

NOTE

Subminimum or Subpar? A Note in Favor of Repealing the Fair Labor Standards Act's Subminimum Wage Program

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“Let’s tie the minimum wage to the cost of living, so that it finally becomes a wage you can live on.”

– President Barack Obama.¹

“Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”

– William J. Brennan, Jr.²

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1. President Barack Obama, Remarks by the President at the State of the Union Address (Feb. 12, 2013) [hereinafter President Barack Obama, 2013 State of the Union Address], *available at* <http://www.whitehouse.gov/the-press-office/2013/02/12/president-barack-obamas-state-union-address>.

2. *Sch. Bd. of Nassau City v. Arline*, 480 U.S. 273, 284 (1987). William J. Brennan, Jr. was an Associate Justice of the United States Supreme Court from 1956 to 1990.

I. INTRODUCTION

The term “employment” implies so much more than the mere holding of a job for wage compensation. Employment can be a vehicle for fulfilling basic needs while also allowing a person to do what she most desires to accomplish. There are feelings of fulfillment and pride that can only be experienced from finishing an honest day’s work. However, for too long these feelings of satisfaction from earning a living wage have been outside the reach of certain persons with disabilities. Despite the strides made in achieving civil rights³ and combating the low expectations of persons with disabilities in regards to physical mobility, intellectual ability, and educational capacity, stereotypes in the field of employment continue to persist. Since 1938, Section 14(c) of the Fair Labor Standards Act (FLSA) has discriminated against people with disabilities by authorizing employers to pay less than the federal minimum wage to certain employees with disabilities.⁴

In 2011, Representatives Cliff Stearns (R-Fla.)⁵ and Timothy Bishop (D-N.Y.)⁶ proposed legislation intended to address the rights disparity and ensure workers with disabilities earn a fair wage.⁷ That legislation, the Fair Wages for Workers with Disabilities Act of 2011 (House Resolution 3086),⁸ was intended to phase out Section 14(c)’s productivity-based subminimum wage program; however, the proposed bill—opposed by employers of workers with disabilities⁹—died on the house floor during the 112th Congress.¹⁰ Representative Gregg Harper (R-Ms.)¹¹ recent-

3. For example, the enactment of the Americans with Disabilities Act. *See generally* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(7) (2012).

4. *See* The Fair Labor Standards Act of 1938, 29 U.S.C. § 214(c) (1989).

5. *Rep. Clifford “Cliff” Stearns*, GOVTRACK.US, http://www.govtrack.us/congress/members/clifford_stearns/400388 (last visited Mar. 20, 2014). Cliff Stearns was a U.S. Representative for Florida’s 6th Congressional District, serving from 1989 to 2013. *Id.*

6. *Rep. Timothy Bishop*, GOVTRACK.US, http://www.govtrack.us/congress/members/timothy_bishop/400031 (last visited Mar. 20, 2014). Timothy Bishop is a U.S. Representative for New York’s 1st Congressional District, serving from 2003 to 2015. *Id.*

7. Deborah Hammonds, *Congressmen Introduce Fair Wages for Workers with Disabilities Act*, EMP. L. DAILY (Oct. 26, 2011), <http://www.employmentlawdaily.com/index.php/2011/10/26/congressmen-introduce-fair-wages-for-workers-with-disabilities-act/>.

8. Fair Wages for Workers with Disabilities Act of 2011, H.R. 3086, 112th Cong. (2011), available at <http://www.govtrack.us/congress/bills/112/hr3086>.

9. For example, one company opposed to the bill was Goodwill. *See* Mike Ervin, *NFB Boycott Targets Subminimum Wage*, INDEPENDENCE TODAY, <http://www.itodaynews.com/2012-issues/august2012/boycott.htm> (last visited Mar. 20, 2014).

10. *See* H.R. 3086.

11. *Rep. Gregg Harper*, GOVTRACK.US, http://www.govtrack.us/congress/members/gregg_harper/412280 (last visited Mar. 20, 2014). Gregg Harper is a U.S. Representative for Mississippi’s 3rd congressional district, serving from 2009 to 2015. *Id.*

ly proposed similar legislation during the 113th Congress.¹² The Fair Wages for Workers with Disabilities Act of 2013 (House Resolution 831) was referred to the House Committee on Education and the Workforce, which has no currently scheduled action on the bill.¹³

This Note argues for the repeal of Section 14(c) of the FLSA, which continues to perpetuate a system allowing employers to pay less than minimum, or “subminimum,” wage to certain employees with disabilities. The Section 14(c) program is a relic of policy leftover from the 1930s and does not help the disabled community, but rather rests on the presumption that persons with disabilities never progress. In light of recent House Resolution 3086, Congress went against the current trend of encouraging maximum independence and equal opportunities for persons with disabilities and instead upheld the subminimum wage program; however, Congress now has another opportunity to repeal Section 14(c) with House Resolution 831.

Part II of this Note examines the historical development of disability rights and the circumstances giving rise to House Resolutions 3086 and 831. Part III discusses the pros and cons of Section 14(c)’s subminimum wage program—using Washington State as a model, this Note argues for the repeal of Section 14(c) of the FLSA. Part IV suggests alternatives to the Section 14(c) program. Part V briefly concludes.¹⁴

II. HISTORICAL DEVELOPMENT OF DISABILITY RIGHTS AND WAGE LEGISLATION

Although discriminatory in its application, the Fair Labor Standards Act’s Section 14(c) subminimum wage certificate program seems to have largely escaped the critical attention of disability rights activists despite its embodiment of the very stereotypical assumptions targeted by the

12. Fair Wages for Workers with Disabilities Act of 2013, H.R. 831, 113th Cong. (2013), available at <http://www.govtrack.us/congress/bills/113/hr831>.

13. *Fair Wages for Workers with Disabilities Act Reintroduced*, ARC: CAPITOL INSIDER (Mar. 4, 2013), <http://insider.thearc.org/2013/03/04/fair-wages-for-workers-with-disabilities-act-reintroduced/>.

14. The goal of this Note is to critically examine Section 14(c) of the FLSA and the need for its repeal in order to make good on the ADA’s policies designed to empower and enforce the civil rights of persons with disabilities. Although this Note focuses on Section 14(c)’s application to person with disabilities, there are many other groups affected by Section 14 and who are currently calling for the repeal of the statute. Also, this Note’s focus on Washington and Oregon is not intended to suggest that they are the only states in which subminimum wage concerns exist. Because the ultimate goal of this Note is to draw attention to the blatant inequality resulting from Section 14(c), this Note discusses Section 14(c)’s effect on Washington and Oregon’s wages merely as a concrete illustration of why Section 14(c) should be repealed.

Americans with Disabilities Act (ADA).¹⁵ This may be changing, however, as activists and the disabled community come to recognize a reality articulated by Samuel Bagenstos:¹⁶ “In the post-ADA world, Section 14(c) is an anomaly in the law, and it is one that should be ed.”¹⁷ This reality gives rise to the dire need for a systematic restructuring of employment opportunities for individuals with disabilities. Regardless of the approach chosen, one thing is certain—Section 14(c) of the FLSA must be repealed. To understand the current landscape of disability rights may require some understanding of how we arrived at this point. This Part thus begins by discussing the historical development of disability rights. For the convenience of readers new to the Section 14(c) program, this Part then outlines the basic structure and tenets of Section 14(c), and the rise of sheltered workshops that are the holders of over 94% of Section 14(c) subminimum wage certificates. Lastly, this Part considers recent statutory challenges to the subminimum wage certificate program.

A. Development of Disability Rights

At the close of the nineteenth century, Washington’s mission for the disabled was misguided but well-intentioned. Like most states, Washington’s modest goals for the disabled community included furnishing bodily care, medical attention, and instruction with training in a manner of cleanliness.¹⁸ During the early twentieth century, these goals fell to the wayside as the American eugenics movement gained support, focusing on the compulsory sterilization of the poor, disabled, and the “immoral” in order to “prevent degeneracy of race, pauperism, insanity and crime by permitted feeble-minded to procreate their kind.”¹⁹ On March 22, 1909, Washington became the second state in the United States to pass a law allowing for the forced sterilization of people with

15. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2012). The ADA is the dominant source of disability rights in the United States.

16. Samuel Bagenstos is a professor of law at the University of Michigan. Mr. Bagenstos also served as the Principal Deputy Assistant Attorney General for the U.S. Department of Justice Civil Rights Division from 2009 to 2011. *Faculty Bio, Samuel Bagenstos*, UNIV. OF MICH. L. SCH., <https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=sambagen> (last visited Mar. 21, 2014).

17. Samuel R. Bagenstos, *The Case Against the Section 14(c) Subminimum Wage Program*, NAT’L FED’N OF THE BLIND, http://nfb.org/Images/nfb/documents/word/14c_Report_Sam_Bagenstos.doc (last visited Mar. 20, 2014).

18. BARBARA BRECHEEN, *FROM SEGREGATION TO INTEGRATION* 98 (1988).

19. *Id.* at 99.

disabilities and other citizens in the name of improving society.²⁰ Such pieces of legislation were buttressed by the United States Supreme Court's 1927 decision in *Buck v. Bell*,²¹ in which the Court upheld a statute permitting forced sterilization of the mentally retarded for the protection and health of the state, famously writing that "three generations of imbeciles are enough."²²

During the first half of the twentieth century, institutionalization of disabled people rose in popularity;²³ however, during the 1960s, there was strong pushback to keep individuals with disabilities in community settings or return them home as soon as possible.²⁴ With origins in the U.S. civil rights movement, the disability rights movement focused on the right of self-determination and on an individual's ability to live independently.²⁵ Deinstitutionalization was largely popularized after the media exposed Willowbrook State School, a state-supported institution for children with intellectual disabilities in New York. Geraldo Rivera's 1972 exposé brought the crowded, filthy living conditions and the neglect of institutionalized residents into America's living room.²⁶ This triggered a number of lawsuits against state-run institutions and, for the most part, institutionalization policies dropped in favor of integrating the developmentally disabled into the community.²⁷

20. *Eugenics and Disability: History and Legacy in Washington*, UNIV. OF WASH., <http://depts.washington.edu/disstud/eugenics-and-disability> (last visited Mar. 20, 2014). In addition to being the second state to pass a compulsory sterilization law in the United States, Washington also passed a broader sterilization law in 1921. The law touted that the sterilization of certain mentally deficient and morally degenerate persons and of habitual criminals was within the police power of the state. In 1942, the sterilization law was declared unconstitutional. See Lutz Kaelber, *Eugenics: Compulsory Sterilization in 50 American States*, UNIV. OF VT., <http://www.uvm.edu/~lkaelber/eugenics/WA/WA.html> (last visited Mar. 20, 2014); see also *In re Hendrickson*, 123 P.2d 322 (Wash. 1942).

21. 274 U.S. 200, 207 (1927). Although *Buck v. Bell* was never officially overturned, eugenics case law appears to end with *Skinner v. Oklahoma*, 316 U.S. 535 (1941).

22. *Buck*, 274 U.S. at 207.

23. BRECHEEN, *supra* note 18, at 99–101.

24. *Id.* at 104.

25. See *id.* at 105. At the forefront of the disability rights movement was the issue of deinstitutionalization and integration into the community to allow people with disabilities to live as more active participants in the community. Advocates included individuals from the non-disabled and disabled community. The independent living and self-advocacy movements also gained a strong footing during this time. See generally ROBERTA ANN JOHNSON, MOBILIZING THE DISABLED, IN WAVES OF PROTEST: SOCIAL MOVEMENTS SINCE THE SIXTIES 22–45 (1999); *The Disability Rights and Independent Living Movement*, UNIV. OF CAL. BERKELEY, <http://bancroft.berkeley.edu/collections/drilm/index.html> (last updated May 4, 2010).

26. GERALDO RIVERA, WILLOWBROOK: A REPORT ON HOW IT IS AND WHY IT DOESN'T HAVE TO BE THAT WAY (1972).

27. *Id.*

Around this same time, Congress recognized the serious and pervasive problems of isolation and segregation of individuals with disabilities. To address these problems, Congress enacted civil rights laws designed to protect persons with disabilities from discrimination for reasons related to their disabilities. Thus, Section 504 of the Rehabilitation Act of 1973²⁸ (Section 504) was enacted to protect the rights of individuals with disabilities enrolled in programs and activities (including schools) receiving federal funds. Widely recognized as the first civil rights statute for persons with disabilities, Section 504 provides, “No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”²⁹

The ADA’s³⁰ Title II language, as it applies to public entities, is identical.³¹ The ADA also broadened its application to agencies and businesses, which must comply with the non-discrimination and accessibility provisions of the law under Title III of the ADA.³² As such, the ADA affords similar protections against discrimination to Americans with disabilities³³ similar to the protections the Civil Rights Act of 1964 affords to African-Americans.

By providing broad protections in employment, transportation, public accommodations, telecommunications, and the public services available for people with disabilities, the passage of the ADA was a major step in correcting past wrongs experienced by people with disabilities. Landmark decisions like *Olmstead v. L.C.*³⁴ have been used to interpret the scope of the ADA. Hailed as the *Brown v. Board of Education*³⁵ of the disabled rights movement, the U.S. Supreme Court’s decision in *Olmstead* holds that the unjustified isolation and segregation of the

28. 29 U.S.C. § 701 (2012). Section 504 of the Rehabilitation Act was the precursor to the Americans with Disabilities Act of 1990.

29. *Id.* § 794.

30. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2012).

31. *Id.* § 12131.

32. Civil Rights Div., U.S. Dep’t of Justice, *Disability Rights Section, Title II Highlights*, AMS. WITH DISABILITY ACT, <http://www.ada.gov/t2hlt95.htm> (last updated Aug. 29, 2002).

33. The ADA provides a three-part definition of disability. Under the ADA, an individual with a disability is a person who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 42 U.S.C. § 12102.

34. 527 U.S. 581 (1999), *aff’d in part, vacated in part, and remanded in part*.

35. 347 U.S. 483 (1954).

disabled, including persons with developmental disabilities, constitutes a form of discrimination.³⁶

Essentially, *Olmstead* reaffirms the ADA's requirement that people with disabilities have a right to receive services in the most integrated setting appropriate to them.³⁷ The Court reasoned that public entities are required to provide community-based services to persons with disabilities when (a) the services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) the services can be reasonably accommodated taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity.³⁸ The Supreme Court explained that this holding reflects two evident judgments.³⁹ First, "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."⁴⁰ Second, "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."⁴¹ In making these findings, the Court complied with the ADA's integration mandate, requiring public entities to reasonably modify their policies, procedures, or practices in order to avoid discrimination.⁴²

In the years since the *Olmstead* decision, the ADA's integration mandate has been the subject of substantial litigation.⁴³ While individuals with disabilities have made significant progress in expanding rights related to education and housing, employment continues to be a battleground where there is significant room for progress. People with disabilities are regularly denied freedom of choice, or in other words, "To be denied the right to choose how to lead one's life is to deny a person's right as a human being."⁴⁴

36. *Olmstead*, 527 U.S. at 597.

37. *Id.* at 591.

38. *Id.* at 607.

39. *Id.* at 600.

40. *Id.*

41. *Id.* at 601.

42. *Id.* at 603 (citing 28 C.F.R. § 35.130(b)(7)).

43. See, e.g., *Lynn E. v. Lynch*, No. 1:12-cv-53-LM (D.N.H. Apr. 4, 2012) (enforcing the integration mandate for institutionalized persons with mental illness); *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199 (D. Or. 2012) (enforcing the integration mandate in employment).

44. *Olmstead at Work: Legal Frameworks for Integrating Individuals with Mental Disabilities into the Workplace*, YOUTUBE (Mar. 21, 2011), <http://www.youtube.com/watch?v=kptYL4NBv2U> (content uploaded by Case Western Reserve University School of Law).

Despite the passage of Section 504, the ADA, and the groundbreaking *Olmstead* decision, the employment rate of Americans with disabilities remains dramatically lower than the employment rate of people without disabilities.⁴⁵ Not only are Americans with disabilities underemployed, but federal law⁴⁶ also allows persons with disabilities to be dramatically undercompensated.

B. The Fair Labor Standards Act's Section 14(c) Program

The Fair Labor Standards Act (FLSA)⁴⁷ provides for a federal minimum wage,⁴⁸ overtime pay,⁴⁹ and child labor protections.⁵⁰ At the time the FLSA was adopted, Congress found that some employers paid substandard wages and addressed the issue in 1938 by establishing a minimum wage of \$0.25 an hour.⁵¹ After several increases, the federal minimum wage is currently set at \$7.25 per hour,⁵² which means that under the FLSA, employers must pay employees at least minimum wage.⁵³ However, there are still a handful of exemptions that allow employers to pay their employees a subminimum wage: Such employees include tipped employees, workers with disabilities, new hires under the age of twenty, full-time students who work in retail or service establishments, agricultural workers, institutions of higher education, and high school students who are at least sixteen years of age and enrolled in a vocational education program.⁵⁴ Under Section 14(c) of the FLSA, employers may pay subminimum or special minimum wages (SMWs) to workers with disabilities.⁵⁵ Today, about 424,000 persons with disabilities are paid subminimum wages.⁵⁶

45. As of February 2013, the Office of Disability Employment Policy reported that the labor force participation rate of people without disabilities was at 68.8% while the participation of people with disabilities was significantly lower at 20.7%. *Office of Disability Employment Policy*, U.S. DEPT OF LABOR, <http://www.dol.gov/odep/> (last visited Mar. 21, 2014).

46. Fair Labor Standards Act of 1938, 29 U.S.C. § 214(c) (2012).

47. *Id.* § 201–219.

48. *Id.* § 206.

49. *Id.* § 207.

50. *Id.* § 212.

51. GERALD MAYER & DAVID H. BRADLEY, CONG. RESEARCH SERV., R42713, THE FAIR LABOR STANDARDS ACT (FLSA): AN OVERVIEW (2012), available at www.hsdl.org/?view&did=725108.

52. This figure is accurate as of the time of publication.

53. 29 U.S.C. § 206.

54. *Id.* § 213.

55. *Id.* § 214(c). In addition to the federal laws governing minimum wage, many states have their own regulations, requirements, and policies regarding minimum and subminimum wages. Some states have adopted policies that go beyond the federal requirements and place greater restrictions on

At its core, the intent of Section 14(c)'s subminimum wage certificate program is not to maliciously rob disabled workers of fair wages. In fact, Section 14(c) was in many ways adopted to incentivize job creation opportunities for persons with disabilities in work settings where they otherwise might not be hired.⁵⁷ Thus, "to the extent necessary to prevent curtailment of opportunities for employment,"⁵⁸ under Section 14(c) the Secretary of Labor has the power to grant wage certificates, which lawfully permit employers to pay below federal minimum wage to persons "whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury."⁵⁹

Section 14(c) defines a disability as either physical or mental, including blindness; mental illness or retardation; alcoholism; and drug addiction.⁶⁰ It is noteworthy that not all persons with disabilities fall under the Section 14(c) program because the statute is designed to target workers who, because of a disability, have lower productivity level than that of non-disabled workers.⁶¹ This diminished level of productivity requirement is used to justify paying persons with disabilities a wage often far lower than the federal minimum wage.⁶²

The FLSA's subminimum wage program operates under a system of employer certificates from the Department of Labor Wage and Hour Division that authorizes employers to pay subminimum wages.⁶³ An application for a certificate authorizing the payment of special minimum wages to disabled workers is relatively simple and can be completed by the employer.⁶⁴ The Wage and Hour Division issues certificates to three types of employers: work centers, hospital or residential care facilities,

the using of subminimum wages. For example, Washington State makes the paying of subminimum wages permissible under Wash. Rev. Code § 49.46.060 (2014).

56. U.S. GOV'T ACCOUNTING OFFICE, GAO-01-886, SPECIAL MINIMUM WAGE PROGRAM: CENTERS OFFER EMPLOYMENT AND SUPPORT SERVICES TO WORKERS WITH DISABILITIES, BUT LABOR SHOULD IMPROVE OVERSIGHT 1 (2001), *available at* www.gao.gov/new.items/d01886.pdf [hereinafter GAO].

57. *See* MAYER & BRADLEY, *supra* note 51, at 10.

58. 29 U.S.C. § 214(c)(1).

59. *Id.*

60. 29 C.F.R. § 525.3(d) (2014).

61. *See* William G. Whittaker, *Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act*, CORNELL UNIV. ILR SCH. DIGITAL COMMONS (Feb. 9, 2005), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1211&context=key_workplace.

62. Where such workers earn in excess of the federal minimum wage, section 14(c) is not applicable.

63. 29 C.F.R. § 525.7.

64. *See* Wage & Hour Div., U.S. Dep't of Labor, *Fact Sheet #39A, OCCUPATIONAL SAFETY & HEALTH ADMIN.*, http://www.osha.gov/pls/epub/wageindex.download?p_file=F9617/Fact%20Sheet%2039A.pdf (last updated July 2008).

and business establishments.⁶⁵ Work centers, also called “sheltered workshops,” offer employment, training, and rehabilitation services. Of the estimated 5,600 employers paying special minimum wages to workers with disabilities, the General Accounting Office (GAO) determined about 84% are sheltered workshops—established to provide employment opportunities to persons with disabilities.⁶⁶

In order to pay a disabled worker less than federal minimum wage, the employee’s disabilities must impair his productive capacity in the job being performed.⁶⁷ While no specific wage floor is mandated, the wages paid must be scaled to the individual’s productivity.⁶⁸ The worker’s special minimum wage is calculated “commensurate” to the productivity of experienced workers who are not disabled and who perform the same kind and quality of work in the surrounding vicinity.⁶⁹ Thus, if a disabled worker’s productivity is reported to produce 50% of the productivity of a nondisabled worker doing essentially the same kind of work, the disabled worker can be legally compensated with 50% of the prevailing wage.⁷⁰ This system of paying subminimum wages keeps people with disabilities in a cycle of poverty and dependence.⁷¹

Per Section 14(c), an employer must review and adjust the disabled workers’ wages accordingly every six months.⁷² Additionally, the wages of all disabled workers must also be adjusted at least annually to account for changes in wages paid to experienced nondisabled workers.⁷³ Any employee (or the employee’s parent or guardian) paid a special minimum wage may ask the Wage and Hour Division to review the worker’s wage.⁷⁴ Unfortunately, financing a lawsuit against an employer violating the Section 14(c) program is all but impossible given the paltry wages of the disabled workers.⁷⁵

65. Wage & Hour Div., *Field Operations Handbook*, U.S. DEP’T OF LABOR, <http://www.dol.gov/whd/FOH/ch64/64d00.htm> (last visited Mar. 21, 2014).

66. See GAO, *supra* note 56, at 3.

67. 29 U.S.C. § 214(c)(1) (2012).

68. *Id.* § 214(c)(1)(B).

69. *Id.*

70. 29 C.F.R. § 525.3(i) (2014).

71. *Sheltered Workshops No Better Than Institutions, Report Finds*, R.I. DEVELOPMENTAL DISABILITIES COUNCIL, <http://www.riddc.org/downloads/websiteShelteredWSreport.pdf> (last visited Mar. 21, 2014).

72. 29 U.S.C. § 214(c)(2)(A) (2012).

73. *Id.* § 214(c)(2)(B).

74. *Id.* § 214(c)(5)(A).

75. See Whittaker, *supra* note 61, at 30. During a hearing of the 103rd Congress, James Gashel, speaking for the National Federation for the Blind, explained that while workers “can challenge the sub-minimum wage in a hearing . . . they are almost certain to lose” due to the costs incurred in

Unlike other FLSA subminimum wage provisions which make workers eligible for wages below the minimum because they are at a particular stage in their careers (apprentices, students, etc.),⁷⁶ Section 14(c) denies disabled workers minimum wage for potentially any job based on their disability status—“a status that can be lifelong.”⁷⁷ In the post-ADA and *Olmstead* world, such blatant discrimination demands justification.

C. The Rise of Sheltered Workshops

Section 14(c) allows employers to use government-issued certificates to pay their disabled workers subminimum or special minimum wages,⁷⁸ a practice often, although not exclusively, used in sheltered workshops. Labor force statistics from February 2013 state that 68.8% of working-age adults (ages sixteen and over) without disabilities are employed, compared with a meager 20.1% of working-age adults with disabilities.⁷⁹ In 2001, a GAO survey estimated that about 424,000 workers with disabilities earned special minimum wages,⁸⁰ and of these workers, 400,000, or about 94%, were employed by work centers or sheltered workshops.⁸¹ Businesses, hospitals, other residential care facilities, or schools employ the remaining workers.⁸² In theory, the wages for subminimum wage employees are commensurate with their productivity.⁸³

Consistent with the perceptions and policies originally used to justify institutionalization, sheltered workshops abide by the paternalistic belief that disabled persons are incapable of adequately functioning in a community setting.⁸⁴ Sheltered workshops arose from the need to provide an outlet for the identified vocational skills of persons classified as having severe disabilities.⁸⁵ Within the sheltered workshop model, there are two distinct types of shops: transitional and extended. Transitional workshops attempt to eventually find competitive community employ-

challenging an employer's practices. James Gashel, Testimony of the National Federation of the Blind before the Subcommittee on Labor Standards (Mar. 16, 1994).

76. 29 U.S.C. § 214(a)–(b).

77. See Bagenstos, *supra* note 17, at 6.

78. 29 U.S.C. § 214(c).

79. John Butterworth et al., *State Data: The National Report on Employment Services and Outcomes*, INST. FOR COMMUNITY INCLUSION, UNIV. OF MASS. BOS., 9 (2011), http://statedata.info/statedatabook/img/statedata2011_Fweb.pdf.

80. GAO, *supra* note 56, at 18.

81. *Id.*

82. *Id.*

83. See 29 U.S.C. § 214(c)(1)(B) (2012).

84. See STEPHEN T. MURPHY & PATRICIA M. ROGAN, *CLOSING THE SHOP: CONVERSION FROM SHELTERED TO INTEGRATED WORK* ix (1995).

85. *Id.*

ment for individuals once they are deemed “ready for community work;”⁸⁶ extended workshops provide indefinite sheltered work for people deemed “unable to compete in the open labor market.”⁸⁷ It is beyond the purview of this Note to review all justifications for sheltered workshops; however, the inherent contradictory policy message that is furthered by the existence of sheltered workshops is evident. While the passage of the ADA signals that people with disabilities are recognized as capable citizens with the same rights as those without disabilities, many people with disabilities continue to be subjected to old stereotypes due to the segregating effect of sheltered workshops and the Section 14(c) program that transmits images of deficiency, weakness, and inequality.

Segregated subminimum wage programs, often referred to as sheltered workshops, pay people with disabilities below minimum wage, often for fully productive work. In 1970, there were approximately 160,000 workers with disabilities employed in sheltered workshops; in 1987, this number ballooned to over 650,000.⁸⁸ As recent as 2001, GAO surveys determined that approximately 400,000 workers were employed in sheltered workshop programs.⁸⁹ The GAO estimates that over half of these certificate employees are earning \$2.50 or less per hour.⁹⁰ Seventy-four percent of certificate employees were individuals with mental retardation or another developmental disability.⁹¹

The issue of subminimum wages recently gained traction in Oregon when Disability Rights Oregon (DRO) filed suit against the State. DRO alleged that the State failed to provide supported employment services to Oregon residents in the most integrated setting as is required under *Olmstead*.⁹² In total, DRO asserts that more than 2,300 residents are segregated in sheltered workshops and are paid below minimum wage—many of these workers are often paid less than \$1.00 per hour for their labor in the workshops.⁹³

86. *Id.* at 6.

87. *Id.*

88. *Id.* at 7.

89. See GAO, *supra* note 56, at 18.

90. *Id.* at 4.

91. See CLOSING, *supra* note 84, at 3.

92. Lane v. Kitzhaber, 841 F. Supp. 2d 1199 (D. Or. 2012).

93. Lane v. Kitzhaber *Certified As a Class Action*, DISABILITY RTS. OR., <http://www.dr Oregon.org/news/Lane-v-Kitzhaber-Certified-as-Class-Action> (last visited Mar. 21, 2014).

*D. Challenges to FLSA Section 14(c) and
House Resolutions 3086 and 381*

In the subsequent decades since the enactment of the FLSA, there have been numerous challenges to, and ongoing restructuring of, section 14(c).⁹⁴ In 2001, during the 107th Congress, the issue of Section 14(c) emerged. Then-Representative Johnny Isakson (R-Ga.) introduced House Resolution 881, which would have prevented the Secretary of Labor from issuing certification for the payment of a subminimum wage to persons who are vision-impaired; however, no action was taken on the Isakson proposal.⁹⁵ In 2001, the GAO released a scathing study of the Department of Labor's (DOL) management of the Section 14(c) program.⁹⁶ The GAO concluded that the DOL "lacks the data it needs to manage the program and determine what resources are needed to ensure employer compliance."⁹⁷ The GAO also stated that the DOL "has not done all it can to ensure that employers comply with the law" and "has provided little training to its staff" that would enable them to run the program.⁹⁸

On October 4, 2011, Representatives Cliff Stearns and Tim Bishop introduced House Resolution 3086 during the 112th Congress.⁹⁹ House Resolution 3086 would phase out Section 14(c)'s special wage certificates, which continue to allow employers to hire individuals with disabilities and compensate them at subminimum wages below the federal minimum wage of \$7.25 an hour.¹⁰⁰ The bill proposed a gradual transition to fair wages by revoking special wage certificates held by private for-profit entities one year from the bill's date of enactment; by public or governmental entities within two years; and by non-profit entities within three years.¹⁰¹ Representative Bishop compellingly argued for the end of wage discrimination: "Ensuring that Americans with disabilities receive equal pay for equal work is more than a matter of basic fairness, it's a long-overdue acknowledgement of the value disabled Americans contribute to our workplaces every day."¹⁰² Along similar lines, Representative

94. See Whittaker, *supra* note 61, at 13, 29.

95. *Id.* at 33.

96. See GAO, *supra* note 56, at 18.

97. *Id.* at 4.

98. *Id.* at 5.

99. Fair Wages for Workers with Disabilities Act of 2011, H.R. 3086, 112th Cong. (2011).

100. Michelle Diamant, *Plan To Regulate Subminimum Wage Sparks Debate*, DISABILITY SCOOP (July 19, 2011), <http://www.disabilityscoop.com/2011/07/19/plan-subminimum-wage/13562/>.

101. H.R. 3086.

102. Chris Danielson, *U.S. Representatives Stearns and Bishop Introduce Fair Wages for Workers with Disabilities Act*, GA. ADVOC. OFF. (Oct. 4, 2011), <http://thegao.org/initiatives/em>

Stearns stated, “Protections for disabled workers were excluded in the Fair Labor Standards Act in the mistaken belief that they were not as productive as other workers. Workers with disabilities contribute to our economy and to our society, and they deserve equal pay for equal work.”¹⁰³ New York Governor David A. Paterson, a strong supporter of the bill, criticized Section 14(c) as “anachronistic.”¹⁰⁴

The main findings to support repeal of Section 14(c) cited that paying individuals with disabilities below minimum wage was antiquated. Unlike when the bill was originally adopted in the 1930s, today there are vastly greater employment opportunities and assistive technologies for individuals with disabilities.¹⁰⁵ Congress also found that the bill incentivizes cheap exploitation of labor.¹⁰⁶ Other findings referenced GAO investigations citing that the DOL Wage and Hour Division charged with overseeing the special wage certificates often lacked the capacity, training, and resources to monitor employers adequately.¹⁰⁷

Soon after the bill’s introduction, it was referred to the House Committee on Education and the Workforce where the bill was left to the committee chair to determine whether it would move past the committee stage.¹⁰⁸ Despite eighty-two cosponsors of the original bill and significant push from disability advocates, House Resolution 3086 remained at the committee level at the close of the 112th Congress.

On February 26, 2013, Representative Gregg Harper introduced House Resolution 831, titled the Fair Wages for Workers with Disabilities Act of 2013.¹⁰⁹ Like its counterpart in the 112th Congress, House Resolution 831 would slowly phase out Section 14(c). As Representative Harper explained,

Section 14(c) of the FLSA, enacted out of the ignorance of the true capacity of people with disabilities, currently prevents over 300,000 people with disabilities from gaining access to the work and training

ployment/u-s-representatives-stearns-and-bishop-introduce-fair-wages-for-workers-with-disabilities-act/.

103. Hammonds, *supra* note 7. Protections for disabled workers were excluded in the Fair Labor Standards Act in the mistaken belief that they were not as productive as other workers. Workers with disabilities contribute to our economy and society; thus, they deserve equal pay for equal work.

104. Chris Danielsen, *Governor David Paterson Urges Immediate Passage of Fair Wages with Disabilities Act*, BUS. WIRE (Oct. 10, 2011), <http://www.businesswire.com/news/home/20111010005904/en/Governor-David-Paterson-Urges-Passage-Fair-Wages>.

105. H.R. 3086.

106. *Id.*

107. *Id.*

108. *Id.*

109. Fair Wages for Workers with Disabilities Act of 2013, H.R. 831, 113th Cong. (2013).

environments that have been proven to be more cost effective and to provide more competitive integrated work outcomes. Subminimum wage work is just an expression of low expectations that instills a false sense of incapacity in individuals who could become competitively employed with the proper training in support.¹¹⁰

These efforts to repeal Section 14(c) are geared at correcting the decades of wrongs workers with disabilities have incurred in being robbed of fair and equal wages.

III. DOES SECTION 14(C) STILL MAKE SENSE?

[D]isability is a natural part of the human experience that does not diminish the right of individuals with developmental disabilities to live independently, to exert control and choice over their own lives, and to fully participate in and contribute to their communities through full integration and inclusion in the economic, political, social, cultural, and educational mainstream of United States society.¹¹¹

In examining the issue of subminimum wage, it is important to consider the reasons for adopting the program and analyze whether those reasons are still an effective and valid strategy for enhancing employment of persons with disabilities. To understand Section 14(c) today, some understanding of the arguments for and against its repeal are required. This Part examines the economic, workforce participation, freedom of choice, and administrative arguments offered by Section 14(c) supporters to keep the special minimum wage certificates program as well as the criticisms mounted by Section 14(c) opponents.

A. Economic Arguments

1. Supporter Argument: Earning a Wage Is Better Than No Wage at All

The underpinning of this justification reaches back to the legislation's original inception. At a joint hearing before the Senate and House Labor Committees on the Fair Labor Standards Act, hearing testimony by Yale Professor Hudson Hastings expressed concern that the creation of a minimum wage may be set "so high as to prevent millions of work-

110. Chris Danielsen, *National Federation of the Blind Applauds Introduction of Fair Wages Legislation*, NAT'L FED'N OF THE BLIND (Feb. 27, 2013), <https://nfb.org/national-federation-blind-applauds-introduction-fair-wages-legislation>.

111. The Developmental Disabilities Act and Bill of Rights Act, 42 U.S.C. § 15001 (2012).

ers who are subnormal in their physical or mental capacities from securing employment whatsoever.”¹¹² With this in mind, it appears as though Section 14(c)’s purpose is to ensure that open-market employers are not discouraged from hiring workers with disabilities because of the requirement to pay them a minimum wage.¹¹³ This congressional intent is embodied in the language of Section 14(c), which provides that below-minimum wages are designed to “prevent curtailment of opportunities for employment.”¹¹⁴ Section 14(c)’s ability to allow employers to scale wages relative to the disabled worker’s individual productivity makes employing disabled workers an economically viable option rather than mere charity or, worse, total unemployment. Regardless of what one believes about the validity of this argument, Congress adopted the ADA concluding that it is often stereotypes—not facts—that lead employers to believe that people with disabilities cannot be productively employable.¹¹⁵

One employer who has put the Section 14(c) program to work on a large scale is Goodwill. Goodwill’s network of 165 community-based organizations in the United States and Canada employs a total of 113,000 workers with disabilities.¹¹⁶ When House Resolution 3086 was proposed to repeal the Section 14(c) program, Goodwill issued a number of press releases opposing the bill.¹¹⁷ In these press releases, Goodwill admitted that of its 113,000 employees, approximately 5%–7% were receiving below minimum wage under the Section 14(c) program.¹¹⁸ According to the company, the certificate program enables Goodwill to hire thousands

112. See Bagenstos, *supra* note 17, at 3 (citing *Fair Labor Standards Act of 1937: Joint Hearings Before the S. Comm. on Educ. and Labor and the H. Comm. on Labor*, 75th Cong. 1080 (1937) (statement of Hudson Hastings, Professor, Yale University)).

113. See Bagenstos, *supra* note 17, at 6.

114. 29 U.S.C. § 214(c)(1) (2012).

115. *Question & Answers About Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/types/intellectual_disabilities.cfm (last visited Mar. 21, 2014). Many employers will exclude individuals with intellectual disabilities from the workplace because of persistent—but unfounded—myths, fears, and stereotypes. For instance, some employers believe that workers with intellectual disabilities will have a higher absentee rate than employees without disabilities. Studies, however, show that this is not true: workers with intellectual disabilities are absent no more than other workers. See, e.g., *Myths, Misconceptions, and Realities of Disability*, MICH. COMMUNITY SERVICE COMMISSION, http://www.michigan.gov/mcsc/0,4608,7-137-8074_22503_231_85-63417--,00.html (last visited Mar. 21, 2014).

116. *Employment of People with Disabilities Through FLSA Section 14(c)*, GOODWILL INDUSTRIES INT’L, INC., <http://www.goodwill.org/wp-content/uploads/2013/06/Goodwill-14c-Fair-Wages-Position-Paper.pdf> (last visited Mar. 21, 2014) [hereinafter *Employment of People with Disabilities*].

117. *Id.*

118. *Id.*

of employees with severe disabilities “who otherwise might not be part of the workforce.”¹¹⁹

2. Opponent Argument: Section 14(c)’s Subminimum Wage Program Is Facially Discriminatory

Like nondisabled workers, workers with disabilities need a living wage that raises them out of poverty and reduces reliance on public assistance. Since Section 14(c)’s inception, employers have been quick to take advantage of the misconception that workers with disabilities are not productive enough to earn a living wage.¹²⁰ But this is simply not the case. As President Barack Obama emphasized in his 2013 State of the Union address, “We may do different jobs, wear different uniforms, and hold different views than the person beside us. But as Americans, we all share the same proud title: We are citizens.”¹²¹

Advocacy organizations like the National Federation of the Blind are proponents of the idea that just because a person may look or do things differently than a nondisabled worker, it does not mean the disabled worker is worthless or *worth less* than their nondisabled counterpart. People are *worth more* than merely how fast their hands move and should not be discriminated against because of the disabilities a person may possess. Making assumptions about a worker’s abilities is discriminatory and is contrary to the mission of the ADA.

B. Participation in the Workforce

1. Supporter Argument: Section 14(c) Encourages Employers in the Open Market to Hire People with Disabilities

Proponents of Section 14(c) justify the program because it encourages open-market employers to hire workers with disabilities. Among such businesses hiring workers at subminimum wages are well-known organizations such as Goodwill, Easter Seals, United Cerebral Policy, and the ARC.¹²² Research conducted by the National Federation of the Blind (obtained via the Freedom of Information Act) revealed that an

119. The certificate enables Goodwill and thousands of other employers to provide opportunities for people with severe disabilities who otherwise might not be part of the workforce.

120. Marc Maurer, *What Remains Unsaid About the Minimum Wage*, NAT’L FED’N OF THE BLIND (Feb. 13, 2013), <https://nfb.org/blog/vonb-blog/what-remains-unsaid-about-minimum-wage>.

121. President Barack Obama, 2013 State of the Union Address, *supra* note 1.

122. For a full list of employers paying subminimum wages under Section 14(c)’s special minimum wage certificate program, see Wage & Hour Div., *Community Rehabilitation Programs (CRPs) and Patient Worker Certificate Holders*, U.S. DEP’T OF LABOR, <http://www.dol.gov/whd/specialemployment/CRPlist.htm> (last updated Nov. 1, 2013).

Easter Seals facility paid as little as fifty-two cents per hour, while some Goodwill workers were paid as little as \$1.44 per hour.¹²³ Such employers argue that the certificate program enables individuals, who might not otherwise be a part of the workforce, to earn a wage.¹²⁴

2. Opponent Argument: Sheltered Workshops Are Not a Stepping Stone to Competitive Employment

Recall that 94% of disabled workers receiving subminimum wages work in sheltered workshops—not the open market.¹²⁵ While it may seem persuasive to argue that Section 14(c) programs, particularly sheltered workshops, provide a training ground for persons with disabilities to learn and perfect skills before leveraging those experiences into a job in a competitive labor market, this simply is not the case. In a report on the Section 14(c) program, Samuel Bagenstos noted that unlike Section 14(c)'s provisions for apprentices and students—which offer a temporary opportunity for individuals to receive training before jumping into their careers—most individuals in sheltered workshops will not move to competitive employment.¹²⁶

Sheltered workshops, subsidized by Section 14(c), do not adequately train people with disabilities for real-world employment because many workshops are not designed to provide job-relevant skills. In fact, sheltered workshops are often “terminal places of employment in which so-called unemployable may find a drudge’s niche at the bench.”¹²⁷ Because individuals with disabilities are often tasked with busy work such as folding and unfolding newspapers,¹²⁸ these workers never develop any skills to transition out of the workshop and into the competitive labor market. Due to the sequestered and sheltered nature of these employers, these jobs provide poor vehicles for developing skills, such as behavioral expectations and social relations, that real employers require in the open-market economy.¹²⁹

Given the nature of the so-called “work” assigned to many individuals with disabilities in sheltered workshops, the subminimum wage system breeds an unbreakable chain of dependence. The use of subminimum wage certificates often means that individuals with disabilities cannot

123. Ervin, *supra* note 9.

124. *Employment of People with Disabilities*, *supra* note 116.

125. See GAO, *supra* note 56.

126. See Bagenstos, *supra* note 17, at 8.

127. *Id.* at 9 (internal citation omitted).

128. Susan Stefan, *Beyond Residential Segregation: The Application of Olmstead to Segregated Employment Settings*, 26 GA. ST. U. L. REV. 875, 877 (2010).

129. See Bagenstos, *supra* note 17, at 10.

succeed in establishing financial independence. “The lack of a true minimum wage for many workers with disabilities keeps them in a life of perpetual poverty. It leaves them dependent on family or government programs just to meet their basic needs of food, shelter, and medical care.”¹³⁰

C. Freedom of Choice

1. Supporter Argument: Section 14(c) Preserves Freedom of Choice

Proponents of Section 14(c) justify the program by explaining that it instills self-determination and freedom of choice by allowing people with disabilities to seek the employment of their choosing. Goodwill, a proponent of this theory, relies on a heartstring-pulling argument that the certificate program enables Goodwill and other employers to employ 7,300 people with disabilities who might not otherwise be part of the workforce.¹³¹ ACCSES, the self-proclaimed voice of disability service providers,¹³² justifies the program because it preserves “the right of an individual with a significant disability to make an informed choice.”¹³³ ACCSES also recognizes that many of the individuals with significant disabilities might be forced to stay at home and face the reality of no work if programs funded by Section 14(c) were shut down.¹³⁴

2. Opponent Argument: Section 14(c) Perpetuates Old Stereotypes and Misconceptions of the Abilities of Persons with Disabilities

In actuality, this freedom of informed choice is unfair and continues to enforce “the soft bigotry of low expectations” for workers with disa-

130. Laura C. Hoffman, *Sub-Minimum Wage or Sub-Human? The Potential Impact on the Civil Rights of People with Disabilities in Employment*, 17 PUB. INT. L. REP. 14, 17 (2011). Though not within the scope of this piece, it is interesting to note that this forced reliance on federal benefit programs, like Supplemental Security Income and Medicaid, for many disabled workers in fact *requires* disabled workers to be poor in order to receive any form of benefit. See NAT’L DISABILITY RIGHTS NETWORK, SEGREGATED & EXPLOITED: A CALL TO ACTION! THE FAILURE OF THE DISABILITY SERVICE SYSTEM TO PROVIDE QUALITY WORK (2011), available at www.napas.org/images/Documents/Resources/Publications/Reports/Segregated-and-Exploited.pdf.

131. *Employment of People with Disabilities*, *supra* note 122.

132. “ACCSES represents more than 1,200 disability service providers across the country as the *Voice of Disability Service Providers*.” *About Us*, ACCSES, <http://accses.org/about-us> (last visited Mar. 21, 2014). ACCSES promotes community-based solutions that maximize employment and living opportunities for individuals with disabilities. See *id.*

133. Terry R. Farmer, *Opposition to H.R. 3086, the Fair Wages for Workers with Disabilities Act*, ACCSES (Nov. 15, 2011), <http://accses.org/CMS/Resources/dropbox/accseslettertocommitteeadershipopposinghr3086.pdf>.

134. *Employment of Individuals with the Most Significant Disabilities*, ACCSES (July 2012), <http://accses.org/CMS/Resources/dropbox/accsespositionon14c.pdf>.

bilities.¹³⁵ The National Federation of the Blind and other organizations supporting Americans with disabilities consider the freedom of choice argument offered by supporters of the subminimum wage program as one coming from a false sense of compassion rather than an actual interest in preserving choice.¹³⁶ However, a choice to give up equal treatment under the law and equal opportunity is not really a freely made “choice” at all. President of the National Federation of the Blind Dr. Marc Maurer stated,

The Fair Wages for Workers with Disabilities Act [H.R. 3086] is a long-overdue effort to correct an injustice written into a law meant to protect all American workers from abuse and exploitation. Workers with disabilities were excluded from the protections of the Fair Labor Standards Act because of the false belief that we cannot be as productive as Americans without disabilities.¹³⁷

In expanding federal disability rights, it seems logical to eliminate subminimum wage. The ADA passage even shows that measured action was being taken to prohibit employers from discriminating against qualified individuals with disabilities in job application procedures, including hiring, firing, and compensation. Although the ADA affords protection to individuals who, with or without reasonable accommodation, can perform the essential functions of the job, an employer is not required to lower quality or production standards in making accommodations for a disability.¹³⁸ So, while this means that the ADA does not nullify the provisions of Section 14(c), its continued application perpetuates horrendous stereotypes that are in no uncertain terms in direct contravention to the ADA’s policy goals.

D. Administration

1. Supporter Argument: Section 14(c)’s Built-in Procedures Ensure Employer Compliance

Proper program administration ensures that built-in procedures enforce employer compliance. Under Section 14(c) of the FLSA, the Secretary of Labor, “to the extent necessary to prevent curtailment of opportunities for employment,” may issue certificates to permit payment of wag-

135. Maurer, *supra* note 120.

136. *Id.*

137. Michelle Diament, *Congressmen Call for End to Subminimum Wage*, DISABILITY SCOOP (Oct. 5, 2011), <http://www.disabilitycoop.com/2011/10/05/congressmen-end-subminimum/14181/>.

138. *Field Operations Handbook*, *supra* note 65.

es lower than the otherwise applicable federal minimum wage to persons “whose earning or productive capacity is impaired” by disability.¹³⁹ Because disability is not a generic term, the nature and extent of each disability must be assessed together with the precise relationship between the disability and reduced productivity.¹⁴⁰ Under this scheme, no wage floor is mandated, but wages for workers with disabilities are scaled to a wage rate *commensurate with* the worker’s productivity.¹⁴¹

When the Secretary of Labor issues a Section 14(c) certificate to an employer, the certificate’s terms must be made known to the worker upon the petition “and, where appropriate, a parent or guardian of the worker” may also petition.¹⁴² All Section 14(c) wages must be reviewed and adjusted at periodic intervals if appropriate. At a minimum, an employer is required to reevaluate the productivity of hourly paid workers every six months¹⁴³ and conduct a new prevailing wage survey at least every twelve months.¹⁴⁴ This effort requires documentation that is maintained by the employer.¹⁴⁵ The Wage and Hourly Division of the Department of Labor is responsible for the administration and enforcement of the FLSA’s subminimum wage provisions.¹⁴⁶

2. Opponent Argument: The Section 14(c) Program Lacks Administrative Oversight

To pay workers less than federal minimum wage, an employer needs to obtain a Section 14(c) certificate from the Wage and Hour Division of the Department of Labor.¹⁴⁷ Employers are required to renew their certificates annually and assess their employees’ abilities to recalculate commensurate wage rates once every six months. In its 2001 report to Congress,¹⁴⁸ the GAO offered a number of criticisms of the Section 14(c) special minimum wage program. Specifically, the GAO noted a lack of training or guidance of DOL staff; inadequate procedures to ensure employer compliance; failure to track resources devoted to the program; inaccurate data on the number of employers and workers partici-

139. 29 U.S.C. § 214(c)(1) (2012).

140. Recall that a disability unrelated to productivity is insufficient for Section 14(c) purposes. *See id.* § 214.

141. *Id.* § 214(c)(1)(B).

142. *Id.* § 214(c)(5)(A).

143. *Id.* § 214(c)(2)(A).

144. *Id.* § 214(c)(2)(B).

145. 29 C.F.R. § 525.16 (2014).

146. *Enforcement Issues Under FLSA Section 14(c)*, U.S. DEP’T OF LABOR, <http://www.dol.gov/elaws/esa/flsa/14c/20.htm> (last visited Mar. 21, 2014).

147. 29 C.F.R. §§ 525.5, 525.7.

148. *See* GAO, *supra* note 56.

pating in the program; and a general failure to follow up when employers do not renew Section 14(c) certificates.¹⁴⁹ The GAO also acknowledged a gap in written guidance for DOL employees.¹⁵⁰

Recently, the issue of subminimum wage has come under increased scrutiny. In 2009, the Secretary of Labor brought an action against Henry's Turkey Services, a Texas company that profited for decades by supplying mentally disabled workers to an Iowa turkey plant at wages of forty-one cents per hour.¹⁵¹ Henry's Turkey Services housed thirty-one developmentally disabled workers in cockroach-infested bunkhouses with no central heating while confiscating their workers' wages and social security checks.¹⁵² The wages paid to the disabled turkey plant workers never changed during the thirty-year period they worked at the plant, regardless of whether they worked more than forty hours a week.¹⁵³ This violation of rights reflects the inadequacy of administrative oversight in the Section 14(c) program.

At the Washington state level, Kitsap Applied Technology (KAT)—a non-profit organization offering sheltered workshop and other employment services for disabled veterans and adults with developmental disabilities¹⁵⁴—was recently under scrutiny. It was revealed that the agency lacked in several areas, including its fiscal management of \$443,440 in federal and state funds. The investigation showed that KAT was underperforming in meeting Washington's ADA-minded integration policies.¹⁵⁵ KAT is currently trying to get in line with Washington's

149. *See id.* at 26–35.

150. *Public Employer's Guide to FLSA Employee Classification*, 5 THOMPSON PUB. GROUP, INC., Jan. 2000, at 10.

151. *See Judge: Texas Firm Must Pay Disabled Workers \$1.4M*, CBS NEWS (Sept. 20, 2012), [http://www.cbsnews.com/8301-201_162-57516536/judge-texas-firm-must-pay-disabled-workers-\\$1.4m/](http://www.cbsnews.com/8301-201_162-57516536/judge-texas-firm-must-pay-disabled-workers-$1.4m/); *Iowa: Back Wages Are Ordered for Disabled Turkey Plant Workers*, N.Y. TIMES (Sept. 19, 2012), http://www.nytimes.com/2012/09/20/us/iowa-back-wages-are-ordered-for-disabled-turkey-plant-workers.html?_r=0.

152. *APSE's Call to Phase Out Sub-Minimum Wage by 2014*, APSE, [http://www.apse.org/docs/APSE%20Subminimum%20Wage%20Policy%20Statement%2010.09\[1\].pdf](http://www.apse.org/docs/APSE%20Subminimum%20Wage%20Policy%20Statement%2010.09[1].pdf) (last visited Mar. 21, 2014).

153. *See Judge: Texas Firm Must Pay Disabled Workers \$1.4M*, *supra* note 151.

154. *Creating Opportunities and Building Success*, KITSAP APPLIED TECHNOLOGIES, http://www.katkitsap.org/Kitsap_Applied_Technologies/Home.html (last visited Mar. 21, 2014).

155. Chris Henry, *Work Program for Severely Disabled May Lose County Funding*, KITSAP SUN (May 8, 2011), <http://www.kitsapsun.com/news/2011/may/08/work-program-for-severely-disabled-may-lose/#axzz2LIsIggS1>. It is important to note that many of those that KAT provides services to are very medically fragile and psychologically vulnerable (some clients possess the intellectual capacity of a two-year-old child).

Working Age Adult Policy,¹⁵⁶ which requires all clients in programs like sheltered workshops to be tracking towards independent employment.¹⁵⁷

Many other states, including Oregon, are facing similar problems. Recently, advocates for individuals with intellectual and developmental disabilities filed a class action lawsuit¹⁵⁸ challenging Oregon's failure to provide supported employment services to more than 2,300 state residents who are currently segregated in sheltered workshops.¹⁵⁹ The lawsuit targets Oregon's gap in providing integrated services in conformance with the ADA, citing that the disabled workers are paid far below the minimum wage—with one worker receiving a high of sixty-six cents an hour over a twelve-month period.¹⁶⁰

In 2001, the GAO reported that the Department of Labor “has not effectively managed the special minimum wage program to ensure that 14(c) workers receive the correct wages.”¹⁶¹ It noted that “in past years, [the Department had] placed a low priority on the program.”¹⁶² The GAO concluded that the Department “has not done all it can to ensure that employers comply with the law” and “has provided little training to its staff” that would enable them to work with the several program participants.¹⁶³

IV. SUGGESTIONS FOR IMPROVING WAGES FOR PEOPLE WITH DISABILITIES

Promoting employment opportunities for people with disabilities is an important objective, but Section 14(c)'s subminimum wage provision is not the answer. Section 14(c) openly discriminates and fails in serving its intended purpose of promoting open-market hiring of workers with disabilities. Instead, it promotes sheltered workshops that segregate disa-

156. Chris Henry, *Kitsap Applied Technologies Gets Reprieve from County Board*, KITSAP SUN (May 27, 2011), available at <http://www.kitsapsun.com/news/2011/may/27/kitsap-applied-tech-nologies-gets-reprieve-from/#axzz2OCOU2AVo>.

157. Developmental Disabilities Ass'n, *County Services for Working Age Adults Policy 4.11*, WASH. ST. DEP'T OF SOC. & HEALTH SERVS. (July 15, 2013), <http://www.dshs.wa.gov/pdf/adsa/ddd/policies/policy4.11.pdf>

158. *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199 (D. Or. 2012).

159. *Lane v. Kitzhaber: Class Action Lawsuits Seeks and End to Segregated Sheltered Workshops*, DISABILITY RTS. OR., <http://www.dr Oregon.org/results/lane-v.-kitzhaber-class-action-lawsuit-seeks-an-end-to-segregated-sheltered-workshops> (last visited Mar. 21, 2014). Many of these workers perform mundane tasks, such as folding UPS bags. *Id.*

160. *Id.*

161. See GAO, *supra* note 56, at 4.

162. *Id.*

163. *Id.* at 5.

bled workers from integrated work environments. This Part suggests an empowerment and self-determination employment model instead of Section 14(c)'s charity model.¹⁶⁴ This Part examines how the role of employers, educational institutions, and the ADA can be used to empower individuals with disabilities to achieve economic self-sufficiency, independent living, inclusion, and integration into all aspects of society.

A. Improve Integrated Employment and Other Non-Work Services

Of the approximated 400,000 workers employed by sheltered workshops, only about 5% ever exit the workshop to take a job in the community.¹⁶⁵ This statistic illustrates the failure of one of Section 14(c)'s goals—the goal of sub-minimum wage positions serving as stepping-stones to gainful employment. Unfortunately, the Section 14(c) program has not lived up to its goals and thus needs to be retired.

There are a few alternatives to the Section 14(c) sheltered workshop model that offer integrated employment outcomes and community-based non-work services. Integrated employment models focus on creating jobs in a community business setting where disabled workers work alongside non-disabled workers and earn at least minimum wage for their work.¹⁶⁶ Integrated employment is a feasible option provided that potential workers are given proper supports. Supports might include developing state and federal policy that reflect a bias in favor of integrated employment settings, expanding access to job-carving services, and developing collaboration across state agencies.¹⁶⁷ For those disabled workers incapable of employment, community-based non-work alternatives are also available and focus on providing the citizen with community involvement such as access to public resources or volunteer activities.¹⁶⁸

One of the critical components to succeeding in this area is to bar the Department of Labor from issuing additional Section 14(c) certificates. Regarding existing holders of Section 14(c) certificates, these employers must be encouraged to convert their businesses into a supported

164. See generally *National Council on Disability Report on Subminimum Wage and Supported Employment*, NAT'L COUNCIL ON DISABILITY, <http://www.ncd.gov/publications/2012/August232012/> (last visited Mar. 21, 2014) [hereinafter *Report on Subminimum Wage*].

165. *Id.*

166. See, e.g., *HDC's 40 Hour Supported Employment CORE Training Certificate*, HUM. DEV. CENTER, <http://www.hdc.lsuhsu.edu/employment/index.html> (last visited Mar. 21, 2014). In Washington State, there are a number of integrated employers including Skills, Inc., an integrated work environment that targets innovative enterprising opportunities and seeks to support and employ persons with disabilities. For more information visit SKILLS, INC., <http://www.skillsinc.com> (last visited Mar. 21, 2014).

167. See *Report on Subminimum Wage*, *supra* note 164.

168. The scope of this Note does not focus on community-based non-work alternatives.

employment model, putting persons with developmental or intellectual disabilities in an integrated and competitive work environment.

B. Improve K-12 Education and Expand Opportunities for Post-Secondary Training

Education is a critical indicator in determining whether an individual is likely to choose integrated employment. Both children with disabilities and their parents will be more apt to support a desire for integrated employment if a child is exposed to integrated classrooms at a young age. For instance, Washington State's early childhood education programs make integrated employment outcomes a goal for all students. Elementary school-aged children with disabilities are encouraged to take on school responsibilities in addition to their academic work to develop job skills alongside their non-disabled peers.¹⁶⁹ By setting these expectations early, an individual's desire for integration is fostered from a young age because that individual *expects* integrated settings as an adult.

A way of achieving increased integration is for the Department of Education to issue guidance to help school districts understand that a student with a disability needs to be prepared for the academic rigors of school while also being provided with transitional services to target job development and independent life skills training. By laying the foundation during K-12 education, it is possible to create meaningful transitions into mainstream competitive employment. These K-12 foundations can help to ensure that disabled students gain meaningful employment rather than end up doing make-work activities such as folding and unfolding newspapers in sheltered workshops.¹⁷⁰

C. Apply the Vision of the ADA to Ensure Equality and Opportunity by Eliminating Policies of Discrimination

Many of the assumptions that guided the legalization of Section 14(c)'s subminimum wage provision more than seventy years ago "are essentially no longer valid."¹⁷¹ When Congress adopted the Americans with Disabilities Act in 1990, it concluded that it is often stereotypes, rather than facts, that lead society to believe that individuals with disabil-

169. See *Report on Subminimum Wage*, *supra* note 164.

170. Stefan, *supra* note 128, at 877.

171. Rita Price, *Disabled Deserve Better Pay Than Subminimum Wage*, *Report Says*, COLUMBUS DISPATCH (Aug. 24, 2012), <http://www.dispatch.com/content/stories/local/2012/08/24/disabled-deserve-better-pay-than-sub-min-wage.html>. Clyde Terry, the speaker of this statement, is a member of a Washington-based council that makes recommendations to the President and Congress. *Id.*

ities lack the capacity to become productive members of society. So, in adopting the ADA, individuals with disabilities were extended civil rights protections similar to those provided to individuals on the basis of race, sex, national origin, and religion.¹⁷² The ADA accomplished this by guaranteeing equal opportunity for the disabled in the contexts of employment; public accommodations; transportation; state and local government services; and telecommunications.¹⁷³

One major focus of the ADA is its goal to eliminate unnecessary segregation of individuals with disabilities. As described in Part II, enforcement of the Supreme Court's decision in *Olmstead v. L.C.* requires states to eliminate unnecessary segregation of person with disabilities and ensure that persons with disabilities receive services in the most integrated setting appropriate to their needs.¹⁷⁴ Although *Olmstead* focused on transitioning people with disabilities from segregated institutions into community-based living environments, this integration principle transfers easily to the employment setting. In 2009, the Civil Rights Division of the Department of Justice launched an aggressive effort to enforce *Olmstead's* holding to transition persons with disabilities from segregated worksites to more integrated employment settings. The Department of Justice asserted that the integration regulation of the ADA prohibits the unnecessary segregation of persons with disabilities by public entities in non-residential settings, including segregated sheltered workshops.¹⁷⁵

A recent example of a state's failure to comply with the integration regulation portion of the ADA occurred in Oregon.¹⁷⁶ Oregon's segregated sheltered workshops are under the microscope of the Department of Justice because the state has failed to provide employment services in community settings.¹⁷⁷ Accordingly, Oregon's failure to provide community placement with supported services to those who would prefer such placement resulted in the unnecessary segregation of individuals with disabilities in violation of Title II of the ADA and *Olmstead*.¹⁷⁸

172. Office for Civil Rights, *Americans with Disabilities Act (ADA)*, U.S. DEP'T OF EDUC. (Apr. 25, 2006), <http://www2.ed.gov/about/offices/list/ocr/docs/hq9805.html>.

173. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2012).

174. See *supra* Part II; see also *Olmstead v. L.C.*, 527 U.S. 581 (1999), *aff'd in part, vacated in part, and remanded in part*.

175. See *Report on Subminimum Wage*, *supra* note 164; see also Letter from Thomas E. Perez, Assistant Att'y Gen., to John Kroger, Att'y Gen. for State of Or. (June 29, 2012), available at http://www.ada.gov/olmstead/documents/oregon_findings_letter.pdf.

176. *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199 (D. Or. 2012).

177. Letter from Thomas E. Perez, *supra* note 175, at 5.

178. *Id.* at 3.

In order to bring the ADA's goal of integration into fruition, it is necessary to repeal Section 14(c)'s subminimum wage program. As stated in Part III, sheltered workshops represent 94% of all Section 14(c) subminimum wage workers. Sheltered workshops segregate individuals from the community and provide little or no opportunity to interact with non-disabled persons, other than paid staff. Many persons with intellectual or developmental disabilities in sheltered workshops are capable of, and interested in, receiving services in the community where they would have access to competitive employment that pays a minimum wage or higher. Nevertheless, most persons with these disabilities remain confined to segregated sheltered employment, despite evidence showing that disabled workers can succeed in jobs in the community alongside non-disabled workers. These individuals currently in, or at risk of entering, segregated sheltered workshops are at the mercy of discriminatory systemic state actions and relic policies from the pre-ADA era. As a result of these state actions and policies, thousands of people with intellectual and developmental disabilities are denied the opportunity to "move proudly into the economic mainstream of American life," one of the primary purposes of the ADA.¹⁷⁹

Repealing Section 14(c) will also show policy continuity with President Obama's current plan to raise minimum wage to a living wage. In his 2013 State of the Union Address, President Obama stated, "[N]o one who works full time should have to live in poverty."¹⁸⁰ The President explained that many people would require less aid from the government if the federal minimum wage floor were raised. Minimum wage requirements are regulated by the Department of Labor under the Fair Labor Standards Act—the same Act that perpetuates the use of the Section 14(c) program. By eradicating the unfair Section 14(c) subminimum wage certificate program, there would be continuity with the greater plan to raise minimum wages to living wages.

As one state policymaker in Vermont put it, "We made the decision many years ago to invest our money where our values were, and not fund the outcomes we didn't believe in. That has made all the difference."¹⁸¹ By focusing on the values-based approach and adopting financial arrangements that focus more specifically on expanding supported

179. President George H.W. Bush, Remarks at the Signing of the Americans with Disabilities Act (July 26, 1990), *available at* http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html.

180. President Barack Obama, 2013 State of the Union Address, *supra* note 1. President Obama's comment is founded on the fact that a minimum wage worker earning \$7.25 per hour working full time earns \$14,500 per year. *Id.*

181. *Report on Subminimum Wage*, *supra* note 164, at 13.

employment services, there is huge potential to impact the rate of growth in supported employment services and integrated employment. Because so much effort is diverted into special education programs for individuals with disabilities, it only makes sense to continue this trend in believing in their ability to participate in the community and to try to get them into competitive employment.

V. CONCLUSION

Section 14(c)'s subminimum wage provision legalizes discrimination against people with disabilities. The ADA and the Rehabilitation Act impose virtually identical obligations on public entities or programs receiving federal financial assistance. Both Acts prohibit discrimination, mandate the administration of services in the most integrated setting appropriate for the individual, and relieve affected entities of that obligation only where the modifications would "fundamentally alter the nature of service" (ADA) or "impose undue hardship" (Rehabilitation Act). Upon review of the ADA and its legislative history, the Solicitor's Office concluded that the ADA does not nullify the provisions of Section 14(c) because an employer is not required to lower quality or production standards to make an accommodation.¹⁸²

In the decades since its enactment, it has become overwhelmingly clear that the intent of Section 14(c) has not been realized. While Section 14(c) was intended to prevent the curtailment of employment opportunities for individuals with disabilities in the open market, the program has largely become a tool for sheltered workshops to maintain artificial and isolated work environments. These artificial and isolated work environments have proven to be ineffective in enabling individuals with disabilities to gain competitive skills and opportunities to transition to employment in the general workforce at market wages. Moreover, these segregated environments contradict the intent and spirit of the ADA as well as the Supreme Court's holding in *Olmstead*, which both value community-based strategies for enabling individuals with disabilities to obtain and maintain employment in the general workforce. Also, the justifications for the continuation of Section 14(c) are stale and outdated. While proponents of Section 14(c) argue that the program allows people with disabilities to make informed choices, this argument has no place in the public policy of our country because the program advances the disabled

182. *Field Operations Handbook*, *supra* note 65.

community's dependence on publicly funded benefits and services to a greater extent than necessary.

The repeal of Section 14(c) and its discriminatory practice of paying disabled workers less than the federal minimum wage should be done in accordance with the transition principles outlined in House Resolution 831.¹⁸³ The desired outcome is the elimination of Section 14(c) for policies favoring wage equality and greater integrated employment opportunities in accordance with the ADA.

183. Fair Wages for Workers with Disabilities Act of 2013, H.R. 831, 113th Cong. (2013).