PENNIES AN HOUR: WAS THIS REALLY THE INTENT BEHIND § 14(C) OF THE FAIR LABOR STANDARDS ACT? A NOTE CALLING FOR A SYSTEM CHANGE TO AN OTHERWISE BROKEN SYSTEM

Comment*

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** B.A. Communication, St. Edward's University, 2009; J.D. Candidate, Texas Tech University School of Law, 2016. This Comment is dedicated to my brother, Sean Bedoe, who has inspired my passion for disability rights, and to Kendra Kerbow, who graciously shared her story and serves as a role model in the disabled community. A special thanks to my husband, Brian Golde, for his unconditional love and support, and Professor Denette Vaughn for her guidance in helping me select and develop this topic. A special thanks also to everyone who contributed their time for an interview: Shaun Bickley, David Hutt, Kendra Kerbow, Elaine Roberts, Rose Sloan, and Halle Stockton.

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I. DIFFERENT DOES NOT MEAN "LESS," OR DOES IT?

For generations, disabled individuals have faced a cumbersome battle to overcome the stereotype that *different* means "less"—less intelligent, less capable, less fit, or, worst of all, less human.[1] A world of absolute equality is nonexistent, so for centuries it has been our legal system's job to advocate for justice.[2] Yet, despite the transformation in our laws since the beginning of our country's formation, progress is a long way from perfect.[3]

The story of "The Men of Atalissa" gives one heart-breaking example.[4] In 2009, this story was brought to the public's attention when it caught the headlines of newspapers across the nation.[5] In an attempt to rectify the ill-treatment that occurred, the Equal Employment Opportunity Commission (EEOC) sued Henry's Turkey Services for extreme violations under the Americans with Disabilities Act (ADA), including discriminatory wage

1. *See infra* Parts III–VI.
2. *See infra* Parts III–VI.
3. *See infra* Parts III–VI.
4. *See* Dan Barry, *The 'Boys' in the Bunkhouse: Toil, Abuse and Endurance in the Heartland*, N.Y. TIMES (Mar. 9, 2014), http://www.nytimes.com/interactive/2014/03/09/us/the-boys-in-the-bunkhouse.html.
5. *See generally id.* (illustrating the story of The Men of Atalissa, and explaining that "the Atalissa case has been a catalyst for change, according to Senator Tom Harkin, Democrat of Iowa, . . . who still struggles with what these vulnerable men endured in his home state"); Jack Douglas Jr. & Ginger Allen, *Texans Still Recovering After "Cruel" Life on Iowa Turkey Farm*, CBS DFW (June 19, 2014, 9:05 PM), http://dfw.cbslocal.com/2014/06/19/texans-still-recovering-after-cruel-life-on-iowa-turkey-farm/ (sharing the story of two of The Men of Atalissa, Jeff Long and Brady Watson, who described the cruel conditions they endured); Charlotte Eby, *Some Men from Atalissa Bunkhouse Found to Be Malnourished*, GLOBE GAZETTE (Mar. 17, 2009), http://globegazette.com/news/local/some-men-from-atalissa-bunkhouse-found-to-be-malnourished/article_5c5d8ec2-3b06-5b70-b9bb-d6721f5e9a36.html (showing how this story hit the headlines in 2009 and continued thereafter as the country became more aware of the circumstances surrounding this case).

practices.[6] As required under the ADA, disabled workers are to receive "sufficient wages to meet the minimum wages and overtime amounts required by law."[7]

An exception to this requirement, however, falls under the special certificate provision of the Fair Labor Standards Act (FLSA)—commonly referred to as § 14(c).[8] Enacted in 1938, this provision of the FLSA allows employers, even today, to pay disabled individuals subminimum wage.[9] Section 14(c) requires an assessment of the individual's productivity level because subminimum wage is allocated accordingly.[10] Utilizing this special certificate, Henry's Turkey Services paid a group of disabled men with intellectual disabilities subminimum wage, all the while failing to acknowledge their actual productivity.[11] The case against Henry's Turkey Services demonstrates how a statutory provision from 1938 can be, and most certainly was, abused.[12]

Before taking a deeper look at The Men of Atalissa, the notorious 1927 case, *Buck v. Bell*, presents a clear example of the disheartening reality that, even to the legal system, different meant less.[13]

A. Buck v. Bell—*Shedding Some Light on the View That Used to Exist*

Buck provides context for the harsh mentality that used to exist in society, setting the stage for what disability laws over the past century have had to overcome.[14]

In *Buck*, the United States Supreme Court held that a Virginia statute issuing eugenic sterilization for the "genetically unfit" did not violate one's constitutional rights.[15] Carrie Buck, described as a "feeble minded" woman, lived at the State Colony for Epileptics and Feeble Minded.[16] The

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6. Equal Emp't Opportunity Comm'n v. Hill Country Farms, Inc., 899 F. Supp. 2d 827, 828 (S.D. Iowa 2012). Hill Country Farms, Inc. conducted business as Henry's Turkey Services. *Id.*

7. *Id.* at 831.

8. 29 U.S.C. § 214(c) (2013).

9. *Id.*

10. *Id.* § 214(c)(5)(D).

11. *See Hill Country Farms*, 899 F. Supp. 2d at 830–32.

12. *See id.*; Barry, *supra* note 4.

13. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.").

14. *Id.*

15. *Id.* at 208; *see also* Lutz Kaelber, *Eugenics: Compulsory Sterilization in 50 American States*, UNIV. VT., http://www.uvm.edu/~lkaelber/eugenics/ (last visited Nov. 6, 2015) (discussing that eugenic serialization, or American eugenics, referred "to compulsory sterilization laws adopted by over 30 states that led to more than 60,000 sterilizations of disabled individuals" (emphasis removed)). Kaelber also notes, "Many of these individuals were sterilized because of a disability: they were mentally disabled or ill, or belonged to socially disadvantaged groups living on the margins of society." *Id.* (emphasis removed).

16. *Buck*, 274 U.S. at 205; *see also* Gary Emerling, *Sterilized: What Virginia and Nazi Germany Had in Common*, U.S. NEWS (Jan. 27, 2014, 7:00 AM), http://www.usnews.com/news/articles/

superintendent of the institution was going to sterilize Ms. Buck without her consent.[17] Justice Holmes delivered the Court's opinion:

> The judgment finds the facts that have been recited and that Carrie Buck "is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization . . . ."[18]

Citing Carrie Buck's potential to parent socially inadequate offspring, the Court determined that Ms. Buck's sterilization would benefit society.[19] She was already deemed the mother of a feeble-minded child and the daughter of a feeble-minded mother.[20] The Court was therefore of the opinion that, "Three generations of imbeciles [were] enough."[21]

Ironically, despite its enactment about a decade after *Buck*, § 14(c) fell short of taking a step forward.[22]

B. Hill Country Farms, Inc.*—Has This View Changed?*

Almost a century later, though our legal system progressed beyond the shocking opinion of *Buck v. Bell*—retracted in 1968—§ 14(c) maintains the aforesaid stereotype that different means less.[23]

The story of The Men of Atalissa is illustrative.[24] This is a story of several disabled men who moved from Goldthwaite, Texas, to Atalissa, Iowa, with the prospect of an "opportunity" to work.[25] As part of the arrangement for the job, Henry's Turkey Services contracted Louis Rich Foods—now West Liberty Foods (WLF)—to have these men work at WLF's meat processing plant.[26] "Every morning before dawn, [the men] were sent to eviscerate turkeys at a processing plant, in return for food, lodging, the occasional diversion and $65 a month."[27] The mere wage of $65 a month

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2014/01/27/a-dark-past-should-virginia-pay-those-it-robbed-of-the-right-to-bear-children (explaining the malice intent behind eugenic serialization: "[T]he idea [was] that the human population can be improved through selective reproduction; [t]hose put under the knife to prevent the passing on of potentially harmful hereditary traits often were deemed mentally disabled—or 'feebleminded'—and subsequently, a financial drain on society.").

17. *Buck*, 274 U.S. at 206.
18. *Id.* at 207.
19. *Id.*
20. *Id.* at 205.
21. *Id.* at 207.
22. *See infra* Part III.B.
23. *See infra* Parts V–VI.
24. *See* Equal Emp't Opportunity Comm'n v. Hill Country Farms, Inc., 899 F. Supp. 2d 827, 827 (S.D. Iowa 2012); Barry, *supra* note 4.
25. *See* Barry, *supra* note 4.
26. *Hill Country Farms*, 899 F. Supp. 2d at 830.
27. Barry, *supra* note 4.

was justified by Henry's Turkey Services for the "accommodations" it provided.[28] Yet, truth be told, this opportunity turned into decades of exploitation.[29] The men were housed in a rundown schoolhouse, known as the Atalissa bunkhouse, which was infested with cockroaches.[30] Their "lodging" consisted of sleeping on soiled mattresses, having mice crawling in their rooms, and surviving without central heat.[31] All the while, the men received pennies an hour to endure a job where they faced constant "verbal and physical abuse . . . [from being] called derogatory names and [being] hit and kicked by employees responsible for their supervision."[32]

These uninhabitable conditions remained masked by "the schoolhouse's immaculate exterior."[33] It was not until a veteran social worker followed up on an investigation that the truth was uncovered.[34] During the social worker's investigation, she explained how she witnessed a group of malnourished men in need of medical attention.[35] The condition inside the bunkhouse was so appalling that even "[t]wo decades on the front lines of human frailty had not prepared her for this."[36] The horrific lifestyle these men endured continued from the 1970s until 2009, when the bunkhouse was finally shut down and the men were removed.[37]

In addition to the thirty-plus years stolen from these men's lives, Henry's Turkey Services compensated them at an inexcusable wage.[38] Because of the special certificate provision of the FLSA, the company was allowed to pay these men pennies an hour.[39] Although Henry's Turkey Services had been operating for some time under an expired 14(c) certificate, the focus here is not regarding this expiration.[40] Instead, the focus is on the grueling question of why a law like § 14(c) allows for such compensation in

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28. *See id.*; *Hill Country Farms*, 899 F. Supp. 2d at 829–30.

29. *See* Barry, *supra* note 4.

30. *See generally* Clark Kauffman, *Abused Disabled Iowa Workers Awarded $240M*, USA TODAY (May 1, 2013, 1:41 PM), http://www.usatoday.com/story/money/business/2013/05/01/abused-disabled-iowa-plant-workers-awarded-240m/2126651/ (stating conditions inside the bunkhouse included "cockroaches so numerous that one social worker said she could hear them in the walls").

31. *See id.*; *Hill Country Farms*, 899 F. Supp. 2d at 829–30; *see also* Barry, *supra* note 4 (discussing the living conditions the social worker witnessed as she walked through the bunkhouse).

32. Abigail Rubenstein, *EEOC Lands $240M Win for Disabled Workers in Abuse Case*, LAW360 (May 1, 2013, 4:53 PM), http://www.law360.com/articles/437792/eeoc-lands-240m-win-for-disabled-workers-in-abuse-case.

33. Barry, *supra* note 4.

34. *Id.*

35. *Id.*

36. *Id.*

37. *See id.*; Equal Emp't Opportunity Comm'n v. Hill Country Farms, Inc., 899 F. Supp. 2d 827, 827 (S.D. Iowa 2012).

38. *See* Barry, *supra* note 4.

39. *See id.*

40. *See* NAT'L DISABILITY RIGHTS NETWORK, SEGREGATED & EXPLOITED: A CALL TO ACTION! THE FAILURE OF THE DISABILITY SERVICE SYSTEM TO PROVIDE QUALITY WORK 11, 20 (2011), https://www.disabilityrightstx.org/files/segregated-and-exploited_v18.pdf.

the first place.[41] By allowing the company to have this certificate, it gave the company a legal avenue to exploit these workers for years.[42]

At the time the case began, not only were the discriminatory wages unlawful due to the expired certificate, but the wages were also unlawful due to the actual productivity level of the disabled workers.[43] The court noted: "The disabled plant workers . . . performed as productively and effectively as non-disabled workers doing the same jobs at the turkey processing plant."[44] Yet, the men earned a net pay of about $.41 an hour even though their nondisabled coworkers earned $9 to $12 an hour performing at an equal productivity rate.[45] Henry's Turkey Services was capitalizing on § 14(c) by paying the men subminimum wage despite receiving hundreds of thousands of dollars from WLF for their labor.[46] Unfortunately, it was not until this case was initiated that these discriminatory practices came to light.[47]

The shock from this story is heightened by the EEOC's landmark verdict of $240 million for the disabled workers.[48] This "verdict sends an important message that the conduct that occurred here is intolerable in this nation."[49] The judgment was not only based on the years of abuse these men faced, but also on their thirty-plus years of lost wages.[50] According to Dr. Sue Gant, an expert witness for the EEOC, "the judgment represents 'a groundbreaking

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41. *See* 29 U.S.C. § 214(c) (2012).

42. *See generally* NAT'L DISABILITY RIGHTS NETWORK, *supra* note 40 (explaining that "employers with expired certificates may purposefully or by mistake continue to pay sub-minimum wages in violation of the FLSA as there appears no additional follow-up by the Department of Labor of employer[s] who fail to respond").

43. Equal Emp't Opportunity Comm'n v. Hill Country Farms, Inc., 899 F. Supp. 2d 827, 829–32 (S.D. Iowa 2012).

44. *Id.* at 832.

45. Zach Burr, *Payee Project Tackles Financial Exploitation*, DISABILITY RTS. WASH. (Oct. 26, 2011), http://www.disabilityrightswa.org/advocacy-news/payee-project-tackles-financial-exploitation.

46. *See* Barry, *supra* note 4; *see also Hill Country Farms*, 899 F. Supp. 2d at 830 (stating that Henry's Turkey Services "received over $500,000 annually in 2006, 2007, and 2008 from WLF in compensation for work performed by [its] employees").

47. *See* Barry, *supra* note 4.

48. *See* Abigail Rubenstein, *$240M Jury Verdict for Disabled Workers to Embolden EEOC*, LAW360 (May 2, 2013, 7:07 PM), http://www.law360.com/articles/438148/240m-jury-verdict-for-disabled-workers-to-embolden-eeoc. This verdict was cut back to $1.6 million due to statutory limitations from the Americans with Disabilities Act. Abigail Rubenstein, *Landmark $240M EEOC Disability Verdict to be Cut to $1.6M*, LAW360 (May 13, 2013, 2:30 PM) http://www.law360.com/articles/440988/landmark-240m-eeoc-disability-verdict-to-be-cut-to-1-6m [hereinafter Rubenstein, *Disability Verdict Cut*]. The final judgment ended up being about $3.4 million, which consisted of "$1.4 million in back pay, $1.6 million in damages and more than $421,000 in interest. The EEOC was also awarded more than $10,000 in costs." Ben James, *EEOC Scores $3.4M Win in ADA Suit Over Abused Workers*, LAW360 (June 12, 2013, 4:24 PM), http://www.law360.com/articles/449366/eeoc-scores-3-4m-win-in-ada-suit-over-abused-workers.

49. Rubenstein, *Disability Verdict Cut*, *supra* note 48.

50. *See generally* Clark Kauffman, *Jury: $240 Million for Atalissa Workers*, DES MOINES REG. (May 1, 2013), http://archive.desmoinesregister.com/article/20130501/NEWS/305010095/Jury-240-million-Atalissa-workers ("The $240 million verdict reflects $5.5 million in compensatory damages for each of the 32 men who worked for Henry's between 2007 and 2009, or their estates, plus $2 million each as punitive damages due to Henry's acting with malice or reckless indifference.").

advancement in that it demonstrates that the men have value that is equal to people without disabilities.'"[51]

What an astonishing reality it is that The Men of Atalissa endured such dreadful conditions because of a statutory provision giving businesses, like Henry's Turkey Services, the "OK" to pay disabled individuals less than minimum wage.[52] "History teaches that whenever any group of human beings is viewed as inferior and marked for different treatment, that group becomes subject to exploitation and abuse. This is true even if the badge of inferiority was not necessarily intended to lead to that result."[53] Section 14(c) did not have the same callous intent behind it as the Virginia statute in *Buck*—calling for the sterilization of the disabled to prevent future generations of, as Justice Holmes put it, "imbeciles."[54] Yet, despite any positive intentions the drafters might have had, the unfortunate truth is that § 14(c) isolates the disabled community with regard to their capability, emphasizing quite literally that different is less.[55]

Perhaps even more confounding than the statute itself is the fact that while § 14(c) requires monitoring by the Department of Labor (DOL) to prevent potential abuse,[56] this monitoring is lacking and far from effective.[57] In *Hill Country Farms*, despite having years of labor law violations from the DOL—in 1997, 1998, and 2003—the company was able to slide without a punishment due to the DOL's inaction.[58] In the twenty-first century, a story like The Men of Atalissa should be just that: a story.[59] But as Curt Decker from the National Disability Rights Network stated: "This is what happens when we don't pay attention."[60]

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51. Kauffman, *supra* note 30.

52. *See* 29 U.S.C. § 214(c) (2012).

53. Jessica Wichmann, *The Horrors of Atalissa*, NAT'L FED'N BLIND (Mar. 10, 2014, 4:55 PM), https://nfb.org/blog/vonb-blog/horrors-atalissa.

54. *Compare* § 214(c) (intending to provide employment opportunities), *with* Buck v. Bell, 274 U.S. 200, 207 (1927) (supporting societal allowances for forced sterilization of individuals).

55. *See infra* Parts II.B, VI.

56. 29 C.F.R. § 525.12 (2014).

57. *See Few Labor Violators Are Fined*, NAT'L WAGE & HOUR CLEARINGHOUSE (Jan. 5, 2010), http://www.just-pay.org/news/article.290308-Few_labor_violators_are_fined (stating that according to Senator Harkin, "there is 'no question' the law currently fails to provide the disabled with "fair employment opportunities that are sufficiently policed to prevent exploitation"); *see also* NAT'L DISABILITY RIGHTS NETWORK, *supra* note 40 (addressing that in 2001, the Government Accountability Office "stated that 'Labor has not effectively managed the special [sub]minimum wage program to ensure that 14(c) workers receive the correct wages because . . . the agency placed a low priority on the program . . .' noting problems like failure to act on expired certificates, no data nor system to verify worker productivity").

58. *See Few Labor Violators Are Fined*, *supra* note 57; *see also* Eby, *supra* note 5 ("McCalley placed some of the blame for the Atalissa case on the U.S. Department of Labor. The federal agency had been in charge overseeing the men's employer, Henry's Turkey Service. But McCalley said the labor department didn't have the resources to inspect employers that hired workers with special needs.").

59. *See* Barry, *supra* note 4.

60. *Id*.

This Comment first takes a brief historical look at the laws that changed the face of the disabled community over the past century.[61] Setting aside progress other laws have made with regard to integration and accommodations for the disabled, Part II evaluates the legislative intent behind § 14(c) and considers the reasons for its continued presence. Part III then examines how § 14(c) works and addresses previous attempts at its abolishment—considering both the pros and cons of this action.[62] H.R. 188 is also discussed because this bill demonstrates the next federal attempt at repealing § 14(c).[63] Finally, § 511 of the Rehabilitation Act, which was integrated into the Workforce Innovation and Opportunity Act, as well as Executive Order 13658 are analyzed, looking at their influence, or lack thereof, on minimizing subminimum wage.[64] Part IV provides an assessment of Vermont's transition away from subminimum wage to illustrate how states can take action to fix problems stemming from § 14(c). The Vermont approach in shifting away from subminimum wage to a system of integrated employment is a proven model for other states to follow.[65]

This Comment then shifts to Texas, in Part V, looking at where Texas laws stand on this issue. Many of the exploited workers in *Henry's Turkey Services* were Texans.[66] Thus, the following questions remain: What has Texas done since this abuse and exploitation to ensure employers utilizing § 14(c) do not misuse this provision?[67] Do Texas state laws take extra measures to regulate these employers?[68] Texas created the Employment First Task Force (EFTF) to increase employment opportunities for the disabled, but changes in the law have yet to be made with regard to § 14(c).[69] A 2012 Freedom of Information Act (FOIA) request is analyzed to highlight many of the low wages disabled employees in Texas have been earning, including pennies an hour.[70] In light of the many individuals making pennies an hour, the EFTF recommended to the 84th Legislature that Texas adopt the Vermont approach.[71] This recommendation was modified into S.B. 1559.[72] Although the modified bill did not pass, Part V analyzes the recommendation as EFTF members hope to include it in their report to the 85th Legislature. Ultimately,

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61. *See infra* Part II.
62. *See infra* Part III.A–C.
63. *See infra* Part III.D.
64. *See infra* Part III.E–F; David Hoff, *WIA is Now WIOA: What the New Bill Means for People with Disabilities* 31, INST. BRIEF 1 (Aug. 2014), http://www.communityinclusion.org/pdf/IB31_F.pdf.
65. *See infra* Part IV.
66. *See* Barry, *supra* note 4.
67. *See infra* Part V.
68. *See infra* Part V.
69. *See infra* Part V.
70. *See infra* Part V.A.
71. *See infra* Part V.B.
72. *See infra* Part V.B.

this Comment suggests that the 85th Legislature fully adopt and pass the recommendation to move toward a system of supported employment.[73]

In Part VI, this Comment takes a deeper look at § 14(c) and analyzes its effect on society's view toward the disabled. Part VI also provides an analogy to women's rights to highlight how views can change over time if the proper actions are taken to facilitate such change.[74] It then discusses § 14(c) as a law that stagnates growth.[75] Additionally, Part VI.C recognizes § 511 and President Obama's Executive Order as steps in the right direction; these two laws, in spite of their narrow focus, have made some progress in the federal sphere.[76] Finally, this Comment expresses that the low wages resulting from § 14(c) call for a systemic change to an otherwise broken system.[77] Through state action, the hope is that a federal push to abolish § 14(c) will be reached.[78] At the very least, however, the federal government should acknowledge that earning pennies an hour does not constitute a wage.

II. AS PROGRESS SURMOUNTS IN THE DISABLED COMMUNITY, § 14(C) REMAINS STAGNANT

A. The Progress Since Buck v. Bell *in Our Disability Laws*

A brief history of disability rights extending beyond the FLSA will provide the proper context for the analysis that follows.[79] To note some significant improvements since *Buck*, the United States has enacted several laws to protect the disabled: the Developmental Disabilities Services and Facilities Construction Amendments of 1970 (amended in 2000), the Rehabilitation Act of 1973 (amended in 2014), the Education for Handicapped Children Act of 1975 (reauthorized in 1990), the Americans with Disabilities Act of 1990, and the Restoration of the Americans with Disabilities Act of 2008.[80] Additionally, the Supreme Court's 1999 opinion in *Olmstead v. L.C. ex rel. Zimring* was a landmark decision for the disabled community.[81]

Since the early 1900s—a time when the stigma of the disabled mirrored the Supreme Court's opinion in *Buck*—various laws have improved the rights

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73. *See infra* Part VII.
74. *See infra* Part VI.A.
75. *See infra* Part VI.B.
76. *See infra* Part VI.C.
77. *See infra* Part VII.
78. *See infra* Part VII.
79. *See* MAURIANNE ADAM ET AL., TEACHING FOR DIVERSITY AND SOCIAL JUSTICE app. 14C (2d ed. 2007), http://www.life.arizona.edu/docs/ra-section/ability-hist.pdf; *Key Federal Laws*, ARC, http://www.thearc.org/what-we-do/public-policy/know-your-rights/federal-laws (last visited Nov 2, 2015).
80. *See Key Federal Laws*, *supra* note 79.
81. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581 (1999).

of the disabled.[82] For instance, the Developmental Disabilities Services and Facilities Construction Amendments of 1970—renamed the Developmental Disabilities Assistance and Bill of Rights Act in 1975—prompted states to create programs, including state disability councils, that would plan and execute services for the disabled population.[83] The Act's purpose was to "promote self-determination and community inclusion" by giving disabled individuals and their families access to community-based programs that help promote autonomy and productivity.[84] When amended in 2000, it "authorized grant funds to provide civil rights protections, education and early intervention, child care, health, employment, housing, transportation, recreation, family support, and other services."[85] This amendment exhibited the wide array of assistance the Act offered to the disabled community.[86]

The Rehabilitation Act, passed by Congress in 1973, proved to be another big federal measure for the disabled community.[87] This Act authorized grant programs for vocational rehabilitation, supported employment, and independent living.[88] It required vocational rehabilitation services to create "an individualized written rehabilitation program (IWRP) with each individual receiving services."[89] The Act also protected the disabled from discrimination in federal-agency or federal-contractor employment opportunities.[90] Moreover, § 504 of this law brought about changes in public access for the disabled (for example, wheelchair ramps).[91] The public accommodations of § 504, however, only applied to public institutions.[92]

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82. *See Key Federal Laws*, *supra* note 79.

83. *See generally Part 1: Major Legislation*, JOSEPH P. KENNEDY, JR. FOUND., http://www.jpkf.org/Documents/part1.pdf (last visited Nov. 6, 2015) (listing the four programs that were created through the Act, including State Councils on Developmental Disabilities (DD Councils), Protection and Advocacy (P&A) systems, University Centers for Excellence in Developmental Disabilities (UCEDDs), and Projects of National Significance (PNS)). The DD Councils not only created community-based services for the disabled, but have support activities such as "outreach training, public education, and information to policy-makers." *Id.* The P&A systems protect disabled individuals from human rights abuses; they are a source of legal information and an outlet for reports of incidents. *Id.* The UCEDDs, located on university campuses, provide students and professionals with interdisciplinary training and provide direct support to the disabled. *Id.* The PNS focuses on local concerns in the disabled community and works to provide practical solutions for such areas of concern. *Id.*

84. *See id.*

85. *Key Federal Laws*, *supra* note 79.

86. *See id.*; *see also Developmental Disabilities Assistance and Bill of Rights Act (DD Act) History*, AUCD.ORG 15–20, http://www.aucd.org/docs/urc/New%20Directors%20Orientation/UCEDD%20New_Directors_%20DDAct.pdf (last visited Nov. 26, 2015) (discussing some of the significant improvements of the 2000 amendment).

87. *See Part 1: Major Legislation*, *supra* note 83.

88. *See id.*

89. *Key Federal Laws*, *supra* note 79.

90. *Id.*

91. *What Is Section 504?*, EVEN GROUNDS, http://evengrounds.com/articles/section-504 (last visited Nov. 2, 2015).

92. *Id.*

The Education for Handicapped Children Act of 1975 continued making progress in the area of disability law. It required public schools to provide a free, appropriate public education to children with disabilities in the least restrictive manner possible.[93] It also created what is known as an Individual Education Plan (IEP) to help facilitate structure for disabled students in schools.[94] During its reauthorization in 1990, the Education for Handicapped Children Act expanded the definition of *disability* to include brain injury and required schools to prepare these students for adulthood.[95] The IEP discussed and planned the services needed to meet this requirement.[96]

Finally, one of the most significant pieces of legislation for disabled individuals was the ADA, passed in 1990.[97] As a milestone in the disabled community, the ADA represented "wide-ranging legislation intended to make American society accessible to people with disabilities."[98] It required changes to a mentality of neglect or indifference toward the disabled by prohibiting discrimination in several areas of society: employment, public services, transportation, public accommodations, and telecommunications.[99] The ADA was a civil rights law meant to protect the disabled in a similar way individuals are protected from discrimination on the basis of race, color, sex, age, or religion.[100]

Additionally, the ADA was a big step forward from the Rehabilitation Act of 1973.[101] In providing accommodations for the disabled with regard to access, it was intended to "go beyond Section 504 [of the Rehabilitation Act] by including private entities—a much larger group of facilities and employers than had been covered under the 1973 law."[102] Looking at access, the ADA also provided accommodations to the disabled to protect their voting

93. *Part 1: Major Legislation*, *supra* note 83.

94. *Id.*

95. *Key Federal Laws*, *supra* note 79.

96. *Id.*

97. *Part 1: Major Legislation*, *supra* note 83.

98. *Key Federal Laws*, *supra* note 79.

99. *See generally* NAT'L DISABILITY RIGHTS NETWORK, *supra* note 40, at 8 ("The passage of the Americans with Disabilities Act (ADA) in 1990 was a major step in correcting past wrongs faced by people with disabilities."); *Part 1: Major Legislation*, *supra* note 83 (discussing that the ADA "[g]uarantees the civil rights of people with disabilities by prohibiting the discrimination against anyone who has a mental or physical disability").

100. *The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities*, U.S. DEP'T JUST. (2014), http://www.ada.gov/ada_voting/ada_voting_ta.htm.

101. *See* JACQUELINE VAUGHN SWITZER, DISABLED RIGHTS: AMERICAN DISABILITY POLICY AND THE FIGHT FOR EQUALITY 61 (2003).

102. *Id.*

rights.[103] Title II of the ADA requires state and local governments to ensure that the disabled have an equal opportunity to vote.[104]

In 2008, after years of being eroded by the courts, Congress amended the ADA.[105] The restoration of the ADA was brought about to fix areas of the law that courts had worn down through narrow interpretations of the definition of *disability*.[106] "[A] 2006 study indicated that plaintiffs [had] lost more than 97% of ADA employment discrimination claims, more than under any other civil rights statute—and the majority of these cases [were] lost because courts determine[d] plaintiffs [were] not disabled."[107] To fulfill its original intent—protecting the disabled from discrimination in areas such as employment—and lessen the cumbersome burden for disabled plaintiffs to prove their disability, the restoration was promulgated.[108] The ADA Amendments Act of 2008 expanded the definition of *disability*.[109]

Furthermore, although not a statute, another significant milestone in the disabled community was the United States Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring*.[110] The Olmstead Court has come a long way from the comments made in *Buck v. Bell*.[111] Rather than referring to the disabled as "imbeciles," the Supreme Court held in favor of the disabled.[112] In *Olmstead*, mentally disabled individuals were institutionalized, and the petitioner healthcare officials refused to place the individuals in a community-based treatment program.[113] The Supreme Court drew attention to the fact that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of

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103. *The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities*, *supra* note 100. Before voting rights for the disabled were ensured through the ADA, "[p]eople who use[d] wheelchairs or other mobility aids, such as walkers, [had] been unable to enter the polling place to cast their ballot because there was no ramp. People who [were] blind or [had] low vision could not cast their vote because the ballot was completely inaccessible to them." *Id.*

104. *Id.*

105. *See* ADA Amendments Act of 2008, 42 U.S.C. § 12101 (2012); *see also* Katherine Shaw, *The Disability Rights Movement–The ADA Today*, MOMENTUM, Fall 2008, at 20, http://www.nationalmssociety.org/NationalMSSociety/media/MSNationalFiles/Brochures/Article-ADA-Fair-Play-for-People-with-Chronic-Disease-or-Disability.pdf ("[C]ourt decisions and inconsistent policies have eroded the intention of the ADA . . . .").

106. *See* Shaw, *supra* note 105*; Key Federal Laws*, *supra* note 79.

107. *ADA Restoration Act: A Civil Rights Promise to Fulfill*, ACLU, https://www.aclu.org/files/images/asset_upload_file833_33633.pdf (last visited Nov. 6, 2015) [hereinafter *ADA Restoration Act*].

108. *See* Shaw, *supra* note 105; *see also ADA Restoration Act*, *supra* note 107 ("The ADA Restoration Act restores the original intent of the ADA by clarifying that anyone with an impairment, regardless of the successful use of mitigating measures, is entitled to seek a reasonable accommodation in the workplace or further remedies.").

109. *See generally* 42 U.S.C. § 12101 (2012) (showing the new definition of *disability*).

110. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 607 (1999).

111. *Compare* Buck v. Bell, 274 U.S. 200, 207 (1927) (determining that Buck's sterilization would have personal and societal benefits), *with Olmstead*, 527 U.S. at 587 (holding that the ADA proscription on discrimination may require disabled individuals to be placed in community rather than institutional settings).

112. *Olmstead*, 527 U.S. at 581.

113. *Id*. at 588 (quoting 42 U.S.C. § 12101(a)(2) (1990)).

discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[114] In addressing this problem, the "Supreme Court stated loud and clear that the denial of community placements to individuals with disabilities is precisely the kind of segregation that Congress sought to eliminate in passing the Americans with Disabilities Act."[115] This holding supports the conclusion that society should be moving away from segregating the disabled and instead should be providing an opportunity for integration to occur.[116]

B. The Noble, but Unfulfilled Legislative Intent Behind § 14(c)

Ironically, in spite of all the progress made in disability laws over the past fifty years, one law—§ 14(c) of the FLSA—still remains intact and dates back almost a century.[117]

The legislative intent behind § 14(c) sounded relatively promising.[118] The National Disability Rights Network stated: "The concept that individuals with disabilities should be earning less than their able-bodied peers is a throwback to the 1930s and the creation of the Fair Labor Standards Act, during a time when veterans and others with physical disabilities were seeking factory jobs in the manufacturing industry."[119] To create job opportunities for everyone, the Legislature provided exemptions in the FLSA to incentivize employers to hire the disabled.[120] These incentives allowed disabled individuals, who may not be as productive as nondisabled workers, to find employment.[121]

Unfortunately, despite the positive legislative intent, creating a special category for disabled individuals keeps the disabled segregated.[122] Segregation maintains the stereotype that other disability laws have fought

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114. *Id.*

115. Nat'l Ass'n of Prot. & Advocacy Sys., *Questions and Answers About the Legal Interpretations of the* Olmstead v. L.C. *Decision*, NAT'L DISABILITY RTS. NETWORK, http://www.ndrn.org/issues/community-integration/311--olmstead-v-lc-decision-qa.html (last visited Nov. 6, 2015).

116. *See id.* ("The decision presents new opportunities for advocating for community-based services and supports for people with disabilities.").

117. *See infra* Part III.

118. Wichmann, *supra* note 53.

119. *Testimony of Curtis Decker, Executive Director, National Disability Rights Network for the Health, Education, Labor and Pensions Full Committee Hearing*, NAT'L DISABILITY RTS. NETWORK, http://www.ndrn.org/advocacy/testimony/452-testimony-preventing-worker-exploitation.html (last visited Nov. 6, 2015).

120. *See* Wichmann, *supra* note 53.

121. *See id.*

122. *See, e.g.*, Claire Zillman, *Disabled Workers Left in the Cold on Minimum Wage*, FORTUNE (Feb. 12, 2014, 4:19 PM), http://fortune.com/2014/02/12/disabled-workers-left-in-the-cold-on-minimum-wage/?section=magazines_fortune ("Congress passed the original legislation [77] years ago because it 'rightfully felt that these individuals had the desire to be part of the fabric of America' . . . . But that was a different time; when 'discrimination was inevitable because service systems were based on a charity model, rather than empowerment and self-determination and when societal low expectations for people with disabilities colored policy making' . . . .").

years to get past.[123] Yale Professor Hudson Hastings emphasized this stereotype all too well when he shared what occurred at a committee hearing during the FLSA's formation.[124] Hastings testified at "a joint hearing before the Senate and House Labor Committees, [and] expressed concern that the minimum wage would be set 'so high as to prevent millions of workers who are subnormal in their physical or mental capacities from securing any employment whatsoever.'"[125] One member of Congress coined the term *subnormal workers*, which was then endorsed by President Franklin Roosevelt's Administration.[126] In advocating a bill with the intent to help the disabled, the Roosevelt Administration ended up endorsing a term that reflects the origins of a long-standing stereotype.[127]

III. SHIFTS IN THE LAW AND UNATTAINED GOALS

A. Understanding § 14(c)

As the legislative intent delineated, § 14(c) arose out of the notion that disabled employees would be unable to meet the standards of nondisabled employees.[128] The original idea of paying an employee subminimum wage to counter the lack of productivity came during the passage of the National Industrial Recovery Act (NIRA).[129] The NIRA set up a system of certificates in which employers would receive a certificate that allowed them to pay a disabled individual subminimum wage through a productivity-based standard.[130] In 1935, however, the NIRA was declared unconstitutional.[131]

A few years later, in 1938, Congress enacted the FLSA, reestablishing the certification system.[132] Under this system, employers must file an application with the Wage and Hour Division of the DOL.[133] If the Secretary of Labor grants a Special Wage Certificate, employers are then allowed to pay their disabled employees subminimum wage commensurate with the individual's productivity level.[134] The statute specifically protects against

123. *See infra* Part VI.

124. Samuel R. Bagenstos, *The Case Against the Section 14(c) Subminimum Wage Program,* NAT'L FED'N BLIND 3 (Jan. 31, 2012), https://nfb.org/images/nfb/documents/word/14c_report_sam_bagenstos.doc.

125. *Id.*

126. *Id.*

127. *See id.*

128. *See* Wichmann, *supra* note 53.

129. WILLIAM G. WHITTAKER, CONG. RES. SERV., TREATMENT OF WORKERS WITH DISABILITIES UNDER SECTION 14(C) OF THE FAIR LABOR STANDARDS ACT 6–7 (Feb. 9, 2005), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1211&context=key_workplace.

130. *Id.*

131. *Id*. at 7.

132. 29 C.F.R. § 525.1 (2014).

133. *Id.* § 525.7.

134. *Id.* § 525.5; *Fair Wages for Workers with Disabilities*, NAT'L FED'N BLIND, https://nfb.org/fair-wages (last visited Nov. 7, 2015).

exploitation, as it states: "An individual whose earning or productive capacity is not impaired for the work being performed cannot be employed under a certificate issued pursuant to this part and must be paid at least the applicable minimum wage."[135]

Currently, certificates are issued on an establishment basis; there are four categories of certificate holders that fall within the three types of establishments.[136] The four groups of certificate holders include business certificate holders, school–work experience programs (SWEP), community rehabilitation programs (CRPs), and employers of patient–workers.[137] The three types of establishments and their respective certificate holders are work centers (CRPs), hospitals or resident care facilities (employers of patient workers), and business establishments (business certificate holders and SWEP).[138] According to the Department of Labor's website, work centers have historically "provided rehabilitation services, day treatment, training, and employment opportunities at their facilities to individuals with disabilities."[139] Under hospitals or resident care facilities, patient–worker certificates are issued because the facilities will often have their patients helping with work on the grounds—janitorial work, maintenance, and food services.[140] Business establishment certificate holders allow private employers to receive a certificate and pay their disabled employees subminimum wage.[141] Finally, SWEP, which also falls under a business establishment, is a school-based work program in which high school students with disabilities are placed at work sites in the community.[142]

These establishments create either a regular work environment or a sheltered work environment.[143] In a regular work environment, the employee is integrated into the workforce and "may work for janitorial services, in restaurants and small retail operations, or engage in light manufacturing or production work, such as putting together packs of coffee and teas for use in hotel guest rooms."[144] Work centers, on the other hand, which are commonly referred to as sheltered workshops, create an isolated setting; the disabled

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135. 29 C.F.R. § 525.5.

136. *See generally Section 64d00: Introduction*, U.S. DEP'T LAB., http://www.dol.gov/whd/FOH/ch64/64d00.htm (last visited Nov. 7, 2015) (listing the types of establishments that can receive certificates).

137. *See Special Employment*, U.S. DEP'T LAB., http://www.dol.gov/whd/specialemployment/ (last visited Nov. 20, 2015).

138. *Section 64d00: Introduction*, *supra* note 136.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *See id.*

144. *Fewer Reasons to Celebrate on Labor Day for Some Workers with Disabilities*, NAT'L DISABILITY RTS. NETWORK (Aug. 29, 2014), http://www.ndrn.org/en/media/ndrn-blog/523-labor-day-subminimum-wage-piece.html.

employees are segregated as they work on particular tasks.[145] This environment is supposed to provide the disabled with the opportunity to learn the basic skills required to work in the general economy.[146] Yet, "[t]he truth is that sheltered workshops are part of a long history in this country of segregating people with disabilities, where they have little or no interaction with their peers, are paid low wages, and are not being properly prepared for the real world of work."[147] This lack of preparation results from individuals being assigned menial tasks.[148] At sheltered workshops, the "preference [is] for relatively simple work activities such as assembling, packing, woodworking, manufacturing, servicing, or sewing."[149] Employers that usually run these sheltered workshops include nonprofits or state or local government programs.[150] Goodwill, for example, is one nonprofit that employs many individuals under § 14(c) in various states.[151]

Originally, there was no floor that set the minimum amount an employer could pay below minimum wage.[152] The standard rate in a competitive industry was seventy-five percent of the FLSA minimum.[153] Yet, in sheltered workshops, employers were allowed to pay individuals based on their earning capacity.[154] "Thus, in practice, a dual standard was established: a productivity wage in sheltered workshops; [and] a specific minimum rate for other sheltered employment."[155]

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145. Melissa Linebaugh, *How Sheltered Work Affects Social Security Disability*, DISABILITYSECRETS, http://www.disabilitysecrets.com/resources/disability/how-sheltered-work-affects-social-security-dis (last visited Nov. 7, 2015).

146. *Id.*

147. Ittai Orr, *Hire Learning: Why Sheltered Workshops Do More Harm than Good*, THINK BEYOND LABEL (Aug. 7, 2013), http://www.thinkbeyondthelabel.com/Blog/post/Why-Sheltered-Workshops-Do-More-Harm-than-Good.aspx; *see also* NAT'L DISABILITY RIGHTS NETWORK, *supra* note 40, at 6 (discussing how sheltered workshops are "affirmative industries, training facilities, and rehabilitation centers which congregate large numbers of people with disabilities and claim to be providing rehabilitation geared toward transition into the general labor market by providing activities that typically involve repetitive tasks").

148. *See* Orr, *supra* note 147.

149. Alberto Migliore, *Sheltered Workshops*, INT'L ENCYCLOPEDIA REHABILITATION, http://cirrie.buffalo.edu/encyclopedia/en/article/136/ (last visited Nov. 7, 2015).

150. Linebaugh, *supra* note 145; *see also* Anna Schecter, *Disabled Workers Paid Just Pennies an Hour–and It's Legal*, NBC NEWS (June 25, 2013, 3:12 PM), http://investigations.nbcnews.com/_news/2013/06/25/19062348-disabled-workers-paid-just-pennies-an-hour-and-its-legal ("In 2001, the most recent year for which numbers are available, the GAO estimated that more than 90 percent of Section 14 (c) workers were employed at nonprofit work centers.").

151. *See* Rudi Keller, *Wages at Goodwill Draw Protestors to Local Store*, COLUM. TRIB. (July 1, 2014, 12:34 PM), http://www.columbiatribune.com/news/local/wages-at-goodwill-draw-protesters-to-local-store/article_d7bc951a-a43f-523c-ab38513f280138d9.html (explaining that of the "160 sheltered workshops operated by Goodwill nationwide, 64 pay less than the minimum wage").

152. *See* WHITTAKER, *supra* note 129.

153. *Id.*

154. *Id.*

155. *Id.*

Today, there is still no floor in place.[156] The FLSA requires employers to show that workers will be paid a wage that meets their productivity level when applying for a certificate.[157] The amount is supposed to be "relative to the wages and productivity of experienced workers who are not disabled and who perform the same type and quality of work in the same geographic area."[158] Under the law, this productivity level must be reevaluated once every six months to consider any changes in the worker's output.[159] The reevaluation provision is meant to ensure that disabled workers who improve their quality of work are compensated accordingly.[160]

The wage rate for every employee must also be reevaluated every year.[161] The purpose of the annual review is to make sure that the employees' wages "reflect changes in the prevailing wages paid to experienced individuals not disabled for the work to be performed employed in the locality for essentially the same type of work."[162] The DOL is supposed to monitor the entities that hold a certificate to verify that these provisions are properly and timely enforced.[163]

B. Section 14(c) Has Not Yet Led to Supported Employment

In the 1980s, society experienced a "philosophical mind-shift," which prompted a change toward supported employment in the disabled community.[164] This shift should have helped individuals working under the certification system receive an income commensurate with their work product.[165] Yet, society has fallen short of this goal.[166]

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156. *See* 29 C.F.R. § 525.1 (2014).

157. GERALD MAYER, BENJAMIN COLLINS & DAVID H. BRADLEY, CONG. RESEARCH SERV., THE FAIR LABOR STANDARDS ACT (FLSA): AN OVERVIEW 5 (June 4, 2013), http://fas.org/sgp/crs/misc/R42713.pdf; *see also Section 64d00: Introduction*, *supra* note 136 ("The certificates do not establish specific subminimum wage rates. They do, however, require the payment of at least commensurate wage rates . . . .").

158. MAYER, COLLINS & BRADLEY, *supra* note 157.

159. 29 C.F.R. § 525.1(b).

160. *See id.*; MAYER, COLLINS & BRADLEY, *supra* note 157, at 9.

161. 29 C.F.R. § 525.1(b).

162. *Id.*

163. *Id.* § 525.19.

164. Nicki Brooke et al., *Supported Employment: A Customer-Driven Approach*, *in* SUPPORTED EMPLOYMENT HANDBOOK: A CUSTOMER-DRIVEN APPROACH FOR PERSONS WITH SIGNIFICANT DISABILITIES 3–4 (1997), http://www.worksupport.com/documents/sechapter11.PDF. According to the National Disability Rights Network, *supported employment* is defined as "competitive work performed in an integrated work setting where individuals are matched to jobs consistent with the strengths, resources, abilities, capabilities, interests, and informed choice and are provided individualized supports to learn and keep the job." NAT'L DISABILITY RIGHTS NETWORK, *supra* note 40, at 6.

165. *See infra* Parts V–VI.

166. *See infra* Parts V–VI.

When supported employment became popular, new vocational alternatives for those with severe disabilities were created.[167] Supported employment includes individual placement or group option arrangements.[168] Under the Individual Placement Model of Competitive Employment, disabled individuals receive specialized treatment "to obtain and maintain the community integrated competitive employment position of choice."[169] This model was considered the least restrictive, as well as the "most normalizing" for the individual.[170]

Under the group arrangements, four options exist: enclave, mobile work crew, dispersed group or cluster option, and entrepreneurial model.[171] An enclave is a group of individuals working together under a permanent, full-time supervisor.[172] This arrangement "occurs within a regular, community-based industry called the host company with participants' earnings based upon production rate results."[173] The mobile work crew option involves individuals with severe disabilities working on specialized contracts and traveling to a community for said work.[174] This option differs from enclaves because the arrangement requires traveling to different businesses and handling several contracts.[175] In the dispersed group or cluster option, individuals are hired by businesses and compensated with an income equal to that of their coworkers performing the same or similar duties.[176] In this model, the individuals all work in different positions although there is still one supervisor.[177] The entrepreneurial model changed over the years, but most recently involved the disabled entering into business endeavors with their family and friends and actually owning and operating their own businesses.[178]

The shift toward supported employment models remains a work in progress.[179] Regrettably, § 14(c) has failed to achieve supported employment despite the fact that some of these arrangements have been utilized under the system.[180]

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167. Brooke et al., *supra* note 164, at 4. "These alternatives ranged from day treatment services which are facility-based and generally non-vocational in design; to supported employment, which includes real jobs in the local labor market with assistance and support in obtaining and maintaining community integrated competitive employment." *Id.*

168. *Id.* at 5–6.

169. *Id*. at 5.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 5–6.

179. *See infra* Parts V–VI.

180. *See infra* Parts V–VI.

C. Attempted Legislation to Abolish § 14(c) and Fear of Its Abolishment

Over the past five years, two pieces of legislation, which mirrored one another, attempted to abolish § 14(c): the Fair Wages for Workers with Disabilities Act of 2011 (H.R. 3086) and the Fair Wages for Workers with Disabilities Act of 2013 (H.R. 831).[181]

H.R. 3086 and H.R. 831 called for a transition out of the subminimum wage program as well as a repeal of § 14(c) over the course of three years.[182] The transition period was meant to give employers with current certificates time to transition out of paying subminimum wage.[183] This transition was also recommended by disability advocates to help the disabled individuals phase out of the system.[184] Jonathan Young, chairman of the National Council on Disability (NCD), stated: "The 14(c) program should be phased-out gradually as part of a systems change effort that enhances existing resources and creates new mechanisms for supporting individuals in obtaining integrated employment and other nonwork services."[185] With regard to this change, the bills called for varying degrees of transitioning out of the program based on the entity holding the special wage certificate.[186] Specifically, the bills required that special wage certificates be: (1) revoked after one year for private for-profit entities, (2) revoked after two years for public or governmental entities, and (3) revoked after three years for nonprofit entities.[187] Once the three years were up, § 14(c) would be repealed and "any remaining special wage certificates issued under such section [would] be revoked."[188]

Unfortunately, neither bill passed.[189] The fear of abolishing § 14(c) and the resulting changes seem to be the driving factors behind the hesitation for its repeal.[190] Employers are under the impression that abolishing § 14(c) will

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181. Fair Wages for Workers with Disabilities Act of 2013, H.R. 831, 113th Cong. (2013); Fair Wages for Workers with Disabilities Act of 2011, H.R. 3086, 112th Cong. (2011).

182. *See* H.R. 831; H.R. 3086.

183. *See* H.R. 831; H.R. 3086.

184. *See Feds Recommend Eliminating Subminimum Wage for People with Disabilities*, NAT'L COUNCIL ON DISABILITY, http://www.riddc.org/downloads/WebsiteSubminimumwage.pdf (last visited Nov. 7, 2015) ("NCD recommends a phase-out of the 14(c) program rather than immediate repeal because those who have been in the program for many years need time to transition to a supported employment environment.").

185. *Id.*

186. H.R. 831; H.R. 3086.

187. H.R. 831; H.R. 3086.

188. H.R. 831; H.R. 3086.

189. *See generally H.R. 3086 (112th): Fair Wages for Workers with Disabilities Act of 2011*, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/hr3086 (last visited Nov. 2, 2015) (noting the bill's failure); *Text of the Fair Wages for Workers with Disabilities Act of 2013*, GOVTRACK.US, https://www.govtrack.us/congress/bills/113/hr831/text (text as introduced on Feb. 26, 2013) (noting the bill's failure).

190. *See generally* Schecter, *supra* note 150 (discussing both employers' and families' perspectives on the law).

take away job opportunities for the disabled—hurting both the employer and the individual.[191] Employment for people with disabilities is already extremely low as "[j]ust over 19 percent of disabled people work—compared with 68 percent of all Americans 16 and older."[192] According to employers that favor the 14(c) program, these numbers would be even worse if such a program did not exist.[193] Martin Lampner, the CEO of a nonprofit that provides services to those with developmental disabilities, stated: "Many employers are not willing to give these folks a chance."[194]

Another hesitation for the repeal comes from the families who have a loved one employed under § 14(c). Families fear the retraction of a law that gives their disabled family member a chance to work.[195] For example, an NBC article shared the personal story of Ms. Fran Davidson.[196] Ms. Davidson's disabled son, Jeremy, worked at a Goodwill sheltered workshop for more than a decade.[197] Ms. Davidson expressed her thoughts on the matter: "I know he's not getting picked on, and he's in a safe place. He enjoys what he's doing, and he's happy, and that's what we like for our kids."[198] Like Fran Davidson, many families similarly situated "say their loved ones enjoy the work experience, enjoy getting a paycheck, and the amount is of no consequence."[199]

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191. *See* Schecter, *supra* note 150 ("A Barnes & Noble spokeswoman defended the Section 14(c) program as providing jobs to 'people who would otherwise not have [the opportunity to work].'" (alternation in original)).

192. Alison Knezevich, *'Subminimum Wage' for Disabled Workers Called Exploitative*, BALT. SUN (June 14, 2014), http://articles.baltimoresun.com/2014-06-14/news/bs-md-subminimum-wage-20140614_1_disabled-workers-subminimum-wage-low-paying-jobs.

193. *Id.*; *see also* Zillman, *supra* note 122 ("ACCESS, a coalition of nonprofits that employ the disabled, is against phasing out 14c. In a letter opposing the National Council on Disability's 2012 recommendation to end the program, it said that 'hundreds of thousands of people with disabilities will most likely become unemployed or lose the opportunity to become employed in the future.' A commensurate wage, the letter said, is in place to 'prevent the curtailment of employment' for individuals who are 'not capable of meeting productivity standards.'").

194. Knezevich, *supra* note 192.

195. *See* Schecter, *supra* note 150 (sharing the stories of families who are content with the law).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*; *see also* Sarah Blahovec, *It's About TIME: Ending Subminimum Wages for Workers with Disabilities*, HUFFINGTON POST (June 10, 2015, 5:59 AM), http://www.huffingtonpost.com/sarah-blahovec/its-about-time-ending-sub_b_7041592.html ("[A] father of a severely disabled woman argued that her capacity to work [was] truly limited, but that she [took] pride in bringing home even a small paycheck every few weeks. If these wage certificates are phased out, she will no longer have the opportunity to participate in this employment because the severity of her disability, even with proper training, limits her ability to be productive enough to compete. . . . [T]hese opportunities provide satisfaction for people with severe disabilities that bar them from participating fully in the workforce, and that satisfaction should be valued.").

D. The TIME Act: Maybe Third Time's a Charm?

On January 7, 2015, Congressman Gregg Harper initiated another attempt at abolishing § 14(c).[200] This new bill, H.R. 188, entitled the Transitioning to Integrated and Meaningful Employment Act (TIME Act), is identical to the two previous attempts.[201] Following H.R. 3086 and H.R. 831, the TIME Act shows continued effort in trying to phase out of the subminimum wage program.[202]

Although H.R. 188 reflects the language of the preceding federal bills, this year the title given to the bill presents a more pressing acronym.[203] Rather than calling the bill the Fair Wages for Workers with Disabilities Act of 2015, it has a title that created a rather appropriate acronym: TIME.[204] In an article regarding the TIME Act, the National Federation of the Blind (NFB) stated: "After more than seventy-five years of demonstrated failure, it is time to invest in proven, effective models for employment. Section 14(c) sustains the same segregated subminimum wage environments that existed in 1938."[205]

Unfortunately, the new bill is progressing slowly.[206] The last action taken was on April 29, 2015, when the Speaker of the House of Representatives referred the bill to the Workforce Protections Subcommittee.[207] A U.S. House Education and Workforce Committee spokesperson said: "The bill has been referred to the committee, but no further legislative action has been scheduled at this time."[208] According to govtrack.us, as of June 2015, "the bill has only a 3 percent chance of being enacted, seemingly because it is a low priority."[209] Consequently, drawing attention to it being time to repeal this antiquated law does not seem to be enough to make it happen.[210]

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200. *See generally Fair Wages for Workers with Disabilities Act Introduced*, ARC (Jan. 12, 2015), http://insider.thearc.org/2015/01/12/fair-wages-workers-disabilities-act-introduced/ ("Last week, Congressman Gregg Harper (R-MS), introduced H.R. 188 . . . . An identical bill, the Fair Wages for Workers with Disabilities Act of 2013 (H.R. 831), introduced by Congressman Harper in 2013, died at the end of the 113[th] Congress with 97 co-sponsors.").

201. *See* Transitioning to Integrated and Meaningful Employment (TIME) Act, H.R. 188, 114th Cong. (2015) (providing for a transition out of the subminimum wage program and repealing § 14(c)); Fair Wages for Workers with Disabilities Act of 2013, H.R. 831, 113th Cong. (2013) (same); Fair Wages for Workers with Disabilities Act of 2011, H.R. 3086, 112th Cong. (2011) (same).

202. H.R. 188.

203. *Id.*

204. *Id.*

205. *Fair Wages for Workers with Disabilities*, *supra* note 134.

206. *See* H.R. 188.

207. *Id.*

208. Telephone Interview with Spokesperson, U.S. House Educ. and Workforce Comm. (July 15, 2015).

209. Blahovec, *supra* note 199. As of November 2015, govtrack.us reports that the bill only has a "2% chance of being enacted." *H.R. 188 (114th): TIME Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/114/hr188 (last visited Nov. 20, 2015).

210. *Id.*

E. Section 511: Limitations on the Use of Subminimum Wage

Although attempts at abolishing § 14(c) are slow to make way and the future of the TIME Act seems doubtful, in July 2014, the federal government successfully passed one law—the Workforce Innovation and Opportunity Act; the new law amended Title V of the Rehabilitation Act by adding § 511—a provision that puts limitations on the use of subminimum wage.[211] The National Disability Rights Network believes § 511 attempts to solve some of the problems with subminimum wage for disabled individuals.[212] According to the Executive Director Curt Decker, "Section 511 would, for the first time, require that [disabled] individuals apply for [vocational rehabilitation] services and if eligible, work toward competitive integrated employment before any consideration of a subminimum wage position."[213]

This provision obligates vocational rehabilitation services to follow a number of steps when working with disabled individuals twenty-four years of age or younger.[214] These steps must be completed before a subminimum wage position is considered to help qualified individuals find employment opportunities that pay at least minimum wage.[215] Part of the process involves providing pre-employment transition services to the individual and making sure the individual applied for vocational rehabilitation services, both of which prevent attempts to circumvent subminimum wage positions.[216] Additionally, "[t]he measure also mandates that state vocational rehabilitation agencies work with schools to provide transition services to all students with disabilities and requires that the agencies allocate at least 15 percent of their federal funding toward such transition efforts."[217] This mandate creates assurance that schools will play a more active role in preparing students to transition out of high school and into the workforce.[218] Moreover, if one gets placed in a subminimum wage position after alternative options have failed, § 511 still requires the individual to receive "career

211. *See* Workforce Innovation and Opportunity Act, Pub. L. No. 113–128, 128 Stat. 1425, 1676–79 (to be codified at 29 U.S.C. § 511); *Workforce Innovation and Opportunity Act (WIOA)*, U.S. DEP'T LAB., https://www.dol.gov/odep/pdf/WIOALimitationsUseOfSubminimumWage.pdf (last visited Nov. 22, 2015) (Powerpoint presentation at slide 2); *see also* Michelle Diament, *Obama Signs Law Limiting Sheltered Workshop Eligibility*, DISABILITY SCOOP (July 22, 2014), http://www.disabilityscoop.com/2014/07/22/obama-law-limiting-sheltered/19538/ (explaining what § 511 entails).

212. David Card, *Statement by Executive Director Curt Decker Supporting Section 511 of the Rehabilitation Act*, NAT'L DISABILITY RTS. NETWORK (Aug. 20, 2013), http://www.ndrn.org/en/media/releases/505-press-release-supporting-section-511-of-the-rehabilitation-act.html.

213. *Id.*

214. *See* Workforce Innovation and Opportunity Act § 511.

215. *See id.*

216. *See id.*

217. *See* Diament, *supra* note 211.

218. *Id.*

counseling."[219] Information and referrals given during counseling help the individual make decisions regarding future career advancements.[220]

Section 511 also requires continued support by the employer.[221] The goal is that the employee remains informed "of self-advocacy, self-determination, and peer mentoring training opportunities available in the individual's geographic area."[222] This information on self-advocacy, self-determination, and peer-mentoring training opportunities must be "provided by an entity that does not have any financial interest in the individual's employment outcome," which is a means to safeguard against potential exploitation.[223] These requirements last throughout the time the individual is employed in a subminimum wage position.[224] Thus, as President Obama stated: The bill "will help workers, including workers with disabilities, access employment, education, job-driven training, and support services that give them the chance to advance their careers and secure the good jobs of the future."[225]

The shortcomings of the law, however, lie in the number of disabled individuals it reaches.[226] Section 511 does not address the entire disabled community, but focuses on the younger adult population.[227] As a result, critics of the law, at least as it pertains to fixing the problems with § 14(c), comment on how the supposed "step forward . . . [l]eaves [e]veryone [e]lse [b]ehind."[228] In attempting to aid young adults in their employment prospects, § 511 does little to improve the employment prospects for those already working for subminimum wage.[229]

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219. *Id.*

220. *See* Workforce Innovation and Opportunity Act § 511.

221. *See id.*

222. *See id.*

223. *See id.*

224. *See generally id.* (explaining that the timing requirements for receiving "unit career counseling" and information on training opportunities are "once every 6 months for the first year of the individual's employment at a subminimum wage, and annually thereafter for the duration of such employment").

225. Hoff, *supra* note 64; *see also* Press Release, APSE, Congressional Leaders Announce Agreement on Reauthorization of Workforce Investment Act and Rehabilitation Act 1 (May 23, 2014), http://www.apse.org/wp-content/uploads/2014/05/Final-APSE-Public-Statement-on-WIA-Reauthorization-5-23-14.pdf (stating that § 511 "[i]ncreases pre-employment transition services to include experience in competitive integrated settings through internships, part-time jobs and summer jobs, and requires state VR agencies to presume all individuals with disabilities who want to work can do so with the appropriate supports and services").

226. *Proposed Section 511 of the Rehabilitation Act–Arguments For and Against,* WORLD INST. ON DISABILITY, http://wid.org/center-on-economic-growth/policy-summit/oppose-section-511 (last visited Nov. 20, 2015).

227. *Id.*

228. *Id.*

229. *Id.*

F. President Obama's Executive Order

Another step forward in the federal sphere is President Obama's Executive Order 13658.[230] This Executive Order increased minimum wage for federal contractors and subcontractors to $10.10 an hour.[231] The increase applies to every federal contractor and subcontractor, including those under the 14(c) program.[232] As directed by the Executive Order, the DOL issued regulations regarding implementation for the new minimum wage.[233] Part of the requirements under these regulations entailed paying the new minimum wage beginning January 1, 2015.[234]

The policy intent behind the Executive Order was "to increase efficiency and cost savings."[235] "Boosting wages lowers turnover, increases morale, and will lead to higher productivity overall on Federal contracts."[236] Like the change from § 511, this shift in the law has a narrow focus.[237] It is, however, helping individuals who already work for subminimum wage, thus making additional progress beyond § 511.[238]

IV. THE VERMONT APPROACH—HOW IT WORKED

Despite the progress from § 511 and Executive Order 13658, the narrow focus of these laws failed to fix the core problem: § 14(c).[239] The stagnant nature of § 14(c) in the federal sphere has prompted some states to take action on eliminating the use of subminimum wage through state legislation.[240] Vermont presents a great example.[241]

Vermont achieved the elimination of the subminimum wage program through a reduction and reallocation of state funds.[242] Starting in 1999, Vermont started to gradually restrict the use of state funds to sheltered

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230. *See* Exec. Order No. 13658, 79 Fed. Reg. 9851 (Feb. 12, 2014), http://www.gpo.gov/fdsys/pkg/FR-2014-02-20/pdf/2014-03805.pdf.

231. *Id.*

232. *Id.*

233. Leslie A. Stout-Tabackman & Mickey Silberman, *DOL Announces Final Regulations on Executive Order Requiring $10.10 Minimum Wage for Federal Contractors*, NAT'L L. REV. (Oct. 2, 2014), http://www.natlawreview.com/article/dol-announces-final-regulations-executive-order-requiring-1010-minimum-wage-federal-.

234. *Id.*

235. *See* Exec. Order No. 13658, 79 Fed. Reg. at 9851–54.

236. U.S. DEP'T OF LABOR, FACT SHEET: PROPOSED RULEMAKING TO IMPLEMENT EXECUTIVE ORDER 13658, ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS 1 (June 2014), http://www.dol.gov/whd/flsa/nprm-eo13658/fs-EO13658.pdf.

237. *See* Exec. Order No. 13658, 79 Fed. Reg. at 9851–54.

238. *See id.*

239. *See supra* Part III.E–F.

240. *See supra* Part III.C.

241. *See* JOHN BUTTERWORTH ET AL., STATE AND INTERNATIONAL EFFORTS TO REFORM OR ELIMINATE THE USE OF SUB-MINIMUM WAGE FOR PERSONS WITH DISABILITIES 36–38 (Nov. 2007), http://www.vadrs.org/essp/downloads/wireport011207.doc.

242. *Id.* at 36.

workshops under the 14(c) program.[243] With this reduction in funds, the state worked alongside the providers to stimulate a conversion from sheltered workshops to individualized support.[244] This individualized support prevented the disabled, who transitioned out of a sheltered workshop, from being sent home with no alternative opportunity.[245] One important measure that a sheltered workshop provider in Vermont took during the process involved holding meetings with parents and families.[246] Through such meetings, parents and families were able to address any concerns they had about the redirection in the community that their loved ones would be facing.[247] The state's Division of Disability and Aging Services (DDAS) worked with the providers during the conversion process to avoid "'pulling the rug out' from under providers by eliminating congregate funding all at once."[248]

In the transition, DDAS, as well as the Division of Vocational Rehabilitation, "collaborated with four providers to close down their workshops and move people into community supports, providing both technical support and extra funding."[249] This conversion process continued for several years until all funding was eventually reallocated to individualized support.[250] "[T]he goal was to convert to a system that would not allocate resources to congregate settings," which meant that the state would no longer encourage sheltered workshops.[251]

Vermont's 1999 plan—reducing funding to sheltered workshops—helped prevent their subminimum wage system from growing.[252] By not providing resources to the workshops, the state's idea was that no new individuals would enter into workshop employment; therefore, the state could focus on transitioning out those who were already employed.[253] The state's push to phase out the subminimum wage program in the 1999 legislative plan was further delineated through the 2002 legislative plan.[254] The 2002 plan went beyond the 1999 plan by incorporating group employment settings, including enclaves or work crews.[255] This plan stopped state funds from being used to increase employment capacity in such environments.[256] By

243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 37.
247. *See id.*
248. *Id.*
249. *Id.* at 36.
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 36–38.

2005, all sheltered workshops were successfully closed.[257] Vermont had a system in place for most of the disabled community to receive one-on-one day supports (i.e., individualized support) for employment and other activities.[258]

Individualized support provides a number of beneficial services. With regard to employment, the services include employment assessment, employer and job development, job training, and ongoing support to maintain employment.[259] Although one may receive a small amount of hours for help with employment services due to his or her level of need, additional support is provided through community-based day supports, which are funded as an alternative to sheltered workshops.[260] When individuals transitioned out of sheltered workshops, the increased funding allowed more individuals to receive assistance in community-based, non-work activities.[261] These activities included volunteering, going to appointments, running errands, enjoying leisure activities, and spending time with family and friends.[262] Support with such activities provides "[s]pecific, individualized[,] and goal oriented services which assist individuals in developing skills and social supports necessary to promote positive growth."[263] The transition to a system of individualized support enhanced one's ability to manage life skills, increased autonomy, and proved to be a successful model for employment.[264]

The transition away from sheltered workshops prompted a fundamental change in Vermont's disabled community.[265] The successful redirection of funds ultimately led Vermont to have "no public dollars . . . used for anything less than integrated employment. That also eliminated enclaves, which are work programs that take people with disabilities into regular workplaces with close supervision."[266] This fundamental change allowed for a major increase in employment opportunities over the past decade.[267] Within three years after

257. *Id.* at 37.

258. *Id.*; *see also* Michael Flaum, Univ. of Iowa, Supported Employment: The Individualized Placement and Support (IPS) Approach (June 7, 2011), http://www.healthcare.uiowa.edu/icmh/archives/documents/SE_IPSprinciplesandevidence_outcomes.pdf (Powerpoint presentation at slide 21) (discussing the idea of supported employment and how disabled individuals receive an employment specialist—similar to what one would receive in Vermont's one-on-one day supports—"to help [him or her] become as independent as possible in his or her vocational role, while always remaining available to provide support and assistance").

259. *Developmental Disability Services*, VT. DIV. DISABILITY & AGING SERVS., http://www.ddas.vermont.gov/ddas-programs/programs-dds/programs-dds-default-page (last visited Nov. 2, 2015).

260. BUTTERWORTH ET AL., *supra* note 241, at 46.

261. *Id.*

262. *Id.*

263. *Developmental Disability Services*, *supra* note 259.

264. *See id.*; *see also* Halle Stockton, *What Happens When Sheltered Workshops Close?*, DISABILITY SCOOP (Sept. 30, 2014), http://www.disabilityscoop.com/2014/09/30/what-sheltered-workshops-close/19717/ (showing the drastic progress in employment prospects since Vermont transitioned away from subminimum wage).

265. *See* Stockton, *supra* note 264.

266. *Id.*

267. *Id.*

the last sheltered workshop closed, about 80% of the workshop's employees found jobs.[268] The individuals that did not find jobs received other community-based services.[269] In Halle Stockton's 2014 article, *What Happens When Sheltered Workshops Close?*, she readily answered her own question: "[T]he employment rate of people with developmental disabilities in the New England state is twice the national average."[270] Further highlighting the success of Vermont's approach, Ms. Stockton pointed out recent wages that disabled individuals earned in Vermont.[271] Reported from 2013, supported employees made an average of $9.26 an hour, which was $.50 above Vermont's minimum wage and $2 above the national minimum wage.[272] This shift away from sheltered workshops to earning a real wage shows how "the attitude of the state and its business community" can change when the law sets it in the right direction.[273]

V. WHERE DOES TEXAS STAND ON THIS ISSUE?

Unfortunately, Vermont's success has not made national headway.[274] Many states lag behind the goal of supported employment and fail to reach the employment rates Vermont has achieved.[275] Like many states, Texas continues to allow sheltered workshops and maintains certificate holders under the 14(c) program.[276] Texas, however, has taken the initiative to foster better employment opportunities for the disabled by creating the EFTF.[277] The 84th Legislature considered the EFTF's recommendation to adopt the Vermont approach, partially accepted it, and modified it into S.B. 1559.[278] Although the 84th Legislature made progress in other areas of disability law, S.B. 1559 did not pass.[279] Over the interim, EFTF members hope to work on

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268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *See supra* Part IV.
275. *See infra* Part V.B.
276. *See infra* Part V.A; *see also* Rick Karlin, *Sheltered Workshops Are in Midst of a Storm*, TIMES UNION (July 20, 2013, 11:43 PM), http://www.timesunion.com/local/article/Sheltered-workshops-are-in-midst-of-a-storm-4677272.php (sharing the story of a disabled employee, who is "one of almost 8,000 people in New York state who work in 115 sheltered workshops, or closely supervised settings where their differences are accommodated").
277. *See* EMP'T FIRST TASK FORCE, TEXAS EMPLOYMENT FIRST POLICY AND TEXAS EMPLOYMENT FIRST TASK FORCE REPORT 6 (2014), https://www.dads.state.tx.us/providers/supportedemployment/EFTFReport.pdf (explaining how to transition out of the subminimum wage program and follow model states like Vermont).
278. *See id.*
279. *See* Tex. S.B. 1559, 84th Leg., R.S. (2015); *see also* Interview with Shaun Bickley, Self-Advocate Coordinator at Tex. Advocates & Member of the Emp't First Task Force, Tex. (July 11, 2015). Any comments made by Shaun Bickley during the interview and referenced in this Comment were made by Shaun Bickley in his individual capacity, not in any official capacity, and reflect only his personal

this issue again and possibly include it in their report to the 85th Legislature.[280]

A. Texas 14(c) Certificate Holders

Before taking a more extensive look at the EFTF recommendation, it is essential to understand the necessity behind the recommendation. A FOIA request depicted a number of Texas individuals making pennies an hour, creating a framework for the importance of this issue.

With 117 certificate holders in Texas, the subminimum wages across the state vary widely.[281] The FOIA request contained § 4(c) applications from 2012 and showed that many employees working under the special certificate program have been paid pennies an hour.[282] Not all employers under this system, however, pay pennies an hour since the wages vary depending on the primary disability of the individual and the work being performed.[283]

The Devereux Foundation in Victoria, Texas, for example, is an employer that operates as a hospital and residential care facility, and employs patient–workers.[284] Some of its employees earn between $5 and $6 an hour.[285] Yet, discrepancies exist because, while some employees at the Devereux Foundation make $5 or $6 an hour, others make $1 or $2 an hour with the lowest wage at $.66 an hour.[286] The disability for the individual making $.66 is listed as "IDD," which means he or she has an intellectual/developmental disability.[287] The position he or she holds is "Napkin Folder."[288] While this one Napkin Folder makes $.66 an hour, there are other Napkin Folders with the same listed disability of IDD making up to $1.77 an hour.[289] These individuals are paid at a rate presumably matching

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views and opinions. Mr. Bickley explained that the 84th Legislature abolished the Texas Council on Purchasing from People with Disabilities and reformed the state use program, which will presumably help put more money towards improving employment opportunities for the disabled. *Id.*

280. Telephone Interview with Elaine Roberts, Member of the Emp't First Task Force, Tex. (July 13, 2015). Any comments made by Elaine Roberts during the telephone interview and referenced in this Comment were made by Elaine Roberts in her individual capacity, not in any official capacity, and reflect only her personal views and opinions.

281. *See generally Special Employment*, *supra* note 137 (listing the number of Texas certificate holders under each category).

282. Department of Labor, Freedom of Information Act Request (2012), http://www.texastechlawreview.org/article-supplements/ (on file with the Author) (showing several 14(c) applications as of 2012).

283. *See id.*

284. *Id.* at 5.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

their productivity level.[290] Whether such compensation is reevaluated every six months as the law requires (to give the opportunity for higher wages based upon increased productivity) is undetermined.[291]

A few examples of work centers that pay a wide range of wages to their employees are Disability Resources, Inc. in Abilene, Texas; Goodwill Industries of Dallas, Inc.; and St. Giles Worksource in Beaumont, Texas.[292] At Disability Resources, Inc., the wages vary anywhere between $.06 an hour and $5.21 an hour.[293] The disability of the individual making $.06 an hour is "Severe MR" (*MR* is an acronym for mental retardation), while the disability of the individual making $5.21 an hour is also MR.[294] Both individuals perform the type of work classified as "Kitchen Helper."[295] Additionally, at Goodwill Industries of Dallas, Inc., individuals holding the position "Laborer Piecework" make anywhere between $.52 an hour and $6.64 an hour.[296] The disabilities of these workers differ as the person making $.52 has "Personality Disorder," while the person making $6.64 is classified with the disability of "Schizophrenic/Paranoid."[297] Finally, an even more extreme variation in wages exists at St. Giles Worksource.[298] There, an individual with MR makes as little as $.85 an hour for shredding paper, while another individual with the same classified disability performing the same work makes as high as $13.52 an hour.[299] Like the Devereux Foundation, each individual at these work centers is paid at a rate presumably matching his or her productivity level.[300] Yet, the process of reevaluation that each individual should be afforded to increase potential earnings is undetermined.[301]

Another work center in Texas is the Evergreen Presbyterian Ministries of Texas, Inc.[302] This work center does not have the wide range of wages seen in the previous three certificate holders.[303] At Evergreen Work Center, the individuals make between $4 and $6 an hour.[304] The lowest wage is $4.04, and the highest wage is $5.94.[305] Many of the individuals' disabilities

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290. *Id.*

291. *Id.* This discussion on whether employers are properly monitored and whether employees are given the opportunity to earn more upon increased productivity could constitute its own Comment. Instead, the Author chose to focus on highlighting the low wages this FOIA request established to provide context for the recommendation that follows.

292. *Id.* at 11–12, 63–65, 436–38.

293. *Id.* at 11–12.

294. *Id.*

295. *Id.*

296. *Id.* at 63–65.

297. *Id.*

298. *Id.* at 436–38.

299. *Id.*

300. *Id.* at 11–12, 63–65, 436–38.

301. *Id.*

302. *Id.* at 18–19.

303. *Id.*

304. *Id.*

305. *Id.*

are classified as "MR" with the work performed described as "janitorial services."[306]

Some certificate holders pay their disabled employees the lowest wage an individual can earn: one cent an hour.[307] Examples of these employers include Alternative Business Services, Mexia State Supported Living Center, and Blue Bell Creameries, which operates as an enclave under the Brenham State Supported Living Center.[308] Several employees are paid, if not one cent an hour, pennies an hour.[309] The Lufkin State Supported Living Center, for example, pays eight individuals less than ten cents an hour.[310] Many of these individuals have a disability classified as MR or Profound MR.[311] The type of work performed includes tasks such as "box recycling" or "hand packaging."[312]

B. The Employment First Task Force's Recommendation and Texas Legislation

These low wages provide context for the recommendation that the EFTF sent to the Texas Legislature during the 84th Session.[313] Although S.B. 1559 did not pass, as discussed, the hope is that this issue will continue to be worked on during the interim and possibly included in the next report to the legislature.[314] Because these issues will hopefully be considered next session, it is important to understand what has been suggested thus far.

Looking first at the modified bill—introduced by Senator Zaffirini—S.B. 1559 shows that only parts of the recommendation were accepted.[315] The focus of the bill was to help create a shift in the law by having Texas agencies work together to transition individuals with disabilities out of subminimum wage.[316] The goal was to develop and implement a plan that would transition individuals with disabilities out of segregated subminimum wage positions and into integrated, competitive employment settings.[317] Although the time frame differed from the recommendation, the ultimate elimination of subminimum wage in the state was the goal: "[N]ot later than September 1, 2022, the Health and Human Services Commission shall adopt a plan to prohibit the use of state funds for programs offered in environments

306. *Id.*
307. *See, e.g.*, *id.* at 170–74, 220–21, 341–52.
308. *Id.*
309. *Id.*
310. *Id.* at 145–50
311. *See, e.g.*, *id.* at 145–50, 170–74, 220–21, 341–52.
312. *Id.*
313. *See supra* Part V.A.
314. Telephone Interview with Elaine Roberts, *supra* note 280.
315. Tex. S.B. 1559, 84th Leg., R.S. (2015).
316. *See id.*
317. *See id.*

in which persons with disabilities are segregated and receive wages that are less than minimum wages."[318] Like Vermont, the transition would have been achieved by slowly shifting funding away from the subminimum wage program.[319] Another highlight of the bill was that it "require[d] the Department of Assistive and Rehabilitative Services to conduct outreach to persons with disabilities in sheltered workshops to determine the services, reasonable accommodations, or assistive technology needed to increase the marketable job skills, productivity, and work options for persons with disabilities."[320] This provision of the bill would have helped initiate a proactive response to the shift away from subminimum wage.[321]

Looking more extensively at the EFTF's recommendation, the Fall 2014 Report reflects the EFTF's decision to model Vermont's approach.[322] The report highlighted the statistics the FOIA request confirmed: "[S]ome workers with disabilities earn less than 10 cents per hour, including individuals who make between 1 ½ cents and 5 cents per hour despite working for a highly profitable local business."[323] The EFTF's recommendation created a schedule that would have gradually phased out sheltered workshops.[324] This schedule called for a transition away from the subminimum wage program as follows:

> (1) By September 1, 2016, Texas would have been required to pay all state employees as well as workers for the state set-aside contracts at least minimum wage.
> (2) By September 1, 2016, a State Care System Plan should have been adopted to prohibit state funds for sheltered workshops that provide services to recent high school graduates.
> (3) By September 1, 2016, the State Care System Plan should also have provided funding to programs that would assist in the conversion process of sheltered workshops and enclaves to individualized, community-based employment services.
> (4) By September 1, 2019, the State Care System Plan should have prohibited the use of state funds to sheltered workshops and enclaves.[325]

Following Vermont's lead, this gradual shift would have prevented funding from being cut off all at once.[326] Parents' fears that their child would be thrown out of a sheltered workshop without any opportunity could be eased

318. *Id.*
319. *See id.*
320. *Id.*
321. *See id.*
322. EMP'T FIRST TASK FORCE, *supra* note 277, at 9.
323. *Id.* at 22.
324. *Id.* at 22–23.
325. *Id.*
326. *See supra* Part IV.

by the understanding that the system is designed to help those currently under the program find new employment. The idea was that, over the transition period, no more funding would go into sheltered workshops and no new individuals would be placed in. As a result, new individuals would not find themselves being directed toward a sheltered workshop as a possible placement for employment. Rather, they would have had access to individualized support.

In Texas, the individualized support is provided through vocational rehabilitation services from the Texas Department of Assistive and Rehabilitative Services (DARS) and the Texas Department of Aging and Disability Services (DADS).[327] With individualized support, an individual can get a job coach to help find integrated employment opportunities as well as transition them into the workforce.[328] In its recommendation, the EFTF also encouraged immediate action by DARS with regard to job coaches "conduct[ing] outreach to persons currently in sheltered workshops or enclaves to determine what services, reasonable accommodations or assistive technology are needed in order to increase participants marketable job skills, productivity and community-based work options or other support programs."[329] The recommendation would have prompted DARS to start looking for individuals to assist and transition out of sheltered workshops.[330] With increased funding for individualized support, more individuals currently employed at sheltered workshops would have been able to transition out and have the chance at a real job.[331]

VI. A DEEPER LOOK AT § 14(C): WHY SOCIETY NEEDS TO SEE A CHANGE

Looking at the first question posed with regard to a long-standing stereotype in the disabled community—different does not mean less, or does it?—§ 14(c) has forced the answer that it does.[332] Reflecting on the movement society has experienced with disability rights over the past century, it is perplexing to ponder a law that contradicts the many goals other

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327. *See* TEX. DEP'T OF AGING & DISABILITY SERVS., DADS GUIDE TO EMPLOYMENT FOR PEOPLE WITH DISABILITIES 4, http://www.dads.state.tx.us/providers/supportedemployment/EmploymentGuide.pdf. Following the enactment of S.B. 200 and S.B. 208, DARS and DADS will be consolidated under either the Texas Workforce Commission, the Health and Human Services Commission, or both.

328. *See generally id.* ("Anyone in a new job needs assistance and mentoring before being able to do the job independently. If the person might need long-term, paid, on-the-job coaching, in addition to the natural supports provided by supervisors and co-workers, explore the funding sources for that coaching, as well as where the person might access job coaches. Talk about a plan for gradually fading the support, such that the person is eventually doing the job with no or infrequent paid, on-the-job coaching.").

329. EMP'T FIRST TASK FORCE, *supra* note 277, at 23.

330. *See id.*

331. *See id.*

332. *See supra* text accompanying note 1.

legislation has worked towards: promoting integration, opportunities, and accommodations for the disabled.[333]

A. Noting the Progress: How Disability Laws Compare to Women's Rights

Since our country's formation, society has had several philosophical mind shifts in what is considered "normal."[334] For instance, it used to be normal for a woman's role solely to be at home, so she could take care of the children and have dinner on the table by the time her husband came home.[335] Women faced the same stereotype we see here today towards the disabled, as they too have been considered less capable or less fit for certain roles.[336] Through changes in legislation and an active fight for women's rights, society experienced some movement away from gender discrimination that allowed for a change in how women were treated in society.[337]

In much the same way equal opportunities for women developed over time, disability laws have also fought for such change.[338] The movement away from gender discrimination, for instance, shows:

> While institutions of higher learning were once the domains of men, women are now the *majority* of global graduates, earning 58% of the world's college degrees. And in an economy in turmoil, women dominate growing industries—fields like health-care, education and personal services—and are responsible for starting two out of every five small businesses.[339]

These statistics illustrate that women are now immersed into competitive employment opportunities, which allow them to achieve high-level positions.[340] Likewise, the development of disability laws has

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333. *Compare supra* Part I (discussing the intended functions of § 14(c)), *with supra* Part II.A (identifying the stagnant nature of § 14(c)).

334. *See, e.g.*, *Women's Rights Movement*, ENCYCLOPEDIA.COM, http://www.encyclopedia.com/topic/Womens_rights.aspx (last visited Nov. 8, 2015) ("Enormous changes swept through the United States in the nineteenth century, altering the lives of women at all levels of society.").

335. *See generally id.* (highlighting stereotypes that a woman's "responsibilities consisted of creating a haven away from the harsh workplace in which her husband toiled and raising virtuous, productive citizens of the Republic").

336. *See generally Women's Rights*, U.S. HIST., http://www.ushistory.org/us/26c.asp (last visited Nov. 8, 2015) (explaining how women's rights activists asserted that "women deserved equal wages and career opportunities in law, medicine, education and the ministry" rather than be subservient to men).

337. *See Women's Rights Movement*, *supra* note 334.

338. *See* Jenna Goudreau, *Success Secrets of the World's Most Powerful Women*, FORBES (Oct. 24, 2012, 2:32 PM), http://www.forbes.com/sites/jennagoudreau/2012/10/24/success-secrets-of-the-worlds-most-powerful-women/.

339. *Id.*

340. *See id.* (stating that "for the first time in history, 20 female CEOs were installed in the 500 largest U.S. corporations").

opened many doors for disabled individuals to be immersed into competitive employment opportunities.[341]

Texas Governor Greg Abbott is a great example.[342] Despite being wheelchair bound, his physical impairment has not created a barrier to his success.[343] After graduating from Vanderbilt University Law School, Governor Abbott faced a tragic accident.[344] In what was a normal day's activity—jogging—he was left partially paralyzed by a falling tree.[345] Notwithstanding his physical adversities, he has served as a State District Judge in Harris County, a Justice on the Texas Supreme Court, the Attorney General for Texas, and is now the Texas Governor.[346] Governor Abbott is "the first elected governor to be in a wheelchair since George Wallace of Alabama in 1982."[347] His milestone signifies how laws, such as the ADA, have prompted a mentality in society to refrain from viewing those with physical impairments as less capable.[348]

B. Why § 14(c) Fails to Continue This Progress and Diminishes the Prospect for Growth

After looking at the evolution of disability rights, the question now becomes: Why does § 14(c) maintain the stereotype that other disability laws have fought so hard to get past?[349]

The answer hinges on a common concern among the disabled.[350] Although there are stories of individuals like Governor Abbott, whose physical impairment has not been a deterrent, there are also many disabled individuals who are mentally or physically limited by their disability to the extent that even a minimum wage position may be hard to come by.[351] Because of this limitation, those in opposition of the abolishment of § 14(c)

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341. *See generally The Americans with Disabilities Act*, CTR. FOR ACCESSIBLE SOC'Y, http://www.accessiblesociety.org/topics/ada/ (last visited Nov. 7, 2015) ("The [ADA] is the most comprehensive federal civil-rights statute protecting the rights of people with disabilities. It affects access to employment; state and local government programs and services; access to places of public accommodation such as businesses, transportation, and non-profit service providers; and telecommunications.").

342. *See Greg Abbott*, ABBOTT GOVERNOR, http://www.gregabbott.com/bio/ (last visited Nov. 7, 2015).

343. *See id.*

344. *See id.*

345. *See id.*

346. *See id.*

347. Catalina Camia, *Greg Abbott's Election in Texas Opens Possibilities for Disabled*, USA TODAY POL. (Nov. 5, 2014, 1:32 PM), http://onpolitics.usatoday.com/2014/11/05/greg-abbott-disability-governor-wheelchair/.

348. *See The Americans with Disabilities Act*, *supra* note 341.

349. *See supra* Part II.A.

350. *See supra* Part III.A.

351. *See* Blahovec, *supra* note 199.

argue that these individuals would not have an opportunity to work if not for the subminimum wage program.[352]

Despite the legitimacy of this concern, without taking steps forward and moving away from a system that stagnates growth, society's mentality will be hard to change. Section 14(c) allows for a literal fulfillment of the stereotype that different means less—disabled individuals are employed at subminimum wages because they are different from the average employee, and they make less than the average employee because of their disability.[353] This influences a social perspective toward the disabled that hinders their opportunity to advance.[354] Looking again at the analogy of women's rights, the idea is that just as society would make assumptions about women being unable to fill certain roles, a program like § 14(c) facilitates similar assumptions toward the disabled.[355] These assumptions are made without regard to the disabled individual's capabilities and before any limitations are often known.[356]

Allowing society to view the disabled under the scope of these assumptions inhibits growth.[357] Creating a situation in which groups of people are lumped together, even those capable of advanced physical or intellectual tasks, takes away opportunities rather than providing them.[358] Robert Scott, a former professor of sociology at Princeton, provides context for how opportunities are taken away.[359] After graduate school, Mr. Scott got a job to conduct an extensive, multi-year survey, which determined the efficiency of blindness organizations at helping the blind.[360] Months into the process, he happened to come across "a blind beggar . . . asking for money."[361] Mr. Scott asked the individual if he could "buy some of [his]

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352. *See id.*

353. *See supra* Part I.B.

354. *See supra* Part III.

355. *Compare The Women's Rights Movement, 1848–1920*, HIST., ART, & ARCHIVES: U.S. HOUSE REPRESENTATIVES, http://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Essays /No-Lady/Womens-Rights/ (last visited Nov. 7, 2015) ("Initially, women reformers addressed social and institutional barriers that limited women's rights; including family responsibilities, a lack of educational and economic opportunities, and the absence of a voice in political debates."), *with* Shaun Heasley, *Justice Department Urges Shift Away from Sheltered Workshops*, DISABILITY SCOOP (Apr. 8, 2014), http://www.disabilityscoop.com/2014/04/08/justice-away-sheltered/19265/ (explaining limitations on those in sheltered workshops because once individuals are there, "they typically linger[] for years in segregated environments earning an average of $2.21 per hour").

356. *See* Heasley, *supra* note 355.

357. *See supra* Part VI.A; *see also Fair Wages for Workers with Disabilities*, *supra* note 134 (discussing how the 14(c) program "is based on the false assumption that disabled workers are less productive than nondisabled workers," despite the fact that "successful employment models have emerged in the last seventy-five years to assist people with significant disabilities in acquiring the job skills needed for competitive work").

358. *See* Ira Glass, *This American Life Episode 544: Batman*, CHI. PUB. MEDIA (Jan. 9, 2015) (transcript available at http://www.thisamericanlife.org/radio-archives/episode/544/transcript).

359. *Id.*

360. *Id.*

361. *Id.*

time" for an interview.[362] They proceeded to a restaurant, and the man shared his story.[363]

This man worked for a paint factory until a work accident left him blind.[364] The paint factory liked him, so they offered to give him a job if he was trained to work with his disability.[365] The man then went to an organization that "helps" the blind.[366] He received the following response from the organization: "Oh, no. You can't do that. Blind people can't do those things. What we're going to do is put you through a program of rehabilitation and then move you along to our sheltered workshop that manufactures mops and brooms."[367] Ironically, a place that one would imagine provides opportunities for the blind has itself become convinced of the assumption that certain opportunities are moot.[368] What a sad reality it is when an organization meant to help the disabled lumps these individuals together with the mistaken belief that they are less capable.[369]

Thankfully, not every organization helping the blind has similar assumptions.[370] For example, the NFB keenly advocates for the abolishment of § 14(c).[371] Last year, when California Assemblywoman Lorena Gonzalez introduced a resolution to encourage Congress to phase out and repeal § 14(c), Dr. Marc Maurer, President of the NFB, stated: "The National Federation of the Blind commends Assemblywoman Gonzalez for recognizing the value of workers with disabilities and encouraging Congress to repeal this antiquated law."[372]

Apart from the admirable perspective of the NFB, the fact that individuals are lumped together at all in a place that should foster their growth paints the disheartening reality of the preconceived notions that exist toward

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362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *See id.*; *see also* ROBERT A. SCOTT, THE MAKING OF BLIND MEN: A STUDY OF ADULT SOCIALIZATION 24 (1981) ("Blindness is a stigma, carrying with it a series of moral imputations about character and personality. The stereotypical beliefs . . . lead normal people to feel that the blind are different; the fact that blindness is a stigma leads them to regard blind men as their physical, psychological, moral, and emotional inferiors.").

369. *See* Glass, *supra* note 358.

370. *See* Lydia Schuck, *The Transition Conversation: The Journey to Adulthood of Blind Youth with Additional Disabilities*, NAT'L FED. BLIND (Fall 2014), https://nfb.org/images/nfb/publications/fr/fr33/3/fr330310.htm. "The NFB has adopted a new brand statement: 'The National Federation of the Blind knows that blindness is not the characteristic that defines you or your future. Every day we raise the expectations of blind people, because low expectations create obstacles between blind people and our dreams. You can live the life you want; blindness is not what holds you back.'" *Id.*

371. See Press Release, Nat'l Fed'n of the Blind, National Federation of the Blind Applauds Resolution to Phase Out Section 14(c) of Fair Labor Standards Act (Feb. 24, 2014), https://nfb.org/national-federation-blind-applauds-resolution-phase-out-section-14c-fair-labor-standards-act.

372. *Id.*

the disabled.[373] Governor Abbott, during his campaign kickoff, stated: "After my accident, I realized our lives aren't defined by how we're challenged . . . . Instead we define our lives by how we respond to challenges."[374] Even with the positivity this statement declares, when individuals are lumped together the way this blind man was, their lives are defined by how they are challenged.[375] If not given the chance, they cannot respond to the challenge in a manner that exceeds society's assumptions.[376]

Kendra Kerbow provides a humbling perspective on what happens when someone is given that chance.[377] In 1984, the year following her graduation from high school, Ms. Kerbow was placed into a sheltered workshop.[378] For about the next eight years, she made anywhere from one cent an hour to five cents an hour.[379] Much of her work involved using greasy material that Ms. Kerbow described as making "a big mess all over [her] clothes."[380] After years of dealing with this material and earning pennies an hour, Ms. Kerbow became frustrated.[381] She explained that she was bored.[382] Her job at the sheltered workshop was not challenging her; it was not matching her potential.[383] As a result, she ran away because she was unhappy.[384] After being told by the staff at the group home where she resided that she must go back to the workshop, the workshop supervisors attempted to aid her frustration.[385] They gave her the "opportunity" at the end of the day to work in an integrated setting.[386] This opportunity, however, only gave her about fifteen minutes at the end of the day to work with the receptionist, and it was not even an opportunity she got every day.[387] In the early 1990s, Ms. Kerbow was finally able to transition into a real job.[388] Through the help of a job

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373. *See* Glass, *supra* note 358.

374. Camia, *supra* note 347 (quoting Texas Governor Greg Abbott).

375. *See, e.g.*, SCOTT, *supra* note 368 ("When a person with a stigma encounters a normal person, barriers are created between them. These barriers, though symbolic, are often impenetrable." (footnote omitted)).

376. *See id.*

377. Telephone Interview with Kendra Kerbow, Member of the Emp't First Task Force, Tex. & Self-Advocate, MHMR of Tarrant Cnty. (Jan. 30, 2015). Any comments made by Kendra Kerbow during the telephone interview and referenced in this Comment were made by Kendra Kerbow in her individual capacity, not in any official capacity, and reflect only her personal views and opinions.

378. *Id.*; *see also* NAT'L DISABILITY RIGHTS NETWORK, *supra* note 40, at 24 ("You rarely, if ever, will hear a person say, 'I want to attend a sheltered workshop!' Rather, a person likely ends up working in a sheltered or segregated environment simply because it was presented as the only available opportunity.").

379. Telephone Interview with Kendra Kerbow, *supra* note 377.

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

coach, she was able to get a job working as a self-advocate at MHMR of Tarrant County.[389] Now, with over seventeen years at this organization making above minimum wage, she can positively say: "I feel happy. I love what I'm doing."[390] Ms. Kerbow's story is bolstered by the fact that she currently sits as a member of the EFTF.[391] For one who started at pennies an hour out of high school, it is remarkable to see what she has accomplished thus far.[392]

If there is one point to be drawn from Ms. Kerbow's story and the story of the blind man who was turned away from getting proper help, it is that § 14(c) confines individuals to the aforesaid stereotype.[393] Each disabled individual can meet different responsibilities, and the law is supposed to provide a proper assessment of such skills.[394] The law is also supposed to provide a reevaluation of such skills, so those starting below minimum wage have the chance to earn more.[395] The system, however, is flawed, and effective oversight is almost impossible.[396] As *Hill Country Farms* showed, oversight from the DOL is inadequate.[397] Although proper oversight is essential, with 117 certificate holders in Texas alone, the DOL does not have enough resources to account for every disabled individual employed under the program.[398] Consequently, many disabled individuals have been exploited.[399]

C. Section 511 & President Obama's Executive Order: Take What We Can Get

This avenue for exploitation has prompted some action on the federal level.[400] Section 511 of the Rehabilitation Act as well as President Obama's Executive Order 13658 create slight movement away from § 14(c).[401] Although these laws help improve the issue of subminimum wage, the

389. *Id.*

390. *Id.*

391. *See Employment First Task Force*, TEX. DEP'T. AGING & DISABILITY SERVS., http://www.dads.state.tx.us/providers/supportedemployment/pi/index.html (last visited Nov. 7, 2015).

392. *See* Telephone Interview with Kendra Kerbow, *supra* note 377.

393. *See id.*; Glass, *supra* note 358.

394. *See supra* Part III.A.

395. *See supra* Part III.A.

396. *See supra* Part I.B; *see also* NAT'L DISABILITY RIGHTS NETWORK, *supra* note 40, at 19 ("As of 2009 only three Division staff and a supervisor [from the DOL] were assigned to review the 2,500 annual renewal applications as well as first time applications for 14(c) certificates. Since each staff member processes 800 applications in a year, it is questionable the level of depth and analysis possible to ensure that the employer is conducting valid productivity measures and wage assessments.").

397. *See supra* Part I.B.

398. *See supra* Part V.A.

399. *See* Telephone Interview with Kendra Kerbow, *supra* note 377; Glass, *supra* note 358.

400. *See supra* Part III.

401. *See supra* Part III.E–F.

provisions have a narrow focus and fail to successfully account for the vast number of citizens affected by this program.[402]

Even with the narrow focus, however, both § 511 and the Executive Order foster growth in the disabled community.[403] First, the Executive Order dramatically raises the wage requirement in comparison to wages earned under § 14(c).[404] At $10.10 an hour, disabled federal contractors earn a wage over the current national minimum wage of $7.25 an hour.[405] Not only may this help stimulate the need for higher wages in other areas of employment, but it might also help facilitate a change in the assumption that the disabled are less capable.[406]

Additionally, looking at § 511, many supporters of this law state that some change is better than no change.[407] For example, the National Council on Independent Living supports the bill, taking the approach that we need to take what we can get:

> It is important to remember that language for Section 511 is offered by Senator Tom Harkin, one of the most respected champions of disability rights this nation has known. Section 511 stands as the most realistic and effective solution in this tough political climate to decrease the amount of workers with disabilities that are currently being used and degraded.[408]

The National Disability Rights Network also supports § 511 because it prevents young adults from automatically being considered for sheltered workshop placements and instead encourages competitive, integrated employment as the first step.[409] When signing the legislation, President Obama remarked: "As we approach the 24th anniversary of the ADA, this bill takes new steps to support Americans with disabilities who want to live and work independently."[410] This law forces states to provide better employment options to the younger adult population instead of making assumptions regarding an individual's potential limitations.[411] Because the goals of § 511 initiate some change in the mentality toward the disabled with regard to their capabilities, the idea that we need to take what we can get stands true.[412] If § 511 helps keep some young adults out of the sheltered

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402. *See supra* Part III.E–F.
403. *See supra* Part III.E–F.
404. *See supra* Part III.F.
405. *See Minimum Wage*, U.S. DEP'T LAB., http://www.dol.gov/dol/topic/wages/minimumwage.htm (last visited Nov. 7, 2015).
406. *See supra* Part VI.A–B.
407. *See Proposed Section 511 of the Rehabilitation Act–Arguments For and Against*, *supra* note 226.
408. *Id.*
409. Card, *supra* note 212.
410. *See* Diament, *supra* note 211.
411. *See id.*
412. *See Proposed Section 511 of the Rehabilitation Act–Arguments For and Against*, *supra* note 226.

workshop program by presenting them with better opportunities initially, then the law takes us one step forward.[413]

VII. CALLING FOR A SYSTEM CHANGE TO AN OTHERWISE BROKEN SYSTEM

A. States Need to Take Action

In light of the prevailing assumptions the disabled continue to fight against, anything short of recommending abolishment of § 14(c) seems misplaced.[414] Yet, failed legislative attempts at abolishing § 14(c) create uncertainty for the future of the TIME Act.[415] This dubiety has forced recognition that an attempted repeal of this archaic law cannot be the only option.[416] Section 14(c) has been around since 1938, thus proving the challenge of making headway with a federal repeal.[417] If the TIME Act fails, persistent attempts to abolish § 14(c) should, of course, continue.[418] But to ensure movement away from subminimum wage, additional efforts must be made.[419] States have to take action to circumvent years of delay in fixing this system.[420]

If all states that have not already taken action were to follow Vermont's lead by sidestepping § 14(c), our nation would begin to see a real change in the mentality that exists toward the disabled.[421] Thankfully, there are states like Vermont providing proof that a system without sheltered workshops can exist and be successful.[422] This state legislative action, cutting off state funding to sheltered workshops, thereby forcing the development of better opportunities for the disabled, allowed many disabled individuals to find real jobs.[423] Through the reallocation of funds, more people received individualized support, which in turn provided the proper guidance for the disabled entering into the workforce.[424]

Understandably, the shift away from a system of subminimum wage can cause concern, which is why Vermont had a transition period.[425] By taking funds away from sheltered workshops over time, the workshops were slowly

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413. *See* Card, *supra* note 212.
414. *See supra* Part I.
415. *See supra* Part III.D.
416. *See supra* Part III.C.
417. *See supra* Parts II–III.
418. *See supra* Part III.D.
419. *See supra* Part VI.
420. *See supra* Part IV.
421. *See supra* Part IV.
422. *See supra* Part IV.
423. *See supra* Part IV.
424. *See supra* Part IV.
425. *See supra* Parts III.C–F, IV.

shut down.[426] This helped avoid an economic shock to the system as well as an emotional shock to the disabled individuals employed at that time.[427] Having seen the success Vermont achieved in circumventing the federal law and helping its disabled community find real employment, the 85th Texas Legislature should fully accept the EFTF's recommendation and make a similar transition.[428] Going forward, Texas can serve as another model state that provides a supported and integrated employment environment.[429]

B. Specific Concerns for Texas to Consider

If Texas successfully adopts the EFTF's recommendation in the 85th Legislative Session, to achieve the employment rates Vermont reached, Texas has to account for certain concerns.[430]

Among these concerns is the consolidation of DARS and DADS according to S.B. 208 and S.B. 200—signed into law June 2015.[431] S.B. 208 will transition part of DARS, including several vocational rehabilitative programs, to the Texas Workforce Commission (TWC).[432] S.B. 200 then consolidates the rest of DARS under the Health and Human Services Commission (HHSC)—abolishing the agency entirely.[433] S.B. 200 will also abolish DADS by incorporating DADS under HHSC.[434] The time frame for this incorporation will occur over the next two years.[435]

In their current states, DADS and DARS both offer the disabled access to vocational rehabilitation programs, which help them find and retain a job.[436] If sheltered workshops were to close, thus reallocating state funds to supported employment, state funds would likely go to DARS and DADS to provide additional vocational rehabilitation services.[437] With this consolidation, however, the TWC and HHSC will consume these disability

426. *See supra* Part IV.
427. *See supra* Part IV.
428. *See supra* Part IV.
429. *See supra* Part V.B.
430. *See supra* Part IV.
431. Tex. S.B. 208, 84th Leg., R.S. (2015); Tex. S.B. 200, 84th Leg., R.S. (2015).
432. Tex. S.B. 208; *see also Transfer of Programs from DARS to TWC*, DARS, http://www.dars.state.tx.us/services/Transfer%20of%20programs%20one-pager%20(7%2015%2015)%20FINAL.pdf (last visited Nov. 7, 2015) (explaining that, effective September 1, 2016, S.B. 208 "directs the transfer of several vocational rehabilitation (VR) programs from the Department of Assistive and Rehabilitative Services (DARS) to the Texas Workforce Commission (TWC)," including general vocational rehabilitation and blind vocational rehabilitation).
433. Tex. S.B. 200; *see also* Joey Reed*, Sunset Update,* TEX. HEALTH & HUMAN SERVS. COMMISSION 7 (June 12, 2015), http://www.hhsc.state.tx.us/news/meetings/2015/council/061215/4a.pdf (explaining the time frame for the consolidation and what should be accomplished by each particular date).
434. Tex. S.B. 200.
435. *Id.* Effective September 1, 2016, HHSC will consolidate part of DADS as well as the remaining programs under DARS, and effective September 1, 2017, HHSC will take over the rest of DADS. *Id.*
436. *See supra* Part V.B.
437. *See supra* Part V.B.

departments, forcing all services to fall under these big agencies.[438] Having two big agencies oversee the many issues the departments separately administered could foster a system of disconnect regarding where funding should be allocated.[439] This disconnect may stem from convoluting priorities under a much bigger entity that handles a wide array of matters.[440] If no system is in place to answer for the various priorities, then funding from the proposed transition may not end up being directed as planned.[441] Thus, if the EFTF's recommendation is successful in the 85th Legislative Session, the new TWC and HHSC will need to ensure that funding for disability services does not all of a sudden become funding for one big entity.[442]

In its Report regarding the HHSC consolidation, the Sunset Committee explained: "Management of state hospitals, state supported living centers, and other system facilities are split among agencies, reducing focused attention on similar issues."[443] Thus, one goal of the consolidation is to make sure such issues receive the attention they deserve.[444] Yet, combining agencies to increase the attention given to certain issues cannot come at the cost of losing attention on other equally important issues.[445] The system has to properly address all concerns and allocate funds accordingly.[446]

Thankfully, there is a system in place to guide the agencies in this transition.[447] Both consolidations call for a Legislative Oversight Committee to help ease the transition for everyone affected.[448] S.B. 200 requires a Transition Legislative Oversight Committee "to facilitate the transfer of functions . . . with minimal negative effect on the delivery of services to which those functions relate."[449] S.B. 208 also creates a Legislative Oversight Committee to facilitate the transfer and calls for the TWC, DARS, and HHSC to develop a transition plan that will be sent to the committee for implementation.[450] This plan, among other things, is supposed "to ensure that unnecessary disruption to the provision of services does not occur."[451]

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438. Tex. S.B. 208, 84th Leg., R.S. (2015); Tex. S.B. 200.

439. Tex. S.B. 208; Tex. S.B. 200.

440. Tex. S.B. 208; Tex. S.B. 200.

441. Tex. S.B. 208; Tex. S.B. 200.

442. Tex. S.B. 208; Tex. S.B. 200.

443. SUNSET ADVISORY COMM'N, HEALTH AND HUMAN SERVICES COMMISSION AND SYSTEM ISSUES 3 (Dec. 2014), http://www.sunset.texas.gov/public/uploads/files/reports/HHSC%20and%20System%20Issues%20DM.pdf.

444. *See id.*

445. *See id.*

446. *See id.*

447. Tex. S.B. 208; Tex. S.B. 200.

448. Tex. S.B. 208; Tex. S.B. 200.

449. Tex. S.B. 200.

450. Tex. S.B. 208; *see also Transfer of Programs from DARS to TWC*, *supra* note 432 (explaining what the plan must include and the time frame for sending it to the Legislative Oversight Committee).

451. *Transfer of Programs from DARS to TWC*, *supra* note 432.

Although these committees seem to allow for accountability, this entire transition is complex.[452] If these committees do not properly address funding over the next few years to account for this complexity, issues could arise with not having enough financial support for disability employment services.[453] Consequently, if the EFTF's recommendation were to pass and funding were taken away from the subminimum wage program, this funding could get diluted.[454] Because the success of the proposed transition away from sheltered workshops relies on a proper allocation of funds, it is crucial that the Legislative Oversight Committees provide the appropriate level of funding for these disability services.[455] Instead of having money go into a random pool of funds for each big agency, money must be allocated directly to improving vocational rehabilitation services and to helping further job prospects for the disabled.[456]

C. State Action Will Hopefully Prompt Federal Change

Having states take action may lead to a change in the federal sphere.[457] If Texas adopts the EFTF's recommendation and successfully allocates funds to improve supported employment, then Texas will hopefully be the next state to achieve a significant boost in wage earnings for the disabled.[458] As more states set a higher bar for employment options, the federal government should take a deeper look at § 14(c) and realize this archaic law is entirely out of place.[459]

Even if the federal government still takes no action to abolish § 14(c) following state movement, at a minimum, the hope is that it will acknowledge that pennies an hour is not an appropriate wage.[460] Seeing an increase in the income disabled individuals receive under state laws should prompt the federal government to set a floor for the subminimum wage program.[461] Of course, it seems extremely improper to suggest that the government should establish any floor besides minimum wage for the disabled.[462] Nevertheless, the reality is that something has to be done to prohibit a wage of just pennies an hour. The federal government needs to establish that an individual's

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452. Tex. S.B. 208; Tex. S.B. 200.
453. Tex. S.B. 208; Tex. S.B. 200.
454. Tex. S.B. 208; Tex. S.B. 200.
455. Tex. S.B. 208; Tex. S.B. 200.
456. Tex. S.B. 208; Tex. S.B. 200; *see supra* Part V.
457. *See supra* Part IV.
458. *See supra* Part IV.
459. *Compare supra* Part IV (discussing how Vermont legislatively eliminated the subminimum wage program by reducing and reallocating state funds from sheltered workshops), *with supra* Part V.A (explaining the variance of wages paid by § 14(c) certificate holders in Texas based on individuals' disabilities and the type of jobs they perform).
460. *See supra* Part V.A.
461. *See supra* Part IV.
462. *See supra* Part V.A.

earnings under § 14(c) be at least closer to minimum wage. Suggesting any concrete figure below minimum wage would be inappropriate because such a figure would be entirely arbitrary. The point is not about what number should set the floor for § 14(c); rather, it is that pennies an hour cannot and should not constitute a wage.

VIII. PENNIES AN HOUR: WHAT HAPPENED TO DON'T MESS WITH TEXAS?

As *Buck v. Bell* illustrated almost a century ago, even to the legal system different meant less.[463] Yet, decades have passed since this shocking opinion, and society has seen immense progress in how we accommodate the disabled.[464] Because of this progress, laws like the ADA—marking one of the landmark pieces of legislation in the disabled community—allowed for the abused and exploited workers of Henry's Turkey Services to be awarded millions of dollars.[465] By making it illegal under the ADA to have discriminatory wage practices, The Men of Atalissa were able to have a voice when the horrific story about their lives unfolded.[466]

Consequently, the following question must be asked again: Why does § 14(c) maintain the stereotype that other disability laws have fought so hard to get past?[467] Society is under the delusion that § 14(c) gives individuals with disabilities the opportunity to work.[468] But, at the rate of pennies an hour, this system cannot be called "work."[469] Pennies an hour should not be considered income.[470] One cent an hour is the lowest amount of money one can earn and yet, as the Texas FOIA request demonstrated, it is the actual amount some individuals receive.[471] It is highly misplaced to call any job related to such wage an opportunity.[472] By classifying these so-called opportunities as work, society continues to view the disabled as less capable, and accordingly, society regards the disabled as less.[473]

This mentality, however, must not remain stagnant.[474] Over time, society has regarded various groups of individuals as less.[475] Yet, much like what was seen in the fight for women's rights, disabled individuals are not less capable and can also surmount society's expectations.[476] If Texas and

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463. *See supra* Part I.A.
464. *See supra* Part II.A.
465. *See supra* Part I.B.
466. *See supra* Part I.B.
467. *See supra* Part VI.B.
468. *See supra* Part VI.B.
469. *See supra* Part V.A.
470. *See supra* Part V.A.
471. *See supra* Part V.A.
472. *See supra* Parts IV–V.
473. *See supra* Part VI.
474. *See supra* Parts VI–VII.
475. *See supra* Part VI.A.
476. *See supra* Parts VI–VII.

other states follow Vermont's proven approach to phasing out a system with sheltered workshops, the preconceived notions that exist can be overcome.[477] State action will help force the federal government to recognize the problems with § 14(c), thereby prompting the potential repeal of this archaic law.[478]

The EFTF needs to reintroduce its recommendation during the 85th Legislative session. Texas needs to fully adopt and pass this recommendation, and work towards a system of supported employment. By being the next model state for the rest of the nation to follow, Texas can add a new meaning to its infamous slogan: "Don't Mess with Texas *Employees*!"

477. *See supra* Part VII.
478. *See supra* Part VII.