NOTES

UNPAID INTERNSHIPS IN THE FEDERAL SECTOR: THE CASE FOR A LEGISLATIVE FIX TO A CONGRESSIONALLY CREATED MESS

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Unpaid internships in the federal government operate under a statutory and regulatory regime unlike any other in American employment law. The Fair Labor Standards Act (FLSA) constrains internships that are hosted by nonfederal entities. The FLSA applies to the United States as an employer, but in practice, it has proven almost entirely irrelevant to federal unpaid internships, which instead owe their form to the interaction of appropriations law, the Antideficiency Act's voluntary service prohibition, and 5 U.S.C. § 3111, which authorizes "student volunteer" service at federal agencies under strict, enumerated conditions.

This Note—the first comprehensive doctrinal and statutory account of federal unpaid internships—argues that the federal government's legal authority to host unpaid interns is both narrower and more rigid than commonly understood. The Note first contextualizes federal "student volunteer" programs within the broader economy of unpaid internships, tracing the evolution of these programs and identifying how education-based exceptions have redefined the permissible boundaries of intern labor. It then turns to the federal sector, where legal authority to accept voluntary service depends on a statutory scheme that expressly bars compensation and classifies interns as non-employees for nearly all legal purposes. The Note synthesizes this landscape into a clear legal test for when unpaid internships in federal agencies are lawful.

Yet even lawful unpaid internships present profound problems. This Note identifies structural inequities, legal accountability gaps, and governance blind spots that arise when federal agencies rely on unpaid student labor. Because these issues are entrenched in federal statute, they are impervious to litigation or state-based reform. Accordingly, this Note concludes with legislative solutions to fix a Congressionally created quagmire that only Congress can properly fix.

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Introduction

In 2015, the House Oversight Committee heard testimony from Environmental Protection Agency (EPA) employees who described widespread sexual harassment of interns in their regional office. Between 2000 and 2011, the employees testified, a single environmental scientist systematically sexually harassed more than a dozen female interns.[1] Allegations included unwanted touching and inappropriate advances. One witness said an intern was so shaken that she "changed her mind about not only working for EPA but also for working in the federal sector at all."[2] Internal reporting was futile; when one intern

[1] *See EPA Mismanagement, Part II: Hearing Before the H.R. Comm. on Oversight and Gov't Reform*, 114th Cong. 2–4, 7–8, 65, 77 (2015) [hereinafter *EPA Mismanagement, Part II*].
[2] H.R. Rep. No. 114-383, at 3 (2015).

filed a complaint, management simply moved her cubicle.[3] Her office's Equal Employment Opportunity specialist was powerless to help, so he encouraged the intern to pursue private legal action—but the intern was in graduate school, just getting her life together, and had no money to spare. "[S]he just simply couldn't afford it," the specialist testified.[4]

The problem, one representative highlighted, was simple: "[C]urrent law does not prohibit sexual harassment or discrimination against unpaid interns or others who are not paid directly by an agency."[5] These interns were without recourse under federal law.

Consensus in the House of Representatives is a rare thing. But in 2016, it agreed—unanimously—that the law should have protected those interns. To that end, it voted 414 to 0[6] to pass the Federal Intern Protection Act.[7] According to the committee report, the proposed law targeted a gap in statutory coverage, "extend[ing] to interns working at federal agencies the same statutory protections against harassment and discrimination that currently apply to paid employees."[8] The report went on to explain that although the laws, regulations, and policies targeting discrimination and harassment in the federal workplace cover paid interns, who qualify as employees, "unpaid interns are not explicitly covered."[9]

To fill this statutory void, the bill would have brought unpaid interns for the United States government expressly[10] within the protection of Section 717 of the Civil Rights Act of 1964[11] (Title VII); Sections 12 and 15 of the Age Discrimination in Employment Act of 1967[12] (ADEA); and Section 501 of the Rehabilitation Act of 1973.[13] If it hadn't died in the Senate, that is.[14]

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3 *See EPA Mismanagement, Part II*, *supra* note 1, at 58 (statement of Ronald Harris).

4 *Id.* (statement of Ronald Harris).

5 *Id.* at 5 (statement of Rep. Elijah E. Cummings, Ranking Minority Member, H.R. Comm. on Oversight and Gov't Reform).

6 *Roll Call* 35 | *Bill Number: H. R.* 3231, Clerk of the U.S. House of Representatives (Jan. 11, 2016, 7:00 PM), https://clerk.house.gov/Votes/201635 [https://perma.cc/N43D-A2MD].

7 Federal Intern Protection Act of 2016, H.R. 3231, 114th Cong. (as passed by House of Representatives, Jan. 11, 2016).

8 H.R. Rep. No. 114-383, at 2.

9 *Id.* at 5.

10 *Id.* at 12.

11 Civil Rights Act of 1964 § 717, 42 U.S.C. § 2000e-16 (prohibiting the federal government from employment discrimination based on race, color, religion, sex, or national origin).

12 The Age Discrimination in Employment Act of 1967 (ADEA) § 15, 29 U.S.C. § 633a, prohibits the federal government from employment discrimination based on age. The Age Discrimination in Employment Act § 12, 29 U.S.C. § 631 limits age-based protections under the Act to those age forty and older.

13 Rehabilitation Act of 1973 § 501, 29 U.S.C. § 791 (prohibiting the federal government from employment discrimination based on disability).

14 *See* S. 2480, 114th Cong. (2016), https://www.congress.gov/bill/114th-congress/senate-bill/2480 [https://perma.cc/65LW-29R7]. Substantially identical bills met the same fate in the

The Federal Intern Protection Act defined "intern" as "an individual who performs *uncompensated voluntary service* in an agency to earn credit awarded by an educational institution or to learn a trade or occupation."[15] That language speaks to a central cleavage in employment law between paid and unpaid interns. Paid interns are employees, subject to all the benefits and obligations thereof; meanwhile, uncompensated interns are unpaid and unprotected.

Title VII and the ADEA, among other statutes, define "employee" as "an individual employed by an employer."[16] You read that right. Faced with this helpful and not at all circular definition,[17] courts look to common law for guidance: "[I]t is well established that when Congress uses the term 'employee' without defining it with precision, courts should presume that Congress had in mind 'the conventional master-servant relationship as understood by the common-law agency doctrine.'"[18]

A wage is not necessarily dispositive to a master-servant (more commonly known as a principal-agent) analysis—unless there is no wage. Most circuits apply a "threshold-remuneration" test for coverage under Title VII and other statutes.[19] Only if a plaintiff proves significant compensation—either in the form of wages or benefits—will these circuits examine a principal-agent relationship.[20] In short, if an intern collects no wages, odds are, they are not going to qualify as an "employee," and the court will not construe a statute targeting employment to protect them.

Senate after passing the House by voice vote in 2017, *see* H.R. 653, 115th Cong. (2017), and again in 2019, *see* H.R. 136, 116th Cong. (2017).

[15] Federal Intern Protection Act of 2016, H.R. 3231, 114th Cong. § 2 (as passed by House of Representatives, Jan. 11, 2016) (emphasis added) (specifying an amendment to this definitional language to 5 U.S.C. § 2302, the statute covering prohibited personnel practices in the federal government).

[16] Civil Rights Act of 1964 § 701(f), 42 U.S.C. § 2000e(f); Age Discrimination in Employment Act of 1967 § 11(f). Other statutes that similarly define employee include the Americans with Disabilities Act, 42 U.S.C. § 12111(4) ("an individual employed by an employer"); the Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff(2)(A) (same); and the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4303(3) ("any person employed by an employer").

[17] *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (noting that such a definition is "completely circular and explains nothing").

[18] O'Connor v. Davis, 126 F.3d 112, 115 (2d Cir. 1997) (quoting *Darden*, 503 U.S. at 322–23).

[19] *See, e.g.*, Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 435 (5th Cir. 2013) (adopting the threshold-remuneration test and noting that the Second, Fourth, Eighth, Tenth, and Eleventh circuits had done the same).

[20] *See id.* at 437 (adopting the approach of the Second and Fourth circuits in finding that "significant indirect benefits" may support a showing of remuneration in the absence of wages).

The 'no money, no coverage' problem is true of all unpaid internships. It's not that Congress *only* cares about federal interns.[21] In early January 2019, Representative Elijah Cummings, perennial sponsor of the Federal Intern Protection Act,[22] introduced the Unpaid Intern Protection Act to propose protection for all interns.[23] The Unpaid Intern Protection Act never moved beyond initial referral to committee, and neither the Unpaid nor the Federal Intern Protection acts resurfaced after 2019. Representative Cummings passed away in October of that year.[24]

Why, then, did the Federal Intern Protection Act focus on a single sector? One reason could be that until 2018, the Department of Labor's reading of the Fair Labor Standards Act (FLSA) cast most unpaid internships as unlawful in the first place.[25] In the federal government, however, agencies stood on far firmer legal ground. Not only were federal employers authorized to host unpaid interns in their agencies, but the authority was mutually exclusive with paying a wage.[26] At the same time, appropriations law generally constrained agencies from directing any real money toward these programs, all but guaranteeing that interns could not clear the threshold-remuneration barrier in court.[27] This complex dynamic likely prompted the House to recognize a need for legislation to bridge the gap.

This Note aims to explain that complexity, mapping the topography of this unique legal landscape for unpaid internships in the federal sector. It describes, apparently for the first time, that unpaid internships in the federal government represent a distinct creature of statute defined coextensively with "student volunteer" under the Civil Service Reform Act of 1978.[28] They are distinguishable from other unpaid internships,

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21 This sentence might better be worded as "It's not that the *House* only cares about federal interns." The Senate's persistent inaction suggests it doesn't care about *any* interns, federal or otherwise.

22 *See* Katherine Tully-McManus, *House Moves to Protect Federal Interns from Harassment and Discrimination*, Roll Call, (Jan. 15, 2019, 2:03 PM), https://rollcall.com/2019/01/15/house-moves-to-protect-federal-interns-from-harassment-and-discrimination [https://perma.cc/D55E-7FYE].

23 Unpaid Intern Protection Act, H.R. 134, 116th Cong. (2019). For another legislative effort to protect interns, see Rep. Grace Meng of New York's Intern Protection Act, H.R. 2034, 114th Cong. (2015).

24 *See* Sheryl Gay Stolberg & David Stout, *Elijah Cummings, Powerful Democrat who Investigated Trump, Dies at* 68, N.Y. Times, (Oct. 25, 2019), https://www.nytimes.com/2019/10/17/us/politics/elijah-cummings-death-illness.html [https://perma.cc/XL3P-VCUD].

25 Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (discussed *infra* Part II).

26 *See infra* notes 74–81 and accompanying text.

27 *See infra* notes 75–80 and accompanying text (explaining general restrictions on agency spending in the absence of Congressional authorization and appropriated funds).

28 5 U.S.C. § 3111.

such as those in the private, nonprofit, and state and local public sectors. Likewise, they differ from other federal "pathway," "intern," and similarly named "fellow" programs. These student volunteers work in numbers that the agencies are unable to count, under authority and programs largely uncharted by the government, let alone legal scholars. We have little way of knowing how many federal unpaid internships exist. Demographic data on the students who fill those positions is virtually nonexistent.[29] Data for *paid* federal internships, on the other hand, is both available and reflective of dramatic fluctuation over time, with paid positions under the Pathways Program declining from 60,000 in 2010 to just 4,000 in 2020.[30]

Problems baked into the system of unpaid internships are magnified, compounded, and complicated within the federal government. Although this Note proposes solutions to some of the issues unpaid internships create, its focus is primarily descriptive—identifying and explaining a previously overlooked topic. To that end, it proceeds in four parts. Part I sets an economy-wide stage, explaining in broad strokes the employment law of unpaid internships in the private and nonprofit sectors and the tug of war over whether and how they are excepted from coverage under the FLSA. Part II—this Note's central contribution to the scholarship—maps the parallel statutory universe in which federal unpaid internships emerged and took shape. Drawing on my experience as a budget analyst in the federal government, I discuss federal appropriations law and the particularized application of the FLSA to the United States as an employer. Part III examines the distinctly sticky problems that arise within this federal scheme—some unique to the sector, some common to all unpaid internships, but especially troubling when the boss is the United States government. Part IV looks to the future, focusing first on a big legislative fix before turning to specific, concrete proposals for reform. Whether implemented as part of a big legal package or in separate, more targeted efforts, these proposals focus on promoting equal opportunity, reducing risks to good government, and ensuring interns are truly primary beneficiaries of their experience.

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[29] *See* Jack Leahey, *Want a More Representative Federal Workforce? Pay More Interns.*, OnLabor (Dec. 6, 2021), https://onlabor.org/want-a-more-representative-federal-workforce-pay-more-interns [https://perma.cc/6L6H-QKQX] ("It is difficult to say what percentage of all federal internships are unpaid because the Bureau of Labor Statistics traditionally does not track these positions.").

[30] *See Chairman Connolly Announces Plan to Leverage Internships to Rebuild Federal Workforce*, House Comm. on Oversight and Gov't Reform (Oct. 4, 2021), https://oversightdemocrats.house.gov/news/press-releases/chairman-connolly-announces-plan-to-leverage-internships-to-rebuild-federal [https://perma.cc/WD6F-9ZRH].

I
Unpaid Internships Outside Federal Government

Unpaid internships inside the federal government are exceptional; they are best understood in the context of the rule from which they depart. Here, that rule is the Fair Labor Standards Act. This Part lays the foundation necessary to understand the nature of unpaid internships in the federal space. Section I.A situates federal "student volunteers" within the broader unpaid internship economy. It then shifts to case law, explaining how a nearly 80-year-old case involving railroad brakemen[31] laid a foundation for the contemporary intern economy. Section I.B describes how the Department of Labor (DOL) embraced the *Portland Terminal* training exception—and how the Second Circuit's subsequent rejection of that test prompted the Department to reverse course. Section I.C further refines the scope of this Note by highlighting exceptions from the text of the FLSA (as opposed to the judicially created standard in Sections I.A and I.B).

A. Fair Labor Standards Act and the Portland Terminal *Training Exception*

At first, the Fair Labor Standards Act (FLSA) might seem an unlikely source from which to salvage legal protections for student workers. Like Title VII, the FLSA defines "employee" as "any individual employed by an employer."[32] However, the FLSA further defines "employ" as "to suffer or permit to work."[33] This statutory definition has prompted courts to interpret the FLSA's scope more broadly than other federal employment statutes.[34] As the Supreme Court wrote in *Walling v. Portland Terminal Co.*: "This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category."[35]

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

32 29 U.S.C. § 203(e)(1); *see also supra* note 16 and accompanying text.

33 29 U.S.C. § 3(g).

34 *See, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (describing the "striking breadth" of to "suffer or permit to work" as extending the meaning of employee "to cover some parties who might not qualify as such under a strict application of traditional agency law principles"); United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945) (noting the FLSA's definition of employee as "the broadest definition ever included in any one act" (quoting 81 Cong. Rec. 7657 (1937) (statement of Sen. Hugo Black))).

35 330 U.S. 148, 150–51 (1947).

The Supreme Court has never directly addressed unpaid internships under the FLSA, but in *Portland Terminal*, it did recognize a narrow fact pattern in which training could fall outside the FLSA's minimum wage mandate. The respondent railroad company hosted trainings for prospective brakemen.[36] Trainees spent seven to eight days on site under the supervision of a railyard crew, starting out observing and gradually progressing to "actual work under close scrutiny" of regular employees, whom the trainees did not displace.[37] The trainees were neither paid nor charged, and the court found no indication that the trainees expected wages.[38] Perhaps decisively, the Supreme Court accepted an unchallenged finding of fact that any work the trainees performed was of no "immediate advantage" to the railroad.[39]

The fact pattern confronted the Supreme Court with a dilemma. Though the trainees had engaged in "the kind of activities covered by the Act,"[40] those activities had a distinctly educational character:

> Had these trainees taken courses in railroading in a public or private vocational school, wholly disassociated from the railroad, it could not reasonably be suggested that they were employees of the school within the meaning of the Act. Nor could they, in that situation, have been considered as employees of the railroad merely because the school's graduates would constitute a labor pool from which the railroad could later draw its employees. The Fair Labor Standards Act was not intended to penalize railroads for providing, free of charge, the same kind of instruction at a place and in a manner which would most greatly benefit the trainees.[41]

In other words, a strict construction of "suffer or permit to work" would lead to absurd results: "[A]ll students would be employees of the school or college they attended, and as such entitled to receive minimum wages."[42] Because such an outcome "was obviously not intended,"[43] the Court concluded that the FLSA's expansive coverage had limits, and the *Portland Terminal* training program lay beyond them.[44]

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36 *Id.* at 149.
37 *Id.* at 149–50.
38 *Id.* at 150.
39 *Id.* at 153 (emphasis added).
40 *Id.* at 150.
41 *Id.* at 152–53.
42 *Id.* at 152.
43 *Id.*
44 *Id.* at 153.

B. From Portland Terminal *to* Glatt*: Testing Internships Under the FLSA*

The first few decades following *Portland Terminal* saw minimal impact on the education sector.[45] That started to change, however, around 1970, as universities saw more students attending college than ever before, and a tough labor market left institutions scrambling to help students find work.[46] Schools and students started embracing experiential learning to gain footholds in sought-after sectors—between 1970 and 1983, the number of universities offering students the opportunity to intern while taking classes increased from 200 to 1,000.[47] This was roughly the same time the DOL began addressing inquiries about labor by applying *Portland Terminal*'s fact pattern as a six-element test for whether a relationship with trainees, be they student or professional, constitutes employment for purposes of minimum wage and overtime.[48] The *Portland Terminal* test made frequent appearances in the ensuing decades.[49]

In 2010, the DOL's Wage and Hour Division (WHD) issued guidance on internships under the FLSA.[50] Under the 2010 guidance, interns could go unpaid only if all six *Portland Terminal* criteria were satisfied:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;

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[45] *See, e.g.*, Olivia B. Waxman, *How Internships Replaced the Entry-Level Job*, TIME (July 25, 2018, 4:00 PM), https://time.com/5342599/history-of-interns-internships [https://perma.cc/9SXM-8Z2G].

[46] *Id.*

[47] *Id.*

[48] *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on the Fair Labor Standards Act (FLSA) (Mar. 31, 1970) (declining to opine upon whether a student doing on-the-job training as part of a college curriculum would qualify as an employee but saying that the *Portland Terminal* elements would apply).

[49] *See, e.g.*, U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on the Fair Labor Standards Act (FLSA), 1974 WL 38693 (Feb. 22, 1974) (explaining results of a field investigation finding sewing machine operators for an industrial glove manufacturer who were also students at a vocational-technical school did not qualify as an exception under the *Portland Terminal* criteria); U.S. Dep't of Labor, Opinion Letter on the Fair Labor Standards Act (FLSA) (Sept. 9, 1994) (indicating based on facts presented by the employer that their training program would likely pass the *Portland Terminal* test); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on the Fair Labor Standards Act (FLSA) (May 17, 2004) (applying the *Portland Terminal* test to an internship program and advising that it would likely fail to meet several criteria).

[50] U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act (2010) [hereinafter DOL 2010 Fact Sheet].

3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.[51]

It took several years before unpaid interns would reach a federal appellate court with a case to put the DOL's FLSA internship criteria to the test. In 2015, a cohort of former unpaid interns seeking backpay for their work on the film "Black Swan" at Fox's New York offices finally forced the question: Would a court adopt the DOL's all-or-nothing *Portland Terminal* elements?

The answer in *Glatt v. Fox Searchlight Pictures, Inc.* was a hard no.[52] The Second Circuit held that the lower court erred in applying the DOL's test to answer the "question of under what circumstances an unpaid intern must be deemed an 'employee' under the FLSA and therefore compensated for his work."[53] Describing the substance of the DOL 2010 Fact Sheet as "essentially a distillation of the facts discussed in *Portland Terminal*," the court rejected the six-element test as unpersuasive and unentitled to deference under the *Skidmore* doctrine.[54] Instead, the court announced seven nonexhaustive factors to ascertain the "primary beneficiary" in an intern-employer relationship, which would, in turn, determine whether the intern is an employee under the FLSA:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment,

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[51] *Id.*

[52] Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2016), *amending and superseding* 791 F.3d 376 (2d Cir. 2015).

[53] *Id.* at 533, 538.

[54] *Id.* at 536 ("Because the DOL test attempts to fit *Portland Terminal*'s particular facts to all workplaces, and because the test is too rigid for our precedent to withstand, we do not find it persuasive, and we will not defer to it." (citations omitted)); *see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (establishing the principle of persuasive authority in administrative interpretation, with the weight a court affords to an agency's reasoning determined by the power of that reasoning to persuade).

including the clinical and other hands-on training provided by educational institutions.

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[55]

In 2018, the DOL essentially adopted that analysis as its own, re-releasing a new version of Fact Sheet #71 and thereby replacing the six *Portland Terminal* elements with seven factors taken verbatim from *Glatt*.[56] In a field assistance bulletin to regional administrators and district directors announcing the change, the WHD noted, "Every federal appellate court that has considered the six-part test since the WHD issued the fact sheet . . . has expressly rejected the test . . . ."[57] While technically true—one circuit rejected the test before *Glatt*,[58] and two circuits took up the *Glatt* factors following the Second Circuit's decision[59]—the WHD's rush to embrace *Glatt* belies discord across circuits on the right way to examine education-adjacent training under the FLSA.[60]

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55 *Glatt*, 811 F.3d at 536–37.

56 U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act (2018) [hereinafter DOL 2018 Fact Sheet].

57 U.S. Dep't of Labor, Wage & Hour Div., Field Assistance Bulletin No. 2018-2, at 1 (Jan. 5, 2018).

58 *See* Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525–26, 528 (6th Cir. 2011) (calling WHD's *Portland Terminal* approach "overly rigid," but applying several of its criteria to decide the primary beneficiary of the relationship between a vocational school and its students).

59 *See* Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1209–12, 1215 (11th Cir. 2015) (adopting *Glatt*'s primary beneficiary factor analysis and remanding to district court to apply it to student trainees in a clinical anesthesia program); Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1147–48 (9th Cir. 2017) (applying the *Glatt* factors and concluding cosmetology students were primary beneficiaries of their work in a school-operated salon).

60 As of December 2024, only the Second, Ninth, and Eleventh Circuits apply the *Glatt* factors. *See supra* note 59 and accompanying text. On the other extreme are the Fifth and Tenth circuits. The Tenth Circuit flatly rejected *Glatt*. *See* Nesbitt v. FCNH, Inc., 908 F.3d 643, 647–48 (10th Cir. 2018) (finding "no need" to apply *Glatt*'s primary beneficiary test, "given the breadth of our test, which relies on the totality of the circumstances and accounts for the economic reality of the situation"). The Fifth Circuit said WHD's six-element test merited "substantial deference," but it analyzed only whether trainees' activities immediately

As Part II will explain, unpaid internships in the federal government are inherently academic. In contrast, the go-to *Portland Terminal* training exception was completely disconnected from formal education. The Second Circuit's *Glatt* factors, on the other hand, place substantial emphasis on education. Ironically, the upshot of the WHD's abandonment of the *Portland Terminal* elements and embrace of the *Glatt* factors is that ground rules for what makes a lawful unpaid internship have come vaguely into alignment across the public and private sectors. Lessons from one domain thus have more instructive power in the other than they otherwise might have. Before turning to the federal sector in earnest, however, Section I.C briefly discusses two other sectors distinct from the prevailing for-profit norms: nonprofit organizations and sub-federal public agencies.

C. Beyond the For-Profit Sector: Nonprofits and State and Local Government

The FLSA isn't one-size-fits-all. It has changed considerably since 1947's *Portland Terminal* holding opened the door to the concept of a training exception. These differences may help explain the *Glatt* court's caution in cabining application of its primary beneficiary factors to for-profit employers.[61] Both the old and new WHD fact sheets apply their tests only to private, commercial employers, noting that internships with public agencies and charitable nonprofits, "where the intern volunteers without expectation of compensation, are generally permissible."[62]

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advantaged an employer. *See* Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1128 (5th Cir. 1983) (examining a case involving trainees in a car factory). The Fourth and Sixth Circuits use a generalized "primary beneficiary" test. *See* McLaughlin v. Ensley, 877 F.2d 1207, 1209–10 (4th Cir. 1989) (construing *Portland Terminal*'s thrust as a question of which party is the primary beneficiary of a trainee's labor, finding the trainees at a snack distribution center to be employees because the dynamic worked to the employer's benefit); Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006, 1013–14 (6th Cir. 2020) (directing courts to apply a looser "primary beneficiary" analysis to cosmetology students working at a school-operated salon). The Seventh and Eighth Circuits are harder to characterize but have eschewed a uniform test. *See* Petroski v. H&R Block Enters., LLC, 750 F.3d 976, 980–81 (8th Cir. 2014) (examining whether tax professionals participating in seasonal rehiring training were employees by analogizing to the facts of *Portland Terminal*); Hollins v. Regency Corp., 867 F.3d 830, 836–37 (7th Cir. 2017) (holding a cosmetology student was not an employee of her school, noting that the student was actually paying the school to work and emphasizing the necessity of supervised experience to attain a state license to practice).

[61] Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 n.2 (2d Cir. 2016) ("Like the parties and amici, we limit our discussion to internships at for-profit employers.").

[62] At the risk of splitting hairs, the two versions use slightly different language. *Compare* DOL 2018 Fact Sheet, *supra* note 56, at n.1 (referring to unpaid internships "for public sector and non-profit charitable organizations"), *with* DOL 2010 Fact Sheet, *supra* note 50, at n.1 (referring to unpaid internships "in the public sector and for non-profit charitable organizations").

That said, the statute does not categorically exclude nonprofit employers from coverage.[63] The exemption the WHD alludes to likely refers to its general policy that volunteers working "freely for public service, religious or humanitarian objectives" are not employees under the FLSA.[64] However, a court may well find entitlement to a wage in certain circumstances.[65]

Unlike nonprofit volunteers, the FLSA clearly *does* exclude from coverage public volunteers who perform services at state, local, and interstate public agencies, provided "(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and (ii) such services are not the same type of services which the individual is employed to perform for such public agency."[66] The DOL Wage and Hour Division notes this statutory exception in its internship fact sheet.[67]

As I will explain in Part II, what truly differentiates federal unpaid internships from the standard-issue variety is that they are tested differently.

II
"Student Volunteers": Unpaid Internships in the Federal Sector

In this Part, I get to the heart of why the House of Representatives, seemingly incapable of alignment, nevertheless agreed on the need to fix a major break in the law that exposed interns in the United States government to discrimination, harassment, and retaliation. Recognizing that two concepts render unpaid internships in the federal government administratively convoluted and fundamentally distinct, the House realized that only legislative action could fix this mess. Section II.A looks first at the Antideficiency Act, a law imposing basic restrictions on federal spending that explains, as much as anything else,

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63 For an excellent discussion of the FLSA's exception—or lack thereof—in the nonprofit sector, see Amanda M. Wilmsen, *A Fair Day's Pay: The Fair Labor Standards Act and Unpaid Internships at Non-Profit Organizations*, 34 A.B.A. J. Lab. & Emp. L. 131 (2019).

64 U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act (2015).

65 *See, e.g.*, Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 298–99 (1985) (affirming that nonprofit's business activities that compete with "ordinary commercial enterprises" are subject to the FLSA).

66 29 U.S.C. § 203(e)(4)(A) (2018).

67 DOL 2018 Fact Sheet, *supra* note 56, at n.1 ("The FLSA exempts certain people who volunteer to perform services for a state or local government agency . . . ."). The earlier Fact Sheet #71 iteration included the same language. *See* DOL 2010 Fact Sheet, *supra* note 50, at n.1 ("The FLSA makes a special exception under certain circumstances for individuals who volunteer to perform services for a state or local government agency . . . .").

why unpaid internships in the federal government look the way they do. Section II.B picks up on the FLSA discussion introduced in Part I, pivoting to language unique to the federal government and examining the sum of the statutory parts: the combined effect of the FLSA and the student volunteer exception. Section II.C draws upon both Acts to distill a test for whether an unpaid internship is lawful in the federal government. Section II.D applies the foregoing analysis to a Federal Circuit holding on the meaning of "federal employee" within the FLSA, which has big implications for how courts might examine this issue moving forward.

A. The Antideficiency Act

In my past life as a budget analyst for the federal government, I found unpaid internships baffling. I couldn't fathom how the federal government could get away with hiring students without paying them. My confusion arose not from the FLSA but from another law: the Antideficiency Act.[68] The Act is a cornerstone of federal appropriations law, the body of statute, process, and precedent that controls how agencies can use the funding allocated to them in annual spending packages.[69]

An extended treatment of appropriations law is beyond the scope of this Note, but to understand the significance of the Antideficiency Act, a few key points are important. First, federal employees can face criminal penalties for violations of the Antideficiency Act.[70] Second, Congress has vested in the Comptroller General and Government Accountability Office (GAO) authority to settle government accounts[71] and to relieve accountable executive officials from liability for losses caused by deficiencies, such as illegal, improper, or incorrect payments in violation of the Act.[72] As a result, opinions of the Comptroller carry significant weight, though they do not bind agencies. Violating the Antideficiency Act carries real consequences, so when the GAO says agencies can't use funds in a particular way, the budget analysts in the civil service take heed.

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[68] *See* 31 U.S.C. §§ 1341, 1342, 1349–1351, 1511–1519.

[69] Gillian Metzger offers an outstanding treatment of federal appropriations, exploring the topic's unjustifiable marginalization in public law doctrine and explaining how the appropriations process works in law and in practice. *See generally* Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075 (2021).

[70] *See* 31 U.S.C. § 1350 (imposing fines of up to $5,000 and/or imprisonment for up to two years for certain knowing and willful violations). Employees also face administrative discipline, including "when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a).

[71] *See* 31 U.S.C. § 3526.

[72] 31 U.S.C. §§ 3527–3528.

In essence, Congress uses the Antideficiency Act to keep control over the power of the purse. Its first Section prohibits federal agencies from obligating money that Congress didn't appropriate.[73] An extension of this core restriction is the Antideficiency Act's prohibition on accepting voluntary labor for the government.[74] That ban arose in the early days of the Antideficiency Act, when Congress got tired of agencies trying to skirt the law with what's called a "coercive deficienc[y]"—accepting compensable service but delaying remuneration so agencies could stay within appropriation limits, then presenting Congress with the bill and appealing to a moral obligation to pay.[75]

A body of law grew around the § 1342 prohibition against voluntary services. In some cases, its application looked remarkably similar to *Portland Terminal*'s FLSA-exception holding as interpreted by the DOL until 2018—specifically, its nondisplacement principle.[76] For example, in 1947—the same year *Portland Terminal* recognized that at least some training programs could fall beyond the FLSA—the Civil Service Commission, the agency predecessor to the Office of Personnel Management (OPM), queried whether federal agencies could accept uncompensated student "interne[s] [sic]" and task them with work comparable to that performed by regular employees of the civil service.[77] The Comptroller General said no.[78] The work described would constitute filling a position with a rate of compensation fixed by law, and under 31 U.S.C. § 1342, the worker could not waive that compensation.[79] Anyone performing those duties would have to be paid the going rate.

Until 1978, the Antideficiency Act meant the government couldn't host unpaid interns—period, full stop.[80] But as part of the Civil Service Reform Act of 1978, perhaps motivated by the growing embrace of experiential learning in the education sector, Congress enacted 5 U.S.C. § 3111. It authorized agency heads—notwithstanding the voluntary service prohibition under 31 U.S.C. § 1342 and subject to regulations issued by OPM—to accept voluntary service for the United

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73 31 U.S.C. § 1341.

74 31 U.S.C. § 1342 (titled "[l]imitation on voluntary services").

75 *See* 2 Off. of Gen. Couns., U.S. Gov't Accountability Off., GAO-06-382SP, Principles of Federal Appropriations Law 6-34 (3rd ed. 2006) [hereinafter GAO Red Book, GAO-06-382SP] ("Perhaps most egregious of all, some agencies would spend their entire appropriations during the first few months of the fiscal year, continue to incur obligations, and then return to Congress for appropriations . . . .").

76 *See* DOL 2010 Fact Sheet, *supra* note 50, at 1 (stating criterion 3: "The intern does not displace regular employees, but works under close supervision of existing staff").

77 *See* U.S. Civ. Serv. Comm'n, Opinion Letter, 26 Comp. Gen. 956, 957 (June 27, 1947).

78 *See id.*

79 *See id.* at 959.

80 *See* GAO Red Book, GAO-06-382SP, *supra* note 75, 6–102 to –03.

States, provided such service: "(1) is performed by a student, with the permission of the institution at which the student is enrolled, as part of an agency program established for the purpose of providing educational experiences for the student; (2) is to be uncompensated; and (3) will not be used to displace any employee."[81]

Congress defined "student" in rather precise terms. They must be enrolled on no less than a half-time basis "in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution," and if they have a period of unenrollment of "not more than 5 months," they must show "a bona fide intention of continuing to pursue a course of study or training in the same or different educational institution . . . immediately after the interim."[82]

The statute goes on to stipulate that student volunteers shall "not be considered a Federal employee" with three exceptions: work injuries; tort claims against the United States; and programs incentivizing commuting by means other than single-occupancy vehicles.[83] Based on this language[84] and legislative history,[85] the Comptroller General in 1981 wrote that 5 U.S.C. § 3111 "reflects the Congressional intent that expenditures thereunder be limited to payment of the students' injury compensation and of tort claims resulting from their activities."[86]

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[81] 5 U.S.C. § 3111(b). OPM's regulations largely restate the text of the statute, though they do add a few clarifications. Specifically, Section 308.101 delegates from OPM to agencies authority to decide whether a student has a bona fide intention to resume studies between enrollment periods. 5 C.F.R. § 308.101 (2024). It also says that student volunteers cannot staff positions that are a "normal part of the agency's work force." *Id.* Section 308.102 requires student volunteers to satisfy any minimum age requirements in Federal, State, or local laws and employment standards. 5 C.F.R. § 308.102 (2024). Section 308.103 describes the agency programs Congress authorized as "designed to provide educationally related work assignments for students in nonpay status." 5 C.F.R. § 308.103 (2024).

[82] 5 U.S.C. § 3111(a).

[83] *See* 5 U.S.C. § 3111(c)(1) (citing 5 U.S.C. §§ 8101–8193) (relating to compensation for injury); 28 U.S.C. §§ 2671–2680 (relating to tort claims against the United States); 5 U.S.C. § 7905 (relating to commuting by means other than single-occupancy motor vehicles). Regulations have not been updated to reflect the addition of the commuting incentives program. *See* 5 C.F.R. § 308.102(b) (2024) ("A student participating under an agency volunteer program is not considered to be a Federal employee for any purposes other than injury compensation or laws related to the Tort Claims Act. Service is not creditable for leave accrual or any other employee benefits.").

[84] The clause about single occupancy vehicles was not considered, as it was added to the statute after the Comptroller's opinion as a technical and conforming amendment through the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

[85] *See generally* S. Rep. No. 95-969 (1978) (describing the legislative history of the Civil Service Reform Act, which clarified the status of students as volunteers, not federal employeees, with exceptions for injury compensation and tort claims).

[86] Student Voluteers – Traveling & Living Expenses, 60 Comp. Gen. 456, 458 (1981). Indeed, the Congressional Budget Office cost estimate for the student volunteer services authority contemplated nothing beyond "some costs as a result of claims by volunteers," with no such expenses included in its estimate. *See* S. Rep. No. 95-969, at 120 (1978).

Accordingly, the Comptroller cautioned OPM against issuing regulations that would permit students to be "reimbursed for their out-of-pocket traveling and living expenses—or to be provided with transportation, meals, and quarters in kind—by the government while they are participating in the volunteer programs."[87] Other statutes authorizing agency heads to accept volunteer service expressly provide for payment of certain expenses.[88] In contrast, the Comptroller advised that "[n]o provision was made in 5 U.S.C. § 3111 for the students' traveling and living expenses to be borne by the government, and it does not appear that any such provision was intended."[89]

In 1990, the GAO's General Counsel issued a legal opinion applying similar constraints to the agency itself. Responding to an inquiry from its recruitment office questioning the GAO's policy against reimbursing student volunteers for expenses incurred while visiting local audit sites, the General Counsel cited its 1981 opinion: "The Congressional intent was not to authorize the students to travel at Government expense but rather to limit the expense of the educational programs to payment of the students' injury compensation and of tort claims arising from their activities."[90] It noted that the scope of 5 U.S.C. § 3111 is "very narrow," authorizing "the limited use of student volunteers for the purpose of enhancing their educational experiences."[91]

Other Antideficiency Act-related statutory provisions and GAO opinions further immure the federal government. Absent specific legislation to the contrary, for example, agencies cannot use appropriated funds to foot the bill for nonemployees to travel to meetings.[92] Nor can they accept donations to subsidize expenses for unpaid interns. Funding gifted to agencies, though not appropriated by Congress, is nevertheless an appropriation that can be spent only "in furtherance of authorized agency purposes,"[93] and where 5 U.S.C. § 3111 is

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87 Student Voluteers – Traveling & Living Expenses, 60 Comp. Gen. 456, 456–57 (1981).

88 *See, e.g.*, 16 U.S.C. § 558b (authorizing the Secretary of Interior to "provide for incidental expenses, such as transportation, uniforms, lodging, and subsistence" for Forest Service volunteers).

89 Student Voluteers – Traveling & Living Expenses, 60 Comp. Gen. 456, 459 (1981).

90 U.S. Gov't Accountability Off., Off. of Gen. Couns., Memorandum: Use of Appropriated Funds For Various Recruitment Expenses, B-236763, at 9 (Jan. 10, 1990) (quoting Student Voluteers – Traveling & Living Expenses, 60 Comp. Gen. 456, 459 (1981)).

91 *Id.*

92 *See* 31 U.S.C. § 1345. The GAO has pointed to this statute as a reason its own recruitment office could not subsidize student travel for recruitment events. *See* U.S. Gov't Accountability Off., Off. of Gen. Couns., *supra* note 90, at 7. In validating GAO's construction of that statute, however, the Office of Legal Counsel noted that violating 31 U.S.C. § 1345 would not, on its own, constitute an Antideficiency Act violation. *See* Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences, 31 Op. O.L.C. 54, 54 (2007).

93 GAO Red Book, GAO-06-382SP, *supra* note 75, 6-226.

concerned, the only time an agency is "authorized" to spend money on an unpaid intern is when someone has been injured.[94]

With agencies functionally banned from compensating student volunteers through means other than a wage, the only avenue to ensure federal antidiscrimination laws targeting employment protect interns is to pay them. And a law applies to the United States as an employer that appears (at least at first) to mandate a minimum wage: the FLSA. The next Section explores the FLSA as applied to the federal government.

B. The FLSA's Federal Face

As an employer, the federal government is subject to the Fair Labor Standards Act. However, this was not the case until the mid-1970s. As the Federal Circuit recently noted, "[I]n 1974, Congress amended the FLSA's definition of 'employer' to remove the language excluding the United States, and it amended the FLSA's definition of 'employee' to expressly include 'an individual employed by a public agency' of 'the Government of the United States,' subject to certain conditions."[95] The legislative history to the 1974 Amendment substantiates the Federal Circuit's interpretation: "The bill extends the minimum wage and overtime coverage of the [Fair Labor Standards] Act to Federal, State, and local government employees."[96]

As previously noted, federal agencies couldn't hire unpaid interns at all until 1978, when Congress codified an exception to the Antideficiency Act's prohibition on voluntary service.[97] In short, the strictures of the Antideficiency Act, not the FLSA, constrain the federal government's internship practices. This Note has covered the student volunteer exception on its own terms and in the context of federal spending law, but it's worth revisiting here. That's because two provisions within 5 U.S.C. § 3111 take on heightened significance with reference to the FLSA. First, there's the requirement in § 3111(b)(2) that student volunteers be uncompensated. Second, there's § 3111(c), which delineates three, and only three, specific statutory purposes for which the government considers student volunteers to be federal employees.[98] The Senate Report to the Civil

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[94] *See* U.S. Gov't Accountability Off., Off. of Gen. Couns., *supra* note 90, at 9.

[95] Avalos v. United States, 54 F.4th 1343, 1349 (Fed. Cir. 2022) (quoting the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55, 58–60 (codified as amended at 29 U.S.C. § 203)), *cert. denied sub nom.* Martin v. United States, 144 S. Ct. 557 (2024).

[96] H.R. Rep. No. 93-913, at 2 (1974), as reprinted in 1974 U.S.C.C.A.N. 2811, 2812.

[97] *See* GAO Red Book, GAO-06-382SP, *supra* note 75, at 6-103.

[98] The three purposes being injuries, claims related to the Federal Tort Claims Act, and agency transit incentives. *See* 5 U.S.C. § 3111(c)(1); *see also supra* note 83 and accompanying text.

Service Reform Act makes the congressional intent as to the combined effect of these provisions unambiguous:

> Subsection 3111(c) explains that a volunteer is not considered a Federal employee for the purposes of any Federal law except for injury compensation and tort claims. *The exclusionary language of subsection (c), when read with subsection (b), precludes payment for voluntary services under the Fair Labor Standards Act of 1938*, as amended, or any other statute providing for the compensation of Federal employees.[99]

Combined, these provisions exclude *all* unpaid internships in the federal government from the FLSA. In other words, the very statute that authorizes federal employers to host unpaid interns without violating the Antideficiency Act's voluntary service prohibition says those interns cannot be federal employees for FLSA purposes.

A recent Federal Circuit decision tackled an interesting question: What happens when someone—a contractor, for example—who isn't an employee in the conventional civil servant sense believes they've nevertheless been "suffer[ed] or permit[ted] to work"[100] by the United States Government? *Lambro v. United States* answered that issue. The case involved a contractor for Voice of America, whom the parties agreed was not a federal employee under any statute other than the FLSA.[101] The government contended that Lambro's lack of an appointment or other congressionally authorized employment relationship with the federal government precluded him from a claim under FLSA itself.[102] In a decision reflective of Claims Courts' sensitivity to technicalities of federal statute, regulation, and administrative process, it held that the contractor's FLSA claim couldn't proceed, emphasizing that "'technical concepts,' such as appointment, are crucial to determining whether an individual is a federal employee."[103] Unlike private employment, the court stated, "federal workers' rights are defined by Title V and not by contract, the common law, or other statutes not specifically made applicable to federal workers."[104]

Finding the Claims Court had erred in concluding that status as a federal employee for the FLSA is predicated on holding an appointment or other statutorily created relationship with the

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99 S. Rep. No. 95-969, at 65 (1978) (emphasis added).

100 Fair Labor Standards Act of 1938 § 3(g), 29 U.S.C. § 203(g).

101 *See* Lambro v. United States, 162 Fed. Cl. 344, 350 (2022) (analyzing plaintiff's employment status under the FLSA only because while "the parties dispute whether Plaintiff is an employee," neither party contended he was an employee under any other statute), *vacated and remanded*, 90 F.4th 1375 (Fed. Cir. 2024).

102 *Id*.

103 *Id.* at 351.

104 *Id.* (quoting Griffin v. Sec'y of Health & Hum. Servs., 124 Fed. Cl. 101, 106 (2014)).

government, the Federal Circuit vacated and remanded the case to determine whether Lambro was employed by Voice of America under the FLSA's own standard.[105] It reasoned that validating the logic of the Claims Court—essentially, that the FLSA's definitions don't apply to the federal sector—would thwart congressional intent.[106] Concerning the FLSA's definition of "employ"[107] and the broad interpretation courts have applied to it, the Federal Circuit stated that Congress "refrained from taking the readily available textual steps . . . that might have made that provision inapplicable to federal employees."[108] The FLSA itself supplies "congressional authorization of the recognition of an employment relationship with the federal government *for FLSA purposes*."[109] The employment relationship is self-contained: It exists only for the purposes of the FLSA.[110]

Applied to unpaid interns within the federal government, *Lambro*'s holding that a federal worker can be a federal employee under the FLSA, and only the FLSA, could prove significant. To put the full significance in context, however, we need to examine the cumulative effect of the Antideficiency Act and related appropriations constraints alongside the application of the FLSA to the federal government. The next Section undertakes that effort.

C. Sum of the Statutory Parts: A Test for Permissibly Unpaid Federal Internships

For a federal agency to spend money, Congress must authorize it. As the previous discussion established, there is no overlap in the theoretical Venn diagram of student volunteers on the one hand and FLSA employees on the other. The student volunteer exception thus translates to a near-categorical restriction against spending money on unpaid interns. Only if an expense arises from one of the three statutory contexts in which 5 U.S.C. § 3111 permits treating student volunteers as employees, the expense will not violate the Antideficiency Act or the Appropriations Clause of the U.S. Constitution.[111] Outside those three

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105 Lambro v. United States, 90 F.4th 1375, 1375, 1380 (Fed. Cir. 2024) ("[T]he FLSA grants the protections at issue to all those suffered or permitted to work for a covered federal agency, where 'suffered or permitted to work' has a meaning, focused on economic realities, that courts have repeatedly set forth.").

106 *See id.* at 1381–82.

107 29 U.S.C. § 203(g) ("'Employ' includes to suffer or permit to work.").

108 *Lambro*, 90 F.4th at 1382.

109 *Id.* at 1380 (emphasis added).

110 *See id.* at 1382 (cabining its conclusion to the FLSA context by noting that its holding, "based on § 203(g)'s definition of 'employ' (and its longstanding interpretation)," would not "reach statutes without that language, which would require a separate analysis").

111 *See* 5 U.S.C. § 3111(c)(1); *see also* U.S. Const. art. I, § 9, cl. 7.

purposes, however, an agency cannot spend appropriated funds on an unpaid student intern unless Congress specifically provides for such an expenditure, nor can they typically accept unpaid volunteer service.[112]

As a result, I propose a test for whether an unpaid internship is allowed in the federal government. It comes not from the FLSA, but from the text of 5 U.S.C. § 3111, with a few additions imported from the Antideficiency Act and closely related statutes and regulations.

1. The internship is performed by a student who is enrolled* on at least a half-time basis at an accredited educational institution.[113]
2. The student participates with permission of the educational institution at which they are enrolled.[114]
3. The internship is part of an agency program established for the purpose of providing educational experiences for the student, through which the agency provides educationally related work assignments for students in nonpay status.[115]
4. The internship is uncompensated.[116]
5. The student will not be used to displace any employee or to staff a position regularly a part of the agency's workforce.[117]
6. No agency funds are spent directly on or in reimbursement for the student's benefits or expenses of any kind, including but not limited to travel, transportation, and/or subsistence expenses for meetings.[118]
7. The student is not a federal employee except for purposes of the Tort Claims Act (28 U.S.C. §§ 2671–80); workplace injuries (5 U.S.C. §§ 8101–93); and an agency program incentivizing commuting by means other than single-occupancy vehicle (5 U.S.C. § 7905).[119]

* Note on "enrolled": A student will still be deemed enrolled during an interim between school years of no more than five months, provided the interim is no more than five months, and provided the agency is satisfied with the student's bona fide intention to resume enrollment at the same or a different accredited educational institution immediately after the interim.[120]

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112 *See* 31 U.S.C. § 1341(a) ("An officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation[.]"); 31 U.S.C. § 1342 ("An officer or employee of the United States Government . . . may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.").

113 5 U.S.C. § 3111(a).

114 5 U.S.C. § 3111(a), 3111(b)(1); 5 C.F.R. § 308.101 (2023).

115 5 U.S.C. § 3111(b)(1); 5 C.F.R. § 308.103 (2023).

116 5 U.S.C. § 3111(b)(1)(2); 5 C.F.R. § 308.101 (2023).

117 5 U.S.C. § 3111(b)(1)(2); 5 C.F.R. § 308.101 (2023).

118 31 U.S.C. §§ 1344–1345.

119 5 U.S.C. § 3111(c)(1); 5 C.F.R. § 308.102(b) (2023).

120 5 U.S.C. § 3111(a).

The test is one of elements, not factors; each component is necessary for an unpaid internship to fully comply with 5 U.S.C. § 3111. To the extent an internship program fails to conform with the test's requirements, the program potentially exposes the agency to a deficiency. The test's authoritative power, therefore, derives from the powerful deterrent effect of the Antideficiency Act's penalty provisions.[121]

The test has a surprising outcome. Functionally, if an internship in the federal government satisfies the criteria for the student volunteer exception to the Antideficiency Act's voluntary service prohibition, the FLSA will not mandate a minimum wage. Given the nature of the federal unpaid internship, which is predicated on the intern being a student, this outcome is unsurprising with respect to the *Glatt* factors.[122] More striking, given several courts' rejection of the *Portland Terminal* test as excessively rigid, is how handily a compliant federal unpaid internship satisfies the all-or-nothing *Portland Terminal* standard. In short, if an unpaid internship complies with the 5 U.S.C. § 3111 student volunteer exception, it will probably pass whatever FLSA training exception test the court might apply.

D. Applying the Test

If a case occasions a court to stress test that conclusion, it will likely arise in the Federal Circuit. Under the Tucker Act, the Court of Federal Claims has jurisdiction over any FLSA claim alleging monetary damages owed by the U.S. government.[123] Claims for less than $10,000—certainly plausible in the context of a short-term internship—may also be brought in any federal district court.[124] But a district court would have little, if any, binding authority to guide it. That's because the high-stakes (read: high-dollar) case law construing the FLSA in the federal sector comes exclusively from the Federal Circuit and Court of Federal Claims below. If a district court wants persuasive authority to guide it, that authority will come from the Federal Circuit's courts.

In any scenario, then, *Lambro* will loom large.[125] Recall that in *Lambro*, the Federal Circuit court held that by amending the FLSA

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121 *See supra* note 70 and accompanying text.

122 The *Glatt* factors heavily integrate formal education into their analysis. *See infra* Section III.A.

123 *See* 28 U.S.C. § 1491(a)(1).

124 28 U.S.C. § 1346 (a)(2).

125 It will loom largest, of course, in the Federal Circuit. Because the Federal Circuit follows the law of the circuit rule, both it and the Claims Court below are bound by the rule announced in *Lambro v. United States* "unless or until" an en banc circuit panel or the Supreme Court overturns it. *See* Hamilton v. United States, 85 Fed. Cl. 206, 216 (2008)

to include federal employees, Congress authorized recognition of an employment relationship with any federal worker who falls within the scope of the Act.[126] The Court of Federal Claims had therefore erred by dismissing a Voice of America contractor's claim for damages under the FLSA.[127] Because the contractor's conceded lack of appointment or other congressional authorization for federal employment under a statute outside of the FLSA was not dispositive of coverage inside the FLSA, "Mr. Lambro [was] entitled to a determination of whether he met [the FLSA standards]."[128]

A court would likely reach the same conclusion of an unpaid intern—that she's entitled to a determination of whether she's an employee for purposes of the FLSA. Moreover, *Lambro*'s outcome suggests the FLSA question could proceed without first addressing whether the internship is a valid exercise of authority under the student volunteer exception.[129] For an agency playing by the rules around 5 U.S.C. § 3111, the timing of the FLSA inquiry probably would not matter. A program that satisfies the student volunteer elements should have no trouble with the *Portland Terminal* elements or *Glatt* factors. Whatever the sequence of the issues, the result would be the same: no compensation paid nor required, and no violation of the Antideficiency Act.

An agency with a noncompliant student volunteer program, on the other hand, faces a scenario all but impossible before *Lambro*: The internship gets put to the FLSA exception test and fails, triggering liability and—because the liability traces to an unauthorized acceptance of voluntary service—a deficiency for the agency. This is a remarkable prospect, given that, had the Federal Circuit in *Lambro* endorsed the Claims Court's conclusion below, a rogue student volunteer program could have flown beneath the radar indefinitely. The Claims Court's logic would cut a student off from the FLSA whether the agency program satisfied the requirements of 5 U.S.C. § 3111 or

(citing Preminger v. Sec'y of Veterans Affs., 517 F.3d 1299, 1309 (Fed. Cir. 2008)), *aff'd*, 374 F. App'x 20 (Fed. Cir. 2009).

126 *See* Lambro v. United States, 90 F.4th 1375, 1379 (Fed. Cir. 2024) ("We hold that the FLSA does authorize the recognition—solely for application of the FLSA's own provisions—of an employment relationship between the federal government and those federal government workers who satisfy the FLSA's definitions, notably its definitions of 'employee' and 'employ,' under the standards long adopted by the courts.").

127 *See id.*

128 *Id.*

129 *See id.* at 1380 (describing the FLSA as granting protection to "all those suffered or permitted to work for a covered federal agency" and reiterating that this grant constitutes "congressional authorization of the recognition of an employment relationship with the federal government for FLSA purposes").

not. A compliant internship creates a congressionally authorized *nonemployment* relationship.[130] A noncompliant internship may or may not create an employment relationship, but regardless of the relationship, Congress didn't authorize it.[131] None of those possibilities would have gotten past a motion to dismiss.

Where an agency runs a student volunteer program consistent with the Antideficiency Act's requirements, *Lambro* isn't a big deal. For any programs that stray outside the lines, however, *Lambro* sets up a potential reckoning. Before *Lambro*, courts would presumably dispense with an FLSA claim using similar logic to the Claims Court in that case: An unpaid intern, like a contractor, lacks an authorized employment relationship with the government. That alone would shut the door to closer scrutiny of the facts. In contrast, the Federal Circuit's *Lambro* interpretation of the FLSA—that it constitutes its own source of authority for employment—keeps the inquiry open. Where the court's analysis will go from there is, of course, anyone's guess. We have no case law to look to on the issue, nor do we know how closely agency unpaid internships reflect the concepts encoded in statute. What we do know is that if an unpaid internship sticks to the standards required by laws outside the FLSA, the FLSA's training exception, however the court tests it, will probably apply.

My proposed test can help agencies, courts, and potential plaintiffs examine how well a federal unpaid internship conforms to legal requirements. The bigger problem? Ultimately, plaintiffs cannot litigate away the most troubling features of federal unpaid internships. Whether agencies follow the rules or not, too many players lose. In other words, the law is the problem. The remainder of this Note unpacks what that means and offers pathways to a better system.

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130 *See* 5 U.S.C. § 3111(c)(1) (restricting purposes for which a student volunteer may be considered a federal employee to specific statutes involving tort claims, workplace injuries, and shared/public transit incentive programs).

131 This is how the Comptroller General has interpreted such a scenario, holding that the Department of Treasury violated the Antideficiency Act's voluntary service prohibition when it accepted unpaid service from volunteers who did not qualify for the 5 U.S.C. § 3111 student volunteer exception. *See* Dep't of Treas., B-324214, 2014 WL 293545 (Comp. Gen. Jan. 27, 2014). The precise contours of the violation concerned failure to execute written compensation waivers (something not required for student volunteers) and are beyond the scope of this Note. For a discussion of this and related issues, see generally Kenneth J. Allen, *The Obsolete Service Restrictions of the Antideficiency Act—Still the Law*, Briefing Papers, Nov. 2017, at 1, https://www.westlaw.com [https://perma.cc/E6RQ-5QC6].

III
Problems With Unpaid Internships in Federal Government

The rules for unpaid internships in the federal sector are fundamentally different. Still, an agency program that follows those rules should pass any FLSA training exception test the court might apply. The problem is not a double standard or agencies not complying with the law. Compliance fails to mitigate, and indeed compounds and exacerbates, troubling features locked into statute. The rules themselves are broken, and the system is failing as a result.

This Part reflects on system failure: the problems it creates, the risks it engenders, and how their entrenchment in federal statute complicates solutions. Consequences flowing from the student volunteer exception may be felt individually, but they permeate across the entire federal government. Section III.A examines how federal unpaid internships gatekeep opportunity for those who can work for free and condition that opportunity on college enrollment. Section III.B highlights noncoverage by crucial federal employment laws (including antidiscrimination statutes that protect workers and good governance statutes that protect the public interest), which traces back to federal unpaid interns' lack of employee status. Section III.C discusses a final problem, the inadequacy of nonfederal solutions, which arises by virtue of the boss: the U.S. government.

A. Gatekeeping Opportunity and Privileging Students

Much concern over unpaid internships derives from their tendency to perpetuate privilege and fuel growing inequality.[132] At the same time, people who continue their education are already better off than those who do not.[133] These twin phenomena heighten the impact of a

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132 *See, e.g.*, Nicole A. Lilly, *Understanding the Costs of Unpaid Internships*, Nat'l Career Dev. Ass'n: Career Convergence (Apr. 1, 2024), https://www.ncda.org/aws/NCDA/pt/sd/news_article/559302/_PARENT/CC_layout_details/false [https://perma.cc/58JR-PHFU] (noting that students from low-income families sometimes cannot afford to accept unpaid work); Mary Gatta, *The Class of* 2023*: Inequity Continues to Underpin Internship Participation and Pay Status*, Nat'l Ass'n of Colls. & Emps. (Aug. 8, 2023), https://www.naceweb.org/diversity-equity-and-inclusion/trends-and-predictions/the-class-of-2023-inequity-continues-to-underpin-internship-participation-and-pay-status [https://perma.cc/U825-HKWP] (presenting data that "point to systemic inequality in who takes part in internships and who is most likely to get a paid internship").

133 *See* James Tompsett & Chris Knoester, *Family Socioeconomic Status and College Attendance: A Consideration of Individual-Level and School-Level Pathway*, 18 PLoS ONE 1 (Apr. 11, 2023), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0284188 [https://perma.cc/7RPD-P9X3] (modeling student data and finding that a one unit increase in family socio-economic status more than tripled the odds of a student attending college

general tendency in the *Glatt* analysis: An unpaid internship will prove permissible if a school is involved.

Portland Terminal afforded a parity for practical training outside the classroom. The Wage and Hour Division's 2010 guidance embodied that parity. Of its six elements, only one referenced education at all: "The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment."[134] Nothing about that language implied that a trainee's educational status, student or not, was relevant.

In stark contrast are the WHD's 2018 factors, taken whole cloth from the *Glatt* opinion. The *Glatt* test tethers the primary beneficiary analysis to an absent third party—a school—that neither the intern nor the employer controls. Two of seven factors are loaded to approve unpaid internships for students, but not for those who have exited the education system. Factor three weighs "[t]he extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit."[135] If you aren't a student, there is no extent to which your internship will tie to credit or coursework. Factor four queries "[t]he extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar,"[136] something an internship cannot do for an intern with no such commitments or calendar.

To be fair, the academic bias engrained in the test is a feature, not a bug. The Second Circuit intended the analysis to complement the contemporary higher education economy: "The approach we adopt also reflects a central feature of the modern internship—the relationship between the internship and the intern's formal education—and is confined to internships and does not apply to training programs in other contexts."[137]

The likely outcome is that employers will hire students, and only students, for unpaid internships. That suggests the real primary beneficiary in the equation is neither the intern nor the employer but the school that collects tuition for the credits it awards without itself supplying the training. In this respect, colleges and universities have been integral to the ecosystem of unpaid federal internships. Academic credit lends legitimacy to essentially volunteer labor, and by awarding that credit, schools benefit from tuition revenue and enhanced metrics

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and more than doubled the odds of a student attending a four-year college versus a two-year college).

134 DOL 2010 Fact Sheet, *supra* note 50, at 1.

135 DOL 2018 Fact Sheet, *supra* note 56, at 1.

136 *Id.*

137 Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 537 (2d Cir. 2016).

for student success. The number of schools participating in this system has grown from a handful to nearly all accredited institutions over the past few decades, mirroring the internship boom. As one analysis by the Economic Policy Institute noted, "universities have a cozy deal" with this arrangement.[138]

The *Portland Terminal* test was rigid, to be sure. But the rigidity came with consistency, and it put training programs disconnected from classrooms on an equal footing with analogous programs in the education space. The Second Circuit's *Glatt* factors, and the Wage and Hour Division's adoption of them, facilitated a shift in focus. No longer are the main takeaways from *Portland Terminal* the primary beneficiary concept and the narrow training exception to the FLSA. Today, we read *Portland Terminal* as an exception to the general rule that if you want to train someone and do not want to pay them, you should make sure they are in school. Privileging educational status is therefore essential to modern internships.

The unspoken reality of unpaid internships is that they gatekeep opportunity for *wealthy* students. Positions without pay prove functionally foreclosed to people who cannot afford to work for free. As Senator Bernie Sanders of Vermont has put it, "If you want to attract working class and middle class kids, they're going to have to be paid."[139]

Many federal programs means-test benefits to ensure public resources go toward those in need.[140] Unpaid internships in the federal government do precisely the opposite. The White House acknowledged as much in 2022 when it described its move to pay interns as one that would "remove barriers to equal opportunity for low-income students and first-generation professionals at the beginnings of their careers."[141]

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138 Ross Eisenbrey, *Unpaid Internships: A Scourge on the Labor Market*, Econ. Pol'y Inst.: Working Econ. Blog (Feb. 7, 2012), https://www.epi.org/blog/unpaid-internships-scourge-labor-market [https://perma.cc/8GLU-8TU9] (describing colleges' negative reaction to the Obama administration's 2010 crackdown on unpaid internships, noting institutional reluctance to forego "collecting tuition for semesters in which their students get farmed out as free labor to employers").

139 Katherine Scott & Madi Alexander, *Congress's Paid Internships: One Program, 535 Sets of Rules*, Bloomberg Gov't (May 16, 2019), https://about.bgov.com/insights/news/congresss-paid-internships-one-program-535-sets-of-rules [https://perma.cc/9WVY-CWDV] (quoting Sen. Bernie Sanders).

140 *See, e.g.*, 20 U.S.C. § 1070a(b)(1) (2018 & Supp. V 2024) (specifying how Federal Pell Grants are to be determined, with award amounts delineated relative to the federal poverty line).

141 *Biden-Harris Administration Announces the First Session of the White House Internship Program, Administration Will Pay Interns for the First Time in History*, White House (June 2, 2022), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/06/02/biden-harris-administration-announces-the-first-session-of-the-white-house-internship-program-administration-will-pay-interns-for-the-first-time-in-history [https://perma.cc/MG4L-CS74] ("Too often, unpaid federal internships have been a barrier

As with the *Glatt* factors,[142] the standard applied in the federal government stacks the deck in favor of students. But for the federal government, student status goes beyond weighing in favor of unpaid internships—it's mandatory.[143]

B. Exposing Interns and Agencies to Statutory Coverage Gaps

When it comes to federal employment statutes, what happens outside the FLSA has ripple effects far beyond the statute. When an employer hires but declines to pay an intern, they place the student in a vulnerable position.[144] That's true no matter where the intern works; just as unpaid interns in the private sector get excluded from protection under employment-based antidiscrimination laws,[145] so too do federal unpaid interns.[146]

And unlike the nonfederal public sector, which has a specific FLSA coverage exception that permits paying benefits or expenses to a volunteer (e.g., an unpaid intern),[147] the student volunteer exception for the federal government makes no such allowance. Thus, the government can host unpaid student trainees, but it can't use funding to offer things like "transportation, meals, and quarters in kind"[148]—the very things a court might find sufficiently beneficial to an intern to clear the threshold remuneration test and, at least in theory, gain coverage under the crucial civil rights protective statutes discussed in the Introduction to this Note. With benefits proscribed by statute, it is essentially impossible for a federal agency to "employ" a student volunteer in a manner that brings her within the coverage of federal employment antidiscrimination laws that, if they bother to define "employee" at all, tend to do so tautologically.

In this respect, the federal government's constraints under the Antideficiency Act make it fundamentally different from the state and local public employers. Recall that part (i) of the FLSA's public volunteer exception permits payment of "expenses, reasonable benefits,

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to hardworking and talented students and professionals, preventing them from contributing their talents and skills to the country and holding them back from federal career advancement opportunities.").

142 *See supra* Section I.B.

143 *See supra* Section II.C and the student volunteer exception test; the first element comes directly from statute and requires school enrollment for participation.

144 *See supra* notes 16–25 and accompanying text.

145 *See supra* notes 16–23 and accompanying text.

146 *See* 5 U.S.C. § 3111(c) (limiting student volunteers' employment status to three statutory functions, none of which includes civil rights protection).

147 29 U.S.C. § 203(e)(4)(A); *see also supra* Section III.B.1.

148 Student Voluteers – Traveling & Living Expenses, 60 Comp. Gen. 456, 291 (1981).

or a nominal fee."[149] Under that language, a state or local employer could provide benefits or expenses sufficient to bring an intern past the "remuneration" threshold several circuits recognize for coverage under statutes like Title VII.[150] In this sense, the FLSA may apply very differently to state and local governments than to their federal counterpart.[151] Because only one federal circuit court has examined the public volunteer exception as applied to unpaid interns, it is hard to draw any conclusions, but the possibility remains open for now. Moreover, because the remuneration test is merely a threshold inquiry upon which further court adjudication is predicated, clearing that hurdle is just the first step. The intern would then have to satisfy a court's test, whatever that may be, for what constitutes an employment relationship.

Absent some separate authorization, agencies can't provide benefits to tip the scales in favor of employment coverage under federal antidiscrimination laws without violating the Antideficiency Act.[152] Moreover, benefits themselves, even if authorized, may not suffice to overcome the language of 5 U.S.C. § 3111. The clause restricting student volunteers from being considered employees outside the three enumerated functions could be interpreted to rule out employment under antidiscrimination laws.[153] On the other hand, while the legislative history of the student volunteer exception suggests congressional intent to preclude employment status under the FLSA,[154] there is no comparable signal regarding antidiscrimination law.

To be clear, this problem is not unique to the federal government. Private and nonprofit employers may also be deterred from providing benefits sufficient to bring an unpaid intern past a remuneration threshold. As the Supreme Court noted in *Tony & Susan Alamo Foundation v. Secretary of Labor*, benefits can bring nonemployees out of the exception and into the FLSA's mandates: "Under *Portland Terminal*, a compensation agreement may be 'implied' as well as 'express,' and the fact that the compensation was received primarily in

149 29 U.S.C. § 203(e)(4)(A); *see also supra* Section I.C.

150 *See supra* notes 16–20 and accompanying text.

151 Interestingly, there is no such volunteer exception for nonprofits. For an excellent discussion of the FLSA's exception—or lack thereof—in the nonprofit sector, see Amanda M. Wilmsen, *A Fair Day's Pay: The Fair Labor Standards Act and Unpaid Internships at Non-Profit Organizations*, 34 ABA J. Lab. & Emp. L. 131 (2019).

152 *See* Student Volunteers – Traveling & Living Expenses, 60 Comp. Gen. 456 (1981).

153 *See* 5 U.S.C. § 3111(c) (stating that "any student who provides voluntary service . . . shall not be considered a Federal employee for any purpose other than for" the three purposes of commuting, worker's compensation, and tort claims).

154 *See supra* note 99 and accompanying text.

the form of benefits rather than cash is in this context immaterial. These benefits are, as the District Court stated, wages in another form."[155]

Other statutes similarly exclude interns. For federal agencies, a raft of important conduct and ethics laws apply only to employees. According to the Office of Government Ethics (OGE), unpaid interns are not subject to criminal conflict of interest statutes,[156] the Ethics in Government Act,[157] or the regulations for ethical executive branch employee conduct.[158] Nor do unpaid interns have to undertake ethics training.[159]

The Office of Special Counsel (OSC) says unpaid interns are not subject to the Hatch Act.[160] The Hatch Act, among other things, is meant to ensure nonpartisan administration of federal programs, protect federal employees from coercion based on politics, and prevent political affiliation from subverting the merit system.[161] Unpaid interns also cannot file claims with OSC for prohibited personnel practices—leaving them without redress if they encounter nepotism, political favoritism, discrimination, whistleblower retaliation, and other activities corrosive to public integrity.[162]

These exemptions create a critical blind spot in the federal workforce. Unpaid interns—despite often having access to sensitive information and performing substantive work—may enter public service unfamiliar with the legal and ethical norms and obligations that attend civil service. This exposes them to the risk of inadvertently engaging in conflicts of interest or improper conduct and heightens the risk of reputational or legal harm to the agencies they serve. The lack of accountability mechanisms leaves both interns and agencies vulnerable: Interns lack protection, and agencies lack the safeguards that ensure a consistent standard of conduct across their workforce.

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155 471 U.S. 290, 301 (1985) (citation omitted) (applying this test to hold that workers in church-affiliated business establishments were employees, not volunteers, under the FLSA). As previously discussed *supra* note 65, the fact that the church's businesses competed with the commercial sector was significant.

156 18 U.S.C. §§ 202–209.

157 Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered Sections of 2, 5, 18, 26, 28 U.S.C.).

158 U.S. Off. of Gov't Ethics, Opinion Letter on the Application of the Ethics Laws to Interns, 2–3 (Aug. 14, 2017) [hereinafter OGE Advisory Letter].

159 *See id.* at 3; 5 C.F.R. § 2638.304 (2025).

160 *Hatch Act FAQs*, U.S. Off. of Special Couns., https://osc.gov/Services/Pages/Hatch Act-FAQ.aspx [https://perma.cc/QKK6-VQQB].

161 *Hatch Act Overview*, U.S. Off. of Special Couns., https://osc.gov/Services/Pages/ HatchAct.aspx [https://perma.cc/Q5FH-MN6H].

162 *See id.*; 5 U.S.C. § 2302; *see also Prohibited Personnel Practices Overview*, U.S. Off. of Special Couns., https://osc.gov/Services/Pages/PPP.aspx [https://perma.cc/YC38-VPTB].

C. *The Supremacy Clause and Inadequacy of Non-Federal Solutions*

Several states have taken up the mantle left abandoned by the legislature and exploited by the executive branch. In 2009, the District of Columbia became the first jurisdiction to codify protection for interns. A few months after its federal district court dismissed an intern's claim for sexual harassment under the D.C. Human Rights Act (DCHRA), holding she failed to meet the Act's definition of "employee"—defined in the statute at the time as merely "any individual employed by or seeking employment for an employer"[163]—the D.C. Legislature amended the DCHRA to protect unpaid interns.[164] Oregon enacted a similar protection in 2013.[165] That same year, the Southern District of New York issued a holding similar to the one that had prompted D.C. to take legislative action a few years prior.[166] The New York City legislature swiftly amended the statute, adding an allowance for interns to bring actions against employers for discrimination and harassment.[167] New York State quickly followed suit.[168] Since then, many states have followed suit, extending Title VII-like protections to interns.[169]

These laws offer state (or local) protection for unpaid interns irrespective of the sector in which they work. In that respect, they go to tremendous lengths to remediate federal employment statutes' noncoverage for unpaid interns. Unfortunately, state stopgaps are not a permanent fix for a problem inherent to the Supremacy Clause.

Federal occupation of a legislative domain generally will not preclude states from enacting protections beyond the federal baseline, but the Supremacy Clause ensures that state laws cannot constrain the federal government itself.[170] Thus, the Supremacy Clause will almost

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163 Evans v. Wash. Ctr. for Internships & Acad. Seminars, 587 F. Supp. 2d 148, 151 (D.D.C. 2008) ("The statute defines an employer as 'any person who, *for compensation*, employs an individual . . . .' Plaintiff did not satisfy this definition." (alteration in original)).

164 The code now includes a clarifying sentence: "The term 'employee' includes an unpaid intern and an individual working or seeking work as an independent contractor." D.C. CODE ANN. § 2-1401.02(9)(A) (West 2024).

165 OR. REV. STAT. ANN. § 659A.350 (West 2024).

166 *See* Wang v. Phx. Satellite Television U.S., Inc., 976 F. Supp. 2d 527, 537 (S.D.N.Y. 2013) (dismissing an unpaid intern's claim for hostile work environment under the New York City Human Rights Law because the law didn't apply to unpaid interns).

167 N.Y.C. ADMIN. CODE §§ 8-102, 8-107(23) (West 2024) (defining "intern" and applying the § 8-107 provisions on unlawful discrimination practices to interns, first codified in 2014).

168 N.Y. EXEC. LAW § 296-c (McKinney 2024) (covering "[u]nlawful discriminatory practices related to interns," first codified in 2014).

169 *See, e.g.*, CAL. GOV'T CODE § 12940 (West 2024); 775 ILL. COMP. STAT. 5/2-101(A) & 5/2-102 (2024); TEX. LAB. CODE ANN. § 21.1065 (West 2024).

170 The doctrine of conflict preemption will apply. U.S. CONST. art. VI, cl. 2; *see, e.g.*, Arizona v. United States, 567 U.S. 387, 399 (2012) (describing conflict preemption to include

certainly thwart these efforts to protect unpaid interns in the United States government. Moreover, preemption will also kill any state minimum wage mandates for interns if those interns work for the federal government.[171]

Similar limitations make tort remedies an inadequate replacement for statutory protections. Liability has limits at any level, but sovereign immunity figures especially prominently as a constraint when the entity accused of tortious conduct is the U.S. government.[172] For example, the Federal Tort Claims Act limits the waiver of sovereign immunity for intentional torts like assault and battery.[173] This significantly limits certain claims that would, if not excluded from the waiver, offer an avenue to seek redress for conduct that a plaintiff cannot pursue on a theory of sexual harassment.

Given the inadequacies of existing state and tort remedies, we must turn to federal legislative solutions to sufficiently address the issues facing federal unpaid interns. Part IV undertakes the task of analyzing what a "Big Legislative Fix"—or, more probably, a series of little legislative fixes—would look like.

IV
The Big Legislative Fix(?)

In this Part, I offer counterweights and correctives to the issues identified in Part III, *supra*. I conclude with what should, by now, be obvious: The federal government's unpaid internship system is a federally legislated quagmire that only federal legislation can fully correct. Ideally, Congress would enact one streamlined, comprehensive bill to remedy the myriad concerns this Note has identified—but given how seldom Congress actually passes significant legislation in the contemporary era, a piecemeal approach will probably have to suffice. Accordingly, my big legislative fix is really a series of complementary congressional acts and directives that could fit within a single legislative push *or* proceed independently.

"cases where compliance with both federal and state regulations is a physical impossibility, and those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (citations omitted)).

171 U.S. Off. of Pers. Mgmt., CPM 2019-23, Inapplicability of a State or Local Minimum Wage to Federal Employees (2019).

172 Sovereign immunity limits government liability generally. Suits are permitted only with a waiver, such as under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671–80.

173 28 U.S.C. § 2680(h).

A. Amending Authorizing Statutes

Congress should begin by resurrecting the Federal Intern Protection Act's extension of the Title VII, the ADEA, and the Rehabilitation Act to student volunteers. Further, it should amend the 5 U.S.C. § 3111 student volunteer exception to provide that such volunteers are to be considered employees for purposes of these antidiscrimination laws. Additionally, for simplicity and administrability's sake, legislators should consider codifying the student volunteer exception's outer limit as coextensive with the FLSA's trainee exception as applied to federal interns. Doing so would dramatically simplify things for interns, managers, and courts alike.

A final option would be eliminating the student component from the volunteer exception. If eliminating all preference for continuing education is a nonstarter, perhaps extending eligibility to other groups, such as those who have received or are working to receive relevant professional certifications and individuals transitioning out of other programs of federal assistance, might find support.

B. Appropriations Experimentation

Annual appropriations are a handy tool to road-test temporary authorizations with one-time authority that both sanctions and funds a specific activity for a limited period.[174] Recall, for example, the general rule prohibiting agencies from paying travel expenses for nonemployees to attend meetings codified at 31 U.S.C. § 1345.[175] Beginning with fiscal year 1983, the Departments of Labor, Education, and Health and Human Services received an annual pass on the restriction.[176] In 1992, Congress added slightly more specific wording to the recurring provision to give the authority permanent effect.[177]

This pattern is common throughout federal appropriations: Congress uses the short shelf life inherent to annual funding to experiment with new proposals. When the temporary authorization goes well, Congress can repeat it the next year or cement authority

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174 *Cf.* Metzger, *supra* note 69, at 1092 (noting Congress's increasing tendency to forgo authorizing legislation for appropriations).

175 *See supra* note 92 and accompanying text.

176 Pub. L. No. 97-377, § 505, 96 Stat. 1830, 1904 (1982) ("Appropriations contained in this Act, available for salaries and expenses, shall be available for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of those functions or activities.").

177 Act of Oct. 6, 1992, Pub. L. No. 102-394, § 505, 106 Stat. 1792, 1825 (adding after the first clause of the language in note 176 *supra*, "or subsequent Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Acts").

(though not the appropriation) more permanently. If things go poorly, Congress can simply omit the failed experiment from the next year's spending law.

Applied to federal unpaid internships, Congress could leverage general provisions or language in an agency or subagency's salaries and expense account appropriation to authorize, for example, stipends, benefits, tuition subsidies or scholarships, or other funds for 5 U.S.C. § 3111 student volunteers. Initially, this authority should be phrased permissively, using "may" rather than "shall" and, if tying authority to a specific amount, doing so as a ceiling and not a floor. Legislators could also attach strings to funding, such as conditioning expenditures on a student volunteer's Pell Grant eligibility or a similar means test.[178]

C. Congressional Directives

Conditional funding is far from the only way Congress uses appropriations to pursue its priorities. The reports that accompany annual spending bills are loaded with what budget analysts call "Congressional directives," which are instructions and requests from legislators to conduct research, generate reports, provide technical assistance, and pursue specific points of focus with appropriated funds. This Section closes with a brief discussion of two things Congress could implore the federal agencies to focus on: enforcing disparate impact regulations in the education sector and adjusting agency policies and practices.

1. Disparate Impact: A School-Focused Enforcement Option?

An underexamined option to tackle equity problems endemic to unpaid internships would focus on schools instead of employers. Given the current state of affairs, including the Trump administration's efforts to shutter the Department of Education, an approach dependent on this agency's regulatory bandwidth should wait for a future, stabler time.[179] If it comes, both Titles VI and IX offer enforcement vehicles

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[178] *A Brief Guide to the Federal Budget and Appropriations Process*, AM. COUNCIL ON EDUC., https://www.acenet.edu/Policy-Advocacy/Pages/Budget-Appropriations/Brief-Guide-to-Budget-Appropriations.aspx [https://perma.cc/D8K2-XA47] ("[I]t has become increasingly common for appropriations bills to include policy changes, or 'riders.' A common rider is language prohibiting an agency from using any of the funds included in the bill to perform a certain action that legislators oppose.").

[179] In March 2025, President Trump issued an executive order attempting to shutter the Department of Education. *See* Exec. Order No. 14,242, 90 Fed. Reg. 13679 (Mar. 20, 2025). The order came shortly after the Department announced a massive reduction in force that would reduce the agency from more than 4,000 full-time equivalent employees to closer to 2,000. U.S. DEP'T OF EDUC., PRESS RELEASE: U.S. DEPARTMENT OF EDUCATION INITIATES

that the Department of Education could leverage to crack down on educational institutions' complicity in driving the unpaid internship cycle.[180] Title VI § 602 has served as a hook to challenge practices with disparate impact on protected classes. But to the extent that a school's practices—such as charging tuition for unpaid internship credit—tend to exacerbate inequality, the Education Department has preexisting authority to promulgate and enforce solutions to that problem.

Leveraging an important distinction between student interns and program beneficiaries (parties receiving federal grant funding) for purposes of the Antideficiency Act could help address the fact that only students can hold unpaid federal internships. The GAO treats program beneficiaries differently.[181] Where a federal program provides funding to a nonfederal organization, the organization can sponsor and pay for individuals to work without compensation from the federal government itself.[182] The Office of Management and Budget could consider a data call to agencies with significant grant outlays in relevant areas—education and labor, in particular—to examine the feasibility of a pilot beneficiary sponsorship intern program within specific, already established funding streams.

2. Agency Management as a Backstop

Not all interns for the government are unpaid; as Congress has noted, paid interns enjoy antidiscrimination protections coextensive with their non-intern coworkers.[183] One solution, then, would be to stop hiring unpaid interns in the first place. This is admittedly a tall

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Reduction in Force (2025), https://www.ed.gov/about/news/press-release/us-department-of-education-initiates-reduction-force [https://perma.cc/8A6H-C55Z]. Litigation regarding both the layoff and the closure is ongoing.

180 Title VI § 602 authorizes the Department of Education and other agencies to promulgate regulations in support of § 601's prohibition on discrimination by federal funding recipients. Although *Alexander v. Sandoval*, 532 U.S. 275 (2001), held there is no private right of action to enforce disparate impact regulations under § 602, agency enforcement remains intact via the Department's Office of Civil Rights (OCR). *See* Jared P. Cole, Cong. Rsch. Serv., IF12455, Race Discrimination at School: Title VI and the Department of Education's Office for Civil Rights (2023).

181 GAO Red Book, GAO-06-382SP, *supra* note 75, at 6-104 to 105.

182 *See* Participation of Federal Agencies in the Comprehensive Employment and Training Act of 1973, 54 Comp. Gen. 560, 561 (1975) ("[F]ederal agencies may participate as hosts for enrollees or trainees by providing work, training projects and on-site experience – on tasks and operations involving the agency's mission – to trainees who are sponsored and paid from federal grant funds by non-federal organizations . . . .").

183 H.R. Rep. No. 114-383, at 5 (2015) ("H.R. 3231 would amend federal law to provide unpaid federal interns protection from workplace harassment and discrimination. (Paid interns are already treated as employees.) Although the federal government prohibits discrimination in the workplace through laws, regulations, and agency policies, unpaid interns are not explicitly covered.").

order—and although it is consistent with a 2021 executive order on diversity, equity, and inclusion in the federal workforce,[184] that order was revoked almost immediately following President Donald Trump's second inauguration.[185]

Short of refraining from hosting unpaid interns, there are other ways to fill gaps in the law. Given the crucial civil rights protection unpaid interns lack, a key priority should be reducing the risk that unpaid interns encounter discrimination in the workplace. One way to accomplish this is to structure internal policies authorizing discipline for conduct that exposes nonemployees to discrimination.

Similarly, internal policies, training practices, and promotion of institutional norms can help cut against the consequences of interns' exclusion from ethics laws. For example, OGE urges "agencies to consider whether permitting volunteer interns to engage in activities that would otherwise be prohibited by the ethics laws would be inappropriate."[186] OGE offers similar advice regarding ethics training, encouraging agencies to require unpaid interns to complete such training as part of internal policy.[187]

Conclusion

The federal government has long been a vanguard of equal opportunity and a model employer. Its system of unpaid internships should threaten that reputation, but it seldom faces scrutiny—a byproduct of statutory complexity. Locked into this underexamined legislative scheme are features that leave interns unprotected against discrimination, uncovered by good government rules, and unrepresentative of the American public. When the House passed the Federal Intern Protection Act on a unanimous vote almost a decade ago, it recognized something fundamental: This is a federally legislated mess that only federal legislation can fix.

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184 *See* Exec. Order No. 14,035, 86 Fed. Reg. 34593, 34598 (June 25, 2021) (directing OPM and OMB to issue guidance to promote paid internships in the federal government, including guidance to "reduce the practice of hiring interns, fellows, and apprentices who are unpaid").

185 *See* Exec. Order No. 14,148, 90 Fed. Reg. 8237, 8239 (Jan. 20, 2025).

186 OGE Advisory Letter, *supra* note 158, at 2 ("As a matter of prudence, an agency may make a management decision to exclude volunteer interns from such activities where warranted.").

187 *Id.* at 3 ("At a minimum, it may be prudent to train volunteer interns that they should not misuse government property or resources, and should not disclose non-public information.").