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Testing Economic Reality:
FLSA and Title VII Protection for
Workfare Participants

Benjamin F. Burry†

I. INTRODUCTION

Both the Fair Labor Standards Act of 1938 ("FLSA")1 and Title VII of the Civil Rights Act of 1964 ("Title VII")2 provide considerable protection for low-wage workers in the United States. This Comment explores how the two statutes have been applied to welfare recipients required to perform work-related activities—such as training, trial jobs, and community service—in order to continue receiving welfare benefits ("workfare").

The existing workfare framework was enacted in 1996, when President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA").3 PRWORA created a new federal program, Temporary Assistance for Needy Families ("TANF"), to oversee government initiated transfer payments based on economic need. Congress sought to end welfare recipients' dependence on government assistance by giving states, rather than the federal government, flexibility to devise and administer the bureaucracy for such payments.4 Under PRWORA, states receive block grants from the federal government to distribute to individuals and families, replacing the system of individual determinations of welfare eligibility by the federal government. In order for a state to receive federal welfare grants, TANF requires that a certain percentage of the state's welfare recipients participate in "work activities."5

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1 29 USC §§ 201 et seq (2006).
4 See, for example, 42 USC § 601(a) (2006) (enumerating the types of state programs that will be given greater flexibility).
5 42 USC § 607(a) (2006) (enumerating the percentage required for different fiscal
PRWORA specifically applies four federal nondiscrimination statutes to all programs and activities receiving welfare grants: (1) The Age Discrimination Act of 1975; (2) Section 504 of the Rehabilitation Act of 1973; (3) The Americans with Disabilities Act of 1990; and (4) Title VI of the Civil Rights Act of 1964. FLSA and Title VII are not included.

The conspicuous absence of FLSA and Title VII has raised contentious questions about whether and to what extent rights afforded workers under FLSA and Title VII also apply to welfare participants. Since PRWORA came into effect in 1997, courts have differed on how to reconcile the longstanding broad applications of FLSA and Title VII with their apparent omission from PRWORA. The unique duality of welfare participants, as both workers and welfare recipients, has not made this question easy.

Section II and Section III will consider the purview of FLSA and Title VII, respectively. Section IV considers the two statutes in light of recent federal courts of appeals decisions and finds that there is a circuit split as to whether FLSA and Title VII apply to workfare participants. Section V shows that this circuit split has been reinforced by federal district court decisions. Section VI then assesses the current state of the law, explores the two statutes in light of their contradictions, and considers how a consistent judicial interpretive philosophy can be devised. Finally, Section VII offers summary conclusions.

II. FLSA

For an individual to receive FLSA protections, which include the federal minimum wage and overtime pay, that individual must fall under the statute’s definition of an “employee.” FLSA states that “the term ‘employee’ means any individual employed by an employer.” An “employer” is defined as “any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency.” FLSA also

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12 Id at § 203(e)(1).
13 Id at § 203(d).
states the term "'[e]mploy' includes to suffer or permit to work.""14 This is a circular definition,15 and the Supreme Court has held that Congress intended to enact a broad scope of coverage.16 Courts have interpreted the definition of "employee" with reference to the remedial purposes of FLSA.17 Interpretation of a statute by referring to its remedial purposes is to apply the statute in cases where its non-application is deemed to lead to the conditions that motivated the statute's passage. Correspondingly, the remedial purposes of FLSA have been codified as follows:

The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.18

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14 Id at § 203(g).
15 See, for example, Marshall v Baptist Hospital, Inc, 473 F Supp 465, 467 (M D Tenn 1979) ("The definition of "employee" provided in the Act is virtually circular."). revd, 668 F2d 234 (6th Cir 1981).
16 United States v Rosenwasser, 323 US 360, 362–63 (1945) (stating that "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame").
17 See A.H. Phillips, Inc v Walling, 324 US 490, 493 (1945) (holding that any exemptions from FLSA must be narrowly construed to this "humanitarian and remedial legislation," and giving due regard to congressional intent); Boucher v Shaw, 2009 US App LEXIS 16555, *9 (9th Cir) ("[T]he definition of 'employer' under FLSA is not limited by the common law concept of 'employer,' but is to be given an expansive interpretation in order to effectuate FLSA's broad remedial purposes.") (citations and internal quotation marks omitted); Antenor v D & S Farms, 88 F3d 925, 929 (11th Cir 1996) (considering the statutory definitions of "employee" under FLSA and Migrant and Seasonal Agricultural Worker Protection Act); Dole v Snell, 875 F2d 802, 804 (10th Cir 1989) (citing cases that have adopted an expansive interpretation of "employee" under FLSA in order "to effectuate its broad remedial purposes").
Courts have held that the expansive definition of "employee" under FLSA extends beyond the common law agency test traditionally used for the employment relationship.\textsuperscript{19} In its place, courts have utilized the broader and more subjective "economic reality" test to assess whether a putative employee meets the FLSA definition.\textsuperscript{20} This holistic assessment considers the entire relationship between the putative employee and employer.\textsuperscript{21}

The Ninth Circuit's four-factor approach in \textit{Bonnette v California Health and Welfare Agency}\textsuperscript{22} is by far the most common framework to guide applications of the economic reality test.\textsuperscript{23} The \textit{Bonnette} factors include whether the employer: (1) had the power to hire and fire the employee; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records.\textsuperscript{24} The \textit{Bonnette} factors have been utilized by most federal circuits, including the Second Circuit.\textsuperscript{25} It is important to note, however, that the role of the \textit{Bonnette} factors is that of a tool to help courts understand and apply the economic reality test. As subsequent decisions unequivocally point out, satisfying the \textit{Bonnette} test is not an essential precondition to finding an employment relationship.\textsuperscript{26}

In sum, the definition of "employee" under FLSA has been construed broadly, based on the totality of the circumstances of a particular relationship, to give effect to FLSA's remedial purpos-

\footnotesize{\textsuperscript{19} See, for example, \textit{Nationwide Mut Ins Co v Darden}, 503 US 318, 326 (1992) (stating that FLSA's expansive definition of "employ" stretches the definition of "employee" to cover parties who would not qualify under common law agency principles); \textit{Rutherford Food Corp v McComb}, 331 US 722, 728–29 (1947) (examining the definition of "employ" and other words in FLSA to show an expansive interpretation of the word "employee").

\textsuperscript{20} \textit{Goldberg v Whitaker House Coop, Inc}, 366 US 28, 33 (1966) (holding that under the economic reality test, home-workers were employees of an embroidering co-operative despite their technical classification by that co-operative).

\textsuperscript{21} \textit{Rutherford}, 331 US at 730 (looking at the circumstances of the whole activity instead of isolated factors to find that meat boners were employees of the slaughtering plant under FLSA).

\textsuperscript{22} 704 F2d 1465, 1470 (9th Cir 1983).

\textsuperscript{23} See, for example, \textit{Villarreal v Woodman}, 113 F3d 202, 205 (11th Cir 1997) (discussing the history of application of the \textit{Bonnette} factors by the courts).

\textsuperscript{24} \textit{Bonnette}, 704 F2d at 1470 (compiling factors used by other courts to determine whether the party was an "employee" under FLSA).

\textsuperscript{25} See \textit{Herman v RSR Security Services Ltd}, 172 F3d 132, 139 (2d Cir 1999); \textit{Brock v Superior Care, Inc}, 840 F2d 1054, 1058–59 (2d Cir 1988); \textit{Carter v Dutchess Community College}, 735 F2d 8, 12 (2d Cir 1984).

\textsuperscript{26} \textit{Barfield v New York City Health & Hospitals Corp}, 537 F3d 132, 142 (2d Cir 2008) (stating that none of the factors individually is dispositive, nor are they exclusive); \textit{Ling Nan Zheng v Liberty Apparel Co}, 355 F3d 61, 71 (2d Cir 2003) (denying that the four factors are the "exclusive touchstone" in the FLSA employment inquiry).}
es. The four-factor Bonnette approach is the most common iteration of the totality of the circumstances analysis.

III. TITLE VII'S NARROWER SCOPE

Title VII protects employees from discrimination based on race, color, religion, sex, or national origin.27 As noted in Section I, PRWORA omits Title VII from the enumerated list of nondiscrimination statutes applicable to workfare. Like FLSA, Title VII does not provide much guidance as to which workers constitute "employees" protected by the statute. The definition of "employee" under Title VII is "an individual employed by an employer."28 Title VII differs from FLSA in that it does not define "employ" as "to suffer or permit to work." In this way, Title VII is even more circular than FLSA. Courts initially struggled with this definition and applied several interpretive tests.29

The Supreme Court ultimately took on the issue and held that the common law agency test should be used where a statute defines "employee" in a circular way and provides no other guidance as to how to apply the term.30 Specifically, the Court in Nationwide Mutual Insurance Co v Darden31 held that such statutory language invokes the thirteen-factor common law agency test, as summarized by the Supreme Court in Community for Creative Nonviolence v Reid,32 to determine whether the worker is an "employee." These factors are: the hiring party's right to control the manner and means by which the product is accomplished; the skill required; the sources of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring

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28 Id at § 2000e(f).
29 See Cobb v Contract Transport, Inc, 452 F3d 543, 550–51 (6th Cir 2006) (declining to adopt an Eleventh Circuit test for interpreting the Title VII definition of "employer" that is very similar to the one used for interpreting the FSLA definition); Garcia v Copenhaver, Bell & Associates, 104 F3d 1256, 1265–66 (11th Cir 1997) (discussing different tests used by courts to determine the meaning of "employer" and "employee" in Title VII).
30 Darden, 503 US at 323 (applying the common law agency test to ERISA's definition of "employee").
32 Id at 741–42 (1989) (discussing the various factors used by the lower courts).
party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the party.\(^3\)

It is important to note that the Darden Court specifically exempted FLSA from its decision.\(^3\) Because FLSA also includes a definition for "employ" ("to suffer or permit to work"),\(^3\) the Darden Court held that FLSA uniquely "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles."\(^3\)

Thus, the statutory definition of "employ" has provided the basis for applying the economic reality test, rather than the common law agency test, to FLSA and the basis for interpreting "employee" under FLSA with reference to the statute's remedial purposes.\(^3\) Since Title VII does not contain such language it is not interpreted in light of its remedial purposes.\(^3\) In sum, Title VII invokes the common law agency test, which is narrower than the economic reality test, and Title VII is not interpreted with reference to the statute's remedial purposes. Both FLSA and Title VII were omitted from PRWORA, so whether and how each applies to workfare participants is unclear. The discussion now turns to the judicial resolution of these questions.

IV. APPLICATION OF FLSA AND TITLE VII: JOHNS AND CITY OF NEW YORK

This section first considers FLSA. In Johns v Stewart,\(^3\) the Tenth Circuit became the first federal court of appeals to address whether workfare participants can be considered employees for the purposes of FLSA. Johns built upon Tenth Circuit precedent that, consistent with the discussion in Section II, defined FLSA employment based on the overall nature of the parties' relationship, using the economic reality test.\(^4\)

\(^3\) Darden, 503 US at 323–24 (adopting the common law agency test articulated in Community for Creative Non-Violence, 490 US at 751–52).
\(^3\) Darden, 503 US at 326 (stating that FLSA's expansive definition of "employ" stretches the definition of "employee" to cover parties who would not qualify under common law agency principles).
\(^3\) 29 USC § 203(g).
\(^3\) Darden, 503 US at 326.
\(^3\) Id at 323; Frankel v Bally, Inc, 987 F2d 86, 90 (2d Cir 1993).
\(^3\) Id.
\(^3\) 57 F3d 1544 (10th Cir 1995).
\(^3\) See, for example, Reich v Parker Fire Protection District, 992 F2d 1023, 1026–27 (10th Cir 1993) (holding that persons training to be firefighters did not constitute employees of fire protection district for purposes of FLSA); Dole, 875 F2d at 812 (holding that as a matter of "economic reality" cake decorators are employees not independent
In this seminal decision, *Johns* held that workfare participants in Utah were not covered by FLSA. The purpose of the Utah programs was to provide immediate assistance to citizens with pending applications for federal benefits. The plaintiffs argued they were entitled to the federal minimum wage, claiming that they met the FLSA employment test because Utah required them to perform work-related activities in exchange for workfare benefits.

An important reason the court rejected the plaintiffs’ claims was that the plaintiffs participating in Utah’s Financial Assistance General Assistance/Self-Sufficiency Program (“GA”), Work Experience and Training Projects (“WEAT”), and Financial Assistance Emergency Work Program (“EWP”) were obligated to meet a number of requirements. They were required to “(1) meet a needs test; (2) be unemployable, marginally employable, or 60 years old or older (for GA); (3) have no dependent children and be able to perform a work project (for EWP); and (4) agree to participate in adult education, training, skills development, and job search activities.”

Furthermore, the plaintiffs applied for public assistance, not state jobs. Although GA, WEAT, and EWP participants worked alongside Utah state employees at some of their assigned projects, there were differences between the plaintiffs and actual state employees, including method of payment, taxation, absence of sick and annual leave, job security, and compensation.

These findings led the court to conclude that the overall economic reality of the relationship was one of assistance rather than employment.

As noted in Section III, courts have consistently interpreted FLSA as carrying a broader definition of “employee” than Title VII. To make categorical comparisons between FLSA and Title VII, however, FLSA’s economic reality test must be broader than Title VII’s common law agency test in all cases, such that the latter is subsumed by the former. Case law and commentators support this proposition.

Therefore, since *Johns* held that state contractors under FLSA); *Marshall v Regis Education Corp*, 666 F2d 1324, 1328 (10th Cir 1981) (holding that resident hall assistants did not constitute employees of Regis College for purposes of FLSA since the RA program was simply one component of their entire educational experience).

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41 *Johns*, 57 F3d at 1558.
42 Id at 1558–59.
43 Id.
44 Id at 1559–60 (noting that the plaintiffs did not claim an ongoing violation of a federal right).
45 See *Darden*, 503 US at 326 ("[The FLSA definition] stretches the meaning of 'em-
workfare participants were not "employees" under FLSA, a consistent judicial interpretation would require finding that workfare participants in similar programs are also not "employees" under Title VII. That is, if one has not been "permit[ted] or suffer[ed] to work" by another, then they cannot be an agent either.

From a preliminary understanding of Title VII, this section now turns to the application of Title VII to workfare participants. In United States v City of New York, four participants in New York City's Work Experience Program ("WEP") sued the City for sexual and racial harassment in violation of Title VII. New York City's WEP is a work activity program under TANF. The question before the Second Circuit was whether WEP participants qualify as "employees" under Title VII, a necessary condition for the plaintiffs' harassment suit.

The Second Circuit uses a two-part test to determine whether an individual is an employee under Title VII. First, an individual must show she was hired by the putative employer. This requires plaintiffs to establish receipt of remuneration for WEP work. To constitute remuneration, benefits must be substantial and not merely incidental to the activity performed. Second, the court applies the common law agency test to determine if the worker is an "employee." In City of New York, the court found that WEP participants meet the definition of employees under Title VII. Of the thirteen common law agency factors, the court placed the greatest emphasis on the first one: "the extent to which the hiring party controls the manner and means by which employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles.") Richard Carlson, Why the Law Still Can't Tell an Employee When it Sees One and How it Ought to Stop Trying, 22 Berkeley J Empl & Labor L 295, 334, 354 (2001) (stating that the common law agency test includes "every aspect of the economic realities test," and that the difference is that the economic reality test fosters an additional inquiry into statutory purpose, and "statutory purpose nearly always leads in the same direction: broad statutory coverage of economically dependent workers").

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46 359 F3d 83 (2d Cir 2004).
47 Id at 87.
48 Id at 86-87.
49 Id at 91-92.
50 City of New York, 359 F3d at 92. See also York v Association of the Bar of the City of New York, 286 F3d 122, 126 (2d Cir 2002) (listing examples of such remuneration).
51 City of New York, 359 F3d at 92 (citing York, 286 F3d at 126).
52 City of New York, 359 F3d at 92. See also Reid, 490 US at 750-51 (citing Restatement § 220(2) while setting forth a nonexhaustive list of factors relevant to determining whether a hired party is an employee); Eisenberg v Advance Relocation & Storage, Inc, 237 F3d 111, 113-14 (2d Cir 2000) (relying on the thirteen factors enumerated in Reid).
53 City of New York, 359 F3d at 97.
the worker completes his or her assigned tasks. Under the common law agency test, emphasizing a single factor is permissible; however, no single factor may be dispositive.

Applying the common law agency test, the court in City of New York held that WEP participants are employees because benefits could be withheld from a participant refusing to perform work-related activities in exchange for his or her welfare payments. The court recognized Johns, yet sought to distinguish that holding on four grounds in order to avoid the otherwise inevitable conclusion that its decision created a circuit split. These four reasons, as well as other aspects of the court's decision, were subject to a vigorous dissent by Judge Jacobs.

First, the majority in City of New York pointed out that Johns concerned whether a workfare participant is an employee under FLSA, rather than Title VII. As discussed in Section III, however, the economic reality test is broader than the common law agency test; since Johns held that workfare participants do not meet the FLSA employment test, they cannot meet the Title VII employment test either. Additionally, as the Supreme Court has held, participants in programs like WEP, which provide training for a short period or offer closely supervised work to promote training and rehabilitation, are not employees under FLSA.

Second, the majority relied on statements by the Equal Employment Opportunity Commission ("EEOC") regarding the purview of Title VII. Here the court emphasized that the EEOC—the agency charged with interpreting Title VII—that a welfare recipient participating in work-related activities "will likely

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54 Id at 92 (citations omitted).
55 See, for example, Eisenberg, 237 F3d at 114 (discussing the development of the Reid factors).
56 Reid, 490 US at 752 (holding that the hiring party's control over the work is not dispositive, and even though the hiring party retained control over the work, the defendant in this case was an independent contractor); Ward v Atlantic Coast Line R Co, 362 US 396, 400 (1960) (stating that the parties' characterization of the events was only one factor among many to be considered); Hilton International Co v NLRB, 690 F2d 318, 320-21 (2d Cir 1982) (listing relevant factors to be considered and stating that no single factor is determinative).
57 City of New York, 359 F3d at 92.
58 Id at 102-10 (Jacobs dissenting).
59 Id at 94 (majority) (distinguishing Johns).
60 See, for example, Walling v Portland Terminal Co, 330 US 148, 153 (1947) (holding that trainees for a railroad company are not "employees" under FLSA).
61 City of New York, 359 F3d at 103 (Jacobs dissenting).
be an 'employee.'” Further, in an attempt to undermine the Tenth Circuit's holding in *Johns*, the majority cited the Department of Labor ("DOL") compliance manual. In the manual, the DOL—the agency charged with interpreting FLSA—stated that welfare recipients would "probably not be employees under FLSA."63

As the dissent pointed out, and the majority conceded, such agency interpretations are entitled to no deference beyond their "power to persuade."64 The Supreme Court has consistently held that the EEOC does not have the authority to promulgate Title VII rules and regulations, and that EEOC interpretive claims should be treated only as arguments to be considered.65 The same is true for the DOL with respect to FLSA.66 Thus, since these qualified assertions by the EEOC and DOL about what would "likely" or "probably not" happen are conclusory (in other words, the administrative agency interpretations are unsupported), they correspondingly do not provide an adequate basis for a judicial decision on the existence or nonexistence of an employment relationship under FLSA or Title VII.

Third, the majority attempted to draw a distinction between the case before it and *Johns* by opining that the benefits offered to workfare participants in the GA, WEAT, and EWP programs were not as extensive as those offered to WEP participants.67 The Second Circuit argued that even if *Johns* did properly hold that Utah workfare participants did not qualify as employees under FLSA, the WEP participants in *City of New York* were differently situated and thus could still be deemed FLSA employees.68

Although this argument is logically correct, it is not supported by the facts in the two cases. The benefits that workfare participants in *Johns* lacked in comparison to state employees working on the same projects are also benefits lacked by WEP

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62 Id at 93 (majority) (emphasis added), quoting EEOC Notice No 915.003 § 5.a (Dec 3, 1997).

63 Id (emphasis added).

64 Compare id at 93 with id at 109 (Jacobs dissenting).


66 See *Skidmore v Swift & Co*, 323 US 134, 140 (1944) (holding that DOL rulings, interpretations, and opinions regarding FLSA are not authoritative); *Arriaga v Florida Pacific Farms, LLC*, 305 F3d 1228, 1238 (11th Cir 2002) (holding that DOL interpretations are entitled to respect only to the extent they have the power to persuade).

67 *City of New York*, 359 F3d at 94.

68 Id.
employees. WEP employees "do not receive the same salary, safe working conditions, job security, career development, Social Security, pension rights, collective bargaining, or grievance procedures as do the actual employees." Since it can be shown that WEP participants lacked at least as many benefits as offered to their counterpart state employees as the GA, WEAT, and EWP participants lacked in *Johns*, the workfare participants in *City of New York* cannot make a stronger case for an employment relationship than was made in *Johns*. Accordingly, there is insufficient factual discrepancy between the two workfare programs to justify distinguishing the Second Circuit's holding from that of the Tenth Circuit.

Furthermore, subsequent lower court decisions within the Second Circuit support the view that WEP participants would not be FLSA employees under *Johns*. Asked to consider whether WEP participants constituted employees under FLSA, the District Court for the Western District of New York found the arguments in *Johns* compelling, yet decided that it was bound by *City of New York* to hold otherwise. Similarly, the District Court for the Northern District of New York found *Johns* to be "relevant and persuasive" when considering whether FLSA applies to WEP participants, but understood itself to be bound by *City of New York*. The Second Circuit lower courts recognized that workfare participants should not be considered "employees" under FLSA. Both lower courts favored the same conclusion as the Tenth Circuit in *Johns*: workfare participants fall outside the purview of FLSA (and thus, outside the scope of Title VII). The fact that the District Courts in *Elwell* and *Stone* and the Court of Appeals in *City of New York* all considered New York WEP programs strongly suggests that there is not a basis for the *City of New York* court's suggestion that factual differences between New York and Utah's workfare programs justify FLSA status for workfare participants in the former state but not the latter.

Fourth, the *City of New York* court opined that the holding in *Johns* relied upon an "artificial dichotomy," whereby an individual can only be a welfare recipient or an employee, while Second Circuit precedent has recognized that one can permissi-

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69 Id at 109 (Jacobs dissenting).
70 See *Elwell v Weiss*, 2006 US Dist LEXIS 96934, *13–18 (W D NY) (adopting the analysis used in *City of New York*).
71 *Stone v McGowan*, 308 F Supp 2d 79, 86 (N D NY 2004) (holding that defendants, as WEP participants, are not "employees" under FLSA).
72 *City of New York*, 359 F3d at 94 (distinguishing *Johns*).
bly be classified as an employee in one respect and not another.\footnote{Id at 94.} As the City of New York dissent pointed out, however, Johns did not hold that a welfare recipient could not be an employee.\footnote{Id at 109 (Jacobs dissenting) (likening the case to Johns).} Here, the majority improperly suggested the false dichotomy. The question in Johns was not, as City of New York suggested, whether workfare participants, generally, should be deemed welfare recipients or employees. Instead it was whether the overall nature of the relationship between the plaintiff-participants and the state was one of employment. The court concluded that it was not.\footnote{Johns, 57 F3d at 1558–59.}

In sum, the Second Circuit offered four distinctions between City of New York and Johns that do not hold up under closer scrutiny. City of New York held that Title VII applies to workfare participants after the Tenth Circuit had previously concluded that FLSA, and thus Title VII, do not apply to similarly situated workfare participants.

V. THE CIRCUIT SPLIT GROWS DEEPER

This section addresses the ramifications of the circuit split noted in Section IV. Additionally, it will more carefully consider the lower court decisions within the Second Circuit that were introduced in the previous section. Subsequent decisions in Second Circuit district courts have further reinforced the circuit split between the Second and Tenth Circuits.

First, in Elwell v Weiss,\footnote{2006 US Dist LEXIS 96934, *4–6 (challenging the WEP’s interpretation of “work activities”).} a WEP participant sued, claiming he was an employee under FLSA and thereby entitled to be paid the federal minimum wage. Despite the Second Circuit’s attempt to distinguish Johns from its holding in City of New York by pointing out that the Tenth Circuit considered FLSA rather than Title VII, it is clear that this nominal distinction was not viable in practice. In fact, according to the Elwell court, “the Second Circuit’s analysis in finding an employment relationship in New York’s WEP program is every bit as applicable and compelling to Elwell’s relationship with the County of Schuyler WEP program.”\footnote{Id at *11.} Noting that the FLSA test is “considerably more inclusive” than Title VII’s common law agency test, the Elwell court
held that "the Second Circuit's analysis in City of New York compels the conclusion that Elwell was an employee within the meaning of FLSA."\(^7\)

Closer examination of the court's reasoning provides further support for the conclusion that Title VII employment is a wholly included subset of FLSA employment and City of New York was therefore inconsistent with Johns. To determine whether WEP participants are employees, the Elwell court first invoked the economic reality test as "provid[ing] the appropriate guideposts in determining an individual's status under FLSA."\(^7\) But rather than applying the Bonnette factors,\(^8\) the court determined that the economic reality test had been satisfied through inquiry into the five common law agency factors used by City of New York. The Elwell court's deference to City of New York's Title VII analysis as dispositive is so great that the court did not even attempt to mitigate the Second Circuit's "greatest emphasis' on the extent to which the hiring party controls the manner by which the worker completes his assigned tasks."\(^8\) Courts conducting an analysis under the economic reality test have been unwilling to distinguish any "factor" as more important than another.\(^8\) The Elwell court's use of common law agency factors where one is distinguished above others demonstrates that the common law agency test is considered to be a wholly inclusive subset of the economic reality test; only such an understanding explains the court's holding that the plaintiff is an employee under FLSA by virtue of the fact that he satisfies the Title VII employment test. If the Elwell court did not have such understanding, the court would have been forced to step outside the common law agency factors to consider the "totality of the circumstances" and also decline to prioritize any one factor.

Elwell was not the only court to face a dilemma applying the FLSA employment test in the wake of City of New York. Immediately after the City of New York decision, the District Court for the Northern District of New York heard Stone v McGowan.\(^8\) In

\(^7\) Id at *18.
\(^8\) Id at *16.
\(^8\) See Bonnette, 704 F2d at 1470.
\(^8\) Elwell, 2006 US Dist LEXIS 96934 at *10.
\(^8\) See, for example, Frasier v General Electric Co, 930 F2d 1004, 1008 (2d Cir 1991) (stating that no one factor is dispositive); Brock, 840 F2d at 1059 (stating that no factor is dispositive and that the test is based on a totality of circumstances); Carter, 735 F2d at 12 (holding that the lower court erred in giving undue weight to the control factor alone).
\(^8\) 308 F Supp 2d at 86 (stating that the court was bound by City of New York).
Stone, the plaintiff sued Oswego County for its administration of a WEP, under which the plaintiff performed highway maintenance duties for the Town of Sandy Creek. The workfare participant claimed he was an employee under FLSA and thereby entitled to the federal minimum wage. Some defendants (in particular, the state commissioners) filed a motion to dismiss on the grounds that a WEP participant is not an FLSA employee. After looking to precedent and then finding the Tenth Circuit's reasoning in Johns to be "relevant and persuasive," the Stone court was tempted to grant the government's dismissal. The court decided, however, that it was obligated to rule for the plaintiff because it was bound by the Second Circuit's decision in City of New York.

With due consideration of Elwell and Stone, the circuit split created by City of New York becomes much clearer. Since 2004, district courts within the Second Circuit have struggled to reconcile City of New York with FLSA precedent. The result has been that holdings in FLSA employment cases are even further at odds with Johns.

One source of confusion regarding the purview of employee status under Title VII and FLSA is that the tests for both statutes are largely the same. Title VII precedent instructs courts to ask whether a putative employee receives substantial remuneration, not incidental to her employment. Courts then apply the common law agency factors that are generally used to distinguish an employee from an independent contractor.

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84 Id at 81 (stating that the plaintiff sought monetary damages and injunctive relief).
85 Id at 81–82 (noting that the court had previously denied the plaintiff's motion for class certification to join past and present WEP participants for similar claims).
86 Brukhman v Giuliani, 94 NY 2d 387, 392–93 (NY App 2000) (holding under NY law, not FLSA, that WEP participants are not employees within the meaning of the constitutional provision). Brukhman was distinguished by the City of New York court as only construing New York state law. See City of New York, 359 F3d at 95.
87 Stone, 308 F Supp 2d at 86 (stating, however, that the court was bound to follow the analysis of City of New York).
88 Id (discussing the textual analysis of the statute in Johns).
89 Id (noting that the Second Circuit subsequently suggested that it would have decided the issue in Johns differently).
90 See generally City of New York, 359 F3d at 83 (distinguishing Johns in 2004).
91 See, for example, Elwell, 2006 US Dist LEXIS 96934 at *13–16 (adopting the analysis used in City of New York); Stone, 308 F Supp 2d at 86 (adopting the analysis used in City of New York).
92 City of New York, 359 F3d at 92 (citing York, 286 F3d at 126).
93 Darden, 503 US at 323–24.
FLSA precedent condenses the analysis by instructing courts to inquire into the economic reality of an alleged employment relationship, considering the "circumstances of the whole activity." The economic reality test, however, is merely a more discretionary method of conducting the already very discretionary common law agency analysis. FLSA considers five "guideposts" in place of Title VII's thirteen. The primary difference lies in courts' contemplation of FLSA's codified remedial purposes to determine the breadth of the statute's employment test. This distinction originates with the Rutherford Court's suggestion that the legislative history of FLSA intended to express a particularly "broad" definition of "employ." In subtle contrast, Title VII, when later enacted with nearly identical language relating to employment, did not include this FLSA definition of "employ."

The current legal model has been to conduct these comparable analyses in a manner such that the economic reality test is less stringent than the common law agency test; yet the extent to which this is the case remains unquantified. This uncertainty, along with the unique nature of the workfare relationship, is what gave the City of New York court's assertion—that no circuit split had been created—some plausibility before subsequent lower court decisions. In Darden, the Supreme Court provided clear guidance as to the test applicable to Title VII and other statutes using identical language. The Court indicated that the more broadly applicable FLSA was not subject to this holding. Guidance on the applicability of these two statutes to workfare participants would serve the valuable goals of apprising participants of their rights and enabling states to craft work-related activity programs with an understanding of the duties incumbent upon them.

94 Rutherford, 331 US at 730.
95 Id at 728 (noting that the expansive definition apparently originated in various child labor statutes).
97 See Carlson, 22 Berkeley J Empl & Labor L at 343 n 277 (cited in note 40) (indicating that a random search of state appellate cases in which at least one judge dissented on the issue of worker status yielded nine such cases in a nine month period).
98 Darden, 503 US at 326 (stating that FLSA's expansive definition of "employ" stretches the definition of "employee" to cover parties who would not qualify under common law agency principles).
VI. CONSIDERATIONS IN CREATING A CONSISTENT JUDICIAL INTERPRETIVE PHILOSOPHY

Noting that a circuit split does, in fact, exist leaves us to consider how a consistent judicial interpretive philosophy can be devised. Such a philosophy should be consistent with the purposes of FLSA and Title VII; it should also reflect the interests of the more than three million TANF recipients, the 138 million United States taxpayers who fund the program,99 as well as society as a whole.

With identical language to FLSA, Title VII defines an “employee” as “an individual employed by an employer.”100 As noted in Section V, the origin of the uniquely broad judicial interpretation of “employee” under FLSA has its roots in legislative history. In particular, a statement by Senator Hugo Black has been used to this effect.101 The statutory language of the two statutes is only distinguished in that Title VII does not include a definition of “employ” as “to suffer or permit to work.”

The unequal treatment of these two statutes and encompassment of Title VII within FLSA appears to be neither mandated by the Senator’s statement nor intrinsic to FLSA’s additional definition. In fact, the more expansive definition of FLSA—as compared to other federal employment statutes—is at least partially based on its history as a derivation from child labor laws that sought broad application so as to assure children would be prohibited from working, both as employees and independent contractors.102 These justifications for a more expansive employment test for FLSA than for Title VII have little relevancy to workfare or the text of either statute.

Applying FLSA to workfare programs, however, does present some concerns. First, one integral goal of PRWORA is to incentivize and facilitate non-working recipients of government transfer payments to ultimately obtain employment; this is achieved

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100 42 USC § 2000(e)(f).
101 See Rosenwasser, 323 US at 363 n 3 (quoting the Senator’s statement on the Senate floor that the term “employee” had been given “the broadest definition that has ever been included in any one act”).
102 Darden, 503 US at 326 (comparing the definition of “employee” in FLSA and ERISA); Rutherford, 331 US at 728, 728 n 7 (noting the broad use of the phrase “employed, permitted or suffered to work” was found in child labor laws in 32 states and the District of Columbia, as well as in several federal child labor laws).
by promoting involvement in "work activities" so that participants can develop the skills and habits necessary for employment.\textsuperscript{103} If FLSA were applied to state workfare programs, the higher wages mandated would force the workfare programs to increase payments to each worker and, correspondingly, to reduce total participants. This effect takes greater force with the knowledge that TANF reforms required, by 2008, at least 70 percent work participation by each state's welfare recipients.\textsuperscript{104} This is a significant increase beyond the 25 percent requirement in 1997.\textsuperscript{105} Furthermore, recipients now must undertake forty hours of workfare obligations per week, where no more than sixteen of those forty hours may be training.\textsuperscript{106} As a result, each TANF recipient must perform at least twenty-four hours of work activities per week; initially, workfare programs only required twenty hours of work activities each week.\textsuperscript{107} Moreover, in 2007 Congress increased the minimum wage.\textsuperscript{108} Thus, applying FLSA to workfare participants is much more onerous for state workfare programs than it would have been in the past: the government will have to pay a higher minimum wage to a greater number of participants, who will all be working a greater number of hours.

There is reason to think that FLSA's goal of achieving "maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers"\textsuperscript{109} can be best achieved by not applying FLSA to workfare programs. Without FLSA's minimum wage requirement, at least some workfare programs in some states could lower payments and thus use their federal funds to reach a greater number of unemployed citizens. If there is a diminishing marginal utility to welfare pay-


\textsuperscript{104} See To Reauthorize and Improve the Program of Block Grants to States for Temporary Assistance for Needy Families, Improve Access to Quality Child Care, and for Other Purposes, HR Rep No 4, 108th Cong, 1st Sess (2003) (revising annually mandatory work requirements starting in the fiscal year 2005). See also Nicola Kean, The Unprotected Workforce, 9 Tex J on CL & CR 159, 164 (Spring 2004) (describing legislation that would increase the minimum work requirements for TANF).

\textsuperscript{105} 42 USC § 607(a)(1).

\textsuperscript{106} Kean, 9 Tex J on CL & CR at 164 (cited in note 101) (describing proposed legislation that would increase the minimum work requirements and decrease employee training requirements for TANF).

\textsuperscript{107} See 42 USC § 607(c)(1)(a) (stating that in 1997, TANF recipients must participate in 20 hours per week of work activities).

\textsuperscript{108} Stephen Labaton, Congress Passes Increase in the Minimum Wage, NY Times A12 (May 25, 2007).

\textsuperscript{109} 29 USC § 202(a).
ments, which seems most likely, a greater aggregate standard of living can be achieved by allocating the last dollars now awarded to existing recipients as the first dollars received by needy citizens excluded from the current program. In this case, a more egalitarian dispersal of payments across the population of eligible recipients can be expected to improve the overall standard of living.

To be sure, allowing workfare payments to fall below the minimum wage will not necessarily produce the best results with respect to workfare's stated goals in all scenarios. In some cases, a small number of eligible recipients may produce great social benefit when such recipients receive high payments; or a high threshold level of payments may be necessary for an individual participant to benefit from workfare. But when the workfare programs designed by states are not constrained by FLSA's minimum wage mandate, states are less likely to be prevented from creating the best set of workfare programs for their citizens: high wages for a small number of recipients, low wages for a large number of recipients, or any permutation thereof. Thus, unless there is reason to think that state governments are not best situated to develop workfare programs that meet local needs, applying FLSA to workfare has dubious benefits since the effect is simply to restrict states' options. Keeping in mind that a foundational premise of PRWORA is a belief that workfare is best administered on a state level, freeing workfare programs from FLSA mandates is in accordance with that goal.

The marked changes in PRWORA predicted to "end welfare as we know it" included the limitations on how long recipients may receive benefits and a notable shift of authority from the federal government to states. The Second Circuit's decision in *City of New York* suggests support for a public policy goal that workfare participants should be entitled to protections of Title VII and FLSA. If such provisions are best suited for workers they may be most quickly, cost-effectively, and uniformly implemented into programs like WEP by state legislatures. A legislature can make findings, debate public policy, and make a democratic choice as to how to best prepare workfare participants for full-time employment in the mainstream economy. Such an alternative may be more in accordance with PRWORA than judi-

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110 See 42 USCS § 601(a) (stating that the purpose of block grants to states for TANF "is to increase flexibility of States in operating [workfare]").
cial maneuvering to shoehorn workfare participants into federal provisions largely designed to differentiate between workers and independent contractors. PRWORA relied on a firmly held view by the President and Congress that the states, rather than the federal government, were best suited to establish, structure, and manage welfare programs.

Second, it is worth considering whether preserving states’ autonomy with respect to workfare programs rather than applying FLSA is worthwhile because of the incentives such decisions create for individual states. As touched on above, application of FLSA to workfare may force states to discontinue assistance to needy families in order to offset the higher cost of providing any assistance at all. But since many states’ TANF programs have yet to be considered by a court with regard to whether FLSA applies, we should expect states predicting that the presence of a federal minimum wage requirement will harm their workfare programs will change their current programs to make FLSA coverage by judicial decision less likely.

Applying FLSA to state workfare programs occurs on a case-by-case basis because the economic reality test mandates such an approach. States may work to avoid such a result by distancing themselves from workfare participants; adjustments like providing less supervision, less training, less oversight, and less investment in workfare participants render the totality of the circumstances less akin to an employment relationship. Rather than programs structured so participants accomplish the most socially beneficial tasks and make the greatest improvements in human capital, states may be encouraged to consider tasks that will allow them to distance themselves from these workers so as to avoid FLSA mandates.

Previous commentators have argued that FLSA should apply to workfare participants because doing so would be consistent with the statute’s broad policy goals.112 To the extent that such application crowds out the policy goals of PRWORA, it is ill-advised. PRWORA omits FLSA from both its enumeration of discrimination statutes applying to TANF workfare participants113 and from subsequent amendments adding protection under simi-

112 See, for example, Kevin Miller, Comment, Welfare and the Minimum Wage, 66 U Chi L Rev 183, 184 (Winter 1999) (arguing that workfare participants should be considered “employees” under FLSA).
113 42 USC § 608(d).
lar federal statutes. Thus, coverage of workfare participants under FLSA not only appears to be absent from FLSA's textual requirements, but also warrants consideration by courts as to whether it may be detrimental to PRWORA's policy goals.

VII. CONCLUSION

In conclusion, in City of New York the Second Circuit creates, without acknowledgement, a circuit split with the Tenth Circuit. Lower court decisions in the Second Circuit demonstrate this point. When focusing on interpreting FLSA with reference to its remedial purposes we find support, now more than ever, for the Tenth Circuit's exclusion of workfare participants from coverage. So, although workfare participants stand to benefit from Title VII protection, such an outcome by judicial decisions is unworkable. It would (1) be inconsistent with the existing understanding of the interpretive tests for FLSA and Title VII; (2) necessitate case-by-case implementation: a costly approach enabling avoidance by states; and (3) be inconsistent with the federalist premise of PRWORA. Furthermore, there are several policy considerations that suggest such a sweeping expansion of FLSA may not be wise.