
2010

Intended and Unintended Consequences: The 2006 Fair Minimum Wage Amendment of the Ohio Constitution

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Recommended Citation

Jason R. Bristol, Ashley A. Weaver, and Thomas A. Downie, *Intended and Unintended Consequences: The 2006 Fair Minimum Wage Amendment of the Ohio Constitution*, 58 Clev. St. L. Rev. 367 (2010) available at <https://engagedscholarship.csuohio.edu/clevstrev/vol58/iss2/6>

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INTENDED AND UNINTENDED CONSEQUENCES: THE 2006 FAIR MINIMUM WAGE AMENDMENT OF THE OHIO CONSTITUTION

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On November 7, 2006, Ohio voters approved State Issue 2—the Ohio Fair Minimum Wage Amendment—an amendment to the Ohio Constitution altering the state’s minimum wage laws.¹ The Fair Minimum Wage Amendment was intended to provide additional protections for, and rights to, Ohio workers. The changes included an increase in the Ohio minimum wage to \$6.85 per hour beginning January 1, 2007 together with guaranteed future increases.² The Amendment also explicitly defined the term “employee,” identified the exclusive exemptions to be applied to this definition, and imposed new record-keeping requirements on Ohio employers.³ Finally, the Amendment set forth when an employee may file suit for a violation of the Amendment and what damages may be recovered.⁴

Significantly, the Amendment was written to be self-executing, such that no action was required by the Ohio General Assembly to implement the protections provided by the Amendment. This ensured that Ohio workers would receive the protections they voted for without relying on legislative action. Nonetheless, legislative action, while not required, was permitted, so long as such action was only to “implement” the provisions of the Amendment or to “create additional remedies.”⁵ The Fair Minimum Wage Amendment explicitly prohibits laws “restricting any provision” of the Amendment.⁶ However, the Ohio General Assembly did exactly that.

On January 2, 2007, outgoing Governor Bob Taft signed into law House Bill 690, proposed by then-Representative Bill Seitz (now in the Ohio Senate).⁷ HB 690 purported to implement the specific requirements of the Fair Minimum Wage

¹ OHIO CONST. art. II, § 34a.

² *Id.* Future increases are ensured by the Amendment’s mandate that “[o]n the thirtieth day of each September, beginning in 2007, this state minimum wage rate shall be increased effective the first day of the following January by the rate of inflation for the twelve month period prior to that September according to the consumer price index or its successor index for all urban wage earners and clerical workers for all items as calculated by the federal government rounded to the nearest five cents.” *Id.*

³ *Id.* The Amendment provides that “employee” and certain other terms are to have “the same meanings as under the federal Fair Labor Standards Act,” and that “[o]nly the exemptions set forth in this section shall apply.” As to record keeping, the Amendment states that employers “shall maintain a record of the name, address, occupation, pay rate, hours worked for each day worked and each amount paid an employee for a period of not less than three years following the last date the employee was employed,” and “upon request,” that information “shall be provided without charge to an employee or person acting on behalf of an employee.” *Id.*

⁴ For a more detailed discussion of the provisions of the Amendment, see text accompanying notes 78-99 *infra*.

⁵ OHIO CONST. art. II, § 34a.

⁶ *Id.* The Amendment specifies that “[l]aws may be passed to implement its provisions and create additional remedies, increase the minimum wage rate and extend the coverage of the section, but in no manner restricting any provision of the section.” This specification, and its apparent violation by the legislation enacted to “implement” the Amendment’s protections, are discussed further in the text accompanying notes 99-106 *infra*.

⁷ 2006 Ohio Laws File 184 (Am Sub. H.B. 690), Ohio 2006 Session Law Service, 126th General Assembly (Thomson/West 2007).

Amendment by amending Ohio Revised Code §§ 4111.01-4111.10 and adding § 4111.14.⁸ Embedded in those revisions of Ohio's minimum wage laws, however, were a number of requirements not prescribed by the Amendment and which were arguably in conflict with the provisions authorized by Ohio voters. Whether or not these restrictions on the rights of Ohio workers were intended, they pose both a threat to the fidelity of our system of government—in that the legislature has attempted to trump the supremacy of the state Constitution and the will of the voters—and a thorn in the side of attorneys who practice in this area.

This Article first provides a brief overview of federal and Ohio minimum wage law. The Article then examines the text of the 2006 Amendment. The third section delves into the provisions of HB 690 and the differences between HB 690 and the Amendment. The final section explores litigation issues arising from these differences.

I. FEDERAL AND STATE WAGE-AND-HOUR LAWS

A. Historical Development of Wage-and-Hour Laws

The concept of a “minimum wage” is not one that easily took root in the United States. Massachusetts enacted the first minimum wage law in 1912,⁹ but the law covered only women and children and even then was not compulsory because the state's minimum wage commission “could only recommend minimum-wage rates that would provide a living wage.”¹⁰ Within eight years, at least thirteen states had passed minimum wage laws,¹¹ and in 1918 Congress enacted a law “providing for the fixing of minimum wages for women and children in the District of Columbia.”¹² However, in 1923, the U.S. Supreme Court struck down the District of Columbia legislation as unconstitutional in *Adkins v. Children's Hospital*.¹³ In a decision later described as “a classic of laissez-faire philosophy,”¹⁴ the Supreme Court found that the statute “is simply and exclusively a price-fixing law” that “forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment.”¹⁵ The Great Depression began to change those feelings.

⁸ *Id.* at § 1.

⁹ William P. Quigley, *Full-Time Workers Should Not Be Poor: The Living Wage Movement*, 70 Miss. L.J. 889, 905 (2001) [hereinafter Quigley, *Full-Time Workers Should Not be Poor*].

¹⁰ William P. Quigley, “A Fair Day's Pay For A Fair Day's Work”: *Time To Raise and Index the Minimum Wage*, 27 ST. MARY'S L.J. 513, 516 (1996) [hereinafter “Quigley, A Fair Day's Pay”].

¹¹ *Id.*

¹² *Adkins v. Children's Hosp.*, 261 U.S. 525, 539 (1923), discussed in note 15 *infra*.

¹³ *Id.*

¹⁴ Quigley, *A Fair Day's Pay*, *supra* note 10, at 520 (quoting John W. Chambers, *The Big Switch: Justice Roberts and the Minimum-Wage Cases*, 10 LAB. HIST. 44, 47 (1969)).

¹⁵ *Adkins*, 261 U.S. at 554-55. Justice Sutherland wrote that “[t]he feature of this statute, which perhaps more than any other, puts upon it the stamp of invalidity, is that it exacts from

The first attempt at establishing a national minimum wage came in 1933 when a \$0.25 per hour standard was set as part of the National Industrial Recovery Act.¹⁶ Once again, in the 1935 case of *Schechter Poultry Corp. v. United States*,¹⁷ the Supreme Court declared the act unconstitutional,¹⁸ and the minimum wage was abolished amidst concerns that employers could not afford to pay higher wages during the economic turmoil of the time.¹⁹ Finally, a nationwide minimum wage was established in 1938 with the enactment of the Fair Labor Standards Act.²⁰

B. The Fair Labor Standards Act

The Fair Labor Standards Act²¹ (“FLSA”) requires employers engaged in interstate commerce to pay a minimum wage,²² as well as overtime pay,²³ in

the employer an arbitrary payment,” the “declared basis” of which was “the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals.” *Id.* at 558.

¹⁶ Act of June 16, 1933, ch. 90, 48 Stat. 195, 196 (codified at 15 U.S.C. § 703 (2009)). The Act authorized the President to promulgate a “Live Poultry Code” for that industry. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 523 (1935). The Code approved by President Roosevelt on April 13, 1934 established a minimum wage of fifty cents per hour, a maximum workweek of forty hours, and the right of employees to select a union and engage in collective bargaining. *Id.* at 524. The Act even required a minimum complement of employees in slaughterhouses, “the number being graduated according to the average volume of weekly sales.” *Id.*

¹⁷ *Schechter Poultry*, 295 U.S. at 549-51.

¹⁸ The Court held that the Act unconstitutionally delegated legislative power to the President “to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.” *Id.* at 537-38. Specifically addressing the wage and hour provisions, the Court found that “persons employed in slaughtering and selling in local trade are not employed in interstate commerce” and “[t]heir wages and hours have no direct relation to interstate commerce.” *Id.* at 548. The Court’s view that regulating wages and hours exceeded the reach of the Commerce Power was summarized in its prophetic observation that

[i]f the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the State over its domestic concerns would exist only by sufferance of the federal government.

Id. at 546.

¹⁹ Opposition to wage-and-hour legislation came from such divergent groups as national business lobbies and the American Federation of Labor, as well as from Southern Democrats who wanted “North-South wage differentials to prevent increases in agricultural labor costs and industrial prices.” Quigley, *A Fair Day’s Pay*, *supra* note 10, at 528 (quoting JAMES M. BURNS, CONGRESS ON TRIAL: THE LEGISLATIVE PROCESS AND THE ADMINISTRATIVE STATE 77-78 (1949)).

²⁰ Pub. L. No. 75-718, ch. 676, 52 Stat. 1060 (1938) (codified at 29 U.S.C. ch. 8 (2009)).

²¹ 29 U.S.C. § 201, *et seq.*

²² 29 U.S.C. § 206.

²³ 29 U.S.C. § 207.

specified circumstances. The remedies for violations of the FLSA include compensatory damages, liquidated damages, and attorneys' fees.²⁴

1. Enforcement by the Department of Labor

Congress empowered the U.S. Department of Labor ("DOL") to interpret and enforce the FLSA.²⁵ The DOL is comprised of several divisions and seven major program agencies.²⁶ The primary DOL office for FLSA enforcement is the Wage and Hour Division ("WHD"), which is part of the Employment Standards Administration ("ESA").²⁷ The WHD is responsible for enforcing the FLSA's requirements on the minimum wage, overtime pay, recordkeeping, youth employment, as well as various other workplace laws.²⁸

The DOL promulgates rules and publishes interpretations of the FLSA in Volume 29 of the Code of Federal Regulations. These rules and interpretations are given different weight depending on the situations to which they apply, but are often given great weight by courts when construing provisions of the FLSA.²⁹ The DOL also issues opinion letters in response to fact-specific inquiries regarding compliance with the Act.³⁰ These opinion letters do not have the status of law with penalties for non-compliance, but they can have legal significance. Under the Portal to Portal Act of 1947, a defense to a back wage claim may exist if the employer can show reliance

²⁴ 29 U.S.C. § 216(b).

²⁵ Section 16(c) of the FLSA authorizes the Secretary of Labor to "bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages." 29 U.S.C. § 216(c). Sums recovered by the DOL are "held in a special deposit account and . . . paid, on order of the Secretary of Labor, directly to the employee or employees affected." *Id.*

²⁶ The seven major program agencies include the Employment Standards Administration (ESA), the Occupational Safety and Health Administration (OSHA), the Employment and Training Administration (ETA), the Mine Safety and Health Administration (MSHA), the Pension and Welfare Benefits Administration (PWBA), the Veterans' Employment and Training Service (VETS), and the Bureau of Labor Statistics (BLS). ELLEN C. KEARNS, *THE FAIR LABOR STANDARDS ACT 41* (2007).

²⁷ Section 4(a) of the FLSA established the Wage and Hour Division, to operate under the direction of an Administrator appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 204(a).

²⁸ The Wage and Hour Division also enforces laws relating to special employment, family and medical leave, migrant workers, lie detector tests, worker protections in certain temporary worker programs, and the prevailing wages for government service and construction contracts.

²⁹ See *Skidmore v. Swift Co.*, 323 U.S. 134 (1944); *Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060 (1st Cir. 1995); see also *Johnson City Med. Ctr. v. United States*, 999 F.2d 973, 980-82 (6th Cir. 1993) (discussing the difference between rules and regulations and the weight given to a particular rule or regulation under certain circumstances).

³⁰ See Administrator's Interpretation No. 2010-1, available at <http://www.dol.gov/whd/opinion/AdminIntrprtnFLSA.htm>. On March 24, 2010 the WHD issued its first-ever "Administrator Interpretation." According to the WHD, "Requests for opinion letters generally will be responded to by providing references to statutes, regulations, interpretations and cases that are relevant to the specific request but without an analysis of the specific facts presented." This represents a change in longstanding WHD procedure.

on “any written administrative regulation, order, ruling, approval, or interpretation” of the Administrator of the WHD.³¹

Enforcement of the FLSA is generally conducted by investigators located in various regional and district offices throughout the United States. Enforcement actions typically begin with a complaint by an employee to the DOL, but the DOL routinely investigates potential FLSA violations without the filing of a complaint. Where violations are found, investigators typically recommend changes in employment practices to bring an employer into compliance and oversee the payment of back wages where liability is established.

In the event an employer fails to comply voluntarily, the Solicitor of Labor (“SOL”) possesses broad power to conduct enforcement litigation in United States District Courts.³² Enforcement litigation typically takes the form of civil litigation to recover back wages, but the SOL also litigates before the DOL’s Office of Administrative Law Judges, independent commissions, and administrative appellate tribunals.

2. Private Enforcement in Collective Actions

The primary mechanism for private enforcement of the FLSA is the “collective action.” Section 216(b) of the FLSA provides that “[a]n action to recover the liability” prescribed by the Act for unpaid minimum wages, overtime compensation, and liquidated damages “may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.”³³ Section 216(b) specifies that “[n]o employee shall be a party plaintiff to any action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”³⁴ Thus, unlike Federal Rule of Civil Procedure 23, class actions that typically include all class members who do not opt out, FLSA actions are “collective actions” in which similarly situated persons must “opt in” to the litigation.³⁵

Also unlike Rule 23 class actions, the commencement of an FLSA collective action does not toll the running of the statute of limitations for putative class members. Rather, pursuant to the FLSA and the Portal-To-Portal Act, an opt-in plaintiff’s claim against the employer is not commenced until the date on which his or her written consent to join the collective action is filed with the district court.³⁶

³¹ 29 U.S.C. § 259.

³² The SOL conducts almost all government litigation under the FLSA as a result of a longstanding delegation of power by the U.S. Department of Justice to the SOL. *See* Letter from Frank Murphy, Att’y Gen., to Elmer F. Andrews, Wage and Hour Administrator (Jan. 13, 1939).

³³ 29 U.S.C. § 216(b).

³⁴ *Id.*

³⁵ *See* Jackson v. Papa John’s USA, Inc., No. 1:08-CV-2791, 2009 WL 385580, at *4 (N.D. Ohio Feb. 13, 2009) (Gwin, J.) (“under the FLSA a putative plaintiff must affirmatively opt into the class”).

³⁶ 29 U.S.C. §§ 216(b) and 256; *see also* Cahill v. City of New Brunswick, 99 F. Supp. 2d 464, 479 (D.N.J. 2000).

To “ensure[] that all potential plaintiffs receive timely notice of a pending suit,” district courts supervise the conduct of FLSA collective actions and the giving of notice to potential opt-ins.³⁷ The process begins with “conditional certification,” which is a determination that the action may properly proceed under 29 U.S.C. § 216(b) as an action “by any one or more employees” on behalf of “themselves and other employees similarly situated.”³⁸ Courts in the Sixth Circuit “have used a two-phase inquiry” to determine whether employees are “similarly situated for the purposes of the statute’s requirements.”³⁹ The first phase—“the notice stage”—“takes place at the beginning of discovery,” while “[t]he second occurs after all of the opt-in forms have been received and discovery has concluded.”⁴⁰ At the “notice stage,” an FLSA plaintiff must show “only that ‘his position is similar, not identical, to the positions held by the putative class members.’”⁴¹

As Judge Gwin explained in *Jackson v. Papa John’s USA, Inc.*, a collective action under the FLSA “furthers several important policy goals.”⁴² These goals were identified by the U.S. Supreme Court in *Hoffman-LaRoche v. Sperling*.⁴³ The collective action mechanism protects workers’ interests by “allow[ing] . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources.”⁴⁴ A collective action also promotes judicial economy by enabling “efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.”⁴⁵

3. Compatibility with State Law Class Actions—The Opt-In vs. Opt-Out Debate

A hotly debated issue in wage-and-hour enforcement is whether the opt-in design of FLSA collective actions can co-exist with the traditional class action mechanism under Federal Rule 23, which permits a court to adjudicate the claims of all members of a certified class who do not opt out, while the FLSA requires that every party-plaintiff “give[] his consent in writing to become such a party.” The question of conflict typically arises when factually related claims under state wage-and-hour laws are brought as class claims under Rule 23.

³⁷ *Garner v. G.D. Searle*, 802 F. Supp. 418, 422 (M.D. Ala. 1991).

³⁸ 29 U.S.C. § 216(b).

³⁹ *Comer v. Wal-Mart Stores*, 454 F.3d 544, 546 (6th Cir. 2006).

⁴⁰ *Comer*, 454 F.3d at 546 (quoting *Goldman v. RadioShack Corp.*, No. Civ.A. 2:03-CV-0032, 2003 WL 21250571, at *6 (E.D. Pa. Apr. 17, 2003)).

⁴¹ *Id.* at 548 (quoting *Pritchard v. Dent Wizard Int’l*, 210 F.R.D. 591, 595 (S.D. Ohio 2002)).

⁴² *Jackson v. Papa John’s USA, Inc.*, No. 1:08-CV-2791, 2009 WL 385580, at *3 (N.D. Ohio Feb. 13, 2009).

⁴³ *Hoffman-LaRoche v. Sperling*, 493 U.S. 165 (1989).

⁴⁴ *Id.* at 170.

⁴⁵ *Id.*

Prior to the enactment of the Class Action Fairness Act, many courts found opt-in and opt-out procedures to be “incompatible.”⁴⁶ The typical rationale⁴⁷ was articulated in *Williams v. Trendwest Resorts, Inc.*,⁴⁸ in which the court held that granting class treatment of state law claims in an FLSA collective action would allow the plaintiffs to “circumvent the restrictive opt-in requirements of the FLSA.”⁴⁹ Under this view, certifying both opt-in and opt-out classes “contravenes the purposes of the FLSA” because it “allows for the possibility that plaintiffs who have chosen to not opt into the FLSA class are nevertheless included in the broader Rule 23 state class.”⁵⁰

⁴⁶ See, e.g., *Williams v. Trendwest Resorts, Inc.*, No. 2:05-CV-0605, 2007 WL 2429149, at *3 (D. Nev. Aug. 20, 2007) (“incompatible”); *Otto v. Pocono Health Sys.*, 457 F. Supp. 2d 522, 523 (M.D. Pa. 2006) (“inherently incompatible”).

⁴⁷ Another rationale for rejecting Rule 23 certification of state law claims in an FLSA collective action is the “potential confusion to class members that could be caused by employing conflicting class procedures in the same case.” *De la Cruz v. Gill Corn Farms, Inc.*, No. 03-CV-1133, 2005 WL 5419056, at *8 (N.D.N.Y. Jan. 25, 2005). The court in *De La Cruz* was concerned that:

[P]otential class members, who are comprised of migrant farm workers, many of whom may not speak English and likely have very little understanding of our legal system, would be forced to make the confusing choices of opting into an FLSA overtime action and then deciding whether it should opt out of a New York overtime action.

Id. See also *Thiebes v. Wal-Mart Stores, Inc.*, No. 98-802-KI, 1999 WL 1081357, at *4 (D. Or. Dec. 1, 1999) (among the “pragmatic reasons” for rejecting Rule 23 certification, the court found “it would be difficult to fashion an effective notice to prospective class members that explains their opportunity to opt in to the FLSA collective action as well as their choice to opt out of the class action”). However, other courts have disagreed. See *Ladegaard v. HardRock Concrete Cutters, Inc.*, No. 00 C 5755, 2000 WL 1774091, at *7 (N.D. Ill. Dec. 1, 2000) (rejecting the argument that “it would be confusing for the class members to receive notice from the court about their choices to ‘opt-in’ to the FLSA action and ‘opt-out’ of the state actions under Rule 23(b)(3)”).

⁴⁸ *Williams*, 2007 WL 2429149, at *3 (D. Nev. Aug. 20, 2007).

⁴⁹ *Id.* at *4; accord, *Otto v. Pocono Health Sys.*, 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006) (permitting and opt-in action under the FLSA to be “accompanied by a Rule 23 opt-out state law class action claim would essentially nullify Congress’s intent in crafting Section 216(b) and eviscerate the purpose of Section 216(b)’s opt-in requirement”); *Moeck v. Gray Supply Corp.*, No. 03-1950, 2006 WL 42368 (D.N.J. Jan. 5, 2006) (“[a]llowing [the plaintiff] ‘to circumvent the opt-in requirement . . . by calling upon state statutes similar to the FLSA would undermine Congress’s intent to limit these types of claims to collective actions’”) (citing *McClain v. Leona’s Pizzeria, Inc.*, 222 F.R.D. 574, 577 (N.D. Ill. 2004)).

⁵⁰ *Williams*, 2007 WL 2429149, at *3. On the other hand, many courts did not see any inherent incompatibility between the FLSA’s collective action procedure and the certification of state law claims for class adjudication under Rule 23; see, e.g., *Lindsay v. GEICO*, 448 F.3d 416, 424 (D.C. Cir. 2006) (holding that the FLSA opt in procedure does not preclude a district court from exercising supplemental jurisdiction over state law claimants who did not affirmatively join the FLSA claim); *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 308 (D. Mass. 2004) (“Nothing in the [FLSA] limits available remedies under state law”); *In re Farmers Ins. Exch. Claims Reps. Overtime Pay Litigation*, No. MDL 1439, 2003 WL 23669376 (D. Or. 2003) (certifying Rule 23 class to assert state law wage and hour claims in

Courts that rejected class treatment of state law claims in FLSA actions often saw such claims as exceeding the scope of their supplemental jurisdiction. Here again, *Williams v. Trendwest Resorts, Inc.* illustrates this view:

Should only a few plaintiffs opt into the FLSA class after the court were to certify a Rule 23 state law class, the court might be faced with the somewhat peculiar situation of a large number of plaintiffs in the state law class who have chosen not to prosecute their federal claims. The court might then be in a position in which declining supplemental jurisdiction would be appropriate, given that the state law claims could be said substantially to predominate over the federal claims.⁵¹

The jurisdictional plane tilted, however, with the passage of the Class Action Fairness Act of 2005 (hereinafter “CAFA”). CAFA amended 28 U.S.C. § 1332, which confers diversity jurisdiction on federal district courts, by adding new § 1332(d). The new subsection provides that “[t]he district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000,⁵² exclusive of interest and costs, and is a class action.”⁵³

While courts in FLSA actions formerly considered “declining supplemental jurisdiction” over state law claims when class treatment of such claims was sought, they now roundly entertain class claims in the exercise of their express diversity jurisdiction under CAFA. For example, in *Bouaphakeo v. Tyson Foods, Inc.*,⁵⁴ the court found it had “subject matter jurisdiction over the state law claim because the parties meet the requirements for diversity jurisdiction under the Class Action Fairness Act,”⁵⁵ and ruled that “Plaintiffs’ motion for class action certification under

conjunction with FLSA claims); *Scott v. Aetna Servs. Inc.*, 210 F.R.D. 261, 268 (D. Conn. 2002) (certifying Rule 23 class to assert state law wage and hour claims in conjunction with FLSA claims); *Beltran-Benitez v. Sea Safari Ltd.*, 180 F. Supp. 2d 772, 774 (E.D.N.C. 2001) (denying defendant’s motion to dismiss state law claims because the FLSA does not prohibit Rule 23 opt-out class actions for related state law claims); *Ansoumana v. Gristede’s Operating Corp.*, 201 F.R.D. 81, 91 (S.D.N.Y. 2001) (certifying Rule 23 class to assert state law wage and hour claims in conjunction with FLSA claims).

⁵¹ *Williams*, 2007 WL 2429149, at *3 (quoting *Leuthold v. Desitation America, Inc.*, 224 F.R.D. 462, 469-70 (N.D. Cal. 2004)).

⁵² The jurisdictional amount is satisfied by any class action in which the matter in controversy exceeds five million dollars. 28 U.S.C. § 1332(d)(2) (2006). CAFA “abrogates the rule against aggregating claims” and “confers federal diversity jurisdiction over class actions where the aggregate amount in controversy exceeds \$5 million dollars.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 571 (2005).

⁵³ 28 U.S.C. § 1332(d)(2). A “class action” is a civil action filed under Federal Rule 23 or any “similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.” 28 U.S.C. § 1332(d)(1)(B). Among CAFA’s “threshold” requirements, “the aggregate number of members of all proposed plaintiff classes [must be] 100 or more persons,” and the primary defendants must not be “States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.” *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1020-21 (9th Cir. 2007) (citing and quoting 28 U.S.C. § 1332(d)(5)).

⁵⁴ *Bouaphakeo v. Tyson Foods, Inc.*, 564 F. Supp. 2d 870, 879 (N.D. Iowa 2008).

⁵⁵ *Id.*

Rule 23 should be granted as modified” on the state-law claim.⁵⁶ Another case, *DeKeyser v. Thyssenkrupp Waupaca, Inc.*,⁵⁷ after finding that “[j]urisdiction for the state claims falls under the Court’s . . . original jurisdiction under the CAFA,”⁵⁸ concluded that “nothing in the FLSA precludes Plaintiffs from seeking [class] certification on their state law claims.”⁵⁹ Post-CAFA decisions confront the jurisdictional question head-on.⁶⁰ *Hickton v. Enterprise Rent-A-Car Co., Inc.*,⁶¹ for example, squarely held that “[t]he inherent incompatibility doctrine . . . does not provide a basis for declining to exercise original jurisdiction when the jurisdictional allegations are sufficiently pled” under CAFA.⁶²

The DOL recently clarified its position on the compatibility of collective and class actions.⁶³ In the Third Circuit case of *Parker v. NutriSystem, Inc.*, Labor Secretary Hilda Solis submitted an amicus brief arguing that FLSA collective actions and Rule 23 class actions are compatible.⁶⁴

In *Parker*, plaintiff Adrian Parker brought a collective action under § 16(b) of the FLSA alleging that he and other current and former call center employees were entitled to overtime compensation for the weeks in which they had worked more than forty hours.⁶⁵ Parker also asserted class claims under the Pennsylvania Minimum Wage Act (“PMWA”) pursuant to Federal Rule of Civil Procedure 23. The district court granted Nutrisystem’s motion to dismiss the class claims under state law, declining to exercise supplemental jurisdiction over those claims on the basis of the inherent incompatibility doctrine.⁶⁶

⁵⁶ *Id.* at 909.

⁵⁷ *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, 589 F. Supp. 2d 1026 (E.D. Wis. 2008).

⁵⁸ *Id.* at 1028 n.1.

⁵⁹ *Id.* at 1033.

⁶⁰ *Jackson v. Alpharma Inc.*, No. 07-3250, 2008 WL 508664 (D.N.J. Feb. 21, 2008): Defendant has not described any basis on which the Court could dismiss state law claims predicated on CAFA jurisdiction. Indeed, assuming that CAFA jurisdiction exists, it is unclear what would be accomplished by dismissal of the state claims, because Plaintiff could simply file a separate lawsuit in this district solely on the basis of the state claims. *Jackson*, 2008 WL 508664, at *5.

⁶¹ *Hickton v. Enterprise Rent-A-Car Co., Inc.*, No. 07-1687, 2008 WL 4279818 (W.D. Pa. Sept. 12, 2008).

⁶² *Id.* at *6 (citing *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 608 (6th Cir. 2004)).

⁶³ *Compare* Brief of the Secretary of Labor as Amicus Curiae Supporting Appellants, *Long John Silver’s Restaurants, Inc. v. Cole*, 514 F.3d 345 (4th Cir. 2008) (arguing that the written consent requirement of the FLSA is irreconcilable with the “opt-out” rules for class certification Fed. R. Civ. R. 23), *with* Brief of the Secretary of Labor as Amicus Curiae Supporting Appellants, *Parker v. NutriSystem, Inc.*, No. 09-3545-CV (3d Cir. Sept. 10, 2009) *available at* <http://www.dol.gov/sol/media/briefs/parker%28A%29-01-21-10.pdf> (arguing that FLSA collective actions and Rule 23 class actions are compatible).

⁶⁴ Brief of the Secretary of Labor as Amicus Curiae Supporting Appellants, *Parker v. NutriSystem, Inc.*, No. 09-3545-CV(3d Cir. Sept. 10, 2009).

⁶⁵ *Id.* at 3.

⁶⁶ *Id.* at 4.

Urging reversal in the Third Circuit, the DOL argued that under the supplemental jurisdiction provisions of 28 U.S.C. § 1367, a federal court entertaining a claim under a federal law such as the FLSA “shall have supplemental jurisdiction over all other claims that are so related . . . that they form part of the same case or controversy.”⁶⁷ Section 1367, the DOL argued, “reflects a strong presumption by Congress in favor of having related federal and state claims proceed together in one federal court lawsuit.”⁶⁸

Pointing to the fact that § 18(a) of the FLSA contains a “savings clause” that provides that “states and localities may enact wage laws that are broader and more protective than the FLSA’s provisions,”⁶⁹ the DOL argued that neither the text nor the legislative history of FLSA § 16(b) “supports the district court’s conclusion that the provision for an opt-in collective action under the [FLSA] is incompatible with a Rule 23 opt-out class action brought under analogous state wage laws.”⁷⁰ The opt-in requirement of § 16(b) specifically applies only to FLSA minimum wage, overtime pay, and retaliation claims, and it makes no mention of state or other claims.⁷¹ The plain terms of the section, the DOL argued, show that the opt-in procedure “does not apply to state law claims.”⁷²

Moreover, the legislative history shows that Congress, in amending the statute in 1947 through the Portal to Portal Act, intended only “to restrict FLSA actions, by requiring individual employees to opt-in, . . . not to prohibit Rule 23 state wage law class actions in federal courts.”⁷³ The Portal to Portal Act specifically states that the opt-in requirement “shall be applicable only with respect to actions commenced under the FLSA.”⁷⁴

Finally, the DOL argued, the legislative history of the Portal to Portal Act contains “no suggestion of any intent to prevent class certification of, or the exercise of supplemental jurisdiction over, state wage claims.”⁷⁵ The DOL pointed out that Rule 23 did not have an opt-out provision at the time of the passage of the Portal to Portal Act, and when it was added to Rule 23 in 1966, the advisory committee notes specifically state that the change was not intended to affect FLSA collective actions.⁷⁶ Thus, in its amicus brief in *Parker*, the DOL has argued forcefully against the “inherent incompatibility doctrine.”

⁶⁷ *Id.* at 5 (quoting 28 U.S.C. 1367(a) (2006)).

⁶⁸ *Id.*

⁶⁹ *Id.* at 7.

⁷⁰ *Id.* at 8.

⁷¹ *Id.*

⁷² *Id.* at 9.

⁷³ *Id.*

⁷⁴ *Id.* at 10.

⁷⁵ *Id.*

⁷⁶ *Id.* at 11-12.

C. Ohio Wage-and-Hour Laws

Since the passage of the FLSA, states have struggled with whether the federal law offered sufficient protections to local workers. Ohio was, in some respects, at the forefront of this movement. Ohio has provided minimum wage protections to employees since at least 1933 when the state legislature enacted the O'Neil-Pringle Minimum Wage Bill.⁷⁷ O'Neil-Pringle allowed a state official to establish minimum wages for both women and children employed in certain businesses, including factory workers and other industrial occupations.⁷⁸

Ohio law provides wage-and-hour protections that parallel the provisions of the FLSA. Minimum wage rates and remedies are prescribed by Ohio Revised Code § 4111.02, § 4111.10 and, since the passage of the Fair Minimum Wage Amendment and HB 690, § 4111.14. Overtime compensation for hours worked in excess of forty in a workweek is required by § 4111.03. Employer record-keeping is required by § 4111.08.

II. THE FAIR MINIMUM WAGE AMENDMENT

Like each of its predecessor wage-and-hour laws, Ohio's Fair Minimum Wage Amendment was intended to provide greater protection for Ohio workers than that provided by the FLSA. It was sponsored by pro-labor groups. The intentions were, in part, realized. In its first year, the new law resulted in doubling the complaints filed with the Ohio Department of Commerce.⁷⁹ However, as this Article explores below, some of these steps forward are threatened by the restrictions put in place by HB 690. First, we explain the protections accorded by the Minimum Fair Wage Amendment.

A. The Text of the Fair Minimum Wage Amendment

As stated in the introduction to this Article, the Fair Minimum Wage Amendment includes several important changes to the Ohio minimum wage laws and new protections for Ohio workers. These include: (1) an increase in the state minimum wage with guaranteed future increases; (2) an expansive definition of the term "employee"; (3) limitations on the exemptions to coverage by the Amendment; (4) new record-keeping requirements for Ohio employers; (5) guarantees that the right of an employee to enforce the protections of the Amendment not be abridged; (6) a self-executing text; and (7) an explicit restriction on any legislative action that might impair the protections provided in the Amendment.⁸⁰

With respect to the new minimum wage, Section 34a provides that, with certain exceptions, every employer shall pay their employees a wage rate of not less than \$6.85 per hour beginning January 1, 2007 and that this rate shall increase by the rate

⁷⁷ Enacted as the Ohio Minimum Wage Act, General Code §§ 154-45d to 154-45t (1938); see *Strain v. Southerton*, 74 N.E.2d 69, 70-71 (Ohio 1947). *Strain* upheld the statute against the challenge that the legislature lacked authority to enact minimum wage legislation and the law affected "an unauthorized delegation of legislative power." *Id.* at 71.

⁷⁸ See *Strain*, 74 N.E.2d at 71.

⁷⁹ Policy Matters Ohio: New Legislation Undermines the Minimum Wage Amendment, http://www.policymattersohio.org/ohio_minimum_wage_undermined.htm (last visited May 19, 2010).

⁸⁰ OHIO CONST. art. II, § 34a.

of inflation on the 30th day of each September, beginning in 2007.⁸¹ Employees under the age of sixteen and employees of businesses with annual gross receipts less than a certain, annually-adjusted amount (initially, \$250,000) may be paid at the lower, FLSA rate.⁸² Further, an employer may pay an employee as little as half of the state minimum wage if the employer is able to demonstrate that the employee receives tips that, when combined with the wages paid, are equal or greater to the minimum wage rate for all hours worked.⁸³ These minimum wage provisions do not apply to employees of a family-owned and operated business if the employee is also a family member of an owner of the business.⁸⁴ The provision also permits the state to issue licenses to employers authorizing payment of a lower wage rate to individuals with mental or physical disabilities that may otherwise adversely affect their opportunity for employment.⁸⁵

The second paragraph of Section 34a deals with the definitions of “employers” and “employees.” Specifically, the Amendment provides that the terms “employer” and “employee” shall have the same meanings as those terms are defined by the FLSA with several exceptions.⁸⁶ First, the term “employer” in Ohio shall also include the state and every political subdivision—a significant departure from federal law.⁸⁷ Second, the term “employee” shall not include an individual employed in or about the property of an employer’s individual residence on a casual basis.⁸⁸ And, third, only the exemptions set forth in Section 34a shall apply.⁸⁹ This is particularly notable, as the federal FLSA contains many exemptions to coverage, which are not enumerated in Section 34a.

Regarding record-keeping, Section 34a requires employers to “maintain a record of the name, address, occupation, pay rate, hours worked for each day worked and each amount paid an employee for a period of not less than three years following the last date the employee was employed.”⁹⁰ The employer must also provide its contact information to all of its employees.⁹¹ An employee, groups of employees, or any interested party “may file a complaint with the state for a violation of any provision of this section,” which “shall be promptly investigated and resolved by the state.”⁹²

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

In addition, “[t]he state may on its own initiative investigate an employer’s compliance with this section.”⁹³

The means of enforcement are also explicitly addressed in the Amendment. Section 34a provides that “[a]n action for equitable and monetary relief may be brought against an employer by the attorney general and/or an employee or person acting on behalf of an employee or all similarly situated employees in any court of competent jurisdiction . . . for any violation of this section or any law or regulation implementing its provisions.”⁹⁴ Such action must be brought “within three years of the violation or of when the violation ceased if it was of a continuing nature, or within one year after notification to the employee of final disposition by the state of a complaint for the same violation, whichever is later.”⁹⁵ The Amendment further specifies that “there shall be no exhaustion requirement, no procedural, pleading or burden of proof requirements beyond those that apply generally to civil suits in order to maintain such action and no liability for costs or attorney’s fees on an employee except upon a finding that such action was frivolous in accordance with the same standards that apply generally in civil suits.”⁹⁶

If an employer has been found to have violated any provision of the section, the employer must pay all back wages, damages, costs, and attorney’s fees within thirty days.⁹⁷ Payment shall not be stayed pending an appeal.⁹⁸ “Damages shall be calculated as an additional two times the amount of the back wages and in the case of a violation of an anti-retaliation provision an amount set by the state or court sufficient to compensate the employee and deter future violations, but not less than one hundred fifty dollars for each day that the violation continued.”⁹⁹

Lastly and significantly, the Amendment specifies that the section “shall be liberally construed in favor of its purposes. Laws may be passed to implement its provisions and create additional remedies, increase the minimum wage rate and extend the coverage of the section, but in no manner restricting any provision of the section.”¹⁰⁰

B. HB 690 and Its Departures from the Amendment

House Bill 690 made changes to several provisions of Ohio law. The bill amended §§ 4111.01-4111.10 and added § 4111.14.¹⁰¹ The Bill Summary states that Ohio’s prior minimum wage laws must be changed to “comply with” the new constitutional provisions:

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

[B]ecause some provisions in Section 34a conflict with certain provisions in Chapter 4111 of the Revised Code, as explained in detail below, Section 34a supercedes [sic] those conflicting provisions (hereafter “prior minimum wage law”). The bill amends those conflicting provisions to comply with Section 34a.¹⁰²

However, HB 690 did more than “implement” the Fair Minimum Wage Amendment. As an authoritative treatise tactfully puts it, “some of the legislative language is different than the new language in the Ohio Constitution.”¹⁰³ The provisions that conflict with the Fair Minimum Wage Amendment are examined below.

1. Employees’ Right to Sue

The first departure of the legislative action from the dictates of the Amendment concerns an employee’s right to initiate a suit against his employer. HB 690 provides: “No employee shall join as a party plaintiff in any civil action that is brought under division (K) of this section by . . . a person acting on behalf of all similarly situated employees *unless that employee first gives written consent to become such a party.*”¹⁰⁴ This provision thus requires each and every plaintiff to opt into the action. It is also arguably more restrictive than the Fair Minimum Wage Amendment, which permits any “employee or person acting on behalf of an employee or all similarly situated employees” to file suit.¹⁰⁵

2. The Definition of “Employee”

HB 690 also defines the term “employee” in a more restrictive fashion than Section 34a: “‘Employee’ means individuals employed in Ohio, *but does not mean individuals who are excluded from the definition of ‘employee’ under 29 U.S.C. 203(e) or individuals who are exempted from the minimum wage requirements in 29 U.S.C. 213.*”¹⁰⁶ This new statutory dictate seems to even more clearly conflict with the Amendment. The Amendment explicitly defined which exemptions were to apply—that is, only those enumerated in the Amendment itself. The legislature purported to be confused by this, stating that perhaps the Amendment was poorly written and used the term “exemption” inadvertently. The authors do not believe the Amendment to be unclear in any way. The FLSA contains provisions for “exemptions” and “exceptions.”¹⁰⁷ Those terms are consistently used throughout the federal minimum wage law. The Ohio General Assembly’s attempt to import the

¹⁰² HB 690, Bill Summary.

¹⁰³ WAGE AND HOUR LAWS: A STATE-BY-STATE SURVEY 531 (Gregory K. McGillivray ed., Cum. Supp. 2007).

¹⁰⁴ OHIO REV. CODE ANN. § 4111.14(K)(2) (emphasis added).

¹⁰⁵ OHIO CONST. art. II, § 34a.

¹⁰⁶ OHIO REV. CODE ANN. § 4111.14(B)(1).

¹⁰⁷ Exemptions from the FLSA’s wage and hour requirements are provided in 29 U.S.C. § 213. In addition, some of the FLSA’s definitions have exceptions. For example, the term “employee” does not include an individual “who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency” under certain specified circumstances. 29 U.S.C. § 203(e)(4)(A).

many exemptions from federal law into the new Ohio law is contrary to the express dictates of the Amendment.

C. Remedies for Overtime Violations Unaffected by HB 690

The Ohio Fair Minimum Wage Amendment made no change in Ohio's overtime laws, but rather was limited to minimum wage issues. That is also true of the implementing legislation, HB 690. In particular, the "opt-in" mechanism for minimum wage claims under Ohio Revised Code § 4111.14(K) is expressly limited to civil actions "brought under division (K) of this section"—that is, to civil actions asserting minimum wage violations.¹⁰⁸

In *Laichev v. JMB*,¹⁰⁹ Judge Michael Barrett of the Southern District of Ohio held that the opt-in mechanism of § 4111.14(K) does not apply to claims for overtime violations under §§ 4111.03 and 4111.10.¹¹⁰ Judge Barrett concluded that "since § 4111.10 does not include a consent provision like § 4111.14(K)(2), Plaintiff may maintain a class action for violations of § 4111.10 under Fed. R. Civ. P. 23."¹¹¹

Judge Barrett distinguished Judge Aldrich's holding in *Williams v. Le Chaperon Rouge*,¹¹² on the basis that, unlike the plaintiff in *Laichev*, the plaintiff in *Williams* had moved for class certification not only under §§ 4111.03 and 4111.10 but also under §§ 4111.01-99, which included § 4111.14(K)(2).¹¹³ Judge Aldrich later vacated her opinion in *Williams* in response to a reconsideration motion outlining many of the same grounds adopted by Judge Barrett in *Laichev*.¹¹⁴ Similarly, in *Dillworth v. Case Farms Processing, Inc.*,¹¹⁵ the court initially dismissed Ohio class claims, holding that "Ohio's overtime statute allows only for an opt-in action similar to a collective action under [the] FLSA."¹¹⁶ However, the court later reconsidered and vacated that holding.¹¹⁷

The practical implications of changing the minimum wage laws but not the overtime laws in this respect is examined in the "practice pointers" section below.

D. Consequences of the General Assembly's Action

It is fundamental to the functioning of our governmental systems that we respect the supremacy of the Constitution. The same is true on both the federal and state levels. Moreover, the Ohio Constitution provides that no legislative act may restrict

¹⁰⁸ OHIO REV. CODE ANN. § 4111.14(K)(2).

¹⁰⁹ *Laichev v. JMB*, No. 1:07-CV-802 (S.D. Ohio Jun. 19, 2008).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 3-4.

¹¹² *Williams v. La Chaperone Rouge*, 1:07-CV-829, 2007 U.S. Dist. LEXIS 95510 (N.D. Ohio Dec. 17, 2007).

¹¹³ *Laichev*, No. 1:07-CV-802 at 3-4.

¹¹⁴ *Williams v. La Chaperone Rouge*, 2008 WL 2810619, at *1 (N.D. Ohio July 21, 2008).

¹¹⁵ *Dillworth v. Case Farms Processing, Inc.*, No. 08-CV-1694 (N.D. Ohio Aug. 27, 2009) (Lioi, J.).

¹¹⁶ *Id.* Mem. Op. and Order, at 9.

¹¹⁷ *Id.* Mem. Op. filed Mar. 8, 2010.

any provision of the Constitution enacted by the voters: “The Ohio Constitution reserves for the people of the State of Ohio the power to adopt or reject, by vote at a general election, any law or section of law proposed by the General Assembly.”¹¹⁸ The Fair Minimum Wage Amendment, itself, also provides that “laws may be passed to implement its provisions and create additional remedies . . . but in no manner restrict any provisions of the section.”¹¹⁹

The authors recognize, of course, that “[i]t is difficult to prove that a statute is unconstitutional. All statutes have a strong presumption of constitutionality.”¹²⁰ Before a court may declare a statute unconstitutional, “it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.”¹²¹ Even more challenging is “the fact that a statute might operate unconstitutionally under some plausible set of circumstances is insufficient to render it wholly invalid.”¹²²

The constitutionality of implementing legislation largely depends on whether the constitutional provision being implemented is “self-executing.”¹²³ A provision is self-executing “when it is complete in itself,” and “specifically provides for carrying into immediate effect the enjoyment of the rights established therein without legislative action.”¹²⁴ When a constitutional provision is found to be self-implementing, any laws enacted to facilitate its operation must “not restrict or limit the provision or the powers therein reserved.”¹²⁵ Thus, as the Colorado Supreme Court noted in a decision cited with approval in Ohio, an important objective of making a constitutional provision self-executing “is to put it beyond the power of the legislature to render it nugatory by passing restrictive laws,” inasmuch as “the power to impair would be the power to destroy.”¹²⁶

In *Schryock v. Zanesville*,¹²⁷ the court explained the purpose of the language in Section 1g of Article II of the Ohio Constitution and of the referendum provisions generally in the following words:

¹¹⁸ OHIO CONST. art. II, §§ 1, 1c.

¹¹⁹ OHIO CONST. art. II, § 34a.

¹²⁰ *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 429 (2007).

¹²¹ *Arbino*, 880 N.E.2d at 429 (citing *State ex rel. Dickman v. Defenbacher*, 128 N.E.2d 59 (1955) (Syllabus at ¶ 1)); *see also Schaller v. Rogers*, No. 08AP-591, 2008 WL 4078446, at *32 (Ohio App. 10 Dist. 2008).

¹²² *Harrold v. Collier*, 836 N.E.2d 1165, 1171 (2005); *see also Schaller*, 2008 WL 4078446, at *33 (quoting *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)).

¹²³ *In re Protest Filed by Citizens for the Merit Selection of Judges, Inc.*, 551 N.E.2d 150, 152 (1990); *State v. Williams*, 728 N.E.2d 342, 352 (2000).

¹²⁴ *In re Protest*, 551 N.E.2d at 152 (citing *Yenter v. Baker*, P.2d 311 (1952)). Conversely, a constitutional provision is not self-executing if it is “a mere framework,” *In re Protest*, 551 N.E.2d at 152, and “so broad as to [represent] aspirational ideals that require enabling legislation to be practically applied.” *Williams*, 728 N.E.2d at 352.

¹²⁵ *In re Protest*, 551 N.E.2d at 152 (citing *Daggett v. Hudson*, 3 N.E. 538 (1885)).

¹²⁶ *Yenter v. Baker*, 248 P.2d 311, 314 (1952) (quoting *Kitchens v. City of Paragould*, 88 S.W.2d 843, 846 (1935)), *cited with approval in In re Protest*, 551 N.E.2d at 152.

¹²⁷ *Schryock v. Zanesville*, 110 N.E. 937 (1915).

In this connection it will not escape notice that as to the state-wide exercise of the power the constitution goes into the minutest detail, leaving nothing to the action of the general assembly and concluding with the general statement that the provisions of the whole section should be self-executing, thereby putting it beyond the power of an unfriendly legislature to cripple or destroy it.¹²⁸

In *In re Protest Filed with the Franklin City Board Of Elections by Citizens for the Merit Selection of Judges, Inc.*,¹²⁹ the Supreme Court considered whether Ohio Revised Code § 3519.10, which required that each person signing any initiative petition had to include his or her voting residence, conflicted with Section 1g. The court held that “[w]e do not view this requirement as restricting or limiting the power to sign initiative petitions conferred by Section 1g, Article II, but as a fully contemplated and consistent requirement of the voting franchise provisions. The purpose of this requirement is not to restrict the power of the people to vote or to sign petitions, but to ensure the integrity of and confidence in the process.”¹³⁰

Similarly in *In re Protest of Brooks*,¹³¹ the Court of Appeals of the Third District of Ohio considered whether the circulator compensation statement requirement within § 3519.05 violated the language in Section 1g on the ground that it restricts the exercise of the right of the referendum. Recognizing that states have “considerable leeway to protect the integrity and reliability of the initiative process,” the court stated that a reasonable reading of § 3519.05 reveals that neither the purpose nor effect of the circulator’s compensation statement is to restrict the rights of the people.¹³² It is to help ensure the integrity and reliability of the process through public disclosures. Therefore, the law facilitated the exercise of the initiative power by the people.¹³³

In *Schaller v. Rogers*,¹³⁴ the Supreme Court considered whether a ten-business-day review could cripple a petitioner’s efforts at gathering the necessary signature to meet a 90-day deadline.¹³⁵ The ten-business-day review effectively forced a petitioner to get the same amount of signature within an 80-day period. The court stated that, “[a]rguably, however, the ten-business-day provision would not always cripple such efforts. The fact that the ten-business-day provision might work to restrict, rather than facilitate, the referendum process under some plausible set of circumstances is insufficient to render the trial court’s denial of relief an abuse of discretion.”¹³⁶

¹²⁸ *Id.* at 939.

¹²⁹ *In re Protest Filed with the Franklin Cty. Bd. Of Elections by Citizens for the Merit Selection of Judges, Inc.*, 551 N.E.2d 150 (1990).

¹³⁰ *Id.* at 154.

¹³¹ *In re Protest of Brooks*, 801 N.E.2d 503 (2003).

¹³² *Id.* at 507.

¹³³ *See Schaller v. Rogers*, No. 08AP-591, 2008 WL 4078446 (Ohio App. 10 Dist. 2008).

¹³⁴ *Id.* at *39.

¹³⁵ *Id.* at *52.

¹³⁶ *Id.*

III. PRACTICE POINTERS—IMPLICATIONS FOR THE OPT-IN VS. OPT-OUT DEBATE

There are several points the authors would like their readers to take from this article. First, § 4111.14 applies only to minimum wage claims. Second, courts err in importing the opt-in requirement of Division (K)(2) [relating to minimum wage violations] to actions brought pursuant to the overtime law [Ohio Revised Code § 4111.10].¹³⁷ Next, it seems clear to us that, if the General Assembly contemplated that minimum wage and overtime claims could be asserted in the same action, it was not bothered by the idea of combining an opt-in action [minimum wage] with a traditional opt-out class action [overtime]. Thus, the courts' struggles with this issue seem unwarranted. Opt-in and opt-out claims may happily co-exist in a single suit. In addition, prior to the approval of the Ohio Fair Minimum Wage Amendment, state law actions brought on behalf of similarly situated employees were brought as Rule 23 class actions. The Amendment was not meant to take away existing procedural avenues to relief. It is to be construed liberally to achieve its purposes.

IV. CONCLUSION

The protection of employees' wage-and-hour rights has been hampered by various obstacles over the years. Initially there was reluctance even to enact wage-and-hour laws, and that was followed by a period in which fledgling attempts to establish protections on the state or federal level were struck down by the courts as unconstitutional. Comprehensive federal protection was finally implemented in 1938 with the passage of the Fair Labor Standards Act. Even then, private enforcement efforts were hobbled by the FLSA's requirement that "[n]o employee shall be a party plaintiff to any action unless he gives his consent in writing to become such a party,"¹³⁸ a requirement that limits private FLSA enforcement to "collective actions" that lack the breadth and concomitant effectiveness of traditional class actions under Rule 23. The inherent limitations of federal enforcement mechanisms heighten the importance of state laws for the protection of employee wage-and-hour rights.

This Article has shown what the Ohio Fair Minimum Wage Amendment was intended to accomplish, and how that intention has been frustrated by limitations and restrictions imposed by the legislature under the guise of "implementing" the Amendment. Such limitations not only were not authorized by the Amendment but were expressly prohibited by it. There is, therefore, ample basis for the courts to

¹³⁷ See *Dillworth v. Case Farms Processing, Inc.*, No. 08-CV-1694 (N.D. Ohio Aug. 27, 2009) (Lioi, J.) (holding plaintiffs must opt in to collective action *for overtime wages* pursuant to Ohio Revised Code § 4111.14 on motion to dismiss Ohio claims (no discussion of conflict with Ohio Constitution or justification for importation of minimum wage provision into overtime action)); *Williams v. Le Chaperon Rouge*, No. 07-CV-829 (N.D. Ohio Dec. 17, 2007) (Aldrich, J.) (declining to certify an Ohio class in same action as FLSA collective action) (later vacated). Compare *Frisby v. Keith D. Weiner & Assoc. Co., LPA*, No. 1:09-CV-2027, 2009 WL 3818844 (N.D. Ohio Nov. 17, 2009) (Gwin, J.) (Recognizing the supremacy of the Ohio Constitution over the enabling legislation in holding Ohio law provides employees with a private cause of action to enforce the record keeping requirements of the Amendment: "Defendants fail to provide this Court any case law or even argument as to why art. II, § 34a's express grant of a private cause of action does not control this issue.").

¹³⁸ 29 U.S.C. § 216(b).

strike down the restrictions and limitations of the implementing legislation and enable the Amendment to provide the strong protections that Ohio voters intended.