Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern

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INTRODUCTION

Last September, the Second Circuit handed down a decision that could significantly affect the courts' future interpretations of the scope of Title VII of the Civil Rights Act of 1964 ("Title VII"). In O'Connor v. Davis, the court held that Bridget O'Connor, an unpaid intern for the Rockland Psychiatric Center, was not an "employee" for purposes of Title VII and was therefore precluded from bringing a sex discrimination action under that title. O'Connor's internship at Rockland was a mandatory component of her major in social work for which she was required to perform 200 hours of field work at one of several hospitals designated by her college. As an intern, O'Connor was responsible for attending staff meetings with Rockland employees, meeting with patients both one-on-one and in groups, and documenting the results of these sessions for review by her supervisors.

O'Connor never completed her internship at Rockland. Shortly after her arrival, Dr. James Davis, a psychiatrist employed by Rockland, began tormenting O'Connor with a steady onslaught of verbal assaults. Among Davis's cruder remarks to O'Connor were his reference to her as "Miss Sexual Harassment," his suggestion that O'Connor and other women participate in an "orgy," and an instruction that O'Connor remove her clothing in preparation for a meeting with him. O'Connor left Rockland after her supervisors failed to deal adequately with Davis's abusive conduct.

O'Connor sued Rockland, claiming that she was sexually harassed in violation of Title VII. Without addressing the substantive merits of O'Connor's Title VII claim, the district court granted Rockland's motion for summary judgment dismissal, based in part on the court's finding that O'Connor had received no remuneration for her work at Rockland. The Court of Appeals affirmed.

3. Id. at 115.
4. Id. at 113.
5. Id.
6. Davis began harassing O'Connor within two days of her arrival at Rockland.
7. Id. at 113-14.
8. The court found that although O'Connor reported a good deal of Davis's conduct to her supervisor, Rockland "did nothing to remedy the situation." Id. at 114.
9. Id.
10. See id. at 116.
district court’s dismissal of O’Connor’s Title VII claim, Judge Walker described O’Connor as a “volunteer” who received no “benefits” for her work at Rockland. Consequently, she was not a “hired party”—that is, she was not an employee of Rockland and, therefore, was not protected by Title VII. By classifying O’Connor as a “volunteer,” the court appeared to draw a bright line rule that an unpaid intern can never be considered an “employee” under Title VII. Such a rule, while good for judicial economy, may overlook the fact that most unpaid internships are anything but “voluntary.”

O’Connor is one of many cases that has sought to lend clarity to what has evolved as a murky Title VII jurisprudence, with much of the confusion centering around the issue of who should be regarded as an “employee” for purposes of the statute. Title VII circularly defines the term “employee” as “an individual employed by an employer.” The statute’s legislative history is similarly unhelpful, providing few clues as to where Congress intended to limit the term “employee.”

11. Id. at 112.
12. Id. at 116. “Volunteers” are not protected by Title VII because they are “not susceptible to the discriminatory practices which [Title VII] was designed to eliminate.” Smith v. Berks Community Television, 657 F. Supp. 794, 795 (E.D. Pa. 1987); see also Leda E. Dunn, Note, “Protection” of Volunteers Under Federal Employment Law: Discouraging Voluntarism?, 61 Fordham L. Rev. 445, 460-61 (1992) (commenting that courts have not treated unpaid volunteers as employees under Title VII).
14. See infra Part I.A (explaining that in today’s competitive job market, many employers require that job applicants acquire work experience before applying, and that often internship positions are unpaid simply because the demand for them is so great that employers can avoid having to offer salaries).
15. See Patricia Davidson, The Definition of “Employee” Under Title VII: Distinguishing Between Employees and Independent Contractors, 33 U. Cin. L. Rev. 203, 206 (1984) (observing that Congress’s vagueness in defining the term “employee” has left courts with “an almost barren legislative history with which to interpret a term that is the basic component of the jurisdictional requirement of the statute”); Dunn, supra note 12, at 458-61 (tracing judicial efforts to define who constitutes an “employee” under Title VII).
16. 42 U.S.C. § 2000e(f) (1994). This section reads in pertinent part:
   The term “employee” means an individual employed by an employer, except that the term “employee” shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.
   Id.
17. See Davidson, supra note 15, at 205 (noting that although the legislative history of Title VII is “replete with references to the goal of implementing a national policy of equal opportunity for employment free from wrongful discrimination,” there is little on record that reveals the intended scope of that statute). At least one court has proposed that the term “employee” should be understood according to its common dictionary meaning, but there is limited support for this conclusion. See Graves v. Women’s Prof’l Rodeo Ass’n, 907 F.2d 71, 73 (8th Cir. 1990) (reasoning that because the legislative history suggests that the authors of Title VII intended that the
Despite the uncertainties courts have encountered in defining Title VII's jurisdictional limits, one fairly consistent trend has been to draw Title VII's protections expansively, so as to vindicate the statute's principal aims of eradicating unlawful discrimination in the workplace.\textsuperscript{18} Thus, Title VII has been found to cover, \textit{inter alia}, former employees,\textsuperscript{19} an attorney who was denied partnership status by her law firm,\textsuperscript{20} and part-time workers.\textsuperscript{21}

Given the trend favoring an expansive reading of Title VII, the Second Circuit's ruling that all unpaid interns are excluded from protection under Title VII appears misplaced.\textsuperscript{22} In today's job market, an unpaid internship can represent a crucial step in an individual's pursuit of a livelihood.\textsuperscript{23} Moreover, Title VII's language does not indicate that the statute was intended to cover only salaried employees.\textsuperscript{24}

This Note proposes that if Title VII's goals are to be advanced in the twenty-first century, courts must acknowledge the significant long-term benefits that accompany many unpaid internships and that interns rely on in exchange for their services.\textsuperscript{25} As career experts are acknowledging with increasing regularity, "[w]ith some internships, the payoff is not reflected in the paycheck."\textsuperscript{26} Rather than drawing an arbitrary line around wages, which threatens to unfairly exclude unpaid interns in contravention of Title VII's intent, this Note proposes alternative methods by which courts may measure employee status under Title VII.

Part I analyzes current employment trends, specifically the role that unpaid internships play in individual career development. Part I points to the blurry, if not illusory, distinction between paid and unpaid interns, and demonstrates that both employees and employers

\textsuperscript{18} See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities . . . . "); Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983) ("[T]he term employee in Title VII 'must be read in light of the mischief to be corrected and the end to be attained.'" (quoting Dunlop v. Carriage Carpet Co., 548 F.2d 139, 145 (6th Cir. 1977))); Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979) ("[B]ecause [Title VII] is remedial in character, it should be liberally construed, and ambiguities should be resolved in favor of the complaining party.").

\textsuperscript{19} See supra notes 2-12 and accompanying text.

\textsuperscript{22} See infra Part I.A.

\textsuperscript{25} See infra note 14 and accompanying text.

\textsuperscript{26} Jay Hefflin & Richard Thau, \textit{The Internship Experience}, in Peterson's Internships 3 (18th ed. 1997); see Mary Beth Marklein, \textit{Interns Invest Time in Future}, USA Today, June 7, 1995, at 5D (commenting that sometimes the long term rewards of an unpaid internship are more important than salary).
reap substantial benefits from an internship experience. Part II explores Congress's intent in enacting Title VII. It first discusses the broad policy goals behind Title VII, and then turns to the specific question of how Title VII defines the term "employee." Part III explains that a court will only treat a person as an "employee" under Title VII if there is evidence that an "employment relationship" existed between the person and his putative employer. While courts have liberally construed the "employment relationship," virtually all courts require that an employee receive some "compensation" in exchange for services rendered. Part III then reviews the three judicial tests under which courts have analyzed employee status in the context of "independent contractor" cases—that is, cases where a person is alleged to be an independent contractor rather than an employee and thus not protected by Title VII. These tests are useful for determining what courts have emphasized in defining who is an employee under Title VII.

Lastly, in part IV, this Note argues that many unpaid interns receive benefits that constitute the "compensation" needed to establish an employment relationship. It further argues that the "hybrid" test that courts use to analyze "independent contractor" cases is applicable to other types of cases involving issues of employee status; under this comprehensive test, unpaid interns may be employees. This Note then proposes that even if courts decline to apply the "hybrid" test to cases involving unpaid interns, they should consider an unpaid intern's employment realities before determining whether an unpaid intern is an employee under Title VII.

I. UNPAID INTERNSHIPS: BENEFITS TO INTERNS AND EMPLOYERS

Internships, including unpaid internships, play a significant role in today's job market. This section explores the ways in which internships help to further individual career ambitions and examines the benefits that employers derive from sponsoring unpaid interns. It concludes that both the interns and their employers receive valuable consideration from the internship experience.

A. The Value of Internships in Today's Job Market

Employment realities have changed dramatically in recent years.27 As the job market becomes increasingly specialized and diverse,28 job applicants are likely to find significantly heightened expectations from their potential employers. Many employers require that candidates

28. See Fram, supra note 27.
for skilled-labor positions, even entry-level positions, include work experience in the field among their qualifications.\textsuperscript{29} Recent graduates are discovering that "any attempt to use a college degree alone as a route to career stability and success is likely to be met with frustration."\textsuperscript{30}

Moreover, heightened employer expectations have created a "catch-22" in today's job market: Employers tend to hire only experienced personnel, but college graduates possess little applicable experience.\textsuperscript{31} This trend is particularly prevalent in certain highly competitive career fields such as entertainment, electronic media, and sports.\textsuperscript{32} College graduates are not the only ones who stand to benefit from pre-graduation work experience. A survey of recent law school graduates revealed that performance of a "legal clerkship"\textsuperscript{33} while in law school has a "dramatic effect" on a law student's ability to obtain his or her first full-time legal position upon graduation.\textsuperscript{34} Other graduate students have similarly emphasized the importance of obtaining work experience prior to completing their degree.\textsuperscript{35}

To facilitate the increasingly difficult transition from college into the job market, colleges and universities, and employers themselves, have encouraged students to seek internships while in college, graduate school, during the summer, or even after graduation.\textsuperscript{36} Students have recognized the value of internships as well: Today, nearly three-

\textsuperscript{29} See Heflin & Thau, supra note 26, at 3; Mark Oldman & Samer Hamadeh, America's Top Internships at xiii (1997 ed. 1996) ("For many employers, good grades and the right college major are just not enough; they seek employees who have paid their dues in the working world.").

\textsuperscript{30} Fram, supra note 27, at 42; see also Paul Osterman, The Great American Job Hunt, Current, Mar. 1, 1995, at 13 ("A staple of the Generation X story is the young person who invested in four years of college and yet finds himself in a job well below what he expected, both in terms of what it demands and what it pays.").

\textsuperscript{31} See Heflin & Thau, supra note 26, at 3.

\textsuperscript{32} See Marklein, supra note 26.

\textsuperscript{33} Donald N. Zillman & Vickie R. Gregory, Law Student Employment and Legal Education, 36 J. Legal Educ. 390, 391 (1986). A legal clerkship is a position at a law firm, corporation, or government agency. Id.

\textsuperscript{34} See Jill Chaifetz, The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School, 45 Stan. L. Rev. 1695, 1708 (1993) (citing Zillman & Gregory, supra note 33, at 391). The Zillman and Gregory study also reported that many students felt that their efficiency in law school increased during the time of their clerkship, as did their appreciation of their academic work. Zillman & Gregory, supra note 33, at 398-99. Although the aforementioned study surveyed students working in paid positions, Chaifetz notes that "paid and unpaid internships are similar in some respects, including the types of legal work that students do." Chaifetz, supra, at 1709.


\textsuperscript{36} See Marklein, supra note 26 (reporting that career experts have advised that unpaid internships are "worth [the] financial sacrifice"); Oldman & Hamadeh, supra note 29, at 65, 304, 357 (describing internships at The Carter Center, the Surfrider
quarters of all college students complete an internship before they graduate, compared with 1 in 36 who interned in 1980.37

While one apparent advantage to interning, particularly while in college, is to earn money, unpaid internships are becoming increasingly prevalent and are recognized as a source of invaluable on-the-job training.38 While students may earn academic credit for interning, and some are academically required to complete an internship program prior to graduation,39 internships need not be for credit, because for many interns the “payoff” comes in the form of valuable experience gained by working in a professional environment.40

While certain industries, such as the entertainment industry, are known to commonly employ interns,41 the range of internships available in today’s job market spans dozens of career fields, including public, private, and charitable organizations.42 And although some of these internships may involve an element of “grunt work,”43 career experts stress that internships are increasingly “powerful conduit[s] to the best jobs.”44

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37. Oldman & Hamadeh, supra note 29, at Author’s Note.
38. See Heflin & Thau, supra note 26, at 3.
39. See, e.g., Diane Harney, Why Businesses Should Pay for Student Internships, Puget Sound Bus. J., June 6, 1997, at 11 (explaining that in the communications department at Pacific Lutheran University, every student is required to complete an internship); Oldman & Hamadeh, supra note 29, at xvi (noting that one student earned academic credits worth about $30,000 in tuition through his “nonpaying internship”); Eric L. Smith, Breaking into the Biz, Black Enterprise, Dec. 1996, at 93-94 (providing potential applicants with a list of available internships in the entertainment industry, most of which are unpaid, but for which student-interns earn academic credit).
40. See Heflin & Thau, supra note 26, at 3.
41. The “Late Show with David Letterman” and “MTV” have two of the more notable and sought after internship programs in the entertainment world. See Oldman & Hamadeh, supra note 29, at 175, 211.
42. America’s Top Internships provides an extremely diversified listing of available internship opportunities. For example, it offers descriptions of the Elite Model Management Corporation internship, which provides an opportunity for interns to “assist[] employees in every capacity, from the clerical duties to the actual work of the booking agents,” Oldman & Hamadeh, supra note 29, at 101. The Carter Center, “a think tank to improve the quality of life for people around the world,” where interns “work[] with world leaders and dignitaries to promote democracy, resolve conflicts, protect human rights, eradicate disease, improve agriculture in developing countries, and tackle social problems in urban areas,” id. at 65, and an internship at the Smithsonian Institution, where interns may be placed “among 40 museums, administrative offices, and research programs,” id. at 278. All of the above are unpaid internships.
43. Stephen E. Frank, Workplace: Taking Out the Garbage, Walking the Boss’s Dog and Other Interns’ Tales, Wall St. J., July 19, 1994, at B1. As an example of “grunt work,” Frank recounts the story of one intern whose supervisor asked him to load his own car with leaking bags of refuse and then drive around until he found a dumpster. Id.
44. Oldman & Hamadeh, supra note 29, at xiii.
In addition, eager applicants hoping to thrust a foot through the proverbial door rapidly fill available internships, including unpaid positions. One intern admits to having “lived essentially (like) a bum” while working without pay at ABC’s “Nightline” in the hope of realizing what she regarded as a “once-in-a-life chance.” Another worked from 6 P.M. to 2 A.M. at a bar to support himself during his unpaid internship at MTV. Ultimately, individuals who choose to make such sacrifices do so primarily because they identify an internship as the “most bankable credential you can put on a resume.” Given the axiom that “experience is the best teacher,” many people have found internship programs to be the ideal way to get an early initiation into the workforce.

B. Benefits Employers Derive From Unpaid Interns

Interns are not the only ones who stand to gain from an internship. Employers who sponsor internships derive significant benefits from interns, particularly unpaid interns whose work has been cynically characterized as a form of “slave labor.” In many organizations, there is little discernable difference in job description between paid and unpaid internship positions. This increasingly blurred distinction has raised questions regarding the appropriateness of denying interns salary, and has even prompted labor disputes with unions accusing employers of attempting to skim costs by replacing union employees with unpaid interns. In short, unpaid interns are not unpaid due to some qualitative difference in the type of work performed, but because there is an ample supply of young laborers who are willing to work “for nothing.”

45. Marklein, supra note 26.
46. Id.
47. Oldman & Hamadeh, supra note 29, at xiii (quotations omitted).
48. Smith, supra note 39, at 93.
50. See, e.g., Frank, supra note 43 (citing one MTV executive as acknowledging that paid and unpaid interns have “similar responsibilities”); Marklein, supra note 26 (reporting that in some of the more highly competitive fields, employers “can get away without paying people... because the competition’s stiff”) (quotations omitted); Prato, supra note 49 (stating that radio and television stations would pay interns but for the fact that students are “lined up [and] willing to work for free”) (quotations omitted).
51. See Harney, supra note 39, at 11 (arguing that because interns provide valuable services for employers, and many interns must endure serious economic hardship in order to maintain their unpaid position, few employers are justified in denying pay to interns).
52. See Robert Feder, Unpaid TV Interns Prompt Union Static, Chi. Sun-Times, June 23, 1988, at 65.
53. See supra note 50 and accompanying text.
54. Conte, supra note 27.
Despite acknowledgment that interns perform the work of regular employees, employers have refused to characterize them as such when doing so would require the employer to provide an extra benefit to the intern. For example, the Fair Labor Standards Act ("FLSA") requires that employers pay their employees minimum wage. The Department of Labor has waived this requirement with respect to "trainees," however, if the employer derives no "immediate advantage" from the putative trainee's services. Although many employers continue to classify their unpaid interns as "trainees" for purposes of the FLSA, the typical internship experience belies the statutory requirement that employers derive no benefit from their unpaid interns. Thus, notwithstanding the tendency of many employers to view themselves as performing a gratuitous service for their interns and receiving no consideration in return, the facts paint a considerably different picture.

Interns can be a valuable resource and have made significant contributions in a wide range of fields. As one small business owner recently commented when referring to a pair of unpaid

56. Id. § 206.
57. Wage and Hour Division, U.S. Department of Labor, Employment Relationships Under the Fair Labor Standards Act (WH Pub. 1297, 1985); see also Kelly Jordan, Note, FLSA Restrictions on Volunteerism: The Institutional and Individual Costs in a Changing Economy, 78 Cornell L. Rev. 302, 315-16 (1993) (reciting the criteria used to distinguish "trainees" from "employees" under the FLSA). The requirement that employers receive no immediate advantage from the trainee's services is only one of six requirements that an individual must satisfy to qualify as a "trainee." Id. Collectively, the requirements suggest that the person must be doing the service for substantially educational purposes, with the employer functioning more as an educator than an employer. See id.
58. See Prato, supra note 49 (quoting Verne Stone, Professor Emeritus at the University of Missouri School of Journalism, who notes that the issue of payment versus non-payment in journalism rests more on "supply and demand" than on substantive differences in responsibility). Two issues arise from this discussion. The first question is whether all unpaid interns, given the significant contributions they provide for employers, ought to be compensated in fairness to both the interns and the employer's competition. The latter may be placed at a competitive disadvantage when forced to pay for the same labor that an intern performs for free. See supra note 57 and accompanying text; see also Donald T. O'Connor, The Price of Free Labor, A.B.A. J., Jan. 1997, at 78 (1997). Secondly, given the enhanced role of internships in individual career development, Congress might consider amending the FLSA by easing minimum wage restrictions to accommodate employers who employ certain types of laborers at sub-minimum wage. Under a more relaxed minimum wage regime, employers would be less concerned with reprisal under the FLSA, and consequently sponsor greater numbers of unpaid interns, and other forms of "volunteer" labor. See Dunn, supra note 12, 463-66. But see Harney, supra note 39, at 11 (arguing that employers should be required to pay interns because of the substantial benefit they gain from internships and to prevent hardship to the interns). A comprehensive treatment of these issues is beyond the scope of this Note.
59. See supra note 49 and accompanying text.
60. See, e.g., Oldman & Hamadeh, supra note 29, at xv (reporting that interns at 3M and Reebok have contributed to substantive projects); Frank, supra note 43 ("The Wall Street Journal's internship program ... [is] a full-body plunge into a chilly sea of journalistic responsibility . . . ."); Karl, supra note 35, at 15 (noting that interns can be
ADAPTING TITLE VII

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II. **Title VII and the Statutory Scope of Covered “Employees”**

This part provides a brief introduction to Title VII of the Civil Rights Act of 1964 ("Title VII"), including Congress's intent in enacting anti-discrimination legislation in the employment sphere and Title VII's jurisdictional limits. This part then turns to the legal history of Title VII in search of an answer to the question of who is a covered "employee" under Title VII.

A. **Title VII Generally**

Before turning to the question of who is an “employee” under Title VII, it is useful to first explore Congress's goals in enacting Title VII. This section reviews the legislative history and explains how sexual harassment has come to be defined as a form of sex-based discrimination, prohibited by Title VII.

1. **Legislative History**

Congress enacted Title VII as part of a comprehensive Civil Rights Act that was designed to address the serious problem of racial discrimination in American society. Although Title VII prohibited only racial, ethnic, and religious discrimination in its original proposed form, a late-hour amendment included the insertion of the word “sex” into the bill. Thus, Title VII, in its current form, expressly forbids employers from discriminating on the basis of race, color, religion, sex, or national origin. Moreover, Title VII features ancillary prohibi-

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70. See Charles A. Sullivan et al., Employment Law 473 (1993) (observing that Title VII of the Civil Rights Act of 1964 was enacted to deal with "the pervasive problem of employment discrimination"); Charles & Barbara Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act passim (1985); Suzanne Sangree, Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight, 47 Rutgers L. Rev. 461, 481 (1995) (noting that the Civil Rights Act was "passed in response to the mounting popular demand to extend constitutional equality protections to African-Americans").
71. See Whalen & Whalen, supra note 70, at 115-18. Ironically, the Smith Amendment, which called for inclusion of sex among the protected categories, was intended to derail Title VII. Id. at 116. Representative Howard W. Smith of Virginia, a staunch opponent of the anti-discrimination bill, introduced the amendment as part of a plan to ruin the bill. Id. at 115-16. Smith assumed that his proposal would pass in the Judiciary Committee, but he was certain that many Congressmen would oppose a bill that gave women equal job rights with men, thus making the resolution so controversial that it would be voted down either in the House or Senate. Id. The plan backfired when too many Congressmen felt compelled to "demonstrate their support for motherhood," and voted in favor of the resolution that would eventually become Title VII. Id. at 118.

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,
tions aimed at combating discrimination in the workplace. These include a prohibition of retaliating against an employee for charging an employer with discriminatory conduct, and a prohibition against publishing advertisements that indicate a prohibited preference. Moreover, these prohibitions apply to agents of an employer as well as the employer itself. In short, the authors of Title VII intended to eliminate discrimination in employment by passing a law that would declare "the right of persons to be free from [improper] discrimination." In addition, Title VII's protections were intended to be comprehensive and not diluted by concerns for judicial economy, which might otherwise encourage a narrower reading.

2. Extension of Title VII to Sexual Harassment Claims

Title VII specifically forbids employers from firing or refusing to hire an individual based on protected characteristics such as race and sex, and further mandates that these characteristics are not to be considered with respect to the "terms, conditions, or privileges of em-

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely effect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

74. Id. § 2000e-3(a); see also Sias v. City Demonstration Agency, 588 F.2d 692, 694-96 (9th Cir. 1978) (holding that the Title VII provision prohibiting retaliation against persons filing discrimination complaints protects employees who file a discrimination complaint against their employer, even if there is a reasonable mistake in the allegation); Robert Keith Shikiar, Title VII Retaliation Claims, 57 Geo. Wash. L. Rev. 1168 (1989) (discussing remedies available under Title VII for persons retaliated against for reporting employment discrimination); see generally Douglas E. Ray, Title VII Retaliation Cases: Creating a New Protected Class, 58 U. Pitt. L. Rev. 405 (1997) (reviewing the retaliation provision, including scope, methods of proof, and remedies).
75. 42 U.S.C. § 2000e-3(b); see also Hailes v. United Air Lines, 464 F.2d 1006, 1007-08 (5th Cir. 1972) (finding that a "Help Wanted—Female" advertisement violated Title VII because Title VII expressly prohibits publication of advertisements indicating a preference based on sex); Sangree, supra note 70, at 522 (explaining that an advertisement for "men only" violates Title VII).
78. See, e.g., Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1049 (3rd Cir. 1977) ("The congressional mandate that the federal courts provide relief is strong; it must not be thwarted by concern for judicial economy.").
The "terms, conditions, or privileges" clause has been used to place sexual harassment claims within Title VII's jurisdiction. This is generally accomplished in one of two ways: the employee may either allege that the employer engaged in "quid pro quo" sexual harassment, or she may claim that the employer created a "hostile work environment." A quid pro quo plaintiff typically alleges that the employer conditioned employee benefits on compliance with sexual demands. In a hostile work environment case, the employee claims that the employer has created a hostile environment in which the "day-to-day working environment has been polluted with verbal or physical abuses." Each of these two forms of sexual harassment is "[w]ithout question" a form of sex-based discrimination, and therefore a violation of Title VII.

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80. See id.; see also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (finding that by creating a sexually hostile work environment, the employer had discriminated against the employee in the "terms, conditions, or privileges" of employment, thereby violating Title VII); Hishon v. King & Spalding, 467 U.S. 69, 74-75 (1984) (holding that an implicit promise that an associate in a law firm would be considered for promotion to partner in a law firm was included among the "terms, conditions, or privileges" of employment protected by Title VII). 81. See, e.g., Meritor, 477 U.S. at 64 (holding that the phrase "terms, conditions, or privileges of employment" encompasses the "entire spectrum of disparate treatment," not just "economic" or "tangible" discrimination (citations omitted)); Tomkins, 568 F.2d at 1045 (finding illegal sex discrimination where employer made compliance with sexual demands a condition of employment). 82. See Alba Conte, Sexual Harassment in the Workplace: Law and Practice § 2.2 (1990). 83. Id.; see also Henson v. City of Dundee, 682 F.2d 897, 910-11 & n.22 (11th Cir. 1982) (noting that quid pro quo harassment usually involves a situation in which a supervisor demands sexual consideration in exchange for employment benefits); Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc., 755 F.2d 599, 603-04 (7th Cir. 1985) (finding that quid pro quo sexual harassment had occurred when plaintiff was pressured to submit to sexual advances that amounted to an "additional[] humiliating condition" of her continued employment); Laura E. Fitzrandolph, Comment, Title VII—Employer Liability for Sexual Harassment, 64 Geo. Wash. L. Rev. 1168, 1169-70 (1996) ("The quid pro quo theory of sexual harassment requires a plaintiff to show that a tangible job benefit or privilege is conditioned on the plaintiff succumbing to another employee's sexual advances or that adverse consequences will result from a refusal to comply."). Fitzrandolph reviewed five criteria a plaintiff must satisfy to create a showing of quid pro quo sexual harassment. Id. 84. Conte, supra note 82, at § 2.2; see Meritor, 477 U.S. at 65 (finding that prohibited sexual misconduct constitutes sexual harassment "whether or not it is directly linked to the grant or denial of an economic quid pro quo, where 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment'" (citations omitted)); see also Fitzrandolph, supra note 83, at 1170 (explaining that only those plaintiffs who can establish a pattern of harassment that was so "severe or pervasive" that it "created an abusive working environment" will triumph under a "hostile work environment" theory). 85. Meritor, 477 U.S. at 64. In Meritor the Court held that a claim of "hostile environment" sex discrimination is actionable under Title VII. Id. at 73.
B. Title VII's Definition of "Employee"

Although Title VII is specific regarding certain elements of its jurisdictional scope, it is remarkably vague in defining who constitutes an "employee." Title VII defines the term "employee" as simply "an individual employed by an employer." While this definition provides scarce insight on where to draw the line defining the class of protected persons, it is generally accepted that Congress intended Title VII to be understood in the broadest possible terms.

Additionally, the statute and the legislative history contain two possible clues as to Congress's intent regarding who constitutes an employee. First, Title VII is specific as to those workers who may not be deemed an "employee" under Title VII. This group includes public officials, any person serving on a public official's staff, an appointee to a public official's office who is charged with policy-making, or an immediate advisor to a public official. Given the specific statement of who is exempted from consideration as an employee under Title VII, one might infer that beyond those named exceptions, "Congress intended to cover the full range of workers who may be subject to the harms the statute was designed to prevent." Thus, the word "employee" might arguably be interpreted as broadly as is reasonably possible in order to satisfy Title VII's legislative intent.

Secondly, Title VII's legislative history reveals that one of the principal authors of the statute intended for the word "employer" to be understood by its "common dictionary meaning, except as expressly qualified by the act." Some courts have inferred from this statement that the term "employee" must also be understood according to its

86. For example, Title VII only applies to employers with fifteen or more employees. See 42 U.S.C. § 2000e(b).
87. Id. § 2000e(f).
88. See, e.g., Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979) ("[Because Title VII is remedial in character, it should be liberally construed, and ambiguities should be resolved in favor of the complaining party."); see also Armbruster v. Quinn, 711 F.2d 1332, 1339-42 (6th Cir. 1983) (concluding that Title VII would regard employees of a subsidiary corporation as employees of the parent corporation rather than independent contractors because the Act was intended to cover "the full range of workers who may be subject to the harms the statute was designed to prevent"); Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978) ("The elimination of discrimination in employment is the purpose behind Title VII and the statute is entitled to a liberal interpretation." (quoting Hearth v. Metropolitan Transit Comm'n, 436 F. Supp. 685, 689 (D. Minn. 1977))); Nancy E. Dowd, The Test of Employee Status: Economic Realities and Title VII, 26 Wm. & Mary L. Rev. 75, 75 (1984) (commenting that "courts have liberally interpreted the substantive and procedural provisions of Title VII to ensure the achievement of [statutory] goals").
90. Id.
91. Armbruster, 711 F.2d at 1339.
92. See id. at 1340.
common dictionary definition. Reliance on the dictionary meaning favors a broad reading of the term "employee": Webster's Dictionary defines an "employee" as "[o]ne who works for another in return for a salary, wages, or other consideration." That definition invites a comprehensive understanding of the term "employee" for purposes of Title VII in that the word "consideration" can refer to a number of things besides salary.

Despite these possible clues, Congress's specific intent regarding what limitations should be placed on the term "employee" remains a source of confusion. Given the sparse legislative history and lack of a firm statutory directive, the question of who constitutes an employee has, by default, been left for judicial resolution. As courts grapple with that question, they face the arduous challenge of delimiting clear boundaries to Title VII, while ensuring the proper achievement of the statute's critical goals.

III. Judicially Created Tests for Defining Employees Under Title VII

Courts have applied different standards for determining who is an employee under Title VII. The issue most often arises in cases where a court must decide whether a person is an employee or an independent contractor, with only the former being entitled to Title VII pro-

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94. See Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990) (noting that the legislative history of Title VII explicitly provides that the dictionary definition should govern the interpretation of "employer" under Title VII, and therefore the term "employee" should be treated similarly); see also Haavistola v. Community Fire Co. of Rising Sun, 6 F.3d 211, 221 (4th Cir. 1993) (citing Graves as support for the proposition that dictionary definitions should govern interpretation of the words "employer" and "employee").

95. See Haavistola, 6 F.3d at 220 (holding that the type of compensation a putative employee must receive in order to have had adequate consideration to enter into a bona fide employment relationship is not well defined, and therefore must be decided on an ad hoc basis). But see Graves, 907 F.2d at 73-74 (citing Webster's Third New International Dictionary as support for its finding that a rodeo racer was not an "employee" of a nonprofit association that organized female rodeo contestants and sanctioned rodeo events).


97. Applying the legal definition of "consideration" would almost certainly support a broader reading of the word "employee." See Randy E. Barnett, Contracts: Cases and Doctrine 669 (1995) (explaining that under basic contract law, "consideration" can be defined simply as one's "motive" in making a promise and that a person may have an infinite number of valid motives when making a promise).

98. See Davidson, supra note 15, at 203 (discussing the various ways in which courts have grappled with the question of whether a worker is an employee or an independent contractor); Dowd, supra note 88, passim (discussing different standards courts have used to determine who qualifies as an employee under Title VII); Dunn, supra note 12, at 470 (noting a discrepancy between the courts' refusals to classify volunteers as employees under Title VII and the statute's remedial goals).

99. See infra Part III.A.

100. See, e.g., Armbruster v. Quinn, 711 F.2d 1332, 1341-42 (6th Cir. 1983) (finding certain "manufacturer's representatives" to be employees, rather than independent
tection. In these cases, a court’s analysis relies heavily on common law principles of agency, particularly the employer’s “right to control” the regular activities of the putative employee.101 When a case requires distinguishing an employee from other non-employees besides independent contractors, however, courts rely less on common law tests and more on the presence or absence of an ordinary “employment relationship.”

This part begins by surveying the three principal tests that courts have used to distinguish employees from independent contractors: the right to control test, the economic realities test, and the “hybrid” test, which incorporates the first two. Although these tests might be limited to the “independent contractor” context, they are useful to explore what courts consider in determining employee status. This part then explains that, in cases involving employee status generally, many courts eschew common law tests in favor of the more fundamental inquiry of whether an “ordinary employment relationship” exists between parties. The scope of the “employment relationship” may be interpreted broadly to comport with the legislative goals of Title VII, but as this part explains, courts have generally insisted that an employment relationship feature the exchange of labor for some “compensation.” The term compensation, however, may be susceptible to multiple meanings.

A. Judicial Treatment of Independent Contractors Versus Employees

Although courts have devoted considerable attention to the question of employee status under Title VII, most of the cases addressing this issue have focused on the specific problem of separating employees from independent contractors.102 To aid in this inquiry, courts have devised a series of tests rooted in the common law of agency.103 These tests, while arguably less applicable outside the limited context

contractors under Title VII); Cobb v. Sun Papers, Inc., 673 F.2d 337, 341-42 (11th Cir. 1982) (holding that a janitor could not sue his employer under Title VII because he was an independent contractor, not an employee).

101. At common law, independent contractors were not considered employees because they were not subject to the same degree of control as regular employees, and control was considered a “basic ingredient” in the employer-employee relationship. See Davidson, supra note 15, at 207-08.

102. See id. at 204 (describing the “recurring problem” courts have faced in distinguishing independent contractors from employees under Title VII); Dowd, supra note 88, at 75-77 (describing the tension courts have faced in upholding Title VII’s goals while remaining faithful to common law principles). Independent contractors, broadly defined, are people who work for themselves and therefore are not employees under Title VII. See Wilde v. County of Kandiyohi, 15 F.3d 103, 104 (8th Cir. 1994) (citing Spirides v. Reinhardt, 613 F.2d 826, 829-30 (D.C. Cir. 1979)).

103. See Dowd, supra note 88, at 80 (“The classic formulation of the test [for an employment relationship] is stated in section 220 of the Restatement (Second) of Agency, which distinguishes between servants or employees and independent contractors.”).
of “independent contractor” cases, are nonetheless useful for analyzing the factors courts have considered when defining employment relationships generally. The three principal tests that courts have relied on in the independent contractor context are reviewed below.

1. The Right to Control Test

Courts have traditionally used the “right to control” test to distinguish between employees and independent contractors. Courts applying this test have examined the “right to control” reserved by the person for whom the work is being done, “not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished.” Under the right to control test, it is the “element of control that distinguishes the employer-employee relationship from the independent contractor relationship,” with “control” being viewed “as a relative factor . . . judged not by its actual exercise but rather by the employer’s authority to use it.” This test has been rejected by most courts because, by promoting a “limited, mechanistic analysis” of the employment relationship, it tends to exclude the greatest number of persons from Title VII coverage. For example, courts relying on a right to control analysis might exclude workers from protection under Title VII simply because they are paid on commission or work flexible hours to accommodate clients, while precluding a fuller examination of “the nature of the interaction between [the] workers and the employer.”

104. See infra Part III.B.

105. This statement is particularly true with respect to the “economic realities” test, discussed infra Part III.A.2, and the “hybrid” test, discussed infra Part III.A.3. These tests tend to focus less on the employer’s “right to control” and more on the putative employee’s economic necessity in performing services for the employer. Thus, these tests are more easily transferable to the broader context of whether an employment relationship exists in general, as opposed to the narrower context of whether a person is an employee or an independent contractor.

106. 1 Matthew Bender, Employment Discrimination § 4.02, at 4-11 to -12 (2d ed. 1997).

107. Smith v. Dutra Trucking Co., 410 F. Supp. 513, 516 (N.D. Cal. 1976), aff'd, 580 F.2d 1054 (9th Cir. 1978) (quoting NLRB v. Phoenix Life Ins. Co., 167 F.2d 983, 986 (7th Cir. 1948)). For a discussion of how courts have applied the traditional “right to control” analysis, see Dowd, supra note 88, at 80-86.

108. Davidson, supra note 15, at 207. One who hires an independent contractor contracts for a specified result, and therefore exercises “little or no control over the execution of the job.” Id.


110. Id. at 83; see also 1 Matthew Bender, supra note 106, § 4.02, at 4-12 (characterizing the right to control test as the “most stringent” of the tests for distinguishing between employees and independent contractors).

111. Dowd, supra note 88, at 85.
2. The Economic Realities Test

In response to the highly rigid right to control test, the Sixth Circuit introduced the "economic realities" test for measuring employee status under Title VII in *Armbruster v. Quinn.* In *Armbruster*, the court was called upon to resolve the issue of whether certain "manufacturer's representatives," who did not work in the defendant's corporate office, sold product lines beside those of the defendant, and received no salary apart from commissions, could nevertheless be construed as employees under Title VII. The court held that they could, thus rejecting the notion that the term "employee" was meant "in a technical sense." Instead, the proper standard for determining employee status under Title VII was one that "examine[d] the economic realities underlying the relationship between the individual and the so-called principal in an effort to determine whether that individual is likely to be susceptible to the discriminatory [employment] practices."

This standard, which the *Armbruster* court borrowed from a 1944 Supreme Court case interpreting the National Labor Relations Act ("NLRA"), mandates that when employment status is in doubt, statutes designed to protect workers should be applied broadly, "upon an examination of [the] 'underlying economic facts.'" By adopting this broad test for employee status, the Sixth Circuit downplayed common law distinctions between employees and independent contractors based on the employer's right to control the employee. Instead, the test focuses on a person's economic dependency on the putative employment relationship, measured from the perspective of the em-

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112. 711 F.2d 1332 (6th Cir. 1983).
113. Id. at 1339.
114. Id. at 1341.
115. Although *Armbruster* set out to determine whether certain workers were employees or independent contractors, the court gave no indication that the "economic realities" test should be limited to independent contractor cases, and, in fact, the test may be applicable to all cases involving employee status under Title VII. See infra Part IV.B.
116. *Armbruster*, 711 F.2d at 1340.
117. See NLRB v. Hearst Publications, Inc. 322 U.S. 111, 131-32 (1944) (construing the National Labor Relations Act broadly by emphasizing the economic dependency of a group of newsboys in rejecting the defendant employer's assertion that the newsboys were independent contractors).
119. *Armbruster*, 711 F.2d at 1341; see also Davidson, supra note 15, at 219-22 (discussing generally the holding in *Armbruster*). The Sixth Circuit is apparently the only circuit that discounts the employer's "right to control" altogether. See 1 Matthew Bender, supra note 106, § 4.02, at 4-17 to -18 (noting that for some time, it appeared as though the Seventh Circuit would join the Sixth in favoring the "economic realities" test, but that this no longer appears to be the case). Those courts that have rejected the Sixth Circuit's approach have drawn criticism, however, for not being more open to the "economic realities" test. See Dowd, supra note 88, at 112-14.
ployee. The "economic realities" analysis offers the advantages of "avoid[ing] the rigidity of the common law test and . . . accomodat[ing] the present range of employment relationships and the new patterns that may evolve in the future." Courts, however, have generally eschewed the test: By refusing to read any restriction on Title VII's breadth beyond the vague requirement that employees be vulnerable to "the kind of employment practices that Title VII was intended to prevent," the Sixth Circuit's analysis fails to provide a clear, workable standard for defining employee status.

3. The "Hybrid" Approach

Most courts apply a "hybrid" standard that combines elements of both the "right to control" test and the "economic realities test." This hybrid test, first adopted by the District of Columbia Circuit in Spirides v. Reinhardt, directs a court to consider the economic realities of a relationship in light of the employer's right to control, with the emphasis being on the latter. Under a hybrid analysis, "it is the economic realities of the relationship viewed in light of the common law principles of agency and the right of the employer to control the employee that are determinative [of employee status]." Thus, for example, when the Spirides court offered some relevant considerations for determining employee status under Title VII, it cited several factors indicative of a control analysis, but added factors unrelated to control, including the "intention of the parties."

When considering whether a person is an employee or an independent contractor, courts still rely heavily on the common law "right to control" analysis. The Sixth Circuit's "economic realities" test, however, and to a lesser degree the "hybrid" test, emphasize more generalized considerations beyond the mere right to control, arguably rendering these tests more appropriate to the question of who is an employee generally. Nevertheless, many courts have regarded these tests as only marginally useful, if not wholly inapplicable, to questions of employee status outside the independent contractor setting. The following section explores how courts have analyzed questions of employee status in other contexts.

120. Dowd, supra note 88, at 112.
121. Id. at 113.
122. 1 Matthew Bender, supra note 106, § 4.02, at 4-18.
123. See Wilde v. County of Kandiyohi, 15 F.3d 103, 105 (8th Cir. 1994); Deal v. State Farm County Mut. Ins. Co., 5 F.3d 117, 118-19 (5th Cir. 1993); see also 1 Matthew Bender, supra note 106, § 4.02, at 4-12 (reporting that most courts have adopted the hybrid test).
124. 613 F.2d 826 (D.C. Cir. 1979).
125. See id. at 831-32.
127. Spirides, 613 F.2d at 832.
128. See supra notes 123-26 and accompanying text.
129. See infra Part III.B.
B. The "Employment Relationship" Requirement

Common law tests for measuring employee status, derived from the common law of agency, have emphasized the degree of control exercised by the employer over the putative employee. These tests, while useful for purposes of distinguishing employees from independent contractors, are less helpful when considering whether a person is an employee versus, for example, a volunteer because they tend to discount the "economic realities" underlying the relationship between the parties. For example, although a university exercises a considerable degree of "control" over its students, the students are clearly not "employees" of the university. Thus, outside of the independent contractor context, many courts have focused on the more fundamental question of whether any cognizable "employment relationship" exists at all. Accordingly, these courts require a showing of a basic employment relationship, which generally features the exchange of labor for some form of compensation, and are less persuaded by traditional "control" arguments.

The de-emphasis of common law factors designed to distinguish employees from independent contractors was most clearly illustrated in Graves v. Women's Professional Rodeo Ass'n, Inc. In Graves, the plaintiff, a male rodeo barrel racer, brought a Title VII action against the Women's Professional Rodeo Association ("WPRA"), a nonprofit corporation organized for the purpose of promoting rodeo barrel

130. See O'Connor v. Davis, 126 F.3d 112, 115 (2d Cir. 1997) (explaining that tests for determining employee status are "culled" from the Restatement of Agency); Dowd, supra note 88, at 77-86 (recounting the development of common law tests).
131. See supra Part III.A.
132. Volunteers have been found to be outside Title VII's protection because their services are gratuitous, and therefore they ostensibly have little to lose if discriminated against. See, e.g., Tadros v. Coleman, 717 F. Supp. 996, 1003 (S.D.N.Y. 1989) (holding that voluntary lecturer on college campus was not a Title VII "employee" simply because he "rendered service to an appreciative defendant"), aff'd, 898 F.2d 10 (2d Cir. 1990); Smith v. Berks Community Television, 657 F. Supp. 794, 795 (E.D. Pa. 1987) (concluding that unpaid volunteers are not employees within the meaning of Title VII because they are not "susceptible to the discriminatory practices which the Act was designed to eliminate") (citation omitted); see also Dunn, supra note 12, at 458-61 (discussing the status of volunteers under Title VII). Other groups that are beyond the scope of Title VII include shareholders, see Norman v. Levy, 767 F. Supp. 144, 1446-47 (N.D. Ill. 1991), general partners in an accounting firm, see Wheeler v. Hurdman, 825 F.2d 257, 277 (10th Cir. 1987), and applicants to a graduate studies program, see Pollack v. Wm. Marsh Rice Univ., 690 F.2d 903 (5th Cir. 1982).
134. Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990).
135. See infra notes 137-55 and accompanying text.
136. See, e.g., Smith, 657 F. Supp. at 795 (rejecting an argument that volunteers at a television station were employees by virtue of the station's control over them, because a "control" analysis is directed towards the distinction between an employee and an independent contractor). For a discussion of the compensation requirement, see infra notes 176-91 and accompanying text.
137. 907 F.2d 71 (8th Cir. 1990).
The plaintiff, Lance Graves, alleged that the WPRA impermissibly denied him membership on the basis of his gender. After finding that the WPRA was not an "employer" under Title VII because it lacked the jurisdictional minimum number of employees required by Title VII, the district court granted summary judgment for the WPRA. The issue of who constitutes an "employee" was critical in Graves because if the members of the WPRA were "employees," then the WPRA would meet the jurisdictional requirements for an "employer" under Title VII.

The Court of Appeals for the Eighth Circuit affirmed the dismissal of Graves's case, concluding that the membership roster of the WPRA could not be reasonably construed as a list of employees. In so doing, the court rejected the appellant's argument that the WPRA members were employees because their relationship with the WPRA satisfied the common law "right to control" test. Judge Bowman found the "right to control" test, which focuses on the degree of control that an employer exercises over a worker, to be inapposite on the facts of the case.

The court explained that before invoking any of the common law tests for establishing who is an "employee," the plaintiff was first required to demonstrate that an "employment relationship" existed, "according to the ordinary meaning of the words." As to this fundamental element of proof, the plaintiff had failed to carry his burden because membership in the WPRA entailed no duty of service to the WPRA or anyone else. Therefore, irrespective of whether the WPRA exercised control over the members, its relationship with the

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138. Id. at 71.

139. Id.

140. Under Title VII, an "employer" is defined as a person who has fifteen or more employees. 42 U.S.C. § 2000e(b). Because only "employers" are subject to Title VII, a business that employs fewer than fifteen employees cannot be exposed to Title VII liability. See id.


142. See Graves, 907 F.2d at 72.

143. Id. at 73-74.

144. Id. For a discussion on the common law "right to control" test, see supra part III.A.1.

145. Graves, 907 F.2d at 73.

146. Id.

147. Id. Specifically, the court found that while some prize money was awarded to WPRA members, the money was provided exclusively by outside sponsors, and the winner did not necessarily have to be a member of the WPRA. Id.

148. Id. This factor appeared far less influential to the court's holding than the lack of compensation received by WPRA members. See id. In fact, by noting that WPRA members owed little duty of service to the WPRA, the court appeared to be responding directly to the appellant's argument that the WPRA enjoyed a "right to control" its members. See id. The court's emphasis on this detail is perplexing because the opinion painstakingly emphasized that application of the "right to control" test was inappropriate on these facts.
members was "so unlike" an employment relationship that the court deemed it unnecessary to further probe the details of the relationship.\(^\text{149}\)

Other courts have substantially agreed with the approach of the Graves court in considering whether a person is an employee. For example, in O'Connor, the Second Circuit held that it was inappropriate to consider whether the plaintiff was an employee under the general common law of agency because such a framework "ignore[d] the antecedent question of whether O'Connor was hired . . . for any purpose."\(^\text{150}\) In the court's view, she was not so hired.\(^\text{151}\) Similarly, in Smith v. Berks Community Television,\(^\text{152}\) the district court declined to accord substantial weight to the common law test that emphasized the employer's control over the putative employee.\(^\text{153}\) The court reasoned that, because common law tests "are directed towards the distinction between an employee and an independent contractor," they were not dispositive of the issue of whether unpaid volunteers were "employees."\(^\text{154}\)

Graves and its companion cases suggest that while judicial tests for determining employee status might in some cases be relevant to the inquiry of who is an employee under Title VII, a court must first consider whether an ordinary employment relationship exists.\(^\text{155}\) As the following discussion indicates, the phrase "ordinary employment relationship" should be read expansively in keeping with Title VII's broad purposes.\(^\text{156}\) Evidence of compensation, however, is central to a finding of an employment relationship.\(^\text{157}\)

\(^{149}\) Id. at 74.

\(^{150}\) O'Connor v. Davis, 126 F.3d 112, 115 (2d. Cir. 1997). The court's opinion suggests, by its use of the word "hired," that the Second Circuit was addressing the same problem that arose in Graves—determining whether an ordinary employment relationship exists. See id. (referring to the "antecedent question" of whether there was a relationship upon which a legal test for employee status could reasonably be applied). Citing the Eighth Circuit's opinion in Graves, the court in O'Connor stated that any ordinary employment relationship—even one where the court ultimately finds that the plaintiff is an independent contractor rather than an employee—must involve compensation, or else any common law test for employee status is inapplicable. See id. at 115-16; supra notes 137-49 and accompanying text. For a recounting of the facts in O'Connor, see supra notes 2-12 and accompanying text.

\(^{151}\) O'Connor, 126 F.3d at 115.


\(^{153}\) See id. at 795.

\(^{154}\) Id.

\(^{155}\) This is especially true outside the context of cases in which a court must determine whether a worker was an "employee" or an "independent contractor" for purposes of Title VII. For a discussion of that line of cases, see Dowd, supra note 88, passim, and Davidson, supra note 15, passim. For a discussion of the applicability of common law tests to determining employee status outside the "independent contractor" framework, see supra notes 130-54 and accompanying text.

\(^{156}\) See infra Part III.B.1.

\(^{157}\) See infra Part III.B.2.
1. The Supreme Court’s Broad Reading of the Employment Relationship

In *Graves*, the court held that for the plaintiff to demonstrate that the WPRA members were “employees” for purposes of Title VII, it was first necessary to establish that an ordinary employment relationship existed between the WPRA and its members.\(^{158}\) While holding that an ordinary employment relationship should involve some form of compensation,\(^{159}\) the court did not offer other guidelines defining the boundaries of employment relationships. Despite the Eighth Circuit’s conclusion that the WPRA and its members lacked an employment relationship, courts have generally construed the employment relationship broadly to effectuate Congress’s goals in enacting Title VII.\(^{160}\)

The Supreme Court has defined the scope of the employment relationship expansively for purposes of Title VII, as was illustrated in two landmark cases. The first, *Hishon v. King & Spalding*,\(^{161}\) dealt with whether eligibility for partnership status in a law firm could be considered a term of employment. The second, *Robinson v. Shell Oil Co.*,\(^{162}\) addressed the issue of whether a former employee maintained an employment relationship with his former employer for purposes of Title VII.

In *Hishon*, the Supreme Court held that a female associate who was denied partnership status could bring suit under Title VII, even though partners of the firm were not themselves “employees.”\(^{163}\) Chief Justice Burger, writing for the majority, rejected the Eleventh Circuit’s holding that a decision to extend an offer to join a partnership is necessarily beyond the scope of an employment relationship.\(^{164}\) Instead, the Court found that partnership status was a “term, condition, or privilege of employment”\(^{165}\) because associates at the defendant’s firm could regularly expect to be considered for partnership at the end of their “apprenticeships.”\(^{166}\) Because there was an implicit agreement that if an associate remained in good standing she would be made partner after a certain number of years, the employment re-

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158. *See supra* notes 137-49 and accompanying text.
159. *Graves v. Women’s Prof’l Rodeo Ass’n*, 907 F.2d 71, 73 (8th Cir. 1990).
160. *See supra* note 88 and accompanying text.
163. *Hishon*, 467 U.S. at 76-79.
164. *Id.* at 75; *see also* 1 Matthew Bender, *supra* note 106 § 4.03, at 4-24 (2d ed. 1997) (discussing the holding in *Hishon*). For the Eleventh Circuit’s opinion, see *Hishon v. King & Spalding*, 678 F.2d 1022 (11th Cir. 1982).
165. *Hishon*, 467 U.S. at 75.
166. “Apprenticeships” in this case referred to the period of employment spent as an associate of the firm. *Id.* at 76. “Partner” referred to one of more than fifty partners in a general partnership. *Id.* at 71.
relationship in *Hishon* was held to include an implied promise to be considered for partnership status.\(^{167}\)

*Hishon* stopped short of declaring that partners in a law firm have an employment relationship with the firm; the partners themselves were not protected by Title VII.\(^{168}\) The Court indicated, however, that the contract creating an employment relationship may be an "informal" one that "arise[s] by the simple act of . . . providing a workplace."\(^{169}\) Moreover, the "terms, conditions, or privileges" of that relationship should be viewed expansively to guarantee fairness in employment, and encompass such tangential benefits as the prospect of eventually earning partner status.\(^{170}\)

In *Robinson*, the Court again elected to define the employment relationship expansively. In *Robinson*, an African-American plaintiff sued his former employer under Title VII, alleging that the employer had given him a negative reference in retaliation for an earlier discrimination claim the plaintiff had filed with the Equal Employment Opportunity Commission ("EEOC").\(^{171}\) Responding to the employer's argument that Title VII's protection of "employees" did not extend to former employees, the Court acknowledged that "[a]t first blush, the term 'employees' . . . would seem to refer to those having an existing employment relationship with the employer in question."\(^{172}\) The Court rejected such a limited reading of Title VII, however, because where Title VII was "ambiguous" as to whether former employees should merit statutory protection, the Court found it proper to base its determination on "the broader context of Title VII and the primary purposes of [the statute]."\(^{173}\) This conclusion was strengthened by the fact that Title VII forbids discriminatory discharge and, if former employees could not bring suit, that purpose would be thwarted.\(^{174}\) Consequently, the Court held that former employees were within Title VII's definition of "employee."\(^{175}\)

\(^{167}\) See *id.* at 76 ("[T]he benefit of partnership consideration was allegedly linked directly with an associate's status as an employee . . . ").

\(^{168}\) In fact, in his concurring opinion, Justice Powell emphasized that the Court's opinion should not be read to extend Title VII to the management of a law firm by its partners. See *id.*; see also *Wheeler v. Hurdman*, 825 F.2d 257, 277 (10th Cir. 1987) (finding that a general partner in an accounting firm was not an "employee" under Title VII).

\(^{169}\) *Hishon*, 467 U.S. at 74.

\(^{170}\) *Id.*

\(^{171}\) *Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 845 (1997). The initial charge filed with the EEOC was still pending when the unlawful retaliation claim was brought to trial. *Id.*

\(^{172}\) *Id.* at 846.

\(^{173}\) *Id.* at 849.

\(^{174}\) *See id.*

\(^{175}\) *Id.*
2. The Critical Element of Compensation

While Hishon and Robinson demonstrate the Court’s willingness to interpret the employment relationship expansively, courts have consistently declined to extend Title VII’s protection when there has been insufficient evidence of “compensation,” which is the hallmark of an employment relationship.176 Outside of Title VII jurisprudence, an employment relationship has been found to exist absent compensation.177 In Title VII cases, however, an employee must have received compensation to be covered by the statute because, if a person has nothing to gain by performing a service for another, he is not “susceptible to the discriminatory practices which [Title VII] was designed to eliminate.”178

Thus, resolving the question of whether there was an employment relationship for purposes of Title VII will often hinge on the court’s determination of whether there was adequate compensation to form the basis of an employment relationship.179 The Fourth Circuit grappled with this issue in Haavistola v. Community Fire Co. of Rising Sun.180 In Haavistola, the plaintiff, a female volunteer firefighter, brought an action against the fire company that alleged unlawful sex

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176. See, e.g., O’Connor v. Davis, 126 F.3d 112, 115-16 (2d Cir. 1997) (recognizing that “remuneration” is an “essential condition” of an employment relationship); Graves v. Women’s Prof’l Rodeo Ass’n, 907 F.2d 71, 73 (8th Cir. 1990) (finding that compensation by the putative employer to the putative employee in exchange for his services is an “essential condition” to the existence of an employment relationship, and therefore contestants in a rodeo who received no substantive compensation were not “employees” under Title VII); Hall v. Delaware Council on Crime & Justice, 780 F. Supp. 241, 244 (D. Del.), aff’d mem., 975 F.2d 1549 (3d Cir. 1992) (holding that workers who received no significant benefits other than free admission to an annual luncheon were volunteers, and thus beyond the purview of Title VII).

177. See Farmers & Merchants Ins. Co. v. Smith, 742 S.W.2d 217, 219 (Mo. Ct. App. 1987) (holding that for purposes of determining tort liability, a trucker was “employed” by his brother even though his work was gratuitous because lack of compensation did not remove him from the “employed” category); 27 Am. Jur. 2d Employment Relationship § 8 (1996) (“Although an employment contract normally requires the exchange of valuable consideration, an employment relationship may exist when a person volunteers to perform services for another person . . . .” (citations omitted)).

178. Smith v. Berks Community Television, 657 F. Supp. 794, 795 (E.D. Pa. 1987) (quoting Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983)). Presumably, volunteers are less susceptible to discriminatory practices because they do not have the same economic reliance as employees, and are therefore more free to walk away from a discriminatory situation. See id.

179. Courts have wrestled with the question of what compensation suffices to trigger an employment relationship. Compare Hall, 780 F. Supp. at 241 (finding reimbursement for work-related expenses and free admittance to an annual luncheon insufficient compensation to raise a volunteer to the status of an employee), with Hornick v. Borough of Duryea, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980) (concluding that school crossing guards who worked “only a couple of hours a day” and were paid “only $40.00 per month” were nonetheless “employees” within the meaning of Title VII).

180. 6 F.3d 211 (4th Cir. 1993).
discrimination. On appeal, the Fourth Circuit reversed and remanded. The court began its analysis by acknowledging that in order for the plaintiff to be considered an "employee" under Title VII, she must have received compensation. The court then determined that the plaintiff had received no "direct" compensation. Nevertheless, the court rejected the district court's conclusion that the plaintiff, as a matter of law, was not an employee under Title VII. Instead, the court held that "compensation is not defined by statute or case law," and, consequently, the issue of whether alleged benefits amounted to "compensation" for purposes of establishing an employment relationship could "not be found as a matter of law." As a result, the district court had erred in not allowing the jury to determine the ultimate issue of whether the indirect benefits plaintiff received amounted to significant compensation, or the "inconsequential incidents of an otherwise gratuitous relationship."

Haavistola has been understood to mean that a person can be an "employee" under Title VII even without "receiv[ing] a paycheck." After Haavistola, it is no longer clear what constitutes sufficient compensation to establish an employment relationship. According to the Fourth Circuit, however, significant benefits outside of salary must be

181. Id. at 213.
183. Haavistola, 6 F.3d at 222.
184. See id. at 219 (noting that in cases where there is no evidence of compensation, courts have found Title VII inapplicable).
185. Id. at 221.
186. Id. at 222.
187. Id. at 222-22.
188. Id. at 222. The "indirect benefits" that plaintiff received included a state-funded disability pension, survivors' benefits for dependents, scholarships for dependents upon disability or death, bestowal of a state flag to family upon death in the line of duty, benefits under the Federal Public Safety Officers' Benefits Act, insurance coverage, reimbursement for job-related expenses, the ability to purchase without paying extra fees a special commemorative registration plate for private vehicles, and access to a method by which she may obtain certification as a paramedic. Id. at 221 (emphasis added) (citations omitted). On remand, a jury determined that these benefits did not constitute sufficient compensation to form the basis of an employment relationship. Haavistola, 839 F. Supp. at 372 (D. Md. 1994).
189. See Neff v. Civil Air Patrol, 916 F. Supp. 710, 713 (S.D. Ohio 1996) (finding that the "emotional benefit" a volunteer received from a charitable organization was insufficient compensation to create an employment relationship under Title VII). The Neff court cautioned, however, that Haavistola was an unusual decision, and further noted that, on remand, the jury concluded that Haavistola was not an "employee" within the definition of Title VII. Id. at 712. Nevertheless, the court acknowledged that the absence of direct wages is not necessarily conclusive evidence that a person is not an employee. Id.
regarded as at least potentially sufficient compensation. For example, after Haavistola, a court may consider benefits that "create career opportunities" as counting toward the compensation requirement. The possibility that some unpaid interns may receive indirect compensation sufficient to form the basis of an employment relationship is explored in part IV.

IV. COURTS SHOULD REFRAIN FROM ESTABLISHING A BRIGHT LINE RULE THAT PRECLUDES ALL UNPAID INTERNS FROM BEING CONSIDERED "EMPLOYEES" UNDER TITLE VII

Parts II and III established that courts have consistently afforded Title VII the broadest possible interpretation consistent with its statutory language. This section argues that, in keeping with that trend, courts should avoid establishing a bright line rule that precludes all unpaid interns from being classified as "employees" under Title VII.

First, this part scrutinizes those cases that have focused on the issue of "compensation" in denying unpaid workers employee status under Title VII. While Title VII may provide no protection for volunteers, some courts have endorsed an unprincipled expansion of the term "volunteer" to include any worker who does not receive a salary. "Compensation" is not necessarily limited to money, however, and may include a variety of different types of benefits. This section argues that courts should remain open to the possibility that some unpaid interns receive sufficient "compensation" to establish an employment relationship.

This part then advocates application of the hybrid test to cases involving unpaid interns. Although some courts have found judicial tests to be inapplicable outside of "independent contractor" cases because such tests traditionally have focused exclusively on an employer's right to control, the modern hybrid test incorporates the "economic realities" of an employment relationship, thereby broadening its applicability. Therefore, this part argues that the hybrid test is useful for defining an employment relationship in any context, and that under a hybrid analysis, many unpaid interns would be regarded as employees.

Finally, this part argues that even if the hybrid test is to be limited in application to the "independent contractor" context, courts should still remain open to the possibility that at least some unpaid interns may be employees under Title VII. This Note concludes by proposing

190. See Haavistola, 6 F.3d at 220; see also Neff, 916 F. Supp. at 712 (leaving open the possibility that "benefits that create career opportunities" might potentially amount to adequate compensation).
191. See Neff, 916 F. Supp. at 713.
ADAPTING TITLE VII

certain factors courts should consider in determining whether an unpaid intern may be afforded employee status under Title VII.

A. Unpaid Interns May be a Party to an "Employment Relationship"

Some courts have held that, as a rule, certain relationships are so unlike an "employment relationship" that they do not merit consideration under any of the judicial tests devised to measure employee status under Title VII. Often preceding this conclusion is a finding that the putative employee received no "compensation" that could reasonably form the basis of an employment relationship. Adequacy of compensation, however, remains an open question.

1. Compensation Should Not be Limited to Monetary Wages

In O'Connor v. Davis, the Second Circuit held that an unpaid intern could not be considered an "employee" under Title VII because she received no compensation. The term "compensation," however, is ambiguous, for purposes of Title VII, and in general. Even if Title VII necessarily requires that an "employee" receive compensation for his labor, the quality and quantity of compensation needed to establish a bona fide employment relationship remains uncertain. The Fourth Circuit held in Haavistola that there is no defined legal standard for what constitutes "compensation." Moreover, the dictionary that the court cited defines an "employee"

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192. See supra Part III.A.
193. See supra Part III.B.2.
194. See supra notes 179-91 and accompanying text.
195. 126 F.3d 112 (2d Cir. 1997).
196. Id. at 115.
197. See supra Part III.B.2.
198. In Haavistola v. Community Fire Co. of Rising Sun, 6 F.3d 211 (4th Cir. 1993), the court identified two lines of cases that have developed on the construction of the word "employee" under Title VII: The first group deals with the situation in which compensation is uncontested, but the parties disagree as to whether the degree of control exerted over the putative employee evidences an independent contracting relationship. The second group involves those cases in which there is no evidence of compensation and, in all cases, the courts have found Title VII inapplicable. Id. at 219 (emphasis added).
199. See Haavistola, 6 F.3d at 221-22; Neff v. Civil Air Patrol. 916 F. Supp. 710, 713 (S.D. Ohio 1996).
200. Haavistola, 6 F.3d at 221-22.
as someone employed by another "usu[ally] in a position . . . for wages," as opposed to someone who always works for wages.201

To be sure, there are many cases where a person who does not receive wages cannot reasonably be considered an employee within the meaning of Title VII.202 For example, benefits such as the "challenge of assisting people in need" and "self-esteem" have been rightly discounted as inadequate forms of compensation to constitute the basis of an employment relationship, because they are unrelated to any "potential financial benefits."203

These facts, however, do not lead to an inevitable conclusion that unpaid interns must, de facto, be considered volunteers rather than employees. To the contrary, there is room within the definition of "compensation" to consider benefits that, although arguably less easily identifiable than wages, are equally real. Under Title VII, volunteers are not employees because they are "not susceptible to the same types of economic pressures" as employees and, therefore, are not prone to suffer the same effects from an employer's wrongful discrimination.204 But in the case of many unpaid internships, interns are susceptible to these economic pressures and may rely heavily on benefits provided by the internship such as indispensable work experience, academic credit, the opportunity to audition for a job, and valuable employer references.205

Under a regime that limits the meaning of "compensation" to salary, an employee who works part time for negligible wages would enjoy full protection under Title VII, but an unpaid intern who works full time in a highly specialized position in fulfillment of an academic requirement, understanding that she is auditioning for a salaried position, would be excluded from coverage.206 This scenario seems anom-

201. Id. at 220 (quoting Webster's Third New Int'l Dictionary 743 (1981) (emphasis added)).
202. See Neff, 916 F. Supp. at 712 (noting that outside of Haavistola, federal courts have consistently found that unpaid workers are volunteers rather than employees).
203. See id. at 713. Non-financial benefits are not protected by Title VII because denial of such benefits does not pose the threat of economic harm against which Title VII was intended to protect. See id.
204. Id. at 712; accord Smith v. Berks Community Television, 657 F. Supp. 794, 795 (E.D. Pa. 1987) ("Unpaid volunteers are not susceptible to the discriminatory practices which [Title VII] was designed to eliminate."). Although neither Neff nor Smith makes clear why unpaid volunteers are not as susceptible to discriminatory practices as employees, presumably it is because they have less at stake in their position and are therefore more free to mitigate the effects of discrimination by simply walking away.
205. See supra Part I.A. Interns may be susceptible to additional pressure if they need to complete their internship to graduate. See supra note 39 and accompanying text.
206. These examples are borrowed from actual cases. The intern example is a representation of what happened to Bridget O'Connor. See O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997). Though not a Title VII case, for an example of an unpaid intern who received important benefits from her internship, but would not be covered by Title VII under the court's holding in O'Connor, see Davis v. Wyoming Medical Center, Inc., 934 P.2d 1246, 1248-49 (Wyo. 1997) (describing one unpaid internship
alous given that one of Title VII's principal aims is the assurance of equal employment opportunities in the workplace.\textsuperscript{207}

Considering both Title VII's goals and Haavistola's reasoning that the adequacy of compensation must be measured according to the facts of each case, it would be peculiar to deny an unpaid intern Title VII's protection when her internship may provide the key to long-term economic security.\textsuperscript{208} Yet by lumping unpaid interns together with all other non-salaried persons, the Second Circuit in O'Connor did just that by overlooking critical distinctions between the benefits received by an unpaid intern and a true "volunteer."\textsuperscript{209}

Title VII is "remedial in nature" and should be given the "broadest interpretation consistent with its purpose."\textsuperscript{210} Moreover, in cases that bear on the breadth of the employment relationship, the Supreme Court has favored an expansive reading of Title VII's protective provisions.\textsuperscript{211} And while the text of Title VII may define the term "employee" with "magnificent circularity,"\textsuperscript{212} a broad reading of

where the intern worked 600 hours to earn her applied science degree in surgical technology with the understanding that she would be offered a paid position by the sponsor at the end of her internship). The example of the part-time employee reflects the court's findings of fact in Hornick v. Borough of Duryea, 507 F. Supp. 1091, 1098 (M.D. Penn. 1980) (concluding that part-time school crossing guards were employees under Title VII).

\textsuperscript{207} See Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). Even more anomalous is that if the employer decides to hire the intern, it could conceivably have discriminated against the intern throughout the duration of her internship without incurring Title VII liability, but be forced to stop the moment the intern is "hired" for salary.

208. The link between internships and long term economic stability is not attenuated, as often an unpaid internship represents the only feasible way to secure a permanent position in a given career field. See supra Part I.A. Moreover, that connection is expected to become more prominent in the near future. See Fram, supra note 27, at 43 (noting that in the future, more education and training will take place on the job and more employers may seek to evaluate final job applicants via unpaid internships).

209. The Second Circuit relied on Graves v. Women's Professional Rodeo Ass'n, 907 F.2d 71 (8th Cir. 1990), as support for the proposition that "[w]here no financial benefit is obtained by the purported employee from the employer, no 'plausible' employment relationship of any sort can be said to exist . . . ." O'Connor, 126 F.3d at 115-16 (quoting Graves, 907 F.2d at 73). Graves, however, presented significantly different facts than O'Connor. In Graves, the "employees" were voluntary contestants in a rodeo who competed for prize money distributed by an outside sponsor. Graves, 907 F.2d at 73. Similarly, the court analogized O'Connor to Tadros v. Coleman, 717 F. Supp. 996 (S.D.N.Y. 1989), aff'd, 898 F.2d 10 (2d Cir. 1990). O'Connor, 126 F.3d at 116. But that case also featured markedly different facts from O'Connor. In Tadros, the plaintiff was designated a "Visiting Lecturer" by the Cornell University Medical College, but had no regularly assigned work hours, never delivered a single lecture (notwithstanding his title), and received absolutely no identifiable benefit outside of free access to the Medical College's library. Tadros, 717 F. Supp. at 998.


211. See supra Part III.B.1.

“employee” is consistent with the broader context of Title VII. Title VII’s goal of remedying discrimination in the workplace would be better served if courts recognized the important distinction between a volunteer who works gratuitously and an unpaid intern who works with an eye toward significant long-term economic reward. Moreover, acknowledging such differences would comport with the courts’ tradition of liberally reading the word employee, as well as Haavisto’s directive to treat “compensation” as a factual, case-by-case inquiry.

2. The Hybrid Approach Can be Used to Analyze Title VII Cases Involving Unpaid Interns

Often, in cases that address whether a person is an employee or a volunteer, courts have found common law agency tests inapposite because those tests are designed to distinguish employees from independent contractors, not from volunteers or other non-employees. Specifically, common law tests have been limited to “independent contractor” cases because those tests emphasize an employer’s “power to control,” which is not typically at issue in cases where a person is alleged to be a volunteer, rather than an employee. For example, in Smith v. Berks Community Television, which required the court to distinguish employees from volunteers, the court found common law “control” principles inapposite because the television station workers in Smith were not alleged to be independent contractors. Instead, the court held that the “economic realities” of the relationship between the workers and the station would be determinative of the workers’ status as employees, because that approach would ensure protection of those “susceptible” to discriminatory practices.

213. Robinson v. Shell Oil Co., 117 S. Ct. 843, 848 (1997); see also Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979) (“[B]ecause [Title VII] is remedial in character, it should be liberally construed, and ambiguities should be resolved in favor of the complaining party.

214. See supra note 132 and accompanying text.

215. See supra Part I.A.

216. See, e.g., O’Connor v. Davis, 126 F.3d 112, 115 (2d Cir. 1997) (finding agency analysis to be “flawed” when the issue is whether an unpaid intern had been “hired”); Graves v. Women’s Prof’l Rodeo Ass’n, 907 F.2d 71, 74 (8th Cir. 1990) (explaining that courts only apply common law tests in situations that “plausibly approximate an employment relationship”); Smith v. Berks Community Television, 657 F. Supp. 794, 795 (E.D. Pa. 1987) (holding that cases directed towards the distinction between an employee and an independent contractor are inapplicable to the issue of whether a person was an employee or a volunteer). For examples of various categories of non-employees beside independent contractors, see supra note 132.


218. Id. at 794.

219. Id. at 795.

220. Id. Finding that the television workers were not susceptible to discriminatory practices, the Smith court found for the defendant. Id. at 794. The court suggested
Under the "hybrid" test that virtually all courts now apply to distinguish independent contractors from employees, however, the "economic realities" of the relationship are considered. In *Spirides v. Reinhardt*, the District of Columbia Circuit introduced the hybrid test as a means of deciding whether the plaintiff in that case could be "deemed an employee under Title VII." Although the defendant in *Spirides* argued that the plaintiff was an independent contractor, there is no indication from the opinion that the court intended to limit the test to cases where a person is alleged to be an independent contractor. In fact, the same analysis was applied outside the "independent contractor" context in *Haavistola v. Community Fire Co. of Rising Sun*, where the Fourth Circuit analyzed employee status under the hybrid test, even though the plaintiff in that case was not alleged to be an independent contractor. Oddly, the *Haavistola* court referred to that unpaid workers should not be covered by Title VII because it would be difficult to fashion an appropriate remedy when the worker never received any salary. See *id.* at 795 ("[T]he remedy of back pay would be wholly inappropriate for unpaid workers."). Following a 1991 amendment to the Civil Rights Act, however, Title VII plaintiffs may now receive compensatory and punitive damages. See 42 U.S.C. § 2000e-5(g)(1) (1994). Another viable remedy is injunctive relief, such as an order to cease discriminatory conduct or reinstatement of an unpaid worker terminated due to illegal discrimination. See Dunn, supra note 12, at 466.

221. See supra Part III.A.3. Interestingly, the district court in *Smith* relied on the pure "economic realities" test as defined by the Sixth Circuit in *Armbuster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983). Given the court's statement that the "control" test was inapposite because it neglected to consider the adequacy of compensation, however, one can infer that the "hybrid" test would be applicable because that test considers both the employer's right to control the employee and the economic realities of the relationship. See *Spirides v. Reinhardt*, 613 F.2d 826, 831-32 (D.C. Cir. 1979) (explaining that the determination of employee status under Title VII involves analysis of the economic realities of the relationship, but "the employer's right to control the 'means and manner' of the worker's performance is the most important factor to review" (citations omitted); see also Cobb v. Sun Papers, Inc., 673 F.2d 337, 341 (11th Cir. 1982) ("[I]t is the economic realities of the relationship viewed in light of the common law principles of agency and the right of the employer to control the employee that are determinative [of who is an employee under Title VII].").

222. 613 F.2d 826 (D.C. Cir. 1979).

223. *Id.* at 831; see also Cobb, 673 F.2d at 339 (describing the issue of "employee status" generally, as opposed to employee status versus independent contractor status).

224. The hybrid test might be misinterpreted as exclusively a test for distinguishing employees from independent contractors, but that is most easily attributable to the overwhelming number of "independent contractor" cases to which the hybrid test has been applied. See supra Part III.A.3.

225. 6 F.3d 211 (4th Cir. 1993).

226. *Haavistola* examined whether the benefits that the plaintiff received were sufficient to render her an employee as opposed to a volunteer. *Haavistola*, 6 F.3d at 221. Although Chief Judge Ervin acknowledged that "[c]ontrol loses some of its significance in the determination of whether an individual is an employee in those situations in which compensation is not evident," *id.* at 220, he still analyzed the facts "under a standard that incorporates both the common law test derived from principles of agency and the so-called 'economic realities' test," which is the essence of the hybrid test. See *id.* at 219 (citations omitted).
"[t]wo lines of cases" that have developed regarding the construction of "employee" under Title VII, and described them as follows:

The first group deals with the situation in which compensation is uncontested, but the parties disagree as to whether the degree of control exerted over the putative employee evidences an independent contracting relationship. The second group involves those cases in which there is no evidence of compensation and, in all cases, the courts have found Title VII inapplicable.

The court then implicitly acknowledged a third type of case in which control is not at issue, but compensation is. As to this third line of cases, the court still applied the hybrid test, but with the understanding that "[c]ontrol loses some of its significance" when the disputed issue is whether compensation existed.

These cases suggest that the hybrid test can be helpful in analyzing employee status questions beyond the limited context of independent contractor cases. The court's holding in Graves v. Women's Professional Rodeo Ass'n, that it was "unnecessary" to consider any judicial tests for employee status, overlooks the comprehensive nature of the hybrid test, which focuses on an employer's right to control and the employee's economic realities. The court confused the analysis by first concluding that there was no "plausible employment relationship" and then using that conclusion to justify skipping the inquiry into whether there was, in fact, an employment relationship.

Although application of the hybrid test in Graves would probably still result in a finding that rodeo contestants were not employees under Title VII, the same is not necessarily true for O'Connor. In O'Connor, the Second Circuit, like the Eighth Circuit in Graves, declined to apply any of the traditional tests for employee status, including the hybrid test, because there was no "plausible" employment relationship between an unpaid intern and the defendant psychiatric hospital. Apparently, the court only considered the "right to con-
trol” element of the hybrid test and, therefore, concluded that such an analysis would be inapropriate when the real issue is whether the plaintiff had received any meaningful benefit from her work. But the hybrid test, which would have examined O’Connor’s economic dependency on her internship in light of Rockland’s right to control her activities, would determine the very issue that the court summarily resolved before applying any analysis at all—whether O’Connor was in fact an employee.

Had the O’Connor court applied the hybrid test, it might have concluded that O’Connor had relied on certain benefits incident to the internship when she accepted the position at Rockland, thereby creating an implicit employment contract. Instead, the court dismissed O’Connor’s claims without considering her “economic realities,” thereby failing to apply the “hybrid” test to the very question it was designed to resolve, and signaling a broad refusal to acknowledge the employment realities of many unpaid interns.

Under the hybrid test, an unpaid intern might well be considered an employee. The “right to control” element, which is the cornerstone of any hybrid analysis, is typically present in unpaid internships where interns are often designated substantially similar responsibilities to full employees. As for the “economic realities” portion of the hybrid test, in many professions an unpaid internship represents a necessary step toward career stability. Oftentimes, colleges and universities require that students complete an unpaid internship as part of their chosen major. In still others, employers hire full-time salaried employees from their pool of interns, which essentially renders the internship another step in the promotional chain. While a hybrid analysis may produce different outcomes in different cases, at least in the case of some unpaid internships, it would be appropriate under the hybrid test to acknowledge an employment relationship for purposes of Title VII.

236. Id. at 115 (“In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished.” (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989))).
237. See O’Connor, 126 F.3d at 115.
238. See id. at 115 (finding the “antecedent question of whether O’Connor was hired by Rockland for any purpose” to be dispositive).
239. See Haavistola v. Community Fire Co. of Rising Sun, 6 F.3d 211, 221 (4th Cir. 1993) (holding that whether indirect benefits amount to sufficient compensation to establish an employment relationship is a question of fact).
240. See supra Part III.A.3.
241. See supra Part I.B.
242. See supra Part I.A.
243. See supra note 39 and accompanying text.
244. See supra notes 62-64 and accompanying text.
B. Factors Courts Might Consider in Determining Whether Unpaid Interns Have an Employment Relationship with Their Sponsors

Assuming that the hybrid test must be limited to cases where the issue is a person's status as an employee or an independent contractor, courts should still consider other, non-wage, factors suggestive of an ordinary employment relationship to determine whether a person is an employee under Title VII. These factors might include the frequency and overall number of similar internships in the particular field, the value of the intern's services to the employer, the benefits the intern receives from the internship, including indirect, long-term career gains, or other similar considerations that acknowledge modern employment realities while reasonably limiting the scope of Title VII.

An employment contract that calls for the exchange of labor for indirect compensation such as academic credits, referrals, the promise of a future salaried position, or simply much-needed experience, may be more difficult to discern than one that provides for the simple exchange of labor for money. Complexity alone, however, should not place a putative employment relationship outside the realm of Title VII, which must not be "thwarted by concern for judicial economy."245

By establishing factors that limit "employment relationships" to those cases where there is evidence of a clear economic benefit that could only be reasonably obtained by completion of the internship, courts can successfully limit the number of actions brought under Title VII. Moreover, the status of "employees" under Title VII has never been a clear cut question, as is poignantly evidenced by the "independent contractor" cases, where courts must weigh an abundance of fact-specific considerations to properly resolve employee status.246

In all likelihood, not every unpaid intern will qualify as an "employee" under Title VII. For example, in the case of some unpaid internships, it may be that there are few career gains that arise out of the internship, and the intern may be motivated by a general interest in the business or a desire to perform charitable work. For many unpaid interns, however, their internship experience is a "once-in-a-life chance" to enter a highly competitive field where prior work experience is a practical demand.247 As for employers, many of them sponsor unpaid internships implicitly understanding that the interns are "doing a job [they] should be paid for."248

246. See, e.g., Spirides v. Reinhardt, 613 F.2d 826, 832 (D.C. Cir. 1979) (listing eleven different factors courts must consider to determine whether a person is an employee or an independent contractor under Title VII); Cobb v. Sun Papers, Inc., 673 F.2d 337, 340 (11th Cir. 1982) (same).
247. See Marklein, supra note 26.
248. Prato, supra note 49.
Market forces that permit many employers to get away with denying interns salary should not also grant employers immunity from legitimate Title VII claims. Courts would further Title VII's goals of ensuring equal opportunity in the pursuit of a livelihood by being open to the realities that many unpaid interns face when entering the job market and analyzing Title VII claims in light of those realities.

Conclusion

Today, more than ever, internships represent the key to an increasingly competitive job market. Although many internships involve substantive work similar to the kind performed by paid employees, some employers have taken advantage of a tight job market by denying interns salary, despite their interns' substantial contributions to their business. Nevertheless, most unpaid interns reap significant long term rewards from interning, and many rely heavily on the indirect benefits that certain internships provide.

In O'Connor v. Davis, the Second Circuit opted for a bright line rule that excludes all unpaid interns from protection under Title VII, defying a well established judicial trend toward defining that statute expansively. Such a rule, while advancing the interests of judicial economy, threatens to thwart Congress's intent in enacting Title VII, which purported to guarantee equal opportunity in the pursuit of a livelihood. Moreover, a bright line rule precludes the application of well-reasoned judicial tests that are specifically designed to evaluate a person's employment status under Title VII.

Even if courts decline to apply traditional analysis for determining employee status, they should still consider other factors that encourage the careful weighing of all relevant considerations, rather than adopting a bright line rule that exempts all unpaid interns from Title VII coverage. By considering carefully drawn factors that acknowledge current employment conditions, courts can ensure equal opportunity for those who are newly embarking on a career path, while preserving the integrity and substance of Title VII.

249. See supra Part I.B.
250. 126 F.3d 112 (2d Cir. 1997).