THE FAIR LABOR STANDARDS ACT—ANTI-POVERTY LEGISLATION IN THE MODERN ERA: ADVOCATING JUDICIAL SCRUTINY UNDER A FEMINIST POLICY-CENTERED ANALYSIS

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NOTES

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INTRODUCTION

Congress enacted the Fair Labor Standards Act ("the FLSA" or "the Act") in 1938. The major provisions of this Act established a minimum wage floor and overtime provisions for employees "engaged in commerce or in the production of goods for commerce." Emerging as the country struggled to recover from the Great Depression, the Act represented a collective effort granting hope of economic prosperity for millions of American workers. Fundamental to the purpose of the Act was the notion that

[t]his nation cannot build a stable industry that can adequately support all its people until those who work are given a larger share in the yield. . . . Continued low wage incomes . . . will continue to undermine the stability of markets for both farm and factory products. It is only by a wider distribution of our national income that we can expand our markets, increase production and gradually eliminate unemployment.

Balanced against this sentiment, however, was the fear that the minimum wage and overtime rates would effectively "throw[] thousands of people out of work" as employers struggled to make the same profit while paying higher wages. Thus, the FLSA attempted to strike a delicate balance between eradicating the detrimental conditions of some workers, and preserving entry-level, low-skill positions in the economy.

4. § 6(a), 52 Stat. at 1062 (current version at 29 U.S.C. §§ 206, 207 (1994)).
7. See infra Part I.A for a discussion of the 1938 version of the FLSA.
In 1961, Congress amended the FLSA and expanded the coverage by shifting the focus of the Act from the employee to the enterprise.\(^8\) In this amendment, Congress extended the Act's provisions to employees of large "enterprise[s] engaged in commerce or the production of goods for commerce."\(^9\) The enterprise concept thus broadened the focus of the FLSA from an employee's activity to the nature of an employer's business.\(^10\) Once again, some members of Congress voiced the concern that increasing the scope of the Act's coverage would further decrease the number of entry-level, low-skill jobs available to part-time workers, the elderly, and students.\(^11\)

The most recent amendment to the enterprise concept occurred in 1972 when Congress added "preschool" to the definition of enterprise.\(^12\) In doing so, however, Congress not only failed to include a definition of "preschool,"\(^13\) it also failed to substantively debate the purpose of treating a "preschool" as a covered enterprise. Consequently, the scope of the term "preschool" is ambiguous.

This Note analyzes the interpretive methods employed by federal courts in determining what type of business is considered a "preschool" within the meaning of the Act. This Note concludes that the confusion in the courts concerning what businesses are con-


\(^9\) § 2(s), 75 Stat. at 65 (emphasis added).

\(^10\) The constitutionality of the enterprise concept was the subject of heated debate in Congress and vigorously litigated in the courts. See generally 107 Cong. Rec. H4589 (daily ed. Mar. 22, 1961) (statements of Rep. Hiestand) (debating the constitutionality of the enterprise concept); see also Maryland v. Wirtz, 392 U.S. 183, 204 (1968), overruled on other grounds by National League of Cities v. Usery, 426 U.S. 833 (1976) (holding that the "enterprise concept" in the 1961 amendment to the FLSA is constitutional). The substance of the debate surrounded whether Congress had, in creating the "enterprise concept," gone beyond the power granted Congress in the Commerce Clause of the United States Constitution. See U.S. Const. art. I, § 8, cl. 2.


sidered "preschools" under the 1972 amendment to the FLSA is justified. Federal courts have had difficulty interpreting the word "preschool" because either a broad or a narrow interpretation produces results that are inconsistent with the FLSA's anti-poverty purpose. Until these inadequacies are addressed by Congress, federal courts must continue to interpret a vague amendment that fails to resolve the underlying policy tensions evident in the Act.

This Note asserts that without congressional clarification of what businesses are considered a "preschool," the only effective method of interpreting the 1972 amendment is a policy-centered approach. A policy-centered method is advocated because the traditional methods of interpretation collapse under the weight of an issue that is inextricably entwined with public policy issues. Furthermore, although other interpretive methods exist that would address the conflict in policy, this Note advocates a feminist policy-centered analysis. This feminist perspective recognizes that either a broad or narrow interpretation of the 1972 amendment adversely impacts low-income women—a result entirely at odds with the fundamental purposes of the Act.

For instance, a broad interpretation that holds that preschool workers should be paid minimum wage may ultimately result in increased costs for day care. This increased cost, without adequate subsidies, disproportionately impacts low-income women's ability to participate in the economy on equal terms. Similarly, because women comprise the majority of the workforce in the pre-kindergarten childcare industry, a narrow interpretation that does not confer rights under the FLSA, results in a disproportionate impact on a predominately female sector of the workforce.

Finally, this Note argues that the judiciary should, in the interest of justice, fully articulate and comment on the conflicting policy issues that arise in interpreting the Act. The Act provides a mechanism that justifies such a discourse. Section 204(d)(1) of the Act provides for biennial reports by the Department of Labor to Con-

14. For example, practical reasoning, or the use of positive political theory as a method of interpretation might broaden the analysis beyond the limitations of the three traditional methods of interpretation used by the courts. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 STAN. L. REV. 321 (1990); McNollgast, Comment, Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation, 57 LAW & CONTEMP. PROBS. 3 (1994).
15. See infra note 126 for Bureau of Labor Statistics regarding workforce demographics in the pre-kindergarten childcare industry.
16. See 29 U.S.C. § 204(d)(1) (1994). This Note does not advocate that the courts rewrite the statute in conformity with its policy analysis. Rather, this Note asserts that
Thus, the judiciary, through a policy-centered analysis, may help identify the deficiencies in the Act's provisions.

Part I of this Note will explore the historical background of the FLSA and its major amendments leading to the treatment of "pre-school" as a covered enterprise. Part II provides the reader with a brief overview of the methods of statutory interpretation used by federal courts in interpreting the 1972 amendment to the FLSA, and reviews an alternative feminist method of statutory interpretation. Part III analyzes the interpretational approaches employed by federal courts in addressing the question of what businesses are within the scope of the FLSA through the inclusion of "preschool" as a covered enterprise. Part IV comments on the effectiveness of the various interpretational approaches employed by these courts and proposes a policy-centered method of analysis that is founded on feminist concerns.

I. BACKGROUND

A. The Fair Labor Standards Act of 1938

On June 25, 1938 Congress enacted the Fair Labor Standards Act. In passing the Act, Congress was concerned with "the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." Thus, the FLSA was created to correct, as quickly as possible, employment conditions that Congress believed were detrimental to the worker. To effectuate this goal, the FLSA created a minimum wage floor and a ceiling of a maximum number of hours for each "employee who is engaged in commerce or in the production of goods for commerce..."

17. See id.
19. § 2(a), 52 Stat. at 1060 (current version at 29 U.S.C. § 202(a) (1994)).
20. See § 2(b), 52 Stat. at 1060 (current version at 29 U.S.C. § 202(b) (1994)). “It is hereby declared policy of this Act...to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.” Id.
Congress, however, feared that too radical a change would counteract the Act's stated purpose of correcting detrimental employment conditions and result instead in the elimination of positions altogether. Underlying this fear was the belief that if employers had limited money for wages, imposing a minimum wage would necessarily lead to the elimination of other positions. To address this fear and to ensure a smooth transition, the provisions of the Act were to be implemented gradually, with full effect occurring seven years after the effective date of the Act.

Congress created the FLSA to address specific labor conditions that had contributed to

[t]he exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage [that] is not only detrimental to their health and well-being but casts a direct burden for their support upon the community.

Congress passed the FLSA pursuant to the legislative power delegated to Congress by the Commerce Clause as the United States commerce.”

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23. §§ 6(a), 7(a), 52 Stat. at 1062-63 (current version at 29 U.S.C. §§ 206(a), 207(a) (1994)). The FLSA also prohibited the use of oppressive child labor in activities related to interstate commerce. See § 12(a)-(b), 52 Stat. at 1067 (current version at 29 U.S.C. § 213(C) (1994)). Additionally, the FLSA includes numerous other exemptions that are beyond the scope of this Note. See § 13, 52 Stat. at 1067-68 (current version at 29 U.S.C. § 213(a)-(h) (1994)).

24. See § 2(b), 52 Stat. at 1060 (current version at 29 U.S.C. § 202(b) (1994)).

25. See 83 Cong. Rec. S9164 (daily ed. June 14, 1938) (statement of Sen. Thomas) (“We all recognized the hazard of placing this floor too high at the start without giving industry time to adjust itself.”).


(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,
(2) during the next six years from such date, not less than 30 cents an hour,
(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower.

Id.

was emerging from the Great Depression. By exerting financial pressure on employers through the minimum wage and overtime provisions of the Act, Congress helped employees gain bargaining power. This increased bargaining power contributed to improving the labor conditions of many workers. Additionally, because the Act's overtime provisions discouraged overtime, work was distributed more equitably among a greater number of employees, thus lowering unemployment rates.

Congress recognized that amendments to the Act would be needed as the country's labor conditions evolved. Accordingly, the Act contains a provision under which the Administrator of the Wage and Hour Division is to compile data biennially and make any necessary legislative recommendations for future amendments to the Act.

B. The 1961 Amendment to the Fair Labor Standards Act

The 1961 amendment to the FLSA expanded the Act's cover-
age to include employees of enterprises "engaged in commerce or in the production of goods for commerce."³³ Congress enacted this amendment to promote a more widespread distribution of purchasing power essential to the growth of the economy.³⁴ To clarify the scope of the amendment, Congress defined "enterprise"³⁵ and the phrase "enterprise engaged in commerce or the production of goods for commerce."³⁶


³⁵. Act of May 5, 1961 § 2(r), 75 Stat. at 65 (current version at 29 U.S.C. § 203(r)(1) (1994)). Section 2(r) defines "enterprise" as:

[T]he related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor.

Id.

³⁶. § 2(s), 75 Stat. at 66 (current version at 29 U.S.C. § 203(s) (1994)). Section 2(s) defines "enterprise engaged in commerce or in the production of goods for commerce" as:

[A]ny of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:

(1) any such enterprise which has one or more retail or service establishments if the annual gross volume of sales of such enterprise is not less than $1,000,000, exclusive of excise taxes at the retail level which are separately stated and if such enterprise purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more;

(2) any such enterprise which is engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier if the annual gross volume of sales of such enterprise is not less than $1,000,000, exclusive of excise taxes at the retail level which are separately stated;

(3) any establishment of any such enterprise, except establishments and enterprises referred to in other paragraphs of this subsection, which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000;

(4) any such enterprise which is engaged in the business of construction
The enterprise concept broadened coverage under the minimum wage and maximum hour provisions by shifting the focus from an employee's activity to the nature of an employer's business. Under this amendment, employers were required to comply with the minimum wage and overtime provisions not only for employees who were engaged in interstate commerce, but also for any employee of an enterprise that met the monetary requirements of coverage.

The 1961 amendment corrected an inconsistency in the Act. Previously, the Act focused on the nature of the employee's position. This focus resulted in a discrepancy because within one business, one employee might work on goods that go into interstate commerce, while other employees might not be working with such.
goods. Therefore, within one business, some employees would be protected by the Act, but other employees would not be afforded such protection. The 1961 amendment thus filled the gaps that existed in coverage in the situation where a single employer had some employees who were covered by the Act and others that were not covered by the Act.\(^41\) However, the amendment did not necessarily extend coverage to additional employers because only those employers who already engaged in some form of interstate commerce, and met the FLSA's economic criteria, were affected.\(^42\)

The 1961 amendment passed despite vehement debate in Congress.\(^43\) One concern involved fears that the Act would generate increased labor costs,\(^44\) and thus have the counterproductive effect of actually raising unemployment levels.\(^45\) Members of Congress feared that the broadened scope would effect entry-level, low-skill workers, such as students, the elderly, and part time workers—populations of workers that the Act was intended to help.\(^46\) Congress addressed this issue by creating restrictions on the applicability of the FLSA to a business unless, for instance, it met a minimum requisite gross volume of sales. Such restrictions limited the expan-

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41. *See* id.


[M]any small businesses not previously covered, are going to find it difficult to meet the minimum wage. . . . The result will be either that they will be forced to cut marginal producers out of their labor force, or they may be compelled to go out of business. Either way, the result is unemployment. And the unemployment will affect the very same people this bill is supposed to help.

*Id.*


If this bill passes, who will be hurt? First, the elderly, trying to supplement social security or other income by low-paying jobs. Second, the handicapped, and the less efficient workers, who are the first to go when a reduction in work force becomes necessary. Third, students and other part-time workers.

*Id.*
sion of coverage under this amendment.\textsuperscript{47}

Thus, in order to obtain passage, proponents of the amendment were forced to agree upon a complicated regulatory scheme to determine whether an enterprise was covered under the Act.\textsuperscript{48} For instance, the Committee on Labor and Public Welfare report discussed how business activities would be considered part of a single enterprise and thus subject the enterprise to the FLSA's provisions if such activities are for a "common business purpose."\textsuperscript{49} However, the Committee report also stated that where the purposes of the activities are unrelated to one another, even though operated by the same employer, the employees not individually engaging in interstate commerce were not covered by the FLSA.\textsuperscript{50} Because Congress intended only to extend coverage to additional employees of enterprises that either substantially engaged in commerce or in the production of goods for commerce,\textsuperscript{51} application of the amendment's new provisions was to be determined on a case-by-case basis.

C. The 1966 Amendment to the Fair Labor Standards Act

In 1966 Congress again amended the FLSA.\textsuperscript{52} Specifically, the 1966 amendment broadened the scope of coverage under the "enterprise"\textsuperscript{53} and "enterprise engaged in the production of goods for


\textsuperscript{48} See, e.g., § 2(s)(1)-(5), 75 Stat. at 66 (current version at 29 U.S.C. § 203(s) (1994)).


\textsuperscript{50} See id.


\textsuperscript{53} § 102(a), 80 Stat. at 831. This amendment redefined the definition of enterprise to:

For the purposes of this subsection, the activities performed by any person or persons—(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an \textit{elementary or secondary school}, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

\textit{Id.} (emphasis added).
commerce" concepts. In 1966, the time was ripe for change. The "war on poverty" had been met with great public approval, and the country was looking for answers to increasing social problems, particularly in urban areas. Congress recognized that the Act had not kept pace with the advancing economy. This failure resulted in disproportionately low wages for large groups of workers. Congress enacted the 1966 amendment in an effort to help alleviate the circumstances of the working poor and to erase discriminatory wage patterns. Thus, by expanding the scope of the Act in the 1966 amendment, Congress continued to advance the original purpose of the Act as an anti-poverty statute.

The creation of a new category in the definition of "enterprise" and "enterprise engaged in commerce or in the production of goods for commerce," extended coverage for minimum wage

54. § 102(c), 80 Stat. at 831-32. The meaning of "enterprise engaged in commerce or the production of goods for commerce" was changed, in relevant part, to: "[A]n enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person . . ." Id. See supra note 26 for the text of the 1938 version of the Act which looked to the employees' position rather than the nature of the employers' business.

55. 112 CONG. REC. H11279 (daily ed. May 24, 1966) (statement of Rep. Dent) ("This [amendment] is an essential effort in our war on poverty.").


These amendments will also aid in erasing the present discriminatory wage patterns. Almost two-thirds of all white workers come within the present coverage provisions, but less than half of all non white workers are covered . . . Two-thirds of all men employed in non-supervisory jobs are covered by the Act, but only about half of the women in such jobs.

Id.


The philosophy behind the passage of that bill was that by putting more money into the hands of the workers, it would create a greater demand for goods; and a greater demand for goods would create a greater production; and a greater production would create a greater number of jobs.

Id.


63. § 102(c), 80 Stat. at 831-32 (current version at 29 U.S.C. § 203(s) (1994)).
and overtime requirements. As a result of the definitional changes, 7.2 million additional workers were covered by the FLSA. After the 1966 amendment, the FLSA covered employees if the employer met certain monetary requirements, and the enterprise was one of the following:

[A] hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

Thus, the redefinition of enterprise included within its scope elementary and secondary schools. Additionally, the new terms "elementary" and "secondary" school were defined. These changes further expanded the scope of enterprise coverage under the Act.

Opponents of the move to treat elementary and secondary schools as covered enterprises expressed the fear that the requirement of minimum and overtime wages would burden already financially strained school systems. A second concern surrounded what some in Congress felt was the continued potential for the elimination of low-skill jobs for entry level or part time workers.

Although the Senate bill did not include elementary and secondary schools in the definition of "enterprise engaged in commerce or the production of goods for commerce," the House bill,

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66. See id.
67. § 102(d), 80 Stat. at 832 (current version at 29 U.S.C. § 203(v) (1994)) ("[e]lementary school' means a day or residential school which provides elementary education, as determined under State law").
68. § 102(d), 80 Stat. at 832 (current version at 29 U.S.C. § 203(w) (1994)) ("[s]econdary school' means a day or residential school which provides secondary education, as determined under State law").
70. See supra note 46 for a discussion of this concern as raised in the 1961 amendment.
which did include elementary and secondary schools, was the version Congress ultimately passed. However, no recorded debate exists concerning the inclusion of elementary and secondary schools. Thus, congressional passage of the House version supports the inference that Congress determined that the benefits of extending the protection of the FLSA to these enterprises outweighed the problems associated with extending coverage. Once the enterprise concept was expanded, unlimited possibilities for further amplification of this concept existed. One such amplification occurred in the 1972 amendment to the FLSA.

D. The Education Amendments of 1972

As part of its 1972 higher education bill, Congress passed another amendment to the FLSA. In this amendment, Congress changed the definition of enterprise by adding “preschool” to the existing list of activities performed for business purposes. However, unlike the 1966 amendment, Congress failed to define “preschool.” The congressional record is devoid of reference to why Congress included the term “preschool” in the definition of enterprise.

The question of what type of businesses fall within the list of covered enterprises under the 1972 addition of “preschool” remains subject to judicial interpretation. The courts, in analyzing this prob-

74. See Reich v. Miss Paula's Day Care Ctr., 37 F.3d 1191, 1193 n.4 (6th Cir. 1994).
75. See Willis, supra note 28, at 626 (“It is important to note that there are unlimited possibilities for amplification of the Act's coverage by the judiciary by way of [Sections 3(r) and 3(s)].”). Another shift that occurred with the 1966 amendments was the type of federal litigation brought under the FLSA. See id. Previously, litigation focused on the employee-centered basis of coverage. See id. With the 1966 amendments, litigation shifted to the enterprise coverage concept. See id.
77. Id. Section 203(r)(1) defines enterprise as:

 Enterprise means the related activities performed in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, mentally ill or defective, a school for the mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education.

Id. Section 203(s)(5) also includes the term “preschool.”
lem, have principally employed traditional methods of statutory inter­pretation. Only one court has discussed policy-centered considerations. This Note asserts that the traditional methods of statutory interpretation employed by federal courts in interpreting the 1972 amendment to the FLSA are ineffective when, as here, conflicting legislative policies emerge to cloud the interpretive process.

II. Approaches to Statutory Interpretation Used by Federal Courts in Interpreting the 1972 Amendment to the FLSA

In the past fifty years, and particularly since the 1960s, statutory law has increasingly replaced the common law. This heightened activity of the legislature has created additional issues to be resolved by the judicial branch. The increased use of statutes as methods of regulation has spurred debate on the proper methods of statutory interpretation.

There are three principal approaches to statutory interpretation relied upon by federal courts in analyzing the meaning of the 1972 amendment to the FLSA: first, the plain meaning rule which

79. See infra Part II for a discussion of the three approaches to statutory interpretation used by federal courts in interpreting the 1972 amendment to the FLSA, as well as a discussion of a feminist method of interpretation.

80. See Reich v. Miss Paula's Day Care Ctr., 37 F.3d 1191 (6th Cir. 1994).

81. See Robert J. Araujo, S.J., The Use of Legislative History in Statutory Interpretation: A Look at Regents v. Bakke, 16 SETON HALL LEGIS. J. 57, 63-64 (1992) (applying a synthetic approach which includes the use of legislative history in interpreting Title VI); Justice Ellen Ash Peters, Common Law Judging in a Statutory World: An Address, 43 U. PITT. L. REV. 995, 996 (1982) ("It seems to be indisputable that by the end of the century, our legal landscape will be one in which statutes of one kind or another will be, not just occasional landmarks, but the dominant feature on the map.").


83. The traditional approaches to statutory interpretation used by federal courts in interpreting the 1972 amendment to the FLSA are under criticism by many theorists. For instance, Professor Eskridge, in advocating a practical reasoning approach to statutory interpretation, has made several criticisms of the traditional approaches to statutory interpretation. The traditional methods, which Professor Eskridge calls "grand theories," suffer common weaknesses:

First, each rests upon questionable premises about the nature of interpretation and the legislative process. Second, none can systematically produce determinate results in the "hard cases," which undermines their claims to "objectivity." Third, although each theory rests upon and subsumes important values that should be considered when interpreting statutes, no theory persuades us that its cluster of underlying values is so important as to exclude all others.
states that the self-evident meaning of the statute's words takes precedence as long as an absurd result will not occur;\textsuperscript{84} second, a textualist approach, which also focuses on the statute's language, but allows the interpreter to go beyond the particular provision to view the statute as a whole;\textsuperscript{85} and third, an intentionalist approach which examines legislative history in addition to the text to discover Congress's intent in enacting the statute or amendment.\textsuperscript{86} Courts interpreting the FLSA have not adhered to any one these traditional approaches, but have selectively borrowed from each in their analysis of the 1972 amendment.

This Note discusses briefly the traditional approaches to statutory interpretation underlying the federal courts' analysis in interpreting the 1972 amendment to the FLSA, as well as a policy-centered approach that is founded on a feminist analysis. This Note concludes that, in analyzing which businesses are considered "preschools" within the meaning of the Act, the approaches used by federal courts thus far fail as interpretive tools because they do not address the underlying policy tensions evident in the FLSA. These policy tensions include the Act's purpose as an anti-poverty statute and Congress's reluctance to implement complimentary legislation that would enable the Act's purpose to be effectuated. Therefore, alternative methods of statutory interpretation, which bring to light the policy tensions within the Act, must be employed.

A. The Plain Meaning Rule

Under the plain meaning rule, the particular provision in the text itself takes precedence over all else.\textsuperscript{87} This rule is based on the theory that "the best way to ascertain the meaning of statutory language is to consider the language of the statute itself."\textsuperscript{88} The plain meaning rule limits the interpretive inquiry to whether interpretation of the plain meaning of the words in the particular factual con-

\textsuperscript{84} See Araujo, supra note 81, at 69; see also Eskridge & Frickey, supra note 14, at 340 (plain meaning posits that "[t]he beginning, and usually the end of statutory interpretation should be the apparent meaning of the statutory language." (citation omitted)).

\textsuperscript{85} See Araujo, supra note 81, at 73.

\textsuperscript{86} See Eskridge & Frickey, supra note 14, at 345.

\textsuperscript{87} See Araujo, supra note 81, at 69. "Under the plain meaning doctrine of statutory interpretation, the language of the statute is exclusively examined." \textit{Id.}; see also Eskridge & Frickey, supra note 14, at 340.

\textsuperscript{88} Araujo, supra note 81, at 70.
text would lead to an absurd result.89 'If the plain meaning of the
words does not lead to an absurd result, the interpretation ends
there.90 Thus, "the factual context, the surrounding general circum­
stances of the history of the legislative process underlying the stat­
ute's passage, rules of construction, and examination of intent or
purpose are irrelevant to an individual interpretation of the
statute."91

The enticement of the plain meaning rule is its simplicity.92
The plain meaning rule draws a bright line at the statute’s language.
Thereby, it fails to address the possibility of ambiguity which might
exist within the statute.93 Advocates of the plain meaning rule
frequently use dictionary definitions to arrive at the “plain meaning”
of a word.94 However, one problem with the rule is that its simplic­
ity often leads to apathy, whereby “judges, in struggling to avoid
legislative history, have ‘found’ a plain meaning in the text rather
than the ambiguity that leads to deference to agencies.”95 Addition­
ally, the plain meaning rule fails to recognize that the historical
particularity of the interpreter fundamentally affects her under­
standing of the value and meaning of words.96 Thus, one inherent
problem with the plain meaning rule is that it does not have, within
its methodology, a check and balance system that challenges the

89. See id. at 69.
90. However, where an absurd result would occur, plain meaning interpreters will
use other sources. Nevertheless, because plain meaning gives the interpreter great lati­
tude in determining the plain meaning of a word, these other methods may never be
utilized.
91. Araujo, supra note 81, at 71.
92. See Outzs, supra note 82, at 307 (“Under the plain-meaning rule, one looks
first to the text. If it is perceived by the judge to be clear, the inquiry ends.”); Gene R.
Shreve, Symmetries of Access in Civil Rights Litigation: Politics, Pragmatism & Will, 66
IND. L.J. 1, 7-8 (1990) (“The plain meaning rule, which provides that a statute be inter­
preted according to the plain or ordinary meaning of its language, continues to exert
influence.”).
93. See Araujo, supra note 81, at 71-72.
94. See, e.g., United States Dep’t of Labor v. Elledge, 614 F.2d 247, 250 (10th Cir.
1980). But see Clark D. Cunningham et al., Plain Meaning and Hard Cases, 103 YALE
L.J. 1561, 1614 (1994) (exploring the ideas raised in LAWRENCE M. SOLAN, THE LAN­
GUAGE OF JUDGES (1993), for example, the idea that linguistic analysis shows that plain
meaning cannot be found in the dictionary).
95. Outzs, supra note 82, at 298 (citation omitted).
96. See Naomi R. Cahn et al., The Case of the Speluncean Explorers: Contempo­
analyses to Lon Fuller’s classic article The Case of the Speluncean Explorers, 62 HARV.
L. REV. 616 (1949)). “The meaning of the language of the statute depends on who is
reading the statute and where she places emphasis as to what different ‘plain mean­
ing(s)’ will emerge.” Id. at 1759.
interpreter's basic assumptions.97

B. The Textualist Theory of Statutory Interpretation

The textualist theory of statutory interpretation, like the plain meaning rule, focuses on the statute and does not consider legislative history or other sources to resolve conflict or ambiguity.98 However, unlike the plain meaning rule, a textualist interpretation will go beyond the particular provision and look at the entire statute to arrive at an interpretation.99

Textualism is distrustful of the use of legislative history in statutory interpretation and the ambiguities it creates.100 Rather, textualism views statutes as "'one-time pronouncements of an independent Congress, binding so far as they impose a meaning, but not instructive, not illuminated either by their political history or by the course of their implementation.""101

Although more complex in its approach than the plain meaning rule, textualist theory poses a similar problem as the plain meaning rule by being overly simplistic, static, and by failing to recognize that the meaning one gives to words is largely determined by context.102 As Professor Eskridge has stated, one inherent problem of the textualist method is that "interpretation cannot aspire to universal objectivity, since the interpreter's perspective will always in-

97. See, e.g., Cahn et al., supra note 96, at 1759-60. "[W]e must instead recognize that law and facts are intertwined, and that how we view the facts is influenced by how we view the law." Id. at 1760.

Another problem with the plain meaning rule is that Congress often intentionally leaves a statute's language ambiguous in an effort to include currently unimagined potential applications. See Eskridge & Frickey, supra note 14, at 347; see also Susan G. Fentin, Note, The False Claims Act-Finding Middle Ground Between Opportunity and Opportunism: The "Original Source" Provision of 31 U.S.C. § 3730(e)(4), 17 W. NEW ENG. L. REV. 255, 286 (1995) (arguing against the use of the plain meaning rule with ambiguous statutes and, instead, advocating the use of fundamental principles of statutory construction to interpret an ambiguous statute).

98. See Araujo, supra note 81, at 73.

99. See id.

100. See Outzs, supra note 82, at 307. The basis for this distrust is twofold. First, the use of legislative histories or other sources is seen as violating the democratic system established through the doctrine of separation of powers. Second, the use of these sources expands the powers of interest groups by emphasizing the deals they made with Congress. See id. (citing Nicholas Zeppos, Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation, 76 VA. L. REV. 1295, 1300-08 (1990)).


102. See Eskridge & Frickey, supra note 14, at 342-43.
teract with the text and historical context.” Additionally, textualism, like the plain meaning rule, errs in presupposing that language is intrinsically determinate.

C. The Intentionalist Theory of Statutory Interpretation

The intentionalist theory of statutory interpretation is based on the notion that a statute by nature is more general than specific, giving the statute greater effectiveness in a broader range of circumstances. However, statutes are not enacted in a vacuum. Most often, statutes are enacted with a general policy framework. To this end, intentionalism examines the “‘intent of the legislature’ in enacting the statute.” Under this view, the court “acts as the enacting legislature’s faithful servant, discovering and applying the legislature’s original intent.” As an agent of the legislature, the court’s role is limited to discovering and applying the legislature’s intent to a particular factual context.

Various tools may be used by advocates of this position to address the issue of Congress’s intent, including the legislative history. The use of legislative history is especially necessary in determining why a particular word or phrase was added. Intentionalism, thus, is limited in effect because it disregards subsequent historical developments or the changing societal context. However, intentionalist theory seeks to find what the general intent of the legislature was and apply that intent to the situation at hand, not to discover the specific intent of particular legislators.

D. A Feminist Theory of Statutory Interpretation

There is no single feminist approach to statutory interpretation...
In fact, as Professor Bartlett points out, suggesting a uniquely feminist interpretive method is inherently problematic. "[The] use of the label 'feminist' has contributed to a tendency within feminism to assume a definition of 'woman' or a standard for 'women's experiences' that is fixed, exclusionary, homogenizing, and oppositional, a tendency that feminists have criticized in others." However, one characteristic common to a feminist approach to statutory interpretation, unlike the traditional approaches, is that "[f]eminists have called attention to the importance of identifying and using traditionally obscured perspectives to expose hidden bias and to develop new interpretations." For instance, feminists have challenged the presumption that the judicial role in statutory interpretation is or can be neutral. In particular, as Professor Resnik has noted, the feminist critique often begins with the notion that courts have employed the traditional methods of statutory interpretation under a misguided notion of judicial objectivity. Feminists have challenged the classical view of a judicial role where "'judges are not supposed to have an involvement or interest in the controversies they adjudicate. Disengagement and dispassion supposedly enable judges to decide cases fairly and impartially.'" Rather, feminist analysis suggests that in practice disengagement is not followed, and that in theory the traditional view of statutory interpretation is not something to which we should aspire. A feminist theory of statutory interpretation re-

115. See Cahn et al., supra note 96, at 1756; see also A. Yasmine Rassam, "Mother," "Parent," and Bias, 69 IND. L.J. 1165 (1994) ("Contemporary scholars do not share a single ideological approach to feminist jurisprudence." (citations omitted)).

116. Katharine T. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 834 (1990) (citation omitted). In this article, Professor Bartlett establishes the feminist stance of positionality and advocates that feminist methods are ends in themselves. See id.

117. Cahn et al., supra note 96, at 1757.

118. See generally Judith Resnik, On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges, 61 S. CAL. L. REV. 1877 (1988) (advocating that the classical theory that judges are to be unbiased, impartial, and objective is not theoretically or practically precise).

119. See id. at 1882.

120. Id. (quoting Judith Resnik, Managerial Judges, 96 HARV. L. REV. 376 (1982)).

121. See id.
places this traditional view of the judicial role as the objective interpreter with the notion that the interpreter necessarily has involvement in the issues. Thus, once we understand that there is no position of objectivity, but only a series of perspectives, we learn that "[t]here is no neutrality, no escape from choice."122

Therefore, feminist approaches to statutory interpretation principally challenge the notion of the objectivity of the interpreter.123 Feminist methods suggest that judges, because of their particular race, gender, and economic circumstances, interpret statutes from a very specific "lens" that should be acknowledged.124 In this way, feminist legal scholars argue that language, and thus meaning, is constructed and is not an objective truth one can simply uncover.125 Thus, interpretation of a statute from a feminist perspective might allow the experience of exclusion to influence the analysis. Using the experience of exclusion, a feminist analysis may simply but fundamentally alter the starting point of the interpretation of a statute.

A feminist analysis is particularly relevant to the statutory interpretation of which businesses are defined as "preschools" and, therefore, required to comply with the FLSA. The feminist approach is relevant to determine which businesses fall within the definition of "preschool" because it involves two areas that have been traditionally dominated by women, and which disproportionately affect women's opportunities to participate equally in the economy. Specifically, the labor force for day care centers and "preschools" is predominately composed of women,126 and the affordability of day care disproportionately affects all women's ability to work outside

123. See generally id. at 57; Rassam, supra note 115, at 1170-73.
124. See generally Resnik, supra note 118, at 1906.
125. See Bartlett, supra note 116, at 849. Other legal scholars have also criticized the notion that language can be "plain" in its meaning. See Rassam, supra note 115, at 1169-71. But see Christian Zapf & Eben Moglen, Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein, 84 GEO. L.J. 485, 485 (1996) (asserting that the advocates of linguistic indeterminacy are wrong in their reliance on Wittgenstein to support their position).
126. In 1995, the number of child care workers (undefined) that were women was 223,000, compared to 20,000 men. Also in 1995, the number of pre-kindergarten and kindergarten teachers that were women was 489,000, compared to 9,000 men. See Bureau of Labor Statistics, Dep't of Labor, Employed & Experienced Unemployed Persons Detailed by Occupation, Sex, Race & Hispanic Origin, Annual Average, 1995, tbl.1 (1995) (unpublished tables) (on file with author) [hereinafter Bureau of Labor Statistics]; see also William Goodman, Boom in Day Care Industry the Result of Many
the home.\textsuperscript{127} Thus, a feminist analysis, because it uses the experience of exclusion in its interpretation, provides a starting point for departure from the three traditional approaches to statutory interpretation employed by federal courts in interpreting the 1972 amendment to the FLSA.

Confronting the vague and ambiguous 1972 amendment to the FLSA, federal courts have struggled to decide whether centers that care for children under the age that children traditionally enter school are required to comply with the FLSA's wage and hour requirements. In this effort, the courts have used traditional methods of statutory interpretation borrowing from the plain meaning rule,\textsuperscript{128} textualism\textsuperscript{129} and intentionalism\textsuperscript{130} to interpret the 1972 amendment to the FLSA. However, no court exclusively uses one approach to statutory interpretation. Instead, each court combines these approaches, shifting from one to another to arrive at its conclusion. In the following section, this Note will discuss the approaches courts employ to interpret the 1972 amendment to the FLSA.

III. Judicial Treatment of Whether a Child Day Care Center is a Covered Enterprise Under the 1972 Amendment

A. The Fair Labor Standards Act Does Not Apply to Child Day Care Centers: Marshall v. Rosemont, Inc.\textsuperscript{131}

The Secretary of Labor, in \textit{Marshall v. Rosemont, Inc.}, brought two actions pursuant to his power under the FLSA\textsuperscript{132} to enjoin two day care centers from violating the minimum wage and maximum

\textit{Social Changes, Monthly Lab. Rev.,} Aug. 1995, at 3 (discussing various social changes that have resulted in the need for increased day care providers).

\textsuperscript{127} For instance, a study of 158,000 AFDC recipients in Illinois found that 91\% of parents who were not working would prefer to be working if they had child care that they liked and trusted. \textit{See Illinois Department of Public Aid, Child Care: AFDC Recipients in Illinois} (1991) [hereinafter \textit{Illinois Dep't of Public Aid Report}]; \textit{see also} Catherine L. Fisk, \textit{Employer-Provided Child Care Under Title VII: Toward an Employer's Duty to Accommodate Child Care Responsibilities of Employees}, 2 \textit{Berkeley Women's L.J.} 89, 89 (1986) (“Motherhood . . . is . . . one of the most persistent impediments to economic equality for women. . . . [Women] experience a variety of adverse employment consequences because of their conflicting responsibilities to their children.”).

\textsuperscript{128} See \textit{supra} Part II.A for a discussion of the plain meaning rule.

\textsuperscript{129} See \textit{supra} Part II.B for a discussion of textualism.

\textsuperscript{130} See \textit{supra} Part II.C for a discussion of intentionalism.

\textsuperscript{131} 584 F.2d 319 (9th Cir. 1978).

hour provisions of the Act. In one center the children ranged in age from infancy to kindergarten. In the other center, the children ranged from infancy to third grade. The Secretary claimed the enterprises at issue were "preschools" within the definition of covered enterprises. In support of this assertion, the Secretary relied upon a Wage and Hour Opinion Letter that, in the absence of congressional direction, defined the term "preschool" broadly. The district court held that neither of the defendant's day care centers were operating a preschool within the meaning of the Act and both complaints were dismissed. The Secretary of Labor appealed.

The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision. Relying on textualist methods of interpretation, the Ninth Circuit first looked to the statute and analyzed the word "preschool" within the context of the definition of enterprise. The court recognized that Congress, in developing the particular types of institutions within the Act, added "preschool" to a long list of other types of schools. The court concluded that Congress, therefore, used the term "preschool" to

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133. See Rosemont, 584 F.2d at 320.
134. See id.
135. See id.
136. This is an administrative ruling promulgated by the Wages-Hours Administrator. Opinion letters are written under a variety of circumstances. In this case, the letter was a response to a resolution to clarify the Wages-Hours law (the Chief of the Branch of Coverage and Exemptions in the Wage and Hour Division proposed this resolution). See Opinion Letter of the Wage-Hour Administrator, No. 1346, [June 1973-Sept. 1978 Transfer Binder, Wages-Hours Administrative Rulings] Lab. L. Rep. (CCH) ¶ 30,953 (October 24, 1974) [hereinafter Opinion Letter No. 1346].
137. See id. This letter discusses the history of the FLSA, in particular the legislative activity leading to the inclusion of "preschool." Coverage was extended to include "preschool" regardless of the dollar volume of business or their public or private nature, so long as it has employees engaged in commerce, or the production of goods for commerce. See id. Additionally, the letter defined the term "preschool" as including:

[A]ny establishment or institution which accepts for enrollment children of preschool age for purposes of providing custodial, educational, or developmental services designed to prepare the children for school in the years before they enter the elementary school grades. This includes day care centers, nursery schools, kindergartens, head start programs and any similar facility primarily engaged in the care and protection of preschool children.

Id.
138. See Rosemont, 584 F.2d at 320.
139. See id.
140. See id. at 322.
141. See id. at 321.
142. See id.
mean an enterprise that is part of the school system.\footnote{143} Thus, in interpreting the Act, the Ninth Circuit focused upon the educational nature of a "preschool."\footnote{144} By inference, child day care centers were thus custodial in nature.

Again relying on textualist methods of interpretation, the court also reviewed Congress's definitions of "elementary" and "secondary" school, which were covered under the same provision in the Act.\footnote{145} Because the Act defers to state law in the definition of elementary and secondary schools,\footnote{146} the court concluded that state law was relevant in determining whether a child day care center was a "preschool" within the meaning of the 1972 amendment.\footnote{147} Thus, because the day care centers were not regulated by the state of Arizona, and because the Secretary did not present any conclusive evidence that these institutions should be considered an enterprise, the court held that the FLSA did not apply to these day care centers.\footnote{148}

\begin{itemize}
\item \footnote{143} See id. “Of 'schools' [the Act] lists schools for 'handicapped or gifted children'; it then proceeds to 'a preschool, elementary or secondary school, or institution of higher education.'” Id.
\item \footnote{144} See id.
\item \footnote{145} See id. at 320-21.
\item \footnote{146} See id.; see also Smith v. Friends of Children, 616 F. Supp. 180 (S.D. Miss. 1985). The Smith court advocated a similar reasoning as the court in Rosemont: Since within the Act deference is given to state law in defining "elementary" and "secondary" school, because the Act defers to state law in defining each term, by inference, state law is determinative in defining "preschool." See id. at 183. See supra notes 67 and 68 for the definitions of "elementary" and "secondary" schools. Thus, since the Head Start program was not certified by the State Department of Education, the court held that it was not operating a preschool within the meaning of the FLSA. See Smith, 616 F. Supp. at 183.
\item \footnote{147} See Rosemont, 584 F.2d at 321. Similarly, in Satyal v. Shah, 756 F. Supp. 937 (E.D. Va. 1991), the plaintiff, a live-in day care worker, filed suit seeking minimum wage and overtime pay under the FLSA. See id. at 938. The Satyal court, like the court in Rosemont, concluded that the day care center was not an enterprise covered under the Act. See id. at 941. As did the court in Rosemont, the Satyal court reviewed the statute's treatment of "elementary" and "secondary" schools. The court held that the FLSA deferred to state law concerning the definition of "elementary" and "secondary" schools but failed to do this with "preschool." The Satyal court, however, unlike the court in Rosemont, concluded that state law should not be the point of distinction, because Congress chose to omit any reference to state law and presumably would have included such a reference had it been important. See id. at 939.
\item \footnote{148} See Rosemont, 584 F.2d at 321-22.
\end{itemize}
B. The Fair Labor Standards Act Applies to Child Day Care Centers

1. United States Department of Labor v. Elledge

In United States Department of Labor v. Elledge, the Secretary of Labor appealed a judgment by the lower court holding that the day care center was not a “preschool” within the meaning of the Act. The “Young Sooners Day Care Center” was open to children ranging in age from infancy to twelve years. Sixty-two percent of the children were three to five years old. The center transported children of school age to and from their schools and provided them with games, toys, activities, books, and food for snacks and meals while at the center. The center provided the same sort of activities for the children who were not school age with the addition of naps.

The United States Court of Appeals for the Tenth Circuit first relied on intentionalist methods of statutory interpretation to analyze the meaning of “preschool” within the Act by reviewing the history of the FLSA, and particularly the evolution of the definition of “enterprise” and the definitions of “elementary” and “secondary” schools. The Tenth Circuit concluded that the legislative history leading to the 1972 amendment was unhelpful. Turning then to Oklahoma law, the court recognized that the state had licensed the center as a “day care center.” Under this Oklahoma statute, a day care center was defined as a “facility which provides care and protection of six or more children for part of the twenty-four hour day.” Additionally, the statute excluded from its

149. 614 F.2d 247 (10th Cir. 1980).
150. See id. at 248. The Secretary of Labor instituted the action for declaratory judgment on the issue of whether the enterprise was a preschool covered under the FLSA. See id.
151. See id. at 249.
152. See id. No statistics were given for the age breakdown of the other 38% of the children.
153. See id. at 249.
154. See id. See supra notes 67 and 68 for the definition of “elementary” and “secondary” school.
155. See Elledge, 614 F.2d at 249. The court found that the only reference to the 1972 amendment was in H.R. Rep. No. 92-1085, at 2 (1972), reprinted in 1972 U.S.C.C.A.N. 2462, 2567. This merely notes the addition of “‘preschool’ to the existing listing of ‘an elementary or secondary school’ as types of activities performed for business purposes.” Elledge, 614 F.2d at 249.
156. See Elledge, 614 F.2d at 249.
157. Id. (quoting Okla. Stat. tit. 10, § 402(d) (no date provided by the court)).
scope all facilities that were educational in purpose. These excluded facilities which were registered through the state board of education, included nursery schools, kindergartens, elementary, and secondary schools.

The court in *Elledge* rejected the conclusion in *Rosemont* that a "preschool" should be distinguished from a day care center on the grounds that the former serves a primarily educational function while the latter provides only a function of custodial care. The *Elledge* court held that this was an artificial distinction, because the relevant section of the FLSA relates to enterprises with primarily a custodial function as well as those with primarily an educational function. As additional support for this conclusion, the Tenth Circuit turned to an earlier Tenth Circuit decision, *McComb v. Farmers Reservoir & Irrigation Co.* In *McComb*, the court held that the FLSA "is not expanded to include some employees and limited to exclude others engaged in the same work, depending upon local statutory or judicial concepts." The Tenth Circuit held that this principle is controlling unless Congress makes state law applicable. Thus, the Tenth Circuit highlighted one of the original purposes of the Act: to provide uniformity in the treatment of workers.

158. *See id.*
159. *See id.*
160. *See id.* at 249-50.
161. *See id.* at 250.
162. 167 F.2d 911, *modified and aff’d*, 337 U.S. 755 (1949). In *McComb*, the Tenth Circuit addressed whether all of the defendant’s employees, except one, were engaged in commerce or the production of goods for commerce under the agriculture provisions of the Act. *See id.* at 912. The action in *McComb* was brought before the “enterprise concept” was introduced into the Act. Thus, the Secretary had to prove that each employee was engaged in commerce or the production of goods for commerce. In this context, the court concluded that “local law relating to the imposition of special assessments or the levying of ad valorem taxes is not the test for determining whether the employees of such a corporation are engaged in agriculture within the meaning of [the] section.” *Id.* at 915. To do this would be to “introduce [as many] variations . . . as the laws of the several states.” *Id.* The court, therefore, concluded that under the Act, “[p]ersons engaged in identical work [cannot] be within the statute or exempt from its provisions depending upon the location of their work and the attitude of the particular state.” *Id.* *See supra* note 26 for the text of the 1938 version of 29 U.S.C. § 206(a)(1)-(3) (1994); see also * supra* Part I.A for a discussion of the 1938 enactment of the FLSA.
164. *See Elledge*, 614 F.2d at 250.
165. *See supra* Part I.A for a thorough discussion of Congress’s intent in enacting the FLSA.
Shifting to the text, the court analyzed the Act's deference to state law in the definitions of "elementary" and "secondary" school relative to the absence of state law in defining "preschool."\textsuperscript{166} The Tenth Circuit, in contrast to \textit{Rosemont}, held that because Congress specifically allows states to substantively define "elementary" and "secondary" school,\textsuperscript{167} and conversely fails to refer to state law with "preschool," Congress intended to treat "preschools" differently.\textsuperscript{168}

Next, the court employed the plain meaning rule and reasoned that, in the absence of direction from Congress and in the absence of legislative history, "it is appropriate for the court to interpret [preschool] in accordance with its ordinary, everyday meaning."\textsuperscript{169} The court then turned to Webster's definition of "preschool," which was defined as "a kindergarten or nursery school where children of preschool age, sometimes in age groups, are entered for observation and social and educational training."\textsuperscript{170} The court noted that this definition was consistent with a Wage and Hour Opinion Letter issued by the Department of Labor, which does not make a distinction between the custodial and educational functions of "preschool" and day care centers.\textsuperscript{171}

The Tenth Circuit, in concluding that the "Young Sooners Day Care Center" was a covered enterprise under the Act,\textsuperscript{172} cited the remedial and humanitarian intent of the Act as addressing the detrimental circumstances of many workers.\textsuperscript{173} The Tenth Circuit noted that the Act, as a remedial and humanitarian statute, has been interpreted to reach the furthest coverage "consistent with congressional direction."\textsuperscript{174} Similarly, to effectuate its remedial

\textsuperscript{166} See \textit{Elledge}, 614 F.2d at 250.
\textsuperscript{167} See \textit{supra} notes 67 and 68 for the definitions of "elementary" and "secondary" schools under the FLSA.
\textsuperscript{168} See \textit{Elledge}, 614 F.2d at 250.
\textsuperscript{169} \textit{Id.} (quoting United States v. New Mexico, 536 F.2d 1324, 1327-28 (10th Cir. 1976)).
\textsuperscript{170} \textit{Elledge}, 614 F.2d at 250 (quoting \textit{WEBSTER'S NEW INTERNATIONAL DICTIONARY} (2d ed.) (no date provided by the court)).
\textsuperscript{171} See \textit{id.} at 251; see \textit{supra} note 137 for the text of the letter.
\textsuperscript{172} \textit{Elledge}, 614 F.2d at 251.
\textsuperscript{173} See \textit{id.}; see also \textit{Hodgson v. University Club Tower, Inc.}, 466 F.2d 745, 746 (10th Cir. 1972) (indicating that the FLSA was passed for humanitarian and remedial purposes). The Act itself lends this interpretation. Section 216 of the Act provides penalties for knowing violations of the Act. \textit{See} 29 U.S.C. § 216 (1994). This demonstrates the Act's remedial nature. Additionally, the humanitarian purpose is clearly stated in the declared policy of the Act to "correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power." 29 U.S.C. § 202(b) (1994).
\textsuperscript{174} \textit{Elledge}, 614 F.2d at 251 (quoting \textit{Mitchell v. Lubin, McGaughy & Assoc.},
and humanitarian purpose, the Act’s breadth of coverage has historically been viewed as vital to the Act’s mission. Thus, the Tenth Circuit reasoned that categorizing the plaintiff’s day care center as a “preschool” is consistent not only with Congress’s intent with regard to the 1972 amendment, but also with the Act as a whole.

2. Reich v. Miss Paula’s Day Care Center

In Reich v. Miss Paula’s Day Care Center, the United States Court of Appeals for the Sixth Circuit also addressed the issue of when a facility that cares for children below the compulsory school age becomes a “preschool” within the meaning of the Act. Miss Paula’s Day Care Center provided custodial care in the Appalachian region of southeastern Ohio for over sixty children ranging in age from infants to six year olds. Even though Ohio has a separate license for “preschool,” the center had never sought this license, but had been a state-licensed day care center since 1985. The district court, rejecting the center’s argument that the distinction between a day care center and “preschool” lies in the nature of the institution, held that the center came within the meaning of the Act because the common sense definition of a “preschool” includes a day care center. The center appealed.

The Sixth Circuit looked to the language of the statute as well as the surrounding provisions concerning the definition of “elementary” and “secondary” school. The court interpreted the 1972 amendment, which included “preschool” in the list of covered en-

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358 U.S. 207, 211 (1959) (holding that the Act should be liberally construed to its furthest reaches, consistent with congressional direction).
175. See id. (citing Powell v. United States Cartridge Co., 339 U.S. 497, 516 (1950)).
176. See id.
177. 37 F.3d 1191 (6th Cir. 1994).
178. See id. at 1192.
179. See id.
180. See id.; see OHIO REV. CODE ANN. § 3313.646 (Banks-Baldwin 1994). “Preschool program” is defined as “a child day care program for preschool children.” § 3301.52(A).
181. See Miss Paula’s, 37 F.3d at 1192. The center was licensed under OHIO REV. CODE ANN. §§ 5104.01-.03 (Banks-Baldwin 1984).
182. See Miss Paula’s, 37 F.3d at 1195. To this end, the center argued that day care centers are primarily custodial, and “preschools,” as the name suggests, are primarily educational. See id.
183. See id.
184. See id. at 1192.
185. See id. at 1193-94.
enterprises, within the context of the 1966 amendment which expanded the "enterprise concept." The court noted that in amending the FLSA in 1966 to include elementary and secondary schools as covered enterprises, Congress expressed concern over the impact an increase in wages would have on school district budgets. However, despite this concern, Congress included elementary and secondary schools as covered enterprises under the Act. From these historical facts, the court inferred that Congress knowingly decided that the extension of the FLSA to these employees outweighed the financial burden it would impose on the school systems. The court held that it was reasonable to infer from the House Report that "preschool[s]" were added to the Act because of the economic characteristics they share with elementary and secondary schools. Therefore, the Sixth Circuit held that the financial strains of compliance with the Act were not intended by Congress to be considered in determining coverage under the Act. Despite this analysis, the court ultimately concluded that the legislative history was unhelpful in interpreting the 1972 amendment.

The Sixth Circuit next recognized the distinction that other courts, based on the text of the statute, had made between the supposed custodial nature of day care centers and the educational nature of "preschools." The Sixth Circuit, however, held that this was a strained reading of the statute because the Act included traditionally custodial institutions, such as hospitals, as well as traditionally educational institutions like secondary schools.

The Sixth Circuit employed the plain meaning rule to reach its conclusion that the center was a "preschool" within the meaning of the Act. The court held that it was reasonable that Congress did not provide for "child day care centers" separately, because it re-

186. See id. at 1194.
188. See id.
190. See id. at 1193.
191. See id.
192. See id. at 1194-95. This had been the center's primary support for its argument that it should not fall within the FLSA's umbrella. See also Marshall v. Rosemont, 584 F.2d 319, 321 (9th Cir. 1978).
193. See Miss Paula's, 37 F.3d at 1195. The court noted this reading assumes more than the statute's words suggest. See id.
194. See id.
arded them in their common language meaning as serving any child who is before or "pre" school age. Additionally, the court held that even under a state law definition, the "plain meaning" of "preschool" would include child day care centers like Miss Paula's, because even though the state of Ohio licenses "preschools" and "day care centers" differently, Ohio's definition of preschools includes "day care" programs. Therefore, the Sixth Circuit held that even if Miss Paula's could show it provided no education to the children and was merely a custodial center, Miss Paula's would still be obligated to comply with the FLSA because the statute includes purely custodial institutions.

The Sixth Circuit was reluctant to end its inquiry with the statutory interpretation of the 1972 amendment. Rather, the court noted the conflict in policies when it recognized that the facts of the case were disturbing because Miss Paula's provided educational enrichment to low-income children while their parents were productive members of the work force. The Sixth Circuit further noted that, as the facts indicated, the requirements of the FLSA placed a severe burden on Miss Paula's and thus on the children's parents. Nevertheless, the Sixth Circuit inferred that even though this decision may have an adverse effect, if it is the government's social policy to eliminate low wage operations, the court was not allowed to stand in its way, for this was a legislative and not a judicial function. As further support for this conclusion, the Sixth Circuit commented that to exempt day care centers from the FLSA's minimum wage and overtime provisions would be to encourage centers to "dumb down" their programs in an effort to avoid the extra financial burden.

195. Id.
196. Id. This was the magistrate judge's interpretation of this part of Ohio's statute, which the court accepted. See id.; see supra notes 180 and 181 for citation to Ohio's statutes.
197. See Miss Paula's, 37 F.3d at 1196. The court noted the precarious position of the center. At one end of the Act, educational institutions are required to comply, and at the other end, purely custodial professional babysitting services must also comply. See id.; see also 29 U.S.C. §§ 206-207 (1994) for exemptions of casual babysitting services.
198. See Miss Paula's, 37 F.3d at 1197.
199. See id.
200. See id. Additionally, the court noted that it may be Congress's intent to eliminate low-cost operations like Miss Paula's. See id.
201. See id.
IV. LEGAL ANALYSIS

Defining the scope of coverage under the FLSA has been a fundamental point of legislative and judicial disagreement since the Act’s inception.202 As the courts in Miss Paula’s, Elledge, and Rosemont concluded, the legislative history of the 1972 amendment, which added “preschool” to the list of covered enterprises, was unhelpful in determining the scope of coverage under the 1972 amendment.203 Senate and House Reports, as well as the Congressional Record, are frustratingly void of reference to Congress’s reasoning in amending the FLSA to include “preschool” in its treatment of covered enterprises.204

The only insight into congressional intent in amending the FLSA to include “preschool” is in the language of the 1972 amendment itself. However, that amendment simply adds “preschool” to the existing list of “activities performed for business purposes.”205 Therefore, because the definition of “preschool” is left without legislative direction, the courts charged with defining its import have employed a variety of interpretive methods.

In interpreting the 1972 amendment, the courts have used traditional approaches to statutory interpretation. These approaches include the plain meaning rule, and methods consistent with intentionalism and textualism. No court uses one approach exclusively. Instead, each court combines different approaches to arrive at its conclusion. Additionally, no court has substantively considered the policy of the Act as an anti-poverty provision. Instead, the only court to address policy issues concluded that consideration of public policy issues was not a judicial function.206

This analysis will address the difficulties courts have faced in interpreting the 1972 amendment to the FLSA. This Note asserts

202. See Maryland v. Wirtz, 392 U.S. 183 (1968) (holding that the 1961 amendment introducing the “enterprise” concept is constitutional), overruled on other grounds by National League of Cities v. Usery, 426 U.S. 833 (1976); Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943) (holding the FLSA's Commerce Clause base to be constitutional); see also Willis, supra note 28, at 609 (commenting that although the FLSA has been in existence since 1938, and most of its terms are clear, litigation concerning coverage continued to be greater than any other labor law well into the 1970s).

203. See Miss Paula's, 37 F.3d at 1193; United States Dep't of Labor v. Elledge, 614 F.2d 247, 249 (10th Cir. 1980); Marshall v. Rosemont, 584 F.2d 319, 321 (9th Cir. 1978).


205. Id. at 1, reprinted in 1972 U.S.C.C.A.N. at 2462.

206. See Miss Paula's, 37 F.3d at 1197. For a more thorough discussion of Miss Paula’s, see supra Part III.B.2.
that the traditional approaches employed by federal courts in interpreting the 1972 amendment to the FLSA fail under the weight of an issue that is inextricably entwined with public policy. Further, the approaches to interpretation used by the federal courts, without consideration of public policy issues, allow justification of decisions based on reasons unrelated to the purpose of the statute. Thus, the interpretive methods used by federal courts neither provide efficient and consistent analysis, nor substantively address inconsistencies within the Act.

After examining the courts’ methods of interpreting the 1972 amendment, this Note concludes that a policy-centered method is the only effective analysis for courts to employ.\textsuperscript{207} A feminist policy-centered method highlights how traditional methods have failed to address the adverse impact on low-income women that results from either a broad or narrow interpretation of the 1972 amendment to the FLSA. Thus, this feminist analysis forms the starting point of a policy-centered analysis. Further, a policy-centered analysis, founded on feminist concerns, leads to greater judicial honesty concerning the nature of the problems that emerge in interpreting the 1972 amendment to the FLSA.

This Note advocates that courts should not disregard policy as beyond the purview of the judiciary. Instead, courts should weigh the public policy issues in order to fill the legislative void left by Congress when it failed to define “preschool” in the 1972 amendment to the FLSA. Furthermore, courts should practice judicial honesty and, where the Act’s omissions result in injustice, discuss policy in their opinions. This Note concludes that what the Sixth Circuit in \textit{Miss Paula’s} deemed beyond the role of the judiciary, is fundamental to the proper administration of justice.

A. \textit{The Plain Meaning of “Preschool” is Inconclusive}

The court in \textit{Miss Paula’s} and \textit{Elledge} employed the plain meaning rule in their interpretation of the 1972 amendment.\textsuperscript{208} In


208. \textit{See Miss Paula’s}, 37 F.3d at 1195; \textit{Elledge}, 614 F.2d at 250; see also \textit{supra}}
Elledge, the Tenth Circuit relied on the plain meaning rule after exhausting other interpretive methods.\(^{209}\) Using the plain meaning rule as a method of last resort suggests that the court found a plain meaning in the text rather than addressing the ambiguity of the text.\(^{210}\)

As support for its "plain meaning" that a child day care center is a "preschool" within the meaning of the Act, the court in Elledge relied on the dictionary.\(^ {211}\) The court used Webster's New International Dictionary, second edition ("Webster's"), as clear support for its position.\(^{212}\) In Webster's, preschool is defined as "a kindergarten or nursery school where children of preschool age, sometimes in age groups, are entered for observation and social and educational training."\(^ {213}\)

The problem with using a dictionary as a source for the plain meaning of a word is that it does not define the term according to the statute, but instead defines the term according to one particular usage of a word. For instance, had the court in Elledge used the American Heritage Dictionary, second edition, the definition would have read: "Of, pertaining to, or designed for a child of nursery-school age."\(^ {214}\) This definition, unlike that of Webster's, does not support the court's conclusion. Thus, although appearing self-evident, the court's use of the plain meaning rule in Elledge gives the false impression that the statute has one clear meaning.\(^ {215}\)

Similarly, the court in Miss Paula's employed the plain meaning rule when it held that the absence of a statutory definition for "preschool" may be the result of Congress considering day care centers as part of the "'preschool' rubric."\(^ {216}\) Thus, the court in-
ferred that the preschool rubric was clear. However, this interpretation of the plain meaning of "preschool" is likewise inconclusive because it begs the question and fails to address the ambiguity in the term.217

For instance, rather than seeing day care centers as part of the "'preschool' rubric," it is equally plausible that, in 1972, Congress did not address the issue of whether a child day care center was to be considered a "preschool," because Congress either was not aware of the distinction, or the distinction did not exist because day care centers were not common. Thus, a modern interpreter might be similarly unaware of the distinction between preschools and day care centers. Therefore, the "plain meaning" of "preschool" could suggest a more literal interpretation, applying only to enterprises with the word "preschool" in the name.

In interpreting the meaning of "preschool," use of the plain meaning rule allows the interpreter to rest upon her presumptions, rather than forcing her to challenge them. These presumptions are problematic because, as Professor Resnik suggests, "what has been assumed (by some) as a universal viewpoint is, in fact, a viewpoint of some men, who have articulated a vision of reality and claimed it to be true for us all."218 Thus, the plain meaning rule is ultimately inconclusive in interpreting which businesses are considered to be a "preschool" within the meaning of the Act.

B. The Use of Textualism is Ineffectual

In interpreting the meaning of "preschool" in the 1972 amendment to the FLSA, courts most extensively relied upon methods consistent with textualism.219 In *Rosemont*, the Ninth Circuit employed a textualist method in two ways. First, the court reviewed where the word "preschool" was introduced in the relevant sections of the Act.220 Noting that "preschool" was among a list of other types of schools, the court in *Rosemont* concluded that a "pre-

217. For instance, if day care centers were part of everyday experience, then the absence of the inclusion of "day care center" would lead to the conclusion that Congress did not intend to include day care centers as covered under the 1972 amendment to the FLSA. By contrast, if day care centers were not common in 1972, Congress reasonably would not have known of them, so the absence of day care centers in the 1972 amendment would not mean that Congress did not intend to include them.


219. See *supra* Part II.B for a discussion of the textualist theory of statutory interpretation.

220. See Marshall v. Rosemont, 584 F.2d 319, 321 (9th Cir. 1978).
school” is a part of the school system.\(^{221}\) Second, upon deciding that a preschool is part of the school system, the court looked to the definitions of “elementary” and “secondary” school.\(^{222}\) Finding that in these definitions the Act deferred to state law, the court concluded that state law is also determinative in interpreting a “preschool.”\(^{223}\)

The Tenth Circuit in *Elledge* also employed textualist methods of interpretation similar in process, if not in result, with the court’s method in *Rosemont*. The *Elledge* court also began its analysis by looking to the sections of the Act where the word “preschool” was added.\(^{224}\) However, the *Elledge* court specifically rejected the conclusion reached in *Rosemont*.\(^{225}\) Instead, the Tenth Circuit held that, because Congress specifically allowed states to substantively define “elementary” and “secondary” school,\(^{226}\) and conversely failed to refer to state law with “preschool,” Congress intended to treat “preschools” differently.\(^{227}\) Additionally, the Tenth Circuit disagreed with the *Rosemont* court’s textual interpretation that the distinguishing feature of a “preschool” is its primarily educational function in contrast to the custodial nature of a day care center.\(^{228}\) Rejecting this textual interpretation, the court in *Elledge* held that the relevant section of the statute relates to enterprises with a primarily custodial function as well as those with primarily an educational function.\(^{229}\) Thus, the court held that there is no distinction in the function of the enterprise.\(^{230}\)

As evidenced by the differing judicial interpretations of the same language, the textual approach is largely colored by the interpreter’s presumptions. Specifically, in interpreting the 1972 amendment, the value the interpreter gives to Congress’ silence determines the textual interpretation of this silence. For instance, in *Elledge*, the court weighed silence as a stronger inference of Con-

\(^{221}\) See *id.*

\(^{222}\) See *id.*

\(^{223}\) See *id*. The trial court found that there was no guidance in state law concerning the term “preschool.” Therefore, the trial court held hearings to determine the definition. See *id.*

\(^{224}\) See United States Dep’t of Labor v. *Elledge*, 614 F.2d 247, 249 (10th Cir. 1980).

\(^{225}\) See *id.*

\(^{226}\) See *supra* notes 67 and 68 for the definitions of “elementary” and “secondary” schools under the FLSA.

\(^{227}\) See *Elledge*, 614 F.2d at 250.

\(^{228}\) See *id.* at 249-50.

\(^{229}\) See *id.* at 250.

\(^{230}\) See *id.*
gress's intent. Thus, in textually interpreting the relevance of the definitions of "elementary" and "secondary" schools, the court in *Elledge* held that the state-law definitions were inapplicable to "preschool." The court in *Rosemont*, however, was less willing to interpret Congress's silence as a statement of intent. Thus, in interpreting the text, the *Rosemont* court found that an analysis into state-law definitions of "preschool" was relevant to analyzing the meaning of "preschool" under the FLSA.

The textualist approach is ultimately ineffectual as a means of interpreting the 1972 amendment to the FLSA because the interpreters' presumptions alter the substantive result of Congress' silence in defining the term "preschool" in the 1972 amendment to the FLSA. Accordingly, textualist approaches fail to provide guidance concerning the inclusion of "preschools" as covered enterprises under the 1972 amendment to the FLSA.

C. The Intent of Congress in Enacting the FLSA Suggests Broad Coverage in Favor of the Day Care Center Employee

Each court charged with interpreting the 1972 amendment has recognized the absence of legislative history concerning the 1972 amendment. However, in interpreting what businesses are covered by the inclusion of "preschool," the court in *Elledge* and *Miss Paula's* moved beyond the 1972 amendment to interpret the amendment's intent within the Act as a whole.

In *Miss Paula's*, the United States Court of Appeals for the Sixth Circuit employed an intentionalist approach to statutory interpretation when it addressed the debate surrounding the inclusion of "elementary" and "secondary" schools in the 1966 amendment. The court noted that the Senate had initially omitted these institutions due to the concern over the financial impact that minimum wage and overtime requirements would have on state school

231. See *id.*
233. See *Reich v. Miss Paula's Day Care Ctr.*, 37 F.3d 1191, 1193 (6th Cir. 1994) ("[t]he statute's legislative history casts little light on whether Congress considered custodial 'child day care centers' to be 'preschools'); *Elledge*, 614 F.2d at 249 ("We find no legislative history of any help or significance."); *Rosemont*, 584 F.2d at 320 ("Congress ... left the definition of 'preschool' undefined. Literally, it could apply from babes in arms to the first classification to be defined thereafter.").
234. See *supra* Part II.C for a discussion of the intentionalist theory of statutory interpretation.
235. See *Miss Paula's*, 37 F.3d at 1193.
Although no record exists concerning why these businesses were ultimately included in the Act, the Sixth Circuit inferred that their inclusion meant that Congress believed the benefits of coverage outweighed the detriment. Thus, the Sixth Circuit concluded that Congress’s intent was to extend coverage to more employees despite potentially adverse economic consequences.

Although the court in Elledge relied heavily on a textualist approach to interpretation as final confirmation for its position that the child care center is a “preschool” within the meaning of the Act, the court found support in the FLSA’s larger intent. To this end, the court in Elledge cited case precedent concerning the Act’s purpose as a remedial and humanitarian statute. Thus, the court concluded that, where ambiguity exists, this humanitarian intent advises broad coverage in favor of the employee.

The courts in Miss Paula’s and Elledge agreed that Congress intended to extend coverage liberally in favor of the employee. Nevertheless, the intentionalist approach fails because the focus of its inquiry is too narrow. For instance, while broad coverage in favor of the employee is consistent with the FLSA’s anti-poverty purpose, this insight alone is insufficient precisely because modern circumstances affecting poverty have changed while the Act has remained constant. Thus, as the court in Miss Paula’s noted, although it may be the government’s policy to eliminate low wage operations, complying with the FLSA’s minimum wage and overtime requirements may have the effect of placing an unmanageable burden on the parents who are themselves low wage workers. Thus, intentionalism, without a policy-centered focus, is ineffectual.

236. See id. at 1193 n.4.
237. See id. The court’s reasoning could have been that, rather than a substantive reason for acquiescence, one chamber may merely have acceded to the other. See generally, Outzs, supra note 82, at 301, for a discussion of the legislative process of a statute from a proposed bill to enactment.
238. See Elledge, 614 F.2d at 250-51.
239. See id. at 251.
240. See id.
241. See id. at 250-51; Miss Paula’s, 37 F.3d at 1197.
242. See infra Part IV.D for a discussion of how modern circumstances affect the Act’s minimum wage and overtime provisions.
243. See Miss Paula’s, 37 F.3d at 1197.
244. See generally Schreve, supra note 92, at 8. Schreve notes that an additional problem with ending the interpretive analysis with a review of the intent of Congress is
D. A Policy-Centered Interpretation, Founded on Feminist Concerns, Recognizes the Complexity of the Issue

Only the Sixth Circuit in Miss Paula's notes in dicta what might be considered a policy-centered analysis. However, the Sixth Circuit's use of these observations as a method of interpretation was restricted by its assumption that discussing the Act's inconsistencies was a legislative, not judicial, function. Therefore, the court kept its policy-centered observations from becoming an interpretive method. Thus, it remains unclear what result a policy-centered interpretation of the 1972 amendment to the FLSA might have on the courts' analysis.

A policy-centered analysis might ask three interrelated questions: first, using traditional methods of interpretation, whether day care workers are the kind of workers the FLSA was intended to protect; second, whether the traditional interpretation is consistent with the purpose of the Act; and third, to the extent that there is a conflict in policies, how might the judiciary inform the legislature of the inconsistency in the particular factual context at hand?

In particular, a policy-centered analysis, focused on feminist concerns, is a natural starting point to a policy-centered interpretation of the 1972 amendment to the FLSA. For instance, a broad interpretation of the 1972 amendment results in preschool workers' wages increasing. However, increased labor costs also will likely result in the cost of day care rising. The availability of low-cost day care affects women's ability to work outside the home, particularly single women, and thus, impacts low-income women's ability to participate in the economy on an equal basis.

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245. There are numerous ways a feminist analysis might begin to address the problem of interpreting the 1972 amendment to the FLSA. This is but one way to construct the analysis.

246. Feminist statutory interpretation instructs the interpreter's inquiry based on the notion that "[f]eminist theories share a view that much of women's experiences of their lives [have] been omitted in the standard scholarly and popular descriptions of the world." Resnik, supra note 118, at 1906.

247. See Chris Tilly & Randy Albelda, University of Mass. at Boston, It'll Take More than a Miracle: Income in Single-Mother Families in Massachusetts, 1979-1987 (1992) [hereinafter Tilly & Albelda, Occasional Paper]. This paper outlines why single-mothers failed to experience the benefits of the "Massachusetts Miracle." In this paper the authors point out that the combination of children, one working-aged adult, and the adult being female creates a "triple whammy" that significantly depresses the family's earning power. See id. at 1-2; see also Women in the Workforce in the Year 2000, Daily Lab. Rep. (BNA), Apr. 13, 1988, available in WESTLAW, BNA-DLR Database (State-
women are the large majority of the "preschool" workforce, a narrow interpretation that finds that preschools are not covered under the Act results in a female-dominated area of the workforce earning below minimum wage.

Thus, a feminist inquiry forms the starting point of a policy-centered analysis, in that a feminist inquiry recognizes that either a broad or narrow interpretation of the 1972 amendment to the FLSA results in a disproportionate impact on low-income women. Therefore, the question remains: How can the judiciary, in interpreting the 1972 amendment to the FLSA, bring to light the nature of the interpretive problem?

1. Are Day Care Center Workers the Kind of Workers the FLSA is Intended to Protect?

The history of the FLSA suggests that the term "preschool" should be read broadly to include day care center workers. With each amendment to the Act, courts have consistently advocated a liberal construction of an increasingly broad coverage area in favor of the employee. Additionally, the Supreme Court has held that "Congress intended instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act."

In particular, because women comprise most of the work force in the area of child care, broad coverage in favor of the day care center employee would effectuate a feminist goal of providing

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249. See supra Part I.A-D; Willis, supra note 28, at 608. "Although the FLSA has been amended many times through the years, the congressional purpose of the Act, like those of many other social laws, has remained anchored in the Commerce Clause. It is under the guise of the broad commerce powers that the gradual, consistent extension of the coverage of the [FLSA] has been and will continue to be accomplished." Id.
251. Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am., 325 U.S. 161, 167 (1945) (holding that uniformity of coverage for employees engaged in the same work is required under the FLSA).
greater economic opportunities for women. Thus, as a preliminary
matter, a policy-centered analysis overall accords with the more
traditional interpretation that there is, within the Act, a preassump­
tion of inclusion in favor of the employee.

2. Is the Traditional Analysis Consistent with the Larger
Purpose of the Act?

The second question concerns the purpose of the Act and, in
particular, whether broad coverage in favor of the day care center
employee is consistent with that purpose. From the Act’s inception,
its principal purpose has been to alleviate poverty.253 With each
amendment to the Act, its anti-poverty purpose has remained con­
stant.254 The Act employs the minimum wage floor and maximum
hours provisions to effectuate its anti-poverty goal.255 Despite nu­
merous amendments to the Act, the minimum wage and maximum
hours provisions have consistently remained the principal means to
effectuate the Act’s purpose. Amendments to the minimum wage
and maximum hours provisions have merely increased the mini­
mum wage, or increased the scope of coverage.256 Furthermore,
until the 1966 amendment to the Act, the types of positions covered
under the Act were traditionally male-dominated.257 In fact, the
1966 amendment was partially in response to the recognition that
many traditionally female positions were not covered under the
Act.258

Although the FLSA’s anti-poverty purpose has remained con­
stant since its inception, workforce demographics have changed.259

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253. See supra Part I.A for a discussion of the original and unchanging purpose of
the FLSA.

254. See 29 U.S.C. § 202 (1994). This section of the Act has remained substan­
tively the same since the Act’s inception in 1938. Any amendments to this section have
merely furthered the anti-poverty purpose by expanding the scope of coverage under
the Act, or raising the minimum wage. See, e.g., Pub. L. No. 93-259, 87 Stat. 245 (codi­
ified as amended at 29 U.S.C. § 202 (1994)) (adding that “employment of persons in
domestic service in households affects commerce”).


256. See supra Part I.B-D for a discussion of amendments to the FLSA that ex­
panded the scope of coverage under the minimum wage and maximum hours
provisions.

257. See supra Part I.C for a discussion of the purpose of the 1966 amendment to
the FLSA.

Powell); see also supra note 56 for the text of Representative Powell’s statement.

259. From 1963 to 1988 the number of women working or looking for work
outside the home increased by 29 million. See Statement of Professor Barrett, supra
note 247.
The most dramatic change, relevant to the 1972 amendment to the FLSA, has been in the labor statistics of women with preschool children. In 1960, fewer than 20% of women with preschool children worked outside the home, whereas in 1988 over 50% of these women worked outside the home. This dramatic change in women’s work roles has affected the structure of family life and, consequently, affected the needs of the modern workforce. In particular, since women are working in greater numbers, families can no longer rely on the services of a full-time homemaker. Furthermore, “[t]he feminization of poverty is real.” For instance, working-aged women in Massachusetts earn only about two-thirds as much per week as do working-aged men.

An additional change in labor is that people are increasingly unable to work their way out of poverty. This phenomenon has occurred, in part, because since the 1980s, wages for less skilled workers decreased while wages for more skilled workers increased. Additionally, the decrease in less skilled workers’ ability to earn a living wage is further diminished by the cost of child care. For instance, in Massachusetts in 1995, a parent working full-time, year round at minimum wage, had gross earnings of $8,840. The average cost for licensed child care in Massachusetts was $5,000 to $8,000 per year. Thus, the cost of child care was well over half of an individual’s income.

While the Act has remained constant in its anti-poverty purpose, it has also remained static in its approach to eliminating pov-

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260. See id.
261. See id.
264. See Joint Economic Comm., 102d Cong., Growth is Not Enough: Why the Recovery of the 1980’s Did So Little to Reduce Poverty (Comm. Print 1991) (prepared by Rebecca M. Blank) [hereinafter 1991 Joint Economic Comm. Print]; William B. Cannon, Enlightened Localism: A Narrative Account of Poverty and Education in the Great Society, 4 Yale L. & Pol’y Rev. 6, 58 (1985) (“For the vast majority of poor people in America today there is no exit from poverty, either for themselves or for their children, and they are beginning to recognize the permanent nature of this status.”).
265. See Affidavit of Elaine Fersh, Executive Director of Parents United for Child Care, submitted in opposition to Massachusetts’ Request for Waiver Pursuant to Section 1115 of the Social Security Act, May 9, 1995, at 1 [hereinafter Affidavit of Elaine Fersh].
266. See id.
erty through positive work hours regulation. Thus, in interpreting
the 1972 amendment to the FLSA, because the FLSA is limited in
scope to changes in the minimum wage and overtime provisions,
the Act's anti-poverty purpose is thwarted. An interpretation of
the 1972 amendment to the FLSA in favor of the day care center
employee ignores the fact that economic and labor circumstances
have changed while the Act has remained single-focused in its ap­
proach to eliminating poverty through minimum wage and overtime
provisions. 267

For instance, the effect of a broad construction in favor of day
care center workers may increase the costs of child care to the point
of making it too costly for low-income parents. 268 Similarly, a nar­
row construction holding that day care centers do not have to com­
ply with the FLSA's provisions contradicts the historical
presumption of broad coverage in favor of the employee. 269 Fur­
thermore, this interpretation would also disproportionately affect
women because most day care workers are women. 270 Thus, in in­
terpreting the 1972 amendment to the FLSA, courts are forced to
choose between two groups of disadvantaged women. This occur­
rence is due to the failure of the FLSA to address the complex na­
ture of poverty.

The economic realities of modern life suggest that for the
FLSA to serve its purpose as an anti-poverty statute, more complex
solutions are needed, such as an increase in available, affordable
day care, to ensure that the purpose of the FLSA is not defeated. 271

267. The Act has addressed the issue of poverty by increasing minimum wage
progressively over time. See 29 U.S.C. § 206 (1994). It is the position of this Note that
this method no longer effectuates the FLSA's goals.

268. See Affidavit of Elaine Fersh, supra note 265, at 1; see also ILLINOIS DEPT
OF PUBLIC AID REPORT, supra note 127.

269. See supra Part I.B-C for a discussion of the historical source of this
presumption.


271. See Kathleen A. Murray, Child Care and the Law, 25 SANTA CLARA L. REV.
261 (1985). Murray discusses several federal child care programs, concluding that cur­
rent subsidies are inadequate. Two of the subsidies cited include: Dependant Care
Assistance Programs, see 26 U.S.C. § 129 (1994), and AFDC Child Care Expense Disre­
gard, see 42 U.S.C. § 602(a) (1994). See Murray, supra, at 290-97. However, current
government subsidies are ineffective because waiting lists are extensive and, therefore,
not every eligible family can receive a subsidy. See HEALTH, EDUC., AND HUMAN
SERVICES DIV., U.S. GEN. ACCOUNTING OFFICE CHILD CARE: WORKING POOR AND
WELFARE RECIPIENTS FACE SERVICE GAPS 15 (1994) (report to the Committee on Ed­
ucation and Labor, May 13, 1994) [hereinafter Child Care Report].
3. How the Judiciary Might Inform the Legislature of the Conflict in Policies: Applying a Policy-Centered Analysis to Miss Paula's

The court in Miss Paula's noted the conflict concerning the consequences that broad coverage in favor of child day care center workers had for day care center businesses as well as for the parents served by these businesses. However, the Sixth Circuit ended its "policy analysis" with the recognition that Congress may have intended to eliminate low-wage operations. In light of the problems with the traditional approaches to statutory interpretation employed by federal courts thus far, this section suggests one way the Sixth Circuit in Miss Paula's might have applied a feminist policy-centered analysis to the facts in light of the 1972 amendment to the FLSA.

The conclusion that the FLSA requires Miss Paula's to pay minimum wage and overtime may result in putting the day care center out of business. Alternatively, the center might remain in business by increasing its fees, or eliminating some workers to decrease its overhead. Increasing the cost of day care is presumptively unreasonable because the parents in Miss Paula's are students or workers in one of the most economically depressed areas in the United States. The elimination of low-cost day care forces parents to either pay more for day care or stay home with their children. Therefore, the parents must choose between working or caring for their children.

Working is not a logical choice because if day care rates in-

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272. See Reich v. Miss Paula's Day Care Ctr., 37 F.3d 1191, 1197 (6th Cir. 1994).
273. See id.
274. See id. The fear that increasing the scope of coverage under the Act would result in enterprises going out of business was expressed with each amendment that broadened coverage. See supra Part I.B-D for a thorough discussion of the issues involved in expanding the scope of coverage under the Act.
275. See Miss Paula's, 37 F.3d at 1192.
276. Department of Labor statistics from 1991 (unpublished) show that the lower a family's income is, the greater the percentage of income is spent on day care:

<table>
<thead>
<tr>
<th>Monthly Family Income</th>
<th>Percent of Income Spent on Daycare</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under $1,500</td>
<td>22%</td>
</tr>
<tr>
<td>1,500-$2,999</td>
<td>11%</td>
</tr>
<tr>
<td>$3,000-$4,499</td>
<td>7%</td>
</tr>
<tr>
<td>$4,500 and over</td>
<td>5%</td>
</tr>
</tbody>
</table>

Unpublished Department of Labor Statistics, 1991; see also Affidavit of Elaine Fersh, supra note 265.
277. Certainly, there may be other choices for the parents such as leaving the
crease, most, if not all, of the parents’ money earned will go to pay day care costs and expenses. Thus, requiring Miss Paula’s to comply with the FLSA’s minimum wage and overtime provisions places these parents in a lose-lose situation, where they are forced to remove their child from day care and stop working. Additionally, the increased labor costs may, in turn, force the center out of business. The elimination of one business in a rural area with severely limited economic opportunities would generate a higher unemployment rate which contradicts the policy of the FLSA.

Alternatively, not requiring Miss Paula’s to comply with the requirements of the FLSA’s minimum wage and overtime provisions is inconsistent with case precedent suggesting broad coverage in favor of the employee. Although a job paying under minimum wage may be comparatively attractive to unemployment in the economically depressed region of Appalachia, the Act’s application cannot depend on regional economic factors. Furthermore, the provisions of the Act are intended to serve an anti-poverty purpose by increasing wages. Thus, any interpretation that advocates wages below minimum wage cannot be consistent with the FLSA.

Although broad coverage in favor of the day care center employee is consistent with case precedent and the history of the FLSA as an anti-poverty provision, the court is unable to effectuate this purpose adequately under the Act. While requiring Miss Paula’s to comply with the Act’s provisions increases the economic opportunities for some workers, it effectively displaces other workers by making day care too costly for low-income workers. Thus, in effect, interpreting Congress’s treatment of “preschool” to include day care centers as covered enterprises defeats the Act’s anti-poverty purpose because of Congress’s failure to adequately address the day care needs of the working poor.

Although not directly part of the FLSA, the issue of adequate low-cost day care is inextricably linked to the interpretation of the

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278. The parents would have to earn well over minimum wage to make day care in the center economically feasible. This seems unlikely given the center’s clientele of primarily college students and low-income working mothers. See Affidavit of Elaine Fersh, supra note 265.

279. See supra Part I.A for a discussion of the FLSA’s anti-poverty purpose.

280. See supra Part I.A-C for a discussion of the history of the FLSA as an anti-poverty provision.

281. See Murray, supra note 271, at 290-97 for a list of some of the current federal subsidies available for child care.
1972 amendment to the FLSA. Congress should study the negative effects of broad coverage of the FLSA's scope with an eye toward creating supplemental provisions that fully address the complex nature of poverty such as the need for sufficient, low-cost day care. Absent an initiative by Congress in this direction, a feminist policy-centered analysis that outlines clearly the intertwined nature of low-cost day care and the FLSA's anti-poverty purpose is a necessary interpretive method.

In the end, a policy-centered analysis, founded on a feminist interpretive analysis, might reach the same result as the Sixth Circuit did in *Miss Paula's*: that is, that the center is required to comply with the minimum wage and maximum hours provisions of the FLSA. However, under a policy-centered analysis, judicial scrutiny of the causes and effects of the outcome would be explicitly discussed as part of the court's opinion. In addition, this method should reveal other areas the legislature might need to address in order to effectuate the FLSA's goals. Information could be shared with Congress through the vehicle of section 204(d)(1) of the FLSA which provides that the Secretary of Labor shall report to Congress biennially to make recommendations for amendments to the Act. The Secretary of Labor's Annual Report to Congress includes a litigation section. In the litigation section, the Secretary outlines the results of litigation on the FLSA presumably with the intent to outline for Congress significant problem areas. Thus, if the judiciary did not view policy as beyond its purview, the conflicts and inconsistencies of the Act as seen through the eyes of the judiciary, might be revealed through this process.

Ultimately, because the Act fails to address the relationship that exists between the Act's provisions, its purpose and broader economic realities, public policy considerations become paramount in the interpretive process. Although traditionally public policy issues were thought to transcend the judicial function, a policy-centered analysis of the FLSA suggests that public policy issues are intimately tied to the judicial role as administrators of justice.

Conclusion

Because of the lack of assistance for poor working people with
children, broad inclusion in favor of the day care center employee
under the FLSA, while logical given the Act’s history, intent, and
purpose to improve employees’ work status, conflicts with the es-
sence of the Act as an anti-poverty statute. Although adequate day
care is not directly related to the FLSA’s provisions, this public pol-
icy issue is inextricably entwined with interpretation of the Act’s
provisions.

This Note does not suggest that the minimum wage and over-
time provisions of the Act should be abolished, nor that broad cov-
erage under the Act should be discontinued. Instead, this Note
suggests that while the judicial role in interpreting the Act is re-
stricted by legislative inadequacies, the judicial role should not be
restrained from analyzing the effects of these inadequacies. There-
fore, a policy-centered method that reveals the problems inherent
in the Act, as a feminist policy-centered analysis does, is not beyond
the purview of the court.

Particularly, where legislative inadequacies thwart the inter-
pretive process, the judiciary must take public policy issues into
consideration when interpreting the Act. Furthermore, the Act
contains a vehicle for reporting the conflicts which emerge in inter-
preting the Act. Section 204(d)(1) specifically requires the Secre-
tary of Labor to make recommendations biennially for further
legislative action.

A feminist policy-centered method is, nevertheless, limited.
Congress must address the complexities of poverty if the Act is to
continue its anti-poverty purpose. Simple answers, such as raising
the minimum wage, are no longer effective to increase employee
bargaining power and eliminate poverty. In fact, they may have the
opposite effect. Thus, for the Fair Labor Standards Act to remain a
viable anti-poverty statute, Congress ultimately must respond to the
increasingly complex circumstances which create poverty in a com-
prehensive and systematic way.

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