § 216(b) (2000)) (allowing private civil enforcement for wage and hour violations). The original version of § 216(b) provided that an action could be:
   maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.
Id.
37. Id.
38. See Pentland v. Dravo Corp., 152 F.2d 851, 853-56 (3d Cir. 1945) (surveying cases addressing binding effect of judgment on absent class members in FLSA class actions). The Pentland court noted that while courts have varied in their approaches, a majority have held that absent class members are not bound unless they opt into the suit. Id. at 853-55.
39. Foster, supra note 34, at 325-26 (discussing influence of Rule 23 on FLSA class actions). Foster observes that the Federal Rules of Civil Procedure “unquestionably exerted major influence on the
B. The 1938 Version of Rule 23

The Federal Rules of Civil Procedure became effective in October of 1938, five weeks before the effective date of the FLSA’s wage and hour provisions. In its original form, Rule 23 provided for “true,” “hybrid,” and “spurious” class actions. In a true class action, the joinder of numerous parties was necessary because the parties shared a joint, common, or secondary right in the subject matter of the suit. This category did not apply to FLSA actions because § 216(b) allows employees to sue individually; it was never an absolute necessity for parties to join. The hybrid class action applied when numerous persons had a mutual right in specific property, and it too was generally inapplicable to FLSA actions. Finally, the spurious class action applied when numerous persons shared a common question of law or fact and sought common relief. When courts applied Rule 23 to FLSA suits, they proceeded as spurious class actions.

Unlike true or hybrid class actions, spurious class actions had no res judicata effect on absent parties, and therefore parties were not bound by a judgment unless they opted into the suit. This led commentators to analogize spurious class actions to a mere joinder device, however, unlike the rules of joinder, spurious class actions did not require each individual plaintiff to file a pleading or appear before the court. Nevertheless, courts agreed that plaintiffs in a development of representative actions” under the FLSA. Id.; see Spahn, supra note 7, at 128 (discussing original version of Rule 23). While the original version of Rule 23 did not expressly require absent class members to opt in, courts adopted the procedure based largely upon the influential writings of Professor Moore. Spahn, supra note 7, at 128. Spahn explains that the drafters of the Federal Rules omitted Moore’s opt-in proposal because they were concerned its effect was substantive, and therefore beyond their authority. Id.

40. Foster, supra note 34, at 325 (discussing historical proximity of Federal Rules of Civil Procedure and FLSA).

41. See 5 MOORE ET AL., supra note 3, § 23App.01[1] (reprinting original text of Rule 23); see also Rahl, supra note 1, at 124-25 (outlining three categories of class actions permitted by 1938 version of Rule 23).

42. Rahl, supra note 1, at 125 (explaining “true” class actions). An example of a true class is an action involving representatives of an unincorporated association. Id. at 125 n.31.

43. 29 U.S.C. § 216(b) (2000) (allowing employees to bring actions on their own behalf).

44. Rahl, supra note 1, at 125 (explaining “hybrid” class actions). For example, if multiple creditors in a corporate bankruptcy proceeding shared rights to specific property, such as proceeds, the action could be maintained as a hybrid class action. Id. at n.32.

45. Rahl, supra note 1, at 125 (explaining “spurious” class actions). Examples of a spurious class action include an action by a large number of taxpayers or a suit by multiple retailers to enforce a statute. Id. at n.33.


47. See 5 MOORE ET AL., supra note 3, § 23App.02[1] (noting judgments in spurious class actions only extended to intervening parties); see also supra note 46 (citing FLSA cases where absent parties in spurious class actions not bound by judgment).

48. See 5 MOORE ET AL., supra note 3, § 23App.01[1] (reprinting 1938 version of Rule 23). When a class is too numerous for all parties to appear before the court as joinder, Rule 23 permits class members appearing before the court to represent the interests of other parties. Id. § 23App.02[1]; see also Spahn, supra note 7, at
spurious suit were required to opt in, and regardless of whether courts expressly applied Rule 23, they consistently applied its opt-in requirement to collective actions under the FLSA. Congress eventually drafted this practice into the statute when it amended the FLSA in 1947.

C. Amendments to § 216(b): The Portal-to-Portal Act of 1947

Congress enacted the Portal-to-Portal Act of 1947 in response to a series of Supreme Court decisions holding the FLSA requires employers to compensate employees for time spent traveling to and from their workstations. Congress was concerned that expanded liability under the FLSA would have a deleterious effect on the economy. The Portal-to-Portal Act amended the FLSA’s class provisions in two respects, both of which were consistent with Rule 23. First, it eliminated the provision allowing for outside agents to sue on behalf of similarly situated employees. This particular form of class action was contrary to Rule 23’s requirement that representatives of the class actually belong to the class. Second, it required employees to opt in by filing a written...

132-33 (distinguishing spurious class actions from joinder). Spahn suggests the misconception that spurious class actions are simply a joinder device is largely attributable to comments by Professor Moore which were misapprehended and taken out of context. Spahn, supra note 7, at 132. Professor Moore likened spurious class actions to joinder, but only as a means of distinguishing them from true class actions. Id. See supra notes 38-39 and accompanying text (discussing consistent application of opt-in requirement to FLSA class actions).


52. See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 691-92 (1946) (holding time spent by employees between clocking in and arriving at workstation compensable under FLSA); Jewel Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am., 325 U.S. 161, 166 (1945) (holding coal miners owed compensation for time spent traveling within mine shafts); Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 603 (1944) (holding FLSA requires employers to compensate miners for time traveling to and from work station); see also Bowermaster, supra note 6, at 30-32 (discussing history of Portal-to-Portal Act). The term “portal” refers to a mine’s entrance; expanded employer liability in the context of mining cases led to the term “portal-to-portal.” Bowermaster, supra note 6, at 31.

53. 29 U.S.C. § 251(a) (2000) (summarizing congressional findings and declaration of policy). “The Congress finds that the Fair Labor Standards Act . . . has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities . . . .” Id. The congressional findings further indicated concern that expanded liability under the FLSA would create serious financial problems for employers. Id. See Bowermaster, supra note 6, at 30-35 (arguing Congress amended FLSA’s class provisions to promote procedural uniformity, not to restrict employer liability). The substantive provisions of the Portal-to-Portal Act were intended to reign in the scope of employer liability to where it had been prior to expansive judicial interpretations. Id. at 32-33. Bowermaster argues that the opt-in provision and the two-year statute of limitations were simply procedural provisions designed to promote uniformity. Id. at 33-34; see also Spahn, supra note 7, at 129 (noting 1947 amendments to § 216(b) mimicked spurious class action procedures).


55. See 5 MOORE ET AL., supra note 3, § 23App.01 (reprinting 1938 version of Rule 23); see also Foster,
consent with the court.57

By eliminating the agency suit and requiring plaintiffs to opt in, Congress amended the FLSA in a manner that was consistent with the then-current version of Rule 23.58 Given the similarities between the spurious class action under Rule 23 and collective actions under § 216(b), there was little need for courts to distinguish between the two.59 When the Supreme Court’s Advisory Committee revised Rule 23 to its opt-out form, however, it no longer corresponded with the opt-in requirement of § 216(b).60

D. The 1966 Revision of Rule 23

In 1966, the Supreme Court’s Advisory Committee revised Rule 23 to resemble its modern form.61 In doing so, the Advisory Committee established certification guidelines designed to promote judicial economy and ensure due process for absent class members.62 Rule 23(a) sets forth four prerequisites to class certification: the class must be so numerous that joinder is impracticable (numerosity), questions of law or fact must be common to the class (commonality), the claims or defenses of the representative class members

supra note 34, at 323 n.100 (discussing representative actions). Under the Federal Equity Rules and the subsequent Federal Rules of Civil Procedure, courts have required that parties representing a class actually belong to the class. Foster, supra note 34, at 323 n.100.


58. Spahn, supra note 7, at 129-30 (explaining similarities between amended form of § 216(b) and spurious class procedures). Spahn notes that both § 216(b) and spurious class actions incorporate two distinct theoretical foundations for representational litigation. Id. at 129. The “congruence-of-interests” theory assures quality representation of absent parties by class representatives by requiring all parties to be similarly situated to each other. Id. at 125, 129. The “consent” theory also serves as a procedural safeguard because parties are not bound by a judgment unless they consent to joining the action. Id. In discussing the writings of Professor Yeazell, Spahn suggests the two theories are incompatible and that it is unnecessary for § 216(b) actions to require both consent and a congruence of interests. Id. at 130 n.60.

59. See Pentland v. Dravo Corp., 152 F.2d 851, 856 (3d Cir. 1945) (observing courts’ divergent approaches to FLSA collective actions nevertheless lead to similar results); cf. Burrell v. La Follette Coach Lines, 97 F. Supp. 279, 282-83 (E.D. Tenn. 1951) (distinguishing class actions from collective actions, but noting FLSA requires written consent for both).


62. See Fed. R. Civ. P. 23 advisory committee’s note, 39 F.R.D. 69, 97-107 (1966) [hereinafter Advisory Committee’s Note] (explaining rationale for revisions to Rule 23). The prior classifications of “true,” “hybrid,” and “spurious” class actions under the 1938 version of Rule 23 were problematic and often led to misclassification. Id. at 98-99. These classifications determined the res judicata effect of the action. Id. at 98. Judgments in true or hybrid class actions extended to the entire class, while judgments in spurious class actions only extended to parties that had consented to joining the action. Id. These “obscure” distinctions were abolished and the amended rule put forth measures to ensure procedural fairness. Id. at 99; see also Bayles v. Am. Med. Response of Colo., Inc., 950 F. Supp. 1053, 1064 (D. Colo. 1996) (noting Rule 23’s pre-1966 version “baffled” courts as to which category of class action applied); Charles Donelan, Prerequisites to a Class Action Under New Rule 23, 10 B.C. INDUS. & COM. L. REV. 527, 527-28, 532 (1969) (analyzing revised Rule 23 and noting it promotes efficiency and protects parties’ rights).
must be typical of the class as a whole (typicality), and the representative parties must adequately protect the interests of the entire class (adequacy). 63

Among these four prerequisites, numerosity and commonality seek to promote judicial efficiency. 64 When the number of persons constituting a class is so numerous that it would be impracticable for each individual to appear before the court, multiple suits can be avoided by designating class representatives. 65 This allows plaintiffs to pool their resources and protects defendants from both the risk of inconsistent judgments and the need to defend multiple suits. 66 Resources of the court are also preserved by avoiding multiple trials. 67 These efficiencies are defeated, however, if the parties’ claims and defenses depend upon differing questions of law or fact. 68

Rule 23(a)’s remaining prerequisites address due process concerns. 69 Rule 23(a) ensures a close congruence of interests between the named plaintiffs and

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63. Fed. R. Civ. P. 23(a) (setting forth prerequisites for class certification). These conditions are “necessary but not sufficient” for maintaining a class action. Advisory Committee’s Note, 39 F.R.D. 69, 100 (1966). Upon satisfying the threshold requirements of 23(a), the class must fall within one of the three categories provided for in Rule 23(b). Fed. R. Civ. P. 23(b).

64. See Advisory Committee’s Note, 39 F.R.D. 69, 102-03 (1966) (noting class actions “achieve economies of time, effort, and expense, and promote uniformity of decision”). The Advisory Committee further notes that judicial economy can only be achieved when common questions apply to the group as a whole. Id. at 103.

65. Fed. R. Civ. P. 23(a)(1) (requiring numerosity when joinder “impracticable”); see 5 Moore et al., supra note 3, § 23.22 (explaining courts consider several factors in determining whether plaintiffs satisfy numerosity requirement). The numerosity requirement of Rule 23 is not based on a set number. 5 Moore et al., supra note 3, § 23.22[2]. Rather, courts take into account the ability of individual plaintiffs to sue based on factors such as individuals’ financial resources and their geographical disbursement. Id. For example, if joinder is not feasible because plaintiffs cannot satisfy jurisdictional requirements, class treatment may be appropriate. Donelan, supra note 62, at 531. While the numerosity requirement is flexible, courts have determined that less than twenty-one litigants is generally not enough. 5 Moore et al., supra note 3, § 23.22[3][a]. But cf. Spahn, supra note 7, at 147 (suggesting class with only two litigants promotes judicial economy by avoiding separate trials).

66. Biek, supra note 25, at 117 (observing class procedures enable plaintiffs to pool resources). Biek suggests that society as a whole benefits when actions are decided on their merits, rather than on a lack of financial resources. Id.; Spahn, supra note 7, at 147 (noting class actions promote efficiency by avoiding risk of inconsistent judgments).

67. Biek, supra note 25, at 117 (explaining resolution of claims in single action reduces overcrowding of courts’ dockets).

68. Donelan, supra note 62, at 532 (observing judicial economy not promoted when class relies on different questions of law or fact). The language of Rule 23(a) indicates that plaintiffs must share common questions of law or fact, indicating that more than one common question is required. Fed. R. Civ. P. 23(a)(2). In practice, however, courts may certify an action if only one single question is common to the group. 5 Moore et al., supra note 3, § 23.23[2]. The presence of differing questions of law or fact among class members does not necessarily defeat the commonality requirement. Id. In defining the scope of a class, Rule 23(c)(4) gives courts the authority to create subclasses if necessary. Fed. R. Civ. P. 23(c)(4); 5 Moore et al., supra note 3, § 23.05[1] (explaining use of subclasses to adjudicate different issues among the class).

69. See Donelan, supra note 62, at 534-35 (noting typicality and adequacy of representation ensure protection of absent class members); see also Spahn, supra note 7, at 146 (analyzing Rule 23(a)). The typicality and adequacy-of-representation requirements of Rule 23(a) protect absent class members by ensuring that class representatives aggressively litigate claims belonging to the class as a whole. Spahn, supra note 7, at 146.
absent parties by requiring that the named plaintiffs’ claims be typical of the group as a whole, and that they adequately represent the class.70 These due process protections made it unnecessary for plaintiffs to opt in71 and, instead, Rule 23(c) allows putative class members to opt out if they choose not to be bound by a judgment.72

Once plaintiffs have satisfied the requirements of Rule 23(a), the action may proceed as a class action if it falls within one of the three categories identified in 23(b).73 When plaintiffs seek monetary relief, as is typically the case in § 216(b) actions, Rule 23(b)(3) requires that common questions of law or fact predominate over questions affecting individual class members.74 Like the requirements of Rule 23(a), the “predominance” requirement of 23(b)(3) promotes efficiency and protects parties’ rights by assuring the class device is “superior” to other methods of litigation.75

Following the revision of Rule 23, Rule 23(c)’s opt-out provision directly contradicted § 216(b)’s opt-in requirement.76 A potential conflict may have arisen as to whether Rule 23’s opt-out provision superseded the opt-in requirement,77 but the Advisory Committee’s Note expressly stated that the

70. Fed. R. Civ. P. 23(a) (requiring typicality and adequacy of representation); see Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) (recognizing judgment may bind absent class members when participating parties adequately represent their interests); Donelan, supra note 62, at 534-35 (emphasizing Rule 23’s typicality and adequacy requirements ensure class representative will protect interests of others); see also supra note 58 and accompanying text (discussing application of congruence-of-interests theory to Rule 23 and § 216(b) actions).


72. Fed. R. Civ. P. 23(c)(2) (requiring notice to absent parties for class actions under 23(b)(3)). The notice must inform plaintiffs that they can request exclusion from the action if they so choose. Id. Class actions maintained under 23(b)(1) and (b)(2), however, do not require an opt-out notice, and the class is defined by the court. Fed. R. Civ. P. 23(c)(3).

73. Fed. R. Civ. P. 23(b) (outlining categories of class actions); 5 Moore et al., supra note 3, § 23.40 (summarizing requirements of Rule 23(b)). The first two class action categories are set forth in subsections 23(b)(1) and (b)(2). Fed. R. Civ. P. 23(b). These categories apply when plaintiffs seek injunctive relief. 5 Moore et al., supra note 3, § 23.40. When plaintiffs seek monetary damages, however, the action usually proceeds under Rule 23(b)(3). Id.

74. Fed. R. Civ. P. 23(b)(3) (allowing class to proceed when action achieves economies of time, effort, and expense). Under a Rule 23(b)(3) action, courts require the class mechanism to be “superior” to other methods of adjudication. Advisory Committee’s Note, 39 F.R.D. 69, 101-03 (1966). These concerns are also balanced with concerns over procedural fairness. Id. at 103.

75. Advisory Committee’s Note, 39 F.R.D. 69, 101-02 (1966) (noting advantages and procedural concerns of Rule 23(b)(3)); see 5 Moore et al., supra note 3, § 23.44 (noting “superiority” of Rule 23(b)(3) requires weighing advantages and disadvantages of class proceeding).

76. See LaChapelle v. Owens-Ill., Inc., 513 F.2d 286, 289 (5th Cir. 1975) (describing Rule 23 and § 216(b) as “mutually exclusive and irreconcilable”); see also Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 862 (9th Cir. 1977) (same); Schmidt v. Fuller Brush Co., 527 F.2d 532, 536 (8th Cir. 1975) (same).

77. 1 James Wm. Moore et al., Moore’s Federal Practice § 1.06 (3d ed. 2003) (stressing Rules of Civil Procedure equivalent to statutes). “[W]hen a Rule of Practice and Procedure becomes effective, all laws in conflict with the rule no longer have any force or effect.” Id.
modifications to Rule 23 were not intended to affect § 216(b).78 So regardless of whether Congress had originally intended Rule 23 to apply to collective actions under § 216(b), it was clear that legislative reform would be needed for the two to once again be in harmony with each other.79


When Congress enacted the Equal Pay Act of 1963 (EPA)80 and the Age Discrimination in Employment Act of 1967 (ADEA),81 it further complicated the issue of whether Rule 23 should apply to collective actions under § 216(b).82 Both of these anti-discrimination laws allow for private enforcement through § 216(b) of the FLSA.83 The EPA presents fewer complications than claims under the ADEA because plaintiffs alleging gender-based discrimination are also protected by Title VII.84 Therefore, plaintiffs may choose to proceed under Title VII, which allows for opt-out class actions under Rule 23.85 Plaintiffs alleging age discrimination, however, may only proceed collectively under § 216(b).86 Unlike EPA plaintiffs, ADEA plaintiffs are not afforded the additional protection of Title VII, and much of the case law interpreting whether Rule 23 should apply to § 216(b) actions has developed through ADEA actions.87

78. Advisory Committee’s Note, 39 F.R.D. 69, 104 (1966) (noting parenthetically that amendments to Rule 23 not intended to affect § 216(b)). The Committee’s note provides no explanation for exempting § 216(b) from Rule 23’s effects. Spahn, supra note 7, at 131. The Advisory Committee likely believed that altering § 216(b)’s class procedures would have been beyond its authority. Id. These concerns are consistent with prior concerns which led to the omission of the res judicata portion from the 1938 version of Rule 23. Id. at 128. Fearing the proposed res judicata portion of the rule was substantive, the Advisory Committee chose to omit it. Id.

79. See supra notes 58-60 and accompanying text (noting Rule 23 worked in conjunction with § 216(b) prior to 1966 revision of Rule 23).


81. Id. §§ 621-44 (protecting persons over forty from age discrimination).

82. See supra notes 22-25 and accompanying text (observing procedural differences between Rule 23 and § 216(b) lead to anomalous results).

83. 29 U.S.C. § 206(d) (amending FLSA and allowing enforcement of EPA claims through FLSA procedures under § 216(b)); id. § 626 (providing for enforcement of ADEA claims in accordance with § 216(b)).

84. 42 U.S.C §§ 2000e to 2000e-17 (2000) (prohibiting employment discrimination based on race, religion, sex, and national origin); see 8 CONTE & NEWBERG, supra note 17, § 24:4, at 64 (observing EPA largely “preempted” by Title VII).

85. See 8 CONTE & NEWBERG, supra note 17, § 24:4, at 64-67 (comparing Title VII with EPA). When plaintiffs allege gender-based pay discrimination, there are several advantages to proceeding under the EPA. Id. at 65. Section 216(b) allows for double damages, and plaintiffs may proceed directly to court without exhausting administrative procedures. Id. Title VII plaintiffs may proceed under Rule 23, but plaintiffs proceeding under both Title VII and the EPA may not use Rule 23 to avoid § 216(b)’s opt-in requirement. Id. at 67.

86. 29 U.S.C. § 626 (2000) (stating ADEA violations enforced in accordance with § 216(b)).

87. See, e.g., Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989) (holding district court may facilitate notice to putative class members in ADEA action); Thiessen v. G.E. Capital Corp., 267 F.3d 1095,
Courts frequently note the similarities between Title VII and the ADEA, and the history of the two acts indicates that their procedural differences may be unintentional. Title VII prohibits discriminatory employment practices based on race, religion, sex, and national origin. When Congress enacted Title VII in 1964, it considered the problem of age discrimination, but the extent of the problem was not clear. So instead of prohibiting age discrimination under Title VII, Congress directed the Secretary of Labor to further investigate the problem. The Secretary’s findings ultimately led Congress to enact the ADEA in 1967.

When Congress enacted the ADEA, however, Title VII was already in effect and the Equal Employment Opportunity Commission (EEOC), created to enforce discrimination claims, was overburdened and largely ineffective. Rather than enforcing ADEA claims through the EEOC or creating a separate...
enforcement agency, Congress chose to enforce ADEA claims through the existing framework of the Department of Labor’s Wage and Hour Division.\(^\text{95}\) In doing so, Congress also adopted the enforcement provisions that were already in place under § 216(b) of the FLSA.\(^\text{96}\) Given that the Advisory Committee amended Rule 23 to its opt-out form just one year prior to enactment of the ADEA,\(^\text{97}\) it is unclear whether Congress, in adopting § 216(b)’s enforcement procedures, intended to preclude ADEA claims from Rule 23 procedures.\(^\text{98}\)

### IV. PROCEDURAL ISSUES

The language of § 216(b) fails to give courts clear guidance on a number of important procedural issues.\(^\text{99}\) Over the years, courts have struggled with a number of these issues, including: whether each individual plaintiff is required to satisfy administrative filing requirements, whether filing the original complaint tolls the statute of limitations for putative plaintiffs, and whether district courts have the authority to facilitate notice to putative members of the class.\(^\text{100}\) Perhaps the most difficult issue, however, is whether courts may apply Rule 23’s certification requirements to collective actions under § 216(b).\(^\text{101}\)

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95. See Bowermaster, supra note 6, at 36 (explaining legislative history of ADEA). Prior to enactment of the ADEA, Senator Javits had proposed a bill to amend the FLSA as a means of prohibiting age discrimination. S. REP. NO. 723, at 13-14 (1967). The proposed bill would have allowed for administrative oversight through the Secretary of Labors’ Wage and Hour Division, which also oversaw enforcement of the FLSA. Id. at 13. A similar amendment had been successful in amending the FLSA to prohibit wage discrimination based on gender. See 29 U.S.C. § 206(d) (2000) (incorporating Equal Pay Act into FLSA). Senator Javits’ proposed amendment ultimately failed, yet he was successful in implementing the provision that allowed for enforcement of age discrimination claims through the Wage and Hour Department. See id. § 626(b).

96. See Bowermaster, supra note 6, at 35 n.175 (suggesting “administrative convenience” as primary reason for Congress adopting FLSA procedures to enforce ADEA claims); see also Biek, supra note 25, at 119-20 (noting use of FLSA enforcement mechanisms for ADEA claims precluded need to create separate bureaucracy). In assigning enforcement of ADEA claims to the Wage and Hour Department, it logically followed that Congress also adopted the same enforcement procedures that were used to enforce FLSA and EPA claims. Biek, supra note 25, at 119-20.


98. See Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 266 (suggesting Congress unintentionally segregated ADEA from Rule 23 enforcement). Given the historical proximity of Rule 23’s revision and enactment of the ADEA, the Shushan court noted that when Congress incorporated § 216(b) into the ADEA, it was not able to legislate against a background of cases holding Rule 23 inapplicable to § 216(b) actions. Id.; cf. 1 MOORE ET AL., supra note 77, § 1.04[1][a] (explaining Congress not responsible for drafting Rules of Civil Procedure).

99. See Thiessen v. G.E. Capital Corp., 267 F.3d 1095, 1102 (noting § 216(b) fails to define what “similarly situated” means); see also Rahl, supra note 1, at 121 (explaining poor draftmanship of FLSA confuses courts and hinders its remedial goals).

100. Infra Parts IV.A-C (outlining procedural issues arising in context of § 216(b) collective actions).

101. Infra Part IV.D (discussing different approaches courts use to certify § 216(b) actions).
A. Administrative Filing

Neither the FLSA nor the EPA require administrative filing, therefore the issue of whether putative class members must individually satisfy administrative filing requirements only arises in the context of ADEA claims.102 It is now well settled that when named plaintiffs allege class-wide discrimination, it is not necessary for opt-in plaintiffs to individually satisfy the filing requirements.103 In this regard, collective actions under the ADEA closely resemble Title VII class actions under Rule 23.104

B. Tolling the Statute of Limitations

Section 256 of the FLSA, which applies equally to the EPA, provides that tolling only occurs after plaintiffs have opted in.105 Congress did not expressly incorporate this provision into the ADEA, and the circuit courts are split on whether filing of the original complaint tolls the statute of limitations for opt-in plaintiffs in an ADEA action.106 The Eleventh Circuit addressed the tolling issue in \textit{Grayson v. K Mart Corp.}.107 and, relying on § 256 of the FLSA, held that filing of the original complaint does not toll the statute of limitations for ADEA plaintiffs until their consent is filed with the court.108 The court reasoned that the similarities between the ADEA and the FLSA evidence Congress’ intent for the tolling provisions of § 256 to apply.109

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103. See 8 CONTE & NEWBERG, supra note 17, § 24.3, at 29-30 (explaining administrative filing not required for opt-in plaintiffs when complaint sets forth class allegations).

104. See supra note 88 (listing cases acknowledging similarities between Title VII and ADEA).

105. 29 U.S.C. § 256 (requiring FLSA and EPA plaintiffs to opt into action before statute of limitations tolled). Section 255 of the FLSA sets forth the applicable statutes of limitations for claims under the FLSA and EPA. Id. § 255. Plaintiffs must commence an action within two years of the violation or within three years for willful violations. Id. An action is not “commenced” for opt-in plaintiffs until their written consent is filed with the court. Id. § 256.


107. 79 F.3d 1086 (11th Cir. 1996).

108. Id. at 1105-06 (holding FLSA tolling procedures should govern ADEA actions). Noting the circuit court split, the \textit{Grayson} court explained that the issue of tolling procedures in ADEA class actions is determined by whether Title VII or FLSA procedures apply. \textit{Id.}

109. Id. at 1106 (interpreting legislative intent of ADEA as rejection of tolling procedure under Title VII and Rule 23). The \textit{Grayson} court noted that the ADEA did not specifically incorporate the FLSA’s tolling procedures, but reasoned that Congress’ decision to incorporate § 216(b)’s opt-in requirement into the ADEA
Addressing the same issue, the Third Circuit reached a different result in *Sperling v. Hoffman-La Roche*. Instead of relying on the ADEA’s similarities to the FLSA, the *Sperling* court adopted the same tolling procedures that exist under Title VII. Discrimination claims under Title VII proceed in accordance with Rule 23, and therefore the filing of a class complaint will toll the statute of limitations for putative class members. In applying Rule 23’s tolling procedures to the plaintiffs’ claims, the *Sperling* court explained that when Congress selectively incorporated § 216(b) into the ADEA, it deliberately chose not to adopt the tolling procedures of § 256. Considering Congress’ rejection of § 256, the court held that when an ADEA plaintiff files a class complaint, the statute of limitations is tolled and the opt-in plaintiffs’ claims relate back to the original filing date, not the opt-in date.

These contradictory approaches to tolling further demonstrate the need for clarification of whether § 216(b) is a joinder device, a class action device, or something in between. Under the *Sperling* approach, claims that may otherwise be time-barred are allowed. Under *Grayson*, however, such claims would not be allowed. Like the differing standards for class certification, these varied procedural approaches result in substantive effects by expanding and contracting parties’ rights and liabilities.

**C. Notice to Absent Class Members**

Unlike Rule 23, § 216(b) does not expressly authorize courts to facilitate

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indicated Congress’ intent for the FLSA’s tolling procedures to apply. *Id.*

110. 24 F.3d 463, 472 (3d Cir. 1994).

111. *Id.* (rejecting application of FLSA tolling procedures to ADEA action).

112. See Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 551 (1974) (holding original complaint tolls statute of limitations for all class members under Rule 23); see also 8 CONTE & NEWBERG, supra note 17, § 24:60, at 258 (explaining that filing of class action tolls statute of limitations for entire class).

113. *Sperling*, 24 F.3d at 470 (noting ADEA shares common elements with both Title VII and ADEA). The *Sperling* court reasoned that by purposefully incorporating different parts of both the FLSA and Title VII, Congress had consciously rejected the FLSA’s tolling procedures. *Id.*

114. *Id.* at 472 (holding FLSA’s tolling procedures not applicable to ADEA class actions). The court explained that for tolling to apply, the initial complaint must put the defendant on notice by indicating that the suit is filed on behalf of a class. *Id.* at 470-71.

115. See *infra* Part V.C (suggesting legislative reform of § 216(b)).


118. See *infra* Part V.C (stressing need for clarification of § 216(b) class procedures); cf. *Spahn*, supra note 7, at 159 (noting courts must struggle with “procedural complexities” in absence of congressional action).
notice of a pending class action to putative class members. The question of whether courts may facilitate notice in a § 216(b) action divided courts until the Supreme Court resolved the issue in *Hoffman-La Roche v. Sperling*. In *Hoffman-La Roche*, the Court held that court-facilitated notice is consistent with the right to sue on behalf of similarly situated employees. The Court noted that district courts have a “managerial responsibility to oversee the joinder of additional parties.” In support of its decision, the Court analogized collective actions under § 216(b) to class actions under Rule 23. The Court explained that when notice is not regulated by the courts, the potential for abuse in a § 216(b) action is the same as in class actions under Rule 23.

While *Hoffman-La Roche* settled the issue of whether district courts have discretion to facilitate notice in § 216(b) actions, the Court failed to set forth any standards for exercising such discretion. Therefore, courts have been left to their own devices in determining when court-facilitated notice is appropriate. Courts generally agree that notice is appropriate when plaintiffs are similarly situated, but disagree over the standards for making such a determination.

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119. Compare 29 U.S.C. § 216(b) (2000) (failing to specify whether representative plaintiffs may notify putative, opt-in plaintiffs of pending action), with FED. R. CIV. P. 23(c)(2) (1966) (setting forth notice provisions to inform putative, opt-out plaintiffs of pending action under Rule 23(b)(3)).

120. 493 U.S. 165, 170 (1989) (resolving circuit court split by holding notice in § 216(b) actions permissible). Prior to the Supreme Court’s decision in *Hoffman-La Roche*, the circuit courts were divided on the notice issue. Compare McKenna v. Champion Int’l Corp., 747 F.2d 1211, 1213-17 (8th Cir. 1984) (holding district courts not authorized to facilitate notice in § 216(b) actions), and Kinney Shoe v. Vorhes, 564 F.2d 859, 864 (9th Cir. 1977) (holding district courts cannot facilitate notice and expressing concerns over client solicitation by lawyers), with Woods v. N.Y. Life Ins. Co., 686 F.2d 578, 580-81 (7th Cir. 1982) (allowing court-approved notice in § 216(b) action), and Braunstein v. E. Photographic Labs., Inc., 600 F.2d 335, 336 (2d Cir. 1978) (explaining notice in § 216(b) action furthers FLSA’s remedial goals).

121. *Hoffman-La Roche*, 493 U.S. at 170 (observing benefits of proceeding collectively depend on employees receiving timely notice of pending action). The Court noted that collective actions enable plaintiffs to lower individual costs by pooling resources and that courts also benefit because common issues of law and fact are resolved in a single proceeding. Id.

122. Id. at 170-71 (explaining court-facilitated notice promotes efficiency).

123. Id. at 171 (discussing prior Supreme Court decision that addressed Rule 23 class action).

124. Id. (stressing district court judges’ duty and obligation to prevent potential abuses of class action procedures). In Shushan v. Univ. of Colo. at Boulder, the court interpreted the Supreme Court’s comparison of § 216(b) actions to class actions under Rule 23 as impliedly permitting application of Rule 23 standards in certifying § 216(b) actions. 132 F.R.D. 263, 265 (D. Colo. 1990).


126. See 8 CONTE & NEWBERG, supra note 17, § 24.3, at 58-62 (observing inconsistent standards amongst courts in determining whether notice appropriate). While some courts require a factual showing that plaintiffs are similarly situated before allowing notice, other courts will allow notice based only on allegations in the complaint. Id. at 60.

127. See infra Part IV.D (outlining different standards for certification of § 216(b) actions).
D. Class Certification Standards for § 216(b) Actions

Section 216(b) provides no guidance as to what factors a court should consider in determining whether plaintiffs in a collective action are similarly situated.128 As a result, courts employ inconsistent standards for certifying § 216(b) actions.129 In Thiessen v. General Electric Capital Corp.,130 the Tenth Circuit outlined the varied approaches courts use to determine whether plaintiffs are similarly situated.131 While courts have articulated a number of different approaches, most courts have chosen between two.132 One of these approaches rejects Rule 23 altogether, while the other requires plaintiffs to satisfy the requirements of Rule 23 that are not contrary to the statutory requirements of § 216(b).133

The first approach determines whether plaintiffs are similarly situated by considering only the plain language of the statute itself, without consideration of Rule 23.134 Courts make this determination at two separate stages.135 The initial stage “requires nothing more than substantial allegations that the putative class members were . . . victims of a single decision, policy, or plan.”136 If this
requirement is met, the court will conditionally certify the class for the purpose of sending notice to absent parties. 137 After discovery, the second stage is triggered by a motion to decertify. 138 At this point, the court has more information on which to base its decision, and it applies a higher standard to determine whether plaintiffs are similarly situated. 139

In applying this higher standard of review, courts will consider several factors. 140 These factors include: the disparate factual and employment situations of the plaintiffs, the possible defenses available to each individual plaintiff, fairness and procedural concerns, and whether plaintiffs have complied with administrative filing requirements 141 before instituting an action. 142 Given that both stages of the two-stage approach are independent of Rule 23, and that each stage requires a case-by-case analysis, courts often refer to this approach as the ad hoc approach. 143

The second approach to class certification of § 216(b) actions is typified by Shushan v. University of Colorado at Boulder. 144 In Shushan, the plaintiffs sought conditional certification for the purpose of sending notice to putative class members. 145 The Shushan court acknowledged that § 216(b)’s opt-in

the first stage of certification, a “fairly lenient” standard to certification is applied. Mooney, 54 F.3d at 1214. 137. 8 CONTE & NEWBERG, supra note 17, § 24:3, at 52-53 (summarizing two-stage certification approach). After the court conditionally certifies the class, notice is sent to putative class members and the action proceeds as a class action throughout discovery. Id. at 53.

138. Bayles, 950 F. Supp. at 1066 (outlining procedure for two-stage certification). If the court determines the plaintiffs are similarly situated at the second stage of review, the action proceeds to trial. Walker & Chung, supra note 18, at 10.

139. See Thiessen, 267 F.3d at 1102-03 (explaining second stage of two-stage certification requires more demanding standard of review); Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1214 (5th Cir. 1995) (observing § 216(b) actions not likely to survive after motion to decertify). But cf. Bradford v. Bed, Bath & Beyond, 184 F. Supp. 2d 1342, 1352 (N.D. Ga. 2002) (denying defendant’s motion to decertify FLSA class action); Cowan v. Treetop Enters., Inc. 163 F. Supp. 2d 930, 932 (M.D. Tenn. 2001) (allowing § 216(b) action to proceed as class after defendant moved to decertify).

140. Thiessen, 267 F.3d at 1103 (setting forth criteria for determining whether class certification warranted).

141. See supra note 102 and accompanying text (noting administrative filing not required for FLSA and EPA plaintiffs).

142. Thiessen v. G.E. Capital Corp., 267 F.3d 1095, 1103 (10th Cir. 2001) (outlining factors considered in determining whether to decertify § 216(b) class). If the court determines the plaintiffs are not similarly situated, the court dismisses the opt-in plaintiffs without prejudice and the class representatives proceed to trial. 8 CONTE & NEWBERG, supra note 17, § 24:3, at 53.

143. Mooney, 54 F.3d at 1213 (noting § 216(b) actions well-suited for “ad hoc,” “case-by-case” analysis); Thiessen, 267 F.3d at 1103 (referring to two-stage approach as “ad hoc”). The Thiessen court noted that, under the ad hoc approach, it is not necessary for courts to consider Rule 23’s requirements in deciding whether to certify a class. 267 F.3d at 1103.


145. Shushan, 132 F.R.D. at 264 (setting forth facts of case). Shushan was decided only four months after
requirement was “inconsistent” with Rule 23’s opt-out requirement, but held the inconsistency did not render Rule 23’s other requirements inapplicable. Therefore, the plaintiffs were required to satisfy Rule 23(a)’s four prerequisites, as well as 23(b)(3)’s requirement that common questions of law and fact predominate over questions affecting individual class members. In favoring the Rule 23 approach, the Shushan court reasoned that § 216(b) class actions would be “practically formless” without the guidance of Rule 23.

When courts refuse to apply Rule 23 to § 216(b) actions, they often base their decision upon the notion that Congress intended Rule 23 and § 216(b) to be independent of each other. The Thiessen court explained that the ad hoc approach is preferable because “Congress clearly chose not to have Rule 23 standards apply” to § 216(b) actions. While courts generally consider the Rule 23 approach to be a more stringent standard, a number of courts have noted that the different approaches often lead to the same result. Depending on the facts of a given case, however, these different approaches may have substantive effects.

V. ANALYSIS

A. Congressional Intent

Since its inception, courts have been uncertain whether Congress intended §
216(b) to be a joinder device, a class action device, or something in between. Yet the language of § 216(b) makes clear that Congress intended it to be something more than a mere joinder device. Section 216(b) allows individuals to bring suit on behalf of other employees. When parties proceed collectively under joinder rules, they only bring suit on behalf of themselves; there is no representative nature to the action.

Congress’ use of the term “similarly situated” further indicates its intent for § 216(b) to work as a class device. Parties have traditionally used this term to describe class action pleadings in federal and state courts. It seems unlikely that Congress would employ the language that gives rise to a class action if it did not intend § 216(b) to serve as a class device. On the contrary, Congress’ preference for a generic term like “similarly situated,” instead of specific reference to Rule 23, was most likely influenced by the lack of uniformity among state class action procedures in 1938. It was necessary for Congress to use words that would ubiquitously allow for class enforcement, regardless of jurisdiction, because § 216(b) authorizes parties to bring suit in both federal and state court.

It is also significant that both the FLSA and the original version of Rule 23 went into effect at essentially the same time. Congress may not have been

154. See Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 264 (D. Colo. 1990) (observing § 216(b) actions share characteristics of both joinder and class suits); see also Rahl, supra note 1, at 123 (noting uncertainty over how § 216(b) actions should proceed).
155. See Sperling v. Hoffman-La Roche, 24 F.3d 463, 472 (3rd Cir. 1994) (rejecting defendant’s argument that § 216(b) intended as permissive joinder device); Shushan, 132 F.R.D. at 268 (explaining § 216(b) actions resemble class action more than joinder). The Shushan court reasoned that the Supreme Court’s decision in Hoffman-La Roche, allowing notice to opt-in plaintiffs, affirmed that § 216(b) actions are closely analogous to Rule 23 class actions. 132 F.R.D. at 268.
157. Shushan, 132 F.R.D. at 264 (distinguishing joinder from class action). Unlike joinder, plaintiffs in a § 216(b) collective action do not file pleadings or appear before the court. Id.; Spahn, supra note 7, at 132 (outlining procedural differences between joinder and class actions).
158. Spahn, supra note 7, at 133 (suggesting Congress’ use of term “similarly situated” intended to allow class enforcement of § 216(b) actions).
159. Saxton v. W.S. Askew Co., 35 F. Supp. 519, 521 (N.D. Ga. 1940) (noting “similarly situated” commonly used in class proceedings). When the FLSA went into effect in 1938, Congress presumably allowed for state enforcement of FLSA claims to ensure that individuals living in remote areas would have access to courts. Foster, supra note 34, at 299.
160. See Rahl, supra note 1, at 128 (observing term “similarly situated” gives rise to class action suit).
162. 29 U.S.C. § 216(b) (2000) (allowing plaintiffs to bring actions in federal or state courts); Pentland v. Dravo Corp., 152 F.2d 851, 853 (3d Cir. 1945) (characterizing language of § 216(b) as necessary to allow class enforcement in state courts). In its 1945 decision, the Pentland court explained that spurious class actions were a novel development at that time and that many state courts did not allow them. 152 F.2d at 853.
163. See Foster, supra note 34, at 325-26, 325 n.108 (noting close historical proximity between Rule 23 and FLSA). President Roosevelt signed the FLSA into law in June of 1938. Forsythe, supra note 34, at 473. Congress first considered the Act in May of 1937. Id. at 474. Prior to its final approval, Congress debated over several drafts. Id. The Supreme Court’s Advisory Committee finalized its original version of Rule 23 in
fully aware of Rule 23’s existence when drafting § 216(b) because the Supreme Court is responsible for drafting the Federal Rules of Civil Procedure and Congress’ role is essentially passive.\textsuperscript{164} Presumably, Congress was more concerned with drafting the FLSA to pass constitutional muster rather than referencing a procedural rule that was drafted by a separate entity.\textsuperscript{165}

Regardless of Congress’ reasons for failing to reference Rule 23, its omission from § 216(b) should not be dispositive of whether courts may apply it to § 216(b) actions. In the context of other statutory schemes, courts have applied Rule 23 in the absence of language authorizing its application.\textsuperscript{166} Congress did not specify Rule 23 as a means to enforce Title VII claims, but courts and Congress alike recognize that Rule 23 provides an effective means of achieving Title VII’s remedial goals.\textsuperscript{167} The FLSA, ADEA, and EPA also serve remedial goals and, therefore, they too should proceed in accordance with Rule 23.\textsuperscript{168}

Of course, the strongest argument against using Rule 23 to certify § 216(b) actions is § 216(b)’s opt-in requirement.\textsuperscript{169} Yet the history of § 216(b)’s opt-in requirement supports, rather than negates, an inference that Congress intended Rule § 216(b) to work in conjunction with Rule 23.\textsuperscript{170} When Congress amended § 216(b) in 1947, it added the opt-in requirement and eliminated a provision allowing outside agents to bring suit.\textsuperscript{171} These amendments were both consistent with spurious class procedures under Rule 23.\textsuperscript{172}

December of 1937, six months after Congress considered the original draft of the FLSA. See \textit{Fed. R. Civ. P. 23.} Rule 23 went into effect in September of 1938 and the FLSA’s wage and hour provisions became effective one month later. Foster, \textit{supra} note 34, at 325 n.108.

\textsuperscript{164} See 1 \textit{Moore et al., supra} note 77, § 1.04[1][a] (explaining Congress’ passive role in drafting Federal Rules of Civil Procedure). After the Advisory Committee submits Federal Rules of Civil Procedure to Congress, the rules become effective unless Congress chooses to amend them. \textit{Id.} § 1.04[3][a].

\textsuperscript{165} See Forsythe, \textit{supra} note 34, at 464-67 (noting constitutional challenges to wage and hour regulation).


\textsuperscript{167} Bowermaster, \textit{supra} note 6, at 15-16 (observing Title VII claims proceed under Rule 23 in absence of language authorizing its application); Biek, \textit{supra} note 25, at 106-07, 106 n.21 (noting courts and Congress support class enforcement of Title VII despite lack of authorizing language).

\textsuperscript{168} See \textit{supra} note 34 and accompanying text (discussing remedial goals of FLSA); see also \textit{supra} notes 80-83 and accompanying text (noting EPA and ADEA designed to prohibit discrimination).

\textsuperscript{169} See LaChapelle v. Owens-Ill., Inc., 513 F.2d 286, 289 (5th Cir. 1975) (describing opt-in and opt-out class actions as “mutually exclusive”). But see Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 266 (D. Colo. 1990) (acknowledging conflict between § 216(b)’s opt-in requirement and Rule 23’s opt-out provision). Despite Rule 23’s opt-out requirement, the \textit{Shushan} court held that Rule 23’s other requirements should apply to § 216(b) actions. \textit{Id.} at 269.

\textsuperscript{170} See Spahn, \textit{supra} note 7, at 129 (noting similarities between § 216(b)’s opt-in requirement and 1938 version of Rule 23).

\textsuperscript{171} \textit{Supra} notes 54-57 and accompanying text (summarizing 1947 amendments to § 216(b)).

\textsuperscript{172} \textit{Supra} note 58 and accompanying text (observing that 1947 amendment of § 216(b) closely resembled Rule 23 procedures).
intended to segregate § 216(b) from Rule 23, it could have done so. Instead, it amended § 216(b) in a way that so closely resembled the then-current version of Rule 23, that it was essentially unnecessary for courts to distinguish between the two.

When the Supreme Court’s Advisory Committee revised Rule 23 in 1966, it eliminated the opt-in requirement of spurious class actions and replaced it with the opt-out provision of 23(c)(2). Buried within the Advisory Committee’s note lies a parenthetical comment excluding § 216(b) from the revision. In the absence of further explanation, it is not clear why the Advisory Committee excluded § 216(b) actions, but commentators have suggested the Committee was concerned that it lacked the authority to amend § 216(b)’s class procedures.

Given Congress’ passive role in adopting the rules of procedure, it is likely that Congress was unaware of the effect, or lack of effect, that Rule 23’s revision would have on § 216(b) actions. Moreover, the ramifications of segregating Rule 23 and § 216(b) would not have been clear because, prior to the revision of Rule 23, the class action device had not yet risen to its prominence as a means of enforcing remedial statutes. Before 1966, class actions under the FLSA, or the recently-enacted EPA, could only have been brought in the familiar, opt-in form and it was probably of little concern to Congress that § 216(b) actions would continue as such.

When Congress enacted the ADEA only one year after Rule 23’s revision, it was not able to legislate against a backdrop of cases holding Rule 23 inapplicable to § 216(b) actions. Therefore, Congress was probably not aware that incorporating § 216(b) into the ADEA would preclude it from the

173. See Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 166 (1989) (noting 1947 amendment of § 216(b) not intended to prohibit class enforcement). The Hoffman-La Roche Court rejected the petitioner’s argument that Congress intended the Portal-to-Portal Act of 1947 to ban collective actions under § 216(b). Id. The Court explained that Congress simply intended to prohibit class suits brought by outside agents with no personal stake in the litigation. Id. The Court also noted that Congress left the ‘similarly situated’ language intact as a means of allowing collective enforcement. Id.

174. See Bowermaster, supra note 6, at 33-35 (observing 1947 amendment to § 216(b) resulted in procedural uniformity).

175. Fed. R. Civ. P. 23(c)(2) (allowing putative plaintiffs to request exclusion from class action suits).

176. Advisory Committee’s Note, 39 F.R.D. 69, 104 (1966) (exempting § 216(b) actions from amendment of Rule 23).

177. See supra note 78 and accompanying text (offering rationale for Advisory Committee’s exclusion of § 216(b) from 1966 amendment of Rule 23).

178. Biek, supra note 25, at 124 (suggesting Congress unaware that amendment of Rule 23 not applicable to § 216(b) actions).

179. See Biek, supra note 25, at 106-07, 106 n.21 (noting Rule 23 gained its prominence following 1966 revision as means of enforcing statutes).

180. See Bowermaster, supra note 6, at 41 (explaining § 216(b) actions could only proceed as opt-in actions prior to revision of Rule 23).

procedural advantages of Rule 23. Rather than seeking to limit enforcement by requiring plaintiffs to opt in, it appears that Congress sought to promote enforcement by providing for administrative oversight of ADEA claims through the Department of Labor’s Wage and Hour Division. In doing so, it also adopted the enforcement provisions that were already in place under § 216(b).

B. Using Rule 23 to Certify § 216(b) Class Actions

When courts refuse to apply Rule 23’s certification standards to § 216(b) actions, they often do so based on misconceptions of congressional intent. The overlapping history of Rule 23 and § 216(b) suggest, however, that their procedural differences are unintentional. While § 216(b)’s opt-in requirement is obviously inconsistent with Rule 23’s opt-out provision, Rule 23’s other features offer useful guidelines for certifying § 216(b) actions. The two-stage, ad hoc approach, which rejects Rule 23 altogether, fails to provide courts with objective certification standards. Rule 23 promotes judicial economy and protects parties’ rights, and these goals are equally relevant in § 216(b) actions.

The commonality requirement of Rule 23 promotes judicial economy by narrowing the focus of the court’s inquiry. When plaintiffs rely on different questions of law or fact, the courts’ ability to resolve multiple claims in a single

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182. Biek, supra note 25, at 120 (observing Congress most likely unaware of consequences of incorporating § 216(b) into ADEA). Support for the theory that Congress improvidently incorporated § 216(b) into the ADEA is found by noting that § 216(b) only applies to “employees.” See 29 U.S.C. § 216(b) (2000). Therefore, a literal application of § 216(b) would render it inapplicable to individuals who allege age discrimination in a failure-to-hire claim because, technically, they are not “employees.” See id. § 623(a)(1) (declaring failure to hire based on age unlawful).

183. Supra notes 94-98 and accompanying text (indicating administrative concerns guided Congress’ decision to incorporate § 216(b) into ADEA).

184. Supra notes 94-98 and accompanying text (discussing Congress’ rationale for adopting § 216(b) as means of enforcing ADEA).

185. See Thiessen v. G.E. Capital Corp., 267 F.3d 1095, 1105 (10th Cir. 2001) (suggesting Congress intended to segregate § 216(b) actions from Rule 23); see also Bayles v. Am. Medical Response of Colo., Inc., 950 F. Supp. 1053, 1066 (D. Colo. 1996) (arguing Congress intended § 216(b) to be independent of Rule 23).

186. See generally Part V.A (outlining historical overlap and development of § 216(b) and Rule 23).

187. Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 268 (D. Colo. 1990) (holding plaintiffs in § 216(b) action must satisfy requirements of Rule 23); see supra note 144 (listing cases in accord with Shushan approach to certifying § 216(b) actions).

188. Shushan, 132 F.R.D. at 267 (describing § 216(b) actions as “formless” without guidance of Rule 23 standards); see Donelan, supra note 62, at 528 (noting Rule 23 sets forth clear guidelines for certifying class actions).

189. See Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 171 (1989) (clarifying concerns relevant in Rule 23 class actions also apply to § 216(b) actions); supra notes 64-75 and accompanying text (explaining how Rule 23’s requirements promote efficiency and protect parties’ rights).

190. Supra note 68 and accompanying text (explaining commonality requirement of Rule 23 promotes efficiency); cf. Hoffman-La Roche, 493 U.S. at 171 (noting judicial system and litigants benefit from resolution of common issues in single action).
action is defeated.\textsuperscript{191} Section 216(b) essentially mandates the commonality requirement by requiring plaintiffs to be similarly situated, thus there is no rational basis for courts to exclude § 216(b) plaintiffs from this requirement.\textsuperscript{192}

The numerosity requirement of Rule 23 is satisfied when the class is too numerous to proceed as joinder.\textsuperscript{193} When plaintiffs proceed as a class, not all class members individually appear before the court and, therefore, the numerosity requirement ensures that an action will only proceed as a class action when there is a “real need” for the class device.\textsuperscript{194} Courts consider a number of factors to determine whether a “real need” exists, including the ability of individual plaintiffs to sue on their own behalf.\textsuperscript{195} Given the flexible nature of the numerosity requirement, its application to § 216(b) actions would not significantly impair the ability of plaintiffs to seek redress for their claims.\textsuperscript{196}

The typicality and adequacy-of-representation requirements of Rule 23 ensure due process for class members by requiring a close congruence of interests between the class representative and absent parties.\textsuperscript{197} Some courts have suggested that when plaintiffs consent to join an action by opting in, the due process protections of Rule 23 become unnecessary.\textsuperscript{198} This caveat

\begin{itemize}
\item \textsuperscript{191} See Donelan, supra note 62, at 532 (observing different questions of law or fact undermine efficiency of class actions).
\item \textsuperscript{192} Spahn, supra note 7, at 149 (stating commonality requirement of Rule 23 inherent in language of § 216(b)). Spahn describes the commonality requirement of Rule 23 as being well-suited for § 216(b) actions. \textit{Id.} at 146. Unlike the two-stage, ad hoc approach to certification of § 216(b) actions, however, the commonality requirement requires more than just conclusory allegations. See Hawkins, supra note 5, at 37 (summarizing certification requirements of Rule 23 in context of employment discrimination claims).
\item \textsuperscript{193} \textit{Fed. R. Civ. P. 23(a)(1)} (allowing actions to proceed as class action only if joinder “impracticable”).
\item \textsuperscript{194} See Lusardi v. Xerox Corp., 118 F.R.D. 351, 354 (D.N.J. 1987) (selecting sampling of 51 class members as microcosm of 1,312 opt-in plaintiffs). The \textit{Lusardi} court based its decision on a sampling of plaintiffs because it would have been “impracticable” for each plaintiff to undergo discovery and appear before the court. \textit{See id.} This inexact approach is typical and often necessary in class action suits, therefore courts only employ the class device when a “real need” exists. See 5 \textit{MOORE ET AL., supra note 3, § 23.22[1]}. \textit{But cf. Spahn, supra note 7, at 147} (arguing numerosity requirement of Rule 23 not needed to promote judicial economy). Spahn argues that judicial economy is promoted even if a class consists of only two plaintiffs because it avoids separate trials. \textit{Spahn, supra note 7, at 147.} Of course, this argument applies equally to joinder, except plaintiffs in a joinder case have the opportunity to appear before the court and represent their own interests. See Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 264 (D. Colo. 1990) (distinguishing class actions from joinder).
\item \textsuperscript{195} 8 \textit{CONTE & NEWBERG, supra note 17, § 24:18, at 107-11} (outlining factors considered by courts in determining whether joinder impracticable). When the number of plaintiffs alone does not make joinder impracticable, courts may consider other factors, including: judicial efficiency, plaintiffs’ fear of harassment or retaliation, the geographical proximity of plaintiffs, and the financial worth of individual claims. \textit{Id.}
\item \textsuperscript{196} Donelan, supra note 62, at 53-31 (noting flexibility of Rule 23’s numerosity requirement); see supra notes 64-67 (discussing numerosity requirement of Rule 23).
\item \textsuperscript{197} See supra notes 69-72 and accompanying text (explaining due process protections of Rule 23).
\item \textsuperscript{198} See Dolan v. Project Constr. Corp., 725 F.2d 1263, 1267-68 (10th Cir. 1984) (noting plaintiffs in § 216(b) not bound by judgment unless they opt in); Burt v. Manville Sales Corp., 116 F.R.D. 276, 278 (D. Colo. 1987) (commenting due process protections unnecessary in opt-in class actions); see also Spahn, supra note 7, at 149 (arguing protections of Rule 23 not necessary in opt-in class actions).
\end{itemize}
emptor-like approach to class certification fails to recognize that opt-in plaintiffs often base their decision to join an action solely on the receipt of notice, rather than a meaningful evaluation of the class representative. Furthermore, such an evaluation may hinge on legal distinctions that are best determined by a court. Like Rule 23 plaintiffs, opt-in plaintiffs in a § 216(b) action are bound by the court’s final judgment, and they are entitled to the same degree of due process protection as their Rule 23 counterparts.

In addition to the procedural safeguards of Rule 23(a), subsection (b)(3) further promotes efficiency and protects parties’ rights by requiring that common questions of law or fact predominate over questions affecting only individual class members. The “predominance” standard of Rule 23(b)(3) ensures that the suit will only proceed as a class action if doing so achieves economies of time without jeopardizing procedural fairness. Courts should apply this same standard to collective actions under § 216(b) because these concerns are equally relevant in all class actions, regardless of which statute gives rise to the claim.

Rule 23 provides courts with consistent standards for certifying § 216(b) actions, but it also requires a more intensive discovery process before notice is sent to absent class members. While notice is pending, however, the statute of limitations continues to run for plaintiffs who have not opted in. For claims under the ADEA, courts can avoid this problem by tolling the statute of limitations when the complaint sets forth class allegations. The Third Circuit adopted this approach in Sperling v. Hoffman-La Roche, noting that the ADEA does not prohibit tolling for opt-in plaintiffs.

Unlike the ADEA, however, the FLSA and EPA prohibit tolling the statute

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199. See Lusardi, 118 F.R.D. at 354 (allowing thirteen named plaintiffs to represent interests of 1,312 class members). In Lusardi, the plaintiffs were dispersed between different departments and geographic locations. Id. at 352.


201. Id. (holding opt-in requirement does not relieve court of responsibility to protect plaintiffs); cf. Grayson v. K Mart Corp., 79 F.3d 1086, 1106 (11th Cir. 1996) (explaining § 216(b) plaintiffs bound by judgment once they opt in).

202. See supra notes 73-75 and accompanying text (outlining requirements of Rule 23(b)(3)).

203. 5 MOORE ET AL., supra note 3, § 23.45 (summarizing due process and procedural concerns addressed by Rule 23(b)(3)).

204. See supra note 189 and accompanying text (noting procedural concerns in Rule 23 class actions equally relevant to § 216(b) actions).

205. See Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989) (observing benefits of proceeding collectively in § 216(b) action depend on timely receipt of notice); see also supra note 151 and accompanying text (observing Rule 23 certification more demanding than two-stage, ad hoc approach).

206. Supra Part IV.B (summarizing statute of limitations issues in § 216(b) actions).

207. Supra notes 110-16 and accompanying text (noting some courts permit tolling of statute of limitations in ADEA collective actions).

208. 24 F.3d 463, 472 (3d Cir. 1994) (applying Rule 23 tolling procedures to ADEA collective action).
of limitations until plaintiffs have opted in.  The two-stage, ad hoc approach compensates for this dilemma by expediting the notice process and allowing § 216(b) plaintiffs to proceed as a class based on nothing more than the allegations set forth in the pleadings.  This accommodation, however, is an over-compensation and courts should require plaintiffs to make a more substantial showing that they are, in fact, similarly situated. Given that FLSA and EPA claims often center on relatively simple accounting-type wage issues, courts should allow a limited discovery phase before notice is sent to putative class members.

The statute of limitations problem in FLSA and EPA claims warrants some flexibility at the notice stage, but it does not warrant a total rejection of Rule 23. When courts allow § 216(b) actions to proceed as class actions based on nothing more than allegations made in the pleadings, they seldom survive the second stage of review. Therefore, requiring plaintiffs to satisfy Rule 23 standards at the notice stage will preserve the resources of litigants and courts alike.

C. The Need for Statutory Reform

While the opt-in and opt-out distinction may seem largely procedural, there are also substantive rights at stake. When procedural rules are applied inconsistently, parties’ rights and liabilities often expand and contract based on

212. See Brooks v. BellSouth Telecomm., Inc., 164 F.R.D. 561, 566 (N.D. Ala. 1995) (allowing plaintiffs to conduct discovery before sending court-facilitated notice); cf. Grayson v. K Mart Corp., 79 F.3d 1086, 1099 (11th Cir. 1996) (explaining courts may hold evidentiary hearing prior to class certification). The Grayson court held the district court did not abuse its discretion in failing to hold an evidentiary hearing. Grayson, 79 F.3d at 1099. Unlike many § 216(b) collective actions, however, the plaintiffs in Grayson established that they were similarly situated by both allegations and evidence before the court granted conditional certification. Id.
213. See supra note 105 and accompanying text (noting Rule 23 tolling procedures not applicable to FLSA and EPA actions).
214. Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1214 (5th Cir. 1995) (observing § 216(b) actions often decertified at second stage of two-stage approach).
215. See supra notes 64-67 and accompanying text (describing how courts and litigants benefit from class procedures under Rule 23).
216. See Bowermaster, supra note 6, at 19-22 (explaining how procedural rules can have substantive effects). In comparing federal and state procedural rules, Bowermaster discusses varying tests courts employ to determine whether a rule is substantive or procedural. Id. In making such determinations, courts will consider whether a rule places additional burdens upon the plaintiffs. Id. at 21-22. Considering this factor, it is clear that § 216(b)'s opt-in requirement has a substantive effect. See Hensler et al., supra note 2, at 476-77 (observing opt-in requirement deters participation). Defendant employers may also be unfairly prejudiced when courts apply less stringent certification standards. See Bayles v. Am. Med. Response of Colo., Inc., 950 F. Supp. 1053, 1067 (D. Colo. 1996) (noting collective actions may present unfair prejudice to defendants).
jurisdictional differences.\(^{217}\) If Congress eliminated § 216(b)’s opt-in requirement and amended the FLSA and EPA to permit tolling for putative class members, § 216(b) actions could proceed in full accordance with the uniform certification standards that exist under Rule 23.\(^{218}\)

Employers would benefit from such a reform because courts would be more willing to apply Rule 23’s requirements to § 216(b) actions before allowing the plaintiffs to proceed as a class.\(^{219}\) When courts apply less stringent certification standards to § 216(b) actions, employers are often subject to the expense of needless discovery and are more likely to be faced with blackmail suits.\(^{220}\) Employers would further benefit by avoiding the hassle and expense of defending multiple suits, with potentially inconsistent results, because judgments under Rule 23 are binding on all employees unless they affirmatively opt out.\(^{221}\)

Amending § 216(b)’s procedures would also benefit employees because they could seek redress for their claims without the deterrent of being required to opt in.\(^{222}\) Under the opt-in system, an employer’s liability depends on the willingness of employees to come forward.\(^{223}\) If Congress eliminated the opt-in requirement, employers would be liable for the full extent of their violations, thereby furthering the remedial goals of the FLSA, EPA, and ADEA.\(^{224}\)

Given the reluctance of many courts to apply Rule 23 to § 216(b) actions, amending the FLSA, EPA, and ADEA to comport with Rule 23 procedures would alleviate the courts’ concerns and promote uniformity.\(^{225}\) When plaintiffs assert multiple claims, courts are often faced with the procedural challenge of certifying opt-in and opt-out classes in a single action.\(^{226}\) While the two-stage, ad hoc approach is a commendable attempt to develop a workable standard for § 216(b) actions, it fails to offer the clear guidance that is

\(^{217}\) See supra Part IV.B (summarizing varied approaches to tolling statute of limitations in ADEA collective actions); see also supra Part IV.D (outlining inconsistent approaches to certifying § 216(b) actions); cf. Hawkins, supra note 5, at 34 (explaining relaxed class action procedures result in forum shopping).

\(^{218}\) See Spahn, supra note 7, at 158-59 (noting § 216(b) actions could proceed under Rule 23 if Congress repealed opt-in requirement).


\(^{220}\) See supra note 214 and accompanying text (observing most § 216(b) actions are decertified during second stage of two-stage approach); see also Hawkins, supra note 5, at 45-46 (explaining certification may force employers to settle suit regardless of merits).

\(^{221}\) Fed. R. Civ. P. 23(c)(3) (binding class members by judgment in class action unless they opt out); see Spahn, supra note 7, at 147 (highlighting benefits of class action procedure).

\(^{222}\) See supra note 29 and accompanying text (summarizing disadvantages of opt-in class actions).

\(^{223}\) Foster, supra note 34, at 325-26 (noting damages in opt-in class actions determined by employees’ willingness to come forward).

\(^{224}\) See Spahn, supra note 7, at 158 (describing Rule 23 procedures as effective means of addressing group wrongs).

\(^{225}\) See supra note 76 (listing cases holding § 216(b)’s opt-in requirement “irreconcilable” with Rule 23’s opt-out provision).

\(^{226}\) See supra note 24 (listing cases with opt-in and opt-out classes within same action).
VI. CONCLUSION

The similarities between class actions under Rule 23 and collective actions under § 216(b) far outweigh their differences. Like plaintiffs in a Rule 23 class action, opt-in plaintiffs in a § 216(b) action do not personally appear before the court or file individual pleadings, yet they are bound by the final judgment. The Supreme Court itself acknowledged the similarities between the two when it held that district courts have the authority to facilitate notice to putative class members in a § 216(b) action.

Further similarities exist in the context of ADEA claims. Like Title VII class actions under Rule 23, collective actions under the ADEA do not require each individual plaintiff to satisfy administrative filing requirements and, depending on jurisdiction, the filing of the original complaint may toll the statute of limitations for putative class members. These similarities all support the conclusion that a § 216(b) action is not a joinder device or something less than a class action; it is a class action. Accordingly, courts should treat it like one.

In the absence of much-needed statutory reform, courts and litigants cannot circumvent the opt-in requirement of § 216(b). The opt-in requirement does not, however, warrant a total rejection of Rule 23’s well-established certification standards. While some courts have suggested that Congress intended § 216(b) to be independent of Rule 23, these courts typically have done so without citation to authority or acknowledgement of Rule 23’s and § 216(b)’s overlapping history.

When Congress gave employees the right to bring suit on behalf of “similarly situated” employees, it simply intended to reflect the common-interest requirement that has always been an element of class proceedings, regardless of form. While Congress has failed to amend § 216(b) in accordance with the modern class action form, Congress’ failure to do so does not render the procedural certainties and due process protections of Rule 23 inapplicable to § 216(b) actions. The two-stage, ad hoc approach fails to provide courts with proper guidance in determining whether plaintiffs in a § 216(b) action are, in fact, similarly situated. When courts are faced with the question of whether plaintiffs are similarly situated, they should answer the question by applying the standards of Rule 23.

James M. Fraser