

VOLUNTEER WORK, INCLUSIVITY, AND SOCIAL EQUALITY

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CONTENTS

INTRODUCTION	1
I. THREE MODELS OF VOLUNTEER WORK’S VALUE	5
A. <i>Civic Duty and Humanitarianism</i>	5
B. <i>Volunteering as Gift Giving</i>	8
C. <i>Associational Freedom</i>	11
II. INCLUSIVITY	14
A. <i>Volunteer Work’s Merit Inclusivity</i>	16
B. <i>Opportunity, Identity, and Recognition</i>	19
III. IMPLEMENTING THE VALUE OF VOLUNTEER WORK	23
A. <i>Minimum Wage Exemptions and Unpaid Internships</i>	23
B. <i>Antidiscrimination and Associational Freedom</i>	27
CONCLUSION.....	29

INTRODUCTION

Volunteers lack major workers’ rights and protections. Under U.S. federal law, volunteers have no right to minimum wage,¹ are not protected by employment discrimination law,² and do not have a right to engage in “concerted activities for the purpose of collective

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¹ See, e.g., *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 302 (1985) (explaining that a federal wage and hour statute, the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 et seq. (2012), does not reach “ordinary voluntarism”).

² See, e.g., *O’Connor v. Davis*, 126 F.3d 112, 113–16 (2d Cir. 1997), cert. denied, 552 U.S. 1114 (1998) (holding that the plaintiff, who worked part time without remuneration at a psychiatric hospital to complete her social work degree, was a volunteer and therefore not an employee for purposes of employment discrimination law).

bargaining.”³ Yet volunteers often perform the same kind of work as employees. Volunteers teach and mentor, build and garden, provide medical care, and work for the government. And similar to volunteers, employees perform civic, humanitarian, and charitable work. Employees and volunteers alike may also be vulnerable to sexual harassment and other forms of discrimination.⁴ The rise of unpaid work at the boundaries of the labor market, such as competitive unpaid internships,⁵ places further pressure on whether there is any principled distinction between volunteer work and employment.

Courts typically justify excluding volunteers from workers’ rights legislation on the ground that bona fide volunteers are not financially dependent on the organizations for which they volunteer.⁶ Such an approach can protect against obvious cases of economic exploitation,⁷ but leaves it mysterious why we should have volunteers to begin with. And that is an important burden to carry. Volunteers may displace paid employees. Further, what we include in the legal

³ National Labor Relations Act (NLRA), Section 7, 29 U.S.C. § 157; see *Wbai Pacifica Foundation*, 328 NLRB 1273, 1275 (1999) (finding that volunteers at a radio station were not NLRA employees because “[t]hey receive no wages or fringe benefits”). This Chapter focuses on minimum wage and employment discrimination law. For a discussion of perspectives on how volunteers should be treated under the NLRA, see Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 171–79 (2006).

⁴ See, e.g., *O’Connor*, 126 F.3d at 113–16 (finding that the plaintiff did not have a sexual harassment claim even though her supervisor called her “Miss Sexual Harassment,” suggested that she participate in an orgy, and regularly made remarks about her attractiveness and sex life, because the plaintiff was an unremunerated volunteer).

⁵ See *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 537 (2d Cir. 2016) (holding that unpaid internships that “primarily” benefit the intern, such as by providing “hands-on training,” are exempted from federal minimum wage law).

⁶ See, e.g., *Tony & Susan Alamo Foundation*, 471 U.S. at 301 (explaining that whether someone is a volunteer for purposes of federal wage and hour law turns on whether, as a matter of “economic reality,” she depends for her livelihood on the organization for which she volunteers); *Bryson v. Middlefield Volunteer Fire Dep’t, Inc.*, 656 F.3d 348, 352–54 (6th Cir. 2011) (internal quotation marks and citations omitted) (holding that whether a volunteer firefighter was an employee for purposes of protection from employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2012), turned on whether the firefighter was an employee under the common law agency test (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992))).

⁷ See *Tony & Susan Alamo Foundation*, 471 U.S. at 292–93, 299–303 (finding that “associates,” who were recovering from drug addiction and formerly homeless, were entitled to minimum wage for their work at a religious organization’s commercial hog farms and gas stations, even though the associates felt that they were religiously-motivated volunteers, because the associates were given room and board while they performed such work).

category of volunteer work affects volunteer work's potential and perceived value, such as whether we understand volunteer work to be a distinctive space for moral and community life or primarily an adjunct of the labor market. In turn, the values we choose to identify with volunteer work rather than employment shape and express our hopes for projects and relations pursued in the paid workplace.

While courts tend to take the value of volunteer work for granted, commentators typically applaud volunteerism on the basis of the work's civic, humanitarian, and charitable character.⁸ Although these aspects of volunteer work may be valuable, as models for distinguishing volunteer work from employment they either overlook the many ways in which volunteer work is meaningful to people or imply an unappealing dichotomy between volunteer work as moral work and employment as amoral work. Many paid employees perform civic, humanitarian, and charitable work as part of their jobs. Indeed, the paid workplace's pervasiveness and centrality in social life, in addition to its regulation by antidiscrimination law, should make it well suited for such publicly oriented projects. Volunteer work can, at the same time, fail to be civic, humanitarian, or charitable. A person may, for example, want to volunteer at a museum simply because she loves art. A theory of volunteer work's value should be able to account for volunteerism's diversity or explain why we need not create legal space for the marginal cases.

Instead, I propose distinguishing volunteerism from employment on the basis of its potential to foster a form of inclusivity that tends to be missing in employment: inclusivity with respect to skill and ability. I refer to such inclusivity as *merit inclusivity*. Often all that is required to volunteer is to sign up or show up at a designated location. The animating purposes of volunteer work can also facilitate merit inclusive cooperative relations. For example, the urgent need for help may move neurosurgeons to administer emergency relief alongside nurses

⁸ See *infra* Part I.

and students. Volunteer work is also voluntary—one does not need to volunteer to secure a livelihood—and often performed outside of standard employment hours. As neither a substitute for nor in competition with employment, volunteer work can reduce the costs of trying something new, and can thereby encourage people to work beyond their professional expertise.

In contrast, a person's opportunities for paid work typically depend on her comparative skill and ability. It is precisely on the basis of skill that a person typically has access to the factory floor or the operating room, or to any role therein. By providing access to forms of social cooperation that reflect shared interest rather than comparative skill and ability, volunteer work opportunities can lessen the risk that a person's skills will confine her to certain social roles or arbitrarily limit her opportunities to participate in valuable social projects. Volunteerism's merit inclusivity can thereby complement employment's potential to foster social equality through diversity and inclusivity with respect to race, gender, and other socially salient statuses. The egalitarian concerns that motivate the value of merit inclusivity thus suggest that the liberal position that skill and ability are not morally arbitrary with respect to one's work opportunities should be understood narrowly and with qualification. While skill and ability may sometimes be appropriate criteria for accessing work, in light of work's salience to people's identities, social status, and opportunities to participate in public life, a society ought to preserve social space for work structured by nonmeritocratic principles.

In turn, merit inclusivity can help justify minimum wage exemptions for volunteers. Pay threatens volunteer work's voluntary character and can operate as a meritocratic incentive. Merit inclusivity also supplies a standard for criticizing extant law. If merit inclusivity justifies minimum wage exemptions, then competitive unpaid internships at film studios, the White House, and the like, do not fall within the scope of volunteer exemptions. It will also be hard for

volunteer work to be merit inclusive if disability discrimination is rampant, and volunteer work will fail to complement work's potential status-based inclusivity if volunteer organizations have free reign to discriminate on the basis of race, gender, and other socially salient statuses. Merit inclusivity thus provides a basis for extending antidiscrimination protections to volunteers.

I begin in Part I by arguing that common approaches to conceptualizing volunteer work in terms of its civic-humanitarian, charitable, or associational character fail to provide principled grounds for distinguishing volunteerism from employment. In Part II, I argue that merit inclusivity can distinguish volunteer work from employment while also complementing employment's potential status inclusivity. In Part III, I concretize my proposal by discussing its implications for the employee-volunteer legal boundary.

I. THREE MODELS OF VOLUNTEER WORK'S VALUE

A. *Civic Duty and Humanitarianism*

Volunteer work's civic and humanitarian character is a popular basis for valuing volunteer work.⁹ Volunteers serve food at shelters,¹⁰ offer emotional support to hospital patients,¹¹ and rebuild homes in the wake of a disaster.¹² Volunteer work is a central part of how we care for one another, of how we act on and express beneficence and civic duty.

⁹ See, e.g., 29 C.F.R. § 553.101(a) (explaining that public sector "volunteers" are not employees so long as they neither expect nor are promised compensation for their work, and work for "civic, charitable, or humanitarian reasons"); THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: EXPANDING NATIONAL SERVICE THROUGH PARTNERSHIPS (2013), available at http://www.nationalservice.gov/sites/default/files/page/2013_national_service_memo_release.pdf ("National service and volunteering can be effective solutions to national challenges and can have positive and lasting impacts that reach beyond the immediate service experience.").

¹⁰ See, e.g., *Adopt-A-Meal*, LOS ANGELES MISSION, <https://losangelesmission.org/give/adopt-a-meal/> (last visited May 16, 2016) ("The Adopt-a-Meal program allows volunteer groups to take charge of a meal as though it were their own event. The volunteers will prepare and serve the designated meal for approximately 500 Mission guests.").

¹¹ See, e.g., *POOCH Volunteers*, CEDARS-SINAI MEDICAL CENTER, <http://www.cedars-sinai.edu/About-Us/Volunteer-Opportunities/Programs/POOCH-Volunteers.aspx> (last visited May 16, 2016) (explaining that

Although I do not deny that volunteer work may be valuable in these ways, civic and humanitarian work is not performed only by volunteers. Employees at Save the Children and the U.S. Equal Employment Opportunity Commission also do humanitarian and civically-minded work. It seems plausible that they might understand themselves as working to help others. And it is not only work at nonprofits that may be so understood: Agricultural workers employed by a regional grower might work to support local governance and cultural solidarity.¹³ More broadly, we might be moved to join the paid workforce “to feel that we are contributing to something larger than ourselves and our own families.”¹⁴

Of course, some descriptive overinclusiveness is not necessarily a reason for rejecting a civic-humanitarian model of volunteer work’s value. Overinclusiveness may simply indicate that we have historically erred in sorting work that should be done by volunteers from work that should be done by employees. But I do not think that is the case here. As familiar as the civic-humanitarian model may be as a description of volunteer work’s importance, as a model of volunteer work’s *distinctive* value it is premised on an impoverished view of employment’s moral potential. The model suggests that civic and humanitarian values are not properly at home in employment. Yet why should that be so? To be sure, if the paid workplace were

POOCH volunteers provide “supportive experiences [with dogs] to patients” by, for example, helping patients play with and walk dogs).

¹² See, e.g., *Disaster Response Volunteer Opportunities*, HABITAT FOR HUMANITY, <http://www.habitat.org/disaster/volunteer> (last visited May 16, 2016). For other like examples of voluntary activities and organizations, and data about the extent and type of volunteer work in the United States from 2013 and 2014, see generally *Volunteering in America, Frequently Asked Questions*, CORP. FOR NAT’L COMMUNITY SERVICE, https://www.volunteeringinamerica.gov/about/research_faqs.cfm (last visited Feb. 23, 2016).

¹³ Consider, for instance, members and proponents of La Via Campesina, an international organization that aims to facilitate “small-scale sustainable agriculture” to promote agricultural worker rights and protect agrarian ways of living. *The International Peasant’s Voice*, LA VIA CAMPESINA (Feb. 9, 2011, 2:08 PM), <http://www.viacampesina.org/en/index.php/organisation-mainmenu-44/what-is-la-via-campesina-mainmenu-45>.

¹⁴ Vicki Schultz, *Life’s Work*, 100 COLUMBIA L. REV. 1881, 1928 (2000). Of course, we might also be moved to join because we simply need the money.

predominantly a forum for self-interested activity, then perhaps civic and humanitarian values—because of their cooperative, social character—would best be realized outside of employment. Yet we might also understand employment as a project of harnessing our talents to realize a diversity of public and private aims,¹⁵ as providing a “stable foundation [of repeated interaction] for a democratic order”¹⁶ and embracing our interdependency through mutual aid and support.¹⁷ Civic and humanitarian values would be welcome in such a social world of employment.

Further, as Cynthia Estlund has argued, the paid workplace’s centrality in social life makes it an especially urgent and promising site for diversity—for racial integration, for undoing gendered relationships of subordination, and, more generally, for facilitating social bonds between people from different backgrounds.¹⁸ The paid workplace can facilitate social ties between people who, but for their workforce participation, might never have encountered one another.¹⁹ If employment manifested such inclusivity, the paid workplace would be well-suited for civic and humanitarian projects, given the values of equality and mutual recognition that underlie such projects. By treating civic and humanitarian aims as distinctive of volunteer work, the civic-humanitarian model thus suggests an unappealing dichotomy between volunteer work and employment, according to which publicly-minded work is best done outside of the world of employment.

¹⁵ John Rawls’s *A Theory of Justice* suggests such a vision for the paid workplace:

[E]ven when work is meaningful for all, we cannot overcome, nor should we wish to, our dependence on others. In a fully just society persons . . . rely upon their associates to do things they could not have done, as well as things they might have done but did not It is a feature of human sociability that we are by ourselves but parts of what we might be The division of labor is overcome not by each becoming complete in himself, but by willing and meaningful work within a just social union of social unions in which all can freely participate as they so incline.

JOHN RAWLS, *A THEORY OF JUSTICE* 529 (1971).

¹⁶ Schultz, *supra* note 14, at 1928. See generally CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 118 (2003).

¹⁷ See ESTLUND, *supra* note 16, at 110–112 (discussing Émile Durkheim’s position that the division of labor can facilitate solidarity); RAWLS, *supra* note 15.

¹⁸ See ESTLUND, *supra* note 16, at 4–5; 138–39.

¹⁹ See *id.*

The civic-humanitarian model is also overly narrow in its vision of volunteerism. Many instances of volunteer work are neither civic nor humanitarian. For example, people might volunteer at the opera because of their love of music. Volunteering is a pluralistic practice, as diverse as the associations we might form with one another and the conceptions of the good life we might pursue. By taking such a narrow view on volunteerism's value, the civic-humanitarian model risks overlooking the many ways in which volunteering is meaningful for people. We should at least inquire whether these other forms of volunteering are valuable before we endorse a model of volunteerism that marginalizes them.

B. Volunteering as Gift Giving

Perhaps it is not volunteerism's civic and humanitarian character but its donative character that makes volunteer work distinctive. Volunteer work is typically done without expectation of a wage and volunteers often describe their own work as "giving back."²⁰ Giving a gift of *labor* is, of course, not the only way to communicate beneficence and gratitude to others. Money and goods often suffice. But sometimes gifts of money are inappropriate,²¹ and people may not have enough money to purchase the relevant gift. Although a person may not be able to buy someone a new home, she might still be able to help build one. Volunteerism can thus make gift giving more inclusive and provide a wider range of expressive contexts.

I agree that volunteer work is a valuable part of gift giving, but doubt that that fact can offer a principled basis for distinguishing volunteerism from employment. If what makes

²⁰ Joyce Rudolph, Community: Three Seniors Honored for Their Volunteer Work, LA TIMES (Dec. 16, 2015, 3:27 PM), <http://www.latimes.com/socal/burbank-leader/community/tn-blr-me-community-presidents-call-to-service-award-20151216-story.html> ("The feeling that one gets out of volunteering and giving back to the people in your community — the rewards are indescribable . . . [.]"); see Rubinstein, *supra* note 3.

²¹ For a discussion of duties of gratitude and the potential moral difficulties of giving someone a gift, and thereby placing them under a "debt of gratitude," see generally Barbara Herman, *Being Helped and Being Grateful: Imperfect Duties, the Ethics of Possession, and the Unity of Morality*, 109 J. OF PHILOSOPHY 391 (2013).

volunteer work donative is its being performed from a donative motive, then a gift-giving model runs into one of the same problems as a civic-humanitarian model: the theory is underinclusive of volunteering and may therefore overlook many meaningful forms of volunteering. A person might join her neighborhood association, helping to run regular meetings and organize local events, not because she wants to give back to her community, but because she feels she has a civic duty to participate in local governance. Similarly, another person might lead religious liturgies as a form of worship, while yet another might set up tents and cook food to occupy Wall Street out of social protest. This is not to say that acting from duty and donative motives are mutually exclusive. Indeed, we may sometimes be morally required to give gifts.²² My point is rather that volunteer work need not be performed from donative motives. Volunteer work provides contexts for acting from a variety of motives. A theory of volunteer work's value should be able to explain that diversity.

A donative model of volunteerism may also be overinclusive. Lawyers often speak in the register of gift when they describe pro bono work,²³ even though pro bono hours are often treated as billable hours for purposes of salaries and bonuses.²⁴ Employees at charitable and humanitarian institutions, such as Save the Children, may also be motivated by a desire to give to others, even though they are paid a salary for their work. In such cases, a donative motive may still be possible because the work ultimately produces a gift—legal services, food—for the

²² See Herman, *supra* note 21.

²³ See, e.g., Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 *FORDHAM L. REV.* 2357 (2010).

²⁴ E.g., *Akin Gump Strauss Hauer & Feld LLP*, in *VAULT GUIDE TO LAW FIRM PRO BONO PROGRAMS* 14 (2016) (reporting that Akin Gump gives billable hour credit for pro bono hours, considers pro bono hours for purposes of yearly bonuses, and has no limit on how many pro bono hours may be applied toward the target amount of billable hours); see also *HILDEBRANDT HANDBOOK OF LAW FIRM MANAGEMENT* § 12:10 (2015) (“A survey of major law firms conducted by the Pro Bono Institute in 2005 found that the majority of law firms now provide billable hour parity [for pro bono work] . . . for purposes of meeting billable hour targets.”).

recipient. It would be regrettable if this were not the case, because then perhaps only the very rich would have the opportunity to make it their life's work to help others.

Employment's potential to be inclusive as to race, gender, and other socially salient social statuses may also make the paid workplace's involvement in philanthropy particularly important. White people are historically overrepresented in donor populations, and donor priorities and values may differ along racial lines.²⁵ Status inclusivity in the paid workplace can help make philanthropy more sensitive to the situation of recipients,²⁶ and may mitigate risks of stereotyping or pressuring recipients to conform to disempowering victim tropes.²⁷

But perhaps I have been overly focused on donative motives rather than the donative structure of volunteer work. Borrowing from the idea of a donative promise under U.S. contract law, what makes volunteer work donative, one might argue, is that volunteer labor is not supported by consideration—the work is not exchanged for money or some other bargained-for good,²⁸ service, forbearance, or promise of later performance.²⁹ Under this contract view of donative promises, the fact that an attorney's decision to do pro bono work is not induced by a promise of a bonus or an ongoing salary does not convert her commitment to do pro bono into a gift promise. The money can still count as consideration. Thus, on this contract view, by definition employment is not donative in the same way as volunteer work tends to be.

Even if such a contract view of volunteer work as donative can avoid the over- and underinclusiveness worries, I am not sure the view adds much to the doctrinal proposition we

²⁵ See EMMETT D. CARSON, *DIVERSITY IN GIVING: THE CHANGING LANDSCAPE OF AMERICAN PHILANTHROPY* (2015), available at <http://www.thenonproffitimes.com/wp-content/uploads/2015/03/Diversity-in-Giving-Study-FINAL.pdf>.

²⁶ See *id.*

²⁷ Cf. Jasmine Phillips, Comment, *Black Girls and the (Im)Possibilities of a Victim Trope: The Intersectional Failures of Legal and Advocacy Interventions in the Commercial Sexual Exploitation of Minors in the United States*, 62 *UCLA L. REV.* 1642 (2015).

²⁸ “To constitute consideration, a performance or return promise must be bargained for.” *RESTATEMENT (SECOND) OF CONTRACTS* § 71(1) (1981).

²⁹ See *RESTATEMENT (SECOND) OF CONTRACTS* §§ 71(3), 75 (1981).

started with: that volunteer work is simply some kind of work that is not employment. What seems to make volunteer work donative on this contract view is that the work is simply unpaid or otherwise unremunerated. But that provides little guidance as to what kind of work we should include in that category. Should we, for instance, treat prestigious unpaid internships at government agencies the same way that we treat part time soup kitchen volunteers? And why should we have any volunteers to begin with? What would be lost if all labor had to be paid? The fact that volunteer work is not bargained for seems to say little about what values are at stake in such questions.

C. *Associational Freedom*

In light of volunteer work's diversity of motives and aims, a natural alternative to the civic-humanitarian and donative models is an associational one: volunteer work might be valuable precisely because of its deep tie to associational life.

People do not typically develop ideas and values in isolation. We learn by listening, discussing, and deliberating.³⁰ “The only way opinions and ideas can be renewed, hearts enlarged, and human minds developed is through the reciprocal influence of men upon each other.”³¹ Yet no matter how rigorous the discussion, sometimes ideas need to be put into practice to be understood and realized. For example, to develop an understanding of myself as a member of my community, I might need to do more than just chat occasionally with my

³⁰ See generally SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS* (2014).

³¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, PART II, 598 (Gerald E. Bevan trans., Penguin Books 2003) (1840); *see also* Immanuel Kant, *What does it mean to orient oneself in thinking?* in *THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT: RELIGION AND RATIONAL THEOLOGY* 16 (Allen Wood trans., Cambridge University Press 1996) (1786) (“How much and how correctly would we think if we did not think as it were in community with others to whom we can communicate our thoughts, and who communicate theirs with us!”); John Stuart Mill, *Utilitarianism*, Ch. II (explaining that a person’s capacity for happiness is a “very tender plant” that “speedily dies away if the occupations to which their position in life has devoted them, and the society into which it has thrown them, are not favourable to keeping that higher capacity in exercise”); Seana Valentine Shiffrin, *What’s Really Wrong with Compelled Association?*, 99 *NORTHWESTERN U. L. REV.* 839 (2005) (arguing that voluntary associations are a “site for idea generation and mutual influence”).

neighbors. Coordinating who puts the garbage bins out might help me develop a keener sense of neighborly duties. Tending a neighborhood garden could give content to my ideas of reciprocity. And sometimes being faithful to an idea requires having a cooperative context in which to execute it. Religious values may require ministering; political activism may require canvassing. By joining our minds and labor together, we can realize values and bring about social change on a scale we could likely not accomplish on our own.³² Volunteer work can thus give life to voluntary associations.

Because of the diversity of associations, an associational model of volunteerism's value should be able to avoid the underinclusivity worries to which civic-humanitarian and donative models are vulnerable. But an associational model may still suggest an overly restrictive view of employment's moral significance. Although paid workplaces are not voluntary associations,³³ they bear important similarities to voluntary associations. First, workplaces are not morally neutral. Employers may aim to further a moral mission through the work of their employees. Employees at the aptly named U.S. Equal Employment Opportunity Commission are supposed to further equal opportunity values; soldiers are expected to further goals of national defense. Private sector employers may have distinctive and explicit moral cultures that employees are encouraged to adopt and further.³⁴ Consider Harrah's casinos' conception of service,³⁵ the American Civil Liberties Union's vision of equal liberty,³⁶ and Walmart's antiunionism.³⁷

³² See DE TOCQUEVILLE, *supra* note 31, at 599.

³³ See, e.g., JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (1992). As Cynthia Estlund points out, Alexis de Tocqueville is a notable exception to the view that associations and civil society more broadly exist only outside of the market. See ESTLUND, *supra* note 16, at 108; DE TOCQUEVILLE, *supra* note 31, at 595–600.

³⁴ See generally ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT)* xix, Ch. 2 (2017).

³⁵ *Cf.* *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (holding that requiring female casino bartenders to wear makeup was insufficient to establish a prima facie case for sexual harassment under Title VII of the Civil Rights Act of 1964).

³⁶ See, e.g., *Free Speech*, ACLU, <https://www.aclu.org/issues/free-speech> (last visited June 13, 2017).

Employers may also have well-known political commitments to which they contribute profits generated by their employees.³⁸

Ways of doing business can also have a moral valence, regardless of what an employer explicitly says about its purposes. Employees at Wells Fargo Bank may rightly feel they are furthering a different moral project than those at a university credit union. Similarly, some casino employees may feel that they must facilitate gambling and the objectification of women if their work regularly furthers such aims. Overtime, through repeated outward endorsement and immersion in that environment, employees may come to accommodate and adopt those values.³⁹

Thus, much like voluntary associations, employment relationships are not morally inert. The potential for influence on employee thought is just as strong in the paid workplace as in voluntary associations, if not stronger given the financial significance of employment and the amount of time spent at work. And just as compelled association and speech may be experienced as a kind of “illicit influence” over “character and autonomous thinking,”⁴⁰ so may a person feel who—because of her limited employment opportunities and financial need—comes to work for an organization whose moral vision is incompatible with hers. This is not to say that

³⁷ See Steven Greenhouse, *How Walmart Persuades Its Workers not to Unionize*, THE ATLANTIC (June 8, 2015) <http://www.theatlantic.com/business/archive/2015/06/how-walmart-convinces-its-employees-not-to-unionize/395051/>; Ashley Feinberg, *Walmart’s Leaked Anti-Union Training Video: This Isn’t About You*, GAWKER (May 19, 2015, 12:10 PM), <http://gawker.com/walmarts-leaked-anti-union-training-video-this-isnt-ab-1705509442>.

³⁸ Employee donations may similarly create a certain political culture at work. Cf. Cecilia Kang, *Facebook Forms PAC for Political Donations*, THE WASHINGTON POST (Sept. 26, 2011), https://www.washingtonpost.com/blogs/post-tech/post/facebook-forms-pac-for-political-donations/2011/09/26/gIQAHmW0K_blog.html (“Facebook’s PAC ‘will give our employees a way to make their voice heard in the political process by supporting candidates who share our goals’”).

³⁹ Cf. Shiffrin, *Compelled Association*, *supra* note 31, at 851–873. As workplace relationships become less structured and increasingly temporary, the workplace may not have such an influence over employees. See KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 67–70, 92–94, 112–14 (2004); James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461 (2015) (arguing that the new employment relationship tends to make it less likely that employees will come to identify themselves with workplace norms).

⁴⁰ Shiffrin, *Compelled Association*, *supra* note 31, at 840; *but see* Boy Scouts of America v. Dale, 530 U.S. 640, 655–56 (2000) (suggesting that the wrong of compelled association concerns the ability of the association’s group control its public message).

employment relationships *are* voluntary associations, but rather that employment can implicate some of the same freedoms of thought exercised in voluntary associations. We should not lose sight of this by setting up volunteer work as the special and distinctive context in which we are to exercise those freedoms through our labor.

II. INCLUSIVITY

As the shortcomings of the civic-humanitarian, donative, and associational models of volunteer work illustrate, workforce participation is a major way in which people develop ideas and values, form relationships, understand themselves, and implement conceptions of the good life. Indeed, workforce participation may be one of the most central and pervasive contexts for social cooperation.⁴¹ People spend a substantial portion of their waking hours in the paid workplace and form lasting relationships with coworkers.⁴² This is not simply because most people have to work to earn a living, but also because employment has personal and cultural significance. Workforce participation can “provide[] people with a sense of belonging and contributing to something of value to a group larger than ourselves or our loved one[s]”⁴³ Hence, a person may feel a concomitant loss of self-esteem with a loss of employment.⁴⁴

Workforce participation is also tied to conceptions of equal citizenship⁴⁵—with rejections of

⁴¹ See ESTLUND, *supra* note 16, at 4–5, 12, 125.

⁴² Such a potential for ongoing relationships may be eroding through rising temporary work and underemployment. See ARNE L. KALLEBERG, *GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S TO 2000S* (2011); Gillian Lester, *Careers and Contingency*, 51 *STANFORD L. REV.* 73, 78–87 (1998) (discussing challenges of analyzing “contingent” employment due to its heterogeneity, and suggesting instead that lawmakers refocus reform efforts on underemployment—“employment in a job that undervalues one’s labor relative to that of other workers with the same abilities, availability, and desires”). For an analysis of the international and political dimensions of precarious employment, see GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* (2011).

⁴³ Schultz, *supra* note 14, at 1888.

⁴⁴ See *id.* at 1888–90.

⁴⁵ See generally Kenneth L. Karst, *Coming Crisis of Work in Constitutional Perspective*, 82 *CORNELL L. REV.* 523 (1997); Schultz, *supra* note 14, at 1886–88.

feudalism,⁴⁶ emancipation from slavery,⁴⁷ and women’s freedom from being destined to domestic work within the family.⁴⁸ A person’s workforce participation may, of course, also be demeaning and stigmatizing, but that fact is further evidence of the social salience of work.⁴⁹

Because of its social significance, the paid workplace is an especially important place for social inclusion.⁵⁰ Making the paid workplace inclusive of race, gender, and other socially salient statuses helps ensure fair access to a livelihood and that our primary ways of interacting with one another are not structured by status-based (such as patriarchal or racist) hierarchies. Status inclusivity also mitigates the risk that race, gender, and the like, will arbitrarily limit opportunities for pursuing meaningful life projects and accessing positions of power.⁵¹ Hence, status inclusivity can be understood as a continuation of the larger projects of social equality and emancipation that made wage labor—as opposed to forced labor, or labor compensated in-kind—such an important step forward.

⁴⁶ See, e.g., DEBRA SATZ, *WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS* 24 (2010).

⁴⁷ See, Schultz, *supra* note 14, at 1887–89 (discussing the “complex legacy” of identifying the freedom to sell one’s labor—rather than, say, freedom to own “productive property”—with social and political “independence”); cf. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. REV.* 1156, 1188–92 (2015) (linking the U.S. post-Civil War history of prison labor to attempts to reproduce de facto slavery).

⁴⁸ See, e.g., Schultz, *supra* note 14 (arguing in favor of policies collectivizing housework rather than to paying women for care to their own families); cf. Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in *PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 131 (Judy Fudge & Rosemary Owens eds., 2006).

⁴⁹ See, e.g., TOMMIE SHELBY, *DARK GHETTOS* 199 (2016) (explaining that often the primary work available to poor black women is “domestic service in the homes of affluence white families” that reinforce the “ideological image of the ‘mammy’ . . . used to justify the exploitation and subordination of black women under slavery”); PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 48–64 (2d Ed. 1999) (describing how black women’s work after the Civil War has repeatedly recreated relationships of “interpersonal domination” and domestic service reminiscent of slavery and American apartheid).

⁵⁰ See ESTLUND, *supra* note 16, at 34, 125.

⁵¹ See Samuel Scheffler, *What is Egalitarianism?*, 31 *PHIL. & PUB. AFFAIRS* 5, 26 (2003) (“[A] system that allows the economic distribution to track the distribution of [natural and social contingencies] too closely will compromise the status of some citizens as equals, for it will undermine their ability to satisfy the equally legitimate interest that each citizen has in developing and pursuing a rational plan of life”); cf. Elizabeth Anderson, *What is the Point of Equality?*, 109 *ETHICS* 287 (1999).

A. *Volunteer Work's Merit Inclusivity*

Part of what makes the paid workplace a promising site for status inclusivity is that workforce participation is typically nonvoluntary—we ordinarily have to work to secure a living⁵²—and the paid workplace is regulated by antidiscrimination law.⁵³ Volunteer work, in contrast, is voluntary and generally not subject to antidiscrimination law.⁵⁴ And in practice, volunteer work may actually be less diverse with respect to status than paid work.⁵⁵ The composition of neighborhood-based organizations may reproduce the racial composition of the neighborhood. Women tend to do different kinds of volunteer activities than men.⁵⁶

Yet even if volunteer work is presently less status inclusive than employment, volunteer work may still be inclusive in ways that employment systematically tends not to be. In particular, volunteer work may instantiate *merit inclusivity*—inclusivity with respect to people of different skills and ability. A remarkable and underemphasized feature of volunteer work is that it can be quite easy to volunteer. Often all that is required to, for example, help build houses for Habitat for Humanity, or serve food at a local shelter, is to sign up and show up, or otherwise express an interest in the project. So long as you can serve food, it may not matter whether you can serve twenty or ten people per hour to volunteer at a local shelter. And if you do not have

⁵² Or we need to form an economic unit with someone who performs paid work, such as through marriage. See, e.g., Noah D. Zatz, *Revisiting the Class Parity Analysis of Welfare Work Requirements*, 83 SOCIAL SERVICE REV. 213 (2009).

⁵³ See ESTLUND, *supra* note 16, at 13–15.

⁵⁴ See *supra* note 2.

⁵⁵ Cf. ESTLUND, *supra* note 16, at 8–9.

⁵⁶ See U.S. Bureau of Labor Statistics, *Charts by Topic: Volunteer Activities*, U.S. DEP'T OF LABOR (Dec. 20, 2016), <https://www.bls.gov/TUS/CHARTS/VOLUNTEER.HTM> (explaining that according to the findings of the 2015 American Time Use Survey, women were more likely than men to do volunteer activities such as “food preparation, presentation, and cleanup activities,” in addition to “organizing and preparing activities,” whereas men were more likely than women to do “teaching, leading, and mentoring activities”).

the requisite skills, training may be provided,⁵⁷ someone may be assigned to help you,⁵⁸ or the organization may simply try to find some other way for you to be present and engaged.

In contrast, a person's employment opportunities are normally a product of pre-existing skills and how that person compares to others in the labor force. Paid workplaces may, of course, be diverse with respect to skill and ability. A person does not need to be a physician to work at a hospital, or a career politician to help run a campaign. But for such a workplace to also be inclusive, it must be more than be formally open to difference. An inclusive workplace evinces a willingness to welcome and accommodate difference. A workplace may, for instance, be diverse as to women based on the number of women employees, yet not inclusive if it fails to adopt policies to mitigate the distinctive social pressures women face to be primary caretakers.⁵⁹ Similarly, paid workplaces may be diverse as to skill and talent, but generally fail to be inclusive on that basis. To access the factory floor or a campaign headquarters as an employee, a person ordinarily must go through a competitive hiring process. It is precisely on the basis of comparative skill and talent that a candidate is welcomed to be present and participate. Even when work is denominated as "unskilled," it can still be done better and worse, and employers may still select and promote on that basis.⁶⁰

But to be welcomed as a volunteer, it is typically because you satisfy some other, non-meritocratic criteria. To volunteer to help organize my neighborhood's annual Fourth of July Parade, I need only show that I am a local resident and pay the low yearly neighborhood

⁵⁷ See, e.g., *Adult Volunteers*, CEDARS-SINAI MEDICAL CENTER, <http://www.cedars-sinai.edu/About-Us/Volunteer-Opportunities/Programs/Adult-Volunteer-Program.aspx> (last visited May 31, 2016) (indicating volunteers need not have prior hospital experience and noting that volunteers will be provided with "[j]ob-specific training" for their volunteer work if needed).

⁵⁸ See, e.g., *Volunteers*, CHELSEA OPERA <http://www.chelseaopera.org/volunteers.html> (last visited May 30, 2016) (describing opportunities to volunteer in the Chelsea Opera's management and production activities, and noting that "[n]o prior experience is required [to volunteer], [and that the Opera] will provide any necessary guidance and/or training").

⁵⁹ Cf. Schultz & Hoffman, *supra* note 48 (arguing that a 35-hour work week could relieve such pressures).

⁶⁰ I am indebted to Seana Shiffrin for drawing my attention to this point.

association fee.⁶¹ And indeed such inclusivity may be an aim of the association—to facilitate community ties between retirees, retail workers, stay-at-home parents, professors, teenagers, and people who, for whatever the reason, never have been able to (or never will be able to) enter the paid workforce.

There are, of course, zones of volunteering that require specialized skill. Emergency medical relief should be provided by qualified people; there seems to be no good reason not to give Ebola patients, or earthquake victims, anything less than the best medical care available. But even then, the relief efforts may lack a rigid skill-based division of labor. Cardiothoracic surgeons might administer vaccines alongside general practitioners and students.⁶² Volunteer legal work may similarly engage attorneys from a variety of backgrounds in the provision of the same legal services—a partner at a corporate law firm may volunteer alongside a junior public interest attorney in a landlord-tenant case.⁶³ The urgent need for help may thus produce merit inclusive access and internal cooperative structures even when the work is fairly specialized.

The flexible and voluntary character of volunteer work also helps to facilitate merit inclusivity. Volunteer work is often part-time, after typical workday hours, on weekends, or for limited tours of service.⁶⁴ Employment is typically fulltime, indefinite, and immersive. To be sure, paid work may be part-time and during weekends and evenings. But how flexible the work is and when one works is usually dictated by the amount and type of work the employer needs, and employees face economic pressure to conform to those needs in order to maintain their

⁶¹ See *Join OPA!*, OCEAN PARK ASSOCIATION, <http://www.opa-sm.org/join> (last visited May 20, 2016).

⁶² I am indebted to Noah Zatz for this example.

⁶³ Cf. *Volunteer Opportunities for Attorneys*, LEGAL AID FOUNDATION OF LOS ANGELES, <https://lafla.org/volunteer/pro-bono-attorneys/> (last visited June 16, 2017).

⁶⁴ Although Doctors Without Borders is often thought to be a volunteer-based service, the organization pays nurses and physicians in the field a monthly salary. See *Work in the Field: Benefits & Opportunities*, DOCTORS WITHOUT BORDERS, <http://www.doctorswithoutborders.org/work-us/work-field/benefits-opportunities> (last visited May 20, 2016) (“MSF salaries are set so as to reflect the humanitarian spirit of volunteerism while recognizing the high level of professional expertise provided by field staff.”).

livelihood. In contrast, when people do not need to volunteer in order to access a living,⁶⁵ there is little economic pressure to volunteer at the same organization indefinitely or regularly. By complementing rather than competing with employment, volunteer work can enable people to try new forms of work that they might not want to do long term, and can encourage people to work outside of their professional background without the fear of losing their livelihood. Volunteer work's flexible and voluntary character can thus draw people from a wide range of skill and ability by lowering the costs of trying something new.

B. Opportunity, Identity, and Recognition

Although employment can and should provide opportunities for acting from moral motives—such as civic and humanitarian ones—not everyone may have the background to compete for a fulltime position as, for example, a litigator for the National Association for the Advancement of Colored People (and not everyone may want to do such work fulltime). But it does not follow that people should have to forgo the chance to further racial justice. Volunteer work's merit inclusivity thus helps to explain why we might have thought that volunteer work's value consisted primarily its civic-humanitarian and donative character: it is not that civic-humanitarian or donative values are *distinctive* of volunteer work, but rather than volunteer work's merit inclusivity can make civic-humanitarian and donative projects a regular part of our lives if we so choose.

Opportunities for merit-inclusive volunteer work can thereby help to mitigate the risk that a person's skills will silo a person in a particular cooperative role. Workforce participation may encourage us to hone particular skills at the exclusion of others and to hence narrow our real

⁶⁵ This is in contrast to court-ordered “community service.” See Tia Koonse et al., *Get To Work or Go To Jail: Workplace Rights Under Threat*, UCLA Institute for Research on Labor and Employment, UCLA Labor Center, A New Way of Life Reentry Project (March 2016), <https://www.labor.ucla.edu/publication/get-to-work-or-go-to-jail/>.

employment opportunities. That is not necessarily regrettable; the refinement of one's skills can be a joy for oneself and others.⁶⁶ But while the jobs we do may sometimes be an expression of our own tastes and personality, occupations and workplaces often have distinctive cultures. We may reasonably feel pressure to conform to that culture and tailor our self-presentation accordingly.⁶⁷ Over time, a Google employee may come to see herself as a Googler; a teacher's status as an educator may become the dominant lens through which she understands herself.⁶⁸ In the more pernicious cases, an employee may come to feel alienated from her gender identity or ethnicity after years of trying to fit in a patriarchal workplace.⁶⁹

Volunteer work's merit inclusivity can, in contrast, provide people with opportunities to occupy social roles that are unrelated to the professional (or interpersonal) roles they have come to occupy. Mary does not need to be only a Googler, or mother to Omar and wife to Jean; she can also be a political activist and an amateur astronomer. This is not to suggest that simply being just one of those would be regrettable. Rather, volunteer work's merit inclusivity can provide people with opportunities to express the many dimensions of their personality, and to cultivate a personal identity that is not limited to the form of their workplace contribution or their roles at home (both of which may be a matter of accident and happenstance, or the outcome of inequalitarian social forces, although of course that need not be the case).

⁶⁶ Cf. RAWLS, *supra* note 15, at 429–31, 471.

⁶⁷ See *supra* note 39 and accompanying text.

⁶⁸ See Christine M. Korsgaard, *The Authority of Reflection*, in THE SOURCES OF NORMATIVITY 101 (Onora O'Neill ed., 1996) (“[A practical identity] is a description under which you value yourself, a description under which you find your life to be worth living and your actions to be worth undertaking You are a human being, a woman or a man, an adherent of a certain religion, a member of an ethnic group, a member of a certain profession, someone's lover or friend, and so on.”).

⁶⁹ See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (explaining that employees who are “outsiders” with respect to their workplace's conception of a successful person will tend to put on “identity performances” to counteract stereotypes attached to their race, gender, and the like, and may also relatedly feel pressured to engage in self-denial) ; cf. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006) (“To cover is to tone down one's disfavored identity to fit into the mainstream.”).

In turn, volunteer work can welcome people into roles that value their contributions independently of people's employability. Of course, we may form workplace friendships, and admire of our co-workers' ways of thinking and acting even when they have little to do with how well their filing system works, or how quickly they can toss a bag of vegetables into the bed of a moving truck. Even so, a person's status within her workplace as a cooperator—as evidenced by promotions, her leadership roles, bonuses, and the like—typically depends on how she displays the skills for which she was hired. Thus, although the paid workplace may be uniquely situated to facilitate relationships of mutual respect across race, gender, and other status-based lines, meritocratic structures may encourage valuing one another's contributions primarily on the basis of the instrumental qualities of our labor, such as how quickly we can perform tasks, or how much revenue our IP can generate.

In contrast, by de-emphasizing comparative performance, volunteer work can create cooperative contexts for acknowledging the non-instrumental qualities of people's labor. As volunteers for our neighborhood association, we might value the elaborate dishes you cook for our meetings because they express that you are a thoughtful and creative person, even if the dishes sometimes taste a little peculiar, and, accordingly, you may continue to play that role in our organization. Should we decide to paint a mural, our community might find our work beautiful even if it reveals our lack of training because the mural communicates our backgrounds or the fun we had making it. To be clear, this is not to say that volunteer work is valuable as an arena for low-quality production. I raise these examples where market standards and the basis for recognition diverge to highlight that people's contributions to social projects can be valuable for reasons beyond the quality of what they produce, and that volunteer work provides contexts for making and publicly recognizing those contributions.

Volunteer work can thus provide expanded opportunities for expression, self-definition, and mutual recognition. In addition to having independent value, such opportunities complement the paid workplace's ability to, through its status inclusivity, facilitate relations of social equality. Underlying the democratic ideal of social equality is an ideal of moral equality. The grounds for a person's entitlement to social conditions of equality have little to do with her particular social standing, race, the content of her moral views, and the like, but rather arises from her status as a moral agent—that she has the capacity to responsibly form, revise, and pursue a conception of the good, and to cooperate with and regard others as having like capacities. And part of what it is to regard a person as a moral equal is to value those aspects of her agency. By “value” here, I mean to treat as important (not simply to like or endorse), and hence, to give those aspects of a person contexts for development and realization. Thus, for a parent to value her child's potential for knowledge, it is not enough that she enjoys talking to her child, or that she endorses some of the child's beliefs; the parent must strive to develop that potential by, for instance, providing an education and equipping the child with the confidence to pursue knowledge throughout her life.

Similarly, to value one another as moral equals, we must provide one another with contexts for developing and realizing our moral agency. Status inclusivity in the paid workplace can go a long way in providing such contexts, enabling people to see past their prejudice and offer one another access to power, economic independence, and opportunities for contribution irrespective of race, gender, sexual orientation, and the like. Meritocracy in employment can also help. A meritocratic criterion can displace a racist or sexist criterion, and, as I suggested

earlier,⁷⁰ meritocratic divisions of labor can be situated within a larger social project of embracing our interdependency and valuing our distinctive contributions.

But what values a person might reasonably adopt, who a person is, and how she might express those values and that personality through her social cooperation, far outstrip the expressive and cooperative possibilities her skill sets may provide her with through employment. Opportunities for volunteer work can give those important aspects of moral personality further contexts for development and exercise, and thereby complement employment's status inclusivity in helping to foster conditions for and relations of social equality.

III. IMPLEMENTING THE VALUE OF VOLUNTEER WORK

So far I have argued that merit inclusivity can provide a principled basis for distinguishing volunteerism from employment. By deploying nonmeritocratic access criteria and loosening skill-based divisions of labor, volunteer work can be inclusive of people with a wide range of skill and ability. And when volunteering is flexible with respect to time and truly voluntary, volunteer work can encourage people to work outside of their professional expertise by lowering the costs of trying something new. Merit inclusive volunteer work can thereby provide expanded opportunities for moral agency, self-definition, and mutual recognition, and serve as a valuable complement to employment's potential to foster social conditions and relations of equality through status inclusivity. I now want to turn to the legal implications of distinguishing volunteer work on the basis of merit inclusivity.

A. *Minimum Wage Exemptions and Unpaid Internships*

Volunteers are exempted from federal minimum wage law.⁷¹ Such an exemption is standardly justified on the basis of volunteer work's donative character—in both the contractual

⁷⁰ See *supra* Part I.A.

sense and more robust charitable sense⁷²—and its civic-humanitarian character.⁷³ But as I have argued,⁷⁴ volunteer work’s civic-humanitarian and donative aspects provide an unprincipled basis for distinguishing volunteer work from employment. Employment can (and should) also be a context for civic-humanitarian and charitable projects, and valuable forms of volunteerism need not be limited to those kinds of projects.⁷⁵ The value of merit inclusivity, in contrast, can ground minimum wage exemptions for volunteers. Pay threatens the voluntariness that can encourage people to work outside of their area of expertise. And pay may also operate as a meritocratic incentive, facilitating skill-based competition in hiring and in internal cooperative structures.

Adopting a legal test for minimum wage exemptions that tracks merit inclusivity can therefore lend stability and coherence to legal categories of volunteer work and employment. The current federal minimum wage “economic realities” test for private sector volunteering is promising: a person is an employee and not a volunteer if she depends for her livelihood on the organization for which she purportedly volunteers.⁷⁶ In applying the test, courts consider not only expectations of compensation, but all of the economic circumstances surrounding the relationship, including factors that seem clearly probative of whether the work is meritocratic, such as whether the volunteer is “hired,” the degree of skill required to volunteer, the length of

⁷¹ *Tony & Susan Alamo Foundation*, 471 U.S. at 302 (explaining that the minimum wage and hour provisions of the Fair Labor Standards Act does not reach “ordinary voluntarism”).

⁷² See *supra* Subpart I.B. I argue elsewhere that gift promises frequently are and should often be enforceable in contract even in the absence of consideration. See Sabine Tsuruda, *Contract, Power, and the Value of Donative Promises*, 69 S.C. L. REV. (forthcoming).

⁷³ See *supra* Subpart I.A.

⁷⁴ See *supra* Part I.

⁷⁵ *Id.*

⁷⁶ *Tony & Susan Alamo Foundation*, 471 U.S. at 301 (citing *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961)).

time and degree of regularity of the work, and the impact of performance on the volunteer's livelihood.⁷⁷

But the test suffers from one significant ambiguity: it is unclear how weighty the compensation factor is, and hence, whether pay is required for employee status. Indeed, the U.S. Supreme Court has suggested that it might be open to a remuneration requirement for distinguishing volunteers from employees, noting that federal wage and hour law was “obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage.”⁷⁸

The value of merit inclusivity recommends that courts should not require that work be remunerated for work to count as employment. The fact that no remuneration is expected does not on its own supply a principled reason for distinguishing the work from employment.⁷⁹ And just because a position is unpaid does not mean that it is merit inclusive. Consider, for example, prestigious unpaid internships at the White House and film studios. While these positions may be unpaid, they are typically fulltime and span several months, and are highly competitive. They may also be instrumental to accessing occupations within the labor market, and hence, because of their impact on future livelihood, are not truly voluntary. A remuneration requirement would therefore make the category of volunteer work overbroad.

To be sure, it may be that a value other than merit inclusivity could justify treating unpaid internships the same as volunteer work positions for purposes of minimum wage law. The current legal approach distinguishes unpaid internships from employment on the basis of the

⁷⁷ *See, e.g., Evers v. Tart*, 48 F.3d 319, 320–21 (8th Cir. 1995) (finding that certain poll workers were volunteers for purposes of the FLSA in part because the workers had “worked from as few as no days during the year to eight days during the year, depending on the number of elections held in a given year[,] [and did] not apply for their jobs”).

⁷⁸ *Tony & Susan Alamo Foundation*, 471 U.S. at 302.

⁷⁹ *See supra* Part I.B.

educational character of the internships: an unpaid internship may be exempted if the internship does not displace employee and if the internship provides tangible educational benefits.⁸⁰ For example, in *Wang v. Hearst Corporation*,⁸¹ six former interns at magazines such as *Harper's Bazaar* claimed that their unpaid internships violated federal minimum wage law.⁸² While the interns performed work similar to paid employees, such as data entry, the court also found that the interns “learned tangible skills” for sales and advertising and “gained the intangible value of exposure to the practical realities of jobs in their respective fields.”⁸³ The court concluded that the unpaid internships had educational value that “tip[ped] decidedly . . . toward the conclusion that the Plaintiffs were properly classified as interns.”⁸⁴

Although I cannot fully explore the matter here, I want to briefly point out that such an educational model suffers from some of the same kinds of defects as the civic-humanitarian and donative models. By distinguishing unpaid internships on the basis of their educational value, the exemption implies that learning new skills and developing an understanding of an occupation is not a significant part of employment. Not only does that seem false, but even if it were true, why shouldn't education be a major part of paid work? Having an ongoing understanding of the kind of work you do is a precondition for making personally and socially responsible choices about how to cooperate with co-workers and the state, interact with consumers, and manage environmental impact. Making the creation and sharing of knowledge a significant part of the

⁸⁰ See, e.g., *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2016) (explaining that courts should consider factors such as the “extent to which the internship provides training that would be similar to that . . . given in an educational environment, including the . . . hands-on training provided by educational institutions” and the extent to which the internship is integrated in the intern’s educational program); U.S. Dep’t of Labor, Wage & Hour Div., *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, DOL (April 2010), <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf> (explaining that the internship cannot “displace regular employees” and must be “similar to training which would be given in an educational environment”). The Second Circuit and DOL tests are not identical. See *Glatt*, 811 F.3d at 534–38.

⁸¹ 203 F. Supp. 3d 344 (S.D.N.Y. 2016).

⁸² *Wang*, 203 F. Supp. 3d at 348–49.

⁸³ *Wang*, 203 F. Supp. 3d at 351, 354.

⁸⁴ *Wang*, 203 F. Supp. 3d at 354–55.

paid workplace is thus a part of making the paid workplace supportive of the faculties we need to develop our moral personality.⁸⁵ Volunteer work’s merit inclusivity—and the moral and political values that ground that value—thus recommend denying minimum wage exemptions for competitive unpaid internships.

B. Antidiscrimination and Associational Freedom

What about the employee-volunteer boundary for purposes of antidiscrimination law? First, it is hard to see how volunteer work could complement employment’s status inclusivity if, for instance, racial discrimination was rampant in volunteer work. Even if volunteer work manifested merit inclusivity, the work would fail to be an arena in which we could count as valuing one another as persons, and hence, as moral equals. Just as volunteer work is not the only or the special context for exercising associational freedom, so employment is not the only site for laboring that implicates social equality.

Second, not only is it hard to reconcile discrimination with volunteer work’s potential to complement employment, it is also hard to reconcile with volunteer work’s merit inclusivity. Antidiscrimination norms may require organizations to make reasonable accommodations for physical and mental disability.⁸⁶ Restaurants and workplaces may, for example, need to be wheelchair accessible, or may need to permit people to bring service dogs. Volunteer work’s value seems to require making precisely such accommodations to make volunteer work genuinely welcoming of people with different skill and ability.

⁸⁵ For a discussion of our agential interests in knowledge, see SHIFFRIN, *supra* note 30, at 82–88 (2014).

⁸⁶ *See, e.g.*, Americans with Disabilities Act, 42 U.S.C. § 12112(b)(5)(A) (explaining that it is discrimination “on the basis of disability” to fail to “mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee”).

There are, however, constitutional limits to regulating volunteer work with antidiscrimination law. Volunteerism often occurs within voluntary associations.⁸⁷ Requiring a voluntary association to admit members by operation of antidiscrimination law may violate the associational rights of preexisting members when the compelled association would undermine the animating purposes or message of the association.⁸⁸ Subjecting religious voluntary organizations to antidiscrimination law may also violate the free exercise rights of adherents.⁸⁹ Indeed, even attempting to make a determination as to whether the forced membership is incompatible with the religious organization's values might involve unconstitutional entanglement in church affairs.⁹⁰

Even so, the compelled association doctrine might still leave ample room to regulate secular volunteer work because the aims of many voluntary associations seem perfectly compatible with antidiscrimination norms. Why would a Santa Monica neighborhood association need to discriminate on the basis of disability? Why would a secular hospital need to sexually harass its volunteers? Further, the values underlying merit inclusivity suggest a potential moral limit on constitutional defenses of discriminatory volunteerism. I have argued that realizing merit inclusivity in volunteer work is a part of producing conditions and relations of social equality.⁹¹ If I am ultimately correct, precluding application of antidiscrimination

⁸⁷ See *supra* Subpart I.C.

⁸⁸ See *Dale*, 530 U.S. at 640 (explaining that “forced membership [in a voluntary association] is unconstitutional if the person’s presence affects in a significant way the group’s ability to advocate public or private viewpoints,” even if that membership is “forced” by application of antidiscrimination law). For an argument that such an interpretation of associational freedom is misguided, see Shiffrin, *Compelled Association*, *supra* note 31.

⁸⁹ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012) (holding that applying employment discrimination law to the employment relation between churches and “ministers” violates the free exercise rights of adherents).

⁹⁰ See *Rweyemamu v. Cote*, 520 F.3d 198, 209 (2d Cir. 2008) (holding that a black Roman Catholic Priest’s race discrimination claim for wrongful termination was properly dismissed because adjudicating that claim would entangle the court with religious doctrine).

⁹¹ See *supra* Subpart II.B.

norms to a wide range of volunteer work on grounds of associational or religious freedom would involve an unappealing choice of finding that associational and religious freedom trump the value of social equality. We might instead seek to find ways to interpret the scope of associational and religious freedom so as to harmonize those freedoms with the important and urgent project of realizing social conditions of equality.

CONCLUSION

My aim in this Chapter has been to provide a principled basis for the legal boundary between employment and volunteerism. I explained that familiar attempts to justify that boundary in terms of volunteer work's civic-humanitarian, donative, and associational value are either unresponsive to volunteer work's pluralism or rest on an impoverished view of employment's moral potential. I instead proposed that volunteer work's distinctive value lies in its potential to be diverse and inclusive with respect to skill and ability. Such merit inclusivity provides people with expanded opportunities for moral agency and self-definition, and for valuing each other's contributions on bases beyond labor's instrumental qualities. Creating legal space for merit inclusive volunteer work is thus a part of treating one another as moral equals, as fellow cooperators whose potential for moral personality should neither be constrained by status-based hierarchies, nor limited to marketable skills or roles at home. Volunteer work's potential for merit inclusivity can thus complement employment's status inclusivity in helping to foster social relations of equality. The boundary between volunteer work and employment should seek to enhance that complementary role, and that boundary fails to do so when it permits meritocratic work—such as competitive unpaid positions—to count as volunteer work and fails to extend antidiscrimination protections to volunteers.

Of course, fully realizing merit inclusivity in volunteer work is likely a much larger project than employment law reform. Volunteer work will fail to be merit inclusive to the extent that having less money and less time to volunteer coincides with skill and ability (or a socially salient status such as race). Larger and pervasive forms of social and economic inequality may thus compromise merit inclusivity even if my suggested reforms are adopted.