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Introduction

In 1971, Republicans and Democrats joined together to pass universal child care.[1] Then, President Nixon vetoed the bill, stating to the press, "Neither the immediate need nor the desirability of a national child development program of this character has been demonstrated."[2] Fifty years later, working mothers have become a force in the labor market.[3] However, this economic advancement hit a wall when COVID-19 halted women's employment rates, placing

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1. Jack Rosenthal, *President Vetoes Child Care Plan As Irresponsible*, N.Y. TIMES (Dec. 10, 1971), https://www.nytimes.com/1971/12/10/archives/president-vetoes-child-care-plan-as-irresponsible-he-terms-bill.html [https://perma.cc/4MCF-RVQG]; *see also*, Emily Badger, *That One Time America Almost Got Universal Child Care*, WASH. POST (June 23, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/06/23/that-one-time-america-almost-got-universal-child-care/ [https://perma.cc/347E-2J7K] (explaining that the Act, budgeted at $2 billion, "was supposed to be a serious first step toward alleviating the challenges of a labor force increasingly full of working mothers. The government was to fund meals, medical checkups and staff training. No family would have been required to participate, but every one would have had the option").

2. Rosenthal, *supra* note 1.

3. COUNCIL OF ECON. ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 157–58 (2015) ("In 1920, only 24 percent of women worked outside the home, a share that rose to 43 percent by 1970 . . . . A similar pattern is seen in the participation rate of mothers with small children: 63 percent of whom currently work outside the home, compared to only 31 percent in 1970 . . . . More generally, our economy is $2.0 trillion, or 13.5 percent, larger than it would be without women's increased participation in the labor force and hours worked since 1970.").

the spotlight back onto the scarce availability of child care.[4] With over a quarter-million children still waiting for childcare services, the immediate need for a national child development program has never been clearer.[5]

Unfortunately, the federal government, befuddled in politicking, has failed to achieve the same bipartisan support that propelled universal child care forward in the 1970s.[6] Unnecessarily political, demonizing rhetoric[7] continues to smear universal child

4. During COVID-19, working mothers had a greater decline in employment rates and slower employment recovery than fathers. *See* LIANA CHRISTIN LANDIVAR & MARK DEWOLF, MOTHERS' EMPLOYMENT TWO YEARS LATER: AN ASSESSMENT OF EMPLOYMENT LOSS AND RECOVERY DURING THE COVID-19 PANDEMIC, U.S. DEP'T OF LAB. (2022) 1, https://downloads.regulations.gov/HHS-OS-2022-0012-4045/content.pdf [https://perma.cc/5XFE-Q3S2]. Working Hispanic mothers and Black mothers had the steepest declines, at rates of 21.2% and 15.2%, respectively. *Id.* Unsurprisingly, Hispanic and Black mothers were more likely to "reside in areas with disrupted childcare services and reduced availability of in-person school instruction." *Id.* at 2. Mothers of children aged zero to twelve also faced significant employment setbacks and slower employment recovery rates. *Id.*

5. Head Start, the federally funded preschool program, reportedly has over a quarter million children on its waiting lists. NAT'L. HEAD START ASS'N, AN UPDATE ON HEAD START'S ONGOING WORKFORCE CRISIS 1 (2023), https://nhsa.org/wp-content/uploads/2023/03/2023.02-Workforce-Brief.pdf [https://perma.cc/9FVF-DLBP]. This means that in 2023 *over one-third* of Head Start was not operating at capacity. This was not an issue of funds—the funds were in place. A quarter-million children could not enter Head Start due to staffing shortages. *Id.*

6. *See* Ellen Ioanes, *Did Joe Manchin Just Kill Build Back Better on Fox News?*, VOX (Dec. 19, 2021), https://www.vox.com/2021/12/19/22844969/manchin-build-back-better-setback-biden-social-spending-bill#:~:text=The%20Build%20Back%20Better%20Act,shaky%20ground%20for%20a%20while [https://perma.cc/X5FE-5UQ3] (describing how Democratic Senator Manchin withdrew key support for President Biden's Build Back Better Act, leading to a cut of nearly half of the bill's original $3.5 trillion budget); CONG. RSCH. SRVC., UNIVERSAL PRESCHOOL IN THE "BUILD BACK BETTER ACT" 1 (2021), https://www.congress.gov/crs-product/IN11751 [https://perma.cc/Y239-A7GR] (stating that the Build Back Better Act would have established a universal preschool program for all states, Indigenous Tribes, Tribal organizations, territories, and even organizations serving migrant and seasonal agricultural laborers); Julie Kashen, *How Congress Got Close to Solving Child Care, Then Failed*, THE CENTURY FOUND. (Dec. 12, 2022), https://tcf.org/content/commentary/how-congress-got-close-to-solving-child-care-then-failed/ [https://perma.cc/MS5U-2SLV] (providing a timeline of modern universal child care efforts in Congress, briefly detailing how both Democratic and Republican parties advocated for better child care funding).

7. 167 Cong. Rec. S8938–39 (daily ed. Dec. 7, 2021) (statement of Sen. Mitch McConnell on the Build Back Better Act) ("[T]he last time Washington Democrats pushed through a huge change that disrupted families' arrangements, it earned President Obama the 'Lie of the Year' award . . . . This year, many of the same Democrats want to write a sequel. They want to ram through a radical, reckless, multitrillion-dollar taxing-and-spending spree between now and Christmas. And a huge part of their bill would completely upend childcare and pre-K as they exist for

care efforts, stalling the educational development of young learners and restricting mothers' access to the labor market along the way. But beyond the curtain of apocalyptic rhetoric, universal child care remains incredibly popular.[8] Seventeen states have already funded, or are making progress towards, universal child care.[9]

Whether other states continue this trend, or whether Congress finally takes the same stand of unison that took place over fifty years ago, the demand for universal child care shows no signs of stopping. Inevitably, growing calls for increased access to child care creates higher demand for more teachers, placing a glaring, industry-wide question front-and-center: what do we do about teacher pay?

The Fair Labor Standards Act (FLSA) is the nation's preeminent wage protection statute, granting many employees a right to overtime wage rates.[10] However, the FLSA exempts all teachers from overtime, and of those teacher groups, preschool teachers are receiving the harshest treatment.[11] Preschool teachers—often among the lowest paid and least respected educators—are in need of better wage protections.[12] As it stands,

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families all across our country. If you like your childcare, you can keep your childcare. Well, buckle up, parents. What could possibly go wrong? The Democrats have written their toddler takeover in ways that would turn families' finances literally upside down and make already expensive childcare even costlier.").

8. JOHN HALPIN, KARL AGNE & NISHA JAIN, CTR. FOR AM. PROGRESS, WHAT DO VOTERS WANT ON CHILD CARE AHEAD OF THE 2020 ELECTIONS? 9 (2020), https://www.americanprogress.org/wp-content/uploads/sites/2/2020/09/Child-Care-Polling.pdf [https://perma.cc/AG2V-LV4L] (stating that 90% of Democrats, 76% of Independents, 67% of Republicans, and nearly nine in ten parents support guaranteed "child care assistance to low-income and middle-class families on a sliding scale based on household income"); Charlie Joughin, *National Poll Shows Voters Want Bipartisan Approach to Child Care*, FIRST FIVE YEARS FUND (Dec. 3, 2019), https://www.ffyf.org/resources/2019/12/national-poll-shows-voters-want-bipartisan-approach-to-child-care/ [https://perma.cc/RT4W-W7XF] (showing "one-in-four voters say that early childhood education is a primary factor in deciding whether to support an elected official"). Even employers have picked up the slack by funding "employer-sponsored" preschools. *See* Erin L. Kelly, *The Strange History of Employer-Sponsored Child Care: Interested Actors, Uncertainty, and the Transformation of Law in Organizational Fields*, 109 AM. J. SOCIO. 606, 617–19 (2003).

9. ALLISON H. FRIEDMAN-KRAUSS, W. STEVEN BARNETT, KATHERINE S. HODGES, KARIN A. GARVER, G.G. WEISENFELD, BETH ANN GARDINER & TRACY MERRIMAN JOST, RUTGERS GRADUATE SCH. OF EDUC., THE STATE OF PRESCHOOL 2022 at 9 (2023), https://nieer.org/sites/default/files/2023-09/yb2022_fullreport.pdf [https://perma.cc/2FRW-LDJM].

10. *See infra* Part I.A.

11. *See infra* Part I.D.

12. *See infra* Part I.A.

the FLSA's overtime exemption harms a group of vulnerable workers that the statute was designed to protect.[13]

Unfortunately, legislative history is virtually silent about why the overtime exemption was included in the FLSA, and equally silent about why teachers, and later preschool teachers, became overtime exempt.[14] To pave the way for better labor protections, history must be pieced together to unveil the congressional motive for exempting preschool teachers. This Note traces the historical justifications for overtime exemptions that, at the time, were limited to exempting only doctors and lawyers. Then, the Note looks to the explosion of early childhood education onto the public scene in the mid-1900s. Clashes of ideology rang out around universal child care. On one side, opponents of universal child care worried that a universal childcare bill "Sovietized" children, deprived women of their role as home caretaker, and erased parental authority.[15] On the other, Civil Rights Era advocates saw child care as another battleground for progress. During this time, preschool teachers became exempt from overtime alongside separate legislation for universal child care.[16] This Note posits that nation's preschool infrastructure was contemplated to function in a world that would include universal child care, and that preschool teachers became exempt from overtime in an attempt to mirror overtime exemptions for public school K-12 teachers. Failing to implement universal child care but still exempting preschool teachers from overtime protections harmed the profession for decades, creating issues for federal courts and the Department of Labor (DOL) attempting to grapple with the scope of overtime exemptions. This Note is the first scholarship that attempts to harmonize the historical justifications of overtime exemptions, the preschool politics of the mid-1900s, and an argument for overtime eligibility.

The goal of this Note is two-fold: (1) to advocate removing the FLSA's overtime exemption for preschool teachers so that they are eligible for overtime wage rates and (2) to advocate for a more nuanced overtime exemption that fulfills the FLSA's intended goal of expanding labor rights for low-wage workers.

This Note proceeds in two parts. Part I provides necessary historical background. This includes reviewing the original

13. *See infra* Part I.A.
14. *See infra* Part I.C.
15. *See infra* Part I.D.ii.
16. *See id.*

congressional purpose for enacting the FLSA, an examination of the legislative history and early case law behind overtime exemptions, a breakdown of the regulatory framework for overtime exemptions, and an overview of the ideological tensions & debates swirling around child care during the mid-1900s. Part II analyzes the modern state of preschool teachers against the historical context and case law of overtime exemptions. Part II also argues that overtime exemptions must become more nuanced. The current system unfairly exempts preschool teachers in light of the profession's historical and it's present financial reality.

I. Background

A. The FLSA's Origins—Born Out of the Fight Against Starvation Wages

> There was a girl six or seven feet away who was trying to pass an envelope to me and she was just too far away to reach. One of the policemen threw her back into the crowd and I said to Gus (*Gennerich*), "Get the note from that girl." He got it and handed it to me and the note said this: "Dear Mr. President: I wish you could do something to help us girls . . . .We have been working in a sewing factory, a garment factory, and up to a few months ago we were getting our minimum pay of $11 a week . . . .Today the 200 of us girls have been cut down to $4 and $5 and $6 a week . . . . Please send somebody from Washington up here to restore our minimum wages because we cannot live on $4 or $5 or $6 a week." . . . . [S]omething has to be done about the elimination of . . . starvation wages.[17]

Shortly after this remark, President Roosevelt was asked if something should be done to restore minimum pay and maximum hours, and his answer came quickly: "Absolutely."[18]

The FLSA was enacted during the Great Depression to combat the era's nightmarish labor conditions.[19] Financial ruin dangled over workers and anxious families struggling to get by on low

17. FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 624–25 (1938).

18. *Id.* at 625.

19. *See* Fair Labor Standards Act of 1938, Pub. L. No. 718, 52 Stat. 1063 (1938); Robert F. Lipman, Allison Plesur & Joel Katz, *A Call For Bright-Lines to Fix the Fair Labor Standards Act*, 11 HOFSTRA LAB. L.J. 357, 359 (1994); John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 L. & CONTEMPORARY PROBS. 464, 465–66 (1938).

wages.[20] In response, the FLSA guaranteed now-familiar labor rights including minimum wage, maximum weekly hours, and the right to an overtime wage rate.[21]

These provisions were a recognition that employers maintained greater bargaining power within the employer-employee relationship.[22] Bargaining power had deteriorated to such lopsided lengths that the top 1% in the United States owned 50% of the nation's wealth.[23] Congress saw that the "unprotected, unorganized and lowest paid of the nation's working population" struggled to bargain for protections on their own.[24]

Thus, employers were presented with two choices. Employers could compensate workers accordingly for the wear and tear that their bodies bore after long hours of labor, or, employers could shorten a worker's hours due to the pressure of increased cost.[25] President Roosevelt concisely encapsulated the FLSA's purpose as a guarantee to a "fair day's pay for a fair day's work."[26] Fair pay was, in part, guaranteed through the FLSA's aforementioned overtime provision, which guarantees employees a pay rate of 1.5-times their regular hourly wage rate after they exceed forty hours in a given workweek.[27]

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20. Lipman et al., *supra* note 19, at 359 ("The Act was a response to a call upon a Nation's conscience, at a time when the challenge to our democracy was the tens of millions of citizens who were denied the greater part of what the very lowest standards of the day called the necessities of life; when millions of families in the midst of a great depression were trying to live on incomes so meager that the pall of family disaster hung over them day by day; when millions were denied education, recreation, and the opportunity to better their lot and the lot of their children; when millions lacked the means to buy the products of farm and factory and by their poverty denied work and productiveness to many other millions; and, when one-third of a Nation was ill-housed, ill-clad, and ill-nourished.").

21. Fair Labor Standards Act of 1938, Pub. L. No. 718, 52 Stat. at 1060, 1062–64 (1938).

22. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945) (recognizing that industries taking advantage of vulnerable employees endangered the national health of interstate commerce).

23. SEAN WILENTZ, THE POLITICIANS & EGALITARIANS: THE HIDDEN HISTORY OF AMERICAN POLITICS 58 (2016).

24. *Brooklyn Sav. Bank*, 324 U.S. at 707 n.18.

25. Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 460 (1948).

26. FRANKLIN D. ROOSEVELT, NOTHING TO FEAR: THE SELECTED ADDRESSES OF FRANKLIN DELANO ROOSEVELT, 1932-1945 105–06 (B.D. Zevin, ed., 1946) (describing workers as "ill-nourished, ill-clad, and ill-housed"). The FLSA's declaration of policy perhaps best summarizes some of the evils that fair pay sought to remedy. *See* 29 U.S.C. § 202(a).

27. 29 U.S.C. § 202.

The FLSA also balances these employee protections against harm to employers. While eliminating poor labor conditions is a major goal, the FLSA is explicit about limiting its impact on the economy.[28] An early version of the FLSA required that tripartite committees of labor, business, and the public be formed as a check to the power delegated to government agencies under the FLSA.[29] Some industries saw the revolution of wage protections as inevitable, and sought to minimize the FLSA's reach.[30]

B. The Regulatory Framework for Overtime Exemptions

The concern for employers in the FLSA's early life makes it unsurprising that the FLSA's grand shield for workers is not impenetrable. The FLSA exempts executive, administrative, and professional employees from the right to receive overtime wages (hereinafter referred to as "EAP" or "EAP exemption").[31] This Note only focuses on criteria necessary to satisfy the overtime exemption for professionals classified under the EAP.

Under the EAP exemption, employees employed in a "bona fide . . . professional capacity" are exempt from overtime.[32] To qualify as a bona fide professional,[33] an employee must satisfy two requirements: (1) the salary basis test and (2) the primary duty test.[34] Failure to satisfy either disqualifies an employee from becoming overtime exempt as a bona fide professional.

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28. *See id.* § 202(a–b) (declaring that the FLSA seeks to eliminate labor conditions that threaten the health, efficiency, and general well-being of workers in industries "without substantially curtailing employment or earning power").

29. Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L. J. 616, 663–64 (2019).

30. *Id.* at 665 n.244.

31. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees, 29 C.F.R. § 541.0(a) (2014); *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*, WAGE & HOUR DIV. U.S. DEP. OF LAB. (2019), https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime#:~:text=Highly%20compensated%20employees%20performing%20office,duties%20of%20an%20exempt%20executive%2C [https://perma.cc/4V6Y-Y9ED].

32. 29 C.F.R. § 541.0(a).

33. Regulations also refer to the bona fide professional exemption as a "learned professional." *See* 29 C.F.R. § 541.300–.301(a) (2024).

34. 29 C.F.R. § 541.300 (2024); *See Fact Sheet #17G: Salary Basis Requirement and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA)*, WAGE & HOUR DIV. U.S. DEP'T OF LAB. (2019), https://www.dol.gov/agencies/whd/fact-sheets/17g-overtime-salary [https://perma.cc/F78Y-5CBT] ("Job titles do not

(1) The salary basis test is a straightforward, bright line provision. Under this test, an employee must be compensated with a salary of at least $684 per week.[35] In other words, the salary basis test requires an annual salary of at least $35,568. The salary must also be paid as a predetermined amount.[36] Therefore, employees paid at an hourly rate cannot satisfy the salary basis test.[37]

(2) The primary duty test is much more fact intensive. Under this test, the employee's "primary duty" must be performing work which requires "an advanced type [of knowledge] in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction . . . ."[38] The test is easier to digest when broken into parts.

First, the employee's primary duty must be identified. A "primary duty" means the "principal, main, major, or most important duty that the employee performs."[39] According to federal regulations, a "useful guide" for identifying a primary duty is whether the employee spends more than 50% of their time performing the exempt work.[40] Other factors to help identify a primary duty include the importance of the duty relative to other duties, time spent performing the duty, freedom from direct supervision, and the relationship between the salary and wages paid to other employees compared to the employee performing the exempt duty.[41]

Second, the primary duty must require the employee to utilize "advanced knowledge" from a "field of science or learning."[42] Advanced knowledge is characterized as knowledge that is predominantly intellectual in character and which requires a

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determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations."); *Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA)*, WAGE AND HOUR DIV. U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/fact-sheets/17d-overtime-professional [https://perma.cc/9UAG-LQEG].

35. 29 C.F.R. § 541.600(a) (2024).

36. *See Fact Sheet #17G*, *supra* note 34; 29 C.F.R. § 451.602(a) (2024).

37. *See Fact Sheet #17G*, *supra* note 34.

38. 29 C.F.R. § 541.300(a)(i) (2024). The test is also satisfied by employees with a primary duty that requires "invention, imagination, originality or talent in a recognized field of artistic or creative endeavor." *Id.*. § 541.300(a)(2)(ii).

39. 29 C.F.R. § 541.700(a) (2009).

40. *Id.* § 541.700(b).

41. *Id.* § 541.700(a).

42. *Id.* § 541.301(c).

consistent exercise of discretion and judgment.[43] As for which fields qualify as "field(s) of science or learning," regulations provide a non-exhaustive list including teaching, but also law, medicine, theology, accounting, actuarial computation, engineering, architecture, and the sciences.[44]

Finally, the advanced knowledge described above must be "customarily acquired by a prolonged course of specialized instruction."[45] This is restricted to professions where "specialized academic training is a standard prerequisite for entrance into the profession."[46] An academic degree is the best prima facie evidence that an employee meets this requirement.[47] As for non-degree holders, a combination of work experience and intellectual instruction may satisfy the requirement.[48] However, regulations exclude professions in which "most employees" have acquired their skills through experience rather than intellectual instruction.[49] The test is also not satisfied when the occupation can be performed with only general knowledge acquired by an academic degree in *any* field.[50]

i. The Teacher Test

The primary duty test in the previous section lists teaching as a field that may satisfy the test, indicating that the regulations expressly contemplate teaching to be subject to the primary duty test. However, teachers are not subject to the EAP's bona fide professional test. Instead, the FLSA expressly exempts teachers from its overtime provisions, placing on them a categorical label of "bona fide professionals."[51] When most employees have to meet the salary basis test and the primary duty test to qualify for overtime exemption, teachers are automatically considered bona fide professionals regardless of whether the salary basis test or primary duty test is satisfied. Albeit, on the condition that the employee fits within the regulatory definition of teachers.[52]

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43. *Id.* § 541.301(b).
44. *Id.* § 541.301(c).
45. *Id.* § 541.301(d).
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* § 541.303(a); 29 U.S.C. § 213(a)(1).
52. 29 C.F.R. § 541.303(a).

Regulations define a teacher as "any employee with a primary duty of teaching, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed."[53] Like EAP, this definition has several key components and another chain of regulatory definitions to go with it.

First, the employee must be employed in an "educational establishment."[54] The FLSA defines this as any elementary or secondary school system, a higher education institution, or "other educational institution."[55] The term "preschool" is absent from the plain text. However, the definition of "elementary and secondary school systems" allows state law to determine the scope of these terms.[56] For some states, this mostly includes grades K-12.[57] But the regulations also allow state law to include "nursery school programs in elementary education"[58] and in separate provisions, teachers of "nursery school pupils" are expressly described as exempt teachers.[59]

Regulations contemplate teachers with a teacher's certificate to be those who fit within the scope of the teacher test's exemption.[60] The regulations are unhelpful for employees without certificates—the employee can still be considered a teacher if "employed as a teacher by the employing school or school system."[61] The other requirement is that the employee's primary duty must be teaching in the activity of imparting knowledge.[62] This adopts the primary duty definition from the traditional bona fide professional test in which teaching for over 50% of the time would be a "useful guide" for identifying teachers.[63]

C. The DOL's Original Public Policy on Overtime Exemptions for Teachers in Light of

53. *Id.*
54. *Id.* § 541.204(a).
55. *Id.* § 541.204(b).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* § 541.303(b).
60. *Id.* § 541.303(c).
61. *Id.*
62. *Id.* § 541. 303(a).
63. *Id.* § 541.700(b).

Congressional Silence

The FLSA grants authority to the Secretary of Labor to "define and delimit" the EAP exemption "from time to time."[64] Although the Secretary did so for decades following the FLSA's enactment, the DOL struggled to develop a consistent public policy stance on overtime exemptions.

Importantly, legislative history is silent about the original purpose and scope of the overtime exemptions.[65] The DOL itself acknowledged that Congress never indicated why the EAP exemption was even included in the FLSA.[66] Considering the FLSA's balancing act of protecting employees and employers, exemptions may have been rooted in a desire to protect employers, for as one scholar put it, "It is therefore, the employer who is exempt—from the burden of paying the minimum wage or mandatory overtime, while, conversely, the employee is excluded from these same protections."[67]

Whatever the scope of overtime exemptions, the DOL equally struggled with the EAP exemption's narrower bona fide professional exemption. In 1938, the same year as the FLSA's enactment, the Assistant General Counsel of the DOL's Wage and Hour Division (WHD) expressed that the agency's greatest struggle

64. 29 U.S.C. § 213(a)(1) (2018); *see also* Walling v. Yeakley, 140 F.2d 830, 831 (10th Cir. 1944) ("Congress exempted employees employed in bona fide executive, administrative, or professional capacities . . . . Congress did not undertake itself to define and delimit such phrases . . . .").

65. MARC LINDER, "TIME AND A HALF'S THE AMERICAN WAY": A HISTORY OF THE EXCLUSION OF WHITE-COLLAR WORKERS FROM OVERTIME REGULATION, 1868-2004, at 385–86 (2004) ("Virtually nothing said at the extensive 1937 congressional hearings on the FLSA (transcribed on more than 1,200 printed pages) or during the 1937-38 protracted congressional debates (transcribed over almost 600 tightly printed, double-columned pages), or written in the Senate or House committee reports of those years sheds any light whatsoever on the purpose or scope of the exclusion executive, administrative, or professional employees.").

66. U.S. DEP'T OF LAB., EMP. STANDARDS ADMIN., EXECUTIVE, ADMINISTRATIVE AND PROFESSIONAL EMPLOYEES: A STUDY OF SALARIES AND HOURS OF WORK 3 (1977).

67. LINDER, *supra* note 65, at xxii; *see* Texas v. Dep't of Lab., 756 F. Supp. 3d 361, 399 (E.D. Tex. 2024) ("The [DOL's attempt to raise the salary threshold] impacts millions of employees in every facet of the economy, as well as state and local governments, and will impose billions in costs to employers."); Hewitt v. Helix Energy Sols. Grp., Inc., 15 F.4th 289, 303 (Ho, J., concurring) ("So the goal of the Act was not to induce overtime, but to avoid it. The FLSA achieves its ends when *no* employer pays overtime—when employers meet their labor needs by hiring more workers, not by requiring more hours. To be sure, the FLSA burdens the business community and the freedom of contract.").

with overtime exemptions was attempting to define the bona fide professional exemption.[68]

In 1940, the WHD justified overtime exemptions for bona fide professionals based on such employees having "compensatory privileges" such as an implied prestige, status, and importance.[69] Other compensatory privileges included higher base pay, greater fringe benefits, improved promotion potential, and greater job security.[70] Bona fide professionals also presented overtime enforcement issues because they performed work that was "often difficult to standardize in relation to a specified period of time . . . ."[71]

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68. LINDER, *supra* note 65, at 436–37 (quoting Address by Rufus G. Poole Before the Associated Indus. of New York Annual Meeting, at 11 (Nov. 18, 1938)) ("A newspaper asks whether its boxing columnist and commentator is a professional and therefore exempt . . . . Have you ever tried to define a professional? That is hard enough, but engaged in a 'bona fide capacity' is even harder. The dictionaries do not give us the answer. They indicate that sometimes the word 'professional' is used to mean a person engaged in one of the learned professions—that is medicine, law and the ministry. Then, the dictionaries talk about education and skill and even about one who engaged in sports for money. We had to define this term so that employers and employees could use it; so they could know whether any particular employee was entitled to overtime compensation . . . . This definition and definitions of employees employed in an executive, administrative . . . capacity were worked out in conference with representatives of employers and employees. The only one that has been seriously questioned to date is our definition of the term professional capacity. Even here, those who did not like our definition did not take the view that they could write a better definition. There is a statutory duty on the Administrator to promulgate a definition. So we put out the best definition we could . . . . We tried to be fair to everyone.").

69. Defining and Delimiting the Terms "Any Employee Employed in a Bona Fide Executive, Administrative, or Professional Capacity (Including Any Employee Employed in the Capacity of Academic Administrative Personnel or Teacher in Elementary or Secondary Schools), or in the Capacity of Outside Salesmen," 35 Fed. Reg. 883, 884 (Jan. 22, 1970) (to be codified in 29 C.F.R. pt. 541) ("As pointed out in the 1940 Report, employment in such a capacity implies a certain prestige, status, and importance, and employees who qualify under the definitions are denied the protection of the Act and must accordingly be assumed to enjoy compensatory privileges—an assumption which must clearly fail unless there is an adequate differentiation between the salary normally earned by a nonexempt worker for a standard workweek and that paid the employee for whom exemption is claimed on the ground that he is performing bona fide executive, administrative, or professional functions."); U.S. DEP. OF LAB. WAGE & HOUR DIV. "EXECUTIVE, ADMINISTRATIVE PROFESSIONAL . . . OUTSIDE SALESMAN" REDEFINED 19 (1940).

70. CONRAD F. FRITSCH & KATHY VANDELL, U.S. DEP'T OF LAB., EMP. STANDARDS ADMIN., EXEMPTIONS FROM THE FAIR LABOR STANDARDS ACT: OUTSIDE SALESWORKERS AND EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EMPLOYEES 236 (1977).

71. *Id.* at 240.

Originally, the DOL limited the categorical exemption to doctors and lawyers.[72] In 1949, a proposal was made to extend the categorical overtime exemption to architects, engineers, librarians, nurses, and pharmacists.[73] Since Congress did not provide boundaries to the exemption in the legislative record, the DOL rejected the proposal and provided its own reasons for limiting a categorical status of bona fide professional to doctors and lawyers, citing four factors: (1) "the traditional standing of these professions," (2) "the recognition of doctors and lawyers as quasi-public officials," (3) "the universal requirement of licensing by various jurisdictions," (4) and the "relatively simple problems of classification presented by these professions."[74]

In 1966, the FLSA was amended to include schools within its provisions, thereby placing teachers under the reach of its wage protections and the EAP exemption requirements.[75] But virtually out of nowhere, in 1967, teachers were categorically labeled as bona fide professionals alongside doctors and lawyers.[76] The motive for categorically exempting all teachers is seemingly nonexistent in the legislative records.[77]

Perhaps related, the landmark Elementary and Secondary Education Act (ESEA) was passed in 1965.[78] School regulation was largely a state matter before 1965,[79] but for the first time, the federal government intervened and passed the ESEA, which included $1.3 billion in funds for school districts that met certain

72. Belt v. Emcare, 444 F.3d 403, 414 (5th Cir. 2006).

73. *Id.*

74. *Id.* (quoting U.S. DEP'T OF LAB., REPORT AND RECOMMENDATIONS ON THE PROPOSED REVISIONS OF REGULATIONS, PART 541, at 77 (1949).

75. Act of Sept. 23, 1966, Pub. L. No. 89-601, 80 Stat. 830, 831–32 (1966).

76. REBECCA S. PRINGLE, PRINCESS R. MOSS & NOEL CANDELARIA, NAT'L EDUC. ASS'N., ENDING THE FLSA TEACHER EXCLUSION: PUTTING A FLOOR UNDER THE TEACHING PROFESSION BY PROVIDING TEACHERS WITH THE SAME WAGE AND HOUR PROTECTIONS AS OTHER PROFESSIONALS 7 (2022), https://www.nea.org/sites/default/files/2022-05/Ending%20the%20FLSA%20Teacher%20Exclusion.pdf [https://perma.cc/2JPM-ZGQZ].

77. *Id.* ("The historical record provides no clear explanation for that regulatory decision. The most that one can glean from the rulemaking notices is that the Department believed that teachers, like doctors and lawyers, are part of a 'traditional profession' and therefore the salary test was not needed as an objective measure of their professional status.").

78. Act of Apr. 11, 1965, Pub. L. No. 98-10, 79 Stat. 27, 49 (1965).

79. David Casalaspi, *The Making of a "Legislative Miracle": The Elementary and Secondary Education Act of 1965*, 57 HIST. OF EDUC. Q. 247, 247 (2017).

requirements.[80] In exchange for funds, state education agencies were strongly incentivized to develop stronger teacher preparation programs in higher education institutions,[81] likewise, the funds could also have been directed to teacher salaries.[82]

Also telling about possible intent, the DOL has placed substantial weight on the salary basis test for decades. The DOL views the salary basis test as the "best single test" of exempt status.[83] Failing to meet the salary basis test tends to "overwhelmingly indicate" that an employee won't meet other requirements of the bona fide professional test.[84] In other words, under today's current framework, failing to earn a weekly salary of $684 tends to indicate that the employee will not satisfy the primary duty test. Indeed, the salary basis test has always been intended to screen out "obviously nonexempt employees" from being misclassified as bona fide professionals.[85] So much so, that the agency has not been able to find a better alternative for identifying bona fide professionals.[86]

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80. *Id.* at 254; Matthew A. Kraft & Melissa A. Lyon, *The Rise and Fall of the Teaching Profession: Prestige, Interest, Preparation, and Satisfaction Over the Last Half Century* 3 (Annenberg Brown University Working Paper No. 22-679, 2024) ("Local control and funding had given way to the district consolidation movement with states beginning to play an expanded role in funding public education and regulating its practices. The passage of the [ESEA] in 1965 marked the beginning of a more assertive role for the federal government. The teaching profession was also undergoing a major transition at this time with the rise of industrial-style unionism, changing demographics due to the women's and civil rights movements, and the implementation of court-ordered school desegregation plans.").

81. 79 Stat. at 49.

82. Albert L. Alford, *The Elementary and Secondary Education Act of 1965: What to Anticipate*, 46 PHI DELTA KAPPA INT'L 483, 484 (1965) (written by a key architect of the ESEA).

83. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 69 Fed. Reg. 22122, 22165 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 514).

84. *Id.*

85. *Id.* (quoting the DOL's position in 1949).

86. *Id.* ("[T]he salary tests, even though too low in the later years to serve their purpose fully, have amply proved their effectiveness in preventing the misclassification by employers of obviously nonexempt employees, thus tending to reduce litigation. They have simplified enforcement by providing a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary. The salary requirements also have furnished a practical guide to the inspector as well as to employers and employees in borderline cases. In an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations as the Divisions and the courts have interpreted them. In the years of experience in administering the regulation, the Divisions have found no satisfactory substitute for the salary test.").

The DOL has also emphasized that the minimum salary threshold for the salary basis test should be set at a high enough level to reflect the status of bona fide professionals.[87] At the time this statement was made, 5% of bona fide executives had been earning weekly salaries as low as the then-salary threshold of $100.[88] The Secretary reiterated that the salary basis test should not cover employees with such low salaries.[89]

It is possible that, in 1967, the DOL might have recognized teachers as earning a high enough salary to justify the categorical exemption status. In 1969, teachers earned an average annual income of $8,626.[90] At the same time, doctors and lawyers earned a median income of $40,550 and $47,638, respectively.[91] The earning power of teachers was a far cry from doctors and lawyers, but teachers still earned several thousand dollars more than the median income of men and women.[92]

This correlation of higher salary with exempt status also corresponds with legislative history. Since the FLSA's inception in 1938, the minimum salary threshold has been increased ten times.[93] From 1938 to 1975, the minimum salary threshold of the salary basis test was raised every two to four years.[94] The DOL's consistent rulemakings reflected the agency's desire to ensure that there was

87. Defining and Delimiting the Terms "Any Employee Employed in a Bona Fide Executive, Administrative, or Professional Capacity (Including Any Employee Employed in the Capacity of Academic Administrative Personnel or Teacher in Elementary or Secondary Schools), or in the Capacity of Outside Salesmen," 35 Fed. Reg. 883, 884 (Jan. 22, 1970) (to be codified in 29 C.F.R. pt. 541).

88. *Id.* at 884.

89. *See id.* at 884–85.

90. *Digest of Education Statistics*, *Table 211.60. Estimated Average Annual Salary of Teachers in Public Elementary and Secondary Schools, by State: Selected Years, 1969-70 Through 2019-20*, NAT'L CTR. FOR EDUC. STAT. (2020), https://nces.ed.gov/programs/digest/d20/tables/dt20_211.60.asp [https://perma.cc/9XRX-9W4C].

91. Nancy Ricks, *Doctors' Median Income ($40,550) Spurs Fee Debate*, N.Y. TIMES, Sept. 13, 1971, at 29 (noting that the American Bar Association calculated that attorneys earned an average income of $27,960 per year in 1970); Michael Ariens, *Making the Modern American Legal Profession, 1969–Present*, 50 ST. MARY'S L.J. 671, 686 (2019) (the $47,638 figure is adjusted for dollar value by 1983).

92. U.S. CENSUS BUREAU, P60-70, AVERAGE FAMILY INCOME UP 9 PERCENT IN 1969 (1970) (stating that, in 1969, the median income of men was about $6,430, while women sat at about $2,130).

93. The minimum salary threshold was increased in 1954, 1958, 1961, 1963, 1967, 1970, 1973, 1975, 2004, and 2019. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. 62152, 62155–56 (proposed Sept. 8, 2023) (to be codified at 29 C.F.R. pt. 541).

94. *Id.*

a sufficient difference between the salaries of nonexempt and exempt employees.[95]

But after 1975, the salary level was not raised for nearly thirty years. Eventually in 2004, the salary threshold was raised to $455.[96] One decade later, in a 2014 memo, President Obama criticized the EAP exemption for not keeping up with the modern economy and advocated for modernizing the EAP exemption to become more consistent with the FLSA's intent.[97] The DOL responded with an increase of the salary threshold from $455 to $921 in 2016, but the attempt was barred in the Fifth Circuit.[98] In 2019, the minimum salary threshold was raised to the current mark of $684,[99] two hundred dollars lower than the 2016 attempt. In 2024, the DOL increased the threshold to $844 by July 2024, and to $1,128 by January 2025.[100] To its credit, the DOL also implemented a requirement that the salary threshold be updated every three years, beginning first in July 2027, to reflect changing earnings data.[101] In practice, the current annual salary floor would have increased from $35,568 up to $58,656. An overtime-exempt employee sitting at the current $35,568 minimum would need to earn $23,088 more per year—*a substantial increase of 64%*—before satisfying the salary basis test. But like the attempt to modernize the EAP exemption in 2016, the attempt was swiftly barred in federal court.[102]

Aside from earning power, societal prestige may have also been a factor that warranted categorically exempting teachers from overtime. Teachers have historically been viewed as having an

95. Texas v. Dep't of Lab., 756 F. Supp. 3d 361, 371–72 (E.D. Tex. 2024) ("The Department's rulemakings in 1958, 1963, 1970, and 1975 maintained the same general approach of reviewing salary levels of exempt EAP employees and analyzing the minimum salaries they were paid compared to the higher salaries of nonexempt employees. The Department's focus in adjusting the salary-level test was to set the minimum salary level so that only a small percentage of bona fide EAP employees would be denied the exemption, while also ensuring that an adequate differentiation existed between the salaries of nonexempt workers and supervising exempt workers.").

96. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. at 62155.

97. Presidential Memorandum of March 13, 2014; Updating and Modernizing Overtime Regulations, 79 Fed. Reg. 18737, 18737 (Apr. 3, 2014).

98. *See* Nevada v. U.S. Dep't of Lab., 218 F. Supp. 3d 520 (E.D. Tex. 2016).

99. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. at 62156.

100. 29 C.F.R. 541.600(a) (2024).

101. *Id.* § 541.607(b).

102. *See* Texas v. U.S. Dep't of Lab., No. 4:24-CV-499-SDJ, 2024 WL 4806268 (E.D. Tex. Nov. 15, 2024).

elevated social status similar to doctors and lawyers.[103] In 1969, three-quarters of parents wanted their children to become teachers.[104] Similarly, a 1977 Harris poll found that two-thirds of respondents had "ranked teaching as having at least 'considerable prestige.'"[105] One out of every four college graduates completed an education degree in the early 1970s.[106] This combination of salary along with social status may have placed teachers within the quasi-public official designation that justified keeping doctors and lawyers exempt from overtime.

D. Falling Through the Cracks of Overtime Rights: Preschools, Universal Child Care, and the Political Theater of the Mid-1900s

i. Attempts by Federal Courts and the DOL to Interpret "Preschool" After the 1972 Amendments

Originally, preschools were not establishments covered by the FLSA's wage protections. Shortly after the categorical overtime exemption was applied to teachers in 1967, the FLSA was amended in 1972 to include preschools under its reach.[107] Notably, the FLSA does not differentiate between private or public, or for-profit or nonprofit.[108] However, again, the legislative record is virtually silent as to why preschools were added to the FLSA. Effectively, the 1972 amendments and the congressional silence brought about two important questions: (1) Are preschool teachers exempt from overtime? (2) At what point does an establishment qualify as a preschool? These questions overlap in many respects because the FLSA's overtime protections and exemptions are irrelevant for

103. *See* Goss v. Lopez, 419 U.S. 565, 594, 594 n.12 (1975) (Powell, J., dissenting) ("There is an ongoing relationship, one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute. [n.12] The role of the teacher in our society historically has been an honored and respected one, rooted in the experience of decades that has left for most of us warm memories of our teachers, especially those of the formative years of primary and secondary education.").

104. *See* Kraft & Lyon, *supra* note 80, at 17.

105. *Id.*

106. *Id.* at 19.

107. Education Amendments of 1972, Pub. L. No. 92-318, sec. 906(b)(3), § 3(s)(4), 86 Stat. 235, 375 (codified as amended at 29 U.S.C. § 203(s)(4) (1976)) (amending language by deleting "an elementary or secondary school" and inserting "a preschool, elementary or secondary school").

108. *See* 29 U.S.C. § 203(s)(1)(B).

preschool teachers if the preschool they work in is not covered by the FLSA.

The 1972 amendments did not define "preschool" and so, taking competing approaches to textualism, federal appellate courts were split on whether there should be a distinction between preschool facilities that were "educational" and day care centers that were "custodial."[109] "Custodial" implies physical care, and "education" implies teaching.[110] Could an establishment really be considered a preschool even if education was not a priority? The DOL argued as much in an emerging circuit split.

For its part, the DOL tried to provide clarity to the FLSA. The DOL issued a report in 1972 to clarify and define preschools, notably not distinguishing between custodial and educational services.[111] That same year, the Ninth Circuit ruled that the FLSA's

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109. See Laura, C. Edmonds, *The Fair Labor Standards Act—Anti-Poverty Legislation in the Modern Era: Advocating Judicial Scrutiny Under a Feminist Policy-Centered Analysis*, 19 W. N. ENG. L. REV. 229, 252–57 (1997) (summarizing the early circuit split involving the Sixth, Ninth, and Tenth Circuits). *Compare* Marshall v. Rosemont, Inc., 584 F.2d 319, 321 (9th Cir. 1978) (quoting Dunlop v. Alhambra Nursery & Accredited Kindergarten, Inc., 409 F. Supp. 309, 312 (D. Ariz. 1976)) ("[I]n the trial court's view of the appellees' operations, these are organizations essentially custodial in nature. They are in no way regulated by the State of Arizona as being a part of the state's school system. The Department's position, however, is that a 'preschool' need not be certified or recognized as such under state law . . . . 'In the instant case the Department has presented no evidence to this Court upon which it could reach the conclusion the conclusion that the defendants are certified preschools under state law. However, what the evidence does indicate is that the defendants were primarily engaged in the provision of day care services for infants of working mothers.'"), *with* U.S. Dep't of Lab. v. Elledge, 614 F.2d 247, 250 (10th Cir. 1980) ("We are not impressed by the reference in the Ninth Circuit decision, and in that of the trial court, to state law . . . . The plaintiff and the trial court emphasize the difference between custodial and educational purposes. The statute does not make the distinction."), *and* Reich v. Miss Paula's Day Care Ctr., Inc., 37 F.3d 1191, 1196 (6th Cir. 1994) ("Even if Miss Paula and other 'child day care centers' were able to show that they offer no education or learning whatsoever, and that they provide nothing more than custodial child care that is comparable to professional babysitting, they would still be obligated to comply with the FLSA. Preschools are not merely educational facilities; they also perform a custodial service.").

110. Edmonds, *supra* note 109, at 251.

111. U.S. DEP'T OF LAB., Pub. 1364, PRESCHOOLS UNDER THE FAIR LABOR STANDARDS ACT, JULY 1972, at 1–2, 7 (1972) [hereinafter U.S. DEP'T OF LAB., PRESCHOOLS UNDER THE FLSA] (stating that the report should not "be considered in the same light as official statements of position contained in Interpretative Bulletins and other such releases formally adopted and published in the Federal Register," and defining preschools as "any 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

plain language limited FLSA coverage to only those schools which provided "'elementary' or 'secondary education' . . . 'as determined by state law.'"[112] The preschool had to be part of the state school system, which typically involved licensure under the state's education department.[113] Otherwise, employees must only be providing custodial duties, rather than the educational duties described by the teacher test and inherent to the idea of an educational establishment.[114]

In 1980, the Tenth Circuit disagreed and ruled that "day care centers"—custodial, non-educational establishments—were covered by the FLSA as preschools.[115] In this case, the facility in question was licensed specifically as a day care center by a state statute that explicitly excluded "nursery schools, kindergartens, or other facilities of which the purpose is primarily education."[116] The day care center was not accredited by the state's board of education.[117] Despite this, the court recognized that the FLSA delineated covered entities, with a list that included elementary schools, secondary schools, and hospitals.[118] While elementary schools provide educational services, hospitals provide custodial services—this meant there should be no distinction between custodial duties, educational duties, and ultimately, whether a facility is licensed by a state education department.[119]

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before they enter the elementary schools grades" including "day care centers, nursery schools, kindergartens, head start programs and any similar facility primarily engaged in the care and protection of preschool children").

112. Marshall v. Rosemont, Inc., 584 F.2d 319, 321 (9th Cir. 1978) (quoting Fair Labor Standards Act of June 25, 1838, c. 676, 52 Stat. 1060, as amended, 29 U.S.C. § 203(v)–(w)) (rejecting the DOL's position that a preschool does not need to be certified or recognized under state law).

113. *Id.* at 321.

114. *Id.*; *see* 29 C.F.R. § 541.303(a) (2004).

115. U.S. Dep't of Lab. v. Elledge, 614 F.2d 247, 251 (10th Cir. 1980) (stating that this decision was consistent with the plain language and intent of the FLSA).

116. *Id.* at 249.

117. *Id.* at 249–50.

118. *Id.* at 250.

119. *Id.* at 250–51("[The FLSA] lists hospitals, institutions for the care of the sick, the aged, the mentally ill or defective. This list is followed by reference to a school for the handicapped, and 'a preschool, elementary or secondary school.' Thus the section covers both custodial and educational operations. On the record presented a preschool is both custodial and educational . . . . Application of FLSA may not be avoided by the assertion of primary emphasis on [custodial] and the rejection of the undenied learning opportunities afforded to children.").

In 1994, the Sixth Circuit agreed with the Tenth Circuit.[120] The Sixth Circuit plaintiffs made similar arguments to those in the Ninth Circuit, namely that a day care center is distinct from a preschool because day care centers provide custodial services while preschools provide educational services.[121] The state even distinguished day care centers and preschools for licensing purposes.[122] However, the Sixth Circuit rejected the argument, stating:

> ["]The common sense definition of a preschool includes day care centers. The words are interchangeable in the common parlance . . . .["] Ohio's licensing standards are, in any event, irrelevant to the issues at dispute in this appeal. Even if Miss Paula and other 'child care centers' were able to show that they offer no education or learning whatsoever, and that they provide nothing more than custodial child care that is comparable to professional babysitting, they would still be obligated to comply with the FLSA.[123]

In 1999, the DOL seemed to agree with the majority of the federal courts of appeals and stated that preschools should not be at the mercy of state law.[124] But the DOL contradicted itself nearly a decade later in another opinion letter by stating that exempt preschool teachers must be working at a preschool providing state-law approved curriculum—directly invoking previously rejected arguments that licensure by a state's education department weighs heavily towards determining if a day care center qualifies as a preschool for employee classification purposes.[125]

Courts have only recently started to address the issue again. Over two decades later, in 2016, the Eighth Circuit followed the lead of the Tenth and Sixth Circuits that the difference between

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

121. *Id.* at 1195.

122. *Id.*

123. *Id.* at 1195–96 (footnotes omitted) (quoting the lower court's opinion). The court strongly believed that this interpretation of the FLSA could have an adverse economic impact on day care centers. *Id.* at 1197.

124. U.S. Dep't of Lab., Wage & Hour Div., Opinion Letter on Application of Overtime Pay Requirements to Nonexempt Employees of a Day Care/Preschool Facility (Apr. 24, 1999).

125. U.S. Dep't of Lab., Opinion Letter on Whether Employees of Daycare Centers Qualify as Exempt Teachers, (Sept. 29, 2008) ("You have represented that daycare centers are not licensed by the State Department of Education, but instead are licensed by the Department of Public Welfare. This indicate that the state does not consider the day care centers to be providing educational services. Absent any information to the contrary, we conclude that the instructors do not qualify for the teacher exemption under section 13(a)(1) of the FLSA.").

custodial and educational care is irrelevant for preschools.[126] Along the same lines, a district court in the Fifth Circuit stated the "substantial authority" holds that "preschools" should be interpreted broadly,[127] and only a few years later, a district court in the Third Circuit would follow the previous court's decision.[128]

ii. Child Care and Politics: Universal Child Care Threatens Conservative Idealizations of the "Traditional American Family"

The FLSA's 1972 amendments were pushed through alongside a landmark approval for universal child care. A child care revolution was on its way, but social forces, politics, and outdated ideologies led to President Nixon's veto of universal childcare.

Early on, nursery schools largely disregarded traditional education like reading and writing and focused on children's physical and social development.[129] The U.S. nursery school movement emerged after World War I,[130] and the number of nursery schools in the U.S. exploded from 3 to 262 between 1920 and 1930.[131]

Poverty and child care held close associations with one another because child care emerged from the social welfare system out of a need to care for families post-World War I.[132] The Great Depression exacerbated the need for child care, pushing the U.S. to take action.[133] A government-funded project established 3,000 nursery schools.[134] Beginning in 1934, "[t]he [project] had two declared purposes: (1) to provide relief for unemployed teachers, and (2) to

126. *See* Perez v. Contingent Care, LLC, 820 F.3d 288 (8th Cir. 2016).

127. Biziko v. Van Horne, No. 1:16-CV-0111-BP, 2019 WL 3928575, at *11 (N.D. Tex. Aug. 20, 2019).

128. Slater v. Yum Yum's 123 ABC, No. 2:20-cv-00382-JMG, 2021 WL 2188599, at *3 (E.D. Pa. May 28, 2021).

129. Sheldon H. White & Stephen L. Buka, *Early Education: Programs, Traditions, and Policies*, 14 REV. RSCH. EDUC. 43, 60–61 (1987) ("The nursery school should attend to diet, rest, open-air exercise, physical training, and other health factors, Growth, sight, speech, and hearing should be followed, and corrective action taken as needed . . . .[R]eading, writing, and arithmetic had no place in nursery schools.").

130. *Id.* at 60, 63.

131. *Id.* at 63.

132. EMILY D. CAHAN, PAST CARING: A HISTORY OF U.S. PRESCHOOL CARE AND EDUCATION FOR THE POOR, 1820–1965, at 14 (1989) ("Insofar as day nurseries were conceived of as a form of social welfare, their history is more closely tied in this period to that of the welfare system than it is to the history of early childhood education.").

133. White & Buka, *supra* note 129, at 63.

134. *Id.*

support the growth and well-being of children of unemployed parents."[135]

However, due to its close association to poverty and welfare, child care did not enter the scene unscathed from public opinion. In the early 1800s, being financially poor was thought to be caused by being spiritually poor.[136] The Infant School Society, an early network of infant schools in Boston between 1828 and 1835, maintained a system in which women taught preschool aged children while men spiritually educated the children as a deliberate effort at "morally reforming the poor."[137] Although this early network died out, as child care increased in the nineteenth century, some of these old sentiments remained.[138]

In the 1960s, convictions of the traditional American family clashed with the growing need for child care.[139] Socially, mothers were considered the de facto primary caretakers for children.[140] Childcare services had encroached on this idealized notion by erasing parental authority and involvement in the care of children.[141] Even in scientific fields, psychologists warned that maternal deprivation would harm the cognitive development of children.[142]

In 1961, President Kennedy created the President's Commission on the Status of Women to evaluate the progress of women in American society.[143] After two years, the Commission—which included members from the DOL—released a report that signaled the public campaign to come, stating:

> Widening the choices for women beyond their doorstep does not imply neglect of their education for responsibilities in the

135. *Id.*

136. CAHAN, *supra* note 132, at 9.

137. *Id.* at 9.

138. *Id.* at 11–13.

139. *See* MAXINE EICHNER, THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED) 177 (2020).

140. *See id.*

141. *Id.* at 180 ("The federal government's role [according to President Nixon] 'wherever possible should be one of assisting parents to purchase needed day care services in the private, open market.' For the government itself to provide such [federally funded, universal] day care risked diminishing rather than enhancing 'both parental authority and parental involvement with children.'").

142. MARGARET O'BRIEN STEINFELS, WHO'S MINDING THE CHILDREN? THE HISTORY AND POLITICS OF DAY CARE IN AMERICA 73–75 (1973).

143. PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, AMERICAN WOMEN: REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN iv (1963). The report was created with help from members of the Department of Labor, including Assistant Secretary of Labor, Esther Peterson. *Id.* at 84.

> home . . . . At various stages, girls and women of all economic backgrounds should receive education in respect to physical and mental health, child care and development, human relations within the family. The teaching of home management should treat the subject with breadth that includes not only nutrition, textiles and clothing, housing and furnishings, but also the handling of family finances, the purchase of consumer goods, the uses of family leisure, and the relation of individuals and families to society.[144]

In short, the report advocated for women to receive more education in child care and family life so that women did not neglect the home as they received more opportunities outside its doorstep.[145] Yet at the same time, the report called for a vast expansion of child care services.[146] With conviction, it stated that a failure to provide child care reflected "a lack of community awareness of the realities of modern life."[147] This reflected a growing tension between a desire to keep women at home as the primary caretaker and the need to make child care more accessible for working mothers.

In 1964, President Johnson declared a "War on Poverty."[148] In 1965, Head Start—the federally-funded childcare program that continues today—arrived on the scene.[149] Head Start programs were implemented after a report recommended establishing a federal child care program aimed at improving the development and lifelong outcomes of children, particularly those in poverty.[150]

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144. *Id.* at 32.

145. *Id.* at 66 (stating that better health, earlier marriages, and homes with "laborsaving apparatus[es]" had been pushing women to work more and longer after children became grown).

146. *Id.* at 19–20.

147. *Id.* at 19.

148. Lyndon B. Johnson, President, Annual Message to the Congress on the State of the Union (Jan. 8, 1964) ("Unfortunately, many Americans live on the outskirts of hope—some because of their poverty, and some because of their color, and all too many because of both. Our task is to help replace their despair with opportunity. This administration today, here and now, declares unconditional war on poverty in America . . . . Our chief weapons in a more pinpointed attack will be better schools, and better health, and better homes, and better training, and better job opportunities to help more Americans, especially young Americans, escape from squalor and misery and unemployment rolls where other citizens help to carry them.").

149. *Head Start History*, U.S. DEP'T OF HEALTH & HUM. SVCS.: OFF. OF THE ADMIN. FOR CHILD. & FAMILIES (June 30, 2024), https://acf.gov/ohs/about/history-head-start [https://perma.cc/N26F-GJ5K].

150. ANGELA GIORDANO-EVANS, CONG. RSCH. SERV., EDUC. & PUB. WELFARE DIV., HEADSTART: PROGRAM DESCRIPTION AND LEGISLATIVE HISTORY 34 (1974) (quoting OFF. OF CHILD DEV., RECOMMENDATIONS FOR A HEAD START PROGRAM (1965))

Two important events occurred simultaneously during this time. First, women with children began joining the labor force. In 1950, only 11.9% of women with children under the age of six participated in the labor force, but by 1970, that number increased to 30.3%.[151] Second, as more women with children entered the labor force, a bipartisan, legislative push for universal child care gained major momentum.

The push for universal child care, later known as the Comprehensive Child Development Act (CDA) of 1971, was an outgrowth of the 1960s Civil Rights Movement. One side pushed for progressive societal changes;[152] while the other clung to notions of traditional families and gender roles, and segregated schools.[153] Marian Wright Edelman, the leader of the then-largest Head Start program in the country and advocate of the CDA, reflected on the movement "that 3,000 new jobs, free of the plantation and state system, was revolutionary. Black parents got a new vision of what their children could get, and Head Start was the most exciting thing."[154] Meanwhile, critics worried that federal child care programs would "Sovietize" children,[155] bring the U.S. into a totalitarian state,[156] and that depriving children from their mothers would harm development.[157] Others argued that it deprived women of their most fulfilling duty, claiming that most women "find spiritual and emotional satisfaction in being the hand that, through

("There is considerable evidence that the early years of childhood are the most critical point in the poverty cycle. During these years the creation of learning patterns, emotional development and the formation of individual expectations and aspirations take place at a very rapid pace. For the child of poverty there are clearly observable deficiencies in the processes which lay the foundation for a pattern of failure—and thus a pattern of poverty—throughout the child's entire life.").

151. WILLIAM LERNER, STATISTICAL ABSTRACT OF THE UNITED STATES 1971, U.S. BUREAU OF THE CENSUS 213 (1971).

152. WILLIAM ROTH, INST. FOR RSCH. ON POVERTY, THE POLITICS OF DAYCARE: THE COMPREHENSIVE CHILD DEVELOPMENT ACT OF 1971, at 6–9 (1976).

153. Kimberly Morgan, *A Child of the Sixties: The Great Society, the New Right, and the Politics of Federal Child Care*, 13 J. OF POL'Y HIST. 215, 219 (2001).

154. *Marian Wright Edelman*, *59 Stories*, THEHISTORYMAKERS https://da-thehistorymakers-org.ezp3.lib.umn.edu/storiesForBio;ID=A2001.030 (last visited Mar. 25, 2025).

155. Morgan, *supra* note 153, at 220.

156. ANDREW KARCH, EARLY START: PRESCHOOL POLITICS IN THE UNITED STATES 74 (2013).

157. *Id.* (footnote omitted) ("For example, one letter to House Speaker Carl Albert (D-OK) attributed the most serious social problems of the day to the breakdown of the family unit, noting, 'You must realize that removing children from their mothers' influence for extended periods of time during their formative years could prove disastrous.'").

rocking the cradle, as the timesworn synecdoche has it, comes to rule the world."[158] Head Start was caught in these crosshairs and faced criticisms of being ineffective.[159]

Senator Walter F. Mondale was an instrumental figure in building a bipartisan coalition for universal child care.[160] In subcommittee reports led by Mondale, testimony demonstrated some of the challenges of establishing universal child care. John Niemeyer, an original architect of Head Start and key consultant of the CDA,[161] presented testimony that universal child care would place a huge demand on qualified teachers when there were simply no early childhood teachers available.[162] The lack of teachers meant that people needed to be trained, and the training needed to focus more on practical work rather than theoretical, classroom training.[163]

Echoing similar concerns, former Head Start Director Julie Sugarman testified that there was simply a small number of teachers in the field of early childhood.[164] Senator Mondale asked whether teachers of other age groups could be retrained for the field, and Sugarman agreed but reemphasized the lack of qualified

158. *Id.* (footnote omitted).

159. *See* MARY F. BERRY, THE POLITICS OF PARENTHOOD: CHILD CARE, WOMEN'S RIGHTS, AND THE MYTH OF THE GOOD MOTHER 173 (Penguin Books 1993); White & Buka, *supra* note 129, at 74–75; Morgan, *supra* note 153, at 226.

160. ROTH, *supra* note 152, at 11–12. *See also Comprehensive Child Development Act of 1971: Joint Hearings Before the Subcommittee on Employment, Manpower, and Poverty and the Subcommittee on Children and Youth of the Committee on Labor and Public Welfare*, *United States Senate, Ninety-Second Congress, First Session on S.1512)*, 92d Cong. 5 (1971) [hereinafter Subcommittee on Employment, Manpower, and Poverty] (Sen. Mondale, Chairman, S. Comm. on Children and Youth, presiding).

161. Wolfgang Saxon, *John Harry Niemeyer, 95; Headed Bank Street College*, N.Y. TIMES (May 1, 2004), https://www.nytimes.com/2004/05/01/nyregion/john-harry-niemeyer-95-headed-bank-street-college.html [https://perma.cc/HT4E-Z79Y].

162. Subcommittee on Employment, Manpower, and Poverty, *supra* note 160, at 166–67 ("[T]hey said, we want to start 100 centers. We said, please don't. And they said, we must. They ended up by starting 15. Let me talk about the 15. Where [were] we going to get the teachers and staff? They didn't exist . . . . With very few exceptions, the staff of the 15 centers—and this was somewhere over 200 persons—were nonprofessionals. Many of them got their high school equivalency in the course of the training program. Some of them had finished high school. Almost none had gone on to any college work at the community college level . . . . [After emphasizing there was not enough proposed funds to train teachers] The second point I'd like to make is that if we have 20,000 people, there aren't 20,000 teachers who are sensitive workers with young children out there who can take the job. So we are going to have to take people right out of the neighborhoods and train them.").

163. *See id.* at 167.

164. *Id.* at 177.

personnel that could even retrain teachers.[165] Facing the practical problem of recruiting teachers into the field, Senator Mondale urged that children still required "comprehensive preschool care," to which Sugarman responded with, "There is no question about that Senator . . . [but] I am not looking for masters degrees in early childhood. But I am looking for at least sufficient funds to support continuing training."[166] Both Niemeyer and Sugarman emphasized that emerging early childhood teachers required practical training far more than a traditional classroom education.

Despite the strong ideological tensions swirling around child care, lengthy debates and coalition building led to the House and Senate passing universal child care and sending the bill to President Nixon.[167] The universal child care proposal incorporated educational, nutritional, health, and remedial services modeled after Head Start.[168] The federal government would also issue federal standards establishing a minimum baseline addressing the health, safety, and physical comfort of all children in the child care facilities.[169] It was a multifaceted approach that did not seem to prioritize education over other areas of development.[170]

Nobody knew for certain what President Nixon would do.[171] And so days after Republicans and Democrats joined together to pass universal child care, President Nixon vetoed the bill, echoing conservative fears that parental authority and involvement would be diminished.[172] He accused child care expansions of weakening the family, removing traditional family-centered approaches, and replacing the family from its "rightful position as the keystone of our civilization."[173] The Nixon administration expressed caution

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165. *Id.*

166. *Id.*

167. For a detailed dive into these congressional discussions, see KARCH, *supra* note 156, 59–85 (2013); Morgan, *supra* note 153, at 220–31.

168. *See* KARCH, *supra* note 156, at 68.

169. *See* H. REP. NO. 92-682, at 23–24 (1971); S. REP. NO. 92-523, at 23–24 (1971).

170. *See* KARCH, *supra* note 156, at 68.

171. *See* Morgan, *supra* note 153, at 230–33; KARCH, *supra* note 156, at 82.

172. *See* Rosenthal, *supra* note 1.

173. *Id.* ("The President said that he objected to committing, without wide national debate, 'the vast moral authority of the national Government to the side of [communal] approaches to childrearing over against the family centered approach' . . . . Repeatedly in the message, Mr. Nixon raised strong reservations about the principle of child development. 'We cannot and will not ignore the challenge to do more for America's children in their all-important early years . . . . But our response to this challenge must be a measured, evolutionary, painstakingly

about administrative bloat that might arise from creating a new network of preschools.[174] Following Nixon's veto, critics of universal child care controlled the public narrative and made the issue "so politically toxic that few legislators would come near it."[175]

II. Analysis

This analysis argues that preschool teachers must become eligible for overtime. In Subpart II.A., this Note posits that preschools were intended to be added under the FLSA's coverage during a time that contemplated legislation for universal child care to succeed. As a result, when universal child care failed, the DOL proceeded to regulate in a way that failed to meet the changing nature of preschools and preschool teachers. Subpart II.B. criticizes the current application of the overtime exemption to preschool teachers as being inconsistent with the original public policy and case law on overtime exemptions. Finally, Subpart II.C. completes the analysis by arguing that preschool teachers should be subject to the traditional EAP exemption test, rather than considered categorically exempt from overtime. This Note concludes that preschool teachers must be eligible for overtime because they meet every requirement for overtime eligibility, and that, at minimum, the EAP must become more nuanced so that low wage employees are no longer unfairly exempt from overtime wage rates. Otherwise, the FLSA—designed to protect low wage workers—will continue to restrict preschool teachers from full labor rights.

A. The 1972 Amendments Anticipated a Professionalized Preschool Workforce that Never Materialized Due

considered one, consciously designed to cement the family in its rightful position as the keystone of our civilization.'"). For a discussion on public perception of child care and the failure to advance universal child care measures, *see also* Anna K. D. Halperin, *An Unrequited Labor of Love: Child Care and Feminism*, 45 UNIV. CHI. J. WOMEN IN CULTURE & SOC'Y 1011 (2020) (explaining that child care expansion failed in the 1960s and 1970s due to a combination of "pro family" Christian activism, notions of the traditional family, feminist battle-fatigue, Conservative opposition, and the abandonment of child care as a priority by mainstream feminist organizations).

174. Unfortunately, political ambitions were also a priority for the Nixon administration. Part of the administration's caution was rooted in the fact that passing universal child care would overshadow other legislation that President Nixon had been trying to push for—legislation with less comprehensive childcare efforts. *See* Rosenthal, *supra* note 1.

175. Morgan, *supra* note 153, at 235–37.

to the Collapse of Universal Child Care Efforts

The 1972 amendments that placed preschools under the FLSA were likely intended to accompany the CDA's universal child care provisions. It can be difficult to make sense of congressional silence, but it is more difficult to ignore the fact that the 1972 amendments progressed through Congress alongside the CDA.

Although the amendments became effective in 1972, the amendments were passed in the Senate on August 6, 1971, and in the House on November 4, 1971.[176] The Committee on Labor and Public Welfare reported on the amendments to the Senate.[177] This was the same committee spearheaded by Senator Mondale that led the CDA discussions.[178] In fact, the 1972 amendments were ultimately passed in early November 1971, just a few weeks before the CDA—which was approved by both chambers of Congress in early December.

These bills were likely sister pieces of legislation meant to grapple with the childcare movement. The 1972 amendments were more than likely an anticipatory measure for the new national network of preschools the CDA would usher in.[179] In the same way that the federal government intervened in elementary education under the ESEA in 1965—which incentivized better teacher prep programs in higher institutions—the CDA also contemplated well-trained preschool teachers[180] and preschool facilities that would have to meet minimum federal standards.[181] But unlike the ESEA, President Nixon's veto left the 1972 amendments to stand on their own, without federal standards, and without a clear mandate to have highly qualified preschool teachers.

The DOL's efforts at interpreting the application of the 1972 amendments also parallel the final CDA bill. After the CDA was vetoed, the DOL still had to interpret how preschools and preschool teachers would interact with the rest of the FLSA after the 1972 amendments. In its interpretation, the DOL did not distinguish

176. *See All Information (Except Text) for S. 659 – Education Amendments of 1972*, CONGRESS.GOV, https://www.congress.gov/bill/92nd-congress/senate-bill/659/all-info [https://perma.cc/DL8M-8TJT].

177. S. REP. NO. 92-346, pt. 22, at 28956 (1971).

178. *See* Subcommittee on Employment, Manpower, and Poverty, *supra* note 160.

179. *Id. See infra* Part II.B.

180. Subcommittee on Employment, Manpower, and Poverty, *supra* note 160, at 177.

181. H. REP. NO. 92-682, at 23–24 (1971); S. REP. NO. 92-523, at 23–24 (1971).

between custodial or educational duties,[182] much like the CDA attempted to establish preschools that took a multifaceted approach to child development.[183]

The preschool network was also to be modeled after Head Start, which was the preeminent leader in early childhood education.[184] Under the veto's shadow, preschools continued to operate—not in a highly incentivized system like the ESEA and the universal preschool system contemplated—but through a minimally-regulated, decentralized medley of private and public preschools[185] that historically did not require licenses for teachers.[186] In 2004, only one-third of higher education institutions offered degrees in early childhood.[187] This limited offering arose from the fact that most states did not require degrees to teach in a preschool.[188] Head Start only started requiring 50% of its teachers to have at least an associate's degree in 1998,[189] and since then, only twenty-four states require bachelor's degrees for lead preschool teachers.[190]

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182. *See* U.S. DEP'T OF LAB., PRESCHOOLS UNDER THE FLSA, *supra* note 111, at 1–2 ("The term 'preschool' includes any establishment or institution which accepts for enrollment children of preschool age for purposes of provided 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.").

183. KARCH, *supra* note 156, at 68.

184. *Id.*

185. Yiran Zhang, *Subsidizing the Childcare Economy*, 34 STAN. L. & POL'Y REV. 67, 73–83 (2023); *see also* Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213 (2017) (discussing social and legal forces that forcefully shape how families can raise children).

186. *See* W. STEVEN BARNETT, BETTER TEACHERS, BETTER PRESCHOOL: STUDENT ACHIEVEMENT LINKED TO TEACHER QUALIFICATIONS 9 (2004) (stating that only nine states require college credits in child care generally, and thirty-five states require credits or degrees in state financed pre-K such as Head Start). *Cf.* MARNIE KAPLAN & SARA MEAD, THE BEST TEACHERS FOR OUR LITTLEST LEARNERS 11 (2017) (explaining that in 2015, only 74% of Head Start lead teachers had bachelor's degrees).

187. KAPLAN & MEAD, *supra* note 186, at 11.

188. *Id.*

189. U.S. GEN. ACCT. OFF., HEAD START: INCREASED PERCENTAGE OF TEACHERS NATIONWIDE HAVE REQUIRED DEGREES, BUT BETTER INFORMATION ON CLASSROOM TEACHERS' QUALIFICATIONS NEEDED 6 (2003), https://www.gao.gov/assets/gao-04-5.pdf [https://perma.cc/36TF-GRB9].

190. JANET CURRIE, BROOKING INST. A FRESH START FOR HEAD START?, CHILDREN'S ROUND TABLE REPORT 5 (2001), https://www.brookings.edu/wp-content/uploads/2016/06/issue5.pdf [https://perma.cc/466Y-JJ58]; Supporting the

While preschool teachers learn the skills that make them effective educators without a formal degree, most states still do not require preschool teachers to have degrees.[191] Instead, a bare minimum child development certificate is awarded after a preschool teacher completes a mix of on-the-job experience and school credits (although the certificate is generally not a requirement to teach).[192] This reflects the congressional testimony that the field of early childhood had lacked infrastructure to develop qualified teachers.[193] Had universal child care successfully pushed through, higher institutions could be expected to have developed more early childhood programs much like ESEA.[194]

Preschool teachers were intended to have mirrored the professionalized nature of teachers in the public school system. The fact that preschools had to be explicitly added to the FLSA nearly five years *after* teachers had become exempt, and after public schools were added, lends further credibility to the notion that preschools and preschool teachers were going to be joining the ranks of other schools and teachers as far as structure and regulation were concerned. The 1972 amendments likely contemplated a stringently regulated, highly educated profession, but the field of preschool teachers evolved into something different. The traditional

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Head Start Workforce and Consistent Quality Programming, 88 Fed. Reg. 80818, 80826 (Nov. 20, 2023) (noting that only 20% of Early Head Start teachers have bachelor's degrees); CENT. FOR THE STUDY OF CHILD CARE EMP., EARLY CHILDHOOD WORKFORCE INDEX 2020, at 76 (2020), https://cscce.berkeley.edu/workforce-index-2020/wp-content/uploads/sites/3/2021/02/Early-Childhood-Workforce-Index-2020.pdf [https://perma.cc/847E-E2QD].

191. For a directory of state licensing requirements for preschool teachers, *see National Database of Child Care Licensing Regulations*, CHILD CARE TECH. ASSISTANCE NETWORK, https://licensingregulations.acf.hhs.gov/ [https://perma.cc/K2KF-ZUT6].

192. *Id.*; CENT. FOR THE STUDY OF CHILD CARE EMP., *supra* note 190, at 78 (reporting that eight states do not require *any* credential for preschool teachers, while eleven only require a high school diploma or GED); NAT'L RSCH. COUNCIL, TRANSFORMING THE WORKFORCE FOR CHILDREN BIRTH THROUGH AGE 8: A UNIFYING FOUNDATION 1 (LaRue Allen & Bridget B. Kelly, eds., 2015) ("Despite their shared objective of nurturing and securing the future success of young children, these professionals are not acknowledged as a cohesive workforce, unified by their shared contributions and the common knowledge base and competencies needed to do their jobs well. They work in disparate systems, and the expectations and requirements for their preparation and credentials have not kept pace with what the science of child development and early learning indicates children need.").

193. *See* Subcommittee on Employment, Manpower, and Poverty, *supra* note 160, at 166–77.

194. *Id.* at 167.

justifications for overtime exemptions, as discussed in the next section, fail to harmonize with this reality.

B. Preschool Teachers Do Not Fit Within the Original Scope of Overtime Exemptions

The status of bona fide professional was originally limited to doctors and lawyers,[195] but the historical justifications for limiting this exemption to doctors and lawyers does not align with both the history and modern state of preschool teachers. As previously noted, the legislative history is silent about the scope of the EAP exemption. However, early case law and the DOL's Wage and Hour Division (WHD) interpretations should be afforded persuasive deference because they were established shortly after the enactment of the FLSA. Central to the WHD were the "compensatory privileges" such as an implied prestige, status, and importance that exempt professions held.[196]

As for case law, courts recognized that the DOL limited the exemption to doctors and lawyers because of: (1) "the traditional standing of these professions," (2) "the recognition of doctors and lawyers as quasi-public officials," (3) "the universal requirement of licensing by the various jurisdictions," (4) "and the relatively simple problems of classification presented by these professions."[197]

Certainly, teachers have traditionally enjoyed heightened prestige and social status. As Justice Blackmun wrote:

> There is an ongoing relationship, one in which the teachers must occupy many roles—educator, adviser, friend, and, at times, parent-substitute . . . . The role of the teacher in our society historically has been an honored and respected one, rooted in the experience of decades that has left for most of us warm memories of our teachers, especially those of the formative years of primary and secondary education.[198]

Even in the critical years of the 1960s and 1970s, parents overwhelmingly approved of their children becoming teachers and viewed the profession favorably.[199] However, preschool teachers had

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195. Belt v. Emcare, 444 F.3d 403, 414 (5th Cir. 2006).

196. Defining and Delimiting the Terms "Any Employee Employed in a Bona Fide Executive, Administrative, or Professional Capacity (Including Any Employee Employed in the Capacity of Academic Administrative Personnel or Teacher in Elementary or Secondary Schools), or in the Capacity of Outside Salesmen," 35 Fed. Reg. 883, 884 (Jan. 22, 1970) (to be codified in 29 C.F.R. pt. 541).

197. *Emcare*, 444 F.3d at 414.

198. Goss v. Lopez, 419 U.S. 565, 594 n.12 (1975) (J. Blackmun, J., dissenting).

199. Kraft & Lyon, *supra* note 80, at fig.2.

not yet been accepted as a teacher group and profession that could enjoy an elevated standing.

When teachers became exempt from overtime, the campaign against child care was raging. While three quarters of parents wanted their children to become teachers,[200] political theater swayed the public into viewing child care as a service for poor people that harmed child development.[201] The Nixon Administration and child care critics did not create this narrative out of a vacuum. Parents overwhelmingly preferred familial care for their children over a preschool teacher within structured child care.[202] Child care maintained strong ties to poverty and the social welfare system, so early childhood educators had been attached to perceptions that child care was for the poor,[203] the unemployed,[204] the anti-American,[205] and the immoral.[206] Any reverence extended to most teachers was not extended to preschool teachers.

These perceptions also cut against the view that preschool teachers present a "simple problem[] of classification."[207] The circuit split regarding the scope of the FLSA provisions on preschools was premised on the issue that some preschools offer custodial services while others offer education services.[208] Even decades after the stigmatization that child care received in the 1960s, the Sixth Circuit viewed preschools and day care centers as one and the same[209]—regardless of the fact that day care centers focused on mere supervision (i.e. custodial services) and preschools on education. Federal courts blurred the line between an employee

200. *Id.* at 17.

201. *See supra* Part I.D.ii.

202. BERRY, *supra* note 159, at 180 (stating that less 8% of white working women had children in child care, while that number doubled for Black working women; also noting that polls showed that families largely preferred relatives to care for children while at work). For another discussion on public perception of child care and the failure to advance universal child care measures, *see* Halperin, *supra* note 173 (explaining that child care expansions failed in the 1960s and 1970s due to a combination of "pro family" Christian activism, idealizations of the traditional family, feminist battle-fatigue, Conservative opposition, and the abandonment of child care as a priority by mainstream feminist organizations).

203. CAHAN, *supra* note 132, at 14.

204. White & Buka, *supra* note 129, at 63.

205. *See* Morgan, *supra* note 153, at 220 (noting that critics worried federal childcare programs would "Sovietize" children).

206. CAHAN, *supra* note 132, at 11.

207. Belt v. Emcare, 444 F.3d 403, 414 (5th Cir. 2006).

208. *See supra* Part I.D.i.

209. Reich v. Miss Paula's Day Care Ctr., Inc., 37 F.3d 1191, 1195 (6th Cir. 1994).

providing high-quality education and an employee providing only basic supervision for parents while they work.

For many courts in the circuit split, these classification problems do not present any issue. And yet, stories are in abundance of preschool teachers presenting disdain for this failure to provide a distinction.[210] "Babysitters" and "daycare workers" are two terms that insult the preschool teacher who prides themself on carefully providing developmentally appropriate learning opportunities for children to develop.[211] The legal system has historically ignored the field of early childhood,[212] and so it is unsurprising that courts cannot discern between a legitimate educator that receives a degree in early childhood to develop a career working with children, and a day care worker providing basic supervision.

Preschool teachers do not present a simple problem of classification that applies much more easily to doctors and lawyers. What is true today could only have been doubly true nearly fifty years ago when the field of early childhood was just burgeoning. The gap between quality education and mere day care was also not as evident. Head Start, as influential as it is today, had only just been created in 1965.[213] When preschools were added to the FLSA, Head Start was criticized as poorly run and had been labelled as a program with inadequate educational standards and quality, with claims that it did not produce educational gains.[214] Head Start's regulations and influential performance standards set the mark for quality, educational child care but were not created until 1975.[215]

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210. *See* Mina Kim, *Constructing Occupational Identities: How Female Preschool Teachers Develop Professionalism*, 1 UNIVERSAL J. OF EDUC. RSCH. 309 (2013).

211. *See* Lillian Mongeau Hughes, *What Do Preschool Teachers Need to Do a Better Job?*, THE HECHINGER REP. (Aug. 16, 2016), https://hechingerreport.org/what-do-preschool-teachers-need-to-do-a-better-job/ [https://perma.cc/8Y97-NQ6V] (reporting on New York City's attempt to strengthen the public's perception of preschool teachers by centralizing the industry and increasing program quality); *see also California's Early Childhood Caregivers: 'We Are Not Babysitters. We Are Educators'*, LAIST (June 9, 2021), https://laist.com/news/education/californias-early-childhood-caregivers-we-are-not-babysitters-we-are-educators [https://perma.cc/3QZB-GBSQ].

212. *See generally* Clare Huntington, *Early Childhood Development and the Law*, 90 S. CAL. L. REV. 755 (2017) (advocating for the legal field to begin engaging with the field of early childhood after historically ignoring it).

213. *Head Start History*, *supra* note 149.

214. BERRY, *supra* note 159, at 173; White & Buka, *supra* note 129, at 74–75; Morgan, *supra* note 153, at 226.

215. *Head Start History*, *supra* note 149.

Limiting the scope of the EAP exemption to professions with universal licensing requirements also presents challenges, as the preschool industry, echoing points made in the previous section, is a decentralized mix of private and public preschools that historically has not required teaching licenses.[216] The CDA would have incentivized more centralized, regulated infrastructure much like the ESEA did. The universal child care discussions included key testimony from leaders in the field who recognized a lack of higher education infrastructure, degree offerings, and credentialed teachers in the field.[217] These discussions remain relevant even in recent decades. In 2004, only 30% of higher education institutions offered early childhood degree programs,[218] Head Start only recently made undergraduate degrees a widespread requirement for its educators,[219] many states do not mandate licenses or degrees to practice,[220] and a significant majority of early childhood educators still lack college degrees.[221]

The on-the-job experience combined with bare minimum school credits that most preschool teachers must gain is more akin to the DOL's definition of a "blue collar worker."[222] The DOL explains in 29 C.F.R. § 541.3 that "blue collar workers" do not fall under the EAP exemption because they gain the necessary skill and knowledge through apprenticeships and on-the-job training, rather than "prolonged course[s] of specialized intellectual instruction."[223] The DOL's position is that police officers, firefighters, paramedics,

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216. *See supra* Part II.A.

217. *Id.*

218. KAPLAN & MEAD, *supra* note 186, at 8.

219. Supporting the Head Start Workforce and Consistent Quality Programming, 88 Fed. Reg. 80818, 80904 (Nov. 20, 2023) (to be codified in 45 C.F.R. pts. 1301–05).

220. Linda K. Smith & Caroline Osborn, *Who Can Work in a Child Care Center? What is Good Enough?*, BIPARTISAN POL'Y CTR. (Feb. 8, 2024), https://bipartisanpolicy.org/blog/who-can-work-in-a-child-care-center/ [https://perma.cc/7KX8-HPQ7].

221. The percentage of early childhood educators with some college and/or a high school diploma or less is 52% at center-based facilities, 62% at licensed home-based providers, and 69% at unlicensed home-based providers. *The Early Childhood Workforce Index 2024*, *About the Early Childhood Workforce*, CENT. FOR THE STUDY OF CHILD CARE EMP., https://cscce.berkeley.edu/workforce-index-2024/the-early-childhood-educator-workforce/about-the-early-childhood-workforce/ [https://perma.cc/MM7C-5VKF] (see fig. 2.1.11).

222. As opposed to the EAP, which is commonly known as the "white collar" exemption. *See* 29 C.F.R. § 541.3(a) (2024) (defining "blue collar" workers as those workers who gain skills and knowledge through "on-the-job training," not prolonged education).

223. *Id.*

emergency medical technicians, and other similar employees cannot be considered bona fide professionals because, although they may have college degrees, "a specialized academic degree is not a standard prerequisite for employment in such occupations."[224] Obviously, firefighters and paramedics are not unskilled because they lack academic credentials and gain experience through on-the-job training and apprenticeships. But just as blue collar workers can be justified as safe from overtime exemption on the basis of a lack of academic credentials and the prevalence of on-the-job training, so too can preschool teachers. On-the-job training is key to training preschool teachers[225]—a point emphasized during congressional testimony in the 1960s—due to a widespread lack of academic credentials throughout the field.[226] Yet preschool teachers fall within the EAP exemption.

Exempting preschool teachers from overtime appears to have been an *anticipatory* interpretation from the WHD that saw indications that preschools would explode in quantity and quality under the CDA. But the original scope of the EAP exemption was not anticipatory, it was about compensatory privileges, tradition, prestige, and social standing.[227] Architects, engineers, librarians, nurses, and pharmacists were rejected from categorical overtime exemptions,[228] and they did not face smear campaigns like those that child care workers faced.[229] Preschool teachers did not stand on the same social level as accepted, time-honored professionals like

224. *Id.* § 541.3(b)(4).

225. NAT'L RSCH. COUNCIL, *supra* note 192, at 367 ("Unlike educators in elementary schools, many of these [early childhood] educators do not participate in preservice education; their participation in formal education or training for their profession may not commence until after they have become employed in the field. As a result, for many of these educators, their first job serves as their opportunity for 'practice teaching,' but rarely with a formal induction period or structure of close supervision with an educational aim.").

226. Subcommittee on Employment, Manpower, and Poverty, *supra* note 160, at 166–67.

227. *See* Defining and Delimiting the Terms "Any Employee Employed in a Bona Fide Executive, Administrative, or Professional Capacity", 35 Fed. Reg. 883, 884 (Jan. 22, 1970) (to be codified in 29 C.F.R. pt. 541) ("As pointed out in the 1940 Report, employment in such a capacity implies a certain prestige, status, and importance, and employees who qualify under the definitions are denied the protection of the Act and must accordingly be assumed to enjoy compensatory privileges . . . .").

228. Belt v. Emcare, 444 F.3d 403, 414 (5th Cir. 2006).

229. *See supra* Part I.D.ii (explaining early societal and political factors that led to conservative views dismissive of child care).

doctors, lawyers, and even other teachers, that were contemplated by the categorical overtime exemption.[230]

C. Preschool Teachers Are Textbook, Overtime-Eligible Employees Under the EAP's Traditional Salary Basis and Primary Duty Tests

Preschool teachers are categorically exempt from overtime under the teacher test, and therefore do not have to satisfy the EAP's salary basis and primary duty test. However, if preschool teachers are removed from the categorical, more inclusive overtime exemption of the teacher test, they meet every textbook requirement for overtime eligibility because they fail the EAP's traditional requirements.

The DOL opined for years that the salary basis test was a "completely objective and precise measure,"[231] and went even further to say it is the "single best test" of whether an employee is properly classified as a bona fide professional.[232] The DOL associated bona fide professionals with having compensatory privileges that included higher wages, promotion potential, and job security[233] before preschool teachers were categorized as bona fide professionals in 1972.[234]

But preschool teachers lack such compensatory privilege as they earn less than the salary threshold of the salary basis test. Currently, the average full-time preschool teacher earns an annual salary of $29,140,[235] or in other words, an average of $14.01 per hour, or $560.38 per week. At the bottom of the preschool teacher wage-spectrum are infant and toddler teachers, who earn $10.86 per hour, or $434.40 per week.[236] On the opposite end of the

230. *Id.*

231. HARRY WEISS, REPORT AND RECOMMENDATIONS ON PROPOSED REVISIONS OF REGULATIONS, PART 541, at 9 (U.S. Dep't. of Lab., Wage and Hour Pub. Conts. Divs., 1949).

232. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22165 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 514).

233. *Id.*; FRITSCH & VANDELL, *supra* note 70, at 236.

234. Act of June 23, 1972, Pub. L. No. 92-318, 86 Stat. 375 (amending language by deleting "an elementary or secondary school" and inserting "a preschool, elementary or secondary school"); *see* 29 U.S.C. § 203.

235. Maureen Coffey, *Still Underpaid and Unequal: Early Childhood Educators Face Low Pay and a Worsening Wage Gap*, CENT. FOR AM. PROGRESS (July 19, 2022), https://www.americanprogress.org/article/still-underpaid-and-unequal/, [https://perma.cc/7UYC-QREX] (see figure 2).

236. *Id.*

spectrum are preschool teachers with bachelor's degrees, who earn $18.77 per hour, or $750.80 per week.[237] However, preschool teachers with bachelor's degrees are in the minority: only 29.9% of all preschool teachers have bachelor's degrees or higher.[238]

The financial reality of preschool teachers is that the average preschool teacher's salary is below the current federal poverty line for a family of four.[239] Unsurprisingly, over 50% of childcare workers are enrolled in public support programs, with 15% of these workers receiving financial support such as cash assistance for disabilities, housing assistance, free-reduced lunch for children, and food stamps.[240]

Even the industry leaders do not always satisfy the salary basis test. Head Start requires the majority of its teachers to have four-year degrees.[241] But even Head Start teachers only earn an average of $34,073,[242] below the EAP's $35,568 threshold, and salaries have only regressed over the past decade for teachers across the board.[243] In the 1960s, doctors and lawyers earned a median income of $40,550 and $47,638, respectively[244] but today credentialed and experienced preschool teachers struggle to break the $40,000 mark.[245] Some preschool teachers with bachelor degrees

237. *Id.*

238. *Id.* Notably, when divided on a racial level, around 23% of Black, non-Hispanic and Hispanic preschool teachers have bachelor's degrees or higher, in comparison to multiracial preschool teachers (27.96%), white, non-Hispanic preschool teachers (32.71%), and Asian preschool teachers (59.19%). *Id.*

239. Department of Health and Human Services Annual Update of the HHS Poverty Guidelines, 89 Fed. Reg. 2961, 2962 (Jan. 17, 2024) (explaining the poverty line for a family of four is $31,200); *see also* CENT. FOR THE STUDY OF CHILD CARE EMP., *supra* note 190, at 44 (showing that, in 2020, only the thirteenth percentile of preschool teachers earned at or above $30,520).

240. COFFEY, *supra* note 235 (noting that, comparatively, only 21% of the U.S. workforce benefits from public support programs).

241. 42 U.S.C. § 9843a(a)(2)(A); *See* KAPLAN & MEAD, *supra* note 186, at 11 (noting that, in 2015, 74% of Head Start lead teachers had bachelor's degrees).

242. NAT'L HEAD START. ASS'N, *supra* note 5, at 2.

243. NAT'L EDUC. ASS'N, NEA 2021–2022 TEACHER SALARY BENCHMARK REPORT 1 (2023) (finding that when adjusted for inflation, starting salaries for teachers between 2021–2022 are actually $4,552 less than starting salaries in 2008–2009).

244. Michael Ariens, *Making the Modern American Legal Profession, 1969–Present*, 50 ST. MARY'S L. J. 671, 686 (2019) (noting the $47,638 figure is adjusted for dollar value by 1983); Nancy Ricks, *Doctors' Median Income (40,550) Spurs Fee Debate*, N.Y. TIMES (Sept. 13, 1971) (noting that the American Bar Association calculated that attorneys earned an average income of $27,960 per year in 1970).

245. COFFEY, *supra* note 235.

may satisfy the salary basis test, but the average preschool teacher does not meet the $684 salary threshold.[246]

As for the primary duty test, some preschool teachers may also satisfy it, but many likely will not. Child development takes a comprehensive approach to addressing a child's needs. Preschool teachers certainly do not spend 50% of their time providing traditional education. It can be plausibly argued that a preschool teacher's primary duty could be educational if the "education" aspect includes the physical, social, emotional, and safety needs that child development demands. One side of the circuit split, which blurs custodial and educational services, supports this interpretation.[247] However, exercising these primary duties does not require advanced knowledge from a field of science or learning. Even if some preschool teachers satisfy this requirement in a higher education program, this is not the type of advanced knowledge customarily acquired by a prolonged course of specialized instruction. Regulations state that an academic degree is the best prima facie evidence of satisfying this requirement,[248] which is telling about what the regulations favor—a traditional higher institution education. But this absolutely cannot be satisfied when the occupation can be performed with only general knowledge acquired by an academic degree in any field. A significant number of preschool teachers have only limited college credits or even just a high school degree, so the profession cannot be considered one that requires advanced knowledge customarily acquired by a prolonged course of specialized instruction.[249] And even if the profession could somehow be characterized in such a way, the preschool teachers with only a high school degree should not be treated the same as the teacher with a four-year degree in the field.

Courts have previously maintained that the duties test is more important than the salary basis test, but courts have also tempered this acknowledgment with a recognition that salary is important for

246. *Id.*

247. *See supra* part Part I.D.i.

248. 29 C.F.R. § 541.301(d) (2025) ("The phrase 'customarily acquired by a prolonged course of specialized intellectual instruction' restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree.").

249. *Id.*

identifying overtime exempt employees.[250] In addition, this recognition was made long before the continuously widening earnings disparity of preschool teachers that became apparent decades later, and long before the contradictory public policy of overtime exemptions as to preschool teachers was fleshed out.

Although the DOL has shifted towards a preference for the primary duty test,[251] how low must an employee's salary fall below the salary threshold before the DOL revises the EAP exemption? At this point, the DOL's persistent attempts to exempt employees with low salaries based on already questionable interpretations of primary duty is nothing more than an inflexible, mechanical application of textualism that runs counter to the FLSA's original goal of protecting overworked, underpaid employees. The DOL is tasked with defining and delimiting the bona fide professional exemption. Instead, it has reinforced inequities, and amplified the financial burden that preschool teachers shoulder, rather than mitigating harm to these low wage workers.

The EAP exemption must become more flexible. If overtime exemptions for preschool teachers were limited to the EAP's traditional tests by removing the categorical overtime exemption status, then some preschool teachers would satisfy the EAP exemption requirements while others would not. Even if just a quarter of preschool teachers satisfied the EAP exemption (the equivalent of preschool teachers that hold bachelor's degrees) around 33.1% of preschool teachers would be eligible for overtime.[252] Preschool teachers are unprotected, unorganized, and some of the lowest paid of the categorically exempt professions. Unfortunately,

250. Walling v. Yeakley, 140 F.2d 830, 832 (10th Cir. 1944) ("Obviously, the most pertinent test for determining whether one is a bona fide executive is the duties which he performs. Admittedly, a person might be a bona fide executive in the general acceptation of the phrase, regardless of the amount of salary which he receives. On the other hand, it is generally true that those in executive positions assume more responsibility and are generally higher paid than those who work under the supervision and direction of others. The same is true with respect to those employed in administrative and professional capactities. Therefore, in most cases, salary is a pertinent criterion and we cannot say that it is irrational or unreasonable to include it in the definition and delimitatation.").

251. Texas v. Dep't. of Lab. 756 F. Supp. 3d 361, 377 (E.D. Tex. 2024) (citation omitted) (noting the DOL's recent statement that salary levels are "at most, an indicator of those [primary] duties").

252. JOHN SCHMITT, HEIDI SHIERHOLZ & JORI KANDRA, ECON. POL'Y INST., EXPANDING OVERTIME PROTECTION FOR TEACHERS UNDER THE FAIR LABOR STANDARDS ACT 4 (2021).

until regulations adopt better protections, preschool teachers as a profession will be harmed by a statute meant to protect them.

Conclusion

The failure to define and regulate preschools and preschool teachers with more nuance has allowed agencies and courts to mismanage the labor rights of preschool teachers under the FLSA. Universal child care gains momentum with every passing year, and the infrastructure for a centralized childcare industry is growing. The DOL may be anticipating that preschool teachers will one day join the prestige of other teachers, perahps even doctors and lawyers. But even if that were the case, and until then, the EAP exemption must be addressed. Otherwise, preschool teachers without degrees, supporting families while earning less than the federal poverty guidelines, will continue to be harmed. Basic issues like overtime exemptions only exacerbate the challenges that preschool teachers face. Since President Nixon vetoed universal child care, preschool teachers have faced decades of ill-advised agency interpretations, federal case law, and poor labor conditions. Federal courts and agencies must not forget the real-world human costs when they allow rigid interpretations and regulatory schemes to undermine the FLSA's purpose:

> We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.[253]

Revising the FLSA and its corresponding regulations to have a more nuanced overtime exemption could be a first major step in supporting an entire profession's journey towards better labor conditions.

253. Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590, 597 (1944).