

ALL WORK, NO PAY: THE CRUCIAL NEED FOR THE SUPREME COURT TO REVIEW UNPAID INTERNSHIP CLASSIFICATIONS UNDER THE FAIR LABOR STANDARDS ACT

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ABSTRACT

Unpaid internships have become increasingly common in recent years because of the economic benefit provided to businesses and the real-world experience afforded to students. While this increase in unpaid internships has provided advantages to students and employers, it has also created concerns regarding the legality of unpaid internships under the Fair Labor Standards Act of 1938 (FLSA). Though the FLSA was created with the goal of ensuring that all employees receive compensation for their work, the FLSA does not address whether workers in unconventional working relationships, such as internships, fall within the definition of employees, which would entitle them to compensation and other federal protections.

Currently, a circuit court split exists regarding the appropriate test for classifying unpaid interns under the FLSA. The Fourth, Fifth, and Sixth Circuits utilize a primary benefit test to determine which party receives the primary benefit of the working relationship, while the Tenth Circuit and lower courts in the Second Circuit utilize a totality of the circumstances test. Additionally, the Eleventh Circuit uses an economic reality test to determine which party benefits economically from the relationship. As a result, student interns are classified differently throughout the nation, creating a disparity in

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the level of protection these students receive under federal law. Current scholarship addressing this issue has focused primarily on legislative and regulatory solutions; however, neither Congress nor the Department of Labor has responded with a controlling solution, leaving many unpaid interns with no protection from employers who exploit them as free labor while providing little to no educational benefit in return.

The Supreme Court should address the issue of how unpaid interns are classified under the FLSA to provide greater protections for students who are being illegally exploited by employers. By adopting the primary benefit test from the Fourth, Fifth, and Sixth Circuits and supplementing this test with the Department of Labor guidelines issued in Fact Sheet #71, the Court can provide a uniform standard for classifying interns under the FLSA. This solution would properly balance the interests of employers and students to ensure that employers can utilize unpaid internships without violating the FLSA and to ensure that students who do not receive an educational benefit from their unpaid internship receive monetary compensation under the FLSA.

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INTRODUCTION

From 2009 to 2010, Eric Glatt and Alexander Footman worked as student interns on the set of the box office hit *Black Swan*.¹ Glatt and Footman consistently worked forty to fifty hours per week,² performing mundane tasks such as running files, overseeing purchase orders, and picking up paychecks.³ Despite the fact that *Black Swan* grossed over \$300 million in revenue, these students did not receive any compensation for their work, nor did they receive any college credit for the internship.⁴ In October 2011, Glatt and Footman filed suit against Fox Searchlight Pictures, Inc., claiming the status of employees under the Fair Labor Standards Act (FLSA) that would entitle them to minimum wage and overtime compensation for the work they performed.⁵ Almost two years later, on June 11, 2013, the Southern District of New York ruled in favor of Glatt and Footman, holding that an employment relationship had been created under the FLSA and that Glatt and Footman should have received compensation for their work.⁶

1. Abby Ellin, *Lawsuit: Unpaid Film Interns Considered Employees*, ABC NEWS (June 13, 2013, 1:39 PM), <http://abcnews.go.com/blogs/business/2013/06/lawsuit-unpaid-film-interns-considered-employees/>.

2. *Id.*

3. Rebecca Greenfield, *The 'Black Swan' Intern Ruling Could Change Unpaid Internships Forever*, ATL. WIRE (June 12, 2013, 2:15 PM), <http://www.theatlanticwire.com/national/2013/06/black-swan-intern-ruling/66168/>.

4. Ellin, *supra* note 1.

5. *See* Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 521-23 (S.D.N.Y. 2013) (examining whether student interns were employees under the FLSA).

6. *Id.* at 534.

In recent years, internships—particularly unpaid internships—have become increasingly prevalent in the United States.⁷ Although exact numbers are unavailable, it is estimated that undergraduate students obtain over one million internships each year in the United States, over half of which are unpaid.⁸ Though the number of unpaid internships has increased rapidly in recent years,⁹ the law governing employment relationships has not kept up with the internship boom.¹⁰ In fact, the most relevant Supreme Court case interpreting the FLSA was decided in 1947, decades before the rise of unpaid internships.¹¹ As a result, unpaid internships have continued to increase in number with little guidance as to whether interns are protected as employees under the FLSA.¹²

The problems created by this lack of guidance are numerous and detrimental. For instance, without standards governing the classification of interns, employers exploit students as free labor, leading to serious problems in the areas of minimum wage and overtime compensation.¹³ In fact, *Glatt* was unusual in that it was the

7. See Natalie Bacon, Note, Unpaid Internships: The History, Policy, and Future Implications of “Fact Sheet #71,” 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 67, 68, 74 (2011).

8. Steven Greenhouse, *Judge Rules That Movie Studio Should Have Been Paying Interns*, N.Y. TIMES, June 11, 2013, at B1. Neither the DOL nor any other organization keeps official statistics regarding the number of unpaid internships each year, making it difficult to properly compute these numbers. Bacon, *supra* note 7, at 69; see also ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY 26-28 (2011).

9. See *infra* text accompanying notes 28-29.

10. The Supreme Court and circuit courts have in the past ruled that unpaid individuals should have received compensation as employees under the FLSA, but prior to the decision in *Glatt*, no court had ruled this way with regard to unpaid interns. See, e.g., *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985) (holding that volunteer workers were employees under the FLSA because they were entirely dependent on the employer for extended periods of time); *McLaughlin v. Ensley*, 877 F.2d 1207, 1210 (4th Cir. 1989) (holding that snack food distribution trainees were employees under the FLSA because the employer received the primary benefit of the working relationship).

11. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) (analyzing whether railroad trainees could be classified as employees under the FLSA for compensation purposes).

12. PERLIN, *supra* note 8, at 62-64.

13. Jessica L. Curiale, Note, *America’s New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531, 1537-38 (2010). In the case of unpaid interns, employers are also not required to provide protections against sexual harassment or employment discrimination unless the interns are statutorily classified as employees; however, these issues are outside the scope of this Note. For a more complete discussion of

first suit brought by unpaid interns where the court ruled in favor of the interns.¹⁴ To date, several legislative solutions have been proposed with little response from legislators or government officials.¹⁵ Additionally, circuit courts have attempted to resolve this problem;¹⁶ however, because Supreme Court precedent interpreting the FLSA is unclear and does not address internships, circuits have reached different conclusions, leading to uncertainty regarding intern classification under federal law.¹⁷

Without a clear and uniform standard for classifying unpaid interns, courts will continue to struggle with these lawsuits, the number of which is likely to grow given the recent success in *Glatt*.¹⁸ Moreover, unpaid interns will remain unsure about whether they are being illegally exploited as free labor, and employers will remain uncertain about the legality of their unpaid internship programs.¹⁹ Given the lack of response to other proposed solutions,²⁰ a uniform test adopted by the Supreme Court is the best option for allowing courts to consistently determine whether student interns are employees under the FLSA and for providing protections for students and employers across the nation. National consistency is especially important in the context of internships because the FLSA is a federal statute that should be interpreted similarly throughout the country, particularly since unpaid internships are common in large,

these issues, see James J. LaRocca, Note, *Lowery v. Klemm: A Failed Attempt at Providing Unpaid Interns and Volunteers with Adequate Employment Protections*, 16 B.U. PUB. INT. L.J. 131, 131 (2006).

14. *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 534 (S.D.N.Y. 2013); see also Greenfield, *supra* note 3.

15. See *infra* note 237 and accompanying text.

16. See generally Petition for Writ of Certiorari, *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 F. App'x 831 (11th Cir.) (No. 13-179), *cert. denied*, 134 S. Ct. 618 (2013) (discussing the current circuit split and asking the Court to grant certiorari to resolve this split).

17. The Court's decision in *Portland Terminal* provided guidance regarding trainee situations; however, the Court did not apply a clear test, resulting in a circuit court split about how the FLSA should be interpreted. In other words, there is a significant question as to what test from *Portland Terminal* should be used in future cases and whether the decision from *Portland Terminal* applies to student interns at all. See discussion *infra* Part II.

18. See Greenfield, *supra* note 3. The court in *Glatt* also certified class action status, allowing even more unpaid interns to pursue remedies against internship sites for lack of compensation. *Id.*

19. See Curiale, *supra* note 13, at 1546-48.

20. See *infra* note 237 and accompanying text.

national corporations.²¹ The “primary benefit test,” adopted by the Fourth, Fifth, and Sixth Circuits,²² supplemented by the factors outlined by the Department of Labor (DOL),²³ would most readily align with Supreme Court precedent,²⁴ would provide the greatest amount of deference to the DOL,²⁵ and would most effectively protect students from illegal exploitation, employers from unwanted lawsuits, and courts from an influx of unnecessary cases brought by unpaid workers.

Part I of this Note discusses the background and development of “internship law,” including the FLSA, the Supreme Court’s interpretation of the FLSA, and the confusing introduction of Fact Sheet #71 in 2010. Part II describes the circuit split and outlines the different tests for interpreting the FLSA that have developed in the circuit courts. Part III analyzes this split and provides a detailed discussion of the benefits and detriments of each test. Finally, Part IV discusses why the adoption of a single test is important, suggests a solution to the circuit split, and discusses how this test will solve the problems facing student interns today.

I. THE DEVELOPMENT OF “INTERNSHIP LAW”

When Congress adopted the FLSA in the early 1900s, it presumably did not contemplate the Act’s application to unpaid internships.²⁶ This lack of consideration was likely a result of the low prevalence of unpaid internships in the early twentieth century compared to the number of internships in today’s workforce.²⁷ One of the largest contributors to the increased prevalence of internships in today’s workforce was the economic downturn in 2008—

21. David C. Yamada, *The Employment Rights of Student Interns*, 35 CONN. L. REV. 215, 218 (2002).

22. See discussion *infra* Section II.B.

23. See discussion *infra* Section I.C (examining the DOL six-prong test outlined in Fact Sheet #71).

24. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

25. See *infra* note 84 (discussing the level of deference to be afforded to the DOL interpretation).

26. Because the increase in unpaid internships is fairly recent, federal employment regulations do not directly address internships. See PERLIN, *supra* note 8, at 65. Thus, many of the regulation problems with unpaid internships arise because courts continue to try to interpret internships based on outdated terms such as “apprenticeships,” “trainees,” and “independent contractors,” which have been extensively examined by the courts. See *id.*

27. *Id.* at 30-36 (discussing the rise of internships from the early 1900s and the “explosion” in the 1980s and 1990s).

sometimes referred to as the “Great Recession”—which caused many employers to decrease the size of their workforce.²⁸ This decrease, in turn, led to an increased number of unpaid interns to supplement the smaller number of employees working for pay in any particular industry.²⁹

Criticized by some as exploitative, unfair, and available only to wealthy students,³⁰ internships³¹ have been described by the National Association of Colleges and Employers (NACE) as “unique and valuable experiences for students both academically and in professional career preparation.”³² Many proponents of internships argue that internships give students an otherwise unobtainable foot in the door by allowing them to gain valuable work experience, network with professionals in their field, and build their resumes.³³ In fact, in deciding whom to hire out of college, many employers look for internships or other outside-the-classroom experiences that

28. Approximately 7.5 million jobs were lost as a result of the economic downturn, and the unemployment rate doubled to more than 10%. DAVID B. GRUSKY, BRUCE WESTERN & CHRISTOPHER WIMER, *THE GREAT RECESSION* 4 (2011).

29. Bacon, *supra* note 7, at 69; *see also* Eve Tahmincioglu, *Working for Free: The Boom in Adult Interns*, TIME MAG. (Apr. 12, 2010), <http://www.time.com/time/magazine/article/0,9171,1977130,00.html>.

30. *See* Eric M. Fink, *No Money, Mo' Problems: Why Unpaid Law Firm Internships Are Illegal and Unethical*, 47 U.S.F. L. REV. 435, 441 (2013) (arguing that unpaid internships at law firms are illegal and unethical and lawyers who provide these unpaid internships should be subject to lawyer discipline).

31. For purposes of this Note, the term “internship” refers only to unpaid internships, but does not include paid internships or internships completed for class credit.

32. NAT'L ASS'N OF COLLS. & EMP'RS, POSITION STATEMENT: UNPAID INTERNSHIPS (2010), *available at* <https://www.nacweb.org/advocacy/position-statements/unpaid-internships.aspx>. Though there is not one generally accepted definition of “internship,” NACE has recommended that “internship” be defined as a form of experiential learning that integrates knowledge and theory learned in the classroom with practical application and skills development in a professional setting. Internships give students the opportunity to gain valuable applied experience and make connections in professional fields they are considering for career paths; and give employers the opportunity to guide and evaluate talent.

NAT'L ASS'N OF COLLS. & EMP'RS, POSITION STATEMENT: U.S. INTERNSHIPS (2011), *available at* <http://www.nacweb.org/advocacy/position-statements/united-states-internships.aspx>.

33. Bacon, *supra* note 7, at 68 (“Individuals are aware of the importance of internships and seek to break into their fields via internships.”); Charles Westerberg & Carol Wickersham, *Internships Have Value, Whether or Not Students Are Paid*, CHRON. HIGHER EDUC. (Apr. 24, 2011), <http://chronicle.com/article/Internships-Have-Value/127231/>.

provide students with skills necessary to handle real-world situations.³⁴ The importance of internships to today's graduates combined with the economic benefits for businesses, especially in light of the recent economic downturn, has led to an increase in the number of internships,³⁵ as well as an increase in significant issues regarding the classification of student interns under the FLSA.³⁶

For instance, because it is unclear whether interns should be classified as employees or whether they fall outside of the FLSA's purview, many employers with an interest in cutting costs gladly accept the opportunity to utilize free labor in their company.³⁷ Before *Glatt*, no court had classified a student intern as an employee entitled to minimum wage or overtime compensation under the FLSA, so employers could proceed with numerous unpaid internships unhindered by the prospect of losing a lawsuit for not compensating their interns.³⁸ While *Glatt* provided protections for one group of student interns, as a district court case, it did not create far-reaching implications for students across the nation.³⁹ Moreover, because so many employers require students to have internship experience to receive serious consideration for permanent employment, students are often compelled to take unpaid internships, as well as the financial hit, in order to stay competitive.⁴⁰ In fact, one commentator,

34. A 2010 survey of employers undertaken by the Association of American Colleges and Universities found that 79% of employers desired marketable skills that are best obtained outside a classroom, such as the "ability to apply knowledge and skills to real-world settings through internships or other hands-on experiences." HART RESEARCH ASSOCS., RAISING THE BAR: EMPLOYERS' VIEWS ON COLLEGE LEARNING IN THE WAKE OF THE ECONOMIC DOWNTURN 9 (2010), available at https://www.aacu.org/sites/default/files/files/LEAP/2009_Employer_Survey.pdf; see also Joseph E. Aoun, *Protect Unpaid Internships*, INSIDE HIGHER ED (July 13, 2010), <http://www.insidehighered.com/views/2010/07/13/aoun> (noting that approximately 75% of employers prefer students with internship experience and over 90% prefer students with experience in their own organization).

35. Bacon, *supra* note 7, at 68, 74.

36. See *id.* at 75 (noting that criticisms of internship law increased as the number of internships increased because of the lack of protections for student interns and the issues with intern classification according to the traditional test).

37. See PERLIN, *supra* note 8, at 63 (stating that "[e]ntire industries rely unabashedly on this source of free or cheap labor" partly because many people are unaware of or confused by the law).

38. See *supra* notes 13-14 and accompanying text.

39. *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 534 (S.D.N.Y. 2013).

40. Jim Frederick, *Internment Camp: The Intern Economy and the Culture Trust*, BAFFLER, no. 9, 1997, available at https://www.thebaffler.com/past/internment_camp.

using the example of an internship program at MTV, noted that one student working two days a week in a twelve-week internship loses approximately \$2,742 over the course of the internship, while MTV saves \$642,270 a year for all of the internships it oversees.⁴¹ Another scholar estimated that the total amount companies save through internships is approximately two billion dollars annually.⁴²

This exploitation of workers is precisely what Congress sought to avoid when it adopted the Fair Labor Standards Act of 1938.⁴³ However, the vague definitions provided in the Act have led to much confusion regarding the Act's applicability to nontraditional workers, such as trainees.⁴⁴ In recent years, officials have attempted to further tailor these protections to the growing number of unpaid interns with some difficulty due in large part to the lack of guidance from the Supreme Court.⁴⁵

A. The Fair Labor Standards Act

In 1938, Congress enacted the FLSA as a response to the substandard treatment of employees during the Great Depression.⁴⁶ Controversial at first, the FLSA was adopted to establish better working conditions and provide more protections for the average

41. *Id.* According to this commentator, MTV “employs” approximately 150 interns each semester for three semesters each year—a twenty-week spring semester, a twelve-week summer semester, and a twenty-week fall semester. *Id.* This data was calculated in 1997, when the federal minimum wage was \$5.15 an hour. WAGE & HOUR DIV., U.S. DEP’T OF LABOR, HISTORY OF FEDERAL MINIMUM WAGE RATES UNDER THE FAIR LABOR STANDARDS ACT (2009), available at <http://www.dol.gov/whd/minwage/chart.htm>. Using the same numbers with the 2009 minimum wage of \$7.25 an hour, the results increase to \$1,392 lost by a single student intern over a twelve-week period and \$904,800 saved by the employer for all internships within a year. *See id.*

42. PERLIN, *supra* note 8, at 124 (using “up-to-date, but still conservative figures” of 500,000 interns at the 2010 minimum wage of \$7.25 an hour).

43. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 2(a)-(b), 52 Stat. 1060, 1060 (discussing the policy behind adopting the Act as providing greater protections for the average worker); *see also* Bacon, *supra* note 7, at 70 (discussing Congress’s intent in adopting the FLSA).

44. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947); *see also infra* notes 50-54 and accompanying text.

45. *See* Bacon, *supra* note 7, at 72, 74, 91. In fact, some small- and medium-sized businesses are hesitant to take on student interns because of a latent fear of getting suit for unintentionally violating the law. *Id.* at 91.

46. Fair Labor Standards Act § 2(a)-(b); *see also* Bacon, *supra* note 7, at 70 (discussing the impetus for Congress’s creation of the FLSA).

worker.⁴⁷ For instance, the greatest achievements of the FLSA were banning most forms of child labor and establishing minimum wage laws and maximum working hours.⁴⁸ In fact, according to the Supreme Court, the overall purpose of the FLSA was to “insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage.”⁴⁹

Though the FLSA’s goal of protecting vulnerable employees seemed clear enough, its vague definitions have led to major problems with consistently achieving this purpose.⁵⁰ Under the FLSA, the term “[e]mploy” is defined as “to suffer or permit to work.”⁵¹ Further, an “employee” is defined as “any individual employed by an employer.”⁵² Unless a person is an “employee” under the FLSA, an employer is not required to provide minimum wage or overtime benefits.⁵³ However, the definitions of “employee” and “employ” do little to indicate whether non-traditional workers, such as student interns, are entitled to minimum wage or overtime benefits, leading to a myriad of issues in classifying student workers under this statute.⁵⁴

While the Act may be vague in some areas, in others, it is quite clear. For instance, in 1985, Congress amended the FLSA to provide an exception for individuals who volunteer their services at a government agency.⁵⁵ According to this amendment, an “employee” does not include any person who volunteers to work for a public state agency, a subdivision of the state, or an interstate governmental agency if the person is not paid and is not employed by the public

47. See PERLIN, *supra* note 8, at 65 (describing the FLSA’s goal as “the ‘elimination of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency and well being of workers’”).

48. Bacon, *supra* note 7, at 70.

49. *Portland Terminal*, 330 U.S. at 152.

50. See Curiale, *supra* note 13, at 1539 (describing the definition of “employee” under the FLSA as “‘the broadest definition that has ever been included in any one act’” (quoting *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945))).

51. 29 U.S.C. § 203(g) (2012).

52. *Id.* § 203(e)(1).

53. *Id.* §§ 203(e)(1), 206, 207.

54. Curiale, *supra* note 13, at 1539-40.

55. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 4(a), 99 Stat. 787, 790 (amending the Act to exclude public service volunteers); see also Anthony J. Tucci, Note, *Worthy Exemption? Examining How the DOL Should Apply the FLSA to Unpaid Interns at Nonprofits and Public Agencies*, 97 IOWA L. REV. 1363, 1373 (2012) (discussing the amendment process of the FLSA).

agency.⁵⁶ Thus, the term “employee” specifically excludes workers at public or government agencies because Congress exempted this class of people from FLSA protections by classifying them as volunteers.⁵⁷ Additionally, though the FLSA provides no explicit exceptions for nonprofit agencies, except nonprofit food banks,⁵⁸ unpaid workers at nonprofits are also generally exempt from FLSA coverage because they, too, are considered volunteers.⁵⁹

Whether an individual is classified as an “employee” under the FLSA is determinative of whether he or she is entitled to compensation.⁶⁰ Yet, the definitions in the Act provide little guidance and, in fact, often complicate the analysis because they are vague and misunderstood.⁶¹ Thus, in *Walling v. Portland Terminal Co.*, the Supreme Court attempted to clarify the application of the FLSA and its vague definition of “employee.”⁶²

B. *Walling v. Portland Terminal Co.*

Almost ten years after the FLSA was enacted, the Supreme Court confronted the issue of whether the FLSA’s definition of employee included temporary trainees under consideration for permanent employment.⁶³ In *Walling v. Portland Terminal Co.*, the Portland Terminal Company instituted a preliminary training program to railroad trainees through which potential brakemen would participate to learn the requirements of the job.⁶⁴ The program lasted seven to eight days, and the trainees were required to observe yard crew members and participate in tasks under close supervision before obtaining full-time employment.⁶⁵ The training was a necessary component of the job given its important nature, and, as

56. 29 U.S.C. § 203(e)(4)(A).

57. *Id.*; see also Tucci, *supra* note 55, at 1373; WAGE & HOUR DIV., U.S. DEP’T OF LABOR, FACT SHEET #71, INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010) [hereinafter FACT SHEET #71], available at <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>.

58. See 29 U.S.C. § 203(e)(5).

59. See Bacon, *supra* note 7, at 72 (noting that “non-profit employers do not have to pay interns because they are classified as volunteers”); Tucci, *supra* note 55, at 1370-72 (describing the FLSA exemption for nonprofit workers).

60. See *supra* text accompanying note 53.

61. See *supra* notes 50-54 and accompanying text.

62. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 149 (1947).

63. *Id.* Interestingly, the Court noted, “Certiorari was granted because of the importance of the questions involved to the administration of the Act.” *Id.*

64. *Id.*

65. *Id.*

reiterated by the Supreme Court, “[a]n applicant for such jobs [was] never accepted until he . . . had this preliminary training.”⁶⁶

To determine whether the trainees were entitled to minimum wage or overtime compensation, the Court examined the definitions of employee and employ under the FLSA.⁶⁷ The Court first noted that the Act did not intend for everyone who worked for their own benefit to receive compensation merely because they performed work for the employer.⁶⁸ The Court applied several criteria to the trainees to determine which party received the benefit of the training: (1) whether the training was “practical” to receive a full-time position; (2) whether the trainees displaced regular employees who were necessary to supervise the trainees; (3) whether the trainees benefitted or hindered the progress of the work performed; (4) whether the trainees were guaranteed a position after the training; (5) whether the trainees expected to receive compensation for the training; and (6) whether the training was primarily for the benefit of the trainees.⁶⁹ Concluding that the railroad received no “‘immediate advantage’” from the trainees, the Court held that the trainees were not employees under the FLSA and were not entitled to minimum wage.⁷⁰

Portland Terminal is widely regarded as the seminal case for interpreting and applying the definitions of employee and employ in the FLSA.⁷¹ While the Court attempted to clarify the scope of the FLSA, the interpretation of employee since this decision has been

66. *Id.* However, successful completion of the training program was not a guarantee of automatic employment, though it allowed the trainees’ names to be placed on a list of qualified workmen available when the railroad needed them. *Id.* at 150.

67. *Id.* at 152.

68. *Id.* This statement has generally become the basis of the primary benefit test, adopted by some circuits as the test for determining when a worker is an employee for FLSA purposes. See discussion *infra* Section II.B.

69. *Portland Terminal*, 330 U.S. at 149-50, 153. The Court did not enumerate these criteria, nor did it specifically describe these criteria as “factors” to be used when determining whether a trainee is an “employee.” See Bacon, *supra* note 7, at 72-73 (outlining the six “factors” derived from *Portland Terminal*).

70. *Portland Terminal*, 330 U.S. at 153; see also *supra* note 68 and accompanying text.

71. See Bacon, *supra* note 7, at 73 (stating that “[i]t is widely accepted and unquestioned that *Portland Terminal* is the case from which the rules governing unpaid interns come”).

anything but clear or consistent.⁷² Though the Court has not yet addressed the FLSA's application to unpaid internships, since the decision in *Portland Terminal*, the DOL has attempted to clarify the vague definition of employee on several occasions, most notably through the implementation of Fact Sheet #71.⁷³

C. The Department of Labor's Fact Sheet #71

Though *Portland Terminal* created a trainee exception by limiting the scope of the FLSA to cover only employees who worked for the benefit of the employer, uncertainties remained as to whether student interns could be classified as employees and if so, how they would be evaluated under the FLSA.⁷⁴ To aid in this analysis, in 2010, the Wage and Hour Division of the DOL released *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act* to help employers and courts determine whether student interns are entitled to minimum wage compensation and overtime benefits under the FLSA.⁷⁵ The guidance provided in Fact Sheet #71 was similar to guidance previously provided by the DOL regarding trainees and other volunteer workers; however, it was the first time that the DOL had released a generalized statement regarding the classification of interns under the FLSA.⁷⁶

Recognizing that the term employ was defined very broadly in the FLSA, the DOL created a six-prong test to assist employers in determining when a student intern at a for-profit agency is entitled to minimum wage and overtime compensation.⁷⁷ The DOL noted that because the purpose of the FLSA was to protect vulnerable workers, the "exclusion from the definition of employment is necessarily quite

72. See Petition for Writ of Certiorari, *supra* note 16, at 9 (examining the circuit court split regarding the application of the FLSA to unpaid interns); see also discussion *infra* Part II (discussing the circuit court split).

73. FACT SHEET #71, *supra* note 57.

74. PERLIN, *supra* note 8, at 65-66.

75. FACT SHEET #71, *supra* note 57. The law governing the FLSA remained relatively static between *Portland Terminal* in 1947 and Fact Sheet #71 in 2010, despite changing circumstances. See Bacon, *supra* note 7, at 74-75. It is not clear why the DOL waited until 2010 to provide clarification of the FLSA, but some speculate that Fact Sheet #71 may have been issued as a result of increasing criticisms of the traditional test for classifying employees under the FLSA, particularly given the emerging prevalence of unpaid internships. *Id.*

76. The DOL had previously provided individualized responses to employer inquiries about compliance with the FLSA. See *infra* note 86 and accompanying text.

77. FACT SHEET #71, *supra* note 57.

narrow,” and thus, most interns at for-profit agencies should receive compensation according to FLSA standards.⁷⁸ The six elements that the DOL established in determining whether a student intern is an employee are

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship;
- and 6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.⁷⁹

The DOL further stated that “[i]f *all* of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act’s minimum wage and overtime provisions do not apply to the intern.”⁸⁰ Thus, the DOL believed that these six elements would allow employers to recognize whether an employment relationship had been created with student interns such that the students were entitled to minimum wage and overtime under the FLSA.⁸¹

Fact Sheet #71 was supposed to bolster the decision in *Portland Terminal* and provide a more readily understandable and uniform interpretation for classifying interns under the FLSA;⁸² however, many courts continue to struggle with consistently interpreting the definition of employee in the FLSA.⁸³ While Fact Sheet #71 provides guidance on the difficult issue of employee classification under the FLSA, as an opinion letter from the DOL, it is not binding law.⁸⁴ Further, although it has been described as a

78. *Id.*

79. *Id.*

80. *Id.* (emphasis added).

81. *Id.*

82. Bacon, *supra* note 7, at 76 (suggesting that the DOL factors were implemented because of criticism of the guidelines for interpreting the FLSA and because of a lack of protection for unpaid interns).

83. *See* discussion *infra* Part II.

84. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (stating that “the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance”). In addition to disagreeing about the interpretation of the FLSA, courts have also disagreed about the level of deference to give the DOL Fact Sheet. *Compare Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 525 (6th Cir.

logical extension of *Portland Terminal*,⁸⁵ some critics argue that it actually creates *more* confusion because the DOL suggests two different tests and does not clarify which test should control.⁸⁶ As the Supreme Court has not yet addressed the issue of how student interns should be classified under the FLSA, lower courts have taken matters into their own hands and have achieved vastly different results due to a lack of guidance.⁸⁷

II. HOW THE COURTS HAVE ATTEMPTED (AND FAILED) TO CONSISTENTLY CLASSIFY EMPLOYEES UNDER THE FLSA

Though *Portland Terminal* helped to clarify the definition of employee under the FLSA, and Fact Sheet #71 provided some helpful guidance as well, federal courts have still struggled to consistently interpret the FLSA, resulting in confusion as to the precise test to be used for classifying student interns.⁸⁸ For instance, the Tenth Circuit and lower courts in the Second Circuit utilize a

2011) (reasoning that the DOL Fact Sheet #71 should not be given deference under *Skidmore*), with *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 532 (S.D.N.Y. 2013) (affording deference to the Fact Sheet). For instance, some courts have given it great deference according to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (creating a two-step test that affords deference to Congress if it has spoken directly to the issue in question). By contrast, others have given it little or no deference based on *Skidmore*. 323 U.S. at 140 (creating a “power-to-persuade” test that gives agencies the opportunity to persuade courts to give them deference). However, given that Fact Sheet #71 is not entitled to the same binding force as a regulation, the decision in *Christensen v. Harris County* suggests that Fact Sheet #71 is “entitled to respect” under the *Skidmore* test but is not entitled to *Chevron* deference. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (quoting *Skidmore*, 323 U.S. at 140) (holding that a DOL opinion letter was entitled only to *Skidmore* deference).

85. See Bacon, *supra* note 7, at 75.

86. The DOL stated both that “[t]he determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program,” suggesting a totality of the circumstances test, and also that all the factors listed must be met, suggesting the use of an “all-or-nothing” approach. FACT SHEET #71, *supra* note 57. Moreover, from 1994 to 1996, in a series of responses to employers’ inquiries about the legality of their internships, the DOL suggested the same six factors as a method for determining whether interns are employees under the FLSA. See Yamada, *supra* note 21, at 233-34. However, it is unclear whether the approach suggested by the DOL in these letters used an “all-or-nothing” method or a “totality of the circumstances” method. See *id.* at 233.

87. See Petition for Writ of Certiorari, *supra* note 16, at 14-21 (discussing the current circuit split regarding the classification of student interns under the FLSA); see also discussion *infra* Part II (outlining the circuit split).

88. See Petition for Writ of Certiorari, *supra* note 16, at 9.

totality of the circumstances test for interpreting the FLSA, which balances all the factors surrounding the working relationship to determine whether the worker is an employee.⁸⁹ By contrast, the Fourth, Fifth, and Sixth Circuits utilize a “primary benefit” test, which examines which party receives the primary benefit of the working relationship.⁹⁰ Finally, the Eleventh Circuit has shown support for the “economic reality” test, which examines whether the worker relies on the employer to obtain an economic benefit.⁹¹ Though not all of these circuits have yet attempted to classify student interns according to the FLSA, several of the circuits have applied the FLSA to other types of working relationships—most notably trainees, vocational student workers, and independent contractors.⁹² While differences exist between these types of relationships,⁹³ the tests used to classify each of these categories of workers contribute to the circuit split by demonstrating how the circuits interpret the FLSA definition of “employee.” Further, while the tests overlap in some aspects, there are obvious distinctions in the way the FLSA is interpreted under each test, which often leads to considerably different results.⁹⁴

A. The Totality of the Circumstances Test

In determining whether an individual is an employee under the FLSA, some courts have taken a holistic analysis by utilizing a

89. See discussion *infra* Section II.A.

90. See discussion *infra* Section II.B.

91. The economic reality test had previously been applied only in the context of independent contractors; however, in *Kaplan v. Code Blue Billing, Inc.*, the Eleventh Circuit expanded its application by applying this test to student interns. See discussion *infra* Section II.C.

92. See, e.g., *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311-12 (11th Cir. 2013) (applying the FLSA to independent contractors); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 529 (6th Cir. 2011) (applying the FLSA to vocational student workers); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209-10 (4th Cir. 1989) (applying the FLSA to snack food distribution trainees).

93. For instance, vocational student workers generally spend class time and training time learning skills for a particular trade. See *Laurelbrook*, 642 F.3d at 520. Independent contractors, on the other hand, are generally full-time workers who generate business by seeking out general contractors. See *Scantland*, 721 F.3d at 1314-15.

94. Yamada, *supra* note 21, at 233 (stating that “[t]he difference in results can be a potentially significant one”).

totality of the circumstances test.⁹⁵ A totality of the circumstances test examines all of the facts and circumstances surrounding the working relationship.⁹⁶ Most significantly, the Tenth Circuit has championed this approach to interpreting the FLSA for several years.⁹⁷ Recently, however, lower courts in other circuits, namely the Second Circuit, have relied on this test specifically for classifying student interns.⁹⁸

1. *The Tenth Circuit*

In 1993, in *Reich v. Parker Fire Protection District*, the Tenth Circuit adopted the totality of the circumstances test to determine whether firefighter trainees were employees during their training time at the academy.⁹⁹ To become members of the firefighter force, trainees were required to attend the academy, although they understood that they would not be compensated for their attendance.¹⁰⁰ Those who successfully completed training were entitled to permanent employment with the force.¹⁰¹ Utilizing a six-factor test provided by the DOL to interpret the FLSA,¹⁰² the court explicitly rejected an all-or-nothing application of the six factors, acknowledging that the DOL factors were important but not

95. *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1027 (10th Cir. 1993); *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 525 (S.D.N.Y. 2013).

96. *Reich*, 992 F.2d at 1027.

97. *See id.* (applying the totality of the circumstances test to firefighter trainees).

98. *See* discussion *infra* Subsection II.A.2.

99. *Reich*, 992 F.2d at 1026-27 (discussing how training lasted approximately ten weeks and included classroom instruction, fire simulations, and demonstrations).

100. *Id.* at 1029.

101. *Id.*

102. The factors provided by the DOL at this time were nearly identical to those provided by the DOL in 2010. The factors stated:

[(1) t]he training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; (2) t]he training is for the benefit of the trainee; (3) t]he trainees do not displace regular employees, but work under close observation; (4) t]he employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded; (5) t]he trainees are not necessarily entitled to a job at the completion of the training period; and, (6) t]he employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

Id. at 1026 (citation omitted).

determinative in analyzing whether the trainees were employees.¹⁰³ Instead, the court reasoned that a strict application of all the factors was not supported by the Court's decision in *Portland Terminal* because the Court had stated that a consideration of the situation as a whole, rather than specific factors, controlled.¹⁰⁴ Ultimately, the Tenth Circuit concluded that the firefighter trainees were not employees under the FLSA because five of the six factors weighed in favor of the employers, and thus, they were not entitled to minimum wage or overtime compensation.¹⁰⁵

2. Lower Courts in the Second Circuit

More recently, district courts in the Second Circuit have also applied the totality of the circumstances test.¹⁰⁶ While the Second Circuit has yet to review these lower court decisions,¹⁰⁷ the district courts in this circuit have recognized the utility of the totality of the circumstances test and have specifically applied it in unpaid internship situations.¹⁰⁸ Though the district courts have reached different conclusions in applying the totality of the circumstances test based on the factual circumstances of each case, the district courts' willingness to apply this test in several unpaid intern cases suggests strong support for this test in the Second Circuit.¹⁰⁹

103. *Id.* at 1027 (stating that the factors were "relevant but not conclusive to the determination of whether these firefighter trainees were employees under the FLSA").

104. *Id.* at 1026-27.

105. The only factor that weighed in favor of the trainees was that the trainees expected employment at the completion of the training; however, the court noted that this single factor was not dispositive of an employment relationship. *Id.* at 1029.

106. See *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 525 (S.D.N.Y. 2013); *Wang v. Hearst Corp.*, 293 F.R.D. 489, 493 (S.D.N.Y. 2013).

107. In September 2013, the Second Circuit granted appeal to Fox Searchlight Pictures, Inc. based on the decision in *Glatt*, but the Second Circuit has not yet reviewed this decision. See generally *Glatt v. Fox Searchlight Pictures Inc.*, No. 11 Civ. 6784(WHP), 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013) (granting the motion to certify appeal).

108. See *Glatt*, 293 F.R.D. at 521-22; *Wang*, 293 F.R.D. at 490.

109. In fact, the Second Circuit utilized the totality of the circumstances test just a year prior to the decisions in *Glatt* and *Wang* when examining whether an employment relationship existed in a domestic service worker situation. *Velez v. Sanchez*, 693 F.3d 308, 328 (2d Cir. 2012).

a. *Glatt v. Fox Searchlight Pictures Inc.*

As previously discussed, *Glatt v. Fox Searchlight Pictures Inc.* involved two unpaid student workers on the set of the *Black Swan* movie.¹¹⁰ These interns worked five days a week for a total of forty to fifty hours, performing tasks such as getting payroll checks, running errands, and overseeing invoices.¹¹¹ To determine whether these students should have received compensation for their work, the court applied the totality of the circumstances test.¹¹² Specifically rejecting the primary benefit test adopted by other circuits,¹¹³ the Southern District of New York held that the DOL factors should be given significant deference and analyzed according to all the surrounding circumstances.¹¹⁴ The court stated that this test provided the most logical interpretation and the narrowest application of the “trainee exception” adopted by the Court in *Portland Terminal*.¹¹⁵ The court also reasoned that the internship was not structured any differently than a typical employee relationship, particularly because the interns were performing menial tasks that had little to no educational benefit.¹¹⁶ Ultimately, the court held that, according to the totality of the circumstances, the student interns were employees under the FLSA.¹¹⁷

b. *Wang v. Hearst Corp.*

In the same year, the Southern District of New York examined another case similar to *Glatt*.¹¹⁸ In *Wang v. Hearst Corp.*, the court again applied the totality of the circumstances test, but this time it reached the opposite conclusion, denying the unpaid students’

110. *Glatt*, 293 F.R.D. at 522; see also *supra* text accompanying note 1.

111. See *supra* text accompanying notes 2-3.

112. *Glatt*, 293 F.R.D. at 525.

113. See discussion *infra* Section II.B (discussing the primary benefit test used by other circuit courts).

114. *Glatt*, 293 F.R.D. at 532.

115. However, the district court in *Glatt* distinguished the decision from that in *Portland Terminal* by noting that the trainees in that case hindered the business of the employer and worked for their own benefit and not for the benefit of the employer. *Id.* at 534.

116. The court also acknowledged that the employer received the advantage from the working relationship, and any benefit gained by the interns was merely the result of working as an employee would work, not because the internship was designed to provide such a benefit. *Id.* at 533.

117. *Id.* at 534.

118. *Wang v. Hearst Corp.*, 293 F.R.D. 489, 490 (S.D.N.Y. 2013).

motion for summary judgment on the claim that they should have been classified as employees under the FLSA.¹¹⁹ *Wang* involved student interns who worked for magazines owned by the Hearst Corporation.¹²⁰ The students performed a number of tasks, including conducting online research, editing and fact-checking articles, and helping to prepare for events.¹²¹ At the outset of the internship, the Hearst Corporation instructed the interns to provide “school credit letters” evidencing the college credit earned for the internship.¹²² Again rejecting the primary benefit test,¹²³ the court reasoned that it was impractical “that the presence of an ‘immediate advantage’ alone [could create] an employment relationship.”¹²⁴ Here, the court noted that a genuine issue of material fact existed as to whether an employment relationship had been created because there was evidence of an educational benefit for the interns and obstruction of the employer’s normal business operations.¹²⁵ As such, *Wang* can be distinguished from *Glatt* where the interns were expected to perform uncompensated, low-level work with little educational benefit.¹²⁶ While *Wang* and *Glatt* do not directly contribute to the circuit split, these decisions show that lower courts in the Second Circuit have considered the advantage of the totality of the circumstances test, which was traditionally applied in trainee situations, for classifying unpaid interns under the FLSA.¹²⁷

119. The court noted that a genuine issue of material fact existed regarding three of the DOL factors used to determine whether these interns were employees under the FLSA. *Id.* at 494.

120. *Id.*

121. *Id.* at 491-92.

122. *Id.* at 491. Though many employers believe college credit can immunize them from lawsuits based on violations of the FLSA, some courts have held that academic credit provided by the school bears little or no determination on whether interns are employees under the FLSA. *See, e.g., Glatt*, 293 F.R.D. at 537.

123. *See* discussion *infra* Section II.B.

124. *Wang*, 293 F.R.D. at 493 (refusing to adopt the primary benefit test to analyze whether a student intern is an employee under the FLSA).

125. *Id.* at 494.

126. *Glatt*, 293 F.R.D. at 533.

127. *See supra* note 108 (discussing the significance of these district court cases).

B. The “Primary Benefit” Test

By contrast, several circuits apply the “primary benefit” test to determine when a worker is an employee under the FLSA.¹²⁸ The primary benefit test focuses on the benefits flowing to each party and ultimately examines whether the employer or the worker receives the primary benefit of the working relationship.¹²⁹ Under this test, if the employer receives the primary benefit, the worker is an employee under the FLSA; however, if the worker receives the primary benefit, the worker is not entitled to FLSA protections.¹³⁰ Though the primary benefit test has yet to be applied specifically to unpaid interns in a higher educational setting, the Sixth Circuit has applied this test to student workers in a vocational school.¹³¹ The similarities between student interns in an internship setting and student workers in a vocational school suggest that the same test would be applicable in cases involving unpaid interns.¹³²

1. *The Sixth Circuit*

To date, the Sixth Circuit has conducted one of the most thorough inquiries into the primary benefit test’s application to students. In *Solis v. Laurelbrook Sanitarium & School, Inc.*, the Sixth Circuit examined whether high school students who spent a half day

128. See *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 529 (6th Cir. 2011) (applying the primary benefit test to vocational students in the Sixth Circuit); *McLaughlin v. Ensley*, 877 F.2d 1207, 1210 (4th Cir. 1989) (applying the primary benefit test to snack food distribution trainees in the Fourth Circuit); *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1127-28 (5th Cir. 1983) (applying the primary benefit test to manufacturer trainees in the Fifth Circuit); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 272 (5th Cir. 1982) (applying the primary benefit test to flight attendant trainees in the Fifth Circuit).

129. *Laurelbrook*, 642 F.3d at 526.

130. The reasoning behind the primary benefit test is that workers who receive an educational benefit have already been “compensated” through the education they gained, while those who obtain no educational benefit should be compensated monetarily. See *id.* at 528.

131. *Id.* at 529.

132. For instance, both vocational schools and internships provide students with practical skills needed to perform certain jobs. See Carl D. Perkins Vocational Education Act, Pub. L. No. 98-524, § 521(31), 98 Stat. 2435, 2486 (1984) (explaining the purpose of vocational schools, which is to provide hands-on training in a particular trade or industry). Though vocational schools are often tailored directly to one specific trade, both vocational schools and internships involve some component of educating students regarding the appropriate knowledge and skills that will make the students marketable to future employers. *Id.*

in class and a half day learning practical skills were entitled to minimum wage under the FLSA.¹³³ Recognizing the vagueness in the FLSA's definition of employee and the circuit court split, the court examined which test was appropriate under *Portland Terminal* and the DOL interpretations of the FLSA.¹³⁴

The court first acknowledged the Supreme Court's previous use of the economic reality test in situations involving independent contractors.¹³⁵ The court quickly dismissed this test as a basis for determining whether the students were employees because "[t]o state that economic realities govern is no more helpful than attempting to determine employment status by reference directly to the FLSA's definitions themselves."¹³⁶ In other words, the court stated that the economic reality test provided no definitive test or factors to apply, but merely stated a conclusion that was unhelpful in an actual case.¹³⁷

The court then rejected the DOL factors as the sole basis for determining whether an employment relationship existed for the students.¹³⁸ The court concluded that the six-factor test was "overly rigid" and inconsistent with *Portland Terminal* because under the all-or-nothing approach, the absence of one factor was determinative to the outcome.¹³⁹ Instead, the court found that the primary benefit test most closely aligned with *Portland Terminal* because it was appropriately narrow in scope and focused on the benefits afforded to the students through the work they performed.¹⁴⁰ The Sixth Circuit also noted that although the primary benefit was the ultimate basis of the Court's decision in *Portland Terminal*, other factors could be considered, such as whether the students displaced other employees or whether an educational benefit existed for the student.¹⁴¹

133. *Laurelbrook*, 642 F.3d at 520.

134. *Id.* at 522-23. The court specifically stated, "There is no settled test for determining whether a student is an employee for purposes of the FLSA." *Id.* at 521.

135. *Id.* at 522; see also *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985); discussion *infra* Section II.C (discussing the Eleventh Circuit's application of the economic reality test).

136. *Laurelbrook*, 642 F.3d at 522-23.

137. *Id.* at 523.

138. *Id.* at 525 ("We find the WHD's test to be a poor method for determining employee status in a training or educational setting.").

139. *Id.*

140. *Id.* at 526.

141. *Id.* at 526, 529. However, others have argued that the primary benefit test was not the basis of the Court's decision in *Portland Terminal*, but rather, it was a six-factor test similar to the DOL's six-factor test. See Bacon, *supra* note 7, at 73 (noting that an intern can be exempted from the FLSA's requirements only if the six factors laid out in *Portland Terminal* are met).

Ultimately, the court held that the students were not employees covered by the FLSA because the students received the primary benefit of the work, thus precluding them from receiving compensation for the work performed during their practical training.¹⁴²

2. *The Fourth Circuit*

The Fourth Circuit has applied a comparable, though less extensive, test than the one applied by the Sixth Circuit in *Laurelbrook*.¹⁴³ In *McLaughlin v. Ensley*, the Fourth Circuit also applied the primary benefit test, concluding that snack food distribution trainees were employees under the FLSA because they did not receive the primary benefit of the training.¹⁴⁴ Specifically, because the training period lasted only one week and the skills of stocking and repairing vending machines and completing paperwork were menial, the court concluded that the primary benefit flowed to the employer, thus entitling the trainees to minimum wage during their training period.¹⁴⁵

3. *The Fifth Circuit*

The Fifth Circuit has also recognized the importance of the primary benefit test.¹⁴⁶ In *Donovan v. American Airlines, Inc.*, the court examined the applicability of the FLSA to flight attendant trainees.¹⁴⁷ These trainees were required to attend a training session to become employees for American Airlines; however, successful completion of the training did not guarantee a permanent position, and the trainees were not paid during the training time.¹⁴⁸

142. *Laurelbrook*, 642 F.3d at 532.

143. *See* *McLaughlin v. Ensley*, 877 F.2d 1207, 1210 (4th Cir. 1989).

144. *Id.* The trainees in this case were required to participate in a week-long training period that consisted of fifty to sixty hours of work where the trainees would ride along with an experienced distribution employee and assist with the daily tasks in order to learn the requirements of the job. *Id.* at 1208.

145. *Id.* at 1210. Additionally, the trainees were not entitled to a job upon completion of the training. *Id.* at 1208.

146. *See* *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 272 (5th Cir. 1982) (affirming the district court's reliance on a form of the primary benefit test and stating that the district court's finding that the trainees gained the greater benefit of the working relationship was supported by the evidence).

147. *Id.*

148. *Id.* at 269.

Additionally, American Airlines provided food and housing to the trainees for the duration of the training period.¹⁴⁹ The court examined the relationship and determined that the training was given at great cost to the employer, regular employees were not displaced by the trainees, and the trainees were able to obtain employment that they otherwise would have been unable to obtain.¹⁵⁰ Thus, the primary benefit flowed to the trainees rather than the employer, resulting in the trainees not being classified as employees.¹⁵¹

One year later in *Atkins v. General Motors*, the Fifth Circuit again applied the primary benefit test to examine whether automobile manufacturer trainees were employees under the FLSA.¹⁵² These trainees attended training classes and performed hands-on training by cleaning and repairing obsolete machines to learn how to repair and assemble vital equipment.¹⁵³ The trainees understood that they were not guaranteed a job at the conclusion of the training and that they would not be paid for their training.¹⁵⁴ The court concluded that the trainees performed virtually no work that benefitted the employer and in fact, actually damaged or incorrectly repaired equipment on some occasions during their training.¹⁵⁵ Therefore, any work undertaken by the trainees that benefitted the employer was of such minimal value that the trainees could not be properly classified as employees.¹⁵⁶ While the Fifth Circuit has not applied this test directly to unpaid student interns, the application to trainees suggests that the primary benefit test would also be applied to student interns because of the court's consistency in using the primary benefit test to interpret the FLSA.¹⁵⁷

149. Though not all trainees took advantage of this offer, the offer itself is relevant to the analysis by showing that the employers incurred expenses in providing this training to potential employees. *Id.*

150. The court here also acknowledged the importance of the DOL's interpretation of *Portland Terminal* and subsequently applied all of the DOL factors as additional support. *Id.* at 273.

151. *Id.*

152. *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1127-28 (5th Cir. 1983).

153. *Id.* at 1127.

154. *Id.*

155. *Id.* at 1128. Again, in this case, the court cited the DOL factors with approval, though the ultimate analysis turned on which party received the primary benefit of the work. *Id.* at 1127-28.

156. *Id.* at 1129.

157. See, e.g., *id.* at 1127 (relying on the primary benefit test); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 272 (5th Cir. 1982) (using the primary benefit test to interpret the FLSA).

C. The “Economic Reality” Test

In 2013, the Eleventh Circuit intensified the already existent circuit split by applying the “economic reality” test to student interns.¹⁵⁸ The Eleventh Circuit had previously utilized the economic reality test to determine whether other types of workers were employees under the FLSA¹⁵⁹ by relying on Supreme Court precedent.¹⁶⁰ For instance, in *Donovan v. New Floridian Hotel, Inc.*, in determining whether five patients who performed assorted kitchen, maid, and waitress tasks at a retirement center were employees under the FLSA, the Eleventh Circuit stated, “It is well-established that the issue of whether an employment relationship exists under the FLSA must be judged by the ‘economic realities’ of the individual case.”¹⁶¹

The court further defined and expanded this test in *Scantland v. Jeffrey Knight, Inc.* when it laid out six factors to follow when applying this test to independent contractors.¹⁶² The six factors were as follows:

- (1) [T]he nature and degree of the alleged employer’s control as to the manner in which the work is to be performed;
- (2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill;
- (3) the alleged employee’s investment in equipment or materials required for his task, or his employment of workers;
- (4) whether the service rendered requires a special skill;
- (5) the degree of permanency and duration of the

158. *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 F. App’x 831, 834 (11th Cir. 2013).

159. *See Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 470 (11th Cir. 1982).

160. In *Tony & Susan Alamo Foundation v. Secretary of Labor*, the Supreme Court used the “economic reality” test to determine whether individuals who had volunteered for a nonprofit religious organization were employees under the FLSA. 471 U.S. 290, 292, 301-02 (1985). However, the Supreme Court’s application of the “economic reality” test was generally applied only to independent contractors and had not previously been applied to internships until the Eleventh Circuit’s decision in 2013. *See Curiale, supra* note 13, at 1543; *see also* Petition for Writ of Certiorari, *supra* note 16, at 14.

161. *New Floridian Hotel*, 676 F.2d at 470 (quoting *Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185, 1189 (5th Cir. 1979)). The employees in this case were compensated through room and board, and received amounts woefully below the minimum wage standard, such as \$0.17 to \$0.55 per hour. Though the hotel chain argued that the former patients were only given work to keep them busy, not to create an employment relationship, the court held that the patients performed the work of employees and were entitled to compensation. *Id.* at 470-71.

162. *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1312 (11th Cir. 2013).

working relationship; (6) the extent to which the service rendered is an integral part of the alleged employer's business.¹⁶³

Further, the court stated that the overall focus of the economic reality test is the economic dependence of the independent contractor.¹⁶⁴ In other words, whether the contractor is dependent on finding business through other people or is in business for himself or herself is the central focus of the analysis.¹⁶⁵

However, in 2013, the Eleventh Circuit expanded this test outside of the independent contractor context in *Kaplan v. Code Blue Billing & Coding, Inc.*¹⁶⁶ In that case, the court applied the economic reality test to unpaid interns who worked for a coding and billing company to receive academic credit toward graduation from college.¹⁶⁷ Though it did not specifically apply the six factors laid out in *Scantland*, the court examined the economic reality of the working relationship, ultimately concluding that the plaintiffs were not employees under the FLSA because the employer received little economic benefit from the work and the students received educational benefits, such as academic credit, from participation in the internship.¹⁶⁸ This test has not been adopted by any other court in the context of unpaid internships, though it has been widely applied in independent contractor situations.¹⁶⁹

III. WHICH COURT HAS IT RIGHT?: ANALYZING THE COMPETING TESTS

Though the tests applied by the circuit courts overlap in some aspects, there are distinct differences in the application and results of

163. *Id.* The court derived these factors by combining factors used in two different cases; however, most other applications of the economic reality test do not rely on a specific set of factors. *Id.* at 1312 n.2.

164. *Id.* at 1312.

165. *Id.* (concluding that “the final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of FLSA or are sufficiently independent to lie outside its ambit” (quoting *Userly v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311-12 (5th Cir. 1976))).

166. *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 F. App'x 831, 834-35 (11th Cir. 2013).

167. *Id.*

168. *Id.* at 834. Though the court referred to this as an economic reality test, it seems more indicative of a primary benefit test, demonstrating the difficulty in applying this test. *See infra* Section III.C.

169. *See, e.g.*, *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947); *Scantland*, 721 F.3d at 1311; *Pilgrim Equip.*, 527 F.2d at 1311-12.

each test.¹⁷⁰ For instance, the totality of the circumstances test and the primary benefit test both allow for some flexibility in their application; however, the totality of the circumstances test examines *all* of the surrounding factors, which could lead to a much more time-consuming analysis than the primary benefit test.¹⁷¹ Overall, each test has some positive and negative aspects, and all of the tests have been critiqued by courts, attorneys, and academic scholars.¹⁷²

A. The Totality of the Circumstances Test

The totality of the circumstances test, which has been adopted by the Tenth Circuit and district courts in the Second Circuit, has been praised by courts for its flexibility because it allows each internship to be examined on a case-by-case basis.¹⁷³ Unlike the all-or-nothing approach advocated by the DOL, under the totality of the circumstances approach, the presence or absence of one factor is not determinative to classification as an “employee,” allowing courts to tailor the inquiry to the specific working relationship.¹⁷⁴ For instance, in *Reich v. Parker Fire Protection District*, in holding for the employers, the Tenth Circuit determined that although only five of the six factors favored the employer, a “single factor cannot carry the entire weight of an inquiry into the totality of the circumstances.”¹⁷⁵ Because of this flexibility, the totality of the circumstances approach can be used to protect both employers, as it did in *Parker Fire*,¹⁷⁶ and

170. Additionally, each test also attempts to defer to the intention of the parties by considering whether the intern or the employer should receive more legal protection. *See* discussion *supra* Part II (discussing the circuit court split).

171. *See infra* note 186 and accompanying text.

172. *See Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 525 (6th Cir. 2011) (critiquing the six factors laid out by the DOL); *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 532 (S.D.N.Y. 2013) (critiquing the primary benefit test); Petition for Writ of Certiorari, *supra* note 16, at 16-17 (critiquing the use of the economic reality test); PERLIN, *supra* note 8, at 67 (critiquing the totality of the circumstances test).

173. *See, e.g.*, *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 141-42 (2d Cir. 2008) (“[T]his court has treated employment for FLSA purposes as a flexible concept to be determined on a case-by-case basis by review of the totality of the circumstances.”).

174. *See Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993) (stating that “a true ‘totality of the circumstances’ test . . . should not turn on the presence or absence of one factor in the equation”).

175. *Id.* at 1029.

176. *Id.*

students, as it did in *Glatt*,¹⁷⁷ depending on the unique circumstances of each internship.

Likewise, the totality of the circumstances test has support in the DOL factors.¹⁷⁸ In Fact Sheet #71, the DOL stated that “[t]he determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program,” advocating for a totality of the circumstances approach.¹⁷⁹ Moreover, it can also be argued that this test has support in *Portland Terminal*.¹⁸⁰ According to the Southern District of New York, the Court used several factors surrounding the work relationship to examine trainee classification under the FLSA.¹⁸¹ Though the Court never explicitly mentioned the totality of the circumstances test, it is reasonable to conclude, based on subsequent interpretations of the Court’s opinion, that this test has support in *Portland Terminal*.¹⁸²

Paradoxically, this test can also be interpreted as inconsistent with the DOL’s interpretation of the FLSA, which requires that all six factors be met for an employment relationship to exist.¹⁸³ According to some views, because the DOL is the agency charged with interpreting the FLSA and its interpretation in Fact Sheet #71 is well-reasoned, it should be entitled to deference.¹⁸⁴ Thus, one major weakness of the totality of the circumstances test is that it ignores the DOL’s statement that all six factors should be present to avoid creating a broad exception to the status of an “employee.”¹⁸⁵

177. See *Glatt*, 293 F.R.D. at 534.

178. See FACT SHEET #71, *supra* note 57; see also *supra* note 86 (discussing how the DOL Fact Sheet has created confusion regarding which test should be applied).

179. FACT SHEET #71, *supra* note 57.

180. See *Glatt*, 293 F.R.D. at 532.

181. According to the court, these factors were ultimately used by the DOL to create Fact Sheet #71. *Id.* at 531-32.

182. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 149-50 (1947).

183. This inconsistency in Fact Sheet #71 is one of the causes for confusion in classifying student interns in the first place. FACT SHEET #71, *supra* note 57; see also discussion *supra* Section I.C.

184. See *Glatt*, 293 F.R.D. at 532. However, other courts note that because the DOL Fact Sheet is merely an opinion letter promulgated by a federal agency and is not binding law, it should not be entitled to much, if any, deference. For instance, the Sixth Circuit did not give the DOL’s test in Fact Sheet #71 deference under the *Skidmore* test. *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 525 (6th Cir. 2011).

185. See FACT SHEET #71, *supra* note 57.

Moreover, one scholar notes that “under the totality of circumstances approach, a trier of fact must engage in an extensive, drawn-out factor analysis that, by necessity, requires a great deal of subjective judgment . . . [that] virtually ensures inconsistent results.”¹⁸⁶ As a result of this subjectivity, it is nearly impossible for employers to know before taking on an intern whether an employment relationship will exist.¹⁸⁷ Thus, under the totality of the circumstances test, employers cannot ensure compliance with the FLSA because the determination of whether a student is an employee is subjective based on circumstances that the employer may not know at the outset of the relationship, such as the amount of learning that will take place throughout the internship and the court’s determination of which factors should be given the most weight.¹⁸⁸ Overall, the totality of the circumstances test allows for flexibility and is deferential to the DOL factors; however, it also creates subjectivity and, as a result, can be difficult to apply.

B. The Primary Benefit Test

Similar to the totality of the circumstances test, one of the greatest strengths of the primary benefit test is its flexibility because no one factor is dispositive to the inquiry.¹⁸⁹ For instance, in *Laurelbrook*, the Sixth Circuit acknowledged that a pivotal aspect of the primary benefit test is the balance between the employer’s and student’s benefits derived from the relationship.¹⁹⁰ Because the primary benefit test focuses on weighing the entire relationship, rather than a specific list of factors or elements, it is flexible enough to allow courts to consider the unique nature of each working relationship.¹⁹¹ This flexibility allows decisions regarding employee status to be based on the individual student and situation, thus

186. Yamada, *supra* note 21, at 233.

187. *See id.* (discussing the subjectivity of the totality of the circumstances test).

188. *See id.*

189. In *Laurelbrook*, although the court’s ultimate analysis rested on a primary benefit test, the court also looked at the totality of the circumstances to determine which party received the primary benefit of the relationship. 642 F.3d at 529.

190. *Id.*

191. *Id.* at 525 (discussing the rigidity of the all-or-nothing approach compared to the primary benefit test).

providing fairer outcomes and more protections for each student intern.¹⁹²

Moreover, because the nature of the primary benefit test is such that it relies on whether the primary benefit flows to the student or the employer, unlike the totality of the circumstances test, employers can take steps throughout the internship to ensure that the benefit is flowing to the student.¹⁹³ For instance, these steps could include providing regular educational training prior to the intern performing a given task, scheduling regular progress evaluations, or allowing the student to shadow the employer to gain valuable insight into company procedures that would not otherwise be available to paid employees.¹⁹⁴ These steps would not only benefit students by ensuring that they, rather than the employer, receive the primary benefit of their unpaid work, but it would also protect employers from unanticipated lawsuits for a lack of compliance with the FLSA.¹⁹⁵ In other words, if employers retain control over who benefits from the internship, they can be sure at the beginning and throughout the duration of the working relationship that the internship complies with the FLSA.¹⁹⁶ On the other hand, if the employer wants to hire students to complete menial, non-educational tasks, students will still receive protections under this test by being classified as an “employee,” requiring compensation of at least minimum wage.¹⁹⁷

The primary benefit test also has support in *Portland Terminal*.¹⁹⁸ In that case, the Court found for the employers only

192. *Id.* at 529 (“The [primary benefit] test is pitched at an appropriate level of generality to enable it to reach non-employer-based training relationships, such as those provided in schools, and can take into consideration the unique nature of the training situation presented here.”).

193. See KATHRYN ANNE EDWARDS & ALEXANDER HERTEL-FERNANDEZ, ECON. POLICY INST., POLICY MEMO NO. 160, NOT-SO-EQUAL PROTECTION: REFORMING THE REGULATION OF STUDENT INTERNSHIPS (2010), available at http://s1.epi.org/files/page/-/pdf/epi_pm_160.pdf.

194. See *id.*

195. See *id.* at 4-5 (providing two examples of how employers could calculate the benefits and costs to their company by educating students through internships).

196. See *id.*

197. See 29 U.S.C. § 206 (2012) (outlining the minimum wage provision in the FLSA).

198. See Petition for Writ of Certiorari, *supra* note 16, at 18. *But see* Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 531-32 (S.D.N.Y. 2013) (“The Supreme Court did not weigh the benefits to the trainees against those of the railroad, but relied on findings that the training program served *only* the trainees’

after concluding that the Portland Terminal Company received no “immediate advantage” from the trainees’ work.¹⁹⁹ Under the Court’s reasoning, if an employer provides aid and instruction to a student intern, but the student gains the benefit of the work, the student is not an employee under the FLSA.²⁰⁰ In other words, the Court acknowledged that as broad as the definition of employee may be, it “cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction.”²⁰¹ Just as *Portland Terminal* examined whether the “immediate advantage” flowed to the employers or the trainees, the primary benefit test also examines whether the benefit flows to the student intern or the employer.²⁰²

The primary benefit test is not, however, without its weaknesses. For instance, one court criticized the primary benefit test as “subjective and unpredictable” because it could allow students at the same internship to be classified differently under the FLSA depending on how much each student learned from the internship.²⁰³ In other words, if one of the students in *Glatt* had gained educational value through training, shadowing, or hands-on learning experience on the *Black Swan* set while the other had merely performed menial jobs such as taking lunch orders and getting coffee, the former student would be properly classified as an intern while the latter might be considered an employee.²⁰⁴ Thus, a student’s classification under the FLSA could be very unpredictable depending on how much value each student gained from the internship.²⁰⁵

Moreover, it is incredibly difficult to quantify which party receives the primary benefit of an internship experience.²⁰⁶ For instance, one scholar questions, “Can you balance out thirty hours of

interests and that the employer received ‘no “immediate advantage” from any work done by the trainees.’” (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947)).

199. *Portland Terminal*, 330 U.S. at 153.

200. *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 525, 529 (6th Cir. 2011).

201. *Portland Terminal*, 330 U.S. at 152.

202. *See id.* at 153; *see also Laurelbrook*, 642 F.3d at 529 (discussing how *Portland Terminal* applied a form of the primary benefit test to classify the trainees in question).

203. *Glatt*, 293 F.R.D. at 532.

204. *See id.* (discussing how two students in the same internship could be classified differently under the primary benefit test).

205. *Id.*

206. *See* PERLIN, *supra* note 8, at 67.

data entry with thirty minutes of database training or a brief powwow with executives? Is it vocational training to learn by osmosis, from being cc'd on emails or by sitting in on staff meetings?"²⁰⁷ Stated differently, the work accomplished by interns and the amount of learning that takes place is often difficult to quantify, making it even more difficult to weigh the benefits to determine which party received the *primary* benefit.²⁰⁸ By and large, despite being difficult to quantify and unpredictable in some circumstances, the primary benefit test provides flexibility, certainty for employers, and deference to *Portland Terminal*.

C. The Economic Reality Test

As with the two preceding tests, the economic reality test also has positive and negative attributes. The strongest argument in support of the economic reality test is the explicit wording for this test used by the Supreme Court in *Tony & Susan Alamo Foundation*.²⁰⁹ In that case, the Supreme Court stated that "[t]he test of employment under the [FLSA] is one of 'economic reality.'"²¹⁰ Though the Court did not further define the economic reality test, the language alone provides support for the application of the economic reality test in all FLSA employment contexts.²¹¹ Further, even courts that have applied other tests to internship contexts have recognized that the ultimate test is one of economic reality.²¹²

207. *Id.* While this scholar is specifically analyzing the totality of the circumstances in this discussion, he notes that the ultimate decision would depend on whether the benefit to the intern outweighed the benefit to the employer. *Id.*

208. *Id.*

209. *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985).

210. *Id.*; *see also Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) ("[T]he 'economic reality' rather than 'technical concepts' is to be the test of employment."); *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) ("[E]mployees are those who as a matter of economic reality are dependent upon the business to which they render service.").

211. *See Curiale*, *supra* note 13, at 1543 (discussing how the Court applied the economic reality test to "volunteers").

212. *See, e.g., Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 522, 529 (6th Cir. 2011) (applying a primary benefit test and stating that "it is the 'economic reality' of the relationship between parties that determines whether their relationship is one of employment or something else"); *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 525 (S.D.N.Y. 2013) (applying a totality of the circumstances test but noting that the ultimate test is one of economic reality).

However, the application of the economic reality test provides little practical guidance for courts to use when determining whether a student intern is an employee under the FLSA.²¹³ For instance, though the Sixth Circuit recognized the overarching importance of examining the economic reality of the working relationship, it further stated that the economic reality test alone was too broad because it did not provide a “question to answer, factors to balance, or some combination of the two.”²¹⁴ Thus, if the court in *Glatt* had attempted to apply only the economic reality test, it is unclear what analysis it would have undertaken.²¹⁵ In other words, the statement that an employment relationship is dependent on the economic reality of the situation provides little guidance without a more specific test to apply.²¹⁶

Another weakness of the economic reality test is that it has been primarily applied in cases involving independent contractors, and it is questionable whether this test can be easily mapped onto internship cases.²¹⁷ For instance, the economic reality test examines circumstances such as the independent contractor’s opportunity for profit or loss and the contractor’s investment in special equipment, ultimately focusing on whether the contractor is dependent on the employer for finding business.²¹⁸ These contractor situations provide little assistance in analyzing an internship, which primarily deals with the educational or learning experience afforded to a student, rather than the student’s level of economic dependence on a particular employer.²¹⁹

Finally, the economic reality test has no cognizable basis in *Portland Terminal*, perhaps explaining why the Eleventh Circuit has been the only circuit to apply this test outside of the context of independent contractors.²²⁰ Because the economic reality test does not provide a decisive framework or factors for examining whether

213. See *Laurelbrook*, 642 F.3d at 522-23.

214. *Id.* The court then proceeded to apply the primary benefit test and specific factors to determine which party received the primary benefit of the relationship. *Id.* at 529.

215. See *id.* at 522-23.

216. See *id.* (discussing how the economic reality test alone provides an incomplete analysis for courts to use in future cases).

217. Petition for Writ of Certiorari, *supra* note 16, at 15-16 (critiquing the application of the economic reality test to unpaid interns).

218. See *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1312 (11th Cir. 2013) (citing *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 301-02 (5th Cir. 1975)).

219. Petition for Writ of Certiorari, *supra* note 16, at 16.

220. *Id.* at 31-32.

an intern is an “employee,” it is unlikely that other circuits will adopt this test for classifying student interns absent additional guidance or factors to apply when analyzing unpaid internships.²²¹

While the circuits have attempted to resolve the confusion surrounding the vague definitions in the FLSA, the resulting interpretations have led to even more uncertainty.²²² This confusion is particularly problematic with regard to unpaid internships because students remain unprotected from employers who exploit this circuit court split to receive free labor.²²³ To resolve this split and the resulting confusion, the Supreme Court should examine the pros and cons of each test and adopt the test that would provide the most protection for interns and employers, while still deferring to Congress’s intent in creating the FLSA.²²⁴

IV. CHOOSING A SIDE: THE IMPORTANCE OF ADOPTING A UNIFORM TEST AND WHICH TEST SHOULD BE ADOPTED

The current circuit split and the rapidly increasing prevalence of internships create a need for uniformity in the way that vulnerable students are classified under the FLSA.²²⁵ Though all of the tests have both positive and negative aspects, each test’s outcome for classifying student interns under the FLSA is not equal.²²⁶ Keeping in mind Congress’s ultimate goal in adopting the FLSA—to provide broader protections for the average worker—and balancing this consideration with the values that make a test effective will allow for adoption of the test that is most apt to protect student interns from

221. *See id.* at 31-33.

222. *See supra* discussion Part II (discussing the circuit court split created by the confusing definitions in the FLSA).

223. *See PERLIN, supra* note 8, at 63 (discussing how employers accept unpaid internships as a way to cut costs); *see also* Curiale, *supra* note 13, at 1537-38 (discussing the forms of exploitation that occur as a result of lack of protections for student interns).

224. *See* Petition for Writ of Certiorari, *supra* note 16, at 11-12 (urging the Court to grant certiorari to resolve the current circuit court split).

225. *See* Curiale, *supra* note 13, at 1548.

226. *Compare Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 522-23 (6th Cir. 2011) (reasoning that the economic reality test is not specific enough to be practical in situations involving students), *with Kaplan v. Code Blue Billing & Coding, Inc.*, 504 F. App’x 831, 834-35 (11th Cir. 2013) (utilizing the economic reality test to determine whether student interns were employees under the FLSA).

illegal exploitation as free labor.²²⁷ Given these considerations, the Supreme Court should adopt the primary benefit test supplemented with the DOL factors to allow courts to consistently determine which party received a greater benefit from the relationship in order to provide protections to students who do not receive educational benefits.

A. The Need for a Uniform Test

As an increasingly populous group, it seems paradoxical that student interns receive some of the smallest levels of protection of all the working groups.²²⁸ One reason for this lack of protection is that many student interns cannot easily bring lawsuits for unfair treatment or lack of compensation during unpaid internships because they are often buried in educational debt and do not have the means for expensive lawsuits.²²⁹ Moreover, even if students have the means to bring these lawsuits, many are hesitant to do so because they believe it will give them a bad reputation within their chosen field.²³⁰ If the ultimate goal of an internship is to provide students with a foot in the door, many students may believe that it would be unwise to tarnish their reputations by suing potential employers for noncompliance with the FLSA.²³¹ However, the most significant reason is likely because the rapidly increasing number of internships has led to much confusion about whether student interns are covered by the FLSA, resulting in uncertainty regarding employers' obligations and making it increasingly difficult for courts to resolve these issues in a way that provides broad protections for interns.²³²

Adopting a national standard for evaluating internships under the FLSA can alleviate some of the problems with unfair treatment

227. See 29 U.S.C. § 202 (2012) (defining the policy behind adoption of the FLSA); see also *supra* note 49 and accompanying text.

228. See Yamada, *supra* note 21, at 218-22 (describing the most common issues facing student interns as a result of their unclear classification, including sexual harassment and age, wealth, gender, and, less commonly, race discrimination).

229. See *id.* at 218, 223-24. The lack of income and ability to obtain other employment because of unpaid internships also keeps many students from being able to afford expensive lawsuits.

230. *Id.* at 232.

231. See *id.* This argument is advanced as one reason for a lack of lawsuits brought by unpaid interns. See *id.* Another is that unpaid interns are unaware that they may be entitled to compensation under the FLSA. *Id.*

232. PERLIN, *supra* note 8, at 66.

of student interns by providing clarity in advance of creating an intern relationship.²³³ Because a uniform test will allow for greater understanding of employers' obligations, colleges and universities can educate students and potential employers about strict compliance with the FLSA and can create helpful guidelines, such as advising employers to provide a certain number of educational hours or feedback, to ensure that interns obtain the maximum benefit from their working experience.²³⁴ Though it may be argued that the same result can be obtained by allowing each circuit to adopt its own test for interpreting the FLSA, the FLSA is a federal law that should be interpreted consistently across the nation.²³⁵ More importantly, because many unpaid internships take place in "glamorous fields" in nationally based companies, a national standard would ensure that interns working for the same company in different locations are classified consistently regardless of where they are working.²³⁶

Another potential avenue for adopting a uniform standard is through rulemaking by the DOL or legislation by Congress; however, these solutions have been advocated by other commentators with little response.²³⁷ In fact, problems with unpaid internships have persisted for several years, and Congress has yet to respond through legislation,²³⁸ and the DOL has responded only with a series of nonbinding opinion letters.²³⁹ Given that Congress and the DOL have been slow to respond thus far, it is unlikely that a rapid change will occur in the near future.²⁴⁰ In the meantime, the Supreme Court should take up the issue and create a uniform test for

233. See EDWARDS & HERTEL-FERNANDEZ, *supra* note 193, at 4-5.

234. See Yamada, *supra* note 21, at 236 (proposing a three-part test for students participating in school-sponsored internships).

235. See Bacon, *supra* note 7, at 70.

236. See Yamada, *supra* note 21, at 218 (noting that some of the most prestigious internships take place in the fields of politics or entertainment at companies such as the American Civil Liberties Union, CNN, Merrill Lynch, MTV, and Rolling Stone).

237. See Curiale, *supra* note 13, at 1549-51 (arguing that rulemaking is the best solution to the current problems facing internship law); Yamada, *supra* note 21, at 246 (arguing that congressional amendments to employment statutes are the "cleanest way" to solve the problems); EDWARDS & HERTEL-FERNANDEZ, *supra* note 193, at 5 (arguing that the best solution to the problem would be for Congress to amend the FLSA to include student interns).

238. See LaRocca, *supra* note 13, at 142.

239. See FACT SHEET #71, *supra* note 57; see also Bacon, *supra* note 7, at 75 (noting that the guidelines issued by the DOL in 2010 were merely a restatement of prior guidelines with no significant improvements).

240. LaRocca, *supra* note 13, at 142.

classifying interns under the FLSA.²⁴¹ Given the recent success of the interns in *Glatt*, more students will likely be willing to take their chances with a lawsuit, giving the Court an opportunity to address the issue and solve the circuit split.²⁴²

B. The Values of an Effective Test

Having determined that a national standard created by the Supreme Court through judicial review is the best option for promoting the goal of the FLSA, it is necessary to examine the policy considerations that determine the effectiveness of any particular test adopted by the Court. Many legal scholars have pondered the implications of adopting bright-line rules versus flexible standards, often arguing that these options individually can advance only *some* of the goals of the judiciary.²⁴³ While these goals are numerous and often broad, they are useful in determining whether a particular test is serving its purpose.²⁴⁴ The list of values examined here is not exhaustive; yet, it provides helpful guidance to determine which test is most appropriate in the context of unpaid internships.²⁴⁵

One of the most important values for an effective test is that it provides justice and fairness to those who choose to use the court system to resolve their disputes.²⁴⁶ An effective test must not unfairly benefit one party or group of individuals, but instead must ensure that justice is provided to the party who deserves it under the law.²⁴⁷ In the case of unpaid internships, the DOL stated that “exclusion

241. Petition for Writ of Certiorari, *supra* note 16, at 11-12.

242. Greenfield, *supra* note 3. In *Glatt*, the court also granted class action status to the student interns, resolving some of the problems that interns have with affording expensive lawsuits and giving them a greater ability to bring lawsuits as a group. *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 538 (S.D.N.Y. 2013).

243. See, e.g., Spencer Overton, *Rules, Standards, and Bush v. Gore: Form and the Law of Democracy*, 37 HARV. C.R.-C.L. L. REV. 65, 73-75 (2002); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57-69 (1992); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 777 (1995).

244. See Wilson, *supra* note 243, at 777.

245. For a more thorough discussion of these considerations, see generally Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

246. *Id.* at 392 (noting that interpretation based on standards generally examines values such as fairness and community).

247. H.L.A. HART, *THE CONCEPT OF LAW* 157-67 (2d ed. 1994) (discussing the basic notion of justice in law and describing why justice is an important value for criticizing legal principles).

from the definition of employment is necessarily quite narrow,” suggesting that the fairest test is one that more often than not classifies interns as employees because it provides the highest level of protection for students.²⁴⁸ Additionally, student interns are relatively powerless in the working relationship and need more protection as a result of their vulnerability.²⁴⁹ Ultimately, the test adopted by the Court must fairly weigh the considerations between interns and employers, with a presumption that excluding interns from classification as employees is a rare exception.²⁵⁰

In addition to being fair, a good test should provide predictability both to individuals who intend to bring lawsuits and to those who want to avoid being sued.²⁵¹ If a test is too subjective or returns different results among analogous cases, individuals will lose trust in the court system, thereby creating hesitancy to bring meritorious cases for fear of how they will be decided.²⁵² In fact, in the context of unpaid internships, one court characterized tests that are subjective and unpredictable as “unmanageable.”²⁵³ Although tests cannot create perfect certainty in the outcomes of cases, there should be at least some understanding that certain cases will come out in a certain way.²⁵⁴ Absent this basic level of predictability, the creation of a test is virtually useless because it provides little incentive for individuals to bring lawsuits and lacks the objectivity necessary for people to understand their status under the law.²⁵⁵

Additionally, an effective test should be consistent with prior jurisprudence regarding the specific practice area.²⁵⁶ For example, for unpaid internships, an effective test must align with Supreme Court

248. FACT SHEET #71, *supra* note 57.

249. Student interns are often young and either unaware of their rights or afraid to report issues because of their low status within the company. *See* Curiale, *supra* note 13, at 1537.

250. FACT SHEET #71, *supra* note 57.

251. *See* Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 532 (S.D.N.Y. 2013) (critiquing the primary benefit test as “unpredictable” in its outcomes).

252. *See* HART, *supra* note 247, at 229 (“For one of the typical functions of law, unlike morality, is to . . . maximize certainty and predictability and to facilitate the proof or assessments of claims.”).

253. Glatt, 293 F.R.D. at 532 (analyzing the subjectivity of the primary benefit test based on the amount of learning that takes place among students).

254. Schlag, *supra* note 245, at 411.

255. *Id.*

256. Of course, if a distinction can be made from prior decisions, the resulting decision can be considered “consistent” with prior jurisprudence by distinguishing it from prior case law. HART, *supra* note 247, at 135.

precedent for interpreting employee under the FLSA, most notably, *Portland Terminal*.²⁵⁷ Thus, to be effective, any test for the classification of unpaid interns must be consistent with *Portland Terminal*'s decision regarding the classification of trainees.²⁵⁸ As with the consideration of predictability, the need for consistency with prior jurisprudence stems from a desire to obtain respect for the judiciary.²⁵⁹ Absent this consistency with prior case law, judges will be accused of deciding cases based on their own personal beliefs, rather than through sound legal analysis that the public expects and desires.²⁶⁰

Finally, an effective test should provide practical factors, elements, or some other form of analysis for courts to consistently apply in future cases.²⁶¹ Without any guidance for courts in future cases, a test cannot be effective because it does not provide the objectiveness, fairness, and predictability mentioned above.²⁶² Keeping these considerations in mind will allow for resolution of the current circuit split in a way that provides the greatest levels of fairness and predictability for interns and employers, and the necessary consistency with prior decisions, such as *Portland Terminal*.

C. Proposed Solution: The Primary Benefit Test Supplemented by the DOL Factors

Given the pros and cons of each test and the considerations for a proper test, the Supreme Court should adopt the primary benefit test from the Fourth, Fifth, and Sixth Circuits²⁶³ and supplement this test with the DOL factors to determine which party received the benefit.²⁶⁴ Practically, this test would mirror the one used by the

257. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

258. *See Curiale, supra* note 13, at 1540 (stating that *Portland Terminal* was the origin of the DOL factors as well as courts' interpretation of the FLSA in many contexts, including unpaid internships).

259. *See HART, supra* note 247, at 136 (discussing the policy implications and importance of consistency to jurisprudence and public standards of the judiciary).

260. *See id.*

261. *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 523 (6th Cir. 2011) ("There must be some ultimate question to answer, factors to balance, or some combination of the two.").

262. *See id.*

263. *See discussion supra* Section II.B.

264. *See FACT SHEET #71, supra* note 57.

Sixth Circuit in *Laurelbrook*.²⁶⁵ More importantly, this test would provide courts with the proper level of objectivity and flexibility, allowing them to tailor the analysis to the particular internship and to balance the important interests of both employers and students.

Adoption of the primary benefit test supplemented with the DOL factors not only implicates many of the considerations of an effective test, but it also provides advantages that would otherwise be unattainable with other tests.²⁶⁶ For instance, one of the greatest strengths of the proposed solution is that it provides factors for courts to apply in future cases—a key consideration absent from the economic reality test.²⁶⁷ The importance of this consideration can be demonstrated through an example. Suppose a court attempted to apply the economic reality test to an internship at a large magazine company. The court would begin by asking, “What is the economic reality of the working relationship?”²⁶⁸ Because this is the only inquiry provided by the economic reality test, the court would have no further guidance for its analysis.²⁶⁹ While the court could potentially use economic dependence to determine the economic reality, as some courts have done with independent contractors,²⁷⁰ this analysis, too, would prove unhelpful because the court would always come to the same conclusion—that unpaid interns do not receive compensation and are thus never economically dependent on employers.²⁷¹

By contrast, the proposed solution provides both a question to answer and factors for courts to apply to decide this answer. Because the crux of the primary benefit test requires balancing the two parties’ perceived gains from the relationship, courts need only determine which party gained a greater benefit as a result of the

265. The Sixth Circuit noted that the primary benefit test was the appropriate test for interpreting the FLSA but also examined DOL factors that helped determine the primary benefit. See *Laurelbrook*, 642 F.3d at 529.

266. See discussion *supra* Section III.B.

267. See *Laurelbrook*, 642 F.3d at 523.

268. See *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 292, 301-02 (1985) (stating that the test for an employee is one of economic reality and distinguishing the case from *Portland Terminal*).

269. See *Laurelbrook*, 642 F.3d at 522-23 (questioning the specific inquiry in an economic reality test). *But see* *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311-12 (11th Cir. 2013) (utilizing a factored test to determine the economic reality of the relationship and applying it to the case at bar).

270. See discussion *supra* Section II.C.

271. See *Laurelbrook*, 642 F.3d at 523 (noting that under the economic reality test, “[i]t is *dependence* that indicates employee status” (quoting *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976))).

internship.²⁷² To reach this conclusion, courts can apply the DOL factors, such as whether the relationship displaces paid employees,²⁷³ whether the employer's work was hindered by the intern's presence,²⁷⁴ or whether there is educational value derived from the internship.²⁷⁵ In fact, in its application of the primary benefit test, the Sixth Circuit stated, "Additional factors that bear on the inquiry should also be considered insofar as they shed light on which party primarily benefits from the relationship."²⁷⁶ Unlike the economic reality test, the proposed solution would be fairly easy to apply because it creates a balancing test with objective factors to analyze to reach a definitive conclusion.²⁷⁷

The proposed solution also allows for a level of predictability that would be lacking if the Supreme Court adopted the totality of the circumstances test.²⁷⁸ To demonstrate, suppose a court examining whether an internship complies with the FLSA decides to use the DOL factors based on a totality of the circumstances test. While this approach allows for application of specific factors, how will the court decide which factors weigh more heavily than others?²⁷⁹ Moreover, how can it be guaranteed that different courts will weigh the factors similarly?²⁸⁰ In the internship context, this subjectivity does not provide employers with the predictability necessary to allow them to understand whether they are complying with the law.²⁸¹

By contrast, although the proposed solution also uses the DOL factors, the ultimate goal of determining the primary benefit provides

272. *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 271-72 (5th Cir. 1982).

273. This factor can suggest that the employer received the primary benefit by cutting costs and replacing paid employees with unpaid ones. *See* FACT SHEET #71, *supra* note 57.

274. This factor can suggest that the intern received the primary benefit because he or she hindered the work of the employer, something a normal employee is ideally not going to do. *See id.*

275. This factor can suggest that the intern received the primary benefit so long as the educational value outweighed any value received by the employer. *See id.*

276. *Laurelbrook*, 642 F.3d at 529.

277. *Id.* at 523.

278. *See supra* text accompanying notes 186-88 (discussing the subjectivity of the totality of the circumstances test).

279. PERLIN, *supra* note 8, at 67 (arguing that the totality of the circumstances test is inherently subjective).

280. *See id.* (noting that this test practically ensures inconsistency and subjectivity).

281. In fact, subjectivity in internship contexts leads to many problems with national companies. *See id.*

a check against uncertainty by demonstrating which consideration ultimately receives the most weight.²⁸² If the Supreme Court adopts the proposed solution, courts and employers alike will be aware that interns' educational gain must be the primary focus of the internship.²⁸³ This awareness will allow employers to tailor their internships to ensure strict compliance with the FLSA.²⁸⁴ For instance, employers can ensure that educational training is part of the internship and can periodically supervise students throughout the internship.²⁸⁵ Using both the primary benefit test and the DOL factors incorporates important considerations of an effective test by giving courts objective considerations to weigh and creating a higher level of predictability than the totality of the circumstances test.²⁸⁶

While greater levels of predictability can create lesser levels of flexibility,²⁸⁷ adopting the proposed solution will provide a balanced level of both considerations. Though the primary benefit test alone provides some level of flexibility by balancing the parties' perceived gains, supplementing the test with the DOL factors creates even greater flexibility.²⁸⁸ Because each internship is different, a rigid test—such as the all-or-nothing approach advocated by the DOL in Fact Sheet #71—would not allow for individual consideration based on the differing situations.²⁸⁹ For instance, some critics take issue with the DOL's all-or-nothing approach because the absence of one factor automatically creates an employment relationship for an

282. EDWARDS & HERTEL-FERNANDEZ, *supra* note 193, at 4-5.

283. *See id.* at 5, 7.

284. *See id.* at 5 (arguing that a test similar to the one proposed here would “benefit employers by reducing uncertainty surrounding the legal status of their interns” and would also “make it easier for employers to understand their obligations”).

285. *See id.* at 4-5.

286. This flexibility is particularly important in the context of unpaid internships because the future of unpaid internships is indefinite and adoption of a flexible standard allows for more adaptability to changing circumstances. *See* Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 7 (1987).

287. *See* Wilson, *supra* note 243, at 777.

288. *See* Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 141-42 (2d Cir. 2008).

289. *See* PERLIN, *supra* note 8, at 66 (discussing how employers have tried to “squeeze” internships into the six-factor test that creates an exemption from employee status).

unpaid internship that would otherwise be legal.²⁹⁰ While this approach is certainly protective of interns, it is also problematic, particularly in regard to element four, which requires that the employer receive no immediate advantage from the relationship.²⁹¹ Because it is rare that an employer receives *no* advantage from hiring an unpaid intern, the all-or-nothing approach creates a virtually impossible standard that is inherently inflexible.²⁹² However, applying the proposed solution and using the DOL factors as a balancing test, rather than a checklist of elements that must all be met, gives courts a method to determine whether the employer or student received the primary benefit while creating a test that is flexible enough to be applied to every internship.²⁹³

Another advantage to adopting the proposed solution is that it has a strong basis in Supreme Court precedent by way of *Portland Terminal*.²⁹⁴ In *Portland Terminal*, the Court noted that a person who works for his own benefit and receives the instruction of another cannot be considered an employee for FLSA purposes.²⁹⁵ This language indicates that the Court applied a form of the primary benefit test to trainees by suggesting that these individuals worked for their own benefit and could not be considered employees.²⁹⁶ The Court also applied several factors for determining whether the employers received an advantage, showing that the Court contemplated the use of descriptive factors for the determination of which party primarily benefitted.²⁹⁷

Moreover, student interns can be analogized to trainees, demonstrating that *Portland Terminal* has even more precedential value.²⁹⁸ Trainees typically work for a particular company in order to learn the aspects of a job in the hopes of getting hired for permanent

290. *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 525 (6th Cir. 2011) (noting that the DOL's test "is overly rigid" because "no one factor," or absence thereof, should control); *see also supra* text accompanying notes 138-39.

291. FACT SHEET #71, *supra* note 57.

292. Some commentators have noted that element four means that *no* work can be performed by interns that would provide *any* benefit to the employers. *See* Bacon, *supra* note 7, at 79; *see also Unpaid Internships - Common but Illegal*, LAB. & EMP. L. BLOG (Nov. 4, 2007), http://laborlaw.typepad.com/labor_and_employment_law_/2007/11/unpaid-internsh.html.

293. *See* Wilson, *supra* note 243, at 777 (discussing the flexibility of standards as compared to rigid rules).

294. *See* Petition for Writ of Certiorari, *supra* note 16, at 32.

295. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152-53 (1947).

296. *Id.* at 152.

297. *Id.* at 149-50.

298. *See* Petition for Writ of Certiorari, *supra* note 16, at 32.

employment.²⁹⁹ Interns, too, work for certain companies in the hopes of gaining more practical experience in a particular field and getting a foot in the door.³⁰⁰ In fact, some may even hope to obtain permanent employment with the company for whom they are interning.³⁰¹ While distinctions can be made between interns and trainees, such as the type of work performed and the length of time spent in the training process, the similarities between the two relationships combined with the support for the primary benefit test and DOL factors provided in *Portland Terminal* suggest that this solution is steeped in precedent.³⁰² Additionally, this test has been the dominant test used by the circuits for interpreting the FLSA,³⁰³ further implying its usefulness and applicability to unpaid interns.

Finally, and most importantly, adoption of the proposed solution would solve many of the practical problems with the current circuit split. Not only would adoption of a single test ensure that all interns are analyzed the same way under the FLSA,³⁰⁴ but employers would also be aware of this interpretation so they could avoid illegally exploiting interns in the first place.³⁰⁵ Additionally, one advantage to Supreme Court review over congressional rulemaking is that Supreme Court review tends to generate more publicity than congressional action, providing a greater likelihood that interns will be made aware of their rights and that employers will be more apt to correct for violations of the law.³⁰⁶ Further, this approach provides at

299. *Portland Terminal*, 330 U.S. at 150 (describing the process by which trainees at the Portland Terminal Company were hired).

300. Bacon, *supra* note 7, at 68 (explaining the importance of internships to students who want to get ahead and noting that “[s]tudents rely on internships for getting into their careers”).

301. However, the DOL factors make it clear that an intern cannot *expect* to receive permanent employment after the internship and still be considered an intern. FACT SHEET #71, *supra* note 57.

302. See Petition for Writ of Certiorari, *supra* note 16, at 32 (discussing how the primary benefit test comports with *Portland Terminal*).

303. See discussion *supra* Part II (examining the circuit court split).

304. One intern who petitioned the Supreme Court to grant certiorari argued that “a consistent test should be applied throughout the country so the FLSA’s coverage concerning minimum wage and overtime pay is not dictated by the circuit in which an intern or extern works.” See Petition for Writ of Certiorari, *supra* note 16, at 30.

305. EDWARDS & HERTEL-FERNANDEZ, *supra* note 193, at 6 (arguing that employers should inform students of their rights *prior* to the internship’s start).

306. For instance, one newspaper article suggested that the *Glatt* ruling in the Southern District of New York had the impact of “setting a precedent for future disgruntled worker bees and also scaring potential intern abusers into paying their summer or short-term staffers some actual money.” Greenfield, *supra* note 3. If a

least some deference to the agency that created the FLSA and is charged with its interpretation because it utilizes the DOL factors to determine which party received the benefit of the relationship.³⁰⁷

Admittedly, adoption of the proposed solution, or any test in general, will not solve all of the problems with the current state of internship law.³⁰⁸ As noted earlier, the primary benefit test has been critiqued for being unpredictable in its outcomes and for creating difficulties in determining who receives the *primary* benefit of the work.³⁰⁹ However, the proposed solution leads to more predictability than the other tests, even if it does not achieve complete predictability.³¹⁰ Additionally, while it may sometimes be difficult to determine which party received the *primary* benefit, by encouraging courts to focus on the educational value of the working relationship, courts need not be so concerned with “balanc[ing] out thirty hours of data entry with thirty minutes of database training,” as one scholar criticizes.³¹¹ Instead, by focusing on the educational value students gain from the internship and the profit employers gain from free labor, courts can readily determine whether interns deserve compensation for the menial work they perform or whether they have been compensated through the valuable education that they would not have otherwise received.³¹²

A single test adopted by the Court will not alleviate all the struggles that unpaid interns have in regard to bringing lawsuits in

district court case could have this impact, a Supreme Court case would likely be much more impactful. *See id.*

307. As briefly noted earlier, the level of deference to afford the DOL Fact Sheet has been in contention among lower courts as well, so providing deference to the DOL at some level is important. *See supra* note 84.

308. *See supra* text accompanying note 243.

309. *See supra* text accompanying notes 206-08.

310. For instance, the totality of the circumstances test is not limited to a certain number of factors, giving judges almost complete discretion to determine what factors should be examined and how they should be examined. *See Yamada, supra* note 21, at 235. On the other hand, the economic reality test has no factors for courts to examine, leaving it up to judges to determine how to discover the economic reality of the working relationship. *See Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 523 (6th Cir. 2011). By contrast, the proposed solution gives judges factors to consider and creates a balancing test for judges to weigh these factors, limiting the amount of discretion judges have and creating more predictability. *See supra* text accompanying notes 282-86.

311. *See PERLIN, supra* note 8, at 67.

312. *Laurelbrook*, 642 F.3d at 529 (noting that the primary benefit test reflects the goals of the FLSA in distinguishing between workers and volunteers and is broad enough to encapsulate non-traditional working relationships, such as internships).

the first place.³¹³ However, given Congress's lack of response and the importance of unpaid internships to today's economy,³¹⁴ the Court's review of the circuit split and adoption of the proposed solution will provide a necessary step in the right direction toward greater protection of unpaid interns.³¹⁵ Ultimately, the Court's willingness to examine and solve this issue will indicate the seriousness of violating the FLSA and will allow courts and employers to consistently correct for illegal exploitation of today's students.³¹⁶

CONCLUSION

The story about Glatt and Footman's legal victory has been widely publicized since the Southern District of New York reached its decision in June 2013.³¹⁷ Anger, frustration, excitement, and triumph were only some of the emotions surrounding the decision to classify these overworked students as employees and to compensate them under the FLSA.³¹⁸ In the wake of *Glatt*, many attorneys, interns, and employers alike expressed frustration with the current state of the law, crying out for change and expressing a desire for fully explained guidelines that conform to the FLSA and provide protections for confused and mistreated students.³¹⁹

Had the Supreme Court adopted the proposed solution prior to the lawsuit filed by Glatt and Footman, it is likely that this case

313. Notably, *Glatt* also granted the unpaid interns class action status, potentially alleviating some of the issues with interns being unable to pay for lawsuits. *See* *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 539 (S.D.N.Y. 2013). In fact, the attorney for Glatt and Footman noted that what class status "really does mean is interns can pursue these claims on the class basis." *See* Greenfield, *supra* note 3.

314. LaRocca, *supra* note 13, at 142.

315. *See* 29 U.S.C. § 202 (2012) (discussing Congress's intent behind adopting the FLSA as protecting vulnerable workers).

316. *See* Greenfield, *supra* note 3 (discussing how the decision in *Glatt* has helped to expose the current problem with internship law).

317. *See, e.g.*, Ellin, *supra* note 1 (discussing the decision in *Glatt*); Greenfield, *supra* note 3 (discussing how *Glatt* was a victory for student interns); Greenhouse, *supra* note 8, at B1 (discussing the implications of the decision in *Glatt*).

318. Greenhouse, *supra* note 8, at B1.

319. *See, e.g.*, Petition for Writ of Certiorari, *supra* note 16, at 11-12 (requesting the Court to grant certiorari and solve the circuit split); Sam Hananel, *Unpaid Internships in Jeopardy After Court Ruling*, WASH. TIMES (June 14, 2013), <http://www.washingtontimes.com/news/2013/jun/14/unpaid-internships-jeopardy-after-court-ruling/> (discussing the importance of the decision in *Glatt* and the impact it could have on the future of unpaid internships).

would not have been filed.³²⁰ In fact, having a concrete and uniform rule governing intern–employer relationships would have allowed Fox Searchlight Pictures, Inc. to know before the internship began whether these students should have been paid.³²¹ By adopting the proposed solution, the Court will ensure that internships remain a critical part of a student’s entrance into the workforce while providing students with a full and enlightening experience without fear of exploitation. For employers, a uniform test will allow them to properly train the next generation of workers without being concerned about getting sued for not complying with a vague and poorly defined law.³²²

Though only a small percentage of petitions for certiorari are actually granted during each Supreme Court term,³²³ the influx of lawsuits predicted by the triumph in *Glatt* will likely give the Court ample opportunity to address this issue once and for all.³²⁴ The Supreme Court should, and hopefully will, review the circuit court split in the near future and adopt the proposed solution to provide stronger protections for vulnerable students. Until or unless this happens, thousands of unpaid student interns will continue to work for no pay—many without any idea that they may be entitled to compensation under the FLSA.³²⁵

320. See discussion *supra* Section IV.C.

321. See discussion *supra* Section IV.C.

322. See discussion *supra* Section IV.A.

323. *Frequently Asked Questions*, SUP. CT. U.S., <http://www.supremecourt.gov/faq.aspx#faqgi2> (last visited Nov. 19, 2014).

324. Greenfield, *supra* note 3 (predicting that student interns will be more willing to challenge internships).

325. See Yamada, *supra* note 21, at 232.

