America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change

Jessica L. Curiale
Notes

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Unpaid internships are increasing in the United States, and one can surmise that they will become even more common as the economy continues to deteriorate. Most internships are not paid, especially in “glamorous fields,” such as politics or entertainment. Instead of wages, the company offering the internship promises the candidate “great experience” and an opportunity to get his foot in the door. Because employers respond favorably to internship experience on a résumé, individuals see internships as increasingly necessary to be competitive in the job market. But without being paid, low-income individuals often cannot afford to take them. This raises a troubling class divide between entry-level jobseekers who can afford the luxury of unpaid experience and those who cannot. Because employers may decide to hire unpaid interns instead of paid laborers, unpaid internships also indirectly contribute to rising unemployment.

These serious problems are exacerbated the extremely convoluted and unclear nature of the federal law governing unpaid interns. Under current federal law, it is often difficult to tell whether an internship is illegal, and to even know where to begin in suggesting change. Indeed, suggesting change to the law governing unpaid interns begs the question: what law?

This Note urges the Wage and Hour Division of the Department of Labor to promulgate a rule that will create an explicit “intern-learner” exemption to the FLSA, similar to the current “learner” exemption. This new rule will benefit both interns and businesses, by clarifying that anyone who qualifies as an “employee” for purposes of the FLSA must be paid minimum wage, but allowing employers who create an approved “intern-training” program to pay their interns slightly less than minimum wage. This will subject internship programs to regulation by the Department of Labor and ensure that all who are legally entitled to wages receive payment, ultimately leading to a decrease in unpaid internships nationwide.

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INTRODUCTION

Quinn Thomas came to law school hoping to work as a lawyer specializing in digital technology. Interested in venture capital, technology licensing, and development, she settled on a law school in Northern California, close to Silicon Valley. When Quinn entered her second semester of law school, she began to look for summer employment. Through connections she had made at a previous job, Quinn learned of an internship with the legal department of a small digital technology start-up company in San Francisco. She interviewed and was offered the position. It did not pay, but it did promise to provide

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Our Nation, so richly endowed with natural resources and with a capable and industrious population, should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day’s pay for a fair day’s work.

—President Franklin Delano Roosevelt

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1. S. REP. NO. 75-884, at 2 (1937); 81 CONG. REC. 4983 (1937) (message from President Roosevelt urging Congress to pass the Fair Labor Standards Act (FLSA)).
2. The following narrative is derived from an interview with a law student in San Francisco, California, on March 11, 2009. Her name has been changed to preserve anonymity.
her with great experience and the opportunity to network with others in the field. The position was highly sought-after, and she felt lucky to have secured it. From May until August, Quinn interned eight hours a day, four to five days a week, assisting with deals, summarizing cases, drafting contracts, and writing opinion letters.

Because digital technology is a niche field, Quinn felt she would have no chance of breaking in without the experience and connections she hoped to gain as an intern. Despite this valuable experience, life as an unpaid intern turned out to be much more difficult than she had anticipated. Quinn was unable to secure additional loans for the summer, and her family could not provide her with any financial assistance. In order to make ends meet, Quinn was forced to work in the mornings as a gardener for a wealthy family a few miles from her home. She then went to her internship, where she worked from noon to eight p.m. Because the wages she earned gardening barely covered her rent and food, she did not have enough money left over even to take the bus to work. Quinn had to walk everywhere, often as far as three miles in a city characterized by its steep hills. Unable to make any payments on her loans or credit card balance, she sank deeper into debt and fell behind on her bills. Although Quinn was struggling just to make ends meet, she felt that she had no choice: without experience in her desired field, she would surely be at a disadvantage in the job market after she graduated from law school.

This story is similar to those of interns throughout the nation. The number of unpaid internships is increasing in the United States, and one can surmise that they will become even more common as the economy continues to deteriorate. Many companies offer internships to recent college graduates or young professionals looking to gain experience in a particular field. Most such internships are not paid, especially in "glamorous fields," such as politics or entertainment. Instead of wages, the company offering the internship promises the candidate "great
experience" and an opportunity to get his foot in the door.\textsuperscript{8} Because employers respond favorably to internship experience on a résumé, individuals see internships as increasingly necessary to be competitive in the job market.\textsuperscript{9} But, without being paid, low-income individuals often cannot afford to take them.\textsuperscript{10} The increasing prevalence of internships thus raises a stark class divide between entry-level jobseekers who can afford the luxury of unpaid experience and those who cannot. Because employers may decide to hire unpaid interns instead of paid laborers, unpaid internships also indirectly contribute to rising unemployment.\textsuperscript{11}

These serious problems are exacerbated by the fact that the convoluted and unclear nature of the federal law governing unpaid interns makes both regulation and reform nearly impossible. While it may seem at first blush that an unpaid internship is simply unpaid labor with a fancy name, and therefore illegal, the legal status of unpaid internships is anything but simple. Under current federal law, it is often difficult to tell whether an internship is illegal and to even know where to begin in suggesting change. Indeed, suggesting change to the law governing unpaid interns begs the question: \textit{what law}? This Note is therefore concerned with identifying the current state of federal law as it relates to unpaid interns, highlighting problems with the law, and pinpointing what needs to be done in order to bring the current state of the law into line with Congress's original intent.

The Note proceeds in four Parts. In Part I, I will elaborate on why unpaid internships are particularly problematic, and why the unpaid internship debacle is only getting worse. In Part II, I will provide an overview of the Fair Labor Standards Act (FLSA),\textsuperscript{12} the law most relevant to unpaid internships, and will highlight the inconsistent interpretation of the FLSA by the Wage and Hour Division (WHD) of the Department of Labor on the one hand, and by the courts on the other. I will show that the WHD actually considers most interns to be employees covered by the FLSA while the courts do not and will explain why this inconsistency aggravates the unpaid internship problem. Part III of the Note argues that the WHD must conduct a rulemaking to clarify the law. Part IV sets forth a proposed rule that will create an explicit "intern-learner" exemption to the FLSA, similar to the current "learner" exemption. This new rule will benefit both interns and businesses by clarifying that anyone who qualifies as an employee for purposes of the FLSA must be paid minimum wage, but allowing employers who create

\begin{itemize}
  \item \textsuperscript{8} See id. at 217.
  \item \textsuperscript{9} See id. at 218–19.
  \item \textsuperscript{10} Id.; see also Andrea Perera, \textit{Paying Dues in Internships}, L.A. \textit{Times}, Apr. 22, 2002, at B4; Stockman, \textit{supra} note 5; Sung, \textit{supra} note 3.
  \item \textsuperscript{11} See Gregory, \textit{supra} note 6, at 262.
\end{itemize}
an approved “intern-training” program to pay their interns slightly less than minimum wage. This will subject internship programs to regulation by the WHD and ensure that all who are legally entitled to wages receive payment, ultimately leading to a decrease in unpaid internships nationwide.

I. WHAT’S SO BAD ABOUT UNPAID INTERNSHIPS?

Internships in the United States are on the rise. In 1981, the proportion of college graduates nationwide who interned was one in thirty-six; by 1991, that number had jumped to one in three.13 A survey by Vault estimated that in 2004, eighty percent of graduating college seniors had participated in some sort of internship, whereas a decade ago only sixty percent of seniors had interned.14 Recently the New York Times reported findings that, in 2008, eighty-three percent of graduating students had interned, with experts estimating that up to one-half of these interns were not paid.15 Indeed, internships are so common that businesses have sprouted up that specialize in placing interns with companies.16

It is of course true that internships benefit interns. Internships allow interns to gain insight into different companies and perhaps make better career choices as a result. Interns also make key connections in fields in which they hope to work17 and gain real-world work experience in the process.18 Perhaps because of these obvious benefits, people are often reluctant to acknowledge the problematic aspects of unpaid internships. If an ambitious college student wants to work for free in order to get a leg up in the business world, why should anyone discourage her? And unpaid internships seem like an ideal solution for a small business that needs help but has limited resources—the business gets a worker who gladly agrees to be paid in experience rather than money.19 If both parties to the transaction are happy, why should anyone else complain?

16. Jamie Herzlich, Internships Help Businesses, Students Alike, NEWSDAY, May 5, 2008, at D4 (interviewing Irene de Gasparis, president of Interns for You Inc., a company which specializes in setting up and managing intern programs); see also Sue Shellenbarger, Do You Want an Internship? It'll Cost You, WALL ST. J., Jan. 28, 2009, at D1 (describing the recent and increasing phenomenon of parents paying for-profit companies to place their children in unpaid internships).
17. See Yamada, supra note 4, at 217 (“A survey . . . found that 57 percent of . . . former interns were offered full-time positions by the organization that sponsored them.” (quoting Glenn C. Altschuler, A Tryout for the Real World: Interning Is Good for the Resume. Better Yet, It May Get You Hired, N.Y. TIMES, Apr. 14, 2002, § 4A, at 20)).
18. Gregory, supra note 6, at 241; see also Diane E. Lewis, Internships Are Key Resume Booster, BOSTON GLOBE, Apr. 13, 2003, at G1.
19. See, e.g., Herzlich, supra note 16 (“You're thinking you can use an extra pair of hands around July 2010] AMERICA'S NEW GLASS CEILING 1535
Unfortunately, this characterization of unpaid internships is deceptively simplistic. For with the benefits of unpaid internships come a myriad of broad and serious societal problems. While interns who can afford and are willing to work for free gain valuable experience and make lucrative connections, those who do not have the luxury of accepting an unpaid position find it harder and harder to advance in society. As internships become increasingly common, employers come to expect internship experience on a résumé. Because most “key résumé boosting” internships do not pay, students who do not come from money and do not have any independent source of financing often cannot afford to take them. If these students do find a way to accept an unpaid position, it often means spending the rest of their days working part-time paying jobs, taking out additional loans, or even skipping meals. This creates a distinct class divide between students who can afford to take unpaid internships and those who cannot and renders social mobility and equal opportunity even more difficult to obtain. Those who cannot afford an unpaid internship are increasingly unlikely to find a paid one: as unpaid internships become increasingly important and more individuals who can afford to forgo a paycheck agree to work for free, employers have little incentive to pay interns. Indeed, this is exactly why we have wage regulation at all—without it, wages would constantly be driven down.

A subspecies of this general problem is that because internships are concentrated in the most sought-after and competitive fields, low-income individuals have an even harder time breaking into these markets. For example, political internships in Washington, D.C. are seen as “serv[ing] as a pipeline that brings policy makers into the nation’s office this summer but can’t afford to hire more staff right now. Well, then an internship program may be just what your business needs.”

20. See, e.g., Lewis, supra note 18.
21. Yamada, supra note 4, at 218–19; Lewis, supra note 18.
22. Yamada, supra note 4, at 218–19; see also Perera, supra note 10; Stockman, supra note 5; Sung, supra note 3.
23. Yamada, supra note 4, at 218–19.
25. See Tony & Susan Alamo Found. v. Sec’y of Labor, 471 U.S. 290, 302 (1985). For example, consider this hypothetical situation: I am unemployed and in serious need of money. I am looking for an unskilled job, the prevailing wage for which is ten dollars per hour, but no one seems to be hiring. Finally, deciding that nine dollars per hour would be better than nothing, I start offering my services for nine dollars per hour instead of ten dollars. I am quickly hired. This works great until someone else comes around and offers her services for eight dollars per hour. And so on and so forth it goes, until the wage is driven down to rock bottom. This is the reason we have a minimum wage; to prevent this race-to-the-bottom scenario. If we did not have minimum wage, people offering their services for the lower price would clearly be the more attractive choice. Likewise, in the internship situation, an intern who is willing to work for nothing is clearly a more attractive choice than an intern who seeks wages.
26. See Lee, supra note 4; Yamada, supra note 4, at 219.
Since these internships are unpaid, "some people fear that over the long term, internships will be another means, like the rising costs of college tuition, of squeezing voices from the working class and even the middle class out of high-level policy debates." At the same time, as companies realize that they can hire "interns" to work for free, they may opt to fill job openings with such unpaid interns instead of hiring paid students or other workers. Paid workers are thereby indirectly replaced, or not hired in the first place. These displaced workers then have to find other jobs, and they may draw on unemployment insurance or even welfare benefits.

Unpaid internships thus work a double hardship on the economically disadvantaged: Because an unpaid internship is increasingly necessary to advance one's career, those who cannot afford to work for free may be stuck for longer in low-level jobs. But because companies replace their low-level workers with unpaid interns, paid low-level jobs are disappearing and the possibility of working one's way up is becoming more and more remote. These problems are compounded by the fact that those who are poised to tackle these issues (legislators, judges, attorneys, journalists, etc.) are very likely people who have benefited from unpaid internships themselves. Such individuals may be less inclined to acknowledge the severity of the internship debacle, or even to view it as a problem.

Moreover, even interns who are able and willing to work for experience without actual wages may find themselves facing unanticipated problems. Research suggests that unpaid interns are more vulnerable to sexual harassment than regular employees. Because interns are often young, and their positions within companies can be vague, interns may have a particularly difficult time asserting themselves, for example, in the face of a "persistent older charmer." Older candidates may also be more prone to experience age discrimination because companies advertising for "interns" expect young men and women to apply. Unpaid internships also, of course, raise concerns

27. Lee, supra note 4.
28. Id.
29. Bernadette T. Feeley, Examining the Use of For-Profit Placements in Law School Externship Programs, 14 CLINICAL L. REV. 37, 47 (2007); see also Herzlich, supra note 16.
30. Gregory, supra note 6, at 262; O'Connor, supra note 4 (describing interns as "becoming ubiquitous in the workplace").
31. Gregory, supra note 6, at 262.
32. Yamada, supra note 4, at 219-20.
33. Id. at 221 (quoting Andrew Sullivan, Sex and This City: Even Without the Harsh Glare of Scandal, Washington's Sexual Dynamic Has Always Had a Uniquely Predatory Cast, N.Y. TIMES MAG., July 22, 2001, at 16).
34. See id. at 221-22.
regarding exploitation of workers. Interns may take an unpaid position hoping to gain valuable work experience, only to end up as the company’s administrative assistant or gopher. Not only is such an intern not making money, he is not even receiving compensation in the promised form of “experience.”

Change must therefore be effected soon, before the number of unpaid interns and of those who are correspondingly disadvantaged grows to overwhelming proportions. As noted earlier, unpaid internships are becoming commonplace. As the labor market becomes more competitive and unemployment remains high, the numbers can only be expected to increase. In difficult economic times, jobseekers may become more desperate and thus more willing to take an internship that pays only in “experience” in the hopes of later leveraging that experience into a paid position. For those who are already financially disadvantaged and cannot afford to accept experience in lieu of actual wages, prospects of upward social mobility become more remote. Recently, top officials at the Department of Labor have taken note of these problems and have vowed to crack down on employers who are using unpaid internships as a source of unpaid labor in contravention of the FLSA. However, this growing problem cannot truly be solved without clear law that squarely addresses, and strictly regulates, unpaid internships. As I argue below, most interns actually qualify as employees under the FLSA pursuant to the Department of Labor’s interpretation of the statute. Recent statements by Nancy J. Leppink, the acting director of the WHD, have corroborated this position. But because the law as it currently stands is ambiguous, courts can reach different conclusions. Thus, the law must be updated to state clearly that if a business benefits from an intern, the intern must be paid at least minimum wage. Without such law, companies will use increasing numbers of free interns, and the class divide will grow larger. The remainder of this Note will detail the deficiencies in the current law and the most effective means of repairing it.

35. See Feeley, supra note 29, at 46; Yamada, supra note 4, at 218–22.
36. See Gregory, supra note 6, at 242.
37. See supra notes 11–15.
39. See Stockman, supra note 5.
40. See Greenhouse, supra note 15.
41. See id.
II. CURRENT STATE OF THE LAW

A. THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act is the federal statute that regulates employment and is administered by the Wage and Hour Division of the Department of Labor.\(^42\) The FLSA fixes a minimum wage that employers must pay employees who work in covered activities.\(^43\) Whether one is entitled to minimum wage, therefore, depends on whether she is an "employee" for purposes of the Act.\(^44\) The FLSA, unhelpfully, defines "employee" as "any individual employed by an employer."\(^45\) It defines "employ" as "to suffer or permit to work."\(^46\)

While the definition of "employee" is said to be "the broadest definition that has ever been included in any one act,"\(^47\) there are certain exemptions to the minimum wage requirements included in the text of the statute and further defined by WHD regulations. For example, the FLSA has exceptions for "learners," "apprentices," "messengers," and certain full-time students.\(^48\) The WHD has also defined a subcategory of exempted workers called "student-learners."\(^49\) If certain requirements set forth in the WHD regulations are met, these workers may be paid a subminimum wage (between seventy-five and ninety-five percent of the minimum wage, depending on the specific exemption).\(^50\)

The first step in regulating interns is to determine where they fit into the statutory framework. This is not an easy task. The FLSA does not define what an intern is, nor does it exempt interns from minimum or

\(^44\) Id.
\(^46\) Id. § 203(g).
\(^47\) United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945) (quoting 81 CONG. REC. 7657 (1937) (statement of Sen. Hugo Black)).
\(^49\) See 29 C.F.R. § 520.300 (2009) ("Student-learner means a student who is at least sixteen years of age, or at least eighteen years of age if employed in an occupation which the Secretary has declared to be particularly hazardous, who is receiving instruction in an accredited school, college or university and who is employed by an establishment on a part-time basis, pursuant to a bona fide vocational training program.").
\(^50\) See 29 U.S.C. § 214 (authorizing the Secretary of Labor to pass regulations providing for the employment of learners, apprentices, and messengers at wages lower than minimum wage); 29 C.F.R. § 520.407 (2009) (messengers may be paid at a rate of ninety-five percent of the minimum wage); id. § 520.408 (learners may be paid at a rate of ninety-five percent of the minimum wage); id. § 520.506 (student-learners may be paid at a rate of seventy-five percent of minimum wage). For reasons explained below, these exemptions are generally not applicable to interns. See infra Part II.B. The FLSA also has an exception for apprentices and certain kinds of volunteers. See 29 U.S.C. § 293; 29 C.F.R. § 520.300; U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2006-28 (Aug. 7, 2006). An apprentice is a worker employed to learn a skilled trade through a registered apprenticeship program. 29 C.F.R. § 520.300. Apprentice training is "provided through structured on-the-job training combined with supplemental related theoretical and technical instruction." Id.
The student and learner exemptions mentioned above do not address when, if ever, a worker does not have to be paid any wages at all, and they are mostly inapplicable to typical internships. The WHD has not promulgated any regulations specifically related to unpaid internships. The critical initial consideration, therefore, is whether an intern is an "employee" under the FLSA—if so, she is entitled to minimum (or, if she qualifies for one of the exemptions mentioned above, a slightly subminimum) wage, regardless of her title. However, the WHD and the courts are often not in agreement about when an intern qualifies as an "employee" for purposes of the statute.

B. Administrative and Judicial Interpretation of the FLSA in the Context of Unpaid Internships

The origin of both the WHD's and the courts' interpretation of the FLSA, as is relevant to unpaid internships, can be traced back to the 1947 United States Supreme Court case Walling v. Portland Terminal Co.\(^5\) That case involved applicants to a railroad company who were required to undergo a training period during which no compensation was paid.\(^5\) The trainees shadowed employees, observing and eventually doing some supervised work.\(^5\) The training lasted an average of seven or eight days.\(^5\) The trainees did not displace any regular employees, and their work did not expedite the railroad's business, but actually impeded it on occasion.\(^5\) The trainees claimed they were entitled to minimum wage for these training hours, but the Supreme Court disagreed.\(^5\) The issue of whether the trainees were entitled to minimum wage turned on whether they were "employees" under the FLSA.\(^5\) The Court decided that they were not, primarily because the employees worked solely for their own benefit. In an oft-quoted passage, the Court stated:

The definition "suffer or permit to work" was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages. . . . The Act's purpose as to wages 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. The definitions of "employ" and of "employee" are broad enough to accomplish this. But, broad as they are, they 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.  

Accepting the "unchallenged findings" that the railroads received no "immediate advantage" from the trainees' work, the Court held that the trainees were not employees under the FLSA, and therefore were not entitled to minimum wage.  

Both the WHD and the courts have used *Portland Terminal* as a backdrop for interpreting the FLSA. These interpretations, however, differ in fundamental respects.  

1. Agency Interpretation  

Based on its reading of *Portland Terminal*, the WHD developed a six-factor test to determine whether someone is an employee under the FLSA. If the following six factors are met, the intern or trainee is not an employee under the statute:

1. The 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. The training is for the benefit of the trainee;

3. The trainees do not displace regular employees, but work under [their] close observation;

4. The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion the employer's operations may actually be impeded;

5. The trainees are not necessarily entitled to a job at the completion of the training period; and

6. The employer and the trainee understand that the trainees are not entitled to wages for the time spent in training.  

This six-factor test appears in numerous agency interpretations in the form of field operations manuals and opinion letters, some of which directly address unpaid interns.  According to these interpretations, all six criteria must be satisfied for the student or trainee not to be considered an employee under the FLSA.  

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59. *Id.* at 152.  

60. *Id.* at 153.  

61. See, e.g., U.S. Dept't of Labor, Wage & Hour Div., Op. Letter No. FLSA2004-5NA (May 17, 2004). This opinion letter was issued in response to an inquiry whether an internship program teaching "marketing, promotion, and statistical analysis to students in a real world setting" was legal. *Id.* The WHD advised the inquiring party that it was unclear whether an employment relationship would exist based on the information provided. *Id.*  


63. See, e.g., DEP'T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK ch. 10, § 10b11
WHD has also recently made public statements indicating that the agency still takes the position that all six criteria must be met in order for an internship to be legal under federal law. 64

2. Court Interpretation

Although it does not appear that the federal courts have squarely addressed the legality of the kinds of internships that are ubiquitous today, they have interpreted *Portland Terminal* to determine when certain individuals are "employees" under the FLSA. As many of these cases involved scenarios analogous to unpaid internships—such as trainee programs—it can be inferred that the courts would apply the same analysis if ever directly confronted with the question of whether an unpaid intern is an employee under the FLSA. The courts' interpretations of *Portland Terminal* and of the standard to be employed to determine whether individuals are employees, however, have been much less clear than those of the WHD.

In 1985, the United States Supreme Court noted that "[t]he test of employment under the [FLSA] is one of 'economic reality.'"65 To determine whether a worker is an employee under the economic realities test, courts "focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself."66 In the context of determining whether a trainee or volunteer is an employee, courts examine the "underlying economic facts,"67 especially whether the trainees or interns expect to receive payment for their services.68 If circumstances indicate that an individual engages in activities "in expectation of compensation," the individual is an employee within the meaning of the FLSA.69 This test

(1993) ("If all six of the following criteria apply, the trainees or students are not employees within the meaning of the FLSA."); U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2006-12 (Apr. 6, 2006) ("If all of the following six factors are met, then an employment relationship does not exist."); U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2004-16 (Oct. 19, 2004) ("If all six of the following criteria apply, the trainees are not employees within the meaning of the FLSA."); U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2002-8 (Sept. 5, 2002) ("If all of the following criteria apply, the trainees or students are not employees within the meaning of the Act."); see also O'Connor, supra note 4; Yamada, supra note 4, at 228 ("The Division requires that all six criteria be met in order to find that 'trainees or students are not employees within the meaning of the FLSA.'"); Garen Dodge, *Trainees and Students Under the Fair Labor Standards Act: Must They Be Provided Overtime?*, METROPOLITAN CORP. CONS., Aug. 2006, at 19, 19.

64. See Greenhouse, supra note 15 ("Ms. Leppink [acting director of the Wage and Hour Division] said many employers failed to pay even though their internships did not comply with the six federal legal criteria that must be satisfied for internships to be unpaid.").


68. See Tony & Susan Alamo Found., 471 U.S. at 301-02, 306.

69. See id. at 302.
does not depend on isolated factors, but on the “circumstances of the whole activity.”  

While the economic realities test is most commonly used to distinguish between an independent contractor and an employee, it has also been used by the Supreme Court to distinguish between “volunteers” and employees. In *Tony & Susan Alamo Foundation v. Secretary of Labor*, the Court applied the economic realities test and found that certain individuals who had allegedly volunteered for the commercial businesses of a nonprofit religious organization were employees under the FLSA.  
The Court noted that, under this test, it makes no difference that the trainees or volunteers themselves “vehemently protest coverage under the Act.” The Court concluded that the Tony & Susan Alamo Foundation’s volunteers were employees within the meaning of the FLSA “because they work in contemplation of compensation.”  

The economic realities test, however, has not been widely applied in the internship/trainee context. Perhaps because *Tony & Susan Alamo Foundation* involved the distinction between employees and “volunteers” (for which the WHD applies a separate multi-factored test), and not the distinction between employees and “trainees,” most circuit courts have instead applied some iteration of the six-factor test. These courts have disagreed both with the WHD and with each other regarding the proper interpretation of the FLSA and *Portland Terminal*. While there is no clear majority approach, it is possible to outline the general approaches of some circuits.

For example, despite the fact that the WHD has indicated that all six factors must be satisfied for an intern not to qualify as an employee, the Tenth Circuit has interpreted this test as a “totality of the circumstances” test, while the Fifth Circuit has followed the WHD’s approach of applying it as an all-or-nothing test. In 1982, the Fifth Circuit cited the WHD’s all-or-nothing six-factor test with approval and, in 1983, applied the test in an all-or-nothing fashion, stating that the case “turn[ed] on the fourth criterion.” Neither of the Fifth Circuit cases mentioned the economic realities test.

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71. 471 U.S. at 292, 301–02.
72. Id. at 302.
73. Id. at 306.
75. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026–27 (10th Cir. 1993) (rejecting the all-or-nothing approach and employing a totality of the circumstances approach to the six-factor test).
76. Donovan v. Am. Airlines, Inc., 686 F.2d 267, 273 (5th Cir. 1982) (citing the WHD’s “all or nothing” approach with approval).
77. Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1128 (5th Cir. 1983) (following precedent established in *Donovan*).
In contrast, in Reich v. Parker Fire Protection District, the Tenth Circuit considered whether firefighters were trainees or employees during the time they spent training at a firefighting academy. The court rejected the Secretary of Labor’s argument, which the court characterized as requiring that the six-factor test be applied in such a way that, “unless all six criteria are met, the trainees are employees for purposes of the FLSA.” Instead, the court declared that the WHD’s interpretation was not entitled to substantial deference and adopted the defendant’s argument that, “as a true ‘totality of the circumstances’ test, this determination should not turn on the presence or absence of one factor in the equation.” While not purporting to apply the economic realities test, the court noted,

[In the analogous situation of distinguishing between an independent contractor and an employee under FLSA this court has held that “no one . . . factor[] in isolation is dispositive; rather, the test is based upon a totality of the circumstances.”] We have also held with respect to this issue that “[i]n determining whether an individual is an ‘employee’ within the meaning of the FLSA, we must look to the economic realities of the relationship.” Although we recognize that the factors distinguishing employees from independent contractors are different from the factors distinguishing employees from trainees, we find it informative that determinations of employee status under FLSA in other contexts are not subject to rigid tests but rather to consideration of a number of criteria in their totality.

The court did not cite Tony & Susan Alamo Foundation. The Fourth Circuit, in contrast, has declined to rely on the WHD’s six-factor test at all, instead applying its own “primary beneficiary” test. In the 1989 case McLaughlin v. Ensley, the court stated that in applying this primary beneficiary test, the Fourth Circuit does “not rely on the formal six-part test issued by the Wage and Hour Division” but instead on its own precedent. The proper legal inquiry in the Fourth Circuit is whether the defendant or the trainees “principally benefited” from the work that the trainees do. The court in McLaughlin did not mention the economic realities test at all.

78. 992 F.2d at 1025.
79. Id. at 1026.
80. Id.
81. Id. at 1027 (quoting Dole v. Snell, 875 F.2d 802, 805 (10th Cir. 1989) (internal citations omitted); Doty v. Elias, 733 F.2d 720, 722 (10th Cir. 1984)).
82. 877 F.2d 1207, 1209 n.2 (4th Cir. 1989).
83. Id. at 1209; see also Wirtz v. Wardlaw, 339 F.2d 785, 787-88 (4th Cir. 1964). In Wirtz, an insurance salesman hired two young women to help him around the office and paid the women below minimum wage. Id. at 786-87. The salesman argued that the women were exempt from the FLSA because he was “endeavoring to teach [them] enough to enable them to determine whether they would be interested in preparing for careers in the insurance business after completion of their high school courses.” Id. at 787. The court rejected this argument, holding:

This case is not like Walling v. Portland Terminal Co., where it was held that workers whose
A district court case in the Second Circuit, *Archie v. Grand Central Partnership Inc.*, seemingly attempts to apply all of the tests noted above, illustrating the confusion over the correct standard to be applied to determine employee status under the FLSA. *Archie* involved a group of plaintiffs, formerly homeless individuals, who sued defendants, nonprofit corporations, for minimum wage. The plaintiffs participated in a Pathways to Employment ("PTE") Program run by defendants, in which plaintiffs were paid subminimum wages to perform "clerical, administrative, maintenance, food service, and outreach work" for defendants. Defendants argued that "plaintiffs were not employees of the PTE Program, but were instead trainees receiving essential basic job skills development and counseling, and thus were not entitled to minimum wage." The court disagreed, finding that the plaintiffs were in fact employees entitled to minimum wage. In its discussion of whether the plaintiffs were employees, the opinion (by then-Judge Sonia Sotomayor), began by quoting *Tony & Susan Alamo Foundation* for the proposition that "[a]t base, 'the test of employment under the [FLSA] is one of economic reality.'" The court then considered the WHD's six-factor test. While the court stated that the factors were "not exhaustive" and that it did not "rel[y] exclusively on a single factor, but instead require[d] consideration of all the circumstances," the court carefully considered all six factors in its analysis and ultimately concluded that the plaintiffs would be considered employees under the WHD's test. However, the court asserted that the fact that plaintiffs were employees under the six-factor test was "not determinative of whether a person is an employee under the FLSA," but is "a factor to be weighed in the analysis." The court then went on to

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*Id.* at 787–88 (citation omitted).


85. *Id.* at 507.

86. *Id.*

87. *Id.*

88. *Id.* at 507–08.

89. *Id.* at 531 (quoting *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985)) (internal quotation marks omitted).

90. *Id.*

91. *Id.* at 532–33.

92. *Id.* at 533.
consider the facts under the economic realities test, ultimately concluding that the plaintiffs were employees and thus entitled to minimum wage.3

3. Problems with Inconsistent Interpretation

Given the lack of uniform interpretation of the FLSA as applied to unpaid internships, compliance with the law is nearly impossible. While the Department of Labor has recently indicated that it believes many unpaid internships are illegal,4 businesses that genuinely want to follow the law may be at a loss as to how to do so.5 For instance, many businesses interpret the six-factor test as requiring unpaid interns to receive school credit for their internship in order to avoid being classified an employee under the FLSA.6

This confusion is also reflected in mainstream articles and news reports. A Wall Street Journal article about a controversy involving an Atlanta public relations firm and its unpaid internships, for example, lists "whether the trainee will receive college credit for time spent in the internship" as one "important consideration" under the FLSA in determining whether an intern should be considered an employee.7

93. Id. at 533–35. The Archie court's interpretation of the economic realities test as set forth in Tony & Susan Alamo Foundation was itself rather confusing.

Another point of disagreement between the circuits was how much deference to give the agency's interpretation of the FLSA. Because the six-factor test is contained only in agency opinion letters and manuals, some courts have accorded the agency interpretation only limited deference. See, e.g., Reich v. Fire Prot. Dist., 592 F.2d 1023, 1026 (10th Cir. 1979) (noting that the WHD test was entitled to some deference under Skidmore, but ultimately finding "little support for [a] strict application" of the test). Other courts, meanwhile, have applied the very deferential Chevron standard, which accords agency interpretations deference so long as they are reasonable. See, e.g., Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1128 (5th Cir. 1983) ("The Administrator's interpretation is entitled to substantial deference by this court."); Archie, 977 F. Supp. at 323 ("The Wage and Hour Test is a reasonable application of the FLSA and Portland Terminal and is entitled to deference by this court." (citing Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842–45 (1984))). In 2000, however, the Supreme Court conclusively stated that Department of Labor opinion letters do not warrant Chevron deference. Christensen v. Harris County, 529 U.S. 576, 587 (2000). In 2001, the Court clarified that although agency opinion letters and agency manuals do not qualify for Chevron deference, courts may give such informal agency decisions deference "proportional to [their] power to persuade." United States v. Mead Corp., 533 U.S. 218, 235 (2001) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

94. See Greenhouse, supra note 15.

95. This is, of course, giving businesses the benefit of the doubt. While it is likely that many employers do make a good faith effort to comply with the law, it is also likely that many more do not. A brief survey of Craigslist.org postings in major cities yields literally hundreds of advertisements for unpaid internships that would likely fail to satisfy any iteration of the six-factor test. Employers offering such positions may be willfully blind to their legal obligations with respect to minimum wage, or may simply have decided that the risk of being caught is outweighed by the cost efficiency of a steady stream of free labor. Based on my continuous survey over the past year of advertisements for unpaid internships and articles relevant to the subject, I suspect that for-profit businesses that offer unpaid internships under the honest belief, based on diligent research, that such internships are legal represent the minority.

96. Feeley, supra note 29, at 44.

However, this is not a formal consideration under any test employed by the agency or the courts.\footnote{98. See, e.g., Greenhouse, supra note 15 ("[F]ederal regulators say that receiving college credit does not necessarily free companies from paying interns, especially when the internship involves little training and mainly benefits the employer.").}

In another article, \textit{Newsday} reports that if "you can use an extra pair of hands around the office this summer but can't afford to hire more staff... an internship program may be just what your business needs."\footnote{99. Herzlich, supra note 16.} Despite the fact that one of the stated six factors is that the business cannot derive any immediate benefit from its unpaid interns, the article encourages businesses to hire interns on the basis that the business \textit{will} immediately benefit.\footnote{100. Id.} In fact, in reporting the six factors, the article states that the company cannot obtain any "predominant advantage" from the intern,\footnote{101. Id.} which differs subtly but crucially from the analogous WHD criteria that the business cannot obtain any "immediate advantage" from the intern.\footnote{102. See, e.g., DEP'T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK ch. 10, § 10b11 (1993); U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2006-12 (Apr. 6, 2006); U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2004-16 (Oct. 19, 2004); U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2004-5NA (May 17, 2004); U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2002-8 (Sept. 5, 2002). Another example of a muddled interpretation of the law regarding unpaid internships is the practice of having interns sign agreements indicating they understand that they are not employees per the WHD's six-factor test. See Dodge, supra note 63 (advising that employers require trainees to sign a "Release from Liability Agreement that includes a section confirming the satisfaction of the six factors of the employment test"). This is presumably meant to protect the business from liability under the FLSA. However, it is well settled that, as a matter of law, employees cannot waive their federal minimum wage rights. See Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 302 (1985); Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981); Marshall v. Quik-Trip Corp., 672 F.2d 801, 806 (10th Cir. 1982); Chellen v. John Pickle Co., 344 F. Supp. 2d 1278, 1292 (N.D. Okla. 2004) ("As a matter of law, federal rights to minimum wages cannot be waived by contract or other agreement."). Thus, such an agreement is meaningless under the WHD's six-factor and primary beneficiary tests and would not be dispositive under the economic reality test. See Tony & Susan Alamo Found., 471 U.S. at 301.} Moreover, if an internship does result in litigation, whether the six-factor test is applied as an all-or-nothing test or not may have a serious impact on the outcome of the case. As David C. Yamada has noted,

The difference in results [when the six-factor test is applied as an all-or-nothing test versus a totality of the circumstances test] can be a potentially significant one. For example, in situations where an intern is performing considerable, bona fide work for an employer, the all or nothing approach is easy to apply. It is clear that the employer derives an "immediate advantage" and thus fails to meet one of the criteria. However, under the totality of the 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. Accordingly, this approach virtually ensures inconsistent results.\textsuperscript{66}

Given this confusion over compliance and lack of uniformity in the implementation of a national statute, the law is currently in an unacceptable state and must be remedied expeditiously. As explained below, the most prudent way to fix the law is for the WHD to clarify the FLSA through rulemaking.

\section*{III. Solution: Rulemaking}

This Part advocates a rulemaking by the WHD as the best possible solution to the unpaid internship problem. It further addresses the source of the WHD's rulemaking authority and why a rulemaking is the best option. The next Part proposes a rule and discusses the textual and policy reasons that support that rule.

\subsection*{A. Statutory Authority}

The FLSA does not contain a broad grant of general rulemaking power to promulgate regulations to effectuate the purpose of the statute. Thus, the WHD cannot simply pass a rulemaking codifying its six-factor test without finding a source of authority to do so in the text of the statute. As set forth fully in Part IV, I propose that the WHD promulgate regulations creating a new subcategory of the "learner" exception (mentioned \textit{supra} Part II) for "intern-learners," pursuant to the rulemaking authority granted in §214(a) of the FLSA. Section 214(a), entitled "Learners, apprentices, messengers," states, in its entirety,

\begin{quote}
The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 206 [minimum wage provisions] of this title and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.\textsuperscript{4}
\end{quote}

Accordingly, the WHD has the power to pass rules and regulations relating to the employment of learners. While it may seem questionable whether the WHD has the authority to create a new type of learner, the WHD has done exactly this in the past.\textsuperscript{105} In a series of regulations entitled "Employment Under Special Certificate of Messengers, Learners (Including Student-Learners), and Apprentices," the WHD created a

\begin{thebibliography}{99}
\bibitem{}Yamada, \textit{supra} note 4, at 233.
\bibitem{}See, \textit{e.g.}, 29 C.F.R. §§ 520.200–520.412 (2009).
\end{thebibliography}
new category of learners called "student-learners." Unlike messengers, learners, and apprentices, student-learners are mentioned nowhere in the text of the FLSA.

The WHD thus has the authority, pursuant to § 214(a), to create a subcategory of "learners" specifically relating to interns. The remainder of this Part addresses why rulemaking is the best option to deal with the internship problem.

B. WHY RULEMAKING IS THE BEST SOLUTION

The WHD is in a better position than both the courts and Congress to address the unpaid internship problem. While the Supreme Court could conceivably decide a case to resolve the circuit split, there is no way to know when, if ever, it might do so. Even assuming the Court is aware of the problems associated with unpaid internships, the Court cannot simply choose the cases that come to it; it must wait for a case with the proper facts. Even then, the Court grants certiorari only rarely. Moreover, because there is no clear majority or minority approach to FLSA interpretation in the unpaid internship or trainee context, the Supreme Court might not even be able to solve the problem in a single opinion. It is also highly unlikely that Congress could effectively amend the FLSA to address the unpaid internship problem; Congress writes broad statutes and generally does not amend them to address such specific problems. Congress has, however, vested the WHD with the power to administer the FLSA by promulgating rules and regulations that have the force of law. As a result, the WHD must conduct a rulemaking and pass specific and clear regulations regarding unpaid interns. There are many reasons why this is the most prudent course.

First, assuming the courts could make uniform law with respect to unpaid internships, the WHD should be the entity that makes this law. Congress created the Wage and Hour Division to administer the FLSA and has expressly delegated to it rulemaking authority with respect to many portions of the statute, including the power to make regulations.

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106. See id.
107. Student-learners are distinct from full-time students, with respect to which the WHD is granted explicit rulemaking authority. 29 U.S.C. § 214(b). The WHD has passed a series of regulations pursuant to the express grant of authority in § 214(b) entitled “Employment of Full-Time Students at Subminimum Wages.” See 29 C.F.R. §§ 519.1-519.19 (2009).
109. See supra Part II.B.2.
110. See, e.g., 29 U.S.C. § 214; Beck v. City of Cleveland, 390 F.3d 912, 918 (6th Cir. 2004) (“Under the FLSA, the Secretary possesses the authority to issue rules and regulations to implement the Act.” (citing 29 U.S.C. §§ 202, 203 (2006))).
regarding learners and apprentices." With such delegation of authority comes a basic presumption that Congress intended for the agency to fill gaps in the statute. As the Supreme Court has stated,

"The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left ... by Congress." If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."

Even if Congress has not explicitly delegated authority to implement a specific provision or fill a certain gap, it may yet "be apparent from the agency's generally conferred authority ... that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute ... even one about which 'Congress did not actually have an intent' as to a particular result." Thus, given that there are obvious gaps and ambiguities in the FLSA regarding the statute's application to unpaid interns, it may be inferred that Congress would have wanted the WHD to fill in these gaps by promulgating elucidating regulations.

Second, the agency should promulgate this rule because it is the more politically accountable entity (as compared to courts), and therefore, is in a better position to make this kind of decision. Determination of interns' employment status is essentially a policy choice, and such matters of policy are "more properly addressed to legislators or administrators, not to judges." The courts should not be the ones fashioning common law interpretations of the FLSA through case law. Rather, the agency should promulgate clear rules through regulation. As the Supreme Court noted in Chevron,

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which

\[111. \text{See, e.g., 29 U.S.C. \$ 204 (2006) (creating the Wage and Hour Division); id. \$ 214; Beck. 390 F.3d at 918.}
\[113. \text{United States v. Mead Corp., 533 U.S. 218, 229 (2001) (quoting Chevron, 467 U.S. at 845); see also Chevron, 467 U.S. at 844 ("[T]he legislative delegation to an agency on a particular question [may be] implicit rather than explicit.").}
\[114. \text{Chevron, 467 U.S. at 864.}]}
Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.\textsuperscript{115}

Similarly, here, an executive agency ought to make the policy choice regarding whether certain interns are subject to the FLSA or not. This is especially true with an issue, such as unpaid internships, which will affect so many. Notice-and-comment rulemaking would allow employers, interns, and any other interested parties to participate in the decisionmaking process, instead of simply having a court impose a rule.

Moreover, the agency has expertise with the substantive statute. Many questions must be answered in promulgating this regulation, and many competing theories must be considered. The agency must consider the purpose of the statute and make an informed judgment in the context of the statute as a whole.\textsuperscript{116} The agency is in the best position to accomplish this feat because such an undertaking will require the kind of expertise and resources unique to agencies such as the Department of Labor.\textsuperscript{117} This is more reason to infer "that Congress intended its broad grant of definitional authority to the Department to include the authority to answer these kinds of questions."\textsuperscript{118} Moreover, having the agency make this law will promote geographic uniformity: the agency will interpret the FLSA consistently for the whole country and then promulgate a rule accordingly, as opposed to court decisions that are different in different circuits.

Thus, because the WHD is in the best position to clarify the law regarding unpaid interns, it must undertake a rulemaking and promulgate clear regulations with which businesses can easily comply.

IV. PROPOSED RULE

Determining that a rulemaking is necessary is only the first step in achieving meaningful clarification of the law as it applies to unpaid interns. The next step is to determine what the rule should be. In this Part, I argue that the WHD should promulgate regulations creating a new subcategory of the FLSA’s “learner” exception called the “intern-learner,” which will incorporate the six-factor test as an all-or-nothing inquiry.\textsuperscript{119} Section A explains why the WHD’s current regulations

\textsuperscript{115} Id. at 865–66.
\textsuperscript{116} See Walling v. Portland Terminal Co., 330 U.S. 148, 150–51 (1947) (“[I]n determining who are ‘employees’ under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.” (internal citation omitted)).
\textsuperscript{118} Id.
\textsuperscript{119} The WHD should also carefully consider whether a finding that an intern gets school credit
defining and delimiting the scope of the "learner" exception to the minimum wage requirements of the FLSA are inadequate to deal with the internship problem. It then sets forth the proposed "intern-learner" rule. Section B goes on to explain why the text of the FLSA itself, the intent of the Congress that passed it, and sound public policy all support the proposed rule.

A. INADEQUACY OF CURRENT "LEARNER" EXCEPTION TO REGULATE INTERNSHIPS AND PROPOSED NEW "INTERN-LEARNER" CATEGORY

As noted earlier, § 214(a) of the FLSA gives the WHD the authority to pass regulations providing for the employment of "learners" at subminimum wages, although the statute does not define "learners" at all. 120 The WHD has passed several regulations defining and clarifying the "learner" exception and allowing for the employment of learners at a wage of ninety-five percent of the federal minimum wage if the employer obtains a certificate from the WHD. 121 In theory, one might make the argument that the "learner" exception is clear evidence that interns are meant to be regulated by the FLSA and must be paid minimum wage unless their employer obtains a certificate issued by the WHD. In reality, however, the "learner" exception in its current incarnation is of little use in regulating internships because typical internships simply do not fit into this category. The WHD has defined "learners" as follows:

Learner means a worker who is being trained for an occupation, which is not customarily recognized as an apprenticeable trade, for which skill, dexterity and judgment must be learned and who, when initially employed produces little or nothing of value. Except in extraordinary circumstances, an employee cannot be considered a "learner" once he/she has acquired a total of 240 hours of job-related and/or vocational training with the same or other employer(s) or training facility(ies) during the past three years. An individual qualifying as a "learner" may only be trained in two qualifying occupations. 122

The WHD regulations go on to clarify that "[n]o certificates will be granted authorizing the employment of learners at subminimum wage rates . . . in office and clerical occupations in any industry." 123 In order to qualify for a certificate to employ a learner at subminimum wage, the
employer must show, among other things, that "an adequate supply of qualified experienced workers is not available for employment," and that "the experienced workers presently employed in the plant or establishment in occupations in which learners are requested are afforded an opportunity, to the fullest extent possible, for full-time employment." Clearly, it would be a rare internship that fell into this category. The learner exception seems the product of another time, and it is simply not relevant in today's internship market.

However, the purpose and intent of the learner exception is applicable to the internship context. The purpose of the learner exception was to help new workers, unlikely to command minimum wage because of their lack of experience, to secure employment and thus the experience they would need to progress in the workforce. While the Congress that enacted the FLSA could not have anticipated the modern internship economy, today's unpaid interns are analogous to the new workers Congress sought to protect with the learner exception. Interns work for free because they are unable to get comparable jobs without experience. Internships help them get the experience they need and move forward in the workforce. And just as regulations regarding "learners" were needed for all the reasons noted by Congress, unpaid internships must be regulated for all of the reasons noted in Part I. The WHD should therefore pass a regulation creating an "intern-learner" exception to facilitate the regulation of internships. The following are the most important parts of the proposed intern-learner regulation:

1. Definition: The first thing the WHD must do in its rule is set forth a short definition of intern-learner that reflects the realities of modern-day internships. The notice-and-comment rulemaking process will be especially helpful here, as the WHD can use comments from interested parties, such as businesses and interns themselves, in crafting this definition. A proposed definition is as follows:

**Intern-learner** means a worker who is receiving training pursuant to an intern-training program approved by the Administrator in an occupation for which specialized skill (e.g., proficiency in certain computer programs, print media layout, etc.); knowledge (e.g., of important industry executives, current trends, etc.); and experience (e.g., with discretion in dealing with sensitive government or legal information, interfacing with clients, etc.) are necessary. A worker is

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124. *Id.* § 520.404(d).
125. *See infra* Part IV.B.
126. Other parts, such as "When Will Authority To Pay Intern-Learners Subminimum Wage Become Effective?" and "How Will I Be Notified that My Request To Employ Intern-Learners at Subminimum Wages Has Been Denied, and Can I Appeal the Denial?" will likely be very similar to analogous provisions in the regulations for learners and student-learners. *See, e.g.*, 29 C.F.R. §§ 520.409, 520.505 (2009).
no longer considered an "intern-learner" once she or he has completed the intern-training program.

2. Six-Factor Test: The rule should next set forth the WHD’s six-factor test. The rule should state in no uncertain terms that if a contemplated internship program meets all six of these criteria, then an intern in this program is not an employee at all within the meaning of the FLSA, and therefore neither the statute itself nor the intern-learner exception apply. The business would not be required to pay such interns any wages at all.

3. Interns Who Are Employees: The rule should then state that if a contemplated internship program does not meet all six criteria in the now-codified six-factor test, the potential intern is considered an employee within the meaning of the FLSA. The employer would therefore be required to pay the intern minimum wage unless the internship program qualifies for the intern-learner exemption.

4. Applying for and Receiving the Intern-Learner Exemption: Finally, the rule should state that if an intern is considered an employee for purposes of the FLSA (as determined by the six-factor test), the employer can nevertheless apply for an intern-learner exception certificate from the WHD allowing the employer to pay the intern-learner subminimum wage. In order to qualify for the exception, the employer must submit a proposed intern-training program demonstrating that (1) the intern will benefit meaningfully from the training by obtaining skills, knowledge, and/or experience necessary to succeed in the given occupation; and (2) the intern-training program does not displace workers by allowing the company to hire subminimum wage workers to do jobs that it would otherwise have to hire nonexempt employees to perform at minimum wage or above. The application must also state how many interns the employer is requesting to hire at subminimum wage and how long each training program will last. The Administrator will then review the program and, if approved, will grant the employer a certificate to hire interns at eighty-five percent of the minimum wage. The certificate will be good for two years, and the employer does not need to renew its application within the two-year period every time one intern-training cycle ends and another begins, as long as the training program and the number of interns hired per program remains the same. Once an intern is hired pursuant to this certificate, the intern and the employer shall execute a signed agreement setting forth the terms of the internship, including payment of eighty-five percent of the minimum wage, and certifying that the employer is complying with the approved intern-training program. The executed

127. See supra note 61 and accompanying text.
agreement shall be returned to the Administrator no later than five days after the intern begins the intern-training program.

As explained below, both the FLSA itself and public policy support this proposed rule. It is consistent with the text of the statute and the intent of the Congress that passed it. Moreover, it will codify the six-factor test while still allowing employers who do not meet the test to receive the benefits that are afforded to employers of learners, messengers, apprentices, and student-learners. The rule will help students who might not otherwise be able to afford internships by ensuring that the financial impact of such experience is cushioned by some wages and will set an example for states to follow in crafting similar legislation at the state level.

B. SUPPORT FOR RULE

1. Text of the Statute and Congressional Intent

In deciding how the agency should act, the most fundamental place to look for guidance is to the text of the statute itself. It is also important to examine the purpose of the statute, as well as Congress's intent in passing it.

The text of the FLSA indicates that Congress would not have wanted the agency to create a rule exempting interns entirely from the FLSA's coverage. While the statute allows for the payment of learners, apprentices, and full-time students at subminimum wages, it does not mention any analogous category of unpaid workers. As the Supreme Court has noted, the expansive language of the FLSA "leaves no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded."[128]

The purpose of the statute and the intent of those who passed it also support this result. The FLSA itself describes its purpose as follows:

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce...to be used to...perpetuate such labor conditions...; (2) burdens commerce...; (3) constitutes an

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[128] United States v. Rosenwasser, 323 U.S. 360, 363 (1945); see also Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 296 (1985) ("[B]road coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency."); Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 211 (1959) ("[T]he Act has been construed liberally to apply to the furthest reaches consistent with congressional direction."); A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945) ("Any exemption from such humanitarian and remedial legislation must...be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress."); Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984) ("The [FLSA] is a remedial [statute], written in the broadest possible terms so that the minimum wage provisions would have the widest possible impact in the national economy.").
unfair method of competition in commerce; (4) leads to labor disputes...; and (5) interferes with the orderly and fair marketing of goods in commerce...

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.129

As President Roosevelt stated simply when he initiated the legislation, the purpose of the FLSA was to provide “a fair day’s pay for a fair day’s work.”130 In passing the FLSA, Congress sought to protect the nation from “the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.”131 Employers that receive the benefit of the important work of interns while paying them no wages at all surely undermine this important goal. As such, they must be subject to regulation under the FLSA.

In addition to seeking to protect workers, Congress, in passing the FLSA, also sought to protect more broadly the national economy and to prevent market forces from driving down the minimum wage.132 Thus, the FLSA sought to establish minimum standards in the workplace in order to eliminate unfair competition both among employers and also among workers looking for jobs.133 As one House Report summarized,

The wages and hours prescribed apply nationally in each particular industry. There are to be no differentials either between sections of the United States, between industries, or between employers. No employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wage and hour standards higher than those applicable to his competitors. No employee in any part of the United States in any industry affecting interstate commerce need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes.134

Thus, the text of the statute itself as well as congressional intent both support regulation of internships through the proposed rule. The rule will allow businesses to determine more easily whether an intern is or is not an employee and to apply for a special intern-learner exemption for those interns that do qualify as employees. This will leave employers...

133. Carter, 735 F.2d at 13.
with the choice of either structuring their internship programs so that their interns are not employees and thus not subject to the FLSA; to pay minimum wage to those who are employees; or to create an intern-training program so that subminimum wages can be legally paid. These results are consistent with the FLSA's purposes of protecting workers, eliminating unfair competition, and ensuring a "fair day's pay for a fair day's work."

2. Public Policy

Given the broad remedial purpose of the statute, sound public policy also supports regulating interns through the creation of an intern-learner exemption. In particular, public policy weighs in favor of codification in the exemption of the six-factor test as an all-or-nothing inquiry. Clearly stating who would be considered an employee and who would not, by setting forth the six-factor test in a binding regulation, will eradicate the gray area between legal and illegal internships. It will ensure that regulated businesses can easily comply with the law and will assist courts in determining when an intern is an employee under the FLSA. As noted previously, "under the totality of the 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." Not only is the totality of the circumstances approach difficult to apply, it "virtually ensures inconsistent results." Furthermore, the totality of the circumstances approach is "especially punitive towards entry-level job seekers, as it implicitly suggests that the cost of getting a foot in the door must be borne by the worker herself."

Potential interns will benefit from the proposed rule because it will mandate that an internship actually benefit the intern and provide a legitimate learning experience in order to be legal. If an employer does not want to pay its interns minimum wage, it will still have the option of structuring its internship program so that it meets all the factors of the six-factor test. Such employers will still have incentive to hire interns because interns may bring new perspectives to a business, and the employer still has the substantial (although not immediate) benefit of observing a large swath of potential future employees over a prolonged period of time, thus learning much more about them than would be possible from a brief job interview. Hiring an employee who was once an intern is "roughly one-third the cost of recruiting and training a new employee with no prior experience with the particular employer." If

135. Yamada, supra note 4, at 233.
136. Id.
137. Id. at 234.
138. See Gregory, supra note 6, at 241.
139. Id.
the employer wishes to hire an intern who does benefit the business, the employer may still choose to do so but must comply with the FLSA. Such an employer may either pay its intern minimum wage, or develop an intern-training program and obtain a certificate allowing it to pay its intern eighty-five percent of the minimum wage. Paying an intern minimum wage or eighty-five percent of minimum wage is still substantially less expensive than hiring an employee at a higher rate, and the intern will gain considerable experience and make connections without being exploited. Either way, a potential jobseeker will not be forced to take an exploitive unpaid internship just to get the same experience as other jobseekers.

If the WHD does not promulgate a rule clearly mandating that the six-factor test be applied in an all-or-nothing manner to determine whether an intern is an employee, courts may continue to find unpaid internships legal under various other tests, even when the employer is gaining an immediate advantage from the intern. As unpaid internships proliferate, workers are “pressured to work with little or no compensation in the hope of bolstering skills and credentialed experience sufficiently eventually to obtain, full-time compensated employment.” Employers know students need experience. “When jobs are scarce, and students are aggressively seeking every possible way to distinguish themselves, the exploited student interns are in a no-win situation.” Such interns essentially have a choice between “suffer[ing] through the experience, performing uncompensated grunt work,” or reporting the very employer for whom they are hoping to eventually work. A clear policy on unpaid internships will shift some of the onus of compliance to the employer, who will be able to easily understand and follow the law. This will also reduce the importance of unpaid internships, which will benefit low-income individuals who cannot afford to take unpaid positions and therefore lack critical experience on their résumés.

Moreover, allowing willing interns, who have the means, to work for free drives wages down, and thereby circumvents the very purpose of the FLSA and the minimum wage. The FLSA is meant to prevent a “volunteer” from “displac[ing] a bona fide applicant who desire[s] to sell his services at prevailing rates.” As the Supreme Court has noted, if an exception to the FLSA were instituted for employees willing to state that they worked voluntarily, “employers might be able to use superior bargaining power to coerce employees to make such assertions, or to

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140. See supra Part II.B.2.
141. Gregory, supra note 6, at 240.
142. Id. at 262.
143. Id.; see also Greenhouse, supra note 15.
waive their protections under the Act."145 Such an exception would “be likely to exert a general downward pressure on wages in competing businesses.”146 Federal regulation of unpaid internships will curb this effect and will provide model law for states to follow, further remedying the unpaid internship problem.

As long as the law continues to be so unclear, employers may continue to take advantage of and exploit interns as a free source of labor. Employers may “regard unpaid interns as means to reduce, if not to avoid altogether, labor costs. Various employers, rather than placing a student intern in a meaningful position, place the intern into meaningless ‘grunt’ work, to fetch coffee and make copies.”147 Such internships clearly contribute to the displacement of the paid work force.148 Furthermore, employers who do not pay their workforce have a competitive advantage over businesses who do, regardless of the benefits to the interns themselves.149 Once the law is clarified and it becomes clear that interns cannot provide an immediate advantage to an employer, businesses that do pay interns who benefit the business will not have to worry that they are at a disadvantage because other businesses are hiring interns for free. This will promote a healthier economy and will further discourage the displacement of paid workers.

Therefore, the WHD should promulgate a rule that creates an intern-learner category as a subcategory of the learner exception. This rule should codify the six-factor test as a mandatory all-or-nothing test and clarify that if an individual qualifies as an employee under this test, his employer must either pay him minimum wage or develop an intern-training program and obtain permission from the Administrator to pay him subminimum wage. Such a rule would not burden employers significantly because they would be allowed to hire interns at rates lower than the minimum wage, or to structure their internship program pursuant to the six-factor test so that interns can legally be unpaid. At the same time, the rule would protect interns who provide immediate benefit to their employers and allow them to gain valuable experience

146. Id.
147. Gregory, supra note 6, at 242; see also Herzlich, supra note 16 (quoting Debbie Regan, a
location agent in the film and print industries with an internship program, as stating that the only
difference between a regular employee and an intern is that “this ‘employee’ [the intern] generally
requires more hand-holding”).
148. Feeley, supra note 29, at 47 (“[U]npaid internships may preempt or replace paid opportunities
for students. If there were no unpaid interns, for-profit organizations might hire students instead to
meet their workload demands.” (footnote omitted)).
149. Cf. Danneskjold v. Hausrath, 82 F.3d 37, 44 (2d Cir. 1996) (“Where a prisoner’s work for a
private employer in the local or national economy would tend to undermine the FLSA wage scale . . .
the FLSA applies.”).
while still earning some wages. This is consistent with the purpose of the FLSA and with Congress’s intent in passing it.

CONCLUSION

As internships become increasingly prevalent in the United States, they also become increasingly problematic. As more young people participate in internships, more employers come to expect that experience on a résumé. For those that cannot afford to work for free, the expectation of internship experience is a glass ceiling preventing them from upward social mobility. Unpaid internships also displace paid workers and may cause problems even for interns who are willing and able to work for free. Because unpaid internships are so problematic and subject to abuse by employers, they must be closely regulated. However, the current state of the law as applied to unpaid internships is extremely convoluted and unclear. The Wage and Hour Division should therefore conduct a rulemaking and promulgate clear rules regarding unpaid internships. The agency should memorialize its prior opinion letters in a binding regulation, create an intern-learner category under the FLSA, and declare once and for all that the six-factor test is an all-or-nothing requirement. This will benefit interns and businesses alike, will help to equal the playing field, and will chip away at the class divide that is currently plaguing the country.