Explaining the Boom: An Empirical Study of Federal Wage and Hour Litigation

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Note to the reader:
The maps in Figure 5 and the graph in Figure 11 in this manuscript are in color. I am working on converting them to grayscale so that they are more legible when printed in black and white, and I am particularly working on improving the legibility of the maps in Figure 5. In the meantime, please view both figures in electronic format to get the full effect. Thanks!

Explaining the Boom: An Empirical Study of Federal Wage and Hour Litigation

Federal lawsuits alleging minimum wage and overtime violations under the Fair Labor Standards Act have increased by over 300% since 2000. In some jurisdictions, FLSA cases have overtaken employment discrimination as the most common type of workplace lawsuit. Employers have restructured jobs to minimize litigation risk; insurers have created new lines of coverage; advocates have petitioned Congress to amend the FLSA to reduce litigation. Yet little is known about the reasons for the FLSA boom. This article begins to fill that gap by offering the first systematic empirical study of the modern boom in federal wage and hour litigation.

INTRODUCTION

Here is a sampling of words that have been used to describe the rise in minimum wage and overtime lawsuits since the early 2000s: plague, epidemic, scourge, deluge, explosion, tidal wave, avalanche, crush, surge, flood, tsunami, revolution, boom.[1] Behind this language of upheaval and cataclysm, the data show that

[1] Angelique Groza Lyons, *The FLSA Plague: How to Protect Yourself*, Constangy, Brooks & Smith, available at www.hrflorida.org/associations/.../FLSAPlague_WaystoProtectYourself.pdf (plague); Stephen Miller, *FLSA Suits Hit Record High in 2014*, Society for Human Resource Management (May 22, 2014), available at https://www.shrm.org/hrdisciplines/compensation/articles/pages/flsa-suits-hit-record.aspx (epidemic); Lawrence Peikes, *White-Collar Workers Challenge Overtime Exemptions*, 37 Conn. Law Tribune (Jan. 31, 2011), available at http://www.wiggin.com/12577 (scourge); Stephanie L. Fong, *When Is a Complaint a Complaint? After Kasten and Beyond*, 25 EMPLOYMENT LAW COMMENTARY 1 (May 2013), available at http://media.mofo.com/files/Uploads/Images/130530-Employment-Law-Commentary.pdf (deluge); Mark A. Konkel, *FLSA Trends: A Mixed Bag with a Silver Lining*, LaborDays (May 6, 2015), available at http://www.labordaysblog.com/2015/05/flsa-trends-a-mixed-bag-with-a-silver-lining/ (boom); U.S. Dep't of Labor, Employment Litigation and Dispute Resolution, available at http://www.dol.gov/_sec/media/reports/dunlop/section4.htm (explosion); McEldrew Young, *Employment Class Action Settlements Set Record in 2015 Amidst Tidal Wave of FLSA Lawsuits* (Jan. 13, 2016), available at http://www.mceldrewyoung.com/tidal-wave-flsa-lawsuits/ (tidal wave); Mark Tabakman, *Here Comes An Avalanche of FLSA Cases: Employers Be Aware, Be Proactive!*, Wage & Hour – Developments and Highlights (July 16, 2010), available at http://wagehourlaw.foxrothschild.com/2010/07/articles/class-actions/here-comes-an-avalanche-of-

between the years 2000 and 2015, the number of minimum wage and overtime lawsuits filed under the Fair Labor Standards Act (FLSA) in federal district courts nationwide increased by 317 percent.[2] In fact, since the rise began in 1990, the number of federal FLSA case filings has grown by 542 percent.[3] Anecdotal accounts report that wage and hour litigation has increased dramatically in state courts as well.[4] By comparison, federal civil lawsuit filings of all types increased by only seven percent since 2000[5]; discrimination lawsuits, the most common type of employment litigation in absolute terms, declined by thirty-five percent.[6] In some jurisdictions, FLSA lawsuits have even overtaken discrimination cases as the most frequently filed type of federal workplace lawsuit.[7] Commentators predict

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flsa-cases-employers-be-aware-be-proactive/ (avalanche); LexisNexis OnDemand Webinar, *The Wage & Hour Avalanche: Avoiding the Crush of Class Actions & Investigations* (May 21, 2014), available at https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2014/03/16/the-wage-amp-hour-avalanche-avoiding-the-crush-of-class-actions-amp-investigations-lexisnexis-174-cle-accredited-webinar.aspx (crush); Ben James, Surge In FLSA Suits Not Expected To End Soon, Law360 (Jan. 8, 2009), available at http://www.law360.com/articles/82322/surge-in-flsa-suits-not-expected-to-end-soon (surge); Gregory R. Wachtman, *Top Ten Tips for Avoiding and Surviving FLSA Litigation and DOL Audits*, Association of Corporate Counsel (Apr. 1, 2011), available at http://www.acc.com/legalresources/publications/topten/FLSA-Litigation-and-DOL-Audits.cfm (flood); Jack McCalmon, *Wage and Hour Litigation Alert: Why a Litigation Tsunami Warning is Issued for 2016*, Wissel & Walsh Insurance (Jan. 5, 2016), available at http://wisselandwalsh.com/news/2016/1/5/wage-and-hour-alert-why-a-litigation-tsunami-warning-is-issued-for-2016 (tsunami); Jonathan Segal, *The New Workplace Revolution: Wage and Hour Lawsuits*, Mondaq Business Briefing, Duane Morris LLP (June 7, 2012) (revolution).

[2] In 2015, 8,070 FLSA cases were filed, compared to 1,935 FLSA cases in 2000. Administrative Office of the U.S. Courts, Statistics and Reports, Table C-2, available at http://www.uscourts.gov/statistics-reports and on file with author. All case filing totals are listed and explained in Appendix A. These data use federal fiscal years, explained *infra* at note 44.

[3] In 2015, 8,070 FLSA cases were filed, compared to 1,257 in 1990. *Id.*

[4] Due to differences in states' docketing and case coding systems, no uniform data is available in electronic form for wage and hour case filings in state courts. However, according to anecdote, state courts have seen increases in wage and hour litigation that is similar to federal increases. *See, e.g.*, Michael Orey, *Wage Wars*, Bloomberg BusinessWeek Magazine (Sept. 30, 2007) (discussing wage and hour litigation boom, particularly in California state courts); Richard Alfred, *The Wage and Hour Litigation Epidemic Continues*, Seyfarth Shaw LLP (May 16, 2014), available at http://www.wagehourlitigation.com/dol-compliancerule-making/the-wage-and-hour-litigation-epidemic-continues/ ("Although anecdotal, we believe that those numbers would be substantially greater if wage and hour lawsuits filed in state courts under state pay practices, tip laws, meal and rest break requirements, independent contractor rules, and the like, were added.").

[5] In 2015, 28,1608 civil cases were filed, compared to 26,2548 cases in 2000. Administrative Office of the U.S. Courts, *supra* note 2.

[6] In 2015, 14,338 employment discrimination cases were filed, compared to 21,928 cases in 2000. *Id.*

[7] In a snapshot of case filing totals in the Southern District of Florida, for example, FLSA case filings exceeded civil rights-employment case filings in every month from November 2006 through November 2011. Author-compiled data from federal Public Access to Electronic Court Records database (PACER), Nature of Suit codes 710 (Fair Labor Standards Act) and 442 (civil rights-employment) (data on file with author).

that FLSA case filing will continue to rise.[8] In a recent dissent, for example, U.S. Supreme Court Justice Clarence Thomas suggested that the majority's plaintiff-friendly decision in an FLSA case would "profoundly affect future FLSA-based class actions—which have already increased dramatically in recent years."[9]

In response, employers have engaged in litigation avoidance by restructuring jobs to avoid wage and hour compliance costs.[10] They have attempted to contract around FLSA liability by requiring mandatory arbitration and waivers of workers' FLSA claims.[11] Insurers have created new lines of coverage to allow employers to hedge against wage and hour litigation risk.[12] Overtime consultants now offer strategies to "limit [employers'] exposure to such litigation and its related costs."[13] And employer representatives have petitioned Congress to amend the FLSA to fix what they call a "litigation-festering atmosphere."[14]

Yet despite the increasing importance of wage and hour law, little is known about why FLSA litigation has boomed in recent years. Some commentators point to an aggressive plaintiffs' bar that has "discovered" the FLSA as a lucrative source of attorneys' fees.[15] Others suggest that a rise in underlying violations is to blame,

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[8] *See, e.g.*, Tim Gould, *New OT Rules Could Bring Deluge of Employee Lawsuits, Attorney Says*, CFO Daily News (Jan. 14, 2016), available at http://www.cfodailynews.com/new-ot-rules-could-bring-deluge-of-employee-lawsuits-attorney-says/.

[9] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 381 (2016).

[10] *See, e.g.*, U.S. Dep't of Labor, *supra* note 1 ("[A]side from the direct costs of litigation, employers often dedicate significant sums to designing defensive personnel practices (with the help of lawyers) to minimize their litigation exposure."); Abshire v. Redland Energy Servs., LLC, No. 11-3380 (8th Cir. Oct. 10, 2012) (upholding employer's change to workweek to reduce employees' entitlement to overtime).

[11] Amelia W. Koch, Jennifer McNamara & Laura Carlisle, *Individualizing the FLSA: Collective Action Waivers and the Split in the Federal Courts*, 13 ENGAGE (Oct. 2012), available at http://www.fed-soc.org/publications/detail/individualizing-the-flsa-collective-action-waivers-and-the-split-in-the-federal-courts. Employers seem particularly concerned with avoiding collective actions under the FLSA, in which groups of workers join together to pursue their federal wage and hour claims, sometimes in conjunction with state wage and hour claims. *See, e.g.*, William C. Martucci & Jennifer K. Oldvader, *Addressing the Wave of Dual-Failed Federal FLSA and State Law "Off-the-Clock" Litigation: Strategies for Opposing Certification and a Proposal for Reform*, 19 KAN. J.L. & PUB. POL'Y 433, 433 (2010).

[12] Steve Tuckey, *Wage-Hour Claims Next EPLI Frontier*, National Underwriter (Apr. 17, 2006); Peter R. Taffae & Bob Bregman, *Wage and Hour Coverage Finally Comes of Age*, EPLiC (Summer 2010). For a general description (and critique) of employment practices liability insurance, see Joan T.A. Gabel, Nancy R. Mansfield & Gregory Todd Jones, *The Peculiar Moral Hazard of Employment Practices Liability Insurance: Realignment of the Incentive to Transfer Risk with the Incentive to Prevent Discrimination*, 20 NOTRE DAME J. OF LAW, ETHICS & PUBLIC POLICY 639 (2006).

[13] Business Insurance, *Wage-and-Hour Litigation: Strategies for Managing This Growing Risk*, available at http://www.businessinsurance.com/section/NEWS070103.

[14] Statement of Richard J. Alfred, Seyfarth Shaw, LLP, *The Fair Labor Standards Act: Is it Meeting the Needs of the Twenty-First Century Workplace?* Hearing Before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives (July 14, 2011) available at http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg67301/html/CHRG-112hhrg67301.htm.

[15] Victoria Roberts, *Attorneys Explore Reasons for Surge in Wage and Hour Lawsuits, Offer Strategies*, DAILY LABOR REPORT (BLOOMBERG BNA), Dec. 12, 2002, at C-1 (quoting an employment lawyer as commenting, "Plaintiffs' counsel are becoming a lot more sensitive

as employers cut corners on compliance due to the Great Recession and its after-effects.[16] Still others cite technology's influence on the structure of work and resulting disputes about which activities count as work time.[17] Yet beyond these and other hypotheses, to date there has been little empirical investigation of the modern FLSA boom.[18]

This project begins to fill that gap, offering the first systematic empirical study of the increase in federal wage and hour litigation. It draws on three data sources: federal district court case filing totals from the Administrative Office of the U.S. Courts for the years 2000 through 2015; a hand-collected data set of all 54,247 FLSA cases filed in federal district courts in the years 2000 through 2011; and a random sample of 1,010 of those FLSA cases, with extensive additional information coded from each one.[19] All of the 1,010 cases in the sample had closed by the time of coding, allowing examination of their progress from the filing of the complaint to the ultimate resolution of the case.

Using these data, this article describes the modern FLSA boom and then sets out the best data-supported guesses about the reasons for its existence. A subsequent forthcoming article uses the sample of 1,010 coded cases to create a profile of modern FLSA litigation, exploring the characteristics of the plaintiffs who bring, and win, federal FLSA cases; the characteristics of the defendants who

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to FLSA violations[.]"; "Meanwhile, lawyers representing employers argue that vast payouts to plaintiffs—and their attorneys—are causing the upswing in lawsuits.").

[16] *Id*. (quoting plaintiffs' attorney as commenting that "[a]busive working conditions have prompted many workers to contact lawyers. . . . Nonunion employers are 'squeezing as many hours out of salaried workers as they can,' while limiting the number of hourly workers.").

[17] Spencer H. Silverglate & Craig Salner, *Smartphones and the Fair Labor Standards Act*, For the Defense: Employment Law (June 2011), available at cspalaw.com/pdf/Smartphones.pdf; Paul Davidson, *More American Workers Sue Employers for Overtime Pay*, USA TODAY (Apr. 15, 2012) ("Courts . . .must reconcile decades-old labor laws with ever-evolving technology. The spread of BlackBerrys and iPhones has many workers tethered to employers, for better or worse, even during off hours and vacations."); Steven M. Gutierrez & Joseph Neguse, *Emerging Technologies and the FLSA*, 39 THE COLORADO LAWYER 49 (Nov. 2010).

[18] There are commercially-available reports on FLSA litigation, but they tend to draw on small, e.g. 300-case, samples, and are limited to settled cases only. *See, e.g.*, Denise Martin, Stephanie Plancich & Janeen McIntosh, "*Trends in Wage and Hour Settlements: 2011 Update*, NERA Economic Consulting (Mar. 22, 2012) (reporting on 344 settled FLSA cases). In addition, employment defense firm Seyfarth Shaw produces an annual report on workplace class action litigation that covers FLSA collective actions. See, e.g., Gerald L. Maatman Jr., *It's Here – Seyfarth's 2016 Workplace Class Action Report*, available at http://www.workplaceclassaction.com/2016/01/its-here-seyfarths-2016-workplace-class-action-report/. The author has also done some prior empirical work on FLSA litigation. XXXXX; XXXXX; *see also* Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269 (2009); Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1617 (2008) (observing a "marked post-[Class Action Fairness Act] increase in labor class actions, particularly FLSA actions"); 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, 516–518 (2009) (discussing the "explosion" of dual-filed FLSA and state-law wage claims in recent years).

[19] Only cases filed in federal court, rather than state court, were examined due to difficulty in accessing electronic state court records in all jurisdictions.

are sued; the legal claims that are the most successful; and the amount of money that is changing hands.

The findings presented here and in future work are useful in their own right, as they help to map the previously unexplored terrain of federal wage and hour litigation. These findings also provide a jumping-off point for future research on employers' perceptions of and responses to their wage and hour litigation risk,[20] on the development of FLSA doctrine, and on the relative strength and weakness of workers' minimum wage and overtime rights.

This project has predecessors in studies of case filing trends and case outcomes in federal employment discrimination litigation. Nielsen, Nelson, and Lancaster (2010),[21] Clermont and Schwab (2004 and 2009),[22] and Donohue and Siegelman (1991),[23] for example, have all investigated the fate of antidiscrimination plaintiffs in federal court and the implications for workers, employers, and the law of the workplace.[24] And though wage and hour law may be supplanting – or at least

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[20] Scholars have noted employers' problematic and misinformed reactions to inaccurately perceived litigation risks in other areas of employment law. *See, e.g.*, Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663 (2005) (discussing employers' inflated view of the risk of employment discrimination lawsuits); Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 AM. BUS. L. J. 123 (2001) (discussing employers' overestimation of the risk of defamation lawsuits arising out of employee references); Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47 (1992) (discussing employers' inflated view of the risk of wrongful discharge lawsuits); Thomas O. McGarity & Sidney A. Shapiro, *OSHA's Critics and Regulatory Reform*, 31 WAKE FOREST L. REV. 587 (1996) (arguing that critics of the Occupational Safety and Health Act likely overstate its negative impact on employers); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3 (2003) (examining employers' problematic responses to the threat of sexual harassment liability).

[21] Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175 (2010).

[22] Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 103 (2009); *see also* Kevin M. Clermont et al., *How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547 (2003).

[23] John Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

[24] Other scholars have performed similar studies of case filing patterns and outcomes in other areas of law. *See, e.g.*, Anupam B. Jena, Seth Seabury, Darius Lakdawalla & Amitabh Chandra, *Malpractice Risk According to Physician Specialty*, 365 N. ENGL. J. MED. 629 (2011) (studying medical malpractice suit filings); Lauren B. Edelman, Steven E. Abraham & Howard S. Erlanger, *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47 (1992) (wrongful discharge); Ramona Paetzold & Steve Willborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 AM. BUS. L. J. 123 (1992) (libel); Scott F. Norberg & Nadja Schreiber Compo, *Report on an Empirical Study of District Variations, and the Roles of Judges, Trustees, and Debtors' Attorneys in Chapter 13 Bankruptcy Cases*, 81 AM. BANKR. L.J. 431 (2007) (bankruptcy filings); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J. L. & PUB. POL'Y 801, 818 n. 88 (1994) (same); Jean O. Lanjouw & Mark Schankerman, 47 J.L. & ECON. 45 (2004) (patent litigation); Harold H. Gardner, Nathan L. Kleinman & Richard

joining – antidiscrimination law as a key source of protection for workers and a major source of litigation risk for employers, scholars have yet to turn their attention to the FLSA.[25]

Accordingly, this article proceeds as follows. Part I provides a brief primer on the wage and hour protections offered by the FLSA. Part I also uses the U.S. Courts' Administrative Office data to trace the history of FLSA case filing from the 1940s to the present. Part II describes the project's research design and methodology and acknowledges some limitations inherent in the data. Part III draws on the data to set out and test various possible explanations for the modern FLSA boom. Part IV then shifts from the descriptive to the normative to consider the implications of the modern FLSA boom. Part V concludes.

I. A BRIEF FLSA PRIMER AND HISTORY OF FLSA LITIGATION

This part describes the FLSA's wage and hour protections and provides a history of FLSA case filing trends from 1941 to the present.

A. The FLSA's Wage and Hour Protections

The Fair Labor Standards Act was passed in 1938 as part of President Franklin D. Roosevelt's New Deal, and the central wage and hour protections offered by the statute have remained largely unchanged.[26] The FLSA's two main provisions guarantee that covered workers – those who engage in interstate commerce[27] and do not fall into one of the FLSA's many exemptions[28] – receive a minimum hourly wage[29] and time-and-a-half overtime pay for every hour over forty that they work in a workweek.[30] The FLSA also contains recordkeeping provisions, requiring that

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J. Butler, *Workers' Compensation and Family and Medical Leave Act Claim Contagion*, 20 J. RISK & UNCERTAINTY 89 (2000) (workers' compensation and Family and Medical Leave Act claims).

[25] XXXXX, et al., *supra* note 18 (discussing hypothesis that plaintiffs' employment attorneys are actively shifting their caseloads away from the harder-to-win discrimination cases to FLSA cases, which they perceive as being more viable in court due to the lack of an intent requirement, which may make discrimination cases relatively more difficult for plaintiffs to win).

[26] Fair Labor Standards Act of 1938, 52 Stat. 1060, 1069 (1938) (current version at 29 U.S.C. §§ 201–219)); William C. Martucci, Katherine R. Sinatra & Gregory K. Wu, *Understanding and Preparing for Today's Employment Class Action Environment* in STRATEGIES FOR EMPLOYMENT CLASS AND COLLECTIVE ACTIONS: LEADING LAWYERS ON ADDRESSING TRENDS IN WAGE AND HOUR ALLEGATIONS AND DEFENDING EMPLOYERS IN CLASS ACTION LITIGATION (2012) ("While Congress has amended the statute periodically since its passage, most recently in 2004, the changes have not been that significant over the years. Indeed, the procedure for litigating collective wage-and-hour violations under Section 216(b) of the FLSA has remained largely unchanged."); Seymour Moskowitz, *Malignant Indifference: The Wages of Contemporary Child Labor in the United States*, 57 OKLA. L. REV. 465, 471 (2004) ("Despite the extraordinary economic and social changes in the United States, the FLSA remains largely unchanged since the 1960s.").

[27] *See, e.g.*, 29 U.S.C. §§ 206, 207 (requiring that employees or the enterprise that employs them engage in interstate commerce).

[28] *See, e.g.*, XXXXX (describing many FLSA exemptions under 29 U.S.C. § 213).

[29] 29 U.S.C. § 206.

[30] 29 U.S.C. § 207.

employers record workers' hours of work and other information[31]; anti-retaliation provisions, which protect workers from reprisals for enforcing their rights under the statute[32]; and child labor provisions, which prohibit the employment of workers under the age of sixteen except in certain narrow circumstances.[33]

Many states and localities have their own version of the FLSA.[34] States and cities may require payment of wages that are higher than the federal minimum: California and New York, for example, have recently enacted a $15 hourly minimum wage, to be phased in over a period of years, as have the cities of Los Angeles and Seattle.[35] Other states have lower minimum wage rates than the federal $7.25 floor, meaning that workers who are exempt from the federal FLSA receive only $5.15 per hour in Georgia, for instance, or in Wyoming.[36]

Workers who seek redress for violations of their FLSA rights may complain to the United State Department of Labor (DOL), which may file its own lawsuit against an offending employer, or – much more commonly – workers themselves may sue their employer in state or federal court, either individually or as a group.[37] Here, the FLSA diverges from many other workplace rights statutes.[38] Under other workplace laws, the mechanism for group litigation is the class action, brought pursuant to Fed. R. Civ. P. 23, in which designated class representatives prosecute the litigation and win a class wide recovery that is distributed to all class members who have not opted out.[39] In FLSA cases, the default is reversed. After a judge preliminarily certifies an FLSA "collective action" under 29 U.S.C. 216(b), each worker must individually opt in. The case may then be decertified after discovery if the judge is convinced that the plaintiffs are not similarly situated.[40] If the case remains a collective action through judgment or settlement, only those plaintiffs who have affirmatively opted in may collect a share of the recovery.[41]

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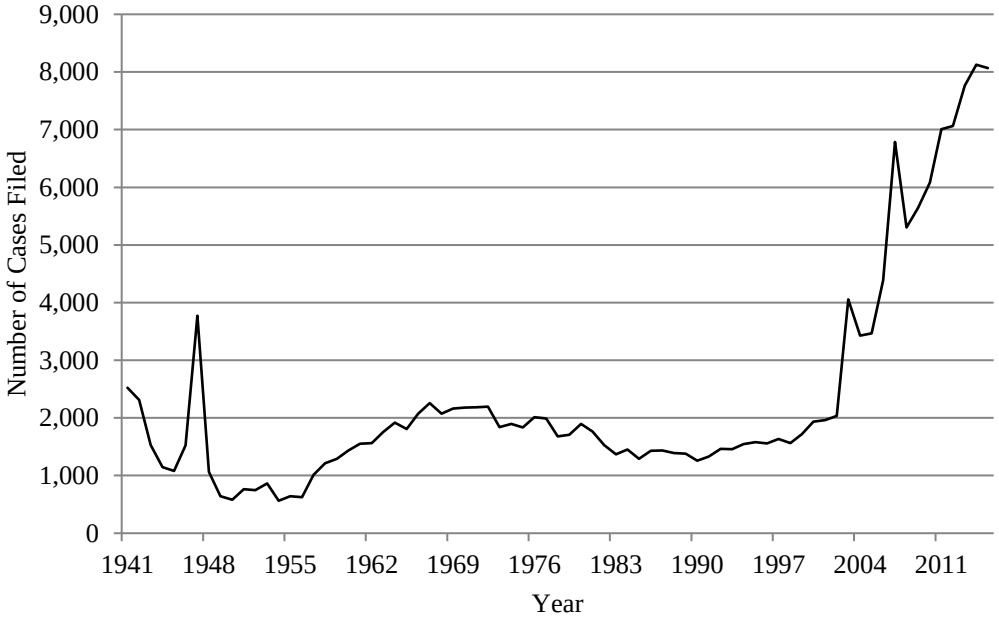
[31] 29 U.S.C. § 211(c).
[32] 29 U.S.C. § 215.
[33] 29 U.S.C. § 203(l); 29 U.S.C. § 212.
[34] *See* U.S. Dep't of Labor Wage and Hour Division, *State Labor Laws*, available at http://www.dol.gov/whd/state/state.htm.
[35] Michael R. Blood & Don Thompson, *California, New York Enact US-Highest $15 Minimum Wages*, ABC News (Apr. 5, 2016), available at http://abcnews.go.com/Politics/wireStory/california-enacts-highest-statewide-minimum-wage-us-38139591.
[36] U.S. Dep't of Labor, Wage and Hour Division, Minimum Wage Laws in the States - January 1, 2016, available at http://www.dol.gov/whd/minwage/america.htm.
[37] XXXXX (describing ratio of private wage and hour lawsuits to U.S. Department of Labor enforcement actions).
[38] Koch et al., *supra* note 11 (citing Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1807 (3d ed.) (describing FLSA lawsuits as a "unique species of litigation"); Raniere v. Citigroup Inc., 827 F. Supp. 2d 294, 311 (S.D.N.Y. 2011) ("Collective actions under the FLSA are a unique animal.")).
[39] Fed. R. Civ. P. 23(b)(3). Some class actions, such as those in which the plaintiffs seek only injunctive relief or a declaratory judgment, do not allow the opt out option. Fed. R. Civ. P. 23(b)(1)-(2).
[40] Koch et al., *supra* note 11.
[41] 29 U.S.C. § 216(b). The U.S. Department of Labor has additional punitive and remedial tools at its disposal, including enjoining the shipment or sale of "hot goods" produced in violation of the FLSA. *See, e.g.*, Stephanie A. Koltookian, *Some (Don't) Like It Hot: The Use of the "Hot Goods" Injunction in Perishable Agriculture*, 100 IOWA L. REV. 1842 (2015).

Regardless of whether an FLSA case proceeds as an individual or collective action, victorious plaintiffs may recover their lost wages, as well as liquidated, or double damages.[42] Courts may also issue injunctions that require employers to change their pay practices or otherwise alter their procedures to avoid future violations.[43]

B. Historical FLSA Litigation Patterns

The graph in Figure 1 below shows all FLSA cases filed in U.S. district courts beginning in federal fiscal year 1941, the year the Administrative Office for the U.S. Courts began compiling such statistics, to 2015, the most recent complete year of data.[44] The data from which Figure 1 and subsequent graphs in this part were generated appear in Appendix A.

Figure 1: FLSA cases filed in all U.S. district courts, federal fiscal years 1941-2015



SOURCE: Administrative Office of the U.S. Courts, Statistics and Reports, Table C-2 (1944-2015), Table 6 (1943), Table 7 (1942), Table 4 (1941), available at http://www.uscourts.gov/statistics-reports and on file with author.

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[42] 29 U.S.C. § 216(b).

[43] 29 U.S.C. § 217.

[44] Before 1977, the federal fiscal year began on July 1 and ended on the following June 30. From 1977 to 2015, the federal fiscal year ran from October 1 to the following September 30. The years shown on Figures 1-4 in this article are those in which that particular fiscal year came to an end. *See* U.S. Senate Glossary, *Fiscal Year*, available at http://www.senate.gov/reference/glossary_term/fiscal_year.htm; TreasuryDirect, Historical Debt Outstanding – Annual 1790-1849 ("The first fiscal year for the U.S. Government started Jan. 1, 1789. Congress changed the beginning of the fiscal year from Jan. 1 to Jul. 1 in 1842, and finally from Jul. 1 to Oct. 1 in 1977 where it remains today."), available at https://www.treasurydirect.gov/govt/reports/pd/histdebt/histdebt_histo1.htm.

As Figure 1 shows, FLSA case filing numbers first spiked in the late 1940s. After that, they rose and fell periodically until 1990, when they began a sustained rise that continued through 2015. This rise was punctuated by two more dramatic spikes in fiscal years 2003 and 2007.[45]

Labor scholar Marc Linder explains that the 1940s spike was the result of court battles over the compensability of workers' pre-shift time spent walking from the gate, or "portal," of a plant to their work stations, where they began productive activity.[46] This dispute was, according to THE NEW YORK TIMES, "one of the greatest legal-economic controversies in American history."[47] In 1946, a so-called "portal pay" FLSA lawsuit made its way to the U.S. Supreme Court, and in a decision called *Anderson v. Mt. Clemens Pottery Co.*, the Court sided with the workers on the question of the compensability of their time in transit.[48] Figure 1 illustrates the *Mt. Clemens* effect, showing a spike in FLSA case filings in 1947.

Mt. Clemens was significant not only because of its holding on compensability, but also because of the "representative action" form in which it was litigated. As originally enacted, the FLSA had enabled workers to sue their employers either individually or in groups, or, as in *Mt. Clemens*, via a union or other representative as the named plaintiff.[49] After the decision, fearing that unions would seize on the ruling to file still more representative actions, Congress quickly amended the FLSA with the Portal to Portal Act of 1947.[50] That law eliminated unions' ability to litigate on behalf of their members and put into place the opt in procedure – still in place today – that requires each individual plaintiff affirmatively to join a collective FLSA lawsuit and forecloses the typical class action under Fed. R. Civ. P. 23.[51]

The rhetoric around the Portal to Portal Act and the 1940s FLSA litigation boom to which it was responding is strikingly similar to the rhetoric deployed by employers today.[52] As the Supreme Court noted in a later FLSA case, Congress was moved to act in 1947 in response to "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome."[53] The litigation spike constituted an

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[45] The two spikes in fiscal 2003 and 2007 are explored further in Part III.B below.

[46] Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 54 (1991). A later book by Linder supplies a more thorough account of the fight in the courts and in Congress over portal to portal pay. MARC LINDER, MOMENTS ARE THE ELEMENTS OF PROFIT: OVERTIME AND THE DEREGULATION OF WORKING HOURS UNDER THE FAIR LABOR STANDARDS ACT 168-403 (2000).

[47] Linder (1991), *supra* note 46 at 54.

[48] Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).

[49] Fair Labor Standards Act of 1938, 52 Stat. 1060, 1069 (1938) (current version at 29 U.S.C. § 216(b)); *Mt. Clemens*, 328 U.S. at 684 ("Seven employees and their local union, on behalf of themselves and others similarly situated, brought this suit under s 16(b) of the Fair Labor Standards Act[.]").

[50] 29 U.S.C. § 251 *et seq*.

[51] XXXXX, *supra* note 18 at 459 (explaining history of the FLSA's opt in requirement); *see also* Linder (1991), *supra* note 46 at 167 (noting that though "the unions had not conducted the portal litigation in the form of such [representative] class actions, . . . congressional animus against that procedural form was based on the mistaken impression that they had done so").

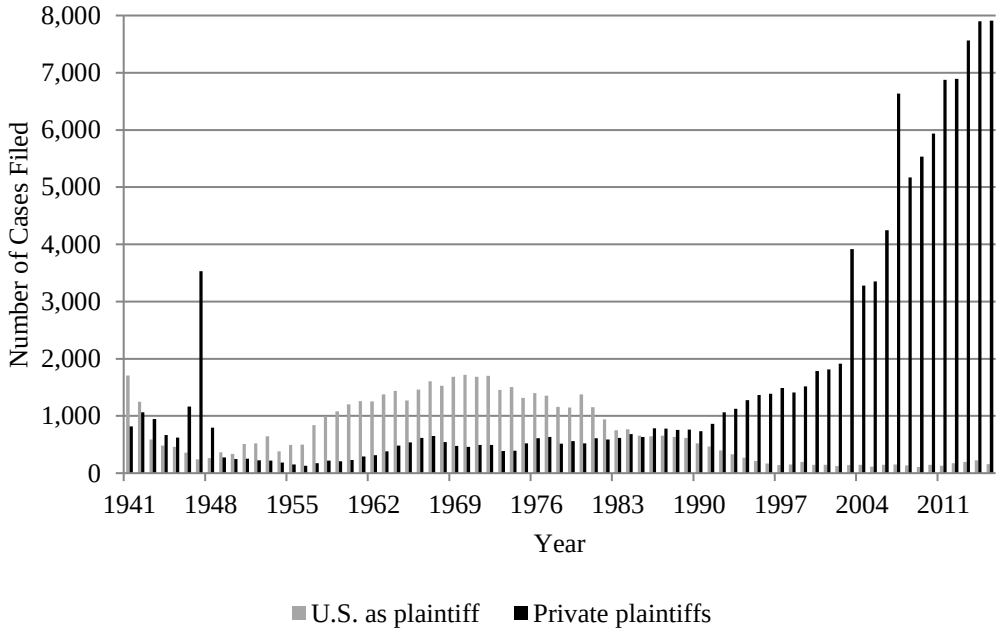
[52] *See, e.g.*, Statement of Richard J. Alfred, *supra* note 14 (describing the current FLSA "litigation festering atmosphere").

[53] Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 173 (1989).

"appalling national problem" and a "'national emergency' created by a flood of suits under the FLSA aimed at collecting portal-to-portal pay allegedly due employees."[54]

After Congress stepped into the fray in 1947, however, the FLSA largely receded from the public eye, generating only a modest level of litigation until more recent years. In fact, Figure 2 below shows that much of the FLSA case filing activity between the 1950s and 1980s was generated by the U.S. Department of Labor as the plaintiff, rather than by private plaintiffs.[55] The number of cases filed by the DOL jumped between 1956 and 1957 by sixty-nine percent, and continued to rise until it began to drop off again at the end of the 1960s, to be overtaken by a substantial margin by private plaintiff cases in 1990 and beyond.[56]

Figure 2: FLSA cases filed in all U.S. district courts, federal fiscal years 1941-2015, U.S. as plaintiff and private plaintiffs



SOURCE: Administrative Office of the U.S. Courts, Statistics and Reports, Table C-2 (1944-2015), Table 6 (1943), Table 7 (1942), Table 4 (1941), available at http://www.uscourts.gov/statistics-reports and on file with author.

The initial 1956-1957 jump might be explained by the 1957 arrival and 1958 confirmation of Clarence Lundquist as Administrator of the DOL's Wage and Hour Division, the unit charged with FLSA enforcement.[57] Contemporary accounts

[54] Arrington v. National Broadcasting Co., Inc., 531 F. Supp. 498, 500 (D.D.C. 1982) (quoting 93 Cong. Rec. 2194, 80th Cong., 1st Session (Remarks of Senator Wheeler) and 93 Cong. Rec. 2098 (Remarks of Senator Donnell)).

[55] The data from which Figure 2 was generated appear in Appendix A.

[56] *See* Appendix A, *infra* (listing 840 FLSA cases filed by the U.S. in 1957 and 497 cases filed in 1956).

[57] Thanks to Marc Linder for his assistance in identifying reasons for the level of public enforcement during this period and in locating source material. THE WASHINGTON POST, *Clarence Lundquist*

portray Lundquist as focused on increasing agency enforcement of wage and hour law and the Department as engaging in robust enforcement efforts.[58] Indeed, Lundquist's tenure from 1957 to 1969 maps closely onto the increased public FLSA enforcement shown in Figure 2.[59] The DOL's statutory authority to engage in enforcement was also enhanced in 1961 by the passage of FLSA amendments that expanded the Department's ability to file suit to recover workers' unpaid wages.[60]

In any case, as Figure 3 below shows, between the early 1980s and 2000s, FLSA cases of all types – public and private – were regularly outnumbered by cases concerning employment discrimination, workplace injuries, health, safety, labor, ERISA,[61] and FMLA[62] violations.[63] As one veteran employment lawyer has remarked, the FLSA was long the "ugly stepchild" compared to the more common antidiscrimination lawsuit.[64] It was not until 2002 that the FLSA equaled and then overtook any other workplace lawsuit category, eventually outpacing both the labor and injury, health, and safety categories substantially and converging on the category representing ERISA, FMLA, and other employment law violations.

Moreover, the FLSA trend line since the early 2000s has been on the rise, in contrast with all other categories of employment related lawsuit, which have declined. Figure 3 shows that employment discrimination cases dropped particularly sharply since their peak in the late 1990s, which was itself likely a result

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Dies (Oct. 17, 1988), available at https://www.washingtonpost.com/archive/local/1988/10/17/clarence-lundquist-dies/4f5862fb-a906-44aa-ab3d-4ccd3dfdfb36/ (listing Lundquist's years of service as Wage and Hour Administrator); *see also Forty-Fifth Annual Report of the U.S. Dep't of Labor*, Fiscal Year 1957 at 208.

[58] *See, e.g.*, Forty-Fifth Annual Report, supra note 57 at 221 (describing efforts at increasing enforcement staff and improving their training and an increased focus on measuring and ensuring employer compliance with the FLSA's wage and hour mandates); *see also Fair Labor Standards Act*: Hearing Before the Subcomm. on Fair Labor Standards of the H. Comm. on Educ. and Labor, 85th Cong, 31 (July 15, 1958) (testimony by Clarence Lundquist; questioning by Rep. Roosevelt) (questioning Lundquist in detail about the investigation and enforcement procedures of the Wage and Hour Division; stating, "[W]hat we want to do is to be able to satisfy ourselves that the Department is not arbitrarily going after people and stretching the application of the law where it does not really seem to have a sound application.").

[59] THE WASHINGTON POST, *supra* note 57.

[60] Specifically, 29 U.S.C. § 217 was amended to permit injunction suits for wages. Charles H. Still, *Monetary Recovery Under the Fair Labor Standards Act*, 45 TEX. L. REV. 921, 922 (1967) (explaining 1961 amendments to Section 217).

[61] "The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans." U.S. Dep't of Labor, *Health Plans & Benefits: ERISA*, available at https://www.dol.gov/general/topic/health-plans/erisa (describing ERISA, 29 U.S.C. § 18 et seq.).

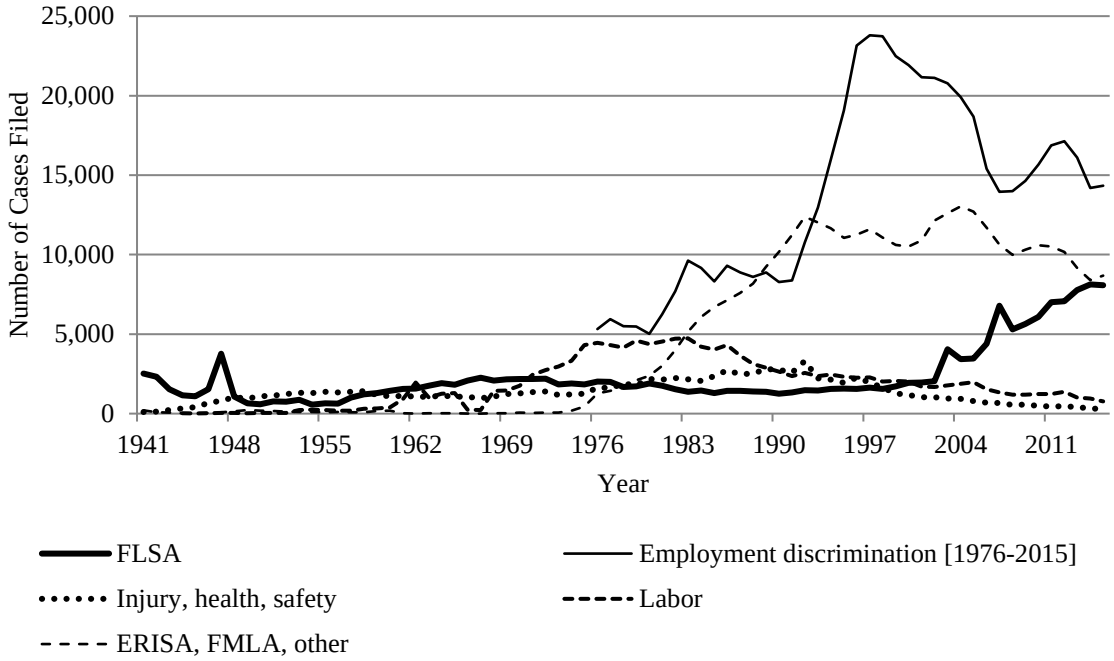
[62] "The FMLA [Family and Medical Leave Act] entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave." U.S. Dep't of Labor, *Wage and Hour Division: Family and Medical Leave Act*, available at http://www.dol.gov/whd/fmla/ (describing FMLA, 29 U.S.C. § 28 et seq.).

[63] The data from which Figure 3 was generated appear in Appendix A, along with a full explanation of the cases included in each case filing category.

[64] XXXXX et al., *supra* note 18.

of the earlier expansion of statutory protection by the Civil Rights Act of 1991.[65] Part III.D below explores a possible relationship between this drop in employment discrimination litigation and the increase in cases filed under the FLSA.

Figure 3: Employment related lawsuits filed in all U.S. district courts, federal fiscal years 1941-2015



SOURCE: Administrative Office of the U.S. Courts, Statistics and Reports, Table C-2 (1944-2015), Table 6 (1943), Table 7 (1942), Table 4 (1941), available at http://www.uscourts.gov/statistics-reports and on file with author.

NOTES: A full explanation of the cases included in each case filing category appears in Appendix A. Employment discrimination cases were recorded as their own category beginning in 1976.

Finally, as the graph in Figure 4 below shows, the sharp FLSA increase since 1990 departs from the trend for federal civil case filings as a whole. Figure 4 indexes both trend lines to a common starting point of 100, representing case filing numbers in 1990.[66] Whereas all other civil case filings increased by about twenty-seven percent between 1990 and 2015, FLSA case filings increased by 542 percent over the same period.[67]

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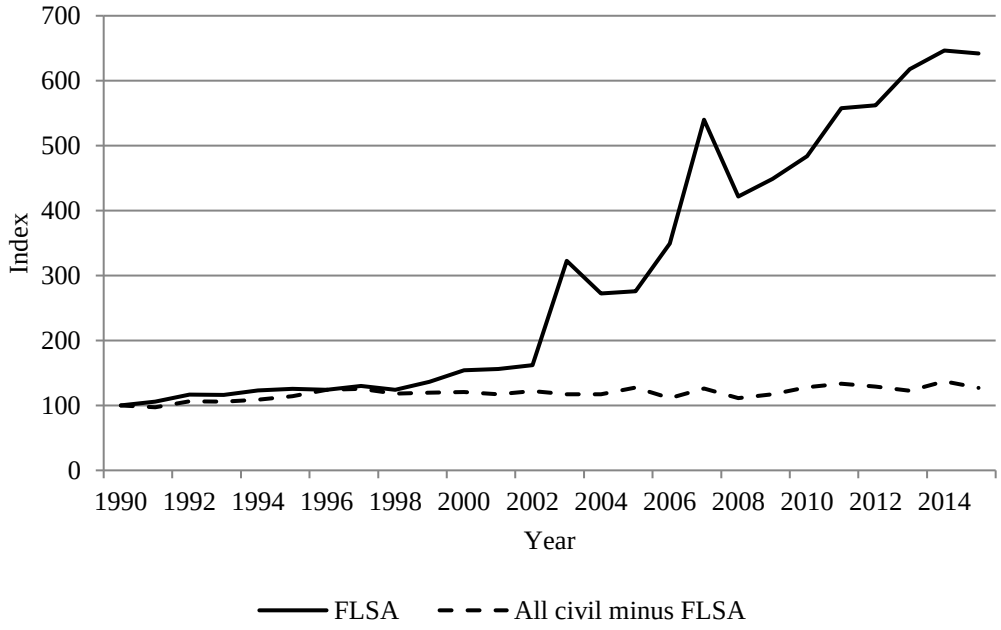
[65] *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 333 (1991) (discussing Congress' override, with the Civil Rights Act of 1991, of nine Supreme Court decisions that had narrowed Title VII of the Civil Rights Act of 1964).

[66] For an explanation of indexing, see Federal Reserve Bank of Dallas, Research & Data, *Indexing Data to a Common Starting Point*, available at http://www.dallasfed.org/research/basics/indexing.cfm.

[67] The data from which Figure 4 was generated appear in Appendix A.

Figure 4: FLSA cases and civil cases (minus FLSA) filed in all U.S. district courts, federal fiscal years 1990-2015, index, 1990 = 100



SOURCE: Administrative Office of the U.S. Courts, Statistics and Reports, Table C-2 (1944-2015), Table 6 (1943), Table 7 (1942), Table 4 (1941), available at http://www.uscourts.gov/statistics-reports and on file with author.

Referring back to Figure 2, it appears that private plaintiffs have been the driver of the post-1990 FLSA litigation boom, rather than the U.S. Department of Labor. The parts that follow begin to explore the reasons why. Part II introduces the full case-level data set of all 54,247 FLSA lawsuits filed in federal court in the years 2000 through 2011 and describes the coding process employed to examine 1,010 of those cases in detail. Part III then deploys those data to hypothesize about the reasons behind the boom.

II. METHODOLOGY, DATA, AND LIMITATIONS

This part describes the processes used to assemble the full FLSA case data set, to code a random sample of those cases, and to ensure the quality of the data by cross-checking the results against other FLSA data sources. This part also acknowledges the limitations of these methods and the data they produced.

A. Full Data Set Assembly

When a plaintiff files a lawsuit in federal district court, she or her lawyer must fill out what is known as a civil cover sheet.[68] On that sheet, she must categorize her case's "Nature of Suit" (NOS) by choosing one option from a list.[69] NOS code 710 is assigned to the Fair Labor Standards Act.[70] If a plaintiff does not choose an NOS code herself, clerk's office staff assign one to the case.[71]

Once a lawsuit is initiated, its records become available electronically via the U.S. Courts' Public Access to Court Electronic Records (PACER) service. PACER can be searched by NOS and other case characteristics; third party search providers such as BloombergLaw and WestlawNext also allow access to PACER with more user-friendly search interfaces.

Via a PACER search, one can access two categories of information: each case's docket sheet, and the documents filed in the case by the parties and the judge. The docket sheet serves as an index. It displays the parties' and attorneys' names and provides a chronological listing of all documents filed, hearings, court orders, and other events in the case. Docket sheets are available via PACER for most every civil case from the 1950s onward.[72]

The accessibility of the underlying court documents – the pleadings, motions, briefs, and court orders filed in the case – is more varied. Court documents are available via PACER if they were filed electronically in the first instance, or if they were later scanned in from hard copies by clerk's office personnel. All U.S. district courts now use electronic case filing, meaning that court documents are widely available in more recent cases, but courts' adoption dates vary.[73] And even the later-adopting courts have scanned many earlier case files into the system.[74] It is

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[68] U.S. Courts, Services and Forms, Civil Cover Sheet, available at http://www.uscourts.gov/forms/civil-forms/civil-cover-sheet ("This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed.").

[69] *Id.* at 2 ("Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.").

[70] *Id.*

[71] *Id.* ("If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit.").

[72] U.S. Courts, Public Access to Court Electronic Documents, Case Locator, Court Information (login needed; table on file with author).

[73] *See, e.g.*, U.S. District Court for the Northern District of Ohio, *Letter by James G. Carr, Chief Judge* (Dec. 6, 2005) (stating in 2005 that the court had permitted electronic filing for ten years); *see also* U.S. Courts, Public Access to Court Electronic Records, *Frequently Asked Questions, PACER Case Locator*, available at https://www.pacer.gov/psc/faq.html ("How far back does the information go on PACER Case Locator? This varies from court to court.").

[74] Email correspondence with PACER Service Center representative ("Cases were being filed in paper and docket entries were manually updated using a different system prior to CM/ECF [the electronic case filing system accessible via PACER]. Some court scanned documents in cases prior

therefore surprisingly difficult to pinpoint the date at which both docket sheets and underlying court documents became uniformly available across district courts. Duke Law School's library, for example, advises that 1996 is the date after which "the majority of [court] materials are available for download in PDF format" from PACER.[75]

This uncertainty informed the choice of 2000 through 2011 as the study period for this project. The 2011 end date was chosen for coding purposes in order to return as many cases as possible that had proceeded all the way through to settlement or other disposition; the assumption was that most cases filed in 2011 would likely have concluded by the time coding was complete four years later, in 2015.[76] The 2000 start date was chosen to be well beyond the 1996 estimated date by which a "majority" of records would be available via PACER, but before the fiscal year 2003 FLSA case filing spike that is evident from the Administrative Office data. Though a start date of 1990 or before would have been preferable, data limitations narrowed the viable date range for this research.

Thus, using BloombergLaw and WestlawNext, the author searched PACER to identify all cases with the NOS code 710 that were filed in the years 2000 through 2011. An initial round of searches produced 55,014 cases, 767 of which were removed as duplicate or erroneous filings, resulting in a final list of 54,247.[77] This data set contains the following information about each case: (1) case title, which includes lead plaintiff and defendant names; (2) docket number; (3) U.S. district court in which the case was filed; (4) U.S. circuit court of appeals to which the district court belongs; (5) filing date and year; (6) presiding district court judge's name; (7) lead plaintiff attorney name; and (8) lead defendant attorney name. These data serve as the basis for the analyses conducted in Part III below.

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to the go live dates, and some just imported the docket information into CM/ECF.") (correspondence on file with author).

[75] Duke Law, Court Records and Briefs, available at https://law.duke.edu/lib/researchguides/records_briefs/ ("For federal courts, the best source for recent (1996-present) records and briefs is PACER, or Public Access to Court Electronic Records. PACER is a service from the federal judiciary, and includes case and docket information from U.S. District, Appeals, and Bankruptcy courts. Because most federal courts require documents to be filed electronically, the majority of materials are available for download in PDF format, generally from 1996-present.").

[76] Institute for the Advancement of the American Legal System, University of Denver, *Civil Case Processing in the Federal District Courts* 4 (2009) (finding from a review of 7,700 closed civil cases across eight federal district courts that two-thirds of cases were resolved within one calendar year of filing); *id*. at 38, Table 4 (listing only 323 cases, or four percent of the sample, as having persisted beyond 1,095 days, or three years).

[77] Duplicates were identified as cases with identical names, docket numbers, and filing dates and then confirmed by examining the underlying case docket and filed documents. Erroneous filings were identified by notes entered by clerk's office staff in place of the case name such as "Case filed in error." "Erroneous" here does not refer to cases that were erroneously given the FLSA NOS code when they should have been given another NOS code. Instead, it refers to an electronic record that appears to represent a case in the PACER system but does not, in fact, represent a real lawsuit.

B. Coding Methodology

Next, the author selected a random sample of cases for further coding. The author initially drew a sample of 1,050, but threw out forty of those cases during coding because they did not, in fact, contain any FLSA allegations.[78] This resulted in a final coded sample of 1,010 cases, which produces a margin of error of just over three percent at a ninety-five percent confidence level.[79] In other words, just as the results of opinion polls that target a small number of randomly selected respondents can be generalized to the population at large, within a certain margin of error, statistics describing these 1,010 cases can be generalized to the population of 54,247. We can be ninety-five percent certain that the generalization of each statistic is accurate, within a range of plus or minus approximately three percent.

After first receiving training on the FLSA, federal civil litigation procedure, and coding protocols,[80] a team of law students were each assigned a set of cases from the sample.[81] Using BloombergLaw and WestlawNext to access PACER, the students reviewed each case's docket sheet and selected court documents, including the complaint, major pretrial motions and briefs, settlement agreement, and/or judgment. For each case, coders entered twelve pieces of information into a custom designed, password-protected data entry website, which generated a spreadsheet of variables for use in analysis.[82] While coding was underway, the author met weekly with the coding team to ensure consistency in coding and to spot check the coders' work.[83] As an additional measure of consistency, the author assigned approximately five percent of the cases in the sample to more than one coder to code independently, and then compared the results.[84] In the event of a

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[78] This is likely due to plaintiff error in completing the civil cover sheet or clerk error in inputting the civil cover sheet data into the electronic case management system that is accessed by PACER.

[79] For a general discussion of sampling and sample size, see LEE EPSTEIN & ANDREW D. MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH 283 (2014).

[80] *See, e.g.*, Lee Epstein & Andrew Martin, *Coding Variables*, *in* ENCYCLOPEDIA OF SOCIAL MEASUREMENT 1-7 (Kimberley Kempf-Leonard, ed.) (2004) (describing good coding protocols).

[81] The team of coders consisted originally of three law students. Because the coding process continued past some coders' graduation, a second team of four law students was assembled. The second team consisted of one continuing student who had worked as a coder the previous year and three new students. All students received the same training and followed the same coding protocols.

[82] The variables coded were (1) party names; (2) district and circuit courts; (3) year filed, year terminated, and case duration; (4) parties' attorneys' names; (5) number of plaintiffs listed on the docket sheet; (6) filing and disposition of collective action motion by the plaintiff, if any;[82] (7) claim type(s): minimum wage, overtime, retaliation, other; (8) fact pattern(s): problems with non-hourly pay arrangements, unpaid time/late pay/unlawful pay deductions, straight time paid instead of overtime, misclassification as exempt from overtime, other FLSA violations; (9) plaintiff's occupation; (10) lead defendant's industry; (11) final case disposition; and (12) damages and attorneys' fees paid, if any.

[83] Other researchers have used similar methods in coding projects involving court decisions. *See, e.g.*, Eden B. King et al., *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 PSYCH. PUB. POL. AND L. 54, 61 (describing a coding project involving court decisions); Nielsen et al., *supra* note 21 at 182 (same).

[84] *See, e.g.*, Epstein & Martin, *supra* note 80 at 7 (describing ways to ensure reliability in coding). In addition to measuring inter-coder accuracy, the author checked the quality of the coding by cross-referencing it against case termination data for the FLSA NOS code obtained from the

disagreement, the author discussed the divergent coding results with the entire group to ensure future consistency. Measures of inter-coder accuracy via this method compared favorably to those in other, similar litigation-related coding projects.[85] These coded cases inform the analysis in Part III of the reasons for the post-1990 FLSA boom, but are primarily relevant to the subsequent, forthcoming article that explores the operation of modern FLSA litigation from filing to disposition.

C. Limitations

This research design has some inherent limitations. First, the method of assembling the full set of 54,247 FLSA cases by NOS code relies ultimately on plaintiffs' own characterization of their case's "Nature of Suit," a term that is not defined on the civil cover sheet and susceptible to different interpretations. Relying on the code as a filtering device likely produces results that are both under and over inclusive. Indeed, of the 1,050 cases originally drawn as a random sample, forty, or four percent, were discarded because they did not, in fact, contain FLSA allegations.[86]

With respect to under inclusiveness, the author ran a search in WestlawNext for federal district court decisions mentioning the terms "FLSA" or "Fair Labor Standards Act" in the years 2000 through 2011, and then randomized the search results. Coders identified the first one hundred decisions that analyzed substantive FLSA issues as opposed to just mentioning the statute in passing. Coders then cross-checked those one hundred known FLSA cases against the 54,247 cases in the data set that carried the FLSA NOS code in PACER.[87] Ninety percent of the Westlaw-identified FLSA cases appeared in the PACER data set. Of the ten percent of cases that did not, many carried the NOS code for civil rights employment matters, and were brought by pro se plaintiffs. Thus, with respect to under inclusiveness, the data set of 54,247 likely disproportionately omits cases filed by pro se plaintiffs, and also those in which FLSA claims were brought alongside employment discrimination claims – it appears that such claims may trump FLSA claims in parties' or clerks' assignment of NOS codes.

One final limitation suggests itself. If the goal is to describe and analyze all wage and hour litigation across the country, this research fails on that measure, as it focuses only on FLSA litigation in federal courts. This is due to the inaccessibility of much state court data and inconsistencies in how cases are categorized and classified across state jurisdictions. The goal of this research is

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Administrative Office of the U.S. Courts. The results of these comparisons are reported in the companion article to this one, which also presents all results of the coding project.

[85] In ninety-four percent of cases, all coders agreed as to the final disposition of the case. In ninety-one percent of cases, coders agreed as to the amount of damages paid, and in ninety-four percent of cases, coders agreed as to the amount of attorneys' fees paid. In comparison, Nielsen et al. achieved ninety-four percent inter-coder agreement as to case outcome in their study of federal employment litigation outcomes. Nielsen et al., *supra* note 21 at 182.

[86] Instead, these cases contained, variously, state wage and hour law claims, claims under the Family and Medical Leave Act, and arbitration-related issues.

[87] Thanks to Margo Schlanger for suggesting this strategy.

therefore more modest: to describe and analyze federal FLSA litigation only. Nevertheless, the lack of consistent access to state court records means that we may be missing some relational effect. For example, if news accounts are correct that California state courts have seen an extraordinary recent FLSA boom, then relatively low numbers of FLSA cases may appear in federal courts that are located in California, as state courts may be siphoning off FLSA litigation.[88] However, without the ability to compare state to federal FLSA case filings across the country, we are unable to investigate this possibility.

Despite these limitations, these data are valuable as the first of their kind to shed light on the possible reasons for the modern FLSA boom in federal courts and to allow description of the operation of FLSA litigation in federal court today.

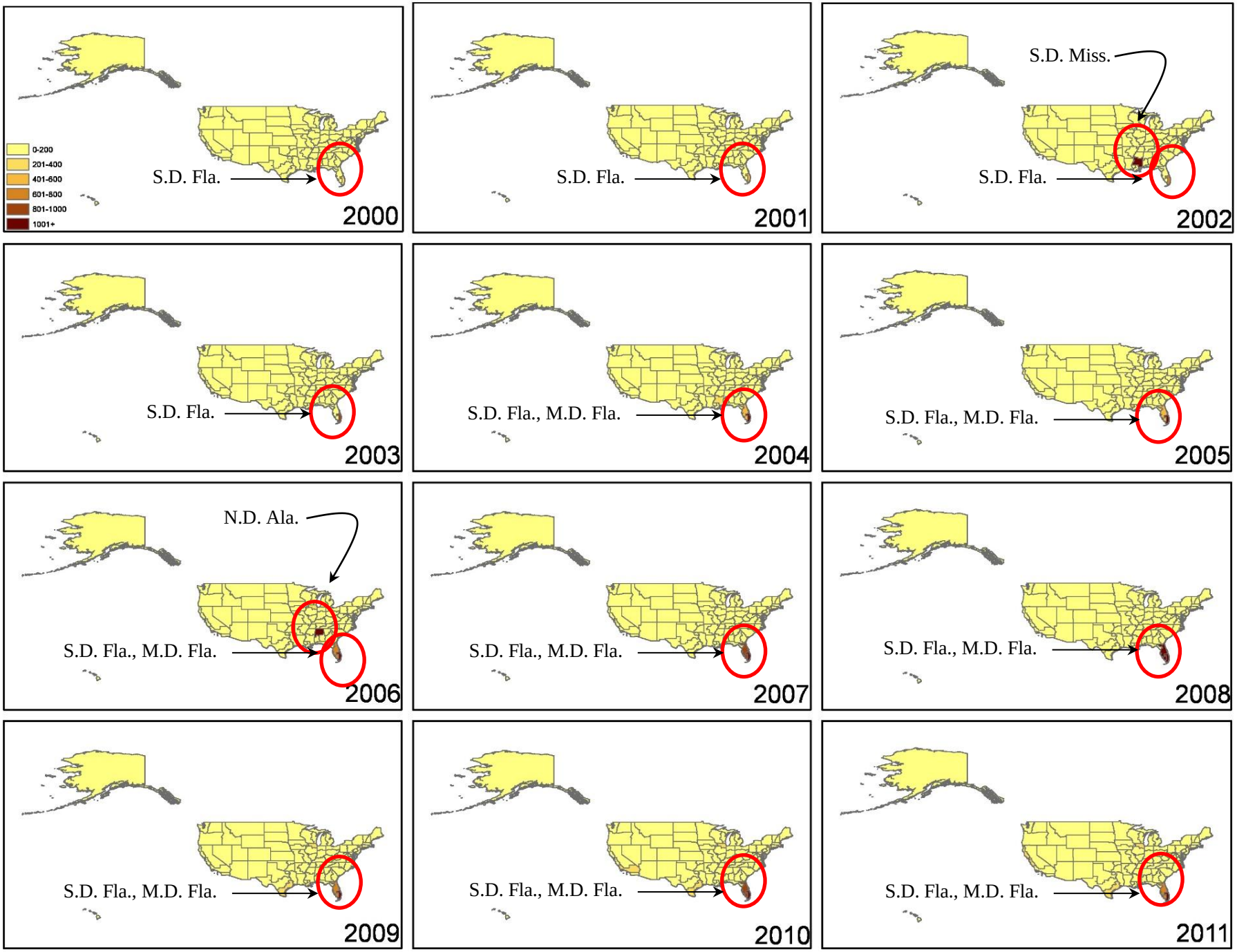
III. EXPLAINING THE MODERN FLSA BOOM

This part begins by taking a close look at the full set of case filing data to make some observations about the modern FLSA boom, and then discusses possible explanations.

As the graph in Figure 1 showed above, federal FLSA litigation began to rise in the year 1990 and continued to rise through 2015, with some peaks and valleys along the way. In fact, the modern FLSA boom has been quite heterogeneous. Figure 5 below maps the number of FLSA cases filed in each federal district court in each year in the study period. As the maps illustrate, the rise in FLSA litigation did not occur evenly spatially or temporally. Throughout the study period, first the Southern and then the Middle District of Florida accounted for substantial numbers of FLSA case filings, consistently outpacing nearly all other districts. Separately, the maps show short-term increases in other judicial districts, particularly in the Southern District of Mississippi in 2002 and the Northern District of Alabama in 2006. These are the same two large spikes that appeared in Figure 1 above in federal fiscal years 2003 and 2007.[89]

[88] Roberts, *supra* note 15 (discussing boom in wage and hour litigation in California state courts).
[89] The years are different due to the federal fiscal year designation, which spans two calendar years. *See* note 44, *supra*.

Figure 5: FLSA cases filed by U.S. district court, calendar years 2000-2011



These observations suggest that the modern FLSA boom actually consists of three distinct phenomena: (1) the overall rise, which began in 1990 but for which we have case-level data for the years 2000 through 2011; (2) the sustained high numbers of case filings in the Southern and Middle Districts of Florida; and (3) the short-term case filing spikes in Mississippi and Alabama, and, to a lesser extent, in other districts as well. The remainder of this part takes on these three phenomena in turn, beginning with the last and proceeding to the first.[90] First, however, we step back to construct a theory of the preconditions for FLSA case filing. Why might an FLSA case be filed at all, and why might the prerequisites for case filing be disproportionately present in certain districts and certain years?

A. The Preconditions for FLSA Case Filing

Drawing on previous empirical research on case filing patterns in other areas of law[91] and literature from political science on the drivers of litigation,[92] this article hypothesizes that an FLSA case is filed when three necessary conditions are met. First, there must be an apparent violation of the law. There does not have to be an actual FLSA violation for a lawsuit to be filed; a plaintiff's belief, even if inaccurate, that her employer has violated the law may be sufficient to spur litigation. Changes in the way that work is structured – when an employer switches from paying by the hour to paying by the piece, for example, or newly classifies a worker as exempt from overtime – may give rise to apparent FLSA violations. Likewise, changes to the law itself or to its interpretation by courts can render new fact patterns violations that were previously permissible.

However, violations do not always generate litigation. As David Weil and Amanda Pyles have put it, compliance and complaints do not always map fully onto one another.[93] Accordingly, second, a worker must have knowledge of her legal rights such that she can identify the violation, and the appropriate incentives must

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[90] Similarly, Donohue and Siegelman have observed with respect to employment discrimination case filing trends that "long-run growth in the volume of cases may be due to the steady increase in the population of 'protected workers' covered by antidiscrimination laws or to the gradual dissemination of information on how the law operates. Short-run fluctuations in the volume of cases might correspond to fluctuations in economic output—that is, to macroeconomic recessions and booms." Donohue & Siegelman, *supra* note 23 at 986-87; *id*. at 985 ("Any attempt to understand what determines the volume of employment discrimination litigation must distinguish between causes of long-run trend growth and causes of short-run fluctuations around this trend.").

[91] See note 24, *supra* (collecting studies). Donohue & Siegelman, *supra* note 23, was the most influential predecessor study in the development of this theory and analysis.

[92] *See* Jeff Yates, Belinda Creel Davis & Henry R. Glick, *The Politics of Torts: Explaining Litigation Rates in the American States*, 1 STATE POLITICS & POLICY QUARTERLY 127, 128 (2001) (citing "the relatively small, but insightful, [political science] literature that has sought to explain litigation patterns through extra-legal determinants" such as differences in social development and political culture across geographic areas).

[93] David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y. J. 59 (2005). In their similar study of trends in employment discrimination litigation in federal court, Donohue and Siegelman ask, "Can we attribute the increase to a broadening of plaintiffs' rights, or was it caused by exogenous socioeconomic factors such as the long run increase in unemployment rates?" Donohue & Siegelman, *supra* note 23 at 984.

be in place to encourage her to file suit.[94] Here, a *worker's* legal knowledge may not always be necessary, as an attorney's or government agency's legal knowledge may stand in for the worker's. Whereas the iconic image of legal representation portrays a wronged client seeking out a lawyer for help, the initiation of a lawsuit may in fact run in the opposite direction, with a lawyer identifying FLSA violations in a certain industry and seeking out workers willing to become plaintiffs. Likewise, the Department of Labor, through its strategic enforcement initiatives,[95] might identify high FLSA violation rates within a particular industry and take targeted investigative or enforcement action. In this sense, the lawyer's or the agency's legal knowledge substitutes for the plaintiff's.

Whatever the source of legal knowledge, however, the plaintiff's incentives must line up in a way that promotes litigation. The plaintiff must perform her own personal cost-benefit analysis, weighing the benefits of FLSA litigation (recovered back wages, reformed pay practices) against its costs (the time, effort, and money required to pursue a lawsuit or participate in a DOL enforcement action, along with possible job loss or other retaliatory consequences). A worker who has been laid off, for example, may have a greater incentive to sue her former employer or participate in an agency enforcement action, as she no longer risks retaliatory job loss and may see litigation as a potential income source.

Third, unless the worker chooses to proceed pro se or her case is taken on by the DOL or a nonprofit advocacy group (possibilities discussed further below), a private attorney must be available and willing to take the case. Here, the fee-shifting structure of the FLSA[96] may cause plaintiffs' and attorneys' incentives to align, such that factors that increase plaintiffs' incentives also increase lawyers' incentives to sue.[97] For instance, higher-paid workers might be more willing to sue

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[94] For an extensive discussion of legal knowledge and incentives, see XXXXX, *supra* note 37; *see also* Weil & Pyles, *supra* note 93 at 63 ("[T]he greater the divergence between the wages paid to a worker and the wages he or she is entitled to under the law . . . the more likely a worker is to exercise rights to initiate actions under the FLSA. . . In order to ascertain the magnitude of these benefits, workers must acquire information on the *current* and *legally permissible* level of a regulated outcome."); Steven L. Willborn, *Labor Enforcement Theory: The Case of Public vs. Private Enforcement* 8 (April 5, 2012), http://ssrn.com/abstract=2034893.

[95] David Weil, *Strategic Enforcement to Maximize Impact*, U.S. Dep't of Labor Blog (Oct. 31, 2014), available at https://blog.dol.gov/2014/10/31/strategic-enforcement-to-maximize-impact/.

[96] 29 U.S.C. § 215(a)(3) (making attorneys' fees available to prevailing plaintiffs under the FLSA).

[97] Courts in FLSA cases analyze plaintiffs' attorneys' fee petitions by taking the attorneys' hours of work as a starting point and increasing or decreasing the fee award based on factors including the plaintiffs' degree of success in the litigation. This method is often called the "lodestar" method. *See, e.g. Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 152 (2d Cir. 2008) (using the two-step lodestar methodology in an FLSA case; noting that "we are mindful of the Supreme Court's observation that 'the most critical factor' in a district court's determination of what constitutes reasonable attorney's fees in a given case 'is the degree of success obtained' by the plaintiff"); *Jackson v. Estelle's Place, LLC*, 391 Fed. Appx. 239 (4th Cir. 2010) (using lodestar method to assess FLSA fee award). For a critical view of the lodestar methodology, see Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 4 (1991) (arguing that the lodestar approach gives plaintiffs' attorneys an incentive to prolong litigation to increase their hours rather than settling at the most opportune time for plaintiffs); *see also* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 691 (1986)

than their lower-paid counterparts, as they stand to collect more money in back wages if they win the case. For the same reason, higher-paid plaintiffs may be more attractive clients to lawyers. In addition, lawyers may be more attracted on efficiency grounds to cases in which many workers' claims are combined into one collective action, asserting that one employer committed a common FLSA violation against many plaintiffs.

As an alternative to private attorney representation, a worker's FLSA claims may be litigated by the DOL or its state equivalents, or by a nonprofit advocacy group. Government lawyers are influenced by a different set of factors from those that influence private attorneys, including the enforcement priorities set by the agency as a whole,[98] budgetary considerations, and issues of political will.[99] Likewise, nonprofit advocacy groups may choose specific cases to litigate to further their mission around a particular issue or particular plaintiff population.[100]

These differences in incentives and goals make DOL cases and those brought by nonprofit plaintiffs' attorneys different in kind from those brought by private, for-profit plaintiffs' attorneys. However, these differences are ignored for purposes of this analysis, as government and nonprofit cases represent a small portion of FLSA litigation as a whole: of the 1,010 coded cases in this project, only twenty-four (two percent) and twenty-seven (three percent) were brought by government agencies and nonprofit groups, respectively. The graph in Figure 2 above also showed relatively few FLSA cases in which the U.S. was listed as plaintiff in comparison to those brought by private attorneys. Moreover, of the twenty-seven coded cases in which a nonprofit organization appeared, one or more private attorneys also appeared for the plaintiff in ten (thirty-seven percent), suggesting that many nonprofit attorneys' case representation decisions were also influenced by the private attorney factors identified above.

In this conception, therefore, there are three possible sets of variables that might produce heterogeneous FLSA case filing numbers across years and across districts or states: (1) those that influence the prevalence of perceived FLSA violations, either because of different underlying fact patterns or differences in the law; (2) those that influence plaintiffs' legal knowledge and incentives to sue; and (3) those that influence private attorneys' incentives to extend representation in FLSA cases.

("By severing the fee award from the settlement's size, [the lodestar] formula facilitates the ability of defendants and the plaintiff's attorneys to arrange collusive settlements that exchange a low recovery for a high fee award."); *but see* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006) (arguing that the Macey & Miller and Coffee critiques are misplaced).

[98] *See* Weil, *supra* note 95 (describing DOL's enforcement priorities).

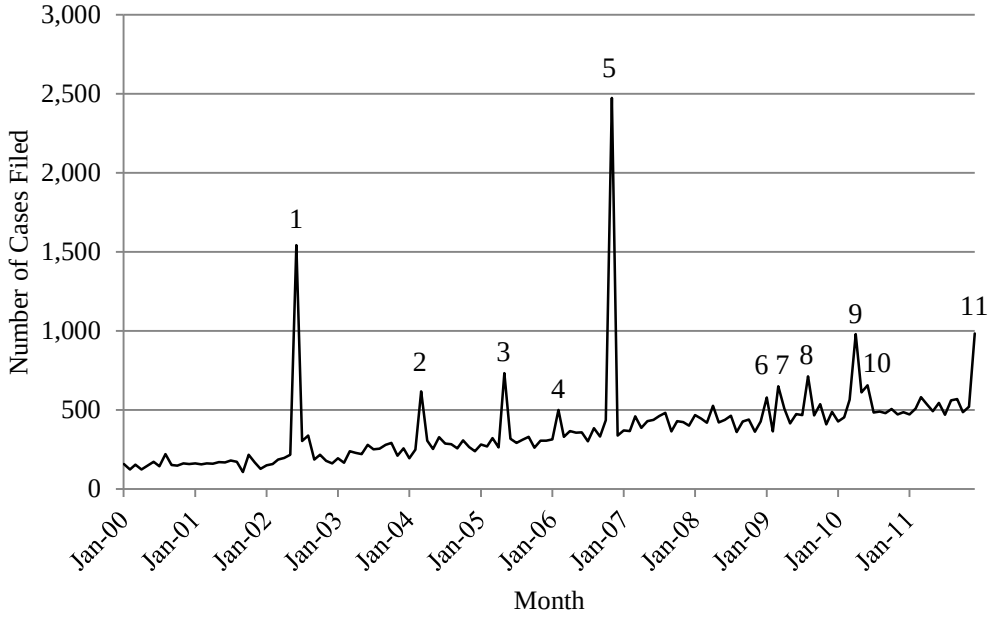
[99] *See generally*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (describing limitations and challenges of agency enforcement).

[100] *See, e.g.*, Georgia Legal Services Program Farmworker Rights Division, Wage Justice, available at https://georgiafarmworkerrights.wordpress.com/what-we-do/wage-justice/ (describing nonprofit organization's wage and hour advocacy on behalf of migrant farmworkers in Georgia).

B. Explaining the Spikes

With this framework in mind, we turn to the spikes evident on the graphs and maps above in Mississippi and Alabama in calendar years 2002 and 2006. The maps in Figure 5 above showed FLSA case filing by district court and year; the graph in Figure 6 below drills down to case filing by month. Figure 6, along with the explanatory table that follows, reveals that the Mississippi and Alabama spikes in fact occurred over periods of only three and two months, respectively. Moreover, those were only two of eleven extremely short duration case filing spikes that appear in the data set. This granular look at the data also reveals that large numbers of the cases in each spike were filed against the same defendant or small number of defendants – listed in the explanatory table that follows Figure 6.

Figure 6: FLSA cases filed in all U.S. district courts, calendar years 2000-2011, by month



KEY:

No.	*Time period*	*District(s)*	*Defendant(s)*	*FLSA cases filed against defendant(s)*	*Percent of all FLSA cases filed in time period*
1	June – August 2002	S.D. Miss.	48 Mississippi public school districts	1,545	71%
2	March 2004	S.D. Miss.	Lefleur (Tupelo)	292	47%
3	May 2005	M.D. La.	New Century Financial Corp.	420	57%
4	February 2006	D. Neb.	West	167	33%
5	October - November 2006	N.D. Ala.	Dolgencorp	2,198	79%
		D. Minn., N.D. Ill.	C.H. Robinson Worldwide	112	
6	January 2009	11 districts	Dolgencorp	183	32%
7	March 2009	10 districts	Dolgencorp	161	25%
8	August 2009	E.D. La.	Big Lots	205	29%
9	April-May 2010	41 districts	Dolgencorp	765	48%
10	June 2010	C.D. Cal.	County of Orange	125	19%
11	December 2011	N.D. Cal.	24 Hour Fitness	260	49%
		20 districts	Cases filed by 24 Hour Fitness to compel arbitration	226	

SOURCE: Author-compiled case filing statistics from PACER.

In fact, the data reveal that each of the eleven spikes was caused by the decertification of a large collective action that had previously been filed against a single defendant. As explained in Part I.A above, FLSA litigation that involves common allegations by more than one plaintiff against a single defendant may be certified preliminarily as a collective action, and then decertified after discovery if the plaintiffs are not, in fact, similarly situated.[101] After decertification, each plaintiff is free to re-file his or her case individually.

In the Northern District of Alabama spike in 2006 (number five above), for example, Dolgencorp, the parent corporation of deep discount retail chain Dollar General Stores, was initially sued in March 2002 by twelve assistant managers for

[101] Koch et al., *supra* note 11.

unpaid overtime.[102] The case was preliminarily certified as a collective action in January 2014, and then decertified in August 2006.[103] This resulted in the filing of 2,081 separate FLSA cases against Dolgencorp in the Northern District of Alabama on a single day, November 3 (with an additional 117 on the previous October 23), and the filing of 1,109 more individual cases in subsequent months across other judicial districts – represented above by spikes six, seven, and nine.[104]

The same pattern of decertification followed by mass individual case filing repeated itself in all other spikes except number eleven, which involved gym chain 24 Hour Fitness. There, following decertification, plaintiffs filed 260 individual FLSA cases against the defendant in December 2011.[105] However, 24 Hour Fitness itself also filed 226 separate actions that same month to compel those individual workers to arbitrate their FLSA claims, further contributing to the case filing spike.[106]

The role that decertification played in driving up FLSA case filing numbers points to a problem with using *cases* as the unit of analysis in projects such as these. A more accurate measure of FLSA litigation activity would be the number of *plaintiffs* who participate in litigation, because a single case appearing on a court's docket could represent a single plaintiff, or thousands. Moreover, the preconditions for FLSA case filing described above all operate at the level of *plaintiffs'* decision making around filing or participating in an FLSA lawsuit or enforcement action, not at the level of case filing.

However, we do not have plaintiff counts for the full set of 54,247 cases, and so cannot convert each case into its constituent number of plaintiffs. We can, however, aggregate the mass individual post-decertification lawsuits back into a single case each – thereby normalizing the case filing trend line. The graph in Figure 7 below does so.

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[102] Brown, et al v. Dollar Gen Stores, et al, Docket No. 7:02-cv-00673 (N.D. Ala., filed March 14, 2002).

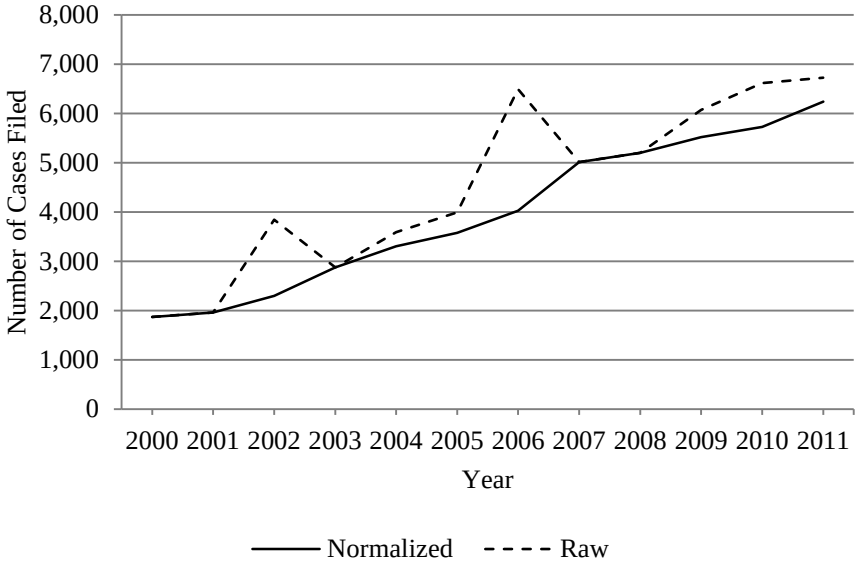
[103] *Id.* at Document 135, Order Certifying Class Action (Jan. 12, 2004); Document 707, Order Granting Motion to Decertify Class (Aug. 7, 2006).

[104] Author-compiled case filing statistics from PACER (on file with author).

[105] Beauperthuy v. 24 Hour Fitness USA, Inc., Case No. 3:06-cv-00715-SC, Document 428, Order Re: Motions to Decertify Conditional FLSA Classes (Feb. 24, 2011) (decertifying collective action and stating "All opt-in Plaintiffs are DISMISSED from this action without prejudice to each such opt-in Plaintiff filing a suit in his or her own behalf."); author-compiled case filing statistics from PACER (on file with author).

[106] *Id.*

Figure 7: FLSA cases filed in all U.S. district courts, calendar years 2000-2011, spikes normalized



SOURCE: Author-compiled case filing statistics from PACER.

This graph corrects for the disaggregation of the eleven large collective actions identified above, but not for other decertified collective actions that may be present in the data set but were too small to register as spikes on the maps or graphs.[107] Moreover, this graph continues to say nothing about plaintiff numbers, as it treats each FLSA case as a single unit, though we know that some cases, such as the Dolgencorp lawsuit, comprised thousands of individual plaintiffs. Nevertheless, Dolgencorp and its fellow large collective actions are likely anomalies: of the 1,010 coded cases in the sample, seventy-five percent listed only one plaintiff on the

[107] For example, though they do not appear as spikes above, the following defendants were each sued at least twenty-four times during the study period, an average of at least twice per year. Some of these repeat defendant cases were clustered in single time periods, suggesting that decertification was at work; others displayed no temporal pattern, suggesting perhaps just that large companies are sued relatively frequently.

Defendant	*Number of times sued in study period*
AT&T Mobility LLC	80
Tyson Foods, Inc.	57
KFC Corporation	48
Texas EZPawn, L.P.	42
Wells Fargo Bank, N.A.	41
Oak Street Mortgage, LLC	39
County of Los Angeles	30
LTD Financial Svcs.	27
Qwest Communications International Inc.	26
Farmers Insurance Exchange	25
San Villa Ship Management Co.	25

docket sheet.[108] A very rough one plaintiff-one case assumption may therefore be justified here on the basis of the super-majority of single-plaintiff FLSA cases in the coded sample.

The cases that comprise the eleven spikes should not be dismissed entirely, however, as they are interesting in their own right, and tie into the preconditions for FLSA litigation discussed above, particularly the discussion of attorney incentives. A closer look at the eleven spikes reveals patterns of concerted, targeted plaintiffs' attorney behavior: the filing of large FLSA collective actions by the same groups of attorneys against clusters of similar defendants. During the June-August 2002 period, for example (spike number one above) a group of plaintiffs' attorneys filed 1,545 separate FLSA cases against forty-eight different public school districts in the Southern District of Mississippi.[109] The underlying factual allegations in all cases were some variation on a common theme: plaintiffs had worked more than forty hours per week without being paid overtime, or had provided off-hour services to the schools for which they were not compensated.[110] This pattern suggests that the same set of plaintiffs' attorneys had discovered a common FLSA violation among a set of similar employers – here, the pay and overtime policies of Southern Mississippi school districts – and pursued targeted, serial litigation against those employers. In fact, the plaintiffs' attorneys in those cases formed a group called the School Overtime Litigation group, and news reports suggest the spread of FLSA litigation to other school districts around the country.[111]

The Dolgencorp litigation appears to have operated similarly. Whereas the very large October-November 2006 spike was concentrated geographically in the Northern District of Alabama, the later spikes were geographically diverse, occurring across eleven, ten, and then forty-one separate judicial districts during the same short time periods. These later cases were filed by many of the same plaintiffs' attorneys listed on the Alabama Dolgencorp lawsuits, but were now targeting different entities within the Dolgencorp corporate structure: Dolgencorp of Texas, for example.[112] Moreover, some of the same plaintiffs' attorneys went on to bring very similar FLSA cases seeking unpaid overtime on behalf of assistant managers against another deep discount retail store, Dollar Tree, again pointing to a concerted targeting strategy.[113]

Further, it is notable that, of the eleven spikes identified above, five occurred in districts in the Deep South: in the Northern District of Alabama, two districts in

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[108] The maximum plaintiff count was 16,703; this and other high values drove the mean, or average, up to twenty-nine plaintiffs per case.

[109] Author-compiled case filing statistics from PACER (on file with author).

[110] Laura Smith, *Working Overtime*, 16.5 Athletic Management (August/September 2004), available at http://www.momentummedia.com/articles/am/am1605/overtime.htm (describing fact patterns in school FLSA cases).

[111] Ice Miller, *Department of Labor Issues New Guidance Concerning Employees Who Volunteer For Their Employer* (2005), available at http://www.icemiller.com/enewsletter/bulletins/volunteer_services.htm ("A group of plaintiffs' attorneys called the School Litigation Group has filed multi-plaintiff FLSA lawsuits against public schools in 10 states through the south, including Mississippi. Recently, multi-plaintiff FLSA lawsuits have been filed or threatened against schools in Ohio, Illinois and Kentucky.").

[112] Author-compiled case filing statistics from PACER (on file with author).

[113] *Id.*

Louisiana, and twice in the Southern District of Mississippi. On the one hand, these courts might perform a particularly lenient preliminary collective action certification inquiry, or use a particularly searching decertification standard, resulting in a greater number of decertifications observed there than elsewhere. However, a search of the law review and case law literature reveals no obvious evidence of such a difference.[114] Alternatively, plaintiffs' lawyers with large, nationwide FLSA collective actions might have chosen to file them disproportionately in the Deep South in the first place. This latter theory is supported by other observations about jury awards in the Deep South, and in Mississippi in particular, which has become known for its "proliferation of lawsuits and . . . huge verdicts and settlements."[115]

Thus, plaintiffs' attorneys' targeting behavior and case-siting decisions speak to the role of attorney incentives in driving case filing trends. When attorneys can realize efficiencies by identifying similar pay practice violations across similar clusters of defendants, they may be motivated to seek out workers who have experienced such violations. This, in turn, drives up case filing rates. And those case filings may occur disproportionately in jurisdictions that the attorneys judge likely to produce favorable results for the plaintiffs and, by extension, for the attorneys themselves.

To conclude, the multiple, short-duration spikes exhibited by the FLSA case filing trend line are a result of the decertification of large collective actions, combined with strategic targeting decisions by plaintiffs' attorneys. Even without decertification's influence, however, federal FLSA litigation would still have increased over the study period. As Figure 7 above showed, even the normalized trend line rose from just under 2,000 cases filed in 2000 to over 6,000 cases filed in 2011 – an increase of over 200 percent.

We turn, then, to Florida.

C. Explaining Florida

As the maps in Figure 5 showed above, the study period was characterized by sustained, high levels of FLSA litigation first in the Southern and then in the Middle District of Florida. Table 1 below provides more detail about those two Florida districts' dominance. The table lists the top ten district courts by number of FLSA cases filed during the study period. Together, the Southern and Middle Districts of Florida accounted for over one-third of all federal FLSA case filings in the years 2000 through 2011. Five of the other district courts that appear among the top ten were also "spike" jurisdictions; their high case filing numbers can be explained by decertification, as noted above. Yet case filing in Florida was not a result of decertification: there were no large clusters of repeat defendants in either the Southern or Middle District during the study period.

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[114] One commentary, for example, discusses the varied certification standards adopted by different courts, but does not single out certain circuits as being more or less lenient. Koch et al., *supra* note 11.

[115] David W. Clark, *Life in Lawsuit Central: An Over-View of the Unique Aspects of Mississippi's Civil Justice System*, 71 MISS. L.J. 359, 360 (2001).

Table 1: Top ten U.S. district courts by number of FLSA cases filed, calendar years 2000-2011

U.S. District Court	*Number of FLSA cases*	*Percent of all FLSA cases*
Florida (S.D.)	12,145	22.4%
Florida (M.D.)	6,212	11.5%
Alabama (N.D.)	2,991	5.5%
New York (S.D.)	2,560	4.7%
Mississippi (S.D.)	2,249	4.1%
New York (E.D.)	2,074	3.8%
Illinois (N.D.)	2,059	3.8%
Texas (S.D.)	1,886	3.5%
California (C.D.)	1,417	2.6%
California (N.D.)	1,245	2.3%

SOURCE: Author-compiled case filing statistics from PACER.

Table 2, in turn, lists the number of FLSA cases filed per 100,000 people in each judicial district. This method accounts for differences in the underlying populations of districts, as one would expect more populous districts to generate more litigation.[116] Here again, the Southern District of Florida dominates, with 190 federal FLSA cases filed per 100,000 people. Four other high districts are also "spike" jurisdictions,[117] and two of the remaining districts are themselves quite small – the Northern Mariana Islands and the District of Columbia – meaning that each FLSA case filed there had a large impact on per capita rankings. Finally, the Southern District of New York appears on the list – this is the district that encompasses Manhattan, and is one of the busiest in the country for all litigation types.[118]

[116] *See, e.g.*, Sullivan et al., *supra* note 24at 818 n. 88 (1994) (explaining rationale for reporting case filing figures per 100,000 people: "The facts that districts differ in population size and that population size changed between 1970 and 1990 are irrelevant here because bankruptcy filings are expressed relative to population size, and changes in size are included by using denominators from the decennial census.").

[117] These are the Southern District of Mississippi, the Northern District of Alabama, and the Eastern and Middle Districts of Alabama.

[118] Jed S. Rakoff, *The Court of Courts*, THE NEW YORK REVIEW OF BOOKS (June 19, 2014), available at http://www.nybooks.com/articles/2014/06/19/southern-district-court/ ("[T]he Southern District [of New York] is, with fifty sitting judges, the largest and busiest federal trial court in the country[.]").

Table 2: Top ten U.S. district courts by number of FLSA cases filed per 100,000 people, calendar years 2000-2011

U.S. District Court	*Number of FLSA cases*	*FLSA cases per 100,000 people*
Florida (S.D.)	12,145	190
Northern Mariana Islands	95	149
Mississippi (S.D.)	2,249	125
Alabama (N.D.)	2,991	112
Louisiana (M.D.)	549	74
Florida (M.D.)	6,212	66
New York (S.D.	2,560	51
District of Columbia	237	41
Louisiana (E.D.)	470	29
New York (E.D.)	2,074	26

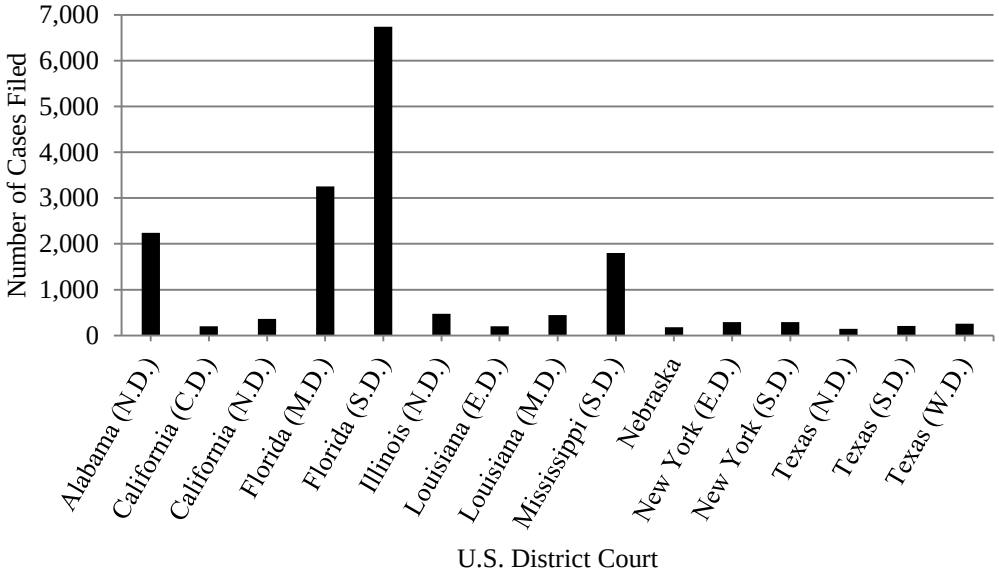
SOURCE: Author-compiled case filing statistics from PACER; TRACFed, TRACExpress, Community Context, Federal Judicial District Population Statistics.[119]

Thus, FLSA case filing in these two Florida districts is both high as an absolute matter and high relative to the districts' populations. Unlike the spike districts that appear in Tables 1 and 2, the Florida districts' presence cannot be explained by decertification. Instead, Florida's sustained FLSA dominance appears, again, to be a result of plaintiff attorney behavior.

A closer look at the FLSA cases filed in Florida reveals large numbers of repeat player plaintiffs' attorneys, defined here as those who filed at least twenty-four cases during the entire study period (or an average of at least two FLSA cases per year). The graph in Figure 8 below illustrates this, listing the top fifteen district courts by number of FLSA cases brought by repeat player plaintiffs' attorneys. In fact, the totals shown in Figure 8 are probably undercounts: because of differences in the way that attorneys' names are listed on court dockets, "Susan B. Anthony" and "Susan Brownell Anthony" would register as different attorneys in this analysis, resulting in an undercount of that lawyer's total appearances. Yet even if the repeat player numbers in Figure 8 are low, Florida's dominance is still striking. Repeat player plaintiffs' lawyers in the Southern District of Florida alone accounted for over twelve percent of cases in the entire data set, i.e. over twelve percent of all FLSA cases filed nationwide from 2000 through 2011. Middle District of Florida repeat player plaintiffs' attorneys accounted for another six percent of the entire FLSA data set.

[119] The only population statistics available for federal judicial districts report population for federal fiscal years 2000 through 2009. The per 100,000 people figures above were calculated by averaging each district's population for 2000 through 2009, dividing the number of FLSA cases filed by that figure, and then multiplying the results by 100,000.

Figure 8: Top fifteen U.S. district courts by number of FLSA cases filed by repeat plaintiffs' attorneys, calendar years 2000-2011



SOURCE: Author-compiled case filing statistics from PACER.

As Figure 8 shows, the only other jurisdictions that approached Florida in terms of repeat player attorney behavior were the familiar Mississippi and Alabama pair. However, plaintiffs' attorney behavior in those two districts was different from that in the Southern and Middle Districts of Florida. As explained above, small groups of attorneys in Mississippi and Alabama targeted similar sets of defendants such as public school districts and dollar stores with large FLSA collective actions. In contrast, the Florida attorneys in the study period maintained high volume caseloads that spanned employer types, blanketing Florida employers with large numbers of individual, small-dollar FLSA cases.[120]

This phenomenon did not escape the notice of the federal judiciary in Florida. Judge Kenneth Ryskamp of the Southern District, for example, berated a plaintiffs' firm in open court in 2008 for its role in filing large numbers of FLSA cases, calling FLSA litigation a "problem" that had "gotten out of hand," and labeling the statute "just a lawyer's retirement bill."[121] In later sanctions proceedings against the same plaintiffs' firm in a different FLSA case, Judge Ryskamp commented, "It is clear that the volume of cases in the Southern District is attorney-driven."[122] These comments point, again, to the role of plaintiffs' lawyers in driving litigation trends. In this view, as in the view expressed in the introduction, aggressive plaintiffs'

[120] Author-compiled case filing statistics from PACER (on file with author); *see also* XXXXX, *supra* note 18 (analyzing Florida attorneys' FLSA caseloads).

[121] Guttentag v. Abercrombie & Fitch Stores, Inc., Case 9:09-cv-80160-JIC, Document 15-2 (March 27, 2009) (citing and attaching transcript in Hamm v. TBC Corp., Case No. 07-808-29-CIV-RYSKAMP, which quoted Judge Ryskamp).

[122] Leigh Kamping-Carder, *11th Circ. OKs Sanctions Against Shavitz In FLSA Suit*, Law360 (Aug. 26, 2009), available at http://www.law360.com/articles/118585/11th-circ-oks-sanctions-against-shavitz-in-flsa-suit.

attorneys in Florida have "discovered" the FLSA as a reliable source of attorneys' fees. This discovery appears to have occurred first in the Southern District and then moved to the neighboring Middle District; indeed, many of the same repeat player plaintiffs' attorneys appear on cases filed in both jurisdictions.

However, the fact that many more repeat player plaintiffs' attorneys were operating in Florida than elsewhere does not necessarily mean that these lawyers were *causing* the FLSA boom in those districts. Instead, the causal arrow could be reversed: plaintiffs' attorneys could have been *responding* to greater plaintiff demand in Florida rather than creating that demand themselves. In other words, might there have been more FLSA violations, more plaintiff-friendly interpretations of the law, and more knowledgeable and incentivized workers in Florida – all of the non-attorney factors identified above as preconditions for FLSA litigation?

Some of these preconditions can be measured by proxy. The rate of FLSA violations may be influenced by the strength of a state's economy, as employers in financial straits may seek to reduce labor costs by falling out of compliance with the FLSA. In states with a lower gross domestic product (a measure of economic activity), then, we might expect to see higher FLSA violation rates. In addition, the DOL has identified a set of industries in which FLSA violations occur most frequently; states with more workers employed in those violator industries would be expected to exhibit higher FLSA case filing numbers.[123]

As for geographical differences in the application of the law, though the FLSA is a federal statute, different circuit courts may have interpreted the law differently during the years covered by the study period, influencing plaintiffs' case filing decisions in their jurisdictions. This would not seem to explain Florida, however, as the other states in the Eleventh Circuit (Alabama and Georgia) did not display similarly high levels of case filing year after year in the study period.

Turning to state-level differences in workers' legal knowledge and incentives to sue, we can measure the size of each state's labor force as a percentage of its population as an indication of the number of potential FLSA plaintiffs in the state. Further, a state's union density might function as a proxy for legal knowledge, as unions are hypothesized to educate workers about their rights on the job.[124] With respect to workers' incentives to sue, those in states with a higher median wage might be more willing to sue than those in lower wage states, as the former category of workers could collect more in back pay than their lower wage counterparts. Higher wages have also been found to correlate with greater legal knowledge.[125] A final state-level variable that might affect workers' incentives to sue is the unemployment rate. As suggested above, unemployment might be positively

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[123] David Weil, *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division* (May 2010) at 2 (listing industries).

[124] However, the unionization effect might be mixed, as unionized workers might actually generate fewer FLSA lawsuits than their non-union counterparts because the union grievance procedure might resolve disputes that would otherwise make their way to court. This possibility is discussed further in Part III.D, *infra*.

[125] XXXXX, *supra* note 37.

correlated with FLSA case filings, as unemployed workers do not fear retaliatory job loss and may see a lawsuit as a possible income source.[126]

To test whether these factors were disproportionately present in Florida during the study period, we can design a regression that identifies correlations between the number of FLSA cases filed in each state and the set of economic and demographic explanatory or predictor variables described above.[127] If Florida case filing numbers were driven by factors such as higher underlying violation rates or more knowledgeable and incentivized plaintiffs, then the litigation levels predicted by the regression should roughly match the actual levels observed in Florida. If there is a mismatch, then some additional factor or factors were likely driving Florida FLSA case filing– perhaps, as Judge Ryskamp suggested, extremely high levels of repeat player attorney behavior.

Importantly, this analysis is far from exact, as other researchers have cautioned in undertaking similar projects. Instead, it "represents an extremely rough attempt to assess the sources of growth in litigation," and should be viewed as "an extended 'back-of-the-envelope' calculation" rather than a definitive statement on the reasons for the distribution of FLSA litigation across states.[128]

Given this caveat, the graphs in Figure 9 below show as a dashed line the number of FLSA cases filed in Florida, Alabama, and Mississippi over the 2000-2011 study period that were predicted by the regression, i.e. predicted as a result of each state's economic and demographic characteristics. The solid line represents the actual number of FLSA cases filed. As the Alabama and Mississippi graphs show, the regression does a fairly good job of predicting FLSA case filing numbers, except for the large spikes. This is because the regression does not account for mass post-decertification case filing. Yet though the spikes deviate from prediction, we are able to explain them, as in Part III.B above, via a close look at the data.

The Florida graph is another matter. There, the actual line exceeds the predicted line by substantial margins throughout the study period, meaning that the economic

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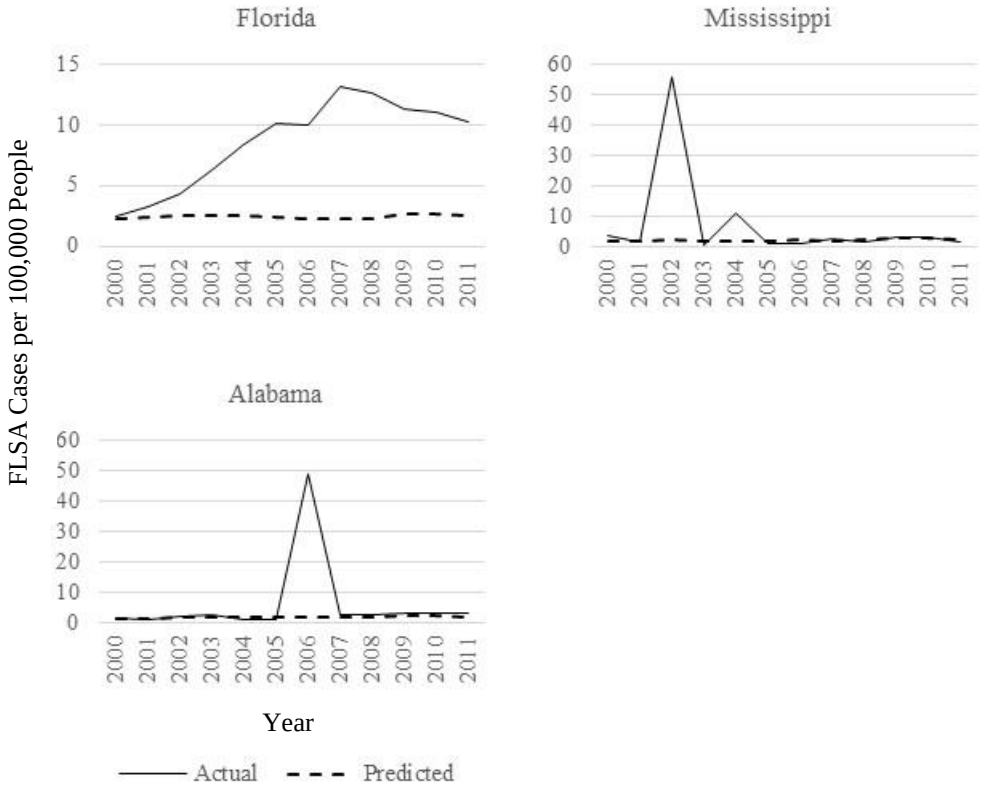
[126] Donohue & Siegelman, *supra* note 23 at 990 (discussing influence of unemployment rate on employment discrimination case filing numbers). Conversely, however, workers who have jobs in high unemployment states may be less likely to sue, as they might fear retaliatory job loss during a time of scarcity.

[127] JEFFREY M. WOOLRIDGE, INTRODUCTORY ECONOMETRICS: A MODERN APPROACH at 68 (4e edition 2009) (explaining multiple regression analysis as allowing the researcher to "explicitly control for many other factors that simultaneously affect the dependent variable"). Specifically, the regression equation can be expressed as $F_{sy} = C_0 + \beta\chi_{sy1} \ldots \beta\chi_{syp} + \varepsilon_{sy,}$ where F_{sy} stands for the number of cases filed per state, per year, C_0 is the constant, $\beta\chi_{sy1} \ldots \beta\chi_{syp}$ represent the collection of predictor variables listed above, and ε_{sy} is the error term, or the residual that is left unexplained by the model. The full regression results appear in Appendix B. This regression explains the variability in FLSA case filings quite poorly, accounting for only about five percent of the difference in FLSA case filing across states and years. Moreover, the effect sizes shown in the regression were quite small, meaning that those variables that were shown to be correlated positively or negatively with FLSA case filing were only very weakly correlated. These observations, along with the graphs in Figure 9, suggest that some variable or variables other than economic and demographic factors are driving FLSA case filing in Florida.

[128] Donohue & Siegelman, *supra* note 23 at 988

and demographic variables included in the regression did not perform well in predicting Florida's FLSA case filing numbers.

Figure 9: FLSA cases in U.S. district courts in selected states per 100,000 people, calendar years 2000-2011, actual versus predicted values



SOURCE: Author-compiled case filing statistics from PACER.

Thus, these graphs suggest that underlying economic and demographic factors would predict a much lower level of litigation than that actually observed in Florida. High volume, repeat player plaintiffs' attorneys are likely the reason for the discrepancy. In fact, the peak number of cases filed by repeat player plaintiffs' attorneys occurred in 2007, the same year that the "actual" case filing line peaked on the Florida graph above in Figure 9.

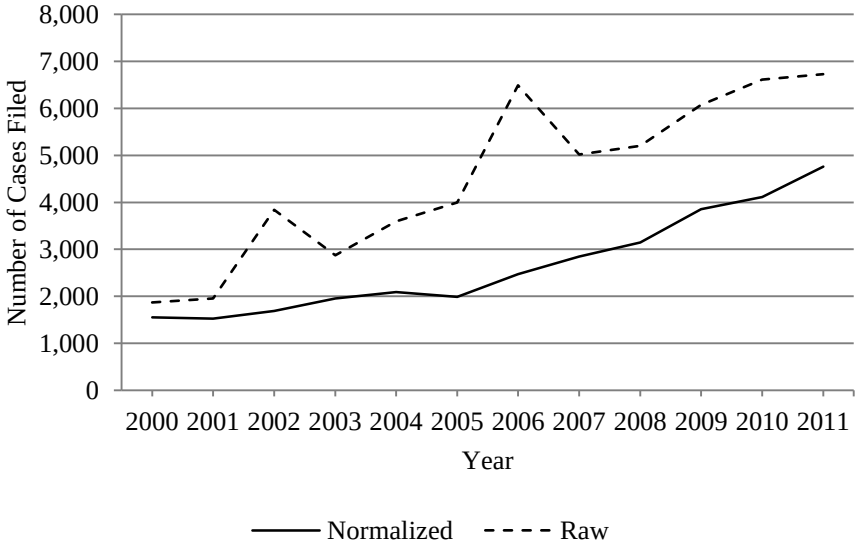
However, these observations leave key mechanism questions unanswered. If a handful of repeat player plaintiffs' attorneys are the reason for Florida's federal FLSA dominance, why? Why and how did Florida attorneys "discover" the FLSA early in the study period, while lawyers in other states did not? Are Florida plaintiffs' lawyers anomalous in some way that is not being captured by these data?

Relatedly, why did FLSA case filing appear to spread from the Southern to the Middle District of Florida during the study period, but not beyond? One interesting note here is that, while these two Florida districts were among the only ones with repeat player plaintiffs' attorneys early in the study period, by 2011, repeat player

plaintiffs' attorneys were operating in thirteen different districts outside of Florida. This suggests that, over time, more plaintiffs' attorneys outside Florida were becoming FLSA specialists and may have adopted the same repeat player approach, but were not litigating with enough volume to register on the maps and graphs presented here. Ongoing research by the author on attorney networks as drivers of litigation may begin to answer some of these mechanism questions, investigating the repeat player phenomenon in Florida and across judicial districts.

As with the litigation spikes noted in the previous section, then, we might view the Southern and Middle Districts of Florida as anomalies due to the unusually high repeat player behavior of the plaintiffs' attorneys practicing there. If we normalize the Florida districts' case filing numbers by replacing them with case filing totals from similar districts,[129] the FLSA case filing trend line for 2000-2011 appears as in Figure 10 below. We can then see that Florida alone does not explain the modern FLSA boom. Indeed, even with Florida normalized and the absolute number of FLSA cases filed reduced, FLSA case filing still increased by over 200 percent during the study period.[130] The next section catalogs possible explanations for this overall rise.

Figure 10: FLSA cases filed in all U.S. district courts, calendar years 2000-2011, Southern and Middle Districts of Florida normalized



SOURCE: Author-compiled case filing statistics from PACER.

D. Explaining the Overall Rise

Having explored the reasons for FLSA case filing spikes and the concentration of FLSA lawsuits in Florida, we now take on the overall rise in FLSA case filing over the course of the study period. This part performs some of the same analyses

[129] The Southern District of Florida was replaced with the Northern District of Texas, and the Middle District of Florida with the Northern District of Illinois.
[130] Cases filed increased from 1,551 to 4,760.

performed above with respect to Florida, examining the various economic and demographic factors that might have produced an increase in FLSA case filing over time. Instead of focusing on geographic differences in those factors, however, we hold geography constant, to examine the United States as a whole and consider variations over time instead. Thus, following the theory set out at the beginning of this part, we examine factors that might have influenced FLSA violation levels over time; changes in the law, its regulations, and its interpretation by courts; changes in workers' legal knowledge and incentives to sue; and changes in private attorneys' case selection decisions. Specifically, we consider changes over the 2000-2011 period in the size of the labor force and the number of workers employed by violator industries, gross domestic product (GDP), union membership, and the unemployment rate. We also consider statutory, regulatory, and case law changes to the FLSA's coverage during the study period. The expected influence of each of these variables on FLSA case filing numbers was explained above in the Florida discussion.

To this list we add three more variables: the number of lawyers over time; the federal minimum wage rate over time; and the number of employment discrimination case filings over time.[131] First, an increase in lawyers over time might be expected to correspond with an increase in case filings, either because increased litigation demand produces more lawyers, or because more lawyers gin up increased litigation demand. Second, a rising federal minimum wage would be expected to push up FLSA case filing numbers as well, as employers might fall out of compliance with the higher required wage rate, and the higher potential back pay awards might entice more workers to sue.

Third, a decrease in the number of employment discrimination case filings might be associated with a rise in FLSA cases. As the trend lines in Figure 3 showed at the outset of this article, the number of employment discrimination cases filed in federal court began to fall in the early 1990s, at around the same time that FLSA cases began to rise. Of course, the trend lines themselves do not prove that one phenomenon caused the other. However, in attorney interviews conducted in other work by this author with XXXXX and XXXXX, experienced employment attorneys identified what they saw as a shift by the plaintiffs' employment bar away from discrimination cases and toward FLSA cases.[132] These attorneys hypothesized that, as the federal courts have become more hostile to plaintiffs asserting claims under Title VII of the Civil Rights Act of 1964, lawyers have sought out replacement claims, and have turned to the FLSA. The FLSA is seen as relatively more attractive due to its lack of a subjective intent requirement and the

[131] The federal minimum wage variable was not included in the Florida analysis as an explanatory or predictor variable because it did not vary by state. The lawyer and employment discrimination variables were not included because lawyer effects were purposely removed from that analysis, to test whether case filing rates could be explained by non-lawyer economic and demographic variables.

[132] XXXXX et al., *supra* note 18 (quoting multiple plaintiffs' and defendants' employment lawyers about the shift); *see also* Roberts, *supra* note 15 ("[E]mployment discrimination attorneys 'have morphed' into wage and hour attorneys over the last few years."). *See also* Segal, *supra* note 1 (suggesting that personal injury lawyers have also switched to FLSA cases).

ease of litigating cases that are "largely proven with an employer's own records."[133] Accordingly, one might expect FLSA cases to rise as Title VII cases fall, as a result of attorney-driven spillover from one case type to the other.

Figure 11, then, sets out the changes in each of these variables over the 2000-2011 study period, indexed to a common starting point of 100 in the year 2000. Changes in the law that might have triggered an increase in FLSA case filing are indicated with numbers on the graph and explained in the table that follows.[134] The FLSA case filing numbers used here are the normalized ones, with the influence of spikes and Florida removed. As with the regression analyses performed above, this graph should be taken with a large grain of proverbial salt – it, again, represents only "an extended 'back-of-the-envelope' calculation."[135] A more precise attempt to divine the reasons for the overall rise in FLSA case filing nationwide would account for interactions and lags, for example, as the variables presented here surely acted differently in concert than alone, and the effects of their changes would not have been observable instantaneously in the case filing numbers.

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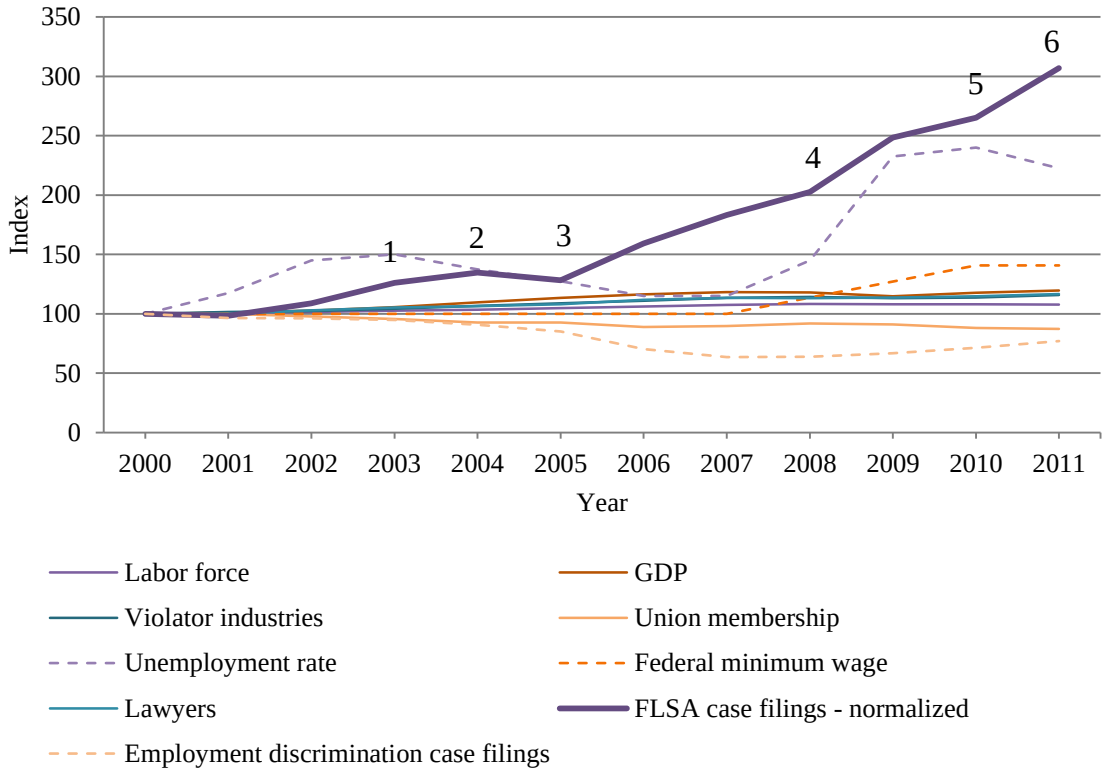
[133] XXXXX et al., *supra* note 18.

[134] Statutory and regulatory changes and case law that would seem to benefit defendants rather than plaintiffs have been excluded from the table. This includes the Worker Economic Opportunity Act of 2000, P.L. 106-202, which excluded certain stock and premium payments from the calculation of a worker's regular rate of pay for overtime purposes; Christensen v. Harris County, 529 U.S. 576 (2000), which allowed employers to compel workers to use their compensatory time in lieu of overtime pay; the Consolidated Appropriations Act of 2004, P.L. 108-199, which permitted minors to engage in woodworking; and Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007), which deemed home companionship service providers employed by third party agencies exempt from the FLSA.

[135] Donohue & Siegelman, *supra* note 23 at 988

Figure 11: FLSA cases filed in all U.S. District Courts and other trends, calendar years 2000-2011, index, 2000 = 100



KEY:

No.	*Date*	*Legal change*	*Expected impact on FLSA case filing*
1	May 18, 2003	Supreme Court allowed removal of FLSA cases from state to federal court.[136]	Small increase
2	August 23, 2004	DOL regulations expanded white collar workers' overtime eligibility.[137]	Large increase

[136] Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691 (2003).

[137] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22260 (April 23, 2004) (to be codified at 29 CFR Part 541) (effective Aug. 23, 2004) (estimating that "[b]ecause of the increased salary level, overtime protection will be strengthened for more than 6.7 million salaried workers").

No.	*Date*	*Legal change*	*Expected impact on FLSA case filing*
3	August 19, 2005	Federal statute extended overtime eligibility to light weight truck drivers and related workers.[138]	Small increase
	November 8, 2005	Supreme Court deemed some of the time that meat and poultry processing workers spent donning and doffing protective gear and walking to their work stations compensable.[139]	Small increase
4	June 6, 2008	Federal statute confirmed extension of overtime eligibility to light weight truck drivers and related workers.[140]	Small increase
5	March 23, 2010	Federal statute required paid break times for nursing mothers to pump breast milk.[141]	Small increase
6	March 22, 2011	Supreme Court allowed FLSA retaliation claims to proceed on the basis of an oral, rather than written, complaint.[142]	Small increase

SOURCES: U.S. Dep't of Labor, Bureau of Labor Statistics, Employment Status of the Civilian Noninstitutional Population (labor force and unemployment rate); St. Louis Fed, Federal Reserve Economic Data (GDP); U.S. Dep't of Labor, Bureau of Labor Statistics, Employment, Hours, and Earnings from the Current Employment Statistics Survey (violator industries); U.S. Dep't of Labor, Bureau of Labor Statistics, Current Population Survey, Union Affiliation Data (union membership); U.S. Dep't of Labor, Wage and Hour Division, Minimum Wage (federal minimum wage); U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Employment Statistics (lawyers); Author-compiled case filing statistics from PACER (FLSA case filings – normalized); Administrative Office of the U.S. Courts, Statistics and Reports, Table C-2 (employment discrimination case filings).

[138] Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users (SAFETEA-LU), P.L. 109-59 (2005).

[139] IBP v Alvarez, 546 U.S. 21 (2005).

[140] Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users Technical Corrections Act of 2008, P.L. 110-244; *see also* U.S. Dep't of Labor, Wage and Hour Division, Field Assistance Bulletin No. 2010-2 (Nov. 4, 2010), available at https://www.dol.gov/whd/fieldbulletins/fab2010_2.htm (explaining interaction between SAFETEA-LU, the Technical Corrections Act, and the FLSA).

[141] Patient Protection And Affordable Care Act, P.L. 111-148.

[142] Kasten v. Saint Gobain Performance Plastics Corp., 563 U.S. 1 (2011).

Of the co-occurring trends displayed on the graph, many displayed little change during the study period. Interestingly, the effects of the Great Recession on the GDP, which displayed a dip in and around 2009, do not seem to explain the FLSA increase.[143] Three trends, however, displayed changes that appear loosely correlated with the normalized FLSA case filing trend line: unemployment rate (positive correlation), the federal minimum wage (positive correlation), and federal employment discrimination case filings (negative correlation). Though these observations and their directions square with intuition, more research is needed to determine whether the hypotheses presented above about the possible influence of unemployment, the minimum wage, and discrimination case filings on FLSA litigation are correct.[144]

In addition, the union density line on the graph dipped somewhat over the study period, while the FLSA line rose. This negative correlation, though very slight, runs contrary to the predictions of theory, which hold that declining unionization would result in a less knowledgeable workforce, less able to litigate to enforce the FLSA. Yet perhaps unionization has a different effect. It is possible that unionized workers resort to the internal union grievance process when a wage and hour dispute arises, rather than to the courts. Therefore, lower union density would produce more, not less, FLSA case filing. Again, however, this conclusion is highly speculative, as the trend lines displayed on the graph can only suggest correlation, not causation.

One more note is warranted about the instances of legal change listed in the table in Figure 11. Recall that the FLSA boom of the late 1940s was heavily

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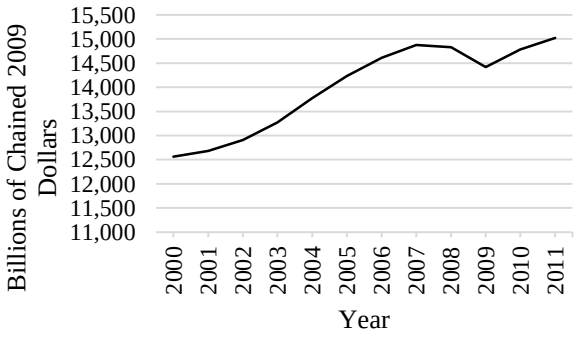
[143] The non-indexed real GDP trend line appears below:



SOURCE: St. Louis Fed, Federal Reserve Economic Data, Real Gross Domestic Product, Billions of Chained 2009 Dollars, Annual, Not Seasonally Adjusted.

[144] The discrimination spillover theory might also explain the Florida effect noted above: if Florida courts were especially hostile to discrimination lawsuits during the study period, then one might expect more spillover to occur into the FLSA case category. Future research is taking on this question, constructing a measure of judicial hostility to Title VII cases and testing its influence across time and judicial districts on FLSA case filing numbers. An ongoing data collection project is also attempting to document numbers of plaintiffs' lawyers who previously handled Title VII cases and who have shifted their practice to FLSA litigation. *See, e.g.*, *FLSA Litigator Q&A: David Borgen Discusses Supreme Court's* Christopher v. GlaxoSmithKline *Ruling, Implications for FLSA Litigation*, BLOOMBERG BNA, Oct. 1, 2012 (quoting plaintiffs' attorney, "When I first came to the firm [in 1990], all of my time was spent on Title VII class actions. We started our wage/hour practice in 1997, and within a year, it swallowed up 100 percent of my professional work time.").

influenced by the Supreme Court's *Mt. Clemens* decision: the case filing trend line on Figure 1 at the outset of this article exhibited a sharp increase directly after that decision expanded workers' FLSA rights. In contrast, the regulations, Supreme Court decisions, and statutory changes noted on the chart above do not appear to have had a similar dramatic, immediate effect. The change that could potentially have affected the greatest number of workers – the 2004 white collar overtime regulations – was not followed by a spike in case filing in the same way that *Mt. Clemens* was. However, the gradual rise between 2004 and 2015 following an initial dip might be attributed to increasing numbers of white collar workers bringing overtime lawsuits who were previously excluded from coverage. It is possible that workers' knowledge of their new rights increased gradually over this time, along with their increased incentive to sue to claim their new overtime pay. The sample of 1,010 coded cases – analyzed in a companion, forthcoming article – should shed light on this question, as coders recorded both the plaintiffs' occupation and the type of FLSA claim they brought.

Finally, apart from the potential influences on FLSA case filing that are recorded on the graph in Figure 11, there are other possible reasons that FLSA litigation might have increased during the study period. These are not readily susceptible to measurement, however, and so are discussed here, but omitted from the graph above.

First, some have hypothesized that changes in the labor market have produced a misfit between work as it is currently structured and the FLSA.[145] Jobs in the new "gig economy," for example, which are often part-time and short-term with little path for advancement, hardly resemble the job of the past, with long-term security and stable working hours.[146] Relatedly, others have suggested that the FLSA has become unsuited to today's new boundary-less workplace, in which technology enables work to be performed nearly anywhere, at any time.[147] The mismatch between the decades-old FLSA, with its foundational assumptions of a relatively stable "work week" and clearly bounded work and leisure time, may thus generate litigation.[148]

A second phenomenon that is not captured by the graph above is the snowball or contagion effect. Indeed, the FLSA litigation boom may have created its own momentum, a form of "claim contagion" of the type identified by Harold Gardner, Nathan Kleinman, and Richard Butler in their work on the spread of workers' compensation and FMLA claims across workplaces.[149] As more FLSA cases are

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[145] As a proxy for this effect, we could measure the number of workers per state who reported working from home, a rough stand-in for workers whose jobs do not fit the traditional notion of employment. However, these statistics, from the U.S. Census Bureau's American Community Survey, are only available from 2005 onward. U.S. Census Bureau, History, American Community Survey, available at https://www.census.gov/history/www/programs/demographic/american_community_survey.html.

[146] *See, e.g.*, ARNE L. KALLEBERG, GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S TO 2000S (2012) (chronicling changes in structure and quality of work).

[147] *See* sources cited at note 17, *supra*.

[148] XXXXX (discussing mis-fit between the FLSA and the way work is structured today).

[149] Gardner et al., *supra* note 24.

filed, more workers learn about their rights under the law; legal knowledge is "spread" in a viral fashion. Therefore, one would expect to see two types of FLSA contagion: (1) states' FLSA case filing totals should increase month by month; and (2) litigation should spread out geographically from FLSA hotbed or node states as legal knowledge is passed through media coverage and workers' social networks. These same effects might also influence plaintiffs' attorneys to begin taking on FLSA cases – a version of the "discovery" narrative advanced at the outset of this article.

Hints of a contagion or snowball effect were present in Florida, as high levels of FLSA litigation seemed to spread from the Southern to the Middle District. It is curious that the spread seemed to stop there, however, though it is possible that a longer study period, through 2015, would evidence more of a geographical creep. Likewise, the fact that more repeat player FLSA attorneys appeared in later years in states other than Florida suggests some sort of snowball effect, as additional lawyers got wind of the potential for attorneys' fee collections in FLSA litigation. Ongoing research on the operation of attorney networks is exploring these possibilities.

Finally, though cases brought by the DOL were few compared to those brought by private plaintiffs during the study period, there is the possibility that private litigation followed DOL litigation in a "piggy back" fashion. Other scholars have noted this phenomenon in the securities litigation context, observing increases in private lawsuits following enforcement action by the Securities and Exchange Commission.[150] By the same token, it is possible that an additional driver of the FLSA boom was DOL enforcement action, and private lawyers' later, follow-on lawsuits against those or similar defendants. In fact, the FLSA may lend itself particularly well to this sort of litigation pattern due to its opt in collective action structure. Only those plaintiffs who choose to join an FLSA collective action are bound by its result. As a result, if the DOL sues a defendant in the construction industry, a private attorney might sue another, similar construction defendant, alleging the same pattern of wage and hour violations uncovered by the DOL lawsuit. Another private attorney might then sue the same defendant again, representing those plaintiffs who did not opt into the first private action, or might sue yet another construction defendant, alleging the same or similar pattern of violations. This scenario is similar to the targeted litigation strategy discussed above in Part III.B, except that it is prompted by DOL litigation in the first instance.

Thus, whereas the FLSA case filing wave of the late 1940s centered on a single legal dispute over the compensability of workers' portal-to-portal transit time and was driven at least in part by unions' role as representative plaintiffs, there are likely multiple different, overlapping explanations for the modern FLSA boom. Though the data analyzed here cannot pick a "winner" among these theories – which, in any case, are not mutually exclusive – they can identify the reasons for anomalies within the data (spikes, Florida) and begin to shed some light on the possible causes of the long-term increase.

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[150] *See, e.g.* Gilles & Friedman, *supra* note 97 at 157 n.201 (collecting citations regarding piggyback securities lawsuits brought by private plaintiffs after an SEC enforcement action).

IV. IMPLICATIONS

The language of upheaval and cataclysm in this article's first sentence presupposes that the modern wage and hour litigation boom is necessarily a bad thing. However, one's view of the increase in FLSA case filing probably depends on whether one is generally aligned with plaintiffs or defendants in employment disputes. Indeed, all of the authors cited in that first sentence appear to be writing from an employer's perspective, describing FLSA litigation as viewed from the defendant's side. The analyses presented in this article might also contribute to this negative normative view of FLSA litigation, as they lay some of the responsibility for the case filing increase at the feet of profit-maximizing plaintiffs' attorneys.

If it appears that lawyers' interests are trumping plaintiffs' interests in FLSA cases, then there may be reason for concern.[151] And there is certainly reason for concern when single district courts are tasked with handling such a high volume of litigation, stretching judicial resources and likely causing processing delays across all case types.

However, other research has established that actual FLSA violations are widespread across states and across industries.[152] Even defendants' lawyers recognize the "low hanging fruit" nature of FLSA cases, acknowledging that even many sophisticated employers are out of compliance in some way.[153] If this is true, then the Florida repeat player plaintiffs' attorneys and the strategic attorneys in Mississippi and Alabama were not, after all, *creating* demand for FLSA litigation, as they were not conjuring up nonexistent FLSA violations out of thin air. Instead, they were capitalizing on what appears to be broad noncompliance by employers, and doing so to a much greater extent than their counterparts elsewhere. Seen in this light, plaintiffs' attorneys begin to look something like zealous traffic cops, ticketing any driver who exceeds the speed limit, rather than granting the customary nine mile per hour cushion over the posted speed. And many, many employers were being caught speeding.

Thus, those employers who protest against the FLSA litigation boom would appear actually to be protesting against the underlying statute. Admittedly, it may

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[151] *See, e.g.*, Macey & Miller, *supra* note 94 at 4 (identifying ways in which attorneys are incentivized to prolong litigation to increase their hours rather than settling at the most opportune time for plaintiffs); *see also* Coffee *supra* note 94 at 691 (warning against collusive settlements that benefit both parties' attorneys at the expense of their clients); XXXXX, *supra* note 18 (discussing ways in which plaintiffs' attorneys' interests might diverge from plaintiffs' in FLSA cases).

[152] *See, e.g.*, KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT (2011) (asserting that "billions of dollars worth of wages are stolen from millions of workers in the United States every year"); Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Biggest Cities* (2009) (surveying over 4,300 low-wage workers in New York, Chicago, and Los Angeles; finding that twenty-six percent of workers had not been paid the minimum wage in the workweek prior to the survey and seventy-six percent had not been paid required overtime in the previous workweek).

[153] XXXXX et al., *supra* note 18 (quoting attorney on advantages of the FLSA); Roberts, *supra* note 15 ("The FLSA is 'essentially counterintuitive legislation,' in that lots of practices that are violations are not apparent to employers. . . . Even 'sophisticated employers' make mistakes when it comes to applying the act[.]").

be time to revisit the FLSA to take into account the substantial changes in the structure of work that have occurred since the law was passed in 1938. However, amending the statute with the primary goal of reducing employers' litigation burden seems to be the wrong approach. Instead, the goal of such a project should be to come closer to Congress' original stated purpose in 1938: to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and [the] general well-being of workers."[154]

V. CONCLUSION

This article represents the first systematic empirical investigation of modern federal wage and hour litigation. This research has uncovered two types of anomalies within the overall upward trend in FLSA case filing: short-term case filing spikes caused by collective action decertification and targeted plaintiff attorney behavior, and the sustained dominance of the Southern and Middle Districts of Florida throughout the 2000-2011 study period, seemingly attributable to repeat player plaintiffs' attorneys. A forthcoming companion article investigates the outcomes of FLSA lawsuits rather than their filing; other future work explores the role of attorney networks in driving case filing rates and the possibility that attorneys are replacing Title VII cases with FLSA ones.

Absent some intervention by Congress, the FLSA case filing boom seems likely to continue. The DOL restricted overtime exemptions in May 2016, extending FLSA coverage to approximately 4.2 million new workers.[155] The DOL's Wage and Hour Division has ramped up its strategic enforcement efforts in recent years, collecting over $175.5 million in back overtime and minimum wages in fiscal year 2015, up from $133.1 million in 2009, and pledging to continue apace.[156] The Supreme Court, as Justice Thomas noted, recently issued a decision that upheld plaintiffs' use of representative evidence to prove collective actions, thereby facilitating workers' ability to engage in group litigation.[157] And increasing activism around raising the minimum wage has likely directed more workers' and plaintiffs' attorneys' attention to wage and hour issues.[158] Beneath all of these changes is the shifting sand of what constitutes "employment" today, as the structure of work continues to adapt and change, while the FLSA's central provisions remain largely the same.[159] Whether Congress steps in, as it did with the Portal to Portal Act of 1947, remains to be seen. In the meantime, all signs point to a continued rise in FLSA litigation, and the growing importance of wage and hour law in the workplace and in the courts.

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[154] FLSA, 29 U.S.C. § 202.

[155] U.S. Dep't of Labor, Feature: The Overtime Rule, available at https://www.dol.gov/featured/overtime.

[156] U.S. Dep't of Labor, Wage and Hour Division, Statistics, Fair Labor Standards Act Enforcement Statistics, available at https://www.dol.gov/whd/statistics/statstables.htm.

[157] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 381 (2016).

[158] *See, e.g.,* Raise the Minimum Wage, available at http://www.raisetheminimumwage.com/.

[159] XXXXX, *supra* note 138 at 695-96.

APPENDIX A

Selected Case Filing Data, All U.S. District Courts, Federal Fiscal Years 1941-2015

Federal Fiscal Year	*All civil*	*FLSA - total*	*FLSA - U.S. as plaintiff*	*FLSA-private plaintiffs*	*Employment discrimination*	*Injury, health, safety*	*Labor*	*ERISA, FMLA, other*
1941	28,909	2,522	1,706	816	-	100	0	196
1942	38,140	2,311	1,249	1,062	-	127	0	73
1943	36,789	1,532	588	944	-	226	0	58
1944	38,499	1,148	484	664	-	324	19	32
1945	60,965	1,081	458	623	-	414	10	28
1946	67,835	1,524	358	1,166	-	669	15	34
1947	58,956	3,772	243	1,290	-	803	34	86
1948	46,725	1,062	266	752	-	1,038	34	150
1949	53,421	642	364	265	-	944	29	218
1950	54,622	583	337	241	-	1,085	49	179
1951	51,600	763	511	239	-	1,133	34	163
1952	58,428	749	524	223	-	1,233	36	114
1953	64,001	863	645	218	-	1,319	224	108
1954	59,461	563	380	183	-	1,284	253	103
1955	59,375	644	491	153	-	1,367	227	78
1956	62,394	626	497	129	-	1,332	175	105
1957	62,380	1,014	840	174	-	1,365	180	88
1958	67,115	1,215	996	219	-	1,402	307	81
1959	57,800	1,290	1,081	209	-	1,178	328	157
1960	59,284	1,436	1,206	230	-	1,096	390	189
1961	58,293	1,554	1,260	294	-	1,114	902	28
1962	61,836	1,565	1,252	313	-	1,074	1,963	11
1963	63,630	1,756	1,376	380	-	1,057	1,019	29
1964	66,930	1,916	1,436	480	-	1,123	1,251	20
1965	67,678	1,806	1,269	537	-	1,073	1,282	17
1966	70,906	2,075	1,459	616	-	1,050	244	5
1967	70,961	2,256	1,608	648	-	976	226	1

Federal Fiscal Year	*All civil*	*FLSA - total*	*FLSA - U.S. as plaintiff*	*FLSA- private plaintiffs*	*Employment discrimination*	*Injury, health, safety*	*Labor*	*ERISA, FMLA, other*
1968	71,449	2,073	1,529	544	-	1,074	1,429	16
1969	77,193	2,164	1,686	478	-	1,233	1,454	13
1970	87,321	2,180	1,721	459	-	1,272	1,751	72
1971	93,396	2,182	1,686	496	-	1,353	2,432	49
1972	96,173	2,195	1,700	495	-	1,391	2,739	53
1973	98,560	1,840	1,454	386	-	1,164	2,953	68
1974	103,530	1,898	1,505	393	-	1,202	3,314	188
1975	117,320	1,836	1,316	520	-	1,243	4,317	454
1976	130,597	2,014	1,401	613	5,321	1,639	4,454	1,275
1977	130,567	1,990	1,356	634	5,931	1,603	4,313	1,436
1978	138,770	1,678	1,160	518	5,504	1,883	4,140	1,643
1979	154,666	1,706	1,148	558	5,477	1,800	4,601	2,097
1980	168,789	1,897	1,378	519	5,017	2,180	4,363	2,380
1981	180,576	1,762	1,153	609	6,245	2,134	4,540	2,998
1982	206,193	1,527	939	588	7,689	2,234	4,716	3,986
1983	250,855	1,368	753	615	9,614	2,148	4,735	5,163
1984	259,956	1,449	768	681	9,163	2,048	4,219	6,087
1985	279,965	1,288	655	633	8,308	2,357	4,036	6,702
1986	246,733	1,428	646	782	9,309	2,719	4,320	7,123
1987	236,727	1,436	658	778	8,880	2,478	3,645	7,593
1988	240,821	1,390	631	759	8,601	2,514	3,131	8,165
1989	226,285	1,381	618	763	8,878	2,808	2,883	9,243
1990	217,013	1,257	522	735	8,273	2,761	2,634	10,177
1991	210,890	1,328	467	861	8,370	2,588	2,351	11,238
1992	230,509	1,464	399	1,065	10,771	3,308	2,556	12,374
1993	229,850	1,457	333	1,124	12,962	2,218	2,350	12,010
1994	236,391	1,545	270	1,275	15,965	2,141	2,458	11,659
1995	248,285	1,580	213	1,367	19,059	1,936	2,317	11,057
1996	269,132	1,558	168	1,390	23,152	2,252	2,263	11,252
1997	272,027	1,633	143	1,490	23,796	1,963	2,277	11,598
1998	256,787	1,562	150	1,412	23,735	1,640	2,009	11,079
1999	260,271	1,717	199	1,518	22,490	1,274	2,051	10,604

Federal Fiscal Year	*All civil*	*FLSA - total*	*FLSA - U.S. as plaintiff*	*FLSA- private plaintiffs*	*Employment discrimination*	*Injury, health, safety*	*Labor*	*ERISA, FMLA, other*
2000	262,548	1,935	149	1,786	21,928	1,169	2,011	10,518
2001	254,523	1,961	147	1,814	21,152	1,026	1,701	10,893
2002	265,091	2,035	123	1,912	21,117	1,024	1,682	12,145
2003	256,858	4,055	140	3,915	20,782	951	1,776	12,611
2004	255,851	3,426	148	3,278	19,912	919	1,870	13,034
2005	278,712	3,464	115	3,349	18,689	783	1,981	12,705
2006	244,068	4,389	145	4,244	15,408	683	1,523	11,690
2007	278,272	6,786	150	6,636	13,943	666	1,323	10,621
2008	245,427	5,302	133	5,169	13,994	549	1,196	9,982
2009	258,535	5,644	110	5,534	14,636	560	1,181	10,302
2010	282,307	6,081	147	5,934	15,654	485	1,224	10,587
2011	294,336	7,008	132	6,876	16,879	446	1,222	10,510
2012	285,260	7,064	173	6,891	17,136	469	1,369	10,168
2013	271,950	7,764	199	7,565	16,098	408	1,002	9,168
2014	303,820	8,126	226	7,900	14,187	329	939	8,387
2015	281,608	8,070	158	7,912	14,338	292	776	8,680

SOURCE: Administrative Office of the U.S. Courts, Statistics and Reports, Table C-2 (1944-2015), Table 6 (1943), Table 7 (1942), Table 4 (1941), available at http://www.uscourts.gov/statistics-reports and on file with author.

NOTES:
Cases denoted "employment discrimination" come from the Administrative Office of the U.S. Courts' "civil rights-employment" and "civil rights- ADA- employment" categories. The Administrative Office began recording civil rights-employment statistics separately from civil rights cases generally in 1976. Prior to 1976, there was a general "civil rights" category, which presumably captured cases filed under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1875, and other civil rights legislation. Pre-1976 cases are excluded here, however, because it is impossible to identify which cases concerned discrimination in employment as opposed to public accommodations, voting, education and other civil rights matters. In 2007, the Administrative Office created a new sub-category called "civil rights- ADA – employment" to capture cases filed under the Americans with Disabilities Act of 1990. These ADA employment discrimination cases are added back to the "civil rights-employment" cases to create a single "employment discrimination" category used in this article.

Cases denoted "injury, health, safety" arose under the Employer's Liability Act of 1908, which compensates railroad workers for their injuries and under the Occupational Safety and Health Act's forfeiture and penalty provisions.

Cases denoted "labor" arose under the Labor-Management Relations Act of 1947, the Labor Management Reporting and Disclosure Act of 1959, and the Railway Labor Act of 1926. All three statutes govern the operation of unions and their relations with management.

Cases denoted "ERISA, FMLA, other" arose under the Employee Retirement Income Security Act of 1974, which regulates private employer-provided pension and health plans; the Family and Medical Leave Act of 1993, which gives employees the right to up to twelve weeks of unpaid leave after a qualified family or medical event; the Welfare Pension Plan Disclosure Act of 1958, which was a predecessor to ERISA; and wage claims by maritime workers that arise under admiralty law. This category also includes cases designated as "other labor litigation" by the Administrative Office.

In addition to the pre-1976 civil rights cases described in the first note above, two categories of cases could be included in the totals listed above, but were omitted due to concerns about over-inclusivity. The Administrative Office's tables capture contract actions that arise under diversity jurisdiction. Though some of these case filings were likely disputes arising out of employment contracts, they are omitted because those particular contract cases are impossible to identify. Likewise, the Administrative Office's tables list a category for marine personal injuries. Early tables identify cases specifically as arising under the Jones Act of 1920, which concerns workers injured while working at sea, but later tables discard the specific Jones Act designation in favor of a category called "personal injury/product liability – marine." Again, it is unclear whether these personal injuries arise from an employment relationship at sea or some other context. As a result, they are omitted from the "injury, health, safety" category listed in this table and used in this article.

APPENDIX B

Regression Results

Variable	*Coefficient*	*Standard Error*	*95% Interval*	*Confidence*
State labor force	-.0001512*	.0000595	-.0002681	-.0000343
State GDP	9.38E-12*	4.37e-12	8.04e-13	1.80e-11
Employees of violator industries in state	.0001325*	.0000624	9.95e-06	.0002551
State union density	-.0000535*	.0000264	-.0001053	-1.57e-06
State unemployment rate	.0001061	.0000689	-.0000292	.0002414
State median income	-2.45e-10	2.13e-10	-6.62e-10	1.73e-10

NOTES: $N = 612$; $*p < 0.05$; $R^2 = 0.0460$. Following Epstein and Martin, this article uses a single asterisk to denote significance at the .05 level. EPSTEIN & MARTIN (2014), *supra* note 79 at 283; *see also* WOOLRIDGE, *supra* note 127 at 135-36 (discussing statistical significance and choice of significance levels).