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Democratizing the FLSA Injunction: Toward a Systemic Remedy for Wage Theft

ABSTRACT. The Fair Labor Standards Act (FLSA) and its state equivalents have proven a regulatory failure, as their minimum wage and overtime protections are widely violated with impunity. This Note attributes that failure partly to the overlooked issue of private injunctive relief. FLSA and most state laws reserve injunctive relief for agency actions—a remedial limitation that reflects New Deal regulatory attitudes presuming agency-centered enforcement, from which Title VII and other statutes have since diverged. Public enforcement is clearly insufficient to address the epidemic in wage and hour violations, and FLSA’s private enforcement regime of retrospective damages actions effectively treats wage theft as a matter of individualized malice. Yet, as Congress understood at FLSA’s passage, wage theft is more often a business model chosen by employers competing in a given market; minimum wage standards, then, are either secured or undermined collectively. This Note argues from policy and litigation perspectives that private injunctive relief would better address the systemic problem of wage theft than damages actions alone, and would help ensure that FLSA’s protections in fact serve as the baseline standards that Congress envisioned.

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INTRODUCTION

When a federal court finds that an employer has engaged in employment discrimination in violation of Title VII, the standard remedy is to award damages such as back pay, order immediate equitable relief such as reinstatement or promotion, and enjoin the employer's unlawful practice prospectively—frequently as applied to all employees, even in the absence of a class action.¹ For example, assume a plaintiff challenges an employer's use of a placement test, and a court holds the test has a disparate impact on Black applicants that cannot be justified by business necessity. Rather than merely preventing the employer from applying the discriminatory test to that particular plaintiff, as well as providing any damages or immediate equitable relief, the court will issue an injunction preventing the employer from using the unlawful test at all.

Not so when it comes to employers stealing wages. When workers show that an employer has violated the minimum wage or overtime provisions of the Fair Labor Standards Act (FLSA),² courts will award damages (including liquidated damages),³ and, for claims of employer retaliation, will provide immediate equitable relief such as reinstatement or front pay.⁴ Courts will not, absent the addition of such a term in a settlement agreement, prospectively enjoin an employer's practice of paying workers less than minimum wage, withholding overtime pay, making illegal deductions, or committing other forms of "wage theft." Instead, plaintiffs or other workers who are subject to continued wage theft from the same employer must file new claims—perhaps attempting to relate these claims to the earlier action—and run through the lengthy motions of civil litigation again.

This feature of FLSA enforcement is not due to a lack of injunctive relief under the Act, as § 217, titled "Injunction proceedings," explicitly provides federal courts with equitable jurisdiction to "restrain violations" of FLSA's main provisions.⁵ Rather, the statute reserves this remedy for agency enforcement by stating in § 211 that "the Administrator shall bring all actions under section 217."⁶

1. See, e.g., *Evans v. Harnett Cty. Bd. of Educ.*, 684 F.2d 304, 305-06 (4th Cir. 1982); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1201-02 (7th Cir. 1971); see also 45C AM. JUR. 2D *Job Discrimination* § 2532 (2017) ("[P]ermanent injunctive relief can be entered on a class-wide basis in a nonclass action and need not be limited to the persons who brought suit.").

2. 29 U.S.C. §§ 206-207 (2012).

3. *Id.* § 216(b).

4. *Id.* (providing "legal or equitable relief" for violation of anti-retaliation provision in 29 U.S.C. § 215(a)(3)).

5. *Id.* § 217.

6. *Id.* § 211(a).

Courts have ordered broad injunctions requiring employers, on pain of contempt, to conform to FLSA's provisions.⁷ However, they have consistently held that injunctive relief is only available in actions brought by the Department of Labor (DOL),⁸ and not in the vast majority of FLSA cases, which are brought by private parties.⁹ As Judge Easterbrook has observed, by limiting injunctive relief to actions brought by the Secretary of Labor, "[t]he statute leaves the heavy artillery to public officials."¹⁰

The absence of private injunctive relief is not the only remedial inadequacy that has prevented FLSA from effectively combatting wage theft on a systematic level; the statute also lacks an opt-out class mechanism. That combination has produced a hobbled private enforcement regime¹¹ as compared to other federal employment laws like Title VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act (ADEA).¹² Opt-out class actions, such as under Rule 23 of the Federal Rules of Civil Procedure, allow one or more named plaintiffs to bring an action on behalf of a class of similarly situated individuals, where

7. See, e.g., *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949); *Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir. 1981); *Wirtz v. Ocala Gas Co.*, 336 F.2d 236 (5th Cir. 1964).
8. See, e.g., *Powell v. Wash. Post Co.*, 267 F.2d 651, 652 (D.C. Cir. 1959); *Roberg v. Henry Phipps Estate*, 156 F.2d 958, 963 (2d Cir. 1946); see also *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (noting agreement among lower courts).
9. According to the Public Access to Court Electronic Records (PACER) system, there were 8,954 FLSA cases filed in 2015, 130 of which were by DOL. See Doug Hass, *FLSA Minimum Wage, Overtime Lawsuits Set New Record in 2015, Filing Growth Continues*, DAY SHIFT (Jan. 4, 2016), <http://dayshift.com/2016/01/04/flsa-minimum-wage-overtime-lawsuits-set-new-record-in-2015-filing-growth-continues/1352> [<http://perma.cc/QG7X-YCJ5>]. Note that these figures do not indicate relative levels of private and public FLSA enforcement generally, given that agency enforcement may not result in a lawsuit—for example, where an employer agrees to settle after an investigation.
10. *Heitmann v. City of Chicago*, 560 F.3d 642, 644 (7th Cir. 2009).
11. Sean Farhang defines “private enforcement regime” as a statute’s set of rules for “who has standing to sue, which parties will bear the costs of litigation, what damages will be available to winning plaintiffs, whether a judge or jury will make factual determinations and assess damages, and rules of liability, evidence, and proof.” SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 3 (2010). Farhang writes, “[T]ogether [these] can have profound consequences for how much or little private enforcement litigation will actually be mobilized.” *Id.* at 3-4 (2010). Note that in terms of remedies, Farhang’s definition focuses on damages and fee-shifting and does not mention whether and what type of injunctive relief is available.
12. 42 U.S.C. § 2000e-5(g)(1) (2012) (providing that a court upon a finding of discrimination under Title VII “may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate,” including “any other equitable relief as the court deems appropriate”); *Pons*, 434 U.S. at 581 (discussing the availability of private injunctive relief under the ADEA).

joinder of all such individuals is impracticable and certain other criteria are met.¹³ Where a class action is properly maintained, individuals within that class are covered by any judgment or settlement unless they affirmatively “opt out” of the litigation.¹⁴ This device thus allows plaintiffs to extend the remedy in a successful case to the entire class of affected individuals, and it allows defendants the benefits of claim preclusion on the same broad scale. By contrast, FLSA’s “collective action” provision, which essentially serves to facilitate notice to potential plaintiffs and joinder, requires employees to affirmatively “opt in” to an action by name in order to be covered.¹⁵ Whereas an opt-out class mechanism allows a handful of named plaintiffs to aggregate and represent the interests of thousands or even millions of individuals who do not directly participate in the litigation, FLSA’s inefficient “collective action” provision requires that organizers and attorneys contact each worker to be covered, and, in the face of a significant possibility of employer retaliation, convince those workers to put their names to a complaint at a point in the case when recovery is uncertain. Moreover, because opt-in actions neither provide relief to nor bind the entire class of affected individuals, they fail to definitively resolve legal issues for both plaintiffs and defendants. For instance, while multiple Rule 23 actions cannot be maintained for the same claims on behalf of the same class of individuals, FLSA’s opt-in mechanism may and sometimes does result in the maintenance of multiple overlapping collective actions with different groups of opt-in plaintiffs, none of which resolves the issue on behalf of all affected workers.¹⁶ Opt-in collective actions therefore present an inefficient and logistically difficult means of aggregating claims as compared to opt-out class actions.

Not all states that enacted parallel wage and hour laws wholly replicated the FLSA private-enforcement model. Some state laws provide opt-out class mech-

13. See FED. R. CIV. P. 23.

14. *Id.* 23(c)(2)(B)(v).

15. 29 U.S.C. § 216(b) (2012) (“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”); see also Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523 (2012) (discussing this provision).

16. See, e.g., *Kampfer v. Fifth Third Bank*, No. 3:14 cv 2849, 2016 WL 1110257, at *2 (N.D. Ohio Mar. 22, 2016) (noting that “[t]he language of Section 216(b) does not expressly prohibit a second collective action,” and citing “[s]everal [district] courts [that] have also endorsed this position”).

anisms, though this limited patchwork does not reach all American workers covered by FLSA.¹⁷ Similarly, while most state wage and hour laws either do not provide injunctive relief or, like FLSA, reserve such relief for agency actions, seven states allow private wage and hour injunctions: Arkansas, Florida, Massachusetts, Minnesota, New Mexico, Rhode Island, and Utah.¹⁸ The record of available opinions, however, suggests that advocates do not actively pursue employer-wide prospective injunctions or enforce injunctions through contempt. That is, advocates do not appear to wield wage and hour cases as one might an employment discrimination case, aimed at changing an employer's policies and ensuring prospective compliance.

In a world where wage theft is endemic in certain industries¹⁹ and often makes economic sense for employers given the low likelihood of enforcement, employers frequently maintain illegal practices following “successful” enforcement actions. Instead of forcing employers to restructure business models built on illegally underpaying workers, workers are often forced to play an ongoing, retrospective game of whack-a-mole.²⁰ Meanwhile, workers lose an estimated

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17. See Nantiya Ruan, *Same Law, Different Day: A Survey of the Last Thirty Years of Wage Litigation and Its Impact on Low-Wage Workers*, 30 HOFSTRA LAB. & EMP. L.J. 355, 376-77 (2013) (discussing state opt-out class actions).
 18. FLA. CONST. art. X, § 24(e); ARK. CODE ANN. § 11-4-218(e)(1) (2017); FLA. STAT. § 448.110(6)(c)(2) (2017); MASS. GEN. LAWS ch. 149, § 150 (2017); MINN. STAT. § 181.171, sub-div. 1 (2017); N.M. STAT. ANN. § 50-4-26(f) (2017); 28 R.I. GEN. LAWS § 28-14-19.2(a) (2017); UTAH CODE ANN. § 34-40-205(2)(a) (West 2017); see generally 1-2 WAGE AND HOUR LAWS: A STATE-BY-STATE SURVEY (Gregory K. McGillivray ed., 3d ed. 2016).
 19. See, e.g., Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, NAT'L EMP. L. PROJECT 4 (2009), <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf> [<http://perma.cc/TWT7-P7UU>] (finding over forty percent noncompliance with the minimum wage in apparel and textile manufacturing, personal and repair services, and private household work).
 20. See Nicole Hallett, *The Problem of Wage Theft 14-16* (Sept. 29, 2017) (unpublished manuscript) (on file with author) (explaining how employers often continue to violate the law after paying a settlement or court judgment, in light of the economic benefits, and illustrating this point with two relatively high-profile cases in New York and Connecticut). As the Government Accountability Office explained in a 1981 report, more than a third of employers found in violation of FLSA were repeat offenders: “Our review showed that many employers repeatedly violated the same sections of the act . . . We believe that many employers are willing to commit repeated violations of the wage and hour laws because chances of discovery are slim, penalties are unlikely, and the rewards of illegally withholding employee back wages can be great.” Comptroller Gen., *Report to the Congress: Changes Needed To Deter Violations of Fair Labor Standards Act*, GOV'T ACCOUNTABILITY OFF. 23 (May 28, 1981), <http://www.gao.gov/assets/140/133362.pdf> [<http://perma.cc/3U4S-Z3C4>]. Indeed, the idea for this Note emerged from a law school clinic case against an employer whom DOL repeatedly found violated state and federal wage and hour laws, yet who continued to do so systematically.

\$15 billion annually in minimum wage violations²¹—an enormous, regressive, and illegal wealth transfer to employers, disproportionately taken from low-wage workers, immigrants, people of color, and women.²² This is no petty theft for the injured workers. Victims typically lose a substantial portion of their already-low incomes, sometimes enough to push them below the federal poverty line: one study found that the average year-round worker who is a victim of wage theft loses \$3,300 per year, resulting in an annual income of just \$10,500.²³ Moreover, wage theft harms society at large by increasing workers' dependency on public assistance programs, in effect subsidizing employers who violate the law;²⁴ reducing payroll and tax revenues;²⁵ decreasing workers' spending power;²⁶ and exerting downward pressure on wages.²⁷

FLSA enforcement has thus proven a “regulatory failure,”²⁸ in which the wage standards that Congress intended to provide universal protection for work-

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21. David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECON. POL'Y INST. 9 (May 10, 2017), <http://www.epi.org/files/pdf/125116.pdf> [<http://perma.cc/TP88-C3AE>].
 22. Bernhardt et al., *supra* note 19, at 42 (reporting that 32.8% of Latino workers were subject to wage violations, as were 19.1% of Black workers and 15.1% of Asian and other nonwhite workers, compared to 7.8% of white workers; 30.2% of female workers were subject to wage violations, compared to 19.5% of male workers; and 37.1% of undocumented workers were subject to wage violations, compared to 21.3% of documented foreign-born workers).
 23. Cooper & Kroeger, *supra* note 21, at 2; *see also id.* at 14 (finding that eliminating wage theft would reduce the poverty rate among minimum-wage earners who are victims of wage theft from 21.4% to 14.8%).
 24. *Id.* at 14 (finding that one in three workers experiencing wage theft is on some form of public assistance, and that 18% of workers experiencing wage theft receive food stamps); *cf.* Ken Jacobs, Ian Perry & Jennifer MacGillvary, *The High Public Cost of Low Wages*, U.C. BERKELEY LAB. CTR. (Apr. 2015), <http://laborcenter.berkeley.edu/pdf/2015/the-high-public-cost-of-low-wages.pdf> [<http://perma.cc/YF7H-DDGP>] (finding that U.S. taxpayers spend \$152.8 billion each year in public support for working families because their wages are not sufficient to support basic living costs).
 25. *Just Pay: Improving Wage and Hour Enforcement at the United States Department of Labor*, NAT'L EMP. L. PROJECT 7 (2010), <http://www.nelp.org/content/uploads/2015/03/JustPayReport2010.pdf> [<http://perma.cc/2TY2-TBTK>].
 26. *Id.*
 27. Josh Bivens et al., *Raising America's Pay: Why It's Our Central Economic Policy Challenge*, ECON. POL'Y INST. 8, 65 (June 4, 2014), <http://www.epi.org/files/pdf/65287.pdf> [<http://perma.cc/7YRB-P55N>]; Cooper & Kroeger, *supra* note 21, at 2, 30.
 28. *See* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1178 (2012) (discussing regulatory failure and mixed private/public enforcement regimes).

ers and an even baseline for employer competition are “regularly and systematically violated.”²⁹ In a survey of low-wage workers in Chicago, Los Angeles, and New York City, the National Employment Law Project (NELP) found that twenty-six percent of workers were paid less than minimum wage in the previous week and that seventy-six percent of employees were not paid their legally required overtime, resulting in an estimated \$2,634 loss annually per worker.³⁰ A vast literature has documented similar violations.³¹ Wage theft is especially acute among women, people of color, and immigrants (particularly those who are undocumented), who most lack the resources and job security necessary to report violations or bring private actions.³²

Neither DOL’s Wage and Hour Division (WHD), which is tasked with enforcing FLSA, nor its state equivalents (where they exist) have proven sufficient to address this gargantuan problem, despite significant reforms under the Clinton and Obama Administrations.³³ Agency resources are sorely lacking and subject to political caprice: while the number of workers covered by wage and hour laws grew fifty-five percent from 1975 to 2004, the number of WHD investigators *decreased* by more than fourteen percent, from 921 to 788.³⁴ Unsurprisingly, the number of workers awarded back wages declined by twenty-four percent during this period.³⁵ Moreover, while WHD hired over three hundred new in-

29. Bernhardt et al., *supra* note 19, at 2.

30. *Id.* at 2, 5.

31. See, e.g., *Winning Wage Justice: A Summary of Research on Wage and Hour Violations in the United States*, NAT’L EMP. L. PROJECT (July 2013), <http://www.nelp.org/content/uploads/2015/03/WinningWageJusticeSummaryofResearchonWageTheft.pdf> [<http://perma.cc/44H2-WFKG>].

32. See Llezlie Green Coleman, *Exploited at the Intersection: A Critical Race Feminist Analysis of Undocumented Latina Workers and the Role of the Private Attorney General*, 22 VA. J. SOC. POL’Y & L. 397, 403-05 (2015).

33. For a report and series of enforcement recommendations that David Weil authored shortly before becoming WHD Administrator in 2014, see David Weil, *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division* 1, 5 (May 2010), <http://www.dol.gov/whd/resources/strategicEnforcement.pdf> [<http://perma.cc/Z4LD-2CVJ>].

34. Annette Bernhardt & Siobhán McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004*, BRENNAN CTR. FOR JUST. 2 (Sept. 2005), <http://www.nelp.org/content/uploads/2015/03/Trends-in-Wage-and-Hour-Enforcement.pdf> [<http://perma.cc/446Z-8EYB>].

35. *Id.*

investigators under the Obama Administration, these officials are still able to investigate only a small fraction of employers covered by FLSA.³⁶ A series of reports by the Government Accountability Office revealed that DOL “frequently responded inadequately to complaints,” sometimes lied to ostensible complainants, and closed cases “based on unverified information provided by the employer.”³⁷ Even if workers are awarded damages, they may see little to no recovery: one study found that only seventeen percent of workers who prevailed at the California wage and hour agency from 2008 to 2011 collected any money.³⁸ In short, there is an enforcement crisis in wage and hour law, and agency actions are clearly insufficient to solve that crisis.

This Note proposes, as a matter of effective regulation and advancing workers’ rights, that injunctive relief be made generally available in private wage theft actions and aggressively pursued in states where it exists. Such relief could be achieved by amending FLSA to strike the language in § 211 that limits injunctive relief to agency actions, or – perhaps more feasibly, but with lesser impact – by adding provisions for private injunctive relief to state wage and hour laws.³⁹ As I demonstrate, the FLSA enforcement regime is a residue of New Deal regulatory attitudes, which presumed a powerful agency as the primary enforcement vehicle and an economy with high union density, where most workers would have recourse in the first instance to a system of collective bargaining to set workplace standards and resolve disputes. Yet today, DOL actions constitute a small fraction of wage theft actions,⁴⁰ and union density has declined precipitously from a height of 30-35% in the mid-1940s and 1950s⁴¹ to 10.7% in 2016 – including as

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36. See Elizabeth J. Kennedy, *Wage Theft as Public Larceny*, 81 BROOK. L. REV. 517, 534-36 (2016).
37. *Highlights: Wage and Hour Division’s Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft*, U.S. GOV’T ACCOUNTABILITY OFF. 1 (2009), <http://www.gao.gov/assets/130/122112.pdf> [<http://perma.cc/2SJ9-4347>].
38. Eunice Hyunhye Cho et al., *Hollow Victories: The Crisis in Collecting Unpaid Wages for California’s Workers*, NAT’L EMP. L. PROJECT 2 (2013), <http://www.nelp.org/content/uploads/2015/02/Hollow-Victories.pdf> [<http://perma.cc/AQ4V-3ZLR>]; see also Cmty. Dev. Project at the Urban Justice Ctr. et al., *Empty Judgments: The Wage Collection Crisis in New York*, NAT’L CTR. FOR L. & ECON. JUST. 5 (2015), <http://nclj.org/wp-content/uploads/2015/11/Empty-Judgments-The-Wage-Collection-Crisis-in-New-York.pdf> [<http://perma.cc/9CV3-AE8D>] (identifying \$125 million in unpaid judgments and orders in New York).
39. Explicit amendment might not be necessary in some states where injunctive relief is impliedly available based on legislative history or remedial provisions from other areas of law, though such an argument is beyond the scope of this Note.
40. See *supra* note 9 and accompanying text.
41. Richard B. Freeman, *Spurts in Union Growth: Defining Moments and Social Processes*, in *THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY* 265, 292 tbl.8A.2 (Michael D. Bordo et al. eds., 1998).

low as 1.6% in one state.⁴² The decline in union density means that an increasing proportion of American workers rely on employment law, rather than collective bargaining, to provide basic workplace protections.⁴³ This strains agency resources further, as FLSA is forced to play an outsized role in the workplace regulatory landscape. In light of this regulatory failure, making wage and hour protections real for most workers requires democratizing all the weapons in FLSA's arsenal, including injunctive relief.

Scholars and practitioners have proposed several reforms aimed at addressing America's wage theft crisis. Many have called for increased penalties, such as mandatory treble damages, to shift the calculus whereby employers conclude that it pays to underpay workers.⁴⁴ Others have suggested pressing state and local law enforcement to bring criminal charges against employers, harnessing the stigma and force of criminal sanctions to induce compliance.⁴⁵ Some have stressed the need for better protections for immigrant workers, such as increased U-visa certifications for workplace-related crimes or greater protections against immigration-related retaliation.⁴⁶ Still others have proposed DOL reforms, such

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42. Bureau of Labor Statistics, *Union Members—2016*, U.S. DEP'T LAB. 1 (Jan. 26, 2017), <http://www.bls.gov/news.release/pdf/union2.pdf> [<http://perma.cc/P5Q2-XB4A>].
43. See Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 321 (2005) (“Since the 1960s, the New Deal collective bargaining system has been supplemented, and largely supplanted, by . . . a regulatory model of minimum standards enforceable mainly by administrative agencies and a rights model of judicially enforceable individual rights.”); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2687-92 (2008) (describing the “hydraulic process” whereby workers have used employment law to serve labor law purposes, and employment law’s limitations in that role).
44. See, e.g., Matthew Fritz-Mauer, *Lofty Laws, Broken Promises: Wage Theft and the Degradation of Low-Wage Workers*, 20 EMP. RTS. & EMP. POL’Y J. 71, 117 (2016); Lauren K. Dasse, Note, *Wage Theft in New York: The Wage Theft Prevention Act as a Counter to an Endemic Problem*, 16 CUNY L. REV. 97, 114 (2012); *Winning Wage Justice: An Advocate’s Guide to State and City Policies To Fight Wage Theft*, NAT’L EMP. L PROJECT 19-20 (Jan. 2011), <http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf> [<http://perma.cc/4ZBG-3ZLL>] (identifying mandatory treble damages as a “NELP Top Pick” among several possible wage and hour reforms).
45. See, e.g., Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655 (2014); Rita J. Verga, *An Advocate’s Toolkit: Using Criminal “Theft of Service” Laws To Enforce Workers’ Right To Be Paid*, 8 CUNY L. REV. 283 (2005).
46. Lee, *supra* note 45; see also Eunice Hyunhye Cho et al., *A New Understanding of Substantial Abuse: Evaluating Harm in U-Visa Petitions for Immigrant Victims of Workplace Crime*, 29 GEO. IMMIGR. L.J. 1 (2014) (describing the heightened difficulty of securing certification for U-visa applications involving workplace-related crimes).

as the 1990s resurrection of FLSA's "hot goods" provision⁴⁷ used to enjoin the sale of goods produced in violation of FLSA and strategic targeting of employers higher up the supply chain.⁴⁸

Many commentators have identified the importance of aggregating claims to achieve systemic employer reform, particularly since the Portal-to-Portal Act of 1947 removed FLSA opt-out class actions and "representative actions" by unions and other organizations.⁴⁹ At least two commentators have called for a private right of action for FLSA's "hot goods" provision,⁵⁰ which would be a potent—if likely controversial⁵¹—tool for workers to halt supply chains built upon wage violations. Still others have suggested improving collection mechanisms, such as pre- and post-judgment liens;⁵² making it easier for workers to collect from the top shareholders of certain corporations;⁵³ and expanding definitions of "employees" and "employers" to cover excluded workers and adapt to the contemporary workplace.⁵⁴ Besides strictly legal solutions, the growth of the "workers center" movement in the past few decades has seen an explosion in innovative organizing strategies, which combine workplace organizing with consumer boycotts, publicity campaigns, litigation, and state and local political advocacy.⁵⁵

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47. 29 U.S.C. § 215(a)(1) (2012) (declaring it "unlawful for any person . . . to transport, offer for transportation, ship, deliver, or sell in commerce . . . any goods" produced in violation of FLSA's minimum wage and overtime provisions).
48. See, e.g., David Weil, *Crafting a Progressive Regulatory Policy: Why Enforcement Matters*, 28 COMP. LAB. L. & POL'Y J. 101, 138, 141-42 (2007); Weil, *supra* note 33.
49. See, e.g., Moss & Ruan, *supra* note 15, at 561; Howard Wial, *Minimum-Wage Enforcement and the Low-Wage Labor Market* 30 (Task Force on Reconstructing Am.'s Labor Mkt. Insts., Working Paper No. WP11, 1999), <http://pdfs.semanticscholar.org/2267/b7484ec851a09189303ce63b9acec45f87a4.pdf> [<http://perma.cc/4R2C-Y22E>].
50. Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2208 (1994); Wial, *supra* note 49, at 27.
51. DOL's increased use of the hot goods injunction has been met with significant opposition from employers, particularly when applied to perishable agricultural goods. See Stephanie A. Koltookian, Note, *Some (Don't) Like It Hot: The Use of the "Hot Goods" Injunction in Perishable Agriculture*, 100 IOWA L. REV. 1841 (2015).
52. See KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT 152-53 (2009); Cho et al., *supra* note 38, at 16-18.
53. Cmty. Dev. Project at the Urban Justice Ctr. et al., *supra* note 38, at 24-25.
54. Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983 (1999).
55. See, e.g., JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM (2006); Andrew Friedman & Deborah Axt, *In Defense of Dignity*, 45 HARV. C.R.-C.L. L. REV. 577 (2010).

Each of these contributions has highlighted important facets of America's wage theft problem, and many have led to municipal and state reforms that have improved the lives of workers and their communities. Yet these reforms have largely failed to make a dent in the fundamental fact of widespread wage theft: a study of states that have passed wage theft laws in the past ten years found that only mandatory treble damages produced a statistically significant—albeit still minor—decline in violations.⁵⁶ Further, all of these proposals have overlooked the issue of prospective injunctive relief under FLSA's main provisions,⁵⁷ failing to note how FLSA's remedial structure differs from other employment and civil rights statutes by reserving this relief for agency actions. Few even acknowledge DOL's use of such injunctions, though they were once a prominent feature of enforcement and continue to be used frequently. Indeed, the only scholarship to directly address § 217 injunctions, apart from those related to “hot goods,” appears to be a student Note and a Comment, both from the late 1940s.⁵⁸ This Note fills that gap by exploring how injunctive relief functions in DOL actions and might be similarly used by private litigants. It proposes private injunctive relief as one tool among many: private injunctive relief is no panacea for wage theft, but it may prove effective in certain circumstances at securing employer compliance, and its availability may shift bargaining power to workers generally.

In addition to providing relief in particular cases, democratizing the FLSA injunction helps conceive of wage theft as a fundamentally systemic problem that—like Title VII—requires restructuring employer practices. Congress understood the systemic nature of wage standards at FLSA's passage, declaring that substandard labor conditions “constitute[] an unfair method of competition” and that commerce in goods that are unfairly produced “spread[s] and perpetuate[s] such labor conditions.”⁵⁹ Yet the dominant understanding of wage theft among scholars and advocates, like FLSA's private enforcement regime, treats wage and hour violations as a problem of individual bad actors. This failure to appreciate the systemic character of wage theft appears to be due in part to the

56. Daniel J. Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSP. ON POL. 324, 339-41 (2016).

57. This Note uses “prospective injunction” or “prospective injunctive relief” to refer to injunctions prohibiting employers from future violations of wage and hour law. By contrast, injunctive relief may address past violations, such as by reinstating workers who were retaliated against by employers, or by enjoining the sale of “hot goods” produced in violation of FLSA. See *supra* notes 47-48 and accompanying text.

58. E. Merrick Dodd, Comment, *The Supreme Court and Fair Labor Standards, 1941-1945*, 59 HARV. L. REV. 321 (1946); Note, *The Statutory Injunction as an Enforcement Weapon of Federal Agencies*, 57 YALE L.J. 1023 (1948).

59. 29 U.S.C. § 202(a) (2012).

dyadic nature of litigation and advocacy campaigns against a given employer, as well as the benefits of emphasizing the individual moral culpability of a targeted employer. Once wage theft is understood not as an act of personal malice but as a business model,⁶⁰ widespread to the extent that it appears necessary to compete in certain industries, the idea of attacking it with individual damages claims appears fundamentally wrongheaded.⁶¹ By contrast, private injunctions invoke the equitable power of courts; they elevate wage theft from a regulatory infraction to what Llezlie Green Coleman rightly identifies as a civil rights issue,⁶² given its disproportionate impact on marginalized groups. In challenging the view of employment law as about and secured by individuals, this Note also joins scholarship seeking to unsettle the line between employment and labor law.⁶³

The Note proceeds in four Parts. Part I situates the FLSA enforcement regime amid both broader attitudes toward regulatory enforcement at its enactment and the movement toward private enforcement in subsequent decades. This Part draws on a growing body of remedies literature investigating why Congress has enacted mixed public-private enforcement regimes, and the relative efficacy of those regimes.⁶⁴ While much of this literature has analyzed Title VII and other

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60. One might then ask why we should retain the moralizing language of “wage theft,” rather than something like “wage and hour noncompliance.” Understanding that structural forces encourage wage theft does not prevent us from condemning its effects and the structures of social domination in which it exists, as well as the abuse and intimidation that typically accompany wage theft. Moreover, “wage theft” has proven a resonant political frame that casts wealth transfers from regulatory violations in a familiar context of stealing and injustice. See generally BOBO, *supra* note 52 (framing wage theft in terms of faith-based notions of justice).
61. This Note is not the first to urge such a framing. As early as 1979, economists Orley Ashenfelter and Robert Smith theorized that employers engage in wage theft based on a cost-benefit analysis that weighs the likelihood of detection and the associated penalties against the expected profits of violating the law. Orley Ashenfelter & Robert S. Smith, *Compliance with the Minimum Wage Law*, 87 J. POL. ECON. 333 (1979). Nicole Hallett has recently argued for engaging with the economics literature and foregrounding the employer’s cost-benefit analysis when developing and measuring solutions to the current wage theft crisis. Hallett, *supra* note 20.
62. Coleman, *supra* note 32, at 417 (referring to “civil rights statutes, including the Fair Labor Standards Act”).
63. See, e.g., Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016); Estlund, *supra* note 43; Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163 (2007); Sachs, *supra* note 43; see *infra* Part IV.
64. See, e.g., David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013); Sean Farhang, *Regulation, Litigation, and Reform*, in THE POLITICS OF MAJOR POLICY REFORM IN POSTWAR AMERICA 48-76 (Jeffery A. Jenkins & Sidney M. Milkis eds., 2014); R. Shep Melnick, *Courts and Agencies in the American Civil Rights State*, in THE POLITICS OF MAJOR POLICY REFORM IN POSTWAR AMERICA 77-102 (Jeffery A. Jenkins & Sidney M. Milkis eds., 2014); Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between*

statutes from the 1960s and 1970s, no articles have explored the history and design of FLSA. This history suggests that FLSA's emphasis on agency enforcement is a vestige of New Deal-era regulatory attitudes from which Congress has since departed, and which is further inappropriate given the outsized role that FLSA and other employment law has been forced to play in the contemporary, largely non-union American workplace.

Part II engages with contemporary private enforcement literature to make the regulatory case for the private wage and hour injunctions. This Part argues that private injunctions would promote more aggressive and consistent enforcement across presidential administrations, harness the informational advantages of workers, and better serve the goal of worker empowerment than agency actions. Part II also responds to policy concerns about private enforcement, including a perceived lack of democratic accountability, the potential to overburden regulated parties (here, employers), and the dangers of abusive enforcers who push meritless claims.

Part III draws on DOL's record of § 217 enforcement to assess the litigation benefits and disadvantages of injunctive relief, and to envision what such relief might look like in a private action. This aspect of DOL's practice has received almost no discussion from commentators or from the Agency itself, despite the impression from courts and Congress that it is "of cardinal importance to the vitality of the Fair Labor Standards Act"⁶⁵ and is the tool ultimately responsible for changing an employer's practices.⁶⁶ Together, the regulatory and litigation benefits⁶⁷ of private wage and hour injunctions counsel in favor of extending such relief under FLSA and in state laws where not presently available, and more aggressively pursuing this relief in states where it exists.

Public and Private Enforcement of Rule 10b-5, 108 COLUM. L. REV. 1301 (2008); George Rutherglen, *Private Rights and Private Actions: The Legacy of Civil Rights in the Enforcement of Title VII*, 95 B.U. L. REV. 733 (2015); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93 (2005).

65. *Wirtz v. Jones*, 340 F.2d 901, 905 (5th Cir. 1965); *see also Heitmann v. City of Chicago*, 560 F.3d 642, 644 (7th Cir. 2009) (describing § 217 injunctions as FLSA's "heavy artillery"); *Metzler v. INBP, Inc.*, 127 F.3d 959, 963 (10th Cir. 1997) ("Prospective injunctions are an essential tool to effectuate the policy of the FLSA . . .").
66. *Fair Labor Standards Amendments of 1977: Hearings on S. 1871 Before the S. Subcomm. on Labor*, 95th Cong. 16-17 (1977) [hereinafter *1977 FLSA Hearings*] (describing an injunction under § 217, in contrast with damages, as the means for "getting the rate [of pay] changed").
67. While there is not a neat division between these two benefits, this Note uses "regulatory benefits and disadvantages" as discussed in Part II to refer to broader, higher-level policy arguments; by contrast, the "litigation" perspective in Part III addresses the concrete legal mechanics of private wage and hour injunctions.

Finally, Part IV discusses how injunctive relief responds to and highlights the systemic nature of wage theft, and thus challenges the conception of employment law as being about and secured by individuals. The traditional dichotomy between employment and labor law posits these two bodies of law as vindicating individual and collective rights, respectively. Yet as Congress understood when passing FLSA, wage theft occurs in a given labor market and jeopardizes standards for other workers and employers in that market. The Note proposes that wage and hour protections therefore be viewed as collective in nature, collectively secured or undermined. By potentially extending relief to all workers affected by an employer's illegal practices of wage theft, injunctive relief may help workers respond to wage theft on an appropriately systemic level.

I. FLSA'S ENFORCEMENT REGIME AS NEW DEAL VESTIGE

Because of the dearth of legislative history on the issue of FLSA injunctive relief, this Part infers Congress's intention in enacting FLSA's enforcement regime by juxtaposing the Act with broader regulatory understandings at the time and with the evolution toward private enforcement in subsequent decades.⁶⁸ This history suggests that FLSA's reservation of injunctive authority for DOL is a vestige of New Deal-era regulatory attitudes presuming agency-centered enforcement. Extending injunctive relief to private actions by updating FLSA and state laws, where applicable,⁶⁹ would therefore move wage and hour law toward the more recently dominant private-enforcement model.

A. *The Post-1960s Trend Toward Private Enforcement*

The New Deal regulatory approach located enforcement primarily in a new set of administrative agencies, which employed tools such as administrative adjudication and rulemaking alongside litigation. Beginning in the late 1960s and 1970s, however, Congress turned to private litigation as a central means of stat-

68. Note that this Part is not attempting to interpret statutory *meaning* in this manner, as courts have consistently held that private injunctive relief is not available under FLSA. See *Powell v. Florida*, 132 F.3d 677, 678-79 (11th Cir. 1998) (noting agreement on this issue among lower courts); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). Rather, the question at issue is *why* Congress chose this structure. This methodological approach is admittedly speculative to some extent, given the lack of directly on-point legislative history.

69. Further research may be warranted into the seven state wage and hour statutes that provide private injunctive relief, to discern how these fit into the historical arc of regulatory attitudes discussed in this Part. See *supra* note 18 (listing these state provisions).

utory enforcement. During that time, Congress enacted civil rights, environmental, consumer protection, and other legislation that made private actions and citizen suit provisions a centerpiece of regulation.⁷⁰ Although private litigation was a significant feature of U.S. regulatory enforcement since at least Reconstruction, the 1960s and 1970s legislation expanded the scope and frequency of private enforcement litigation.⁷¹ This proliferation of private enforcement marked a change in regulatory attitudes from the bureaucratic “enlightened administration” of the New Deal era to what Robert Kagan calls “adversarial legalism.”⁷²

Scholars have provided various explanations for this shift toward private enforcement. Some have argued that the relatively fragmented American government, due to principles of federalism and low government spending, lacked the capacity to meet postwar demands for socially transformative regulation, and was therefore forced to enlist private parties as regulators to accomplish what it could not independently.⁷³ Other explanations for the growth of private enforcement cite changes in social attitudes toward litigation – either negatively framed as a rise in litigiousness, or positively framed as a rise in rights consciousness and assertiveness. Still others claim that such enforcement simply reflects an increased volume of commercial activity, resulting in more legal disputes.⁷⁴ In one now-dominant view, Sean Farhang explains the rise of “the litigation state” as the product of divided party control of the legislature and executive, which accelerated in the late 1960s.⁷⁵ On this view, conflict with the President drives Congress to vest enforcement with private parties and courts rather than with executive officials who may be hostile to their goals, and who will be subject to the oversight of different Congresses in the future.

70. FARHANG, *supra* note 11, at 5; ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 38-39 (2001).

71. FARHANG, *supra* note 11, at 12.

72. Melnick, *supra* note 64, at 82; *see also* KAGAN, *supra* note 70, at 3 (defining adversarial legalism as “policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation”).

73. *See* THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS* 6-7 (2002); KAGAN, *supra* note 70, at 34-44.

74. *See* FARHANG, *supra* note 11, at 13-16 (discussing these and other alternative hypotheses).

75. *Id.* at 5, 13; KAGAN, *supra* note 70, at 48; Farhang, *supra* note 64, at 51 (noting that divided party control marked twenty-one percent of the period from 1900 to 1968, but eighty-one percent of the subsequent thirty-two years).

Farhang and others identify Title VII of the Civil Rights Act of 1964 as marking a pivot among progressives to litigation-centered enforcement⁷⁶—a pivot that is evident in Title VII’s provision of private injunctive relief, in contrast to FLSA. A central demand of civil rights groups pushing for Title VII’s passage was “a robust agency akin to the National Labor Relations Board (NLRB),” with investigatory and cease-and-desist authority.⁷⁷ Many conservatives feared a plaintiff bureaucracy and pushed the litigation-centered model that would eventually be enacted. Under that model, the Equal Employment Opportunity Commission (EEOC) has investigation and mediation powers, but cannot adjudicate claims, issue orders, or promulgate binding regulations.⁷⁸ While the EEOC, in partnership with federal courts, significantly shaped early Title VII jurisprudence through nonbinding guidance—and in 1972 gained the power to bring litigation⁷⁹—a major driver of Title VII implementation was and would remain private litigation.⁸⁰

Civil rights groups’ demand for an NLRB-style agency reflected both post-New Deal regulatory attitudes and the recent history of employment discrimination law. In the two decades following World War II, nearly two dozen states passed employment discrimination statutes.⁸¹ Although advocates and legislators advanced and debated different enforcement provisions, every law enacted in this period vested enforcement in a fair-employment-practices commission (FEPC) with authority to mediate disputes and issue cease-and-desist orders.⁸² Despite a meager enforcement record from even the most developed state FEPC,⁸³ the FEPC statutes provided a readily available legislative model around which various political groups coalesced on the state level. Moreover, “[t]he case

76. Farhang, *supra* note 64, at 53-68; accord ANTHONY S. CHEN, *THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941-1972*, at 170-229 (2009); Rutherglen, *supra* note 64, at 733.

77. CHEN, *supra* note 76, at 171. The NLRB’s cease-and-desist authority is significantly limited, however, by the agency’s need to petition a court of appeals for enforcement. See Paul C. Weiler, *Promises To Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1796-97 (1983).

78. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (noting that Congress “did not confer upon the EEOC authority to promulgate rules or regulations pursuant to [Title VII]” that carried “the force of law,” but that EEOC guidelines were entitled to some deference by courts).

79. See Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 677 (2005).

80. Rutherglen, *supra* note 64, at 736-38.

81. David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071, 1073 (2011).

82. *Id.* at 1073-74.

83. *Id.* at 1091-94.

for aggressive administrative enforcement rested in part on the disappointing experience of litigation under the Reconstruction civil rights acts,” in which courts quickly adopted restrictive legal interpretations that frustrated private enforcement.⁸⁴ In addition, civil rights groups were hesitant about the use of litigation because of the risk of jury nullification in the South.⁸⁵ Those fears led many to favor limiting courts’ remedial power to exclusively equitable relief, thereby avoiding Seventh Amendment jury requirements⁸⁶ – a Title VII feature that endured until 1991.⁸⁷

The compromise bill that Congress eventually passed crucially withdrew adjudicatory power over private employers from the EEOC, thereby placing primary responsibility for enforcement with private litigants while still requiring them to exhaust administrative remedies by filing claims for potential mediation before proceeding to court.⁸⁸ Anthony Chen contends, “No single concession more vividly symbolizes the cost of bipartisanship” than this “shift from an administrative to court-based enforcement”; “[n]owhere is the price of Republican support . . . more concretely captured.”⁸⁹ Nevertheless, as Farhang writes, “If civil rights liberals and private enforcement regimes were a forced marriage, they soon fell in love and became inseparable.”⁹⁰ In an ironic twist, Title VII’s litigation-centered model would prove central to its significant success over the coming decades⁹¹ – a fact that civil rights groups soon noted.⁹²

84. Rutherglen, *supra* note 64, at 737; *see also* GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, at 93-110 (2013) (outlining the cases that adopted restrictive interpretations of the Civil Rights Act of 1866).

85. Rutherglen, *supra* note 64, at 738.

86. *Id.*

87. *See* Occhialino & Vail, *supra* note 79, at 686-87 (describing how the Civil Rights Act of 1991 instituted the right to a jury trial in a Title VII case, and the right to recover compensatory and punitive damages in the case of intentional discrimination); *see also* 42 U.S.C. § 1981a(c) (2012) (noting that “any party may demand a trial by jury”).

88. 42 U.S.C. § 2000e-5(f)(1) (2012); *see also* Rutherglen, *supra* note 64, at 733 (“EEOC enforcement stopped well short of adjudication of claims against private employers.”).

89. CHEN, *supra* note 76, at 188-89.

90. Farhang, *supra* note 64, at 54.

91. *See* Melnick, *supra* note 64, at 97 (“The most important moral of the Title VI and VII stories is that adversarial legalism can promote aggressive federal regulation of the private sector and subnational governments.”); *see also* Farhang, *supra* note 64, at 68 (describing how Title VII “became the liberal model for privatizing enforcement of the new social regulation”); Selmi, *supra* note 64, at 1403-04 (demonstrating that private actions constitute the large majority of Title VII litigation, and that they typically recover significantly more than agency actions).

92. Engstrom, *supra* note 81, at 1142.

Whereas these accounts might suggest that the “New Deal religion” of administrative enforcement was wholly dominant until the late 1960s, David Freeman Engstrom provides a useful corrective.⁹³ In charting debates surrounding state FEPC laws, Engstrom demonstrates that critiques of administrative enforcement were present by the late 1930s and 1940s, such that the American Civil Liberties Union, National Lawyers Guild, and certain community-based civil rights groups advocated for a private right of action in the New York statutes.⁹⁴ The choice of the FEPC model cannot be explained, then, by a then-universal preference for agency enforcement. Rather, Engstrom contends, established civil rights groups preferred the FEPC model because it tended toward gradualism and conciliation, and provided centralized control—as opposed to private litigation, which would allow more confrontational groups to push their own claims directly in court.⁹⁵ Engstrom shows that advocates and legislators advanced critiques of administrative enforcement before Congress’s pivot in the 1960s, although private enforcement did not become dominant until this later period.⁹⁶

By the late 1960s-70s, a marked shift toward private enforcement was underway. As political scientist R. Shep Melnick writes, “Within a decade of passage of the civil rights laws of the 1960s, it was clear that the days of enlightened administration had come and gone [and] [t]he era of . . . adversarial legalism was upon us.”⁹⁷ Progressive groups grew increasingly disillusioned with the New Deal vision of regulation by expert agencies, which they criticized as timid, pro-establishment, and subject to capture⁹⁸—critiques reinforced by Richard Nixon’s election in 1968. These attitudes informed a wave of environmental, consumer protection, and other laws in the late 1960s and 1970s that made unprecedented use of “citizen suit” and other private-enforcement mechanisms. This change in statutory drafting, supplemented by judges’ increased willingness to find implied statutory rights of action, led in the late 1960s to the volume of private regulatory litigation outstripping that of public enforcement actions.⁹⁹ The volume of private enforcement continued to grow under the Reagan Administration despite significant Republican efforts at “litigation reform.”¹⁰⁰ Today, private en-

93. *Id.*

94. *Id.* at 1091-93.

95. *Id.* at 1075, 1114.

96. *Id.* at 1074, 1091-93.

97. Melnick, *supra* note 64, at 98.

98. Farhang, *supra* note 64, at 49-51.

99. FARHANG, *supra* note 11, at 12.

100. Farhang, *supra* note 64, at 68.

forcement through litigation remains “a core dimension of the American regulatory state’s infrastructural power”¹⁰¹ and is “integral to the structure of the modern administrative state.”¹⁰²

In sum, the agency-centered regulatory approach of the New Deal produced statutes such as the National Labor Relations Act (NLRA) and FEPC laws that allocated a minor enforcement role, if any, to private litigation. While that approach was already subject to criticism from civil rights advocates and legislators by the late 1930s and 1940s, it remained sufficiently dominant in the 1960s that proponents of a robust federal employment discrimination statute overwhelmingly favored an NLRA-style agency and disfavored private enforcement. In a compromise that would ultimately prove fruitful for advocates, Title VII adopted a relatively new enforcement model based on private litigation—which, like many subsequent statutes, provided private injunctive relief—that proved more transformative in its implementation than the relatively dismal record of FEPC laws. Since the enactment of Title VII, Congress has turned significantly toward private enforcement, enacting civil rights, environmental, consumer protection, and other legislation that makes private actions and citizen suit provisions a centerpiece of implementation.

B. FLSA’s Private Enforcement Regime

In this context, it appears that when Congress passed FLSA in 1938, it simply assumed a model of agency-centered enforcement. Labor advocates fiercely debated FLSA’s substantive provisions and enforcement mechanisms, leading to abortive attempts at the statute’s passage.¹⁰³ Despite these debates, there is little legislative history discussing the role of private enforcement, much less injunctive relief. The absence of controversy around private enforcement makes sense: even under Engstrom’s account, the enactment of FLSA predated calls in the late 1930s and 1940s for increased private enforcement. Yet as Congress’s subsequent turn to private regulatory litigation illustrates, and as this Note discusses in Part II, there are several policy advantages to a robust private enforcement regime.

The major debates surrounding FLSA did not concern private enforcement, but rather the implementing agency’s identity and powers. The American Federation of Labor (AFL) and newly founded Congress of Industrial Organizations (CIO) were sharply divided over whether the Act should establish universal

101. *Id.*

102. Glover, *supra* note 28, at 1137.

103. Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, MONTHLY LAB. REV., Dec. 2000, at 32, 34-36.

minimum standards (the AFL position) or industry-based wage boards (the CIO position).¹⁰⁴ William Green, AFL president, was also deeply suspicious of the Act's potential interference with collective bargaining rights, which had recently been secured in 1935 under the NLRA, stating in congressional hearings "that he understood the legislation was merely an attempt to encourage collective bargaining and as collective bargaining expanded, government control should abandon the field."¹⁰⁵ FLSA's drafters were thus centrally concerned with the scope of the Act's substantive provisions, as well as the structure of public enforcement and its relationship to the increasing number of workers engaged in collective bargaining.

By contrast, there was little debate over private enforcement. While organized labor divided over whether injunction proceedings would be brought by DOL (the CIO position) or the Department of Justice (the AFL position), neither organization seemed to contemplate private injunctive enforcement, nor did they dispute having a private action as a supplementary mechanism to recover unpaid wages.¹⁰⁶ Both bills reported in the Senate¹⁰⁷ and the House¹⁰⁸ prohibited representative actions by preventing workers from assigning their claims to litigants other than the agency. Neither bill provided opt-out class actions. Yet the provisions establishing representative actions and opt-out class actions,

¹⁰⁴. *Id.* at 34-35.

¹⁰⁵. John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 468 (1939). This optimism about the expansion and centrality of collective bargaining is understandable in 1938, as union density more than doubled in the two previous years, from 13.24% in 1936 to 26.56% in 1938. See Freeman, *supra* note 41, at 292 tbl.8A.2.

¹⁰⁶. Samuel, *supra* note 103, at 34-35.

¹⁰⁷. S. 2475, 75th Cong. (1937) (as reported by Senate, July 8, 1937).

¹⁰⁸. H.R. 7200, 75th Cong. (1938) (as reported by House, Apr. 21, 1938).

which were later repealed by the Portal-to-Portal Act,¹⁰⁹ appeared in the bill's conference report without comment.¹¹⁰

The only discussion of such provisions in FLSA's legislative hearings appears in the June 8, 1937 testimony of John M. Keating, a lawyer speaking on behalf of millinery manufacturers and workers. Keating argued that "one employee or his labor union should be permitted to bring a representative action for the benefit of all employees similarly situated," which would "make the act semi-self-enforcing" and serve as a "psychological weapon" against employers.¹¹¹ Keating also appreciated the informational advantages of private enforcement, noting that "[t]he employee working right in the factory is in a better position than the board to institute suit," and that "[h]e could [bring suit] better than the Board, because he was there."¹¹² Notably, Keating confirmed that he intended to propose a legal and not an equitable action—in other words, a regime limited to damages, not an injunction.¹¹³ Given the agency-centric regulatory environment in which FLSA was passed, it is unsurprising that the private enforcement provisions of the bill received little attention. Moreover, even Keating's testimony, which appears to be the most sophisticated discussion of private enforcement at the FLSA hearings, does not contemplate the possibility of private injunctive relief.

109. The Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84, responded to years of fierce litigation over whether certain time spent traveling and preparing for work—such as time spent passing from one mine portal to another—was compensable work time under FLSA and other statutes. See Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53 (1991). In particular, a nascent CIO brought a wave of portal suits during and following World War II seeking to gain bargaining power against employers and secure large recoveries. *Id.* at 56. This movement was strengthened when the Supreme Court held in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), that preliminary work activities performed entirely for the employer's benefit and subject to employer control constituted work time under FLSA. A conservative Congress reacted to this "emergency" by passing the Portal-to-Portal Act in the same year it passed the Taft-Hartley Act—which significantly gutted the NLRA, or at least codified existing legal precedent that did so. Pub. L. No. 80-101, 61 Stat. 136 (1947); see Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763 (1998) (reviewing the debate on the effect of Taft-Hartley). The Portal-to-Portal Act significantly limited compensable time under FLSA. More significantly, however, the Act—perceiving a threat of unions and plaintiffs' lawyers stirring up litigation on behalf of large numbers of workers—repealed FLSA's representative-action and opt-out class-action provisions.

110. H.R. REP. NO. 75-2738, at 11 (1938) (Conf. Rep.).

111. *Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the S. Comm. on Educ. and Labor & the H. Comm. on Labor*, 75th Cong. 457-62 (1937) [hereinafter *1937 Hearings*] (statement of John M. Keating).

112. *Id.* at 462-63.

113. *Id.* at 462.

Apart from the changes in the Portal-to-Portal Act, the remedial structure of FLSA has remained largely the same since enactment, despite periodic amendments to raise the minimum wage and address issues such as gender equity.¹¹⁴ Sections 206 and 207 of the Act (originally sections 6 and 7) establish minimum-wage and overtime protections, respectively.¹¹⁵ Section 211 requires employers to keep certain records and empowers DOL to investigate and inspect those records.¹¹⁶ Notably, this section also states, “[T]he Administrator [now called “the Secretary”] shall bring all actions under section 217 of this title to restrain violations of this chapter.”¹¹⁷ Section 216 establishes penalties: § 216(a) provides for fines or imprisonment after prior FLSA convictions; § 216(b) provides employees a private right of action to recover for violations of §§ 216-217, plus “an additional equal amount as liquidated damages,” attorney’s fees, and costs.¹¹⁸ Section 16(b) originally allowed an employee or employees to bring a collective action “for and in behalf of himself or themselves and other employees similarly situated,” or a representative action through “an agent or representative to maintain such action for and in behalf of all employees similarly situated.”¹¹⁹ However, the Portal-to-Portal Act removed the representative action provision and added an opt-in requirement for collective actions.¹²⁰ While other areas of FLSA have responded to the changing character of the American workforce and economy, its core remedial provisions have remained stagnant since the Portal-to-Portal Act significantly curtailed private enforcement in 1947.

114. See Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

115. 29 U.S.C. §§ 206-207 (2012).

116. *Id.* § 211.

117. *Id.* § 211(a). This section provides an exception to the Administrator’s sole authority to bring a § 217 action for injunctive relief, for actions arising under the child labor provisions of the Act (§ 212). The exception results from the fact that the Chief of the Children’s Bureau in DOL was originally charged with making all investigations related to § 212, and, “subject to the direction and control of the Attorney General, shall bring all actions under section [2]17.” *Id.* § 212(b). When the Children’s Bureau was transferred to the Social Security Administration in 1946, § 212 was amended to read “The Secretary of Labor.” 29 U.S.C. § 212(b) (1952). Section 211 was not amended to reflect this change, and still states the Administrator “shall bring all actions under section [2]17” except as provided in § 212, which now also refers to the Secretary of Labor. 29 U.S.C. § 211(a) (2012). The most natural way to read this vestigial distinction, given the statutory history, is that the “exception” for § 212 refers to the fact that investigations under that section, unlike under § 211, are “subject to the direction and control of the Attorney General.” *Id.* § 212(b).

118. 29 U.S.C. § 216(b) (2012).

119. 29 U.S.C. § 16(b) (1940).

120. 29 U.S.C. § 216(b) (1952). The opt-in language states, “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.” *Id.*

Despite § 217 generally providing jurisdiction for “injunction proceedings,” § 211 bifurcates public and private enforcement, with DOL bearing primary enforcement responsibility under the Act.¹²¹ This division is illustrated in the 1977 Senate testimony of then-Secretary of Labor F. Ray Marshall and Solicitor of Labor Carin Ann Clauss on a proposed bill to amend FLSA. Marshall proposed a successful amendment to the Act to provide injunctive relief in private actions under FLSA’s anti-retaliation provision, such as to order reinstatement after a retaliatory firing. In response to Marshall’s proposal, the Committee Chairman inquired about FLSA private injunctive relief generally:

THE CHAIRMAN. What action would be taken to get the employer to change the wage? . . . Is there any way to enjoin that rate, or get them to pay the legal rate?

MS. CLAUSS. There is no point of action.

THE CHAIRMAN. But under your proposal, is there?

MS. CLAUSS. No, because we feel we have the resources to bring the injunction suit [*Describing the specific problem of retaliation.*]

THE CHAIRMAN. You will still be the sole enforcement agency in getting the rate changed?

MS. CLAUSS. That is right. We are proposing no change there.

THE CHAIRMAN. Do you have the resources to handle that?

MS. CLAUSS. That is right.¹²²

The Solicitor of Labor tellingly understands injunctive relief as the sole means for “getting the rate changed,” rather than simply compensating workers for violations. This distinction is startling: we would not say that private Title VII litigants may obtain compensation for past harm, but are powerless to change their employers’ practices. Similarly, the Supreme Court has noted that Congress in enacting the ADEA in 1967 “made plain its decision to follow a different course” from FLSA by providing private injunctive relief.¹²³

Secretary Marshall’s arguments in favor of immediate injunctive relief under FLSA’s anti-retaliation provision may be applied to prospective injunctions and help to frame the following policy discussion. As Marshall testified, “the only avenue open to a wrongfully discharged employee is to persuade the Department

121. See 29 U.S.C. §§ 211, 217 (2012).

122. 1977 *FLSA Hearings*, *supra* note 66, at 16-17 (statement of Carin Ann Clauss, Solicitor of Labor).

123. *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

of Labor to file suit.”¹²⁴ That arrangement “places a heavy burden on the Department of Labor’s resources” and “leaves the employee without a remedy in those cases where the Department decides not to sue.”¹²⁵ By contrast, providing private injunctive relief would ease the Agency’s burden and better safeguard workers’ rights, since “if employers knew employees had this added right, it would deter them from [violating] their rights under the act.”¹²⁶ Congress found Marshall’s arguments persuasive and extended injunctive relief to private actions under its anti-retaliation provision in 1977.¹²⁷ Marshall’s insights were not, however, applied to FLSA’s main provisions, and the Act’s use of prospective injunctive relief remained stuck in the agency-centered mold in which it was cast in 1938.

II. THE REGULATORY CASE FOR PRIVATE WAGE AND HOUR INJUNCTIONS

This Part draws on recent private-enforcement literature to make the policy case for the private wage and hour injunction. The absence of private injunctive relief is not only, as the prior Part described, inconsistent with the historical trend toward increased private enforcement, but also results in less effective enforcement. Although some of the private-enforcement literature has referenced FLSA in broader discussions, none has addressed whether private injunctive relief should be available. Drawing on this work, this Part argues that private parties are better situated to pursue aggressive and consistent enforcement, that private parties possess significant informational advantages over agencies, and that expanded private enforcement would better empower workers. The Part then addresses three potential objections to increased private enforcement: a lack of democratic accountability as compared to public agencies; the danger of overburdening regulated parties; and the risk of abusive, frivolous litigation. Ultimately, these concerns are misplaced in the context of the private wage and hour injunction, and in any event are outweighed by its significant regulatory advantages.

124. 1977 *FLSA Hearings*, *supra* note 66, at 15-16 (statement of Hon. F. Ray Marshall, Secretary of Labor).

125. *Id.*

126. *Id.* at 17.

127. See Pub. L. No. 95-151, 91 Stat. 1245, § 10(a) (1977) (amending 29 U.S.C. § 216(b) to provide “such legal or equitable relief as may be appropriate . . . including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages”).

A. *Regulatory Advantages of Private Injunctive Relief*

Extending injunctive relief to private wage and hour actions would result in more aggressive and consistent enforcement, given that agency officials are subject to capture as well as to political pressure from Congresses and presidential administrations that may be hostile to combatting wage theft. Private injunctive relief may also harness the informational advantages of workers and their advocates, especially community-embedded lawyers and advocates at workers centers, who remain close to and knowledgeable of employer noncompliance. Finally, enforcement of private injunctions may better empower workers than agency actions by allowing workers to maintain greater control over the narrative and direction of a private action.

1. *More Aggressive and Consistent Enforcement*

The overwhelming reason to provide private injunctive relief is that the current enforcement regime has proven patently inadequate for ensuring that FLSA provides the baseline standards Congress envisioned.¹²⁸ Wage theft is rampant, with FLSA and state equivalents “regularly and systematically violated” in low-wage industries.¹²⁹ The federal and state agencies tasked with enforcement are dramatically under-resourced and have faced significant criticism.¹³⁰ The state of wage and hour law is what J. Maria Glover calls a “public regulatory failure,” characterized by “historical levels of significant underenforcement.”¹³¹ Glover argues that under these circumstances, in addition to maintaining and improving public enforcement, “courts, legislatures, and, when appropriate, administrative agencies . . . should appropriately calibrate private enforcement mechanisms to enable private litigants to bring about regulation of harm left largely unaddressed by the public regulatory body.”¹³² Glover’s argument, applied to wage and hour law, suggests extending “the heavy artillery”¹³³ of injunctive relief to private actions, in the hopes that this additional tool may lead to higher levels of enforcement.

128. See *supra* notes 73–78 and accompanying text.

129. Bernhardt et al., *supra* note 19, at 2.

130. See *supra* notes 33–38 and accompanying text.

131. Glover, *supra* note 28, at 1203–04.

132. *Id.* at 1205.

133. *Heitmann v. City of Chicago*, 560 F.3d 642, 644 (7th Cir. 2009).

Private injunctive relief may also result in more aggressive enforcement than its public-agency counterpart, given that private actors are not subject to congressional oversight and the problem of agency capture. As Michael Selmi argues in the housing and employment discrimination contexts, agency officials often avoid controversial cases and are less aggressive in enforcement than private parties because they fear congressional retribution or jeopardizing their careers in government.¹³⁴ Such political scrutiny is familiar to agencies regulating labor relations, as Congress's long refusal to allow President Obama to fill an NLRB quorum demonstrated.¹³⁵ Private enforcement may also be more aggressive because agency officials are "captured" — i.e., staffed from or beholden to the parties they regulate — as dramatically illustrated by President Trump's unsuccessful Labor Secretary nomination of Hardee's CEO Andrew Puzder: an outspoken critic of raises in the minimum wage who runs a company that has in recent years paid out millions of dollars in overtime lawsuits.¹³⁶ Because agency officials are subject to political oversight and potential capture, they may therefore be more muted in their regulatory zeal than workers and private advocates.

Robust private remedies can also lead to more consistent enforcement over time. Agencies fluctuate across Congresses and presidential administrations in how zealously they enforce their statutes, and indeed at times appear outright hostile to their own missions.¹³⁷ Moreover, changes in adjacent policy areas may indirectly affect enforcement levels. For example, U.S. Immigration and Customs Enforcement (ICE) has had a Memorandum of Understanding (MOU)

134. Selmi, *supra* note 64, at 1444-45.

135. See Rutherglen, *supra* note 64, at 755 (discussing the dangers of agency politicization with reference to this example).

136. See Andy Puzder, *Minimum Wage, Maximum Politics*, WALL ST. J. (Oct. 5, 2014), <http://www.wsj.com/articles/andy-puzder-minimum-wage-maximum-politics-1412543682> [<http://perma.cc/3MBE-LJ7F>] (opposing a raise in the federal minimum wage from \$7.25 to \$10.10); Julia Horowitz, *Trump Taps Andrew Puzder, CEO of Hardee's and Carl's Jr., as Labor Secretary*, CNN MONEY (Dec. 9, 2016), <http://money.cnn.com/2016/12/08/news/economy/andrew-puzder-trump-labor-secretary> [<http://perma.cc/D8TV-XR5P>] (stating that CKE Restaurants spent nine million dollars settling three overtime class actions in 2004, and another twenty million dollars over eight years addressing overtime lawsuits in California alone); Alan Rappeport, *Andrew Puzder Withdraws from Consideration as Labor Secretary*, N.Y. TIMES (Feb. 15, 2017), <http://www.nytimes.com/2017/02/15/us/politics/andrew-puzder-withdrew-labor-secretary.html> [<http://perma.cc/5BVJ-2FJ7>] (noting Puzder's withdrawal from consideration for Labor Secretary).

137. See, e.g., Scott Detrow, *Scott Pruitt Confirmed To Lead Environmental Protection Agency*, NAT'L PUB. RADIO (Feb. 17, 2017, 1:22 PM), <http://www.npr.org/2017/02/17/515802629/scott-pruitt-confirmed-to-lead-environmental-protection-agency> [<http://perma.cc/CN89-YWKP>] (noting that EPA Administrator Scott Pruitt describes himself in his official biography as "a leading advocate against the EPA's activist agenda").

with DOL since 1998 that prevents ICE from initiating immigration enforcement where there is a pending DOL investigation, based on the understanding that employers use such enforcement to exploit workers and undermine labor protections.¹³⁸ There is already significant uncertainty about whether the Trump Administration has or will continue to honor that policy, which could have a significant chilling effect on immigrant workers reporting wage theft.¹³⁹

When public enforcement wanes, a robust private enforcement regime ensures that some level of regulation remains in place. Farhang thus praises “the autopilot and durable character of the private enforcement infrastructure,” which “had real consequences for presidential power” during the deregulatory era of the Reagan Administration, “restricting the president’s ability to curtail enforcement.”¹⁴⁰ In an era when President Trump has proposed a twenty-one percent cut to DOL’s budget,¹⁴¹ democratizing the FLSA injunction becomes imperative. Injunctive relief in private wage and hour cases would therefore increase workers’ ability to maintain FLSA enforcement during periods of executive ambivalence or hostility to preventing wage theft.

2. *Informational Advantages of Workers and Their Advocates*

Private injunctive relief may also help to improve enforcement given the significant informational advantages that workers and their advocates – especially community-embedded workers centers – possess over DOL and state equivalents. Glover suggests as a general principle that “all things being equal, enforcement mechanisms should be entrusted and tailored to the needs of the regulator

138. *Revised Memorandum of Understanding Between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites*, U.S. DEP’T HOMELAND SECURITY & U.S. DEP’T LAB. 2 (2011), <http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf> [<http://perma.cc/B4GH-SXW2>]; see also *Immigration and Labor Enforcement in the Workplace: The Revised Labor Agency-DHS Memorandum of Understanding*, NAT’L IMMIGR. L. CTR. ET AL. 1 (May 2016), <http://www.nelp.org/content/uploads/Fact-Sheet-Immigration-and-Labor-Enforcement-Workplace.pdf> [<http://perma.cc/4R2Q-TSF5>] (noting that the 2011 memorandum updated an MOU that had been in place since 1998).

139. See Eric Levitz, *Are Employers Using Trump’s ICE Agents To Intimidate Workers?*, N.Y. MAG. (Aug. 4, 2017, 5:30 PM), <http://nymag.com/daily/intelligencer/2017/08/are-employers-using-trumps-ice-to-intimidate-workers.html> [<http://perma.cc/28LV-UEPC>] (reporting two cases in which ICE attended California labor dispute proceedings and apprehended undocumented workers).

140. Farhang, *supra* note 64, at 68.

141. See Jonnelle Marte, *Labor Dept. Cuts Target Job Training Programs for Seniors, Disadvantaged Youths*, WASH. POST (Mar. 16, 2017), http://www.washingtonpost.com/business/economy/labor-dept-cuts-target-job-training-programs-for-seniors-disadvantaged-youths/2017/03/15/44ba0966-0999-11e7-93dc-00f9bddd74ed1_story.html [<http://perma.cc/XM5Y-8729>].

with superior command of information relevant to potential wrongdoing,” a regulator who ideally also “ha[s] sufficient incentives to operationalize that information through enforcement.”¹⁴² Private parties generally have such advantages where

(1) private individuals, as opposed to public regulators, are geographically close to the locus of the alleged harm, (2) the alleged wrongdoing is fairly concrete and aimed directly at or knowingly suffered by private individuals, or (3) the potential private-party regulator is integrated into a market or other structured environment in a way that gives it first-hand awareness of wrongdoing.¹⁴³

In contrast, public regulators are preferable where “(1) a fairly large set of data is needed for the illumination of potential wrongdoing, (2) comparative analysis of that factual information is required or particularly helpful for the discovery of potential wrongdoing, or (3) the information relevant to potential wrongdoing is of a complex nature.”¹⁴⁴

Each of Glover’s criteria indicates that private parties possess informational advantages in the wage and hour context: (1) wage theft is experienced proximately by workers within a particular labor market who (2) suffer concrete harms by being paid in violation of the law; furthermore, (3) a worker can determine a wage and hour violation through firsthand knowledge and a simple calculation, without comparative analysis or data aggregation. Indeed, Glover identifies FLSA as a paradigmatic example where “employees, as opposed to public regulators, generally possess informational advantages about wrongdoing” since “employees protected by the FLSA will usually have the best information regarding underpayment of wages or nonpayment of overtime.”¹⁴⁵ Glover concludes on this basis, along with the fact that DOL lacks the resources to investigate even a significant fraction of covered employers, that “enforcement mechanisms are better entrusted, as an informational matter, to private regulators.”¹⁴⁶

While Glover does not address injunctive relief, her argument applies to such relief with even greater force. Workers and their advocates are better positioned than agencies to monitor and enforce prospective injunctions, given their ongoing connections to the employer and other affected workers. Whereas an agency

142. Glover, *supra* note 28, at 1177-78 (footnotes omitted).

143. *Id.* at 1180-81 (footnotes omitted).

144. *Id.* at 1180 (footnotes omitted).

145. *Id.* at 1183-84 (footnote omitted).

146. *Id.* at 1184.

must make affirmative efforts to reinvestigate employers and reconnect with past complainants to detect that an injunction has been violated, workers confront these realities every day. As Keating remarked to Congress in 1937, “The employee working right in the factory is in a better position than the [agency] to institute suit . . . because he was there.”¹⁴⁷ Unlike agencies, workers centers and other community advocates often maintain deep relationships of trust with plaintiffs, which are necessary to facilitate worker reporting. Moreover, workers centers enjoy some of the informational benefits of both workers and agencies: like workers, they are more proximate to experiences of wage theft than an agency; like an agency, they have the capacity to document and process a large volume of complaints, making them better at aggregating and processing such information than workers, who lack this organizational platform. Workers and their advocates are therefore better positioned than agencies to detect noncompliance with a wage and hour injunction.

Moreover, as Glover observes, because the “FLSA systematically tends to generate low-value claims” due to the low-income nature of those covered by the statute, “mechanisms that facilitate the economics of claiming are required” to promote enforcement by informationally superior private plaintiffs.¹⁴⁸ Presently, FLSA lacks such a mechanism. As Glover contends, “The fee-shifting mechanism is unlikely to provide sufficient enforcement incentives for anyone other than individuals possessing high-value claims” — a “rarity” in the wage and hour context.¹⁴⁹ Similarly, given its inability to extend relief to all workers affected, FLSA’s opt-in “collective action” provision fails to “align . . . the scope of regulation with the scope of harm.”¹⁵⁰ Broad injunctive relief against an employer helps solve this aggregation problem by subjecting an employer to an ongoing court order, thereby supplying non-plaintiff employees with a ready forum to bring noncompliance issues.¹⁵¹ Private injunctive relief therefore helps plaintiffs harness the informational advantages of workers and their advocates to secure employer compliance.

3. *Worker Empowerment*

A third reason to provide private wage and hour injunctions is that private actions can afford workers greater control over and voice in litigation. Worker

147. 1937 *Hearings*, *supra* note 111, at 462-63 (statement of John M. Keating).

148. Glover, *supra* note 28, at 1184.

149. *Id.* at 1184-85 (footnote omitted).

150. *Id.*

151. See *infra* Section III.B.

empowerment is an inherent good for those who view promoting workers' autonomy and sense of self-determination as an important function of employment and labor law, particularly for groups who are subject to other forms of social domination. Private litigation as a vehicle for worker empowerment is not, however, self-evident: for example, Richard Stewart and Cass Sunstein wrote in 1982, "Litigation between private parties is an unlikely forum for achieving community self-determination . . ." ¹⁵² Yet, as the workers center movement of the last thirty years has demonstrated, private litigation combined with organizing and other advocacy can be a powerful tool for marginalized communities to assert their workplace rights and to build their capacity to address other issues. ¹⁵³

Drawing on critical race feminism, Coleman argues that private wage and hour suits "provide[] opportunities for worker empowerment that are often lacking in government cases."¹⁵⁴ This occurs on a formal level in that "DOL and the worker lack an attorney-client relationship," meaning that "many of the ethical responsibilities that would attach and require the attorney to keep the client informed and permit the worker to make decisions do not exist."¹⁵⁵ Less formally, "[w]here state or federal government agencies investigate and negotiate or litigate claims, the voices and narratives of the workers may be lost."¹⁵⁶ As Coleman explains, effective storytelling—which she argues is more possible in private litigation, in which workers maintain greater control—can help decisionmakers understand and retain workers' experiences, and may reveal legal harms that were invisible under previously dominant narratives.¹⁵⁷ In addition, storytelling may "have a cathartic importance" for workers who "have felt their exploitation was unavoidable, and their experiences were invisible."¹⁵⁸ Finally, litigation can set the stage for further action, building solidarity among workers with shared experiences.¹⁵⁹ Private actions may therefore better empower workers by affording them greater control over the direction of litigation and the narratives deployed.

152. Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1295 (1982).

153. See sources cited *supra* note 55.

154. Coleman, *supra* note 32, at 425.

155. *Id.* at 426 (footnote omitted); see also Rutherglen, *supra* note 64, at 738-40 (discussing the importance of individuals having control of civil rights litigation).

156. Coleman, *supra* note 32, at 427.

157. *Id.* at 414.

158. *Id.* at 428.

159. *Id.*

One might add two observations to Coleman's analysis. First, private actions may better empower workers to the extent that workers perceive private attorneys and organizers as part of their community, or at least more so than agency officials. Whereas workers may feel a sense of dependency in returning to an agency to enforce an injunction,¹⁶⁰ they may feel a greater sense of agency and autonomy in facilitating such enforcement through a workers center or community lawyer, whose actions are identified more with the actions of the community. Second, as compared to a retrospective damages action, after which employers frequently continue to engage in wage theft, an injunction may provide workers with greater power to actually change how employers function. This solidaristic goal of transforming employer practices – of ensuring that they and other workers are treated better in the future – is frequently articulated by wage and hour plaintiffs as a reason for their participating in litigation, in the face of significant risks of employment or immigration retaliation.¹⁶¹ For reasons discussed in Part III, injunctive relief may significantly increase workers' ability to achieve such structural change.¹⁶²

B. Potential Objections to Extending Private Injunctive Relief

One might object to private wage and hour injunctions on the basis that private enforcement is less democratically accountable than its agency counterpart. Others might contend that private injunctions would overly burden employers, or that increasing workers' potential recovery with the possibility of an injunction would encourage abusive, frivolous litigation. This Section responds to these concerns in turn, concluding that they are largely misplaced in the specific

160. See William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 457-59 (1995) (sharing a community organizer's reflections that "[t]raditional lawyer advocacy creates dependency" and inhibits community leadership development (quoting Interview with Ron Chisom, Nat'l Trainer, People's Inst. for Survival & Beyond (Jan. 26, 1993))).

161. See Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 702 (2007) (finding that the overwhelming majority of civil plaintiffs report being motivated by nonmonetary issues, to which their attorneys are often not sensitive); Sachs, *supra* note 43, at 2738-40 (describing how workers choose to take actions that entail high risks of employer retaliation based on a "logic of reciprocity," rather than acting as "self-interested wealth-maximizers" (internal quotation marks omitted) (footnotes omitted)).

162. See *infra* Section III.B (describing how the litigation benefits of an injunction, including contempt sanctions and a broad scope of relief, may better secure employer compliance than damages actions alone).

context of wage and hour injunctions, and in any case, are far outweighed by the above regulatory advantages.

1. *Lack of Democratic Accountability*

A first potential objection to extending injunctive relief to private actions is that by doing so we undermine the agency's ability to use prosecutorial discretion to shape enforcement. The agency's enforcement decisions, in contrast to private actions, are democratically accountable through executive and congressional oversight, and ultimately to the public through elections.¹⁶³ On this view, what advocates see as a future administration's abdication looks more like a democratic decision to reduce enforcement: "one person's 'implementation slippage' is another's safeguard against excesses of regulatory zeal."¹⁶⁴ This objection presents two distinct concerns: first, that private actors might bring more enforcement suits than Congress intended, and second, that private actors might bring types of suits that Congress did not intend or envision.¹⁶⁵ As with other objections, much of this criticism has been directed at *qui tam* statutes, which authorize private party enforcers to bring suit on behalf of the government and recover statutory penalties or "bounties."¹⁶⁶

In response to this objection, one might challenge both the democratic nature of the agency baseline against which private actions are measured, and the supposedly undemocratic nature of private enforcement. To the extent that DOL and other agencies are unintentionally underfunded and subject to capture,¹⁶⁷ there are reasons to doubt that their enforcement decisions accurately reflect congressional intent or public opinion. Delegating enforcement to private parties may then in fact be democracy *enhancing*, by "returning power and participation to the people."¹⁶⁸ Rather than an individual, self-focused act, "[p]rivate enforcement can be seen as a participatory activity which allows individuals and groups

163. J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Litigation*, 78 N.C. L. REV. 539, 610-11 (2000); Stephenson, *supra* note 64, at 119; Stewart & Sunstein, *supra* note 152, at 1294 (claiming that "the very origins of administrative agencies lay in dissatisfaction with private litigation as an undemocratic mechanism for social choice and control").

164. Stewart & Sunstein, *supra* note 152, at 1295.

165. Engstrom, *supra* note 64, at 638 (describing how private enforcers may "develop and press novel applications of legal mandates that public enforcers . . . would forgo as inconsistent with the original legislative design").

166. See Beck, *supra* note 163; David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1964 (2014).

167. See *supra* Section II.A.1.

168. See, e.g., Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 33 (2002).

to compete over . . . pluralistic understandings of the public interest.”¹⁶⁹ Barton Thompson thus contends that private enforcement “promot[es] . . . democratic values” by “giv[ing] citizens a socially important means of directly participating in and influencing the formulation and implementation of . . . policy.”¹⁷⁰ In response to the concern about novel legal claims, Thompson notes that many private enforcement innovations are later adopted by agencies, suggesting that private enforcers are simply ahead of the government curve rather than far afield of statutory authorization.¹⁷¹

The democratic argument for private enforcement is especially compelling since victims of wage theft are disproportionately deprived of a political voice – whether formally by virtue of being noncitizens, or de facto by virtue of being low income. As several social scientists recently found, the views of low-income constituents ordinarily have no appreciable effect on their political representatives.¹⁷² For most victims of wage theft, who are low income, private actions represent a primary means of input into how the law is applied. Those participatory benefits are more muted in agency enforcement actions, in which workers have less control over whether and what claims are brought, the narrative and publicity surrounding the complaint, and the settlement process.¹⁷³

The accountability objection is particularly misplaced given wage and hour statutory frameworks and the nature of the private injunction. Federal and state laws already allow private actions, so permitting private injunctions would not allow new parties to bring claims, but simply make enforcement of existing rights more efficacious. Therefore, adding injunctive relief would not fundamentally alter workers’ ability to bring claims or push novel legal theories. Moreover, the issues litigated in the wage and hour context – for example, who qualifies as an employer and an employee, how much a worker was paid – while sometimes hotly contested, do not directly implicate conflicting values to the extent of other areas currently subject to private litigation and injunctive relief, such as what constitutes discrimination or how to strike the proper balance between environmental considerations and industry concerns. Democratic critics

169. Kent Roach & Michael J. Trebilcock, *Private Enforcement of Competition Laws*, 34 OSGOODE HALL L.J. 461, 474 (1996).

170. Barton H. Thompson, Jr., *The Continuing Innovations of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 188.

171. *Id.*

172. See LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 254, 260 (2008) (finding “the views of constituents in the bottom third of the income distribution received no weight at all in the voting decisions of their senators,” and thus “were utterly irrelevant”); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 83 (2012).

173. See Coleman, *supra* note 32, at 425-28.

of private enforcement therefore have less to fear in the wage and hour context than in other arenas where accountability concerns are raised—particularly where the issue is whether to extend a form of relief, and not whether to extend private actions where they did not previously exist.

2. *Overly Burdensome for Employers*

A second potential objection is that private wage and hour injunctions would overburden employers. This objection comes in both a pragmatic and a democratically inflected variant: (1) private enforcement's social costs would exceed its benefits, for example, by preventing regulated entities from functioning; or (2) private enforcement would be overly burdensome in a way not envisioned by Congress or the agency in promulgating regulations,¹⁷⁴ for instance, by pressing technicalities not expected to be enforced. These concerns have found some traction in recent scholarship. Randy Beck explains the British abolition of *qui tam* actions in 1951 partially in terms of “economically harmful prosecutions” and the pursuit of “technical violations,” and he urges reforms to the U.S. False Claims Act (FCA) based on similar grounds.¹⁷⁵ Joan Krause has similarly argued that FCA *qui tam* claims against healthcare providers “are increasingly removed from their factual and legal precursors,” and can be counterproductive for patient care.¹⁷⁶ Providing private plaintiffs with the “heavy artillery” of wage and hour injunctions, the objection goes, might do more damage than good, and may be wielded against relatively minor, technical infractions.

Scholars defending private enforcement have responded that this critique is overstated, and dependent on both the state of public enforcement and the existing harms of noncompliance. Engstrom, for example, argues that where public enforcement is expensive and insufficient, “even overzealous private enforcement efforts may minimize social loss relative to a world in which harmful conduct is not controlled at all.”¹⁷⁷ Moreover, the strength of the burdensome critique may depend on *who* is subject to the costs of overenforcement and underenforcement, given that parties may be differently situated in their ability to bear those costs. The social loss of vast underenforcement is currently borne by

174. See Stephenson, *supra* note 64, at 116 (arguing that agencies intentionally promulgate over-broad regulations understanding that they retain enforcement discretion).

175. Beck, *supra* note 163, at 633, 627.

176. Joan H. Krause, “Promises to Keep”: *Health Care Providers and the Civil False Claims Act*, 23 CARDOZO L. REV. 1363, 1368 (2002).

177. Engstrom, *supra* note 64, at 632.

low-income and other disproportionately marginalized workers.¹⁷⁸ Even if extending private injunctive relief were to result in some instances of overenforcement, employers are relatively more affluent and in a better position to handle such losses than workers who suffer from underenforcement. Any assessment of potentially burdensome social costs of increased private enforcement must therefore take into account the state of public enforcement, the existing costs of underenforcement – which in the case of wage and hour law, are nothing short of massive – and who bears the costs in either case.

Apart from this broader theoretical flaw, the employer-burden critique also fails as an empirical matter. First, there is a nearly eighty-year track record of DOL litigating prospective FLSA injunctions,¹⁷⁹ occasionally aggressively, which does not appear to have destroyed defendant businesses or prompted a critical response. During that time, courts have repeatedly insisted that such injunctions “are not excessively burdensome” because “[t]hey require no more than that the defendants comply with the law.”¹⁸⁰ Although there are reasons to believe that the private enforcement of wage and hour injunctions could be more robust than its agency equivalent,¹⁸¹ the fact remains that such injunctions impose no new regulatory obligations, but instead merely provide courts with an additional set of remedial tools to secure compliance from recalcitrant employers.

Second, insofar as a fundamental purpose of FLSA is to ensure fair competition and labor stability through minimum wage standards, increased (private) enforcement of the Act may *benefit* regulated parties. FLSA’s text and legislative history evince these concerns on behalf of employers as well as workers.¹⁸² The statute’s “finding and declaration of policy” declares that substandard labor conditions “constitute[] an unfair method of competition in commerce,” and recog-

178. See *supra* note 33 and accompanying text.

179. See *supra* Section I.B.

180. *Wirtz v. Ocala Gas Co.*, 336 F.2d 236, 240 (5th Cir. 1964); accord *Mitchell v. Sw. Eng’g Co.*, 271 F.2d 427, 432 (8th Cir. 1959); *Reich v. IBP, Inc.*, Civ. A. No. 88-2171-EEO, 1996 WL 445072, at *1 (D. Kan. July 30, 1996).

181. See *supra* Section II.A.

182. Indeed, one commentator has suggested that businesses should be able to bring FLSA actions against their competitors. *Wial*, *supra* note 49, at 27-28. Such a complaint, however, would be unlikely to succeed under current standards for implied private rights of action, particularly given that Congress explicitly removed FLSA representative actions with the Portal-to-Portal Act of 1947, Pub. L. No. 80-49, § 5, 61 Stat. 84, 87 (codified as amended at 29 U.S.C. § 216(b) (2012)).

nizes that commerce in goods that are unfairly produced “spread[s] and perpetuate[s] such labor conditions among . . . workers.”¹⁸³ In reporting FLSA out of committee, the House Committee on Labor opined:

No employer . . . need fear that he will be required by law to observe wage and hour standards higher than those applicable to his competitors. No employee . . . need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes.¹⁸⁴

Then-Senator John F. Kennedy, upon introducing a 1961 amendment to FLSA, similarly declared, “[I]t will serve as a source of protection to employers who pay a decent wage and who must compete with employers who pay a substandard wage.”¹⁸⁵

These benefits of wage and hour enforcement apply most clearly to employers already complying, but they also arguably extend to employers committing wage theft who are thus exposed to liability and potential labor unrest. While the likelihood of workers asserting their rights under wage and hour law is woefully low, the effect of a large verdict can be significant and sometimes fatal to an employer. By smoothing out noncompliance in industries where wage theft is endemic, greater enforcement might therefore decrease risk by creating conditions where employers are not constantly violating the law and incurring potential liability.

Third, in contrast to certain FCA actions described by Beck and Krause,¹⁸⁶ the conduct restrained by wage and hour injunctions does not involve “technical violations” that are difficult to detect or far removed from Congress’s statutory aims. Although who constitutes a covered employee and employer is at times

183. 29 U.S.C. § 202(a) (2012); *see also* H.R. REP. NO. 75-2182, at 7 (1938) (declaring that “the maintenance of substandard labor conditions in a particular industry by a few employers necessarily lowers the labor standards of the whole industry” and “results in a downward spiral of wages” that “leads to labor disputes”); *id.* at 6-7 (declaring that under FLSA, “[n]o employee . . . need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes”).

184. H.R. REP. NO. 75-2182, at 6-7.

185. *See* S. REP. NO. 87-145, at 2 (1961), *reprinted in* 1961 U.S.C.C.A.N. 1620, 1621.

186. *See supra* notes 175-176 and accompanying text.

intensely disputed,¹⁸⁷ FLSA’s basic minimum wage, overtime, and recordkeeping requirements are much more limited and straightforward than the various statutes and regulations related to Medicare and Medicaid. As Kraus notes,

[T]he enormous quantity of information . . . (not to mention the sheer volume of the laws and regulations applicable to the Medicare program) makes it highly unlikely that the corporate officer who signs the [Medicare] Cost Report will actually know whether the entity is in compliance with each and every program requirement.¹⁸⁸

This opens up Medicare and Medicaid providers to liability for inadvertent omissions. By contrast, employers generally can, with some basic calculations, know whether they are paying their workers the minimum wage and overtime, even if they dispute the applicability of those provisions. Similarly, whereas the FCA “is a classic example of an overinclusive statute,” covering conduct that lacks a specific intent to defraud and that does not result in actual damages,¹⁸⁹ FLSA sets minimum standards that Congress clearly intended to be enforced such that they function as an effective baseline. Concerns that enforcement of “technical violations” may deviate from congressional intent or overburden employers are simply misplaced given that FLSA has a limited amount of core provisions, violations of which are relatively easy for employers to detect.

Last, the burdensome critique is misplaced given certain statutory features of FLSA. Public and private FLSA actions are mutually preclusive—that is, a plaintiff cannot bring a separate action once DOL has filed suit.¹⁹⁰ That exclusivity saves employers the cost and risk of redundant litigation,¹⁹¹ which would ensure that private injunctions are only issued where DOL has failed to act. Further, the statute provides employers an absolute defense when acting “in good faith in conformity with” FLSA administrative rulings or interpretations.¹⁹² This

187. See, e.g., *Nevada v. U.S. Dep’t of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016) (issuing a nationwide injunction against a DOL regulation interpreting FLSA’s executive, administrative, and professional exemption to its overtime provision).

188. See Krause, *supra* note 176, at 1398.

189. Beck, *supra* note 163, at 628-29.

190. See 29 U.S.C. § 216(b) (2012) (stating that the right to bring and maintain a private action “shall terminate upon the filing of a complaint by the Secretary of Labor”).

191. See Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 314-17 (2016) (arguing that mutually preclusive “redundant authority” regimes, where an agency and private parties both have the authority to bring an action but cannot do so simultaneously, “help[] with errors, resources, information, and agency costs while avoiding the direct costs of truly redundant litigation”).

192. 29 U.S.C. § 259 (2012).

safe harbor moots the underlying thrust of concerns about technical violations, by shielding from liability certain violations that are unclear based on existing agency interpretations. These features allow DOL some control over private litigation—insofar as DOL can decide to file first and thus bar private enforcement—and afford employers some protection from overzealous enforcement.

3. *Abusive Private Enforcers*

A third and related objection is that the resulting expansion in employer liability would encourage abusive plaintiffs to pursue frivolous claims and extort defendants through “strike suits”—suits brought for the purpose of inducing settlement, and with no intention to fully litigate.¹⁹³ This objection is misplaced since the remedy in question is injunctive relief and not money damages. While plaintiffs might leverage the marginal increase in bargaining power from the availability of a private injunction to secure an increased monetary settlement, this is a far cry from the large sums that encourage qui tam bounty hunting. Because the FCA provides a minimum \$5,000 and maximum \$10,000 penalty for each statutory violation in addition to treble actual damages to the government,¹⁹⁴ and because a false statement may be repeated in thousands of claims, each of which may arguably constitute a violation, an FCA qui tam action can quickly amount to several million dollars.¹⁹⁵ By contrast, under FLSA, only DOL is allowed to recover civil penalties, and even then in more modest amounts and for repeated or willful violations.¹⁹⁶ Because liquidated damages are directly tied to the amount of stolen wages, there is no danger that the potential recovery in a private FLSA action will vastly outweigh the actual damages suffered through civil penalties that are untethered to those damages. More fundamentally, this objection ignores the fact that wage and hour laws are currently in a state of regulatory failure—wage theft is abundant, so plaintiffs’ attorneys need not look far to find meritorious claims.

193. Stephenson, *supra* note 64, at 115-16; see also Beck, *supra* note 163, at 581-82 (discussing frivolous claims more broadly).

194. 31 U.S.C. § 3729(a)(1)(G) (2012).

195. See Beck, *supra* note 163, at 630 n.476.

196. 29 U.S.C. § 216(e)(2) (2012).

III. LITIGATION STRATEGY AND THE WAGE AND HOUR INJUNCTION

This Part illuminates the regulatory advantages described in Part II by discussing the litigation benefits and disadvantages of private wage and hour injunctions as they operate in a given case. Seven states presently allow private injunctive relief.¹⁹⁷ However, the scant record of published opinions from these laws reveals few employer-wide injunctions or subsequent contempt proceedings. This Part therefore draws on DOL's § 217 enforcement to envision what the mechanics of private injunctive relief might look like. The Part concludes by observing that robust use of private injunctions would challenge the conventional view of employment law as concerned with securing "individual rights." Instead, broad private injunctive relief relies upon and seeks to address the systemic nature of wage theft, comporting with and furthering the structural understanding of wage and hour protections that Congress instantiated in FLSA.

A. How § 217 Injunctions Work

Although private wage and hour injunctions would likely differ somewhat from agency-prosecuted injunctions,¹⁹⁸ DOL's § 217 litigation nonetheless demonstrates how private injunctive relief might function and the nature of the relief private parties could obtain. DOL regularly seeks injunctive relief in FLSA complaints and settlements.¹⁹⁹ Yet this practice has received almost no discussion from commentators or the Agency itself, despite the impression from courts and Congress that this relief is "of cardinal importance to the vitality of the Fair Labor Standards Act,"²⁰⁰ and is responsible for changing employer practices.²⁰¹

In deciding whether to issue a § 217 injunction in a DOL enforcement action, courts typically look to an employer's past conduct, current conduct, and the likelihood of future compliance, though evidence of current compliance is not

197. See sources cited *supra* note 18.

198. See *supra* Section II.A.

199. See, e.g., *Hugler v. Foreclosure Connection, Inc.*, No. 2:15-cv-00653-DAK, 2017 WL 2168202 (D. Utah May 8, 2017); *Landry v. Swire Oilfield Servs., L.L.C.*, No. CIV. 16-621 JB/LF, 2017 WL 1709695 (D.N.M. May 2, 2017); *Perez v. Fog River, LLC*, No. 2:15-cv-500-PMW, 2017 WL 1194343 (D. Utah. Mar. 30, 2017); *Hugler v. Cathedral Buffet, Inc.*, CASE No. 5:15CV1577, 2017 WL 1287422 (N.D. Ohio Mar. 29, 2017); *Perez v. Five M's*, No. 2:15cv176, 2017 WL 784204 (N.D. Ind. Mar. 1, 2017).

200. *Wirtz v. Jones*, 340 F.2d 901, 905 (5th Cir. 1965).

201. See 1977 FLSA Hearings, *supra* note 66, at 16-17.

normally sufficient to deny an injunction.²⁰² Although the burden is on the Agency to establish the need for an injunction, courts have routinely suggested that because such injunctions are remedial and impose no new obligations, they should be granted liberally.²⁰³ Indeed, although broad injunctions ordering defendants to “obey the law” are often held to violate equitable principles of vagueness and the specificity requirement in Rule 65(d) of the Federal Rules of Civil Procedure,²⁰⁴ the Supreme Court has specifically approved § 217 injunctions ordering employers to obey FLSA’s minimum wage, overtime, and recordkeeping provisions²⁰⁵ – and § 217 injunctions are typically phrased in those terms.²⁰⁶

For similar reasons, courts have also issued § 217 injunctions that are wide in geographic scope, including company-wide injunctions.²⁰⁷ As one court explained, “It would frustrate the broad purposes of the FLSA in suits involving large corporate defendants with extensive branch operations to require the Secretary to investigate and prove violations in all or substantially all of the defendant’s branches to justify the issuance of a chain-wide injunction.”²⁰⁸ Indeed, § 217 injunctions without geographical limitations are “frequently granted against construction companies, whose work sites necessarily change from time to

202. See *Metzler v. IBP, Inc.*, 127 F.3d 959, 964 (10th Cir. 1997); *Brock v. Big Bear Mkt. No. 3*, 825 F.2d 1381, 1383 (9th Cir. 1987); *Solis v. Int’l Detective & Protective Serv., Ltd.*, 819 F. Supp. 2d 740, 754 (N.D. Ill. 2011).

203. See *Wirtz v. Ocala Gas Co.*, 336 F.2d 236, 240 (5th Cir. 1964); see also *Dunlop v. Davis*, 524 F.2d 1278, 1281 (5th Cir. 1975) (“[T]his court has not hesitated to reverse district courts for refusing to enjoin future violations.”); *supra* Section II.B.2 (describing the nonburdensome nature of such injunctions).

204. See, e.g., FED. R. CIV. P. 65(d)(1)(B)-(C) (requiring that every injunction “state its terms specifically” and “describe in reasonable detail – and not by referring to the complaint or other document – the act or acts restrained or required”); *NLRB v. Express Publ’g Co.*, 312 U.S. 426, 435-36 (1941); *Jake’s, Ltd. v. City of Coates*, 356 F.3d 896, 904 (8th Cir. 2004); *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 51 (2d Cir. 1996).

205. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191-92 (1949).

206. See, e.g., *Perez v. Gulf Coast Mgmt. Co.*, No. 14-00426-N, 2015 WL 895098, at *9-12 (S.D. Ala. Mar. 3, 2015) (enjoining defendants from violating FLSA’s minimum wage, overtime, and recordkeeping provisions).

207. See, e.g., *Reich v. IBP, Inc.*, Civ.A. No. 88-2171-EEO, 1996 WL 445072, at *1 (D. Kan. July 30, 1996) (issuing a company-wide injunction, rather than limiting it to the plants specified throughout the suit); *Marshall v. Nat’l Freight, Inc.*, No. 76-0385, 1979 WL 1977, at *13 (D.N.J. Sept. 6, 1979) (issuing an injunction against the defendant at each of its twenty-four truck terminals).

208. *Brennan v. J.M. Fields, Inc.*, 488 F.2d 443, 449-50 (5th Cir. 1974), *cert. denied*, 419 U.S. 881 (1974); see also *IBP, Inc.*, 1996 WL 445072, at *1 (finding such a piecemeal approach “highly inefficient and antithetical to the spirit of the FLSA”).

time.”²⁰⁹ Courts have therefore not shied away from granting § 217 injunctions that are expansive in geographic scope, based on the broad dictates of FLSA.

After an injunction is issued, the ultimate enforcement mechanism is a contempt order from the court that issued the injunction. However, when a violation occurs, the Agency may first put an employer on notice and attempt to negotiate a settlement. If negotiations are unsuccessful, DOL may then file either a motion for the defendant to show cause why they should not be held in contempt (a contempt motion) or a new FLSA action. If DOL files a contempt motion and the judge determines that it states a case for the employer’s noncompliance, the judge will order the defendant to show cause and schedule a contempt hearing²¹⁰ – a process significantly shorter than the typical litigation stages of a motion to dismiss, motion for summary judgment, and merits hearing.

In a contempt hearing, the plaintiff bears the burden of demonstrating by clear and convincing evidence that the defendant violated the injunction²¹¹ – that is, that the defendant violated FLSA – though they need not demonstrate that noncompliance was willful.²¹² After the plaintiff makes out this prima facie case for contempt, the burden shifts to the employer to disprove liability or establish a defense such as financial inability to comply.²¹³ Courts have explained that “the employer’s burden is heavy,” akin to the “plain[] and unmistakabl[e]” standard for an employer claiming an exemption under FLSA.²¹⁴ Together, these streamlined procedural steps provide a relatively simple and cost-effective process by which DOL can sanction recalcitrant employers and secure payment of wages to workers.

B. Litigation Benefits of Wage and Hour Injunctions

The advantages of injunctive relief are numerous and include both substantive and procedural benefits. Contempt sanctions allow courts to quickly and flexibly escalate sanctions to induce employer compliance. Injunctions also allow for a broad scope of relief, at the extreme a defendant-oriented injunction covering all of a defendant’s employees, which achieves some benefits of aggregation without an opt-out class device. The ability to quickly return to the same judge

209. *Wirtz v. Ocala Gas Co.*, 336 F.2d 236, 241 (5th Cir. 1964).

210. See 13 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 65.81 (3d ed. 2017).

211. See, e.g., *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 59 (2d Cir. 1984) (citing *Hodgson v. Hotard*, 436 F.2d 1110, 1115 (5th Cir. 1971)).

212. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

213. *Sovereign Sec., Ltd.*, 726 F.2d at 59–60.

214. *Hodgson v. Hotard*, 436 F.2d 1110, 1115 (5th Cir. 1971) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).

means that injured workers can obtain relief more quickly and courts are not burdened with needless preliminary procedures to address repeat violators. Further, an injunction may effectively extend the statute of limitations back to the time the injunction was entered, which may extend recovery for workers who failed to report violations because they were unaware of their rights, lacked access to an attorney, or feared employer retaliation. Finally, the ongoing sense of court supervision from an injunction may exert pressure on employers to comply with the law and empower workers in negotiations with employers.

Except for the broad scope of potential relief, none of these benefits applies to opt-out class actions, meaning that private injunctive relief presents a number of potentially unique benefits. Furthermore, although most wage and hour cases settle, the existence of a statutory right to prospective injunctive relief may increase employers' willingness to include such relief in a settlement, and may also increase judges' willingness to enforce injunctions through contempt. Finally, the statutory availability of injunctive relief may increase workers' bargaining power generally, and might also be used to achieve other concessions from employers.

1. *Contempt Sanctions and Other Equitable Relief*

The clearest benefit of injunctive relief is contempt. The contempt power allows courts to make workers whole by ordering employers to pay back stolen wages, as well as to flexibly and quickly escalate sanctions against employers in order to induce compliance. That is, the ability to escalate sanctions allows courts to gauge an employer's internal cost-benefit analysis and to increase the costs of non-compliance as necessary until they exceed its benefits.²¹⁵

Courts may use civil contempt to order payment of back wages plus compensatory interest. Further, courts may impose conditional "coercive" fines that accumulate until a defendant comes into compliance with an order to pay wages, although such fines must be paid to the court.²¹⁶ For example, one North Carolina district court found defendants in contempt for continuing to violate FLSA, and ordered the defendant company to pay \$10,000 and individual defendants to each pay \$1,000 per day that they failed to pay the judgment awarded.²¹⁷ While courts often only resort to coercive fines after significant noncompliance,

215. See Hallett, *supra* note 20, at 22 (describing the importance of shifting this cost-benefit analysis in order to induce long-term compliance).

216. See, e.g., King v. Allied Vision, Ltd., 65 F.3d 1051, 1061-62 (2d Cir. 1995); Gen. Signal Corp. v. Donallco, Inc., 787 F.2d 1376, 1380 (9th Cir. 1986).

217. McLaughlin v. McGee Bros. Co., 681 F. Supp. 1117, 1140 (W.D.N.C. 1988).

and damages do not go to workers, these fines allow courts to threaten employers with meaningful and escalating sanctions, which employers may avoid by choosing to comply with the law.

Upon a finding of civil contempt, courts may also order an employer imprisoned to induce compliance with a judgment, provided that the employer is released upon compliance²¹⁸ – a power courts have used, if sparingly, in enforcing § 217 injunctions.²¹⁹ Moreover, criminal contempt allows courts to impose non-conditional fines and imprison recalcitrant employers for a non-conditional term,²²⁰ though such sanctions trigger additional procedural protections.²²¹ The availability of contempt therefore introduces several heavier sanctions, which a judge may apply flexibly to induce compliance. In addition, the specter of such judgments may affect an employer’s cost-benefit analysis and increase worker bargaining power, reducing the probability of violations in the first place.

Injunctive relief also triggers courts’ broader equitable powers to effectuate their orders, by ordering relief beyond the statute.²²² For example, courts might impose additional reporting requirements, require employers to provide know-your-rights trainings, or grant workplace access to organizers or DOL representatives. As inspiration for such supplementary measures, workers and their advocates might look to DOL consent decrees entered pursuant to § 217. For example, a court could order an employer to allow organizers workplace access to conduct know-your-rights trainings and private question-and-answer sessions – both of which would be treated as compensable time – and to promote FLSA compliance within trade and professional groups.²²³

218. *United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829 (1994); *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632-33 (1988).

219. *See Sec’y of Labor v. Tony & Susan Alamo Found.*, 783 F. Supp. 405, 406 (W.D. Ark. 1991) (noting a prior order to this effect).

220. *Mitchell v. Fiore*, 470 F.2d 1149, 1151, 1155 (3d Cir. 1972) (affirming a civil and criminal contempt finding, including imprisonment for sixty days, or for thirty days if defendant paid the “civil judgments and costs” within thirty days).

221. *See Hicks*, 485 U.S. at 632.

222. *See Hutto v. Finney*, 437 U.S. 678, 685-87 (1978) (upholding a “comprehensive order to insure against the risk of inadequate compliance,” which extended beyond plaintiffs’ established constitutional rights).

223. *See Perez v. Nat’l Consol. Couriers, Inc.*, No. 3:15-cv-03224, 2015 WL 6692238, at *6-8 (N.D. Cal. July 15, 2015) (ordering such relief through a consent judgment).

2. *Broad Scope of Relief*

Second, a private injunction could provide relief covering a broad set of workers, achieving some benefits of aggregation in the absence of an opt-out class action device or even a large set of plaintiffs. Building on § 217 case law, workers could seek a defendant-oriented injunction covering, in the extreme, all of a defendant's employees. While such an order would not provide damages immediately to non-plaintiffs, the injunction would supply a vehicle for covered but non-party workers to join as plaintiffs and file contempt motions through the original plaintiffs' action, or to negotiate with employers with the possibility of a contempt action as a bargaining chip. Under FLSA as elsewhere, courts will also award compensatory contempt damages to third parties where doing so is necessary to enforce an order,²²⁴ as it clearly would be where a defendant continues to violate wage and hour law against covered non-plaintiff workers.

An injunction may also partially alleviate – although certainly not solve – the access-to-justice problem faced by many low-income FLSA plaintiffs. Such plaintiffs often fail to initiate their own lawsuits because they lack the resources to bring claims, are intimidated from doing so, or have “negative-value” claims worth less than the transaction costs incurred to litigate them.²²⁵ The opt-in nature of the FLSA “collective action” provision aggravates this problem: whereas members of an opt-out plaintiff class may come forward after a successful judgment or settlement to claim their rights, FLSA collective action plaintiffs must put their names, time, and (if their attorneys are not working on a pro bono or contingency basis) money into their case at a point when success is uncertain. By contrast, where a standing injunction exists against an employer, workers may come forward with more confidence about their potential success, and their attorneys may be required to expend less time and resources to secure recovery.²²⁶

The broad scope of FLSA's injunctive remedy is similarly evident in the flexible applicability of injunctions to various corporate forms. In addition to issuing injunctions with wide geographic breadth in terms of the workers protected,

224. *Ahearn ex rel. NLRB v. Int'l Longshore & Warehouse Union*, 721 F.3d 1122, 1131 (9th Cir. 2013) (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193-94 (1949)).

225. Nantiya Ruan, *What's Left To Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1118-19; see also Glover, *supra* note 28, at 1184 (arguing that “FLSA systematically tends to generate low-value claims because of the nature of its protected class”).

226. See *infra* Section III.B.3.

courts implementing § 217 have sometimes attached liability to affiliated or successor corporate entities, which can diminish employers' ability to evade judgments. As Lora Jo Foo writes:

Employers faced with large wage judgments often play the “shell game”—that is, they close down one corporation and start up another Former employees are unable to reach the assets of the new corporation or company because of the legal fiction that the predecessor and successor are separate legal entities.²²⁷

In *Wirtz v. Ocala Gas Co.*, the defendants established three new corporations to operate out-of-state facilities, yet a district court found the prior injunction covered employees of the new corporations.²²⁸ On appeal, the Fifth Circuit similarly interpreted the § 217 consent decree to cover a new corporate entity controlled by the same family, including its operations at multiple new worksite locations.²²⁹ Judges wielding equitable power might thus be less patient with “shell games” and more willing and able to attach liability to affiliated corporate entities.

One might object to defendant-oriented injunctions on the basis that they are overbroad when sought by individual plaintiffs, whose standing is arguably narrower than that of DOL.²³⁰ Yet courts in the Title VII and ADEA contexts frequently issue injunctions covering all of a defendant's employees, even without a class.²³¹ While little systematic guidance exists for courts on the appropriate scope of injunctive relief,²³² one principle from Supreme Court jurisprudence is that “injunctive relief should be no more burdensome to the defendant than

227. Foo, *supra* note 50, at 2189.

228. See *Wirtz v. Ocala Gas Co.*, 336 F.2d 236, 241 (5th Cir. 1964) (describing *Tobin v. Frost-Arnett Co.*, 34 Lab. Cas. (CCH) ¶ 71, 220 (W.D. Tenn. 1958), *aff'd per curiam*, 264 F.2d 246 (6th Cir. 1959)).

229. *Id.* at 242.

230. See, e.g., Michael T. Morley, *De Facto Class Actions? Plaintiff— and Defendant—Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J. L. & PUB. POL'Y 487 (2016).

231. See *supra* note 1 and accompanying text.

232. Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2098 (2017).

necessary to provide complete relief to the plaintiffs.”²³³ Defendant-oriented FLSA injunctions are justified on this basis. As Congress recognized when it passed FLSA, wage and hour protections address a systemic problem: because workers and their employers compete in a labor market where labor costs affect price, violations against one worker or set of workers threaten workers and employers in that market.²³⁴ “Complete relief” in this context thus means that the defendant will neither steal the plaintiffs’ wages nor undermine the plaintiffs’ enjoyment of wage and hour protections by stealing wages from other workers. A defendant-oriented injunction is therefore necessary to provide complete relief to the workers bringing suit, especially where it appears that an employer consistently violates the law as a matter of policy or general practice.

This principle is easiest to grasp with regard to non-party workers at the same workplace: for an employer to pay those workers in violation of wage and hour law threatens the continued employment and working conditions of those workers who have brought suit, whose labor would suddenly be more expensive than their non-party counterparts. Congress’s understanding of the systemic nature of wage and hour protections justifies such relief even where plaintiffs no longer work for an employer, since the former employer’s maintenance of substandard working conditions threatens plaintiffs’ enjoyment of these protections from other employers within the same labor market. Indeed, this principle might even extend to other employers in the same labor market, whose business is threatened by the defendant employer’s maintenance of substandard working conditions, although FLSA’s private right of action refers specifically to workers and would not likely support an action for unfair competition by other employers.²³⁵

Broad private wage and hour injunctions are further justified because they advance the congressionally determined public interest. The Supreme Court has long held that where “matter[s] of public concern” are involved, even where the government is not a party, “[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.”²³⁶ FLSA’s finding and declaration of policy makes clear that Congress understood the Act

233. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (considering the propriety of the district court’s certification of a nationwide class of certain elderly and disabled Social Security beneficiaries, and concluding based on this principle that the lower court had not abused its discretion).

234. *See supra* note 183.

235. *See supra* note 182.

236. *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 552 (1937) (addressing a private labor dispute under the Railway Labor Act).

to forward the public interest in “[maintaining] . . . the minimum standard of living necessary for health, efficiency, and general well-being of workers,” as well as for avoiding labor disputes.²³⁷ As the Fifth Circuit has also observed, § 217 “was designed and enacted as a necessary measure to assure the effective and uniform compliance with and adherence to a public policy relating to wage standards for labor, adopted in the National interest.”²³⁸ Because FLSA is a remedial statute meant to further the public interest as described above – and not merely to settle wholly private disputes – the public interest doctrine supports broad private injunctive relief for wage theft, where such relief is available.

Under Supreme Court precedent, the nonburdensome nature of prospective wage and hour injunctions also supports broad injunctive relief.²³⁹ Private FLSA injunctions impose no new obligations on employers, but merely increase the cost of noncompliance with existing statutory requirements. It is difficult to argue that a broad injunction along these lines would be “*more burdensome* to the defendant than necessary to provide complete relief to the plaintiffs.”²⁴⁰

For similar reasons, a defendant-oriented injunction may be less troubling from the perspective of non-plaintiff workers than such an injunction under Title VII and the ADEA. That is, the content of a wage and hour injunction is – apart from potential attendant prophylactic measures – existing statutory protections.²⁴¹ By contrast, relief under Title VII and the ADEA might include restructuring of hiring and promotion practices, instituting certain complaint

237. 29 U.S.C. § 202(a) (2012).

238. *Wirtz v. Jones*, 340 F.2d 901, 903 (5th Cir. 1965).

239. See *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); see also *supra* Section II.B.2.

240. 442 U.S. at 702 (emphasis added).

241. Where private injunctive relief is available, another path to de facto aggregation is for a workers center to seek injunctive relief based on organizational standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), on the theory that it was injured by diverting resources in response to the employer’s violations. The injunction might cover all a defendant’s employees, or a subset who are reasonably likely to be subject to such violations, on the understanding that such employees could seek the workers center’s help responding to the violations. Unlike an “associational standing” claim under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), such a claim would not be on behalf of workers, but the organization itself. This could present other advantages, such as potentially circumventing arbitration clauses binding employees but not workers centers. See Julius Getman & Dan Getman, *Winning the FLSA Battle: How Corporations Use Arbitration Clauses To Avoid Judges, Juries, Plaintiffs, and Laws*, 86 ST. JOHN’S L. REV. 447 (2012). Such a claim faces a number of potential challenges, including certain circuit precedent holding that litigation expenses cannot establish injury for standing under *Havens*. *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990). *But see* *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993). It may also risk rendering workers centers “labor organizations” under NLRA section 2(5), with

mechanisms, and so on. Given that the range of possible relief under FLSA is much narrower, one might be less concerned that non-plaintiff workers do not have a say in litigation resulting in a defendant-oriented injunction.

In sum, the broad scope of a private FLSA injunction helps to address the aggregation problem posed by the absence of an opt-out class device, by covering non-party workers of the same employer and even across different worksites. An existing injunction may also partially alleviate FLSA's access-to-justice problem, by allowing workers to come forward with more confidence about their potential success, and requiring less time and fewer resources from attorneys seeking to secure recovery. Finally, the flexibility of injunctive relief may allow courts to attach liability to affiliated or successor corporate entities through which employers frequently attempt to evade judgments.

3. *Returning to a Familiar and Potentially Sympathetic Judge*

A third benefit of injunctive relief is that it allows plaintiffs to return to a judge familiar with the parties and who previously held against the employer, without relating the case to the previous action.²⁴² The legal standard and procedure for relating a case to a previous action in federal court are generally set by local rules, and can differ in significant respects from court to court.²⁴³ Regardless, relating a case takes time and effort and might not succeed. Returning to the previous judge may increase the odds of success for potential litigation. It may also lead to quicker relief due to a judge's familiarity with the circumstances, and a shortened motions practice compared to a new civil action.²⁴⁴ In addition to benefiting workers, this speed and efficiency serves general goals of judicial economy.

several attendant consequences. See Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Nat'l Labor Relations Bd. on Restaurant Opportunities Center of New York (Redeye Grill) (Nov. 30, 2006) (concluding that a workers center was not a labor organization). A defendant-oriented injunction involving individual worker plaintiffs may be less risky in that regard because it does not place the workers center as a direct party seeking workplace-wide reforms. However, the possibility of an organizational-standing wage-theft action is worth further research given its potential benefits.

²⁴² See *supra* Section III.A (describing the process for bringing a contempt motion).

²⁴³ Compare D.D.C. LCvR 40.5(c) (requiring that disputes over relatedness be decided by the prior judge in the matter) with E.D.N.Y. R. 50.3.1(d) (requiring that the prior judge takes no part in the relatedness decision).

²⁴⁴ See *supra* text accompanying note 210.

4. *Functionally Extending the Statute of Limitations*

Fourth, a wage and hour injunction can effectively extend the statute of limitations back to when the injunction was entered, allowing workers to recover for additional pay periods. FLSA claims cover violations that occur within two years before filing, or three years for willful violations.²⁴⁵ State law statutes of limitations often cover similar periods, though some are longer.²⁴⁶ By contrast, an injunction may remain in place for several years or even decades.²⁴⁷ Some circuits have held that a contempt action may remedy violations for pay periods from the date the injunction is entered—adding several potential years of recovery. There is a circuit split on this issue, with the Fifth, Ninth, and Tenth Circuits holding that the FLSA statute of limitations does not apply in a contempt action, because such an action enforces an existing order against an employer and does not institute a new FLSA action.²⁴⁸ By contrast, the Sixth Circuit has held that FLSA § 255 requires that the statute of limitations run anew from when a contempt action is brought.²⁴⁹

The majority approach of allowing recovery from the time an injunction is issued accords better with the procedural continuity of a contempt action, the purpose of providing sufficient notice to employers of potential claims, and the broad remedial purpose of FLSA.²⁵⁰ Longstanding Supreme Court precedent holds that the filing of a motion for contempt is to be treated as a continuation

245. 29 U.S.C. § 255(a) (2012).

246. See, e.g., CONN. GEN. STAT. § 52-596 (2017) (covering two years); 820 ILL. COMP. STAT. 105/12(a) (2016) (covering three years); N.Y. LAB. LAW § 198(1-d)(3) (McKinney 2009) (covering six years).

247. See Fla. Ass'n for Retarded Citizens, Inc., v. Bush, 246 F.3d 1296, 1298 (11th Cir. 2001) (“Although not all injunctions operate in perpetuity, a district court should enforce an injunction until either the injunction expires by its terms or the court determines that the injunction should be modified or dissolved.” (quoting Board of Education v. Dowell, 498 U.S. 237, 247-49 (1991))).

248. Donovan v. Burgett Greenhouses, Inc., No. 83-2698, 1985 WL 153928, at *1-2 (10th Cir. 1985); Donovan v. Sureway Cleaners, 656 F.2d 1368, 1376 (9th Cir. 1981); Wirtz v. Ocala Gas Co., 336 F.2d 236, 243 (5th Cir. 1964).

249. Wirtz v. Chase, 400 F.2d 665, 668-70 (6th Cir. 1968).

250. Courts have routinely held that FLSA should be interpreted liberally in order to effectuate its broad remedial purpose. See, e.g., Irizarry v. Catsimatidis, 722 F.3d 99, 110 (2d Cir. 2013); De Ascensio v. Tyson Foods, Inc., 500 F.3d 361, 373 (3d Cir. 2007); Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979); Dunlop v. Carriage Carpet Co., 548 F.2d 139, 144 (6th Cir. 1977).

of the same case rather than as a new action.²⁵¹ As the Ninth Circuit explained, the FLSA statute of limitations was adopted—like other statutes of limitations—to protect defendants from incurring “wholly unexpected liabilities” that “would bring about financial ruin.”²⁵² Yet “[o]nce a prospective injunction has been issued against an employer, . . . the employer is put on notice that future violations will result in civil contempt proceedings to enforce the injunction.”²⁵³ At that point, a recalcitrant employer continues to violate the law at their own peril. In addition, workers often endure wage theft and fail to come forward because they do not know their rights under the law, cannot find an attorney, or fear employer retaliation. Allowing recovery from the time an injunction is issued is thus consistent with the procedural continuity of contempt, providing notice to employers, and the broad remedial purpose of FLSA. Under this majority approach, private injunctions carry the possibility of functionally extending the statute of limitations to the time they were entered. Where employers continue to flout FLSA’s obligations under an injunction, this would allow workers to potentially recover several additional months or years of stolen wages.

5. *Ongoing Court Monitoring and Pressure*

Finally, injunctions may exert ongoing pressure against employers and empower workers to come forward by providing a sense of consistent, potentially sympathetic judicial oversight. In addition to emboldening workers, the specter of judicial oversight may increase workers’ bargaining power in informal negotiations that occur against the backdrop of a contempt action, making it less likely that they will need to resort to the courts at all. This continuity may also stitch together a sense of collective identity among workers who use the same injunction to secure compliance, rather than file a disjunctive series of lawsuits.²⁵⁴ In the absence of a union, workers centers are an ideal organizational vehicle to provide such continuity and oversight. Embedded in the communities they serve, workers centers likely possess better information about employer noncompliance than agencies or other legal organizations that lack an organizing or membership base.²⁵⁵ Moreover, workers centers are more likely to maintain

251. *Ocala Gas Co.*, 336 F.2d at 243 (first citing *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 452 (1932); and then citing *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 444-45 (1911)).

252. *Sureway Cleaners*, 656 F.2d at 1375 (citing 29 U.S.C. § 251(a) (2012)).

253. *Id.*

254. See Sachs, *supra* note 43, at 2722-29 (discussing how employment statutes may serve as a frame for workers’ collective identity formation).

255. See *supra* Section II.A.2 (discussing information advantages and private enforcement).

relationships with former plaintiffs, which are necessary to institute a contempt proceeding based on the previous action.

C. Litigation Disadvantages of Contempt Actions

Notwithstanding these advantages, contempt actions present three potential downsides for plaintiffs as compared to bringing a new case: a heightened “clear and convincing” evidentiary standard; the probable unavailability of liquidated damages under FLSA; and the potential reticence of judges to hold defendants in contempt. Note that these disadvantages only apply to a contempt action under an existing injunction and not an original action seeking an injunction alongside other relief, where there are no clear disadvantages to seeking an injunction. After outlining these potential disadvantages, this Section offers three reasons to believe they are not as significant as they initially appear. First, in a contempt action, the court has already ruled against the employer, which might influence the judge more than a formally heightened burden of proof. Second, the unavailability of liquidated damages is specific to FLSA and could be changed were the statute amended to extend private injunctive relief, and in any case may be offset in settlement negotiations by the availability of contempt sanctions. Finally, despite its perceived severity, many courts have held employers in contempt of wage and hour injunctions, and in any event the perceived severity of contempt may further incline employers to settle. Ultimately, regardless of these merits and drawbacks, where a private injunction exists, workers retain the choice to file a new action or a contempt action – options which may serve different goals of maximizing recovery or ensuring employer compliance and speedy recovery, respectively.

The first obstacle plaintiffs face when bringing a contempt action is that they must demonstrate that the defendant violated each element of the injunction – that is, of FLSA – by “clear and convincing” evidence,²⁵⁶ whereas in a new wage theft action the standard is a mere preponderance of the evidence. While significant, however, this heightened standard is not as burdensome as it first appears. In any contempt action, the judge has previously held against the defendant – a direct experience that may incline the judge in favor of plaintiffs more than a formally heightened burden of proof would disincline them. Further, once a plaintiff satisfies the standard for a prima facie case of contempt, the burden shifts to the employer to demonstrate inability to comply, which courts have described as a “heavy burden.”²⁵⁷ This, too, helps to mitigate the higher evidentiary standard for a contempt action. Therefore, while indeed a heightened burden,

²⁵⁶ *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 59 (2d Cir. 1984).

²⁵⁷ *Id.* at 59-60.

the higher standard of proof for contempt is by no means prohibitive for plaintiffs.

Perhaps more significantly, several courts have held that liquidated damages are unavailable in § 217 contempt proceedings—a serious impairment of FLSA’s remedial capacity.²⁵⁸ Because liquidated damages under FLSA are compensatory rather than punitive,²⁵⁹ they are intended to compensate workers for the delay in receiving their wages, factoring in “the reality that the retention of a workman’s pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages.”²⁶⁰ In addition to affording compensation, the possibility of liquidated damages helps incentivize workers to come forward and report violations. Moreover, liquidated damages are an important sanction to deter employers from engaging in wage theft. Without such multiplier damages, the most that an employer will have to pay back is the bare amount of wages owed, which in effect constitutes a free loan forcibly taken from workers.²⁶¹ For these reasons, the lack of liquidated damages constitutes a significant disadvantage of contempt.

Multiple courts of appeals have held that liquidated damages are unavailable under § 217 contempt actions, based on statutory structure as well as legislative history. As one court explained:

The legislative history of the FLSA reveals that Congress intended to permit recovery of liquidated damages only in suits under 16(b) and 16(c), the two provisions expressly authorizing such damages The statutory scheme gives the Secretary a choice: If he wants to recover liquidated damages, he can sue under section 16(c), in which case the employer is entitled to a jury trial on the back pay award; if the Secretary prefers not

258. See, e.g., *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1063 (2d Cir. 1988); *Donovan v. Brown Equip. & Serv. Tools, Inc.*, 666 F.2d 148, 156 (5th Cir. 1982).

259. *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 (1945).

260. *Renfro v. City of Emporia*, 948 F.2d 1529, 1540 (10th Cir. 1991) (quoting *Laffey v. Nw. Airlines, Inc.*, 567 F.2d 429, 463 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978)).

261. See *Winning Wage Justice: A Summary of Research on Wage and Hour Violations in the United States*, supra note 31, at 53 (stating that when DOL settlements fail to impose liquidated damages, “they give employers little incentive for future compliance” because “employers can rationally gamble that, if they are caught, the only cost they will incur for breaking the law is to pay the wages they would have owed in the first place”).

to have a jury trial, he can sue for an injunction under section 17 and obtain a back pay award as an equitable remedy incidental to the injunction.²⁶²

Although denying liquidated damages, courts have consistently held that prejudgment interest is available in § 217 contempt actions²⁶³ and have awarded DOL investigatory costs and attorney's fees.²⁶⁴ Nevertheless, the more significant sum of liquidated damages is not available in such an action.

This restriction appears specific to FLSA and could be changed were FLSA amended to provide private injunctive relief. Similarly, were a court to find injunctive relief available under a state statute, the court should not deny plaintiffs any available multiplier damages unless that statute contains a similar restriction. Furthermore, even if liquidated damages were unavailable in private contempt actions, potential contempt sanctions against the defendant may offset the unavailability of liquidated damages in settlement negotiations. That is, insofar as defendants settle based on their anticipated costs of trial, and not simply based on a plaintiff's expected recovery, possible contempt sanctions may increase the amount that employers are willing to offer in settlement, making up to some extent for a lack of liquidated damages. Nevertheless, if FLSA were amended to provide private injunctive relief but also extend § 217's restriction on liquidated damages in contempt actions, or if courts found multiplier damages unavailable in private contempt actions under state statutes, the decreased plaintiff recovery would present a significant disadvantage.

Finally, contempt's perceived severity may cause judges to be more reluctant to hold employers in contempt than they would be to hold employers liable in a normal civil action. This effect, like that of the "clear and convincing" standard, is difficult to gauge. Yet the perceived severity of contempt need not be a drawback. Instead, it may incline defendants to settle earlier and for higher amounts. Further, several courts have specifically opined that judges should not hesitate to

262. *Brock*, 840 F.2d at 1063 (first citing S. REP. NO. 87-145 at 39 (1961), as reprinted in 1961 U.S.C.C.A.N. 1620, 1659; then citing *Brown Equip. & Serv. Tools, Inc.*, 666 F.2d at 156; and then citing *E.E.O.C. v. Gilbarco, Inc.*, 615 F.2d 985, 991 (4th Cir. 1980)).

263. See, e.g., *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 57 (2d Cir. 1984) (noting an "overwhelming weight of authority" on this point); *Usery v. Associated Drugs, Inc.*, 538 F.2d 1191, 1194 (5th Cir. 1976) (explaining that this is "well established").

264. See, e.g., *Herman v. Davis Acoustical Corp.*, 196 F.3d 354, 357 (2d Cir. 1999); *Reich v. Giaimo*, Civ. A. No. 85-2184(C)(5), 1993 WL 724662, at *10 (E.D. Mo. 1993).

issue § 217 injunctions²⁶⁵ or to hold defendants in contempt.²⁶⁶ Judicial willingness to issue FLSA injunctions and enforce them through contempt in DOL actions suggests that judges would be willing to do so in private wage and hour actions too.

Ultimately, because an existing injunction does not force non-party workers to file a contempt action if they think the remedy reduces their chance of success, plaintiffs may file a new action if they believe the disadvantages of a contempt action outweigh the benefits. In this way, an existing injunction simply expands workers' strategic options and allows them to pursue different goals. Workers may choose to seek contempt even where liquidated damages are unavailable if they are more concerned about speed than with the volume of recovery. Given their speed and possibility for escalation, contempt actions may better ensure that employers change their policies, even if they do not maximize individual recovery. Alternatively, if liquidated damages were unavailable in a contempt action, workers prioritizing the amount of recovery – and willing to wait through a longer motions process – might decide to file a new action. Similarly, if workers are concerned that the perceived severity of contempt or other factors might make their prospects on that claim dim, they could file a new action. In any case, an existing private injunction would expand workers' choice of remedy.

IV. THE COLLECTIVE NATURE OF EMPLOYMENT LAW

The traditional dichotomy between employment and labor law, dominant in the mid- to late-twentieth century, characterizes employment law – including FLSA – as an “individual rights’ regime in which workplace standards are established by statute and granted to individual workers, regardless of the extent of their collective organization.”²⁶⁷ By contrast, labor law, embodied in the NLRA and similar statutes, provides protection for collective action and a framework for collective bargaining that allows workers to define and enforce workplace rights.²⁶⁸ Although both bodies of law vindicate worker rights, scholars have

265. See *supra* note 203 and accompanying text.

266. In *Hodgson v. A-1 Ambulance Service, Inc.*, the Eighth Circuit reversed a district court declining in its discretion to order wages owed because this could cause the defendant ambulance service to go out of business, negatively affecting the surrounding city. The Circuit rejected this reasoning, holding that “the national policy involved in the Fair Labor Standards Act” did not afford such discretion. 455 F.2d 372, 374 (8th Cir. 1972) (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949)); see also *Usery v. Fisher*, 565 F.2d 137, 139-40 (10th Cir. 1977) (gathering similar cases).

267. Sachs, *supra* note 43, at 2688.

268. *Id.*

long identified tensions between the two²⁶⁹ and have argued that employment law's minimal, poorly enforced protections provide a paltry substitute for collective bargaining agreements.²⁷⁰

The litigation dynamics of private wage and hour injunctions help illustrate how injunctive relief would challenge the traditional view of employment law as affording “rights and protections to employees on an individual – and individually enforceable – basis.”²⁷¹ Although an individual plaintiff or plaintiffs must first secure an injunction, injunctive relief would extend to non-plaintiff workers on the understanding that wage theft is generally a matter of employer policy rather than individualized malice, and that the violation of wage and hour protections “spread[s] and perpetuate[s] such labor conditions.”²⁷² The injunction would provide a source of pressure on employers and, should violations continue, a litigation vehicle for other workers to obtain relief, ideally facilitated by a workers center. Moreover, the court could also grant prophylactic relief, such as know-your-rights trainings or organizer access, which extend benefits to plaintiff and non-plaintiff workers alike.

In challenging the individualist conception of employment law, this Note joins a line of scholarship seeking to unsettle the line between employment and labor law.²⁷³ This literature has emerged amid the recognition of labor law's failure,²⁷⁴ due in no small part to the NLRA's remedial inadequacy, and often attempts to envision a way forward that transcends the current failed regime. In *Employment Law as Labor Law*, for example, Ben Sachs identifies how – given the NLRA's shortcomings – workers centers have used FLSA and Title VII's antiretaliation protections to protect organizing aimed at substantive goals exceeding these statutes.²⁷⁵ More recently, Kate Andrias has challenged the employment/labor law distinction in observing how the Fight For \$15 campaign has mobilized the political power of collective action and unions to raise wage and hour standards.²⁷⁶ Whereas Sachs positions employment law mechanisms as a

269. Estlund, *supra* note 43, at 333; Sachs, *supra* note 43, at 2701-07.

270. Andrias, *supra* note 63, at 39-40.

271. James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1570 (1996).

272. 29 U.S.C. § 202(a) (2012).

273. See *supra* note 63.

274. Andrias, *supra* note 63, at 5-6 (describing the “collapse” of American unions and the failure of the NLRA regime); Sachs, *supra* note 43, at 2685-86 (“[M]ost scholars believe that the NLRA is a failed regime.”).

275. Sachs, *supra* note 43, at 2730-31.

276. Andrias, *supra* note 63.

means of protecting organizing, Andrias demonstrates how organizing can feed back into employment law by building the political power necessary to alter substantive workplace protections: “Under the emerging model, employment law is no longer just a collection of individual rights to be bestowed by the state. Instead, it is a collective project to be jointly determined and enforced by workers, in conjunction with employers and the public.”²⁷⁷ This “social bargaining” model uses collective action and political advocacy to secure reforms that, like employment law, apply at the sectoral, industrial, and regional level, rather than at the level of the individual firm.²⁷⁸

This Note takes that synergy yet further. Unlike Sachs, who observes how employment law mechanisms can be used to protect organizing that secures substantive rights beyond those of employment law, this Note suggests that wage and hour rights themselves should be understood—as Congress understood them when it drafted FLSA—as necessarily collective. In a sense, then, Congress’s conception of these rights as collectively secured or undermined exceeded the structure and efficacy of the enforcement mechanisms that FLSA put into place, especially since the Portal-to-Portal Act further impaired aggregation by eliminating representative actions and adding an opt-in requirement for collective actions. And whereas Andrias blurs the employment/labor law boundary by exploring how organizing and political mobilization can improve employment law protections and other workplace conditions, this Note has addressed how those protections can be more effectively realized by changing the public–private allocation of enforcement remedies. Private injunctive relief would not alter the minimalist character of wage and hour protections, nor the fact that their content is not self-determined by workers, but it could help make them genuine safeguards and transform the position of workers from “passive beneficiaries of the government’s protection” to more active enforcers of their rights.²⁷⁹

Moreover, contemplating injunctive relief in the wage and hour context brings our attention to how wage theft is generally not an act of individualized malice, as a retrospective damages remedial scheme treats it. Rather, as Congress understood it, wage theft is a business model, which has a structural impact on other market participants. The call for private equitable relief, as under Title VII and the ADEA, is also a call for courts to take wage theft seriously in light of FLSA’s regulatory failure, and to assume a more muscular role in making the law’s protections real for the millions of workers—disproportionately low wage, immigrants, people of color, and women—who lose billions of dollars each year to wage theft.

277. *Id.* at 68.

278. *Id.* at 9–10.

279. Estlund, *supra* note 43, at 333.

CONCLUSION

The Fight For \$15 has started a national movement around substantially raising the minimum wage—a move that Americans overwhelmingly support.²⁸⁰ Any such legislation, if it intends to make these protections real for workers, must confront the regulatory failure that is the current wage and hour enforcement regime. This Note has contrasted the FLSA regime with other enforcement models and argued that, as a matter of regulatory design and litigation strategy, private injunctive relief would improve enforcement and advance worker rights. These findings suggest that any state or national wage and hour legislation should, *inter alia*, extend injunctive relief to private actions where it does not exist, and that workers' advocates should more aggressively pursue such relief in the seven states where it does exist.

280. *Majority Supports Increase in Federal Minimum Wage*, PEW RES. CTR. (Dec. 22, 2015), <http://www.people-press.org/2015/12/22/as-election-year-nears-public-sees-mixed-economic-picture/majority-supports-increase-in-federal-minimum-wage> [<http://perma.cc/2Q37-7NPK>] (reporting that seventy-three percent of respondents supported raising the federal minimum wage); *see also Issues and the 2016 Campaign*, PEW RES. CTR. (Aug. 18, 2016), <http://www.people-press.org/2016/08/18/5-issues-and-the-2016-campaign> [<http://perma.cc/P7SS-V5VT>] (reporting that fifty-two percent of respondents favored increasing the federal minimum wage to \$15 an hour).