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TWO (FEDERAL) WRONGS MAKE A (STATE) RIGHT: STATE CLASS-ACTION PROCEDURES AS AN ALTERNATIVE TO THE OPT-IN CLASS-ACTION PROVISION OF THE ADEA

Janet M. Bowermaster*

Agnes was discharged from her sales position shortly before her fortieth birthday and was replaced by a twenty-six year-old. Convinced that her discharge was because of her age, she consulted an attorney to bring suit against her employer for age discrimination. Daunted by the time, expense, and difficulty that she learned would be involved in maintaining her suit against her wealthy and powerful employer, she gave up her lawsuit. Agnes never heard about the age-discrimination suit that had been filed as a class action by another employee against the same corporate employer. If the claim had been for sex discrimination instead of age discrimination, however, Agnes would have received notice of the pending class action and could have joined forces with other "little guy" employees who had victimized by their employer.

Betty did hear about the class-action suit that had been filed against her employer for age discrimination. Convinced that she had been passed over for promotion because of her age, she contacted the attorney for the class to see what she would have to do to become a member of the class. When she found out that she would have to file an individual written consent with the court, she decided against joining the class. Even though the attorney told her that it was against the law for the employer to take adverse employment action against her for filing a discrimination claim, she was afraid of subtle harassment. She preferred to remain in the lower position to avoid becoming the focus of her employer's animosity. If this claim had been for sex discrimination rather than age discrimination, Betty would have been included automatically in the class as an unnamed plaintiff unless she took action to keep from being included.

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Colleen was fifty-three years old and Black. After she and a group of other women who were either Black or over forty were laid off, she filed a suit for sex, race, and age discrimination on behalf of herself and the other similarly situated employees. The lawsuit became a procedural morass when the court ruled that the sex- and race-discrimination claims had to be filed as a Rule 23 “opt-out” class action under Title VII of the Civil Rights Act of 19641 (Title VII) and the age-discrimination claim as an “opt-in” class action under the Age Discrimination in Employment Act of 19672 (ADEA). The conflicting procedural requirements of providing notice to Title VII litigants versus not notifying ADEA litigants, and opting in to the ADEA class versus opting out of the Rule 23 class, left the court, as well as the litigants, unsure of how to proceed.

These are but a few illustrations of how the ADEA's opt-in procedure gives victims of age discrimination less procedural protection than victims of race or sex discrimination under Title VII.

This Article argues that the opt-in class action of the ADEA is an anachronism and that age-discrimination litigants can take advantage of the broader protection afforded to Title VII litigants by bringing their ADEA suits as Rule 23 class actions in state courts. A comparison of the two statutes reveals similar purposes and nearly identical substantive provisions, but procedural provisions that provide less protection to victims of age discrimination, including widely disparate class-action provisions.3

Unfortunately, the Supreme Court appears to have foreclosed the substantive similarity between the acts as a reason for courts to provide ADEA litigants with the procedural advantages enjoyed by Title VII litigants.4 Thus, a new way

3. See infra Part I.
4. The Court in Lorillard, Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575 (1978), addressed the issue of whether there was a right to jury trial in private civil actions for lost wages under the ADEA. See id. at 576. The Act itself contained no provision expressly granting a right to jury trial. Id. at 577. The defendant argued that the substantive similarities between the ADEA and Title VII meant that the ADEA, like Title VII, should be construed not to make jury trials available. See id. at 583.

The Court recognized the similarities in substance and purpose between the two acts, but stated that reliance on these similarities to find a congressional intent that both acts be enforced under like procedures was misplaced. See id. at 585. Indeed,
for victims of age discrimination to receive protection equal to that of Title VII litigants must be found. State class-action rules may provide a solution to this problem. Generally, state procedures control in state courts, even when the state court hears a federal statutory cause of action. State procedural rules, however, may be preempted by federal statutes. By analyzing the case law on procedural preemption, this Article demonstrates that federal statutes do not preempt state procedures which are applied evenhandedly to both state and federal causes of action, which are not outcome determinative,

the Court indicated that Congress's failure to adopt Title VII enforcement procedures while adopting its substantive prohibitions in haec verba suggested a desire to avoid Title VII procedures in enforcing the ADEA. See id. at 584–85.

The Court emphasized that Congress's selective incorporation of certain procedures of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, and amendment of others suggested that, except for these departures, Congress “intended to incorporate fully the remedies and procedures of the FLSA.” 434 U.S. at 582. The Court recognized expressly that when “Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.” Id. at 581.

Nevertheless, the decision and rationale of Lorillard do not necessarily preclude a finding that Rule 23 class actions are available under the ADEA. First, in determining whether the right to jury trial was available in ADEA actions, the Court noted that § 626(b) of the ADEA empowered courts to grant “legal or equitable relief,” see id., and § 626(c) authorized individuals to bring actions for “legal and equitable relief,” see id. at 579. The Court followed the cardinal principle of avoiding deciding constitutional questions when possible by relying on statutory grounds to resolve the jury trial issue. See id. at 577. Thus, the Court found the similarity of the ADEA and FLSA procedures dispositive of the jury trial issue. See id. at 582. However, the Court also said that it could not “believe that in using the word 'legal', Congress was oblivious to its long-established meaning or its significance.” Id. at 585. This suggests that because “legal” relief was available and “legal” rights were determined, the Seventh Amendment would likely have provided a right to a jury trial regardless of the similarity or dissimilarity of the ADEA to other acts.

In addition, the procedural analogy, which the Court rejected in this case, paralleled a specific substantive difference between the ADEA and Title VII. The ADEA expressly provides for “legal or equitable” relief, 29 U.S.C. § 626(b), (c), while Title VII provides only “equitable” remedies. 42 U.S.C. § 2000e-5(g). Moreover, it should be noted that the implication of the right to jury trial in Lorillard comported with the broad, remedial goals of the ADEA.

There is no indication in the Act's broad purposes of any substantive difference that would justify a more restrictive class-action device for the ADEA than for Title VII. Extension of the Court's rationale in Lorillard to the issue of the availability of Rule 23 class actions under the ADEA, on the other hand, would have the effect of denying this useful remedial device to plaintiffs. It is not clear whether the Court would be more receptive to procedural analogies to Title VII where to do otherwise would tend to frustrate the remedial purpose of the ADEA.

5. See infra note 74 and accompanying text.
6. See infra notes 81–85 and accompanying text.
7. See infra notes 101–33 and accompanying text.
and which do not conflict with the purposes of the federal statute. The Article also presents cases in which state courts have applied state procedures even though the federal statute being enforced contained a contrary procedural provision.

The overriding theme of this Article is that state class-action rules ("Rule 23") should not be preempted by the procedural provisions in the ADEA. The Rule 23 class action neither discriminates against federal causes of action brought in state courts nor produces a predictably different outcome than if the case had been tried in a federal court. Most importantly, application of state class-action rules does not conflict with the ADEA's purpose. The history of the ADEA's opt-in provision suggests that the provision may have been retained in the Fair Labor Standards Act (FLSA) by mistake and may then have been incorporated improvidently from the FLSA into the ADEA. This Article argues that employees can best be served by according victims of age discrimination the same degree of procedural protection that is available under Rule 23 "opt-out" class actions.

Finally, the Article notes that the application of state class-action procedures to ADEA actions can be defeated by removal of the cause of action to federal court where federal rules of civil procedure control. Of course, not all defendants will seek to remove ADEA cases. Some may want to avail themselves of more familiar state court procedures, judges and juries they believe will be more sympathetic to their cause of action, or a

8. See infra notes 85–100 and accompanying text.

9. See infra note 127.


11. See infra notes 135–46 and accompanying text.

more conveniently located forum. When the defendant does seek to remove, the circuits remain split on whether ADEA actions are removable.\textsuperscript{13} Although removability has been allowed,\textsuperscript{14} this Article argues that ADEA actions should be interpreted as being non-removable in order to best effectuate the remedial purposes of the Act.

I. TITLE VII AND THE ADEA SHARE SIMILAR SUBSTANCE AND PURPOSE

Both Title VII and the ADEA grew out of the same line of antidiscrimination legislation born of the long struggle for equal opportunity in the United States. This struggle had its beginnings in the Civil Rights Acts of 1870\textsuperscript{15} and 1871,\textsuperscript{16} which were passed to correct racially discriminatory practices after the Civil War.\textsuperscript{17}

Spurred on by civil rights activism in the early 1960s, Congress realized the need for more comprehensive federal legislation.\textsuperscript{18} The Civil Rights Act of 1964\textsuperscript{19} was intended to be

\begin{enumerate}
\item See infra notes 265–66 and accompanying text.
\item Ch. 114, § 16, 16 Stat. 144 (codified as amended at 42 U.S.C. § 1981 (1988)).
\item Section 18 of the Civil Rights Act of 1870 expressly reenacted the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, which was passed to effectuate the 13th Amendment's abolition of slavery. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull).
\item As the House Committee on the Judiciary stated in its report:

Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.

Considerable progress has been made in eliminating discrimination in many areas because of local initiative either in the form of State laws and local ordinances or as the result of voluntary action. Nevertheless, in the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious.

\end{enumerate}
this broadly sweeping measure.\textsuperscript{20} The Act had separate titles devoted to voting rights;\textsuperscript{21} desegregation of public accommodations,\textsuperscript{22} public facilities,\textsuperscript{23} and public education;\textsuperscript{24} and nondiscrimination in federally assisted programs.\textsuperscript{25} Title VII of the Act was aimed specifically at eradicating discrimination in employment.\textsuperscript{26}

Title VII prohibits employment practices which discriminate either directly or indirectly\textsuperscript{27} on the basis of race, color, national origin, religion, or sex.\textsuperscript{28} Its provisions extend to private employers,\textsuperscript{29} employment agencies,\textsuperscript{30} unions,\textsuperscript{31} and federal agencies and officials.\textsuperscript{32}

Although Congress intended Title VII to be a comprehensive antidiscrimination statute,\textsuperscript{33} the statute did not mention age. Congress had considered the problem of age discrimination when enacting Title VII,\textsuperscript{34} but did not include prohibitions against age discrimination because the extent of age discrimination in the workplace was not certain.\textsuperscript{35} Rather, Congress

\begin{thebibliography}{99}
\bibitem{22} \textit{Id.} § 201, 78 Stat. at 243.
\bibitem{23} \textit{Id.} § 301, 78 Stat. at 246.
\bibitem{24} \textit{Id.} § 401, 78 Stat. at 246.
\bibitem{25} \textit{Id.} § 601, 78 Stat. at 252.
\bibitem{26} H.R. Rep. No. 914, \textit{supra} note 18, pt. 1, at 26, \textit{reprinted in} 1964 U.S.C.C.A.N. at 2401. Title VII currently makes it “unlawful . . . for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a) (1988).
\bibitem{29} \textit{Id.} § 2000e-2(a). The Act defines the term “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.” \textit{Id.} § 2000e(b).
\bibitem{30} \textit{Id.} § 2000e-2(b).
\bibitem{31} \textit{Id.} § 2000e-2(c).
\bibitem{32} \textit{Id.} § 2000e-16(a).
\bibitem{33} \textit{See supra} note 20 and accompanying text.
opted for further study of the problem by the Secretary of Labor. This study ultimately led to the enactment of the Age Discrimination in Employment Act of 1967.

The stated purpose of the ADEA is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." The ADEA's prohibitions against age discrimination in employment extend to the practices of private employers, employment agencies, labor organizations, and most branches of the federal government. These prohibitions generally remove age as a consideration in employment decisions, except when it "is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." The Act protects workers who are at least forty years of age.

The similarity of scope and purpose between Title VII and the ADEA has been widely recognized. Whether that

36. Civil Rights Act of 1964 § 715, 78 Stat. at 265, directed the Secretary of Labor to study the problem of age discrimination and to report the findings to Congress. The data collected by the Secretary of Labor is reported in U.S. DEPT OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965) [hereinafter THE OLDER AMERICAN WORKER].
39. Id. § 623(a). The prohibition extends to those employers engaged in commerce with 20 or more employees. Id. § 630(b).
40. Id. § 623(b).
41. Id. § 623(c).
44. Id. § 631(a).
45. See, e.g., Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) (recognizing common purpose and similarities in language between Title VII and the ADEA and analogizing from Title VII to find that individuals in deferral states are required to resort to appropriate state proceedings before bringing suit under the ADEA); Lorillard, Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575, 589 (1978) (recognizing important similarities between the aims and substantive prohibitions of the ADEA and Title VII, but declining to analogize on right to jury trial); Donnelly v. Yellow Freight Sys., Inc., 874 F.2d 402, 408-09 (7th Cir. 1989) (considering similarity of purpose and substantive prohibitions between Title VII and the ADEA in finding that like the concurrent jurisdiction of ADEA cases, state and federal courts have concurrent jurisdiction of Title VII claims as well), aff'd, 494 U.S. 820
similarity argues for analogous interpretations of procedural aspects of the two acts, however, appears to depend on the history and context of the specific provisions in question.\textsuperscript{46}

**II. TITLE VII AND THE ADEA: PROCEDURAL DIFFERENCES**

Despite the fact that both Title VII and the ADEA were passed to stop discrimination,\textsuperscript{47} the two acts have many differences,\textsuperscript{48} the most striking of which is the difference in class-action provisions.

(1990); Nabors v. United States, 568 F.2d 657, 659 n.3 (9th Cir. 1978) (collecting cases referring to the interpretation of Title VII for assistance in defining analogous sections of the ADEA because the acts are so similar).

46. In one context, the Supreme Court stated:

Since the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace, since the language of § 14 (b) [of the ADEA] is almost \emph{in haec verba} with § 706 (c) [of Title VII], and since the legislative history of § 14 (b) indicates that its source was § 706 (c), we may properly conclude that Congress intended that the construction of § 14 (b) [requiring prior resort to appropriate state proceedings before filing suit in federal court] should follow that of § 706 (c).

\textit{Oscar Mayer}, 441 U.S. at 756; \textit{see also Lorillard}, 434 U.S. at 584 ("There are important similarities between the two statutes, to be sure . . . . But in deciding whether a statutory right to jury trial exists, it is the remedial and procedural provisions of the two laws that are crucial and there we find significant differences."); \textit{Donnelly}, 874 F.2d at 409 ("Given the extensive similarities between the two statutes, and the fact that state courts have jurisdiction over private-sector ADEA claims, it seems incongruous to assume that state courts are incompetent to adjudicate Title VII claims."); Dolan v. Project Constr. Corp., 725 F.2d 1263, 1268 (10th Cir. 1984) (distinguishing the restrictive procedures for notice to potential class members under opt-in provision of the ADEA from the liberal notice procedures for Rule 23 class actions).

47. \textit{See supra} notes 20, 26, 38 and accompanying text.

48. The ADEA contains bona fide occupational qualification (BFOQ), bona fide seniority or employee benefits plan, and good cause exceptions. 29 U.S.C. § 623(f) (1988). Although Title VII includes BFOQ and seniority exceptions, 42 U.S.C. § 2000e-2(e), (h) (1988), it has no corresponding good cause exception. In addition, Title VII has some exceptions that the ADEA does not: it makes an exception for matters of national security, \textit{id.} § 2000e-2(g); it gives employers the right to use results of professionally developed ability tests so long as they are not used to discriminate, \textit{id.} § 2000e-2(h); and it permits businesses located near Indian reservations to give preferential treatment to Indians, \textit{id.} § 2000e-2(i).

Actions under the ADEA may be tried to a jury with legal damages available, 29 U.S.C. § 626(c), while Title VII litigation is restricted to the bench, 42 U.S.C. § 2000e-5(f)(4), for equitable relief and/or backpay, \textit{id.} § 2000e-5(g).
A. Title VII—Rule 23 Class Action

The legislative history of Title VII indicates that Congress intended the Act to be enforced primarily through private lawsuits rather than administrative oversight.\(^\text{49}\) In keeping with this intent, the Act's procedural provisions give individual employees the right to bring civil actions in federal district courts against employers who engage in discriminatory employment practices.\(^\text{50}\) Although Congress did not expressly provide for class actions as a statutory enforcement mechanism,\(^\text{51}\) both Congress\(^\text{52}\) and

49. Senators Hubert Humphrey (D-Minn.) and Everett M. Dirksen (R-Ill.) both explained that under their compromise, only the Justice Department would be authorized to bring suit, and then only in cases of "pattern or practice" violations; the primary responsibility for enforcement was left to the individual complainant. 110 Cong. Rec. 12,722, 12,817 (1964), reprinted in part in Legislative History, supra note 34, at 3003-04, 3018-19.


50. See 42 U.S.C. § 2000e-5 (1988). Before bringing a civil action, an aggrieved employee must first file a complaint with the Equal Employment Opportunity Commission (EEOC). Id. § 2000e-5(e). The EEOC then serves notice of the complaint on the respondent. Id. § 2000e-5(b). After investigation, if the EEOC determines that reasonable cause exists to believe the charge is true, the Commission will try to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Id. If, after 180 days from the time the complaint was filed, the EEOC has not been able to obtain a conciliation agreement between the respondent and the aggrieved employee, and the EEOC or the Attorney General has not filed a civil action against the respondent employer, the Commission or the Attorney General must notify the aggrieved employee. Id. § 2000e-5(f)(1). Receipt of the notice, commonly called the "right to sue" notice, then gives the aggrieved employee the right to bring a civil action against the respondent named in her EEOC complaint. Id. She must file her action within 90 days of receipt of the notice. Id.


52. See Johnson, supra note 49, at 5. In 1971, Congress considered an amendment to Title VII which would have authorized the EEOC to issue cease and desist orders. S. 2515, 92d Cong., 1st Sess. § 4(h) (1971). Opponents argued, inter alia, that such authority was unnecessary because the federal courts were enforcing the statutes effectively through private class actions. See H.R. Rep. No. 238, 92d Cong., 1st Sess. 58-67 (1971) (minority views); S. Rep. No. 415, 92d Cong., 1st Sess. 85-88 (1971) (views of Sen. Dominick). The version of the bill that passed the House
the courts recognize the class action as a useful and effective device for handling Title VII litigation.

Class actions under Title VII must meet the requirements of Rule 23 of the Federal Rules of Civil Procedure. Rule 23 requires that an identifiable class of persons exist and that the named plaintiff be an adequate representative for the class. Adequate representation is constitutionally required in order to provide due process to members of the class who are bound by the judgment in a class-action suit.

B. The ADEA—Opt-In Class Action

Although Congress took the substantive provisions of the ADEA directly from Title VII, it took the procedural framework for enforcement of the ADEA from the FLSA. As a result, individual employees may bring civil actions against

would have eviscerated the class-action mechanism in Title VII cases by requiring that all class members either file, or be named in, the charge. See H.R. 1746, 92d Cong., 1st Sess. § (3)(a), (e) (1971). Congress rejected that requirement, and the Senate Committee on Labor and Public Welfare endorsed the use of class actions by “agree[ing] with the courts that Title VII actions are by their very nature class complaints [sic], and that any restriction on such actions would greatly undermine” Title VII’s effectiveness. S. REP. NO. 415, supra, at 27.

53. See, e.g., Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 273 (4th Cir. 1980); Jenkins v. United Gas Corp., 400 F.2d 28, 34 (5th Cir. 1968); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968); Local 186, Int’l Pulp, Sulphite & Paper Mill Workers v. Minnesota Mining & Mfg. Co., 304 F. Supp. 1284, 1287 (N.D. Ind. 1969); see also S. REP. NO. 415, supra note 52, at 27 n.16 (listing cases that the committee interprets as the courts’ acknowledgement that Title VII suits are “class complaints” and that any restriction on the use of class actions would undermine the effectiveness of Title VII).


55. FED. R. CIV. P. 23(a)(4); see also 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1765 (2d ed. 1986).


57. Id. at 44–46.


59. Section 626(b) of the ADEA provides that “[t]he provisions of [the ADEA] shall be enforced in accordance with the powers, remedies, and procedures provided in [certain sections of the FLSA].” 29 U.S.C. § 626(b) (1988). See also 113 CONG. REC. 31,254 (1967) (statement of Sen. Javits) (“The enforcement techniques provided by S. 830 are directly analogous to those available under the Fair Labor Standards Act; in fact, S. 830 incorporates by reference, to the greatest extent possible, the provisions of the Fair Labor Standards Act.”).
their employers for age discrimination and may use the class-action device to litigate their claims. However, each employee who wishes to join an ADEA class action must file a written consent with the court to become a party plaintiff.

This "opt-in" class action clearly affords less protection to potential plaintiffs in age-discrimination suits than a Rule 23 "opt-out" class action does to potential plaintiffs in employment-discrimination suits based on sex or race. Under Rule 23(b)(1) and (b)(2) class actions, members of the class are automatically included in the lawsuit. Under Rule 23(b)(3), notice is sent to potential members of the class; those who do not take action promptly to opt out are included in the class, and their rights are protected in the litigation.

Under the ADEA's opt-in class-action procedure, potential members of the class are not always given notice of the

60. 29 U.S.C. § 626(c) (1988). Before bringing any private action, an individual must file a charge with the EEOC alleging unlawful discrimination. Id. § 626(d). This charge must be filed within 180 days after the alleged unlawful practice occurred. Id. § 626(d)(1). The Commissioner must then seek to eliminate the unlawful practice through informal methods of conciliation, conference, and persuasion. Id. § 626(d). The employee also may bring suit to enforce his rights. Id. § 626(c)(1). However, the employee may bring a private action only if (1) after 60 days from the filing of a charge, the EEOC is unsuccessful in reaching an agreement with the employer through informal methods, id. § 626(d), and (2) the EEOC fails to bring an action on behalf of the employee, id. § 626(c)(1). For a discussion of Title VII procedures, see supra note 50.

61. Section 216(b) of the FLSA provides that an action "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b) (1988).

62. Id. ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").

63. Because unnamed class members must file written consents with the court in order to become parties plaintiff, class actions under the FLSA and the ADEA have come to be known as "opt-in" class actions. See Monroe v. United Air Lines, Inc., 90 F.R.D. 638, 638-39 (N.D. Ill. 1981).

64. FED. R. CIV. P. 23(c)(3) provides in part that "[t]he judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class."

65. The second sentence of Rule 23(c)(3) states:

The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

FED. R. CIV. P. 23(c)(3).
litigation. It is a matter within the discretion of the trial court whether the court will order that potential plaintiffs be notified. Moreover, even when notice is given, those who fail to take action promptly may be excluded from the litigation and their rights left unprotected. Each person in an opt-in class action must take positive action to become a member of the class.

In addition, in a Rule 23 class action, courts suspend the running of the statute of limitations for the asserted members of the class while the class-certification question is decided. This protection is not afforded to members of the opt-in class action under the ADEA. There the statute of limitations is tolled for unnamed class members only after they file their individual consents with the court. Some courts have recognized the inequality of this approach and have allowed for equitable tolling of the statute.

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67. Id. at 169.
68. Id. at 172–73.
69. 29 U.S.C. § 216(b) (1988); see also Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 862 (9th Cir. 1977); Schmidt v. Fuller Brush Co., 527 F.2d 532, 536 (8th Cir. 1975); La Chapelle v. Owens-Illinois, Inc., 513 F.2d 286, 287–88 (5th Cir. 1975).
71. 29 U.S.C. § 626(e)(1) (1988) prescribes the statute of limitations for ADEA actions by incorporating the limitations period set forth in § 255 of the Portal-to-Portal Act. Section 256 of the Portal-to-Portal Act specifies when the limitations period provided for in § 255 begins to run:

In determining when an action is commenced for the purposes of section 255 of this title, an action ... shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action ... it shall be considered to be commenced in the case of any individual claimant—

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced.


III. ADEA SUITS AS RULE 23 CLASS ACTIONS IN STATE COURTS

A. The Typical Procedural Preemption Analysis

The ADEA expressly allows state courts concurrent jurisdiction with federal courts over claims arising under the statute. When a state court hears a lawsuit, the court follows state rules of procedure even when the right sought to be enforced arises out of a federal statute. This is because courts in the United States operate in a dual system of federalism. Federal courts derive their power to adjudicate from Congress, while state courts derive their power to function as courts from the authority of the states creating them. Thus, while Congress can choose whether to entrust the enforcement of the substantive rights it has created to these state courts, it cannot give them jurisdiction over actions arising under that federal law. Also, where a state court does exercise its jurisdiction over a federal cause of action, Congress cannot regulate or dictate the procedures it employs.

This rule, however, is not absolute. The substantive rights created by federal legislation are binding upon state as well as

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73. 29 U.S.C. § 626(c)(1) (1988) provides that "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter."


76. U.S. Const. art. III, § 1; see also Federal Judiciary Act of 1789, ch. 20, 1 Stat. 73.

77. See Bombolis, 241 U.S. at 222.

78. See Taylor, 266 U.S. at 208; see also Bombolis, 241 U.S. at 218; Ex parte Gounis, 263 S.W. 988, 990 (Mo. 1924).


80. Ex parte Gounis, 263 S.W. at 990; Niehaus, 164 S.W.2d at 186.
Thus, to the extent that state procedural rules "dig" into federal substantive rights, they are preempted under the Supremacy Clause of the U.S. Constitution. Courts faced with state procedural provisions must first determine whether the provisions are truly "procedural" rather than substantive. If they are found to be procedural, the court asks whether they affect federal substantive rights by discriminating against the federal cause of action, by affecting the outcome of the case, or by vitiating the federal statute's purpose.

In deciding whether federal law preempts state procedural provisions, courts first consider the nature of the state provision. Traditionally, the state provision in question has been characterized either as substantive, in which case it was preempted by the federal substantive law, or procedural, in which case it was not preempted. Such characterization, however, has tended to come after, or even as a substitute for, striking a proper balance between federal and state interests, with the courts simply summarizing their conclusions under the rubric of "substance" and "procedure."

The basic premise from which analysis on this issue proceeds is that a state court may not use its own procedure if the effect is to substantially impair the federal right. This broad generality, however, provides little guidance in determining how much federal law needs to be applied to keep the federal rights intact. As a result, formulating a precise rule to

81. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819) ("If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action."); see also Felder v. Casey, 487 U.S. 131, 150-53 (1988) (holding that federal procedure preempts state procedure that infringes upon the claimant's substantive federal right); Niehaus, 164 S.W.2d at 186 (holding that in cases arising under the FLSA, federal law binds the states with respect to the rights created by the law, although a state court hearing the case may apply state rules of practice and procedure).


86. See, e.g., White, 238 U.S. at 512.


distinguish "substance" from "procedure" has proven very troublesome indeed.  

One aspect involved in determining that a state rule is substantive in nature is whether the rule has the effect of adding to the burden required for a plaintiff to sustain a cause of action. The underlying reasoning of cases in this area appears to be:

[I]f one jurisdiction permits a plaintiff to recover if he establishes facts A and B, and another jurisdiction permits the plaintiff to recover only if he establishes facts A, B, and C, the rule which requires the plaintiff to establish ... fact C is not really procedural but "part of the very substance" of his case.

Even if a court determines that a provision does not add directly to a plaintiff's substantive burden and is thus procedural, it still examines whether the state rule in question discriminates against the federal cause of action. Although a state court may adhere to its procedural requirements, it may not defeat the substance of a federal claim under the guise of professing merely to prescribe how the claim should be formulated. The focus of this inquiry is "whether the ... courts have merely enforced a local [procedural] requirement ... applicable to all such litigation in [the state] without qualifying the basis of recovery under the [federal ... [a]ct or weighting the scales against the plaintiff."

The Supreme Court recently applied this approach in Felder v. Casey. In that case, the Court considered a state procedural

89.  See id.; see also Brown v. Western Ry., 338 U.S. 294, 296 (1949) (reversing the Georgia court's dismissal of a claim arising under the Federal Employers' Liability Act because such strict application of local procedural rules impinged upon rights under the Act).
90.  See Felder v. Casey, 487 U.S. 131, 141-45 (1988) (finding a state statute which has the effect of granting defendants an additional affirmative defense to be preempted); Garrett v. Moore-McCormack Co., 317 U.S. 239, 248-49 (1942) (finding a state rule that switched the burden of proof from defendant to plaintiff to be preempted); Central Vt. Ry. v. White, 238 U.S. 507, 512 (1915) (finding a Vermont rule requiring plaintiffs to prove lack of contributory negligence to be preempted).
94.  Id. at 301 (Frankfurter, J., dissenting).
rule requiring plaintiffs to file a notice of claim prior to filing a state court suit against local governmental entities or officers.\textsuperscript{96} The Court held that the notice-of-claim statute was inapplicable to section 1983 actions brought in the state courts.\textsuperscript{97} The majority stated that the notice-of-claim provision was not a neutral and uniformly applicable rule of procedure, "'rooted in policies unrelated to the definition of any particular substantive cause of action, that forms no essential part of "the cause of action" as applied to any given plaintiff.'"\textsuperscript{98} Rather, it viewed the provision as "a substantive burden imposed only upon those who [sought] redress for injuries resulting from the use or misuse of governmental authority."\textsuperscript{99} The Court found that the provision discriminated against the precise right that Congress had created in section 1983 because an intentional tort victim was given two years to recognize the injury while a civil rights victim was given only four months to recognize that he had been deprived of a federal constitutional or statutory right.\textsuperscript{100}

Another way that the courts have identified apparently procedural rules that produce substantive effects is to ask whether the state procedural rule would produce a different outcome to the litigation in the state court than a federal rule would have produced in a federal court.\textsuperscript{101} Procedural rules producing different outcomes in different courts run afoul of a basic tenet of our jurisprudential system: treating like cases alike.\textsuperscript{102} The heart of this concept is that a litigant's choice to sue in a state rather than a federal court should not affect the outcome of his case.\textsuperscript{103}

\textsuperscript{96} Id. at 136–37, 143–45.
\textsuperscript{97} Id. at 138.
\textsuperscript{98} Id. at 145 (quoting Brief for International City Management Association et al. as \textit{Amici Curiae} at 22, \textit{Felder} (No. 87-526)).
\textsuperscript{99} Id. at 141. While the majority found the defendant-specific nature of the notice-of-claim provision dispositive of discrimination against the federal substantive rights, Justices O'Connor and Rehnquist, in dissent, found it sufficiently non-discriminatory that the state statute "applie[d] to all actions against municipal defendants, whether brought under state or federal law." Id. at 160. They suggested that "the Wisconsin statute 'discriminates' only against a right that Congress has never created: the right of a plaintiff to have the benefit of selected federal court procedures after the plaintiff has rejected the federal forum and chosen a state forum instead." Id. at 161.
\textsuperscript{100} Id. at 141–42.
\textsuperscript{101} See, e.g., id. at 141.
\textsuperscript{102} See \textit{Erie R.R. v. Tompkins}, 304 U.S. 64, 75–78 (1938).
rules sometimes produce a different outcome, however, is not dispositive.\textsuperscript{104} The essential inquiry that remains is whether the state procedure is inconsistent with or conflicts with the goals of the federal statute sought to be enforced.\textsuperscript{105} More specifically, the question is whether the enforcement of the state rule or procedure stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

In determining whether local practice puts "unreasonable obstacles in the way"\textsuperscript{106} of the federal right, there is some weighing of the policy considerations that are always relevant when one sovereign enforces a right created by another. In the "converse Erie" situation, where a state enforces a federally created right, there is a constitutional obligation arising from the Supremacy Clause to effectuate the intent of Congress embodied in the federal act.\textsuperscript{107} This puts a great deal of emphasis on the interpretation of the statute. Yet, in addition to respecting constitutional limitations, Congress no doubt also has some interest in achieving a degree of federal-state accommodation. It has thus become customary in ascertaining congressional purpose to compare the significance of the policy behind the federal law with that behind the state practice.\textsuperscript{108}

\textsuperscript{104} Compare Felder v. Casey, 487 U.S. 131, 152 (1988) (finding invalid a state notice-of-claim statute that permitted a state court to dismiss a federal cause of action that would have survived in federal court because it placed a "substantive condition on the right to sue") with Missouri ex rel. St. L., B. & M. Ry. v. Taylor, 266 U.S. 200, 207–09 (1924) (finding valid state court jurisdiction over the case under a state service-by-garnishment procedure that is unavailable in federal court, because it "does not enlarge the substantive right").

\textsuperscript{105} See Felder, 487 U.S. at 138 (holding that a state notice-of-claim provision cannot be applied to a § 1983 action because it conflicts with the purposes and objectives of § 1983); Chesapeake & O. Ry. v. Kelly, 241 U.S. 485, 491 (1916) (finding a state procedure for determining compensation to be preempted because "the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employers' Liability Act it must be settled according to general principles of law as administered in the Federal courts").

\textsuperscript{106} Davis v. Wechsler, 263 U.S. 22, 25 (1923).

\textsuperscript{107} See Hill, supra note 91, at 387.

In the typical case where state procedures have been applied in enforcing federal substantive rights in state courts, the federal statute has been silent on the particular procedure at issue. *Hunt v. National Linen Service Corp.* for example, dealt with the specificity of the plaintiff's pleadings regarding the amount of money due, the quantity of overtime worked, and the compensation paid by the defendant to the plaintiff and other parties of interest under the FLSA. The Supreme Court of Tennessee expressly noted that the FLSA did not address the point and held that the issue was governed by the state procedural provision. The court then dismissed the FLSA claim for lack of specificity under state law.

A Texas court made a similar notation in *Munn v. Mohler* where it applied a state statute relating to the venue of civil actions. The Texas Court of Appeals pointed out that the FLSA did not address the point. It then rejected the argument that the FLSA provision authorizing the claimant to maintain his action in any court of competent jurisdiction could be interpreted as manifesting a congressional intent to deprive a state inhabitant of his right to be sued in the county of his domicile as provided by the state venue statute.

In *Morgan v. Monessen Southwestern Railway Co.*, the Pennsylvania Supreme Court applied the state prejudgment interest provision in a Federal Employers' Liability Act (FELA) action after noting that the federal statute neither provided for nor forbade the award of prejudgment interest. The court determined interest to be essentially a question of local law and indicated that for purposes of harmony and uniformity of administration, state statutes relating to interest should be applied whenever it was practical to do so.

This does not mean that where the federal statute is silent, the states are free to apply whatever procedures they wish.

When a federal statute does not provide for universally

109. 157 S.W.2d 608 (Tenn. 1941).
110. *Id.* at 610.
111. *Id.*
112. *Id.*
114. *Id.* at 803.
115. *Id.*
116. *Id.*
118. *Id.* at 1176–77.
119. *Id.*
familiar procedures that are considered necessary for day-to-day adjudications, the state may fill in its own procedures.\textsuperscript{121} State statutes of limitations, for instance, have been applied where the federal acts failed to provide one, under the assumption "that Congress did not intend to create a right enforceable in perpetuity."\textsuperscript{122} In Felder, however, the Court determined that notice-of-claim provisions were not "universally familiar nor in any sense indispensable prerequisites to litigation, and there is thus no reason to suppose that Congress intended federal courts to apply such rules, which 'significantly inhibit the ability to bring federal actions.'"\textsuperscript{123}

State procedures may also be available to enforce federal rights in state courts where the federal statute granting the substantive right makes specific provision for a different procedure to be applied. Professor Hill suggests that although "federal paramountcy extends as much to procedural as to substantive matters,"\textsuperscript{124} the basic postulates of our federalism preclude carrying this notion to the point where the distinction between the federal and state courts is effectively obliterated.\textsuperscript{125} There are limits, he asserts, to "the machinery of state government . . . being remolded for federal purposes insofar as the state courts, in the exercise of a jurisdiction which they ordinarily have no power to decline, are compelled to conduct themselves in all substantial respects as if they were federal courts."\textsuperscript{126} Indeed, state procedural rules have sometimes been applied in the face of contrary provisions in the federal statute.\textsuperscript{127}

\textsuperscript{121} Id. at 1503–04.
\textsuperscript{122} Felder v. Casey, 487 U.S. 131, 140 (1988) (describing lower courts' reasoning in applying state statutes of limitations when federal acts are silent).
\textsuperscript{123} Id. at 140 (quoting Brown, 742 F.2d at 1507).
\textsuperscript{124} Hill, supra note 91, at 387.
\textsuperscript{125} Id. at 413.
\textsuperscript{126} Id.
\textsuperscript{127} See, e.g., Schimerowski v. Iowa Beef Packers, Inc., 196 N.W.2d 551, 555 (Iowa 1972) (applying state law intervention rules in the face of an FLSA provision allowing joinder); Rockwood v. Crown Laundry Co., 178 S.W.2d 440, 441–43 (Mo. 1944) (applying state laws of joinder in the face of FLSA § 216 which authorizes action on behalf of others similarly situated); Niehaus v. Joseph Greenspon's Son Pipe Corp., 164 S.W.2d 180, 185–86 (Mo. Ct. App. 1942) (same); Archer v. Musick, 25 N.W.2d 908, 911 (Neb. 1947) (applying state law assignment rules in the face of an FLSA provision for additional parties to join the action by becoming class-action plaintiffs); Sauerzopf v. North Am. Cement Corp., 93 N.E.2d 617, 619 (N.Y. 1950) (finding that Congress did not intend an FLSA provision concerning when the statute of limitations was to start running to apply to state courts); Sipe v. Pohland Bros., 19 Wage & Hour Cas. (BNA) 63, 64 (Pa. Ct. C.P., Westmoreland County 1969) (finding that an FLSA suit brought in state court is governed by that court's procedure).
On the other hand, the U.S. Supreme Court has held on at least one occasion that a procedural provision in a federal statute controlled over state modes of practice and procedure.\(^\text{128}\)

These cases may be viewed as state courts protecting their sovereignty by applying state rules of practice and procedure and the Supreme Court applying federal law to ensure federal supremacy. The cases also can be reconciled by looking at differences in the nature of the provisions at issue. The provision at issue in *Mitchell v. Clark*,\(^\text{129}\) for example, was inseparable from the substantive relief that Congress intended to provide.\(^\text{130}\) In contrast, procedural provisions such as joinder traditionally have been considered to be among the more purely procedural provisions.\(^\text{131}\)

Congress's ability to prescribe procedures for the enforcement of federal statutes in state courts is not unlimited.\(^\text{132}\) Notions of federalism rooted in the U.S. Constitution preclude Congress from transforming state courts into federal court clones by dictating in too great detail the procedures that state courts must follow in enforcing federal rights.\(^\text{133}\) In the absence of other guidance from the courts, it seems reasonable that the same considerations that inform the decision as to

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\(^\text{128.}\) See *Mitchell v. Clark*, 110 U.S. 633, 646 (1884). The statute in *Mitchell* created a retroactive federal defense for wrongful acts or omissions done by officers or persons pursuant to military orders during the Civil War. *Id.* at 639. The state court in *Mitchell* determined that the defense had been improperly pleaded under state rules of procedure because it did not set out a copy of the military order on which the defense was founded. *Id.* at 645. The Supreme Court noted that the federal statute creating the defense had expressly provided that the order pleaded in defense under that statute could be “written or verbal, general or special.” *Id.* The Court determined that Congress had intentionally specified that manner of pleading in order to effectuate the liberal purposes of the Act under conditions where persons were compelled to obey military authority in time of war without the opportunity to obtain copies of the orders under which they were forced to act. *Id.* at 645–46. The Court thus overruled the Missouri Supreme Court and applied federal law to the question of whether the defense had been properly pleaded. *Id.* at 646.

\(^\text{129.}\) *Id.* at 638.

\(^\text{130.}\) See *id.* at 641–42. *Mitchell*’s war-order defense would have been largely unavailable without the liberalized pleading provisions in the federal statute as the majority of persons who had been forced to obey military orders during wartime had been in no position to demand that they be shown copies of the orders under which they were compelled to act. See *id.* at 646.


\(^\text{132.}\) See *Hill, supra* note 91, at 413.

\(^\text{133.}\) *Id.*
whether state procedures may be applied where the federal act has not addressed the procedural issue may be useful in determining the appropriate federal/state balance where there is a contrary procedural provision embedded in a federal statute. Application of that analysis suggests that state class-action rules should be available in ADEA actions brought in state courts.

B. Applying the Analysis to State Class Actions

Under the analysis described above, state court class-action rules are not preempted by an opt-in provision in a federal statute. Like rules regarding joinder, intervention and other devices that determine who may be a party plaintiff, class-action devices are purely procedural.\(^3\) Such devices neither limit\(^3\) nor expand\(^3\) jurisdiction. Nor do class-action rules impose an additional substantive burden on individual plaintiffs as a result of them bringing their actions in state rather than federal courts. In either jurisdiction, extra procedural steps are required in order to prosecute individual claims in a collective action. However, the procedural burden on unnamed plaintiffs in state court class actions, where they are included unless they affirmatively opt out of the action, is less than the burden in an opt-in action, where they have to file their consent with the court in order to be included in the judgment. Such a difference does not run afool of the rationale in cases where state procedures have been preempted due to their substantive effect on federal rights. The rationale in such cases has been that “[f]ederal law takes state courts as it finds them only insofar as those courts employ rules that do not ‘impose unnecessary burdens upon rights of recovery authorized by federal laws.’”\(^3\) The U.S. Supreme Court indicated recently in Felder v. Casey\(^3\) that the converse is not
a concern. The Court said, "States may make the litigation of federal rights as congenial as they see fit—not as a \textit{quid pro quo} for compliance with other, uncongenial rules, but because such congeniality does not stand as an obstacle to the accomplishment of Congress’ goals."

Furthermore, state class-action rules do not discriminate in any manner against the substantive rights afforded under the ADEA. The majority of state class-action procedures are modeled after the modern Federal Rule of Civil Procedure 23\textsuperscript{140} and are applied uniformly to both state and federal causes of action where the potential plaintiffs are sufficiently numerous and the named plaintiff is an adequate representative for the class.\textsuperscript{141} Also, unlike the notice-of-claim provision held inapplicable in \textit{Felder}, state class-action rules generally apply across the board to all types of litigation in the state courts.\textsuperscript{142}

Finally, state class-action rules do not predictably alter the outcome of the litigation from the result that would have obtained had the action been brought in a federal rather than a state court. Under either jurisdictional scheme, the federal

\begin{itemize}
\item \textsuperscript{139} \textit{Id.} at 151.
\item \textsuperscript{140} See supra note 10; see also Robert A. Skirnick & Patricia I. Avery, \textit{The State Court Class Action—A Potpourri of Differences}, 20 FORUM 750, 759 (1985).
\item \textsuperscript{141} See supra note 55 and accompanying text.
\item \textsuperscript{142} Although some states expressly accept, limit, or prohibit the use of class actions in certain categories of cases, the relevant categories are unrelated to the substantive thrust of the ADEA. See Skirnick & Avery, supra note 140, at 761 nn.55, 56. For state provisions that expressly accept the use of class actions, see, \textit{e.g.}, D.C. CODE ANN. § 3-210.16 (1988) (mayoral actions regarding public assistance); ME. REV. STAT. ANN. tit. 26, § 625-B4 (West 1988 & Supp. 1991) (unpaid severance pay); Mich. COMP. LAWS ANN. § 445.360 (West 1989) (consumer pricing); Minn. Stat. § 325G.34 subdiv. 3 (1982) (Plain Language Contract Act); Okla. Stat. Ann. tit. 63, § 1-1939 (West 1984) (nursing home residents); S.C. CODE ANN. § 56-15-110 (Law. Co-op. 1991) (manufacture, distribution, or sale of motor vehicles); Tex. TAX CODE ANN. § 112.055 (West 1982) (taxpayer suits). For state provisions that expressly limit the use of class actions, see, \textit{e.g.}, Mont. CODE ANN. § 30-14-133(1) (1991) (limits class actions for consumer protection and unfair trade practices); N.J. STAT. ANN. § 56:12-4 (West 1989) (limits on class actions in consumer contract cases); N.M. STAT. ANN. § 57-12-10 (Michie 1987) (Unfair Practices Act limits remedies for class actions to actual damages except that named plaintiffs may additionally recover penalties). And for state provisions that expressly prohibit the use of class actions, see, \textit{e.g.}, Ark. CODE ANN. § 4-87-103 (Michie 1987) (class actions not permitted in Equal Consumer Credit Act); Ga. CODE ANN. § 7-3-29(e) (Michie 1989) (class actions not permitted to borrowers from unlicensed lenders); Iowa CODE ANN. § 537.5203.1 (West 1987) (class treatment not available to remedy violations of the disclosure provision of Truth in Lending Act); Kan. STAT. ANN. § 50-634(b) (1983) (class actions prohibited in unfair trade practices cases); N.C. GEN. STAT. § 75C-5 (1985) (class actions not available under the Motion Picture Fair Competition Act); S.C. CODE ANN. § 37-6-113 (Law. Co-op. 1989) (class actions not permitted for antitrust violations).
\end{itemize}
statute dictates the substantive proof required to entitle a plaintiff to the statutory remedy. The class-action rules merely dictate the procedures to be followed when numerous similar causes of action are tried together in a group action. There are some differences between the opt-in and opt-out class-action schemes that have been the focus of judicial and scholarly attention. These differences, however, affect the size of the class rather than the substantive outcome of the case. The substantive proof of the named plaintiffs is identical and the relief available is precisely the same, regardless of how many unnamed plaintiffs are included in the class they represent.


144. See, e.g., Dolan v. Project Constr. Corp., 725 F.2d 1263, 1266 (10th Cir. 1984) (focusing on the greater burden on defendants and courts in opt-out class-action schemes in contrast to opt-in class-action schemes); see also Biek, supra note 51, at 104–05 (noting the greater procedural burden on claimants wanting to join an opt-in class action); James D. Lipschultz, The Class Action Suit Under the Age Discrimination in Employment Act: Current Status, Controversies, and Suggested Clarifications, 32 HASTINGS L.J. 1377, 1382–83, 1390–91 (1981) (citing the lack of a notice requirement for opt-in class actions).

145. For example, the opt-out provision may result in a larger plaintiff class because potential plaintiffs who do nothing are included under an opt-out provision but excluded under an opt-in provision. This will arguably be accentuated where the potential plaintiffs under the opt-in device are not given notice. In any case, plaintiffs with small claims who were not included in the class action are unlikely to bring separate individual actions. Small amounts at stake work to prevent such actions both by influencing the individuals’ decision and, arguably, by diminishing the number of attorneys interested in handling the cases.

In addition, plaintiff classes under an opt-in arrangement may be smaller because individual plaintiffs who are required to sign a consent may decline to do so out of fear of possible employer reprisal. This proposal finds support in one commentator's contention that private actions for back pay under the opt-in provisions of the FLSA tend to be brought by ex-employees rather than employees who are still on the job. See G.W. Foster, Jr., Jurisdiction, Rights, and Remedies for Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions, 1975 Wis. L. REV. 295, 310; see also James A. Rahl, The Class Action Device and Employee Suits Under the Fair Labor Standards Act, 37 ILL. L. REV. 119, 120 n.10 (1942) (explaining that most suits under § 16(b) of the FLSA are brought by ex-employees). Thus, even though employer reprisals are illegal under § 623 of the ADEA, employees may still consider the possibility of reprisal in making decisions as to whether to join the plaintiff class.

Finally, the plaintiff class may be smaller because under an opt-out device the statute of limitations is tolled for unnamed plaintiffs as soon as the class action is filed, see, e.g., Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 345–46, 352–53 (1983), whereas the statute of limitations under the opt-in device is tolled only after the plaintiff files her consent, see Portal-to-Portal Act, 29 U.S.C. § 256 (1988) (incorporated by reference into § 626(e) of the ADEA). This means that some potential plaintiffs who would have been included in a Rule 23 class would be barred from participating in an opt-in class.
It is true that the use of Rule 23 class actions creates a potential for larger damage awards because the opt-out class is more inclusive than the opt-in class. The opt-out class, however, could not include any plaintiffs who were not substantively entitled to participate in a class action. Thus, under ideal circumstances the two classes would be the same size. The employer's smaller exposure to damage awards under the opt-in class is made possible only by procedurally discouraging potential ADEA claimants from pursuing their claims. Preemption concerns then would be implicated by the greater inclusivity of the Rule 23 class action only if the opt-in provision of the ADEA was intended to limit employer liability by procedurally reducing the size of the substantively qualified plaintiff class. Because the history of the ADEA's opt-in provision suggests that its purpose was not to limit employer liability at the expense of ADEA plaintiffs, it does not conflict with the use of Rule 23 class actions. The difference in class size means mainly that attorneys may be more willing to handle the larger class cases where the fees would be correspondingly higher, and that the scope of defendants' liability might be broader where the class was more inclusive. These effects do not conflict with the purposes of the opt-in provision of the ADEA.

1. The history of the FLSA opt-in provision—Some courts have refused to apply Rule 23 class-action procedures to FLSA claims under the theory that Congress added the opt-in provision of the FLSA in order to limit employer liability. The original FLSA required employers to pay their employees at least the federally mandated minimum wage and to pay overtime for work performed in excess of forty hours per week. When the Act was put into effect, however, controversies began to surface with regard to exactly what constituted compensable “work” under the Act. The first industry
in which this question received significant judicial attention was mining. The judiciary was called upon to determine whether employees began "working" when they entered the mines or not until they had descended the shaft and reached the actual drilling site. The Supreme Court ruled in *Tennessee Coal, Iron & Railroad v. Muscoda Local No. 123*,\(^{150}\) that the employees were entitled to compensation for the time spent en route from the "portal" (entrance of the mine) to the "working face" (drilling site) and back to the "portal," as well as for the time spent at the working face\(^{151}\) (thus, the term "portal-to-portal"). This approach was extended to factory job sites in *Anderson v. Mt. Clemens Pottery Co.*,\(^{152}\) and a flood of litigation ensued that threatened the financial ruin of many industries.\(^{153}\)

F. Supp. 279, 283–84 (D. Md. 1941) (holding that a contract postal carrier was not entitled to compensation for the time he spent waiting between trains); Sunshine Mining Co. v. Carver, 41 F. Supp. 60, 66 (D. Idaho 1941) (holding that miners were entitled to compensation for their travel time to their actual work location after they entered the mine, but that they were not entitled to compensation for their subsurface lunch time); Travis v. Ray, 41 F. Supp. 6, 8–9 (W.D. Ky. 1941) (holding that a bus driver was not entitled to compensation for his mid-route waiting periods); Gordon v. Paducah Ice Mfg. Co., 41 F. Supp. 980, 986–87 (W.D. Ky. 1941) (holding that workers who "iced" railroad cars containing perishables were not entitled to compensation for the waiting time between trains); Super-Cold S.W. Co. v. McBride, 124 F.2d 90, 92 (5th Cir. 1941) (holding that leaving a telephone number or location where he could be found was not enough to show that "on call" meant "at work"); Bulot v. Freeport Sulphur Co., Inc., 45 F. Supp. 380, 381 (E.D. La. 1942) (holding that employees were not entitled to compensation for their travel time to the mine on an optional, employer-provided boat); Walling v. Allied Messenger Serv., Inc., 47 F. Supp. 773, 779 (S.D.N.Y. 1942) (finding that messengers were entitled to compensation for their waiting time); Shepler v. Crucible Fuel Co. of Am., 60 F. Supp. 260, 262 (W.D. Pa. 1943) (holding that a night watchman and a day landing man were not entitled to compensation for their lunch periods), aff'd, 140 F.2d 371, 374 (3d Cir. 1944); Walling v. Peavy-Wilson Lumber Co., Inc., 49 F. Supp. 846, 881–87, (W.D. La. 1943) (holding that loggers were not entitled to compensation for their travel time to their work site on an employer-provided, optional train); Thompson v. Loring Oil Co., 50 F. Supp. 213, 217 (W.D. La. 1943) (holding that an on-call oil pumper was not entitled to compensation for the time he was not actually working); Howard v. Southern Continental Tel. Co., 72 F. Supp. 276, 277 (M.D. Tenn. 1944) (holding that a night shift switchboard operator was not entitled to compensation for his uninterrupted periods of sleep); Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123, 321 U.S. 590, 591–603 (1944) (holding that miners were not entitled to compensation for their underground travel time to the mine's "working face"); Armour & Co. v. Wantock, 323 U.S. 126, 127–34 (1944) (holding that firemen were entitled to compensation for their on call time at their employer's place of business); Bicanic v. J.C. Campbell Co., 19 N.W.2d 7, 9–11 (Minn. 1945) (holding that logging camp's cook and support staff were not entitled to compensation for their waiting time).

150. 321 U.S. 590 (1944).
151. *Id.* at 598–600.
153. For a good discussion of the development and scope of the "portal-to-portal" problem, see Biek, *supra* note 51, at 122–23.
Congress passed the Portal-to-Portal Act\(^{154}\) in direct response to this problem.\(^{155}\) Although the opt-in provision was added to the FLSA in the Portal-to-Portal Act, it is not at all clear that the opt-in provision was intended to limit employer liability by restricting collective suits. First and foremost, the Portal-to-Portal Act was passed to remedy the problem created when the judiciary extended the FLSA to cover employee activities that had not customarily been considered compensable work.\(^{156}\)

The Portal-to-Portal Act dealt with this problem substantively. Part I of the Act contained the findings of Congress and a declaration of policy and purposes of the Act.\(^{157}\) Part II provided relief from existing claims by limiting compensable work to activities that were either (1) included in an express provision of a contract in effect when the activity was performed or (2) recognized by custom or practice in effect at the time the activity was performed at the establishment where the employee was employed.\(^{158}\) Part III provided relief from future claims by excluding from compensable work the type of activities that had been added judicially prior to the Portal-to-Portal Act, unless those activities were part of an express contract or were a clear matter of custom or practice at the place of employment.\(^{159}\) The substantive provisions in Parts


\(^{155}\) The Act itself states:

The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees . . . .

\(^{156}\) Id. § 1(a), 61 Stat. at 84.

\(^{157}\) See supra notes 149-53 and accompanying text.

\(^{158}\) See § 1, 61 Stat. at 84-85.

\(^{159}\) See §§ 2, 3, 61 Stat. at 85-86.

\(^{159}\) See § 4, 61 Stat. at 86-87. Part III of the Portal-to-Portal Act provided in part:

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as
II and III thus effectively brought the scope of liability under the FLSA back to where it had been prior to the portal-to-portal cases.

The opt-in provision, however, was included in Part IV of the Act entitled "Miscellaneous." Part IV dealt with a variety of procedural provisions related to concerns other than limiting employer liability. Section 6, for example, added a two-year statute of limitations for FLSA actions. Prior to the Portal-to-Portal Act, there was no federal statute of limitations governing actions arising under the FLSA. Rather, the state statutes of limitations were applied. Congress adopted a federal statute of limitations because it found that the variation in state limitations periods was creating problems for business and industry. Thus the federal limitations period was adopted to promote uniformity rather than to limit liability.

amended, ... on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act [May 14, 1947]—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Id.

160. See 61 Stat. at 87.
165. Id. at 85 ("The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.").
Similarly, Congress's addition of the opt-in provision in section 5\textsuperscript{166} appears to have been motivated by its concern with procedural problems, rather than with limiting employer liability for wage claims. The FLSA originally provided for two types of group actions: the collective action (where an employee could sue on behalf of himself and other similarly situated employees) and the representative action (where an employee could designate a representative to maintain an action for and on behalf of all similarly situated employees).\textsuperscript{167} Only the representative action, which had been something of an oddity in class-action law to begin with,\textsuperscript{168} was banned in section 5 of the Act.\textsuperscript{169} At the same time that Congress deleted the language authorizing the use of representative suits from section 216(b), it added the opt-in requirement for collective suits.\textsuperscript{170}

The Supreme Court in \textit{Hoffmann-La Roche Inc. v. Sperling}\textsuperscript{171} was presented with the argument that giving plaintiffs notice of ADEA actions would contravene Congress's intention to limit employer liability as expressed in the 1947 amendments to the FLSA.\textsuperscript{172} The Court made clear its position that the opt-in provision was added to the FLSA for procedural reasons rather than for purposes of limiting employer liability in multiparty actions. The Court said:

\begin{quote}
Any employer who violates the provisions [for minimum wages or maximum hours] of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. \textit{Action to recover such liability may 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. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.}
\end{quote}

\textsuperscript{166} Id.
\textsuperscript{167} The Fair Labor Standards Act of 1938, § 16(b) states:

\textit{Any employer who violates the provisions [for minimum wages or maximum hours] of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may 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. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.}

\textsuperscript{169} 61 Stat. at 87.
\textsuperscript{170} Id.
\textsuperscript{171} 493 U.S. 165 (1989).
\textsuperscript{172} See id. at 173.
In 1938, Congress gave employees and their "representatives" the right to bring actions to recover amounts due under the FLSA. No written consent requirement of joinder was specified by the statute. In enacting the Portal-to-Portal Act of 1947, Congress made certain changes in these procedures. In part responding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added. The relevant amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions. Congress left intact the "similarly situated" language providing for collective actions, such as this one. The broad remedial goal of the statute should be enforced to the full extent of its terms.\textsuperscript{173}

Notwithstanding whether this argument can ever be resolved definitively with regard to the FLSA, there is even less reason to suppose that Congress intended to limit the liability of employers under the ADEA by adopting the enforcement mechanisms of the FLSA, which happened to include the opt-in provision.

2. \textit{The history of the ADEA opt-in provision}—The legislative history in both the House and Senate reports is remarkably silent on why Congress incorporated the FLSA enforcement procedures into the ADEA. The major consideration for this choice appears to have been administrative convenience. Although there were suggestions that the ADEA should have been simply an extension of Title VII protection to older workers,\textsuperscript{174} utilization of the existing EEOC enforcement framework for ADEA claims was not envisioned.\textsuperscript{175}

\begin{flushright}
\begin{tabular}{l}
173. \textit{Id.} (citations omitted). \\
175. At the time that the ADEA was being considered by Congress, the EEOC was considered to be largely ineffectual. David L. Rose, \textit{Twenty-Five Years Later}: \\
\end{tabular}
\end{flushright}
Rather, the ADEA as originally proposed was to have agency-sponsored enforcement, which would have included hearings before the Secretary of Labor and the right of appeal to the U.S. courts of appeals.\textsuperscript{176} This scheme, however, would have necessitated the establishment of a separate new bureaucracy, complete with hearing examiners, regional directors, investigators, and attorneys, within the already overburdened Department of Labor.\textsuperscript{177} Congress therefore chose to have ADEA claims administered through the existing framework of the Wage and Hour Division of the Department of Labor.\textsuperscript{178}

Congress apparently felt that age-discrimination complaints could be handled more efficiently by the Wage and Hour Division.\textsuperscript{179} Senator Javits had already attempted unsuccessfully to amend an FLSA bill earlier in 1967 to prohibit age

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There had been sentiment preferring Department of Labor enforcement over enforcement by the EEOC even for Title VII. \textit{See} 110 CONG. REC. 12,595–99 (1964) (remarks of Sen. Clark and Sen. Case). By the time of the hearings on the ADEA, the EEOC's only track record was its slow start. Its early years were, by necessity, devoted to dealing with organizational problems and to developing regulations and interpretative guidelines. Rose, \textit{supra}, at 1135. It was soon swamped by charges and began to fall further and further behind. \textit{Id.} at 1136.

The Senate was apparently not impressed. Senator Javits had introduced a bill earlier that year which would have amended the FLSA to prohibit age discrimination. S.788, 90th Cong., 1st Sess. § 2 (1967); \textit{see also} S. REP. No. 723, 90th Cong., 1st Sess. 13–14 (1967) (statement of Sen. Javits). Like the incorporation of enforcement procedures into the ADEA, that amendment would have utilized the "existing investigative and enforcement machinery of the Wage and Hour Division into which the functions of the administration and enforcement of the ban on age discrimination could easily have been integrated." S. REP. No. 723, \textit{supra}, at 13. When the FLSA amendment failed, Senator Javits successfully implemented the provision for Wage and Hour Division enforcement in the ADEA. \textit{See} 29 U.S.C. § 626(b) (1988).


\textsuperscript{177} \textit{See} 1967 Hearings, \textit{supra} note 176, at 145.


discrimination. Like the incorporation of enforcement procedures into the ADEA, the earlier amendment would have utilized the "existing investigative and enforcement machinery of the Wage and Hour Division into which the functions of administration and enforcement of the ban on age discrimination could easily have been integrated." When that amendment failed, it was only natural for Senator Javits to try to implement the same provision in the ADEA.

There is thus little to suggest that the decision to administer the ADEA and Title VII separately was intended to reflect differences in the degree of protection to be afforded under the respective acts. In addition, none of the distinctions between age discrimination and the types of discrimination prohibited by Title VII justify the different levels of protection afforded by the opt-in class action of the ADEA as opposed to the opt-out class-action device of Title VII.

Age discrimination differs most markedly from other prohibited forms of employment discrimination in that at some point age really is related to job performance. The Third Circuit Court of Appeals said, "Age concededly differs from the Title VII classifications in that, for some jobs, statistically significant correlations might demonstrate that persons above certain middle ages are inherently disabled from performing as satisfactorily as their younger counterparts." This distinction, however, does not justify a less inclusive class-action procedure for age than for Title VII discrimination.

Deterring illegal age discrimination in employment is the focus of the ADEA and illegal age discrimination necessarily implies that an employer has made hiring and firing decisions based on factors other than the worker's ability to do the job. To the extent that Congress was concerned about limiting employer liability because employment decisions based on age were sometimes genuinely related to performance deficits, Congress provided employers with a "bona fide occupational qualification" defense. There is no basis for arguing that

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181. Id. at 13.
182. See Biek, supra note 51, at 119–20.
Congress intended to create additional limitations in the form of a class-action device which procedurally disadvantages plaintiffs who are substantively entitled to the Act's protection.

The legislative history of the ADEA reflects a belief that age discrimination also differs from other kinds of employment discrimination in that age discrimination results from employer misinformation rather than ill will. The original study undertaken by the Secretary of Labor to determine whether legislation on age discrimination was necessary reported that age discrimination in the workplace was pervasive and that its impact on older workers was debilitating. That same report also voiced the belief that unlike racial discrimination, there was "no evidence of prejudice based on dislike or intolerance of the older worker." Rather, age discrimination was viewed as being rooted in the misperceptions of employers that older workers were less capable and less productive than their younger counterparts. This notion was echoed in the congressional debates on the ADEA:

Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. These discriminations result in nonemployment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older job seeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance.

Congress clearly expected the educational programs provided for in the Act to go a long way toward correcting the problems of age discrimination in employment. At the same time,
Congress recognized that some age discrimination resulted from deeply ingrained prejudice and that strong enforcement measures were needed to combat this discrimination.\footnote{192}

The bill recognizes two distinct types of unfair discrimination based on age: First, the discrimination which is the result of misunderstanding of the relationship of age to usefulness; and second, the discrimination which is the result of a deliberate disregard of a worker's value solely because of age. The results of the two types of discrimination are the same, but the remedies called for are different.

The obvious remedy for discrimination born of misunderstanding is the use of education, information, and research—as provided for in section 3.

The second type of unfair discrimination is more pernicious. To eliminate this more serious discrimination, H.R. 13054 provides prohibitions against specific practices of arbitrary discrimination.\footnote{193}

The belief that some age discrimination is caused by misunderstanding does not justify giving less procedural protection to age-discrimination plaintiffs under the opt-in provision of the ADEA than that given to Title VII plaintiffs under Rule 23 class actions. The ADEA contains educational provisions\footnote{194} to correct discriminatory attitudes based on misunderstanding and enforcement provisions\footnote{195} to combat discrimination based on prejudice. When enforcement efforts are employed, the discrimination involved must have been resistant to educational and conciliatory efforts\footnote{196} and may be presumed to be based on prejudice.\footnote{197} Age discrimination based on prejudice is not

193. Id. at 34,747 (statement of Rep. Dent).
195. Id. § 626.
196. Id. § 626(b).
197. See id. ("Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements..."
different from sex or race discrimination in any respects relevant to the procedural protections afforded under the class-action provisions of the two acts.

Finally, age discrimination may differ from other forms of employment discrimination because of the self-corrective aspect of age discrimination. Sex and race are immutable characteristics. Thus, an individual who discriminates against members of another race or sex takes action against a group of which he will never be a part. Aging, on the other hand, is universal—everyone will be old someday. This means that actions taken against older persons may someday be applied to the one who initially took the discriminatory action. Thus, a person predisposed to discriminate against other racial or gender groups might hesitate before discriminating against older persons.

There is no evidence that this self-corrective aspect has resulted in any discernible hesitation on the part of employers to discriminate on the basis of age. More than 14,500 employment-related age-discrimination charges are still filed with the EEOC each year. The consistently large number of age-discrimination claims filed each year suggests that full procedural protection is necessary in

of this chapter through informal methods of conciliation, conference, and persuasion."; 113 CONG. REC. 34,745 (1967) (statement of Rep. Eilberg) ("[T]he bill contains very real and effective tools with which to launch new educational and persuasive programs designed to eradicate discriminatory practices in employment. And, where these tools fail, the bill provides machinery to enable governments and agencies to prevent practices which cannot be otherwise overturned.").

198. The U.S. Supreme Court recognized this aspect of age discrimination in Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). The Court upheld, against an equal protection challenge, a state statute requiring state police officers to retire at age 50. Id. at 317. The Court found that, unlike racial groups, older persons did not constitute a discrete and insular minority deserving of "extraordinary protection from the majoritarian political process," because aging is a process which affects everyone in society. Id. at 313 (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)). The fact that the Court did not find older persons to be entitled as a group to special constitutional protection under the 14th Amendment, however, does not negate the fact that Congress singled this group out for special protection under the ADEA.

199. The number of ADEA claims filed with the EEOC for the years 1981 to 1990 are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 1981</td>
<td>9,479</td>
</tr>
<tr>
<td>FY 1982</td>
<td>11,063</td>
</tr>
<tr>
<td>FY 1983</td>
<td>18,087</td>
</tr>
<tr>
<td>FY 1984</td>
<td>15,614</td>
</tr>
<tr>
<td>FY 1985</td>
<td>16,784</td>
</tr>
<tr>
<td>FY 1986</td>
<td>17,443</td>
</tr>
<tr>
<td>FY 1987</td>
<td>15,121</td>
</tr>
<tr>
<td>FY 1988</td>
<td>14,882</td>
</tr>
<tr>
<td>FY 1989</td>
<td>14,789</td>
</tr>
<tr>
<td>FY 1990</td>
<td>14,526</td>
</tr>
</tbody>
</table>

order for the ADEA to achieve its goal of deterring illegal age discrimination. Use of the more inclusive Rule 23 class action does not conflict with the purposes of the ADEA, and indeed comports more closely with the broad remedial purposes of the Act than the out-dated opt-in provision.²⁰⁰

C. State Class-Action Rules Do Not Conflict with the Purposes of the ADEA

One may argue that the opt-in provision was included in the ADEA by historical accident. Congress incorporated the opt-in provision of the ADEA from the FLSA in 1967,²⁰¹ just one year after the Federal Rules of Civil Procedure were revised to allow opt-out class actions.²⁰² Before 1966, the type of class action involved in the ADEA could only have been brought as an opt-in action, even under Rule 23.²⁰³ In 1966, however,

²⁰⁰ See Biek, supra note 51, at 118; Lipschultz, supra note 144, at 1377.
²⁰² See FED. R. CIV. P. 23(c)(2)(A) advisory committee’s note—1966 amend.
²⁰³ The FLSA as originally enacted authorized three types of private suits: An employee could sue as an individual, could sue collectively on behalf of herself and other similarly situated employees, or could maintain a representative action through a designated agent for all employees similarly situated. Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (1938) (codified as amended at 29 U.S.C. § 216(b) (1988)). As these actions were litigated, courts encountered problems of whether an individual member of the class might be bound by a decision in which she had not participated. Adopting a solution similar to that offered by the court in Shain v. Armour & Co., 40 F. Supp. 488, 490 (W.D. Ky. 1941), the Portal-to-Portal Act added the requirement that plaintiffs in collective actions under the FLSA sign a written consent in order to be included in the class, in effect banning representative actions altogether. Portal-to-Portal Act of 1947, Pub. L. No. 61-49, § 5(a), 61 Stat. 84, 87 (codified as amended at 29 U.S.C. § 216(b) (1988)). This congressional solution ensured that individual plaintiffs whose rights were being adjudicated had knowledge of and were willing to participate in litigation on their behalf.


In the “true” class suit, the right sought to be enforced by or against the class had to be “joint” (tending to follow interpretation of joint rights in compulsory joinder of FED. R. CIV. P. 19(a)), see 7A WRIGHT, supra note 55, § 1752, “common,” see, e.g., Steele v. Louisville & N.R.R., 323 U.S. 192, 194 (1944) (suit by Black members of labor union to enjoin race discrimination in collective-bargaining agreements), 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,” WRIGHT, supra note
Rule 23 was amended to allow opt-out class actions to bind all parties who did not take action to exclude themselves.\textsuperscript{204} Because of the proximity in time of the Rule 23 revision and the enactment of the ADEA, Congress may not have been aware of the ramifications of incorporating the opt-in rule of the FLSA into the ADEA. Indeed, the opt-in provision of the FLSA remained viable only because of an exemption buried in the advisory committee notes to the Rule 23 revision.\textsuperscript{205} The complex chain that Congress would have had to have followed in order to understand how the FLSA, the ADEA, and Rule 23 interacted, argues at least that the ADEA's inclusion of the now outdated opt-in provision was likely unintentional.

\textit{D. Availability of State Class Actions Affected by Removal}

Because state Rule 23 class-action procedures should not be preempted by the procedural provision in section 216(b) of the

\textsuperscript{55} § 1752, at 16 (quoting an earlier version of Rule 23); see also Himmelblau v. Haist, 195 F. Supp. 356 (S.D.N.Y. 1961) (shareholder derivative suit). "It was the nondivisible nature of the right sued on which determined both the membership of the class and the res judicata effect of the final determination of the right." Moore's, \textit{supra} note 134, ¶ 23.30. Wage claims under the FLSA involve individual rather than common or joint rights and thus could not be brought as "true" class actions under Rule 23.

Nor could FLSA actions be brought as "hybrid" class actions under Rule 23. The "hybrid" class suit applied when the rights sought to be enforced were several and related to specific property. \textit{See id.} The judgment in a "hybrid" action was binding on all members of the class, but only with regard to claims involving the specific property involved. \textit{See id.} Specific property was rarely at issue in FLSA suits.

The "spurious" class action under Rule 23 provided a means for the adjudication in one lawsuit of a number of separate claims involving common questions of law or fact where common relief was sought. \textit{See, e.g.,} Hunter v. Southern Indem. Underwriters, Inc., 47 F. Supp. 242 (E.D. Ky. 1942) (action to rescind and recover for numerous individuals the price paid for bonds). While this type of Rule 23 class action might have been applicable to FLSA suits, the judgment in "spurious" actions, unlike the other Rule 23 class actions, was binding only on those who opted in to the lawsuit. \textit{See Smith v. Abbate, 201 F. Supp. 105, 113, 115 (S.D.N.Y. 1961).}

\textsuperscript{204} \textit{See supra} notes 64--65 and accompanying text.

\textsuperscript{205} A parenthetical comment in the Committee notes states without explanation that "[t]he present provisions of 29 U.S.C § 216(b) are not intended to be affected by Rule 23, as amended." \textit{Fed. R. Civ. P. 23} advisory committee's note—1966 amend.

Professor Spahn has suggested that this exception of § 216(b) from the effect of the revised Rule 23 was due to the advisory committee's belief that it did not have the authority to alter the statutorily defined class procedures in the course of revising the Federal Rules. Spahn, \textit{supra} note 168, at 131.
FLSA, plaintiffs may be able to take advantage of the Rule 23 class-action procedures for ADEA actions in state courts. That advantage, though, would be neutralized to the extent that defendants were able to remove ADEA cases to federal courts where the opt-in provision of section 216(b) controls. The issue of whether ADEA actions are removable is not yet settled.

Because the ADEA specifically incorporates the enforcement procedures of the FLSA, most of the case law relevant to the issue of removability has dealt with the removability of FLSA actions. Only two courts have specifically addressed the question of whether ADEA actions are removable and both held that ADEA cases could be removed.206 The main body of precedent for ADEA removal, however, is still FLSA removal, and there is a significant conflict among the courts with regard to the question of FLSA removability.207

There are several threads to the removability question under the FLSA. The Eighth Circuit in Johnson v. Butler Bros.208 appears to have been the first circuit court to address the question of removability of FLSA actions. The Johnson court determined that FLSA actions were not removable.209 Its decision was based on the Act's language that an action could "be maintained in any court of competent jurisdiction."210 The

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207. While apparently favoring removability, Professor Moore and Mr. Ringle note that "the courts still remain divided on the question of removability." 1A JAMES W. MOORE & BRETT A. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 0.167[5] (2d ed. 1991); see also Walter W. Jones, Jr., Annotation, Removal from State Court to Federal District Court of Action for Wages Under § 16(b) of Fair Labor Standards Act (29 U.S.C. § 216(b)), 10 A.L.R. FED. 919 (1972 & Supp. 1991) (discussing the circuit split regarding removability).

208. 162 F.2d 87 (8th Cir. 1947).

209. Id. at 90.

210. Id. at 88–89 (quoting 29 U.S.C. § 216(b)). Section 216(b) provided as follows:

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may 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.

court interpreted this language as not only granting the plaintiff the right to file his action in state courts, but also the right to prosecute the action to final judgment in that court.\textsuperscript{211} If this were not the intention of Congress, the court concluded, the words "may be maintained in any court of competent jurisdiction" merely stated a truism and were surplusage.\textsuperscript{212} A Sixth Circuit district court in \textit{Maloy v. Friedman},\textsuperscript{213} added support to this interpretation, observing that the U.S. Supreme Court had twice construed the word "maintained" in a federal statute to mean continuing or "keep[ing] from collapse a suit already begun"\textsuperscript{214} and that several cases had held that there was a "well defined distinction between beginning and maintaining an action."\textsuperscript{215}

The \textit{Johnson} decision came one year before Congress amended the general removal statute by adding the phrase "except as otherwise expressly provided by Act of Congress."\textsuperscript{216} After amendment, the removal statute read in pertinent part as follows:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.\textsuperscript{217}

Some courts interpreted this change in the removal statute to signal a stricter standard for denying removal. These courts held that the FLSA's "may be maintained" language did not qualify as an express exception to the authority to remove actions to the federal courts. The court in \textit{Rossi v. Singer Sewing Machine Co.},\textsuperscript{218} for example, noted that the plaintiff's

\begin{footnotes}
\item[211.]  \textit{Johnson}, 162 F.2d at 89.
\item[212.]  \textit{Id}.
\item[213.]  80 F. Supp. 290 (N.D. Ohio 1948).
\item[214.]  \textit{Id}. at 292 (citing George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 377 (1933); Smallwood v. Gallardo, 275 U.S. 56, 61 (1927)).
\item[215.]  \textit{Id}. (citing \textit{In re} Charles Nelson Co., 294 F. 926, 928–29 (N.D. Cal. 1924); Rouillard v. Gray, 175 P. 479, 480 (Cal. 1918)); \textit{see also} National Fertilizer Co. v. Fall River Five Cents Sav. Bank, 82 N.E. 671, 672 (Mass. 1907); Friel v. Alewel, 298 S.W. 762, 764 (Mo. 1927); Carson Rand Co. v. Stern, 31 S.W. 772, 773 (Mo. 1895).
\item[217.]  \textit{Id}.
\item[218.]  127 F. Supp. 53 (D. Conn. 1953).
\end{footnotes}
motion to remand an FLSA action to state court was based on the line of cases that interpreted the FLSA's phrase "may be maintained" to mean that an action filed in a state court "could be prosecuted there to conclusion without removal."  The court indicated that this line of cases appeared to have been superseded by the 1948 revision of the federal removal statute. The district court in *Niswander v. Paul Hardeman, Inc.* broke with the Eighth Circuit's interpretation in *Johnson* to adopt similar reasoning. The *Niswander* court said that "if the question were now presented to the Court of Appeals for this Circuit the result that would be reached would be the opposite from that reached in Butler Brothers." A number of courts adopted the position that FLSA actions were removable and that the phrase "may be maintained" in the FLSA was not an express exception to removability under the federal removal statute.

Other courts continued to follow the *Johnson* court's interpretation of the "may be maintained" language. The court in *Bintrim v. Bruce-Merilee Electric Co.* concluded that "when Congress used the word "maintain", it intended to create an express exception to the removal statute." The court in *Wilkins v. Renault Southwest, Inc.* also determined that the language in the FLSA constituted an express exception within the meaning of the removal statute's provision that actions could be removed "except as otherwise expressly provided." In reaching this decision, the *Wilkins* court relied on a senate report.

219. Id. at 54 (citing *Johnson v. Butler Bros.*, 162 F.2d 87 (8th Cir. 1947); M.L. Cross, Annotation, *Removal to Federal Court of Suit Brought in State Court for Overtime Compensation Under Fair Labor Standards Act*, 172 A.L.R. 1161 (1948)).

220. 127 F. Supp. at 54.


222. Id. at 76.

223. Id.


227. Id. at 1027 (quoting *Haun v. Retail Credit Co.*, 420 F. Supp. 859, 862 (W.D. Pa. 1976)).


229. See id. at 648.
in which the congressional intent concerning removability of actions commenced under certain labor legislation was discussed. The report stated:

Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmen's compensation acts of the States. In the Jones Act, the Fair Labor Standards Act, and the Railway Employers' Liability Act, all of which are in the nature of workmen's compensation cases, the Congress has given the workman the option of filing his case in either the State court or the Federal court. If filed in the State courts the law prohibits removal to the Federal court.

The Wilkins court indicated that this report made clear that Congress, in its hearings on the jurisdictional amendments of the removal statute, thought the Johnson court had correctly stated the law.

Other courts have taken issue with this interpretation of the discussion in the report, pointing out that the amendment under discussion in that report involved 28 U.S.C. § 1445, a provision making state workmen's compensation cases non-removable, and that neither 28 U.S.C. § 1441 nor 29 U.S.C. § 216(b) was mentioned or affected by the amendment. These courts view the statement regarding the non-removability of the FLSA in the report as nothing more than "an oblique reference" without documentation.

Many of the courts holding that the FLSA's "may be maintained" language was not an express exception to the removal statute based their decisions on the notion that Congress knew how to make express exceptions to the general rule of removability when it wanted to do so. The fact that it had not done

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230. See id.
so with the FLSA was, in their view, indicative of a congressional intent for FLSA actions to be removable. 236

The weight of authority on this issue has tipped recently in the direction of allowing removal. The First Circuit Court of Appeals in Cosme Nieves v. Deshler 237 said:

Section 1441(a) explicitly states than an express provision by Act of Congress is required to preclude the right to removal. We think the words “expressly provided” must be construed to mean exactly that. Lacking an explicit statutory directive by Congress that the customary right to remove is abrogated in the instance of FLSA suits, we decline to prohibit their removal. The words “may be maintained” are ambiguous; at best they are suggestive. They are not an express provision barring the exercise of the right to removal. 238

This decision adds significantly to the authority favoring removability of the FLSA in general.

The two courts that have addressed the specific question of the removability of ADEA actions have both favored removability as well. The decision of the court in Jacobi v. High Point Label, Inc., 239 amounted to little more than another district court choosing up sides in the “may be maintained” as an “express exception” controversy. 240 The court noted that the ADEA specifically incorporated the enforcement procedures of the FLSA, 241 and that the cases dealing with the question of removability of the FLSA were in conflict. 242 The court then joined what it saw as the growing majority of cases in holding that the “may be maintained” language of the FLSA did not qualify as an express exception to the general rule of removability. 243 The court pointed out that section 626(c) of the ADEA provided only that a person aggrieved “may bring” a

238. Id. at 451 (footnote and citations omitted).
240. See id. at 521.
241. See id. at 520.
242. See id.
243. See id. at 521.
civil action, as opposed to being able to "maintain" an action as under the FLSA, but then it referred to the ADEA's incorporation of the FLSA enforcement procedures, and chose not to distinguish the analysis of the two acts. 244.

The Fifth Circuit in Baldwin v. Sears, Roebuck & Co. 245 also recognized that Congress intended that the ADEA be enforced under section 216 of the FLSA, 246 and indicated further that the issue of removability of FLSA actions was not settled. 247

The court then specifically declined to address the question of removability of the FLSA actions. 248 It decided, based on the language of section 626(c)(1) of the ADEA that a plaintiff "may bring a civil action in any court of competent jurisdiction," that ADEA actions were removable because there was no express prohibition against removal pursuant to 28 U.S.C. § 1441(a). 249 The court made no attempt to reconcile its straightforward analysis of the ADEA's language with the statutory incorporation of the FLSA's enforcement mechanisms into the ADEA. The court noted that even if ADEA actions were not removable, the particular action in question would have been removable under section 1441(c). 250

While the courts allowing removal of FLSA and ADEA actions constitute a growing majority, both courts and commentators have recognized that there are significant policy reasons for favoring the non-removability of these actions. Removal creates practical problems which make it more difficult for plaintiffs to enforce their federal statutory rights. The court in Wilkins v. Renault Southwest, Inc., 251 for example, said:

[R]emoval [is] an obvious tactic by which the defendant could delay, increase the costs of litigation and harass the plaintiff. Where the employee commences [an FLSA] suit in a state court far removed from the nearest federal court

244. See id.
245. 667 F.2d 458 (5th Cir. 1982).
246. See id. at 460.
247. See id.
248. See id. at 461.
249. See id.
250. See id. at 461 n.6 ("Under 28 U.S.C. § 1332 the court would have original jurisdiction of appellant's breach of contract claim, and that claim, if sued upon alone would be removable; therefore, the entire case would be removable pursuant to 28 U.S.C. § 1441(c).”).
the cost of travel and subsistence of the claimant, his
witnesses and attorneys, would amount to a denial of the
very cause of action conferred by Congress in Section
216(b). 252

Other courts have echoed this view, 253 including some of
those that have allowed removal of FLSA actions. 254 The
American Law Institute, noting that FLSA actions are
typically for small amounts and, as such, would invite removal
as a harassing tactic, recommended that wage actions under
the FLSA be non-removable. 255

One commentator has stated that one of the original
purposes for granting concurrent jurisdiction to adjudicate
federal rights was to eliminate the necessity for litigants to
travel great distances to federal forums. 256 An equally
important reason was to prevent congestion of the federal
courts with the great volume of cases engendered by federal
statutes. 257 There can be little disagreement that the 1948
amendments to the removal statute were aimed at avoiding
the expansion of federal jurisdiction through removal. 258
Nevertheless, several courts have indicated that even assum-
ing a congressional intent to restrict jurisdiction of the federal
courts, it is impossible to ignore the language of the removal
statute requiring an "express exception" to make an action
non-removable. 259

Defendants will not always remove, of course. Some will fail
to seek removal within the thirty-day period provided by

252.  Id. at 648.
1966) (allowing removal generally, but remanding in this case because of procedurally
255.  AMERICAN LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE
256.  Charles Warren, Federal Criminal Laws and the State Courts, 38 HARV.
L. REV. 545, 551 (1925).
257.  Felix Frankfurter, Distribution of Judicial Power Between United States
258.  See American Fire & Casualty Co. v. Finn, 341 U.S. 6, 9–10 (1951); Wilkins
v. Renault S.W., Inc., 227 F. Supp. 647, 648 (N.D. Tex. 1964); see also 28
U.S.C. § 1441 historical and revision note (1988) (stating that the revision "will
somewhat decrease the volume of Federal litigation").
259.  See, e.g., Goettel v. Glenn Berry Mfrs., Inc., 236 F. Supp. 884, 885 (N.D.
1953); Bradley v. Halliburton Oil Well Cementing Co., 100 F. Supp. 913, 915 (E.D.
Okla. 1951).
statute. Others may wish to take advantage of the delay in more crowded state court dockets or state rules of procedure they view as being more favorable to their case. Some may want to have their case heard by judges they know or juries selected from a pool they believe will be inclined to view their case sympathetically. Some may be influenced by the convenience of the forum's location. When the question of removability does arise, only three circuit courts have addressed the issue and, of those three, two have allowed removal. However, the availability of Rule 23 class actions for ADEA actions in the state courts would certainly sharpen this controversy. In circuits where the issue has not been decided, the courts should focus on the remedial purpose of the ADEA and its protection of civil rights as well as the policies favoring non-removal of the FLSA. The language of the statute should then be interpreted to give the plaintiff maximal protection by holding ADEA actions to be non-removable.

The best course of action, of course, would be for Congress to amend the “living fossil” of section 216(b) to allow for Rule 23 class actions to bring it in line with all other contemporary class-action suits. Meanwhile, the judiciary should construe the removal statute as prohibiting removal of ADEA suits.

260. 28 U.S.C. § 1446 provides:

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.


262. See id. at 1361–62.


266. See Cosme Nieves, 786 F.2d at 451 (FLSA actions removable); Baldwin, 667 F.2d at 461 (ADEA actions removable).
CONCLUSION

The opt-in class action is an anachronism. Until it is updated, age-discrimination litigants may be able to take advantage of the fuller protections available in Rule 23 class actions by bringing their ADEA cases in state courts. The general rule is that state procedures control in state courts, even when the cause of action being enforced is federal. State class-action procedures do not discriminate against federal causes of action, are not outcome determinative, and do not conflict with the purposes of the ADEA. Therefore, state procedures regarding the conduct of class actions should not be preempted. This should be the result even though the ADEA contains a procedural provision which specifies contrary class-action procedures.

Plaintiffs’ ability to utilize state Rule 23 class-action procedures in ADEA litigation depends on the case being maintained in the state courts. ADEA actions, however, may be subject to removal to federal court where the opt-in provision of the ADEA would control. The majority of circuits have not yet determined whether ADEA actions are removable. The circuits that have addressed the issue are split, with such actions currently non-removable in one circuit and removable in two others. Significant policy considerations favor interpreting ADEA actions to be non-removable.

Utilizing state court Rule 23 class-action procedures would allow age-discrimination litigants to take advantage of added procedural protections that have always been afforded to victims of sex and race discrimination.