

## COMMENTS

### **Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims**

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#### INTRODUCTION

Wage-and-hour class actions are by far the most common type of class action claim filed in federal court, accounting for nearly 20 percent of all class action suits.<sup>1</sup> Employees bring wage-and-hour class actions to recover unpaid wages. The stakes are high. Employers pay out at least \$1 billion annually in these cases.<sup>2</sup> Wal-Mart recently settled sixty-three wage-and-hour class action suits for an estimated \$342 to \$640 million and still has another twelve suits pending.<sup>3</sup> Even with this large volume of litigation, a fundamental question remains unanswered: does state or federal law determine the remedies available and the procedures used in these suits?<sup>4</sup>

The Fair Labor Standards Act of 1938<sup>5</sup> (FLSA) requires employers to pay a minimum wage and overtime rates. It contains a savings clause, which permits states to set more stringent wage-and-hour laws, creating situations in which both state and federal law may apply. In addition, the FLSA contains enforcement provisions detailing how employees may bring claims to recover unpaid wages as well as the remedies they may seek. These enforcement provisions create a private right of action and allow the United States Department of Labor to initiate public enforcement actions. But, the FLSA does not specify whether

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<sup>1</sup> Marc H. Harwell and Mary DeCamp, *Class Action Issues in a Wage and Hour Discrimination Context*, 58 *Federation Def & Corp Counsel Q* 269, 269–71 (Spring 2008).

<sup>2</sup> See Michael Orey, *Wage Wars*, *Business Week* (Oct 1, 2007), online at [http://www.businessweek.com/magazine/content/07\\_40/b4052001.htm](http://www.businessweek.com/magazine/content/07_40/b4052001.htm) (visited Sept 1, 2009) (documenting the growth in wage-and-hour class actions).

<sup>3</sup> Steven Greenhouse and Stephanie Rosenbloom, *Wal-Mart Settles 63 Lawsuits over Wages*, *NY Times B1* (Dec 24, 2008).

<sup>4</sup> See *Bouaphakeo v Tyson Foods, Inc.*, 564 F Supp 2d 870, 885–86 (ND Iowa 2008) (noting conflicting case law regarding the preemption of state law claims).

<sup>5</sup> Fair Labor Standards Act of 1938 (FLSA), Pub L No 75-718, 52 Stat 1060, codified as amended at 29 USC § 201 et seq.

states may determine their own enforcement schemes for wage-and-hour law violations.

With the dramatic rise in FLSA claims over the last decade, courts frequently face wage-and-hour suits containing a FLSA claim and several state law claims. Often, state law provides remedies and procedures that are more favorable to employees than the FLSA enforcement provisions. Sometimes these differences can be very favorable by providing treble damages or changing the class action procedures. Employers often argue these employee-friendly state law claims are preempted: since Congress provided specific enforcement provisions, it intended these federal enforcement provisions to be used instead of state enforcement provisions. Allowing state law claims would frustrate congressional intent, and therefore, those claims should be preempted. Courts have struggled with this question and have issued conflicting opinions.<sup>6</sup>

This Comment resolves these issues. Part I outlines the federal and state statutory background. Part II explains how state law claims may be preempted by subdividing the issue into three categories depending on whether the state wage-and-hour law is: (1) stricter than the FLSA, (2) coextensive with the FLSA, or (3) nonexistent. Part III summarizes the current conflicting case law on FLSA preemption. Part IV begins by demonstrating that the traditional method of preemption analysis (determining whether Congress intended to preempt state law) does not decisively resolve the issue. Part IV then argues for a presumption against preemption in this context because states have traditionally regulated wages and hours, and continue to do so. Further, Part IV applies this proposed presumption to the three preemption categories outlined in Part II. Whenever there is ambiguity, the presumption against preemption wins out, meaning that state law claims should be preempted only if the state does not have a state wage-and-hour law. Finally, Part IV applies this approach to the case law.

## I. FEDERAL AND STATE LAW BACKGROUND

### A. Federal Statutes

Congress enacted the FLSA to remedy labor conditions deemed “detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”<sup>7</sup> To do so, the Act requires employers to pay minimum wages and over-

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<sup>6</sup> See *Bouaphakeo*, 564 F Supp 2d at 885–86.

<sup>7</sup> 29 USC § 202.

time, and prohibits child labor.<sup>8</sup> The Act makes clear that these are minimum standards (at least for wages and overtime): states can enact *stricter* regulations.<sup>9</sup> Besides its substantive regulations, the Act also contains broad enforcement provisions, which specify the remedies available and the procedures used to bring suit under the Act.<sup>10</sup>

The Act was passed primarily out of concern for employees' living and working conditions.<sup>11</sup> President Franklin D. Roosevelt urged Congress to pass the Act to give workers "a fair day's pay for a fair day's work."<sup>12</sup> The Supreme Court confirmed that this is the Act's principal purpose, distinguishing it from other labor laws aimed at striking a balance between employee and employer interests.<sup>13</sup> But the Act did not intend to increase wages at all costs. It is also clear that Congress at least considered the economic effect of these minimum wage-and-hour regulations on the labor market.<sup>14</sup> In lengthy joint House and Senate hearings on the bill, numerous experts testified on its potential adverse economic effects, such as an increase in the cost of living for farmers because they did not receive a corresponding wage increase under the Act.<sup>15</sup>

The substantive provisions of the Act are straightforward. The two that are used most often are the minimum wage and overtime provisions. The minimum wage provision requires that employees receive at least a set dollar amount per hour worked.<sup>16</sup> The overtime provision requires employers to pay overtime rates (one-and-a-half times regular pay) for any hours worked in excess of forty in a single week.<sup>17</sup> But, both of these provisions are subject to numerous exemp-

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<sup>8</sup> 29 USC §§ 206–07, 212.

<sup>9</sup> 29 USC § 218(a).

<sup>10</sup> 29 USC § 216(a)–(b).

<sup>11</sup> For a detailed description of the year-long legislative process leading to the passage of the FLSA, see John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 L & Contemp Probs 464, 464–73 (1939).

<sup>12</sup> Franklin D. Roosevelt, 6 *The Public Papers and Addresses of Franklin D. Roosevelt: The Constitution Prevails, 1937* 210 (Russell & Russell 1941).

<sup>13</sup> See *Barrentine v Arkansas-Best Freight System, Inc.*, 450 US 728, 739 (1981), quoting *Overnight Motor Transportation Co v Missel*, 316 US 572, 578 (1942) (distinguishing the FLSA from the Labor Management Relations Act, which was "designed to minimize industrial strife and to improve working conditions") (emphasis added).

<sup>14</sup> See 29 USC § 202 ("It is hereby declared to be the policy of this Act . . . to correct and as rapidly as practicable to eliminate the [substandard labor] conditions . . . in such industries without substantially curtailing employment or earning power.").

<sup>15</sup> Forsythe, 6 L & Contemp Probs at 467–69 (cited in note 11).

<sup>16</sup> See U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 § 8102, Pub L No 110-028, 121 Stat 112, 188, codified at 29 USC § 206. The minimum wage is \$7.25 as of July 24, 2009. See also *Compliance Assistance—Fair Labor Standards Act*, online at <http://www.dol.gov/esa/whd/flsa> (visited Sept 1, 2009).

<sup>17</sup> 29 USC § 207.

tions. For example, employees acting in an executive, administrative, or professional capacity are exempted from both the minimum wage and overtime provisions of the Act.<sup>18</sup> The Act also entirely exempts certain industries from its provisions, such as seamen.<sup>19</sup> Extensive regulations issued by the Department of Labor clarify these exemptions.<sup>20</sup> Because the regulations are complex and situation specific, employers are often sued for misclassifying employees, and this drives much of the FLSA litigation.<sup>21</sup>

When an employer violates one of these substantive provisions, the FLSA provides employees with specific remedies. Employees may recover the unpaid wages, an extra amount equal to the unpaid wages (liquidated damages), and attorneys' fees and costs.<sup>22</sup> The Act, as amended, also specifies procedures employees must use to bring FLSA lawsuits. The FLSA creates a unique mechanism for a group of employees to bring a single action, termed a "collective action."<sup>23</sup> In these collective actions, employees must affirmatively opt in by filing a form.<sup>24</sup> In a regular federal class action under Rule 23 of the Federal Rules of Civil Procedure, similarly situated employees are class members by default and must choose to opt out if they do not wish to be party to the suit.<sup>25</sup> Numerous commentators and courts have noted the practical effect of the FLSA's collective action rule: the class size is reduced because fewer people opt in, lowering the available damages for the class, thus reducing plaintiffs' lawyers' incentive to bring suit.<sup>26</sup>

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<sup>18</sup> 29 USC § 213(a)(1).

<sup>19</sup> 29 USC § 213(a).

<sup>20</sup> See, for example, 29 CFR § 541 (defining the exemptions for executive, administrative, professional, computer, and outside sales employees).

<sup>21</sup> See, for example, *Takacs v A.G. Edwards and Sons, Inc*, 444 F Supp 2d 1100, 1111–13 (SD Cal 2006) (noting that it is hard to determine if an employee's duties are "administrative"); Harwell and DeCamp, 58 Federation Def & Corp Counsel Q at 271 (cited in note 1) (documenting a \$135 million settlement to 2,615 misclassified insurance adjusters by State Farm Insurance Company). For a detailed discussion of the various exemptions that give rise to much wage-and-hour litigation, see generally Joseph Tilson and Jeremy Glenn, *Hot Topics in Wage and Hour Law*, 782 PLI/Lit 827 (2008).

<sup>22</sup> 29 USC § 216(b).

<sup>23</sup> For a discussion of the unique procedural details associated with FLSA collective actions, see Charles Alan Wright, Arthur B. Miller, and Mary Kay Kane, 7B *Federal Practice and Procedure* § 1807 (West 3d ed 2005).

<sup>24</sup> 29 USC § 216(b) ("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.").

<sup>25</sup> FRCP 23(c)(2)(B)(v) (requiring that potential class members falling under Rule 23(b)(3) be notified of their ability to opt out of the class).

<sup>26</sup> See Craig Becker and Paul Strauss, *Representing Low-wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 Minn L Rev 1317, 1318–19 (2008); *Ellis v Edward D. Jones & Co*, 527 F Supp 2d 439, 444 (WD Pa 2007) (noting the low opt-in rate of 15 to 30 percent if the

Also, the Act gives the Secretary of Labor broad powers to intervene and bring actions on behalf of employees, as well as the power to investigate potential violations.<sup>27</sup>

Both private plaintiffs and public agencies have roles in enforcing the statute. The Wage and Hour Division of the Department of Labor recovered over \$185 million in unpaid wages for more than 228,000 employees in fiscal year 2008.<sup>28</sup> This is just a small percentage of the probable number of FLSA violations.<sup>29</sup> Private actions likely recovered many times more unpaid wages during the same time period. One report suggests private plaintiffs recover over \$1 billion annually.<sup>30</sup> The correct role for public enforcement is also politically contentious. Recently, the Department of Labor was accused of failing to investigate and pursue workers' claims.<sup>31</sup> Business leaders came to the defense of the Department of Labor, countering that its goal should be to help employers comply with the FLSA, not to punish benign mistakes caused by complex regulations.<sup>32</sup> These conflicts demonstrate that the correct role for public and private enforcement is a political issue.

Additionally, the FLSA contains a savings clause, specifically authorizing states to set stricter regulations: "No provision of this [Act] shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum

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collective action is not backed by a union). For a discussion of the economics of class actions, see generally Richard A. Posner, *Economic Analysis of the Law* § 21.11 (Kluwer 7th ed 2007).

<sup>27</sup> 29 USC § 211 (authorizing the Secretary of Labor to investigate wage-and-hour practices, request data from employers, and enter and inspect workplaces); 29 USC § 216(b) (providing for the Secretary of Labor to supervise wage-and-hour actions or intervene in court).

<sup>28</sup> Department of Labor, Employment Standards Administration, Wage and Hour Division, *Wage and Hour Collects over \$1.4 Billion in Back Wages for over 2 Million Employees since Fiscal Year 2001* 1 (Dec 2008), online at <http://www.dol.gov/esa/whd/statistics/2008FiscalYear.pdf> (visited Sept 1, 2009).

<sup>29</sup> See National Employment Law Project, *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-wage Workers in an Era of Government Inaction and Employer Unaccountability* 3-7 (Oct 2006), online at [http://nelp.3cdn.net/95b39fc0a12a8d8a34\\_iwm6bhbv2.pdf](http://nelp.3cdn.net/95b39fc0a12a8d8a34_iwm6bhbv2.pdf) (visited Sept 1, 2009) (documenting labor violations in certain industries, including estimates that over 70 percent of garment employers in southern California and 100 percent of poultry processing plants are in violation of wage-and-hour laws).

<sup>30</sup> Orey, *Wage Wars*, *Business Week* at 50 (cited in note 2).

<sup>31</sup> See Michael A. Fletcher, *Labor Dept Accused of Straying from Enforcement*, *Wash Post* A02 (Dec 1, 2008) (detailing accusations by then-Senator Barack Obama that the Department of Labor was failing to fulfill its enforcement duties and citing a GAO report on the lack of Department of Labor investigations into the treatment of low-wage workers). The Bush administration took a pro-industry approach of trying to help businesses follow labor regulations, while various Democrats called for a more pro-worker approach in which the Department of Labor aggressively enforces the laws. *Id.*

<sup>32</sup> *Id.* (noting the business community's perception that Democratic administrations exercise an "onerous" degree of enforcement, and Republican administrations place more of an emphasis on assisting companies with compliance).

wage established under this [Act] or a maximum work week lower than the maximum workweek established under this chapter.”<sup>33</sup> The savings clause explicitly allows states to set higher minimum wages and adjust the overtime workweek. The overall effect is to give states a continuing role in regulating wages and hours (subject to federal minimums). But, the savings clause does not explicitly indicate whether states may change the remedies available or procedures used to enforce the FLSA, only that they may adjust the minimum wage and overtime workweek.

Several years after the passage of the FLSA, Congress enacted the Portal-to-Portal Act of 1947<sup>34</sup> in response to pressure from employers to limit FLSA liabilities.<sup>35</sup> The primary concern was the many pending “portal-to-portal” suits—actions brought on the theory that travel time and other preliminary and postliminary work activities should be compensated.<sup>36</sup> Nearly two thousand such suits had been filed in a six-month time span, resulting in well over \$6 billion (in 1947 dollars) of estimated liability.<sup>37</sup> The Act foreclosed these suits by making preliminary and postliminary work time generally noncompensable.<sup>38</sup>

The Portal-to-Portal Act also made several other substantive changes to limit employer liability. First, the Act set the statute of limitations at two years (unless the violation was in bad faith, then three years).<sup>39</sup> And it limited the availability of liquidated damages solely to bad faith violations.<sup>40</sup> Most importantly, the Act amended the FLSA to require the opt-in collective action described above.<sup>41</sup> While the reason behind this provision is not contained in the conference report or the House Judiciary Committee Report, the overall structure and intent of the bill was to lessen employer liability.<sup>42</sup> The most apparent conclusion, then, is that this provision was also intended as a check against the liability faced by employers in large FLSA class actions. Some support for this can be seen in comments made during the congress-

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<sup>33</sup> 29 USC § 218.

<sup>34</sup> Pub L No 80-49, 61 Stat 84, codified at 29 USC § 251 et seq.

<sup>35</sup> 29 USC § 251(a).

<sup>36</sup> See Portal-to-Portal Act, HR Rep No 71, 80th Cong, 1st Sess 2–3 (1947).

<sup>37</sup> *Id.* at 3 (noting that from July 31, 1946 to January 31, 1947, 1,913 suits were filed with 1,515 pleading specific damages amounting to \$5.76 billion).

<sup>38</sup> 29 USC § 252 (foreclosing suits seeking to recover wages for activities that were not explicitly stated in contract or that were not customarily compensated); 29 USC § 254 (clarifying that the workday does not include preliminary and postliminary activities).

<sup>39</sup> 29 USC § 255.

<sup>40</sup> 29 USC § 260 (stating liquidated damages are not available if the employer satisfies the court that he has acted in good faith or believed his act or omission did not violate the FLSA).

<sup>41</sup> Portal-to-Portal Act, 61 Stat at 87 (specifying the remedies and procedures for notification and opt-out).

<sup>42</sup> See notes 37–38 and accompanying text.

sional debates. For instance, Senator Forrest C. Donnell, the floor leader for the bill, stated the purpose was to forbid “representative actions” where an “outsider . . . perhaps someone who is desirous of stirring up litigation without being an employee at all” would create “unwholesome champertous situations.”<sup>43</sup> The Supreme Court has also endorsed the limitation of employer liability as the purpose of the Portal-to-Portal Act’s collective action provision.<sup>44</sup>

Each of the above changes from the Portal-to-Portal Act limited employers’ FLSA liability. While the original FLSA was predominantly concerned with advancing worker well-being, the Portal-to-Portal Act supplanted this employee-friendly regime. It provided detailed enforcement provisions to limit employer liability. Thus, Congress no longer intended the FLSA to be focused solely on improving employees’ working conditions. Instead, Congress created a balance between worker well-being and employer liability. This balance is the basis for the preemption argument: state law claims should be preempted because otherwise the FLSA’s detailed enforcement provisions will be circumvented by state-provided remedies and procedures, thereby disrupting the congressional balance.

## B. State Laws

In addition to the FLSA, there are many state law claims that employees may assert to recover unpaid wages, which often provide different remedies and procedures. These state laws fall into three categories: stricter wage-and-hour laws providing greater substantive rights (meaning greater wages), coextensive wage-and-hour laws providing the same substantive rights as the FLSA, and remedial laws providing no substantive rights but that can be used to enforce other substantive laws, such as state wage-and-hour laws or the FLSA.

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<sup>43</sup> 93 Cong Rec S 2182 (Mar 18, 1947). Senator Donnell had union representatives in mind when he spoke of “outsiders.” Prior to that statement, he used an example of a union representative five-hundred miles away directing the litigation. *Id.* Regardless, these worries were most likely driven by the liability employers would face as a result of any representative action. At the time, the modern class action did not exist, making the high-damage FLSA collective actions alarming. See also Becker and Strauss, 92 Minn L Rev at 1321 n 28 (cited in note 26) (noting that Congress was primarily concerned with litigation caused by unions, but that the restriction imposed did not make much sense because courts had already read in an opt-in requirement to collective actions brought by unions).

<sup>44</sup> See *Hoffman-La Roche, Inc v Sperling*, 493 US 165, 173 (1989) (noting that the Act was passed partly in response to “excessive litigation spawned by plaintiffs lacking a personal interest in the outcome” and aimed to “free[] employers of the burden of representative actions”).



Many states have passed their own substantive wage-and-hour laws that are stricter than the FLSA.<sup>45</sup> Thirteen states have set a higher minimum wage rate.<sup>46</sup> Others have modified the overtime rules. For example, Alaska, California, and Nevada require employers to pay overtime rates for any hours worked in excess of eight in a single day.<sup>47</sup> Still others have laws that extend coverage to employees not covered by the FLSA.<sup>48</sup> In all of these instances, the state laws provide employees with greater substantive wage rights.

In other states, wage-and-hour laws exist, but they are coextensive with the FLSA.<sup>49</sup> Coextensive state wage-and-hour laws only give employees the rights to the same wages they would be due under the FLSA. This often occurs when the state regulations were stricter than the federal regulations, but Congress subsequently increased wages making the state and federal rates equal. Even though coextensive wage-and-hour laws provide employees with the same amount of wages as the FLSA, employees may prefer these laws if the associated remedies and procedures are more favorable.

Finally, states may have remedial statutes that enforce state wage-and-hour laws or the FLSA. These remedial statutes do not create rights to receive any wages, but are used to enforce wage rights given by other substantive wage-and-hour laws. The most common remedial statute is a wage payment law. These laws mandate *how* wages should be paid. They do not determine the *amount* of wages that must be paid. Instead, they rely on the FLSA or a state wage-and-hour law to determine the amount of unpaid wages. Iowa's Wage Payment and Collection Law<sup>50</sup> (IWPCCL) is a model example. This statute requires employers to have a regular weekly, semimonthly, or monthly payday.<sup>51</sup> These paydays cannot be more than twelve days (excluding holidays

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<sup>45</sup> See Department of Labor, Employment Standards Administration, Wage and Hour Division, *Minimum Wage Laws in the States* (Jan 1, 2009), online at <http://www.dol.gov/esa/minwage/america.htm> (visited Sept 1, 2009).

<sup>46</sup> *Id.*

<sup>47</sup> Alaska Stat § 23.10.060 (Michie); Cal Lab Code § 510(a) (West); Nev Rev Stat § 608.018(1)(b). Another common change to the overtime rules is that employers must pay overtime for the sixth and seventh days worked in a single seven-day span. See, for example, KY Rev Stat Ann § 337.050(1) (Michie).

<sup>48</sup> For example, seamen are exempted from the FLSA. See note 19. But California's wage-and-hour law applies to seamen operating in California's territorial waters. *Tidewater Marine Western, Inc v Bradshaw*, 927 P2d 296, 296–99 (Cal 1996) (affirming the Division of Labor Standards Enforcement's decision that seamen are covered by California's wage-and-hour law).

<sup>49</sup> See, for example, 19 Del Code Ann § 902 (2008) (setting the state minimum wage at the federal rate). As of July 24, 2009, twenty-seven states had minimum wages equal to the federal rate. See *Minimum Wage Laws in the States*, online at <http://www.dol.gov/esa/minwage/america.htm> (cited in note 45).

<sup>50</sup> Iowa Code Ann § 91A.1 et seq (West).

<sup>51</sup> Iowa Code Ann § 91A.3.



and Sundays) after the period in which the wages were earned.<sup>52</sup> The law is purely remedial and does not provide the amount of wages to be paid, instead relying on Iowa's wage-and-hour law or the FLSA.

State unfair trade practices laws can also be used as remedial statutes in wage-and-hour litigation. For example, California courts hold that the state's Unfair Competition Law<sup>53</sup> (UCL) applies to situations in which employers have not paid their employees the required wages. The UCL prohibits any "unlawful, unfair or fraudulent business act or practice,"<sup>54</sup> and wage-and-hour law violations qualify as an "unlawful business act or practice."<sup>55</sup> Most states' unfair competition laws do not apply to these situations, however.<sup>56</sup>

While not a remedial statute per se, state common law serves a similar role in wage-and-hour litigation. A statutory wage-and-hour law violation may serve as the basis of a common law claim. For example, plaintiffs in one case claimed their employer acted negligently by adopting an inaccurate timekeeping system.<sup>57</sup> The negligent act was installing a timekeeping system that resulted in wage-and-hour violations. To plead the common law claim, the employees had to rely on the substantive wage-and-hour statute requiring employers to compensate employees for certain work activities. In this manner, the common law claim is "enforcing" the substantive wage-and-hour law.

The other two frequently used common law claims are fraud and breach of contract. For example, employees have pleaded fraud when an employer made representations that the employee was not eligible for overtime,<sup>58</sup> and they have pleaded breach of contract when there was an employee handbook explicitly incorporating the FLSA's overtime requirements.<sup>59</sup> In each of these cases, the common law claims relied on substantive rights created by the state wage-and-hour law or the FLSA to establish liability. Common law claims may also be used to enforce employment agreements that set compensation above the federal wage-and-hour level. These employment-contract disputes are determined according to contract law and are not the subject of this Comment.

All of these state law claims may provide more favorable remedies and procedures than the FLSA. For example, unfair competition

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<sup>52</sup> Id.

<sup>53</sup> Cal Bus & Prof Code § 17200 et seq.

<sup>54</sup> Cal Bus & Prof Code § 17200.

<sup>55</sup> *Takacs*, 444 F Supp 2d at 1118.

<sup>56</sup> See, for example, *Anderson v Sara Lee Corp.*, 508 F3d 181, 190–91 (4th Cir 2007).

<sup>57</sup> See text accompanying notes 95–97.

<sup>58</sup> *Petras v Johnson*, 1993 WL 228014, \*1–3 (SDNY) (dismissing the employee's common law claims, which sought punitive damages, because the claims were enforcing the FLSA).

<sup>59</sup> *Avery v City of Talladega, Alabama*, 24 F3d 1337, 1348 (11th Cir 1994) (holding that the employees' breach of contract claim was not preempted, even though it was enforcing the FLSA).

laws typically provide treble damages.<sup>60</sup> State common law claims usually allow punitive damages.<sup>61</sup> Wage payment laws may make liquidated damages mandatory or increase them to twice the amount of unpaid wages.<sup>62</sup> Most importantly, these claims often allow employees to use an opt-out class action instead of an opt-in collective action.<sup>63</sup> Because of the more favorable remedies and procedures, employees often bring state law claims in addition to, or instead of, FLSA claims. Employers try to limit their liability exposure by arguing that these state law claims are preempted.

## II. HOW STATE WAGE-AND-HOUR CLAIMS MAY BE PREEMPTED

This Part describes how the FLSA may preempt state wage-and-hour claims. It then divides the preemption issue into separate categories based on the type of state wage-and-hour law and describes how preemption applies to these specific scenarios. These different scenarios will be useful for understanding the case law described in Part III. They will also be used in Part IV to resolve the preemption dilemma.

Federal law may preempt state law to the extent there is disagreement between the two.<sup>64</sup> The Supreme Court has recognized three types of federal preemption: express, field, and conflict.<sup>65</sup> Express preemption applies when a federal statute explicitly abrogates state law.<sup>66</sup> Field preemption applies when a state attempts to regulate a field that Congress intends to regulate exclusively.<sup>67</sup> Conflict preemption applies when it is impossible to comply with both state and federal law, or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>68</sup>

Federal preemption becomes an issue when employees bring state law claims instead of, or in addition to, FLSA claims. The general argument in favor of preemption is that Congress intended the FLSA’s specific procedures and remedies to apply to all wage claims as a way of limiting employer liability. State wage claims that provide

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<sup>60</sup> See Cal Bus & Prof Code § 17082.

<sup>61</sup> See, for example, *Petras*, 1993 WL 228014 at \*1 (seeking punitive damages by claiming common law fraud in a wage-and-hour dispute).

<sup>62</sup> See, for example, 26 Me Rev Stat Ann § 626-A (West) (mandating employers pay twice the unpaid wages as liquidated damages for violations of Maine’s state wage payment law).

<sup>63</sup> See, for example, *Bouaphakeo v Tyson Foods, Inc.*, 564 F Supp 2d 870, 909 (ND Iowa 2008) (allowing the plaintiffs to proceed with their IWPC claim as a Rule 23 class action).

<sup>64</sup> US Const Art VI, cl 2 (“[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . Laws of any State to the Contrary notwithstanding.”).

<sup>65</sup> *English v General Electric Co.*, 496 US 72, 78–79 (1990).

<sup>66</sup> *Id.* at 78.

<sup>67</sup> *Id.* at 79.

<sup>68</sup> *Id.*

different procedures and remedies stand as an obstacle to that congressional objective, implicating conflict preemption. Express preemption does not apply because the FLSA does not explicitly address whether states may provide different remedies and procedures.<sup>69</sup> It only prevents states from setting lower wage-and-hour standards. Field preemption does not apply because the FLSA gives states a continuing role in regulating wages through the savings clause.<sup>70</sup>

As described in Part I, state wage-and-hour laws may differ from the FLSA in several ways, and these differences will lead to different preemption arguments. First, the state wage-and-hour law may provide greater substantive rights for some employees, such as a greater minimum wage, or by extending coverage to employees not covered by the FLSA. Second, the state wage-and-hour law may be coextensive with the FLSA so that the amount of unpaid wages due under both is the same. Third, and finally, there may simply be no state wage-and-hour law. Even without a state wage-and-hour law, other state law claims may still be used to enforce the FLSA. All of these three situations bring about different preemption scenarios.

Note that a single state law may fit into several preemption categories depending on the nature of the case. For example, a state wage-and-hour law may exclude any FLSA-covered employee.<sup>71</sup> When FLSA-covered employees bring suit, the state wage-and-hour law does not apply to them, making the case fit into the third category. But for non-FLSA-covered employees, the state wage-and-hour law is their only source of substantive wage rights. In this case, the claim fits in the first category.

#### A. The State Wage-and-Hour Law Provides Greater Substantive Rights

The first scenario—in which the state wage-and-hour law provides greater substantive rights than the FLSA—presents the weakest argument for preemption. Here, the employee is due a higher amount of wages under the state law than the FLSA. The only way he can recover the full amount of his unpaid wages is through state law.<sup>72</sup>

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<sup>69</sup> See 29 USC § 218. See also *Williamson v General Dynamics Corp*, 208 F3d 1144, 1151 (9th Cir 2000) (addressing FLSA preemption of state law claims and noting “[n]o statutory language expressly preempts the [employees’] claims”).

<sup>70</sup> See 29 USC § 218. See also *Williamson*, 208 F3d at 1151 (“FLSA’s ‘savings clause’ is evidence that Congress did not intend to preempt the entire field.”).

<sup>71</sup> See, for example, 40 Okla Stat Ann § 197.4(d) (West) (“This act shall not apply to employers subject to the Fair Labor Standards Act of 1938.”).

<sup>72</sup> Note that it is plausible that employees may *choose* to bring a FLSA claim instead of a state law claim, even though the employee will receive a greater amount of wages under state law. Employees would do this if the FLSA provided more favorable remedies and procedures,

Preempting the entire claim is not an option because that would be plainly contrary to the FLSA's savings clause, which specifically allows states to set stricter minimum wage rates and overtime provisions. The only possible argument is that states may enact stricter wage provisions but may not enact separate enforcement provisions.

Every court that has addressed this scenario directly has held that state enforcement provisions are not preempted.<sup>73</sup> Courts have implicitly assumed that the congressional authorization to set higher wage rates is also an authorization for states to set distinct enforcement mechanisms for those higher rates. This view has textual support from the FLSA, which states that the FLSA's enforcement procedures only apply to FLSA violations.<sup>74</sup> Therefore the FLSA's enforcement provisions would not apply to situations in which only the state wage-and-hour law is violated. This is precisely the situation here. States have stricter wage-and-hour laws so that employers may be in violation of state law, but not in violation of the FLSA; and therefore, FLSA's enforcement provisions do not apply because there has been no FLSA violation.

#### B. The State Wage-and-Hour Law Is Coextensive with the FLSA

The argument for preemption is stronger when the state wage-and-hour law is coextensive with the FLSA. The state is effectively substituting its remedies for those provided by the FLSA. Unlike the previous category, every violation of a state wage-and-hour law is also a violation of the FLSA. In every case, the employee may recover the entirety of his wages through the FLSA's enforcement provisions. The employee has just chosen to use the state enforcement provisions instead. The argument for preemption, then, is that the state is frustrating congressional intent by changing the remedies associated with FLSA violations when it does not have the explicit authority to do so.

On the other hand, the state has enacted its own wage-and-hour law providing employees with independent substantive rights. While Congress enacted the Portal-to-Portal Act to limit employer liability, it is possible that Congress only intended to limit employer liability im-

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and if the benefit from those remedies and procedures outweighed the extra wages due under state law. But, no situation was found in which this was the case because the FLSA remedies and procedures appear to always be less favorable than those provided by state laws. This does not affect the analysis of this Comment because the state law claim would not be preempted; the employee would just choose not to use it.

<sup>73</sup> See, for example, *Pacific Merchant Shipping Association v Aubry*, 918 F.2d 1409, 1420 (9th Cir. 1990) (upholding a California law extending overtime to seamen, which are exempted from the FLSA).

<sup>74</sup> See 29 USC § 216(b) (providing remedies and procedures for any employer who "violates the provisions" of the FLSA).

posed by federal law.<sup>75</sup> Arguably then, a state retains the authority to set distinct remedies for violations of its state wage-and-hour law. In doing so, the state is not replacing the FLSA's enforcement provisions, but is exercising its continuing ability to regulate wages and hours subject to federal minimum standards.

This is also likely to be the preemption scenario under which most wage-and-hour disputes arise. It often occurs when a state passes a minimum wage law higher than the federal rate with a provision that the state's minimum wage will increase to the federal rate, if the federal rate ever becomes higher.<sup>76</sup> The federal minimum wage is then increased, causing the state wage-and-hour law to be the same as the FLSA. The recent minimum wage increase (completed July 24, 2009) caused twenty-seven states to have minimum wages equal to the federal rate and twenty-four states to have identical overtime provisions.<sup>77</sup> Furthermore, a large majority (approximately 90 percent) of the wage-and-hour cases are overtime violations.<sup>78</sup> Since twenty-four states have coextensive overtime provisions and a majority of wage-and-hour claims deal with overtime violations, a substantial portion of FLSA preemption disputes fall into this category.

### C. The State Wage-and-Hour Law Does Not Exist or Does Not Apply

The third scenario—in which the state wage-and-hour law does not exist or does not apply—presents the strongest argument for preemption. The state does not have a substantive wage-and-hour law, so any state law claim is merely enforcing the FLSA. These state law claims provide different remedies than the FLSA, but rely on the FLSA for the substantive rights being asserted, making the state claims purely remedial. The preemption argument is that these state law claims are frustrating congressional intent by providing new remedies in place of the FLSA's specific remedies. Unlike the second

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<sup>75</sup> See Part I.A (describing the shift in congressional intent from sole concern with employee well-being with the FLSA of 1938 to a balance between employee well-being and employer liability with the Portal-to-Portal Act of 1947).

<sup>76</sup> See text accompanying note 49.

<sup>77</sup> See Department of Labor, *Minimum Wage Laws in the States* (cited in note 45). Many more states have overtime provisions that are substantially similar to the FLSA. They have minor differences like requiring overtime pay for the seventh consecutive day worked. *Id.* These differences are usually not an issue raised in wage-and-hour suits, so that the state overtime provisions are coextensive with federal law in most cases, notwithstanding the minor differences. But, these states with minor differences were excluded from the tally. The number of states with overtime provisions *effectively* coextensive with the FLSA may be significantly higher.

<sup>78</sup> US Department of Labor, *Wage and Hour Collects over \$1.4 Billion* at 2 (cited in note 28) (reporting that, of the total unpaid wages collected by the Department of Labor, 88 percent were from overtime violations and 12 percent were from minimum wage violations).

scenario, there is no argument that state law provides remedies for an independent state wage-and-hour violation.

### III. THE CONFLICTING APPROACHES TO FLSA PREEMPTION

This Part lays out the conflicting case law on whether the FLSA preempts certain state law claims. First, it describes one of the earliest decisions on the issue by the Ninth Circuit. Ultimately, the Ninth Circuit decided the case on other grounds, but the opinion provides a detailed preemption analysis and has been cited by several courts. Then, it presents the conflicting district and circuit court cases, making use of the framework from Part II.

#### A. The Ninth Circuit's Preemption Analysis

In *Williamson v General Dynamics Corp.*,<sup>79</sup> four General Dynamics employees sued to recover unpaid overtime wages.<sup>80</sup> They were originally eligible to join a settlement class action to receive their unpaid wages.<sup>81</sup> But, their employer advised them not to join the settlement class action because it would be “career suicide.”<sup>82</sup> General Dynamics promised them that their jobs would be safe if they did not join the settlement suit.<sup>83</sup> As a result, the employees chose not to join the lawsuit, but lost their jobs less than a year later when General Dynamics closed their division for business reasons.<sup>84</sup> Subsequently, the four employees brought common law fraud claims based on General Dynamics's inducement not to join the settlement class action in return for job security.<sup>85</sup>

General Dynamics argued that the employees' fraud claim was equivalent to a claimed violation of the FLSA's antiretaliation provision, which protects employees from retaliation for asserting their FLSA wage rights.<sup>86</sup> In General Dynamics's view, the common law claim provided nothing more than a remedy for a FLSA violation. If that were the case, the claim would fall into the third preemption category (nonexistent state wage-and-hour law) because it would have been enforcing the FLSA. Congressional intent would arguably be frustrated because state law remedies would replace the FLSA's enforcement provisions. The court ultimately held that the fraud claims

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<sup>79</sup> 208 F3d 1144 (9th Cir 2000).

<sup>80</sup> *Id.* at 1148.

<sup>81</sup> *Id.* at 1147.

<sup>82</sup> *Id.*

<sup>83</sup> *Williamson*, 208 F3d at 1147.

<sup>84</sup> *Id.* at 1148.

<sup>85</sup> *Id.* at 1147.

<sup>86</sup> *Id.* at 1152.



were not equivalent to claims of violations of the FLSA's antiretaliation provisions.<sup>87</sup> The fraud claim remedied a wrong that the FLSA did not cover and was therefore outside the FLSA's preemptive scope.<sup>88</sup>

Before coming to that conclusion, the court gave a detailed preemption analysis, focusing on the congressional intent behind the FLSA.<sup>89</sup> It brushed aside the employer's argument that the Portal-to-Portal amendments to the FLSA were intended to "mitigate the impact of the [original FLSA] on American industry by [limiting relief]."<sup>90</sup> Instead, the court stated that "the Supreme Court and the Ninth Circuit have consistently found that the central purpose of the FLSA is to enact minimum wage and maximum hour provisions designed to protect employees."<sup>91</sup> To the Ninth Circuit, the primary focus of Congress was to maximize employee welfare, not balance employee and employer interests.

Even so, the Ninth Circuit stated that "[c]laims . . . directly covered by the FLSA . . . must be brought under the FLSA."<sup>92</sup> This statement was dicta, but clearly suggested state law claims are preempted in situations where the FLSA could be used to recover the unpaid wages. That would mean claims falling in the second preemption category (coextensive state wage-and-hour law) and third preemption category (nonexistent state wage-and-hour law) would be preempted. Subsequent courts in and outside the Ninth Circuit have interpreted this decision differently.

#### B. Courts Preempting State Law Claims

The Fourth Circuit—the most recent circuit court to address the issue—has held that common law claims cannot be used to enforce the FLSA. In *Anderson v Sara Lee Corp.*,<sup>93</sup> more than one thousand workers at a Sara Lee factory filed a class action to recover unpaid wages.<sup>94</sup> They pleaded various common law causes of action and, notably, did not plead a FLSA violation.<sup>95</sup> Instead of claiming a FLSA violation because they were not compensated for time worked, they pleaded

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<sup>87</sup> *Williamson*, 208 F3d at 1152 (holding the FLSA's antiretaliation provision would not apply because the employees did not file a wage complaint, complain to supervisors, or cause any proceedings to be instituted).

<sup>88</sup> *Id.* at 1154 ("Fraud claims by employees do not conflict with the FLSA any more than claims for wrongful death, assault, or murder.").

<sup>89</sup> *Id.* at 1150.

<sup>90</sup> *Id.* at 1154.

<sup>91</sup> *Williamson*, 208 F3d at 1154.

<sup>92</sup> *Id.*

<sup>93</sup> 508 F3d 181 (4th Cir 2007).

<sup>94</sup> *Id.* at 182.

<sup>95</sup> *Id.* (alleging breach of contract, negligence, fraud, conversion, and unfair trade practices).

common law negligence due to an inaccurate timekeeping system. The plaintiffs did not assert that any state statute entitled them to the unpaid wages.<sup>96</sup> As such, the court noted these state law claims were simply enforcing the FLSA.<sup>97</sup> Under this Comment's framework, the state law claims would fall in the third preemption category (enforcing the FLSA).

The court held that the common law claims must be preempted because they frustrated congressional intent (conflict preemption).<sup>98</sup> Congress had provided an "unusually elaborate enforcement scheme" to remedy FLSA violations.<sup>99</sup> In addition, the FLSA savings clause did not authorize states to set alternative remedies for FLSA violations.<sup>100</sup> The court inferred from this that Congress intended the FLSA to be the exclusive remedy for violations of its provisions, meaning that common law claims could not be used to enforce the FLSA.<sup>101</sup>

The Fourth Circuit's holding in *Anderson*—that the FLSA provides the exclusive remedy for violations of its provisions—has already been followed by a number of district courts. For example, in *Lopez v Flight Services & Systems, Inc.*,<sup>102</sup> the court dismissed several common law causes of action because they were all remedial: "[A]ll of the state-law claims pertain to Defendants' alleged failure to pay Plaintiffs in accordance with the FLSA."<sup>103</sup> The court relied on the Fourth Circuit's holding that state law claims providing remedies for FLSA violations are preempted.<sup>104</sup>

But unlike the Fourth Circuit, which noted that no state law entitled the plaintiffs to wages, *Lopez* dismissed the common law claims even though the employees pleaded state wage-and-hour law violations.<sup>105</sup> Arguably, this makes *Lopez* distinguishable from the Fourth Circuit's *Anderson* holding because the common law claims could have been enforcing the *state* wage-and-hour law and not just enforcing the FLSA. The *Lopez* court did not mention this distinction. Also, note that under this Comment's framework, *Lopez* falls in the second category (enforcing a state wage-and-hour law) while *Anderson* falls in the third category.

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<sup>96</sup> Id at 193.

<sup>97</sup> *Anderson*, 508 F3d at 193–94.

<sup>98</sup> Id.

<sup>99</sup> Id at 192.

<sup>100</sup> Id at 193.

<sup>101</sup> *Anderson*, 508 F3d at 194.

<sup>102</sup> 2008 WL 203028 (WDNY).

<sup>103</sup> Id at \*7.

<sup>104</sup> Id at \*5.

<sup>105</sup> Id at \*1.

In *Roman v Maietta Construction, Inc*<sup>106</sup>—a First Circuit decision similar to *Lopez*—the plaintiff claimed state wage-and-hour and FLSA violations.<sup>107</sup> He recovered his unpaid wages at trial, but appealed because a state wage payment law would have provided him with twice the amount of liquidated damages than he received.<sup>108</sup> The court held that this claim was preempted because state law claims cannot be used to replace the FLSA’s enforcement provisions.<sup>109</sup> Like in *Lopez*, there was also a state wage-and-hour law, which provided substantive rights at least equal to those of the FLSA.<sup>110</sup> Again, the court did not distinguish between situations in which a state wage-and-hour law exists and those in which no such law exists.

While most courts that have preempted state law claims have done so because of the FLSA’s detailed enforcement provisions, the Central District of California took a slightly different approach by focusing on the balance between enhancing employee well-being and limiting employer liability. In *Flores v Albertson’s Inc*,<sup>111</sup> the plaintiffs pleaded FLSA and California wage-and-hour law violations, as well as common law negligence and Unfair Competition Law claims.<sup>112</sup> Relying on Ninth Circuit precedent from *Williamson*, the court held that the common law negligence claims were preempted because they were “directly covered” by the FLSA.<sup>113</sup> They were nothing more than “additional legal theories.”<sup>114</sup> Allowing the common law claims would have “upset the balance established by Congress in enacting the

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<sup>106</sup> 147 F3d 71 (1st Cir 1998).

<sup>107</sup> *Id* at 72–73.

<sup>108</sup> *Id* at 76 (“[The employee] argues that the trial court erred in failing to grant him remedies set forth in [Maine’s wage payment law].”).

<sup>109</sup> *Id* (“[T]he plaintiff cannot circumvent the exclusive remedy prescribed by Congress by asserting equivalent state claims in addition to the FLSA claim.”). The court also provided an alternative procedural reason for its holding. The court noted that the plaintiff had not specifically pleaded a state wage payment violation, only a violation of the state minimum wage law. *Id*. Thus, the plaintiff had waived his right to assert the state wage payment claim. Even if the case was decided on a procedural issue, other courts have ignored the procedural justification and have interpreted the case to mean that state claims enforcing the FLSA are preempted. See, for example, *Bouaphakeo v Tyson Foods, Inc*, 564 F Supp 2d 870, 884 (ND Iowa 2008) (citing *Roman* for the proposition that the FLSA is the exclusive remedy for enforcing rights under the FLSA); *Anderson*, 508 F3d at 194 (listing *Roman* as one of a series of cases in agreement with its holding that the FLSA provides exclusive remedies for violations of its provisions).

<sup>110</sup> See 26 Me Rev Stat Ann § 664 (West) (requiring that the state minimum wage be at least equal to the federal minimum wage and requiring overtime pay for hours worked in excess of forty in a single week).

<sup>111</sup> 2003 WL 24216269 (CD Cal).

<sup>112</sup> *Id* at \*1.

<sup>113</sup> *Id* at \*6.

<sup>114</sup> *Id* at \*5.

[FLSA].”<sup>115</sup> Like in previous cases, a state wage-and-hour law existed, but the court did not reference that in its analysis. In the court’s view, the common law negligence claims were just enforcing the FLSA and would have upset the congressional balance by increasing employer liability.<sup>116</sup>

### C. Courts Allowing State Law Claims

While *Flores* interpreted the Ninth Circuit’s “directly covered” language to mean that state law claims enforcing the FLSA are preempted, other district courts within the Ninth Circuit have come to the opposite conclusion, finding that such claims are not preempted.<sup>117</sup> In *Takacs v A.G. Edwards and Sons, Inc.*,<sup>118</sup> a group of financial consultants sued for overtime pay, claiming FLSA violations, California wage-and-hour law violations, and UCL violations.<sup>119</sup> Both *Flores* and *Takacs* were litigated in California with the same state law background, making the cases indistinguishable. In both cases, there was a state wage-and-hour law at least as strict as the FLSA,<sup>120</sup> placing them in the first or second preemption category.<sup>121</sup> The defendants argued that *Williamson* required the court to hold that the UCL claim was preempted because it was “directly covered” by the FLSA.<sup>122</sup> The court rejected this

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<sup>115</sup> *Flores*, 2003 WL 24216269 at \*5. Surprisingly, the court did allow the UCL claim to remain without any justification. *Id.* at \*6. It is not clear why the court believed the common law claims would upset the balance, but the UCL claim would not.

<sup>116</sup> The increase in liability is due to the more favorable remedies and procedures, *not* because plaintiffs are allowed double recovery under state and federal law. No court has ever allowed plaintiffs this type of double recovery. See, for example, *Roman*, 147 F3d at 76 (“Since [the plaintiff] received compensation under the FLSA for his claims, he cannot recover again under [state] law.”).

<sup>117</sup> See *Bahramipour v Citigroup Global Markets, Inc.*, 2006 WL 449132, \*2–6 (ND Cal) (holding that an opt-out UCL class action was not preempted by the FLSA); *Barnett v Washington Mutual Bank, FA*, 2004 WL 2011462, \*4–7 (ND Cal) (same). See also *Tomlinson v Indymac Bank, FSB*, 359 F Supp 2d 898, 899–902 (CD Cal 2005) (rejecting a preemption-like argument that the UCL should not be construed to allow plaintiffs to plead around the FLSA’s specific provisions).

<sup>118</sup> 444 F Supp 2d 1100 (SD Cal 2006).

<sup>119</sup> *Id.* at 1104.

<sup>120</sup> Compare California Department of Industrial Relations, *History of California Minimum Wage*, online at <http://www.dir.ca.gov/Iwc/MinimumWageHistory.htm> (visited Sept 1, 2009) (documenting the minimum wage as \$6.75 between January 1, 2002 and January 1, 2007), with Department of Labor, Wage and Hour Division, *History of Federal Minimum Wage Rates under the Fair Labor Standards Act, 1938–2007*, online at <http://www.dol.gov/esa/minwage/chart.pdf> (visited Sept 1, 2009) (documenting the minimum wage as \$5.15 between September 1, 1997 and July 24, 2007). See also text accompanying note 47 (noting California’s stricter overtime provisions).

<sup>121</sup> Even though the state wage-and-hour law has stricter rates than the FLSA, the damages due under both laws may have been the same. This occurs when the overtime provisions are violated and the unpaid overtime is the same under state and federal law. With the available facts, it is not clear whether the claim fits in the first or second category.

<sup>122</sup> *Takacs*, 444 F Supp 2d at 1117.

argument, stating that *Williamson* was nonbinding dicta.<sup>123</sup> It emphasized the *Williamson* court's conclusion that the primary purpose of the FLSA was to "protect all covered workers from substandard wages and oppressive hours."<sup>124</sup> Thus, the court found no conflict with the FLSA because the UCL claim would impose greater liability, and as a result, "protect against a greater number of violations of the federal law."<sup>125</sup> The court did not consider whether this would upset a congressional balance between employee working conditions and employer liability like the *Flores* court did when it came to the opposite conclusion.<sup>126</sup>

The Northern District of Iowa went one step further by holding that state law claims are not preempted even when they are enforcing the FLSA and cannot be enforcing a state wage-and-hour law. In *Bouaphakeo v Tyson Foods, Inc.*,<sup>127</sup> a group of approximately 1,600 employees working at a Tyson pork processing facility sued to recover for uncompensated work hours.<sup>128</sup> The employees claimed that Tyson violated the FLSA and the IWPCCL.<sup>129</sup> The IWPCCL is a purely remedial statute<sup>130</sup> for wage-and-hour violations that the plaintiffs likely used because it allowed them to file an opt-out class action.<sup>131</sup> Because the plaintiffs did not assert any state wage-and-hour violation, the IWPCCL claim relied on the FLSA to determine the amount of wages due.<sup>132</sup> Thus, the IWPCCL claim was solely enforcing the FLSA, placing the case in the third preemption category.

In its analysis, the *Bouaphakeo* court noted how similar this situation was to the one the Fourth Circuit faced in *Anderson*—a state law claim was enforcing the FLSA. Instead of following the Fourth Circuit, the court used the Ninth Circuit's *Williamson* decision as guidance.<sup>133</sup> The court stated that the primary purpose of the FLSA was to promote employee welfare, as had the Ninth Circuit.<sup>134</sup> Consequently,

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<sup>123</sup> Id.

<sup>124</sup> Id.

<sup>125</sup> Id at 1117 n 12.

<sup>126</sup> See text accompanying notes 113–115.

<sup>127</sup> 564 F Supp 2d 870 (ND Iowa 2008).

<sup>128</sup> Id at 878.

<sup>129</sup> Iowa Code § 91A.1 et seq.

<sup>130</sup> *Hornby v State*, 559 NW2d 23, 26 (Iowa 1997) (stating that "chapter 91A is a remedial statute" designed to help "employees collect wages owed to them by their employers").

<sup>131</sup> *Bouaphakeo*, 564 F Supp 2d at 880 ("Plaintiffs also ask the court to certify their [IWPCCL] claim as a 'class action' under Rule 23 of the [FRCP].").

<sup>132</sup> Id at 883 ("Plaintiffs do not assert their right to wages . . . is conferred by anything other than the FLSA."); id at 886 ("[T]his case may be a first in holding that the FLSA does not preempt a *duplicative* state law claim.").

<sup>133</sup> See id at 881. Interestingly enough, the court viewed *Anderson* and *Williamson* as conflicting decisions, which is not strictly correct. *Williamson* did not concretely hold whether the FLSA preempted state law claims enforcing the FLSA as *Anderson* did. See Part III.A.

<sup>134</sup> Id at 885.

the court perceived no conflict in allowing a state law claim which would further the Act's purpose by providing greater remedies, deterring future violations.

The Eastern District of North Carolina took the middle ground by specifically allowing state law claims to enforce only substantive state wage-and-hour laws. In *Martinez-Hernandez v Butterball, LLC*,<sup>135</sup> the employees pleaded violations of North Carolina's wage payment law, North Carolina's wage-and-hour law, and the FLSA.<sup>136</sup> Importantly, the plaintiffs specifically pleaded that their state wage payment claim relied on North Carolina's wage-and-hour law to determine the amount of wages due, and not on the FLSA.<sup>137</sup> The court used this to distinguish the Fourth Circuit's holding in *Anderson* that state law claims enforcing the FLSA are preempted.<sup>138</sup> Without further discussion, the court held that the state wage payment claim was not preempted.<sup>139</sup> Unlike previous courts, *Martinez-Hernandez* found that state law claims enforcing state wage-and-hour laws and state law claims enforcing the FLSA are distinguishable. This approach amounts to holding that claims falling in the second preemption category (coextensive state wage-and-hour law) are not preempted, while claims falling in the third category (no state wage-and-hour law) are preempted.

The Eleventh Circuit is the only circuit court to address the issue and hold that state law claims are not preempted.<sup>140</sup> In *Avery v City of Talladega, Alabama*,<sup>141</sup> police department employees brought FLSA and breach of contract claims to recover overtime pay.<sup>142</sup> The breach of contract claim sought to enforce an employment contract, which the court interpreted as providing the same rights as the FLSA: "[T]he parties' intent . . . was to be bound by the terms of the FLSA, nothing more."<sup>143</sup> It is not clear whether the court meant that the breach of contract claim was enforcing the FLSA or that the contract was a separate legally binding agreement that imported the FLSA's terms. If the court meant it was the former, then this case would fit into the third

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<sup>135</sup> 578 F Supp 2d 816 (EDNC 2008).

<sup>136</sup> *Id.* at 817.

<sup>137</sup> *Id.* at 820.

<sup>138</sup> *Id.* at 819.

<sup>139</sup> *Martinez-Hernandez*, 578 F Supp 2d at 820.

<sup>140</sup> The opinion is relatively old (issued in 1994) and the preemption analysis is cursory (only several paragraphs). See *Avery v City of Talladega, Alabama*, 24 F3d 1337, 1348 (11th Cir 1994). Thus, the opinion is on relatively shaky ground and perhaps the Eleventh Circuit would decide the case differently today. It is included for completeness and because several other decisions cite to it for the stated proposition. See, for example, *Anderson*, 508 F3d at 194–95 (citing *Avery* for the proposition that common law claims may be used to enforce the FLSA).

<sup>141</sup> 24 F3d 1337 (11th Cir 1994).

<sup>142</sup> *Id.* at 1340.

<sup>143</sup> *Id.* at 1348.



preemption category because a state law claim would be enforcing the FLSA. If it is the latter, then there is no preemption issue because the parties agreed to an independently enforceable contract. At least one court has interpreted this case to stand for the former proposition—state law claims may be used to enforce the FLSA.<sup>144</sup>

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While the case law is complex, several principles emerge. Courts finding preemption of state law claims usually focus on the FLSA's detailed enforcement provisions as evidence that Congress intended for no other remedies or procedures to be available to employees in FLSA suits. In doing so, several of those courts have, perhaps unintentionally, overlooked the fact that the state law claims may be enforcing *state* wage-and-hour laws. In addition, at least one court has held that state law claims are preempted because they would impose additional liability on employers, upsetting the congressional balance. On the other hand, courts that hold state law claims are not preempted usually focus on the FLSA's original purpose. The FLSA intended to remedy poor working conditions. State law claims with more favorable remedies or procedures will deter FLSA violations and are therefore in accord with that purpose.

#### IV. RESOLVING THE PREEMPTION DILEMMA

The preemption dilemma must be solved by determining whether Congress intended to preempt state law, as congressional intent is the “ultimate touchstone” in every preemption case.<sup>145</sup> This Part applies the traditional methods of determining congressional intent in preemption cases to show that the issue cannot be conclusively resolved by those methods.<sup>146</sup> Each of the three indicators of congressional intent—plain text, structure, and purpose—leave some doubt as to whether state law claims should be preempted when there is a coextensive state wage-and-hour law. This Part then argues for a strong presumption against preemption because states have had a traditional (and continuing) role in wage-and-hour regulation and enforcement. It revives the often-repeated—but often-ignored—preemption doctrine that Congress should not be presumed to inter-

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<sup>144</sup> See *Anderson*, 508 F3d at 195.

<sup>145</sup> *Altria Group, Inc v Good*, 129 S Ct 538, 543 (2008).

<sup>146</sup> This is not uncommon. See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 377 (Aspen 2d ed 2002) (noting that often the “Court purports to be finding congressional intent” but that it is often “left to make guesses” because the intent is not clear).

fere with traditional areas of state regulation.<sup>147</sup> Next, this Part applies this presumption, along with the traditional indicators of congressional intent, to the three preemption categories discussed in Part II and finds that state law claims should only be preempted when the state does not have a wage-and-hour law (the third preemption category). Finally, this Part applies this analysis to the previous case law to show the practical results of the proposed solution.

#### A. The Traditional Preemption Analysis Yields Ambiguous Results

Courts resolve preemption cases by determining whether Congress intended to preempt state laws.<sup>148</sup> To determine congressional intent, the Court routinely uses three indicators: (1) the plain text, (2) the statute's structure, and (3) the statute's purpose.<sup>149</sup> Each of these indicators of congressional intent is ambiguous when there is a coextensive state wage-and-hour law, which is likely to be the most common situation faced by courts.<sup>150</sup> Thus, congressional intent cannot decisively resolve the preemption issue.

First, the plain text of the statute only addresses state laws in the savings clause: "No provision of this chapter . . . shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum work week."<sup>151</sup> The plainest interpretation of this language is that Congress intended to allow states to set higher minimum wages and stricter overtime rules. The text does not address remedies, and therefore congressional intent to preempt state law claims should not be inferred from the text.<sup>152</sup>

One commentator has argued that a negative inference should be drawn from the savings clause. This argument suggests that since Congress explicitly chose not to preempt stricter state wage-and-hour laws, it should be inferred that Congress intended to preempt state law

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<sup>147</sup> See *Rice v Santa Fe Elevator Corp*, 331 US 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of the Congress.").

<sup>148</sup> *Altria*, 129 S Ct at 543 ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case").

<sup>149</sup> *Id.*; *Medtronic, Inc v Lohr*, 518 US 470, 485–86 (1996). See also James T. O'Reilly, *Federal Preemption of State and Local Law: Legislation, Regulation and Litigation* 79 (ABA 2006) (noting that courts begin their consideration of preemption issues by examining the statutory text and then turning to an inquiry into the statute's structure and purpose).

<sup>150</sup> See text accompanying notes 76–78.

<sup>151</sup> 29 USC § 218(a).

<sup>152</sup> See *Williamson*, 208 F3d at 1151 ("While the FLSA may be a comprehensive remedy, . . . the 'savings clause' indicates that it does not provide an exclusive remedy.").

claims in the absence of a stricter state wage-and-hour law.<sup>153</sup> If this were the case, then a coextensive wage-and-hour law would be preempted along with the more favorable remedies and procedures it supplied.

The application of this inference is questionable in light of the plainer interpretation that Congress just intended states to be able to set higher minimum wages and did not consider preempting coextensive wage-and-hour laws. Courts have noted the clear language of the savings clause and stated that it should be interpreted “narrowly” as “merely establish[ing] a wage and hour ‘floor’ above which states are free to rise.”<sup>154</sup> In other contexts, similar negative inference arguments have been rejected as inconclusive canons of statutory interpretation.<sup>155</sup> Congress could have preempted state law remedies with a more precise statement,<sup>156</sup> but did not do so, casting doubt on whether a more strained interpretation should be used.<sup>157</sup>

Second, some courts interpret the structure of the statute to show that Congress intended to preempt state law remedies.<sup>158</sup> Congress supplied detailed enforcement provisions to remedy FLSA violations. This is evidence that Congress intended that only those provisions may be used to enforce the Act. Thus, when an employee is able to recover his unpaid wages through the FLSA, congressional intent will be frustrated if the employee is instead allowed to use a state law claim. These state law claims provide their own remedies and procedures, which effectively replace the detailed enforcement provisions that Congress intended to be available.<sup>159</sup>

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<sup>153</sup> Rachel K. Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve The Integrity of Federal Group Wage Actions*, 58 Am U L Rev 515, 552 (2009) (“[T]he existence of the FLSA’s savings clause demonstrates Congress’s intent . . . to preempt state law claims that were equal to or less generous than FLSA’s terms.”).

<sup>154</sup> See, for example, *Ellis v Edward D. Jones & Co*, 527 F Supp 2d 439, 450 (WD Pa 2007).

<sup>155</sup> See, for example, *United States v Vasquez-Alvarez*, 176 F3d 1294, 1299 (10th Cir 1999) (holding that a federal statute authorizing state and local police to arrest immigrants in some circumstances did not mean Congress intended to displace state and local police authority to arrest immigrants in other circumstances).

<sup>156</sup> ERISA is one example where Congress was explicit in its intent to preempt state law remedies. See 29 USC § 1144(a) (“[ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.”); *Barber v Unum Life Insurance Co of America*, 383 F3d 134, 140–41 (3d Cir 2004) (holding that a Pennsylvania statute providing punitive damages for ERISA violations was preempted because of the express preemption clause in § 1144(a)). But see Equal Pay Act, 42 USC § 2000e-7 (allowing states to set their own penalties for employment discrimination, thus suggesting that perhaps Congress is explicit when it wishes to allow states to set their own remedies and not the other way around).

<sup>157</sup> It is not uncommon that the plain text does not resolve preemption issues. See O’Reilly, *Federal Preemption* at 55, 58 (cited in note 149) (noting that federal preemption is usually a “minor detail” and that it may be intentionally left undecided to aid the speedy passage of a bill).

<sup>158</sup> See, for example, *Anderson*, 508 F3d at 194.

<sup>159</sup> See *id.*

Even if this argument is somewhat persuasive, it does not resolve the issue. In the coextensive situation, there is a separate coextensive state wage-and-hour law, which gives employees the right to receive the same amount of wages as the FLSA does. It is plausible that state law claims are *not* enforcing the FLSA, but are instead enforcing the *state* wage-and-hour law, and thus, the state enforcement provisions are not replacing the FLSA's enforcement provisions. The FLSA's detailed enforcement provisions will still apply to claims that are actually enforcing the FLSA. This understanding has some support from the FLSA's text, which only says that the enforcement provisions apply to violations of the FLSA.<sup>160</sup> Since it is unclear whether the detailed enforcement provisions should be extended to apply to state wage-and-hour law violations, the structure of the Act does not conclusively resolve the issue either.<sup>161</sup>

Third, the FLSA's purpose does not resolve the preemption issue. Congress intended the original FLSA to benefit workers.<sup>162</sup> More favorable state law remedies would not contradict this purpose because they would deter noncompliance with the FLSA.<sup>163</sup> But, the Portal-to-Portal Act intended to limit employer liability. This amendment balanced employees' ability to enforce the FLSA with the costs imposed on employers.<sup>164</sup> To the extent that the Portal-to-Portal Act conflicts with the FLSA's original purpose, the Portal-to-Portal Act must be given primacy in determining congressional intent because it is the most recent legislative action.<sup>165</sup> Thus, it is incorrect to assert that the FLSA only intends to benefit workers by increasing individual wages, as some courts have done.<sup>166</sup>

Even so, it is not clear whether this balance should extend to state wage-and-hour laws. The Portal-to-Portal Act may have only intended to limit liability imposed by the FLSA, and not liability imposed by

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<sup>160</sup> See 29 USC § 216(b) (stating that the enforcement provisions only apply to violations of § 206 (minimum wage) and § 207 (overtime)).

<sup>161</sup> Ocean-fishing regulations are an example of federal laws with sufficient structural detail to suggest congressional intent to preempt state law. The level of detail suggests a "regulatory system that Congress intends to be national in character." O'Reilly, *Federal Preemption* at 71 (cited in note 149), citing *City of Charleston, South Carolina v A Fisherman's Best, Inc.*, 310 F3d 155, 170 (4th Cir 2002). That does not exist here because wage-and-hour regulation is not exclusively national, and thus, it is not clear that the detailed enforcement scheme should be extended to state wage-and-hour laws.

<sup>162</sup> See text accompanying notes 89–91.

<sup>163</sup> See text accompanying notes 124–125.

<sup>164</sup> See text accompanying note 115.

<sup>165</sup> See 82 CJS Statutes § 243 (2005) (stating that amendments have a "force superior" to the original legislative enactment in the case of conflict between the two).

<sup>166</sup> See text accompanying notes 118–126 (discussing the *Takacs* case where the court stated that the purpose of the FLSA was solely to protect workers from oppressive working conditions, and therefore more favorable remedies should be allowed to deter violations).

state laws. After all, the FLSA explicitly allows states to set stricter wage-and-hour laws, and this was not changed by the Portal-to-Portal Act.<sup>167</sup> These state laws increase employer liability, also upsetting the congressional balance. Since states may already upset this “balance” by enacting stricter wage-and-hour laws, it is not clear why states may not upset this “balance” in other ways, like setting their own enforcement provisions. Furthermore, it appears questionable to extend the Portal-to-Portal Act to preempt state law remedies when the main impetus behind the Act was to abolish “portal-to-portal” suits, not to limit remedies.<sup>168</sup>

#### B. A Presumption against Preemption: States Traditionally Regulate Wages and Hours

The Supreme Court has long held that there should be a presumption against preemption in areas of traditional state authority.<sup>169</sup> The justification for this presumption finds its roots in federalism principles.<sup>170</sup> If courts are too quick to preempt state laws in areas that states have traditionally regulated, then the benefits of our federalist system will be diminished because states will lose much of their autonomy. Courts should only preempt state law in these areas when Congress has been clear about its intent by providing a plain statement.<sup>171</sup> But, this presumption is often not decisive in courts’ decisions,<sup>172</sup> and some commentators argue that it has been effectively abandoned.<sup>173</sup> The courts “pay lip service” to the presumption and then ignore it.<sup>174</sup>

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<sup>167</sup> See 29 USC § 218(a).

<sup>168</sup> See text accompanying notes 35–38. Federal regulation of automobile safety features is an example of when purpose carries the day. In *Geier v American Honda Motor Co*, state tort suits seeking damages for unsafe automobiles were preempted because the federal regulations intended to create a regulatory environment where manufacturers were free to experiment with safety devices. 529 US 861, 874–75 (2000). State tort suits would have imposed additional safety requirements on manufacturers and frustrated the regulations’ purpose. *Id.* at 881. The requisite purpose is lacking here because Congress did intend for states to be able to impose additional costs on employers (at least through stricter wage-and-hour laws).

<sup>169</sup> See *Rice*, 331 US at 230; *Altria*, 129 S Ct at 543 (citing *Rice* for the presumption against preemption in a 2008 case).

<sup>170</sup> Chemerinsky, *Constitutional Law* at 379 (cited in note 146).

<sup>171</sup> See Laurence H. Tribe, *American Constitutional Law* 480 (Foundation 2d ed 1988) (noting that the Supreme Court only finds preemption when Congress clearly restricts state sovereignty).

<sup>172</sup> See, for example, *Gade v National Solid Wastes Management Association*, 505 US 88, 104 n 2, 108 (1992) (holding that state work safety laws were preempted by a federal statute, even though states traditionally regulated safety laws and the statute was ambiguous).

<sup>173</sup> See Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 SC L Rev 967, 1005–13 (2002) (analyzing cases and arguing that there is no longer an operative presumption against preemption).

<sup>174</sup> See O’Reilly, *Federal Preemption* at 8 (cited in note 149) (noting a study by Kenneth Davis, which finds that there is no presumption against preemption).

Courts addressing FLSA preemption are also dismissive of the presumption against preemption. Several have noted the presumption at the beginning of their analyses, but have not used it in formulating their decision.<sup>175</sup> This Comment argues that the presumption still exists and that courts have at times found it decisive. This presumption should apply to FLSA preemption cases because of states' traditional and continuing role in regulating wages and hours and enforcing those laws.<sup>176</sup> The presumption should be used to resolve the ambiguity discussed in Part IV.A.

In the "federalism revival" of the 1990s, the Court held that the federal government must be manifestly clear that it intends to regulate in areas of traditional state authority. In *Gregory v Ashcroft*,<sup>177</sup> the Court held that the Age Discrimination in Employment Act (ADEA) did not preempt a state law requiring state judges to retire at a certain age.<sup>178</sup> Determining the qualifications of elected officials is a quintessential area of state authority.<sup>179</sup> Absent a clear statement to the contrary, federal law should not be presumed to abrogate state authority in similar areas.<sup>180</sup> The Court justified its use of the clear statement principle as upholding federalism principles and maintaining the resulting advantages of: (1) sensitivity to diverse conditions, (2) increased democratic involvement, (3) state innovation, and (4) state competition.<sup>181</sup> More recently, in 2006, the Court applied this principle and held that an Oregon statute allowing physician-assisted suicide was not preempted by the Controlled Substances Act (CSA) because regulation of the medical profession is an area of traditional state authority.<sup>182</sup>

This presumption against preemption should apply to FLSA preemption cases. States enacted wage-and-hour laws and enforced them long before there was a federal wage-and-hour law, making this a traditional area of state authority. When the FLSA was passed, states continued to enact wage-and-hour laws and enforce them, showing that the federal law did not, in practice, completely abrogate state authority in wage-and-hour regulation. Also, applying the presumption to the FLSA

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<sup>175</sup> See, for example, *Anderson*, 508 F3d at 192, 194 (noting the presumption against preemption at the beginning of the analysis, but then ignoring it and ultimately deciding that the detailed enforcement provisions decided the case).

<sup>176</sup> See Part IV.B.1–2.

<sup>177</sup> 501 US 452 (1991).

<sup>178</sup> *Id.* at 464 (upholding a Missouri mandatory retirement statute for judges).

<sup>179</sup> *Id.* at 463 (noting that there exists broad authority that states may select the requirements for their judges).

<sup>180</sup> *Id.* at 464, citing Tribe, *American Constitutional Law* at 480 (cited in note 171).

<sup>181</sup> *Gregory*, 501 US at 458.

<sup>182</sup> *Gonzales v Oregon*, 546 US 243, 270 (2006) (recognizing state authority to regulate for the health and well-being of its citizenry).



will further the underlying federalism goals. And the usual countervailing interest in favor of federal preemption—uniformity in the law—does not apply in this case, strengthening the case for the presumption.<sup>183</sup>

1. States traditionally regulate wages and hours.

States regulated wages and hours long before Congress enacted the FLSA in 1938. Fifteen states, along with Puerto Rico and the District of Columbia, enacted wage-and-hour laws between 1912 and 1923.<sup>184</sup> These laws were enacted during the *Lochner* era, and many were ultimately struck down as interfering with the freedom of contract.<sup>185</sup> States also created their own labor departments, which were in charge of administering and enforcing these laws, long before the federal government had an equivalent department. The first government labor organization was the Massachusetts Bureau of Labor Statistics in 1869, and one of the first state labor departments was created in New York in 1901.<sup>186</sup> The federal government did not have a cabinet-level labor department until 1913.<sup>187</sup>

2. States continued to regulate wages and hours after the FLSA was enacted.

When Congress enacted the FLSA in 1938, it did so against this background of traditional state regulation. Congress could have regulated the entire field, but it instead preserved a role for states, explicitly allowing them to set stricter wage-and-hour regulations.<sup>188</sup> And states have continued to use this power. Numerous states have changed the minimum wage, modified the overtime rules, provided coverage to

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<sup>183</sup> See O'Reilly, *Federal Preemption* at 7 (cited in note 149) (noting the presumption is stronger in areas where the states traditionally exercised their powers).

<sup>184</sup> See Clifford F. Thies, *The First Minimum Wage Laws*, 10 *Cato J* 715, 718–19 (1991) (containing a figure showing early minimum wage laws by state or territory).

<sup>185</sup> See, for example, *Adkins v Children's Hospital of the District of Columbia*, 261 US 525, 561 (1923) (striking down a minimum wage statute). *Adkins* was later overruled by *West Coast Hotel Co v Parrish*, 300 US 379, 388–401 (1937).

<sup>186</sup> Charles F. Gettemy, *The Massachusetts Bureau of Statistics, 1869–1915: A Sketch of Its History, Organization and Functions* 6–7 (Wright & Potter 1915) (noting that the Massachusetts Bureau of Labor Statistics was a revolutionary state organization created to investigate working conditions and served as the precursor to other state and federal labor departments); Press Release, *Governor Spitzer Declares May 2007 Labor History Month: Calls for Strict Enforcement of New York State's Labor Laws* (May 11, 2007), online at [http://www.labor.state.ny.us/pressreleases/2007/May11\\_2007.htm](http://www.labor.state.ny.us/pressreleases/2007/May11_2007.htm) (visited Sept 1, 2009) (providing a timeline for the history of New York labor law developments).

<sup>187</sup> See Jonathan Grossman, *The Origin of the U.S. Department of Labor*, 96 *Monthly Labor Rev* 3, 7 (Mar 1973) (noting that President William Howard Taft signed the Department of Labor Bill in 1913).

<sup>188</sup> 29 USC § 218.

FLSA-exempt employees, and enacted other statutes regulating employment, like state wage payment laws.<sup>189</sup>

States have not only enacted stricter wage-and-hour laws, but they have also been active in enforcing those laws. Each state has a labor department in charge of enforcing the state labor laws. The states cumulatively investigate approximately four times as many claims as the US Department of Labor.<sup>190</sup> Also, the states cumulatively collect approximately 70 percent of what the federal government recovers in unpaid wages.<sup>191</sup> These statistics make clear that the states continue to play a large role in enforcing wage-and-hour laws, accounting for a sizable portion of the total wage-and-hour law enforcement.

3. The presumption furthers the underlying federalism goal of sensitivity to local circumstances.

The Court in *Gregory* enumerated the goals of federalism that the presumption served to advance.<sup>192</sup> While the presumption would further all four of those goals to some extent, the two primary and related goals—the need for sensitivity to diverse local labor conditions and state innovation—are particularly applicable.<sup>193</sup> Giving states the flexibility to modify the procedures and remedies will allow them to modify the level of private enforcement and thus be more sensitive to diverse labor conditions. The presumption will ensure that states retain this flexibility unless Congress clearly intends otherwise. Also,

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<sup>189</sup> See Part I.B.

<sup>190</sup> Eighteen state labor departments reported the number of wage-and-hour claims investigated in online annual performance reports. These states reported investigating 42,377 complaints in comparison to the 23,845 investigated by the US Department of Labor. These numbers were normalized using the populations of the respective reporting states, resulting in 4.12 state investigations per 1 federal investigation. Data on file with author.

<sup>191</sup> Twenty state labor departments reported the amount of unpaid wages collected in annual performance reports. These states reported recovering \$60,681,765.87 in comparison to the \$185,287,827 recovered by the US Department of Labor. In per capita amounts, the states recovered approximately \$0.42 while the federal government recovered \$0.61, leading to the approximate 70 percent figure. Data on file with author. The discrepancy between the states investigating relatively more claims than the federal government yet recovering less unpaid wages may be explained by the types of investigations in which the states and the federal government typically engage. It seems likely that the federal government may take on the larger multi-state investigations that would be outside a single state labor department's jurisdictional reach. Those larger investigations likely have a greater amount of wages to collect.

<sup>192</sup> See text accompanying notes 178–181 (arguing that federalism results in greater sensitivity to local conditions, increased democratic participation, innovation among states, and competition between states).

<sup>193</sup> See O'Reilly, *Federal Preemption* at 8 (cited in note 149) (describing the presumption against preemption as balancing the competing goals of “centralization and devolution”).

applying the presumption will not interfere with national uniformity, the primary advantage of federal preemption.<sup>194</sup>

A state can only modify the level of private enforcement by adjusting the remedies and procedures. Modifying the remedies for wage-and-hour violations (for example, mandating liquidated damages) changes the plaintiffs' lawyers' contingency fees.<sup>195</sup> Modifying the procedures (for example, allowing opt-out class actions) changes the cost of bringing suit.<sup>196</sup> As previous commentators have noted, the change in class action procedure is likely to be one of the largest factors in the level of private enforcement.<sup>197</sup> Thus by modifying the remedies and procedures, states change the incentives for private lawyers to bring suit and thus change the level of private enforcement. Since private enforcement dominates public enforcement as the means of enforcing wage-and-hour laws, flexibility to change the levels of private enforcement is very important to states that desire to change the overall level of wage-and-hour law enforcement.

Being able to change the level of private enforcement allows states to be more responsive to diverse labor conditions. States have different labor conditions, leading to a variation in the optimal level of wage-and-hour enforcement. Some states contain industries with chronic violations of wage-and-hour laws. For example, wage-and-hour violations are pervasive in Southern California's garment factories, with nearly 70 percent of workers not receiving the minimum wage.<sup>198</sup> These states need to devote extra resources to wage-and-hour enforcement. They could do so by increasing the levels of public or private enforcement. But they may prefer to increase the level of private enforcement, instead of public enforcement, due to the opportunity cost of devoting a greater percentage of their budget to public enforcement. Flexibility to change private enforcement levels would allow states to achieve the desired level of enforcement without sacrificing other public projects.

In addition, the optimal type of wage-and-hour enforcement, such as the balance of public and private enforcement, may vary among states. For example, some states have large undocumented worker

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<sup>194</sup> See *id.*

<sup>195</sup> See text accompanying notes 60–63.

<sup>196</sup> If plaintiffs must use an opt-in collective action, they must expend more resources attempting to persuade class members to join the suit. The resulting class size will also be smaller, so that the fixed costs of bringing suit are distributed over a smaller number of class members. See text accompanying note 26.

<sup>197</sup> See note 26.

<sup>198</sup> See note 29.

populations, which are often the subject of wage-and-hour violations.<sup>199</sup> Public enforcement is not effective because undocumented workers are particularly wary of government employees and will often not be cooperative.<sup>200</sup> Some speculate that private enforcement may be a better mechanism for enforcing wage-and-hour violations among undocumented workers because of the workers' distrust of government employees.<sup>201</sup> Other considerations may include whether plaintiffs' firms capable of investigating and pursuing these large suits exist in the state and whether the plaintiffs' bar is acting detrimentally to the state's interest by pursuing a kind of employment law "strike suit."<sup>202</sup> Finally, wage-and-hour law enforcement is a political issue.<sup>203</sup> Allowing states the flexibility to change the remedies and procedures will allow them to be more sensitive to local labor conditions and their citizens' preferences.

At the same time, the competing interest of uniformity would not matter because there is little benefit to increasing uniformity in wage-and-hour enforcement provisions. The FLSA created a *non-uniform* system. It specifically allows states to deviate in substantial ways, such as providing coverage to FLSA-exempt employees, changing the overtime rules, or changing the minimum wage.<sup>204</sup> Employers must already take account of the differences in employment law between states.<sup>205</sup> The additional cost of accounting for differences in enforcement provisions is likely to be minimal. The FLSA regulatory scheme is unlike others where national uniformity is a compelling interest. For exam-

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<sup>199</sup> Southern Poverty Law Center, *Under Siege: Life for Low-income Latinos in the South* 6–7 (Apr 2009), online at <http://www.splcenter.org/legal/undersiege/UnderSiege.pdf> (visited Sept 1, 2009) (reporting that 41 percent of low-income Latinos in the South had been the victim of wage theft and that the problem was most severe among undocumented workers because employers use their immigration status against them).

<sup>200</sup> See *Ending Abuses and Improving Working Conditions for Tomato Workers, Hearings before the Senate Committee on Health, Education, Labor and Pensions*, 110th Cong, 2d Sess (Apr 15, 2008) (testimony of Mary Bauer, Director of the Immigration Justice Project, Southern Poverty Law Center), online at [http://help.senate.gov/Hearings/2008\\_04\\_15/Bauer.pdf](http://help.senate.gov/Hearings/2008_04_15/Bauer.pdf) (visited Sept 1, 2009) (testifying on the lack of legal remedies for migrant workers partly because they are afraid of deportation and on the effort to encourage private practitioners to investigate migrant labor violations as a solution). "Most workers told us that they would not consider calling the Department of Labor under any circumstances." *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> Consider Cal Labor Code § 2699.3 (mandating that employees notify the state before filing a civil action to recover unpaid wages, providing the state an opportunity to intervene on behalf of the employees and potentially stop disruptive strike suits).

<sup>203</sup> See text accompanying notes 31–32.

<sup>204</sup> See text accompanying notes 45–48. See also Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 *Fordham L Rev* 469, 541–43 (1993) (discussing the federal-state delegation of authority in employment law).

<sup>205</sup> See note 21.

ple, in *Geier v American Honda Motor Co.*,<sup>206</sup> it was impractical to allow each state to impose its own safety standards on cars because that would require car manufacturers to adopt the strictest safety standard, or produce fifty different cars.<sup>207</sup> Since national uniformity is not a compelling interest in wage-and-hour enforcement, the presumption against preemption is strengthened even further.<sup>208</sup>

### C. Applying the Presumption against Preemption to the Three Preemption Categories

#### 1. The state wage-and-hour law provides greater substantive rights.

The first category—the state wage-and-hour law provides greater substantive rights—is the weakest case for preemption, and no court has ever preempted state law claims in this category.<sup>209</sup> None of the three indicators of congressional intent suggests that state law claims should be preempted, making the presumption unnecessary in this case. First, the plain text (savings clause) explicitly allows states to enact stricter wage-and-hour regulations, rendering the negative inference inapplicable. Second, the detailed enforcement provisions of the FLSA may be unavailable to remedy violations of the stricter state wage-and-hour law. In some situations, the state wage-and-hour law is violated, but the FLSA is not. Thus, it would be a stretch to suggest that detailed enforcement provisions for FLSA violations should be extended to acts that are not even FLSA violations.<sup>210</sup> Third, the Portal-to-Portal Act’s purpose of creating a “balance” does not prevail. The state has already imposed greater costs on employers by enacting a stricter wage-and-hour law, suggesting that the Portal-to-Portal Act’s “balance” does not apply to this situation. The presumption is unnecessary, and the state law claims should not be preempted.

#### 2. The state wage-and-hour law is coextensive with the FLSA.

In the second category—the state wage-and-hour law is coextensive with the FLSA—all three indicators of congressional intent point more strongly towards preemption than in the previous category, but

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<sup>206</sup> 529 US 861 (1993).

<sup>207</sup> *Id.* at 881 (stating that state regulations could, in the automotive safety context, be an “obstacle” to the federal safety goals).

<sup>208</sup> See Tribe, *American Constitutional Law* at 499 (cited in note 171) (noting that the presumption is weakened if underlying interests are national).

<sup>209</sup> See Part II.A.

<sup>210</sup> This was why the *Williamson* court denied preemption of the common law fraud claims. See text accompanying notes 79–92.

there is still ambiguity. First, while the negative inference from the savings clause does apply to this case, there is a plainer meaning: The savings clause's only function is to allow states to set higher minimum wages and stricter overtime rules. It does not speak to the preemption issue at all. Even if this plainer meaning is not persuasive, it places the negative inference on shaky ground.<sup>211</sup>

Second, the detailed FLSA enforcement provisions suggest that coextensive state wage-and-hour laws should be preempted. The detailed enforcement provisions are evidence that Congress intended those enforcement provisions to be the sole means of enforcing the FLSA. Congressional intent would be frustrated if an employee were allowed to enforce the FLSA through a state law claim; the state enforcement provisions would effectively replace the FLSA enforcement provisions. The solution is to preempt the state law claims, thereby preserving the detailed enforcement provisions. But, another plausible interpretation is that the detailed enforcement provisions only apply to FLSA violations. A coextensive state wage-and-hour law provides independent rights to receive wages, and as a result, the state law claims are not replacing the FLSA enforcement provisions. The employee is just choosing not to use the FLSA to recover his unpaid wages. Thus, the preemptive intent that can be inferred from the detailed enforcement provisions is not a clear statement that Congress intended to preempt state law.

Third, since states are allowed to impose additional costs on employers by enacting their own stricter wage-and-hour laws, the Portal-to-Portal Act's "balance" may not extend to state wage-and-hour laws. The Portal-to-Portal Act may have only limited employer liability stemming from federal law violations. The Act may not be decisive regarding liability stemming from state wage-and-hour law violations.

Since each indicator has a plausible interpretation that suggests Congress did not intend to preempt state law claims, the presumption should be used to resolve the dilemma. State law claims are not preempted when there is a coextensive wage-and-hour law. Courts should not infer congressional intent to preempt state law in an area that states have traditionally regulated, absent a clear statement to that effect.

### 3. The state wage-and-hour law does not exist or it does not apply.

The third category—the state wage-and-hour law does not exist or it does not apply—is the strongest case for preemption. The only plausible interpretation for the structure and purpose indicators is

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<sup>211</sup> See notes 152–155 and accompanying text.



that Congress intended to preempt state law claims premised on FLSA violations. First, the structure (detailed enforcement provisions) evidences Congress's intent to preempt state law claims in this category. Unlike the previous cases, a state law claim is necessarily enforcing a FLSA violation; there is no state wage-and-hour law providing independent rights to receive wages. Thus, the FLSA is necessarily the source of the wages that employees seek to recover. Since all possible employee claims are recovering FLSA-required wages, FLSA's detailed enforcement provisions must be used.

Second, the Portal-to-Portal Act's purpose was to strike a balance by limiting employer liability stemming from FLSA violations. Again, any state law claim in this category is solely a FLSA violation. Allowing different state remedies and procedures would then change the liability balance for violations of federal law, contrary to congressional intent. Unlike before, there is no argument that the "balance" does not extend to liability for violations of state law. Because these two indications unambiguously point in favor of preemption, the presumption is unnecessary. State law claims must be preempted when a state wage-and-hour law does not exist.

#### D. Applying These Results to the Case Law

As the preceding discussion shows, when addressing a FLSA preemption issue, courts need to examine the state wage-and-hour law and determine the type of preemption category. If a state wage-and-hour law exists, the state law claims should not be preempted because the state law claims may be enforcing the state wage-and-hour law, not the FLSA. That is not to say that state law claims are not preempted whenever there is a state wage-and-hour law. They may be, but not through federal preemption. Instead, state law claims enforcing state wage-and-hour laws may only be preempted by *state* law.

As noted in Part III, many courts have wrongfully ignored the distinction between claims premised on FLSA violations and those premised on state wage-and-hour law violations. For example, the First Circuit in *Roman* did not allow the plaintiffs to receive the greater liquidated damages provided by Maine's state wage payment law.<sup>212</sup> The court believed it could not allow these greater damages because the FLSA specifically set the liquidated damages at a lower amount. But Maine also had a state wage-and-hour law at least as strict as the FLSA.<sup>213</sup> The state wage payment claim is better understood as providing remedies for Maine's wage-and-hour law. The court in *Lopez*

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<sup>212</sup> See text accompanying notes 106–110.

<sup>213</sup> See note 110.

reached a similar result and held that common law claims were preempted even though the plaintiff pleaded a state wage-and-hour law violation. These common law claims should have been deemed part of the state's enforcement scheme for the state wage-and-hour law.<sup>214</sup> It may be that the common law claims should have been preempted, but the analysis should have hinged on whether they were preempted by *state* law.

In addition, if the analysis above is persuasive, no circuit court has reached the correct result. The Ninth Circuit's "directly covered" language appears to reach the wrong result when there is a coextensive state wage-and-hour law.<sup>215</sup> In this situation, state law claims would be "directly covered" by the FLSA—an employee could recover the full amount of unpaid wages through the FLSA. But, as argued above, state law claims should not be preempted when there is a coextensive state wage-and-hour law. On the other hand, the Eleventh Circuit and the Northern District of Iowa have gone too far by allowing state law claims even if there is no state wage-and-hour law.<sup>216</sup>

The Fourth Circuit may be the closest to the proposed solution. It preempted state law claims and suggested that part of the reason was that no state wage-and-hour law existed.<sup>217</sup> Perhaps the Fourth Circuit will eventually hold that state law claims are not preempted so long as they are premised on a state wage-and-hour law violation. The Eastern District of North Carolina did subsequently interpret the Fourth Circuit precedent to mean that state law claims enforcing a coextensive state wage-and-hour law are not preempted.<sup>218</sup> This suggests that the Fourth Circuit may ultimately adopt this Comment's conclusion.

#### CONCLUSION

This Comment addressed a situation in which congressional intent as to whether state law should be preempted was ambiguous. Both the detailed enforcement provisions and the Portal-to-Portal Act's purpose of limiting employer liability suggested that Congress intended that only the FLSA enforcement provisions could be used to enforce the FLSA. But, it is not clear that Congress intended to preempt state law claims enforcing state wage-and-hour laws. Congress may have intended states to be able to set their own enforcement provisions along with their own state wage-and-hour laws.

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<sup>214</sup> See text accompanying notes 102–105.

<sup>215</sup> See text accompanying note 92.

<sup>216</sup> See text accompanying notes 127–34 (discussing *Bouaphakeo*); text accompanying notes 140–44 (discussing *Avery*).

<sup>217</sup> See text accompanying notes 93–101.

<sup>218</sup> See text accompanying notes 135–39.

This ambiguity is best resolved by a presumption against preemption. States have historically enacted and enforced their own wage-and-hour laws. They continue to do so, taking a large role in wage-and-hour regulation. If Congress intends to interfere with state regulation and enforcement in this area, it must be clear about its intent. Otherwise, the benefits of state autonomy will be diminished if courts are too quick to replace state laws. In this case, those benefits of state autonomy are particularly salient because enforcement of wage-and-hour laws is an area in which sensitivity to local concerns is important, and uniformity concerns are minimal. This strengthens the case for the presumption against preemption. As a result of the presumption, state law claims should not be preempted as long as a state wage-and-hour law exists. This is intuitive from the consideration of state autonomy: states should be able to decide how their own laws are enforced.