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ARTICLES

COLLEGE INTERNSHIP PROGRAMS AND THE FAIR LABOR STANDARDS ACT

by

Magdalena Lorenz*

INTRODUCTION

"A delirious fever-dream,"[1] "vivid and engrossing, teetering between trash and art,"[2] "a marvelous construction that's in line for multiple Oscar nominations,"[3] were the words used by critics to describe the Fox Searchlight Pictures' production "The Black Swan." After the dance stopped and awards were handed out, the public got a glimpse behind the scenes of the acclaimed masterpiece. A complaint filed on behalf of two interns who worked on the movie set paints a far less alluring picture: "In misclassifying many of its workers as unpaid interns, Fox Searchlight has denied them the benefits that the law affords to employees, including unemployment and workers' compensation insurance, sexual harassment and discrimination protections, and, most crucially, the right to earn a fair day's wage for a fair day's work."[4]

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A case pending in the Southern District of New York, *Glatt v. Fox Searchlight Pictures Inc.*,[5] has intensified a national debate over the question of whether for-profit employers can lawfully benefit from the work of unpaid interns. The litigation is proliferating.[6] The question has gone without clear guidance from courts for decades. In 2010, the U.S. Department of Labor ("DoL") stirred up controversy by issuing guidelines for internship programs.[7] The guidelines include a requirement that the employer cannot derive any "immediate advantage" from the activities of the intern, if the intern is not being paid minimum wage and overtime.[8] While college administrators and employers are grappling with the question of how to structure their internship programs without running afoul of the Fair Labor Standards Act ("FLSA") and state employment regulations, the current cases may soon provide some answers.

This article (i) reviews the statutory framework and the Supreme Court jurisprudence with respect to the FLSA as it pertains to unpaid interns at for-profit businesses; (ii) discusses how the DoL approached the question of the unpaid interns in the past; (iii) compares the position of the DoL with the stance the courts have taken on the issue; (iv) considers current litigation brought by college interns; and (iv) discusses how schools and employers are responding to the changing legal environment while arguing that from the public policy perspective, the best approach may be a blanket requirement that interns who perform productive work for the employer should be classified as "employees" under the FLSA. The focus of the controversy and this article is internship programs in for-profit settings. Unpaid internships in public sector and non-profit organizations do not create the same issues, as both the FLSA and the DoL apply different standards to such employers.[9]

The article focuses on the FLSA[10] requirements because they potentially affect every single student who does productive work for an employer. Minimum wage and overtime provisions are also the basis for the recent litigation, which can potentially alter how internship programs are structured. It is worth mentioning, however, that the issue of whether college interns should be classified as "employees" has legal consequences beyond the impact of the FLSA. It affects the interns' ability to seek protection under other employment laws, including antidiscrimination provisions of Title VII, Americans with Disabilities Act and unemployment and workers' compensation statutes.[11]

THE STATUTORY FRAMEWORK AND SUPREME COURT JURISPRUDENCE

The FLSA requires all covered employers to compensate employees at least the statutory minimum wage[12] and overtime for hours worked in excess of forty in any given week.[13] The statutory scheme explicitly contemplates that certain employees-in-training may be paid less than minimum wage.[14] Congress gave the Secretary of Labor a broad mandate to write regulations allowing the employers to pay less than minimum wages to learners and apprentices.[15] Under the relevant regulations, upon filing a certificate with the Secretary of Labor, an employer will be allowed to pay up to 25% less than the prescribed minimum wage if the employee is a "student-learner."[16] A "student learner" is defined as a student "who is receiving instruction in an accredited school, college or university and who is employed by an establishment on a part-time basis, pursuant to a bona fide vocational training program.[17] A vocational training program is one that teaches "technical knowledge and related industrial information."[18] A typical college intern would not fall into that category. The significance of this provision, however, is that it shows that the

legislators have contemplated giving a break to employers who employ students requiring training. There is a mechanism under which the Secretary of Labor could relieve employers from paying minimum wage to college interns. If such breaks are not provided, it is by choice of the Secretary of Labor and not by the DoL being oblivious to reality.

The FLSA also contains a number of complete exemptions from minimum wage and overtime provisions, but no exemption applicable to interns. One exemption relieves employers from paying minimum wages and overtime to professional and administrative employees.[19] The related regulations and DoL interpretations of this particular exemption, however, require that the employees must meet certain tests regarding their job duties and be paid a salary of no less than $455 per week.[20] Consequently, even when the employer assures that the intern performs absolutely no menial work, this exemption would be completely irrelevant with respect to unpaid college interns.

Whether an intern is entitled to minimum wage has therefore been interpreted to depend on whether the intern is an "employee" within the meaning of the FLSA. Under the FLSA, an "employee" is "any individual employed by an employer"[21] – a perfect definition to leave for the courts to interpret. The term "employ" means to "suffer or permit work."[22] It has taken the courts over seven decades to unpack the definition, and we still do not have a clear answer how to apply it to college interns.

Over 60 years ago the Supreme Court created a precedent which many employers have taken as opening a door to a wholesale exclusion of interns from the definition of "employees." *Walling v. Portland Terminal Co.*[23] involved a training program for individuals who wanted to be certified as

qualified brakemen in a shipping yard. The training program lasted about a week.[24] During that week, the individuals would follow and observe yard workers of Portland Terminal and eventually be permitted to do actual work under the workers' close observation and supervision. [25]Upon successful completion of the course, the names of the trainees were placed on a list of certified brakemen. [26]When the company had to hire new brakemen, the new employees came from that list.[27]

The Court held that the individuals who participated in the training should altogether be excluded from the definition of "employees."[28] The court reasoned that an individual whose work serves "only his own interest" cannot be treated as an employee of the person who provides him with instruction.[29] Had the individuals taken a similar course at a vocational school, it would be absurd to treat them as employees of that school and require the school to compensate them.[30] The railroad was not deriving any "immediate" advantage from providing the training.[31]

Never again did the Supreme Court look at the definition of "employee" in the context of a training program or a situation which would resemble a college internship program. When called upon to clarify the concept of employment under the FLSA in distinguishing between employees and independent contractors, the court has considered a variety of factors, basically looking at the totality of circumstances.[32] The totality of circumstances approach has crystalized into a multi-factor test.[33] When asked to distinguish between employees and volunteers at a non-profit organization, the Court used an "economic reality" test.[34] The facts of the cases which distinguish employees from independent contractors or employees from volunteers are so different from the circumstances surrounding a typical college internship that those cases are of little help.

The bottom line is that the FLSA does not have an exemption for interns. There is no guidance from the Supreme Court whether and when employers could exclude interns from the definition of "employees," just a single case involving a week-long program for certification as a brakeman at a railroad yard. Is that enough for legions of employers to justify not paying their interns?

THE POSITION OF THE U.S. DEPARTMENT OF LABOR

The DoL took the facts of *Portland Terminal*, cut the opinion into bits and pieces and crafted a six-factor test to determine when an intern or trainee could be excluded from the definition of "employee."[35] In effect, if the internship program does not look exactly like the *Portland Terminal* case, the DoL has consistently taken the position that the intern should be paid, especially when the employer in question is a for-profit entity.

The test, hereafter referred to as the "DoL test," has appeared in opinion letters issued by Wage and Hour Administrator responsible for the oversight of the minimum wage and overtime provisions of the FLSA since at least 1967[36] and in Wage & Hour Division's manual since 1975.[37] The most recent reincarnation of the DoL test has been quoted from the "Fact Sheet # 71: Internship Programs Under the Fair Labor Standards Act" (the "Fact Sheet") published in 2010. The Fact Sheet made its way to colleges and employers and stirred a significant amount of controversy, as discussed below, although the DoL test has been around for quite a while. It is notable that the DoL makes it clear that this test is to be applied to interns working for "for profit" employers. The FLSA contains an exception for volunteers at governmental agencies

and private non-profit food banks.[38] The Wage and Hour Administrator also recognizes an exception for volunteers at non-profit organizations. The aforementioned Fact Sheet explicitly states that "unpaid internships in the public sector and for non-profit charitable organizations are generally permissible."[39]

The DoL has applied the test quite consistently in evaluating various training programs fashioned by employers. The DoL has also been generally consistent in insisting that all six factors of the test must be met, or the trainee falls within the scope of FLSA protections.[40] What particularly stirred up the controversy when the Fact Sheet was published was the factor requiring that the employer could not derive any immediate advantage from the services provided by the intern.[41] A plain reading translation of that factor leads to the conclusion that it does not matter whether the intern is doing substantive work and learning skills which she can transfer to another setting; or whether the intern performs completely menial duties, filing and answering telephones. If the employer has any actual use for the product of the intern's work, the factor cannot be met and the intern has to be paid. As reiterated by Nancy J. Leppinck, a one-time acting director of the Wage and Hour Division: "If you're a for-profit employer or you want to pursue an internship with a for-profit employer, there aren't going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law."[42]

Until 2009, an employer who had questions regarding compliance with the FLSA could formally ask the Wage and Hour Administrator for an opinion. The Wage and Hour Division, after reviewing the facts, would issue and publish an opinion letter. Research of opinion letters currently available at the DoL's website revealed only one situation where a quasi-

internship program passed the muster of the DoL Test. The program involved students "shadowing" employees of the sponsor organization for one week. The purpose of the program was to expose students to various careers. The students did not receive college credit for participating in the program. They did not work for the employer, although they would sometimes be asked to perform small office tasks.[43] In sum, short of student interns whose principle task is "shadowing" employees, it is really hard to conceive any internship program in a for-profit setting which would relieve the employer from paying the interns minimum wage and overtime, unless the employer is ready to pick a fight with the DoL.

The Wage and Hour Administrator no longer issues opinion letters since a slight difference in facts may result in a different interpretation of the law, and the Wage and Hour Division believes that responding to fact-specific inquiries is not the best use of the DoL's resources.[44] The Administrator also reserves the right to update and withdraw a ruling or an interpretation.[45] A couple of older opinion letters from the mid-1990s, not currently available on the DoL's website, suggested that the situation was not so clear-cut when the school sponsored the internship program and the intern was receiving college credit for the experience. In such a situation, the older opinion letters suggested that the Administrator may weigh whether the productive value of work performed by interns outweighs the burden of training suffered by the employer.[46] As recent litigation shows, despite the guidance provided in the Fact Sheet, more recent opinion letters, and public statements made by the Secretary of Labor, some employers see college credit as a shield against the FLSA.[47]

It is worth mentioning that state departments of labor have followed the example set by the DoL. It has been reported that officials in California, Oregon and New York stepped up

enforcement efforts.[48] The New York State Department of Labor (the "NYDoL"), for example, has come up with its own "fact sheet" and a twelve-factor test.[49] The test incorporates the six DoL factors plus adds another six, thus assuring that virtually no internship program in New York in a for-profit setting could feasibly escape the reach of New York's employment laws. On the issue of college credit, the New York fact sheet explains that if an academic institution awards credit for the internship, it is considered to be SOME evidence that the internship is for the benefit of the student rather than the employer, one of the twelve factors to be satisfied.[50]

DoL's opinion letters and fact sheets do not have the force of law. The position taken by the DoL may change overtime due to new court rulings inconsistent with DoL's interpretation or even due to change in the administration and the priorities of the agency. In sum, however, given the more current pronouncements of DoL's position, any for-profit employer who offers unpaid internships, whether they are for college credit or not, is exposing itself, at a minimum, to a DoL investigation.

THE POSITION OF THE COURTS

While the stance of the DoL has been generally clear and consistent, the judicial interpretation of the FLSA on the issue has been anything but. After *Portland Terminal* the High Court has not revisited the question of how trainees should be treated under the FLSA. The Court has interpreted the meaning of the term "employee" in the context of distinguishing "employees" from "independent contractors."[51]The Court has also considered whether volunteers at a non-profit foundation should be considered employees.[52]A modern day college intern at a for-profit business has never appeared as a plaintiff before the Supreme Court.

Despite the fact that college internship programs are so prevalent, the research has not revealed any published opinions from lower courts directly on point, which makes the current litigation described in the following section quite intriguing. Factually, the closest case is perhaps *Wirtz v. Wardlaw*,[53]an older case which involved two young women working at an insurance agency for sub-minimum wages. The employer argued that he was exempt from the statutory minimum wage requirements because he was teaching the women the business of insurance to help them determine whether they would be interested in preparing for careers in the field.[54] The Court had no problem reaching the conclusion that the two students were employees within the meaning of the FLSA and entitled to minimum wage.[55]

Why then doesn't this case control today with respect to treatment of interns, even in the Fourth Circuit from which the opinion came? The crucial "mistake" that the insurance agency made was that it decided to pay the women. The employer got sued because the pay was below the minimum wage. The court, quoting *Portland Terminal* opinion, stated:

> Without doubt the Act covers trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation… This … means that employers who hire beginners, learners, or handicapped persons, and expressly or impliedly agree to pay them compensation, must pay them the prescribed minimum wage, unless a permit not to pay such minimum has been obtained from the Administrator.[56]

Would the decision of the court have been different had Wardlaw paid the two women nothing instead of $12 per week? That would seem like a perverse result. And yet, that must be the belief of scores of employers today who offer unpaid internship programs.

Subsequent to *Wardlow*, in the last half a century circuit and district courts were faced with a plethora of cases which considered the *Portland Terminal* precedent and the six factor DoL test, but none of these situations involved college interns working in an office setting. The cases discussed e.g. trainees in a flight attendant school,[57] children working in a school cafeteria,[58] homeless undergoing job skills training[59] or individuals undergoing training at companies selling snacks[60] and knives.[61] What clearly emerges from these cases is that the courts are split on how *Portland Terminal* precedent or the DoL test should be applied. Three different approaches to the issue emerge from the review of court cases: (i) accept the DoL test, as described above, as the standard for determining whether a trainee is an employee;[62] (ii) reject the DoL test and inquire whether the employer or employee is the primary beneficiary of the trainees labor[63]and (iii) employ an "economic realities" test, which uses the DoL factors, but does not require that all six factors be satisfied.[64] Some courts clearly take one of the above approaches; other courts analyze the cases under more than one of the tests.[65]

Courts Accepting the DoL Test

If the case is brought in the Fifth Circuit, the court will likely examine all six criteria of the DoL test and require that the employer satisfy all of them in order to escape the definition of employee. For example, in *Atkins v. General Motors Corp.*,[66] the corporation designed a course of study for workers at a manufacturing plant.[67] The classes were

conducted either by the State of Louisiana or by General Motors on its premises outside normal working hours.[68] The court applied all six factors of the DoL test, including the requirement that the employer did not derive any immediate advantage from the trainees' work.[69] In essence, the trainees were not to perform any productive work during the training.

Similar analysis was performed by the court in *Donovan v. American Airlines*,[70] which involved future flight attendants attending classes at American's Learning Center. Affirming the dismissal of the trainees' case, the court observed that all six criteria of the DoL test were satisfied.[71]

The Primary Beneficiary Test

If your case comes up in the Fourth or the Sixth Circuit, the court will use the primary beneficiary test.[72] The test essentially looks at the totality of circumstances to determine who benefited more from the work of the trainee: the organization or the trainee. In a recent case *Solis v. Laurelbrook Sanitarium and School, Inc.*,[73] the court surveyed various approaches taken by courts to determine whether a trainee is an employee and ultimately rejected the DoL test, finding it to be "a poor method for determining employee status in a training or educational setting."[74] *Laurelbrook Sanitarium* involved a school established by the Seventh-Day Adventist Church, which embraced the view that education should have a practical training component.[75] As part of the learning experience, students were assigned to kitchen, housekeeping or CNA training programs at a sanitarium run by the school.[76] On balance, the court found that the greater benefit from the work of the students was to the students themselves and not the school.[77]

The primary beneficiary test was also used in cases where the employer was not the school itself, but a for-profit business. In *McLauglinn v. Ensley*, a snack food distributor required its employees, prior to paid employment, to work for a week assisting regular routemen as part of "training."[78] The "training" was found to be of primary benefit to the employer rather than trainees, who were entitled to minimum wage.[79]

The Economic Realities Test

If the case comes up in the Ninth or the Tenth Circuit, the court will use the economic realities test. Under this test, the court will apply the six factors of the DoL test, but will not require the employer to comply with all the factors. The Ninth Circuit discussed the test in a recent case, *Harris v. Vector Marketing Corp.*, where plaintiffs were required to undergo a three-day marketing training to become sales representatives selling knives.[80] Similarly, the Tenth Circuit examined all six factors of the DoL test to determine whether potential firemen undergoing training were "employees" within the meaning of the FLSA.[81] The employer satisfied all but one of the factors (all trainees expected to be employed after completion of the training); the court concluded that the trainees cannot win just because of this one factor and dismissed the case.[82]

Summary

On balance, there is: (i) no single opinion dealing with a situation of an intern working without pay in an office setting at a for-profit business; (ii) one case involving what today could be called "interns", who did expect to get paid and won; (iii) a plethora of cases involving various types of trainees and volunteers, where courts struggle what test to apply in evaluating whether these trainees and volunteers are "employees;" and (iv) one circuit following the DoLs approach

to require application of the six-factor DoL test with all six prongs of the test satisfied.

Courts are increasingly focusing the debate on which test to apply and how much deference should be given to the DoL in evaluating these cases. In the pursuit of the right "test", the perfect measurement, the courts and commentators seem to be losing the forest for the trees. There is no statutory exemption for college interns under the FLSA. That should be a starting point for any discussion on whether a trainee or intern should be compensated for work performed. In the words of Justice Sotomayor, evaluating the Pathways to Employment Program,

> [The] question of whether such program should be exempted from the minimum wage laws is a policy decision either Congress or the Executive Branch should make…[The] Court… cannot grant an exemption where one does not exist in law.[83]

Where a typical college intern performs substantive work which has a direct economic benefit for the employer, there is no sound reason based on the plain reading of the statute to exclude the internship program from the coverage of the FLSA. In particular, it is troubling to see how the old *Portland Terminal* case got transformed by some lower courts into a "primary beneficiary test" where the company pays the trainee only if the company gets more out of the work of the trainee than the trainee out of the training. The statute clearly contemplates paying trainees for the work performed, albeit allowing the employer under certain circumstances, to pay less than the minimum wage.[84] The "balancing of interests" as a sole measurement whether the trainee should be paid is a pure invention of a couple of circuit courts. The proper focus should be whether the trainee performs any productive work for the

employer. If so, the trainee is an "employee" under the FLSA. Plain and simple.

RECENT LITIGATION

When it rains, it pours. While there are no published opinions addressing college internship programs up-to-date, there are currently three such cases pending in New York. Two of the cases have been brought in federal court under the FLSA.[85] The one in state court involves New York employment law statutes,[86] and, therefore is beyond the scope of this article. The spur in litigation may be due to the DoL's recent focus on college internship programs, the issuance of the Fact Sheet #71 in an effort to educate the employers and schools, and the resulting increase in national debate about the legality of unpaid internships.

The first case, *Glatt v. Fox Searchlight Pictures Inc.* involves two college interns who worked on the production set of the *Black Swan*.[87] Eric Glatt was an accounting intern who worked for several months full-time under the supervision of the employees of the accounting department. When the film shooting ended, he continued interning there on a part-time basis.[88] Glatt was not getting college credit for his work.[89] The complaint alleges that he did not get paid for his work, other than for one single Sunday, when he worked for 12 hours. Glatt worked hand-in-hand with the accounting staff. His duties included filing, mailing and purchasing office supplies and snack foods.[90] The second plaintiff in the case, Alex Footman, worked as an office production intern for about five months.[91] His duties included preparing coffee, taking and distributing lunch orders, running errands and miscellaneous secretarial work.[92] On many occasions, he worked overtime.[93] He never got paid for the work performed.[94] Instead, University of Maryland granted him college credit for the internship, for which he presumably paid tuition to the school.

The two were not the only unpaid interns on the set. The complaint alleges that Fox Searchlight is profitable due, in part, to lowering film production costs by employing a steady stream of unpaid interns on the sets.[95] The plaintiffs seek a class-action certification, which would make the lawsuit a worthwhile endeavor for their attorneys. One reason why there have not been much litigation surrounding unpaid internship programs is that individual interns do not have much to gain by bringing a law suit.

Since the lawsuit hit the news in 2011, the plaintiffs have successfully added another defendant, Fox Entertainment Group, Inc., of which Fox Searchlight is a unit.[96] Several other plaintiffs joined the litigation, including Eden Antalik, who worked in the publicity office of Fox Entertainment Group and Kanene Gratts, who was employed in the production of the movie *500 Days of Summer*.[97] The lengthy discovery process was completed mid-January 2013.[98] The court is scheduled to reach a decision whether to certify the case as a class action in May 2013.[99] No trial date has been set.[100]

The plaintiff in the second case is Xuedan Wang who worked as the "Head Accessories Intern" at *Harper's Bazaar*, a publication of Hearst Corporation.[101] She was employed for about five months, according to a set schedule, on occasions working over 40 hours a week.[102] Her responsibilities included coordinating pickups and deliveries of samples between the magazine and outside vendors, showrooms and public relations firms, maintaining records of the samples kept by the magazine and assisting at photo shoots.[103] The interesting development in this case is that the magazine apparently believed that Wang was earning college credit doing this. Wang, who had presented some evidence to Hearst's human resources department that she would be enrolled at Ohio State University

to receive credit for her internship, eventually did not do that.[104]

Hearst's position is that if a student is getting college credit for an internship, that should create a presumption that the internship is for the benefit of the student rather than the employer.[105] The defendant is arguing that the "primary beneficiary" test, as discussed above, applies in college internships.[106] Consequently, Hearst makes it a prerequisite for all interns to be registered for college credit. Many employers follow that practice. The defendant seems to believe that that requirement shields Hearst from application of the FLSA. In an interesting twist, Wang's attorneys contended that tuition payments amounted to an unlawful deduction from wages, and interns should be reimbursed for such payments.[107]The judge was not convinced by their arguments on that point and dismissed that portion of the complaint.[108]

So far, a number of interns have joined the *Hearst* class action and another plaintiff, Erin Spencer, has been included as a lead plaintiff.[109] The discovery process is still in progress, to be completed by the end of January 2013, with the trial to take place during the summer of 2013.[110]

The question whether an intern is an employee within the meaning of the FLSA is a question of law to be determined by the courts. It is to be hoped that either the *Glatt* or the *Hearst* court will answer the question and provide guidance for employers and schools on how to lawfully structure their internship programs.

The Southern District of New York Court has already faced the question of whether a trainee should be viewed as an employee and answered it in the affirmative. In *Archie v. Grand Central Partnership*,[111] plaintiffs, formerly homeless and unemployed individuals performed clerical, administrative,

maintenance, food service and outreach work as part of a "Pathways to Employment" program run by the defendant. The defendant argued that the plaintiffs were not employees but rather trainees receiving essential basic job skills and counseling.[112] Justice Sotomayor examined how the training program complied with all six factors of the DoL test and found that the program failed to comply with several of those factors.[113] Next, the court determined that although trainees did receive some benefit, the greater benefit went to the employer.[114] Finally, the court focused on the "economic reality" of the situation, in particular whether the plaintiffs expected compensation and whether the defendant gained an immediate advantage from the trainees' labor.[115] The court concluded that the defendant structured a program that required the plaintiffs to do work that had a direct economic benefit to the defendants.[116] That made the trainees "employees."[117]

The current cases differ from *Archie v. Grand Central Partnership* principally in two respects: (i) the interns for Fox and Hearst knew from the beginning that these were unpaid internships and (ii) some of the interns were receiving college credit for their work. The expectation of the trainee with respect to pay is a factor that courts and DoL will consider, but it is not determinative. One of the goals of the FLSA is to eliminate the competitive advantage an employer who uses unpaid labor has over a competing business who complies with wage and hour regulations.[118]Furthermore, there is the obvious concern that employers can use superior bargaining power to coerce employees to waive protections of the FLSA.[119]

With respect to the college credit issue, for Hearst the fact that an educational institution grants college credit should constitute objective evidence that the internship provides an educational experience.[120] Whether an internship provides an educational experience is, in fact, a crucial question that the

school should answer when evaluating the internship for credit, but it is not the proper inquiry for the employer to rely on when deciding whether to classify the intern as an employee or not. The educational assessment by the school is a separate question from the classification of an intern by the employer under the FLSA. When assessing the internship for credit, the internship coordinator should look at whether the intern is going to be doing substantive work rather than performing menial tasks. The coordinator should assess whether the intern will be gaining skills which can be carried over to another job, rather than learning about the employer's operations. That will be enough to earn college credit. The statute and case law suggest that when a trainee is doing substantive, productive work for the employer, that trainee should be paid. The result should not be different when the trainee is required by the employer to register for college credit and labeled an "intern." Merging the inquiry of whether the internship is worthy of college credit (performed by the school) with the inquiry whether the intern is an "employee" within the FLSA (performed by the employer) would be a policy mistake and set a dangerous precedent, effectively making the colleges guardians of FLSA compliance.

From the public policy perspective, it would be detrimental if the court bought into Hearst's argument that educational credit creates a presumption that the internship is for the benefit of the intern rather than the employer. As a result of practices of companies like Hearst, students who want to break into industries such as publishing or entertainment are effectively arm-wrestled by the employers into paying tuition for credit whether they need that credit for graduation or not, just so the employer can wield that college credit as a shield against the FLSA and other employment laws.

RESPONSE FROM COLLEGES AND EMPLOYERS, AND THE CHANGING REALITY

The recent enforcement efforts on the part of DoL, as well as current litigation have stirred controversy among both employers and colleges. The National Association of Colleges and Employers ("NACE"), an organization representing campus recruiting and career services professionals, has openly criticized the six-factor DoL test, in particular the requirement that the employer derive no immediate advantage from the activities of the intern.[121]The organization approvingly cited the primary beneficiary test and proposed its own set of factors to determine whether "experience" can be considered a legitimate internship. Once the school determines that the experience qualifies as a creditworthy "internship," the employer would classify the student as an "intern" rather than "employee" and would be free not to pay the intern. If one followed the NACE approach, the decision whether to pay or not pay the intern would be left with the college internship coordinators. Once the college coordinator decided that credit could be granted for the experience, the employers would effectively be off the hook with respect to compliance with the FLSA and other employment laws.

Using college credit as a proxy for whether an intern is or is not an "employee" within the meaning of the FLSA is a flawed approach for the reason that educators generally do not have training in the application of employment laws and are poorly positioned to be the judges of compliance, even if they had appropriate training. Internship coordinators are generally not even aware that their classification of a position as an "internship" may have profound employment law consequences for the employer and for the student. Internship coordinators should be interested in what the student is going to learn during the internship experience; what kind of

transferable skills the student will acquire; whether the student will be working on substantive assignments and gaining knowledge of the industry or doing menial work, such as filing and answering phones. If the work is substantive rather than menial, the school will coordinate with the employer in enabling the student to receive college credit for the experience.[122] My assessment of the "creditworthiness" of the internship is completely separate from the employer's assessment whether the intern is an "employee" within meaning of the FLSA. To collapse these assessments into one would have detrimental effects for our students.

Why is that? As it is, not many students can afford the luxury of an unpaid internship. When employers, such as Hearst, take the position that college credit creates the presumption that the intern is not an "employee", such employers require students to enroll for credit for the duration of the internship. Now the student not only has to work for free, but the student also has to pay tuition expenses for the privilege of working. Seems like a win-win situation from the perspective of for-profit employers and colleges, considering that many colleges today operate like businesses. Thirteen universities, including New York University, issued a letter to the DoL asking the government to cool down recent regulatory enforcement efforts with respect to internships.[123]

Why would some schools care whether interns are classified as "employees" under the FLSA or not? Since wages should neither enhance nor diminish the educational value of the experience, one would think that schools would be neutral or even supportive of the DoL's efforts. Once the employer pays the intern, the employer does not require the intern to register for college credit. Unless the student needs those college credits to graduate, as in the situation where the college made the internship a mandatory part of the program, the

student now has no incentive to register for credit and pay tuition to the school. Some commentators point out that the schools may have ulterior motives in expanding their internship programs.[124] Internships can help the schools' bottom line, allowing schools to charge tuition without needing faculty to conduct classes.[125]Whatever motivates some universities like NYU to criticize the enforcement efforts of the DoL, one thing is for certain: when an employer requires a student to register for college credit while interning, it is the tail wagging the dog. And, that is the current result of the interpretation that college credit creates a presumption that the intern is not an "employee."

All can agree that work experience before graduation benefits students and helps them get a job once they graduate. There is no evidence, however, that unpaid work experience is any more "educational" than paid work. Carving out an exception to FLSA requirements for "interns" does not find any justification from either public policy perspective or plain reading of the statute. Neither does application of "the primary beneficiary test" in the situation where an intern works for a for-profit employer. When an intern working full-time, performing productive work for an employer, is also registered for college credit, both sides arguably benefit. How does one measure whether the college credit is worth more to the intern than the productive work performed by the intern is worth to the employer? A simple approach mandating compliance with minimum wage requirements whenever an intern performs productive work for the employer, other than *de minimis* in value, seems to make the most sense. Adopting such an approach would likely eliminate some internship opportunities for students, but may also open some paid employment opportunities for others. Having no guidance from the courts and many inconsistent approaches certainly do not benefit anyone.

[1] Lou Lumenick, *On pointe!*, N. Y. POST (Dec. 2, 2010), *at* http://www.nypost.com/p/entertainment/movies/portman_is_swan_derful_in_dance_FnEpfIi1zTTiS6q8MvNmtI.
[2] Christopher Orr, *Does "Black Swan" Bring Out Natalie Portman's Dark Side?*, ATLANTIC (Dec. 3, 2010), *at* http://www.theatlantic.com/entertainment/archive/2010/12/does-black-swan-bring-out-natalie-portmans-dark-side/67386/.
[3] Andrew O'Hehir, (Dec. 2, 2010) *"Black Swan" – Even Better Than You've Heard*, *at* http://www.salon.com/2010/12/03/black_swan_2/.
[4] Plaintiffs' Complaint at 3, *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11 CV 6784 (S.D.N.Y. Sep. 28, 2011).
[5] *Id*.
[6] *See Wang v. Hearst Corp*., No. 12 CV 00793 (S.D.N.Y. Feb. 1, 2012); *see also* Steven Greenberg, N.Y. Times (March 14, 2012), *Former Intern at "Charlie Rose" Sues, Alleging Wage Laws Violations, available at* http://mediadecoder.blogs.nytimes.com/2012/03/14/former-intern-at-charlie-rose-sues-alleging-wage-law-violations/, reporting on a law suit filed in March 2012 by Lucy Bickerton in New York state court alleging violations of New York state employment laws.
[7] U.S. DEP'T OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (Apr. 2010), *available at* http://www.dol.gov/ whd/regs/compliance/whdfs71.pdf.
[8] *Id.*
[9] *See id.*, explaining: "The FLSA makes a special exception under certain circumstances for individuals who volunteer to perform services for a state or local government agency and for individuals who volunteer for humanitarian purposes for private non-profit food banks. WHD also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible." "WHD" refers here to the Wage and Hour Division of the DoL. The Wage and Hour Division is the part of the DoL in charge of administering and enforcing minimum wage and overtime provisions of the FLSA.
[10] Fair Labor Standards Act 29 U.S.C. §§ 201-219 (2012).

[11] *See* David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215 (2002) for a comprehensive review of employment laws affecting college interns.
[12] 29 U.S.C. §206 (2012).
[13] 29 U.S.C. §207 (2012).
[14] 29 U.S.C. §214 (2012).
[15] 29 U.S.C. §214(a) (2012).
[16] C.F.R. §520.506 (2012).
[17] *Id.*
[18] *Id.*
[19] 29 U.S.C. §213(a) (2012).
[20] U.S. DEP'T OF LABOR, FACT SHEET #17(C): EXEMPTION FOR ADMINISTRATIVE EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (Apr. 2010), *available at http://www.dol.gov/whd/regs/compliance/fairpay/fs17c_ administrative.pdf.*
[21] 29 U.S.C. §203(e)(1) (2012).
[22] 29 U.S.C. §203(g) (2012).
[23] 330 U.S. 148 (1947).
[24] *Id* at 150.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 153.
[29] *Id.* at 152.
[30] *Id.*
[31] *Id.*at 153.
[32] *Rutheford Food Corp. v. McComb*, 331 U.S. 722 (1947).
[33] *See e.g. Commun. For Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).
[34] *See e.g. Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985) *at* 13; *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 38 (1961) *at* 33.
[35] U.S. DEP'T OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT, *supra* note 7. The six factor test used by the DoL is as follows: 1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment; 2. The internship experience is for the benefit of the intern; 3. The intern does not displace regular employees, but works under close supervision of existing staff; 4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations

may actually be impeded; 5. The internship is not necessarily entitled to a job at the conclusion of the internship; and 6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

[36] *Reich v. Parker Fire Prot. Dist*., 992 F.2d 1023 (10th Cir. 1993), at 7.

[37] *Id.* at 5.

[38] 29 U.S.C. §203(e)(5) (2012).

[39] U.S. DEP'T OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT, at endnote, *supra* note 7.

[40] Yamada, *supra* note 11, at 228, citing various Opinion Letters issued by the Wage and Hour Division and evaluating training / internship programs; *see also* e.g. *Solis v. Laurelbrook Sanitarium and School, Inc*., 642 F.3d 518 (6th Cir. 2011) at 524, where the Secretary of Labor urged the court to apply all six prongs of the DoL test to evaluate training programs run by a non-profit school; the court ultimately rejected the all-or-nothing approach advocated by the Secretary of Labor.

[41] *See* National Association of Colleges and Employers, *A Position Statement on U.S. Internships* (July 2011) *available at* http://www.naceweb.org/ connections/advocacy/internship_position_paper/, stating that "In the 2010 NACE survey, both career services and employers agreed with five of the six FLSA criteria; both groups disagreed with the criterion that the employer derives no immediate advantage from the activities of the student."

[42] Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (APRIL 2, 2010), *available at* http://www.nytimes.com/2010/04/03/business/03intern.html?pagewanted=all

[43] U.S. Dep't of Labor, Employment Standards Administration, Wage and Hour Division Op. Letter FLSA2006-12 (April 6, 2006), *available at http://www.dol.gov/whd/opinion/FLSA/2006/2006_04_06_12_FLSA.pd*f.

[44] *See* Wage and Hour Administrator's explanation *at* http://www.dol.gov/whd/opinion/opinion.htm.

[45] *Id.*

[46] Yamada, *supra* note 11, at 230.

[47] *See e.g.* Memorandum in Support of Defendant's Motion to Strike the Class and Collective Action Allegations at 13, Wang v. Hearst Corp., No. 12 CV 00793 (S.D.N.Y. Feb. 1, 2012), stating that "internships for college credit are presumptively lawful."

[48] Greenhouse, *supra* note 42.

[49] N.Y. STATE DEP'T OF LABOR FACT SHEET: WAGE REQUIREMENTS FOR INTERNS IN FOR-PROFIT BUSINESSES (April 2011), *available at http://www.labor.ny.gov/formsdocs/wp/P725.pdf.*
[50] *Id.*
[51] *See e.g., supra* note 32 .
[52] *Supra* note 34. In the aftermath of this decision Congress has amended FLSA to include an exception for volunteers. U.S.C. § 203(e)(4)(A). DoL promulgated regulations to define who is a "volunteer" 29 C.F.R. § 553.101(a). Consequently, interns at public agencies and not-for profits could in many instances fall within the "volunteer" exception. There is no "volunteer" exception for for-profit employers.
[53] *Wirtz v. Wardlaw*, 339 F2nd 785 (4th Cir. 1964).
[54] *Id.* at 787.
[55] *Id.*
[56] *Id*. at 788.
[57] *Donovan v. American Airlines, Inc*., 686 F.2d 267 (5th Cir. 1982).
[58] *Boblin v. Board of Education*, 403 F. Supp. 1095 (D. Haw. 1975).
[59] *Archie v. Grand Cent. P'ship*, 997 F. Supp. 504 (S.D.N.Y. 1998).
[60] *McLaughlin v. Ensley*, 877 F.2d 1207 (4th Cir. 1989).
[61] *Harris v. Vector Marketing Corp*., 753 F.Supp. 2d 996 (N.D. Cal. 2011).
[62] *See e.g. Atkins v. Gen. Motors Corp*., 701 F.2d 1124 (5th Cir. 1983).
[63] *See e.g. McLaughlin v. Ensely*, 877 F.2d 1207 (4th Cir. 1989).
[64] *See e.g. supra* note 36 at 1026-27; and *supra* note 61.
[65] *See e.g. supra* note 59, applying all six factors of the DoL test and the economic realities test.
[66] *Supra* note 62.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Supra* note 57.
[71] *Id.*
[72] *See e.g. supra* note 60; *Solis v. Laurelbrook Sanitarium and School, Inc.*, 642 F.3d 518 (6th Cir. 2011).
[73] *Solis v. Laurelbrook Sanitarium and School, Inc*., 642 F.3d 518 (6th Cir. 2011).
[74] *Id.* at 525.
[75] *Id.* at 520.
[76] *Id.*
[77] *Id.*
[78] *Supra* note 60.
[79] *Id.*

[80] *Supra* note 61.
[81] *Supra* note 36.
[82] *Id.*
[83] *Supra* note 59 at 508.
[84] 29 U.S.C. §214 (2012).
[85] *Glatt v. Fox Searchlight Pictures, Inc*. No. 11 CV 6784 (S.D.N.Y. Sep. 28, 2011); *Wang v. Hearst Corp.*, No. 12 CV 00793 (S.D.N.Y. Feb. 1, 2012).
[86] *see* Greenberg, *supra* note 6.
[87] *Supra* note 4.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] Plaintiffs' First Amended Class Action Complaint, *Glatt v. Fox Searchlight Pictures, Inc.* No. 11 CV 6784 (S.D.N.Y. Oct. 19, 2012).
[97] *Id.*
[98] *See Deadlines / Hearings Schedule* for *Glatt v. Fox Searchlight Pictures*, Inc. No. 11 CV 6784 (S.D.N.Y. Sep. 28, 2011), available through PACER Case Locator.
[99] *Id.*
[100] *Id.*
[101] Plaintiff's Complaint, *Wang v. Hearst Corp.*, No. 12 CV 00793 (S.D.N.Y. Feb. 1, 2012).
[102] *Id.*
[103] *Id.*
[104] Memorandum in Support of Defendant's Motion to Strike the Class and Collective Action Allegations at 1, *Wang v. Hearst Corp*., No. 12 CV 00793 (S.D.N.Y. Feb. 1, 2012).
[105] *Id.* at 13.
[106] *Id.* at 2.
[107] *Id.* at 24.
[108] Opinion and Order dated Jan. 9, 2013, *Wang v. Hearst Corp*., No. 12 CV 00793 (S.D.N.Y. Feb. 1, 2012).
[109] Plaintiff's Third Amended Class Action Complaint, *Wang v. Hearst Corp.*, No. 12 CV 00793 (S.D.N.Y. Feb. 1, 2012).

[110] *See Deadlines / Hearings Schedule* for *Wang v. Hearst Corp*., No. 12 CV 00793 (S.D.N.Y. Feb. 1, 2012), available through PACER Case Locator.
[111] 997 F. Supp. 504 (S.D.N.Y. 1998).
[112] *Id* at 507.
[113] *Id.* at 532.
[114] *Id.* at 533.
[115] *Id.* at 534.
[116] *Id.*
[117] *Id.* at 507.
[118] *See supra* note 34 at 299.
[119] *Id*. at 302.
[120] Memorandum in Support of Defendant's Motion to Strike the Class and Collective Action Allegations, *Wang v. Hearst Corp*., No. 12 CV 00793 (S.D.N.Y. Feb. 1, 2012).
[121] NACE, *supra* note 41.
[122] *See e.g.* STATE UNIVERSITY OF NEW YORK, INTERNSHIPS, A GUIDE FOR PLANNING, IMPLEMENTATION AND ASSESSMENT (April 2007) at 10, for guidelines issued to member institutions how to evaluate internships.
[123] *See* Patrick Arden, *Unpaid internships Aid Schools' Bottom Lines, But Do They Flout the Law? Will Work for Credits,* Village Voice (January 4, 2012), *available at* http://www.villagevoice.com/content/printVersion/3279792/.
[124] *Id.*
[125] *Id.*

KATZENBACH V. McCLUNG REVISITED: HOW THE RENQUIST AND ROBERTS COURTS WOULD HAVE DECIDED THE CASE

by

Carly Jannetty*
with
Sharlene A. McEvoy**

I. Introduction

Consider the following hypothetical.

A vegetarian living in a small coastal New England town decides to open a restaurant, named Veggies, that only serves salads and soups. The freshness of these menu options is going to be Veggie's biggest selling point and it advertises accordingly: nothing processed, canned or shipped from out of state will do. To ensure freshness, Veggies negotiates supply contracts with local farmers all within the state.

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***This article arose from an Independent Study conducted by Attorney Jannetty who is the primary author of this article. Dr. McEvoy suggested the topic which arose out of a discussion in the course The Supreme Court in the 1960's. McEvoy presented the paper at the 2012 NEALSB meeting and edited the article for publication.

The restaurant is going to be based in an old farmhouse on private property that is visible from the road, but several miles from the closest highway. All of the furniture and décor is purchased locally.

There's just one snag: Veggies will not serve customers who are known for being racist. It is located in rural area with parochial racial views, and as certain clientele have been turned away, claims have started swirling that Veggies is engaging in discriminatory practices. As claims have grown to harassment, Veggies files a lawsuit seeking declaratory judgment that it has the right to decline service at its sole discretion. Miraculously, the case has made its way to the Supreme Court and will be heard in the upcoming session. What will the outcome be?

Counsel for the protestors rely heavily upon the 1964 Supreme Court decision of Katzenbach v. McClung in which the owner of Ollie's BBQ sought a declaratory judgment that he did not have to serve blacks in his privately owned, local restaurant despite the passage of the Civil Rights Act of 1964[1].

Since its opening, Ollie's had a policy of only allowing whites to be served indoors, restricting service for blacks to a take-out window. The restaurant was located 11 blocks from an interstate on a state highway and even further away from any railroad or bus station.[2] In the year prior to passage of the Act, Ollie's had purchased approximately $150,000 of food locally, 46% of which was meat purchased from a local retailer who had obtained it from an out of state third party supplier.[3] Despite passage of the law, Ollie's announced its intent to continue its discriminatory practices, believing that forced compliance would result in the loss of business, as it catered to mainly local, white families who would decline to eat with blacks in the dining room.[4]

The Supreme Court unanimously held that Ollie's BBQ's refusal to serve blacks was unconstitutional and in violation of the Civil Rights Act of 1964, which barred racial discrimination at any restaurant that serves or offers to serve food to interstate travelers or that obtains a substantial amount of food that has moved in interstate commerce.[5] The Court stated that the Act was enforceable against Ollie's because it was participating in interstate commerce, which fell under Congress's power to regulate through the Commerce Clause.[6]

Counsel for Veggie's would argue that the Katzenbach decision wrongly assigned an overly expansive view of the Commerce Clause for purposes of remedying a social ill and that Ollie's operated on a primarily local basis and therefore should not have been subject to regulation by Congress, whose regulatory power is limited to interstate economic activities. Because Veggies is operating in a similar fashion, it should be exempt from regulation by Congress under a proper interpretation of the Commerce Clause. That the holding in Katzenbach is specious is strengthened by subsequent cases where Congress's ability to legislate policy through the Commerce Clause was denied by the Court, in United States v. Lopez and United States v. Morrison, in which the Supreme Court struck down acts of Congress holding that the Commerce Clause did not grant Congress a police power to regulate any economic activity that it could only tenuously connect to interstate commerce.

While many scholars concede that Katzenbach played a critical role in combating the rampant racism in America at that time, others argue the decision ranks among the most flawed in Supreme Court history. Would the outcome be the same if the Supreme Court decided Katzenbach today? The thesis of this article is the Katzenbach was wrongly decided based on the clear meaning of the Commerce Clause, which does not allow Congress to regulate economic activities that are local in nature. This article will examine the legal missteps of the Warren

Court in improperly expanding the Commerce Clause to regulate local economic activity.

II. Expansive Interpretations of the Commerce Clause

In the 1942 decision of Wickard v. Filburn, the Court determined that Congress had the authority to regulate economic activity through the Commerce Clause.[7] This Clause applies only to economic activities if they are interstate in nature, that is, if they involve activities that cross state lines.[8] An Ohio wheat farmer, Roscoe Filburn, brought suit against Secretary of Agriculture, Claude R. Wickard, contesting the constitutionality of the Agricultural Adjustment Act of 1938 and its penalties.[9] The law mandated limitations on the amount of wheat each farmer could produce, calculated on a per acreage basis, to prevent overages or shortages that would cause market prices to fluctuate.[10]

Prior to passage of the law, Filburn had planed a winter crop of wheat for personal and commercial use.[11] As required by law, he was notified prior to the 1941 planting that his assigned wheat crop was fixed at 20.1 bushels for each of his 11.1 allotted acres.[12] Ignoring this restriction, he sowed 23 acres in the winter of 1940, resulting in an "overproduction" of 239 bushels. Under the Act, this overproduction constituted "marketing excess" which resulted in a penalty of 49 cents per excess bushel.[13]

Filburn refused to pay the penalty and to deliver the excess wheat to the Secretary of Agriculture.[14] He filed a lawsuit to enjoin enforcement of the Act and sought a declaratory judgment that the law unconstitutionally exceeded Congress's power to regulate commerce.[15] The federal district court determined that Filburn was not subject to the amended Act because it would impose retroactive penalties in violation of the Fifth Amendment and thus found them unenforceable.[16] The decision was based primarily on comments made by Wickard during a mid-day radio address to wheat farmers

which few heard because of the time it was broadcast.[17] The Secretary appealed to the Supreme Court.[18]

Filburn argued that his production of wheat for personal consumption was beyond the power of Congress to regulate through the Commerce Clause, as his production was "local" in character and any effect that his production had on interstate commerce was "indirect" at best.[19] The government countered that the Act was aimed at regulating the sale and prices of wheat, and not its production or consumption, which it could do under the Commerce Clause.[20] In addition, it argued that the Act was "sustainable as a 'necessary and proper' implementation of the power of Congress over interstate commerce."[21]

After a lengthy analysis of the Commerce clause, the Court determined that economic activities appearing local in nature could still be subject to legislative regulation if they have an impact on interstate commerce through repetition. What if other farmers ignored the law as Filburn did?[22] The Court noted that Filburn's act of growing excess wheat for personal consumption, if considered in the aggregate, could substantially affect both the price and availability of wheat on the market.[23]

The Warren Court relied heavily upon Wickard in Katzenbach. Like Filburn, McClung, the owner of Ollie's BBQ, sought a declaratory judgment that an Act of Congress based on the Commerce Clause was unconstitutional.[24] McClung sued to enjoin the government from forcing him to comply with Title II of the Civil Rights Act of 1964, which states that persons could not be turned away on discriminatory grounds from restaurants that served or offered to serve food to interstate travelers or if they obtained a substantial amount of food through interstate commerce.[25]

The district court determined that Ollie's was not subject to regulation by the Act, as Congress had "legislated a conclusive presumption that a restaurant affects interstate

commerce if it serves or offers to serve interstate travelers or if a substantial portion of the food which it serves has moved in commerce."[26] The Court determined that such legislation was inappropriate because Congress had failed to establish a "demonstrable connection" between the meat obtained from out of state by the third party retailer and the conclusion that Ollie's discriminatory practices would affect interstate commerce."[27] Thus, Ollie's was granted the injunction and declaratory judgment that its policy of race-based service was not subject to regulation by the Civil Rights Act of 1964.[28]

The government appealed, and the case went to the Supreme Court. In evaluating whether Ollie's was subject to the Act, Justice Clark, writing for the majority, discussed the findings of the extensive congressional hearings, which included an abundance of testimony indicating that racial discrimination at restaurants had acted as a deterrent for many blacks, who then choose to spend their money elsewhere resulting in lower profits for certain restaurants.[29] In turn, these restaurants purchased less food from the market.[30] There was also testimony that discrimination in restaurants had a significant impact on interstate travel, as blacks were prevented from purchasing food while traveling except at undesirable locations, and would avoid travel rather than risk being subjected to discrimination.[31] In addition, both new businesses and black, skilled workers were deterred from settling in areas where racial discrimination at restaurants was rampant because, as the Court pointed out, "one can hardly travel without eating."[32]

Despite these findings, counsel for Ollie's argued that Congress had overstepped its bounds by attempting to regulate the activity of all restaurants rather than evaluating each on a case-by-case basis.[33] Instead, Ollie's argued that Congress "arbitrarily created a conclusive presumption that all restaurants meeting the criteria set out in the Act 'affect

commerce,'" which, it argued, was inappropriate in this instance because Ollie's was operating solely on a local basis.[34]

The Court was not persuaded and reversed the lower court's decision. Based on Wickard v. Filburn, it determined that the economic impact of the food purchased by Ollie's was insignificant, but if other restaurants followed suit, the effect on interstate commerce would be great.[35]

The Court determined that as long as Congress had a rational basis for its legislation, it could act in a preventative manner.[36] Because the record of congressional hearings was replete with indications that racial discrimination in restaurants already existed and was spreading and would presumably have a negative effect on interstate commerce, the Court specifically noted that "Congress was not required to await the total dislocation of commerce" prior to taking action.[37] Thus, the Court held that "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."[38] Furthermore, the Court reiterated its prior holding in Wickard v. Filburn, specifically stating that the power of Congress did extend to local activities "even if [the] activity [is] local and though it may not be regarded as commerce…if it exerts a substantial economic effect on interstate commerce."[39]

III. Controlling the Breadth of the Commerce Clause

Consider what the outcome of Katzenbach would have been had it been decided by the Supreme Court thirty-one years later. In 1995, the Court issued a ruling in U.S. v. Lopez, striking down the Gun-Free School Zone Act of 1990, a law that prohibited the possession of a gun on school grounds or within 1,000 feet of a school, as unconstitutional.[40] The law was premised upon the notion that the presence of guns in school zones negatively affects the interstate commerce in two ways: 1) necessitating higher insurance premiums that must be

carried by the population, and 2) deterring travel to parts of the country deemed as unsafe.[41]

The Supreme Court rejected these contentions, determining that gun possession within a school zone could not even remotely be classified as an economic activity subject to regulation by Congress through the Commerce Clause because such possession, even when considered in the aggregate, does not substantially affect interstate commerce.[42] The majority opinion, authored by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy and Thomas, noted the danger in allowing Congress to legislate through the Commerce Clause where the connection to interstate commerce is tenuous, writing "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[43]

The Court analyzed the enumeration of powers among the separate branches of government, cautioning that giving Congress free rein to legislate any activity it cold vaguely connect to interstate commerce would "effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[44] In addition to warning against acts of Congress that would foster the creation of a centralized, rather than enumerated, national government, the Court also made the significant point that if it were to allow Congress to invoke the power of the Commerce Clause in an unchecked manner, it would be "hard pressed to posit any activity by an individual that Congress is without power to regulate," such as telling local restaurants whom it must serve.[45] Consequently, the Gun-Free School Zone Act of 1990 was declared unconstitutional.

In a concurring opinion, Justices Kennedy and O'Connor took the majority position one step further arguing that to allow Congress to legislate through the Commerce

Clause, despite a weak connection between the regulated activity and interstate commerce, would result in the destruction of government accountability. Permitting Congress to legislate in an unimpeded manner would not only "[blur] the boundaries between the spheres of federal and state authority," but it would also result in the "inability to hold either branch of the government answerable to the citizens [which is] more dangerous even than devolving too much authority to the remote central power."[46] Justice Kennedy also discussed at length the Framers' intent in crafting the Constitution by creating a government marked by separation of powers and checks and balances, not a centralized government controlled by Congress.[47] The Court therefore should, through judicial review, protect the enumeration of powers prescribed by the Constitution, which it failed to do in Wickard and Katzenbach.[48]

In another concurring opinion, Justice Thomas observed "our case law has drifted far from the original understanding of the Commerce Clause," remarking the hope that "in a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to … that Clause."[49] That jurisprudence would make clear that Congress does not have regulatory police power and, in fact, that there are real limits to the scope of its power to legislate.[50] Importantly, he reminded that where the Constitution was meant to grant authority to Congress to regulate interstate commerce, it contains a specifically enumerated power, such as the power to coin money and the power to establish post offices and roads.[51] Had the Framers intended for Congress to regulate nearly all economic activities, they would have delineated such intentions along with the other powers specifically reserved for Congress. The fact that the Constitution contains no such enumeration is both paramount and instructive. Congress should be prevented

from acting as though it has the police power under the guise of regulating interstate commerce.

Without question the Katzenbach decision would have been decided differently by the Lopez Court. Certainly those Justices that joined in the majority opinion in Lopez would agree, that just as one would be hard pressed to find a connection between guns in school zones and interstate commerce, one would be similarly hard pressed to find a connection between a small town restaurant that caters to a local clientele and interstate commerce. The Lopez majority specifically rejected the argument that guns in school zones negatively affected travel and deterred new settlement as a means of classifying guns in school zones as an economic activity. These same arguments regarding travel and settlement were accepted by the Warren Court in Katzenbach.[52] In 1995, they would have been rejected by the Renquist court.

The only potential connection between Ollie's BBQ and interstate commerce was that some of its meat was procured from a local buyer who received it from an out of state third party. This connection is just as tenuous, if not more, than the contention that guns school zones will result in higher insurance premiums and a decrease in travel. Ollie's owner did not travel out of state to purchase any food nor did he knowingly contract with any out of state suppliers. The fact that a local supplier with whom he had a relationship tended to secure meat from out of state was not a conscious act by Ollie to conduct business across state lines.

Furthermore, as highlighted by Justice Thomas's concurring opinion in Lopez, Congress' action would surely be likened to a police power if afforded the power to dictate who restaurateurs are required to serve on their private property absent any substantial connection between the restaurant's activity and interstate commerce. Even if considered in the aggregate, a restaurant's selection of patrons does not rise to

the level necessary for Congress to have the authority to regulate in protection of interstate commerce. At worst, those local patrons that know they will not be permitted to dine in one restaurant will either spend their money at a grocery store or go to a different restaurant. The fact that everyone needs to eat was a point that was ironically and mistakenly used by the Warren Court in support of its decision to uphold the Act against Ollie's BBQ. Either way, money spent on food is entering a market, leading to the conclusion that interstate commerce is not substantially affected by a local restaurant's practices, however discriminatory they may be. The Rehnquist Court would not have maintained the connection recognized by the Warren Court between the meat and interstate commerce and, if the same line of reasoning applied in Lopez was applied in Katzenbach, the Civil Rights Act of 1964 would have been struck down as applied to Ollie's BBQ.

The Rehnquist Court's 2000 decision in U.S. v. Morrison reached a conclusion similar to that in Lopez regarding Congress's ability to legislate through the Commerce Clause. In Morrison, Rehnquist writing for the majority and joined by O'Connor, Scalia, Kennedy and Thomas, struck down the Violence Against Women Act of 1994 as unconstitutional, determining that the violent act of rape was not an economic activity and Congress's attempt to regulate it exceeded its power.[53]

The opinion made several references to the decision in Lopez, specifically noting that it applied to the fact that the Commerce Clause could not be used by Congress to regulate activities that were noneconomic in nature, even if when considered in the aggregate, it could have an indirect economic impact.[54] Although the government relied upon evidence compiled in congressional hearings indicating that rape deterred interstate travel and business, diminished national productivity, and resulted in increased medical costs, the Court

rejected these findings as virtually having the effect of classifying rape as an economic activity.[55]

In his concurring opinion, Justice Thomas again stressed that the state of modern case law with respect to defining the scope of the Commerce Clause had diverged greatly from its original understanding and early case law.[56] He referred to his opinion in Lopez to note that "[u]ntil this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce."[57]

Following this line of reasoning it is clear that Congress does not have the police power to remedy social ills such as gun violence in school zones, violence against women, or the discriminatory actions of a private, local restaurant. The Commerce Clause does not grant Congress the ability to disregard the Constitution's enumeration of powers. Nor does it afford Congress the authority to legislate in areas that are specifically reserved for regulation by the states, or that are not subject to legislation at all, such as the activities of a business such as Ollie's BBQ.

The majority in Morrison thus would likely overturn the holding of the Warren Court in Katzenbach. A local restaurant's activities, irrespective of whether it deterred travel, incidentally resulted in lower profits that led to fewer purchases by the restaurant, or resulted in deterred settlement to the area, are just that: local. They cannot be viewed as an interstate economic activity if its practices, so far as conducted by the restaurant, are local. Nor can they be viewed in the aggregate so as to elevate their practices from being local in nature to being interstate.

Even more persuasive is the Morrison majority's reference to the Civil Rights Cases, five cases heard collectively by the Supreme Court in 1883.[58] Several African-Americans filed suit claiming discrimination by theatres, hotels,

and transit companies in violation of the Civil Rights Act of 1875. The Supreme Court held that Congress lacked the authority to outlaw racial discrimination by private individuals and organizations or to regulate any non-state based discrimination.[59] Writing for the majority, Justice Bradley directed that "[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business."[60] While laws can be enacted to protect against discrimination by a state or federal body or agency, such as discrimination by police officers or on public transportation, no such law can dictate whether one chooses to discriminate on their own property, such as in their home or car. This decision has never been overturned. In fact, the majority in Morrison notes its "enduring viability."[61]

It is safe to say that if the Morrison majority had decided Katzenbach, the result would have been different. It is doubtful that the Court would determine that the business of Ollie's BBQ affected interstate commerce or that the Court would instruct Ollie's, a privately owned, local restaurant, about whom it must accept as patrons. Although Ollie's practices were morally objectionable, they were not illegal or subject to regulation by Congress. The Warren Court failed to appreciate, or perhaps refused to acknowledge, these differences, choosing instead to issue a unanimous decision not based on the controlling principles outlined in the Constitution.

IV. The Roberts Court

What if the Roberts Court were to hear Katzenbach today? Would the outcome have been similar to that reached by the Rehnquist Court in Lopez and Morrison? Justices Scalia, Thomas and Kennedy, who all joined in the majority opinions in Lopez and Morrison, are still on the Court. Thus, only two more votes would be needed to overturn Katzenbach.

Justice Roberts would be one of these votes because he indicated his agreement with the Lopez decision during the hearings before the Judiciary Committee in 2003, during which he stated "[i]t's not a question of an abstract fact, does this affect interstate commerce or not, but has his body, the Congress, demonstrated the impact on interstate commerce that drove them to legislate? That's a very important factor. It wasn't present in Lopez at all."[62] It would seem that he, too, would agree that a tenuous connection between the regulated activity and interstate commerce is not enough to support legislation under the Commerce Clause.

The second vote would likely come from Justice Alito, who authored a lengthy dissenting opinion in United States v. Rybar during his tenure on the United States Court of Appeals for the Third Circuit.[63] He wrote that he would have struck down congressional legislation banning private citizens from owning submachine guns on the same grounds as outlined in Lopez, noting that to regulate activities that are clearly local in nature absent any actual or established connection to interstate commerce under the guise of the Commerce Clause was an unconstitutional expansion of Congress's power.[64] His opinion opens with the poignant, obviously rhetorical question, "Was U.S. v. Lopez a constitutional freak? Or did it signify that the Commerce Clause still imposes some meaningful limits on congressional power?"[65] He also discussed the importance of preserving federalism as discussed in Lopez, reminding that the sensitive balance between state and federal power should be respected.[66]

V. Conclusion

Katzenbach v. McClung was a unanimous decision based on a moral and ethical grounds regarding race, not a legal sound interpretation of the Constitution or the powers it affords to Congress. The court decision was clearly a policy-making one than one aimed at correctly interpreting the law.

The outcome of Katzenbach is unsurprising, having been before the Court only a decade after the landmark decision of Brown v. Board of Education at a time when the social ills of racism were still plaguing the country. It was one of several decisions in a decade where unanimity on issues of racial equality was of paramount concern to the Court. However, the interpretation of the law and a government defined by separation of powers, rather than a centralized police power, should not have been sacrificed for purposes of combating racism. Congress does not have the authority to regulate private activities on private property. Just as the government cannot force a private citizen to allow persons he finds objectionable into his private home, it cannot force Ollie's BBQ to serve blacks or force Veggies to serve racists in its local, privately owned restaurant. More recent interpretations of the Commerce Clause reveal that there are limits to Congress's power to legislate, and those limitations should certainly be recognized in Veggie's case.

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[1] Id., 379 U.S. at 296 (1964).
[2] Id.
[3] Id.
[4] Id.
[5] Katzenbach v. McClung, 379 U.S. 294, 298, (1964).
[6] Id.
[7] Wickard v. Filburn, 317 U.S. 111 (1942).
[8] U.S.C.A. Const. art. 1, § 8, cl. 3.
[9] Id., 317 U.S. at 113 (1942).
[10] Id. at 14.
[11] Id., 317 U.S. at 114 (1942).
[12] Id.
[13] Id. The Act was amended May 26, 1941. Prior to the amendment, the penalty was fixed at 15 cents per bushel. In a national radio address to wheat farmers, the Secretary of Agriculture announced the terms of the proposed referendums, but failed to inform of the increased penalty rate one-half of the parity loan amount rate of about 98 cents. The farmers then

voted and passed the amendments by a vote of 81% to 19% and it is argued that they did so without being advised of this penalty increase.
[14] Id.
[15] Id., 317 U.S. at 118 (1942).
[16] Id.
[17] Id.
[18] Id.
[19] Id., 317 U.S. at 119 (1942).
[20] Id.
[21] Id. The Court briefly discusses the Government's reliance on "marketing" regulation versus "consumption" or "production" regulation, the former of which the Government perceived as subject to legislative regulation. The Court completely rejected any argument based on these distinctions. Id., 317 U.S. at 124 (1942).
[22] Id., 317 U.S. at 124 (1942). Citing United States v. Wrightwood Dairy Co., 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726 (1942) (wherein the Court instructed "[t]he power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution … It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.'") The Court instructed "'[t]he commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."
[23] Id., 317 U.S. at 127 (1942)
[24] Katzenbach v. McClung, 379 U.S. 294, 296 (1964).
[25] Id., 379 U.S. at 295 (1964).
[26] Id., 379 U.S. at 297 (1964).
[27] Id.
[28] Id., 379 U.S. at 295 (1964).
[29] Id., 379 U.S. at 299-300 (1964).
[30] Id.
[31] Id.
[32] Id., 379 U.S. at 300 (1964).
[33] Id. 379 U.S. at 302-303 (1964).
[34] Id.

[35] Id., 379 U.S. at 301 (1964).
[36] Id.
[37] Id.
[38] Id., 379 U.S. at 304 (1964).
[39] Id., 379 U.S. at 302 (1964). Katzenbach was heard in conjunction with Heart of Atlanta Motel, Inc. v. United States, a case where the constitutionally of the same Sections of the Civil Rights Act of 1964 were being challenged with respect to hotels and motels. See Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 243 (1964). There, a motel operator filed suit requesting a declaratory judgment as to the unconstitutionality of the Act and injunctive relief that would prevent suit from being maintained against him in the future for failure to comply with it.39 The motel was located in Atlanta, Georgia and was easily accessible to interstate highways 75 and 85 and state highways 23 and 41.39 It had 216 rooms and records reveal that 75% of its guests hailed from out of state. The owner advertised extensively through the national media, maintained over 50 billboards throughout the state, and accepted convention trade from out of state.39 It had a policy of refusing rooms to blacks and intended to continue that policy despite passage of the Act, thus prompting the suit.39 Unlike Katzenbach, the lower court in Heart of Atlanta issued a ruling in favor of the government, issuing a permanent injunction requiring that the motel refrain from implementing discriminatory practices.39 This ruling was affirmed by the Supreme Court.

Nonetheless, assuming arguendo that the motel's activities were found to be purely local, certainly the act that three-quarters of its 216 rooms accommodated out of state guests that would need to patronize the local restaurants, gas stations, and convenience stores would allow for the presumption that its local activities could substantially affect interstate commerce is unavoidably clear.

But is the economic effect of a small, family-owned restaurant, such as Ollie's BBQ, that does not advertise out of state and that caters to local families analogous to that of the Heart of Atlanta Motel? How about if that restaurant's only tie to interstate commerce is a local supplier that may procure some of its goods from an out of state third party with which the restaurant has no contact? Clearly there are differences between the activities of the motel and the restaurant. Yet, the ruling in Heart of Atlanta Motel, Inc. provided the immediate reference point and served as the backdrop for the ruling in Katzenbach, however dissimilar or inapposite their facts in terms of their effect on interstate commerce. As a result, to say that the decision in Katzenbach was flawed or that the Warren Court

inappropriately allowed Congress to act as a moral police power under the cloak of the Commerce Clause should be expected.
[40] U.S. v. Lopez, 514 U.S. 549, 551 (1995).
[41] Id., 514 U.S. at 563-564 (1964).
[42] Id., 514 U.S. at 567 (1964).
[43] Id.
[44] Id., 514 U.S. at 557 (1964) citing National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 37 (1937).
[45] Id., 514 U.S. at 564 (1964).
[46] Id., 514 U.S. at 577 (1964).
[47] Id., 514 U.S. at 568-583 (1964).
[48] Id.
[49] Id., 514 U.S. at 584 (1964).
[50] Id.
[51] Id., 514 U.S. at 592 (1964).
[52] Katzenbach v. McClung, 379 U.S. 294, 301 (1964).
[53] U.S. v. Morrison, 529 (1964).
[54] Id., 529 U.S. at 610-611 (2000).
[55] Id., 529 U.S. at 615 (2000).
[56] Id., 529 U.S. at 627 (2000).
[57] Id.
[58] Id., 529 U.S. at 624 (2000) citing to Civil Rights Cases, 109 U.S. 3 (1883).
[59] Civil Rights Cases, 109 U.S. 3 (1883).
[60] Id., 109 U.S. at 24-25 (1883).
[61] U.S. v. Morrison, 529 U.S. 598, 624 (2000).
[62] Hearings before the Committee on the Judiciary, United States Senate, 108th Congress, 1st Session, U.S. Government Printing Office. Serial No. J-108-1. Part 3. Available as a PDF on the Web. Retrieved February 22, 2012.
<http://www.access.gpo.gov/congress/senate/pdf/108hrg/92548.pdf>
[63] United States v. Rybar, 103 F.3d 273, 286-294 (3d Cir. 1996). Rybar was convicted on two counts of possessing an illegal machine gun under the Firearm Owners Protection Act of 1986, legislation created under the Commerce Clause.
[64] Id.
[65] Id., 103 F.3d at 286 (1996).
[66] Id., 103 F.3d at 294 (1996).

FINANCIAL LITERACY: EDUCATING STUDENTS TO UNDERSTAND THE BENEFITS AND RISKS OF INVESTMENTS

by

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INTRODUCTION

The financial crisis of 2007-2009 that continues to reverberate globally exposed an underlying flaw both within the financial community and among the general population. The lack of knowledge about the basic understanding of finance becomes more and more apparent. This ignorance affects not only the public at large, but also sophisticated investors who were deceived by the complex financial instruments that were a hallmark of the giddy rise of values especially in the housing market.[1]

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This crisis highlights the need for a broadband access and spread of information beginning at lower levels of scholastic training to investors who are either too busy with their daily occupations or are unable to keep up with the innovative developments in the financial sector.

Many universities have introduced an Introduction to Business course, a popular study for incoming business students. At our university it is entitled “Contemporary Business Practice”; the course introduces the students to the world of business and is, in essence, an overview of the main areas of business in which students may major: marketing, management, accounting, finance, and employment relations. A number of excellent texts couple video presentations, power points, and other accessories for student learning.[2] This article proposes that university offer an alternative or additional course which will acquaint all students with a seriously neglected area of studies, namely, a course on financial literacy. This article discusses the meaning of financial literacy; the efforts of governmental and non-governmental organizations to educate the public concerning financial matters, both locally and internationally; the effectiveness of those efforts; and concludes that financial literacy among all citizens requires urgent attention.

FINANCIAL LITERACY

Financial literacy presently concerns many national and international organizations. The International Organization of Securities Commissions (IOSCO), the G8[3], the World Bank[4], and the Organization of Economic Cooperation &

Development (OECD)[5] sponsor international conferences. A general consensus among national and international groups defines "financial literacy" as including the possession of knowledge and understanding of financial matters[6]; the skills and knowledge about financial matters sufficient to take effective action that best fulfills and individual's personal, family, and global community goals[7]; the ability to make informed judgments and manage money effectively[8]. Financial literacy combines consumer/investor understanding of financial products and concepts and the ability to appreciate financial risks and opportunities, to make informed choices, to know where to go for help, and to take other effective actions to improve financial well-being[9].

Financial literacy is related to consumer protection, but differs from it. Consumer protection merely supplies information that allows consumers to make informed decisions and avoid fraudulent and deceptive practices. Financial literacy offers consumers and others the practical skills to understand and evaluate the information they receive.[10]

U. S. GOVERNMENTAL AND NON-GOVERNMENTAL FINANCIAL LITERACY EFFORTS

Learning Modules

The Financial Industry Regulatory Authority (FINRA) Investor Education Foundation provides modules for both high school and college level students. For high school students, a course on financial literacy consists of eight instructional modules and handouts.[11] The eight modules are entitled Asset

Allocation and Security Selection; Creating and Monitoring a Diversified Stock Portfolio; Internet Resources for Bond and EFT Investors; Investing in Equity Mutual Funds; Investing for Retirement; Personal Financial Statements; Portfolio and Risk Management; and Selecting a Financial Advisor.

For example, the first module for the high school students describing Asset Allocation and Security Selection, contains three topics: (1) investor's risk and risk tolerance; (2) approaches to asset allocation strategies-aggressive, moderate, or conservative; and (3) exploration of security selection techniques by use of an online worksheet and stock screening tool. Numerous website references at the end of this and every module further allow enhancement of a student's learning potential.

The modules for investors and post-high school students include Preparing to Invest; Key Investment Concepts; Bank Products; US Treasury Securities; Common Types of Investments; Retirement Savings Vehicles; Choosing the Right Investments; Managing Investment Risk; Evaluating Performance; Investment Professions; Safeguarding Your Investments. [12]

Each module is subdivided into 6-12 segments detailing the particular module. For example, the initial module , "Preparing to Invest", discusses savings and investing, earning interest, bank products,, growth through investing, the prospective of time, creating a budget, paying off credit cards or other high interest debt, setting investment goals, establishing an emergency fund, choosing investments wisely and practicing good habits. A student undertaking such a course would become substantially familiar with the practical

aspects of finance so that s/he will be able to make intelligent choices in determining his or her financial future. Few persons today have the capability of understanding financial products. A course which enlightens one's knowledge of the intricacies of finance may form the basis for budgeting and investing intelligently.

The FINRA Investor Education Foundation has sponsored many other materials that were prepared and issued by grantees of its funding.[13] Among the materials are the following:

- *The Gen I Revolution* developed by the Council for Economic Education to teach personal finance skills to middle and high school students through the use of interactive materials to combat "Murktide", which is personal confusion among the population concerning person finance principles;
- *Are You Financially Fit,* which is a brochure and workbook in English and Spanish that was created by the Florida State University that contrasts the personal finance strategies of households that had similar opportunities to accumulate wealth over their lifetimes but ended with substantially different results;
- *Get Rich Slow,* which is a women's retirement game developed by the Boston College Center for Retirement Research;
- *Investing for Farm Families*, which is an online course developed by the Cooperative Extension Service for farmers and ranchers;
- *Your Mind or Your Money,* which is a feature series that explores personal finance and its implications for investors produced in cooperation with the Nightly

Business Report and Kiplinger's Personal Finance; and other materials.

- *FINRA Investor Education Foundation Newsletter,* which discusses current articles and programs to combat financial illiteracy and fraud.[14]

Other noteworthy projects sponsored by the FINRA Investor Education Foundation developed by law schools include the following:

- *Investor's Guide to Securities Industry Disputes: How to Prevent and Resolve Disputes with Your Broker*, which was prepared by the Pace University Law School[15], *uses* the format of questions and answers that emphasizes "The Arbitration Process" and 'The Mediation Alternative". It includes the names, addresses and contact persons of law school clinics which were created to aid investors;
- *Guidelines for Establishing a Law School Investor Advocacy Clinic* developed by Northwestern Law School, which details how a law school may create an investor advocacy clinic, staffing, facilities and equipment, student participation, clients and case section, case handling, funding sources, and a number of appendices that practically facilitates the creation of a clinic.[16]

FINRA has sponsored a report, *Critical Choices: How Colleges Can Help Students and Families Make Better Decisions about Private Loans,* prepared by the Institute for College Access & Success, an organization devoted to making college more affordable and accessible for people of all backgrounds, and which is funded by the Bill & Melinda Gates

Foundation and other foundations.[17] The Report concerns the very important decisions that parents and students make annually concerning the affordability and choices available to them. It discusses the differences between private and federal student loans, institutional policies and practices, policies and market context, and recommendations for college policies and practices. The explicit language of the report aims at clarifying the misunderstandings, availability, and unawareness of student loans. It identifies useful models for all colleges and related issues.[18]

The American Institute of Certified Public Accountants (AICPA) promotes a multi-curricular, multi-media education program for students entitled "360 Degrees of Possibilities and other programs for high school and college level students. The Alliance for Investor Education publishes *The Investor's Clearinghouse*, which promotes a greater understanding of investing, investments, and the financial markets among investors of all ages.[19]

The Institute for College Access & Success[20], a not-profit organization funded in part by the Bill & Melinda Foundation and other Foundations, seeks to promote the availability and affordability of higher education to persons of all backgrounds. Under the auspices of FINRA, it issued a report, *Critical Choices: How Colleges Can Help Students and Families Make Better Decisions about Private Loans*, which discusses a number of topics relevant to students and their families in making informed decisions particularly about making financial decisions. Among the topics are the major differences between private and federal student loans,

institutional practices, policy and market context, and recommendations for college policies and practices.[21]

The Financial Literacy and Education Commission

Established under the *Fair and Accurate Credit Transactions Act of 2003* (FACT ACT)[22], the Financial Literacy and Education Commission is chaired by the Secretary of the Treasury and consists of the heads of 20 other federal agencies.[23] Its primary tasks are to create a national financial education web site known as *MyMoney.gov* coupled with an accompanying hotline, 1-800-MyMoney a national strategy on financial education.[24] The U.S. Government Accountability Office (GAO) was charged with assessing the effectiveness of the Commission. Three years after the creation of the Commission, the Commission determined that the National Strategy for Financial Literacy was "a useful first step in focusing attention on financial literacy".[25] Nevertheless, it criticized the Commission for presenting as "calls to action" descriptive initiatives or broad pronouncements but did not include a specific implementation plan. There is a need for "clear and specific goals or performance measures" in carrying out its mission. It recommended that the Commission test its websites for usability or consumer satisfaction and to achieve consensus among the 20 federal agencies concerning financial literacy efforts.[26]

President's Advisory Council on Financial Literacy

In the United States, the need for financial literacy is a non-partisan matter. Initially, President George W. Bush signed Executive Order, which created a 16-member President's Advisory Council on Financial Literacy and established for the first time that it is "the policy of the federal government to encourage financial literacy among the American people".[27] Two years later, President Barack Obama signed an Executive Order establishing the President's Advisory Council on Financial Capability.[28] Each Executive Order has a 2-year termination date. Both are similar in that each sets up a Council whose functions are to collect data concerning financial literacy (called capability under the Obama Order), advise the President concerning financial education directed at individuals from youth to adults, promote the private sector of the economy, educate consumers about the effective use of products and services, and identify effective financial education approaches.

Chaired by the famed broker, Charles R. Schwab, the initial Council issued a report on January 6, 2009 citing the efforts made by the Council to initiate programs of financial literacy. It did so by creating an "easy-to-use" financial literacy curriculum for middle school students, the launching of community pilot programs, hosting numerous town hall, conferences, and other meetings, collaborating with governmental agencies to launch financial literacy programs, and many other efforts. It also made a series of Recommendations that would mandate financial education for all students beginning as early as Kindergarten through post 12th grade. It further recommended that there should be tax initiatives for employers to provide such education to

employees and that the Internet be used by the Treasury Department as a resources for professionals and employers. In addition, there should be increased access to financial services for millions and Americans who are underserved by financial institutions as well as developing a standardized set of skills and behaviors that a financial education program should teach an individual.[29]

The Dodd-Frank Act [30]

Section 917 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*[31] mandates the Securities and Exchange Commission to conduct a study the identify the existing financial literacy among retail investors and to identify methods to improve the level of disclosures to investors in order to permit them to make informed investment decisions.[32] Accordingly, on April 19, 2011, the SEC published a request for public comments concerning effective investor education programs. It also noted that it had upgraded its *Investor.gov* website exclusively devoted to investor education.[33] Among the changes made was the addition or expansion of a variety of topics including how to research investments and investment professionals, understanding fees, and, more importantly, the SEC targeted materials to specific groups including members of the military, teachers and retirees. It also added videos, interactive quizzes, and other investor education materials.[34]

Among the comments was that of The Financial Services Roundtable which noted that its members completed some 301,000 community service projects, and over 28,000 financial education programs mainly with the assistance of

465,000 volunteers who assisted over 7.4 million consumers.[35] It collaborates with 17 non-for-profit partners, eight of which are specifically concerned with financial education. The programs include teaching financial literacy to students from K-12 through Junior Achievement, a 10-week financial literacy program to 5th grade students by bankers from the Fifth Third Bancorp's "Young Bankers Club", programs directed to African American students by the Society for Financial Education and Professional Development; and by the Ebenezer HOPE Center at the MLK Sr., Community Resource Complex in Atlanta, Georgia.[36]

A further comment emphasized that the SEC should encourage investors to think of themselves as shareowners rather than shareholders who use the investment strategy of churning rather than owning and holding shares. The comment also encouraged the SEC to facilitate development of additional financial advice sources such as MoxyVote.com and ProxyDemocracy.org through seed funding from agency budgets or from fees from corporations.[37]

GLOBAL FINANCIAL LITERACY DEVELOPMENTS

Developing Countries

As might be expected, financial literacy in developing countries, such as India and sub-Sahara countries, lags substantially behind the so-called developed world. There are a number of studies that illustrate the low levels of literacy in general and financial literacy in particular in these poorer nations. In a study conducted by the Organization for

Economic Cooperation and Development (OECD), the U.K. Department for International Development (DFID), and the World Bank, it was found that the meager savings of poor laborers were squandered on high-interest loans and no-interest savings in India while in many African nations, only 29 percent of adults have a bank account and, even in the more advanced nation of South Africa, 60 percent of the inhabitants do not understand the term "interest".[38]

These organizations have commenced a number of initiatives to address the lack of financial literacy among the poorest nations. The OECD has developed analytical papers and methodologies to educate the public in these areas especially in the sectors of credit and pensions, in schools and workplaces, and at financial intermediary institutions. It has formulated its first international *Recommendations on Principles and Good Practices for Financial Education and Awareness* and has provided and international forum for exchange of information and recent national experiences at international conferences worldwide.[39]

The DFID has created a new fund (The Financial Education Fund) to improve financial literacy among the world's poorest inhabitants. The Fund seeks to enhance awareness of financial literacy by providing educational awareness in both the public and private sectors. It does so by providing initially some $6.3 million grants to governmental and non-governmental organizations (NGOs) based on strict criteria to assure that financial education projects are implemented and supplemented by evaluations of existing projects and interventions to improve the environment for financial education.[40]

The World Bank Group has undertaken analyses to evaluate the impact of financial literacy programs especially in Russia and in other countries which is financed by the Russian Federation's Financial Literacy Program Trust Fund of $15 million. The World Bank, through its Consultative Group to Assist the Poorest (CGAP), is seeking to strengthen access to the many financial services including by the use of new technologies such as mobile banking, smart cards, and point-of-sale networks. It has developed a pilot program of country diagnostic reviews of consumer protection and financial literacy in six countries in Europe and Central Asia.[41]

At the forefront of investor education is the Organization of Securities Commissions (IOSCO). Based in Madrid, Spain, it is composed of 115 jurisdictions which encompass 95 percent of all securities transactions. It promotes global standards for securities regulators.[42] It also conducts seminars globally to enlighten investors and the general public to financial products.[43] Its current emphasis is a focus on training IOSCO members to understanding financial products in order to improve securities regulation among its members.[44]

The European Union

The European Union (EU) is concerned extensively about financial literacy schemes. In its *Survey of Financial Literacy Schemes in the EU 27* [45], it noted the importance of financial literacy as European economies has grown extensively in the prior two decades and the needs of individuals and financial products have become far more complex. Using a time frame of nine months and the

distribution of 800 questionnaires to carefully selected address, it found that there were some 180 initiatives of financial literacy schemes by the 27 member states. The number and distribution of financial literacy schemes varied broadly among the member states. The United Kingdom (UK), Germany, and Austria possessed the most financial literacy schemes, France and the Netherlands had advanced but less active programs, and Poland led the Eastern European member states for its advanced literacy campaigns. The UK had a third of all schemes to spread financial literacy while other member states had substantially fewer schemes. A fourth of the schemes targeted low-income or low-education groups. Other findings in the Report noted that the main target audiences for such campaigns were children and young adults, that a majority of schemes was provided through intermediaries, and that the Internet has become a major source of spreading financial literacy.[46]

The schemes tended to cover a number of content areas of financial services and basic money issues. Some 15% of the schemes are operated by private financial service providers, which target customers and non-customers. Some schemes target specific target groups or purposes such as Financial Management in young households in Germany mainly for pregnant women, Money Advice in the UK mainly for single parent households, and Fit for Money–Fit for Life in Austria directed to young apprentices.[47]

CONCLUSION

The effort to spread financial literacy does succeed in many circumstances. There are, of course, naysayers who dispute its effectiveness.[48] The essence of objections is that there is a lack of proof that financial literacy campaigns have been effective. Although survey analysis can control certain observable variables, nevertheless, there may be unobserved variables such as the persons selected for the study may not reflect the true population, causality that financial literacy education actually brings about the greater use of financial services, and other variables. What is needed are more rigorous studies to establish not only that financial literacy movements have produced the desired results and/or that such campaigns may need to be more focused to particular sub-segments of the less-developed population.[49]

The 2007-2009 financial debacle illustrated vividly the lack of understanding of financial products even among so-called sophisticated investors. Although securities laws generally exempt some of the stringent filing requirements as they pertain to such investors, nevertheless, their lack of knowledge highlighted the overall lack of knowledge of financial basics such as budgeting one's finances, use of credit cards, and the like. The movement of spreading financial literacy from the very young to seasoned investors has spread globally. The need to give such advice and understanding has been promulgated from the G-20 to IOSCO to individual country and local jurisdictions. No ages are excluded inasmuch as such knowledge is being spread from kindergarten to graduate levels of education and investors. The movement will continue unabated as the complexity of financial products

increases and investments in diverse parts of the world become a part of the ordinary citizen's portfolio.

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[1] There are numerous books and articles concerning the financial crisis of 2007-2009 that continues to affect global markets to this day. Among them that illustrates the lack of understanding of innovative financial instruments are: Nouriel Roubini and Stephen Mihm, CRISIS ECONOMICS: A CRASH COURSE IN THE FUTURE OF FINANCE (2010); Michael Short, THE BIG SHORT (2010); and Joseph E. Stiglitz, FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY (2010).

[2] Among the texts for the introduction to business course are: Courtland L. Bovee and John V. Thill, BUSINESS IN ACTION (2011) and Marce Kelly and Jim McGowen, BUSN (2012).

[3] The G8 or "Group of Eight" is a forum created in 1975 and is composed of the leaders of 8 major countries, namely, the U.S., France, Germany, Italy, Japan, the United Kingdom, Canada, and Russia.

[4] The World Bank is composed of two development institutions, the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) owned by 187 member countries, web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~p….

[5] For example, the OICU-IOSCO conducted a three-day training seminar entitled "Understanding New Financial Products and the Regulatory Implications of Those Products, in Marrakesh, Morocco from June 8-10, 2011. The G-8 conducted

a seminar "International Conference on Improving financial Literacy" in conjunction with the Minister of Finance of the Russian Federation and the OECD in Moscow on November 28-30, 2006, www.oecd.org/document/15/0,3343.en_2649_15251491_37583951_1_1_1_1,00.html.

[6] Investopedia, *Financial Literacy*, www.investopedia.com/terms/f/financial-literacy.asp.

[7] National Financial Educators Council, *Financial Literacy Definition*, www.financialeducatorscouncil.org/financial-literacy-definition.html.

[8] U.S. Government Accountability Office (GAO), *Financial Literacy and Education Commission: Further Progress Needed to Ensure an Effective National Strategy*, Report to Congressional Committees (Dec. 2006)

[9] The International Bank for Reconstruction and Development/The World Bank and the OECD, *The Case for Financial Literacy in Developing Countries*, citing OECD definition (2009), p. 2, www.oecd.org/dataoecd/35/32/43245359.pdf.
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[10] The World Bank, *Good Practices for Consumer Protection and Financial Literacy in Europe and Central Asia: A Diagnostic Tool* (October 2008).
[11] The modules and handouts were developed by The Center for Financial Studies at Southern New Hampshire University (2010), www.finrafoundation.org/resources/education/training.

[12] The modules were prepared by Lightbulb Press for the FINRA Investor Education Foundation, www.finrafoundation.org/resources/education/learning/.

[13] FINRA Investor Education Foundation, *Learning Materials from Grantees,* www.finrafoundation.org/resources/education/learning/.

[14] www.finrafoundation.org/news/newsletters/P124424.

[15] Jill Gross and Alice Oshins, ed., *Investor's Guide to Securities Industry Disputes: How to Prevent and Resolve Disputes with Your Broker,* Pace Law School Investor Rights Clinic, www.sec.gov/spotlight/invadvcomm/iacmeeting051710-agenda.pdf.

[16] J. Samuel Tenebaum and Thomas H. Morsch, Northwestern Law School, *Guidelines for Establishing a Law School Investor Advocacy Clinic,* www.finrafoundation.org/web/groups/foundation/@foundation/documents/foundation/p118734.pdf.

[17] www.ticas.org/files/pub/critical_choices.pdf.

[18] *Id.*

[19] www.investoreducation.org/whatisaie.cfm. For example, one of its articles is *Older Americans and Investment Fraud: 10 of the Best Resources to Protect Yourself and Your Parents/Grandparents* at www.investoreducation.org/release061511.cfm.

[20] www.ticas.org.

[21] www.ticas.org/files/pub/critical_choices.pdf.

[22] Public Law 108-159 (2003), which amended the *Fair Credit Reporting Act*, 15 U.S.C. Sec. 1681. The Act has a number of titles which include the right of all persons to procure an annual free credit report, protections against identity theft, right to contest alleged errors in credit reports…. A criticism of its provisions is its preemption of stricter consumer protection laws is some states.

[23] www.treasury.gov/resource-center/financial-education/Pages/commission-index.aspx.

[24] *Id.*

[25] U.S. Government Accountability Office, Report to Congressional Committees, *Financial Literacy and Education Commission: Further Progress Needed to Ensure an Effective National Strategy* (Dec. 2006).

[26] *Id.*

[27] Executive Order 13455 (January 22, 2008).

[28] Executive Order 13530 (January 29, 2010).

[29] President's Advisory Council on Financial Literacy, *2008 Annual Report to the President* (January 6, 2009).

[30] Pub. L. No 111-203, 124 Stat. 1376 (2010).

[31] Pub. L. No 111-203, 124 Stat. 1376 (2010).

[32] Sec. 917(a)(1)-(3). It reads as follows:

(a) IN GENERAL.- The Commission shall conduct a study to identify—
  (1) The existing level of financial literacy among retail investors, including subgroups of investors identified by the Commission;
  (2) Methods to improve the timing, content, and format of disclosures to investors with respect to financial intermediaries, investment products, and investment services;
  (3) The most useful and understandable relevant information that retail investors need to make informed financial decisions before engaging a financial intermediary or purchasing an investment product or service that is typically sold to retail investors, including shares of open-end companies….;
  (4) Methods to increase the transparency of expenses and conflicts of interests in transactions involving investment services and products, including shares of open-end companies….;
  (5) The most effective existing private and public efforts to educate investors; and
  (6) In consultation with the Financial Literacy and Education Commission, a strategy (including, to the extent practicable, measurable goals and objectives) to increase the financial literacy of investors in or der to bring

about a positive change in investor behavior….

[33] Securities and Exchange Commission, *SEC Seeks Public Comment on Effective Investor Education Programs* (April 19, 2011), www.sec.gov/news/press/2011/2011-93.htm. The SEC Office of Investor Education and Advocacy can be found at www.sec.gov/investor.shtml. An example of the information provided is its *Investor Bulletin: Reverse Mergers.*

[34] *Id.* See, also, Lori J. Shock, Director of the SEC's Office of Investor Education and Advocacy, *Speech: Remarks at InvestEd Investor Education Conference* (May 15, 2011), www.sec.gov/news/speech/2011/spch051511ljs.htm.

[35] Judy Chapa, Letter to the SEC's Secretary, dated June 22, 2011, www.fsround.org/frs/policy_issues/regulatory/pdfs/pdfs11/DFAFinancialLiteracyStudy.pdf.

[36] *Id.*

[37] James McRitchie, *SEC Seeks Comment on Investor Education*(April 30, 2011), http://corpgov.net/?p=5959.

[38] Margaret Miller (World Bank Group), Nicholas Godfrey (Department for international Development, DFID), Bruno Levesque (Organization for Economic Cooperation and Development, OECD), and Evelyn Stark (Consultative Group to Assist the Poorest, CGAP), *The Case for Financial Literacy in Developing Countries: Promoting Access to Finance by Empowering Consumers* (2009), p.4. www.achancetowork.org/ifcext/economics.nsf/AttachmentsByTitle/CON_FinLitSeminar_2008_GodfreyLevesqueMiller/$FI

LE/Godfrey-Levesque-Miller-Stark_CaseForFinLiteracy_SeminarDRAFT.pdf.

[39] *Id.* at pp. 8, 9.

[40] *Id*, p. 10.

[41] *Id.* at 11-12.

[42] IOSCO's mission is to:

- Cooperate together to promote high standards of regulation in order to maintain just, efficient and sound markets;
- Exchange information on their respective experiences in order to promote the development of domestic markets;
- Unite their efforts to establish standards and an effective surveillance of international securities transactions; and
- Provide mutual assistance to promote the integrity of the markets by a rigorous application of the standards and by effective enforcement against offenses. OICU-IOSCO, *Media Release* IOSCO/MR/009/2007 (Nov. 8, 2007).

[43] For example, it conducted four-day courses on "Examination, Investigation, and Litigation of Insider Training and Market Manipulation Cases in Securities Regulation" in Madrid, Sprain on October 27-30, 2009 and in Taipei, Taiwan on June 29-July 2, 2010, and a seminar on "Understanding New Financial Products and the Regulatory Implications of

Those Products" in Madrid, Spain on October 19-22, 2010 and in Marrakesh, Morocco, on June 8-10, 2011.

[44] Letter dated April 12, 2011 to prospective invitees to the training program in Marrakesh, Morocco.

[45] Habschick, Marco, Britta Seidl, Dr. Jan Evers, *Survey of Financial Literacy Schemes in the EU27*, VT Markt/2006/26H-Final Report (November, 2007), http://ec.europa.eu/internal_market/finservices-retail/docs/capability/report_survey_en.pdf.

[46] *Id.* At 3 and 21-22.

[47] *Id.* At 22.

[48] For example, see Bilal Zia, *The Fad of Financial Literacy?* (Aug. 12, 2010), http://blogs.worldbank.org/allaboutfinance/the-fad-of-financial-literacy.

[49] *Id.*