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Disability Law - Needless Institutionalization of Individuals with Mental Disabilities as Discrimination under the ADA - Olmstead v. L.C.

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DISABILITY LAW—Needless Institutionalization of Individuals with Mental Disabilities as Discrimination Under the ADA—*Olmstead v. L.C.*

I. INTRODUCTION

In *Olmstead v. L.C.*,[1] the United States Supreme Court held that Title II of the Americans with Disabilities Act of 1990 (ADA)[2] may require the placement of persons with mental disabilities in community settings, rather than in institutions, when: (1) the state's treatment professionals determine that such a placement is appropriate, (2) the transfer is not opposed by the individual, and (3) the placement can be reasonably accommodated given the resources available to the state and its obligation to provide for the needs of others with mental disabilities.[3] The majority holding, which garnered the support of five Justices,[4] stated that a failure to provide care for individuals with mental disabilities in the most integrated setting appropriate to their needs may be viewed as discrimination, in violation of the ADA, unless the state or other public entity can demonstrate an inability to provide less restrictive care without "fundamentally altering" the nature of its programs.[5]

The *Olmstead* Court's construction of the ADA's Title II anti-discrimination provision,[6] and its application of the Attorney General's Title II integration regulations,[7] should encourage states to hasten efforts to eliminate unjustified segregation of individuals with mental disabilities by transferring funding to community care programs and taking steps to move unnecessarily institutionalized patients into more integrated community settings. It appears, however, that any positive impact on the rights of people with mental disabilities has been diluted by the Court's failure to provide meaningful parameters for the defense that states may raise to excuse a lack of adequate community placements. Although the *Olmstead* decision speaks to a greater recognition of the rights of those with mental disabilities,[8] it leaves a number of important questions unanswered and may not offer the guidance necessary to effectively decrease unjustified institutional segregation without further controversy.

This Note begins by proceeding through the facts and procedural history of the *Olmstead* decision. Next, it provides an historical and contextual background section. A brief overview of the *Olmstead* decision is followed by a more detailed examination of the majority, concurring, and dissenting opinions. Finally, this Note analyzes the Court's decision and discusses its implications for the rights of individuals with mental disabilities to minimally restrictive care and greater community participation.

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1. 119 S. Ct. 2176 (1999).
2. 42 U.S.C. § 12132 (1994).
3. *See Olmstead*, 119 S. Ct. at 2181.
4. *See id.* Justice Ginsburg delivered the majority opinion, joined by Justices O'Connor, Souter and Breyer, and by Justice Stevens on most portions of the opinion. *See id.*
5. *See id.* at 2183; 28 C.F.R. § 35.130(b)(7), (d) (1999).
6. *See Olmstead*, 119 S. Ct. at 2181-82, 2186 (construing 42 U.S.C. § 12132).
7. *See id.* at 2182-83, 2186 (construing 28 C.F.R. § 35.130).
8. *See id.* at 2185-88 (holding that unjustified institutional segregation is to be properly regarded as discrimination based on disability).

II. STATEMENT OF THE CASE

The *Olmstead* controversy arose when an action for declaratory and injunctive relief was brought on behalf of two individuals with mental disabilities in the United States District Court for the Northern District of Georgia.[9] Plaintiffs, who had been institutionalized in a state mental hospital, alleged that under Title II of the ADA and the Fourteenth Amendment they were entitled to an order requiring the state to provide them care in a community-based treatment program, rather than a state mental hospital.[10] Plaintiffs, both of whom were deemed appropriate for transfer to a less restrictive community-based program, contended that they had been unnecessarily segregated in an institutional setting, and that the State's failure to transfer them to a community program constituted unlawful discrimination on the basis of their disabilities, in violation of the ADA.[11] Plaintiffs also alleged that defendants[12] had failed to provide them "minimally adequate treatment and habilitation and freedom from undue restraint" in violation of their rights under the Due Process Clause of the Fourteenth Amendment.[13]

Plaintiffs L.C. and E.W. are women with developmental disabilities.[14] L.C. has also been diagnosed with schizophrenia, and E.W. with a personality disorder.[15]

In May 1992, L.C. was voluntarily admitted to Georgia Regional Hospital (GRH) in Atlanta and confined for treatment in a psychiatric unit.[16] Her psychiatric condition had stabilized by May 1993, and her treatment team agreed that her needs could be met in a state-supported, community-based program.[17] In May 1995, while still confined in GRH, L.C. filed suit, requesting that the State place her in a community-based residential program that could provide her with habilitative treatment intended to maximize her integration into the mainstream of society.[18] L.C. remained institutionalized until February of 1996.[19]

E.W. was voluntarily admitted to GRH in February 1995 and was, like L.C., confined for treatment in a psychiatric unit.[20] In March 1995, GRH made efforts toward discharging E.W. to a homeless shelter, but this inappropriate discharge plan

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9. *See* L.C. v. Olmstead, No. 1:95-cv-1210-MHS, 1997 U.S. Dist. LEXIS 3540, at *2 (N.D. Ga. Mar. 25, 1997).

10. *See id.*

11. *See id.* at *6; *see also* 42 U.S.C. § 12132 (1994) (The Americans with Disabilities Act of 1990). Title II of the ADA, the public services portion, states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Id.*

12. The Commissioner of the Georgia Department of Human Resources, the Superintendent of Georgia Regional Hospital in Atlanta, and the Executive Director of the Fulton County Regional Board were named as defendants, and are referred to collectively as the State. *See* L.C. v. Olmstead, 1997 U.S. Dist. LEXIS 3540, at *2-3.

13. *See id.* at *6.

14. *See Olmstead*, 119 S. Ct. at 2183; *see also* THE AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 39-42, 65-77 (4th ed. 1994) (providing diagnostic criteria for mental retardation and for other pervasive developmental disorders).

15. *See Olmstead*, 119 S. Ct. at 2183; *see also* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 14, at 285-286, 633 (providing diagnostic criteria for schizophrenia and personality disorder).

16. *See Olmstead*, 119 S. Ct. at 2183.

17. *See id.*

18. *See id.* at 2183-84.

19. *See id.* at 2183.

20. *See id.*

was abandoned after her attorney filed an administrative complaint.[21] By 1996, E.W. was deemed ready for transfer to a community-based setting but remained institutionalized at GRH until after the District Court issued its judgment in 1997.[22] E.W. intervened in the action initiated by L.C., stating an identical claim.[23]

In 1997, the district court granted partial summary judgment in favor of plaintiffs and held that the State's failure to place plaintiffs in an appropriate community-based treatment program constituted discrimination by reason of disability in violation of Title II of the ADA and its accompanying regulations promulgated by the Attorney General.[24] Although the State had argued that inadequate funding, rather than discrimination, accounted for plaintiffs' continued institutionalization, the court rejected this argument.[25] "The fact that it may be more convenient, either administratively or fiscally, to provide services in a segregated manner does not justify defendants' failure to comply with the ADA."[26] The court rejected the State's argument that immediate transfers in cases of this kind would "fundamentally alter" the State's activity.[27] Plaintiffs' constitutional claims were not reached by the court but were determined to have been rendered moot by the court's grant of summary judgment on plaintiffs' ADA claim.[28] The court ordered that plaintiffs be placed in a community-based program and provided with services necessary to maintain their placement in the community.[29]

The Court of Appeals for the Eleventh Circuit affirmed the district court's judgment that the State had discriminated against plaintiffs by unnecessarily confining them in a segregated environment, but remanded the case for reassessment of the State's cost-based fundamental alteration defense.[30] The Eleventh Circuit held that the ADA imposes a duty to provide treatment in the most integrated setting appropriate to an individual's needs.[31] This duty, however, is not absolute according to the Eleventh Circuit, which stated that the Attorney General's Title II regulations require a state to make "reasonable modifications" without demanding "fundamental alterations."[32] The district court was instructed to consider, on remand, whether the additional cost of treating L.C. and E.W. in a community-based program would be unreasonable or would require "fundamental

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21. *See id.*
22. *See id.*
23. *See id.* at 2184.
24. *See* L.C. v. Olmstead, No. 1:95-cv-1210-MHS, 1997 U.S. Dist. LEXIS 3540, at *6-10; *see also* 28 C.F.R. § 35.130(d) (1999) (stating that a "public entity shall administer services . . . in the most integrated setting appropriate to the needs of qualified individuals with disabilities"); 28 C.F.R. § 35.130(b) (7) (1999) (stating that a "public entity shall make reasonable modifications . . . necessary to avoid discrimination on the basis of disability," unless doing so would "fundamentally alter the nature of the service, program, or activity").
25. *See Olmstead*, 1997 U.S. Dist. LEXIS 3540, at *9.
26. *Id.* at *12.
27. *See id.* at *11-12 (finding that discrimination cannot be excused by a lack of funding, and that defendants had existing programs providing community services to individuals with mental disabilities).
28. *See id.* at *13-14 (holding that because the court had already determined that plaintiffs' continued institutionalization was unlawfully discriminatory under the ADA, the declaratory and injunctive relief requested by plaintiffs had already been granted, making it unnecessary for the court to address plaintiffs' constitutional claim).
29. *See id.* at *14.
30. *See* L.C. v. Olmstead, 138 F.3d 893, 895, 905 (11th Cir. 1998).
31. *See id.* at 902; *see also* 28 C.F.R. § 35.130(d) (1999).
32. *See Olmstead*, 138 F.3d at 904; *see also* 28 C.F.R. § 35.130(b) (7) (1999).

alterations" in the nature of services the State provides.[33] The district court was also instructed to consider the demands of the State's mental health budget in making this determination.[34]

After certiorari had been granted, and while the case was pending before the Supreme Court, the district court, on remand from the Eleventh Circuit, compared the cost of providing community-based care to plaintiffs with the State's overall mental health budget and rejected the State's argument that the continuation of plaintiffs' institutionalization was justified by budget constraints.[35] The court declared irrelevant the potential impact of its decision beyond plaintiffs.[36]

Although plaintiffs were receiving community-based care at the time of the Supreme Court decision, the case was not considered moot because the controversy at hand would be "capable of repetition, yet evading review."[37]

Twenty-two states and the Territory of Guam joined a brief, in support of petitioner-defendants, urging the Supreme Court to grant certiorari.[38] However, upon further reflection, many of these states withdrew from the group opposing the Eleventh Circuit's ruling. Thirteen states filed a brief on the merits in support of petitioners, but several of those states wrote the Court in order to withdraw from the brief before the case was heard.[39]

In June of 1999, the Supreme Court affirmed the Eleventh Circuit's ruling in part, vacated it in part, and remanded it for further proceedings.[40]

III. BACKGROUND

The Americans with Disabilities Act of 1990 was intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against

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33. *See Olmstead*, 138 F.3d at 905; *see also* 28 C.F.R. § 35.130(b) (7).

34. *See supra* note 33.

35. *See Olmstead*, 119 S. Ct. at 2185 n.7.

36. *See id.*

37. *Id.* at 2184 n.6 (citing Honig v. Doe, 484 U.S. 305, 318-323 (1988)).

38. *See* Amicus Curiae Brief of the States of Florida, et al. in Support of Petitioners for a Writ of Certiorari at 2-8, Olmstead v. L.C. 119 S. Ct. 2176 (1999) (No. 98-536) (arguing that the petition for a writ of certiorari presented important questions of federal law, which could impact the states' delivery of services to individuals with disabilities); *Olmstead*, 119 S. Ct. at 2185 n.8; *see also* Olmstead v. L.C. 525 U.S. 1054 (1998), *cert. granted, amended by*, 525 U.S. 1062 (1998) (clarifying, three days after the grant of certiorari, that certiorari was granted only in regards to the first of the two questions presented by petitioners; the Court granted certiorari on the issue of whether the ADA requires states to provide treatment in a minimally restrictive environment, but did not grant certiorari on the issue of the ADA's constitutionality); *Olmstead*, 119 S. Ct. at 2181 (stating that the case presents "no constitutional question" because the lower courts had not reached plaintiffs' constitutional claims, but had "resolved the case solely on statutory grounds").

39. Only seven remaining states supported petitioners on the merits. The majority of states which had urged the Court to grant certiorari had withdrawn their support of petitioners, including the State of Florida which had sponsored the Amicus Brief urging the Court to grant certiorari. *See Olmstead*, 119 S. Ct. at 2185 n.8; Amicus Curiae Brief of the States in Support of Petitioners, *Olmstead*, (No. 98-536); Amicus Curiae Brief of the States of Florida, et al. in Support of Petitioners for a Writ of Certiorari *Olmstead* (No. 98-536); *Bazelon Center for Mental Health Law* (last modified 02-07-00) <http://www.bazelon.org>.

40. *See Olmstead*, 119 S. Ct. at 2185, 2190 (affirming that unnecessary institutional segregation qualifies as discrimination by reason of disability, but vacating the Eleventh Circuit's remand instruction as unduly restrictive in regard to the fundamental alteration defense available to the states); *see also* L.C. v. Olmstead, 198 F.3d 1259 (11th Cir. 1999) (ordering, upon remand from the Supreme Court, that the case be remanded to the district court to be decided in conformity with the Court's decision).

individuals with disabilities.'"[41] Congress stated in the opening provisions of the ADA that "historically, society has tended to isolate and segregate individuals with disabilities and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem[.]"[42] The Congressional Findings portion of the ADA names institutionalization as one of the "critical areas" where "discrimination against individuals with disabilities persists,"[43] although Title II of the ADA, the public services section, does not specifically mention institutionalization as a form of discrimination.[44] The ADA is the federal government's most recent and most extensive effort to address discrimination against those with disabilities.[45] Prior to the enactment of the ADA, Congress had addressed the civil rights of individuals with disabilities through the Rehabilitation Act of 1973[46] and the Developmentally Disabled Assistance and Bill of Rights Act of 1975.[47]

Congress, in the ADA, instructed the Attorney General to issue regulations implementing the Title II provisions.[48] The "integration regulation," which requires a public entity to administer its programs in "the most integrated setting appropriate to the needs of qualified individuals with disabilities,"[49] and the "reasonable-modifications regulation," which requires public entities to make "reasonable modifications," but not to "fundamentally alter" the nature of their programs,[50] were promulgated by the Attorney General to implement the ADA's Title II provisions.

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41. 42 U.S.C. § 12101(b) (1) (1994).

42. *Id.* (a)(2); *see* Brief for Respondents at v-1, *Olmstead* (No. 98-536) (discussing the history of institutionalization of persons with mental disabilities). Although some individuals may periodically require a hospital setting, the movement beginning around the turn of the century to institutionalize a large portion of persons with mental disabilities in "jail-like asylums" was largely a product of Social Darwinism, the eugenics movement, and the desire of society to "not have [those with mental disabilities] in [its] midst." *Id.* In the past three decades, societal attitudes have begun to change, resulting in a national shift toward community-based care for individuals with mental disabilities, such as group homes. *See id.* at 1-3. *See generally* THE STATE OF THE STATES IN DEVELOPMENTAL DISABILITIES (David Braddock et al. eds., 5th ed. 1998) (providing an historical perspective on society's treatment of individuals with developmental disabilities, as well as the summary of a state-by-state study evaluating the provision of services to individuals with developmental disabilities).

43. 42 U.S.C. § 12101(a) (3) (1994).

44. *See id.* § 12132 (stating that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such an entity").

45. *See Olmstead*, 119 S. Ct. at 2181 n.1; *see also* 42 U.S.C. § 12101 (1994).

46. *See Olmstead*, 119 S. Ct. at 2181 n.1. (referring to the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (1976)).

47. *See id.* (referring to the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. 6001 et seq. (1976)).

48. *See id.* at 2182-83 (citing 42 U.S.C. § 12134(a)-(b) (1994) as instructing that these regulations were to be consistent with the coordination regulations of § 504 of the Rehabilitation Act); *see also* 28 C.F.R. § 41.51(d) (1999). One of the § 504 regulations requires services to be delivered in "the most integrated setting appropriate to the needs of" qualified individuals. *See id.*

49. 28 C.F.R. § 35.130(d) (1999); *see also* GA. CODE ANN. § 37-4-121 (1999) (expressing preference for minimally restrictive placement); Brief for Petitioners at 6-7, *Olmstead* (No. 98-536) (asserting that Georgia has been following national trend by providing more community placements and decreasing the number of hospitalized patients). *But see* Brief for Respondents at 4 *Olmstead* (No. 98-536) (asserting that, at the time suit was filed, Georgia ranked 48th among the states in funding services in the community for individuals with mental disabilities). *See generally* THE STATE OF THE STATES IN DEVELOPMENTAL DISABILITIES, *supra* note 42, at 173-80 (detailing trends in the State of Georgia in public spending for the care of individuals with developmental disabilities).

50. *See* 28 C.F.R. § 35.130(b) (7) (1999).

The Supreme Court, prior to *Olmstead*, has had some occasion to address whether individuals with mental disabilities are entitled to receive care in the least restrictive environment appropriate to their needs.[51] In *Pennhurst v. Halderman*[52] (hereafter "*Pennhurst I*"), the Court held that the Developmentally Disabled Assistance and Bill of Rights Act (DD Act)[53] did not create any "substantive rights" to treatment in the "least restrictive environment" for individuals with developmental disabilities.[54] Although the DD Act does show a congressional preference for minimally restrictive care,[55] the majority in *Pennhurst I* held that, since the DD Act was enacted pursuant to congressional spending power, rather than the Fourteenth Amendment, the language regarding least restrictive care was merely "precatory" and did not create affirmative legal duties in the states.[56] Upon remand, the court of appeals affirmed its previous decision, based upon Pennsylvania statutory and case law, to grant injunctive relief to plaintiff patients of Pennhurst Hospital.[57] The Supreme Court granted certiorari once again and, in *Pennhurst II*, overruled the court of appeals' decision.[58] The Court held that a federal court lacks jurisdiction over a suit for injunctive relief against state officials based on state law because such an action contravenes the Eleventh Amendment.[59]

A year after *Pennhurst I*,[60] in the related case of *Youngberg v. Romeo*, the Court held that an involuntarily committed patient diagnosed with mental retardation had due process liberty interests that "require[d] the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint[.]"[61] The *Youngberg* decision was the Supreme Court's first ruling on the substantive constitutional rights of involuntarily institutionalized individuals with mental disabilities.[62] Even though this decision did represent an increased recognition of the rights of individuals with mental disabilities, the Court did not directly address the rights of patients to habilitation training or the rights of those

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51. *See, e.g.*, Pennhurst v. Halderman, 451 U.S. 1 (1981); Youngberg v. Romeo, 457 U.S. 307 (1982).

52. 451 U.S. 1 (1981).

53. *See id.* at 5 (citing 42 U.S.C. § 6010 (1976) (repealed 1984)).

54. *See id.* at 18. A patient of Pennhurst hospital filed a class action suit, on behalf of herself and all other residents of the hospital, alleging inhumane and dangerous conditions, unduly restrictive treatment, and a lack of habilitative training. *See id.* at 6.

55. *See* 42 U.S.C. § 6010 (1976) (repealed 1984) (stating that "[t]he treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.").

56. *See Pennhurst*, 451 U.S. at 5, 17, 18; *see also* Reply Brief at 9, *Olmstead* (No. 98-536) (arguing that *Pennhurst* should be followed). *But see* Brief for Respondents at 43-45, *Olmstead* (No. 98-536) (distinguishing *Pennhurst* from the matter at hand).

57. *See* Pennhurst v. Halderman, 673 F.2d 647, 660-61 (3rd Cir. 1982) (affirming its previous holding, despite Supreme Court decision that Developmentally Disabled Assistance Act did not create affirmative legal duties, by relying on Pennsylvania statute and recent Pennsylvania Supreme Court decision regarding least restrictive care); *In re* Schmidt, 429 A.2d 631, 637 (Pa. 1981).

58. *See* Pennhurst v. Halderman, 465 U.S. 89, 125 (1984).

59. *See id.* at 121.

60. *See* Pennhurst v. Halderman, 451 U.S. 1 (1981).

61. Youngberg v. Romeo, 457 U.S. 307, 319 (1982). The conditions at Pennhurst Hospital were addressed once again, this time by an individual plaintiff rather than as a class action. *See id.*

62. *See* James W. Ellis, *The Supreme Court and Institutions: A Comment on* Youngberg v. Romeo, 20 MENTAL RETARDATION 197 (1982) (asserting that the *Youngberg* decision was important because of its announcement of the protections which the U.S. Constitution affords to institutionalized individuals with mental disabilities).

who had not been involuntarily committed.[63] *Olmstead* is the first Supreme Court decision to address whether states must, under the ADA, provide community-based treatment to individuals with mental disabilities who are deemed appropriate for a setting less restrictive than institutionalization.[64]

Although *Olmstead* is the only Supreme Court case that has addressed the rights of patients with mental disabilities to receive minimally restrictive care under the ADA, other recent Supreme Court cases have appeared to narrow the applicability of the ADA in other contexts.[65] In *Murphy v. U.P.S.*,[66] the Court held that the determination of whether a condition qualifies as a disability under the ADA is to be made with reference to the mitigating measures available to the individual.[67] In *Murphy*, a mechanic who was fired from his job because of high blood pressure had no ADA claim against his employer because his condition was controllable by medication and, accordingly, did not qualify as a disability.[68] Similarly, in *Sutton v. United Airlines*,[69] two pilots who were not hired because of their visual impairments had no claim under the ADA because their visual impairments could be remedied by the use of corrective lenses.[70] Both of these recent decisions appear to narrow the applicability of the ADA by strictly construing what constitutes a disability and consequently limiting what can be deemed discrimination.[71] Against this backdrop and the Court's apparent reluctance to broaden the ADA's applicability in these recent cases, the *Olmstead* decision is notable for the majority's willingness to resist a narrow construction of discrimination under the ADA.[72]

IV. RATIONALE

A. *Overview*

Although the Supreme Court appeared divided in regard to a number of issues, six Justices joined in the judgment and held that the Eleventh Circuit's decision was to be affirmed in part, vacated in part, and remanded.[73] Justice Ginsburg delivered the Court's decision, joined by Justices O'Connor, Souter, Breyer, and by Justice Stevens on most portions of the majority opinion.[74] The Court held that Title II of

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63. *See Youngberg*, 457 U.S. at 318; Ellis, *supra* note 62, at 198, 200. Because plaintiff in *Youngberg* was involuntarily committed and had severe mental disabilities, which all parties had conceded would disallow him from being able to move into the community, the Court did not have before it the question of the appropriate habilitation for individuals who, with sufficient training, could live outside an institution. *See id.*

64. *See Olmstead*, 119 S. Ct. at 2176.

65. *See, e.g.*, Murphy v. U.P.S., 119 S. Ct. 2133, 2138 (1999); Sutton v. United Airlines, 119 S. Ct. 2139, 2152 (1999).

66. 119 S. Ct. 2133 (1999).

67. *See id.* at 2137.

68. *See id.*

69. 119 S. Ct. 2139 (1999).

70. *See id.* at 2143.

71. *See Murphy*, 119 S. Ct. at 2137; *Sutton*, 119 S. Ct. at 2143.

72. *See Olmstead*, 119 S. Ct. at 2186.

73. Justices Ginsburg, Stevens, O'Connor, Souter, Breyer, and Kennedy joined in the judgment. *See Olmstead*, 119 S. Ct. at 2181.

74. *See id.* at 2181-89. Justices O'Connor, Souter, and Breyer joined in the entirety of Justice Ginsburg's opinion. Justice Stevens, who also wrote a concurrence, joined the majority opinion on portions I, II, and IIIA, but did not join the portion of the opinion, IIIB, concerning the Eleventh Circuit's construction of the reasonable modifications regulation. *See id.*

the ADA may require the placement of persons with mental disabilities in community settings rather than in institutions when: 1) the State's treatment professionals determine that such a placement is appropriate, 2) when the transfer is not opposed by the individual, and 3) when the placement can be reasonably accommodated given the resources available to the State and the needs of others with mental disabilities.[75]

Justices Stevens and Kennedy wrote divergent concurring opinions.[76] Justice Stevens, who joined the majority opinion on most points,[77] stated in his concurrence that he would have affirmed the Eleventh Circuit's decision, indicating that the error was with the district court's interpretation of the Eleventh Circuit's remand instructions.[78] Justice Stevens stated that the district court erred by concluding that costs unrelated to plaintiffs' care should not be considered,[79] but did join the majority in the judgment.[80]

Justice Kennedy, concurring in the judgment, also wrote a separate opinion, which was joined in part by Justice Breyer.[81] Justice Kennedy expressed concern that the ADA could be interpreted by states in such a manner as to result in the inappropriate deinstitutionalization of individuals requiring a structured environment.[82] He cautioned that the opinions of treating physicians must be given the greatest deference in order to avoid the inappropriate discharge of individuals with mental disabilities into settings devoid of needed services.[83] Justice Kennedy also questioned the majority's definition of discrimination and argued for the need for a comparison class in order to show the existence of discrimination.[84] Justice Kennedy's concurrence also mentioned "federalism costs" and indicated that the states must have wide discretion without undue interference from the federal government in decisions regarding budget allocation and program development.[85]

Justice Thomas, joined by Chief Justice Rehnquist and by Justice Scalia, wrote a dissenting opinion.[86] The dissent questioned the majority's construction of the ADA, its deference to the Attorney General's regulations, and its "remarkable and novel"[87] finding of discrimination in the absence of a comparison class.[88] The

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75. *See id.* at 2181.

76. *See id.* at 2190-94 (although both concurring in the judgment of the majority, the opinions written by Justices Stevens and Kennedy differ significantly, as discussed below).

77. *See id.* at 2181-89. Justice Stevens did not join the portion of the opinion concerning the Eleventh Circuit's construction of the reasonable modifications regulation. *See id.*

78. *See id.* at 2190.

79. *See id.* (articulating Justice Stevens' view that the error should be corrected either by the Court of Appeals or by the Supreme Court in review of a decision by the Court of Appeals).

80. *See id.*

81. Justice Breyer, who also joined the majority opinion, joined Justice Kennedy on Part I of his concurrence, regarding the danger of inappropriate deinstitutionalization, and the need to give deference to the opinions of treating physicians. Justice Breyer did not join the portion of Justice Kennedy's opinion that addressed the need for a comparison class to make a finding of discrimination. *See id.* at 2190-94.

82. *See id.* at 2191-92.

83. *See id.* at 2191.

84. Justice Breyer did not join Justice Kennedy on this part of his concurrence. *See id.* at 2193-94.

85. *See id.*

86. *See id.* at 2194-99.

87. *Id.* at 2198.

88. *See id.* at 2195.

dissent also criticized the majority for the "imposition of a standard of care"[89] and stated that the majority's approach raises "significant federalism costs"[90] by directing how states are to make decisions about the delivery of public services.

B. *The Majority Opinion*

Because the lower courts had resolved the case on statutory grounds, certiorari was granted in this case only as to the proper construction of the ADA.[91] Therefore, the Court did not address potential constitutional issues but concerned itself primarily with determining the proper construction of the anti-discrimination provisions contained in Title II (the public services portion) of the ADA.[92]

The Court examined the opening provisions of the ADA, where Congress discussed the fact that society has historically tended to "isolate and segregate" individuals with disabilities—a practice described as a form of discrimination.[93] The opening portions of the ADA also mention institutionalization as one of the critical areas where discrimination against disabled persons exists.[94]

The Court also examined the regulations that Congress instructed the Attorney General to issue for the implementation of Title II.[95] One of these regulations, known as the "integration regulation," requires public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[96] Another of the Attorney General's Title II regulations requires public entities to make "reasonable modifications" in policies, practices, or procedures when the modifications are necessary to avoid discrimination based on disability, "unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity."[97]

Although the Court declined to determine whether the Attorney General's regulations would warrant the high degree of deference generally accorded to an administrative regulation under *Chevron v. Natural Resources Defense Council*,[98] it determined that the well-reasoned views of agencies implementing a statute

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89. *Id.* at 2198.

90. *Id.*

91. The lower courts had not addressed the Fourteenth Amendment claim initially raised by plaintiffs, but granted relief solely on statutory grounds. *See id.* at 2181; *see also* Olmstead v. L.C., 525 U.S. 1054 (1998), *cert. granted, amended by*, 525 U.S. 1062 (1998) (granting certiorari only in regards to first question presented by petitioner-defendants, regarding construction and application of the ADA; certiorari denied in regards to questions concerning the ADA's constitutionality).

92. *See Olmstead*, 119 S. Ct. at 2181-83; *see also* 42 U.S.C. § 12132 (1994) (stating that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity").

93. *See* 42 U.S.C. § 12101(a) (2) (1994); *Olmstead*, 119 S. Ct. at 2181.

94. *See* 42 U.S.C. § 12101(a) (3).

95. *See id.* § 12134(a); *Olmstead*, 119 S. Ct. at 2182-83.

96. 28 C.F.R. § 35.130(d) (1999).

97. *Id.* § 35.130(b) (7).

98. 467 U.S. 837, 844 (1984) (holding that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer).

"constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[99]

The U.S. Department of Justice, argued the majority, has consistently held that the unnecessary segregation of individuals with disabilities is a form of discrimination.[100] The majority rejected Petitioners' argument that L.C. and E.W. encountered no discrimination because they failed to demonstrate that they were denied community placements "by reason of" their disabilities and could identify no comparison class.[101] The Court asserted the belief that "Congress had a more comprehensive view of the concept of discrimination as advanced in the ADA."[102] The Court reasoned that recognizing unjustified institutional isolation as a form of discrimination reflects the judgment that institutionalization is "stigmatizing"[103] and "severely diminishes the everyday life activities" of confined individuals.[104]

The Court was careful to point out that the ADA in no way condones termination of institutionalization for individuals who require an inpatient level of care,[105] nor does it require that community-based treatment be imposed on patients involuntarily.[106] The majority denied requiring states to meet a particular "standard of care" but held that "States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide."[107]

The last portion of Justice Ginsburg's opinion (IIIB), in which she was joined only by Justices O'Connor, Souter, and Breyer, does not represent a majority of the Court.[108] This portion of the opinion, in construing the reasonable modifications regulation and the fundamental alteration defense, indicates that the State's responsibility "is not boundless."[109] The Eleventh Circuit construed the reasonable modifications regulation to allow for a cost-based defense only in very limited circumstances.[110] Upon remand to the district court, the Eleventh Circuit instructed that the additional expenses of treating plaintiffs in a community setting should be looked at vis-a-vis the demands of the State's mental health budget.[111] Justice Ginsburg's plurality opinion stated that the court of appeals' construction would

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99. *Olmstead*, 119 S. Ct. at 2185-86 (citing Bragdon v. Abbott, 524 U.S. 624 (1998), quoting Skidmore v. Swift & Co., 323 U.S. 134, 139-140 (1944)).

100. *See Olmstead*, 119 S. Ct. at 2185-86.

101. *See* Brief for Petitioners at 20, 21, *Olmstead* (No. 98-536); *Olmstead*, 119 S. Ct. at 2176.

102. *Id.* at 2186.

103. *Id.* at 2187 (citing Allen v. Wright, 468 U.S. 737, 755 (1984); Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 (1978)) (referring only fleetingly in the majority opinion to the analogy, drawn by Respondents, between the stigmatizing injury of institutional segregation and that of racial discrimination); *see also* Brief for Respondents at 25-30, *Olmstead* (No. 98-536). *But see* Reply Brief at 17, *Olmstead* (No. 98-536) ("In light of plaintiffs' inflammatory reference to eugenics, racial segregation and other inapt charges, it asks too much of Georgia not to respond . . . such unfair generalizations have 'wounding stigmas' of their own . . .")

104. *See Olmstead*, 119 S. Ct. at 2187 (citing Amici Curiae Brief for American Psychiatric Association at 20-22).

105. Compare this with Part I of Justice Kennedy's concurrence, in which he was joined by Justice Breyer, *Olmstead*, 119 S. Ct. at 2191 (expressing concern that the indiscriminate deinstitutionalization of individuals with mental disabilities could result in some individuals being discharged into settings devoid of necessary services).

106. *See id.* at 2187-88.

107. *Id.* at 2188 n.14.

108. *See id.* at 2188-90.

109. *See id.* at 2188.

110. *See* L.C. v. Olmstead, 138 F.3d 893, 902 (11th Cir. 1998).

111. *See id.* at 905.

leave the states "virtually defenseless."[112] This portion of the opinion expressed concern about the unlikelihood that a state would ever prevail if the expenses entailed in placing an individual plaintiff in a community-based program were to be measured for reasonableness against the state's entire mental health budget.[113] A more sensible construction of the reasonable modifications regulation, reasoned the plurality, would be to require that the costs of providing community-based care to a particular plaintiff be compared to the State's mental health budget, given the responsibility the State has to provide treatment equitably to a large and diverse population of individuals with mental disabilities.[114] The plurality indicated that the district court should consider not only the cost of providing community care to litigants, but must also consider the range of services the State provides to others with mental disabilities while taking into account the State's obligation to provide services to this population in an evenhanded manner.[115]

Justice Ginsburg, writing for the plurality, went on to emphasize that institutional placement may be necessary in some instances and that such placement needs to remain available.[116] Many individuals with mental disabilities may require different levels of care at different times.[117] According to the plurality, a state must have more "leeway" than the court of appeals would allow in order to maintain an appropriate range of facilities and in order to administer services "with an even hand."[118] This portion of the opinion stated that it is not unreasonable for a patient to be temporarily detained until a community bed becomes available.[119] To comply with the reasonable modifications standard, a state would need to demonstrate that it had an effectively working plan for placing qualified persons with disabilities in less restrictive settings and that it had a "waiting list that moved at a reasonable pace not controlled by the state's endeavors to keep its institutions fully populated."[120]

C. *Concurring Opinions*

Justice Stevens agreed with the majority's holding that unjustified institutional isolation constitutes discrimination under the ADA.[121] He parted with the majority, however, in his belief that the court of appeals had appropriately remanded for consideration of the State's affirmative defense.[122] The district court, he wrote, was wrong in concluding that costs unrelated to plaintiffs' treatment should not be considered.[123] He believed that this error should be corrected either by the court of

112. *Olmstead*, 119 S. Ct. at 2188.
113. *See id.*
114. *See id.* at 2189.
115. *See id.*
116. *See id.* (citing Amicus Curiae Brief of the Voice of the Retarded et al. at 11).
117. *See id.* at 2189 (citing Reply Brief at 19).
118. *See id.* at 2189.
119. *See id.* at 2189-90.
120. *Id.* at 2189.
121. *See id.* at 2190.
122. *See id.*
123. *See id.*

appeals or by the Supreme Court in review of that decision.[124] Lacking, however, a sufficient majority in favor of affirming the court of appeals judgment, Justice Stevens joined the majority in the judgment and on the larger part of their opinion.[125]

Justice Kennedy concurred in the judgment of the Court, but wrote a separate opinion.[126] Justice Breyer joined the first part of Justice Kennedy's concurrence.[127] Justice Kennedy expressed concern that the ADA could potentially be misinterpreted by states, resulting in the inappropriate deinstitutionalization of individuals with mental disabilities who legitimately require an institutional setting.[128] "[I]f the principle of liability announced by the Court is not applied with caution and circumspection, States may be pressured into attempting compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition."[129] He cautioned that the recommendations of treating physicians be given the greatest deference to avoid the discharge of patients who could not be adequately served by a community-based environment.[130]

Justice Kennedy, in the second part of his concurrence, stated that he would remand the case to determine whether Plaintiffs could demonstrate discrimination, in violation of Title II of the ADA, by showing that they received different treatment than members of a comparison group based on their disability.[131] Justice Kennedy suggested that Plaintiffs might be able to demonstrate discrimination by contrasting the treatment they received while trying to obtain services to that of non-disabled patients.[132] Non-disabled individuals are not subjected to unwarranted segregation in their pursuit of medical services.[133] Discrimination, Justice Kennedy wrote, "tends to be an expansive concept and, as legal category, it must be applied with care and prudence."[134] Because he did not believe that discrimination by disability was adequately shown, Justice Kennedy asserted that the judgment of the courts below, granting partial summary judgment to plaintiffs, ought not be sustained.[135]

Justice Kennedy, unlike the dissenters, did find it instructive that Congress identified the isolation and segregation of persons with disabilities as a form of discrimination in the opening provisions of the ADA and listed institutionalization as a critical area where discrimination persists.[136] Unlike the majority, however, he interpreted these findings as representative of a congressional concern about

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124. *See id.*
125. *See id.* at 2181-88, 2190.
126. *See id.* at 2190-94.
127. *See id.* at 2190-92.
128. *See id.* at 2191; *see also* Brief for Petitioners at 1, *Olmstead* (No. 98-536) (characterizing Respondents' argument as a "one-size-fits-all solution" and as a matter of "institutionalization vs. deinstitutionalization of mental health care").
129. *Olmstead*, 119 S. Ct. at 2192.
130. *See id.*
131. *See id.*
132. *See id.* at 2192- 93.
133. *See id.*
134. *Id.* at 2193.
135. *See id.* at 2194.
136. *See id.* at 2193.

discrimination in some institutional settings; he did not see the ADA as suggesting a departure from the more traditional definition of discrimination as "differential treatment of similarly situated groups."[137]

Justice Kennedy also expressed concern about interpreting the ADA in such a manner as to interfere with state decisions regarding the allocation of limited resources, and indicated that such an interpretation could result in "federalism costs" by compromising the balance of power between states and the federal government.[138] He stated that these are political issues and should not be governed by federal statute.[139] Justice Kennedy wrote that "grave constitutional concerns" are raised when federal courts are given the authority to review state decisions about the administration of state mental health programming.[140] The Attorney General's reasonable modifications regulation[141] would not, according to Justice Kennedy, require a state to create new community programs where none exist.[142]

Justice Kennedy agreed with the plurality opinion[143] that states are entitled to wide discretion in their allocation of resources and the administration of their mental health programs.[144] According to Justice Kennedy, "we must be cautious when we seek to infer specific rules limiting states' choices when Congress has used only general language in the controlling statute."[145]

D. The Dissenting Opinion

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, disagreed strongly with the majority's interpretation of discrimination.[146] Until this decision, the dissent argued, discrimination had been understood as "differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic."[147] The dissent pointed out that the Court had, in the past, utilized Title VII of the Civil Rights Act to determine standards of discrimination, which required a comparison class when interpreting statutes concerning other forms of discrimination.[148] In past decisions interpreting section 504 of the Rehabilitation Act, the Court found that only "evenhanded treatment of handicapped persons relative to those without disabilities" was required.[149] Because the case at hand

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137. *Id.*
138. *See id.*
139. *See id.*
140. *See id.*
141. *See* 28 C.F.R. § 35.130(b) (7) (1999).
142. *See Olmstead*, 119 S. Ct. at 2193.
143. *See id.* at 2189 (asserting that states must have "more leeway than the courts below understood the fundamental alteration defense to allow").
144. *See id.* at 2194.
145. *Id.*
146. *See id.* at 2194-95.
147. *Id.* at 2194.
148. *See id.* at 2195. In the past the Court has recognized two forms of discrimination under Title VII: disparate treatment and disparate impact, but both have required a comparison class. The Court has used this standard of discrimination in its construction of other anti-discrimination legislation, such as the Age Discrimination in Employment Act of 1967. *See id.*
149. *Id.* at 2196 (citing Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979); Alexander v. Choate, 469 U.S. 287, 302 (1985)); *see* Amicus Curiae Brief of the States in Support of Petitioners at 13-14, *Olmstead* (No. 98-536) (arguing that the Rehabilitation Act had not been interpreted, by the courts, as requiring

concerns disparate treatment among members of the same protected class, the dissent did not believe discrimination could be shown.[150] They argued that "temporary exclusion from community placement" does not constitute discrimination.[151] Because Title II of the ADA forbids discrimination "by reason of such disability,"[152] the dissent argued that the statute "should be read as requiring proximate causation as well."[153] The majority of the Court, wrote the dissent, had based its interpretation on "general, hortatory" language or mere "aspirational terms" contained in the ADA.[154] The dissent also stated that "a departure from the traditional understanding of discrimination requires congressional action."[155] If Congress had intended to redefine discrimination in Title II, the dissent argued, they would have included a special meaning by definition.[156]

The dissent criticized the majority for importing Title I's definition of discrimination into Title II.[157] Although Congress did alter the traditional meaning of discrimination in Title I of the ADA, in describing isolation and segregation as forms of discrimination,[158] they did not explicitly do so with regard to Title II.[159] The Court, argued the dissent, should respect the limited applicability of this altered definition and not apply it to other parts of the statute.[160]

Justice Thomas also maintained that, because the ADA plainly expressed the intent of Congress, the Court need not have relied on the Attorney General's integration regulation.[161] According to the dissent, the Attorney General's regulations contradict the settled meaning of discrimination and cannot prevail against it.[162]

The dissent criticized the majority opinion for "imposing a standard of care."[163] They implied that, given the majority's broadening of the concept, discrimination will be found merely because an individual "does not receive the treatment he wishes to receive."[164]

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that persons with disabilities be placed in the least restrictive setting appropriate). This brief, in support of Petitioners, was filed by a group of 13 states, but several of the states later wrote to the Court asking to withdraw from this brief. *See supra* note 39.

150. *See Olmstead*, 119 S. Ct. at 2194; *see also* Brief for Petitioners at 12-13, *Olmstead* (No. 98-536) (arguing the need for a comparison class to make a finding of discrimination); Amicus Curiae Brief of the States in Support of Petitioners at 10-14, *Olmstead* (No. 98-536).

151. *See Olmstead*, 119 S. Ct. at 2194.

152. 42 U.S.C. § 12132 (1994).

153. *Olmstead*, 119 S. Ct. at 2199.

154. *See id.* at 2197 (referring to the quoted statements of congressional findings as "a rather thin reed upon which to base a requirement").

155. *Id.* at 2195 (citing Field v. Mans, 516 U.S. 59, 69-70 (1995)).

156. *See id.* at 2197; *see also* Amicus Curiae Brief of the States in Support of Petitioners at 14, *Olmstead* (No. 98-536).

157. *See Olmstead*, 119 S. Ct. at 2197-98.

158. *See* 42 U.S.C. § 12101(a) (2) (1994).

159. *See id.* § 12131; *Olmstead*, 119 S. Ct. at 2197-98.

160. *See Olmstead*, 119 S. Ct. at 2197-98 (citing Russello v. United States 464 U.S. 16, 23 (1983)).

161. *See id.* at 2197 n.4, n.5 (asserting that deference to a regulation is only appropriate where there is ambiguity, and then only if the administrative interpretation is reasonable); *see also* Reply Brief at 7-8, *Olmstead* (No. 98-536) (arguing that ADA is not ambiguous and, accordingly, administrative regulations should not be looked to in construing the ADA).

162. *See Olmstead*, 119 S. Ct. at 2197 n.5; *see also* Brief for Petitioners at 39-42, *Olmstead* (No. 98-536).

163. *Olmstead*, 119 S. Ct. at 2198.

164. *Id.* (arguing that the Majority's approach is a departure from the "traditional understanding of

The dissent also expressed significant concern about "federalism costs" incurred in directing states about public service delivery decisions, as the majority's holding does appear to give the federal court system more power to influence state decisions concerning the administration of mental health programming.[165] The dissent argued that "the appropriate course would be to respect the States' historical role as the dominant authority responsible for providing services to individuals with disabilities."[166] The majority's construction of the fundamental alteration defense, asserted the dissent, will "likely come as cold comfort to the States that will now be forced to defend themselves in federal court every time resources prevent the immediate placement of a qualified individual."[167]

V. ANALYSIS

Although the *Olmstead* holding appears hopeful, seeming to promise individuals with mental disabilities less isolation and the chance for greater participation in the benefits of mainstream society, remaining ambiguities could dilute the positive effects of the holding. Because the Court remained divided on a number of important issues such as the nature of discrimination and questions concerning federalism,[168] the *Olmstead* decision provides little guidance regarding a number of important questions.

A. *Unanswered Questions*

A majority of the Court agreed that the unnecessary institutionalization of individuals with mental disabilities may constitute discrimination under the ADA.[169] However, the *Olmstead* majority failed to move beyond basic statutory construction. The Court did not clarify what would constitute "reasonable accommodation" by a state or other public entity, how much deference the Attorney General's regulations should be given, nor did it indicate how it might respond in the future to questions regarding the constitutionality of the ADA.

The portion of Justice Ginsburg's opinion that approaches the issue of what a state must do in order to comply with the ADA did not garner majority support.[170] Justice Ginsburg[171] wrote that a state would meet its obligation under the ADA if it could "demonstrate that it had a comprehensive, effectively working plan for placing qualified persons . . . in less restrictive settings" and a waiting list that "moved at a reasonable pace not controlled by the State's endeavors to keep its

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discrimination," which concerns "a prohibition against certain conduct").

165. *See id.* (citing Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992)); *see also* Brief for Petitioners at 31-32, *Olmstead* (No. 98-536) (arguing that the ADA "does not provide the clear statement necessary" for Congress to seize such "wide-ranging control" over a "core area of state and local government").

166. *Olmstead*, 119 S. Ct. at 2199 (citing Alexander v. Choate, 469 U.S. 287, 307 (1985)).

167. *Id.*

168. *See id.*

169. *See id.* at 2181 (noting that unnecessary institutionalization results when an individual is deemed medically appropriate for, and does not oppose transfer to, a less restrictive setting).

170. *See id.* at 2188-90.

171. Joined by Justices O'Connor, Souter, and Breyer.

institutions fully populated."[172] There was no indication, however, of what might constitute a "reasonable" wait for a community bed or how it could be ascertained whether the waiting list was affected by other institutional concerns such as bed utilization and the fiscal impact of a low census.[173] The Court indicated that a state's treatment professionals should determine when community placement may be appropriate.[174] The Court did not discuss the possibility that state clinicians may be pressured into making treatment recommendations in acquiescence with their employers' administrative and budgetary concerns.[175]

The majority opinion was explicit in stating that the ADA does not impose a standard of care, but did hold that states must adhere to the ADA's nondiscrimination requirement "with regard to the services they in fact provide."[176] The Court, however, did not indicate what would happen if a state did not provide, or should cease the operation of, programs offering services for individuals with mental disabilities.[177]

The majority read the ADA in conjunction with the Attorney General's "integration" and "reasonable modifications" regulations[178] and indicated that the Attorney General's views warrant respect.[179] The Court apparently rejected Respondents' contention that the "integration regulation" had been "incorporated by reference" into the statute when Congress in the ADA instructed the Attorney General to issue implementation regulations modeled on the section 504 regulations.[180] The Court did not, however, specify how much deference these regulations should be given, although the majority's reliance on the Attorney General's regulations does indicate that these regulations are to be looked to in trying to determine how much a state may have to modify its existing programs to comply with the ADA's anti-discrimination provision.[181]

The Court did not grant certiorari on the issue of the ADA's constitutionality,[182] which was raised by petitioners and their amici,[183] nor did it address the constitu-

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172. *Olmstead*, 119 S. Ct. at 2189; *see* Brief for Respondents at 9, 47, *Olmstead* (No. 98-536) (arguing that the reluctance of state officials to downsize large institutions may be due to concern that such decisions would result in a loss of approval from constituents whose jobs may be impacted, and heavy union lobbying).

173. *See Olmstead*, 119 S. Ct. at 2189.

174. *See id.* at 2181. *See generally* Youngberg v. Romeo, 457 U.S. 307, 321-323 (1982) (emphasizing that the courts must show deference to the judgment exercised by qualified professionals in order to minimize interference by the federal judiciary with the internal operations of state institutions, and stating that the opinions of qualified professionals are "presumptively valid").

175. *See* Note, *Leading Cases III: Federal Statutes, Regulations, And Treaties*, 113 HARV. L. REV. 326, 332-334 (1999) (criticizing the *Olmstead* Court for its deference to state treatment professionals who may be influenced by the concerns of their employers).

176. *Olmstead*, 119 S. Ct. at 2188 n.14.

177. *See id.* at 2189; *see also* Rodriguez v. City of New York, 197 F.3d 611, 618-19 (2nd Cir. 1999) (citing *Olmstead* as addressing only services that are already in place, but not requiring states to implement additional programs which would assist individuals with disabilities with the opportunity to remain in the community).

178. *See* 28 C.F.R. § 35.130(d) (1999); 28 C.F.R. § 35.130(b) (7) (1999).

179. *See Olmstead*, 119 S. Ct. at 2186.

180. *See* Brief for Respondents at 18, *Olmstead* (No. 98-536) (citing U.S. v. Bd. of Comm'rs of Sheffield, 435 U.S. 110, 134 (1978)).

181. *See Olmstead*, 119 S. Ct. at 2186.

182. *See* Olmstead v. L.C., 525 U.S. 1054 (1998), *cert. granted, amended by*, 525 U.S. 1062 (1998).

183. *See* Amicus Curiae Brief of the States of Florida, et al. in Support of Petitioners for a Writ of Certiorari at 17-20, *Olmstead* (No. 98-536) (arguing that the ADA, as construed by the Eleventh Circuit, violates the Tenth

tional issues plaintiff-respondents had initially raised in their complaint.[184] Because the *Olmstead* Court did not address these constitutional questions, it is not clear how the Court would respond if these issues were to arise in the future.[185]

B. *The Fundamental Alteration Defense: An Exception that Stands to Swallow the Rule?*

Justice Ginsburg, writing for the plurality,[186] stated that it would be too difficult for states to comply with the Eleventh Circuit's construction of the "fundamental alteration" defense and that a state requires considerable "leeway" in maintaining a range of facilities.[187] The Attorney General's regulations indicate that a "reasonable accommodation" should not impose an "undue hardship" on the operation of a program.[188] The plurality indicated that an "undue hardship" inquiry should consider such factors as the size and type of a program, the entity's budget, and the cost and nature of the requested accommodation.[189] Because this portion of Justice Ginsburg's opinion did not represent a majority of the Court, and because these factors are to be evaluated on a case-by-case basis,[190] considerable ambiguity exists. The *Olmstead* ruling could be interpreted as giving the states enough "leeway" to excuse, as financially prohibitive,[191] practically any request for accommodation by an individual with disabilities. Holding that unjustified institutionalization is a form of discrimination, while excusing the provision of less

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and Eleventh Amendments of the Constitution, and exceeds Congress' § 5 authority to enforce the Fourteenth Amendment); *see also* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 76 (1996) (holding that Congress may abrogate the states' Eleventh Amendment immunity from suit in federal court only through a valid exercise of its § 5 power to enforce the Fourteenth Amendment); City of Boerne v. Flores, 521 U.S. 507, 534-37 (1997) (holding that Congress may act under § 5 of the Fourteenth Amendment to protect discrete groups only when the Court itself has identified that group as deserving of the Fourteenth Amendment's protection). *See generally* James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After* Seminole Tribe *and* Flores, 41 ARIZ. L. REV. 651 (1999) (discussing the controversy, since *Seminole* and *Flores*, over Congress' power to subject states to a federal forum for ADA disability discrimination claims).

184. Although Plaintiffs' complaint had initially raised a Fourteenth Amendment cause of action, the Court declined to address this because the lower courts had resolved the case solely on statutory grounds. *See Olmstead*, 119 S. Ct. at 2181.

185. *But cf.* Alsbrook v. City of Maumelle, 184 F.3d 999, 1007-10 (8th Cir.1999), *cert. granted in part*, Alsbrook v. Arkansas, 120 S.Ct. 1003 (2000), *dismissed*, No. 99-423, 2000 U.S. LEXIS 1736 (March 1, 2000) (holding that extension of ADA Title II to the states is not a proper exercise of Congress' power under § 5 of the Fourteenth Amendment, disagreeing with decisions in the 11th, 5th, 9th, and 7th Circuits). *Alsbrook*, which has been settled, was to be consolidated with Florida Dept. of Corrections v. Dickson, 120 S. Ct. 976 (2000), *dismissed*, No. 98-829, 2000 U.S. LEXIS 1545 (Feb. 23, 2000) (presenting the question of whether the ADA is a proper exercise of Congress' power under § 5 of the Fourteenth Amendment). *Cf.* Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) (holding that the Age Discrimination in Employment Act of 1967 is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment).

186. Joined by Justices O'Connor, Breyer, and Souter. *See Olmstead*, 119 S. Ct. at 2188-90.

187. *See id.*

188. *See* 28 C.F.R. §§ 41.53, 42.511(c) (1999).

189. *See Olmstead*, 119 S. Ct. at 2190 (referring to 28 C.F.R. § 42.511(c) (1999)).

190. *See id.*

191. Although numerous studies indicate that community care can be more cost-effective than institutionalization and federal funding is available to help defray costs, Petitioners expressed concern regarding the potential expenses involved in providing community-based care. *See* Amicus Curiae Brief of 58 Former State Commissioners et al. in Support of Respondents at 8-17, *Olmstead* (No. 98-536); Reply Brief at 11, *Olmstead* (No. 98-536); *see also* Brief for Respondents at 47-48, *Olmstead* (No. 98-536) (alleging that costs are a pretext voiced by states seeking to delay ADA compliance, because of other political and administrative concerns).

restrictive care when it is deemed too costly or difficult, could be construed as tacitly giving the states permission to discriminate against individuals with mental disabilities when it is too inconvenient to do otherwise.

The failure of the Court to provide any practical guidelines may reflect an inability to reach a consensus, or it may indicate the exercise of judicial restraint. All that is certain is that these questions, concerning the scope of a state's duty to provide minimally restrictive care, will remain unanswered until clarification is provided by further litigation or by further legislative efforts.

C. *A More Comprehensive Definition of Discrimination and a Greater Recognition of the Rights of Individuals with Mental Disabilities*

Despite the many questions the Court leaves unanswered, the *Olmstead* majority's construction of discrimination, under the ADA, appears to be a positive step towards recognizing the rights of individuals with mental disabilities.[192] The dissent argued that discrimination "requires a showing that a claimant received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic."[193] Because individuals with mental disabilities often require services not needed by those without such a disability, petitioners' argument that states must only demonstrate "evenhanded treatment between the handicapped and non-handicapped,"[194] apparently adopted by the dissent, would make it virtually impossible to address the rights of people with mental disabilities under the ADA. The majority, however, held that it was "satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA."[195] The Court, in holding that unnecessary institutionalization is a form of discrimination, appears to have rejected petitioners' argument that a voluntarily admitted patient is not, by definition, "confined" in an institution.[196] Despite the Court's failure to define, in a meaningful way, the duty of the states to provide alternative placements,[197] the *Olmstead* Court's construction of discrimination[198] could help bolster the rights of individuals with mental disabilities to more integrated care and a greater degree of community participation.

Although individuals with mental disabilities may vary as to the degree of services they may require at a given time, an unduly restrictive institutional setting can have detrimental effects and may result in regression or the development of maladaptive behaviors.[199] Not only does community care have considerable

192. *See Olmstead*, 119 S. Ct. at 2186.

193. *Id.* at 2194.

194. Brief for Petitioners at 12, 22, *Olmstead* (No. 98-536).

195. *Olmstead*, 119 S. Ct. at 2186.

196. *See* Brief for Petitioners at 36, *Olmstead* (No. 98-536); Reply Brief at 1-3, *Olmstead* (No. 98-536) (emphasizing the distinction between patients admitted voluntarily and those admitted involuntarily, apparently without regard to the fact that such a distinction is meaningless when a voluntarily admitted patient, who requires care, has no other viable options).

197. *See Olmstead*, 119 S. Ct. 2176.

198. *See id.* at 2187.

199. *See* Brief for Respondents at 8, *Olmstead* (No. 98-536); *cf.* Youngberg v. Romeo, 457 U.S. 307, 325-29 (1982) (Blackmun, J., Brennan, J., O'Connor, J., concurring) (arguing that involuntarily institutionalized individuals with developmental disabilities may have a constitutional right to be provided with habilitation training necessary to prevent the deterioration of pre-existing self-care skills).

therapeutic benefits, but numerous studies also indicate that it can be more cost-effective than institutionalization.[200]

Ultimately, the ambivalence of the Court may reflect a more general societal ambivalence toward individuals with mental disabilities. Society itself may be deeply divided about whether individuals with disabilities should be integrated into its midst,[201] who should be responsible for providing and financing their care, and how the needs of individuals with mental disabilities are to be prioritized in the allocation of scarce state resources.

VI. IMPLICATIONS

The *Olmstead* decision should help promote the ongoing trend of providing care to an increasing number of individuals with mental disabilities in less restrictive, community settings.[202] The states, in recent years, have begun to recognize that community care can be therapeutically beneficial, as well as cost-effective.[203] The Court's decision should encourage states in their efforts to plan for the development of mental health programs that provide a full range of services that can accommodate individuals with mental disabilities who can benefit from community-based programs, as well as those individuals who may periodically require a more structured setting.

The lack of clear guidance provided by the *Olmstead* Court, in regard to the states' responsibility to provide minimally restrictive care, will likely result in further litigation around these issues. Numerous ambiguities in the *Olmstead* decision may make it relatively easy for states to use a "fundamental alteration" or "undue hardship" defense[204] to protest practically any request for accommodation. Individuals with mental disabilities who are being subjected to unjustified institutionalization may have to resort to litigation to argue their right to treatment that is not unduly restrictive.

Although the Court's judgment, holding that unjustified institutionalization is a form of discrimination,[205] may help bolster the right of individuals with mental disabilities, the Court's failure to provide any practical guidelines or any meaningful limitation on the defense available to the states will likely dilute the *Olmstead* decision's positive impact on the rights of individuals with mental disabilities.

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200. *See* Amicus Curiae Brief of 58 Former State Commissioners in Support of Respondents at 12-19, *Olmstead* (No. 98-536).

201. *See* Brief for Respondents at 1, *Olmstead* (No. 98-536).

202. *See generally* THE STATE OF THE STATES IN DEVELOPMENTAL DISABILITIES, *supra* note 42, at 9-13 (discussing the expansion of community care services by states).

203. *See* Amicus Curiae Brief of 58 Former State Commissioners in Support of Respondents at 3-6, *Olmstead* (No. 98-536); *see also* Amicus Curiae Brief of the States in Support of Petitioners, Appendix A, *Olmstead* (No. 98-536) (New Mexico currently provides care to individuals with developmental disabilities in intermediate care facilities or community-based programs, rather than in institutions; this information applies only to those individuals with developmental disabilities, not those with mental illness or other types of disabilities). *See generally* THE STATE OF THE STATES IN DEVELOPMENTAL DISABILITIES, *supra* note 42, at 12-13 (discussing the benefits of supported community living).

204. *See Olmstead*, 119 S. Ct. at 2188-90.

205. *See id.* 119 S. Ct. at 2181.

VII. CONCLUSION

The apparent ambivalence of the *Olmstead* Court can be seen as a reflection of more general societal attitudes. Society itself may be deeply ambivalent about the integration of individuals with mental disabilities into community-based programs, the financial impact of providing this care, and the role of the federal government in protecting the rights of individuals with disabilities. Although the Court's construction of the ADA does appear to speak to a greater recognition of the rights of individuals with mental disabilities, the *Olmstead* decision fails to offer the guidance necessary to fully ensure these rights and appears to create as many questions as it answers.

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