2015

When Volunteers Become Employees: Using a Threshold-Remuneration Test Informed by the Fair Labor Standards Act to Distinguish Employees from Volunteers

Emily Bodtke

Note

When Volunteers Become Employees: Using a Threshold-Remuneration Test Informed by the Fair Labor Standards Act To Distinguish Employees from Volunteers

*Emily Bodtke**

Shortly after Rachel Juino started volunteering as a firefighter with the Livingston Parish Fire District 5, a fellow firefighter, John Sullivan, began to sexually harass her.[1] Juino reported the incidents to the captain and fire chief, but neither took action to discipline Sullivan or prevent future harassment.[2] After Sullivan ripped off Juino's face mask during a dispute at a fire scene, Juino ended her services with District 5.[3] Juino filed a claim with the Equal Employment Opportunity Commission, and six months later she sued District 5 for sexual harassment and retaliation under Title VII.[4] On appeal, the Fifth Circuit ruled that because Juino failed to show that she received significant remuneration for her services, she could not claim she was an employee.[5] As a result, the court halted its

* J.D. Candidate 2015, University of Minnesota Law School; B.A., Hillsdale College, 2012. Thank you to Professor Stephen Befort for his thoughtful feedback on this Note. Thank you to Laura Gordon, Kaitlyn Dennis, Samuel Andre, Jonathan Grant, and Joseph Serge for carrying this Note to publication with their careful edits. Thank you to the many teachers, professors, and mentors who critiqued and strengthened my writing over the years. Thank you to my family, especially my parents Larry and Liana Bodtke, for teaching me the value of hard work, giving me opportunities to learn, and inspiring me to pursue a career in law. Thank you to Ugo Ubbaonu for unceasing encouragement throughout the stresses of law school.

1. Original Brief of Appellant, Rachel Juino at 4, Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431 (5th Cir. 2013) (No. 3:11-CV-466).

2. *Id.*

3. *Id.*

4. Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431 (5th Cir. 2013).

5. *Id.* at 439–40.

analysis without any consideration of the traditional common law factors that show employment.[6] The court concluded that Juino was a volunteer rather than an employee, and thus did not fall under the protection of Title VII.[7]

Juino's story is not unique. Many volunteers and other voluntarily unpaid workers like student interns have brought lawsuits alleging discrimination in their workplaces, only to learn statutory protections do not apply to them because they lack employee status.[8] Determining who is or is not an employee is critical because the existence of an employment relationship triggers multiple statutory obligations and legal doctrines, including minimum wage requirements, collective bargaining laws, anti-discrimination rules,[9] workers' compensation coverage, taxes and tax withholding, vicarious tort liability,[10] and, starting in 2015 for large businesses, health insurance coverage.[11]

Despite the fundamental and far-reaching importance of the "employee" determination, the proper judicial test to decide employee status in a volunteer context remains unsettled.[12] The majority of circuits apply a threshold-remuneration test, which requires the disputed volunteer/employee to show substantial compensation before the court will examine the common law agency factors.[13] Under this test, substantial compensation may consist of direct cash payments or significant indirect benefits not merely incidental to the volunteer activity.[14] The Sixth and Ninth Circuits, on the other hand, consider remuneration only one of several non-dispositive factors in determining an em-

6. *Id.*

7. *Id.*

8. *See, e.g.*, McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974 (10th Cir. 1998); Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236 (11th Cir. 1998); O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997); Neff v. Civil Air Patrol, 916 F. Supp. 710 (S.D. Ohio 1996); Lowery v. Klemm, 446 Mass. 572 (2006).

9. *See* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought To Stop Trying*, 22 BERKLEY J. EMP. & LAB. L. 295, 301 (2001).

10. *See* RICHARD A. BALES ET AL., UNDERSTANDING EMPLOYMENT LAW 8 (2007).

11. *See* Dan Mangan, *Delayed: Obamacare's Employer Mandate for Small Businesses*, CNBC (Feb. 10, 2014), http://www.cnbc.com/id/101393331.

12. *Juino*, 717 F.3d at 435.

13. *Id.* ("The Second, Fourth, [Fifth,] Eighth, Tenth, and Eleventh Circuits have adopted the threshold-remuneration test.").

14. *Id*.

ployment relationship.[15] This circuit split exacerbates the already existing difficulty in determining whether an individual is an employee.[16] The split also demonstrates a growing nonuniformity in employment law that challenges employers' and employees' ability to understand their rights and obligations.[17] Although the majority threshold-remuneration test identifies compensation as the key distinction between employees and volunteers, it suffers from inconsistency in application and incongruity with the Fair Labor Standards Act (FLSA).[18] Lack of a precise definition of "remuneration" results in differing applications of the test that further complicate the employment law landscape,[19] while the lack of continuity with the FLSA creates situations where an individual might be an employee under one federal statute but not another.[20]

This Note addresses which test should be applied to volunteers and other unpaid workers claiming employee status and how that test should be defined. This Note does not consider the arguments for or against legislative change to cover volunteers and unpaid interns under various federal employment statutes,[21] but rather focuses on how federal courts should respond to the current legal landscape. The judicial approach to the distinction between employees and volunteers is important because, while our economy increasingly depends upon volun-

15. *Id.* at 435, 438.

16. *See* James O. Castagnera et al., *Are Volunteers Employees?*, 27 NO. 10 TERMINATION EMP. BULL. 1 (Oct. 2011) ("In an economy where the lines between traditional employer-employee relationships and volunteers are blurring in many contexts, settling the issue will take on increasing importance.").

17. *See* Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers*, 14 U. PA. J. BUS. L. 605, 609 (2012).

18. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012).

19. *See* Karen Gwinn Clay, *Volunteers and Title VII: How Far Do Employment Laws Extend?*, 20 NO. 5 MISS. EMP. L. LETTER 3 (Aug. 2013) (discussing the uncertainty of what constitutes threshold remuneration in practice).

20. *See* U.S. COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS - FINAL REPORT 64 (1994) [hereinafter DUNLOP COMMISSION]; Rubinstein, *supra* note 17, at 628 n.121 (describing cases where individuals qualify as employees under one statute but not another).

21. *See generally* Tara Kpere-Daibo, *Employment Law—Antidiscrimination—Unpaid and Unprotected: Protecting Our Nation's Volunteers Through Title VII*, 32 U. ARK. LITTLE ROCK L. REV. 135 (2009) (arguing that Title VII should be amended to cover unpaid workers); David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215 (2002) (recommending legislative change to include unpaid interns under antidiscrimination statutes, regardless of whether they are paid).

teers and unpaid interns,[22] the circuit split over which test to apply to such volunteers is widening (most recently in *Juino*).[23] Circuits that have not yet approached the volunteer-employee question will likely have to choose a side in the near future.[24] This Note presents the first thorough defense and critique of the threshold-remuneration test, explaining both its merits and deficiencies,[25] and offers the novel solution to adopt a modified threshold-remuneration test informed by the FLSA. I propose that courts rely upon standards developed under the FLSA by case law and the Department of Labor in determining what constitutes significant remuneration to create an employment relationship under Title VII and other federal anti-discrimination laws. Integrating the FLSA distinctions between employees and volunteers into the threshold-remuneration test will enable courts to determine employee status in volunteer contexts more consistently and efficiently without leading to divergent results among various employment statutes.

Part I introduces the legal standards developed to determine employment status, with particular emphasis on volunteers. Part II analyzes the merits and downfalls of the threshold-remuneration test as a means of identifying volunteers who should be considered employees. Part III proposes that courts uniformly adopt the threshold-remuneration test for volunteer contexts, but modify the inquiry to increase consistency in application and ensure continuity with the FLSA. This Note ar-

22. *See infra* Part I.B.

23. Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 439 (5th Cir. 2013).

24. *See id.* at 435 (implying that the First, Third, Seventh, and D.C. Circuits have not explicitly addressed how to determine when a volunteer is an employee). For example, district courts in the Seventh Circuit have reached opposing conclusions on which test to apply to volunteers claiming employee status. *Compare* Jones-Walsh v. Town of Cicero, No. 04 C 6029, 2005 WL 2293671, at *4 (N.D. Ill. Sept. 14, 2005) (finding that workers who do not receive any form of compensation are not employees under Title VII), *with* Volling v. Antioch Rescue Squad, No. 11 C 04920, 2012 WL 6021553, at *8–10 (N.D. Ill. Dec. 4, 2012) (finding remuneration one of several common law factors courts must consider when determining whether volunteer ambulance squad members were employees).

25. *Cf.* Christopher R. Morgan, Bryson v. Middlefield Volunteer Fire Department *and the Changing Understanding of Volunteer As Employee*, 17 LEWIS & CLARK L. REV. 1223 (2013) (arguing that remuneration should be one of several non-dispositive factors); Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. 147, 179 (2006) (proposing the uniform adoption of the threshold-remuneration test in volunteer contexts on the basis of its practicality and use by the National Labor Relations Board (NLRB)).

gues that the threshold-remuneration test offers the best method to determine employment status for voluntarily unpaid workers because it recognizes the centrality of compensation to the employment relationship. Despite this benefit, this Note recommends courts more precisely define remuneration to avoid creating yet another unpredictable test in the multifarious arena of employment law and to conform to the FLSA regulatory framework.

I. DETERMINING EMPLOYMENT STATUS IN THE VOLUNTEER CONTEXT

This Part describes the current legal framework for determining whether an individual is an employee under various federal employment statutes. Section A presents the major statutory definitions of "employee" and explains the various judicial tests developed to address the statutory definitions' ambiguity. Section B discusses the role of volunteers and unpaid interns in modern American society. Section C explores the various judicial approaches to voluntarily unpaid workers claiming employee status.

A. LEGAL DEFINITION OF EMPLOYEE

Questions surrounding who is and who is not an employee have long perplexed the employment law arena.[26] This confusion derives largely from employment statutes' failures to define "employee" in a clear and useful way.[27] The National Labor Relations Act (NLRA), for example, states that "the term 'employee' shall include any employee,"[28] while the FLSA defines an employee as "any individual employed by an employer."[29] Such "non-definitions" provide little guidance,[30] essentially forcing courts to apply a judicially created definition.[31]

26. *See* Carlson, *supra* note 9, at 298; Rubinstein, *supra* note 17, at 608.

27. BALES ET AL., *supra* note 10, at 7–8; Carlson, *supra* note 9, at 298; Rubinstein, *supra* note 17, at 608.

28. 29 U.S.C. § 152(3) (2012).

29. *Id.* § 203(e)(1). Many other federal employment statutes adopt identical language. *See* Age Discrimination in Employment Act, 29 U.S.C. § 630(f) (2012); Employee Retirement Income Security Act, 29 U.S.C. § 1002(6) (2012); Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e(f) (2012); Americans with Disabilities Act, 42 U.S.C. § 12111(4) (2012); *see also* Rubinstein, *supra* note 25, at 159.

30. Carlson, *supra* note 9, at 298.

31. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992). Finding that ERISA's definition of "employee" "is completely circular and ex-

In response to this statutory vacuum, courts have developed their own standards to determine employment status.[32] At least four well-established tests exist to distinguish between employees and non-employees: the common law agency test, the primary purpose test, the economic realities test, and a hybrid of the common law and economic realities tests.[33]

The Supreme Court indicated in *Nationwide Mutual Insurance Co. v. Darden* that the common law test is the appropriate standard to apply where the statute at issue fails to articulate a specific definition.[34] The common law agency test focuses on the employer's degree of control over the putative employee,[35] analyzing a non-exhaustive list of anywhere from eleven to twenty un-weighted, non-dispositive factors to determine whether such control is present.[36] The primary purpose test interprets "employee" based upon the context and objective of the statute in which it appears.[37] The economic realities test, which courts apply in cases interpreting the FLSA, the Family

plains nothing," the Court decided to apply the common law agency test. *Id.* at 323.

32. Carlson, *supra* note 9, at 298 ("The real work of identifying 'employees' and their employment relationships has always been in the courts.").

33. Rubinstein, *supra* note 17, at 617.

34. *Darden*, 503 U.S. at 322–23; Stouch v. Bros. of Order of Hermits of St. Augustine, 836 F. Supp. 1134, 1139 (E.D. Pa. 1993).

35. Kpere-Daibo, *supra* note 21, at 143.

36. *See Darden*, 503 U.S. at 523–24 (listing twelve factors); Garrett v. Phillips Mills, Inc., 721 F.2d 979, 982 (4th Cir. 1983) (listing eleven factors relevant to the common law agency test); Rev. Rule 87-41, 1987-1 C.B. 296 (listing the twenty factors used by the Internal Revenue Service to determine employment status); EQUAL OPPORTUNITY EMP'T COMM'N, EEOC COMPLIANCE MANUAL § 2 (2009), http://www.eeoc.gov/policy/docs/threshold.html#2-III-A-1-c (listing sixteen factors). The twelve common law factors listed by the Supreme Court are:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 523–24 (citing Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989)).

37. NLRB v. Hearst Publ'ns Inc., 322 U.S. 111, 124 (1944) ("The word [employee] . . . derives meaning from the context of that statute, which 'must be read in light of the mischief to be corrected and the end to be attained.'" (quoting S. Chi. Coal & Dock Co. v. Bassett, 309 U.S. 251, 259 (1940))).

and Medical Leave Act, and the Social Security Act,[38] analyzes whether the putative employee is economically dependent upon the business he or she serves.[39] This test considers six non-dispositive and un-weighted factors that affect economic dependence.[40] Finally, the hybrid test combines elements of the common law agency test and the economic realities test.[41] Cases applying this test vary on whether the control or economic reliance factors carry greater weight.[42]

Courts and scholars acknowledge that this multiplicity of judicial tests fails to resolve the ambiguities inherent in existing statutory definitions of "employee."[43] If anything, these tests further complicate the issue. By "perpetuat[ing] an ever-expanding catalogue of 'factors,'" which are non-dispositive, non-exhaustive, and un-weighted, courts have increased complexity and reduced predictability in determining whether someone is an employee.[44] Moreover, the sheer number of different tests and definitions can lead to inconsistent results depending on which test is applied.[45] Thus, both the indetermina-

38. BALES ET AL., *supra* note 10, at 13; Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?*, 14 LAB. LAW. 457, 466–67 (1999).

39. Nowlin v. Resolution Trust Corp., 33 F.3d 498, 505 (5th Cir. 1994).

40. BALES ET AL., *supra* note 10, at 11. As articulated by one court, the six factors are: the degree of the alleged employer's right to control the work performed; the worker's investment in facilities and equipment; the alleged employee's opportunity for profit and loss; the degree of skill the performed service requires; the degree of permanence of the working relationship; and whether the service is an integral part of the putative employer's business. Donovan v. DialAmerica Mktg, Inc., 757 F.2d 1376, 1382 (3d Cir. 1985) (quoting Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981)).

41. Rubinstein, *supra* note 17, at 627. Courts frequently apply this test in Title VII cases. *Id.*

42. *Id.* at 627–28.

43. *See* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 121 (1944) ("Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing."); Richardson v. APAC-Mississippi, Inc., 631 So. 2d 143, 150 (Miss. 1994) ("[T]he various tests to determine the type of relationship are themselves generalities which can be viewed quite differently, depending upon which judge is applying them."); Carlson, *supra* note 9, at 298–99 ("[T]he courts have scarcely been any more clear or precise . . . in developing definitions or rules."); Rubinstein, *supra* note 17, at 608 ("[T]here is no clear understanding about how the law should distinguish between employees and non-employees."); Rubinstein, *supra* note 25, at 160 ("From a public policy perspective, this lack of clarity is somewhat shocking.").

44. Carlson, *supra* note 9, at 299 (noting that "the multi-factored 'common law' test begs the question of employee status as much as answers it").

45. DUNLOP COMMISSION, *supra* note 20, at 64 (explaining that "the line

cy within each discrete test and the lack of uniformity across the tests produces a confused regulatory system.[46] Such uncertainty fosters litigation,[47] increases the likelihood of misclassifying employees,[48] and creates absurd results where an individual may be an employee under one statute but not another.[49] In short, the definition of "employee," despite being fundamental to employment law, remains one of the most uncertain concepts in the field.

The "employee" analysis continues to extend to new situations, sometimes resulting in new tests. For example, in *Clackamas Gastroenterology Associates v. Wells*, the Supreme Court considered whether four physician-shareholders at a medical clinic were employees under the Americans with Disabilities Act (ADA).[50] Although the Court concluded that the common-law element of control should be the "principal guidepost," it adopted a new six-factor test promulgated by the Equal Employment Opportunity Commission (EEOC) for the unique problem of determining the employment status of major shareholders.[51] The Court's approach shows that traditional tests developed in an independent contractor versus employee context may not be binding in novel employment situations that involve different relationship dynamics.[52]

B. VOLUNTEERS IN THE UNITED STATES

In most cases analyzing the boundaries of the employment relationship, courts distinguished employees from independent

has been drawn differently in the different statutes"); Rubinstein, *supra* note 17, at 617 (stating that the definition of employee is not uniform across federal law).

46. DUNLOP COMMISSION, *supra* note 20, at 64 (describing the employment law system as a "regulatory morass").

47. Rubinstein, *supra* note 17, at 609.

48. Employee misclassification can be intentional, reckless, or honestly mistaken. *Compare* Carlson, *supra* note 9, at 336 ("[L]egal uncertainty encourages and rewards employer conduct that tests the limits of the law."), *with* Rubinstein, *supra* note 25, at 160 (noting that mistakenly misclassifying an employee can lead to enormous and unexpected financial consequences for an employer).

49. DUNLOP COMMISSION, *supra* note 20; *see also* Rubinstein, *supra* note 17, at 628 n.121 (describing cases where individuals qualify as employees under one statute but not another).

50. Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 440 (2003).

51. *Id.* at 448–49.

52. Rubinstein, *supra* note 25, at 173.

contractors.[53] As *Clackamas* demonstrated, however, the "employee" question is extending to new situations where the factors developed to address the employee-independent contractor distinction may be less relevant.[54] One new situation courts increasingly encounter is a volunteer claiming employee status.[55]

The dictionary defines a volunteer as "a person who voluntarily offers himself or herself for a service or undertaking" or "a person who performs a service willingly and without pay."[56] Writing about the history of American volunteers, Susan Ellis and Katherine Noyes argue that using lack of payment as the sole defining factor of a volunteer is too narrow.[57] Rather, Ellis and Noyes contend that it is possible to receive money and still be considered a volunteer, pointing out that Peace Corps members (typically considered volunteers) receive stipends to cover living expenses and most volunteers receive reimbursements for out-of-pocket expenses.[58] Ellis and Noyes propose their own definition of volunteering: "to choose to act in recognition of a need, with an attitude of social responsibility and without concern for monetary profit, going beyond one's basic obligations."[59]

A somewhat similar but distinguishable definition arises in the case of the unpaid student intern. The unpaid intern, like the traditional volunteer, works voluntarily without pay or obligation, but not out of humanitarian, charitable, or social motivations. Rather, these volunteers work in exchange for valuable job experience and potential career opportunities.[60]

---

53. O'Connor v. Davis, 126 F.3d 112, 115 (1997).

54. *Clackamas*, 538 U.S. at 448–49; Rubinstein, *supra* note 25, at 173.

55. *See*, *e.g.*, Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 432 (5th Cir. 2013); Bryson v. Middlefield Volunteer Fire Dept., Inc., 656 F.3d 348, 350–51 (6th Cir. 2011); *see also* Castagnera et al., *supra* note 16, at 2 (observing that the line between employee and volunteers is "blurring in many contexts").

56. *Volunteer*, DICTIONARY.COM, http://www.dictionary.reference.com/browse/volunteer (last visited Dec. 4, 2014).

57. SUSAN J. ELLIS & KATHERINE H. NOYES, BY THE PEOPLE: A HISTORY OF AMERICANS AS VOLUNTEERS 2 (rev. ed. 1990).

58. *Id.* at 3.

59. *Id.* at 4.

60. *See* Craig J. Ortner, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2618 (1998); Yamada, *supra* note 21, at 220. The distinction between traditional volunteers and unpaid interns appears to lie primarily in their motivations and dependence on the volunteer opportunity. *See* O'Connor v. Davis, 126 F.3d 112, 119 (2d Cir. 1997) (acknowledging that the student intern claiming harassment "was dependent to some degree on successfully completing her internship"). Other scholars, however, conclude that traditional volunteers donate their

Employment law scholar Mitchell Rubinstein classifies volunteers into two types: a "pure volunteer" or a "volunteer plus."[61] A "pure volunteer" "receives nothing in return from the organization he or she is serving,"[62] while a "volunteer plus" receives reimbursement of expenses and other types of "minor benefits such as death or disability insurance or even a small stipend."[63]

The law also attempts to define volunteer in various places, although not in any of the major federal employment statutes themselves.[64] The regulations for the FLSA contain a definition of volunteer that restricts the concept to voluntary and uncompensated service at public agencies.[65] In practice, the Department of Labor also recognizes that volunteers who donate their labor to nonprofit organizations out of "public service, religious, or humanitarian objectives" are not employees.[66] The Volunteer Protection Act, which provides immunity from negligence lawsuits to a nonprofit organization's volunteers,[67] defines volunteer as someone who performs services for a nonprofit organization or governmental unit without compensation, or anything of value in lieu of compensation, over $500 a year.[68]

Although no single definition of volunteer garners complete consensus,[69] it is virtually undisputed that volunteers play a critical role in American society.[70] Approximately 62.6 million

services for multiple reasons, including "their own personal and social goals and needs." JON VAN TIL, MAPPING THE THIRD SECTOR: VOLUNTARISM IN A CHANGING SOCIAL ECONOMY 26 (1988).

61. Rubinstein, *supra* note 25, at 153.

62. *Id.*

63. *Id.*

64. *See* Leda E. Dunn, *"Protection" of Volunteers Under Federal Employment Law: Discouraging Voluntarism?*, 61 FORDHAM L. REV. 451, 453 (1992).

65. 29 C.F.R. § 553.101 (2012) ("An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours.").

66. *Fair Labor Standards Act Advisor: Volunteers*, U.S. DEP'T OF LAB., http://www.dol.gov/elaws/esa/flsa/scope/er16.asp (last visited Dec. 4, 2014). The Department of Labor specifies that individuals cannot volunteer services to "for-profit private sector employers." *Id.*

67. MELANIE L. HERMAN ET AL., NO SURPRISES: HARMONIZING RISK AND REWARD IN VOLUNTEER MANAGEMENT 120 (4th ed. 2006).

68. Volunteer Protection Act of 1997, 42 U.S.C. § 14505(6) (2012).

69. ELLIS & NOYES, *supra* note 57, at 2.

70. *See* Lauren Attard, *A Price on Volunteerism: The Public Has a Higher Duty To Accommodate Volunteers*, 34 FORDHAM URB. L.J. 1089, 1089 (2007) ("Volunteers are essential to the proper functioning of America."); Dunn, *supra*

people volunteered at least once between September 2012 and September 2013 with a median of fifty hours of service per volunteer.[71] Volunteers serve in sectors ranging from religion, education, cultural arts, public safety, and politics to the less intuitive areas of labor, agriculture, business, and industry.[72] These voluntarily unpaid services grow increasingly important as governments reduce their budgets[73] and nonprofits seek to supplement a small paid staff.[74]

Unpaid internships also play a vital and growing role in the American economy. Although no one keeps statistics on the number of unpaid internships, there is widespread agreement that the number has increased to approximately half a million per year.[75] Internships offer valuable job experience and future employment opportunities to students, while providing cheap labor and a convenient employee selection process for employers.[76]

The prominence and importance of volunteerism in American society suggests that the employment status of volunteer workers will critically affect the nonprofit community, the governmental sector, and business industry.[77]

C. WHEN DOES A VOLUNTEER BECOME AN EMPLOYEE?

Standards to determine volunteers' employment status have developed for primarily two purposes: (1) wage and hour protections under the FLSA, and (2) anti-discrimination employment statutes. The analysis under the FLSA rests to some

note 64, at 452 (noting the "pervasiveness of voluntarism in the United States"); Rubinstein, *supra* note 25, at 148 ("[V]oluntarism is critically important to the welfare of this country, particularly in these days of ever-increasing budget cuts."). *See generally* ELLIS & NOYES, *supra* note 57 (providing a history of volunteers in the United States since 1607).

71. *Volunteering in the United States—2013*, U.S. DEP'T OF LAB., BUREAU OF LAB. STAT. (Feb. 25, 2014), at 1, http://www.bls.gov/news.release/pdf/volun.pdf. The Bureau of Labor Statistics defines volunteers as "persons who did unpaid work (except for expenses) through or for an organization," a definition that includes traditional volunteers as well as unpaid interns. *Id.*

72. ELLIS & NOYES, *supra* note 57, at 314–48.

73. Rubinstein, *supra* note 25, at 148.

74. Attard, *supra* note 70, at 1089.

75. Steven Greenhouse, *Jobs Few, Grads Flock to Unpaid Internships*, N.Y. TIMES (May 5, 2012), http://www.nytimes.com/2012/05/06/business/unpaid-internships-dont-always-deliver.html.

76. Ortner, *supra* note 60, at 2616–21. Ortner notes that the "cheap labor" function may violate the FLSA. *Id.* at 2620.

77. *See* Dunn, *supra* note 64, at 452.

degree on a firm statutory and regulatory framework, whereas the analysis under anti-discrimination statutes continues to develop chiefly through case law.

1. VOLUNTEERS UNDER THE FLSA

The Supreme Court explicitly addressed the employment status of volunteers in the 1985 decision *Tony & Susan Alamo Foundation v. Secretary of Labor*.[78] In this case a nonprofit religious organization operated several commercial businesses, which it staffed with former addicts, criminals, and derelicts the organization had rehabilitated.[79] The Foundation did not pay the workers wages or salary, but did provide food, shelter, clothing, transportation, and medical benefits.[80] In considering whether the workers were employees under the FLSA, the Court relied upon the holding in *Walling v. Portland Terminal Co.*[81] In that case, the Court ruled that the FLSA's definition of "employ" as "suffer or permit to work" "was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another."[82] In contrast to the railroad trainees in *Walling*, however, the Court found that the Foundation's volunteers "were 'entirely dependent upon the Foundation for long periods [of time]'" because they received compensation in the form of significant benefits.[83] The fact that the workers strongly protested their classification as employees held little weight for the Court.[84] Although this decision raised concern about the potentially debilitating effects to charitable organizations that rely heavily upon volunteer work,[85] the Court emphasized that the Department of Labor's current approach would not transform services "of the kind typically asso-

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

79. *Id.* at 292.

80. *Id.* at 292–93.

81. *Alamo Found.*, 471 U.S. at 299–300 (citing Walling v. Portland Terminal Co., 330 U.S. 148, 150 (1947)).

82. *Walling*, 330 U.S. at 152 (citing the Fair Labor Standards Act of 1938, 29 U.S.C. § 203(g) (1946)).

83. *Alamo Found.*, 471 U.S. at 301 (quoting Donovan v. Tony & Susan Alamo Found., 567 F. Supp. 556, 562 (W.D. Ark. 1982)).

84. *Id.* at 302.

85. *See* Dunn, *supra* note 64, at 458.

ciated with volunteer work"[86] into labor protected by the FLSA.[87]

The 1985 Amendments to the FLSA added a definition of "volunteer," but the definition applies only to volunteers at public agencies.[88] The amendment allows volunteers at public agencies to receive reimbursed expenses, reasonable benefits, and nominal fees without becoming employees under the FLSA.[89] FLSA regulations specify that allowable payments include: reimbursements for expenses; books, supplies, or other materials essential to volunteer training; coverage under group insurance plans, including health insurance, life insurance, disability insurance, worker's compensation, and pension plans; and nominal fees not tied to productivity.[90] These payments remain subject to an examination of "the total amount of payments made . . . in the context of the economic realities of the situation."[91]

As the *Alamo* Court noted, the Department of Labor continues to recognize "ordinary volunteerism" as falling outside the FLSA's jurisdiction.[92] In its Field Operation Handbook, the Department of Labor acknowledges that "the nature of religious, charitable and similar nonprofit organizations, and schools is such that individuals may volunteer their services in one capacity or another, usually on a part-time basis, not as employees or in contemplation of pay."[93] The Handbook lists several volunteer activities that are unlikely to trigger an employment relationship, including helping at a shelter, providing services for the sick and elderly, and working at a school library or cafeteria.[94]

An entirely different set of standards applies to for-profit private sector employers. The FLSA prohibits for-profit businesses from accepting volunteer services unless the volunteer

86. *Alamo Found.*, 471 U.S. at 303 n.25.

87. *Id.* at 302–03.

88. Pub. L. No. 99-150, § 4, 99 Stat. 787 (1985) (codified as amended at 29 U.S.C. § 203(4)(A) (2012)).

89. *Id.*

90. 29 C.F.R. § 553.106 (2012).

91. *Id.* § 553.106(f).

92. *Alamo Found.*, 471 U.S. at 302–03 & n.25.

93. U.S. DEP'T OF LABOR, FIELD OPERATIONS HANDBOOK 10b03(c) (1993), *available at* http://www.dol.gov/whd/FOH/FOH_Ch10.pdf [hereinafter FIELD OPERATIONS HANDBOOK].

94. *Id.*

meets the six criteria of an intern/trainee.[95] These criteria attempt to ensure that the work arrangement primarily benefits the intern rather than the employer and provides no immediate advantage to the employer.[96] Establishing all six criteria can be difficult and theoretically should preclude private employers from utilizing "free labor."[97] Some scholars, however, suggest that although many employers classify unpaid interns as "trainees" under the FLSA, this classification often ignores the requirement that employers derive no advantage from the intern.[98] Moreover, this six-factor test is not binding on courts, and some courts elect not to use it.[99] Among courts that do apply the test, only some require all six factors to avoid a finding of employee status.[100] Others, like the Tenth Circuit, favor a "totality of the circumstances" approach that considers each factor but only requires most of them to demonstrate a worker is a legally unpaid intern.[101]

2. VOLUNTEERS UNDER ANTI-DISCRIMINATION EMPLOYMENT STATUTES

The circuit courts disagree over which test to apply when confronted with a volunteer or unpaid intern claiming employ-

95. U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT 1 (2010) [hereinafter FACT SHEET #71], *available at* http://www.dol.gov/whd/regs/compliance/whdfs71.pdf (listing the requirements for an unpaid internship as: (1) similar to training in an educational environment, (2) for the benefit of the intern, (3) does not displace regular employees, (4) employer derives no immediate advantage from intern's activities, (5) intern not necessarily entitled to a job at internship's conclusion, and (6) employer and intern understand that intern is not entitled to wages); *see also Tip of the Month: Interns, Volunteers, and Employees: Are You in Compliance?* (Proskauer Rose Emp't Law Counseling & Training Practice Grp., New York, N. Y.), June 2011, *available at* http://www.proskauer.com/files/News/dc18a00a-d961-4da1-b275-37af8d1ef8d7/Presentation/NewsAttachment/73b0c435-5e26-483d-9bc0-39cf5398adbe/Employment-Law-Counseling-Tip-of-the-Month-February-2014-Update.pdf.

96. *See* FACT SHEET #71, *supra* note 95.

97. *See* Richard Tuschman, *Using Volunteers and Interns: Is It Legal?*, FORBES (Aug. 24, 2012), http://www.forbes.com/sites/richardtuschman/2012/08/24/using-volunteers-and-interns-is-it-legal.

98. *See* Ortner, *supra* note 60, at 2620.

99. David C. Yamada, *The Legal and Social Movement Against Unpaid Internships* 4–5 (Suffolk Univ. Law Sch., Research Paper No. 13-34, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2338646.

100. *Id.*

101. *Id.*

ee status.[102] The majority of circuits use a threshold-remuneration test that requires an initial showing of substantial compensation before applying the multi-factor common law agency test.[103] A minority of circuits treat remuneration as one of many non-dispositive factors that must be examined together.[104]

a. Threshold-Remuneration Test

The leading case establishing the threshold-remuneration test is *Graves v. Women's Professional Rodeo Ass'n*.[105] The defendant WPRA sanctioned rodeo barrel races that met its standards and required its members to adhere to certain rules when competing in its approved events.[106] WPRA's membership was restricted to females, and the plaintiff Graves, a male barrel racer, brought a Title VII suit alleging sex discrimination.[107] WPRA defended the suit on the grounds that it did not have the requisite fifteen employees to fall under Title VII's jurisdiction.[108] Graves contested that WPRA's members were its employees.[109] Rather than immediately initiating a common law agency analysis, the court consulted the dictionary definitions of "employee," "employer," and "employ" and found that "[c]entral to the meaning of these words is the idea of compensation in exchange for services."[110] As a result, the court concluded that compensation "is an essential condition to the existence of an employer-employee relationship" and that a multi-factor common law or economic realities analysis should apply "only in situations that plausibly approximate an employment relationship."[111] Because WPRA's members received no compensation, their relationship did not plausibly rise to that between an employer and employee and a common law agency analysis was unnecessary.[112]

102. *See* Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 435 (5th Cir. 2013) (describing the circuit split over which test should be used to distinguish between volunteers and employees).

103. *Id.*

104. *Id.*

105. 907 F.2d 71 (8th Cir. 1990).

106. *Id.* at 72.

107. *Id.* at 71–72.

108. *Id.* at 72.

109. *Id.*

110. *Id.* at 73.

111. *Id.* at 73–74.

112. *Id.* at 73. Although the barrel race winners received a money prize,

The Second Circuit followed the Eighth Circuit's reasoning in *O'Connor v. Davis*, where a student intern sued for sex discrimination under Title VII.[113] The court found application of the common law agency test to determine O'Connor's employment status inappropriate "because it ignores the antecedent question of whether O'Connor was hired."[114] The court ruled that no hire occurred in this case, because O'Connor received no salary, wages, or benefits, nor was she promised such compensation.[115] As a result, the court found O'Connor was not an employee under Title VII.[116]

Following *Graves* and *O'Connor*, several other courts of appeals adopted the threshold-remuneration test in cases where a voluntarily unpaid worker claims employee status.[117]

b. Compensation as a Non-dispositive Factor Within Common Law Agency Test

The Sixth and Ninth Circuits have rejected the threshold-remuneration test in favor of a common law test that includes compensation as one of several non-dispositive factors.[118] In *Bryson v. Middlefield Volunteer Fire Department, Inc.*, an employee of the Fire Department sued for sex discrimination under Title VII.[119] The Fire Department argued it was not an employer under Title VII because it did not have fifteen employees for the relevant time period.[120] Bryson countered that the Fire Department's firefighter-members were employees.[121] The district court applied the threshold-remuneration test and concluded that the firefighters' benefits did not constitute suffi-

non-WPRA members could also compete and receive the prize. *Id.* Moreover, the prize money did not come from WPRA, but rather from the sponsor of the particular rodeo and the competitors' entry fees. *Id.*

113. 126 F.3d 112, 113–14 (2d Cir. 1997).

114. *Id.* at 115.

115. *Id.* at 116.

116. *Id.*

117. *See* Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 439 (5th Cir. 2013); Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1243–44 (11th Cir. 1998); McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974, 979 (10th Cir. 1998); Haavistola v. Cmty. Fire Co. of Rising Sun, 6 F.3d 211, 222 (4th Cir. 1993).

118. *See* Bryson v. Middlefield Volunteer Fire Dep't, Inc., 656 F.3d 348, 354 (6th Cir. 2011); Waisgerber v. City of L.A., 406 F. App'x 150, 152 (9th Cir. 2010); Fichman v. Media Ctr., 512 F.3d 1157, 1160 (9th Cir. 2008).

119. *Bryson*, 656 F.3d at 350.

120. *Id.* at 351.

121. *Id.* at 350–51.

cient compensation to raise a factual issue for the jury.[122] The Court of Appeals for the Sixth Circuit reversed, finding the district court's adoption of the threshold-remuneration test in error.[123]

In explaining its reversal, the court of appeals questioned the precedent on which the majority of circuits based its understanding of remuneration as an independent antecedent factor. The opinion criticized the *O'Connor* court's reliance on the term "hired party" in *Community for Creative Non-Violence v. Reid*[124] as support for establishing a threshold requirement of substantial compensation.[125] The court instead emphasized the *Reid* Court's instruction to apply the common law of agency "'when Congress has used the term 'employee' without defining it,'"[126] observing that the instruction made no exception for cases lacking remuneration.[127] The court also noted that considering remuneration as one of several non-dispositive factors comported with *Nationwide Mutual Insurance Co. v. Darden*'s statement that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[128] The court reversed and remanded the case for further proceedings that weighed common law factors in addition to remuneration.[129]

Legal commentators dispute the relative merits of the threshold-remuneration test versus treating remuneration as one of several non-dispositive factors. Mitchell Rubinstein advocates the uniform adoption of the threshold-remuneration test to determine whether a volunteer is an employee, emphasizing its practicality and adoption by the National Labor Relations Board (NLRB),[130] the quasi-judicial body that decides cas-

122. *Id.* at 351.

123. *Id.* at 353.

124. 490 U.S. 730, 751–52 (1989).

125. *Bryson*, 656 F.3d at 354; O'Connor v. Davis, 126 F.3d 112, 115 (2d Cir. 1997).

126. *Bryson*, 656 F.3d at 354 (quoting *Reid*, 490 U.S. at 739–40).

127. *Id.*

128. *Id.* (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992)) (internal quotation marks omitted).

129. *Id.* at 355–56.

130. Rubinstein, *supra* note 25, at 179. For an overview of the NLRB cases applying the same two-step test used in the threshold-remuneration test, see Northwestern Univ. & Coll. Athletes Players Ass'n, No. 13-RC-121359, slip op. at 13–17 (N.L.R.B. March 26, 2014), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4581667b6f (analyzing compensation before analyzing control factors and concluding that only the football players receiving scholarships were employees under the Act); *In re* Seattle Opera Ass'n, 331

es under the NLRA in administrative proceedings.[131] Christopher Morgan, in contrast, argues that the Sixth and Ninth Circuits' "all the factors" approach better accords with Supreme Court precedent.[132] This debate represents an additional complication to the already inconsistent and unpredictable legal framework for determining employee status. Because the multi-factor approach represents the status quo for determining employment status under Title VII and other federal employment statutes, this Note analyzes the reasons for and against diverging from that status quo with the threshold-remuneration test. As the next Part will demonstrate, the threshold-remuneration test offers a potentially logical and clear test that overcomes much of the unpredictability inherent in the Sixth Circuit's "all the factors" approach. The threshold-remuneration test, however, needs a more precise definition of "remuneration" that accords with the FLSA in order to avoid becoming yet another indeterminate and inconsistent standard to decide employee status.

II. THE PROBLEMS OF THE THRESHOLD-REMUNERATION TEST THREATEN TO UNDERMINE ITS BENEFITS

This Part examines the advantages, criticisms, and deficiencies of the threshold-remuneration test as a method to determine the employment status of voluntarily unpaid workers. Section A discusses the threshold-remuneration test's benefits of logic and efficiency in contrast to multi-factor tests' incompatibility with volunteer situations and unpredictability. Section B addresses and counters two leading criticisms of the threshold-remuneration test: (1) overemphasis on the *Reid* Court's "hired party" language, and (2) violation of precedent. Section C then explains the more serious problems with the threshold-remuneration test: (1) an inconsistent definition of compensation, and (2) incongruity with the FLSA. This Part concludes that while the threshold-remuneration test offers a

N.L.R.B. 1072, 1073 (2000) (examining remuneration before other factors in finding that auxiliary opera choristers were employees), *aff'd*, 292 F.3d 757 (D.C. Cir. 2002); WBAI Pacifica Found., 328 N.L.R.B. 1273 (1999) (concluding that no employment relationship existed where there was no compensation for unpaid staff and that no further test needed to be applied).

131. *The Board*, NAT'L LABOR RELATIONS BD., http://www.nlrb.gov/who-we-are/board (last visited Dec. 4, 2014).

132. Morgan, *supra* note 25, at 1234–35.

potential method to clarify the definition of "employee" in volunteer contexts, it suffers from its failure to delineate the meaning of "remuneration" and its failure to coincide with the FLSA's regulations for determining when a volunteer becomes an employee.

A. THE THRESHOLD-REMUNERATION APPROACH REFOCUSES THE MEANING OF EMPLOYMENT AND SIMPLIFIES THE EMPLOYMENT STATUS DETERMINATION

Case law suggests several reasons for applying the threshold-remuneration test to volunteer situations. First, the threshold-remuneration test calls attention to the core feature of employment relationships: compensation. Second, the test recognizes that control, the focus of the common law agency test, loses its significance when compensation is not evident. Third, the threshold-remuneration approach simplifies the process of identifying an employee by avoiding the multi-factor analysis when no plausible employment relationship exists.

1. The Threshold-Remuneration Test Recognizes the Centrality of Compensation to the Employment Relationship

The threshold-remuneration test emphasizes the importance of compensation by making it an antecedent requirement to conducting a common law agency analysis. The *Graves* court developed this approach by consulting the dictionary definitions of "employee," "employer," and "employ" before diving immediately into a common law agency analysis.[133] Analyzing the dictionary definitions, the court noted that "[c]entral to the meaning of these words is the idea of compensation in exchange for services."[134] The NLRB also referred to the dictionary definitions of "employee" and "employ" in *WBAI Pacifica Foundation*, a case where unpaid staff claimed they should be included in a collective bargaining agreement under the NLRA.[135] The NLRB relied on *NLRB v. Town & Country Electric*, where the Supreme Court looked to various dictionary definitions of "employee" in analyzing the NLRA.[136] Because those dictionary def-

133. Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 72–73 (8th Cir. 1990) (pointing out that statutory definitions' "quite spartan and circular nature . . . seem to leave no other route" than relying upon the words' ordinary usage).

134. *Graves*, 907 F.2d at 73.

135. *WBAI Pacifica Found.*, 328 N.L.R.B. at 1274.

136. NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 90 (1995); *WBAI*

initions all included compensation, the NLRB concluded that an employment relationship requires an economic aspect.[137]

This return to dictionary definitions clarifies the complicated employee question by focusing on the fundamental meaning of employment, whereas multi-factor tests disregard compensation's fundamental role by treating it as one of many factors. The ordinary meanings of "employee" and related words, as shown by dictionary definitions,[138] indisputably feature compensation as a central component of the employment concept—not just a relevant element. Moreover, the dictionary definitions accord with societal perceptions of the distinction between volunteers and employees. As Ellis and Noyes' definition of "volunteer" indicates,[139] a key feature of volunteering is "no personal economic gain."[140] Employment, on the other hand, rests on an economic exchange.[141] Without compensation, a relationship shifts from one of economic exchange to one of freely offered services that generate their own intrinsic value.[142]

Admittedly, in unpaid intern situations, the absence of monetary compensation does not automatically imply a disinterested donation without expectation of extrinsic reward.[143]

Pacifica Found., 328 N.L.R.B. at 1274.

137. *WBAI Pacifica Found.*, 328 N.L.R.B. at 1274–75. Mitchell Rubinstein argues that the NLRB essentially adopted the threshold-remuneration test in this case. Rubinstein, *supra* note 25, at 178.

138. *Merriam-Webster's Collegiate Dictionary* defines employee as "one employed by another usu[ally] for wages or salary and in a position below the executive level." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 408 (11th ed. 2003). "Employ" is defined: "to use or engage the services of" and "to provide with a job that pays wages or a salary." *Id. Black's Law Dictionary* defines employee as a "person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." BLACK'S LAW DICTIONARY 602 (9th ed. 2009). *Black's Law Dictionary* defines "hire" as "[t]o engage the labor or services of another for wages or other payment." *Id.* at 799.

139. "To *volunteer* is to choose to act in recognition of a need, with an attitude of social responsibility and without concern for monetary profit, going beyond one's basic obligations." ELLIS & NOYES, *supra* note 57, at 4.

140. *Id.* at 4–5.

141. *See WBAI Pacifica Found.*, 328 N.L.R.B. at 1275 ("[T]o work for hire is to receive compensation for labor or services."); James E. Brennan, *Money Buys Labor, Not Love*, COMPENSATION CAFÉ (July 10, 2013, 9:12 AM), http://www.compensationcafe.com/2013/07/money-buys-labor-not-love.html ("[L]abor is purchased by money.").

142. *Cf.* Brennan, *supra* note 141 ("Once a price-tag is placed on a task, it tends to be leached of intrinsic value. Involving money alters the transaction into a negotiation over extrinsic market terms.").

143. *See* Ortner, *supra* note 60, at 2618 (arguing that college graduates find it challenging to gain full-time employment without internship experi-

Unpaid interns labor in part out of the expectation of future economic returns.[144] That being said, economic *exchange* is still lacking if the unpaid internship adheres to the Department of Labor regulation that an employer "derive[] no immediate advantage" from the intern's activities.[145] Because the FLSA-compliant employer receives nothing, there is no exchange and therefore no compensation, which *Black's Law Dictionary* defines as "[r]emuneration and other benefits received *in return* for services rendered."[146] Thus, if the employer receives nothing in exchange for giving the intern job experience and career opportunities, no employment relationship exists.

2. The Threshold-Remuneration Test Recognizes that Control Loses Significance when Compensation Is Absent

In establishing compensation as a dispositive factor, the threshold-remuneration test appropriately adjusts the employee inquiry away from control in volunteer situations. Courts determining employment status historically applied the common law agency test with its focus on control because most cases disputed whether an individual was an employee or independent contractor, a distinction where control is the defining factor.[147] Yet, as the *Haavistola* court noted, "[c]ontrol loses some of its significance . . . in those situations in which compensation

ence); Yamada, *supra* note 21, at 217 (noting that internship experience is essentially required as part of a professional education).

144. *See* Greenhouse, *supra* note 75 ("[M]any college graduates who expected to land paid jobs are turning to unpaid internships to try to get a foot in an employer's door."); Michelle Hackeman, *Many Students Debate the Value of Unpaid Internships*, PITTSBURGH POST-GAZETTE (July 14, 2013, 12:00 AM), http://www.post-gazette.com/hp_mobile/2013/07/14/Many-students-debate-the-value-of-unpaid-internships/stories/201307140181 ("[C]ollege students and employers have increasingly regarded internships as stepping stones on the way to full-time employment, so much so that the internship has come to replace a traditional entry-level position.").

145. FACT SHEET #71, *supra* note 95, at 1. Commentators have noted, however, that this criterion is particularly difficult to establish, Tuschman, *supra* note 97, and that many employers classify their interns as non-employees even though the employer does derive benefit from the interns' work, Ortner, *supra* note 60, at 2620. Others have criticized this criterion for disregarding unpaid internships' long-term advantages to employers, including generating goodwill and training future employees on a cost-free basis. Craig Durrant, Comment, *To Benefit or Not To Benefit: Mutually Induced Consideration As a Test for the Legality of Unpaid Internships*, 162 U. PA. L. REV. 169, 178 (2013).

146. BLACK'S LAW DICTIONARY, *supra* note 138, at 322 (emphasis added).

147. Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 220 (4th Cir. 1993); Smith v. Berks Cmty. Television, 657 F. Supp. 794, 795 (E.D. Pa. 1987).

is not evident."[148] Control, as the *Graves* court observed, exists in many relationships that do not give rise to employment status; a university, for example, exercises control over its students, and a credit card company imposes rules on its card members.[149] Volunteers also typically experience a high degree of control over their activities.[150] Consequently, under a typical control test, even the most traditional, "pure" volunteer could meet the definition of employee, regardless of the absence of any expectation or receipt of compensation.[151] Such an outcome disregards the centrality of compensation in the employment relationship[152] and inflates the significance of control.

Moreover, even though control clearly exists in volunteer contexts, its capacity for abuse by employers decreases in volunteer situations. The court in *Smith v. Berks Community Television* reasoned that because volunteers do not rely on the organization they serve for their livelihood, they "are not susceptible to the discriminatory practices which the Act [Title VII] was designed to eliminate."[153] Because a volunteer does not depend upon his or her volunteer work to pay the bills, the volunteer holds greater bargaining power than a typical employee. For instance, the volunteer can leave the position without immediate financial consequences, and in doing so deprive the employer of the benefits of free labor.[154] Therefore, control in a pure volunteer context imposes fewer risks of ongoing discrimination than in an employment relationship, further diminish-

148. *Haavistola*, 6 F.3d at 220.

149. Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990).

150. *See* HERMAN, *supra* note 67, at 13–17 (describing strategies for managing volunteer services, including providing explicit direction, supervising activities, and establishing policies).

151. *Cf.* Rubinstein, *supra* note 25, at 172 ("[S]imply because a volunteer in a hospital gift shop is directly under the control of an administrator . . . may say nothing with respect to whether or not he is an employee if he or she receives absolutely nothing in return.").

152. *See supra* Part II.A.1.

153. Smith v. Berks Cmty. Television, 657 F. Supp. 794, 795 (E.D. Pa. 1987).

154. *See* Peter J. Eide, *Volunteers and Employment Law*, *in* THE VOLUNTEER MANAGEMENT HANDBOOK 339, 340–41 (Tracy Daniel Connors ed., 1995). *But see* O'Connor v. Davis, 126 F.3d 112, 119 (2d Cir. 1997) (recognizing that student interns may not be "in quite the same position to simply walk away from . . . alleged harassment as are many other volunteers"); Kpere-Daibo, *supra* note 21, at 148–50 (arguing that volunteers are vulnerable to discriminatory behavior because their motives for volunteering may be strong enough to tolerate such abuse, and because employers are more likely to abuse unpaid workers because of their temporary status).

ing control's importance to a test distinguishing between volunteers and employees. The threshold-remuneration test properly shifts the focus towards compensation and away from control, a factor that, while important to the employee-independent contractor distinction, carries less weight in volunteer situations.

3. The Threshold-Remuneration Test Avoids the Indeterminate Multi-factor Analysis

Using remuneration as a dispositive factor not only recognizes compensation's centrality in the employment relationship but also simplifies the method of determining when an individual is an employee. If a plaintiff fails to establish sufficient remuneration, the court need not delve into an indeterminate test of non-weighted, non-dispositive factors.[155] Such an approach enhances both judicial efficiency and predictability.[156] Specifically, the court avoids a lengthy analysis of anywhere from six to thirteen additional factors if compensation is clearly absent.[157] The test also improves predictability by clarifying when someone is clearly *not* an employee.[158] Overall, the threshold-remuneration lends much-needed clarity and certainty to the increasingly complicated question of employment status.

Although the test's adoption of one dispositive factor will prove determinative in only some circumstances, it still generates greater predictability than the existing scheme. Moreover, the threshold-remuneration test reorients courts to the fundamental definition of an "employee" by shifting the focus to compensation rather than control in volunteer contexts. Despite the

155. *See* Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 74 (8th Cir. 1990).

156. *See* Rubinstein, *supra* note 25, at 179 ("The two-step approach of the NLRB seems to be the most practical test for distinguishing between volunteers and employees.").

157. *Compare* Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 439–40 (halting its analysis after finding the plaintiff's benefits did not constitute sufficient remuneration), *with* Fichman v. Media Ctr., 512 F.3d 1157, 1160–61 (9th Cir. 2008) (analyzing six factors in addition to remuneration even after finding the putative employees did not receive substantial compensation).

158. *See* Rubinstein, *supra* note 25, at 154 ("When volunteers receive absolutely nothing in return, courts do not seem to have much difficulty in concluding that they are volunteers . . . ."); Castagnera et al., *supra* note 16 (recommending that human resources keep careful track of all forms of compensation for volunteers); Stephen M. Flanagan, *Tip of the Month: Employment Laws and Interns*, 31 No. 7 FLETCHER CORP. L. ADVISER 14 (July 2013) ("The key[] for employers to avoid turning interns into employees . . . [is] . . . no or insignificant remuneration . . . .").

threshold-remuneration test's practical adoption of one dispositive factor, the test has received criticism about its precedential basis. Moreover, the test continues to suffer from inconsistency in application and incongruity with the major federal employment statute addressing compensation: the FLSA.

B. THE THRESHOLD-REMUNERATION TEST NEITHER OVER-EMPHASIZES *REID*'S "HIRED" LANGUAGE NOR VIOLATES PRECEDENT

Despite the threshold-remuneration test's logic and comparative simplicity in defining the employment relationship, it has not escaped criticism. The Sixth Circuit refused to adopt the threshold-remuneration approach on the grounds that other circuits overemphasized the substantive meaning of "hired party" as used by the Supreme Court.[159] Some courts and scholars similarly challenge the threshold-remuneration's precedential foundation, pointing out that prior Supreme Court decisions assert no one factor is decisive in analyzing the employment relationship.[160] These criticisms, however, misinterpret Supreme Court precedent and overlook the logical foundations of the threshold-remuneration test.

1. The Threshold-Remuneration Test Does Not Over-Emphasize the Term "Hired Party"

In *Bryson v. Middlefield Volunteer Fire Department*, the Sixth Circuit questioned the majority's reasoning for adopting remuneration as an "independent antecedent inquiry."[161] The court disagreed with *O'Connor* that the term "hired party" in key Supreme Court cases distinguishing employees from independent contractors[162] signified anything substantive about the meaning of "employee" or the role of remuneration.[163] The Sixth Circuit pointed out that the *Reid* Court defined "hiring party" purely in terms of the Copyright Act as "'the party who claims ownership of the copyright by virtue of the work for hire doc-

159. Bryson v. Middlefield Volunteer Fire Dept., Inc., 656 F.3d 348, 354 (6th Cir. 2011).

160. *Id.*; Morgan, *supra* note 25, at 1234–35.

161. *Bryson*, 656 F.3d at 353.

162. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989); O'Connor v. Davis, 126 F.3d 112, 115 (2d Cir. 1997).

163. *Bryson*, 656 F.3d at 354.

trine.'"[164] Such a definition, the Sixth Circuit reasoned, undercut any inference that the term "hired party" carries any meaningful weight outside the Copyright Act.[165]

The Sixth Circuit's interpretation, however, views "hired party" too narrowly and overlooks the consistent logic of requiring a "hire" before engaging in a full-fledged application of the common law test. First, the *Bryson* court dismissed the Supreme Court's application of the "hired party" language to a case outside the scope of the Copyright Act in *Darden*, where the statute at issue was ERISA.[166] Although the term "hired party" originated from the Copyright Act, the Supreme Court did not hesitate to transfer the language or concept to other employment contexts. Second, the *Bryson* court failed to recognize the rudimentary meaning of "hire" and its presumed existence in both employee and independent contractor contexts. "Hire" means "[t]o engage the labor or services of another for wages or other payment."[167] Both an employee and an independent contractor in the vast majority of cases meet this definition.[168] The common law agency test itself assumes this baseline with the factor "method of payment."[169] This factor presumes the existence of compensation and delineates between employees and independent contractors solely upon the *method* by which such compensation is paid.[170] In volunteer contexts, however, courts cannot similarly presume the existence of compensation or a hire.[171] A preliminary investigation into whether a "hire" has even occurred simply recognizes the assumption under which courts already determine employee status. The Sixth Circuit, by over-analyzing the origins of the term "hired party," fails to recognize its broader use by the Supreme Court and its logical role in defining "employee."

164. *Id.* (quoting *Reid*, 490 U.S. at 738 n.6).

165. *Id.*

166. *Id.*; *Darden*, 503 U.S. at 323–24.

167. BLACK'S LAW DICTIONARY, *supra* note 138, at 799.

168. *See* Rubinstein, *supra* note 17, at 618–19 ("Outside cases involving volunteers, there is usually no issue with respect to whether a hiring took place or whether remuneration is received.").

169. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).

170. *See* BALES ET AL., *supra* note 10, at 9.

171. *See* Rubinstein, *supra* note 25, at 172 ("[T]he employment status of volunteers has very little to do with the issue of whether or not someone is an independent contractor.").

2. The Threshold-Remuneration Test Does Not Violate Precedent

In rejecting the threshold-remuneration test, the Sixth Circuit relied on the Supreme Court's assertion in *Reid* that "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."[172] The Ninth Circuit similarly noted in opting out of the threshold-remuneration test[173] the Supreme Court's statement in *Clackamas* that the outcome of common law test depends on "'all of the incidents of the relationship . . . with no one factor being decisive.'"[174] Morgan argues that the Supreme Court provided a directive in *Clackamas* that all employment factors must be analyzed together with no one factor being dispositive.[175] Morgan further points out that the *Clackamas* Court included remuneration as one of six factors to determine the alleged employees' status in that case, arguing therefore that remuneration cannot be an antecedent requirement.[176] These criticisms raise the question whether the threshold-remuneration test ignores binding precedent.[177]

Such criticism, however, misinterprets the import of the *Clackamas* decision. Rather than compelling an all-the-factors approach, the decision recognizes the legitimacy of adopting a new test for a novel situation. In *Clackamas*, the Court addressed whether four physician-shareholders of a medical clinic were employees, acknowledging that professional corporations have "no exact precedent in the common law."[178] As a result, the Court adopted six new factors promulgated by the EEOC to analyze the narrow and novel question of whether a shareholder is an employee.[179] This divergence from the traditional list of

172. *Reid*, 490 U.S. at 739–40; Bryson v. Middlefield Volunteer Fire Dept., Inc., 656 F.3d 348, 354 (6th Cir. 2011).

173. Fichman v. Media Ctr., 512 F.3d 1157, 1160 (9th Cir. 2008); Morgan, *supra* note 25, at 1232.

174. Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 451 (2003) (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992)).

175. Morgan, *supra* note 25, at 1238.

176. *Id.*

177. *See id.* at 1239 (noting the "all the factors" test "comports with Supreme Court precedent and should therefore be given more credence").

178. *Clackamas*, 538 U.S. at 442, 447.

179. *Id.* at 448–49. The six new factors were: (1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (2) whether and to what extent the organization supervises the individual's work; (3) whether the individual reports to someone higher in the or-

factors indicates the Supreme Court's recognition that new, modified tests are appropriate for scenarios outside the typical employee-independent contractor distinction.[180] The *Clackamas* test, although rooted in agency law, represents a modification of the Supreme Court's past application of the common law agency test. In this particular situation, the Court adhered to the non-dispositive all-the-factors approach that Morgan characterizes as binding, but the Court's willingness to adjust its analysis for non-traditional employment situations reveals that traditional multi-factor tests may not be binding in volunteer contexts.[181]

Morgan further argues, however, that because the *Clackamas* Court specifically included remuneration—defined as "whether the individual shares in the profits, losses, and liabilities"—as one of its non-dispositive factors, precedent bars making remuneration an antecedent requirement.[182] This interpretation, however, overlooks the fact that "remuneration" as defined in *Clackamas* weighed *against* a finding of employment for the shareholders.[183] The Court was not inquiring as to the preliminary existence of payment, but as to how this payment was calculated: as a salary, or as a share of the company's profits.[184] Thus, including the sharing of profits as a non-dispositive factor in the *Clackamas* analysis hardly precludes courts from treating basic remuneration as a threshold factor.

C. THE THRESHOLD-REMUNERATION APPROACH FAILS TO DEFINE "REMUNERATION" AND GENERATES RESULTS INCONSISTENT WITH THE FLSA

Although the threshold-remuneration test overcomes these critiques of its precedential foundation, other, yet unacknowledged problems exist with the test that could undercut its bene-

ganization; (4) whether and to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shared in the profits, losses, and liabilities of the organization. *Id.* at 449–50.

180. Rubinstein, *supra* note 25, at 173.

181. *See id.*

182. Morgan, *supra* note 25, at 1238.

183. *Clackamas*, 538 U.S. at 450–51 ("Some of the District Court's findings . . . appear to weigh in favor of a conclusion that the four director-shareholder physicians in this case are not employees of the clinic. For example . . . they share the profits . . . .").

184. *See id.*

fits of logic and efficiency. First, it remains unclear what constitutes significant remuneration,[185] both because courts tend to apply the standard differently[186] and because new factual scenarios likely will arise.[187] Second, the threshold-remuneration presents the same problematic phenomenon as many other tests in the employment arena that find an employment relationship under one statute but not another.[188]

1. The Definition of "Significant Remuneration" Is Unclear

The threshold-remuneration test suffers from an unclear definition of "remuneration." The Fourth Circuit observed in *Haavistola* that "compensation is not defined by statute or case law."[189] The *Juino* court, in contrast, offered a definition of remuneration as "either direct compensation, such as a salary or wages, or indirect benefits that are not merely incidental to the activity performed."[190] Even this definition, however, produces uncertainty. Partly as a result of little precedent and partly because of courts' reluctance to draw definite lines around the remunerative concept, the threshold-remuneration "test provides very little guidance in its practical application."[191]

Some case comparisons demonstrate this unpredictability. In two similar cases involving volunteer firefighters, one plaintiff established employment status[192] while the other did not.[193]

185. *See* Rubinstein, *supra* note 25, at 157 (noting that "each case is fact specific"); Gwinn Clay, *supra* note 19 (considering several hypothetical variations of the factual scenario in *Juino* and concluding "we don't know" what meets the threshold of remuneration).

186. *Compare* O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997) (analyzing whether the plaintiff received a salary, wages, or benefits), *with* Rafi v. Thompson, No. 02-2356, 2006 WL 3091483, at *1 (D.D.C. Oct. 30, 2006) (analyzing whether the volunteer position afforded future career opportunities with the employer).

187. *See* Rubinstein, *supra* note 25, at 179 (predicting the two-step test may be difficult to apply in certain scenarios).

188. *See, e.g.*, Seattle Opera v. NLRB, 292 F.3d 757, 776–77 (D.C. Cir. 2002) (Randolph, J., dissenting) (noting that the majority's finding of an employment relationship under the NLRA incorrectly necessitated that the employer violated federal tax laws and the Fair Labor Standards Act); DUNLOP COMMISSION, *supra* note 20 (recognizing that "each major labor and employment statute . . . has its own definition of employee").

189. Haavistola v. Cmty. Fire Co. of Rising Sun, 6 F.3d 211, 221 (4th Cir. 1993).

190. Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 435 (5th Cir. 2013).

191. Gwinn Clay, *supra* note 19.

192. Pietras v. Bd. of Fire Comm'rs of Farmingville Fire Dist., 180 F.3d 468, 473 (2d Cir. 1999).

Although this difference may be partly attributable to procedural differences (one case was decided by bench trial[194] and the other by jury trial[195]), it still indicates the malleability of "remuneration." In these two cases, the plaintiffs' indirect benefits overlapped in three categories (disability insurance, life insurance, and death benefits), and each also received other benefits beyond those they shared.[196] Yet only one plaintiff was found to be an employee.[197]

A possible explanation for this difference is the court's opinion in *Pietras* that the plaintiff's retirement pension represented a "considerably more generous" benefit than what the plaintiff in *Haavistola* received.[198] It remains unclear, however, why Haavistola's numerous benefits, which exceeded in number the benefits Pietras received, failed to make up for the retirement pension. Without guidance from more cases, employers and volunteers will have difficulty predicting whether a plaintiff in Haavistola's position is an employee, or whether a plaintiff that receives a retirement pension but nothing else can establish employment status. Most likely, courts will continue to reach different outcomes and foster employment law's notoriously indeterminate stance on employee status.[199]

Courts have also been inconsistent in cases where the putative employee/volunteer receives cash payments. For example, the court in *Juino* interpreted $2 per call, amounting to $78[200] over the course of Juino's four-month tenure,[201] as "purely

193. Haavistola v. Cmty. Fire Co. of Rising Sun, 839 F. Supp. 372, 373 (D. Md. 1994).

194. *Pietras*, 180 F.3d at 470.

195. *Haavistola*, 839 F. Supp. at 373.

196. *Pietras*, 180 F.3d at 471; Haavistola v. Cmty. Fire Co. of Rising Sun, 6 F.3d 211, 221 (4th Cir. 1993).

197. *Pietras*, 180 F.3d at 473; *Haavistola*, 839 F. Supp. at 373.

198. *Pietras*, 180 F.3d at 473 & n.6; *cf.* Morgan, *supra* note 25, at 20 (drawing a distinction between benefits that have no immediate value, like life insurance or disability insurance, and benefits that provide more immediate financial gain, like a retirement pension).

199. For a more recent division between courts on what "significant remuneration" means, compare Finkle v. Howard Cnty., Md., CIV. No. JKB-13-3236, 2014 WL 1396386, at *5 (D. Md. Apr. 10, 2014) (finding disability and life insurance to be significant remuneration even though such benefits accrue only upon injury or death), with Holder v. Town of Bristol, No. 3:09–CV–32 PPS, 2009 WL 3004552, at *5 (N.D. Ind. Sept. 17, 2009) (finding similar "line-of-duty" benefits insufficient because they "are not guaranteed forms of remuneration").

200. Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 431, 439 (5th Cir. 2013).

incidental to her volunteer service."[202] In contrast, the D.C. Circuit[203] in *Seattle Opera v. NLRB* found that auxiliary choristers who received a flat sum of $214 per production received compensation sufficient to give rise to employment status.[204] Although at first glance the difference between $78 and $214 appears substantial, the choristers' $214 payment covered seven music rehearsals, seven stage rehearsals, and eight performances, which amounted to seventy-seven hours of work, at a rate of $2.78 an hour.[205] Thus, the amount the choristers received per hour only slightly exceeded the amount Juino received per call. Regardless of this comparable payment, the choristers established employee status, while Juino did not. Even assuming each of Juino's fire calls lasted three hours, representing payment of $0.66 per hour, there would be only a $2 difference per hour from the choristers' rate of pay. It is unclear where within that $2 range an individual shifts from volunteer to employee. Such uncertainty contributes to the environment of unpredictability in which employers and volunteers operate.

An additional inconsistency in defining "remuneration" is the question of whether non-financial benefits constitute compensation. In *In re Seattle Opera Ass'n*, the NLRB based its holding that the auxiliary choristers were employees partly on the fact that performing as an auxiliary chorister often led to becoming a paid regular chorister.[206] The plaintiff in *Rafi v. Thompson* similarly made a preliminary showing of employee status when he demonstrated that a volunteer position at the National Institute of Health provided a clear pathway to employment at the Institute, as well as the training necessary to fulfill the requirements of the American Board of Medical Ge-

201. Brief of Appellant at 4, Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431 (5th Cir. 2013) (No. 12-30274), 2012 WL 3023864.

202. *Juino*, 717 F.3d at 440.

203. Although the D.C. Circuit has neither explicitly adopted nor rejected the threshold-remuneration test, it appeared to follow the NLRB's example and adopt the threshold-remuneration test in *Seattle Opera*. Rubinstein, *supra* note 25, at 178–79.

204. Seattle Opera v. N.L.R.B., 292 F.3d 757, 764–65 (D.C. Cir. 2002).

205. *Id.* at 773.

206. *In re* Seattle Opera Ass'n, 331 N.L.R.B. 148, 1073 (2000), *aff'd*, 292 F.3d 757 (D.C. Cir. 2002). In affirming this decision, the D.C. Circuit did not rely on career opportunities to establish the presence of compensation, focusing solely on the $214 flat fee. *Seattle Opera*, 292 F.3d at 762–63.

netics.[207] The EEOC also supports this broader interpretation of remuneration. The EEOC states that a volunteer may be covered under Title VII if the volunteer work is required for regular employment or regularly leads to employment with the same entity.[208]

With more courts indicating that non-financial benefits like education, work experience, and job opportunities constitute compensation, the definition of remuneration becomes even more blurred. This trend of including non-financial benefits within the definition of compensation further begs the question which non-financial benefits should constitute significant remuneration, and which should be considered merely "incidental" benefits[209] or emotional rewards,[210] neither of which weigh in favor of an employment relationship. Uncertainty on this issue exacerbates the unpredictable legal framework for determining employee status. In order for the threshold-remuneration test to deliver its potential benefits of logic and simplicity, courts must clarify the meaning of "remuneration."

2. The Test Generates Inconsistency Between the FLSA and Other Employment Statutes

Another problem with the threshold-remuneration test is its potential for inconsistency with the FLSA, the employment statute that itself regulates employee compensation.[211] Judge Randolph recognized this difficulty in his dissenting opinion in *Seattle Opera*.[212] Judge Randolph asserted that, based on the majority's finding of the choristers to be employees, the Opera's

207. Rafi v. Thompson, No. 02-2356, 2006 WL 3091483, at *1 (D.D.C. Oct. 30, 2006); *see also* Holder v. Town of Bristol, No. 3:09–CV–32 PPS, 2009 WL 3004552, at *6 (N.D. Ind. Sept. 17, 2009) ("[N]on-financial benefits could establish an employment relationship in the right context."); Neff v. Civil Air Patrol, 916 F. Supp. 710, 714 (S.D. Ohio 1996) (noting that education may constitute compensation).

208. EQUAL OPPORTUNITY EMP'T COMM'N, EEOC COMPLIANCE MANUAL § 2 (2009), http://www.eeoc.gov/policy/docs/threshold.html#2-III-A-1-c; *Title VII: Vaccination Policies, Covered Entities, Religious Accommodation*, U.S. EQUAL EMP'T OPPORTUNITY COMMISSION (Nov. 2, 2012), http://www.eeoc.gov/eeoc/foia/letters/2012/religious_accommodation_and_vaccination.html.

209. Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 435 (5th Cir. 2013).

210. *Neff*, 916 F. Supp. at 713. *But see* Kpere-Daibo, *supra* note 21, at 150–51 (arguing that the motive to give back to society is "praiseworthy and should be promoted by society and its laws").

211. *See* Fair Labor Standards Act, 29 U.S.C. § 206 (2012).

212. Seattle Opera v. N.L.R.B., 292 F.3d 757, 777 (D.C. Cir. 2002) (Randolph, J., dissenting).

clear understanding of the choristers as volunteers[213] amounted to nothing more than a "charade" that theoretically put the Opera in violation of the FLSA and federal tax laws.[214] As Judge Randolph noted, however, whether the choristers would find protection under the FLSA is highly questionable. The Department of Labor regulations specifically acknowledge that reimbursement for "approximate out-of-pocket expenses," like that in *Seattle Opera*, does not cause a volunteer to become an employee.[215] Because this regulation technically applies only to volunteers at public agencies,[216] it might not cover the auxiliary choristers of a not-for-profit company like the Opera. Even so, Judge Randolph argued that *Walling v. Portland Terminal Co.* would, on its own, likely prevent the auxiliary choristers from establishing employment status under the FLSA.[217] According to Judge Randolph, the auxiliary choristers resembled the railroad trainees in *Walling* since they too were not being compensated for the work performed and had no expectation of compensation.[218] The majority, however, dismissed this reliance on *Walling* because *Walling* was interpreting the FLSA rather than the NLRA (the statute at issue in *Seattle Opera*).[219] This application of *Walling* suggests that divergent conclusions regarding employee status could result under different employment statutes. Such an application, however, perpetrates the problem of inconsistency across employment statutes.[220]

This problem plays out even more clearly in *Pietras*.[221] Pietras was a volunteer firefighter for the Farmingville Fire District, a public agency.[222] The Second Circuit held that Pietras' receipt of certain benefits gave rise to an employment relationship under Title VII.[223] Those same benefits, however, would not have made Pietras an employee under the FLSA.

213. *Id.*

214. *Id.*

215. 29 C.F.R. § 553.106(b) (2012). The Opera claimed that the $214 represented reimbursement for out-of-pocket costs associated with transportation and parking. *Seattle Opera*, 292 F.3d at 762–63.

216. 29 C.F.R. § 553.101(a).

217. *Seattle Opera*, 292 F.3d at 774.

218. *Id.*

219. *See id.* at 762 & n.4.

220. *See* DUNLOP COMMISSION, *supra* note 20.

221. Pietras v. Bd. of Fire Comm'rs of Farmingville Fire Dist., 180 F.3d 468 (2d Cir. 1999).

222. *Id.* at 470–71.

223. *Id.* at 473.

The FLSA regulations explicitly provide that "individuals do not lose their volunteer status if they are provided reasonable benefits by a public agency for whom they perform volunteer services."[224] The regulations go on to list benefits that would be considered reasonable, including health insurance, life insurance, disability insurance, workers' compensation, and pension plans.[225] Under this standard, Pietras' receipt of a retirement pension, life insurance, death benefits, disability insurance, and some medical benefits[226] would almost certainly not entitle her to protection under the FLSA. Yet this same combination of benefits constituted sufficient remuneration under the threshold-remuneration test.[227] Therefore, while Pietras is an employee under Title VII, she likely would not be under the FLSA. Such a disconnect between employment statutes undercuts the threshold-remuneration test's simplicity and perpetuates the potential for inconsistent results in determining employment status across employment statutes.[228] In order to preserve its potential for clarifying employee status in volunteer contexts, the threshold-remuneration test should incorporate consistency with the FLSA.

The threshold-remuneration test offers several benefits lacking in traditional multi-factor tests. Its focus on compensation rather than control better addresses the core distinction between employees and volunteers. Its establishment of an antecedent requirement eliminates some of the uncertainty inherent in multi-factor analyses. The threshold-remuneration approach's problems, however, may undermine its advantages. The test's failure to define remuneration consistently and to accord with the FLSA generates additional unpredictability and discrepancy in determining who is and is not an employee.

III. COURTS SHOULD MODIFY THE THRESHOLD-REMUNERATION TEST TO DEFINE REMUNERATION AND CORRESPOND WITH THE FLSA

To effectuate the threshold-remuneration test's benefits, courts applying the test should articulate a clearer definition of remuneration that also corresponds to the FLSA. Section A out-

224. 29 C.F.R. § 553.106(d) (2012).

225. *Id.*

226. *Pietras*, 180 F.3d at 471.

227. *Id.* at 473.

228. *See* DUNLOP COMMISSION, *supra* note 20; Rubinstein, *supra* note 17, at 628 & nn.120–21.

lines how FLSA triggers for compensation and definitions of "significant" compensation would operate to distinguish between employees and volunteers if incorporated into the threshold-remuneration test. Section B explains why applying FLSA standards to cases arising under Title VII and other anti-discrimination employment statutes is appropriate and logical. Section C addresses anticipated counter-arguments to the proposed solution. This Part concludes that the FLSA's three-tiered regulatory framework for determining the employment status of volunteers and unpaid interns offers a clear and logical method for courts to judge whether a volunteer is (or legally should be) receiving significant remuneration under the threshold-remuneration test.

A. MECHANICS: HOW COURTS SHOULD APPLY FLSA STANDARDS TO THE THRESHOLD-REMUNERATION TEST

The Department of Labor has articulated definite standards for determining the FLSA employment status of volunteers for public agencies in the Code of Federal Regulations[229] and of unpaid interns in the Wage and Hour Division's Fact Sheet.[230] Although the standards for volunteers at not-for-profit private entities are less precise, the Supreme Court decisions in *Walling*[231] and *Tony & Susan Alamo Foundation*,[232] in combination with the Department of Labor's guidelines,[233] provide the necessary framework for evaluating what constitutes compensation for volunteers at not-for-profit companies.

Courts applying the threshold-remuneration test to volunteers at public agencies should hold in accordance with the FLSA regulations that individuals who perform service for "civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered"[234] "may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their

229. 29 C.F.R. §§ 553.100–.106.

230. FACT SHEET #71, *supra* note 95. Several courts apply these standards when determining the employment status of unpaid interns. See Glatt v. Fox Searchlight Pictures, Inc., No. 11 Civ. 6784 (WHP), 2013 WL 2495140, at *11 (S.D.N.Y. June 11, 2013) for a recent and highly publicized application of the standards.

231. Walling v. Portland Terminal, 330 U.S. 148 (1947).

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

233. FIELD OPERATIONS HANDBOOK, *supra* note 93.

234. 29 C.F.R. § 553.101(a).

status as volunteers."[235] The courts should further rely upon the FLSA regulations' delineation of what constitutes permissible reimbursements, reasonable benefits, and nominal fees.[236] The regulations do not address whether future job opportunities represent a benefit that creates an employment relationship. Based on the six criteria for unpaid interns, however, it appears that the potential for a future job should not trigger FLSA obligations. One of the required criterion for an intern to maintain unpaid status is that the intern "is not necessarily entitled to a job at the conclusion of the internship," not that there is no potential whatsoever for a job.[237] Since unpaid interns are viewed with greater scrutiny than traditional volunteers,[238] it seems that this allowance for unpaid interns should apply to volunteers at public agencies as well.

For unpaid workers donating services to for-profit companies, including unpaid interns, courts applying the threshold-remuneration test should analyze whether the unpaid worker is entitled to compensation under the six-factor test promulgated by the Department of Labor.[239] In other words, if the employer derives an immediate advantage from the intern's work or fails to satisfy one of the other factors, the unpaid intern should be an employee under both the FLSA and the threshold-remuneration test, even if he or she received no wages or indirect benefits. This interpretation allows an intern to gain protection under Title VII and other anti-discrimination statutes as long as they are *entitled* to compensation under the FLSA. Because the employee would have been receiving wages had the employer complied with the law, the employee should be able to satisfy the requirement of significant remuneration. The requirement that the intern is "not necessarily entitled to a job at the conclusion of the internship" also makes clear that the mere possibility of a future job will not create an employment relationship.[240]

For volunteers at not-for-profit companies, courts adopting the threshold-remuneration test should follow precedent in

235. *Id.* § 553.106(a).

236. *Id.* § 553.106(b)–(f); *supra* notes 90 and 91 and accompanying text.

237. FACT SHEET #71, *supra* note 95.

238. *See Fair Labor Standards Act Advisor: Volunteers*, *supra* note 66 (discussing the different standards for volunteers at public agencies versus not-for-profit enterprises and for-profit companies).

239. FACT SHEET #71, *supra* note 95.

240. *See id.*

Walling and *Alamo* in determining when benefits constitute significant remuneration. The *Walling* Court ruled that the FLSA is not meant to cover "each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons . . . ."[241] The *Walling* decision further clarified that the potential for a future job alone will not establish an employment relationship, since the railroad trainees had clear potential for a job at the conclusion of the training but were not held to be employees.[242] Finally, the *Alamo* ruling suggested that only compensation creating economic dependence would create employee status for volunteer work done in a nonprofit's commercial enterprise.[243] Because this precedent still contains some gaps,[244] courts should consult the FLSA regulations for volunteers at public agencies in determining what constitutes permissible reimbursed expenses and nominal fees. Since the Department of Labor premised these regulations on Congress's intention not "to discourage or impede volunteer activities for civic, charitable, or humanitarian purposes,"[245] using the public agency volunteer regulations in a not-for-profit context should be permissible since it upholds Congressional purpose to avoid discouraging traditional volunteerism.

B. TRANSFERRING FLSA DEFINITIONS OF REMUNERATION TO THE THRESHOLD-REMUNERATION TEST IS APPROPRIATE AND LOGICAL

Precedent exists for transferring standards developed under one employment statute to another. For example, in *Smith v. City of Jackson*, the Supreme Court found that because Title VII provided for a disparate impact claim, the Age Discrimination in Employment Act (ADEA) should as well since its language and purpose closely resemble Title VII's.[246] Courts have also looked to the NLRA, the "grandparent of most labor

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

242. *Id.* at 150.

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

244. For example, neither these cases nor the regulatory guidance explicitly address the status of reimbursed expenses or stipends for volunteers in nonprofit enterprises, both of which are relatively common. *See* ELLIS & NOYES, *supra* note 57, at 3.

245. 29 C.F.R. § 553.101(b) (2012).

246. Smith v. City of Jackson, 544 U.S. 228, 235–40 (2005).

laws,"[247] for guidance in interpreting other employment laws.[248] Courts interpreting the NLRA, in turn, have considered the FLSA in determining individuals' employee status. In *WBAI Pacifica Foundation*, the NLRB determined that volunteers' eligibility for reimbursed travel expenses and childcare allowances did not demonstrate sufficient compensation to establish an employment relationship, noting that such evidence would fail to trigger FLSA obligations.[249] These examples demonstrate that courts interpreting a particular employment law consult other employment statutes and sometimes borrow the standards developed under those statutes. Applying the FLSA definitions and triggers for compensation to anti-discrimination employment statutes would not diverge from precedent.

The application of the FLSA standards to the threshold-remuneration test is particularly apt. A central purpose of the FLSA is to enforce a minimum wage.[250] In effect, the FLSA enforces the very concept that the threshold-remuneration test requires plaintiffs to show: compensation.[251] This link between the FLSA and remuneration makes the FLSA's standards for when benefits establish an employment relationship persuasive. Moreover, the applicability and enforcement of the FLSA dictates to some degree the outcome of the first step in the threshold-remuneration test.[252] For example, if a student intern meets the six criteria of the trainee test, that intern is not entitled to compensation and therefore does not receive sufficient remuneration to be a protected employee under anti-discrimination statutes. On the other hand, if an intern's activ-

247. Mitchell Rubinstein, *The Use of Predischarge Misconduct Discovered After an Employees' Termination As a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1, 12 (1990).

248. Mitchell Rubinstein, *Advisory Labor Arbitration Under New York Law: Does It Have a Place in Employment Law?*, 79 ST. JOHN'S L. REV. 419, 437 (2005); *see, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975) (interpreting Title VII's back pay provision based on the NLRA's similar provision); Mitchell Rubinstein, *The Affirmative Action Controversy*, 3 HOFSTRA LAB. L.J. 111, 114 & n. 26 (1985) (noting that the term "affirmative action" as used in Title VII cases originated in the Wagner Act).

249. WBAI Pacifica Found., 328 N.L.R.B. 179, 1273 & n.3 (1999).

250. Fair Labor Standards Act, 29 U.S.C. § 206 (2012).

251. *See* Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990) ("Compensation . . . is an essential condition to the existence of an employer-employee relationship.").

252. *See* Yamada, *supra* note 21, at 244 ("[I]f more student interns were paid in compliance with the FLSA, the issue of whether the lack of compensation precludes the plaintiff from claiming employee status in a discrimination claim would become moot in many instances.").

ities deliver an "immediate advantage" to the employer, that intern is entitled to a minimum wage[253] and will be able to demonstrate significant compensation under the threshold-remuneration test.[254] This fundamental connection between the FLSA and the concept of remuneration makes the application of FLSA standards to the threshold-remuneration test functional and logical.

An additional benefit of the proposed solution is that it does not require enhanced enforcement of the FLSA itself. Stronger enforcement of the FLSA likely would increase the number of volunteers and interns receiving a minimum wage and thereby broaden the range of volunteers able to establish significant remuneration.[255] The Department of Labor, however, has only sparingly enforced the FLSA against illegal unpaid internships, effectively forcing volunteers to sue under the FLSA as a preliminary to a successful Title VII suit.[256] But under the proposed solution, volunteers need not sue under the FLSA and procure a minimum wage before bringing a Title VII or other anti-discrimination suit. Instead, volunteers can show employee status under the modified threshold-remuneration test by showing that they are employees *entitled* to a minimum wage under the FLSA. Thus, the proposed solution bypasses the need for stronger FLSA enforcement to give those legally entitled to compensation the protections of anti-discrimination employment statutes.

Using the FLSA standards will substantially improve the threshold-remuneration test's ability to clarify the employment relationship. By adopting the FLSA's explicit definitions of what entitles a worker to compensation and what constitutes significant compensation, the threshold-remuneration test can escape the fate of indeterminate, confusing multi-factor tests.[257] A modified threshold-remuneration test with more rigorous definitions of remuneration will relieve some of the existing test's uncertainty.[258] Moreover, using the FLSA standards will pre-

253. *See* Ortner, *supra* note 60, at 2620.

254. *See* Yamada, *supra* note 21, at 244.

255. *See id*.

256. *See* Andrew Mark Bennett, *Unpaid Internships and the Department of Labor: The Impact of Underenforcement of the Fair Labor Standards Act on Equal Opportunity*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 292, 307–08 (2011).

257. *See* Carlson, *supra* note 9, at 298–99.

258. *See* Rubinstein, *supra* note 25, at 157 (noting that it "is not an easy task" to draw the line between employees and volunteers because "each case is

vent absurd situations where an individual is an employee under Title VII but not under the FLSA.[259] Applying the threshold-remuneration test with reference to the FLSA's definitions and triggers for compensation will clarify employee status and simplify an increasingly muddled area of law.

C. COUNTER-ARGUMENTS TO A THRESHOLD-REMUNERATION TEST MODIFIED BY FLSA STANDARDS

This section acknowledges four expected counter-arguments. First, the underlying FLSA rules contain their own interpretative challenges and deficiencies. Second, bright-line rules like the threshold-remuneration test allow employers to manipulate the employment relationship. Third, courts should recognize job experience and future job opportunities as substantial compensation. Fourth, the differing goals of the FLSA and anti-discrimination statutes support two different standards of coverage. This section addresses each of these arguments in turn and explains why they do not extinguish the proposed solution's benefits of clarity, consistency, and predictability.

1. The Underlying FLSA Framework Contains Its Own Problems

One expected objection to the proposed solution is that the FLSA's standards for distinguishing between employees and volunteers pose their own interpretive problems. Some scholars argue that the Department of Labor's six-prong test for determining the legality of unpaid internships contains significant flaws, including differing applications by federal courts,[260] an unrealistic line between training and work,[261] uncertainty as to how the test should apply to internships sponsored by colleges,[262] and a failure to acknowledge the long-term benefits employers derive from unpaid interns.[263] Others argue that the six-prong test places a chilling effect on beneficial unpaid internships that help students develop job skills.[264] Some scholars

fact specific"); *supra* Part II.C.1.

259. *See* DUNLOP COMMISSION, *supra* note 20; *supra* Part II.B.2.

260. Yamada, *supra* note 99.

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

262. Durrant, *supra* 145, at 177–78; Yamada, *supra* note 21, at 233–34.

263. Durrant, *supra* note 145, at 178–79.

264. Sarah Braun, Comment, *The Obama Crackdown: Another Failed Attempt To Regulate the Exploitation of Unpaid Internships*, 41 SW. L. REV. 281,

contend the FLSA harms nonprofit enterprises that rely on volunteer work not necessarily within courts' conceptions of "ordinary volunteerism."[265] In contrast, other scholars question whether the FLSA framework provides sufficient protection to unpaid volunteers in the government and nonprofit sectors.[266]

No legal framework is perfect, and the FLSA framework for determining when a volunteer becomes an employee is no exception. The FLSA standards, however, provide a more defined and workable structure than the present unsettled concept of "threshold-remuneration" applied to Title VII, the ADEA, and other statutory anti-discrimination claims. Whereas courts' current conceptions of compensation under the threshold-remuneration test range from substantial monetary payment to more amorphous benefits like job opportunities,[267] the FLSA framework delineates specific categories of remuneration that give rise to an employment relationship[268] and criteria an internship must meet not to create employment.[269] These guidelines can reduce divergent concepts of remuneration that lead to inconsistent results. Moreover, by linking the FLSA framework to the threshold-remuneration test, legislators can address any detriments in the distinction between volunteers and employees simultaneously across the FLSA and anti-discrimination statutes like Title VII. In other words, reforms to the FLSA standards will concurrently improve the test to determine employee status under anti-discrimination statutes.

2. Bright-Line Rules Allow Employers to Manipulate the Employment Relationship

Another concern with a more defined threshold-remuneration test is that it gives employers the power to decide unilaterally whether a volunteer becomes an employee.[270] An employer may avoid liability under the FLSA and anti-

294–300 (2012); Lauren Frederickson, Comment, *Falling Through the Cracks of Title VII: The Plight of the Unpaid Intern*, 21 GEO. MASON L. REV. 245, 269 (2013).

265. Dunn, *supra* note 64, at 464.

266. *See* Anthony J. Tucci, *Worthy Exemption? Examining How the DOL Should Apply the FLSA to Unpaid Interns at Non-Profits and Public Agencies*, 97 IOWA L. REV. 1363, 1385 (2012).

267. *See supra* Part II.C.1.

268. *See* 29 C.F.R. § 553.106 (2012).

269. FACT SHEET #71, *supra* note 95.

270. I thank Professor Stephen Befort for pointing out this counter-argument.

discrimination statutes by simply not providing its volunteers with any benefits (or with only certain nominal benefits).[271] Meanwhile volunteers lack the bargaining power to negotiate for greater benefits that might give rise to an employment relationship and its attendant statutory protections.

This criticism overestimates employers' ability to manipulate the employment relationship under the proposed framework. If courts tie the threshold-remuneration test to the FLSA standards, for-profit employers cannot evade liability under either the FLSA or anti-discrimination statutes simply by withholding significant benefits from their interns. Because the Department of Labor requires interns be paid whenever their work provides an "immediate advantage" to the employer, merely not paying the intern will not avoid employment status.[272] Moreover, the requirement that employers receive no immediate advantage from the internship is difficult to fulfill—especially if the employer's ulterior motive for the internship is free labor.[273]

Manipulation of the employment relationship against volunteers in government agencies and nonprofit enterprises is also less likely than it may appear under a FLSA-informed threshold-remuneration test. Although the FLSA regulations identify specific types of compensation that will not transform public agency volunteers into employees, the regulations also provide an important caveat: "whether the furnishing of expenses, benefits, or fees would result in individuals' losing their status as volunteers . . . can only be determined by examining the total amount of payments made . . . in the context of the economic realities of the particular situation."[274] Thus, the proposed solution still retains some flexibility in determining the employment relationship that cuts against employer manipulation. Similarly, the FLSA standards for determining when nonprofit volunteers become employees contain the concept of economic dependence.[275] This standard, while more definite than present understanding of "remuneration," is not a bright-line rule. Although my solution recommends that courts apply the

271. *See* Flanagan, *supra* note 158 ("The key[] for employers to avoid turning interns into employees . . . [is] . . . no or insignificant remuneration . . . .").

272. *See* FACT SHEET #71, *supra* note 95.

273. *See* Tuschman, *supra* note 97.

274. 29 C.F.R. § 553.106(f) (2012).

275. *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 301 (finding that the volunteers were actually employees because the amount of benefits they received made them "entirely dependent upon the Foundation").

public agency standards for stipends and nominal fees to nonprofit enterprises, the case law's overall economic dependence standard still applies.[276] As a result, employer manipulation under a FLSA-informed threshold-remuneration may be less likely than critics suppose.

That being said, ultimately the employer decides how to structure an internship and what benefits to provide volunteers in the course of their service. Accordingly, employers can drastically reduce the likelihood of creating an employment relationship by adhering to the legal requirements. This scenario, however, is not necessarily detrimental. For one, it reflects a legal system with discernable standards and predictable results, rather than unclear rules and arbitrary decisions. This clarity allows both employers and employees to predict the legal consequences of their actions or situations, and also avoids divergent treatment of similarly situated individuals.[277] Moreover, the very fact that volunteers do not receive monetary compensation gives them greater bargaining power than the typical employee because they can deprive the institution of their freely volunteered labor.[278] Nonprofit and government agencies depend on volunteers and do not have the luxury of creating an environment where people do not want to volunteer.[279] Thus, although agencies can prevent their volunteers from becoming employees, they cannot consequently abuse those volunteers with impunity; volunteers can check an agency's actions by threatening to leave. This check on the institution benefiting from volunteer labor, although it does not eliminate the institution's ability to structure the volunteer relationship, makes that ability less worrisome.

3. Job Experience and Employment Opportunities Should Be Included in the Remunerative Concept

As several scholars point out, however, student interns do not have the same freedom as traditional volunteers to exit a hostile work environment because they need the job experience

276. *Supra* Part III.A.

277. *See generally* Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368–69 (1988) (explaining the need for certainty and equality in the law).

278. *See* Eide, *supra* note 154.

279. *Cf.* Linda S. Hartenian, *Nonprofit Agency Dependence on Direct Service and Indirect Support Volunteers: An Empirical Investigation*, 17 NONPROFIT MGMT. & LEADERSHIP 319, 332 (2007) (noting that agencies do not have the luxury of turning away volunteers, even when their performance is subpar).

and employment opportunities an internship affords to advance economically.[280] But in this Note's proposed solution, job experience and the potential for employment do not constitute significant remuneration.[281] Arguably this failure to recognize job experience and opportunities as sufficient compensation to create an employment relationship ignores the student intern's economic compulsion to endure a discriminatory workplace.

This criticism misconstrues the meaning of employment. The argument rests on the premise that economic reliance alone gives rise to an employment relationship. Employment, however, dictates more than economic reliance; it requires an economic exchange.[282] If an intern is not providing anything of value to the company or agency in return for job experience, any benefits the intern receives are gratuitous rather than compensatory. The FLSA six-part test recognizes this key distinction by protecting interns whose economic reliance arises from a true economic exchange of labor for benefits.[283] The point is not that unpaid interns who do not provide the company a financial advantage deserve discrimination and harassment; the point is that unpaid interns who do not provide the company an advantage are not employees. Since the protections of the FLSA, Title VII, and other statutes rely upon a finding of employment, those interns do not fall within the Acts' coverage. Therefore, the appropriate remedy to afford interns and volunteers protection under Title VII is a legislative amendment rather than illogical judicial maneuvering that reaches the desired result.

4. The Goals of the FLSA and Title VII Support Different and Separate Standards of Coverage

The most substantive objection to providing a single standard for determining volunteers' employment status under the FLSA and anti-discrimination statutes like Title VII is the differing consequences to volunteers from exclusion from FLSA's protections versus exclusion from anti-discrimination statutes' protections. Most people accept that volunteers do not deserve a right to minimum wage because the essence of volunteering is

280. Kpere-Daibo, *supra* note 21, at 148–50.

281. *See supra* Part III.A.

282. BLACK'S LAW DICTIONARY, *supra* note 138, at 322.

283. FACT SHEET #71, *supra* note 95 (finding employment where the intern's activities provide an "immediate advantage" to the employer).

to work willingly without pay.[284] On the other hand, it seems unjust for those same volunteers to suffer discrimination and harassment without a legal remedy simply because they are not paid.[285] As a result, two separate standards, one to determine employment status under the FLSA, and one to determine employment status under anti-discrimination statutes, might better fulfill the statutes' goals and promote volunteerism,[286] even though it would deprive employment law of a uniform definition of "employee."

While this argument expresses a reasonable policy and moral judgment, what it does not express is Congress's judgment. Congress explicitly made the FLSA's, Title VII's, the ADEA's, and other statutes' coverage contingent on employee status. As long as Congress continues to use employee status as the "clearly stated basis" for statutory protections, courts are constrained by that measure of coverage.[287] The *O'Connor* court made this point blatantly, concluding that "it is for Congress . . . and not this court, to provide a remedy . . . for plaintiffs in O'Connor's position."[288] The *Juino* court too reiterated its constrained role, shifting the responsibility to Congress to establish a basis for coverage other than employment.[289] But while employment remains the legislatively dictated basis for coverage, courts should interpret that basis consistently across all statutes that invoke it. Only such consistency can create a

284. *See* Dunn, *supra* note 64, at 469 (arguing that whether a volunteer worker is seeking compensation should play a role in whether the FLSA is triggered); *supra* notes 56 and 57 and accompanying text.

285. *See* Dunn, *supra* note 64, at 471 (arguing that volunteers should be exempted from the FLSA but should be included under Title VII and the ADEA).

286. *Id.* at 472. I also thank Professor Stephen Befort for pointing out this counter-argument.

287. *See* Carlson, *supra* note 9, at 300 ("The courts, of course, cannot abandon employee status as a test as long as Congress and state legislatures continue to make employee status the clearly stated basis of statutory coverage.").

288. O'Connor v. Davis, 126 F.3d 112, 119 (2d Cir. 1997). Two state legislatures, Oregon and New York, have provided such a remedy for student interns in their states, although not for the traditional volunteer. *See* Mark S. Goldstein, *New York State Becomes the Fourth Jurisdiction To Protect Unpaid Interns from Employment Discrimination*, FORBES (July 28, 2014), http://www.forbes.com/sites/theemploymentbeat/2014/07/28/new-york-state-becomes-the-fourth-jurisdiction-to-protect-unpaid-interns-from-employment-discrimination; Howard Rubin & Don Stait, *Oregon Passes Workplace Protection Law for Unpaid Interns*, LITTLER (June 21, 2013), http://www.littler.com/publication-press/publication/oregon-passes-workplace-protection-law-unpaid-interns.

289. Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 439 (5th Cir. 2013).

coherent body of law that fosters predictability and fairness. Unless Congress provides clearer direction to define employment differently under different statutes, courts should pursue a consistent definition or else face accountability for an increasingly confused regulatory system.

One way courts can take a step in the right direction is to incorporate FLSA definitions of "significant compensation" and triggers for compensation into the threshold-remuneration test. This approach would capitalize on the threshold-remuneration test's logic and efficiency while improving its consistency across courts and its continuity with the federal statute that regulates remuneration. While this approach will clarify the employment question only in volunteer contexts, it provides much-needed refinement to the "employee" concept.

CONCLUSION

Courts increasingly confront situations where volunteers and unpaid interns claim employment status under Title VII and other anti-discrimination employment statutes. Faced with this novel situation, courts have adopted two different approaches: (1) the common law agency test that analyzes compensation as one of several non-dispositive factors, or, alternatively, (2) the threshold-remuneration test that requires a preliminary showing of sufficient compensation before engaging in a common law analysis. This circuit split represents just part of a growing non-uniformity in the definition of "employee" across statutes, legal tests, and jurisdictions, and demonstrates an increasing unpredictability in determining whether an individual is an employee. The threshold-remuneration test offers a potential solution to this muddled legal landscape in volunteer contexts by refocusing on the fundamental definition of employment and reducing indeterminate multi-factor analyses. With all its benefits, however, the threshold-remuneration test fails to define remuneration clearly and to correspond to the employment statute that actually enforces remuneration: the FLSA. These weaknesses threaten to dilute the test's potential clarity and efficiency.

Courts applying the threshold-remuneration should incorporate the FLSA standards for when compensation is required and when compensation creates an employment relationship into the concept of "significant remuneration." This approach will preserve the threshold-remuneration test's ability to clarify the employment relationship in volunteer contexts and will

avoid creating situations where an individual is an employee under one statute but not another. A modified threshold-remuneration test can represent a small step towards much-needed clarity and consistency in employment law's definition of "employee."