Loyola University Chicago Law Journal

Volume 31
Issue 4 *Summer 2000*

Article 6

2000

The Mandated Move from Institutions to Community Care: *Olmstead v. L.C.*

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Note

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I. INTRODUCTION

Larry McAfee, a twenty-nine year old civil engineer, became a quadriplegic as a result of a motorcycle accident.[1] During the four years following his accident, he was transferred from institution to institution like a "sack of potatoes."[2] The state in which he lived refused to pay for community-based living services for him and only paid for the cost of nursing home care even though he was not ill and did not require any institutional care.[3] In the nursing home, he was told when to eat, when to sleep, and even when he could watch movies on television.[4] Because of these restrictions on his life, he requested the right to be removed from his life-sustaining respirator.[5] Immediately after Mr. McAfee was placed in a community-based setting, however, he changed his mind about suicide.[6]

Mr. McAfee's account of his time spent in a segregated nursing home is not unusual.[7] Others in the disabled community have withstood abuse, isolation, and segregation for hundreds of years, despite this country's attempt to prohibit such treatment. With the passage of the Americans with Disabilities Act ("ADA"), the disabled community, for

1. *See* Steven A. Holmes, *Disabled People Say Home Care Is Needed to Use New Rights*, N.Y. TIMES, Oct. 14, 1990, at A4.

2. *See* Peter Applebome, *An Angry Man Fights to Die, Then Tests Life*, N.Y. TIMES, Feb. 7, 1990, at A1.

3. *See id.*

4. *See* Joseph Shapiro, *Larry McAfee, Invisible Man: The Agonizing Fight to Prevent Legalized "Suicide,"* U.S. NEWS & WORLD REP., Feb. 19, 1990, at 59, 60.

5. *See* Holmes, *supra* note 1, at A4.

6. *See id.*

7. *See generally* Brief for ADAPT, National Council on Independent Living, as Amicus Curiae in Support of Respondents, 1999 WL 106726, Olmstead v. L.C., 119 S. Ct. 2176 (1999) (No. 98-536) (providing accounts of individuals with disabilities who were unnecessarily confined to institutions, where they received cruel and abusive treatment).

the first time, felt they received adequate civil rights protection.[8] Now, almost ten years after the passage of the ADA, the Supreme Court in *Olmstead v. L.C.*[9] concluded that unnecessary segregation of mentally disabled individuals constitutes discrimination under Title II of the ADA and that states must provide qualified disabled individuals with community-based treatment if such treatment is most appropriate to the needs of the individual.[10] As a result, many mentally disabled individuals, like Mr. McAfee, will be able to interact with the non-disabled community and live independent and productive lives.[11] No longer will these individuals be forced to remain hidden from the rest of society, and no longer will they be subject to the restrictive living arrangements that Mr. McAfee experienced in the nursing home.[12]

This Note begins with a brief examination of the lengthy history of discrimination against disabled individuals in the United States.[13] It then discusses § 504 of the Rehabilitation Act of 1973, which is Congress' largest pre-ADA attempt to eliminate discrimination against the disabled.[14] This Note then reviews a brief history of the ADA.[15] Next, this Note examines the case of *Olmstead*, exploring both the majority's and dissent's interpretation of the definition of discrimination under the ADA.[16] Moreover, this Note discusses the affirmative defense available to the states when the transfer of qualified mentally disabled individuals is too costly to the states' budgets.[17] Next, this Note illustrates why the majority in *Olmstead* correctly construed the ADA to prohibit unnecessary institutionalization of the mentally disabled and the reasons why the dissent incorrectly concluded that the definition of discrimination under the ADA does not prohibit unnecessary institutionalization.[18] This Note then shows that the transfer of qualified mentally disabled individuals into community-based settings will not result in an increased financial burden for the

8. *See* Holmes, *supra* note 1, at A4.

9. Olmstead v. L.C., 119 S. Ct. 2176 (1999), *affirming in part and vacating in part* 138 F.3d 893 (11th Cir. 1998).

10. *See id.*

11. *See id.*; *see also infra* Part V.B (discussing the positive effects of community-based treatment on individuals with disabilities).

12. *See* Holmes, *supra* note 1, at A4; *see also infra* Part II.A (discussing the historic discrimination experienced by individuals with disabilities).

13. *See infra* Part II.A.

14. *See infra* Part II.B.

15. *See infra* Part II.

16. *See infra* Part III.C.1-2.

17. *See infra* Parts III.C.1.b, III.C.2.b.

18. *See infra* Part IV.A.

states because community care, on average, costs less than institutional care and the states will be able to receive financial assistance to provide community care through the Medicaid "Waiver" program.[19] Finally, this Note discusses the positive effects of community-based treatment settings on qualified individuals with mental disabilities.[20]

II. BACKGROUND

Disabled Americans have experienced horrific discrimination for hundreds of years, and for much of that time, society accepted this cruel treatment.[21] In the latter half of the twentieth century, however, Congress began to recognize that disabled individuals need protection against discriminatory treatment.[22] One of Congress' first attempts to protect the disabled community from discrimination was the Rehabilitation Act of 1973.[23] This Act, however, covered only public entities that received federal funding.[24] As a result, in 1990, Congress passed the ADA in order to ensure that disabled Americans receive the civil rights protections they deserve.[25]

A. Historic Discrimination Against the Disabled

Historically, states have unnecessarily confined individuals with mental illness, mental retardation, developmental disabilities, and other disabilities to institutions and shunned them from society.[26] Throughout the nineteenth and early twentieth centuries, society widely accepted this discrimination and unnecessary confinement.[27] Much of this

19. *See infra* Part V.A.2.

20. *See infra* Part V.B.

21. *See infra* Part II.A (examining the historic discrimination of the disabled in the United States).

22. *See infra* Part II.A (outlining early congressional attempts to protect the disabled from such discrimination).

23. *See infra* Part II.B (discussing the Rehabilitation Act of 1973 and its protection against discrimination for the disabled community).

24. *See infra* Part II.B (highlighting the shortcomings and deficiencies of the Rehabilitation Act of 1973).

25. *See infra* Part II.C (discussing the Americans with Disabilities Act and the protections it provides to individuals with disabilities).

26. *See* Timothy M. Cook, *The Americans with Disabilities Act: The Movement to Integration*, 64 TEMP. L. REV. 393, 399 (1991). Individuals with mental illness, mental retardation and other disabilities are distinct populations although the groups often overlap. *See id.* Because these populations have shared similar historical discrimination and are often similarly treated under the ADA, they are grouped together here.

27. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 461-63 (1985) (Marshall, J., concurring in part and dissenting in part). In *Cleburne Living Center*, a unanimous Court held that "retarded individuals cannot be grouped together as the 'feebleminded' and

acceptance resulted from the social views and literature produced by leading medical authorities and other professionals who portrayed individuals with disabilities as "unfit for citizenship," "feebleminded," and a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems."[28] Medical authorities advocated for the segregation of disabled individuals to minimize the economic burden that disabled individuals placed on society and to rid society of the "moral losses" that had arisen because disabled people lived within society.[29]

States adopted this negative view toward individuals with disabilities and, shortly thereafter, almost completely segregated the disabled population from the rest of the community.[30] This institutionalization and segregation occurred, in large part, to house individuals with disabilities for their entire existence, thereby preventing them both from co-mingling with society and from reproducing.[31]

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deemed presumptively unfit to live in a community." *Id.* at 455. Justice Marshall observed that persons with disabilities "have been subject to a 'lengthy and tragic history' of segregation and discrimination that can only be called grotesque." *Id.* at 461 (Marshall, J., concurring in part and dissenting in part) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 303 (1978)). Justice Stevens similarly acknowledged "a history of unfair and often grotesque mistreatment" of the disabled. *Id.* at 454 (Stevens, J., concurring in part).

28. *Id.* at 462-63 (Marshall, J., concurring in part and dissenting in part).

29. *See id.* at 462-63 n.9 (Marshall, J., concurring in part and dissenting in part). Historically, it was believed that the segregation of disabled individuals would not only minimize the "menace" that disabled individuals posed to society but would "relieve society of 'the heavy economic and moral losses arising from the existence at large of these unfortunate persons.'" *Id.* (quoting Act of March 22, 1915, ch. 90, 1915 Tex. Gen. Laws 143 (repealed 1955)).

30. *See* Cook, *supra* note 26, at 400.

> In virtually every state . . . people with disabilities—especially children and youth—were declared by state lawmaking bodies to be 'unfitted for companionship with other children,' a 'blight on mankind' whose very presence in the community was 'detrimental to normal' children, and whose 'mingling . . . with society,' was 'a most baneful evil.'

Id. at 400-01 (footnotes omitted).

31. *See Cleburne Living Ctr.*, 473 U.S. at 462 (Marshall, J., concurring in part and dissenting in part). In *Cleburne Living Center*, Justice Marshall explained the historical roots of societal discrimination of the disabled: "[S]tate mandated segregation and degradation soon emerged . . . [and] [m]assive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and 'nearly extinguish their race.'" *Id.* (Marshall, J., concurring in part and dissenting in part). Around the turn of the century, this country implemented a public policy of mandatory sterilization of persons with disabilities in order to avoid "being swamped with incompetence." Buck v. Bell, 274 U.S. 200, 207 (1927). In *Buck*, Justice Holmes found that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." *Id.* This systematic segregation of individuals who were deemed to be inferior was not limited to persons with disabilities. *See* Cook, *supra* note 26, at 404. The far more publicized apartheid in the United States was based on race, when the Supreme Court legally authorized the establishment of "separate but equal" government services for whites and

During the 1950s and 1960s, both policymakers and professionals began to recognize that segregation and isolation of the disabled offended fundamental notions of decency.[32] These emerging views stemmed from societal recognition of the needs of disabled World War II and Korean War veterans.[33] Advocates of social security and rehabilitation sought to expand services to this newly enlarged disabled community.[34]

In 1954, Congress passed the Vocational Rehabilitation Amendments,[35] which expanded existing rehabilitation programs by adding clinics for speech, hearing, cardiac and other disabilities.[36] Disability rehabilitation programs continued to grow and included special education programs and the removal of architectural barriers for those with physical disabilities.[37] With the emphasis on integrating the disabled into the community, many of the newly developed programs mirrored those adopted by the civil rights movement.[38] Neither the advocates of the disabled nor the advocates of civil rights, however, saw either movement as relevant to the other.[39] Therefore, the disabled were not included as a protected class in the landmark Civil Rights Act of 1964.[40] With the growing tendency to require federally assisted

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coloreds in the 1896 case of *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See* Cook, *supra* note 26, at 404. The Jim Crow system established after *Plessy* bears striking resemblance to the systematic segregation of the disabled, and ample historical records illustrate that disability discrimination was born out of the same attitudes and prejudices that existed with respect to race. *See id.*

32. *See* Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925, 929 (1994).

33. *See* Larry E. Craig, *The Americans with Disabilities Act: Prologue, Promise, Product and Performance*, 35 IDAHO L. REV. 205, 207 (1999).

34. *See id.* After World War I and prior to the 1950s, the government's attitude toward the disabled began to change. *See id.* The Vocational Rehabilitation Act of 1920 was evidence of this change of attitude. *See id.* Although this Act served to match state dollars for providing job training, counseling, and placement services to the veterans of the War, it did not include medical services. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.* at 207-08.

39. *See id.* at 208.

40. *See id.* Title VII of the Civil Rights Act bans employment discrimination and makes it illegal for an employer to discriminate against an individual with respect to his or her compensation, terms, conditions, or privileges of employment because of the individual's race, color, sex, national origin, or religion. *See* Olmstead v. L.C., 119 S. Ct. 2176, 2194-95 (1999), *affirming in part and vacating in part* 138 F.3d 893 (11th Cir. 1998); *see also* CLINTON L. DOGGETT & LOIS T. DOGGET, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 51 (1990). Specifically, Title VII bans disparate treatment, which is the purposeful exclusion of members of a certain statutorily described group from jobs. *See* DOGGETT & DOGGET, *supra*, at 72. This treatment

construction and transportation in order to accommodate the disabled, however, the idea surfaced that disability policies could be rights-based.[41]

B. The Rehabilitation Act of 1973

In 1973, as Congress discussed the Vocational Rehabilitation Bill, it added a last-minute sentence to the bill, tacking on a civil rights provision.[42] This provision is known as § 504 of the Rehabilitation Act of 1973 ("§ 504").[43] Section 504 prohibits federal executive agencies, the United States Postal Service, or any other program or activity that receives federal funding from discriminating against an otherwise qualified individual solely on the basis of his or her disability.[44] The enforcement of § 504 was to be accomplished through regulations promulgated by the Attorney General.[45]

From a civil rights perspective, § 504 represented a major historical shift in disability policies.[46] For the first time in American history, Congress recognized disabled individuals as a minority group that had been subject to discrimination and that deserved basic civil rights

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occurs when a member of a certain group is treated differently in comparison to similarly situated individuals outside of the statutorily described group. *See id.* Title VII of the Civil Rights Act did not make it unlawful to discriminate against an individual based on a physical or mental disability. *See id.* at 51.

41. *See* Craig, *supra* note 33, at 208.

42. *See id.*

43. *See* 29 U.S.C. § 794 (1994). The aim of § 504 was to develop and implement "comprehensive and coordinated state of the art programs of vocational rehabilitation" and "independent living" for individuals with disabilities in order to maximize their integration into the workplace and the community. *See id.* § 701(b). The Supreme Court has interpreted the meaning and significance of § 504 and has concluded that it outlaws both intentional and unintentional discrimination. *See* Alexander v. Choate, 469 U.S. 287, 297 (1985).

44. *See* 29 U.S.C. § 794. The Rehabilitation Act, in part, states:

> No otherwise qualified individual with a disability in the United States . . . shall solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Id.

45. Originally, the Department of Health Education and Welfare was authorized to coordinate such regulations, but the authorization was subsequently transferred to the Department of Health and Human Services and then to the Attorney General. *See* Helen L. v. DiDario, 46 F.3d 325, 330 (3d Cir. 1995). One of the regulations promulgated mandates that all recipients of federal financial assistance "shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d) (1999).

46. *See* H.R. REP. NO. 101-485, pt. III, at 26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 448-49.

protections.[47] Congress first proposed § 504 as an amendment to the Civil Rights Act of 1964, and its language virtually mirrored the wording used in Title VI of the Civil Rights Act of 1964.[48] Courts have considered this provision, often referred to as "the civil rights bill of the disabled," as the first broad federal statute aimed at eradicating discrimination against individuals with disabilities.[49]

Although referred to as the "cornerstone of the civil rights movement of the mobility-impaired,"[50] § 504 suffers from shortcomings and deficiencies, which became apparent soon after its passage.[51] For example, it only covered federally-funded entities.[52] Critics have also found that it has inadequate enforcement mechanisms.[53] Thus, the courts erratically have interpreted whether the provision mandates the institutionalization of individuals with disabilities.[54] Furthermore,

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47. *See id.*

48. *See Choate*, 469 U.S. at 295 n.13. Section 601 of the Civil Rights Act of 1964 bars discrimination based upon race, color, or national origin in federally assisted programs. *See* Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 626 (1984).

49. ADAPT v. Skinner, 881 F.2d 1184, 1187 (3d Cir. 1989).

50. *Id.* at 1205 (Mansmann, J., concurring in part and dissenting in part).

51. *See* H.R. REP. NO. 101-485, pt. II, at 47; S. REP. NO. 101-116, at 18 (1989). Indeed, Congress took note of these deficiencies, specifically finding that "[c]urrent Federal law is also inadequate" to address "the pervasive problems of discrimination that people with disabilities are facing." H.R. REP. NO. 101-485, pt. II, at 47.

> As a remedy for segregated public services, the Rehabilitation Act and its contemporaneously enacted regulation have been practically a dead letter. We still see, in almost every school district across the country, just as many students with disabilities excluded and segregated from the public schools their siblings and neighbors attend, despite the mandatory regulation requiring otherwise.

Cook, *supra* note 26, at 394 (citing 28 C.F.R. § 300.552(c) (1990)).

52. *See* 29 U.S.C. § 794(a) (1994).

53. *See* Helen L. v. DiDario, 46 F.3d 325, 331 (3d Cir. 1995) (citing Robert L. Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 431 (1991)). "Section 504 is both ambiguous and lacking in specifics." Disabled in Action v. Sykes, 833 F.2d 1113, 1117 (3d Cir. 1987).

54. *See* Brief for the United States as Amicus Curiae in Support of Respondents, at *23-24, 1999 WL 149653, Olmstead v. L.C., 119 S. Ct. 2176 (1999) (No. 98-536). "[P]rior to enactment of the ADA, there was no settled judicial understanding concerning whether section 504 prohibited the unjustified segregation of persons with disabilities in institutions." *Id.*; *see also* P.C. v. McLaughlin, 913 F.2d 1033, 1041-42 (2d Cir. 1990) (holding that § 504 does not prohibit unjustified segregation); Jackson v. Fort Stanton Hosp. & Training Sch., 757 F. Supp. 1243, 1299 (D.N.M. 1990) (unjustified segregation not prohibited by § 504), *rev'd in part*, 964 F.2d 980 (10th Cir. 1992). For decisions that held or assumed that § 504 requires community placement in certain circumstances, see *Kentucky Ass'n for Retarded Citizens, Inc. v. Conn.*, 674 F.2d 582, 585 (6th Cir. 1982); *Garrity v. Gallen*, 522 F. Supp. 171, 213 (D.N.H. 1981); *Lynch v. Maher*, 507 F. Supp. 1268, 1278-80 (D. Conn. 1981); *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1323-24 (E.D. Pa. 1977), *aff'd in part and rev'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981).

§ 504 does not express whether isolation or segregation of persons with disabilities is a form of discrimination.[55]

Toward the end of the 1980s, Congress recognized that § 504 was "inadequate to address the pervasive problems of discrimination that people with disabilities are facing."[56] The House of Representatives addressed the need for legislation to protect individuals with disabilities.[57] Both the House of Representatives and the Senate concluded that a need remained to devise legislation to end the discrimination against individuals with disabilities and to assist these individuals in emerging from segregated living into mainstream society.[58] Moreover, Congress concluded that such legislation must contain clear and consistent enforcement standards that will address discrimination against the disabled.[59] From these determinations, the ADA was created.

C. The Americans with Disabilities Act

After extensive studies, three years of debate, and numerous hearings, Congress passed the ADA.[60] The statute is intended to eradicate discrimination against individuals with disabilities on a national level,

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55. *See* 29 U.S.C.A. § 794(a) (West 1999). In the opening provisions of the ADA, Congress found that, even though § 504 had been the law for seventeen years, "society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination . . . continue to be a serious and pervasive social problem." Cook, *supra* note 26, at 416 (quoting 42 U.S.C. § 12101(a)(2) (1994)).

56. H.R. REP. NO. 101-485, pt. II, at 47 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 329; S. REP. NO. 101-116, at 18 (1989).

57. *See* H.R. REP. NO. 101-485, pt. II, at 40.

58. *See id.* at 50; S. REP. NO. 101-116, at 20. Both Houses concluded that:

> [T]here is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life. Further, there is a need to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.

S. REP. NO. 101-116, at 20.

59. *See* S. REP. NO. 101-116, at 20; H.R. REP. NO. 101-485, pt. II, at 50. Indeed, Congress specifically observed that "[o]ver the last 20 years, civil rights laws protecting disabled persons have been enacted in piecemeal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair." H.R. REP. NO. 101-485, pt. II, at 48.

60. *See* Cook, *supra* note 26, at 414.

> After all the excitement over the . . . Americans with Disabilities Act . . . after all the letters and telegrams were sent from the grass-roots disability population . . . after eleven public hearings were held by the House of Representatives and three by the Senate, after sixty-three public forums . . . after lengthy floor debates in the Senate and in the House of Representatives . . . the disability community paused for well-deserved self-congratulations and celebrations over this legislative accomplishment.

Id. at 393-94.

in both the public and private sectors.[61] Indeed, the ADA is the government's most "extensive endeavor to address discrimination" against disabled individuals.[62] Importantly, it is the first statute in United States history to declare that segregation and institutionalization of disabled individuals are two distinct forms of discrimination.[63]

Congressional findings are listed in the opening provisions of the ADA, each of which speaks directly to the isolation of disabled individuals from the community settings that the non-disabled generally take for granted.[64] Within these findings, Congress recognized the historical discrimination of individuals with disabilities, including the isolation and segregation that disabled individuals have experienced.[65] Moreover, Congress recognized that, despite efforts to eradicate discrimination against the disabled, such treatment against this group, including institutionalization, continued.[66]

Title II of the ADA applies to "public services" furnished by governmental entities[67] and sets forth generally applicable provisions

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61. *See* 42 U.S.C. § 12101(b)(1) (1994). The ADA intends to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . ." *Id.* "The ADA is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusions and segregation." H.R. REP. NO. 485, pt. III, at 26. Other purposes of the ADA include:

> [T]o provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b)(2)-(4).

62. Olmstead v. L.C., 119 S. Ct. 2176, 2181 n.1 (1999), *affirming in part and vacating in part* 138 F.3d 893 (11th Cir. 1998).

63. *See id.*

64. *See* 42 U.S.C. § 12101(a)(1)-(9). For example, Congress explicitly noted within the findings that "historically, society has tended to isolate and segregate individuals with disabilities and . . . discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem . . . ." *Id.* § 12101(a)(2). Moreover, Congress stated that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization . . . ." *Id.* § 12101(a)(3). The congressional findings also explain that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . ." and that disabled individuals, "as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally . . . ." *Id.* § 12101(a)(5)-(6). Additionally, Congress noted that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subject to a history of purposeful unequal treatment . . . ." *Id.* § 12101(a)(7).

65. *See id.* § 12101(a)(2); *see also supra* note 64 and accompanying text (summarizing the congressional findings within Title II of the ADA).

66. *See* 42 U.S.C. § 12101(a)(3), (5); *see also supra* note 64 and accompanying text.

67. *See generally* 42 U.S.C. §§ 12131-12165.

that apply to any "public entity."[68] The basic anti-discrimination rule of Title II 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."[69]

As remedies for a violation of Title II's prohibition of discrimination, Congress referred to the rights, procedures, and remedies generally available for individuals alleging discrimination under § 504.[70] Moreover, Congress specifically entrusted the Attorney General with the authority and responsibility to promulgate the regulations necessary to further define and implement the anti-discrimination mandate of Title II.[71] Congress additionally required that the Attorney General's regulations be consistent with the coordination regulations applicable under § 504.[72] Accordingly, the Attorney General largely patterned Title II's regulations after the regulations set forth in § 504.[73] Because

68. *See id.* §§ 12131-12134. A public entity includes state and local governments as a whole and particular departments or agencies of these governments. *See id.* § 12131(1). Title I of the ADA applies to discrimination in employment settings. *See id.* §§ 12111-12117. Title III bans discrimination in public accommodations. *See id.* §§ 12181-12189. Because *Olmstead* deals primarily with Title II of the ADA, the discussion here will focus only on this section.

69. *Id.* § 12132. The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." *Id.* § 12102(2). A "qualified individual with a disability" means "an individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2). To show a violation of § 12132, an individual must demonstrate that: (1) he or she is a qualified individual with a disability; (2) that he or she was excluded from participation in, or denied the benefits of, some public entity's services, programs, or activities, or was otherwise discriminated against; and (3) such discrimination was due to his or her disability. *See* Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach, 846 F. Supp. 986, 990 (S.D. Fla. 1994).

70. *See* 42 U.S.C. § 12133.

71. *See id.* § 12134(a). Because Title II does not identify all the forms of discrimination that the section is intended to prohibit, the Attorney General's regulations necessarily set forth the forms of prohibited conduct. *See* H.R. REP. NO. 101-485, pt. III, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 475. Congress intended that the regulations under Title II incorporate interpretations of the term discrimination set forth in Titles I and III of the ADA to the extent that they do not conflict with the coordination regulations promulgated under § 504. *See id.*

72. *See* 42 U.S.C. § 12134(b). The Attorney General's regulations are to be consistent with § 504 with the exception of program accessibility, existing facilities, and communications issues. *See id.* One of § 504's regulations requires all recipients of federal funds to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d) (1999). Moreover, because the ADA regulations were to be patterned after the § 504 regulations, § 504 regulations remain controlling law. *See* Helen L. v. DiDario, 46 F.3d 325, 332 (3d Cir. 1995). This is supported by the legislative history of the ADA, which illustrates that Congress endorsed the coordination regulations of § 504 of the Rehabilitation Act. *See* S. REP. NO. 101-116, at 44 (1989).

73. *See Helen L.*, 46 F.3d at 331.

Congress directed the Attorney General to give meaning to Title II's broad prohibition on discrimination in public services, the regulations are entitled to substantial deference and are "given controlling weight," unless they are "arbitrary, capricious, or manifestly contrary to the statute."[74]

The Attorney General's regulations require integrated services for the disabled and modifications of existing programs to cater to disabled individuals.[75] One regulation states, "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[76] The Department of Justice interpreted this as requiring community-based placement of institutionalized individuals when the state's own professionals have recommended such a placement.[77] Another regulation requires public entities to make reasonable modifications to existing programs in order to avoid discrimination, unless such modifications "would fundamentally alter the nature of the service, program, or activity."[78] Such "fundamental alteration" of a state's programs or activities for the disabled may arise as a defense when the cost to the state for providing the service or modification in services is substantial, thereby threatening the ability of the state to provide other services to individuals with disabilities.[79]

D. Helen L. v. DiDario

One of the first cases to address the effect of the ADA and its integration regulation with respect to a state government's treatment of disabled patients was *Helen L. v. DiDario*.[80] In *Helen L.*, a forty-three

74. *Id.* at 331-32 (quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)).

75. *See generally* 28 C.F.R. § 35.130 (1999) (outlining requirements of public entities for providing equal opportunities and services to qualified individuals with disabilities).

76. *Id.* § 35.130(d). This regulation is referred to as the "integration regulation." *See* Olmstead v. L.C., 119 S. Ct. 2176, 2177 (1999), *affirming in part and vacating in part* 138 F.3d 893 (11th Cir. 1998). The Attorney General has consistently interpreted "the most integrated setting appropriate" to be "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. pt. 35, app. A, at 487.

77. *See* Susanne Brackley, *U.S. Supreme Court to Decide Case Regarding Treatment of Mentally Disabled*, 5 N.Y. HEALTH L. UPDATE 3, 3 (1999).

78. 28 C.F.R. § 35.130(b)(7). This will be referred to as the "fundamental alterations" defense.

79. *See, e.g.*, Helen L. v. DiDario, 46 F.3d 325, 337 (3d Cir. 1995); *see also infra* Part III.B.1-2 (discussing the fundamental alterations defense in the lower courts' opinions in *Olmstead*); *infra* Part III.C.1.b (explaining the Supreme Court's construction of the fundamental alterations defense in *Olmstead*).

80. Helen L. v. DiDario., 46 F.3d 325, 337 (3d Cir. 1995).

year old mother contracted meningitis, became disabled, and, as a result, resided at the Philadelphia Nursing Home.[81] The State's treatment professionals evaluated the plaintiff and determined that she was eligible for home-based services.[82] Because of a lack of funding, however, the plaintiff was placed on a waiting list for home-based services and remained in the nursing home.[83] The plaintiff then filed suit in federal court against the Pennsylvania Department of Public Welfare ("DPW"), alleging that her unnecessary confinement to the nursing home violated the integration regulation of Title II of the ADA.[84]

The district court held that the DPW denied the plaintiff attendant care services because it lacked the funds, not because the plaintiff had a disability.[85] The court noted that the record failed to demonstrate that the plaintiff had been denied the requested services because of her disability.[86]

After reviewing the congressional findings, the legislative history and the Department of Justice's regulations and interpretations of the ADA, the Third Circuit concluded that the regulations of the ADA clearly included acts of unnecessary segregation in Title II's definition of discrimination against the disabled.[87] In doing so, the court rejected the DPW's argument that in order for the plaintiff to establish a claim under Title II, she must prove that she had been discriminated against by receiving disparate treatment as compared to her non-disabled counterparts.[88]

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81. *See id.* at 328. Because the Philadelphia Nursing Home was a public entity that provided services to the disabled community, it was required to comply with the requirements of Title II of the ADA. *See id.* at 339.

82. *See id.* at 329.

83. *See id.*

84. *See id.* at 328.

85. *See id.* at 329.

86. *See id.*

87. *See id.* at 333. The court observed that the regulations promulgated under the ADA were patterned after the coordination regulations of § 504 and that the § 504 regulations have the force of law because the ADA extends § 504's anti-discrimination principles to public entities. *See id.* at 332. Moreover, the legislative history of the ADA illustrates that Congress agreed with the coordination regulations promulgated under § 504 and that the prohibition on discrimination on the basis of disability set out in the regulations for § 504 is applicable to all programs and activities under Title II of the ADA. *See id.*

88. *See id.* at 335-36. The court explained that "[i]f Congress [in creating the ADA] were only concerned about disparate treatment of the disabled as compared to their nondisabled counterparts," Congress' statement that "'discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization'" would be "a non-sequitur, as only disabled people are institutionalized." *Id.* at 336 (citing 42 U.S.C. § 12101(3) (1994)).

The court then addressed the DPW's assertion that although home-based treatment was the most integrated setting appropriate for the plaintiff, it could not provide this setting because doing so would "fundamentally alter" the program's services.[89] The court rejected the DPW's "fundamental alterations" defense and observed that providing integrated services is essential to accomplishing the purposes of both § 504 and Title II of the ADA.[90] The court noted that the goal of the ADA is to create a community in which the disabled participate and that "separate-but-equal" services do not accomplish the goal.[91] Moreover, even though providing segregated services to the disabled may cost less and be easier to administer, such segregation is not justifiable under either § 504 of the Rehabilitation Act or Title II of the ADA.[92]

Finally, the court held that because the State of Pennsylvania chose to provide services to the plaintiff under the ADA, it must do so in a manner that comports with the requirements of the ADA.[93] The court concluded that Pennsylvania's unnecessary confinement of the plaintiff to a nursing home, instead of providing home-based services, violated Title II of the ADA.[94]

The Supreme Court denied certiorari in *Helen L.*[95] It did, however, grant certiorari and decide the similar case of *Olmstead v. L.C.*, which addressed whether Title II of the ADA requires states to place disabled individuals in community-based settings when such programs would provide more appropriate treatment than the traditional segregated institutionalization.[96]

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89. *See id.* at 337.

90. *See id.* at 338-39.

91. *See id.* The goal of the ADA is to "eradicate the 'invisibility of the handicapped' . . . separate-but-equal services do not accomplish this central goal and should be rejected." *Id.* (citing H.R. REP. NO. 101-485, pt. III, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473 (quoting ADAPT v. Skinner, 881 F.2d 1184, 1187 n.3 (3d Cir. 1989))).

92. *See id.* "'The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under Section 504 of the Rehabilitation Act or under [Title II of the ADA].'" *Id.* (quoting testimony from the H.R. REP. NO. 101-485, pt. III, at 50).

93. *See id.* at 339.

94. *See id.* at 327.

95. *See id.* at 339; Pennsylvania Secretary of Public Welfare v. Idell S., 516 U.S. 813 (1995).

96. *See* Olmstead v. L.C., 119 S. Ct. 2176 (1999), *affirming in part and vacating in part* 138 F.3d 893 (11th Cir. 1998); Brackley, *supra* note 77, at 3.

III. DISCUSSION

A. The Facts

L.C., a mentally retarded woman who had been diagnosed with schizophrenia,[97] filed an action to challenge her continued confinement at the Georgia Regional Hospital at Atlanta ("GRH-A"), a state mental institution.[98] L.C. was hospitalized for mental illness, but her psychiatric symptoms had been stabilized since 1993 when her doctors determined that she could appropriately be treated in a community, residential setting.[99] The State of Georgia, however, refused to transfer L.C. to the appropriate community-based treatment setting.

Soon after L.C. filed her claim, the court granted the motion of E.W. to intervene as plaintiff.[100] E.W. was a mentally retarded in-patient at GRH-A, who had been diagnosed with a variety of psychiatric disorders.[101] E.W.'s team of psychiatric professionals also had determined that she qualified for community-based treatment and that the GRH-A did not meet her needs.[102] Again, the State of Georgia refused to provide E.W. with community-based treatment.

Both plaintiffs alleged that the State had unnecessarily confined them to a hospital rather than placing them in an integrated community-based setting and that this constituted unlawful discrimination under Title II of the ADA.[103] As such, the plaintiffs sought to be released from GRH-A and to receive community-based treatment from qualified professionals.[104]

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97. *See* L.C. v. Olmstead, 1997 WL 148674, at *1 (N.D. Ga. Mar. 26, 1997), *aff'd*, 138 F.3d 893 (11th Cir. 1998), *aff'd in part and vacated in part*, 119 S. Ct. 2176 (1999). L.C. has lived more than half of her life, since the age of 14, in Georgia state institutions. *See* Brief for Respondents in Olmstead v. L.C., 1999 WL 144128 at *7, 119 S. Ct. 2176 (1999) (No. 98-536). At the time she filed her initial complaint, L.C. had been confined for three years in GHR-A, a locked state psychiatric hospital, with more than 60 other persons, most of whom are in acute psychiatric crisis. *See id.*

98. *See L.C.*, 1997 WL 148674, at *1. Plaintiff named as defendants the Commissioner of the Georgia Department of Human Resources, the Superintendent of GRH-A, and the Executive Director of the Fulton County Regional Board, which is the body responsible for providing mental health and mental retardation services in Fulton County (collectively "the State"). *See id.*

99. *See id.*; *see also* Brief for Respondents, *supra* note 97, at *6.

100. *See L.C.*, 1997 WL 148674, at *1.

101. *See id.*

102. *See* Brief for Respondents, *supra* note 97, at *7. The professional staff "knew that E.W. did not need to be institutionalized to receive appropriate treatment." *Id.* In 1995, a staff psychologist recommended that E.W. be placed in another environment so that she could "climb out of her depression" and determined that the community was an appropriate setting for her. *Id.*

103. *See L.C.*, 1997 WL 148674, at *1.

104. *See id.*

B. The Lower Court Decisions in Olmstead v. L.C.

1. The District Court

The United States District Court for the Northern District of Georgia granted partial summary judgment for the plaintiffs and ordered that each be placed in a community-based treatment setting.[105] The court rejected the State's argument that the plaintiffs had been retained at GRH-A due to a lack of funding for community placement and not "by reason of" their disabilities.[106] It concluded that the unnecessary institutional segregation of the plaintiffs and the failure to place them in the appropriate treatment program constituted a violation of Title II of the ADA, "which cannot be justified by a lack of funding."[107]

To support these conclusions, the court considered the language and the legislative history of the ADA, which specifically states that "segregation" is a "form of discrimination" under the ADA "that Congress intended to eliminate."[108] The court also considered the Attorney General's regulations for Title II of the ADA and noted that the integration regulation plainly prohibited unnecessary institutional segregation.[109] The court then concluded that the state's unnecessary confinement of the plaintiffs constituted discrimination.[110]

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105. *See id.* at *4. The defendants claimed that the plaintiffs' claims were moot because the State placed L.C. into a community-based setting during this court proceeding. *See id.* at *2. L.C., however, claimed that she was not receiving "the services intended to be" rendered to her and due to her history of repeated institutional hospitalizations over the past years, the court found that a significant threat existed that L.C. would again be placed in GRH-A. *Id.* Therefore, both the trial court and appellate court explicitly stated that the questions presented to the court were "not moot because they are 'capable of repetition, yet evading review.'" *Id.* (quoting Sultenfuss v. Snow, 35 F.3d 1494, 1498 n.5 (11th Cir. 1994)). Moreover, E.W. remained confined in GRH-A, which the defendants claimed resulted from a lack of funding. *See id.* The court rejected this argument and, therefore, held that her claim also was not moot. *See id.* at *3. Plaintiffs also alleged that the defendants failed to provide them with appropriate treatment, "habilitation and freedom from undue restraint," which violated the Fourteenth Amendment of the United States Constitution. *Id.* at *2. The court rendered moot the plaintiffs' claims that their unnecessary institutionalization violated the Due Process Clause as a result of its grant of summary judgment to the plaintiffs on the ADA claim. *See id.* at *4-5.

106. *See id.* at *3.

107. *Id.*

108. *Id.* The court considered the specific congressional findings located within the opening provisions of Title II of the ADA. *See id.*; *see also* 42 U.S.C. §§ 12101(a)(2), (3), (5) (1994); *supra* Part II.C (discussing Title II of the ADA and its prohibitions on discrimination). The court also cited the testimony of Senator Harkin, floor manager of the ADA in the Senate, who stated that the statute "guarantees individuals with disabilities the right to be integrated into the economic and social mainstream of society; segregation and isolation by others will no longer be tolerated." *L.C.*, 1997 WL 148674, at *3 n.2 (citing 135 CONG. REC. 19803 (1989)).

109. *See L.C.*, 1997 WL 148674, at *3 (citing 28 C.F.R. § 35.130(d) (1997)).

110. *See id.* The court did not address whether such discrimination of the plaintiffs was "by

The court also rejected the State's reliance on the fundamental alterations defense.[111] Specifically, the State argued that requiring the immediate transfer of the plaintiffs to community-based treatment centers would result in an increase in cost to the State and, thus, would constitute a fundamental alteration of the services the State provided to individuals with disabilities.[112] The court, however, concluded that the defendants had failed to show that providing community-based services to the plaintiffs would result in a fundamental alteration of the services that the State provided.[113] The court rejected the notion that the State may rely on a "cost based" defense when faced with a claim under Title II of the ADA.[114] The court ordered the State to comply with the ADA by providing all of the necessary services to L.C. and E.W.[115]

2. The Court of Appeals

The Eleventh Circuit Court of Appeals affirmed the district court's finding that the State had violated the ADA's integration requirement by confining the plaintiffs in a segregated institution instead of treating "them in an integrated community-based program."[116] The Eleventh Circuit, however, disagreed with the trial court's complete rejection of the fundamental alterations defense for states.[117] Consequently, the Court of Appeals remanded the "case to the district court for further findings related to the State's defense" that the cost of relief sought by L.C. and E.W. would "fundamentally alter the nature of the service, program or activity."[118]

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reason of . . . disability." *Id.* According to the court, however, its conclusion that the unnecessary confinement of the plaintiffs in GRH-A constitutes discrimination under the ADA rendered the State's argument that the treatment was not "by reason of . . . disability" irrelevant. *Id.* at *3-4.

111. *See id.* at *4; *see also supra* Part II.C (discussing the fundamental alterations defense).

112. *See L.C.*, 1997 WL 148674, at *4.

113. *See id.* To support this finding, the court cited *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir. 1995), and similarly observed that the State not only had existing programs to provide services within the community but that these community-based services also cost less than the institutional settings in which the plaintiffs had lived. *See id.* The trial record showed that "on an annual basis, institutional care for the mentally disabled costs more than twice as much as community care." *Id.* at *4 n.4.

114. *See id.* at *4. The court considered the ADA's legislative history, and found that "[t]he 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." *Id.*

115. *See id.* The court ordered the State to maintain L.C.'s placement in a community-based setting and required the State to place E.W. into a community-based setting. *See id.*

116. L.C. v. Olmstead, 138 F.3d 893, 895 (11th Cir. 1998), *aff'd in part and vacated in part*, 119 S. Ct. 2176 (1999).

117. *See id.*

118. *Id.* (quoting 28 C.F.R. § 35.130(b)(7) (1997)). On remand, the district court rejected the

On appeal, the State argued that the ADA was designed to prevent states from denying individuals with disabilities the services and opportunities offered to healthy, non-disabled individuals, and that the ADA did not apply to the present situation because the services at issue were available only to disabled individuals.[119] The Eleventh Circuit found this argument specious and emphasized that both the plain language and the legislative intent of the ADA provide proof that Congress sought to eliminate the segregation of disabled individuals from the community at large.[120] The court further noted that Congress explicitly considered the provision of segregated services to the disabled a form of discrimination prohibited by the ADA.[121]

Finally, the Eleventh Circuit rejected the State's argument that the State denied the plaintiffs community treatment because it lacked the funds and not "by reason" of their disabilities.[122] Consequently, the court held that the plaintiffs' claims should not fail.[123] The court explained, "the absence of malevolent motive does not convert a facially discriminatory policy into a neutral policy."[124] The Eleventh

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State's fundamental alterations defense. *See* Olmstead v. L.C., 119 S. Ct. 2176, 2185 n.7 (1999), *affirming in part and vacating in part* 138 F.3d 893 (11th Cir. 1998). "The court concluded that the annual cost to the State of providing community-based treatment to L.C. and E.W. was not unreasonable in relation to the State's overall mental health budget." *Id.*

119. *See L.C.*, 138 F.3d at 896.

120. *See id.* The court noted:

> The ADA does not only mandate that individuals with disabilities be treated the same as persons without such disabilities. Underlying the ADA's prohibitions is the notion that individuals with disabilities must be accorded reasonable accommodations *not* offered to other persons in order to ensure that individuals with disabilities enjoy "equality of opportunity, full participation, independent living, and economic self-sufficiency."

Id. at 899 (quoting 42 U.S.C. § 12101(a)(8) (1994)); *see also* Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997) (describing the basic purpose of the ADA as "ensuring that those with disabilities can fully participate in all aspects of society")). The court then adopted the Third Circuit's reasoning in *Helen L. v. DiDario*: "'[I]f Congress were only concerned about disparate treatment of the disabled as compared to their non-disabled counterparts,' then Congress' statement that 'discrimination against individuals with disabilities persists in such areas as . . . institutionalization' would be a non sequitur as only disabled persons are institutionalized." *Id.* at 901 (quoting Helen L. v. DiDario, 46 F.3d 325, 336 (3d Cir. 1995)).

121. *See id.* at 898. Specifically, the court stated, "[c]ertainly, the denial of community based placements to individuals with disabilities such as L.C. and E.W. is precisely the kind of segregation that Congress sought to eliminate." *Id.*

122. *See id.* at 902.

123. *See id.*

124. *Id.* (comparing Title II of the ADA to Title VII of the Civil Rights Act and quoting International Union, UAW v. Johnson Controls, 499 U.S. 187, 199 (1991)). The court explained that even if the State had failed to place L.C. and E.W. into community-based treatment because it lacked funds to do so, "this motive does not lessen the 'discriminatory character' of their segregation." *Id.*

Circuit, however, recognized that a state has a defense to its duty to provide services to a disabled individual in the most integrated setting appropriate.[125] Title II regulations require states to make reasonable modifications but not to make fundamental alterations.[126] The court interpreted the fundamental alterations defense to allow a cost-based rationale "only in the most limited of circumstances."[127] It noted that such a defense would necessarily fail unless the state can prove that requiring it to expend additional funding to provide a disabled individual with the most integrated setting appropriate "would be so unreasonable given the demands of the State's mental health budget that it would fundamentally alter the service it provide[d]."[128]

C. The Supreme Court Decision

1. The Majority Opinion

In a 6-3 decision, the majority opinion, written by Justice Ginsburg, affirmed the Eleventh Circuit's conclusion that unjustified isolation of disabled individuals constitutes discrimination under Title II of the ADA.[129] The majority, however, recognized the States' need to maintain a large range of facilities for the treatment of a variety of mentally disabled individuals and "the State's obligation to administer

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125. *See id.* at 903.

126. *See id.*

127. *Id.* at 902; *see also* Olmstead v. L.C., 119 S. Ct. 2176, 2188 (1999), *affirming in part and vacating in part* 138 F.3d 893 (11th Cir. 1998) (describing the Eleventh Circuit's construction of the fundamental alterations defense).

128. *L.C.*, 138 F.3d at 905. The court of appeals remanded the case because it appeared that the trial court "had entirely ruled out a 'lack of funding' justification." *Olmstead*, 119 S. Ct. at 2184. The appellate court instructed the district court to consider the following factors when determining if the State had met its burden of establishing a "fundamental alterations" defense:

> (1) whether the additional expenditures necessary to treat L.C. and E.W. in community-based care would be unreasonable given the demands of the State's mental health budget; (2) whether it would be unreasonable to require the State to use additional available Medicaid waiver slots, as well as its authority under Georgia law to transfer funds from institutionalized care to community-based care, to minimize any financial burden on the State; and (3) whether any difference in the cost of providing institutional or community-based care will lessen the State's financial burden.

L.C., 138 F.3d at 905.

129. *See Olmstead*, 119 S. Ct. at 2181. The majority opinion, written by Justice Ginsberg, was joined by Justices Stevens, O'Connor, Souter, Kennedy, and Breyer. *See id.* at 2179-80. Justice Stevens, however, did not agree with the majority's construction of the fundamental alterations defense and wrote a concurring opinion on this issue. *See id.* at 2190 (Stevens, J., concurring in part and concurring in judgment). Justice Kennedy concurred in the judgment. *See id.* at 2190-94 (Kennedy, J., concurring). The dissent, written by Justice Thomas, was joined by Chief Justice Rehnquist and Justice Scalia. *See id.* at 2194 (Thomas, J., dissenting).

services with an even hand."[130] Accordingly, the majority concluded that the Eleventh Circuit's evaluation of the fundamental alterations defense unduly restricted the states.[131] The Court further stated that in evaluating such a defense, a court must consider, in view of all the resources available to a state, "the cost of providing community-based care to the" disabled individual, the range of services provided to others with mental disabilities, and the state's obligation to deliver those services in an equal fashion.[132]

a. Unnecessary Institutionalization Is Discrimination Under the ADA

The majority held that undue institutionalization qualifies as discrimination "by reason of . . . disability."[133] In so holding, the majority particularly rejected the State's argument that the State did not discriminate against L.C. and E.W. within the meaning of the ADA because it did not deny them community placement "by reason of" their disabilities.[134] To support this conclusion, the majority considered the amicus brief filed by the Department of Justice, in which the Department advocated that unnecessary institutionalization is discrimination within the meaning of both § 504 and Title II of the ADA.[135] The Court noted that it defered to the views of the Department of Justice and that courts may resort to the Department's views for guidance.[136]

Moreover, the Court rejected the State's argument that discrimination requires the unequal treatment of similarly situated individuals in a different statutorily described class and that plaintiffs did not identify such a comparison class of individuals who were given preferential treatment.[137] According to the majority, Congress intended the ADA's

130. *Id.* at 2185.

131. *See id.*

132. *Id.* The Supreme Court remanded the case for further consideration of the appropriate relief for the plaintiff, given the range of facilities the defendant maintains "for the care and treatment of persons with diverse mental disabilities, and the [state's] obligation [to] administer services with an even hand." *Id.*

133. *Id.* at 2185.

134. *See id.* at 2186.

135. *See id.* at 2185-86 n.9. The majority cited to a number of briefs for the United States in which the Department of Justice stated that institutionalization without a permissible reason violates Title II of the ADA and § 504 if the institutionalization is supported by federal funds. *See id.* at 2186 n.9.

136. *See id.* at 2186 (quoting Bragdon v. Abbott, 524 U.S. 624, 642 (1998)).

137. *See id.*; *see also supra* note 40 and accompanying text (discussing Title VII of the Civil Rights Act and the concept of disparate treatment).

definition of discrimination to be more comprehensive.[138] Even so, the majority illustrated that when the State's definition of discrimination was applied to the plaintiffs' case, discrimination under Title II of the ADA existed.[139]

To illustrate that Congress intended the definition of discrimination to extend beyond the traditional definition, the majority considered earlier statutory measures taken to protect individuals with disabilities from discriminatory treatment, each of which enhanced the earlier measures used to secure the disabled an opportunity to enjoy the benefits of community living.[140] The Court began with the Developmentally Disabled Assistance and Bill of Rights Act ("DDABRA"), which provided in hortatory terms that states should provide an individual with developmental disabilities the least restrictive setting for that individual's personal liberty.[141] Section 504 of the Rehabilitation Act expanded to "mandatory language to proscribe discrimination against people with disabilities" when it stated, "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, or denied the benefits of, or be subjected to the discrimination under any program or activity receiving Federal financial assistance."[142] The majority then considered the congressional findings within Title II of the ADA and concluded that ultimately, when Congress enacted the ADA in 1990, Congress required all public entities to refrain from discrimination.[143] Moreover, Congress explicitly stated within the statute that "unjustified 'segregation' of persons with disabilities" is a form of discrimination.[144] As such, the majority found

138. *See Olmstead*, 119 S. Ct. at 2186. The Court noted that "[t]he dissent is driven by the notion that 'this Court has never endorsed an interpretation of the word 'discrimination' that encompassed disparate treatment among members of the same protected class.'" *Id.* at 2186 n.10 (quoting Justice Thomas' dissenting opinion). The majority, however, refuted the dissent's argument by citing cases in which the Court endorsed a definition of discrimination that involved a member of a particular protected group who "has been favored over another member of that same group." *Id.* at 2186 n.10 (citing Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 76 (1998); O'Conner v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996); Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025, 1032 (1980)).

139. *See id.* at 2187.

140. *See id.* at 2186-87.

141. *See id.* at 2186.

142. *Id.* at 2186-87 (quoting 29 U.S.C. § 794 (1976)).

143. *See id.* at 2187.

144. *Id.* (quoting 42 U.S.C. §§ 12101(a)(2) (1994), which states the congressional findings of the ADA). The majority also cited to § 12101(a)(3) and (5), each of which refers to institutionalization as a form of discrimination against people with disabilities. *See id.*

that unjustified institutional isolation of individuals with disabilities clearly constituted discrimination under the ADA.[145]

The majority also found that unnecessary institutionalization of individuals with disabilities results in dissimilar treatment of such individuals vis-à-vis a different group.[146] Specifically, the Court determined that dissimilar treatment of mentally disabled individuals occurs when the individual who qualifies for community placement is unjustly institutionalized because he or she must, as a result of his or her disability, give up participation in community life in order to receive needed medical assistance and services.[147] The Court considered this dissimilar treatment of the institutionalized disabled individuals in comparison to those without mental disabilities who do not have to relinquish participation in community life to receive medical services.[148]

The Court emphasized that nothing in the ADA requires or even allows the transfer of a disabled individual from an institutional setting to a community-based setting if he or she does not qualify for the transfer.[149] The majority also observed that a state "may rely on the reasonable assessments of its own" treatment professionals to determine whether the disabled individual "meets the essential eligibility requirements" to live in a community-based setting.[150] If the professionals determine that the individual does not qualify for the community-based treatment, the state has no obligation to make such a transfer.[151] Finally, the Court made clear that even if the state's treatment professionals determine that an individual is qualified for community-based treatment, the state may not impose community

145. *See id.*

146. *See id.*

147. *See id.*

148. *See id.* The Court further explained that dissimilar treatment of a disabled individual also occurs when an individual is unnecessarily institutionalized because such confinement perpetuates the unwarranted assumptions that the individual is incapable of participation in community life. *See id.* Moreover, this unnecessary confinement diminishes the everyday life activities of the disabled, such as social life, family relations, ability to receive a higher education, and ability to be economically independent. *See id.*

149. *See id.* The Court stated that "[a]bsent such qualification, it would be inappropriate to remove a patient from the more restrictive setting." *Id.* at 2188.

150. *Id.* "Courts normally should defer to the reasonable judgments of public health officials." *Id.* (quoting School Bd. of Nassau County v. Arline, 480 U.S. 273, 288 (1987)).

151. *See id.* (quoting 28 C.F.R. § 35.130(d) (1998), containing the ADA regulations promulgated by the Attorney General).

treatment on the individual if that individual does not desire such a transfer.[152]

b. The State's Fundamental Alterations Defense

Despite the fact that unnecessary institutionalization constitutes discrimination under the ADA, the Court noted that the State's obligation to transfer a disabled individual to a community-based setting is not absolute.[153] The State may decline to place the qualified individual in a community-based setting if the transfer would "entail a 'fundamental alteration' of the State's services and programs."[154] The Court construed the fundamental alterations defense to allow a state to show that, in allocating its resources, immediate placement for the disabled individual would be inequitable, given the responsibility of a state to care for and provide services to a large number of disabled individuals.[155]

By construing the fundamental alterations defense in this way, the Court rejected the Eleventh Circuit's interpretation that the defense is available to the states only in very limited circumstances.[156] The Court stated that the Eleventh Circuit's construction of the defense would "leave the State virtually defenseless" because it is unlikely that states could ever prevail if the cost of placing one or two mentally disabled individuals into community treatment is measured for reasonableness against the state's entire mental health budget.[157] Moreover, the Court noted that under its interpretation of the "fundamental alterations"

152. *See id.* "Nothing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept." *Id.* (quoting 28 C.F.R. § 35.130(e)(1)).

153. *See id.*

154. *Id.* (quoting 28 C.F.R. § 35.130(b)(7)).

155. *See id.*

156. *See id.* (citing L.C. v. Olmstead, 138 F.3d. 893, 902 (11th Cir. 1998)). The majority's interpretation of the fundamental alterations defense grants the State more "leeway than the courts below understood the . . . defense to allow." *Id.* at 2189. According to the Court, this "leeway" is necessary because the state provides for a wide variety of disabled individuals with changing needs. *See id.* For example, some individuals with disabilities may qualify for community-based treatment, and then later require the more restrictive environment of an institution. *See id.* Therefore, the state cannot simply close institutions as its residents are placed into community-based treatment settings. *See id.* The Court specifically noted that if a state can show that it had developed a comprehensive treatment plan for an institutionalized disabled individual to be placed in a community setting, which was not based on the state's desire to keep up the population of residents within the institution, the reasonable modifications standard would be satisfied. *See id.* Therefore, the state would not have committed discrimination "by reason of disability" by requiring the individual to wait a short period of time for a community-based placement to open up. *Id.* at 2190.

157. *Id.* at 2188.

defense, a state may prevail by showing that the state has incurred additional expenses as a result of funding community placements while not being able to save funds by closing institutions.[158]

In conclusion, the majority held that under Title II of the ADA, a state is required to place an institutionalized disabled individual into a community-based setting when the state's treatment professionals have determined that the community-based setting is appropriate for the disabled individual, and the disabled individual does not oppose the community-based treatment setting.[159] The state, however, is mandated to place the individual in community-based treatment only when it can provide the transfer through reasonable accommodations, taking into account the resources available to the state and the needs of other individuals with mental disabilities.[160]

2. The Dissenting Opinion

In his dissent, Justice Thomas argued that a state's decision to exclude temporarily an individual from community placement does not amount to discrimination in the traditional sense of the word.[161] According to the dissent, the majority interpreted the term discrimination erroneously by encompassing disparate treatment of members of the same class while discrimination actually requires a showing that the "claimant received differential treatment vis-a-vis members of a different group on the basis of a statutorily described characteristic."[162] Moreover, Justice Thomas noted that the majority's conclusion will impose significant federalism costs by instructing the states on how to deliver public services.[163] The dissent explained that the fundamental alterations defense will be of little assistance to states who will be subject to law suits every time the state is financially unable to immediately place a qualified disabled individual in a community-based setting.[164]

a. The Majority's Erroneous Definition of Discrimination

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, disagreed with the majority's conclusion that unnecessary

158. *See id.* at 2184.
159. *See id.*
160. *See id.*
161. *See id.* at 2194 (Thomas, J., dissenting).
162. *Id.* (Thomas, J., dissenting).
163. *See id.* at 2198 (Thomas, J., dissenting).
164. *See id.* at 2199 (Thomas, J., dissenting).

institutionalization constitutes discrimination under Title II of the ADA.[165] According to the dissent, temporary exclusion from community-based treatment does not amount to discrimination, nor had the respondents proven that the State discriminated against them by reason of their disabilities.[166]

First, the dissent accused the majority of endorsing an interpretation of the word discrimination that improperly encompasses disparate treatment of members of the same protected class.[167] In finding the majority's interpretation to be inaccurate, the dissent relied on the dictionary definition of discrimination, the plain language of the ADA and § 504 and court decisions construing the various statutory prohibitions of discrimination.[168] The dissent found that the common understanding of discrimination requires a showing that the individual received unequal treatment vis-à-vis members of a similarly situated group based on a characteristic that is statutorily described.[169]

In support of this conclusion, Justice Thomas considered Title VII of the Civil Rights Act of 1964 and § 504 in an attempt to show that the various statutory prohibitions against discrimination have endorsed the dissent's definition of discrimination.[170] Under Title VII, which bans employment discrimination, it is illegal for an employer to discriminate against a person "with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[171] The Supreme Court has construed the purpose of Title VII as "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[172] According to the dissent, then, a finding of discrimination must involve a comparison of "otherwise similarly

165. *See id.* (Thomas, J., dissenting).

166. *See id.* (Thomas, J., dissenting).

167. *See id.* at 2194 (Thomas, J., dissenting).

168. *See id.* at 2194-95 (Thomas, J., dissenting). Justice Thomas quotes the dictionary definition of "discrimination" as support for the traditional definition of the word discrimination. Discrimination is defined as "to 'distinguish,' to 'differentiate,' or to make a 'distinction in favor or against, a person or a thing based on the group, class, or category to which that person or thing belongs rather than on individual merit.'" *Id.* at 2194 (Thomas, J., dissenting) (quoting RANDOM HOUSE DICTIONARY 564 (2d ed. 1987)).

169. *See id.* at 2194 (Thomas, J., dissenting); *see also supra* note 40 and accompanying text (discussing Title VII of the Civil Rights Act and the concept of disparate treatment).

170. *See Olmstead*, 119 S. Ct. at 2194-96 (Thomas, J., dissenting).

171. *Id.* at 2195 (Thomas, J., dissenting).

172. *Id.* (Thomas, J., dissenting) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).

situated persons who are in different groups by reason of certain characteristics provided by statute."[173] To the dissent, a finding of discrimination under the ADA involves the comparison of the mentally disabled plaintiffs with their non-disabled counterparts and not simply a comparison of the plaintiffs with other mentally disabled individuals.

The dissent then analyzed § 504 and concluded that it too applied the commonly understood meaning of discrimination.[174] The dissent found that under § 504, courts have limited the application of the term discrimination to a member of a protected class who has faced discrimination based on a handicap.[175] According to the dissent, the Court has ruled that § 504 requires only that states treat individuals with disabilities similarly to those without disabilities.[176]

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173. *Id.* (Thomas, J., dissenting). Courts have interpreted Title VII to disallow a plaintiff to prove "'discrimination' by demonstrating that one member of a particular protected group has been favored over another member of that same group." *Id.* (Thomas, J., dissenting). To the dissent, if such a claim were allowed, discrimination could be found "where a black employee with deficient management skills is denied in-house training by his employer (allegedly because of a lack of funding) because other similarly situated black employees are given the in-house training." *Id.* at 2198 (Thomas, J., dissenting).

174. *See id.* at 2195-96 (Thomas, J., dissenting).

175. *See id.* (Thomas, J., dissenting).

176. *See id.* (Thomas, J., dissenting). "[W]e found that § 504 required merely 'the even-handed treatment of handicapped persons' relative to those persons who do not have disabilities." *Id.* at 2196 (Thomas, J., dissenting) (quoting Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979)). To further support its definition of discrimination, the dissent cited case law construing § 504. *See id.* at 2196 (Thomas, J., dissenting). First, in *Alexander v. Choate*, 469 U.S. 287 (1985), the Court previously found no discrimination within a benefits policy that limited in-patient hospital care and that "did not 'distinguish between those whose coverage will be reduced and those whose coverage will not be on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having.'" *Olmstead*, 119 S. Ct. at 2196 (Thomas, J., dissenting) (quoting *Alexander*, 469 U.S. at 302). In *Alexander*, the Supreme Court concluded that under § 504, there is no guarantee that a State will provide one handicapped individual with equal Medicaid benefits to those of other handicapped individuals who also receive such benefits. *See id.* (Thomas, J., dissenting) (describing the holding in *Alexander*). The dissent in *Olmstead* used *Alexander* to illustrate that § 504 does not guarantee equal treatment among individuals within the same statutory class—the guarantee that the dissent accuses the majority of adopting. *See id.* at 2196 (Thomas, J., dissenting). The dissent also cited *Traynor v. Turnage*, 485 U.S. 535 (1988), in which the Court stated that "the purpose of § 504 is to guarantee that individuals with disabilities receive 'evenhanded treatment' relative to those persons without disabilities." *Olmstead*, 119 S. Ct. at 2196 (Thomas, J., dissenting). In *Traynor*, the Court upheld a regulation that provided a benefit to alcoholics with a mental disorder but excluded "primary alcoholics" from receiving the benefit. *See id.* (Thomas, J., dissenting) (quoting *Traynor*, 485 U.S. at 551). The Court noted that the regulation did "not involve a program or activity that is alleged to treat handicapped persons less favorably than nonhandicapped persons." *Id.* (Thomas, J., dissenting). In this case, the Court stated that nothing within § 504 requires that an extension of a benefit "'to one category of handicapped people also be extended to all other categories of handicapped persons.'" *Id.* (Thomas, J., dissenting) (quoting the holding in *Traynor*).

Next, the dissent argued that the majority's reliance on vague congressional findings within the ADA to conclude that unnecessary institutionalization constitutes discrimination under Title II does not show that Congress sought to alter the commonly understood definition of discrimination endorsed by the dissent.[177] According to the dissent, the congressional findings, which label institutional isolation as segregation and include this as a discriminatory practice, are meant to be used in a general sense and pertain only to matters such as access to employment, facilities, and transportation.[178] Because there is no explicit definition of these terms within the statute, the dissent urged that the term discrimination should be defined using its common meaning.[179]

Last, the dissent used statutory construction to support its definition of discrimination.[180] Title I of the ADA contains a specific definition of discrimination to be used within that particular section of the ADA.[181] Under Title I, discrimination arises when a member of a protected group is treated differently from other members of the same protected group.[182] Title II, however, does not contain a specific definition for the term discrimination.[183] Absent a specific definition of discrimination for Title II of the ADA, the dissent argued that the definition used by the majority is "a novel proposition" that is not supported by case law in similar areas of the law.[184] Thus, the dissent concluded that the majority's definition of discrimination is too broad and will allow

177. *See id.* at 2196-97 (Thomas, J., dissenting). According to Justice Thomas, "the congressional findings . . . are written in general, hortatory terms and provide little guidance to the interpretation of the specific language of § 12132." *Id.* (Thomas, J., dissenting). Section 12132 defines "discrimination" under the ADA. *See* 42 U.S.C. § 12132 (1994); *see also supra* Part III.C.1.a (discussing the majority's reliance on the congressional findings within the ADA).

178. *See Olmstead*, 119 S. Ct. at 2197 (Thomas, J., dissenting).

179. *See id.* (Thomas, J., dissenting).

180. *See id.* (Thomas, J., dissenting).

181. *See id.* (Thomas, J., dissenting). Title I, which addresses employment discrimination, contains the following definition of discrimination: "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee." *Id.* (quoting 42 U.S.C.A. § 12112(b)(1)).

182. *See id.* at 2198 (Thomas, J., dissenting).

183. *See id.* (Thomas, J., dissenting). The dissent cites to *Russello v. United States*, 464 U.S. 16 (1983), in which the Court held that "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Id.* at 2197-98 (Thomas, J., dissenting).

184. *See id.* at 2198 (Thomas, J., dissenting). The dissent accused the majority of importing the definition of discrimination used within Title I of the ADA into Title II, "by necessarily assuming that it is sufficient to focus exclusively on members of one particular group." *Id.* (Thomas, J., dissenting).

discrimination of the disabled to arise every time a state treats a disabled individual differently from another disabled individual.[185]

b. The Fundamental Alterations Defense

Next, the dissent briefly addressed the "fundamental alterations" defense available to the states.[186] It concluded that the federal government's interference with the functions of state governments would impose significant federalism costs.[187] The dissent further noted that the defense will provide little assistance to states that are subjected to law suits whenever a qualified individual requests community treatment and the state is financially unable to provide such treatment immediately.[188] According to the dissent, the Court should have left the states with the authority and responsibility to provide services to individuals with disabilities.[189]

3. Justice Stevens' Concurring Opinion

Justice Stevens agreed with the majority's conclusion that unjustified segregation of the disabled constitutes discrimination under the ADA.[190] According to Justice Stevens, however, the majority should have adopted the court of appeals' construction of the "fundamental alterations" defense.[191] To Justice Stevens, the appeals court correctly remanded the case to the district court for determination of the "fundamental alterations" defense.[192] On remand from the Eleventh Circuit's decision, the district court rejected the State's defense.[193]

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185. *See id.* (Thomas, J., dissenting). The dissent attempts to illustrate its point with an example using Title VII of the Civil Rights Act. *See id.* (Thomas, J., dissenting). According to the dissent, when the majority's definition of discrimination is applied to Title VII, discrimination could be found "where a black employee with deficient management skills is denied in-house training by his employer (allegedly because of lack of funding) because other similarly situated black employees are given the in-house training." *Id.* (Thomas, J., dissenting). To the dissent, this is much too broad a definition. *See id.* (Thomas, J., dissenting).

186. *See id.* at 2198 (Thomas, J., dissenting).

187. *See id.* (Thomas, J., dissenting).

188. *See id.* at 2199 (Thomas, J., dissenting).

189. *See id.* (Thomas, J., dissenting).

190. *See id.* at 2190 (Stevens, J., concurring in part and concurring in the judgment).

191. *See id.* (Stevens, J., concurring in part and concurring in the judgment). "If a plaintiff requests relief that requires modification of a State's services or programs, the State may assert, as an affirmative defense, that the requested modification would cause a fundamental alteration of a State's services and programs." *Id.* (Stevens, J., concurring in part and concurring in the judgment).

192. *See id.* (Stevens, J., concurring in part and concurring in the judgment).

193. *See id.* at 2190 (Stevens J., concurring in part and concurring in the judgment); *see also id.* at 2185 n.7.

Justice Stevens stated that if the district court was wrong in its conclusion, the court of appeals or the Supreme Court, in a review of that decision, was responsible for correcting the error.[194] Therefore, the majority should have simply affirmed the conclusion of the Eleventh Circuit.[195]

4. Justice Kennedy's Concurring Opinion

Justice Kennedy expressed concern that the majority's holding would result in the deinstitutionalization of mentally disabled individuals who are not qualified for community-based treatment.[196] According to Justice Kennedy, it would be a "tragic event" if the ADA were interpreted so that states had an incentive to move mentally disabled individuals out of appropriate care in institutions and into a community-care environment that provides too little supervision and aid for disabled individuals.[197] For this reason, Justice Kennedy agreed with the majority's conclusion that the courts must apply the *Olmstead* holding with great deference to the medical decisions of the professionals who determine the appropriate settings for individuals with mental disabilities.[198]

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194. *See id.* (Stevens, J., concurring in part and concurring in the judgment).

195. *See id.* (Stevens, J., concurring in part and concurring in the judgment). Justice Stevens noted that because there were not five votes for his disposition of the case, he joined Justice Ginsburg in Parts I, II and III-A of her opinion. *See id.* (Stevens, J., concurring in part and concurring in the judgment).

196. *See id.* at 2191 (Kennedy, J., concurring in the judgment). Justice Breyer joined Justice Kennedy in his concurrence. *See id.* (Breyer, J., concurring in the judgment).

> [T]he depopulation of state mental hospitals has its dark side . . . "[f]or a substantial minority . . . deinstitutionalization has been a psychiatric Titanic. Their lives are virtually devoid of 'dignity' or 'integrity of body, mind and spirit' . . . . The 'least restrictive setting' frequently turns out to be a cardboard box, a jail cell, or a terror-filled existence plagued by both real and imaginary enemies."

Id. (Kennedy, J., concurring in the judgment).

197. *See id.* (Kennedy, J., concurring in the judgment). "[S]tates 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." *Id.* at 2192 (Kennedy, J., concurring in the judgment).

198. *See id.* (Kennedy, J., concurring in the judgment). Justice Kennedy is also concerned about the federalism costs associated with "referring state decisions regarding the administration of treatment programs [for those with mental disabilities] and the allocation of resources to the reviewing authority of the federal courts." *Id.* (Kennedy, J., concurring in the judgment). For this reason, Justice Kennedy stated that it is of central importance that the courts apply *Olmstead* "with appropriate deference to the program funding decisions of state policymakers." *Id.* (Kennedy, J., concurring in the judgment). Justice Kennedy also noted that, in his opinion, a State may not be forced to create a community treatment program where a program does not currently exist because this would result in a fundamental alteration of the service, program, or policy. *See id.* at 2193 (Kennedy, J., concurring in the judgment).

Justice Kennedy also agreed with the dissent's "traditional" definition of discrimination.[199] Unlike the dissent, however, he observed that "'differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic'" could be found in L.C and E.W.'s case.[200] If the plaintiffs could show that individuals in need of psychiatric or other medical services to treat their disabilities are "subject to a more onerous condition" than are other individuals who qualify for state medical services, and if the removal of this condition would not fundamentally alter the program or require a new program to be established, the plaintiffs might be able to establish a discrimination case under the ADA.[201]

Finally, Justice Kennedy stated that, unlike the dissent, he found it relevant that Congress expressed findings that explained that discrimination against the disabled persists in areas such as institutionalization.[202] According to Justice Kennedy, however, these findings do not show that institutionalization is always a form of prohibited discrimination under the ADA.[203] Instead, the findings show only Congress' concern that segregating the mentally disabled from mainstream society *can* be discriminatory and that such discrimination is a pervasive problem.[204] Justice Kennedy observed that these findings are consistent with the definition endorsed by the dissent, which requires differential treatment of different groups.[205] Therefore, the fact

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199. *See id.* at 2192 (Kennedy, J., concurring in the judgment).

200. *Id.* (Kennedy, J., concurring in the judgment) (quoting *id.* at 2194-95 (Thomas, J., dissenting)). As a result, Justice Kennedy recommended that the case be remanded for a determination of the questions the Court posed and a determination of whether L.C. and E.W. can show a violation of 42 U.S.C. § 12132's ban on discrimination based on summary judgment materials or on any materials properly allowed by the Court. *See id.* at 2194 (Kennedy, J., concurring in the judgment).

201. *Id.* at 2192 (Kennedy, J., concurring in the judgment). Specific to the case of L.C. and E.W., Justice Kennedy outlined what they would need to show to establish discrimination under the ADA:

> [I]f respondents could show that Georgia (i) provides treatment to individuals suffering from medical problems of comparable seriousness, (ii) as a general matter, does so in the most integrated setting appropriate for the treatment of those problems (taking medical and other practical considerations into account), but (iii) without adequate justification, fails to do so for a group of mentally disabled persons (treating them instead in separate, locked institutional facilities), I believe it would demonstrate discrimination on the basis of mental disability.

Id. at 2192-93 (Kennedy, J., concurring in the judgment).

202. *See id.* at 2193 (Kennedy, J., concurring in the judgment) (citing 42 U.S.C. § 12101(a)(2), (3), (5) (1994)).

203. *See id.* (Kennedy, J., concurring in the judgment).

204. *See id.* (Kennedy, J., concurring in the judgment).

205. *See id.* (Kennedy, J., concurring in the judgment).

that L.C. and E.W. were placed in institutions does not conclusively show that Congress intended this confinement to be discriminatory under the ADA.[206]

IV. ANALYSIS

The dissent erroneously applied the "traditional" definition of discrimination to L.C and E.W's case and overlooked the more comprehensive definition of discrimination provided for in the ADA.[207] Although the ADA's definition of discrimination differs from the "traditional" definition, which requires a showing that the claimant received disparate treatment vis-à-vis members of a different group based on a statutory characteristic, the majority correctly construed the ADA's definition of discrimination as prohibiting unnecessary institutionalization.[208] Moreover, while the dissent cited § 504 to illustrate that statutory prohibitions of discrimination have only adopted the "traditional" definition of discrimination, the dissent failed to recognize that under § 504 courts have found unnecessary institutionalization to be discrimination.[209]

A. The ADA's Defintion of Discrimination: No Unnecessary Institutionalization

The majority correctly held that Title II prohibits unnecessary institutionalization and segregation of mentally disabled individuals.[210] This conclusion is evidenced by the plain language of the ADA, the Attorney General's consistent interpretation of the ADA as prohibiting unnecessary institutionalization of the disabled, and the legislative history of the ADA.[211]

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206. *See id.* (Kennedy, J., concurring in the judgment). "The issue whether respondents have been discriminated against under § 12132 by institutionalized treatment cannot be decided in the abstract, divorced from the facts surrounding treatment programs in their State." *Id.* (Kennedy, J., concurring in the judgment).

207. *See generally* 42 U.S.C. § 12101(a) (1994); *see also supra* note 64 and accompanying text (summarizing the congressional findings of Title II of the ADA).

208. *See supra* note 64 and accompanying text (noting that Congress recognized institutionalization as a form of discrimination).

209. *See supra* note 54 and accompanying text (citing cases decided under § 504).

210. *See Olmstead,* 119 S. Ct. at 2190. Although the majority briefly discussed the Department of Justice's consistent interpretation of the ADA as prohibiting unnecessary segregation and the congressional findings within Title II, it did not use the legislative history of the ADA to support the conclusion. *See id.* at 2185-87. The following discussion expands on the majority's opinion and provides further support for its conclusion that unnecessary institutionalization constitutes discrimination under the ADA. *See infra* Part IV.A-C.

211. *See infra* Part IV.A.

1. The Plain Language of the ADA

The critical language of the ADA supports the majority's conclusion that unnecessary segregation of individuals with disabilities constitutes discrimination.[212] The central anti-discriminatory rule of Title II of the ADA provides, in part: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability . . . be subjected to discrimination by any [public] entity."[213] The dissent argued that in order for an individual to be subjected to discrimination under this rule of the ADA, the disabled individual must experience uneven treatment vis-à-vis similarly situated individuals in a different group based on a statutorily described characteristic.[214] This definition of discrimination, however, overlooks the specific congressional purposes and findings contained within the ADA, each of which expands the definition of discrimination beyond the "traditional" definition endorsed by the dissent.[215]

The statutory context of Title II of the ADA includes a set of findings and standards for interpretation of the statute.[216] Within these findings, Congress explicitly stated the meaning it intended to give the term "discrimination" under Title II of the ADA.[217] Among others, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination . . . continue to be a serious and pervasive social problem." [218] Congress also found that "individuals with disabilities continually encounter various forms of discrimination, including . . . segregation,"[219] and that discrimination persists in a wide variety of contexts, including through "institutionalization."[220] These findings show that Congress intended the definition of discrimination to include the unjustified institutional segregation of the disabled.[221] Moreover, these findings illustrate that Congress did not intend to limit discrimination under the ADA to the

212. *See supra* notes 64-66 and accompanying text (summarizing the congressional findings of Title II of the ADA).

213. 42 U.S.C. § 12132 (1994).

214. *See Olmstead*, 119 S. Ct. at 2194 (Thomas, J., dissenting).

215. *See generally* 42 U.S.C. § 12101 (1994); *see also supra* notes 64-66 and accompanying text (summarizing the congressional findings of Title II of the ADA).

216. *See* 42 U.S.C. § 12101; *see also supra* notes 64-66 and accompanying text.

217. *See supra* notes 64-66 and accompanying text.

218. 42 U.S.C. § 12101(a)(2); *see also supra* notes 64-66 and accompanying text.

219. 42 U.S.C. § 12101(a)(5).

220. *See id.* § 12101(a)(3).

221. *See* Brief for the United States as Amicus Curiae in Support of Respondents, *supra* note 54, at *12.

uneven treatment of disabled individuals in comparison to their non-disabled counterparts.

The dissent argued that the congressional findings relied on by the majority are too vague to show that Congress sought to alter the traditional definition of discrimination.[222] Congress, however, included findings directly within the statute that show the specific discriminatory practices that individuals with disabilities experience.[223] None of the findings are vague; rather, they point directly to specific areas against which individuals with disabilities are discriminated.[224] Moreover, Senator Harkin, the sponsor of the ADA, explained that the purpose of the congressional findings was "to ensure once and for all that no Federal agency or judge will ever misconstrue the congressional mandate to integrate people with disabilities into the mainstream."[225] This illustrates that the congressional findings are not only clear but that federal agencies and courts should rely on them when determining what constitutes discrimination under the ADA.

2. The Attorney General's Consistent Interpretation of Title II

In addition to the congressional findings that illustrate that unnecessary segregation constitutes discrimination under the ADA, the Attorney General's consistent interpretation of the integration regulation as prohibiting unnecessary institutionalization of disabled individuals provides further support for the majority's conclusion that unnecessary institutionalization constitutes discrimination under Title II of the ADA.[226] Following Congress' direction, the Attorney General created the integration regulation, which mandates that states administer public services and programs "in the most integrated setting appropriate to the

222. *See* Olmstead v. L.C., 119 S. Ct. 2176, 2196-99 (1999) (Thomas, J., dissenting), *affirming in part and vacating in part* 138 F.3d 893 (11th Cir. 1998).

223. *See* 42 U.S.C. § 12101(a)(5); *see also supra* notes 64-66 and accompanying text.

224. *See* 42 U.S.C. § 12101(a)(3). "[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services . . . ." *Id.* Moreover, the findings explain that the goal of Title II is to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals . . . ." *Id.* § 12101(a)(8); *see also supra* notes 64-66 and accompanying text.

225. Brief for Respondents, *supra* note 97, at 17-18 (citing 135 CONG. REC. S4986 (daily ed. May 9, 1989)).

226. *See* 28 C.F.R. § 35.130(d) (1999). Unlike Title I and Title III of the ADA, Title II does not explain all the forms of discrimination prohibited. Instead, Congress instructed the Attorney General to enact regulations to implement Title II and set forth the forms of discrimination prohibited. *See* H.R. REP. NO. 101-485, pt. III, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 475; *see also* Brief for the United States as Amicus Curiae in Support of Respondents, *supra* note 54, at *7-8.

needs of qualified individuals with disabilities."[227] The Attorney General has interpreted this regulation to require states, in certain situations, to place individuals who reside in institutions into community-based services.[228]

Although the dissent argued that discrimination under Title II only occurs when states treat disabled individuals differently from their non-disabled counterparts, the Attorney General has not interpreted the integration regulation to contain such a limitation.[229] According to the Attorney General, the integration regulation applies to any services of a public entity, including services that are offered only to disabled individuals.[230] Specifically, the Attorney General has explained that the most "integrated setting" within the integration regulation is "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible."[231] This interpretation provides no requirement that the integration regulation mandate the most integrated setting only when the individual has received uneven treatment in comparison to his or her non-disabled counterparts.

The Attorney General has specifically refuted the argument that discrimination requires a showing that a disabled individual has been treated differently than a similarly situated individual in a statutorily different group.[232] According to the Attorney General, there is no single definition of discrimination; rather, the court must derive the

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227. 28 C.F.R. § 35.130(d). In the preamble of the regulations, the Attorney General defined "the most integrated setting" as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." Brief for the United States as Amicus Curiae in Support of Respondents, *supra* note 54, at *8 (quoting 28 C.F.R. pt. 35 app. A § 35.130, at 469 (1996)).

228. *See* Brief for United States as Amicus Curiae in Support of Respondents, *supra* note 54, at *8. The Attorney General explained that, in certain circumstances, the integration regulation does not mandate such placement of disabled individuals. *See id.* These circumstances arise when the disabled individual is not qualified for community treatment or when the State can show that providing community-based treatment would fundamentally alter the services it provides. *See id.*

229. *See id.* at *9.

230. *See id.* The Attorney General also noted that such an interpretation is "controlling" unless it is "plainly erroneous" or "inconsistent with the regulation." *Id.* (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)). Because the Attorney General's interpretation of the integration regulation accords with its plain language, this deferential standard is met. *See id.*

231. 28 C.F.R. § 35 app. A, at 487 (1999).

232. *See* Brief for the United States as Amicus Curiae in Support of Respondents, *supra* note 54, at *11-12. The opportunity for the Attorney General to refute this argument arose in the context of *Olmstead*. The petitioners in *Olmstead* argued that Title II's prohibition on "discrimination" based on disability requires a showing that similarly situated individuals have been treated differently and that when a state offers a service only to persons with disabilities, i.e. institutional living, such a showing of dissimilar treatment cannot be made. *See id.*

meaning of discrimination from the context of the statute in which it is provided.[233] Therefore, the Attorney General correctly concluded that, under the ADA, unnecessary isolation or segregation of disabled individuals constitutes discrimination based on disability.[234]

3. The Legislative History of the ADA

The legislative history of the ADA confirms that when Congress enacted the ADA, it understood that and intended for unjustified segregation of persons with disabilities to be a discriminatory practice prohibited by the statute.[235] Numerous statements show this understanding.[236] For example, at a hearing before the Senate Subcommittee, Attorney General Dick Thornburgh, who testified on behalf of President Bush, stated that a life of isolation is intolerable, that individuals with disabilities are often shut out of the mainstream of American life, that such individuals deserve to participate in society, and that such individuals should have access to all aspects of community life.[237] During the hearings, disabled individuals also described the brutal treatment and unnecessary isolation that occurs in institutions.[238] Additionally, many state administrators testified on the

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233. *See id.* at *12 (citing Alexander v. Choate, 469 U.S. 287 (1985)). The Attorney General also noted that the Supreme Court has stated that "the concept of discrimination is susceptible of varying interpretations." *Id.* (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284 (1978)). Moreover, the Supreme Court has also stated "the term discrimination is 'inherently' ambiguous." *Id.* (citing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592 (1983)).

234. *See id.*

235. *See* Brief for Respondents, *supra* note 97, at *25.

236. *See generally* H.R. REP. NO. 101-485, pt. III, at 26 (1990), *reprinted in* 1990 U.S.C.A.A.N. 445, 448; H.R. REP. NO. 101-485, pt. II (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 332; S. REP. NO. 101-116, at 6 (1989).

237. *See Americans with Disabilities Act: Hearing Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 195 (1989) (statement of Dick Thornburgh, U.S. Attorney General). The Attorney General stated "individuals with disabilities . . . [are] still shut out of the economic and social mainstream of American life . . . [and deserve] full participation in and access to all aspects of society." *Id.* Senator Weicker noted that:

> For years, this country has maintained a public policy of protectionism toward people with disabilities. We have created monoliths of isolated care in institutions and in segregated educational settings. It is that isolation and segregation that has become the basis of the discrimination faced by many disabled people today. Separate is not equal.

Id. at 215.

238. *See* Brief for Respondents, *supra* note 97, at *25-26 (citing *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearings before the Subcomm. on Select Education of the House Comm. On Education and Labor*, 100th Cong. 27-38 (1988)). One individual stated that "[p]eople with mental disorders have been herded into jail-like asylums . . . . Mental patients have [been] isolated, chained and beaten, and abused . . . . Our clients face exclusion from jobs, housing, and the basic rights citizens enjoy." *Id.* at *26 (citing Report on P.L. 101-

exclusion and abuse faced by individuals with disabilities who are confined to institutions.[239]

The committee reports confirm that Congress intended the ADA to ban unnecessary segregation and to include such isolation in the ADA's definition of discrimination.[240] The congressional purpose of the ADA, as declared in these reports, was to provide a "comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life . . . ."[241] One report describes "segregation as a form of discrimination prohibited by the ADA."[242] Another report stated that "the ADA . . . promises a new future of inclusion and integration, and the end of exclusion and segregation."[243] These reports show that Congress intended the ADA's definition of discrimination to encompass the isolation and segregation from mainstream society of individuals with disabilities.

Finally, the floor testimony of the congressional debates further proves that Congress intended unnecessary institutionalization to be a form of discrimination under the ADA.[244] Senator Harkin, as he introduced the ADA to Congress, explained that the ADA will not tolerate segregation and isolation of the individuals with disabilities and that the ADA exists to guarantee individuals with disabilities the right to be integrated into American society.[245] Senator Kennedy stated that the ADA is designed to end the unacceptable practices "by which disabled Americans today are segregated, excluded, fenced off from fair participation in our society by mindless biased attitudes and senseless physical barriers."[246]

336, Legislative History of the Americans with Disabilities Act, at 1161-62 (1990)).

239. *See id.* at *25-26.

240. *See id.* at *27.

241. *Id.* (citing H.R. REP. NO. 101-485, pt. II, at 22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304; S. REP. NO. 101-116, at 2 (1989)). One of the House of Representatives Reports explicitly stated that a purpose of the ADA was "to welcome individuals with disabilities fully into the mainstream of American society." *Id.* at *27 n.28.

242. S. REP. NO. 101-116, at 6. The Senate Report states "[o]ne of the most debilitating forms of discrimination is segregation . . . . Discrimination also includes exclusion, or denial of benefits, services, or other opportunities that are as effective and meaningful as those provided to others." *Id.*

243. H.R. REP. NO. 101-485, pt. III, at 26 (1990), *reprinted in* 1990 U.S.C.A.A.N. 445, 449.

244. *See* Brief for Respondents, *supra* note 97, at *30-31.

245. *See id.* at *30 (citing 135 CONG. REC. S10713 (daily ed. Sept. 7, 1989)). Senator Harkin, as he introduced the ADA, also stated that the ADA's purpose is "getting people . . . out of institutions." *Id.*

246. *Id.* (citing 135 CONG. REC. S4993 (daily ed. May 9, 1989)).

B. Courts Have Construed § 504 to Prohibit Unnecessary Segregation

To support the conclusion that discrimination under the ADA requires a showing that a disabled individual experienced unequal treatment vis-à-vis a similarly situated individual based on a statutorily described characteristic, the dissent argued that under § 504 courts have applied the "commonly understood" meaning of discrimination.[247] The dissent, however, failed to recognize that prior to the enactment of the ADA, judicial interpretations of § 504 were inconsistent. Namely, while some courts construed § 504 to require a showing of disparate treatment of different groups, other courts construed § 504 to prohibit unnecessary institutionalization of the disabled.[248] Moreover, the dissent failed to recognize that Congress sought to end this judicial confusion with the enactment of the ADA.[249]

From the time § 504 was enacted, the Department of Justice construed § 504 as prohibiting unnecessary segregation of disabled individuals.[250] The United States, both as amicus curiae in court cases brought by disabled individuals and as plaintiff, advanced this position.[251] Moreover, at least three lower-court decisions held that § 504 prohibits unnecessary segregation of disabled individuals.[252] Other courts, however, have not construed § 504 to ban unnecessary institutionalization.[253] Even so, this inconsistency in the rulings illustrates that the dissent erred when it concluded that, in order to show discrimination under § 504, the claimant must prove that he or she received differential treatment vis-à-vis members of a different group. A more accurate statement is that courts interpreting § 504 vary in

247. *See* Olmstead v. L.C., 119 S. Ct. 2176, 2196 (1999) (Thomas, J., dissenting), *affirming in part and vacating in part* 138 F.3d 893 (11th Cir. 1998).

248. *See* Brief for the United States as Amicus Curiae in Support of Respondents, *supra* note 54, at *24-25; *see also supra* note 54 (citing cases that have construed § 504 to prohibit unnecessary segregation and cases that construed § 504 not to prohibit unnecessary institutionalization).

249. *See* H.R. REP. NO. 485, pt. II, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 332; S. REP. NO. 101-116, at 20 (1989) (describing Congress' observation that the pre-ADA laws for protection of the disabled were inadequate, and that there existed a need to devise comprehensive legislation to eliminate discrimination against the disabled).

250. *See* Brief for Respondents, *supra* note 97, at *39.

251. *See id.* (citing Post Trial Memorandum of the United States, at 5-26 in Kentucky Ass'n for Retarded Citizens v. Conn., Civ. Ac. No. C-78-0157-L(A) (W.D.KY June 18, 1979); Post-Hearing Brief of Plaintiffs and Amicus Curiae United States, at 186-188 in Wyatt v. Hardin, Civ. Ac. No. 3195-N, (N.D. Ala. Feb. 18, 1979)).

252. *See* Brief for the United States as Amicus Curiae in Support of Respondents, *supra* note 54, at *24; *see also supra* note 54 (citing cases decided under § 504.)

253. *See* Brief for Petitioners, L.C. v. Olmstead, 1999 WL 54623, at *26, 119 S. Ct. 2176 (1999) (No. 98-536) (citing Clark v. Cohen, 794 F.2d 79 (3d Cir. 1986) (later limited in Helen L. v. Didario, 46 F.3d 325 (3d Cir. 1995)); Phillips v. Thompson, 715 F.2d 365 (7th Cir. 1983)).

requiring claimants to show disparate treatment in comparison to another group.

Congress recognized the confusion over whether § 504 required a showing of disparate treatment in comparison to a similarly situated group when it created the ADA.[254] Importantly, Congress noted the judicial confusion over § 504 and explicitly stated that the ADA was intended to clarify § 504, so that with unmistaken clarity, the ADA would prohibit unnecessary segregation of individuals with disabilities.[255] This further illustrates that the dissent erroneously relied on § 504 to demonstrate that the ADA requires a showing that the claimant received disparate treatment vis-à-vis a different group. For the reasons stated above, the ADA does not so require, and it explicitly prohibits unnecessary institutionalization.

C. The Majority's Correct Construction of the Fundamental Alterations Defense

Not only did the majority correctly conclude that unnecessary institutionalization constitutes discrimination under Title II of the ADA, it also correctly construed the fundamental alterations defense to provide a state with a defense when it is unable to immediately fulfill a qualified disabled individual's request for community-based treatment.[256] Moreover, the majority's construction of the states' defense will likely ensure evenhanded treatment of mentally disabled individuals who receive care and treatment from the state.[257]

The Court rejected the Eleventh Circuit's construction of the fundamental alterations defense, which allowed a state a defense *only* when the state could show that providing community-based treatment for a particular individual would be unreasonable, given the state's entire mental health budget.[258] The manner in which the majority construed the defense will be more useful to the states. The majority held that a state may use the fundamental alterations defense whenever

254. *See* Brief for Respondents, *supra* note 97, at *41-42.

255. *See id.* "Moreover, 17 years of experience with section 504 . . . and in the interpretation of [that] law have demonstrated the need for further legislative action in this area." *Id.* (citing H.R. REP. No. 101-485, pt. IV, at 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 512, 513); *see also supra* note 64 (summarizing the congressional findings within the ADA, specifically that discrimination exists in areas of "institutionalization").

256. *See* Olmstead v. L.C., 119 S. Ct. 2176, 2188-89 (1999), *affirming in part and vacating in part* 138 F.3d 893 (11th Cir. 1998).

257. *See id.* at 2189.

258. *See* L.C. v. Olmstead, 138 F.3d 893 (11th Cir. 1998), *aff'd in part and vacated in part*, 119 S. Ct. 2176 (1999); *see also Olmstead*, 119 S. Ct. at 2188.

it can show that in the allocation of all of its available resources for disabled individuals, the immediate placement of the disabled individual in community-based care would be more expensive than institutional care and therefore inequitable in comparison to other disabled individuals in need of treatment and services.[259] This construction will allow states to resist the transfer of a qualified mentally disabled individual if making the transfer would result in lessening the availability of funds for the care and treatment of other mentally disabled individuals within the state.[260] This construction of the defense will ensure that the states provide treatment and care to individuals with disabilities with an even hand because it allows the state to look at the financial effects of a requested transfer in light of the state's obligation to provide similar services to other disabled individuals and allows the states to decline the request if doing so would leave the state with less resources to provide care and services to other individuals.[261] The majority, therefore, construed the fundamental alterations defense to protect the states and to ensure evenhanded treatment of all mentally disabled individuals who receive treatment and care from the state.

V. IMPACT

Although the Supreme Court's decision in *Olmstead* will lead to the transfer of qualified mentally disabled individuals from institutional settings to community-based settings, it will not result in the mass deinstitutionalization of a vast number of mentally disabled Americans.[262] Furthermore, this transfer will not lead to increased costs to the states because community-based programs generally cost

259. *See Olmstead*, 119 S. Ct. at 2189-90. It is unlikely that the states will need to use the fundamental alterations defense when a qualified individual with a mental disability makes a request for community-based care because community care generally costs less than institutional care. *See infra* Part V.A.2 (comparing the costs of institutionalization and community-based care and concluding that community-based care is less expensive to the states).

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

261. *See id.* at 2189-90.

262. *Cf. id.* at 2191 (Kennedy, J., concurring in the judgment). Justice Kennedy, elaborating on his position, stated "it would be a tragic event . . . were the [ADA] to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision. It is not . . . the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter." *Id.*; *see also L.C.*, 138 F.3d at 901. The majority agreed, in stating, "[w]e emphasize that our holding does not mandate the deinstitutionalization of individuals with disabilities." *Olmstead*, 119 S. Ct. at 2187; *see also* Brief for 58 Former State Commissioners and Directors of Mental Health and Developmental Disabilities, et al., as Amicus Curiae in Support of Respondents, 1999 WL 143935, at *4, Olmstead v. L.C. 119 S. Ct. 2176 (1999) (No. 98-536).

less than institutional care.[263] Additionally, *Olmstead* will have a positive effect on many disabled individuals who qualify for community-based treatment and who will now be able to obtain maximum independence and integration into the community, while receiving the support and treatment they need. [264]

A. The Effects of Olmstead v. L.C. on the States

The Supreme Court's conclusion that unnecessary institutionalization is discrimination under the ADA will lead to the transfer of many qualified individuals to community-based care. It will not, however, result in the mass deinstitutionalization of the mentally disabled population. States are concerned about the financial burden caused by the transfer of mentally disabled individuals who qualify for community-based treatment, but the states will not experience an increased financial burden because community care, on average, costs less than institutional care.[265] In fact, states may obtain federal funds through the Medicaid "Waiver" program to assist them in providing such services within the community.[266]

1. *Olmstead v. L.C.* Will Not Result in Mass Deinstitutionalization

The requirement that states provide community-based treatment to mentally disabled individuals to avoid discrimination under Title II of the ADA will not result in careless deinstitutionalization of large numbers of institutionalized mentally disabled patients.[267] The decision

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263. *See infra* Part V.A.2 (analyzing the financial savings to the states associated with community-based care).

264. *See infra* Part V.B (discussing the positive impact of community-based care on disabled individuals who have previously been institutionalized); *see also* Paul J. Carling, *Major Mental Illness, Housing and Supports: The Promise of Community Integration*, AM. PSYCHOLOGIST 969, 971-72 (1990) (summarizing the shift from institutional to community-based care); Brief of National Mental Health Consumers' Self-Help Clearinghouse et al., as Amicus Curiae in Support of Respondents, 1999 WL 143940, Olmstead v. L.C., 119 S. Ct. 2176 (1999) (No. 98-536).

265. *See, e.g.*, Wayne S. Fenton, M.D. et al., *Randomized Trial of General Hospital and Residential Alternative Care for Patients with Severe and Persistent Mental Illness*, 155 AM. J. PSYCHIATRY 516 (1998) (concluding that for patients who do not require intensive medical intervention, community-based care provides outcomes comparable to those of institutional care); Laird W. Heal, *Institutions Cost More Than Community Services*, 92 AM J. MENTAL DEFICIENCY 136, 137 (1987) (finding "incontrovertible evidence" that institutions are inherently more expensive than community services).

266. *See* 42 U.S.C. § 1396n(c) (1994 & Supp. III 1997).

267. *See* Brief for 58 Former State Commissioners and Directors of Mental Health and Developmental Disabilities, *supra* note 262, at *4-5. "This case is not about 'deinstitutionalization' in the sense of widespread closure of institutions and the release of all patients into the community, whether qualified or not, with or without appropriate care .... The ADA does not require states to undertake 'massive deinstitutionalization.'" *Id.* (citing L.C. v. Olmstead, 138 F.3d 893, 902

also will not result in the widespread closure of state-run institutions for the disabled.[268] As explained by Justice Ginsburg, the decision in *Olmstead* allows the states to rely on their own treatment professionals to determine whether an individual "meets the essential eligibility requirements" for habilitation in a community-based treatment setting.[269] If an individual fails to meet these required qualifications, the individual must remain within the institution, as it would be inappropriate for the treatment professionals to recommend community placement.[270] Regardless of the determination of the state treatment professionals, a state will not force a mentally disabled individual out of his or her institutional setting. Rather, the ADA mandates only that a qualified individual be placed in the setting that will most appropriately cater to his or her needs.[271]

Moreover, Justice Ginsburg explicitly stated that nothing within the majority opinion requires mentally disabled individuals to enter into a community-based treatment setting if they would prefer to stay in the institutional setting.[272] As a result, if a mentally disabled individual feels uncomfortable with the freedom associated with community-based treatment, he or she does not have to leave the institution.[273] Therefore, no mass deinstitutionalization of the mentally disabled will result from the Supreme Court's decision in *Olmstead.*

2. Institutions Cost More Than Community-Based Settings

Congress has found that community placements are less expensive, on average, than institutional care.[274] Moreover, numerous research studies comparing the costs and benefits of community care to institutionalization have concluded that community care is the most

(11th Cir. 1998)); *see also Olmstead v. L.C.*, 119 S. Ct. 2176, 2191 (1999) (Kennedy, J., concurring in the judgment), *affirming in part and vacating in part* 138 F.3d 893 (11th Cir. 1998).

268. *See Olmstead*, 119 S. Ct. at 2187. The Court stated: "We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." *Id.*

269. *Id.* at 2188. The Court cites to the integration regulation, which requires an individual to be placed in the most integrated setting *appropriate* for the individual and not in the most integrated setting available. *See id.* at 2189.

270. *See id.* at 2188.

271. *See id.*

272. *See id.* "Nothing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept." *Id.* (quoting 28 C.F.R. § 35.130(e)(1) (1999)).

273. *See id.*

274. *See* S. REP. NO. 101-273, at 25-26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 862, 886-87.

cost-effective way to provide services to people with mental disabilities.[275]

For example, a 1995 study conducted for the *American Journal of Mental Retardation* found that providing community-based care to individuals with disabilities is more cost effective than providing care within an institution.[276] It also found that state-owned institutions were the most expensive setting in which to provide services to the disabled.[277] Furthermore, in addition to being more expensive than community care, the costs of institutional care are rising.[278] Therefore, in the future, states will benefit more from transferring qualified disabled individuals into community-based settings.

3. The Medicaid "Waiver" Program Will Provide States With Federal Funds for Community Programs

Because community-based settings are less expensive, on average, than institutional settings, the states may now be able to save money while providing care to the disabled.[279] Moreover, with the aid of

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275. *See, e.g.*, Edward M. Campbell & Laird W. Heal, *Government Cost of Providing Services for Individuals with Developmental Disabilities: Prediction of Costs, Rates and Staffing by Provider and Client Characteristics*, 100 AM. J. MENTAL RETARDATION 17 (1995) (finding institutions to be the most costly and community-based agencies to be the least costly); Heal, *supra* note 265, at 136-38 (concluding state-run institutions are inherently more expensive than community services); William H. Sledge, M.D. et al., *Day Hospital/Crisis Respite Care Versus Inpatient Care, Part II: Service Utilization and Costs*, 153 AM. J. PSYCHIATRY 1074 (1996) (determining that, on average, institutionalization of acutely ill psychiatric patients was more expensive than outpatient community-based treatment).

276. *See* Campbell & Heal, *supra* note 275, at 18.

277. *See id.* A major reason that institutional care is more expensive than community-based care is the high cost of overhead. *See* Brief for 58 Former Commissioners and Directors of Mental Health and Developmental Disabilities, *supra* note 262, at *14. Because institutions are "total care environments" they must recreate many of the services that are part of the background of daily life. *See id.* The provision of services in an institution "requires significant additional expenditures for facility and vehicle maintenance, utilities, and other fixed costs for the operation of separate facilities, as well as compensation for workforce of cafeteria workers, janitors, and bus drivers." Cook, *supra* note 26, at 464.

278. *See* Brief for 58 Former State Commissioners and Directors of Mental Health and Developmental Disabilities, *supra* note 262, at *14. "During the 1992-1996 period, the national average institutional daily costs [for people with developmental disabilities] advanced from $210 to $258." *Id.* (quoting DAVID BRADDOCK, THE STATE OF THE STATES IN DEVELOPMENTAL DISABILITIES 27 (5th ed. 1998)). When adjusted for inflation, this represents a 10% increase in total costs of running institutions over a five year period. *See id.* The financial costs of treating people with mental illness in institutions is also on the rise. *See id.* This is due, in part, to the fact that many institutions are aging and require significant maintenance expenditures. *See id.* The development of community-based services, however, generally does not require such capital expenditures to maintain because many of the community-based treatment centers exist in small, rented or leased buildings. *See id.* at *15.

279. *See id.*; Brief for the United States as Amicus Curiae in Support of Respondents, *supra*

federal funds through the Medicaid "Waiver" program, states will realize even greater financial savings by providing community-based treatment settings to qualified individuals with disabilities.[280]

The Medicaid "Waiver" program, created in 1981, permits states to apply to the Department of Health and Human Services ("HHS") for a waiver of certain Medicaid rules in order to offer community-based services.[281] Under this program, the government grants states partial funding for mental health and developmental disability services.[282] Currently, funding from Medicaid "Waiver" programs provides between 50% and 83% of the total Medicaid costs for community-based care.[283] This is the same amount of federal contribution available to states for institutional care.[284]

The Home and Community Based Services waiver program is a specific program under the Medicaid "Waiver" program that provides large grants for community-based treatment for developmentally disabled individuals.[285] This program allows states to use Medicaid funds to provide services in the community to individuals with developmental disabilities.[286] This program has become the primary means of serving people with developmental disabilities in the community and will relieve much of the financial responsibility form

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note 54, at *20 ("Virtually all the relevant literature documents that segregating handicapped people in large, impersonal institutions is the most expensive means of care.").

280. *See* Brief for the United States as Amicus Curiae in Support of Respondents, *supra* note 54, at *20-21.

281. *See id.*; *see also* 42 U.S.C. § 1396n(c) (1994 & Supp. III 1997).

282. *See* Brief for 58 Former State Commissioners and Directors of Mental Health and Developmental Disabilities, et al., *supra* note 262, at *9.

283. *See* Brief for the United States as Amicus Curiae in Support of Respondents, *supra* note 54, at *20.

284. *See id.* at 20-21; *see also* 42 U.S.C. § 1396(d)(b). State-run psychiatric hospitals are generally ineligible for Medicaid funding. Thus, states will benefit from moving qualified mentally ill individuals into community-based settings in order to receive the Medicaid funding. *See* Brief for the United States as Amicus Curiae in Support of Respondents, *supra* note 54, at *21.

285. *See* Brief for 58 Former State Commissioners and Directors of Mental Health and Developmental Disabilities, et al., *supra* note 262, at *10.

286. *See* 42 U.S.C. § 1396n(c)(1); *see also* 44 C.F.R. § 441.300 (1999). The "waiver" program allows states to offer an array of services and programs in home and community-based settings that an individual will need to remain in the community and not in an institution. *See* 42 U.S.C. § 1396n(c) (1994 & Supp. III 1997). As a result of the Home and Community Based Services program, states have been able to afford to move countless individuals from institutions into less expensive community-based treatment settings. *See* Brief of 58 Former State Commissioners and Directors of Mental Health and Developmental Disabilities, et al., *supra* note 262, at *10.

the states to provide services to disabled individuals who, after *Olmstead*, will be entitled to community-based treatment.[287]

B. The Benefits of Olmstead v. L.C. for Individuals with Mental Disabilities

Olmstead provides the mentally disabled population with the right to community-based treatment when such treatment is appropriate for the individuals' needs.[288] The professional literature shows that disabled individuals who receive community living arrangements derive greater benefits than those confined to institutions.[289] These benefits include increased in socialization of disabled individuals with non-disabled individuals, improved health, and an increased likelihood that the disabled individual will live, work, and recreate in regular community settings.[290] Moreover, individuals with disabilities generally prefer community-based treatment settings to institutional settings.[291]

When disabled individuals are segregated from the community, they lose the ability to bond with others and to take part in the life of the community because the segregation substantially limits their ability to interact with members of the community.[292] Studies show that when placed in the community, disabled individuals can successfully establish

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287. *See* Brief of 58 Former State Commissioners and Directors of Mental Health and Developmental Disabilities, et al., *supra* note 262, at *10. Since 1992 the number of individuals who have been served by the Home and Community Based Services program under Medicaid has increased 29.2%. *See id.* at *10-11 (citing Gary Smith et al., *The HCB Waiver Program: The Fading of Medicaid's "Institutional Bias,"* MENTAL RETARDATION 262 (1996)). States may also be concerned about the costs incurred in the transition of the institutionalized disabled individuals to community-based settings. *See id.* at *12. These short term costs will likely be offset by the federal funding available to the states through the Medicaid "Waiver" program. *See id.*

288. *See* Olmstead v. L.C., 119 S. Ct. 2176, 2190 (1999), *affirming in part and vacating in part* 138 F.3d 893 (11th Cir. 1998).

289. *See* Brief for National Mental Health Consumers' Self-Help Clearinghouse, *supra* note 264, at *22. A survey of eighteen studies conducted between 1976 and 1988 found that every study reported positive gains in the development of adaptive behavior and skills of disabled individuals living in community-based settings. *See* Brief for American Association on Mental Retardation, et al., as Amicus Curiae in Support of Respondents, 1999 WL 143937, at *15, Olmstead v. L.C., 119 S. Ct. 2176 (1999) (No. 98-536) (citing SHERYL LARSON & CHARLIE LAKIN, THE UNIVERSITY OF MINNESOTA INSTITUTE ON COMMUNITY INTEGRATION, DEINSTITUTIONALIZATION OF PERSON WITH MENTAL RETARDATION: THE IMPACT ON DAILY LIVING SKILLS (March 1988)).

290. *See* Cook, *supra* note 26, at 452-55.

291. *See* Holmes, *supra* note 1, at A4.

292. *See* Cook, *supra* note 26, at 451. Institutionalization, by definition, entails segregation and isolation of disabled individuals. *See* Brief for Respondents, *supra* note 97, at *9. Segregation of the sexes is prevalent, as is segregation of individuals from their families, friends, normal society, and peer groups. *See id.* Patients in institutions generally have almost no contact with non-disabled individuals. *See id.*

and maintain social relationships.[293] Moreover, disabled individuals and non-disabled individuals develop much stronger bonds when the disabled individual has a high degree of contact with others within the community.[294]

In addition to increased socialization, disabled individuals who live within the community generally gain greater independence and are more likely to work in community settings.[295] This is largely a result of the individual's opportunity to learn new skills and to receive appropriate community support, which by definition an institutional setting cannot provide.[296] Community-based treatment provides for more opportunities for disabled individuals to learn new skills and adaptive behavior, thereby enabling them to better function within the community.[297] When disabled individuals learn these skills, they generally become less dependent on others for aid and assistance.[298]

Olmstead will enable qualified disabled individuals to live within the community and experience the aforementioned benefits. Additionally, disabled individuals overwhelmingly prefer community placement to institutional placement.[299] In a brief to the Supreme Court as Amici to

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293. *See* Cook, *supra* note 26, at 451.

294. *See id.* at 450. One study showed that when disabled individuals are regularly exposed to non-disabled individuals, the rates of inappropriate behavior of the disabled individual decreased substantially. *See id.* This often contributes to the development of genuine and lasting friendships, which provides a positive influence on the disabled individuals. *See id.*

295. *See id.*

296. *See* Brief for National Mental Health Consumers' Self-Help Clearinghouse, et al., *supra* note 264, at *22-23. Institutions, by definition, cannot provide community support and adequate opportunity for learning adaptive skills because individuals within institutions are frequently confined within the institution and segregated and isolated from community members and community supports. *See* Brief for Respondents, *supra* note 97, at *9.

297. *See* James Conroy et al., *A Matched Comparison of the Developmental Growth of Institutionalized and Deinstitutionalized Mentally Retarded Clients*, 86 AM. J. OF MENTAL DEFICIENCY 581, 586 (1982). Individuals discharged from state institutions showed significant improvement in functioning and behaviors. *See id.* at 584.

298. *See id.* at 587. Individuals in community settings develop fuller and become more independent than they ever could in an institution—they attend movies, go shopping, and enjoy parks and recreation, all of which is essentially impossible to do in an institution. *See* Brief for American Association on Mental Retardation, et al., *supra* note 289, at *13. Not only do disabled individuals become more independent when living in community-based treatment settings, but they are exposed to a much wider array of services than institutions offer. *See* Brief for National Mental Health Consumers' Self-Help Clearinghouse, et al., *supra* note 264, at *18-19. Such services include: comprehensive treatment programs, which are designed to evaluate the extent of the individuals needs; residential services, which include support services for independent living; and rehabilitation services, which are designed to improve living skills and assist in gaining the maximum amount of independence and productivity. *See id.* Moreover, support services commonly assist the disabled individual with skills for daily living and assure that the individual has the access to resources such as entitlement benefits and medical care. *See id.*

299. *See* Brief for National Mental Health Consumers' Self-Help Clearinghouse, et al., *supra*

Respondents L.C. and E.W., the National Mental Health Consumers' Self-Help Clearinghouse conducted interviews with disabled individuals, who were living within a community-based setting, but who had previously spent time in an institutional setting.[300] The individuals interviewed had experienced a great increase in fulfillment and productivity as workers and volunteers in the community and a more rapid recovery as they learned to make choices, learned new skills, and formed meaningful relationships.[301] Most importantly, the individuals showed and expressed an increase in life satisfaction and overall happiness as they settled into the community settings, experienced more independence, and developed previously unrecognized skills.[302] Many of the individuals noticed a reduction in their symptoms and expressed happiness over the increased freedom associated with community living.[303] Overall, each expressed that he or she felt better about him or

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note 264, at *5.

300. *See id.* The National Mental Health Consumers' Self-Help Clearinghouse is a national technical assistance center run by and for people who are consumers of psychiatric services. *See id.* at *1. Its mission is to promote the participation in planning, providing, and evaluating mental health and community support services and to provide technical assistance and information to consumers of mental health services and survivors of psychiatric illness. *See id.*

301. *See id.* at *5.

302. *See id.* at *9. One interviewee, Mr. Kennedy, born with cerebral palsy and placed in an institution at the age of five, remained there until he won his release when he turned 21. *See id.* He described his experience:

> [During his institutionalization,] all [he and the others] did was watch Sesame Street . . . [and] put pegs in a peg board, [and] took naps . . . . The staff members who cared didn't stay for very long. They couldn't stand to stay and watch what was going on, which included the use of cattle prods and ammonia sprayed in the eyes as punishment.

Id. at *9-10. Once released from the institution, Mr. Kennedy earned his GED and got married. *See id.* Regarding his life in the community, Mr. Kennedy stated:

> We're very well known and respected in our neighborhood. We enjoy going away on vacation, we go to the movies, we do the same things anyone would do . . . . Freedom means a lot—that I am somebody, regardless of what my limitations are. What I advocate for is that people like me can live a normal life, regardless of their disability. Part of my job is to make sure that they get a fair shot.

Id. at *11-12.

303. *See id.* at *14. For example, Ms. Donahue, who has schizophrenia, described her increased privacy, opportunity for making her own choices, and reduction of symptoms that occurred after the state provided her with integrated services in the community. *See id.* She said:

> It's better living in my house [than in the hospital] . . . . It's much better, because you have staff 24 hours a day like in the hospital but you can go to the bank, shopping, or Rite-Aid. It's better out here. It feels like you're in your normal home. You can't live in the hospital all your life.

Id. at *14-15.

herself as a result of the transfer from the institution to the community.[304]

VI. CONCLUSION

The Court correctly concluded that the ADA includes unnecessary institutionalization and segregation in its definition of discrimination and that states must provide community-based care to qualified individuals with mental disabilities in order to avoid discrimination under the ADA. The plain language of the ADA bans unnecessary segregation. Moreover, this is supported by the consistent interpretation of the ADA by the Attorney General and the legislative history of the ADA. As a result of *Olmstead*, disabled individuals who have spent many years segregated from society and confined to institutions will finally be placed in community-based settings and will have the opportunity to live independent and productive lives.

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304. *See id.*