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Is It Worthless to Be "Worth Less"? Ending the Exemption of People with a Disability from the Federal Minimum Wage under the Fair Labor Standards Act Notes

Alanna Sakovits
CUNY School of Law

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Is It Worthless to Be "Worth Less"? Ending the Exemption of People with a Disability from the Federal Minimum Wage under the Fair Labor Standards Act

Notes

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**IS IT WORTHLESS TO BE “WORTH LESS”?
ENDING THE EXEMPTION OF PEOPLE WITH A
DISABILITY FROM THE FEDERAL MINIMUM
WAGE UNDER THE FAIR LABOR
STANDARDS ACT**

Alanna Sakovits†

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“I am opposing a social order in which it is possible for one man who does absolutely nothing that is useful to amass a fortune of hundreds of millions of dollars, while millions of men and women who work all the days of their lives secure barely enough for a wretched existence.”

—Eugene V. Debs¹

I. INTRODUCTION

Even the wealthiest among us would be staunchly opposed to the idea that their income be commensurate with their productivity. Warren Buffet, who is estimated to earn \$1.54 million per hour,² would certainly lose out if his income were determined by his literal physical output, without regard for any additional factors. It would be antithetical to common sense to, in the name of social welfare, subject *only* some of the most vulnerable members of society to such a requirement. Yet, in allowing people with a disability to be paid below the federal minimum wage, section 14(c) of the Fair Labor Standards Act (“FLSA”) does just this.³

Enacted in 1938 by President Franklin Delano Roosevelt, the FLSA created fundamental and critical workers’ rights as basic as the guarantee of a minimum wage,⁴ overtime pay,⁵ and child labor protections.⁶ Section 14(c) of the FLSA, a seemingly innocuous provision, purports to “prevent curtailment of opportunities for employment” for individuals with disabilities.⁷ In setting out to do so, this provision permits employees with a physical or mental disability to be paid at rates below the otherwise applicable federal minimum wage, commensurate with their productivity, as determined by their employer.⁸

This New Deal-era legislation, though progressive for its time,⁹ has since lost pace with modern conceptions of disability rights and

¹ JYOTSNA SREENIVASAN, 1 POVERTY AND THE GOVERNMENT IN AMERICA: A HISTORICAL ENCYCLOPEDIA 199 (vol. 1 2009). Eugene Victor Debs, an American union leader, made this statement to the trial court upon his conviction for violating the Sedition Act on September 18, 1918. *Id.*

² Julia La Roche, *Here’s How Much 10 of the Richest People in the World Made Per Minute in 2013*, BUS. INSIDER (Dec. 19, 2013), <http://www.businessinsider.com/what-warren-buffett-makes-per-hour-2013-12> [<http://perma.cc/W78T-EMV4>].

³ See 29 U.S.C. § 214(c) (2015).

⁴ *Id.* § 206.

⁵ *Id.* § 207.

⁶ *Id.* § 212.

⁷ *Id.* § 214(c)(1).

⁸ See *id.*

⁹ See WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., RL 30674, TREATMENT OF WORKERS WITH DISABILITIES UNDER SECTION 14(C) OF THE FAIR LABOR STANDARDS ACT

values.¹⁰ Dating back to the 1930s, section 14(c) was a mechanism used to protect employment opportunities in a time when there were virtually no employment prospects in the mainstream workforce for workers with a disability.¹¹ The once-grim realities of a bygone era continue to cast a shadow on workers’ and disability rights, retrospectively and more than likely prospectively, placing us on the wrong side of history.

The 14(c) program is antiquated with respect to disability rights as well as in its construction of the employee-employer relationship. Proponents of section 14(c) often attribute the loss of wages to the “therapeutic” benefits that the individual derives from working.¹² This conception perpetuates the notion that employment is strictly an economic arrangement that is not intended to be therapeutic or fulfilling, and moreover, that deriving such psychological benefits should result in decreased compensation. However, employed people are generally more satisfied with their lives than unemployed people,¹³ as all workers reap the therapeutic benefits of work—such as income, sense of purpose, social relationships, structured time, skill development, and creativity.¹⁴ Sigmund Freud identified the two most fundamental components of mental health as “the ability to love and to work.”¹⁵ Nonetheless, section 14(c) supports the notion that people with a disability should be financially accountable for acquiring the therapeutic benefits of work, and in doing so, it reinforces the fallacy that work should not be therapeutic. Repealing section 14(c) must begin with a reevalu-

7-8 (2005), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1211&context=key_workplace [<http://perma.cc/64DB-UJG5>].

¹⁰ See Transition to Integrated and Meaningful Employment Act, H.R. 188, 114th Cong. § 2 (2015) (“Today, advancements in vocational rehabilitation, technology, and training provide disabled workers with greater opportunities than in the past, and the number of such workers in the national workforce has dramatically increased.”).

¹¹ See *id.*; Fair Wages for Workers with Disabilities Act, H.R. 831, 113th Cong. (2013).

¹² See Anna Schechter, *Disabled workers paid just pennies an hour—and it’s legal*, NBC NEWS (June 25, 2013), http://investigations.nbcnews.com/_news/2013/06/25/19062348-disabled-workers-paid-just-pennies-an-hour-and-its-legal [<http://perma.cc/R5JJ-78BM>].

¹³ Stefan Priebe et al., *Employment Attitudes Toward Work, and Quality of Life Among People with Schizophrenia in Three Countries*, 24 SCHIZOPHRENIA BULL. 469 (1998).

¹⁴ *Id.*

¹⁵ *Frequently Asked Questions*, FREUD MUSEUM LONDON, <http://www.freud.org.uk/about/faq/> [<http://perma.cc/QW77-NNF4>] (“This formula was cited by Erik Erikson but it is not to be found in Freud’s works, although . . . [i]n ‘Civilization and Its Discontents’ (1930) he wrote: ‘The communal life of human beings had, therefore, a two-fold foundation: the compulsion to work, which was created by external necessity, and the power of love . . .’”).

ation of societal conceptions about the meaning of work, as well as our assumptions about why people work.¹⁶

Section 14(c) has splintered the disability rights community. Some believe that the program discriminates against, isolates, and underpays workers, while others maintain that section 14(c) is a necessary apparatus for creating sustainable employment opportunities for workers with a disability.¹⁷ Although the latter remains a viable concern, its dogmatic prominence has permitted the tail to wag the dog such that concerns surrounding lack of employment opportunities for people with a disability has come at the expense of exploiting that same workforce.¹⁸

This exploitation has become increasingly salient—so much so that in 2001, the Government Accountability Office (“GAO”) reported that more than half of all section 14(c) workers were paid \$2.50 per hour or less.¹⁹ While remaining cognizant of the real threats posed to the livelihood of workers with a disability in the absence of section 14(c), it cannot go unacknowledged that a law that is devoid of any discernable protections and that facially discriminates against an entire group of people based on characteristics particular to them, was defective from its inception. Nonetheless, this sub-minimum wage program has largely been ignored by legal and academic scholarship.

This Note argues for the repeal of section 14(c) of the FLSA. Part II recounts the historical and modern political development of the “special minimum wage program.”²⁰ Part III outlines the 14(c) program, including eligible participants, the administration and implementation of the program as well as its oversight, or lack thereof. Part IV identifies the pitfalls of the program, which have resulted in exploitation of workers with a disability. Part V argues that the program, which distinguishes between workers whose productivity may be lower due to disability and workers whose productivity may be low due to other reasons, violates the Fourteenth

¹⁶ See John Cicero, *TNS, Inc.—The National Labor Relations Board’s Failed Vision of Worker Self-Help to Escape Longterm Health Threats from Workplace Carcinogens and Toxins*, 24 STETSON L. REV. 20, 79 (1994) (describing the transformation of the status of workers).

¹⁷ U.S. GOV’T ACCOUNTABILITY 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) [hereinafter GAO], www.gao.gov/new.items/d01886.pdf [<http://perma.cc/NCE4-MJFL>].

¹⁸ *Id.* at 3-5 (reporting the lack of federal oversight of the 14(c) program that leads to systematic exploitation of workers with a disability employed under the program).

¹⁹ *Id.* at 6.

²⁰ See GAO, *supra* note 17.

Amendment’s guarantee of equal protection of the laws. Part VI explains why productivity, as a sole criterion, is an inaccurate measurement of the value of one’s work and creates a problematic construction of the employer-employee relationship. Finally, Part VII seeks to correct the assumption that work is a purely economic arrangement by noting the intrinsically therapeutic value work has for all individuals and for society. Part VIII concludes by suggesting a potential remedy for the problems created by section 14(c).

II. POLITICAL AND HISTORICAL DEVELOPMENT OF SECTION 14(c) OF THE FAIR LABOR STANDARDS ACT

An old proverb, “a rolling stone gathers no moss,”²¹ can be read to reflect the idea that laws should not remain stagnant, but are intended to keep pace with the ever-evolving values and views of society. However, the recent political advancement of the sub-minimum wage program, much like its history, can be categorized as largely stagnant.²² One can speculate that this absence of inertia is not due to lack of need or cause for change. Although society’s understanding of disability and the opportunities available to people with a disability has progressed immensely since the 1930s, section 14(c) has not.²³ This incongruity requires change.

A. *History of the Sub-minimum Wage Certificate Program*

Section 14(c) has its roots in the National Industrial Recovery Act (“NIRA”) of 1933-1935, which arranged a productivity-based sub-minimum wage system for persons with a disability.²⁴ Under this system, minimum wages for workers with a disability were set at 75% of the industry minimum in competitive industries.²⁵ However, there was no floor wage set for facility work centers, where the pay rate remained tied to productivity.²⁶ After the NIRA was declared unconstitutional in 1935,²⁷ this productivity-aligned system of calculating wages was reestablished in 1938 with the passage of

²¹ See NABIL M. MUSTAPHA, *ECONOMICS: THE HISTORICAL, RELIGIOUS & CONTEMPORARY PERSPECTIVES: A TREATISE* 316 (2009) (“A ‘rolling stone gathers no moss’ can be contrasted with a stagnant one covered with moss.”).

²² See *The Issue of Fair Wages for Workers with Disabilities*, NAT’L FED’N OF THE BLIND, <https://nfb.org/fair-wages> [<https://perma.cc/G98Y-X2XD>].

²³ See Transition to Integrated and Meaningful Employment Act, H.R. 188, 114th Cong. (2015).

²⁴ See WHITTAKER, *supra* note 9, at 6.

²⁵ *Id.* at 7.

²⁶ *Id.*

²⁷ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

section 14(c) of the FLSA.²⁸

The concept of a sub-minimum wage was raised by then-Labor Secretary Frances Perkins during the hearings preceding the passage of the FLSA.²⁹ Perkins suggested that a sub-minimum wage should be enforced for “substandard workers” whom she described as “persons who by reasons of illness or age or something else are not up to normal production.”³⁰ Under the FLSA, the Department of Labor (“DOL”) was designated as the “Wage and Hour Administrator” and was charged with determining the wage floor for persons with a disability.³¹ It was in 1938 that the DOL ruled that wages should be set “on the basis of earning capacity,” or the literal physical output of a worker.³²

Although a counsel was established to administer the 14(c) program, this group was composed solely of representatives from charitable institutions and employers.³³ It is notable that no spokesperson for workers with a disability took part in formulating the program that was set in place to help them.³⁴ Upon Congressional adoption of the FLSA, while Americans were struggling to break from the grips of the Great Depression, President Roosevelt characterized the Act as “the most far-reaching, far-sighted program for the benefit of workers ever adopted in this or any country.”³⁵

After nearly three decades of dormancy, the sub-minimum wage provision was modified in 1965 to include a minimum wage floor,³⁶ ensuring that employees with a disability would be paid no less than 50% of the statutory minimum wage.³⁷ In 1978, legislation was proposed to exclude persons with vision impairment from the 14(c) program.³⁸ Although that proposal was denied, it catalyzed a conversation about the 14(c) program that brought to light some of its deficiencies, including the lack of federal oversight which allowed the program to be administered by ill-trained management.³⁹

²⁸ WHITTAKER, *supra* note 9, at 8.

²⁹ *Id.* at 7.

³⁰ *Id.* (emphasis omitted).

³¹ *Id.* at 8.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Franklin D. Roosevelt, Broadcast from the White House (May 24, 1938), <http://teachingamericanhistory.org/library/document/radio-address-of-the-president> [<http://perma.cc/6MD3-KTL2>].

³⁶ See WHITTAKER, *supra* note 9, at 9.

³⁷ Pub. L. No. 89-601, § 501(d), 80 Stat. 830, 842-45 (1966).

³⁸ See WHITTAKER, *supra* note 9, at 11.

³⁹ See *id.* at 11-13.

In 1980, following the publication of two investigative articles by *The Wall Street Journal* about the employment of the blind in New York City, the House Subcommittee on Labor Standards conducted two days of hearings regarding oversight of the 14(c) program.⁴⁰ While the hearings yielded no legislative action, a GAO report released in 1981 concluded that the goal of providing a guaranteed 50% of the prevailing minimum wage had not been realized due to exemptions that permitted payment at a lower rate.⁴¹ Rather than increasing oversight or drafting legislation that would achieve the goal of paying workers with a disability at least half of what workers without a disability are paid, the GAO report recommended that the FLSA be modified to eliminate the wage floor for workers with a disability altogether.⁴² Congress adhered to the recommendation and removed the wage floor requirement from section 14(c) in 1986.⁴³ As it currently stands, the statute authorizing the 14(c) program likewise contains no wage floor and permits workers with a disability to be paid below the minimum wage at a rate “commensurate with those paid to nonhandicapped workers”⁴⁴ and “related to the individual’s productivity.”⁴⁵

B. Current Political Disposition of the Sub-minimum Wage Certificate Program

Recent Congressional efforts to ameliorate or repeal this provision have been unsuccessful.⁴⁶ The Fair Wages for Workers Act, House Bill 3086, was proposed in 2011 and died on the House floor.⁴⁷ House Bill 3086 was intended to guarantee a fair wage to workers with a disability by prohibiting the Secretary of Labor from issuing any new “special wage certificates,” which permit individuals with disabilities to be paid below the minimum wage, and prescribed a three-year phase-out of all existing sub-minimum wage

⁴⁰ *Id.* at 14.

⁴¹ *Id.* at 21 (explaining that exemptions for training, evaluation, etc. had led to the lower pay rate).

⁴² *Id.* at 23-24.

⁴³ Pub. L. No. 99-486, 100 Stat. 1229 (Oct. 16, 1986).

⁴⁴ 29 U.S.C. § 214(c)(1)(B) (2015).

⁴⁵ *Id.* § 214(c)(1)(C).

⁴⁶ See Fair Wages for Workers with Disabilities Act of 2011, H.R. 3086, 112th Cong. (2011), <https://www.congress.gov/bill/112th-congress/house-bill/3086> [<https://perma.cc/7YQL-7UGK>]; Fair Wages for Workers with Disabilities Act of 2013, H.R. 831, 113th Cong. (2013), <https://www.congress.gov/bill/113th-congress/house-bill/831> [<https://perma.cc/4CVG-QHP8>].

⁴⁷ H.R. 3086, <https://www.congress.gov/bill/112th-congress/house-bill/3086/actions> [<https://perma.cc/LH6F-UY4H>].

certificates.⁴⁸ Similar legislation, the Fair Wages for Workers with Disabilities Act of 2013, House Bill 831, was subsequently proposed and then referred to the Subcommittee on Workforce Protections in April of 2013.⁴⁹ No action is currently scheduled on the bill.⁵⁰

Although there has been some activism surrounding section 14(c), Ari Ne’eman, co-founder of the Autistic Self Advocacy Network, believes we are unlikely to see any action on this issue in Congress in the near future, stating, “[t]here doesn’t seem to be any appetite on the part of the traditional supporters [of rights of people with a disability] to go after FLSA at this time.”⁵¹ The most recent legislative action surrounding this issue is the Transition to Integrated and Meaningful Employment Act, or “TIME Act,” introduced in Congress on January 7, 2015.⁵² Like House Bills 3086 and 831, the TIME Act also seeks to halt the issuing of “special wage certificates” and prescribes a three-year phase-out of all existing sub-minimum wage certificates as well as the ultimate repeal of the law.⁵³ However, in line with Ne’eman’s prediction,⁵⁴ *GovTrack* estimates just a two percent chance of the bill’s enactment.⁵⁵

III. THE FAIR LABOR STANDARD ACT’S SECTION 14(C) SUB-MINIMUM WAGE CERTIFICATE PROGRAM

For nearly eighty years, section 14(c) of the FLSA has affected, and continues to affect, hundreds of thousands of workers with a disability annually.⁵⁶ Nonetheless, the program has largely been left out of the conversation among workers rights’ and disability advocates alike.⁵⁷ The lack of federal oversight of the program has left it to be administered almost entirely by employers, many of

⁴⁸ *Id.*

⁴⁹ H.R. 831, <https://www.congress.gov/bill/113th-congress/house-bill/831/all-actions> [<https://perma.cc/25YP-JHGV>].

⁵⁰ *Id.*

⁵¹ Bruce Vail, *For Goodwill’s Disabled Workers, Spotlight is on Subminimum Wage*, MOYERS & Co. (Nov. 12, 2013), <http://billmoyers.com/2013/11/12/for-goodwill%E2%80%99s-disabled-workers-spotlight-is-on-subminimum-wage/> [<http://perma.cc/BW29-XXPX>].

⁵² Transition to Integrated and Meaningful Employment Act, H.R. 188, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/188> [<https://perma.cc/TL73-3M7N>].

⁵³ *Id.*

⁵⁴ See Vail, *supra* note 51.

⁵⁵ See H.R. 188: *TIME Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/114/hr188> [<https://perma.cc/PU26-CVL7>].

⁵⁶ GAO, *supra* note 17, at 18 (estimating that, when they conducted their 2001 survey, 424,000 workers with a disability were being paid the “special minimum wage”).

⁵⁷ See Vail, *supra* note 51.

whom profit from paying the workers a lesser wage.⁵⁸ Section 14(c) has remained frozen in time and become somewhat of an anomaly.

A. *Eligible Participants of the 14(c) Program*

Currently, more than 5,600 employers pay sub-minimum wage rates to approximately 424,000 workers nationwide.⁵⁹ In order for an employer to be authorized to pay a sub-minimum wage, the employer must receive a certificate from the Wage and Hour Division of the DOL.⁶⁰ These certificates are issued to four types of employers: work centers, hospital or residential care facilities, and business and school-work exploration programs.⁶¹ The FLSA grants the Secretary of Labor the authority to issue “special certificates,” or sub-minimum wage certificates, that permit employers to set the wages of persons with a disability at a level reflective of their productivity.⁶² All persons with a disability are eligible to be paid the sub-minimum wage under the 14(c) program.⁶³ For purposes of section 14(c), qualifying disabilities include both physical and mental disabilities, and may be related to age or injury, including blindness, mental illness, intellectual disabilities, alcoholism, and drug addiction.⁶⁴ The largest demographic that is employed under the 14(c) program—approximately 74%—are those who have been diagnosed with an intellectual disability.⁶⁵

B. *How Wages are Set and Determined by Employers*

Pursuant to fact sheets that serve as guidance documents for regulations promulgated by the DOL, employers in the 14(c) program determine an hourly wage by measuring the productivity of a worker.⁶⁶ Employers measure productivity by conducting time studies, in which the measured productivity of the worker with a disability is compared against the quality and quantity of work performed

⁵⁸ See GAO, *supra* note 17, at 27-34.

⁵⁹ GAO, *supra* note 17, at 1.

⁶⁰ 29 U.S.C. § 214(c)(1) (2015).

⁶¹ GERALD MAYER ET AL., CONG. RESEARCH SERV., THE FAIR LABOR STANDARDS ACT (FLSA): AN OVERVIEW 5 (2013), <https://www.fas.org/sgp/crs/misc/R42713.pdf> [<https://perma.cc/X9UU-QZCP>].

⁶² 29 U.S.C. § 214(c)(1)(A)-(C).

⁶³ *Id.*

⁶⁴ MAYER ET AL., *supra* note 61, at 5.

⁶⁵ GAO, *supra* note 17, at 3.

⁶⁶ See U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #39 E: DETERMINING HOURLY COMMENSURATE WAGES TO BE PAID WORKERS WITH DISABILITIES UNDER SECTION 14(C) OF THE FAIR LABOR STANDARDS ACT (FLSA) [hereinafter DOL FACT SHEET #39E], <http://www.dol.gov/whd/regs/compliance/whdfs39e.pdf> [<http://perma.cc/Q37T-29TF>].

by an “experienced worker who does not have a disability.”⁶⁷

An employer conducting a time study first determines the length of time that it takes an experienced worker who does not have a disability to perform a given task, usually by using a stopwatch to time the experienced worker.⁶⁸ The wage that a worker with a disability will be paid is then determined by comparing the performance of the experienced worker without a disability against the time it takes a worker with a disability to perform the same task.⁶⁹ The employers are required to conduct these time studies in conditions that emulate the work environment by taking into account the tasks to be performed and a variety of factors that may influence the work, including the method, materials, and equipment to be used as well as the location, the time of day, or the need to work in extreme heat.⁷⁰

The DOL provides the example that, if a worker with a disability was 60% as productive as an experienced worker who does not have a disability performing the same job, the wage for the worker with a disability would be 60% of the wage of the worker who does not have a disability.⁷¹ If the experienced worker without a disability earned \$8.00 per hour, the 14(c) worker in the aforementioned scenario would earn \$4.80 per hour (\$8.00 multiplied by 60%) for performing essentially the same type of work.⁷² Given the enormous potential for exploitation that arises when the employer who profits from paying employees a lesser wage is the same one conducting the time studies, one would certainly assume that such a program would merit a substantial amount of federal oversight. However, available data suggests that such an assumption is dubious at best.⁷³

C. Oversight of the 14(c) Program

Although the DOL is responsible for oversight of 14(c),⁷⁴ a report by the GAO found that the DOL does not compile data on which employers are complying with the provisions of section

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ GAO, *supra* note 17, at 27-34 (reporting that the program greatly lacks federal oversight).

⁷⁴ *Id.* at 1.

14(c), including whether section 14(c) workers are underpaid.⁷⁵ Employers are required to review the wages of all employees annually to reflect changes in productivity and in the prevailing wage rate paid to experienced workers without a disability.⁷⁶ Employers are also required to evaluate the productivity of each section 14(c) worker at least every six months, or whenever there is a change in the methods or materials used.⁷⁷ However, the DOL “does not systematically conduct self-initiated investigations of employers” to verify that their assessments of section 14(c) workers’ productivity levels and wage rates are in compliance with the program.⁷⁸ This is so even though the GAO reports that the DOL provides minimal training to employers on how to correctly compute “special minimum wages.”⁷⁹

This enormous deficit of oversight leaves the group of people it was intended to protect—individuals “whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury”⁸⁰—vulnerable to exploitation at the hands of employers. According to employers’ unchecked⁸¹ assessments, approximately 70% of their section 14(c) workers are less than half as productive as the workers without disabilities performing the same jobs.⁸² These reportedly low productivity levels are intended to explain why more than half of all section 14(c) workers were paid \$2.50 per hour or less in 2001.⁸³

IV. “PEOPLE ARE PROFITING FROM EXPLOITING DISABLED WORKERS”

As recognized in the recently proposed TIME bill, the fact that employers can pay their workers less than the federal minimum wage creates an incentive for them to exploit cheap labor.⁸⁴ In seeking to prevent the curtailment of opportunities for employment for people with a disability,⁸⁵ Congress of more than seventy

⁷⁵ *Id.* at 4-5.

⁷⁶ 29 C.F.R. § 525.1 (2015).

⁷⁷ DOL FACT SHEET #39E, *supra* note 66, at 2.

⁷⁸ GAO, *supra* note 17, at 5.

⁷⁹ *Id.*

⁸⁰ 29 U.S.C. § 214(c)(1).

⁸¹ GAO, *supra* note 17 (noting that there is no systematic oversight of employers’ assessments).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Transition to Integrated and Meaningful Employment Act, H.R. 188, 114th Cong. (2015).

⁸⁵ *See* 29 U.S.C. § 214(c)(1).

years ago presumably never envisioned the creation of a two-tiered system where employers could profit from openly discriminating against an entire class of workers with the backing and sanction of the law. Regardless of the statute's stated purpose, the resulting exploitation has become increasingly newsworthy.⁸⁶

"People are profiting from exploiting disabled workers," stated Ari Ne'eman, president of the Autistic Self Advocacy Network.⁸⁷ "We are certainly in favor of paying our handicapped clients the minimum wage . . .," said Dean Phillips of Goodwill Industries at a Congressional hearing on section 14(c), "when and where they can earn it."⁸⁸ Goodwill Industries is among the nonprofit groups that partake in the sub-minimum wage certificate program.⁸⁹ Although Goodwill is a multibillion-dollar company whose executives make six-figure salaries,⁹⁰ DOL records have documented cases where Goodwill has paid workers under the 14(c) program as low as 41, 38 and 22 cents per hour.⁹¹ Unfortunately, such abhorrent conditions are not uncommon and have increasingly become the topic of recent news stories.⁹²

The Department of Justice found that Rhode Island and the city of Providence had paid workers with a disability under the 14(c) program in publicly funded job programs an hourly wage of \$1.57, with one individual earning just fourteen cents per hour.⁹³ Public outcry against the 14(c) program has intensified since the news story broke in 2009 documenting the horrifying conditions found at a meat processing plant, Henry's Turkey Service.⁹⁴ There, under the 14(c) program, twenty-one men with intellectual disabilities were boarded at a century-old schoolhouse in Iowa in what *The New York Times* referred to as conditions of "servitude."⁹⁵ The men, ranging in age from forty to sixty-years old spent most of their adult lives working for "next to nothing" and lived in "dangerously

⁸⁶ See, e.g., Dan Barry, *The 'Boys' in the Bunkhouse*, N.Y. TIMES (Mar. 9, 2014), <http://www.nytimes.com/interactive/2014/03/09/us/the-boys-in-the-bunkhouse.html>; Vail, *supra* note 51; Schechter, *supra* note 12.

⁸⁷ Schechter, *supra* note 12.

⁸⁸ See WHITTAKER, *supra* note 9, at 17.

⁸⁹ *Id.*

⁹⁰ Schechter, *supra* note 12.

⁹¹ *Id.*

⁹² See, e.g., Barry, *supra* note 86; Vail, *supra* note 51; Schechter, *supra* note 12.

⁹³ Vail, *supra* note 51.

⁹⁴ See Barry, *supra* note 86 (stating that reporter Clark Kauffman helped expose the abuse and neglect in 2009); Yuki Noguchi, *A 'Wake-Up Call' To Protect Vulnerable Workers from Abuse*, NPR (May 16, 2013, 4:29 PM), <http://www.npr.org/2013/05/16/184491463/disabled-workers-victory-exposes-risks-to-most-vulnerable>.

⁹⁵ Barry, *supra* note 86.

unsanitary conditions.”⁹⁶ The men, who were hit, kicked, handcuffed and verbally abused, were paid just \$2 per day.⁹⁷ Referencing the 14(c) program, a Letter to the Editor in *The New York Times* noted that although the unimaginable abuse in Iowa had come to an end, “the Labor Department continues to allow the exploitation of developmentally disabled workers throughout the country.”⁹⁸

However, Goodwill, which has heavily lobbied Congress not to repeal section 14(c),⁹⁹ justifies their support for the program on the basis of “self-determination,” reasoning that workers have a right to choose whether to participate.¹⁰⁰ Terry Farmer, of the disability rights group ACCSES, also supports the federal policy behind section 14(c) on the basis of “self-determination,” or that it enables individuals with a disability to make an “informed choice.”¹⁰¹ This is based on the premise that section 14(c) essentially provides jobs to individuals who otherwise would not qualify for such employment.¹⁰² At a Congressional hearing in 1980, General Council for one section 14(c) employer insisted that if a person with a disability “were to receive the minimum wage regardless of [his] . . . productivity . . . [it could] inhibit his motivation toward increased upward mobility and in reality encourage less productivity.”¹⁰³

However, many people with a disability have found their options more restricted as a result of section 14(c), as they do not always have a choice to work at jobs that will pay them a minimum wage.¹⁰⁴ Harold Leigland, a sixty six-year old Goodwill employee and former massage therapist with a college degree who is paid \$5.46 per hour, believes that the company pays him a low wage because they know he has few alternatives.¹⁰⁵ “We are trapped. Everybody who works at Goodwill is trapped,” he says.¹⁰⁶ Leigland’s

⁹⁶ Noguchi, *supra* note 94.

⁹⁷ *Id.*

⁹⁸ Gabriel Fenigsohn, Letter to the Editor, *Disabled Workers*, N.Y. TIMES (Mar. 13, 2014), http://www.nytimes.com/2014/03/14/opinion/disabled-workers.html?_r=0.

⁹⁹ Vail, *supra* at note 51.

¹⁰⁰ See GOODWILL INDUS. INT’L, INC., EMPLOYMENT OF PEOPLE WITH DISABILITIES THROUGH FLSA SECTION 14(c) 10 (2013) (explaining that the program protects the rights of individuals to “choose” to work in such a program), <http://www.goodwill.org/wp-content/uploads/2013/06/Goodwill-14c-Fair-Wages-Position-Paper.pdf> [<http://perma.cc/XQA3-XJE8>].

¹⁰¹ Letter from Terry R. Farmer, CEO, ACCSES, to Congresspeople (Nov. 15, 2011), <http://www.accses.org/CMS/Resources/dropbox/accseslettertocommitteeleadershipopposinghr3086.pdf> [<http://perma.cc/2S4V-DUX2>].

¹⁰² *Id.*

¹⁰³ See WHITTAKER, *supra* note 9, at 17 (internal quotation marks omitted).

¹⁰⁴ See Schecter, *supra* note 12.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

wife Sheila, who finds the time-study tests to be the most degrading part of her job, quit working for Goodwill after four years when a time study prompted the company to cut her wages from \$3.50 to \$2.75 per hour.¹⁰⁷

While there may be truth to the statement that section 14(c) provides employment opportunities to people who otherwise wouldn't be able to find jobs, it seems that section 14(c) may be creating or at least adding to this problem, rather than fixing it. People with a disability are essentially placed in a Hobson's choice where they are forced to work for a discriminatory sub-minimum wage or to not work at all. The realistic implications of section 14(c) are a degradation of the Act's purpose to provide work opportunities to people with a disability.¹⁰⁸ Section 14(c) emphatically creates a tradeoff where work opportunities are achieved at the cost of exploitation.

No similar provision in the FLSA provides for the payment of a productivity-based sub-minimum wage to workers without a disability. Although both workers with and without a disability could be half as productive as an experienced worker without a disability, only the worker with a disability could be paid below the minimum wage as a result.¹⁰⁹ The logical inconsistency of that fact demands an inquiry into whether there is a rational basis for such discrimination.

V. SECTION 14(C) VIOLATES THE FOURTEENTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION OF THE LAWS

The payment of a sub-minimum wage to people with a disability due to the relatively low productivity levels of some workers is not just unfair, it is unconstitutional. The law does not authorize the payment of sub-minimum wages to all workers below some specified level of productivity, but only to those with a disability.¹¹⁰ It is nonsensical that workers whose low productivity is the product of apathy are guaranteed at least the minimum wage, while workers whose productivity is a result of a disability are penalized.

The concept of a minimum wage is now well entrenched in our society, as many recognize the exploitation that occurs in its

¹⁰⁷ *Id.*

¹⁰⁸ See 29 U.S.C. § 214(c)(1) (2015).

¹⁰⁹ *Id.*

¹¹⁰ See SAMUEL R. BAGENSTOS, THE CASE AGAINST THE SECTION 14(C) SUBMINIMUM WAGE PROGRAM 6, https://nfb.org/images/nfb/documents/word/14c_report_sam_bagenstos.doc [<https://perma.cc/NW7U-V9E3>].

absence. It would seem farfetched to imagine certain groups of workers without a disability to be exempt from the minimum wage based solely on stereotypes about their productivity. However, when the concept of paying “substandard” workers was debated at Congressional hearings regarding the passage of the section 14(c), some argued that the phrase should also encompass workers in certain regions of the country, namely, in the South.¹¹¹ Southern workers, they argued, were slower in movement and less production-oriented and thus should be eligible to be paid sub-minimum wages.¹¹²

The FLSA creates certain minimum wage exemptions for learners, apprentices, messengers, and students.¹¹³ Those exemptions apply to people because of the nature and characteristics of the job or the learning experience they provide.¹¹⁴ Section 14(c), however, denies a group of people the equal opportunity to be paid the minimum wage for any job based on an immutable and potentially lifelong status—being a person with a disability.¹¹⁵

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”¹¹⁶ The Supreme Court’s seminal case of *City of Cleburne v. Cleburne Living Center* held that people with a disability are a protected class for purposes of the Fourteenth Amendment,¹¹⁷ according the classification rational basis review “with a bite.” Under rational basis review, which is used for social or economic classifications, legislation is generally “presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”¹¹⁸ “The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”¹¹⁹ Furthermore, “a bare . . . desire to harm a politi-

¹¹¹ See WHITTAKER, *supra* note 9, at 7.

¹¹² *Id.*

¹¹³ BAGENSTOS, *supra* note 110, at 6 (discussing 29 U.S.C. § 214(a)-(b)).

¹¹⁴ See BAGENSTOS, *supra* note 110, at 6.

¹¹⁵ *Id.*

¹¹⁶ U.S. CONST. amend. XIV.

¹¹⁷ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (applying a slightly heightened form of scrutiny to a disability classification than the Court had used in other cases, such as *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342 (1944), where the Court used “true rational basis scrutiny” and was highly deferential to the legislature).

¹¹⁸ *City of Cleburne*, 473 U.S. at 440; *see also* *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

¹¹⁹ *City of Cleburne*, 473 U.S. at 446.

cally unpopular group” is not a legitimate state interest.¹²⁰

In *City of Cleburne*, the Court held that a Texas city’s municipal zoning ordinance requiring a “special use permit” to be obtained for the operation of a group home for individuals with an intellectual disability, violates the Equal Protection Clause of the Fourteenth Amendment.¹²¹ The Court found that there was no rational basis for the city’s belief that a group home for persons with an intellectual disability would pose a threat to the city’s legitimate interests.¹²² The Court also held that the permit requirement was rooted in irrational fear of, or prejudice against, people with an intellectual disability, which is not a legitimate state interest.¹²³

The Court first found the ordinance to raise a constitutional issue because it facially denied respondents equal protection of the laws.¹²⁴ This is so because, although the permit was required for a home used for the care of persons with an intellectual disability, the city did not require a special use permit for similar buildings, such as apartment houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, nursing homes, or private clubs.¹²⁵ Similarly, section 14(c) draws a distinction between people with and without a disability, rendering people with a disability entirely exempt from minimum wage laws.¹²⁶ The discrimination can thus be deduced from the face of the statute.

The next issue in the equal protection analysis is whether the reason for the differential treatment is rationally related to a legitimate government interest.¹²⁷ The question at the heart of this analysis, the Court stated, “is whether it is rational to treat [individuals with an intellectual disability] differently.”¹²⁸ In *City of Cleburne*, the Court found that there was no rational basis for the city’s concerns involving individuals with an intellectual disability when those same concerns did not apply to other houses permitted in the area such as boarding and fraternity houses.¹²⁹

The inquiry therefore is whether there is a rational basis for

¹²⁰ U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

¹²¹ *City of Cleburne*, 473 U.S. at 450.

¹²² *Id.* (finding no rational basis for why the city’s interests in avoiding population density and lessening street congestion would apply to the group home but not to fraternity and sorority houses or hospitals).

¹²³ *Id.*

¹²⁴ *Id.* at 450.

¹²⁵ *Id.*

¹²⁶ See 29 U.S.C. § 214(c) (2015).

¹²⁷ *City of Cleburne*, 473 U.S. at 446.

¹²⁸ *Id.* at 449.

¹²⁹ *Id.*

exempting from the minimum wage only people whose work productivity may be lower due to disability, but not those whose diminished productivity is due to some other cause. The statute that includes section 14(c) states that its purpose is to prevent the curtailment of opportunities for employment for individuals whose productive capacity is impaired by “age, physical or mental deficiency, or injury.”¹³⁰ This is certainly a commendable ambition, and one that would likely be found a legitimate interest of the state. However, the means chosen to effectuate that interest, exempting people with a disability from the minimum wage, is not rationally related to it.

The basis of the statute is that according people with a disability protection of the minimum wage would lead to curtailment of their employment opportunities.¹³¹ The Court in *City of Cleburne* held the ordinance requiring a “special use permit” unconstitutional because there was no rational justification proffered for why the city’s concerns—avoiding concentration of population and lessening street congestion—applied only to group homes for people with a disability and not to fraternity or sorority houses and hospitals.¹³² Similarly, there is no rational basis for why the concern underlying the “special wage certificate”—an increase in unemployment—applies only to people with a disability and not to people without a disability receiving the minimum wage.

The reasoning behind section 14(c) can be analyzed in line with the same arguments used in opposition to the general minimum wage.¹³³ Eleanor Roosevelt pointed out in her Congressional testimony in 1959 that the same arguments raised against establishing any legal minimum wage have been used repeatedly for more than half a century.¹³⁴ Two of the most common arguments used to oppose the standard minimum wage are the threats of job loss and economic decline.¹³⁵ Some of those same arguments, namely that the minimum wage would raise unemployment, still prevail today and are essentially codified in section 14(c). However, the argument that a minimum wage “would ultimately harm the very work-

¹³⁰ 29 U.S.C. § 214(c)(1).

¹³¹ *Id.*

¹³² *City of Cleburne*, 473 U.S. at 450.

¹³³ See, e.g., NAT’L EMP’T LAW PROJECT & CRY WOLF PROJECT, CONSIDER THE SOURCE: 100 YEARS OF BROKEN-RECORD OPPOSITION TO THE MINIMUM WAGE I (Mar. 2013), <https://www.nelp.org/content/uploads/2015/03/Consider-The-Source-Minimum-Wage.pdf> [<https://perma.cc/URX6-JXXE>].

¹³⁴ *Id.* at 1.

¹³⁵ *Id.* at 3-4.

ers it is intended to help,” has been used to criticize standard state and federal minimum wages for more than a century.¹³⁶ An analysis of one-hundred years of public statements, congressional testimonies, editorials, media interviews and other public records reveal that this argument has been repeatedly espoused and continuously rejected by Congress as insufficient to rebut the maintenance of a minimum wage.¹³⁷

Since the passage of the minimum wage, opposition groups mainly comprised of corporations and conservative politicians have claimed that it decreases living standards,¹³⁸ or has “caused more misery and unemployment than anything since the Great Depression.”¹³⁹ As a report by the National Employment Law Project notes, many minimum wage opponents couch their opposition in the guise of concern for low-wage workers.¹⁴⁰ “There is an extensive record of minimum wage critics, especially elected officials, justifying their opposition to the minimum wage as defenders of the interests of workers affected by this policy.”¹⁴¹

The notion that competitive wages would deprive people with a disability of the opportunity for employment is the same argument that underlies the 14(c) program.¹⁴² Congressional findings listed in the TIME Act report that many employers with a history of paying sub-minimum wages benefit from philanthropic donations and preferred status when bidding on federal contracts.¹⁴³ Those same employers claim that paying the minimum wage to their workers with a disability would diminish their profits and reduce their workforce.¹⁴⁴

The continued existence of the minimum wage is evidence that the allegation that unemployment will rise if a minimum wage is enacted, which has been espoused in Congressional hearings, has been rejected. Similar to the “special use permit” in *City of Cleburne*, the “special wage certificate” implemented by section 14(c) is an unconstitutional denial of equal protection of the laws. There is no rational basis for the federal government to be con-

¹³⁶ *See id.* at 1.

¹³⁷ *See id.* at 7-9.

¹³⁸ *Id.* at 12.

¹³⁹ *Id.* at 14.

¹⁴⁰ *Id.* at 2.

¹⁴¹ *Id.* at 7.

¹⁴² *See* WHITTAKER, *supra* note 9, at 9.

¹⁴³ Transition to Integrated and Meaningful Employment Act, H.R. 188, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/188/text> [<https://perma.cc/8BYM-M9UC>].

¹⁴⁴ *Id.*

cerned that a minimum wage would cause high unemployment for workers with lower productivity due to a disability, but not for workers with lower productivity due to some other cause.

While the means chosen, the sub-minimum wage program, should be found unconstitutional, the state interest, preventing the curtailment of employment opportunities for individuals with a disability, is certainly a legitimate one. It would be absurd to create a minimum wage exemption for all workers who are less productive than the most experienced worker. The state must therefore find some other way to avoid curtailing employment opportunities for such individuals without using a law that unfairly discriminates against them. This highlights the important role of the state in ensuring that employment opportunities are not curtailed for people with a disability and calls into question the barometers society uses to gauge the value of work.

VI. PRODUCTIVITY ALONE IS NOT AN ACCURATE MEASUREMENT OF THE VALUE OF WORK

Productivity is virtually the only standard by which section 14(c) measures the value of work.¹⁴⁵ A vast array of problems arise when the worth of an individual’s work is reduced to such a rigid and narrow category. In Congressional hearings regarding section 14(c), James Gashel, speaking for the National Federation of the Blind, exclaimed, “I am here to tell you that the safeguards are not working.”¹⁴⁶ The problems, he said, were largely structural: the power imbalance permits management to make all of the decisions and the workers are placed at a disadvantage because they enter the workshops under the presumption of low productivity, having to prove themselves worthy of the national minimum wage.¹⁴⁷

A. *Productivity as a Sole Criterion Undervalues Workers*

Using productivity as the sole measurement has led to employers systematically devaluing their section 14(c) workers. The program has thus created a construction of the employer-employee relationship in which employers view their participation in section 14(c) as an act of charity, as if they are not also benefitting from

¹⁴⁵ See 29 U.S.C. § 214(c)(1)(A)-(C) (2015) (allowing wages to be set “lower than the minimum wage . . . commensurate with those paid to nonhandicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality and quantity of work, and related to the individual’s productivity.”).

¹⁴⁶ See WHITTAKER, *supra* note 9, at 30.

¹⁴⁷ *Id.*

the participants' work.¹⁴⁸ This dynamic was noted over thirty years ago when a 1979 investigative article written by *The Wall Street Journal*, which later prompted Congressional interest in the matter, pointed out that to management, "its blind workers aren't employees but 'clients.'"¹⁴⁹ The casting of workers as clients of their employers is a feature of the 14(c) program that continues to this day.¹⁵⁰ Congressional hearings have likewise made apparent that employers do not distinguish "employee" from "client" when referring to workers with a disability, suggesting that employers believe that *they* are the ones providing a service.¹⁵¹

It is often through sanctimonious characterizations that employers speak of their participation in the 14(c) program. For example, a Barnes & Noble spokeswoman justified the company's participation in the program on her belief that it provided jobs to "people who would otherwise not have the opportunity to work."¹⁵² Similarly, Goodwill's position paper on section 14(c) states that the "special minimum wage will preserve opportunities for people with disabilities who would otherwise lose the chance to realize the many tangible and intangible benefits of work."¹⁵³ The testimonial by a father of a section 14(c) worker featured in Goodwill's position paper goes as far as to call the job not charity but a "gift," stating, "Goodwill gave us the greatest gift we could ever receive: a future!"¹⁵⁴

Although these explanations fall squarely within Congress's proffered purpose of section 14(c), "to prevent curtailment of opportunities for employment [for individuals with a disability],"¹⁵⁵ employees are not the only ones who benefit from such an arrangement. An opinion piece in *Forbes* reports that employers large and small have realized that hiring individuals with an intellectual or developmental disability is not just a "feel-good gesture" but also a "smart business decision with enormous dividends."¹⁵⁶ The article, co-written by Carlos Slim Helú, the second richest man in the

¹⁴⁸ *Id.* at 16.

¹⁴⁹ *Id.* at 13.

¹⁵⁰ See, e.g., GOODWILL INDUS. INT'L, *supra* note 100.

¹⁵¹ See WHITTAKER, *supra* note 9, at 16-17.

¹⁵² Schecter, *supra* note 12 (internal punctuation omitted).

¹⁵³ GOODWILL INDUS. INT'L, *supra* note 100, at 14.

¹⁵⁴ *Id.*

¹⁵⁵ 29 U.S.C. § 214(c)(1) (2015).

¹⁵⁶ Carlos Slim Helú & Anthony K. Shriver, Opinion, *Pledging "I'm In To Hire" Individuals With Intellectual and Developmental Disabilities*, FORBES (Oct. 21, 2014 5:06 pm), <http://www.forbes.com/sites/realspin/2014/10/21/pledging-im-in-to-hire-individuals-with-intellectual-and-developmental-disabilities/>.

world, states, “The fact is, the profile of a worker with IDD [“intellectual or developmental disabilities”] reads like that of an ideal employee. Employees with IDD are often . . . dependable, engaged, motivated and highly productive.”¹⁵⁷

A study conducted by the Institute for Corporate Productivity, or “i4cp,” analyzing the practices of high-performance organizations, strikingly reported that organizations deemed high-performance—based on measures of profitability, market share, revenue growth, and customer satisfaction—are 37% more likely than low-performance companies to hire a worker with a disability.¹⁵⁸ The high-performance companies do so for the straightforward reason that the workers with a disability are “good talent matches for open positions.”¹⁵⁹ Good talent matches can be a crucial aspect of creating a work environment in which a worker can thrive. Job incompatibility is detrimental to both the worker and the company. For example, Sheila Leigland, previously mentioned,¹⁶⁰ left her employment at Goodwill when the company cut her wages from \$3.99 to \$2.75 per hour due to a time study.¹⁶¹ Leigland is blind and was timed on her ability to complete the visually demanding task of hanging clothing in accordance with specific requirements, including separating the clothing by gender and facing certain directions.¹⁶²

Recent Congressional findings, as set forth in the TIME bill, maintain that employees with a disability, when provided the proper rehabilitation services, trainings, and tools, can be as productive as employees without a disability.¹⁶³ Moreover, even those individuals that are considered to have the most severe disabilities have successfully obtained employment where they earn minimum wage and higher.¹⁶⁴ This raises important questions: how does soci-

¹⁵⁷ *Id.*

¹⁵⁸ Elizabeth Picciuto, *Hiring People with Disabilities Isn't Just the Right Thing to Do – It's Good for Business*, THE DAILY BEAST (Oct. 27, 2014 5:45 am), <http://www.thedailybeast.com/articles/2014/10/27/hiring-people-with-disabilities-isn-t-just-the-right-thing-to-do-it-s-good-for-business.html> [<http://perma.cc/Y7BF-A2NY>].

¹⁵⁹ *Id.*

¹⁶⁰ See Schechter, *supra* note 12.

¹⁶¹ Susan Adams, *Does Goodwill Industries Exploit Disabled Workers?*, FORBES (July 30, 2013 7:23 pm), <http://www.forbes.com/sites/susanadams/2013/07/30/does-goodwill-industries-exploit-disabled-workers/>.

¹⁶² *Id.*

¹⁶³ Transition to Integrated and Meaningful Employment Act, H.R. 188, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/188/text> [<https://perma.cc/8BYM-M9UC>].

¹⁶⁴ *Id.*

ety quantify and value work, and how correct are these measurements?

B. What Factors Contribute to the Value of Work?

Although section 14(c) employees, like all workers, typically benefit from working, businesses benefit from their work as well.¹⁶⁵ While productivity is an essential part of work, it is certainly not the only component, and in some cases may not even be the most important component. The emphasis placed on productivity by section 14(c) is thus not only discriminatory but also unrealistic, as it fails to reflect the many qualities that account for an individual's contribution to her workplace.

One study reports that more than 75% of employers from the two-hundred organizations surveyed¹⁶⁶ rated their employees with an intellectual or developmental disability as "good" or "very good" on most performance factors, including work quality, productivity, motivation, engagement, integration with co-workers, dependability, and attendance.¹⁶⁷ Of great significance is the fact that productivity is just one among seven factors used to indicate an employee's value.¹⁶⁸ Additionally, certain workplace tasks may be conducted in such a way that quantifying productivity is not feasible. In a job assembling flower arrangements, for example, the aesthetic value of the product is essential to its worth and is something that cannot be easily quantified. Approximately seventy-five of the workers employed by Habitat International, Inc., a Tennessee-based company that produces indoor and outdoor rugs, have a disability, including severe disabilities.¹⁶⁹ CEO David Morris relies on his company's statistics to support his claim that workers with a disability are beneficial to business.¹⁷⁰ Morris reports that his workers are extremely loyal, contributing to low absenteeism and low turno-

¹⁶⁵ See, e.g., Helú & Shriver, *supra* note 156 (reporting that companies enjoy "enormous dividends" from hiring people with a disability).

¹⁶⁶ See Eric Davis, *What Your D&I Policy is Missing: Employing People with Intellectual and Developmental Disabilities*, I4CP (Oct. 15, 2014), <http://www.i4cp.com/trendwatchers/2014/10/15/what-your-d-i-policy-is-missing-employing-people-with-intellectual-and-developmental-disabilities> [<http://perma.cc/2AYR-R7N5>].

¹⁶⁷ See Picciuto, *supra* note 158.

¹⁶⁸ See Davis, *supra* note 166.

¹⁶⁹ *Our People*, HABITAT INT'L, INC., <http://www.habitatint.com/people.htm> [<http://perma.cc/Y58M-Y2S3>].

¹⁷⁰ Sarah Blahovec, *It's About TIME: Ending Subminimum Wages for Workers with Disabilities*, HUFFINGTON POST (Apr. 10, 2015, 5:41 PM), http://www.huffingtonpost.com/sarah-blahovec/its-about-time-ending-sub_b_7041592.html [<http://perma.cc/75L2-MCJ7>].

ver due to job dissatisfaction or firings.¹⁷¹ Those qualities save costs to the business by allowing the entire plant to be overseen by just two managers.¹⁷² Additionally, due to the effectiveness of the workers, there have been no back orders and almost no product defects.¹⁷³

In retail stores such as Goodwill, where customer service is likely an essential part of the establishment, the employee’s ability to interact pleasantly with customers is presumably a very valuable quality. However, DOL guidance documents expressly state that, “[b]ehavioral factors—such as social skills . . . willingness to follow orders, etc.—may not be used when evaluating the workers’ productivity.”¹⁷⁴ Although it may be argued that the exclusion of these characteristics could be for the benefit of certain workers, this is not always the case. Some workers may excel in areas such as interacting with customers and co-workers or the ability to follow orders, and yet these skills are not accounted for in their compensation.

Employing people with a disability also places businesses in good standing with their communities, which companies may use this to their advantage. Goodwill’s website, for example, advertises its employment of people with a disability; the company’s main webpage features a video interview of “Robbie,” a worker with a disability employed by the company.¹⁷⁵

The rhetoric of 14(c) employers is plagued with examples of the many ways its employees benefit from work.¹⁷⁶ These statements are not untrue, as all people benefit from work.¹⁷⁷ However, it is axiomatic that employers benefit from the work of their employees, too. The idea that benefiting from one’s work is a reason to pay that individual less¹⁷⁸ is harmful to all workers, not just those with a disability. Moreover, productivity is just one among many

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *How Hiring People with Disabilities Has Paid Off for Habitat International, Inc.*, HABITAT INT’L, INC., <http://www.habitaint.com/payoff.htm> [<http://perma.cc/6C7W-RYBR>].

¹⁷⁴ DOL FACT SHEET #39E, *supra* note 66.

¹⁷⁵ GOODWILL INDUS. INT’L, INC, <http://www.goodwill.org> (last visited May 31, 2015).

¹⁷⁶ *See, e.g.*, GOODWILL INDUS. INT’L, *supra* note 100.

¹⁷⁷ *See* Cicero, *supra* note 16, at 80 (“[A] transcendental reason for work that assumes an almost spiritual dimension based on intrinsic human needs, such as purpose, meaning, worth, fulfillment, dignity, and respect.”).

¹⁷⁸ *See* Schecter, *supra* note 12 (statement by Goodwill International CEO Jim Gibbons) (“It’s typically not about their livelihood. It’s about their fulfillment. It’s about being a part of something.”).

factors that can be used to measure a worker's contribution to their work environment and to their employer.¹⁷⁹ Using productivity as the sole criterion, as section 14(c) does, is thus overly simplistic and leads to a chronic undervaluing of the work done by individuals with a disability.

VII. RECONCEPTUALIZING ASSUMPTIONS ABOUT WORK AND WHY PEOPLE WORK

Formulating processes to improve the experience of work for people with a disability must begin with an analysis of how we understand work and our assumptions about why people work. In directly correlating the value of one's work with productivity, section 14(c) epitomizes the concept that work is a purely economic arrangement from which therapeutic benefits are not to be expected. This patently ignores the reality that a majority of people exact psychological benefits from working,¹⁸⁰ that work and wellbeing are intrinsically linked,¹⁸¹ and that society as a whole benefits when its population is employed.¹⁸²

A. *Work as a Purely Economic Arrangement*

"Employ" is defined in the FLSA as "to suffer or permit to work."¹⁸³ The use of the word "suffer" as not just an expectation but also as a definition of work is telling. The repeal of section 14(c), if it were to be carried out, could not exist in a vacuum, but would have to be accompanied by a shift in social consciousness. This would necessarily have to begin with examining the intrinsic value of work to an individual's life. The prevailing consciousness of work perceives work as "the giving up of leisure . . . in return for compensation,"¹⁸⁴ typically in the form of income. A central tenet of this view is that the employment relationship is "merely a function of the market where economic prerogative is controlling."¹⁸⁵

The justification that employers use for section 14(c)—that

¹⁷⁹ See Davis, *supra* note 166 (discussing other factors that account for the value of an employee's work such as work quality, motivation, engagement, integration with co-workers, dependability and attendance).

¹⁸⁰ Priebe et al., *supra* note 13, at 469 .

¹⁸¹ See Cicero, *supra* note 16, at 80.

¹⁸² See *Jobs*, OECD BETTER LIFE INDEX, <http://www.oecdbetterlifeindex.org/topics/jobs> [<http://perma.cc/GG3P-DKNW>].

¹⁸³ 29 C.F.R. § 525.3(g) (2015).

¹⁸⁴ Howard Lesnick, *The Consciousness of Work and the Values of American Labor Law*, 32 BUFF. L. REV. 833, 843 (1983).

¹⁸⁵ Cicero, *supra* note 16, at 83.

workers with a disability are paid less in part because their employment is beneficial to them¹⁸⁶—is precisely the construction of the employee-employer relationship that must be corrected. Notably, in defining the term “employ,” the FLSA expressly states that “[t]he determination of an employment relationship does not depend upon the level of performance or whether the work is of some therapeutic benefit.”¹⁸⁷ Although the FLSA recognizes the existence of an employment relationship even where there is a therapeutic benefit, the 14(c) employers seem to view the fact that their employees derive a therapeutic benefit from work as a justification for their decreased compensation.¹⁸⁸ For example, when questioned about the 14(c) program, Goodwill International CEO Jim Gibbons, who was awarded a \$729,000 salary in 2011, stated, “It’s typically not about their livelihood. It’s about their fulfillment. It’s about being a part of something.”¹⁸⁹

The statement made by the Goodwill CEO suggests that earning a livelihood is not only detached from the expectation of fulfillment or a sense of common purpose, but that the former is actually at odds with the latter. This advances the jaded notion that basic human needs, such as emotional fulfillment,¹⁹⁰ are attained through a trade-off of livelihood. This idea goes against other provisions of the FLSA,¹⁹¹ and against the interests of working people generally.

B. *Work is Intrinsically Linked to Therapeutic Benefits*

The reality that an individual gains more than a paycheck from working should not be seen as an aberration, but as a norm. For all workers, with or without a disability, there “exists a transcendental reason for work that assumes an almost spiritual dimension based on intrinsic human needs, such as purpose, meaning, worth, fulfillment, dignity, and respect.”¹⁹² All 14(c) employees who have a disability still have the ability to work.

On an individual level, employment has significant effects on

¹⁸⁶ See GOODWILL INDUS. INT’L, *supra* note 100.

¹⁸⁷ 29 C.F.R. § 525.3(g).

¹⁸⁸ See Schecter, *supra* note 12.

¹⁸⁹ *Id.*

¹⁹⁰ See generally Priebe et al., *supra* note 13.

¹⁹¹ See 29 C.F.R. § 525.3(g) (2015) (“The determination of an employment relationship does not depend upon the level of performance or whether the work is of some therapeutic benefit.”).

¹⁹² Cicero, *supra* note 16, at 80.

physical and mental health,¹⁹³ as well as on subjective well-being.¹⁹⁴ These individual benefits have widespread effects, as societies with higher levels of employment are wealthier, more politically stable, and healthier.¹⁹⁵ However, in accounting for the psychological benefits of employment, “[w]orking conditions can be as important as job availability.”¹⁹⁶ “Work represents many people’s main recognised contribution to the community where they live, and it is a source of pride and dignity; the quality of their jobs is therefore fundamental for them.”¹⁹⁷ The ability to work is therefore meaningful only if people can be employed in a dignified manner, free from legalized discrimination. In a series of Congressional hearings on section 14(c) in 1980, Donald Elisburg, Assistant Secretary for Employment Standards with responsibility over section 14(c), stated that the yardstick for measuring the success of the program “must also be measured in more human terms,” namely, “sense of accomplishment and self-respect as well as income earned.”¹⁹⁸

As previously mentioned, Freud believed that one of the two most fundamental components of mental health is the ability to work.¹⁹⁹ In requiring people to work under the condition of inequality, section 14(c) denies an entire group of people who are able to work the ability to do so with dignity. Refocusing the emphasis of work from purely economic and tangible terms to intangible benefits is not merely the job of workers, but of employers as well. In recognizing the role of work, and more importantly of the worker in society, the importance placed on the physical output of an employee should be deemphasized in light of the drastic psychological and social advantages society as a whole derives when its population is gainfully employed.²⁰⁰

C. *Policies to Remedy and Replace Section 14(c) of the FLSA*

If work came to be known as an entity intrinsically linked to well being and if employment was viewed as a societal rather than

¹⁹³ See generally Wilson, S.H. & Walker, G.M., *Unemployment and Health: A Review*, 107 PUB. HEALTH J.153, 153-62 (1993).

¹⁹⁴ See Andrew E. Clark & Andrew J. Oswald, *Unhappiness and Unemployment*, 104 ECON. J. 648 (1994).

¹⁹⁵ See OECD BETTER LIFE INDEX, *supra* note 182.

¹⁹⁶ OECD, HOW’S LIFE?: MEASURING WELL-BEING 58 (2011), <http://dx.doi.org/10.1787/9789264121164-en> [<http://perma.cc/AY3U-ETB2>].

¹⁹⁷ *Id.*

¹⁹⁸ See WHITTAKER, *supra* note 9, at 15.

¹⁹⁹ See *Frequently Asked Questions*, FREUD MUSEUM LONDON, <http://www.freud.org.uk/about/faq/> [<http://perma.cc/QW77-NNF4>].

²⁰⁰ See OECD BETTER LIFE INDEX, *supra* note 182.

an individual responsibility, a multitude of policies to replace section 14(c) would become available. Although there is no one solution to this problem, there are certainly processes that can provide equal employment opportunities to individuals with a disability. As the recently proposed TIME Act suggests, the DOL should halt the issuing of any new section 14(c) certificates, and a plan should be put in place to phase out the program entirely.²⁰¹ The repeal of the sub-minimum wage program and a transition into integrated and meaningful employment for people with a disability is essential. As part of this process, protections would need to be put in place to ensure that individuals with a disability are not left out of the workforce altogether.

If the government chooses to exempt employers from paying the minimum wage to workers with a disability, the government should subsidize their employment to supplement the paid income of the workers to match the minimum wage. Therefore, if a worker is paid 50% of the minimum wage by her employer, the government should pay the remaining 50%. This remedy would be ideal for three primary reasons. First, as previously discussed, it is not just the worker herself that benefits from being gainfully employed—societies as a whole are healthier, wealthier, and more politically stable when their populations are employed.²⁰² As such, the financial burden of the sub-minimum wage, which is heavy for an individual worker to bear, should be spread more evenly throughout society since society benefits as well.

Second, requiring the government to subsidize the portion of the paycheck that the employer does not pay would serve as an incentive for government oversight of employers. Presumably, the government would want to decrease the amount of money it spends, and would therefore make certain that employers are paying workers an accurate wage by ensuring that they are matching employees to compatible jobs, properly administering the time studies and accurately reporting results. This would likely lead to regular systematic and self-initiated reviews by the DOL of time studies, productivity reports, and payment of workers, all of which employers should be required to maintain in records.²⁰³ By placing taxpayer money into the equation, the program would create government accountability, since all taxpayers would have an interest

²⁰¹ Transition to Integrated and Meaningful Employment Act, H.R. 188, 114th Cong. (2015).

²⁰² See OECD BETTER LIFE INDEX, *supra* note 182.

²⁰³ See GAO, *supra* note 17 (reporting that the DOL does not conduct self initiated investigations into employer compliance with requirements of the program).

in ensuring that employers were not paying workers with a disability an artificially low wage. It may also give the government an incentive to penalize employers who fail to adequately comply with the law, as they would be abusing not only workers but taxpayers, as well.

Third, subsidizing the paychecks of employees to guarantee that they are paid the minimum wage achieves the goal of preventing curtailment of employment opportunities for people a disability while eradicating the discriminatory effects of section 14(c). Subsidizing the employment would be an appropriate means to achieve that government interest, and would thus comport with the Fourteenth Amendment's requirement that people be protected equally by the law.²⁰⁴

Additionally, rather than assuming that a worker with a disability is unable to meet the productivity requirement, there should be a rebuttable presumption that the individual is capable of meeting minimum productivity standards, the burden of which should be placed on the employer to disprove.²⁰⁵ This would help to equalize the power imbalance that workers feel when they enter the workshops under the presumption of low productivity, having to prove themselves worthy of the national minimum wage.

If the government believes employers should have to pay a wage that only reflects the productivity of a worker, the government should pay the remaining wage to account for all of the benefits society attains from having an employed population. Government-subsidized wages would create incentives for taxpayers to hold the government accountable for its policies and to ensure that workers are not being exploited. Although there is much work to be done in shaping these new policies, it is certain that in regard to the sub-minimum wage program under section 14(c), we can do better.

VIII. CONCLUSION

Although well-intentioned when it was initially enacted,²⁰⁶ section 14(c) of the FLSA has remained frozen in time while society

²⁰⁴ U.S. CONST. amend. XIV.

²⁰⁵ See MICHAEL MORRIS ET AL., SECTION 14C OF THE FAIR LABOR STANDARDS ACT: FRAMING POLICY ISSUES 21 (Apr. 2002), http://bbi.syr.edu/publications/morris/Policy_Report_042002.doc [<http://perma.cc/5JET-33MX>].

²⁰⁶ 29 U.S.C. § 214(c)(1) (2015) (stating as its purpose "to prevent curtailment of opportunities for employment . . . of individuals . . . whose earning or productive capacity is impaired by age, physical or mental deficiency or injury").

has continued to progress.²⁰⁷ This form of state-sanctioned discrimination is not an answer to a problem, but is a problem in itself. Section 14(c) hurts not only workers with a disability, but affects all workers by placing the actual worth of employees solely on the quantities they produce.²⁰⁸ Work must be understood as intrinsically linked to well being in order for employers, as well as society, to value the contributions of workers beyond their physical output.²⁰⁹ Therefore, beginning with a shift in how we view work, we can strive to reach a place where the worker will become “more important than the object produced.”²¹⁰

²⁰⁷ See *The Issue of Fair Wages for Workers with Disabilities*, NAT’L FED’N OF THE BLIND, <https://nfb.org/fair-wages> [<https://perma.cc/G98Y-X2XD>].

²⁰⁸ See 29 U.S.C. § 214(c)(1)(C) (requiring wages to be paid “related to the individual’s productivity”).

²⁰⁹ See Cicero, *supra* note 16, at 80; OECD BETTER LIFE INDEX, *supra* note 182; Clark & Oswald, *supra* note 194.

²¹⁰ See David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119, 128 (1988).

