

INSTITUTIONALIZED PATIENT WORKERS AND THEIR RIGHT TO COMPENSATION IN THE AFTERMATH OF *NATIONAL LEAGUE OF CITIES v. USERY*¹

As part of a growing interest in the rights of institutionalized mentally handicapped patients,² much attention is currently being focused on patient labor and the issue of compensation.³ Traditionally, residents in state-supported institutions have been required to perform tasks associated with maintaining the institution⁴ and have not been compensated for this labor.⁵ Requiring patients to work without pay has been promoted as a valuable form of therapy to those patients physically able to work.⁶ Those promoting this concept of work-therapy contend that even though the patients' labor benefits the institution,⁷ the therapeutic value of productive work overshadows the importance of compensating

¹ 426 U.S. 833 (1976).

² As used in this note, the term "mentally handicapped" will include both mentally ill patients and mentally retarded persons living at institutions. By definition, however, the situations of the mentally ill and mentally retarded are different. Mentally ill residents are patients receiving "treatment" for their illness while mentally retarded residents are said to receive "habilitation." While the goal of the mentally ill is to be *cured* of the illness, the goal of habilitation is to help a person with reduced intellectual functioning adapt to the "requirements of social living." See Wyatt v. Stickney, 344 F. Supp. 387, 389 n.2 (M.D. Ala. 1972). For an elucidation of the differences in treatment for the mentally ill and mentally retarded, compare Wyatt v. Stickney, 344 F. Supp. 373, 379-86 (M.D. Ala. 1972) with Wyatt v. Stickney, 344 F. Supp. 387, 395-407 (M.D. Ala. 1972), both opinions *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

³ See, e.g., Lebar, *Worker-Patients: Receiving Therapy or Suffering Peonage?*, 62 A.B.A.J. 219 (1976) [hereinafter cited as *Worker-Patients*]; Friedman, *The Mentally Handicapped Citizen and Institutional Labor*, 87 HARV. L. REV. 567 (1974) [hereinafter cited as *Institutional Labor*]; Friedman, *Thirteenth Amendment and Statutory Rights Concerning Work in Mental Institutions*, 2 Mental Health Law Project, Practicing Law Institute, Legal Rights of the Mentally Handicapped 637 (1973); B. ENNIS, PRISONERS OF PSYCHIATRY 109-27 (1972); Bartlett, *Institutional Peonage: Our Exploitation of Mental Patients*, 214 ATLANTIC 116 (1964).

⁴ For example, patients are often assigned to "kitchens, dining rooms, laundries, farms, and dairies, and as ward helpers, maintenance workers, and sanitary engineers. . . ." Bartlett, *Institutional Peonage: Our Exploitation of Mental Patients*, 214 ATLANTIC 116 (1964), cited in *Institutional Labor*, *supra* note 3, at 568.

⁵ See *Institutional Labor*, *supra* note 3, at 567.

⁶ See Walsh, *Impact of Souder v. Brennan on the Profoundly and Severely Retarded*, 14 J. PSYCH. NURSING & MENTAL HEALTH SERVICES 14, 14-18 (1976) (when work activity was discontinued, the consequence was that many of the residents "reverted to disturbed behavior."); Schwartz, *Expanding a Sheltered Workshop to Replace Nonpaying Patient Jobs*, 27 HOSP. & COMM. PSYCH. 98, 100-01 (1976) ("[Work] modifies the tendency for a 'person' to erode into a 'patient.' For chronically ill residents, it can serve as a pivotal force in rehabilitation. . . . [The patients] were looked on as people who have some skills to offer rather than as patients who must be cared for. That change in attitude made a significant difference [in the patients'] self-concept; it helped give meaning to their lives. . . . It also reduces the boredom that at times has led . . . patients to deliberately bring about their own readmission."); Wilder, *The Case for a Flexible, Long-Term Sheltered Workshop for Psychiatric Patients*, 27 HOSP. & COMM. PSYCH. 112, 115-16 (1976) ("[E]mployment is essential to self-respect and to normal community living. . . . Whether or not a work program is therapy or treatment, it seems to be helpful to many psychiatric patients.").

⁷ In one study conducted in Pennsylvania, it was estimated that, as a result of patient labor, the total savings to Pennsylvania state institutions was \$10,062,000 per year. Pennsylvania

the patient workers.⁸ Adherents of this viewpoint have argued that the compensation of patient workers would present severe fiscal problems for the state,⁹ which ultimately would result in the discontinuance of work programs and thus, the loss of a valuable therapeutic tool altogether.¹⁰ They also have argued that if states should be forced to pay patients for work performed, patients logically should pay for their habilitation at the institution.¹¹ One commentator believes, however, that no patient can begin to earn his cost to the public, in light of the high cost of residential health care.¹²

Critics of noncompensated work therapy have pointed out that, just as work is therapeutic to the patient in and of itself, compensated work is even more therapeutic.¹³ In addition, these critics allege that noncompensated work results in patient exploitation because there is a tendency on the part of institutions to rely on the work of the more proficient patients.¹⁴ As a result, institutions become reluctant to release productive residents who no longer require the institution's services.¹⁵

Despite the growing interest in patients' rights, judicial involvement in the compensation problem has been limited compared to its involvement in other areas of handicapped persons' rights.¹⁶ Nevertheless, in a few instances, the issue of patient compensation has been expressly addressed by the courts. When the issue arose, one approach that was taken was to apply the minimum wage provisions of the Federal Fair Labor Standards Act (FLSA) of 1938, as amended in 1966,¹⁷ to resident workers in non-federal mental institutions. The first time these provisions were applied was by a district court in the 1973 case of *Souder v. Brennan*.¹⁸ There the court was faced with a resident of the Orient State Hospital,

Department of Public Welfare, Calculation of Implied Savings for Nine State Schools and Hospitals as a Consequence of Utilization of Unpaid Patient Labor (June 17, 1969), cited in *Institutional Labor*, *supra* note 3, at 570.

⁸ See *Worker-Patients*, *supra* note 3, at 220.

⁹ *Id.* at 220-21. See also *Souder v. Brennan*, 367 F. Supp. 808, 812 n.10 (D.D.C. 1973).

¹⁰ *Worker-Patients*, *supra* note 3, at 220-21; Walsh, *Impact of Souder v. Brennan on the Profoundly and Severely Retarded*, 14 J. PSYCH. NURSING & MENTAL HEALTH SERVICES 14 (1976).

¹¹ Kapp, *Residents of State Mental Institutions and Their Money (or, the State Giveth and the State Taketh Away)*, 6 J. PSYCH. & LAW 287, 305-36 (1978) [hereinafter cited as *Residents*].

¹² *Worker-Patients*, *supra* note 3, at 221.

¹³ See Richman & Zinn, *Work as a Central Focus in Therapy*, MENTAL HOSPITALS 603, 607 (1962). See also Safier & Barnum, *Patient Rehabilitation Through Hospital Work Under Fair Labor Standards*, 26 HOSP. & COMM. PSYCH. 299, 302 (1975); *Work: The Patients' View*, 27 HOSP. & COMM. PSYCH. 102 (1976).

¹⁴ *Institutional Labor*, *supra* note 3, at 569 n.10.

¹⁵ *Id.*

¹⁶ See, e.g., *Parham v. J.R.*, 442 U.S. 584 (1979) (rights of handicapped persons regarding voluntary civil commitment); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (rights of retarded persons concerning sexual sterilization); *Hudson v. Hudson*, 373 So. 2d 310 (Ala. 1979) (same); *Boxall v. Sequoia Union High School Dist.* 464 F. Supp. 1104 (N.D. Cal. 1979) (rights of the mentally handicapped to special educational services); *In re Juvenile Case #1089*, 398 A.2d 65 (N.H. 1979) (same); *In re Mark "GG"*, 69 A.D.2d 311, 419 N.Y.S.2d 275 (1979) (parental rights of mentally handicapped persons); *Price v. Price*, 255 S.E.2d 652 (N.C. 1979) (same).

¹⁷ Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219, as amended by Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830, codified at 29 U.S.C. § 203. The applicable minimum wage provisions are codified at 29 U.S.C. § 206 (1976).

¹⁸ 367 F. Supp. 808 (D.D.C. 1973).

Nelson Souder, who, during the 33 years prior to his release,¹⁹ had worked in the institution's kitchen preparing food, washing dishes, and cleaning for up to 12 ½ hours a day. Souder had only two days per month free from work. For this effort, Souder received two dollars per month from the State of Ohio, which ran Orient State.²⁰ In 1973, Souder, along with two residents from two other state hospitals, initiated a class action²¹ arguing that the minimum wage and overtime compensation provisions of the FLSA applied to patient workers "of non-Federal hospitals, homes, and institutions for the mentally retarded and mentally ill," and seeking declaratory and injunctive relief.²² Souder's class action referred the court to the provisions of the 1966 amendments to the FLSA, which extended coverage of the Act to employees of non-federal, public or private, profit or non-profit institutions for the care of the mentally ill.²³ These amendments were applicable to Souder by virtue of the 1968 Supreme Court decision in *Maryland v. Wirtz*,²⁴ which held the amendments to be within the authority granted to Congress under the commerce clause of the Constitution.²⁵ Therefore, the con-

¹⁹ Souder was involuntarily committed to Orient State Hospital at age fifteen after the death of his parents. Souder was released on convalescent leave status on March 24, 1973. *Id.* at 811 n.2.

²⁰ *Mossman v. Donahey*, 46 Ohio St. 2d 1, 2, 346 N.E.2d 305, 306 (1976). This case was Nelson Souder's attempt to recover unpaid wages and compensatory damages against the State of Ohio on the basis of the federal court opinion in *Souder v. Brennan*, 367 F. Supp. 808 (D.D.C. 1973). *Mossman v. Donahey*, 46 Ohio St. 2d at 2, 346 N.E.2d at 306-07. For an explanation of *Mossman*, see note 33 *infra*.

²¹ The class was defined as follows:

All patient-workers in non-Federal institutions for the residential care of the mentally ill and mentally retarded who meet the statutory definition of employee, 29 U.S.C. § 203(d), (e), (g) (1976).

Souder v. Brennan, 367 F. Supp. at 814. Other plaintiffs included the American Association on Mental Deficiency (an organization made up of institutional residents, their family members, and other institutional professional workers), the National Association for Mental Health (a citizen's group for the promotion of mental health) and the American Federation of State, County and Municipal Employees, AFC-CIO (a labor union in the health care field "concerned with improving health services"). *Id.* at 811 nn.2-5.

²² *Id.* at 811.

²³ The applicable parts of the 1966 amendments to the Act are as follows:

DEFINITION OF ENTERPRISE

Sec. 102. (a) Section 3(r) of such Act is amended by adding at the end thereof the following: "For purposes of this subsection, the activities performed by any person or persons —

"(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for the mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or . . .

shall be deemed to be activities performed for a business purpose."

Pub. L. No. 89-601, § 102, 80 Stat. 831 (codified at 29 U.S.C. § 203(r)(1) (1976)).

²⁴ 392 U.S. 183 (1968).

²⁵ *Id.* at 197-98. The Court in *Wirtz* maintained that when a state is involved in economic activities which "are validly regulated by the Federal Government when engaged in by private persons," *id.* at 197, the state then may be subject to regulation just as would be private persons. *Id.* The *Wirtz* Court relied heavily on *United States v. California*, 297 U.S. 175 (1936), which

stitutionality of the amendments not in dispute, the only question presented to the *Souder* court by the class action was whether resident workers were institutional employees under the definitions employed by the amendments.²⁶

In response to this question, the court enunciated a test based on "economic reality"²⁷ and concluded that, within the meaning of the 1966 amendments, an employment relationship did exist between patient workers and the state institutions.²⁸ The court's construction of the 1966 amendments was buttressed by section 14 of the 1966 amendments,²⁹ which provides for the issuance of special wage certificates allowing employers to pay less than normally productive mentally and physically handicapped workers a proportionally lower wage based on individual productivity levels.³⁰ A review of section 14's legislative history led the court to conclude that Congress intended all handicapped workers engaged in productive labor to be covered by the FLSA where the worker otherwise met the statutory prerequisites for coverage.³¹ The construction of the 1966 amendments enunciated by *Souder* was used by patient workers as a basis for demanding back wages and requiring institutions to pay an appropriate wage prospectively.³² As a result of the *Souder* decision, the legal rights of patient workers were expanded.³³

earlier had reached the same result by emphasizing the state-private person similarity. *But see* National League of Cities v. Usery, 426 U.S. 833 (1976) (rejecting state-private person similarity). For a discussion of why the Court discarded the state-private person distinction, see note 37 *infra*.

²⁶ *Souder v. Brennan*, 367 F. Supp. at 811-12.

²⁷ *Id.* at 813. The court enunciated the "economic reality" test because the legislative history of the 1966 amendments made no direct reference regarding whether patient workers are "employees" under the statute. *Id.* at 812. The court found that, in reality, many patient workers "perform work for which they are in no way handicapped and from which the institution derives full economic benefit." *Id.* at 813. The court concluded, therefore, that the test for employment is whether an institution derives "a consequential economic benefit" from the patient's labor. *Id.* The court reasoned that, to hold otherwise, "would be to make therapy the sole justification for thousands of positions as dishwashers, kitchen helpers, messengers and the like." *Id.* After acknowledging that patient labor is indeed therapeutic, the court nevertheless rejected the argument that therapy is the sole justification for patient labor:

[T]he work of most people, inside and out of institutions, is therapeutic in the sense that it provides a sense of accomplishment, something to occupy the time, and a means to earn one's way. Yet that can hardly mean that employers should pay workers less for what they produce.

Id. at 813 n.21.

²⁸ *Id.* at 813.

²⁹ Pub. L. No. 89-601, § 501, 80 Stat. 842. Section 14 of the Fair Labor Standards Act is codified at 29 U.S.C. § 214 (1976).

³⁰ 29 U.S.C. § 214(d)(1) (1976).

³¹ 367 F. Supp. at 814. The court admitted that it may be administratively difficult to obtain special certificates for all patient workers nationwide. *Id.* Nevertheless, the court found that where congressional intent is clear in intending coverage, administrative burden is no excuse for non-compliance. *Id.*

³² The *Souder* Court ordered the Secretary of Labor to notify all non-federal institutions of their obligation to compensate patient workers, maintain appropriate record keeping for hours worked and wages paid, and inform patients of their rights under the Fair Labor Standards Act. *Id.* at 809-10. In addition the Secretary of Labor was ordered to keep written records of enforcement activities and promulgate appropriate regulations to assure patient workers an appropriate wage. *Id.* at 809-10. These Labor regulations have since been promulgated and codified at 29 C.F.R. § 529 (1979). However, these regulations have not been enforced by the Department of Labor for several years. See note 39 *infra*.

³³ It should be noted, however, that because the federal court granted declaratory and

The effectiveness of this approach to the compensation issue was short-lived. In 1976, two and one-half years after the *Souder* decision, the Supreme Court erected what some commentators considered to be a roadblock in the path of patients' rights.³⁴ Without directly considering the problem of minimum wage compensation for resident workers, the Court in *National League of Cities v. Usery*³⁵ declared a series of amendments to the FLSA,³⁶ including the 1966 amendments on which *Souder* relied, as not within the authority granted to Congress by the commerce clause.³⁷ In so doing, the Court expressly overruled

injunctive relief only, *Souder* had to turn to the state court system with his claim for unpaid wages and compensatory damages. In this action, *Mossman v. Donahey*, 46 Ohio St. 2d 1, 346 N.E.2d (1976), *Souder's* claim for monetary relief was denied by the Ohio Supreme Court. 46 Ohio St. 2d at 18, 346 N.E.2d at 315. The court held that the eleventh amendment prohibits private citizens from suing a state in a state court as well as in a federal court. 46 Ohio St. 2d at 17, 346 N.E.2d at 315. The most enlightening part of the *Mossman* decision, which shed light on the patient labor issue, was a concurring opinion by Justice W. Brown. 46 Ohio St. 2d at 18, 346 N.E.2d at 315. Justice Brown characterized both the 1966 amendments and the *Souder* decision as "an incredible federal intrusion into internal state affairs." 46 Ohio St. 2d at 19, 346 N.E.2d at 315. Viewing state hospital employee wages as being historically an exclusive state function under the reserved powers of the tenth amendment, the court warned states to consult the tenth amendment before they "abdicate[d] their traditional function." 46 Ohio St. 2d at 19-20, 346 N.E.2d at 315, 316. See also *Fry v. United States*, 421 U.S. 542, 549-59 (1975) (Rehnquist, J., dissenting) (determining wage level paid to state hospital employees is traditional state function and beyond Congress' commerce authority).

³⁴ While noting the potential impact of *National League of Cities* on the progress in the area of patient worker rights that *Souder* had made, these commentators also acknowledged that *National League of Cities* had little immediate impact on institutional policies due to "bureaucratic inertia." *Residents*, *supra* note 11, at 298-300; Armstrong, *The Future of Patient-Worker Programs Without Federal Wage Controls*, 28 HOSP. & COMM. PSYCH. 135, 135-36 (1977).

³⁵ 426 U.S. 833 (1976).

³⁶ The first of the series reviewed by the Court was the Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65. This amendment essentially broadened the Act's coverage to any "[e]nterprise engaged in commerce or in the production of goods for commerce. . . ." 29 U.S.C. § 203(s) (1976). Specifically included under this definition of "enterprise" was any enterprise "engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier. . . ." 29 U.S.C. § 203(r)(2) (1976). The second group of amendments were the Fair Labor Standards Amendments of 1966 which again broadened the definition of "enterprise" to include hospitals and institutions. Pub. L. No. 89-601, 80 Stat. 831. See note 23 *supra*. The third "strike" was the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 58.

³⁷ 426 U.S. at 852. The appellants in *National League of Cities* included several cities and states, the National League of Cities, and the National Governors Conference alleging that a series of amendments to the FLSA was destroying the doctrine of intergovernmental immunity. See note 36 *supra*. These 1974 amendments broadened the definition of "employer" to include "a public agency" which, in essence, required all public agencies of the states and their political subdivisions to pay their employees the federal statutory minimum wage. See 426 U.S. at 838. Beginning in 1961 and ending in 1974, Congress, through a series of amendments to the FLSA, had removed entirely any wage exemption previously applicable to the states except the Act's general exception for executive, administrative or professional personnel. See *id.* at 838-39. This effectively imposed upon the states the same wage requirements that are imposed upon private employers, save those employment relationships of the states that have no private counterpart, such as police and fire protection. *Id.* at 839.

In reaching its decision which declared the amendments unconstitutional, the Court first acknowledged that the amendments were "undoubtedly within the scope of the commerce clause," *id.* at 841, and that the issue was well settled that the Constitution granted to Congress "plenary authority." *Id.* at 840. Nevertheless, Justice Rehnquist, speaking for a majority of the court, pointed out that the plenary authority of Congress had limits so as to prevent "the utter destruction of the State as a sovereign political entity. . . ." *Id.* at 842 (citing *Maryland v. Wirtz*,

the *Wirtz* decision which had held the 1966 amendments constitutional.³⁸ The implications of the Court's holding in *National League of Cities* for patient workers are far-reaching.³⁹ On first glance, it may appear that state-supported institutions are no longer required to pay their residents the federal statutory minimum wage. Indeed, in *Townsend v. Cloverbottom Hospital*,⁴⁰ patient workers were denied back wages and damages from a state hospital on the theory that the Supreme Court in *National League of Cities* had abrogated plaintiff's right to a minimum wage by overruling *Maryland v. Wirtz*.⁴¹

National League of Cities, however, may not be as preclusive as the *Townsend* decision would indicate. When the District Court for the District of Columbia

392 U.S. 183, 196 (1968)). Appellee Secretary of Labor contended that the Court already had upheld vast powers of Congress to regulate commerce even when those exercises of power preempted state regulation of *private* individuals. 426 U.S. at 844-45. The Court responded by saying that it is one thing for Congress to regulate private business that is subject to the dual sovereignty of the state and federal governments; it is quite another thing, the Court said, for Congress to regulate "the States as States" in the same manner as it would the private sector. *Id.* at 845.

The Court went on to answer the question whether the ability to determine employees' wages is a function which is so essential to the separate and independent existence of the state, that Congress may not abrogate the states' power in this instance. *Id.* at 845-46. The Court first stated that the states' compliance with the 1974 amendments would result in increased costs in dollars and therefore, involve a significant impact on the functioning of the governmental entity in terms of budget increases. *Id.* at 846. The Court noted that as a result of such compliance, the states might be forced to discontinue, or at least to make choices between programs which its citizens have come to depend upon. *Id.* at 846-47. The Court maintained therefore, that the increased burden has the net effect of displacing state choices concerning delivery of governmental services with federal choices. *Id.* at 847. The Court acknowledged that private employers have long been faced with this dilemma of displacement of policy choices by the federal government; the state as a state, however, is an element of the federal system while private business is merely a factor in the shifting economic arrangement in our economy. *Id.* at 848-49. The Court explained, moreover, that federal displacement of state decisions "may substantially restructure traditional ways in which the local governments have arranged their affairs." *Id.* at 849. The effect of this is to rob the states of their separate and independent existence and put to rest the doctrine of sovereignty. *Id.* at 851. Consequently, the Court held that insofar as the 1974 amendments operate to displace the states' discretion "to structure integral operations in areas of traditional governmental functions," *id.* at 852 (emphasis added), Congress did not have the power to enact them under the commerce clause. *Id.*

³⁸ *Id.* at 855.

³⁹ Indeed, following the *National League of Cities* decision, the Department of Labor has not sought to enforce the regulations requiring payment of the minimum wage to patient workers promulgated in the wake of *Souder*. See National Association of State Mental Health Program Directors, *Legal Issues* (November 3, 1977) 13, cited in *Residents*, *supra* note 11, at 298-99. There is no indication that the Department's policy has changed.

⁴⁰ No. A-2576 (Chancery Court for Davidson County, Tenn., Part Two, At Nashville, Tenn., Aug. 9, 1976), final order entered, A-2576 (Chancery Court for Davidson County, Tenn., Part Two, At Nashville, Tenn., Aug. 27, 1976).

⁴¹ A-2576 (Chancery Court for Davidson County, Tenn., Part Two, at Nashville, Tenn., Aug. 27, 1976). In *Townsend*, plaintiffs-patient workers sought back wages and liquidated damages from defendant-hospital for alleged violations of the FLSA. *Id.* Defendants moved to dismiss based on *National League of Cities v. Usery* in that, by overruling *Maryland v. Wirtz*, the Supreme Court "abrogated plaintiffs' argument that Congress subjected the State to suit as a necessary and appropriate step to the regulation of commerce." *Id.* Therefore, unless the State has consented to be sued or has waived its immunity, the action would be barred by the doctrine of sovereign immunity. The *Townsend* Court held that the state hospital neither had consented to be sued nor had waived its immunity and dismissed the suit. *Id.* Cf. *Wentworth v. Salem*, 548 F.2d 773 (8th Cir. 1977) (convicted workers in state prison not entitled to coverage of federal minimum wage on basis of *National League of Cities*).

reheard the *National League of Cities* case,⁴² for example, the court refused to extend the application of the Supreme Court's holding to *all* state and local government employees.⁴³ The court noted that Justice Rehnquist's opinion in *National League of Cities* had limited the invalidation of the FLSA provisions to government employees engaged in activities integral to and traditionally provided by state and local governments, and the district court foresaw that employees still could assert that they were in *nontraditional* activities.⁴⁴ Applying this holding to patient compensation cases, patient workers might argue that they are performing nontraditional state activities and, therefore, are beyond the purview of the *National League of Cities* holding. This position seems untenable, however, given Justice Rehnquist's specific reference to the public health area as an example of a traditional state function.⁴⁵

Although this particular legal theory may not be available for patient workers, there are other avenues which seem to be more promising. This article will present and analyze these alternative legal avenues that may be pursued by patient workers, in spite of *National League of Cities*, to obtain fair compensation for work performed in state-supported mental institutions. This article does not purport to set out the definitive mechanisms for obtaining compensation. The arguments that will be explored are relatively untested and based, to an extent, on policy considerations. The purpose of this article is to present legal theories on which a right to compensation might be based in the aftermath of *National League of Cities*. Accordingly, this note will initially discuss three legal theories potentially leading to a finding that compensation is due patient workers. First, it will examine the thirteenth amendment's prohibition against involuntary servitude as a potential source of a right to compensation. Second, this article will analyze whether a patient has a right to participate in a meaningful compensated work program as the result of a constitutional right to treatment guaranteed by the due process clause of the fourteenth amendment.⁴⁶ Third, an

⁴² *National League of Cities v. Marshall*, 429 F. Supp. 703 (D.D.C. 1977).

⁴³ *Id.* at 706.

⁴⁴ *Id.* at 705-06. Plaintiffs in *Marshall*, the same plaintiffs as in *National League of Cities*, sought a decree that would have precluded application of the federal minimum wage to *any* state and local government employees of any provisions regulating minimum wage under the FLSA, 29 U.S.C. §§ 206-207 (1976). *Id.* at 704. In refusing to adopt such a radical position, however, the court cited the broad separability clause of the FLSA, which allows for any clause that is held to be invalid to be separated from the remainder of the chapter, thus not affecting the application of the chapter to other persons and circumstances. *Id.* at 705. See 29 U.S.C. § 219 (1976). The court went on to say, concerning the traditional-nontraditional distinction: "There is certainly a gray area that will require elucidation in the factual settings presented by future cases. Employees asserting they are in *nontraditional activities* may claim that double damages penalties accrued pending the resolution of [*National League of Cities*]." 429 F. Supp. at 706.

⁴⁵ 426 U.S. at 851.

⁴⁶ A patient's right to treatment has been defined as a right inuring to an involuntarily committed patient as justification for society's need to detain mentally handicapped individuals. In other words, confinement, and thus a denial of certain due process rights, is tolerated, but only with adequate assurances that a patient will "receive such individual treatment as will give each [patient] a realistic opportunity to be cured or to improve his or her mental condition." *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). See also *Donaldson v. O'Connor*, 493 F.2d 507, 521-22 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563 (1975); *Rouse v. Cameron*, 373 F.2d 451, 453-56 (D.C. Cir. 1966); *Davis v. Balsam*, 461 F. Supp. 842, 852-53 (N.D. Ohio 1978); *Davis v.*

analysis of section 504 of the Rehabilitation Act of 1973⁴⁷ will be presented to determine whether it might provide a statutory right to compensation. A close examination of the first two approaches reveals, however, that they are affected by the *National League of Cities* holding to some degree. Should the patient workers prevail employing any of these two constitutional theories, a level of compensation must still be determined. It will be submitted that under a due process approach, as opposed to a commerce clause approach, the federal minimum wage standard continues to be applicable to patient workers as a permissible standard for determining compensation. It thus will be proposed that section 14 of the FLSA⁴⁸ is a valid exercise of Congress's plenary power under the fourteenth amendment and is not abrogated by the *National League of Cities* decision. Finally, while the first two approaches based on constitutional theory compel one to establish a standard of compensation with section 14, this article will explain how the use of section 504 of the Rehabilitation Act of 1973 mandates that institutional employers pay their handicapped employees at a commensurate level to that paid non-handicapped employees.

Watkins, 384 F. Supp. 1196, 1197 (N.D. Ohio 1974); Weidenfeller v. Kidulius, 380 F. Supp. 445, 451-52 (E.D. Wis. 1974). The Supreme Court has granted certiorari to Halderman v. Pennhurst State School & Hosp. 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part and rev'd in part*, 612 F.2d 84 (3d Cir. 1979), *cert. granted*, 100 S. Ct. 2984 (1980), a case that may decide the question whether there is a right to treatment which is based on the Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486 (1975), *codified at* 42 U.S.C. §§ 6001-6081 (1976). A complete definition and discussion of the right to treatment is beyond the scope of this article, except of course how this right relates to the issue of resident compensation. Much has been written about the right to treatment. For a general discussion of the right to treatment, see Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499 (1960); Perlin, *The Right to Voluntary, Compensated, Therapeutic Work as Part of the Right to Treatment: A New Theory in the Aftermath of Souder*, 7 SETON HALL L. REV. 298 (1976) [hereinafter cited as *Right to Work*]; Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1 (1978); Note, *Right to Treatment for the Civilly Committed: A New Eighth Amendment Basis*, 45 U. CHI. L. REV. 731 (1978); Note, *Wyatt v. Stickney and the Right of Civilly Committed Mental Patients To Adequate Treatment*, 86 HARV. L. REV. 1282 (1973); Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975).

⁴⁷ Act of Sept. 26, 1973, Pub. L. No. 93-112, 87 Stat. 394, *as amended by* Pub. L. No. 95-602, Nov. 6, 1978, 92 Stat. 2982, 2987, *codified at* 29 U.S.C. § 794 (Supp. III 1979), which provides:

§ 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations.

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

⁴⁸ 29 U.S.C. § 214 reads as follows:

(d)(1) Except as otherwise provided in paragraphs (2) and (3) of this subsection, the Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment

I. LEGAL THEORIES TO SECURE COMPENSATION FOR PATIENT WORKERS

A. *Use of the Thirteenth Amendment's Prohibition Against Involuntary Servitude to Secure Back Wages*

The thirteenth amendment to the Constitution prohibits slavery and involuntary servitude except as punishment for a crime.⁴⁹ Although this amendment was passed for the purpose of outlawing black slavery,⁵⁰ several courts have entertained its application in the context of institutional labor and the mentally handicapped worker.⁵¹ Many patient workers have alleged that their labor is compulsory and thus, a violation of the thirteenth amendment.⁵² Two major problems to recovery for such past abuse, however, must be faced. One must first establish that, although the work may be involuntary, it does not otherwise serve important governmental interests and second, that the labor is performed involuntarily.

Despite the blanket prohibition against involuntary servitude embodied in the thirteenth amendment, the Supreme Court has recognized that the prohibi-

under special certificates of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, at wages which are lower than the minimum wage applicable under section 206 of this title but not less than 50 per centum of such wage and which are commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.

(2) The Secretary, pursuant to such regulations as he shall prescribe and upon certification of the State agency administering or supervising the administration of vocational rehabilitation services, may issue special certificates for the employment of —

(A) handicapped workers engaged in work which is incidental to training or evaluation programs, and

(B) multihandicapped individuals and other individuals whose earning capacity is so severely impaired that they are unable to engage . . . at wages which are less than those required by this subsection and which are related to the worker's productivity.

(3)(A) The Secretary may by regulation or order provide for the employment of handicapped clients in work activities centers under special certificates at wages which are less than the minimums applicable under section 206 of this title or prescribed by paragraph (1) of this subsection and which constitute equitable compensation for such clients in work activities centers.

(B) For purposes of this section, the term "work activities centers" shall mean centers planned and designed exclusively to provide therapeutic activities for handicapped clients whose physical or mental impairment is so severe as to make their productive capacity inconsequential.

⁴⁹ U.S. CONST. amend. XIII, § 1:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

⁵⁰ *Pollock v. Williams*, 322 U.S. 4, 17 (1944); *Hodges v. United States*, 203 U.S. 1, 16 (1906); *Weidenfeller v. Kidulis*, 380 F. Supp. 445, 450 (E.D. Wis. 1974).

⁵¹ *Jobson v. Henne*, 355 F.2d 129, 131 (2d Cir. 1966); *Weidenfeller v. Kidulis*, 380 F. Supp. 445, 450 (E.D. Wis. 1974); *Downs v. Department of Public Welfare*, 368 F. Supp. 454, 465 (E.D. Pa. 1973); *Henry v. Ciccone*, 315 F. Supp. 889, 891 (W.D. Mo. 1970); *Parks v. Ciccone*, 281 F. Supp. 805, 811 (W.D. Mo. 1968); *Johnston v. Ciccone*, 260 F. Supp. 553, 556 (W.D. Mo. 1966); *Tyler v. Harris*, 226 F. Supp. 852, 853 (W.D. Mo. 1964); *Stone v. City of Paducah*, 120 Ky. 322, 331, 86 S.W. 531, 533 (1905).

⁵² See note 51 *supra*.

tion can be overridden if the labor performed involuntarily serves compelling governmental interests.⁵³ A mentally ill person is institutionalized for the purpose of receiving therapy so that the patient may eventually return as a healthier member of society.⁵⁴ An important governmental interest presumably is being served by requiring patients to participate in therapeutic work programs.⁵⁵ Some commentators aver that this important governmental interest outweighs a petitioner's claim of involuntary servitude under the thirteenth amendment.⁵⁶ Nevertheless, if a patient's work program is devoid of therapeutic value, a court justifiably could conclude that the patient is subjected to involuntary servitude, presumably because the governmental interest would no longer be present.⁵⁷

The paradigmatic decision addressing the issue of how the therapeutic value of work relates to a patient worker's thirteenth amendment claim is *Jobson v. Henne*.⁵⁸ Jobson, a resident of a New York mental institution, had been required to work in a boiler house eight hours per night, six nights a week, in addition to working eight hours in the daytime at other jobs.⁵⁹ For his work in the boiler house, Jobson received one cent per hour.⁶⁰ Jobson filed suit against several institutional administrators, claiming his work was in violation of the thirteenth amendment but was denied relief in the district court.⁶¹ As a result, he appealed to the Second Circuit Court of Appeals.⁶² Reviewing this situation, the court first acknowledged that a state institution was permitted under the thirteenth amendment to require a resident to work without compensation if the work was either of a general housekeeping nature or if the chores were reasonably related to a therapeutic program.⁶³ The court stated that whether or not a patient's work could be characterized as involuntary servitude would depend upon the *nature* of the required work and not just *whether* the work was required.⁶⁴ The court further stated that the thirteenth amendment may be violated if the mental institution requires patient work which has no therapeutic purpose or which is not of a personal housekeeping nature, but is required to be performed solely in order to help defray institutional costs.⁶⁵ Thus, if the work is reasonably related to a patient's therapy program or to a patient's personal needs, the thir-

⁵³ *Butler v. Perry*, 240 U.S. 328, 333 (1916); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). See also *Heflin v. Sanford*, 142 F.2d 798, 799 (5th Cir. 1944); *Weidenfeller v. Kidulis*, 380 F. Supp. 445, 450 (E.D. Wis. 1974).

⁵⁴ See *Wyatt v. Stickney*, 334 F. Supp. 1341, 1342 (M.D. Ala. 1972).

⁵⁵ See *Weidenfeller v. Kidulis*, 380 F. Supp. 445 (E.D. Wis. 1974), where the court notes that the burden on the state in thirteenth amendment challenges by patient workers "is something more than merely concluding that all involuntary civil commitments serve the compelling state interest of protecting society from the mentally ill." *Id.* at 451.

⁵⁶ See *Institutional Labor*, *supra* note 3, at 582.

⁵⁷ *Jobson v. Henne*, 355 F.2d 129, 132 (2d Cir. 1966).

⁵⁸ 355 F.2d 129 (2d Cir. 1966).

⁵⁹ *Id.* at 132.

⁶⁰ *Id.* at 132 n.5.

⁶¹ *Id.* at 130-31.

⁶² *Id.* at 131.

⁶³ *Id.* at 131-32.

⁶⁴ *Id.* at 132 n.3.

⁶⁵ *Id.*

teenth amendment's proscription would not apply. The court further stated that given work reasonably related to a therapeutic program, such work may become so ruthless in both the amount demanded and the conditions under which the work must be performed that the work becomes devoid of therapeutic value and, therefore, constitutionally impermissible.⁶⁶ Reviewing the facts before it, the court concluded that *Jobson* had stated a claim under the thirteenth amendment.⁶⁷

While a claim such as that asserted in *Jobson* is thus legally viable, several problems may work towards keeping patient workers from obtaining relief for the claim in court. Not only does a plaintiff face the inherent practical difficulties of proving involuntariness but the burden of establishing that a work program is "devoid of therapeutic purpose" may be insurmountable. For example, in *Souder v. Brennan*,⁶⁸ the court insisted that the work of most people, inside and out of institutions, is therapeutic at least in the sense that work provides a person with a sense of accomplishment and a means to occupy time.⁶⁹ This characterization of work would render the *Jobson* court's devoid-of-therapeutic-purpose standard impossible by definition. Almost all work provides a means to occupy time. The *Jobson* standard thus might force the patient worker to argue an untenable position.

Despite *Souder's* characterization of work, the patient worker asserting a thirteenth amendment claim may be able to employ a more narrow definition of therapeutic work. In *Jobson*, the court first assumed that mandatory patient work, for thirteenth amendment purposes, was permissible if that work was reasonably related to a therapeutic program.⁷⁰ Second, the court went on to declare that even a therapeutic program could be rendered therapeutically valueless by external factors, such as prolonged hours and poor working conditions, so as to constitute involuntary servitude.⁷¹ Thus, in the first instance, a court should look to the therapeutic value of the patient work program. Should the work prove to be therapeutic, a court should go on to scrutinize the texture of the tasks required like the amount of work and the working conditions. Under the first part of the *Jobson* test, therefore, if the mandatory patient work was not "reasonably related to a therapeutic program," a patient worker could claim a violation of the thirteenth amendment without having to prove that the work was ruthless in the amount of work or conditions under which the work was performed. This implies that the *Jobson* court did not consider all work to be therapeutic.

Although the *Jobson* opinion offered no definition of therapeutic work, later cases provide a workable test. For example, in *Davis v. Balson*,⁷² a right to treatment case, forced participation in repetitive, nonfunctional, degrading, and unnecessary tasks was held to be a nontherapeutic work program.⁷³ This defini-

⁶⁶ *Id.* at 132.

⁶⁷ *Id.*

⁶⁸ 367 F. Supp. 808 (D.D.C. 1973).

⁶⁹ *Id.* at 813 n.21.

⁷⁰ 355 F.2d at 131.

⁷¹ *Id.* at 132.

⁷² 461 F. Supp. 842 (N.D. Ohio 1978).

⁷³ *Id.* at 852. See also *Davis v. Watkins*, 384 F. Supp. 1196, 1208-09 (N.D. Ohio 1974).

tion of nontherapeutic work is applicable in involuntary servitude actions as well as in right to treatment actions. By transplanting the *Davis* approach to the thirteenth amendment context, if a patient worker was forced to engage in a degrading or unnecessary task, he would have been engaging in a task not "reasonably related to a therapeutic program" and thus, a violation of the thirteenth amendment. The court would not reach the question whether the task was so ruthless in the amount of and in the conditions of the work that the task, at that point, was devoid of therapeutic purpose. The degrading and unnecessary task already would be therapeutically valueless.

Using this argument in the context of the *Jobson* case, the court first would be required to scrutinize the "intrinsic" factors of the work—whether working in a boiler room in and of itself was nonfunctional, degrading, unnecessary, or otherwise nontherapeutic. If the court found that such work was reasonably related to a therapeutic program, the court would then be required to analyze the "extrinsic" factors of the work—whether working in a boiler room for extended hours and under poor conditions rendered the work nontherapeutic. This two-step approach would insure that upon a claim for involuntary servitude, all aspects of a patient's work program are inspected in evaluating the program's therapeutic value.⁷⁴

Once a plaintiff has shown that the work program served no important governmental interests, the plaintiff still must show that the work was performed involuntarily before past wages can be attained.⁷⁵ The worker's mental capacity and his institutional environment make the problem of proving involuntariness difficult. As a practical matter, the verbal expressions and actions of the patient worker are not always reliable as proof of the voluntariness of the work performed.⁷⁶ Often, a patient will continue to work without complaint because he or she may fear reprisals if objections are made. In one case, a patient's fear of reprisals by institution staff was substantiated by testimony which suggested that if the patient at the institution refused to work, certain privileges would be taken away.⁷⁷ On a more subtle level, it is one commentator's conclusion that the coercive environment of an institution virtually prohibits a voluntary choice to work on the part of the residents.⁷⁸ Given the dismal alternatives to work—

⁷⁴ The result of this test would be a realization that as the therapeutic value of a patient's labor decreases to a certain level, the important governmental interest in therapy may no longer be served by such a *de minimis* level of therapy. Cf. *Roe v. Wade*, 410 U.S. 113, 155-56 (1973) (state interest is of different degrees at different points during a woman's pregnancy).

⁷⁵ *Weidenfeller v. Kidulis*, 380 F. Supp. 445, 450 (E.D. Wis. 1974); *Johnston v. Ciccone*, 260 F. Supp. 553, 556 (W.D. Mo. 1966).

⁷⁶ Cf. *Kaimowitz v. Department of Mental Health*, Civil No. 73-19434-AW, slip op. at 29-31 (Cir Ct., Wayne County, Mich., July 10, 1973), cited in *Institutional Labor*, *supra* note 3, at 581.

⁷⁷ *Dale v. State*, 44 A.D.2d 384, 388-89, 355 N.Y.S.2d 485, 490 (1974), *aff'd*, 36 N.Y.2d 833, 370 N.Y.S.2d 906 (1975). In *Dale*, the plaintiff contended that her "honor card" would be withheld if she did not work. The "honor card" permitted a patient to move freely through the wards and grounds of the institution. 44 A.D.2d at 388, 355 N.Y.S.2d at 490. See also *Parks v. Ciccone*, 281 F. Supp. 805, 811 (W.D. Mo. 1968) (Through talk with another resident, patient received impression that if he did not work, he would be sent to a ward for more mentally regressed patients.)

⁷⁸ *Institutional Labor*, *supra* note 3, at 581.

confinement to a ward—a patient can hardly be said to be making a voluntary choice when he opts for some form of work.⁷⁹ Consequently, it may be argued that a patient worker may work voluntarily only if there are both alternatives to work open to the resident and the resident has a bona fide choice of alternatives.⁸⁰ If a patient worker has no alternative to work and no bona fide choices as to alternative work assignments, his work should be considered involuntary. The need to rely on a patient's outward manifestations as proof of involuntariness thus should be obviated.

Not only must choice of work be related to the voluntariness question, there also must be a strong correlation between compensation and a patient's consent to work.⁸¹ The *Jobson* court held that mere payment for work cannot be determinative of the voluntariness of that work unless the receipt of compensation induces consent to work.⁸² This prohibits institutions from paying a token wage, such as one cent per hour, in order to avoid a claim of involuntary servitude. On the other hand, adequate compensation as opposed to token payments would suggest that the worker performed the labor voluntarily. Institutional administrators might argue, however, that compensation has no bearing on the voluntariness issue since slaves may be paid high wages and still be slaves if they are not free to discontinue their work. The problem is complicated further in the case of a mentally handicapped worker since his personality characteristics make it difficult to determine whether compensation is a sufficient inducement to work. Many of the workers are severely retarded and cannot express their sentiments in a manner from which inferences of inducement can be drawn.⁸³ Therefore, the level of compensation is often the only tangible factor that can be looked to in determining the voluntariness issue. Where compensation is paid to a patient, it may be presumed that he accepted the job voluntarily. In this context the patient worker is considered to be motivated in a fashion similar to the normal worker. He voluntarily exchanges his labor for reasonable compensation. Conversely, it may be said that the failure to compensate patient workers raises a presumption against the institution that its patient workers are performing institutional functions involuntarily. Once this presumption arises, a court could go on to consider other less tangible factors like worker attitudes which would shed light on the voluntariness issue vis-a-vis compensation and inducement.

In sum, the thirteenth amendment offers patient workers a tool to rectify past patient labor abuse. The patient may obtain back wages if he clears two substantive hurdles. First, the patient worker must prove that his uncompen-

⁷⁹ *Id.*

⁸⁰ *Id.* It has been pointed out that voluntarily committed patients may present a different problem to the voluntariness issue than do involuntarily committed patients because the voluntarily committed patients have the option of leaving the institution instead of working there. If such is the case, this option could be interpreted as a "bona fide choice" to working. See *Downs v. Department of Public Welfare*, 368 F. Supp. 454, 466 n.17 (E.D. Pa. 1973).

⁸¹ See *Jobson v. Henne*, 355 F.2d 129, 132 n.3 (2d Cir. 1966); *Heflin v. Sanford*, 142 F.2d 798, 799 (5th Cir. 1944).

⁸² *Jobson v. Henne*, 355 F.2d 129, 132 n.3 (2d Cir. 1966). See also *Heflin v. Sanford*, 142 F.2d 798, 799 (5th Cir. 1944).

⁸³ See Sootkoos & Walsh, *Impact of Souder v. Brennan on the Profoundly and Severely Retarded*, 14 J. PSYCH. NURSING & MENTAL HEALTH SERV. 14 (1976).

sated labor does not serve compelling governmental interests. To do this, he must show that his work program is not reasonably related to a therapeutic program. Second, the patient worker also must show that he is working involuntarily. A patient who has no bona fide alternatives to work may be said to be working involuntarily. Furthermore, the failure to compensate patient workers should create a presumption of involuntary servitude.

B. *Use of the Constitutional Right to Treatment as a fortiori
Mandating Meaningful, Compensated Work Programs*

In general, the thirteenth amendment may be used by patient workers to secure compensation for the performance of nontherapeutic work. On the other hand, work which is therapeutic in all respects is not subject to a thirteenth amendment challenge. Patient workers still may be able to employ a legal theory based on a constitutional right to treatment which may secure compensation for even therapeutic work. The question whether patients who have been committed to state mental institutions have a constitutional right to treatment has received abundant attention in recent years.⁸⁴ Generally, the constitutional right to treatment, based largely upon the due process clause, may be defined as a constitutional right to receive such treatment as will give an institutional resident a reasonable opportunity to be cured or to improve his mental condition.⁸⁵ Although this right to treatment has been enunciated by several lower courts,⁸⁶ the Supreme Court has yet to decide its validity.⁸⁷ Nonetheless, on the

⁸⁴ See articles cited in note 46 *supra*.

⁸⁵ Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971).

⁸⁶ See cases cited in note 46 *supra*.

⁸⁷ In 1975, the Supreme Court, in O'Connor v. Donaldson, 422 U.S. 563 (1975), found it unnecessary to decide the existence of a constitutional right to treatment. The Court had granted certiorari to a Fifth Circuit Court of Appeals decision, Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), which held that the fourteenth amendment due process clause guaranteed involuntarily civilly committed mental patients a right to treatment. *Id.* at 510. The suit had been brought by an involuntarily committed patient who had been diagnosed as a "paranoid schizophrenic" and who had remained in a mental hospital for over fourteen years, allegedly receiving little or no treatment for his disease. The Fifth Circuit opinion justified its holding partly on the Supreme Court's decision in Jackson v. Indiana, 406 U.S. 715 (1972), which held that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 738. Using the Jackson test, the Donaldson court reasoned that "[i]f the 'purpose' of commitment is treatment, and treatment is not provided, then the 'nature' of the commitment bears no 'reasonable relation' to its 'purpose', and the constitutional rule of Jackson is violated." 493 F.2d at 521. The Fifth Circuit also based their finding of a right to treatment on a "quid pro quo" theory. The Donaldson court stated:

The second part of the theory of a due process right to treatment is based on the principle that when the three central limitations on the government's power to detain — that detention be in retribution for a specific offense; that it be limited to a fixed term; and that it be permitted after a proceeding where fundamental procedural safeguards are observed — are absent, there must be a *quid pro quo* extended by the government to justify confinement. And the *quid pro quo* most commonly recognized is the provision of rehabilitative treatment, or, where rehabilitation is impossible, minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary.

Id. at 522.

assumption the right to treatment exists, this section explores the ramifications of such a right for the patient worker seeking compensation. First, this section will explore the reasoning behind the assertion that patients have a right to participate in a therapeutic, voluntary and compensated work program as part of their constitutional right to treatment. The problems in such reasoning will be exposed. Finally it will be submitted that while patients may not have a right to participate in such a work program, if the institution should offer one, the right to treatment mandates that the work program be voluntary, therapeutic, and compensated.

The concept of a constitutional right to treatment is rooted in the 1972 case of *Jackson v. Indiana*.⁸⁸ In *Jackson*, in the context of determining whether Indiana's civil commitment procedures were constitutional, the Supreme Court held that in order for due process requirements to be satisfied, the nature and duration of commitment must bear some reasonable relation to the purpose for which the individual was committed.⁸⁹ Subsequently, applying this holding to the commitment of the mentally handicapped, a district court in *Wyatt v. Stickney*⁹⁰ held that the mentally handicapped have a constitutional right to receive such treatment as will give them a reasonable opportunity to be cured or to improve their mental condition.⁹¹ The court then stated that given the purpose of involuntary hospitalization to be treatment, the institution must render treatment and not mere custodial care.⁹² As a result of this constitutional requirement of treatment, the institutions involved in *Wyatt* were ordered to implement treatment programs that would give each treatable patient a realistic opportunity to be cured or to improve his or her mental condition.⁹³

In setting forth the expansion of the *Wyatt* case to require voluntary and compensated work programs as part of the constitutional right to treatment, the case of *Schindenwolf v. Klein*⁹⁴ is a useful prototype. *Schindenwolf* is an action

In reviewing the appellate court's decision, the Supreme Court declined to reach the right to treatment issue and instead granted Donaldson relief under a "right to liberty" theory. The Court found that a State may not constitutionally confine a nondangerous individual upon the finding of "mental illness" if such person is "capable of surviving safely in freedom by himself or with the help of . . . family members or friends." 422 U.S. at 576. The Court, considering the right to treatment issue, stated that since the jury in the trial court found that no treatment had in fact been administered to Donaldson during his stay at the hospital,

[t]here is, accordingly, no occasion in this case to decide whether the provision of treatment, standing alone, can ever constitutionally justify involuntary confinement or, if it can, how much or what kind of treatment would suffice for that purpose. In its present posture this case involves not involuntary treatment but simply involuntary custodial confinement.

Id. at 574 n.10.

⁸⁸ 406 U.S. 715 (1972).

⁸⁹ *Id.* at 738.

⁹⁰ 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced by* 344 F. Supp. 373 and 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

⁹¹ 334 F. Supp. at 1342.

⁹² *Id.*

⁹³ *Id.* See also *Davis v. Balsom*, 461 F. Supp. 842, 853 (N.D. Ohio 1978); *Davis v. Watkins*, 384 F. Supp. 1196, 1197 (N.D. Ohio 1974).

⁹⁴ Docket No. L 41293-75 P.W. (N.J. Super., motion for summary judgment denied Oct. 22, 1979).

pending in the Superior Court of New Jersey to force New Jersey State institutions to resume providing therapeutic work programs for patients. The *Schindewolf* plaintiffs assert that the phrases "treatment as will give [patients] a reasonable opportunity to be cured"⁹⁵ and "the nature [and duration] of commitment [must] bear some reasonable relation to the purpose for which the individual is committed,"⁹⁶ quoted from *Wyatt and Jackson*, must be interpreted as constitutionally mandating adequate treatment.⁹⁷ The plaintiffs then contend that the opportunity to participate in work programs falls under the rubric of adequate treatment.⁹⁸ The plaintiffs reason that a work program is such an integral and essential part of a patient's therapy program that abrogation of all such programs results in treatment inadequate to achieve the major purposes of confinement, which include improvement of the patients' mental condition and their reintegration into the community, if possible.⁹⁹ To support this theory, plaintiffs cite numerous scientific and behavioral experts whose opinions suggest that voluntary work programs are indeed, very therapeutic.¹⁰⁰ Participation in a meaningful work program is seen by at least one expert as "a pivotal force" in a patient's rehabilitation.¹⁰¹

Taking the theory of their case one step further, the *Schindewolf* plaintiffs argue that just as work itself is therapeutic and a necessary part of an adequate treatment plan, *compensated* labor is an equally invaluable therapeutic tool.¹⁰² Indeed, two behavioralists cited in plaintiffs' trial brief suggest that no single factor is more important in the total picture of rehabilitation than the patient's realization that he is being paid for his ability rather than for his disability.¹⁰³ These behavioralists also state that nothing appears to be a greater stimulus to engaging in activities that reflect health instead of illness than being paid for the results of those activities.¹⁰⁴ Relying on this expert opinion, plaintiffs in *Schindewolf* argue that, if compensated work programs are part and parcel of adequate treatment,¹⁰⁵ the right of a patient to participate in a voluntary, compensated and therapeutic work program also must be recognized.¹⁰⁶

⁹⁵ *Wyatt v. Stickney*, 325 F. Supp. at 784.

⁹⁶ *Jackson v. Indiana*, 406 U.S. at 738.

⁹⁷ Brief for Plaintiffs, *Schindewolf v. Klein*, Docket No. L 41293-75 P.W. (N.J. Super., Motion for summary judgment denied Oct. 22, 1979) at 11-12. See also *Right to Work*, *supra* note 46, at 313-14. The *Schindewolf* case is based on this article by Mr. Perlin, as he is one of the counsel for plaintiffs. See also *Wyatt v. Stickney*, 334 F. Supp. 1341, 1343 (M.D. Ala.) (three fundamental conditions for "adequate" treatment: (1) a humane physical environment, (2) qualified staff in numbers sufficient to administer adequate treatment and (3) individualized treatment plans), 344 F. Supp. at 379 (minimum constitutional standards for "adequate" treatment of the mentally ill). Cf. *Halderman v. Pennhurst State Hosp.*, 612 F.2d 84, 95-96 (3d Cir. 1979) ("appropriate" treatment under a statutory analysis).

⁹⁸ Brief for Plaintiffs at 12, *Schindewolf v. Klein*.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 18-23.

¹⁰¹ Schwartz, *Expanding a Sheltered Workshop to Replace Nonpaying Patient Jobs*, 27 HOSP. & COMM. PSYCH. 98, 99-100 (1976).

¹⁰² Brief for Plaintiffs at 23-26, *Schindewolf v. Klein*.

¹⁰³ Scoles & Fine, *Aftercare and Rehabilitation in a Community Mental Health Center*, SOCIAL WORK 75, 77 (July 1971), cited in Brief for Plaintiffs at 24, *Schindewolf v. Klein*.

¹⁰⁴ *Id.*

¹⁰⁵ See text and notes at notes 95-101 *supra*.

¹⁰⁶ See Brief for Plaintiffs at 29, *Schindewolf v. Klein*.

Beyond the obvious dangers of resting an entire legal theory on a fundamental right which as yet is unrecognized by the Supreme Court, there is a basic flaw in plaintiff's reasoning in *Schindenwolf*. Plaintiffs contend that a resident must be afforded treatment that will give them a realistic opportunity to be cured or to improve their condition and that a compensated work program is an essential element in such treatment.¹⁰⁷ It is, however, easy to conceive of a treatment plan which could afford patients adequate treatment through the use of rehabilitative measures other than compensated work programs. For example, as part of a general program of therapy, institutions may offer programs such as behavior modification point systems,¹⁰⁸ medication therapy,¹⁰⁹ disciplinary programs,¹¹⁰ personal housekeeping chores,¹¹¹ out-of-door physical exercise programs, personal hygiene classes, and craft workshops. A compensated work program is only one alternative, albeit a documented effective one. Indeed, the court in *Davis v. Balson*,¹¹² a case similar to *Schindenwolf* in respect to patient workers demanding compensation, could not find that a work program is constitutionally fundamental treatment.

In *Davis*, patient workers alleged constitutional violations on the part of an Ohio State hospital for the criminally insane.¹¹³ The court decided several issues, one of which was whether state officials constitutionally are required to provide residents an opportunity to participate in therapeutic, compensated work programs as an essential component of the right to treatment.¹¹⁴ The court first recognized the value of therapeutic work programs and concluded that great weight should be given to professional opinion that advises the adoption of work programs.¹¹⁵ The court could not conclude, however, that absent such work programs, a patient would not receive such individualized treatment as would give him a realistic opportunity to be cured or to improve his mental condition.¹¹⁶ The court acknowledged the possibility that, through other treatment modalities, a patient could receive the same therapeutic benefit as would be received by participating in a work program.¹¹⁷ Thus, the *Davis* court could not find that participation in compensated work programs was a fundamental condition for adequate and effective treatment.¹¹⁸

¹⁰⁷ *Id.*

¹⁰⁸ See *F.E. v. Hensley*, No. 73 CV 43-W-1 (W.D. Mo., final judgment entered Dec. 15, 1978) at 13-14 and Appendix A. (Action by patients of youth hospital settled; appropriate treatment modalities agreed upon.) This treatment modality is "designed to improve the functioning level of individual patients through reinforcing adaptive behavior." *Id.* at 13. Generally, the program awards points to patients for acceptable behavior and ignores unacceptable behavior. The patient may win prizes and the like by collecting points. *Id.* at 13-14.

¹⁰⁹ *Id.* at 12-13. Psychotropic drugs will be administered to patients at this hospital when found to be medically necessary to the treatment program. *Id.*

¹¹⁰ *Id.* at 15-18.

¹¹¹ See *Davis v. Balson*, 461 F. Supp. 842, 852 (N.D. Ohio 1978).

¹¹² 461 F. Supp. 842 (N.D. Ohio 1978).

¹¹³ *Id.* at 847.

¹¹⁴ *Id.* at 853.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 853. See *Wyatt v. Stickney*, 325 F. Supp. at 784.

¹¹⁷ 461 F. Supp. at 853-54.

¹¹⁸ See *id.* at 854. Although this seems to be a logical result, it should be noted that *Wyatt*, the very case which *Davis* relied on for a standard of treatment, (see text at note 96 *supra*), earlier described three "fundamental conditions" for adequate treatment, one of which was "a humane

The *Davis* finding notwithstanding, it is crucial to distinguish between the case of the patient who is not involved in any work program and desires to participate in a compensated work program, and the case of the patient worker who is already participating in a work program and desires the program to be therapeutic and compensated. In the former case, the plaintiff-patient worker seeking compensated work must establish that participation in a work program is constitutionally fundamental therapy, while in the latter case, this hurdle is obviated since the patient already is participating in the program. For the patient who already is working, but without compensation, the ultimate issue is not whether work is required treatment. Instead, the issue is whether compensation is a necessary element of a work program to insure that that program satisfies patient worker's constitutional right to treatment.

Both the *Wyatt* and *Davis* courts addressed this issue. In *Davis*, the court's attention was directed to expert testimony adduced at trial that showed that compensation was extremely important in developing a positive attitude toward one's job.¹¹⁹ Likewise, in *Wyatt*, experts testified that nontherapeutic, uncompensated work assignments contributed to a poor psychological environment which created in the patient an impression of the institution as a prison or a "crazy house."¹²⁰ On the basis of this evidence, both courts found that uncompensated work constitutes a dehumanizing factor that contributes to the degeneration of the patient's self-esteem and thus, such work stands in violation of the patient's right to treatment.¹²¹ Further, both the *Wyatt* and *Davis* courts ordered that patient work for which an institution would otherwise have to pay an employee be compensated to insure that a patient's constitutional right to treatment is not violated.¹²² Thus, where a therapeutic work program exists, *Wyatt* and *Davis* support a patient worker's right to compensation embodied in his constitutional right to treatment.

This is not meant to paint a black-and-white picture for patient workers. Institutional administrators may contend that the therapeutic value in work alone is sufficient to pass constitutional muster and that compensation is unnecessary treatment.¹²³ This contention is supported by some commentators who are not convinced that compensation is central to a patient's therapy needs.¹²⁴ In some cases, it may be necessary to demonstrate that compensation is so

psychological and physical environment." *Wyatt v. Stickney*, 334 F. Supp. at 1343. The *Wyatt* court further delineated factors that contribute to a poor environment.

Also contributing to the poor psychological environment [is] . . . the nontherapeutic work assigned to patients (mostly compulsory, uncompensated housekeeping chores).

Id. While it is plausible that an "adequate" therapeutic result can be reached by participation in programs other than compensated work programs, this result cannot be based fairly on *Wyatt* since that case seems to indicate that participation in therapeutic work programs leads to a good psychological atmosphere which is "fundamental" to a patient's right to treatment.

¹¹⁹ *Davis v. Balson*, 461 F. Supp. at 852.

¹²⁰ *Wyatt v. Stickney*, 334 F. Supp. at 1343.

¹²¹ *Wyatt v. Stickney*, 344 F. Supp. at 375; *Davis v. Balson*, 461 F. Supp. at 852.

¹²² 344 F. Supp. at 381; 461 F. Supp. at 852-53.

¹²³ See *Davis v. Balson*, 461 F. Supp. at 852.

¹²⁴ Walsh & Sootkoos, *Impact of Souder v. Brennan on the Profoundly Retarded*, 14 J. PSYCH. NURSING & MENTAL HEALTH SERV. 14, 17 (1976).

important to the therapy needs of the institutionalized patient that a work program without this mode of therapy does not attain constitutional minimums. Nevertheless, courts should approach the issue of compensation as therapy on a case-by-case basis after a comprehensive evaluation of a patient's therapy needs. Such close scrutiny will ultimately reveal whether the dominant purpose of the work is therapy or providing a cheap source of labor for the institution.

*C. Section 504 of the Rehabilitation Act of 1973 and
Compensation for Qualified Patient Workers*

The reluctance of the Supreme Court to address the right to treatment issue leaves the existence of that right in doubt, and a thirteenth amendment approach to patient compensation must confront both the voluntariness and important governmental interest issues before recovering back wages. Even assuming these obstacles are insurmountable, however, a third avenue to compensation may exist. Whether or not a patient has a constitutional right to compensation, there may exist a statutory basis for such a claim. Congress has enacted several statutory prohibitions against handicapped discrimination,¹²⁵ and one of these provisions, section 504 of the Rehabilitation Act of 1973,¹²⁶ may prove applicable to the patient workers' pursuit of just compensation. Generally, section 504 prohibits recipients of federal funds from discriminating against a handicapped individual solely by reason of his or her handicap.¹²⁷ In this section, it will be shown that although institutionalized mental patients are not addressed expressly in the statutory language of section 504, patient workers nevertheless are intended beneficiaries of the statute's protection against discrimination. As a result, arguably, an institution's refusal to compensate qualified handicapped patient workers for work that the institution otherwise would have to pay non-handicapped workers constitutes discrimination based solely on the handicap of the patient worker and thus a violation of section 504.¹²⁸

¹²⁵ See, e.g., The Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6081 (Supp. III 1979) which states: "It is the overall purpose of this chapter to assist States to assure that persons with developmental disabilities receive . . . services necessary . . . [to] ensure the protection of the legal and human rights of persons with developmental disabilities," 42 U.S.C. § 6000(b)(1); The Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401-1420 about which it was stated: "It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity," S. REP. NO. 94-168, 94th Cong., 1st Sess. 9, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1433; Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349, May 23, 1980, 42 U.S.C. § 1997 (1980), which allows the U.S. Attorney General to commence an action on behalf of an institutionalized person when the Attorney General has reasonable cause to believe that such institutionalized person is being deprived any rights, privileges, or immunities protected by the Constitution.

¹²⁶ 29 U.S.C. § 794 (1976).

¹²⁷ See note 47 *supra*.

¹²⁸ The rights conferred under § 504 of the Rehabilitation Act of 1973 likely may be enforced through a private right of action. The overwhelming majority of lower courts that have decided this issue, either in an employment discrimination context or otherwise, have held that § 504 does imply a private cause of action. See *NAACP v. Wilmington Medical Center*, 599 F.2d 1247, 1258 (3d Cir. 1979) (suit to halt relocation of hospital from inner city to suburbs making it

By enacting section 504, Congress provided that no otherwise qualified handicapped individual shall, solely by reason of his handicap, be subjected to discrimination under any program or activity receiving federal financial assistance.¹²⁹ The regulations that enforce this legislation¹³⁰ define a handicapped person, *inter alia*, as one who has been or is regarded as having a physical or mental impairment that substantially limits one or more of such person's major life activities.¹³¹ They define a "qualified handicapped person" with respect to

more difficult for handicapped persons to receive treatment); *Doe v. Calautti*, 592 F.2d 704, 708 n.8 (3d Cir. 1979) (time limits set by state's medical assistance statute for benefits for hospitalization held discriminatory); *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 99 (3d Cir. 1979), *cert. granted*, 100 S. Ct. 2984 (1980) (mentally retarded students challenging confinement conditions, held discriminatory); *Leary v. Crapsey*, 566 F.2d 863, 865 (2d Cir. 1977) (handicapped persons discriminated against in accessibility to mass transportation facilities); *United Handicapped Fed'n v. Andre*, 558 F.2d 413, 415 (8th Cir. 1977), *aff'd*, 622 F.2d 342 (8th Cir. 1980) (same); *Lloyd v. Regional Transp. Auth.* 548 F.2d 1277, 1285 (7th Cir. 1977) (same); *Hart v. County of Alameda*, 485 F. Supp. 66, 73 (N.D. Cal. 1979) (employment discrimination); *New York Ass'n for Retarded Children v. Carey*, 466 F. Supp. 479, 485-86 (E.D.N.Y. 1979), *aff'd*, 612 F.2d 644, 649 (mentally retarded children carrying Hepatitis B virus discriminated against in readmission to public schools); *Boxall v. Sequoia Union H.S. Dist.*, 464 F. Supp. 1104, 1109-10 (N.D. Cal. 1979) (education); *Stemple v. Prince Georges County Bd. of Educ.*, 464 F. Supp. 258, 260 n.1 (D. Md. 1979), *aff'd*, 623 F.2d 893 (4th Cir. 1980) (education); *Stubbs v. Kline*, 463 F. Supp. 110, 115 (W.D. Pa. 1978) (education); *Whitaker v. Board of Educ.*, 461 F. Supp. 99, 107-08 (E.D. N.Y. 1978) (employment); *Davis v. Bucher*, 451 F. Supp. 791, 797 (E.D. Pa. 1978) (employment); *Duran v. City of Tampa*, 430 F. Supp. 75, 78 (M.D. Fla. 1977); *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809, 816 (E.D. Pa. 1977) (employment). *Accord*, 451 F. Supp. 954 (M.D. Fla. 1978) (employment). *Contra*, *Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672, 674-75 (8th Cir. 1980) (employment); *Coleman v. Darden*, 595 F.2d 533 (10th Cir. 1979) (employment); *Trageser v. Libbie Rehab. Center*, 590 F.2d 87, 89 (4th Cir. 1978) (employment).

The Supreme Court has yet to decide whether § 504 implies a private cause of action. In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the Court was called upon to interpret several provisions of § 504 in response to a challenge by an applicant to a nursing school who was denied admission based on her hearing impairment. After deciding the case on the merits, the Court refused to decide the right of action issue: "In light of our disposition of this case on the merits, it is unnecessary to address [the private right of action] issues and we express no views on them." *Id.* at 404-05 n.5. It would seem anomalous, however, to reach the merits of a case without first having *sub silentio* granted plaintiff standing *via* a private right of action. Nevertheless, the Court finally may decide whether § 504 implies a private right of action in *Camenisch v. University of Texas*, 616 F.2d 127 *cert. granted*, 49 U.S.L.W. 3332 (1980). *Camenisch* involves a deaf graduate student who is suing the University of Texas for failing to provide and compensate an interpreter for the student as a "reasonable accommodation" to his physical impairment under § 504 of the Rehabilitation Act of 1973 and its implementing regulations. The circuit court expressly found a private right of action under § 504 basing its conclusion on *Campbell v. Kruse*, 434 U.S. 808 (1977). In *Kruse*, the Supreme Court vacated a district court judgment which held that a Virginia statute, providing tuition grants to handicapped children attending private schools, denied equal protection to handicapped pupils who could not qualify for these grants based on their impoverished condition. The Court ordered the district court to decide the plaintiff's claim "based on the federal statute, Sec. 504 of the Federal Rehabilitation Act of 1973." *Id.* at 808. The circuit court in *Camenisch* interpreted the Supreme Court's decision in *Campbell* as an "acknowledgment" of the judicial authority to entertain private suits for injunctive relief under Section 504. 616 F.2d at 131.

¹²⁹ 29 U.S.C. § 794 (1976).

¹³⁰ 45 C.F.R. § 84 (1979).

¹³¹ 45 C.F.R. § 84.3(j) (1979).

employment as one who, with reasonable accommodation, can perform the essential functions of the job in question.¹³² The consequence of this regulation is that employers must make "reasonable accommodation" to the known physical and mental limitations of the handicapped worker.¹³³ For example, reasonable accommodation might require an employer to install a telephone receiver amplifier for a secretary who has impaired hearing, but who is otherwise capable of performing all the other functions of being a secretary.¹³⁴ All federal fund recipients must make such reasonable accommodation unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.¹³⁵ The regulations offer several factors that help to determine whether a certain accommodation would impose an "undue hardship" on the employer. These factors include the size of the recipients' program, the type of recipients' operation, and the cost of the accommodation needed.¹³⁶ For example, it may not be an undue hardship on a state welfare agency to provide an interpreter for a deaf employee while it would be too severe to impose this requirement on a foster home.¹³⁷ Regarding specific manners of handicap discrimination, the regulations prevent federal fund recipients from discriminating against qualified handicapped individuals in rates of pay or any other form of compensation and changes in compensation.¹³⁸

Patient workers seem to fall within this statutory framework and thus, are entitled to be free from compensation discrimination. First, institutional workers are "handicapped" under the statutory definition since they are either mentally retarded, mentally ill, or possess a specific learning disability.¹³⁹ Second, patient workers must be considered to be otherwise qualified handicapped individuals. The Supreme Court, in *Southeastern Community College v. Davis*,¹⁴⁰ defined an otherwise qualified person for section 504 purposes as one who, with reasonable accommodation, is able to meet all of a program's requirements in spite of his handicap.¹⁴¹ An otherwise qualified handicapped individual in the institutional context therefore, would be a patient worker who could perform the essential functions of the assigned task with reasonable accommodation. In regard to the qualifications of the patient worker, many behavioralists have commented on the great employability of the patient worker and note that, given the patient worker's positive attitude about his work, a patient worker makes as good a worker, if not a better one, than his non-handicapped counterpart.¹⁴² Further, that patient workers are otherwise qualified for their work can be assumed from the historical use of patient labor in

¹³² 45 C.F.R. § 84.3(k)(1) (1979).

¹³³ 45 C.F.R. § 84.12(a) (1979).

¹³⁴ 45 C.F.R. § 84, App. A. at 383 (1979).

¹³⁵ 45 C.F.R. § 84.12(a) (1979).

¹³⁶ 45 C.F.R. § 84.12(c)(1)-(3) (1979).

¹³⁷ 45 C.F.R. § 84, App. A. at 383 (1979).

¹³⁸ 45 C.F.R. § 84.11(b)(3) (1979).

¹³⁹ 45 C.F.R. § 84.3(j)(2)(i)(8) (1979).

¹⁴⁰ 442 U.S. 397 (1979) (suit by a woman with a hearing impairment who was denied entrance into a nursing program based on her handicap).

¹⁴¹ *Id.* at 406.

¹⁴² See Howard, *The Ex-Mental Patient as an Employee*, 45 AM. J. ORTHOPHYCH. 479, 482-84 (1973), cited in Brief for Plaintiffs at 72, *Schindenwolf v. Klein*, Docket No. L 41293-75

an institutional setting.¹⁴³ Third, a state institution almost certainly receives some sort of federal funding which qualifies the institution as a federal fund recipient.¹⁴⁴ This, therefore, subjects the institution to the section 504 mandates. Thus, institutions that compensate non-handicapped workers but not handicapped patient-workers for comparable work assignments are discriminating against the patient worker solely on the basis of handicap. Discrimination of this sort is prohibited by section 504.

Although patient workers seem to fit within the statutorily protected area of section 504, there is a question whether *institutionalized* handicapped persons were intended to be the beneficiaries of this anti-discrimination statute. While there is no legislative history that demonstrates that Congress directly contemplated the employment situation of the patient worker,¹⁴⁵ the stated general intent of section 504 is significant.¹⁴⁶ The Senate committee report indicated that the basic vocational rehabilitation program of section 504 should place emphasis on rehabilitating individuals with severe handicaps.¹⁴⁷ Further, it was Congress's intent to make employment and participation in society more feasible for handicapped individuals.¹⁴⁸ Arguably, therefore, residents at mental institutions were within Congress's target group. First, those handicapped individuals who must be institutionalized are often severely handicapped persons,¹⁴⁹ and Congress expressly intended to benefit the severely handicapped through section 504. Second, just as it was Congress's intent to make participation in society more feasible for the handicapped, it generally is considered to be also an institution's duty eventually to make participation in society and

P.W. (N.J. Super., motion for summary judgment denied Oct. 22, 1979); Morgan, Cheedle, & Staples, *Cash in Hand*, 124 BRIT. J. PSYCH. 487, 493 (1974), cited in Brief for Plaintiffs at 72, Schindewolf v. Klein.

¹⁴³ One commentator has observed:

The system of hospital dependence on patients for labor needs was one outcome of Dorothea Dix's establishing state hospitals in the mid-19th century for the "insane paupers", who previously had been kept in poorhouses or jails. There the able-bodied were expected to work for their keep on moral grounds and this practice carried over to the new state hospitals. In the 20th century, as the need for patient labor continued, because of the welfare status of state hospitals, the justification for the work demands changed from moral to therapeutic; work needed by the hospital became "therapy".

Bartlett, *Institutional Peonage*, 1 The Mandate (Pennsylvania's Mental Health Newsletter) 4 (1974).

¹⁴⁴ A "federal fund recipient" is defined in the enforcing regulations to § 504 as "... any instrumentality of a state or its political subdivision, any public or private agency institution, organization, or other entity . . . which Federal financial assistance is extended directly or through another recipient. . . ." 45 C.F.R. 84.3(f) (1979) (emphasis added). "Federal financial assistance" is defined as "any grant, loan, contract . . . , or any other arrangement by which the Department [of Health and Human Services] provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of Federal Personnel; or (3) Real and personal property or any interest in or use of such property. . . ." 45 C.F.R. § 84.3(h) (1979).

¹⁴⁵ See generally [1973] U.S. CODE CONG. & AD. NEWS 2076-154.

¹⁴⁶ S. REP. NO. 318, 93rd Cong., 1st Sess. 43, reprinted in [1973] U.S. CODE CONG. & AD. NEWS 2076, 2092.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See, e.g., Walsh & Sootkoos, *Impact of Souder v. Brennan on the Profoundly and Severely Retarded*, 14 J. PSYCH. NURSING & MENTAL HEALTH SERV. 14, 14-15 (1976) (At one 1,000-bed facility, 93 percent of the institution's population was profoundly or severely retarded while 33 percent had serious emotional problems further complicating their condition.).

employment more feasible for their residents.¹⁵⁰ Since both Congress and institution administrators presumably work at mutual goals, it follows that Congress's attempt to protect the handicapped through anti-discrimination legislation would operate in the institutional context as well as in other areas of societal employment. Thus, it seems that the legislative intent underlying section 504 can be seen as evincing the application of that statute to patient workers.

Still another obstacle that patient workers must overcome before successfully employing section 504 is a state administrator's claim of undue financial hardship in having to compensate patient workers. The enforcing regulations of section 504 allow federal fund recipients to forego a "reasonable accommodation" should the accommodation impose an undue hardship on the operation of the recipient's program.¹⁵¹ Factors that determine undue hardship include the overall size of the recipient's program with respect to number of employees, size of budget, structure of workforce and the cost or nature of the accommodation.¹⁵² The claim of an undue hardship by a recipient, however, arises only in response to an employer's reasonable accommodation to known physical or mental limitations of handicapped employees.¹⁵³ This hardship exemption seems inapplicable in the case of the patient worker seeking a non-discriminatory wage rate. A "reasonable accommodation," as defined in the federal regulation, contemplates making facilities used by handicapped employees readily accessible, restructuring job functions, modifying equipment, and providing readers or interpreters.¹⁵⁴ Paying handicapped, but equally productive, workers a non-discriminatory wage does not appear to be a "reasonable accommodation" in the same sense as requiring an employer to install a wheelchair ramp in an office. Thus, state institution administrators would appear to be foreclosed from asserting a defense of undue financial hardship as paying equal wages for equal work hardly seems to rise to the level of an "accommodation" under the definition embodied in the regulations.

In conclusion, there are several avenues open to the patient worker in order to secure the right to compensation. The thirteenth amendment may be used to attain back wages for nontherapeutic work assignments. A patient's right to treatment is also a viable constitutional theory which workers may employ to secure the right to compensation should they already be involved in a therapeutic work program. Section 504 of the Rehabilitation Act can be seen as an alternative to these constitutional theories which prevents wage discrimination based on a patient's handicap. A finding of a right to be compensated, however, is only half the battle. A court must also determine a level of compensation which must be paid by an institution. There are many institutional responses to the wage level question. A state institution may choose to cancel its patient work program,¹⁵⁵ or to reduce the number of patients working in order to keep some

¹⁵⁰ *Wyatt v. Stickney*, 344 F. Supp. 387, 390 (M.D. Ala. 1972).

¹⁵¹ 45 C.F.R. § 84.12(a) (1979).

¹⁵² 45 C.F.R. § 84.12(c)(1)-(3) (1979).

¹⁵³ 45 C.F.R. § 84.12(a) (1979).

¹⁵⁴ 45 C.F.R. § 84.12(b) (1979).

¹⁵⁵ In the wake of the *Souder* decision which applied the federal statutory minimum wage to patient workers in 1973, see text and notes at notes 17-33 *supra*, many state institutions eliminated

work program while at the same time lightening the fiscal burden on the institution.¹⁵⁶ In addition, the institution can respond by agreeing to pay all patient workers a certain wage. Since the institution cannot resort to paying token payments,¹⁵⁷ however, the question concerning an appropriate wage still remains. Undoubtedly, institutions will resist having to use the federal statutory minimum wage as a standard as a result of *National League of Cities*.¹⁵⁸ Consequently, it will be the purpose of the remainder of this article to demonstrate how *National League of Cities* affects the amount of compensation to be paid and to discuss methods to secure a level of compensation in spite of *National League of Cities*.

II. ESTABLISHING APPROPRIATE WAGE LEVELS FOR THE SUCCESSFUL PLAINTIFF-PATIENT WORKER

A. *Use of Section 14 of the Fair Labor Standards Act to Determine an Appropriate Wage Standard*

Assuming that a plaintiff-patient worker successfully has argued that his uncompensated work was performed in violation of the thirteenth amendment or in violation of his constitutional right to treatment, a plaintiff also must determine an appropriate wage standard. One standard may be the federal statutory minimum wage.¹⁵⁹ For example, the 1972 case of *Wyatt v. Stickney*¹⁶⁰ ordered voluntary work assignments to be paid in accordance with the minimum wage provisions of the FLSA.¹⁶¹ Although the Supreme Court invalidated the wage statute's application to most state workers as an unconstitutional exercise of the commerce power, it may still have limited applicability under other constitutional provisions. In the following section, it will be submitted that the federal statutory minimum wage is still a viable standard in determining an equitable compensation level for patient workers despite

their patient work programs altogether based upon the large potential cost of paying the residents the minimum wage. For example, before *Souder*, the Trenton Psychiatric Hospital in Trenton, New Jersey employed 42 percent of its patients. As a result of the Labor Department's regulations promulgated pursuant to the *Souder* court order, the work program stopped. For a nationwide survey of institutional responses to *Souder*, see *From Peonage to Pay*, 5 BEHAVIOR TODAY 331, 337-46 (1974).

The institutional response of cancelling patient work programs has been attacked, however, as a violation of a patient's right to treatment. One commentator has argued that a patient has a right to participate in voluntary, compensated, therapeutic work programs as part of a patient's constitutional right to treatment. *Right to Work*, *supra* note 46, at 302-39. Should this position be recognized by the courts, state institutional administrators would presumably be prohibited from stopping work programs altogether.

¹⁵⁶ For example, in the wake of the *Souder* decision the state of Maryland planned to reduce patient involvement in work programs to the extent that patients would be allowed to perform jobs which were deemed "essential" to the existence of the institution. See *From Peonage to Pay*, 5 BEHAVIOR TODAY 331, 332 (1974).

¹⁵⁷ See *Jobson v. Henne*, 355 F.2d at 132 n.5 (paying plaintiff one cent an hour considered inadequate payment).

¹⁵⁸ See text and notes at notes 35-41 *supra*.

¹⁵⁹ See 29 U.S.C. § 206 (1976).

¹⁶⁰ 344 F. Supp. 373 (M.D. Ala. 1972).

¹⁶¹ *Id.* at 381.

National League of Cities. It will be shown that Congress, in enacting section 14 of the 1966 amendments to the FLSA, 29 U.S.C. § 214 (hereinafter section 214),¹⁶² made available to patient workers the federal statutory minimum wage as an appropriate standard of compensation. It also will be shown that, since this legislation is a valid exercise of authority under Congress's fourteenth amendment powers,¹⁶³ such legislation does not offend the holding of *National League of Cities v. Usery*.

In *National League of Cities v. Usery*¹⁶⁴ the Court was careful to emphasize that the 1974 amendments to the FLSA,¹⁶⁵ which extended federal minimum wage requirements to state agency employees, were unconstitutional only insofar as they are not within the congressional authority granted by the commerce clause.¹⁶⁶ The Court, however, specifically declined to express a view regarding whether different results would have been obtained if Congress had sought to affect integral operations of state governments by exercising its power granted under other sections of the Constitution, in particular, section 5 of the fourteenth amendment.¹⁶⁷ In *Fitzpatrick v. Bitzer*¹⁶⁸ decided just four days after *National League of Cities*,¹⁶⁹ the Court acknowledged Congress's far broader power to regulate the states under section 5 of the fourteenth amendment. In *Fitzpatrick*, Connecticut state officials challenged Congress's authority to direct federal courts to award damages to a private individual upon a finding that the individual had been discriminated against in state employment on the basis of sex in violation of the 1972 Amendments to Title VII of the Civil Rights Act of 1964.¹⁷⁰ In holding for the private individuals, the Court rejected the contention that the states were protected by the doctrine of sovereign immunity as afforded by the eleventh amendment.¹⁷¹ The Court recognized that where the state has not waived its sovereign immunity, it cannot be sued by a private individual, but explained that congressional authorization to sue the state, when based on the power of Congress under section 5 of the fourteenth amendment, abrogates the state's non-amenability to suits for damages.¹⁷² Since the prohibitions of the

¹⁶² Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 14, 80 Stat. 842 (amending 29 U.S.C. § 214 (1961)).

¹⁶³ U.S. CONST. amend. XIV, § 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

¹⁶⁴ 426 U.S. 833 (1976).

¹⁶⁵ Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259 § 6a, 88 Stat. 58 (amending 29 U.S.C. § 203 (1972)).

¹⁶⁶ 426 U.S. at 852.

¹⁶⁷ *Id.* at 852 n.17.

¹⁶⁸ 427 U.S. 445 (1976).

¹⁶⁹ Justice Rehnquist wrote the opinions for the Court in both *National League of Cities* and *Fitzpatrick*. 426 U.S. at 835; 427 U.S. at 447.

¹⁷⁰ 427 U.S. at 447-48. The applicable amendments before the Court were the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Pub. L. No. 92-261, § 8(a), 85 Stat. 109 (amending 42 U.S.C. § 2000(e)-2 (1970)).

¹⁷¹ 427 U.S. at 448.

¹⁷² *Id.* at 451-52. See *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945). Cf. *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964) (plaintiff may sue state officials should the state waive its eleventh amendment immunity from suit).

fourteenth amendment are directed to the states,¹⁷³ when Congress acts pursuant to the power articulated in section 5 of the fourteenth amendment, the states are bound to comply with the congressional mandate.¹⁷⁴

The Court stated that the source of the congressional mandate in *Fitzpatrick* was section 5, and in a footnote, compared the importance of this source, vis-a-vis the federal-state balance of power, with action taken pursuant to the commerce clause which had recently been prohibited in *National League of Cities*.¹⁷⁵ In *National League of Cities*, the Court had explained that when Congress, pursuant to authority granted under the commerce clause, legislates in an attempt to directly regulate state behavior, Congress may encounter the constitutional barrier of sovereign immunity as embodied in the eleventh amendment.¹⁷⁶ In *Fitzpatrick*, however, the Court suggested that when Congress legislates pursuant to its enforcement power granted under section 5 of the fourteenth amendment, the eleventh amendment and the doctrine of sovereign immunity necessarily are limited.¹⁷⁷ Congress's fourteenth amendment powers, by their own terms limit state authority.¹⁷⁸ Thus, Congress may affect integral operations of state governments by exercising its authority under section 5 of the fourteenth amendment.¹⁷⁹

Several lower courts¹⁸⁰ have employed this distinction between congres-

¹⁷³ U.S. CONST. amend. XIV, § 1. Section one states:

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. (emphasis added).

¹⁷⁴ 427 U.S. at 454-56. *See also* *Ex parte Virginia*, 100 U.S. 339, 347-48 (1880) (" . . . the Constitution now expressly gives authority for congressional interference and compulsion [into State activities] in the cases embraced within the Fourteenth Amendment.").

¹⁷⁵ 427 U.S. at 453 n.9.

¹⁷⁶ 426 U.S. at 841-42.

¹⁷⁷ 427 U.S. at 456.

¹⁷⁸ *Id.* *See also* *Ex parte Virginia*, 100 U.S. 339 (1880). "[E]very addition of power to the general government involves a corresponding diminution of the governmental powers of the States." *Id.* at 346. Congress's fourteenth amendment powers are "carved out" of state governing powers. *Id.*

¹⁷⁹ The *National League of Cities* and *Fitzpatrick* decisions arguably can be distinguished since *National League of Cities* contemplates Congress's fourteenth amendment power vis-a-vis the tenth amendment while *Fitzpatrick* addresses Congress's due process powers vis-a-vis the eleventh amendment. This distinction has been disregarded, however, by several lower courts.

Although the [*Fitzpatrick*] Court specifically confronted the interrelationship of the Fourteenth and Eleventh Amendments, its rationale applies equally to the interaction of the Fourteenth and Tenth Amendments.

Nilsen v. Metropolitan Fair & Exposition Auth., 435 F. Supp. 1159, 1162 (N.D. Ill. 1977). *See also* *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976).

¹⁸⁰ Several cases have ruled that Congress has the authority under § 5 of the fourteenth amendment to prohibit sex discrimination in employment in the Equal Pay Provision of the FLSA regardless of the effect of this ruling on the employment decisions of the states as employers. *See, e.g.,* *Marshall v. Owensboro-Davies County Hosp.*, 581 F.2d 116 (6th Cir. 1978); *Usery v. Charlestown County School Dist.*, 558 F.2d 1169 (4th Cir. 1977); *Usery v. Allegheny County Inst. Dist.* 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977); *Usery v. Edward J. Meyer Mem. Hosp.*, 428 F. Supp. 1368 (W.D.N.Y. 1977); *Brown v. County of Santa Barbara*, 427 F. Supp. 112 (C.D. Cal. 1977). *See also* *Arrit v. Grisell*, 567 F.2d 1267 (4th Cir. 1977)

sional power under the fourteenth amendment and the commerce clause in relation to the Equal Pay Act amendments to the FLSA.¹⁸¹ The Equal Pay Act provisions prohibit state employers from discriminating between employees on the basis of sex by paying different wages to different employees performing equal work. In these lower court decisions,¹⁸² each court has held that the Equal Pay Act provisions continue to apply to the states despite the holding of *National League of Cities* on the basis that the provisions are a reflection of Congress's power under section 5 of the fourteenth amendment to prohibit sex discrimination in employment. For example, in *Usery v. Allegheny County Institution District*,¹⁸³ the Third Circuit expressly adopted the *Fitzpatrick* reasoning and declared the Equal Pay Act provisions of the FLSA as a clear expression of Congress's power to prohibit sex discrimination under section 5 of the fourteenth amendment.¹⁸⁴ The court disregarded the county's contention that the legislative history of the Equal Pay Act did not rely explicitly on the fourteenth amendment. The court declared that in exercising the power of judicial review, as opposed to the duty of statutory interpretation, the court was concerned with the "actual powers" of Congress and not necessarily ones that were or were not designated in the history of the Equal Pay Act.¹⁸⁵ The decisions of these lower courts support the constitutionality of this amendment to the FLSA, despite *National League of Cities*, because of the congressional authority under which the legislation was enacted.

Recognizing both the Supreme Court's and some lower courts' amenability to the commerce clause versus fourteenth amendment power distinction, patient workers are seeking to employ this distinction in an effort to secure the federal minimum wage. The plaintiffs in *Schindewolf v. Klein*,¹⁸⁶ argue that Congress enacted section 214 with the intention of preventing discrimination against handicapped persons as a means of enforcing the mandates of the fourteenth amendment. This provision allows for employers to apply for special wage certificates to enable employers to pay handicapped workers at less than the minimum wage should the worker's handicap impair his productivity or earning capacity.¹⁸⁷ Employers are required to pay handicapped workers whose

(Congress validly exercised authority under § 5 of fourteenth amendment when enacting the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1976) and rejected contention that Act was impermissively grounded on the commerce clause).

¹⁸¹ Section 6(d)(1) of the Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, codified at 29 U.S.C. § 206(d) (1976).

¹⁸² See note 180 *supra*.

¹⁸³ 544 F.2d 148 (3d Cir. 1976).

¹⁸⁴ *Id.* at 155.

¹⁸⁵ *Id.*

¹⁸⁶ Docket No. L 41293-75 P.W. (N.J. Super. defendant's motion for summary judgment denied October 22, 1979).

¹⁸⁷ Section 214 specifically allows employers to pay handicapped workers with impaired productivity wages which are lower than the minimum wage but rarely less than 50 percent of that wage. The reduced wage is computed on a basis which is commensurate with those paid non-handicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work. 29 U.S.C. § 214(c)(1) (1976). In addition, the Labor Department has promulgated regulations which apply the reduced wage provision allowances to institutional employees should the patient worker's productivity be impaired. 29 C.F.R. § 529 (1979). The regulations provide

productivity capacity is not impaired the statutory minimum wage.¹⁸⁸ The express purpose of the legislation is to "prevent curtailment of opportunities for employment" for the handicapped.¹⁸⁹ In essence, the plaintiffs in *Schindenwolf* argue that the special wage certificate allowance in section 214(c) was Congress's attempt to prevent discrimination in employment by allowing employees to pay a lesser wage to less productive handicapped workers, as opposed to not hiring them at all. Plaintiffs contend that this anti-discrimination provision of the FLSA, like the Equal Pay Act provisions,¹⁹⁰ was enacted pursuant to authority granted to Congress under section 5 of the fourteenth amendment.¹⁹¹ Consequently, plaintiffs argue that they, as handicapped workers under Section 214(c), are entitled to the federal statutory minimum wage reduced only as productivity levels dictate.¹⁹² Plaintiffs claim that this anti-discrimination provision is unaffected by *National League of Cities* because the legislation is expressly enacted pursuant to Congress's fourteenth amendment enforcement powers as opposed to its commerce power.¹⁹³

for four types of special certificates: (1) an evaluation and training certificate, (2) a group minimum wage certificate, (3) a work activities center certificate, and (4) an individual exception certificate. *Id.* § 529.4(b). Numbers (1) through (3) are certificates that set the wage rate for an entire work program while number (4), the individual exception certificate, sets the wage level for individual workers whose productivity levels are either much higher or lower than the group's productivity. *Id.* An evaluation and training certificate is issued to a program that is designed to determine patients' productivity potential while allowing them to adjust to a work environment. No minimum wage is required under this certificate but workers must receive at least wages commensurate with non-handicapped workers in the institution or in the vicinity for essentially the same quality, type and quantity of work. *Id.* § 529.8(e)-(f). A group minimum wage certificate is the wage paid to workers upon completion of an evaluation and training program. *Id.* § 529.2(f). This wage cannot be less than 50 percent of the statutory minimum wage. *Id.* § 529.4(d). The group minimum wage does not apply if a worker is subject to an individual exception certificate or is participating in a work activities center. *Id.* § 529.2(f). An individual exception certificate may not set wages lower than 25 percent of the statutory minimum wage while a work activity center is designed strictly for therapy purposes and involves only those severely impaired patients whose earning capacity is less than 25 percent of the statutory minimum wage. *Id.* § 529.4(e)-(f). Thus, for patients working in a work activities center, no minimum wage guarantee is required under this section. *Id.*

¹⁸⁸ 29 C.F.R. § 529.1(c) (1979).

¹⁸⁹ 29 U.S.C. § 214(c)(1) (Supp. III 1979).

¹⁹⁰ Technically, the Equal Pay Act provisions and the reduced wage provisions of § 214 are dissimilar in that the Equal Pay Act prohibits a wage differential while § 214 could be said to "encourage" one if appropriate. Nevertheless, the purposes of the two pieces of legislation — to prevent discrimination and encourage fair employment practices — are identical. *See* 29 U.S.C. §§ 206(d)(1), 214(c)(1) (Supp. III 1979).

¹⁹¹ Brief in support of motion for leave to seek interlocutory appeal, *Schindenwolf v. Klein*, Docket No. L 41293-75 P.W. (motion for summary judgment dismissed October 22, 1977) at 15.

¹⁹² *Id.*

¹⁹³ *Id.* Initially it may appear that § 214 provides an independent basis for recovery like the theories presented in Part I of this article. Upon closer scrutiny, § 214 seems to be more vulnerable if used as an independent basis for recovery than as a method to determine a wage level. The reduced wage provision of § 214 is designed to determine an appropriate wage standard for handicapped workers. *See* 29 U.S.C. § 214(c) (1976). It is based on a reduction of the federal minimum wage. Neither in the body of the minimum wage provision of section 206 nor in section 214 does Congress address a right to be compensated. *See* 29 U.S.C. §§ 206, 214(c) (1976). These wage provisions, like the FLSA in general, do not seek to establish a right to employment or com-

This argument is particularly persuasive when viewed in the context of the Supreme Court's reasoning in *National League of Cities*.¹⁹⁴ In that case, the Court was fearful that Congress, in a series of amendments, was displacing the harmony between Congress's power to regulate interstate commerce and the states' duty to maintain a "separate and independent existence."¹⁹⁵ The Court found that regulations that operated to displace directly the states' freedom to structure integral governmental functions also operated to displace the states' fundamental existence as states.¹⁹⁶ The Court's concerns about functions essential to the existence of state governments are not applicable to the comparatively minimal intrusion caused by section 214(c). The reduced wage provision of 214(c) imposes only an obligation on the state to avoid discrimination of the handicapped worker who, without the provision, might not be employed. This provision has a decidedly less direct and intrusive impact on the states' self-governing authority than a vast restructuring of the states' employment relationships caused by the 1966 and 1974 amendments applying the minimum wage to virtually *all* state employees.¹⁹⁷

Furthermore, Justice Blackmun's concurring opinion in *National League of Cities*¹⁹⁸ lends support to the plaintiffs' contentions in *Schindenwolf*. In that opinion, Justice Blackmun adopted a balancing approach that would allow federal intrusion where the federal interest was demonstrably greater than the states' interest and would bar such intrusion where the federal interest is subordinate to the states' interest.¹⁹⁹ This ad hoc balancing approach attempts to reconcile important national interests that encroach on a state's ability to make fundamental employment decisions with the states' tenth amendment shield²⁰⁰ against legislation that erodes states' separate and independent existence.²⁰¹

pensation. Rather, these provisions attempt to set standards for use after one is employed. Therefore, a legal theory based on section 214 is more appropriately a wage setting device as opposed to a theory which creates a right to be compensated.

¹⁹⁴ See note 37 *supra*.

¹⁹⁵ 426 U.S. at 851.

¹⁹⁶ *Id.* at 852. See also *Usery v. Bettendorf Community School Dist.*, 423 F. Supp. 637 (S.D. Iowa 1976) where the court found it readily apparent that the Supreme Court in *National League of Cities*, was concerned with increased costs, forced relinquishment of important governmental activities and displacement of state policy choices caused by congressional interference through imposition of minimum wage provisions. *Id.* at 638.

¹⁹⁷ *Cf.*, *Brown v. County of Santa Barbara*, 427 F. Supp. 112, 113 (C.D. Cal. 1977), in which the court stated:

[T]he ability to arbitrarily discriminate in pay on the basis of sex can hardly be called an "undoubted attribute of state sovereignty" or "an important governmental activity". . . . The argument that the decision to discriminate in pay on the basis of sex is an essential and integral State function is both assinine and an affront to human dignity.

Id. at 113.

¹⁹⁸ 426 U.S. at 856 (Blackmun, J., concurring).

¹⁹⁹ *Id.*

²⁰⁰ U.S. CONST. amend. X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people.

²⁰¹ See *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975) (Tenth amendment prohibits Congress from exercising power in a fashion "that impairs the States' integrity or their ability to function effectively in a federal system.").

Applying this balancing approach to the special wage certificate provision of section 214(c), a court could find that the federal interest in ensuring equal employment opportunities for the handicapped is superior to a state's interest in maintaining that employment decision. Even given the concerns of the Supreme Court in *National League of Cities*, it would be difficult for a court to construe Congress's effort at equal employment opportunities for the handicapped, as embodied in section 214(c), as legislation calculated to erode a state's separate and fundamental existence.

Although section 214 might be upheld as a legitimate exercise of congressional power under section 5 of the fourteenth amendment, section 214 is nevertheless related to other provisions of the FLSA that were held to be unconstitutional by *National League of Cities*. As a result of this relationship, there is some question whether the reduced wage provision of section 214 may act independently from those portions of the FLSA that are unconstitutional. Specifically, section 214 allows employers to pay handicapped workers whose earning capacity is impaired a reduced wage which is not lower than fifty per cent of the federal minimum wage applicable under section 206 of the FLSA.²⁰² Section 206 generally directs employers to pay the federal minimum wage to those workers who either are engaged in interstate commerce²⁰³ or have been brought within the purview of this section by certain FLSA amendments.²⁰⁴ State institutional workers were brought within the purview of the minimum wage provisions by the 1966 amendments to the FLSA²⁰⁵ and those amendments were declared constitutional in *Maryland v. Wirtz*.²⁰⁶ *National League of Cities*, however, overruled the *Wirtz* case²⁰⁷ and thus, indirectly disqualified state institutional workers from the federal minimum wage protection. Institutional administrators may argue that this disqualification leaves the section 214 reduced wage provision without a benchmark wage rate from which to be reduced. Alternatively, the institution might argue that the use of the minimum wage rate as a standard in the formula to determine a patient worker's compensation would lead to the absurd result that while a handicapped patient worker is protected by a minimum wage, a non-handicapped institutional worker is not.²⁰⁸

The plaintiff-patient worker is not altogether without a response to these claims. In fact, several lower courts have heard these same contentions in regard to the continued viability of the Equal Pay Act provision of the FLSA subsequent to the *National League of Cities* decision.²⁰⁹ For example, in *Usery v. Allegheny County Institution District*,²¹⁰ defendant-county argued that the Equal Pay Act was

²⁰² 29 U.S.C. § 214(c)(1) (1976).

²⁰³ 29 U.S.C. § 206(a) (1976). "Commerce" is defined as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b) (1976).

²⁰⁴ 29 U.S.C. § 206(b) (1976).

²⁰⁵ See text at note 23 *supra*.

²⁰⁶ 392 U.S. 183 (1968).

²⁰⁷ 426 U.S. at 855.

²⁰⁸ This practice could mean that a nonhandicapped worker must be paid at least fifty percent of the minimum wage. The institution then could contend that nonhandicapped state institutional workers are subject to discrimination based on their nonhandicapped status.

²⁰⁹ See note 180 *supra*.

²¹⁰ 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977).

housed in the minimum wage provisions of the FLSA and, thus, should be held inapplicable to a state subdivision as a result of *National League of Cities*.²¹¹ The *Allegheny County* court held to the contrary, reasoning that even if the Equal Pay Act is regarded as a mere amendment to the FLSA, the equal pay provision would be subject to the severability provision of the FLSA, which allows invalidated provisions of the FLSA to be severed from the rest of the chapter.²¹² Furthermore, the court viewed *National League of Cities* as merely giving to the states an affirmative defense against actions brought by the Secretary of Labor to enforce the federal minimum wage provisions against state employers.²¹³ The court went on to hold that, while section 206 may eliminate some causes of action against the states as employers because of *National League of Cities*, the minimum wage provision remained as the relevant cross-reference for the Equal Pay Act provision.²¹⁴

Similar reasoning may be used by patient workers. Like the Equal Pay Act provision of the FLSA, section 214 is arguably severable from other invalidated provisions of the chapter. Furthermore, although *National League of Cities* precludes the application of section 206 to non-handicapped state workers, it is the purpose of the FLSA's severability provision to have section 206 remain the cross-reference for determining wage rates for less productive handicapped individuals, even though section 206 may be invalid for other purposes.²¹⁵

In sum, Congress may affect state operations by enacting legislation pursuant to powers granted under section 2 of the thirteenth amendment or under section 5 of the fourteenth amendment when, in the same instance, it could not do so pursuant to its commerce power. Section 214, as an anti-discrimination measure, is a permissible intrusion into state affairs because of the congressional authority under which it was enacted. Furthermore, section 214 does not offend the concerns of the Court in *National League of Cities* because of the relatively small intrusion made by the reduced wage provision compared to the displacement of state authority made by the 1966 amendments. Thus, patient workers, having received the right to compensation under either a thirteenth²¹⁶ or fourteenth amendment analysis may employ section 214 to establish an appropriate wage standard despite the holding of *National League of Cities*.

²¹¹ *Id.* at 155.

²¹² *Id.* at 155 & n.10. See 29 U.S.C. § 219 (1976): If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

²¹³ 544 F.2d at 155 n.11.

²¹⁴ *Id.*

²¹⁵ See *Usery v. Charleston County School Dist.*, 558 F.2d 1169 (4th Cir. 1977). In *Charleston County*, the court noted that although the Equal Pay Act was enacted as an amendment to the FLSA, "the Equal Pay Act is separate legislation, aimed at a different evil." *Id.* at 1171. The court concluded that, moreover, the severability provision, 29 U.S.C. § 219, (1976) could be appropriately applied in this case. The reduced wage provision of § 214 likewise was enacted as an amendment and is separate legislation from the minimum wage provision aimed at a different evil. Therefore, a court could conclude that the severability provision is appropriate in the case of the reduced wage vis-a-vis the minimum wage provision.

²¹⁶ The thirteenth amendment analysis proposed in section 1A may be employed to secure the right to compensation in the form of back wages. A court, in forming an award to a meritorious involuntary servitude claim, must nevertheless determine a wage level in order to calculate wages

B. *Use of Section 504 of the Rehabilitation Act of 1973
to Determine an Appropriate Wage Standard*

Unlike the reduced wage provisions of section 214 of the FLSA, section 504 of the Rehabilitation Act of 1973 purports to reach all employers who are federal fund recipients and not just those engaged in interstate commerce.²¹⁷ Moreover, section 504 maintains a wholly separate existence from the Fair Labor Standards Act. The importance of this separate existence is that the limitations imposed upon the FLSA by *National League of Cities* in no way affect the broad anti-discrimination provisions of section 504 and its implementing regulations. Section 504 simply mandates that no otherwise qualified handicapped individual, solely by reason of his handicap, be subjected to discrimination under any activity receiving federal financial assistance.²¹⁸ Furthermore, section 504's implementing regulations regarding employment practices provide that no qualified handicapped person shall be discriminated against in rates of pay or any other form of compensation and changes in compensation.²¹⁹ Those patient workers who, with reasonable accommodation on the part of the employers, can perform the essential functions of the job in question are entitled to the same rate of pay as their fellow non-handicapped workers performing the same or equivalent jobs.²²⁰ Institutional administrators may insist that patient workers are not otherwise qualified and cite instances where patient labor must be redone by professional staff persons.²²¹ Nevertheless, a strong case for the qualifications of many patient workers may be made given the traditional use of

owed to the patient worker. Since the language of the thirteenth amendment does not expressly provide for awards of money damages, a patient worker must sue appropriate state officials under both the thirteenth amendment and 42 U.S.C. § 1983 (1976). *See Jobson v. Henne*, 355 F.2d 129, 133-34 (2d Cir. 1966) (state officials liable to suit for money damages under thirteenth amendment and section 1983 despite defense of official immunity). At first glance, it may appear illogical to base a legal theory designed to set a wage level on the enforcement provision of the fourteenth amendment in response to a successful claim under the thirteenth amendment. However, when a thirteenth amendment action is coupled with section 1983, federal courts are presumably free to use any legal theory which aids in the determination of an appropriate remedy for redress. In this respect, patient workers may offer a legal theory based on section 5 of the fourteenth amendment in order to help a court shape an appropriate remedy to a thirteenth amendment claim. *See Jobson v. Henne*, 355 F.2d at 133 (purpose of section 1983 is to provide a federal remedy for the deprivation of federally guaranteed rights in order to enforce federal limitations on unconstitutional state action). *See also Weidenfeller v. Kidulis*, 380 F. Supp. 445, 450 n.7 (E.D. Wis. 1974) (patient worker action under thirteenth amendment held to have jurisdiction and allow damages under 42 U.S.C. §§ 1983, 1985(3), & 1986 (1976)).

²¹⁷ Compare 29 U.S.C. § 794 (1976) with 29 U.S.C. § 206(a)-(b) (1976).

²¹⁸ 29 U.S.C. § 794 (1976).

²¹⁹ 45 C.F.R. § 84.11(b)(3) (1979).

²²⁰ 45 C.F.R. § 84.11(a)(1) (1979). This means that qualified patient workers may receive wage rates that exceed the federal statutory minimum wage if the state employer compensates non-handicapped employees at such wage rates. Conversely, patient workers may receive wages below the federal minimum wage if the state employer pays all such workers in that manner. There is no provision in either § 214 or § 504 which allows the reduced wage provision to act in conjunction with § 504.

²²¹ Walsh & Sootkoos, *Impact of Souder v. Brennan on the Profoundly Retarded*, 14 J. PSYCH. NURSING & MENTAL HEALTH SERV. 14, 16 (1976).

resident labor²²² and the admitted dependence of institutions on such labor.²²³ In sum, section 504 may be used by qualified plaintiff-patient workers to secure wages comparable to those wages paid to their non-handicapped counterparts.

CONCLUSION

Despite the holding of *National League of Cities v. Usery*, there are still viable legal theories upon which patient workers may rest in their pursuit of fair and equitable compensation. The constitutional prohibition against involuntary servitude embodied in the thirteenth amendment may compel institutions to make work assignments available on a voluntary basis and encourages institutions to compensate patient workers at levels that suggest inducement and voluntariness. In addition, should a patient's constitutional right to treatment be recognized by the Supreme Court, this right may guarantee a patient worker the right to be compensated for work performed that an institution would otherwise have to pay a non-handicapped employee. Should these constitutional theories prove inadequate, section 504 of the Rehabilitation Act of 1973 offers a statutory basis on which to rest a patient's claim for compensation. Furthermore, two congressional anti-discrimination statutes, section 214 of the FLSA and section 504 of the Rehabilitation Act, may be used to determine an appropriate level of compensation. The successful use of these legal theories should serve to advance the course of the patients' rights movement and guarantee to handicapped persons certain basic rights which non-handicapped persons take for granted.

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²²² See note 143 *supra*.

²²³ See Chicago Sun-Times, April 7, 1974, at 4, col. 1-3 (statement by Terry B. Brelje, a psychologist and superintendent of the Chester Mental Health Center in Illinois: "This place has depended so long on patient help that it is hard to determine what is work and what is therapy."). See also *Worker-Patients*, *supra* note 3, at 221.