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ARTICLE

FEDERAL POWER, SEGREGATION, AND MENTAL DISABILITY

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People with serious mental disabilities caught a tantalizing glimpse in 1999 of a path to integration. In *Olmstead v. L.C. ex rel. Zimring*,[1] a case the U.S. Supreme Court decided that year, two women complained that they remained in locked hospital wards with patients suffering uncontrolled psychotic symptoms *years* after their doctors—the State's doctors—found them more appropriately placed in community-based residences.[2] The Court interpreted the Americans with Disabilities Act of 1990[3] (ADA) as codifying a federal mandate to end the segregation of people with disabilities.[4] The Court found that warehousing the disabled in institutions implicated the ADA's protections, holding simply that "[u]njustified isolation . . . is properly regarded as discrimination based on disability."[5]

As is often the case with the tantalizing, the fruits of *Olmstead* threaten to elude the grasp of people with significant mental disabilities. People in this community rely on regulation of state conduct and not the conduct of private actors to gain social integration. Yet the Court, with *Olmstead*'s statutory interpretation, has been giving with one hand and taking with the other. In recent years, the Court has sharply restricted Congress's power to enact social legislation like the ADA, particularly to the extent that legislation impinges on state prerogatives.[6] The new federalism jurisprudence has been

1. 527 U.S. 581 (1999).

2. *Id.* at 593–94; Brief for Respondents at *5–*8, Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581 (1999) (No. 98-536) [hereinafter Brief for Respondents], *available at* 1999 WL 144128.

3. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2000)).

4. *Olmstead*, 527 U.S. at 599–600.

5. *Id.* at 597.

6. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997) (limiting both the scope of Congress's authority to interpret the Constitution and the breadth of its power to enact legislation to remedy or deter state behavior determined by *Congress* to be unconstitutional); *see also* Bd. of Trs. v. Garrett, 531 U.S. 356, 374 & n.9 (2000) (holding

controversial in the Court[7] and in the commentary.[8] This Article does not take up that controversy. The Court is unlikely to change its direction in the short run. Future developments,

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"that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I" of the ADA); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000) (concluding "that the [Age Discrimination in Employment Act contains] a clear statement of Congress' intent to abrogate the States' immunity, but that the abrogation exceeded Congress' [constitutional] authority"). Similarly, the Court has narrowed the substantive scope of Congress's Commerce Clause power. *See* United States v. Morrison, 529 U.S. 598, 601–02, 617–18 (2000) (invalidating the Violence Against Women Act as beyond Congress's Commerce Clause authority); United States v. Lopez, 514 U.S. 549, 551, 567–68 (1995) (invalidating the Gun-Free School Zones Act of 1990 as beyond Congress's Commerce Clause authority). The Court also has determined that the Commerce Clause does not empower Congress to avoid the states' Eleventh Amendment immunity. *See Kimel*, 528 U.S. at 79–80 (stating that Article I Commerce Clause power does not enable Congress to avoid the states' Eleventh Amendment immunity from private money-damages litigation in federal court); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672 (1999) (same); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999) (same); Seminole Tribe v. Florida, 517 U.S. 44, 72–73 (1996) (declaring that Congress's Article I authority "cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction" by the Eleventh Amendment).

7. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1881 (2002) (Breyer, J., dissenting) (rejecting the majority's conclusion that state sovereign immunity shields states from participation in federal administrative hearings); *Garrett*, 531 U.S. at 382–83 (Breyer, J., dissenting) (rejecting the majority's insistence on a substantial evidentiary record to support Congress's finding of the unconstitutionality of states' actions); Alden v. Maine, 527 U.S. 706, 762–64 (1999) (Souter, J., dissenting) (rejecting the majority's articulation of sovereign immunity as a "fundamental aspect" of state sovereignty inherent in the Constitution); Printz v. United States, 521 U.S. 898, 944 (1997) (Stevens, J., dissenting) (rejecting the majority's finding that the Tenth Amendment bars Congress from requiring a local police officer to perform ministerial functions in furtherance of federal law).

8. Commentators have argued against the Court's new direction in general. *See, e.g.*, Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 14–15 (2001) (observing that the Rehnquist "Court's recent federalism decisions, especially those limiting Congress's power under Section 5 of the Fourteenth Amendment," demonstrate that the "Court has revamped the [judicial review] doctrine to eliminate the other branches' interpretive space and protect its own exclusive custody of the Constitution"); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 441–43, 523–26 (2000) (arguing that *Kimel* and *Morrison* restrict Congress's ability to enact antidiscrimination laws under its Commerce Clause power). Commentators also have argued against the Court's new direction in the disability context. *E.g.*, Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 656 (2000) (predicting a pyrrhic victory for the *Olmstead* plaintiffs because "[t]he Court may be on the brink of ruling that ADA Title II exceeds Congress's enforcement authority under [S]ection [5] of the Fourteenth Amendment and thereby unconstitutionally abrogates the states' sovereign immunity under the Eleventh Amendment when it provides for a private right of action for damages" (footnotes omitted)); Arlene B. Mayerson & Silvia Yee, *The ADA and Models of Equality*, 62 OHIO ST. L. REV. 535, 537 (2001) (noting that the recent Supreme Court "cases have held that suits against states can be brought only if the legislation is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment," thereby contravening the ADA's goal of achieving equal opportunity and requiring states to engage in "affirmative steps to eliminate barriers to participation").

including in the Court's makeup over time, may or may not result in a reversion to judicial acquiescence in congressional power over the development of social policy. In the meantime, people with severe mental illness—people like the *Olmstead* plaintiffs—are excluded from social discourse and are denied personal autonomy for want of effective legislative action on their behalf.[9] This Article argues that Congress should act in the interest of mentally disabled people through the means not closed to it by the Court. There need be no abdication. The battle over constitutional structure will go on. But on a parallel track, Congress can and should advance the socially progressive agenda it articulated in the ADA through means remote from the front lines of the battle. The interests of people with mental disability are too severe to be put on hold while even important constitutional fights are fought.

This Article urges a renewed focus on the immediate goal of ending the shameful isolation of people with mental disabilities[10] through "positive law"[11] enacted within the new federalism framework. Congress retains the power to realize the ADA's integrationist goals. Suppose Congress viewed the Court's federalism opinions as a provisionally binding roadmap of structural constitutional requirements and not as an attack on a progressive social program. Suppose further that Congress was litigation-shy; that is, it wished to further disability policy goals within the framework set out by the Court. In that case, Congress can distill three requirements from the Court's recent opinions concerning social legislation implicating state governments. The Court requires that Congress respect the structural importance of the states, speak clearly when binding the states, and design social legislation so as to facilitate political accountability.[12] Within these constraints, effecting the integrationist goals of the ADA is within the power of Congress. Unfortunately, an inverse relationship exists between compliance

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9. Refer to Part I.B *infra* (citing several examples of individuals with severe mental disabilities who were kept in state institutions longer than necessary).

10. The congressional findings in the ADA state that American society historically has "tended to isolate and segregate" people with "physical or mental disabilities." 42 U.S.C. § 12101(a)(1)–(2) (2000).

11. *See Garrett*, 531 U.S. at 368 ("If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause."). Positive law is defined as "[a] system of law promulgated and implemented within a particular political community by political superiors, as distinct from moral law or law existing in an ideal community or in some nonpolitical community." BLACK'S LAW DICTIONARY 1182 (7th ed. 1999).

12. Refer to Part II.B *infra* (developing the three components for social legislation that provide insulation from a federalism attack).

with the Court's dictates and political expediency. The more certain legislation is of passing judicial review, the more politically difficult it is to achieve because it calls for direct federal taxing, spending, and administration.[13] Difficult though that legislative agenda may be, large pieces of it exist in current law and, if reinvigorated, it can form the core of a judicially bulletproof disability rights program.

Part I of this Article describes *Olmstead* and the importance of desegregating people with significant mental illness. Since *Olmstead*, the ADA has been correctly interpreted as requiring not only deinstitutionalization for those who would benefit, but also attention to the next steps—the provision of social programs for those able, with some assistance, to participate fully in community life.[14] Part II distills from the new federalism cases a framework for permissible federal social legislation necessarily implicating state prerogatives. This provisional framework permits social legislation so long as Congress respects states, speaks clearly, and fosters political accountability. Part III sketches out elements of a legislative agenda consistent with this framework, shifting emphasis from Section 5 and Commerce Clause actions to those based on direct and conditional spending powers.

I. INTEGRATION AND THE DUAL NATURE OF THE ADA

A. The Triumph of Integrationism?

President George H.W. Bush paraphrased the *Declaration of Independence* when he signed the ADA. He predicted that the ADA would bring closer the "day when no Americans will ever again be deprived of their basic guarantee of life, liberty, and the pursuit of happiness."[15] The language of the ADA clearly reflects

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13. Refer to text accompanying notes 280–88 *infra* (discussing the inverse relationship between political comfort and the certainty of Congress acting within its power).

14. *See generally* Press Release, Health & Human Services, Administration Announces Steps to Promote Community Living for People with Disabilities (Mar. 25, 2002) (announcing President George W. Bush's New Freedom Initiative as a program "to remove barriers to community living for people with disabilities"), *available at* http://www.tash.org/govaffairs/hhspr32502.htm (last visited Dec. 17, 2002).

15. Remarks on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1068 [hereinafter Remarks on the ADA]; *see* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

an intent to "invoke the sweep of congressional authority"[16] to achieve "the Nation's proper goals regarding individuals with disabilities[, which] are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency."[17] Senate sponsors, cognizant of the role that government played in the frustration of these goals for people with disabilities, pointed to a different historic text as precedent—the *Emancipation Proclamation*.[18] For people with disabilities, the President's and the sponsor's citation to honored texts signaled a federal commitment to act affirmatively to ensure that people with disabilities could live freely and independently in society.[19] In short, it represented a commitment to an integrationist approach to disability rights.[20]

The pursuit of happiness for people with severe psychiatric and cognitive disabilities was a constant struggle in 1990. They faced two distinct social barriers to the good life. Some impediments sprang from the public's overt and irrational fear and dislike of people with mental disabilities.[21] Others, however,

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16. 42 U.S.C. § 12101(b)(4) (2000).

17. *Id*. § 12101(a)(8).

18. *See* 136 CONG. REC. S9,529 (daily ed. July 11, 1990) (statement of Sen. Harkin) ("[W]hat we have now in the Americans with Disabilities Act is a bill that really is the 20th century emancipation proclamation for our disabled Americans."); 135 CONG. REC. S10,789 (daily ed. Sept. 8, 1989) (statement of Sen. Kennedy) ("In a sense, this legislation is an emancipation proclamation for the . . . . [f]orty-three million disabled men, women, and children [who] have been invisible Americans, denied opportunity, victimized by prejudice, excluded from everyday activities of society [for too long].").

19. As President George H.W. Bush described it, the ADA was intended to usher in a "bright new era of equality, independence, and freedom" for people with disabilities. Remarks on the ADA, *supra* note 15, at 1068.

20. *See* Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889, 901–03 (explaining integrationism as "[a]n attitude of inclusion and valuing diversity [that] ignores differences . . . not relevant to the task at hand and avoids creating disabilities"). Professor Weber contrasts a "custodialist" vision of disability rights—focusing on the need to shelter people with disabilities—with an "integrationist" vision, which focuses on achieving social equality for people with disabilities through recognition of the "role of social environment in disability." *See id*. at 899–903. Professor Weber attributes the "dramatic changes [that] have occurred in the field of disability equality" to the "intellectual groundwork" of Jacobus tenBroek and Floyd W. Matson in their article, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809 (1966), proclaiming the article a wellspring of thought on this alternative to custodialism. *Id*. at 890. Professor Weber also emphasizes the need to go beyond integrationism. *See id*. at 891–93 (proposing a new paradigm, the "post-integrationism" theory, which shifts some of the costs of disability onto society as a whole).

21. *See* H.R. REP. NO. 101-485(II), at 30 (1990) (attributing discrimination against people with disabilities to "false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies," and detailing various accounts of discrimination, including "the story of a New Jersey zoo keeper who refused to admit children with Down's Syndrome because he feared they would upset the chimpanzees").

could be characterized as entirely rational. Employers, providers of public services, and providers of public accommodations geared for "normal" people declined to accommodate the differences in the needs and interests of those with disabilities.[22]

The ADA's prohibition of "discrimination" against people with disabilities is intended to address both barriers: classic unequal treatment as well as inequality traceable to a social and economic structure inhospitable to people with disabilities.[23] It outlaws irrational and invidious disparate treatment on the basis of a person's disability.[24] It also, however, requires more than mere equal treatment by requiring "reasonable" accommodations or modifications.[25] On the one hand, the ADA extends classic liberal equalitarian antidiscrimination legislation to prohibit disparate treatment of people with disabilities.[26] On the other hand, the ADA implements a regime mandating concerted action to modify the environment of the workplace, public services, and public accommodations to afford people with disabilities an equal opportunity to pursue happiness.[27] Whether this second aspect is best considered simply a more informed version of equalitarian legislation, or at least in part, as an entitlements statute, the

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22. *See id*. at 23, 39–41 (revealing various testimonial accounts of discrimination "resulting from the construction of transportation, architectural, and communication barriers").

23. *Cf. id*. at 29 ("Discrimination against people with disabilities results from actions or inactions that discriminate by effect as well as by intent or design.").

24. *See* 42 U.S.C. § 12112(b) (2000) (defining "discrimination" in employment as, inter alia, "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee"); *id*. § 12132 (forbidding the exclusion of any "qualified individual with a disability" from participation in "the services, programs, or activities of a public entity"); *id*. § 12182(b)(2)(A) (defining "discrimination" in public accommodations as, inter alia, the application of screening criteria to people with disabilities that are not "necessary" for the operation of the accommodation).

25. *See id*. § 12112(b)(5)(A) (requiring employers to make "reasonable accommodations" to a known disability); *id*. § 12131(2) (defining "qualified individual with a disability" as a person who "meets the essential eligibility requirements" for public services with "reasonable modifications" of policies); *id*. § 12182(b)(2)(A)(ii) (defining "discrimination" as, inter alia, "a failure to make reasonable modifications" to policies in public accommodations in light of a customer's disabilities).

26. *See* Mayerson & Yee, *supra* note 8, at 536 ("Throughout the committee reports and floor statements, the statement was continually made that the ADA simply would complete the path taken in the 1964 Civil Rights Act, which prohibited discrimination on the basis of race, color and national origin, and later, gender." (footnotes omitted)).

27. The findings and purposes of the ADA make explicit the deviation from a pure equal treatment model, finding that "individuals with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices, . . . [and] segregation," and asserting that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(5), (8).

ADA differs in practice from statutes prohibiting actions such as invidious race discrimination.[28] Unfortunately, Congress left obscure the mechanism for melding the equal treatment and accommodations aspects of the statute.[29]

This obscurity played out in *Olmstead*,[30] as Justices Ginsburg and Thomas, both interpreting the ADA, seemed to be reading different statutes.[31] The case dealt only with "the proper construction of the anti-discrimination provision contained in the public services portion (Title II)" of the ADA,[32] and not the thorny questions of congressional power that have marked the Court's last decade.[33] The respondents were two mentally retarded women who had also been diagnosed with psychiatric illness—L.C. with schizophrenia and E.W. with a personality disorder.[34] They both had been treated as inpatients and filed ADA claims when they were kept in the Georgia Regional Hospital in Atlanta after their treating psychiatrists found them appropriate for community-based programs.[35] The specific question addressed was whether the continued isolation of the respondents in institutions when they were more appropriately treated in a community setting constituted "discrimination 'by reason of . . . disability.'"[36] The lower courts had found that unwarranted segregation of people with disabilities is unlawful discrimination in violation of Title II of the ADA.[37] Before the Supreme Court,

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28. *See* Mayerson & Yee, *supra* note 8, at 537 (noting that the drafters of the ADA "were insistent that reasonable accommodation *was not* affirmative action but simply part and parcel of meaningful nondiscrimination"); Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 350 (2001) ("When enacting the ADA, Congress determined that to provide individuals with disabilities with civil rights and equality of opportunity, entities covered by the Act must be required to provide such individuals with some form of special treatment—analogous to 'special favors' or 'entitlements.'"). *See generally* Weber, *supra* note 20, at 899–904, 921 (setting out an historical continuum of disability rights theory running from "custodialism" to "integrationism" to "post-integrationism," differentiating in part on the basis of the extent to which adherents favored affirmative modifications of social structures to empower people with disabilities to enjoy fully integrated independence).

29. *See* Tucker, *supra* note 28, at 352 (noting that the ADA does not address the "seeming conflict" between its legislative history's invocation of equal rights and its reasonable accommodations requirements).

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

31. *Compare id.* at 598 & n.10 (Ginsburg, J.) (explaining the majority's definition of discrimination), *with id.* at 616 (Thomas, J., dissenting) (disagreeing with the majority because the Court traditionally has not interpreted discrimination to include "disparate treatment among members of the *same* protected class").

32. *Id.* at 587.

33. *Id.* at 588 ("This case, as it comes to us, presents no constitutional question.").

34. *Id.* at 593.

35. *Id.* at 593–94.

36. *Id.* at 589–90, 597 (quoting 42 U.S.C. § 12132).

37. *Id.* at 594–96.

the State of Georgia argued that petitioners had failed to prove discrimination because they could not show "uneven treatment of similarly situated individuals"; that is, there was no "comparison class" against which to judge their treatment at the State's hands.[38]

The two principal opinions[39] interpreted the ADA through very different lenses. The majority opinion read the statute as an integral whole, ascertained its requirements from its language and the language of regulations promulgated pursuant to its mandate, and concluded that the ADA prohibited unwarranted isolation.[40] This conclusion was not foreordained. While Title I of the ADA explicitly identifies segregation as "discrimination,"[41] Title II does not.[42] However, the Court noted the congressional findings establishing that unwarranted isolation and segregation were evils affecting large numbers of people with disabilities and determined that unwarranted segregation is included within the ADA's, and specifically Title II's, definition of disability discrimination.[43]

The Court reviewed the statutory predecessors to the ADA and distinguished the ADA as the first statute in which Congress identified isolation or segregation as discrimination: "In the ADA,

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38. *Id.* at 598.

39. There were four opinions in all. Justice Ginsburg wrote for five Justices in finding that unwarranted isolation violates the ADA regardless of the identification of any reference or comparison group, *id.* at 597–98, but for only four on her articulation of reasons for a remand for consideration of the restraint state financial concerns place on the anti-segregation principle, *id.* at 587, 603. Justice Stevens concurred in part and concurred in the judgment, declining only to join in the Court's opinion on the financial limitations of the anti-segregation principle. *Id.* at 607 (Stevens, J., concurring in part and concurring in the judgment). Justice Kennedy concurred in the judgment, writing separately to caution against improvident "deinstitutionalization," with which sentiment Justice Breyer joined, and for himself alone in disagreeing that isolation is unlawful discrimination regardless of the identification of a comparison group. *Id.* at 608–15 (Kennedy, J., concurring). Justice Thomas, writing for himself, Chief Justice Rehnquist, and Justice Scalia, dissented. *Id.* at 615 (Thomas, J., dissenting).

40. *Id.* at 597–603.

41. 42 U.S.C. § 12112(b)(1) (2000) (defining "discrimination" as including "segregating . . . a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee").

42. *See id.* § 12132 ("[N]o 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.").

43. *Olmstead*, 527 U.S. at 588–89 (recounting that "society has tended to . . . segregate individuals with disabilities, and . . . [that] discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization . . . [and that] individuals with disabilities continually encounter . . . segregation" (quoting 42 U.S.C. § 12101(a)(2)–(3), (5)) (third and sixth alterations in original)).

Congress for the first time referred expressly to 'segregation' of persons with disabilities as a 'for[m] of discrimination,' and to discrimination that persists in the area of 'institutionalization.'"[44] The regulations promulgated by the Attorney General pursuant to Title II also focused on the issue of segregation, requiring services to be provided "in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[45] The majority substantially affirmed the lower courts and held that "[u]njustified isolation . . . is properly regarded as discrimination based on disability."[46]

Justice Thomas disagreed. He noted that Congress altered the "traditional"[47] definition of discrimination in Title I—requiring only equal treatment—and found that its failure to do so in Title II should be read as its adoption of a more conventional sense of the word.[48] Justice Thomas found the congressional findings similarly unpersuasive, as they were merely hortatory, and not binding or definitional.[49] He described at length the "traditional" meaning of discrimination, citing to dictionaries[50] and case law interpreting a variety of civil rights statutes.[51] Relying on "[o]rdinary canons of construction," Justice Thomas concluded that Title II could not be read to include the expansive definition of "discrimination" discovered by the majority.[52] Justice Thomas implicitly relied on another maxim,

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44. *Id.* at 589 n.1 (quoting 42 U.S.C. § 12101(a)(2)–(3), (5) (alteration in original)).

45. *See* 28 C.F.R. § 35.130(d) (2002); *see also Olmstead*, 527 U.S. at 591–92. As the Court noted, the provision in Title II requiring the Attorney General to promulgate regulations required that those regulations "be consistent with . . . the coordination regulations . . . applicable to recipients of Federal financial assistance" under [section 504 of the Rehabilitation Act]." *Id.* at 591 (second and third alterations in original). The relevant Rehabilitation Act regulations feature the "most integrated setting" mandate. *See* 28 C.F.R. § 41.51(d). The Attorney General's inclusion of that mandate therefore seems within the letter of the ADA. *See Olmstead*, 527 U.S. at 591–92.

46. *Olmstead*, 527 U.S. at 597.

47. *See id.* at 615–16 (Thomas, J., dissenting) (asserting that "[t]emporary exclusion from community placement does not amount to 'discrimination' in the traditional sense of the word").

48. *Id.* at 620–22 (Thomas, J., dissenting).

49. *Id.* at 620–21 (Thomas, J., dissenting).

50. *Id.* at 616 (Thomas, J., dissenting) (citing the *Random House Dictionary* definition as "to 'distinguish,' to 'differentiate,' or to make a 'distinction in favor of or against, a person or thing belongs rather than on individual merit,'" and the *Webster's Third New International Dictionary* definition as "'the making or perceiving of a distinction or difference' or as 'the act, practice, or an instance of discriminating categorically rather than individually'").

51. *Id.* at 616–20 (Thomas, J., dissenting) (explaining that civil rights holdings in various contexts require "a comparison of otherwise similarly situated persons who are in different groups by reason of certain characteristics provided by statute").

52. *Id.* at 622 (Thomas, J., dissenting). The canon Justice Thomas cited explicitly deals with his concern that the majority was impermissibly importing definitional

that Congress will be assumed to be aware of and to be adopting for a statutory term the meaning of the term found by the Court in prior decisions, unless Congress expressly indicates an intention to use the term in a different sense.[53] Justice Thomas concluded that Title II prohibits only the failure to treat people with disabilities equally, but does not require that public services accommodate disabilities in order to ensure equal opportunity, and certainly does not prohibit segregation or isolation absent a showing of treatment different from that afforded to otherwise similarly situated persons.[54]

The principal opinions employ very different means of interpreting statutes.[55] The majority chose to read a somewhat vague statute as embracing a complex program of disability rights, including both the prohibition of invidiously unequal treatment and the mandate of affirmative accommodations to further the integrationist goal. While the embrace of integrationist views of disability discrimination was ground-breaking in Congress and controversial in the Court, these views had long since achieved mainstream status in public policy circles.

The disability rights movement changed the way society views and treats people with disabilities. This movement confronted the perceptions that people with disabilities were of a different caste, and that society, if it was unable to fix the "defect" causing the disability, was warranted in keeping people

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language from Title I to Title II without an explicit indication that Congress intended such cross-usage: "Where 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.* (Thomas, J., dissenting) (quotation marks omitted) (quoting Bates v. United States, 522 U.S. 23, 29–30 (1997) (quoting Russello v. United States, 464 U.S. 16, 23 (1983))).

53. *Id.* at 623–24 (Thomas, J., dissenting) (describing the conclusion that follows from the definition of "discrimination" in prior case law and the absence of an explicit indication from Congress that the term has a different meaning); *see also* Pub. Employees Retirement Sys. v. Betts, 492 U.S. 158, 172 (1989) (finding invalid Department of Labor regulations relying on legislative history for a definition of "subterfuge" in the context of the Age Discrimination in Employment Act because the plain language of the statute did not indicate an intention to vary from the meaning ascribed to that term in prior Supreme Court decisions).

54. *Olmstead*, 527 U.S. at 623 (Thomas, J., dissenting).

55. Discussion of fashion and principle in courts' review of the text and history of legislation is a fascinating topic beyond the scope of this Article. *See generally* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (comparing the "equity of the statute" method of judicial interpretation with the "faithful agent" approach); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001) (suggesting that over time, the Supreme Court changes both its rules for statutory construction as well as its actual interpretation technique).

separate, so long as it treated them charitably.[56] The movement shifted both the perception of what it means to be a person with a disability and the ground of argument as to society's obligations toward those with disabilities.[57] The former aspect of the movement concerned the locus of disability.[58] The movement shifted the notion of disability from a tragedy that marks a person as less than and separate from "normal" people to one that locates disability (at least in part) in a society that is structured to favor the able-bodied to the continual disadvantage of people with disabilities.[59] This aspect was eloquently captured in the following first-person account from a disability law scholar:

> I did not come to this bandwagon lightly. I had spent more than forty years struggling to adapt as a lone deaf person in this hearing world . . . . My entire life had been premised on the belief that the disability was mine, and thus it was my responsibility to compensate as best as possible for that disability. Society was not responsible for my deafness, and thus society was not responsible for changing the world to meet my needs. All the adapting was my responsibility. . . . In short, I had spent over forty years wholeheartedly supporting the "medical model" of disability, under which the focus is "rehabilitating" or changing the person with a disability rather than on changing society.
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> As more and more commentators began to reject the medical model of disability and to look at disability in the context of a social problem that society as a whole should bear responsibility for rectifying, I became persuaded . . . . Why should all responsibility relating to that disability be mine alone, not to be shared by society? Why not do what is required to open mainstream society to all people, with and without disabilities, rather than requiring people with

56. *See* Samuel R. Bagenstos, *Subordination, Stigma and "Disability,"* 86 VA. L. REV. 397, 427 (2000) (indicating that the 1970s disability rights movement reacted against the perception of people with disabilities as victims of personal tragedy to be treated with charity but to be maintained in "confining social roles").

57. *See id.* at 428–29 (describing the shift to the "social-relations approach," which "treats disability as the interaction between societal barriers").

58. *See id.* at 427–29 (describing the "medical/pathological paradigm," which attempted to locate the "problem" of disability on an individual's "bodily defects or deficiencies," thereby treating the "disability as an inherent personal characteristic that should ideally be fixed").

59. *See id.* at 427–30 (describing the "social-relations approach," which views disability as "arising primarily from the human environment," thereby treating disability as "a problem of social choice and meaning, a problem for which all onlookers are responsible").

> disabilities to do the impossible by seeking to "correct" uncorrectable disabilities?[60]

The disability rights movement argued that disabilities are conditions of society and not individuals.[61] Social contexts are created to benefit a wide range of people. What had previously been considered handicaps or disabilities, advocates argued, are better understood as reflections of the fact that social structures have been maintained to benefit one group (the able-bodied) at the expense of another (people with disabilities).[62]

The movement's second aspect—advocacy for a more active governmental role in the achievement of equal opportunity for people with disabilities—is closely related to the first.[63] As early as 1966, a new paradigm of "integrationism" was overtaking the old "custodialism" orientation of government disability action.[64] Integrationism is a reaction to prior professional and social assumptions that "persons with disabilities are to be sheltered—that they should be kept separate from the population at large and given charity to compensate for their inability to survive in the world on their own."[65] It reacts to assumptions that people with disabilities are helpless, dependent, and therefore properly segregated from society—for their own good.[66] Particularly for people with cognitive and psychiatric disabilities, government's

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60. Tucker, *supra* note 28, at 335–36 (footnote omitted). Professor Tucker has been "profoundly deaf since infancy and [has] never been able to benefit from hearing aids." *Id.* at 335.

61. *See* Bagenstos, *supra* note 56, at 432 ("[T]he disability rights argument is not that disability is entirely a social creation, only that it must be understood as the result of an interaction between biological restrictions and the broader physical and social environment . . . .").

62. *Id.* at 426.

> To most disability rights advocates, "disability" is not an inherent trait of the "disabled" person. Rather, it is a condition that results from the interaction between some physical or mental characteristic labeled an "impairment" and the contingent decisions that have made physical and social structures inaccessible to people with that condition.

Id. In its strong form, the disability rights position has an undeniably utopian feel. *See id*. at 431 ("Even stated in the more modulated form, the disability rights vision seems almost strikingly utopian."); Tucker, *supra* note 28, at 336.

63. Bagenstos, *supra* note 56, at 470 (explaining that people with disabilities will continue to be dependent on governmental assistance to be included in the societal norm).

64. Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 815 (1966) (characterizing "custodialism" and "integrationism" as "two polar sets of attitudes" toward people with disabilities); *see* Weber, *supra* note 20, at 889–90 (describing Mark C. Weber's *The Disabled and the Law of Welfare* as a "prescient" article that perceived the beginning of a shift toward governmental action promoting "autonomy and self-sufficiency rather than paternalism and caretaking").

65. Weber, *supra* note 20, at 899.

66. *Id.* at 899–900 (describing custodialism's approach to disability as one that "[k]eep[s] persons with disabilities hidden . . . [as] a means to protect them").

role from this older perspective was to provide housing in appropriate separate institutions and maintain professional supervision over the "patient's" everyday activities.[67] In short, they were kept separate to keep them safe.[68]

Integrationism pushed to shift government services from protecting the dependent to enabling independence and self-reliance. As disabilities were increasingly understood as at least substantially socially constructed, government services were urged to modify the social services and structures that inhibited disabled persons' pursuit of the good life.[69] Integrationist views led to one further important conceptual step: If disability is largely socially constructed, the modification of social structures and the provision of accommodations to create equal opportunity for people with disabilities are not matters for political choice or social largess, and the failure to enforce accommodations and to provide supplemental services to correct these socially constructed inhibitions does not reflect mere hard-heartedness or parsimoniousness. Instead, such a failure is discrimination, as government and society facilitate the able-bodied population's achievement of the good life and refuse the same treatment to people with disabilities.[70]

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67. *See id.*

68. *See* DAVID BRADDOCK ET AL., THE STATE OF THE STATES IN DEVELOPMENTAL DISABILITIES 5–6 (5th ed. 1998) (describing the American view prior to 1960 as assuming that people with developmental disabilities "needed to be controlled by segregation, sterilization, and isolation," and therefore supporting government services in institutions separate from the community); PAUL J. CARLING, RETURN TO COMMUNITY: BUILDING SUPPORT SYSTEMS FOR PEOPLE WITH PSYCHIATRIC DISABILITIES 23–24 (1995) (describing the older model of services for people with psychiatric illness as premised on a view of the patients as passive and vulnerable).

69. *See* Bagenstos, *supra* note 56, at 430.

> Rather than providing charity or public assistance—an approach that both stigmatizes its recipients and leaves the disabling aspects of the environment in place—most disability rights activists insist that society as a whole has a responsibility to eliminate the social and physical structures that deny people with "disabilities" access to opportunities and thereby create "disability."

Id. (footnote omitted)); tenBroek & Matson, *supra* note 64, at 840 ("[P]ublic assistance must be directed toward opportunity as well as toward security—geared to employment and self-support as well as to relief.").

70. *See* Mayerson & Yee, *supra* note 8, at 536–37 (noting that reasonable accommodation is "*not* affirmative action but simply part and parcel of meaningful nondiscrimination" (emphasis added)); *see also* Bd. of Trs. v. Garrett, 531 U.S. 356, 367–68 (2001) (rejecting this conception of disability discrimination as a Fourteenth Amendment matter).

> States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational. They could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled.

Id.

The drafters, in their attempt to infuse the ADA with integrationism, were:

> insistent that reasonable accommodation *was not* affirmative action but simply part and parcel of meaningful nondiscrimination. . . . [T]he disability movement has known from the outset that for people with disabilities, a civil rights statute based solely on equal treatment would fall far short of achieving the goals of inclusion and participation.[71]

The process of enacting the ADA naturally enough muffled this message to some extent; the long process of moving major legislation through Congress is famously inconsistent with goals of clarity and precision.[72]

What Congress ultimately passed, of course, was not a treatise on disability rights but a statute. It can be seen as making "a revolutionary break with the old ways of thinking about discrimination while charting a new course of affirmative obligations to ensure real equality,"[73] or as a statute with "seemingly conflicting premises . . . [that fails] to straightforwardly present its objectives."[74] It could be viewed as a coherent adoption of a social context theory of disability, or as a pragmatic attempt to meld several visions of disability rights.[75] Whatever the various theoretical threads may have been, the ADA, as signed by President George H.W. Bush, was structured to encompass both the goals of ending irrational discrimination and of ensuring "equality of opportunity, full participation, independent living, and economic self-sufficiency."[76] That, at any rate, is how the *Olmstead* Court has interpreted the ADA. When faced with the choice between reading the ADA as adhering to "traditional"—that is equalitarian—notions of discrimination, or as creating a new set of mandates for government and society to act affirmatively to ensure equal opportunity and independent living, the *Olmstead* majority chose independence.[77]

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71. Mayerson & Yee, *supra* note 8, at 536–37; *see also* Weber, *supra* note 20, at 903 ("The ADA is a classic integrationist statute.").

72. *See* Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 385 (2000) (emphasizing that compromises in language were required to gain the ADA's passage); Tucker, *supra* note 28, at 338–40 (expressing that the ADA "waffle[s]" in its language incorporating integrationist views, in part as a result of "negotiations and compromises" necessary to gain its passage).

73. Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27 , 35 (2000).

74. Tucker, *supra* note 28, at 339.

75. *See* Bagenstos, *supra* note 56, at 433–36 (surveying alternative perspectives from which to view the language of the ADA).

76. *See* 42 U.S.C. § 12101(a)(8) (2000).

77. *Compare* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 597 (1999)

B. Integrationism and People with Psychiatric and Cognitive Disabilities

The difference between Justice Ginsburg's and Justice Thomas's versions of the ADA is crucial to the goal of integration. The dissenters' view of the ADA adopts a "traditional" view of discrimination law.[78] That "traditional" view is purely and formally equalitarian.[79] It takes current social structures as given and simply mandates precisely equal treatment: no person may be treated differently on the basis of, for example, their race, ethnic group, religion, or gender than a similarly-situated person of another race, ethnic group, religion, or gender except in narrow situations, to remedy past unequal treatment.[80] Viewed from the disability rights perspective, this interpretation of the ADA simply blinks at reality. The lower-caste treatment of people with disabilities is due in part to invidious, irrational treatment at the hands of those who dislike or fear them.[81] But it also derives from the social structures and practices that are designed for the benefit of the able-bodied and that inhibit people with disabilities from participating fully in society.[82] Correcting inequality requires more than raising the consciousness of bigots. It requires affirmative changes in the social context that render and support the disparate treatment of people with disabilities.

For people with severe psychiatric and cognitive disabilities—people like the *Olmstead* plaintiffs[83]—the distinction between the majority and dissent's view of the meaning of the ADA is concrete. Equalitarian concepts of discrimination are of quite limited benefit for them. It trivializes the wrongs done to

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("Unjustified isolation, we hold, is properly regarded as discrimination based on disability."), *with id.* at 616 (Thomas, J., dissenting) ("Temporary exclusion from community placement does not amount to 'discrimination' in the traditional sense of the word . . . .").

78. *See id.* at 616 (Thomas, J., dissenting).

79. *See id.* at 617 (Thomas, J., dissenting) (explaining that the traditional language of discrimination is designed "to achieve equality of . . . opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees" (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971)).

80. *See id.* at 617 (Thomas, J., dissenting) (arguing that "a finding of discrimination requires a comparison of otherwise similarly situated persons who are in different groups by reason of certain characteristics provided by statute").

81. *See* Bagenstos, *supra* note 56, at 419–25 (gathering examples of irrational discrimination against people with disabilities based on animus, prejudice, and stereotypes).

82. *See id.* at 428–30 (gathering examples of limitations placed on people with disabilities by social structures and practices suitable only for non-disabled persons).

83. *Olmstead*, 527 U.S. at 593 ("Respondents L.C. and E.W. are mentally retarded women; L.C. has also been diagnosed with schizophrenia, and E.W. with a personality disorder. Both women have a history of treatment in institutional settings.").

the plaintiffs by examining their circumstances through a "traditional" discrimination lens.[84] Plaintiff L.C. was kept as an inpatient in a psychiatric hospital for almost *three years* after everyone agreed she should be moved to a community residence, while plaintiff E.W. was kept as a psychiatric hospital inpatient for almost *two years* after her need for such confinement was agreed to have ended.[85] As the *Olmstead* majority recognized, the harm suffered by L.C. and E.W. was traceable directly to their isolation, without any therapeutic justification, in a locked ward in a psychiatric hospital,[86] and not to the disparate treatment vis-á-vis some other group under traditional discrimination law.[87] Failure to recognize this integrationist aspect of the ADA would deprive people with severe psychiatric and cognitive disabilities of any benefit. Disparate treatment is often rational in the strict sense, and is therefore untouched by equalitarian norms. The opportunity for "[l]ife, [l]iberty and the pursuit of [h]appiness"[88] for *Olmstead* plaintiffs depends almost entirely on the integration mandate.

The segregation suffered by L.C. and E.W. was the most extreme and, therefore, the most obviously harmful to people with mental disabilities—they were locked on a secure ward designed for short-term stays for patients with unstabilized acute psychotic illnesses.[89] It is obvious that their continued

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84. Justice Kennedy's separate opinion in *Olmstead* made the strongest case for a meaningful application of traditional equalitarian discrimination principles to the plaintiffs' circumstances. He hypothesized that the plaintiffs may be able to demonstrate on remand that they had received differential treatment, compared to a different group, on the basis of animus or stereotype. *Id.* at 611–12 (Kennedy, J., concurring). Under the majority's reading of the ADA, this exercise would be unnecessary, as it recognized the ADA as doing more than simply adopting an off-the-shelf meaning of discrimination by tailoring statutory protections for people with disabilities—including protecting them against "unjustified isolation" even if a reference group cannot be said to have been treated differently. *Id.* at 597.

85. *Id.* at 593. *See* Brief for Respondents, *supra* note 2, at *5–*8 (describing L.C.'s and E.W.'s prolonged stays in locked psychiatric wards housing many patients in "acute crisis").

86. *See Olmstead*, 527 U.S. at 601 ("[C]onfinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."); *see also* Brief for Respondents, *supra* note 2, at *6–*8 ("L.C.'s prolonged stay in the acute psychiatric unit was detrimental to her habilitation, as the professional staff recognized, and unnecessarily deprived her of the opportunity to participate in the social life of the community outside of the locked doors of the institution."); *id.* at *7–*8 ("[E.W's] unnecessary institutionalization was profoundly disturbing to her, and prevented the development of independent living skills." (citation omitted)).

87. *Olmstead*, 527 U.S. at 597 (holding that "unjustified isolation . . . is properly regarded as discrimination based on disability").

88. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

89. *See* Brief for Respondents, *supra* note 2, at *6–*7.

confinement in such an inappropriate setting was harmful to their recovery from symptomatic mental illness, and that it deprived them of the ability to participate in broader social life.[90] The Court had a wealth of examples from briefs of *amicus curiae* concerning the effects of institutional isolation on people with mental illness:

> *Bernie S.* Bernie was an inpatient in psychiatric hospitals for twenty-two years, from the time he had been diagnosed with paranoid schizophrenia at age twenty-one.[91] While hospitalized, he "talked very little if at all."[92] In 1998, he left institutional isolation and moved into a group home with four other men and twenty-four hour per day staffing.[93] In contrast with institutional life, the men live in a "family atmosphere" in which they share indoor and outdoor chores, attend community activities, and socialize with people both with and without disabilities.[94] He now spontaneously initiates conversations.[95]
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> *Charles Q.* Charles has mental retardation and had lived in a state hospital for forty years.[96] While hospitalized, he was "incontinent and nonverbal" and became a "backward" patient.[97] His invariable daily routine contained little or no stimulation and almost no contact with the world outside his ward.[98] In 1997, he was released to a group home, where he presently lives with three other residents, along with support staff.[99] He has since become integrated into his community and shares cooking and cleaning chores, shops, attends movies, goes to the park, and surprisingly, "he particularly likes to go to the library. . . . [where] he enjoys reading" (no one in the institution apparently knew he could read).[100]
>
> *Margaret Donahue.* Ms. Donahue spent "most of her life" in institutions after having been diagnosed with

90. *Id.* at *6–*8; *see also Olmstead*, 527 U.S. at 600–01 (cataloguing the harms in extended unwarranted institutional isolation).

91. Amici Curiae Brief of National Mental Health Consumers' Self-Help Clearinghouse, et al., in Support of Respondents, at *12, Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581 (1999) (No. 98-536), *available at* 1999 WL 143940.

92. *Id.* at *13.

93. *Id.* at *12.

94. *Id.* at *12–*13.

95. *Id.* at *13.

96. *Id.* at *15.

97. *Id.* at *15–*16.

98. *Id.* at *16–*17.

99. *Id.* at *17.

100. *Id.*

> schizophrenia.[101] She recently moved to a "supported living" residence, where she lives with two other former state hospital patients, with continuous staffing.[102] Since her transfer to community living, she has "experienced a reduction in symptoms . . . [such as] fighting and banging her head."[103] She socializes, attends church, shares chores, and works part-time cleaning houses.[104] She characterized the change in the following terms:
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> > 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.
> >
> > . . . I like having the power over my own life.[105]

These anecdotal descriptions are supported by the literature. People with psychiatric and cognitive disabilities who do not need inpatient hospital care[106] are simply better off in a community setting such as that ultimately provided to L.C. and E.W.[107] But

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101. *Id.* at *14.

102. *Id.*

103. *Id.* at *14–*15.

104. *Id.* at *15.

105. *Id.* (first and second alterations in original).

106. As Justice Kennedy pointed out in his separate opinion, joined on this point by Justice Breyer, some people with psychiatric or cognitive disabilities will not benefit by transfer from an institutional to a community setting—their disabilities are simply too severe to permit such a shift. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 608–10 (1999) (Kennedy, J., concurring); *see also* Amicus Curiae Brief of the Voice of the Retarded, et al., in Limited Support of Affirmance, at *10, Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581 (1999) (No. 98-536), *available at* 1999 WL 65069 ("Community placement is a splendid idea—for those medically and emotionally able to enjoy it. But there are others whose disabilities are too severe to leave an institution safely."). As the authors of the Voice of the Retarded brief proceed to point out, the ADA does not and was not intended to force deinstitutionalization of people who benefit from institutional care. *Id.* at *4–*8.

107. *See* Brief for Respondents, *supra* note 2, at *8 ("Both [L.C. and E.W.] have now been receiving disability services in community-based programs in regular neighborhoods, L.C. for three years and E.W. for nearly two years. Neither has experienced difficulties or the need for re-institutionalization, and each, according to her home provider, is 'progressing steadily.'"); *see also* Paul J. Carling, *Major Mental Illness, Housing, and Supports: The Promise of Community Integration*, 45 AM. PSYCHOLOGIST 969, 971 (1990) (revealing "studies indicate that community-based treatment is virtually always as effective or more effective than hospital-based treatment in helping people with psychiatric disabilities" to improve their medical condition, functional status, and to gain integration into society); Peter Braun et al., *Overview: Deinstitutionalization of Psychiatric Patients: A Critical Review of Outcome Studies*, 138 AM. J. PSYCHIATRY 736, 747–48 (1981) (indicating that an early survey of studies supports community placements of people with psychiatric illnesses); James Conroy et al., *A Matched Comparison of the Developmental Growth of Institutionalized and Deinstitutionalized Mentally Retarded Clients*, 86 AM. J. MENTAL DEFICIENCY 581, 586–87 (1982) (reporting that an early study

one of the more exciting aspects of *Olmstead* is that the Court's understanding of the prohibition of "unjustified isolation" breathes new life into the right of people with disabilities to treatment in a least restrictive alternative, and expands it robustly into the realm of the treatment needs of voluntary recipients of mental health services.

> For nearly three decades, the phrase "least restrictive alternative" (LRA) has been an essential element of mental disability law. . . . [T]he concept of the least restrictive alternative—the idea that restrictivity of confinement can and must be calibrated and evaluated—has remained one of the core staples of mental disability law. Initially employed in the mental disability law context in an involuntary civil commitment case . . . the use of the concept has expanded to consideration of restrictivity of conditions within an institution, adequacy of treatment, . . . [and] the right to community aftercare and/or de-institutionalization . . . .[108]

Although it left open the proper balance to be struck between the value of integration for people with disabilities and the cost to states of providing services enabling such integration,[109] *Olmstead* articulates an integrationist vision that requires states to generalize the integration remedy demanded by L.C. and E.W. by providing supportive services to all with mental disabilities in the least restrictive alternative.[110]

The bases of the Court's decision on deinstitutionalization were the congressional findings on the history of segregation and isolation of people with disabilities,[111] as well as the Attorney General's regulation requiring that public services be administered "in the most integrated setting appropriate to the

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of the value of community placement of people with mental retardation shows gains in "adaptive behavior" and less dependence than the control group). *See generally* DAVID BRADDOCK ET AL., *supra* note 68, at 3–17 (describing the history and effectiveness of community treatment for people with mental retardation).

108. Michael L. Perlin, *"Their Promises of Paradise": Will* Olmstead v. L.C. *Resuscitate the Constitutional "Least Restrictive Alternative" Principle in Mental Disability Law?*, 37 HOUS. L. REV. 999, 1000 (2000) (footnotes omitted).

109. *See Olmstead*, 527 U.S. at 603–06 (discussing that states must have "leeway" in altering their policies for treatment, in recognition of competing claims on the public fisc).

110. *See id.* at 607.

> States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

Id.

111. *Id.* at 588–89.

needs of the qualified individual with disabilities."[112] The choice among services for people with major mental illness or cognitive impairment is not binary—in the institution or out.[113] Rather, people with mental disabilities, once they are deinstitutionalized, can be more or less integrated into society.[114] To the extent that client-centered, truly independent living provides greater integration than more custodial arrangements in group homes, the inappropriate maintenance of a person with disabilities in a custodial group home rather than in a less restrictive independent community setting would be contrary to *Olmstead*.[115] Just as the failure to provide appropriate community placements causes isolation by locking people into unwarranted institutionalization, so too the lack of a sound system of services for the mentally disabled risks the institutionalization of people with mental illness that could be treated in the community. Social supports comprising therapeutic resources, social services, and housing and employment assistance are necessary to enable the mentally disabled not only to avoid unnecessary institutionalization, but also to *avoid* inpatient care in the first instance.[116] The integrationist focus, then, should be on both the person in an institution who can be returned to the community

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112. *Id.* at 592 (quoting 28 C.F.R. § 35.130(d) (1998)). While the Court was not faced with the question of whether the regulation is valid, it did note that Congress instructed the Attorney General to model the Title II regulations after those adopted pursuant to Section 504 of the Rehabilitation Act of 1973. *Id.* at 591–92. The regulation cited above is nearly identical to the cognate Section 504 regulation, which requires recipients of federal funds to administer programs "in the most integrated setting appropriate to the needs of qualified handicapped persons." *Id.* (quoting 28 C.F.R. § 41.51(d) (1998)).

113. *See* Andrew I. Batavia, *A Right to Personal Assistance Services: "Most Integrated Setting Appropriate" Requirements and the Independent Living Model of Long-Term Care*, 27 AM. J.L. & MED. 17, 17–20 (2001) (describing various types of "personal assistance" services available to disabled persons).

114. *See id.* at 39.

> The vast majority of people with physical disabilities . . . are legally competent and more capable of living independently than the women in *Olmstead*. Consequently, if the Court recognized the right of these women to be served in the community, certainly a similar right would apply to other people with disabilities who are capable of greater self-direction.

Id.

115. *See id.* at 42 (arguing that *Olmstead* provides "dramatically increase[d] . . . leverage" for advocates of independent living models, although the extension of the opinion to ranges of non-institutional care remains uncertain).

116. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL: EXECUTIVE SUMMARY 285–95 (1999) [hereinafter REPORT OF THE SURGEON GENERAL], *available at* http://www.surgeongeneral.gov/library/mentalhealth/home.html (last visited Jan. 17, 2003); Bazelon Center for Mental Health Law, *Under Court Order: What the Community Integration Mandate Means for People with Mental Illness: The Supreme Court Ruling in* Olmstead v. L.C. [hereinafter Bazelon Center], *available at* http://www.bazelon.org/lcruling.html (last visited Jan. 17, 2003); CARLING, *supra* note 68, at 21–48.

with proper services, as well as the person in the community who can remain there—avoiding institutional care, with appropriate service support.

Community services for people with psychiatric and cognitive disabilities are evolving away from separate maintenance and professional control toward client choice and full community integration.[117] For the developmental disability community, this movement can be described as applying the "principle of normalization":[118]

> Normalization assumes that people's social roles are enhanced by age-appropriate activities in settings in which those activities usually occur, by having friends and other associates who are themselves valued socially in the community, and by participating in typical social, cultural, and economic roles in the community. Research and advocacy efforts regarding the issue of "quality of life" for people with mental retardation are a more recent development evolving from the normalization principle. A key feature of "quality of life" is the person with mental retardation's right to make choices about his/her life, and to define what the quality of his/her life will be.[119]

Similar goals of self-direction are described as the current cutting edge of mental health treatment by a consumer of mental health services:

> Since the 1960s, the main alternatives to large state/provincial hospitals have been smaller community-based facilities . . . . I remember people referring to them as "mini-institutions," "candy-coated hospitals," and "living room jails." . . . True, the smaller facilities weren't as bad as state hospitals, and many people did and still do benefit from them. But most who lived in these facilities did so because the alternatives were unacceptable . . . . If they were offered a decent, affordable apartment, most would grab it. Soon, . . . we saw programs with names such as "supported independent living". . . . [But] independence was not the top priority.
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> . . . .
>
> The community support model is beginning to be accepted by many mental health systems as the wave of the

117. *See* BRADDOCK ET AL., *supra* note 68, at 12–16 (discussing integration and choice as increasingly significant themes for people with developmental disabilities); CARLING, *supra* note 68, at 1–15 (noting that integration and self-determination have recently emerged as hallmarks of services for people with psychiatric disabilities).

118. BRADDOCK ET AL., *supra* note 68, at 13.

119. *Id*. (citations omitted).

> future. . . . [C]lient representation and empowerment are important; . . . people need to live in the community, integrated with everyone else; . . . people must be able to make choices . . . .[120]

Least restrictive means, even for those with severe disabilities, increasingly describes integration in "typical neighborhoods, work situations and community social situations," with support offered to the people with disabilities, their family members, and members of their community, in "regular places in the community."[121] The ADA, as interpreted by *Olmstead*, demands an end to unwarranted segregation of the disabled. The therapeutic benefit and integrative potential in a move from a group home to a less restrictive community residence is as positive (and its unwarranted denial as negative) as the move from a state hospital to a group home.[122] The "most integrated setting appropriate"[123] must be assessed on the relative degree of independence offered by alternative placements, and a state is required to move along the integrative continuum until it provides the greatest level of independence for the individual at issue.[124]

Olmstead is limited by its "all deliberate speed" qualifier. Title II applies only to "qualified individual[s] with a disability" and, therefore, only people who can "mee[t] the essential eligibility requirements" with "reasonable modifications" to the services have recourse.[125] The Court[126] read the "reasonable modifications" qualifier as a fiscal limit on the states' responsibilities[127] and set out a standard for the states to refer to as a measure of compliance; a state would meet the "reasonable-modifications standard" if it "had a comprehensive, effectively working plan for placing qualified persons with mental

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120. Howie the Harp, *Preface to* CARLING, *supra* note 68, at xv–xvi.

121. CARLING, *supra* note 68, at 15.

122. *Id*.

123. *See Olmstead*, 527 U.S. at 592 (quoting 28 C.F.R. § 35.130(d) (1998)).

124. *See* Batavia, *supra* note 113, at 40–41 (describing a functional approach to applying *Olmstead*); Perlin, *supra* note 108, at 1045–46 (describing thoughts of "patient advocates" on the application of "least restrictive alternative" models to the "implementation" of *Olmstead*).

125. *Olmstead*, 527 U.S. at 602 (citing 42 U.S.C. § 12131(2)).

126. Actually a plurality—Justice Stevens, the fifth member of the majority, did not join in Part III.B of the opinion, which provides the "all deliberate speed" analysis. *See Olmstead*, 527 U.S. at 607–08 (Stevens, J., concurring in part and concurring in the judgment).

127. *See id*. at 606 n.16 (interpreting the "reasonable modifications" provision to include an "undue hardship" inquiry, which "requires not simply an assessment of the cost of the accommodation in relation to the [state's] overall budget," but also an individualized analysis that weighs several additional factors).

disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated."[128] States, then, must have some "leeway" to design their own programs,[129] and will not be required to modify their programs in a way that would result in an "undue hardship."[130]

But *Olmstead* determined the ADA constitutes a federal integration principle that applies to all qualified persons with disabilities.[131] With respect to people with psychiatric and cognitive disabilities, the ADA's integration principle requires the states to apply a least restrictive alternative factor in providing services.[132] After *Olmstead*, states discriminate against people with disabilities when they provide services in a manner that segregates without sufficient programmatic or financial justification. The precise balance to be struck between integration on the one hand, and programmatic and financial concerns on the other hand, will be the subject of ongoing litigation and public policy debate.[133] The ADA has, however, created an integrationist framework within which states must work.[134] The next Part examines the constitutional question

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128. *Id.* at 605–06.

129. *See id.* at 605.

130. *See id.* at 605, 606 & n.16. The states' response would range beyond the debate over statutory interpretation to include constitutional defenses. Refer to Part II *infra*.

131. *See* Batavia, *supra* note 113, at 38–39 (emphasizing that the *Olmstead* plaintiffs had a "fairly extreme set of functional limitations, . . . [and c]onsequently, if the Court recognized the right of these women to be served in the community, certainly a similar right would apply to other people with disabilities who are capable of greater self-direction" (footnotes omitted)).

132. Refer to text accompanying notes 108–09 *supra* and note 110 *supra* and accompanying text (discussing the interpretation of the integration principle).

133. *See* Batavia, *supra* note 113, at 31, 40–41 (observing that, while the mandatory nature of least restrictive alternatives is not in dispute, *which* alternatives will be appropriate likely will be in dispute); Perlin, *supra* note 108, at 1042–44 (recognizing that *Olmstead*'s endorsement of the "'least restrictive setting' principle" is clear, although a series of knotty problems flows from the adoption of that principle). Lower courts' interpretations of *Olmstead* thus far have been mixed. *See, e.g.*, Rodriguez v. City of N.Y., 197 F.3d 611, 618–19 (2d Cir. 1999) (stating that *Olmstead* "addressed only . . . *where* [the state] should provide treatment, not *whether* it must provide it," and declining to apply the ADA to New York's refusal to provide specific services to facilitate independent living for Medicaid recipients with mental disabilities); Lewis v. N.M. Dep't of Health, 94 F. Supp. 2d 1217, 1237–39 (D.N.M. 2000) (finding that Medicaid-eligible people with disabilities stated a claim under the ADA, following *Olmstead*, against state officials who failed to implement Medicaid waiver programs supporting independent living), *aff'd*, 261 F.3d 970 (10th Cir. 2001). The *Lewis* court further explained that "states are not required to provide community-based services to all those who request them regardless of the cost. Rather, the courts must conduct a cost analysis in determining the appropriate remedy for a state's failure to comply with the ADA's integration mandate." *Id.* at 1239.

134. *See* 28 C.F.R. § 35.130(d) (2002) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of

avoided in *Olmstead*: the extent to which the enforcement of an integrationist principle on the states exceeds congressional authority.

II. A DREAM DEFERRED? THE DIMINISHING CONGRESSIONAL POWER TO EFFECT SOCIAL CHANGE

Olmstead settled many questions about the ADA's meaning.[135] It established that the ADA prohibits disparate treatment of people with disabilities as compared with others with disabilities, not only as compared with people without disabilities.[136] Most significantly, the *Olmstead* Court identified simple segregation on the basis of disability as an act that can violate the ADA.[137] Congress invoked both Commerce Clause[138] and Fourteenth Amendment Section 5 enforcement powers[139] in enacting the ADA.[140] As described above, access to public services is as important to people with severe mental disabilities as is access to public accommodations or employment. Thus, the extent to which they benefit from the enforcement of the ADA's integrationist mandate hinges in large part on the power of Congress to regulate the conduct of the states.[141] This Part examines the vitality of the power by which Congress can effect an integrationist program.

The four bases of power by which Congress may attempt to enforce independent and integrated living programs for those with mental disabilities are Section 5 enforcement power,

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qualified individuals with disabilities.").

135. The principal statutory question left open by the Court is the meaning of its "all deliberate speed" resolution of the arguments over the states' undue hardship defense. Refer to notes 125–30 *supra* and accompanying text (analyzing the limits placed on *Olmstead* by the "all deliberate speed" requirement). The contours of the application of this aspect of *Olmstead* are emerging from lower court opinions. Refer to Part III.A *infra* (discussing the interaction between Medicaid funding and the integration mandate of the ADA under *Olmstead*).

136. *See Olmstead*, 527 U.S. 581 at 598 & n.10.

137. *See id.* at 597 (affirming that "[u]njustified isolation" based on disability may violate Title II of the ADA).

138. U.S. CONST. art. I, § 8, cl. 3 (providing that Congress has the power "[t]o regulate Commerce . . . among the several States").

139. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of the article.").

140. 42 U.S.C. § 12101(b)(4) (2000) (invoking congressional authority to "enforce the Fourteenth Amendment and to regulate commerce").

141. *See, e.g.*, James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disability Act*, 52 ALA. L. REV. 91, 96 (2000) ("The new jurisprudence of federalism creates an environment in which Congress' power to set standards for state conduct under either its Article I or Section 5 powers is increasingly limited . . . .").

Commerce Clause power, conditional spending power, and direct federal spending power. In the real world, Congress must prefer to employ the powers in the order stated to avoid the political responsibility for raising taxes and administering programs. Actions undertaken pursuant to Section 5 and the Commerce Clause are "merely" regulatory in the sense that Congress unilaterally requires or prohibits specific state conduct, and states retain taxing and programmatic responsibilities.[142] In conditional spending programs such as Medicaid, taxing and programmatic responsibilities are shared. The federal government sets initial basic requirements which states accept if they opt to participate in the program and obtain federal financing.[143] In the fourth case, Congress acts alone and is solely responsible for taxing and programmatic responsibility.[144]

What if Congress chose to avoid conflict and placed a high premium on having its enactments upheld when challenged? Under those circumstances, Congress would attempt to follow the Court's decisions on the limits of congressional power, whether or not it agreed with those decisions. This perspective flips the list. That is, the likelihood that the Court will uphold on constitutional challenge an attempt by Congress to achieve the goal of independent living for people with mental disabilities is smallest if the enactment is premised on Section 5, and becomes progressively greater with movement to the Commerce Clause, conditional spending power, and unilateral spending power. The easier an action is politically for Congress, the less likely it is to pass through the Court's federalism screens. The more bulletproof the enactment from a federalism perspective, however, the more painful it is politically, as it requires Congress to do directly what it would rather do indirectly. This Part will suggest that this inverse relationship is no accident, as the Court's federalism cases embody a constitutional vision enforcing transparency and political accountability in the conduct of federal affairs.

A. Sources of Federal Legislative Power to Create Social Programs

1. Section 5 Enforcement Power. Section 5 of the Fourteenth Amendment empowers Congress to enact legislation "appropriate" to the task of enforcing Section 1's injunction against states' denial

142. Refer to Part II.A.1–2 *infra* (discussing Congress's Section 5 enforcement and Commerce Clause powers).

143. Refer to Part II.A.3 *infra* (surveying Congress's conditional spending power).

144. Refer to Part II.A.4 *infra* (examining Congress's direct federal spending power).

of equal protection to any person.[145] The test for determining whether the ADA is "appropriate" Section 5 legislation, and therefore abrogates states' Eleventh Amendment immunity, has three parts.[146] The first part asks whether Congress has with sufficient clarity articulated an intent to abrogate Eleventh Amendment immunity.[147] If a statute applies to a traditional and essential state function, Congress must be more explicit, providing an "unmistakably clear" intent to abrogate Eleventh Amendment immunity.[148]

The second element of the test is whether Congress is *enforcing* Section 1—that is, whether Congress has identified a pattern of state conduct violating individuals' constitutionally protected rights, violations of which Congress may remedy or deter.[149] To meet this element, the Court has required that

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145. *See* U.S. CONST. amend. XIV, §§ 1, 5. The Fourteenth Amendment also enjoins states from depriving persons of "privileges or immunities" and "due process of law." *Id.* § 1. A few recent decisions have explored the question of whether congressional power to enforce the Due Process Clause supports enactment of the ADA. *See* Popovich v. Cuyahoga County Ct. of Com. Pl., 276 F.3d 808, 813–16 (6th Cir. 2002) (en banc) (finding that while Congress lacked authority under Section 5 to enforce the Equal Protection Clause through Title II of the ADA, its authority to enforce the Due Process Clause supported the application of Title II against the state defendants under the circumstances presented), *cert. denied*, 123 S. Ct. 72 (2002); Garcia v. SUNY Health Scis. Ctr., 280 F.3d 98, 108–10 (2d Cir. 2001) (finding "that Title II in its entirety exceeds Congress's authority under [Section] 5" of the Fourteenth Amendment). However, this Article examines only those applications of Title II sounding in equal protection; the Due Process Clause applications are therefore beyond its scope.

146. *See* Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1142–47 (2001) (discussing the Court's departure from a deferential means-ends standard to review Congress's Section 5 enforcement power toward a stringent standard that limits Section 5's legitimate ends to those defined by the federal judiciary and narrows Section 5's permissible means to those "congruent and proportional" to the legitimate ends); Michael H. Gottesman, *Disability, Federalism, and a Court with an Eccentric Mission*, 62 OHIO ST. L.J. 31, 106 (2001) (observing that "[t]he current Court unquestionably has retreated, most notably in its failure to accord the deference to Congress . . . and in its application of 'heightened scrutiny' to Congress's findings and remedies," thereby decreasing Congress's power to end the widespread discrimination by states against persons with disabilities); Leonard, *supra* note 141, at 92, 126 (addressing the "great uncertainty about the effects of the Court's renewed federalism on the power of Congress to impose the ADA's non-discrimination mandate on state and local governments" and noting that, although the recent Court "decisions have cast a shadow of unconstitutionality over the Act," there appears to be an emerging set of guidelines to determine whether congressional legislation falls within Section 5).

147. *See* Bd. of Trs. v. Garrett, 531 U.S. 356, 363 (2001) (noting that Congress can abrogate the states' Eleventh Amendment immunity only if its intent is made "unmistakably clear in the language of the statute"); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000) (recognizing that Congress must "unequivocally intend[]" to abrogate Eleventh Amendment immunity).

148. Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

149. *Kimel*, 528 U.S. at 81 ("Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder . . . .");

Congress demonstrate a pattern and not a scattering of isolated incidents of state conduct comprising violations of substantive constitutional guarantees.[150] These violations must occur under tests adopted by the Court; Congress is not free to reinterpret constitutional rights.[151]

The test's third element asks whether the remedial measure is congruent and proportionate to the violations shown.[152] Section 5 does not grant Congress the authority to exercise "substantive, non-remedial" authority over states,[153] but rather permits remedies closely tailored in subject matter and scope to the actual constitutional violations giving rise to the enactment.[154] Congress may not employ Section 5 to work a "substantive change in constitutional protections," but may only remedy or deter violations of existing constitutional norms.[155]

The ADA meets the first prong; Congress included explicit abrogation language.[156] For this reason, a unanimous Court found in 1998 that the ADA evidences an unmistakably clear congressional intent to abrogate.[157] The other two prongs,

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City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (asserting that Congress's duty is to determine what legislation is necessary to enforce the Fourteenth Amendment).

150. *See Garrett*, 531 U.S. at 369–70 (commenting, in an examination of the ADA, that the few alleged incidents of discrimination of the disabled "taken together fall far short of even suggesting [a] pattern of unconstitutional discrimination"); *Kimel*, 528 U.S. at 89–91 (holding that evidence of discrimination collected in the examination of the Age Discrimination in Employment Act from clips of legislative debates and reports, as well as a state study on age discrimination, were not sufficient to show "*unconstitutional* age discrimination"); *Flores*, 521 U.S. at 530–31 (concluding there was a lack of evidence indicating a "widespread pattern of religious discrimination" because there was an absence of recent examples of religious persecution submitted during the hearings for the Religious Freedom Restoration Act).

151. *See Garrett*, 531 U.S. at 365 ("[It is a] long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."); *Flores*, 521 U.S. at 519–24 (examining the history of the Fourteenth Amendment to confirm that "the remedial, rather than substantive, nature of the Enforcement Clause" grants Congress "the power 'to enforce' not the power to determine what constitutes a constitutional violation").

152. *Garrett*, 531 U.S. at 365 (requiring constitutional "guarantees [to] exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" (quotation marks omitted)); *Flores*, 521 U.S. at 520 (same).

153. *See Flores*, 521 U.S. at 527.

154. *See id.* at 529 (noting Congress's ability to "invalidate any law which imposes a substantial burden on a religious practice unless it is justified by a compelling interest and is the least restrictive means of accomplishing that interest").

155. *See id.* at 532.

156. 42 U.S.C. § 12202 (2000) ("A State shall not be immune under the Eleventh Amendment . . . for a violation of this chapter."); *see also Garrett*, 531 U.S. at 363–64 (determining that Congress "unequivocally intend[ed]" to abrogate the Eleventh Amendment when it enacted 42 U.S.C. § 12202).

157. Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 208–09 (1998) (finding an "unmistakably clear" statement in a case involving the application of Title II to a state

however, have been interpreted with sufficiently restrictive bite so as to invalidate the invocation of Section 5 as authority for Title II under *Olmstead* circumstances.

The second prong is met when Congress identifies a record of unconstitutional state behavior of sufficient salience to support remedial action.[158] In *Garrett*, the Court examined the extensive legislative history concerning state discrimination in employment and found the record insufficient to establish a pattern of discrimination.[159] The Court did not directly address the adequacy of the record on state discrimination in the provision of public services,[160] although the high standards to which the Court held Congress in its amassing of a record of discrimination make it doubtful that it would have reached a different result as to Title II's legislative history.[161] The record is likely to have been found insufficient to support Title II, not only due to what the Court characterized as the "anecdot[al]" nature of the evidence,[162] but also for its failure to document *irrational* discrimination—that is, state conduct that would violate the Equal Protection Clause.[163] The Court observed that it may be rational and therefore constitutional for states to refuse to employ or provide services for disabled people in order to avoid the higher cost of accommodating their disabilities.[164] Even a widespread pattern of "unwillingness on the part of state officials to make the sort of accommodations for the disabled required by the ADA" will not establish the requisite constitutional violation.[165]

Garrett found that Title I of the ADA fails to meet the third prong as well because the ADA requires that states provide accommodations well beyond those required to remedy or deter

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prison).

158. *See* Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 490–91 (2002) (describing a congressional fact-finding requirement read into Section 5 in recent opinions).

159. *Garrett*, 531 U.S. at 368 ("The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.").

160. The parties did not brief the Title II issues, but rather focused on Title I, and the Court therefore did not reach the public service concerns. *Id.* at 360 n.1.

161. The Court did note that the record was richer in describing allegedly unlawful state action in the provision of public services than in employment. *Id.* at 372 n.7. However, the Court discounted this record material as "anecdote" rather than factual findings of Congress or the courts. *Id.*

162. *Id.*

163. *Id.* at 366–67 (citing Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435, 441, 446 (1985), in which the Court held that equal protection claims brought on the basis of disability are reviewed under the rational basis test).

164. *Id.* at 372.

165. *Id.* at 370.

constitutional violations.[166] Because the Court recognized only intentional and irrational mistreatment of the disabled as unconstitutional discrimination, the ADA's affirmative accommodation requirement was necessarily disproportionate to any unconstitutional state conduct.[167] Whatever the wisdom of these remedies as a public policy matter, the Court found them too sweeping to be properly characterized as remedial.[168] Because Title I is invalid under Section 5, private actors are barred by the Eleventh Amendment from pursuing money damages claims against the States.[169] As described above, people with severe mental illness pursuing *Olmstead* claims for community-based services rely on Title II.[170] While the Court declined to reach the validity of Title II under Section 5,[171] the courts of appeal that have considered the question have overwhelmingly found Title II similarly flawed in actions sounding in equal protection.[172]

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166. *Id.* 373–74 (contrasting the breadth of the ADA's remedy with the "detailed but limited remedial scheme" in the Voting Rights Act).

167. *Id.* at 372–73.

168. *Id.* at 374.

> Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here . . . .

Id.

169. *Id*. Congress relied on the Commerce Clause as well as Section 5 in enacting the ADA. Refer to notes 138–40 *supra* and accompanying text. The Court had previously found, however, that Congress may not abrogate states' Eleventh Amendment immunity from money damages actions in federal courts using its Article I powers. *See* Seminole Tribe v. Florida, 517 U.S. 44, 72–73 (1996) ("[Under] [t]he Eleventh Amendment[,] . . . Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). Refer to Part II.A.2 *infra* (discussing the remedies that may be available for abuse of Congress's Commerce Clause authority).

170. Refer to notes 30–55 *supra* and accompanying text (analyzing the *Olmstead* interpretation of discrimination claims by those with severe mental disability under Title II of the ADA).

171. *Garrett*, 531 U.S. at 360 n.1.

172. *See* Klingler v. Director, Dep't of Revenue, 281 F.3d 776, 777 (8th Cir. 2002) (per curiam) (permitting declaratory and injunctive relief in non-employment claims under Title II of the ADA, but precluding claims for monetary damages); Thompson v. Colorado, 278 F.3d 1020, 1034 (10th Cir. 2001) (holding that because there was no finding of an "identified . . . history and pattern of unconstitutional discrimination by the states against the disabled," "Title II is not a valid abrogation of the states' Eleventh Amendment immunity" (quotation marks omitted)), *cert. denied*, 122 S. Ct. 1960 (2002); Reickenbacker v. Foster, 274 F.3d 974, 984 (5th Cir. 2001) (dismissing Title II claims after concluding that Congress did "not validly act[] through its Fourteenth Amendment [Section] 5 power to abrogate state sovereign immunity" because there was no pattern of unconstitutional discrimination by the States against the disabled, and there was no congruence and proportionality between the obligations and the findings of discrimination); Brown v. N.C. Div. of Motor Vehicles, 166 F.3d 698, 707–08 (4th Cir. 1999) (determining that Congress's

The *Garrett* majority's narrow interpretation of Section 5 dooms the ADA either because states have been guilty only of acting "hardheadedly—and perhaps hardheartedly"[173]—but rationally (and therefore lawfully) in failing to provide accommodations,[174] or because they have treated the disabled unequally in an intentional and irrational fashion, but the remedy of broad affirmative accommodations is disproportionate to the violation.[175] In other words, the integrationist aspect of the ADA is not, after *Garrett*, an appropriate Section 5 response to the mistreatment suffered by people with disabilities.[176] Recognizing that the ADA was based on Commerce Clause as well as Section 5 powers, the Court noted *Garrett* does not leave persons with disabilities without "federal recourse against discrimination."[177] Actions can be pursued by the United States, which is not limited by the Eleventh Amendment, or by private litigants pursuing injunctive relief in federal court under the *Ex parte Young* doctrine.[178] To the extent the ADA is within Congress's Commerce Clause power, *Garrett* is "merely" a jurisdictional decision. This leaves the ADA intact as enforceable by the United States in both money damages and injunctive

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attempt to ban the state's surcharge for handicapped parking exceeded its Section 5 enforcement power and the scope of the Fourteenth Amendment, and granting the state Eleventh Amendment immunity from ADA claims); *see also* Popovich v. Cuyahoga County Ct. of Com. Pl., 276 F.3d 808, 810–18 (6th Cir. 2002) (en banc) (finding Title II invalid as against states in actions sounding in equal protection, but finding case-by-case validity in cases sounding in due process), *cert. denied*, 123 S. Ct. 72 (2002); Garcia v. SUNY Health Scis. Ctr., 280 F.3d 98, 109 (2d Cir. 2001) (holding Title II actions against states valid only in cases premised on animus or ill will against the plaintiff on the basis of the plaintiff's disability). The exception is the Ninth Circuit. *See* Hason v. Med. Bd., 279 F.3d 1167, 1170–71, 1174 (9th Cir. 2002) (noting the failure of *Garrett* to reach the Title II issue, and reaffirming circuit precedent finding that Title II validly abrogates states' Eleventh Amendment immunity), *cert. granted in part*, 123 S. Ct. 561 (2002). A dissent from denial of the en banc rehearing noted that *Hason* placed the Ninth Circuit at odds with "every [other] circuit to have analyzed the issue." Hason v. Med. Bd., 294 F.3d 1166, 1171 (9th Cir. 2002) (O'Scannlain, J., dissenting from denial of rehearing en banc).

173. *Garrett*, 531 U.S. at 367–68.

174. *Id.* at 366–67 (commenting that "[s]tates are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational").

175. *Id.* at 372 (recognizing that even if "a pattern of unconstitutional discrimination" is found, the "remedies created by the ADA against the [s]tates would raise the same sort of concerns as to congruence and proportionality").

176. *See id.* at 372–73 (finding that the ADA integrationist requirement "far exceeds what is constitutionally required").

177. *Id.* at 374 n.9; *see also* 42 U.S.C. § 12101(b)(4) (2000) (expressing congressional intent to "enforce the [F]ourteenth [A]mendment and to regulate commerce").

178. *Garrett*, 531 U.S. at 374 n.9; *see also Ex parte* Young, 209 U.S. 123, 167 (1908) (holding that individual state officials can be sued for injunctive relief to prevent the violation of rights, even though the states remain protected by Eleventh Amendment immunity).

relief, by private litigants in federal court through *Ex parte Young* actions for injunctive relief, and even by private litigants for money damages in the courts of states that have waived their sovereign immunity in that forum.[179] The next step in the analysis is to examine the extent of Congress's Commerce Clause authority.

2. Commerce Clause Power. Contraction of Section 5 power may affect ADA protections only to the limited extent that "*private* litigation to enforce the ADA may not proceed in *federal* court."[180] *Garrett* suggests that Commerce Clause authority supports actions in federal court by the United States for money damages and injunctive relief or by aggrieved individuals for injunctive relief.[181] The remedies available under Title II are similar in character.[182] The remedies available to injured parties pursuing a private action under Title II[183] are adopted from § 505,[184] which in turn are adopted from Title VI.[185] A private right of action for injunctive relief has

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179. *See* Erickson v. Bd. of Governors, 207 F.3d 945 (7th Cir. 2000). In *Erickson*, the court observed that a finding that states' Eleventh Amendment immunity is not abrogated by the ADA is jurisdictional because federal court actions are available to the United States (in money damages and injunctive relief) and to private litigants (in injunctive relief only). *Id.* at 952. Private litigants may even proceed under the ADA for money damages in state court if the state has "opened its courts to claims based on state law . . . prohibit[ing] . . . disability discrimination by units of state government." *Id.*; *cf.* Alden v. Maine, 527 U.S. 706, 754 (1999) (holding that states that have not waived their sovereign immunity from state law causes of action need not open their state courts to actions under cognate federal causes of action premised on Article I authority).

180. *Erickson*, 207 F.3d at 952 (emphasis in original).

181. *See Garrett*, 531 U.S. at 374 n.9 (discussing remedies available under Title I after the Court found Title I to exceed Section 5's remedial reach). Refer to note 179 *supra*.

182. *See* 42 U.S.C. § 12133 (2000) (providing that the remedies available under Section 505 of the Rehabilitation Act are available under Title II). Section 505 incorporates the remedies available under Title VI. *See* 29 U.S.C. § 794a(a)(2) (2000) (mandating that "[t]he remedies, procedures, and rights set forth in [T]itle VI . . . shall be available to any person aggrieved"). Section 602 of Title VI, in turn, empowers the United States to enforce the provisions of Title VI by withholding federal funding or by "any other means authorized by law." 42 U.S.C. § 2000d-1; *see also* Alexander v. Sandoval, 532 U.S. 275, 289–90 (2001) (describing the ability of agencies to withhold federal funding to enforce Title VI as well as identifying the limits of that power). An injured person who elects federal agency enforcement first files an administrative complaint with the "appropriate Federal agency," which will attempt to negotiate a resolution of the dispute. U.S. DEP'T OF JUSTICE, THE AMERICANS WITH DISABILITY ACT: TITLE II TECHNICAL ASSISTANCE MANUAL § II-9.1000 (1993), *available at* http://www.usdoj.gov/crt/ada/taman2.html (last visited Jan. 17, 2003). In the absence of such a resolution, the agency will "refer the matter to the Department of Justice for a decision whether to institute litigation." *Id.*

183. *See* 42 U.S.C. § 12133.

184. *See* 29 U.S.C. § 794a(a)(2).

185. *See* 42 U.S.C. § 2000d ("No person . . . shall . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.").

long been recognized under Title VI.[186] Plaintiffs with severe mental illness seeking to invoke *Olmstead* are likely to seek primarily or exclusively injunctive relief, as did the *Olmstead* plaintiffs.[187] The *Olmstead* remedies discussed in Part I above largely survive *Garrett* so long as Title II is a valid exercise of Congress's Commerce Clause power.

Garrett's suggestion that Title I of the ADA is a valid exercise of Congress's Commerce Clause power is fully in line with precedent finding that Commerce Clause power reaches the regulation of employment—even public employment—well beyond the limits of the Equal Protection Clause.[188] But Congress cannot bank on the promise of Commerce Clause power as a basis for social legislation such as Title II of the ADA. The Court has signaled in two lines of cases that Commerce Clause legislation will be closely scrutinized, particularly when it impinges on state prerogatives. The first line of cases signals a revitalization of judicial scrutiny over the "commercial" basis of Commerce Clause legislation.[189] From the time of the New Deal until the mid-1990s, the Court acquiesced in the use of the Commerce Clause to expand federal regulation of American society.[190] *United States v. Lopez* signaled the Court's reassertion of limits as it synthesized previous cases to identify "three broad categories of activity that Congress may regulate under its commerce power."[191] The Commerce Clause may be invoked to protect "channels of interstate commerce" and "instrumentalities of interstate commerce," and to "regulate those activities having a substantial relation to interstate commerce."[192] The federal gun possession statute at issue in *Lopez* was not directed at either

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186. *See Alexander*, 532 U.S. at 279; Canon v. Univ. of Chi., 441 U.S. 677 (1979); *see also* 42 U.S.C. § 2000-7(a)(2).

187. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 593, 594 & n.6 (1999) (discussing possible mootness of the plaintiffs' claims as a result of their obtaining release from the restrictive hospital setting).

188. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78 (2000) (reasoning that because the Age Discrimination in Employment Act (ADEA) was "valid under Congress' Commerce Clause power, . . . it was necessary to determine whether the Act also could be supported by Congress' power under [Section] 5 of the Fourteenth Amendment"); EEOC v. Wyoming, 460 U.S. 226, 243 (1983) (holding that the ADEA constitutes "a valid exercise of Congress's powers under the Commerce Clause").

189. *See* Leonard, *supra* note 141, at 94–95 (noting that *Lopez* "drew into question the Court's longstanding practice of deferring to Congressional use of the Commerce Clause to justify legislative actions").

190. *See* United States v. Lopez, 514 U.S. 549, 552–57 (1995) (describing the history of Commerce Clause interpretation, marking the retreat of judicial scrutiny of social legislation as beginning with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

191. *Id.* at 558.

192. *Id.* 558–59.

channels or instrumentalities of interstate commerce, and was therefore valid only if it regulated activities in substantial relationship with interstate commerce.[193] The Court rejected the argument that gun possession substantially affects interstate commerce.[194] Significantly, it identified "commerce" for purposes of congressional power with "economic activity."[195] *United States v. Morrison*,[196] decided five years after *Lopez*, both reinforced the heightened scrutiny to which congressional invocations of commerce power would be subjected and drove home the identification of "commerce" with "economic activity" for purposes of judicial review.[197]

The second line of cases concerns the limitations on commerce power when it rubs against Tenth Amendment protections. The intersection of the Tenth Amendment and the Commerce Clause has vexed the Court for several decades. In 1976, the Court determined that the Tenth Amendment limited congressional commerce power when it impinged on activities traditional or integral to state functions.[198] In 1985, the Court reversed course, finding in *Garcia v. San Antonio Metropolitan Transit Authority*[199] that judicial inquiry into whether state functions were "integral" was too uncertain to be workable, and that state prerogatives in this regard were better left to the political process.[200]

Notwithstanding the signals sent in *Garcia* regarding the political nature of Tenth Amendment questions, the Court struck down two federal statutes in recent years on Tenth Amendment grounds. In *New York v. United States*,[201] the court found that Congress adopted legislation under its commerce power

193. *Id*. at 559.

194. *Id*. at 562–64.

195. *Id*. at 560.

196. 529 U.S. 598 (2000).

197. *Id*. at 609–13.

198. *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 836, 849–52 (1976) (stating that the 1974 Amendments to the Fair Labor Standards Act that "extended the minimum wage and maximum hour provisions to . . . public employees by the States" were not within Congress's Commerce Clause power because "the challenged amendments operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions").

199. 469 U.S. 528 (1985).

200. *Id*. at 546–47, 552. Tenth Amendment judicial scrutiny was not abandoned altogether. Under *Garcia*, Congress runs afoul of the Tenth Amendment when it: (1) regulates states as states and not merely as commercial actors; (2) addresses matters going to attributes of state sovereignty; (3) impairs states' "ability to structure integral operations of traditional governmental functions"; and (4) acts beyond areas of substantial federal interest justifying state submission. *Id*. at 537 (quotation marks omitted).

201. 505 U.S. 144 (1992).

concerning the disposal of low-level radioactive waste.[202] The statute gave states the option of either adopting state legislation comporting with federal templates or taking title themselves to the radioactive waste.[203] This choice commandeered state legislatures to perform federal functions, the Court found, violating structural constitutional guarantees embodied in the Tenth Amendment.[204] The same anti-commandeering concern animated the invalidation of the Brady Act[205] several years later. In *Printz v. United States*,[206] the Court held that the Tenth Amendment prohibited Congress from imposing ministerial tasks on state and local officials even if the subject matter of the federal legislation is within the range of congressional authority.[207]

New York and *Printz* rooted the anti-commandeering rule in the observation that the Constitution grants Congress the power to "regulate individuals, not States."[208] The Court found federal requirements that state legislative or executive officials perform federal tasks would confuse the constitutional scheme for political accountability:

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or

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202. *Id*. at 173–74. The Court also found that Congress could condition states' receipt of federal funds in compliance with federal requirements regarding the disposal of the waste. *Id*. at 171, 173.

203. *Id*. at 174–75.

204. *Id*. at 187–88 ("State governments are neither regional offices nor administrative agencies of the Federal Government. . . . The Federal Government may not compel the States to enact or administer a federal regulatory program.").

205. The Brady Act regulates the purchase of handguns and requires local law enforcement officials to perform certain functions to ensure compliance with federal law. 18 U.S.C. § 922(s) (2000).

206. 521 U.S. 898 (1997).

207. *Id*. at 926–28 ("It is no more compatible with this independence and autonomy that [the State's] officers be 'dragooned' . . . into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws." (citations omitted)).

208. *See New York*, 505 U.S. at 166; *see also Printz*, 521 U.S. at 913 (contrasting the new federal law system that regulates individual citizens to the old federal law system that was directed to the states).

> unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.[209]

The Court thus interprets the Tenth Amendment as at least in part a "good government" mechanism that renders visible the lines of responsibility for the implementation of laws and regulations, thereby providing assurances that citizens can identify those deserving credit or blame when elections provide the opportunity for public response.[210]

Title I of the ADA is squarely within Congress's commerce power under either line of cases. Employment questions clearly bear a substantial relationship to interstate commerce,[211] and the application of generally applicable employment statutes to states passes muster under *Garcia*'s Tenth Amendment standards.[212] However, severely mentally ill plaintiffs pursuing claims under Title II for services in less restrictive settings rely on Title II, which applies to—and only to—"public" entities, including states and their instrumentalities.[213] How Title II will fare under the Commerce Clause is uncertain under both the *Lopez*/*Morrison* and the *Garcia*/*New York*/*Printz* lines of cases.

Lopez and *Morrison* require that activity be economic in nature and bear a substantial relationship to interstate commerce to fall within congressional power to regulate under the Commerce Clause.[214] It is easy, and perhaps persuasive, for plaintiffs to point out that American hospitals and other

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209. *New York*, 505 U.S. at 168–69. The same accountability argument animated *Printz*:

> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

Printz, 521 U.S. at 930.

210. *See, e.g.*, *New York*, 505 U.S. at 182–83 (pointing out that the powers of Congress cannot be enlarged, even with the states' consent, because to allow such enlargements would allow state officials to duck responsibility for unpopular decisions by shifting blame to the federal government).

211. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42–43 (1937) (finding the National Labor Relations Act within Congress's commerce power).

212. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537, 555–56 (1985) (upholding the application of the Fair Labor Standards Act to states in a Tenth Amendment challenge).

213. 42 U.S.C. §§ 12131–12132 (2000).

214. United States v. Morrison, 529 U.S. 598, 609–10 (2000); *see also* United States v. Lopez, 514 U.S. 549, 558–60 (1995).

providers of health care services are overwhelmingly private entities providing services in return for payment. Such businesses affect interstate commerce every bit as much as do businesses engaged in "intrastate coal mining[,] intrastate . . . credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of homegrown wheat."[215] But are states funding services for the severely mentally ill engaged in the commercial enterprise of health care delivery? What if states argue instead that they are engaged in the provision of social services or welfare benefits to the needy? From this perspective a non-trivial argument can be made that such activities, like the administration of family law and some educational activities, are non-commercial and therefore beyond the reach of congressional commerce power.[216]

Similar arguments can be made under *Garcia*, *New York*, and *Printz*.[217] If it is assumed that states are engaged in the commercial enterprise of health care delivery, then federal regulation of that conduct is permissible under *Garcia*, and in the absence of commandeering of state executive or legislative personnel to do federal business, the Tenth Amendment is not offended.[218] If it is agreed that Title II regulates states as

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215. *Lopez*, 514 U.S. at 559–60 (citations omitted) (listing activities found to be within commerce power in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981); *Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); and *Wickard v. Filburn*, 317 U.S. 111 (1942), respectively).

216. *See Lopez*, 514 U.S. at 564–65 (noting there must be spheres of non-commercial activity beyond the federal commerce power); *see also id*. at 624 (Breyer, J., dissenting) (acknowledging the existence of such spheres of exclusive state regulatory power). Public welfare and social services are, like hospital services, also performed by private entities—principally charities. Are charitable activities "commercial" for *Lopez/Morrison* purposes?

217. The two lines of cases tend to merge in situations in which federal law regulates states' activities that are arguably commercial in nature. For example, the *New York* Court observed,

> In a case like these, involving the division of authority between federal and state governments, the two inquiries [(limits of Article I power and the reach of the Tenth Amendment)] are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

New York v. United States, 505 U.S. 144, 156 (1992) (emphasis omitted).

218. *See Garcia*, 469 U.S. at 537. Health care delivery is not a traditional area of state sovereignty, regulation of that business is not integral to traditional state functions, and ensuring equal opportunities to health care for people with disabilities is a legitimate federal interest. *See* Nora Q.E. Passamaneck, Note, *Diverging Paths from a Shared Origin: Defining "Disability" Under 151B and the Americans with Disabilities Act in* Dahill *and* Sutton, 82 B.U. L. REV. 1263, 1268 (2002) (referring to federal assistance programs such as healthcare for the disabled individual). It is true that Title II regulates

participants in the health care delivery system in *Olmstead* actions, the validity of Title II also would pass muster were *Garcia* to be overruled. In a recent Title II case, Judge Easterbrook opined that regulation of state universities would be within congressional commerce power even under *National League of Cities v. Usery*,[219] the previous Tenth Amendment precedent.[220] Judge Easterbrook noted the Court had found regulation of a state-owned railroad not to violate the Tenth Amendment during the *National League of Cities* era.[221] He observed that "running a university is no more a core governmental function than is running a railroad."[222] The same can be said of health care delivery. But what if the states' activities are seen as providing social services or welfare benefits to the needy? These activities, like family law and local law enforcement, can be argued to be the province of state and local authorities.[223] Current law, then, suggests that Commerce Clause power validly undergirds Title II. The trend in the Court's federalism analysis, however, would give a risk-averse Congress reasons for concern. Its spending powers are on firmer ground.

3. Conditional Spending Power. In *New York v. United States*,[224] the Court noted that the prohibition on commandeering state officials did not prevent Congress from employing other means—including its conditional spending power—to "influence"

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states directly. *See* Pa. Dep't of Corr. v. Yesky, 524 U.S. 206, 209–10 (1998). However, it also regulates other non-federal public entities. *See* Keith R. Fentonmiller & Herbert Semmel, *Where Age and Disability Discrimination Intersect: An Overview of the ADA for the ADEA Practitioner*, 10 GEO. MASON CIV. RTS. L.J. 227, 235–36 (2000) (explaining that Title II governs causes of action for all suits in which violating are being sued including those entities with less than fifteen employees).

219. 426 U.S. 833 (1976).

220. Erickson v. Bd. of Governors, 207 F.3d 945, 952 (7th Cir. 2000).

221. *See id.* (citing United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982), for the proposition that operation of a private railroad engaged in interstate commerce "is not an integral part of traditional state activities" under *National League of Cities* and therefore not immune from federal regulation).

222. *Id.*

223. It is far from clear that such an argument would be successful, as federal programs providing both income support and health care benefits for the needy have existed for decades. For example, the Supplemental Security Income program is entirely federally funded, provides cash supports for the poor and disabled, and is administered through the Social Security Administration. 42 U.S.C. §§ 1381(a), 1382(a) (2000). Medicaid, Title XIX of the Social Security Act, provides health insurance coverage to categorically eligible low-income people in a program jointly administered and funded by the federal government and the states. 42 U.S.C. §§ 1396–1396v. Refer to Part III.A *infra* (discussing the role of Medicaid, the dominant funder of health services, in achieving integration for the disabled).

224. 505 U.S. 144 (1992).

states to align their policies with the federal view.[225] The leading case on congressional conditional spending power is *South Dakota v. Dole*,[226] in which South Dakota challenged a 1984 statute directing the Secretary of Transportation to withhold a portion of federal highway funds from any state permitting persons under the age of twenty-one to purchase alcoholic beverages.[227] The *Dole* Court upheld the statute, noting that the conditional spending power allows Congress to influence states in areas where direct regulation is beyond congressional power.[228] The Court set out limits, described by four factors, for Congress's exercise of the conditional spending power.[229]

First, drawing on the language of the Spending Clause,[230] Congress must act "in pursuit of the 'general welfare.'"[231] Second, Congress must unambiguously describe the nature of the condition and indicate that the funding is conditional in order to permit states the opportunity to knowingly choose whether to accept the funds.[232] Third, the condition imposed must be related or germane to the federal interests underlying the federal spending program.[233] Finally, the condition may not violate other constitutional provisions.[234] The first two requirements engendered little discussion in *Dole*.[235]

South Dakota argued that Congress's intermeddling in alcohol distribution interfered in an area that had been committed to the states in the Twenty-First Amendment.[236] South Dakota argued that Congress, barred by the Twenty-First Amendment from directly regulating the drinking age, instead employed the stratagem of using financial blandishments to induce states to abdicate their constitutional authority in this area.[237] The Court rejected this argument, explaining that states

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225. *Id*. at 167 (noting that "Congress may attach conditions on the receipt of federal funds" or offer states the choice between regulating "according to federal standards or having state law pre-empted by federal regulation" (quotation marks omitted)).

226. 483 U.S. 203 (1987).

227. *Id*. at 205 (referring to 23 U.S.C. § 158(a)(1)).

228. *Id*. at 206–07.

229. *Id*. at 207–08.

230. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

231. *Dole*, 483 U.S. at 207.

232. *Id*.

233. *Id*. at 207–08.

234. *Id*. at 208.

235. *See id*. (noting that the concept of welfare is shaped by Congress and the conditions upon which states received highway funds were clearly stated).

236. *Id*. at 209.

237. *Id*. at 205–06.

could retain their constitutional prerogatives through the "simple expedient of not yielding to . . . federal coercion."[238] Congress violates the "'independent constitutional bar' limitation on the spending power" only if it imposes conditions requiring states to take actions "that would themselves be unconstitutional."[239] A state's agreement to raise the drinking age "would not violate the constitutional rights of anyone."[240] The Tenth Amendment is not implicated so long as states are free to refuse federal funds—that is, so long as the federal offer is not unduly coercive.[241]

Justice O'Connor dissented on the ground that the drinking age requirement was not "reasonably related" to the underlying purposes of the highway funding statute.[242] She argued that the majority's relatedness test permitted Congress to tie federal regulation of "social and economic life" bearing only "attenuated or tangential relationship" to the highway funding statute, thereby enlarging the congressional regulatory agenda without any clear limit.[243] Justice O'Connor would permit Congress to set conditions on how federal funds are spent, but would also respect the role of state government by otherwise barring federal interference with regulatory policy.[244] She described the "clear place at which the Court can draw the line between permissible and impermissible conditions on federal grants" in the following terms:

> The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers.[245]

Justice O'Connor illustrated the distinction by example. She suggested that applying the Hatch Act so as to limit the political activity of state employees whose work is financed by federal funds is *spending* and not *regulation* because the condition

238. *Id*. at 210 (quotation marks omitted).

239. *Id*.

240. *Id*. at 211.

241. *See id*. at 210–11 (commenting that all South Dakota stood to lose was "5% of the funds otherwise obtainable under specified highway grant programs").

242. *Id*. at 213–14 (O'Connor, J., dissenting).

243. *Id*. at 215 (O'Connor, J., dissenting).

244. *Id*. at 216 (O'Connor, J., dissenting).

245. *Id*. at 215–16 (O'Connor, J., dissenting).

"relate[s] to how federal moneys were to be expended."[246] But, she argued, the statute at issue in *Dole* falls on the other side of the divide. The drinking age requirement goes not to how federal funds may be spent, but rather to the regulatory question of "who shall be able to drink liquor."[247] It is not obvious that Justice O'Connor actually offered "a clear place at which the Court can draw the line between permissible and impermissible conditions on federal grants,"[248] but her important voice was heard in favor of a more restrictive interpretation of *Dole*'s relatedness test.

Dole has been reaffirmed as the appropriate standard against which the Court will measure congressional spending powers.[249] The two most important limitations on federal power lurking in *Dole* will emerge from the interpretation of "coercion"[250] and "relatedness" in future conditional spending powers cases.[251] The following section addresses the fourth and surest source of federal power to affect social policy.

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246. *Id*. at 217 (O'Connor, J., dissenting).

247. *Id*. at 218 (O'Connor, J., dissenting).

248. *Id*. at 215 (O'Connor, J., dissenting). The application of the Hatch Act to state workers, for example, could be seen, using Justice O'Connor's rubric, as a regulation under which state employees can engage in political activity, and not merely a condition on the spending of federal funds. State employees' political participation, like the drinking of minors in *Dole*, was not the type of activity for which federal funds were provided.

249. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686–87 (1999) (applying the *Dole* standard and concluding that unlike *Dole*, in which the state was threatened with the denial of a gift or gratuity, in *Florida Prepaid* the state was threatened with a sanction); *see also* New York v. United States, 505 U.S. 144, 158, 167, 188 (1992) (applying the *Dole* standard and concluding that unlike *Dole*, in which Congress could "condition highway funds on States' adoption of minimum drinking age," in *New York* Congress could not "direct the States to provide for the disposal of the radioactive waste generated within their borders").

250. The statute at issue in *Dole* subjected the state only to the loss of 5% of federal highway funds, and such a limited financial loss was found not to rise to inappropriate coercion. *Dole*, 483 U.S. at 211–12. It is unclear what level of financial impact would amount to coercion under *Dole*. *See* Michael Selmi, *Remedying Societal Discrimination Through the Spending Power*, 80 N.C. L. REV. 1575, 1624 (2002) ("[T]he [*Dole*] Court suggested that some conditions might be so coercive as to result in an impermissible level of compulsion, though the Court failed to indicate when such a circumstance might arise. . . . [I]t is also difficult to know how withholding a higher percentage of highway funds might amount to compulsion." (footnote omitted)).

251. Another potential concern regarding spending powers legislation involves private enforcement. A recent breathtakingly broad district court decision found that the ability of private citizens to enforce spending powers statutes by suing state officials under *Ex parte Young* had been superceded *sub silentio* by the Court's recent federalism cases. *See* Westside Mothers v. Haveman, 133 F. Supp. 2d 549, 562 (E.D. Mich. 2001) (stating that *Alden*, *Printz*, *New York*, *Dole*, and *Pennhurst* made clear that "Spending Power enactments do not constitute the 'supreme authority of the United States,'" and therefore "suits cannot be brought against state officials under *Ex parte Young* to enforce those [enactments]"). The Sixth Circuit reversed the district court's grant of summary judgment. *See* Westside Mothers v. Haveman, 289 F.3d 852 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 618 (2002). Refer to Part III.A *infra* (analyzing the Supreme Court's view in

4. Direct Spending to Further the General Welfare. The final source of congressional power relevant to the provision of services to the severely mentally ill is the direct spending power. The scope of congressional power to tax and spend in furtherance of the general welfare is extremely broad, limited only when its exercise would violate some other constitutional term:

> [T]he General Welfare Clause [is] . . . a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause. . . . It is for Congress to decide which expenditures will promote the general welfare: "The power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Any limitations upon the exercise of that granted power must be found elsewhere in the Constitution.[252]

Unlike conditional spending programs in which Congress uses funds to leverage its financial support of a social issue to influence other entities—usually state or local governments—to act in a manner consistent with congressional judgment, direct spending programs arise when Congress is willing to forge its own way, acting immediately on a problem rather than regulating the conduct of others to achieve a social end. When Congress chooses to go it alone, and the resulting program raises no independent constitutional concerns, its judgment as to what serves the general welfare is entitled to such deference[253] that the Court has suggested that this raises a nonjusticiable political question.[254]

Dole, which illustrates where the line between "permissible and impermissible conditions on federal grants" is drawn).

252. Buckley v. Valeo, 424 U.S. 1, 90–91 (1976) (per curiam) (citations omitted). Thus, for example, federal spending might be challenged if it ran afoul of the free speech provisions of the First Amendment. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572–73, 583, 590 (1998) (rejecting a First Amendment challenge to the "decency and respect" criteria that the National Endowment for the Arts considers in deciding how to distribute federal arts funds). Likewise, it may be challenged if it implicated the establishment of religion provisions of the First Amendment. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845–46 (1995) (denying that "eligibility to student publications because of their [religious editorial] viewpoint[s]. . . . undermine[s] the very neutrality the Establishment Clause requires"); *see also* Selmi, *supra* note 250, at 1618–22 (discussing *National Endowment for the Arts* and *Rosenberger*).

253. South Dakota v. Dole, 483 U.S. 203, 207 (1987) (citing Helvering v. Davis, 301 U.S. 619, 645 (1937)). "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield." *Helvering*, 301 U.S. at 645.

254. *Dole*, 483 U.S. at 207 n.2 (citing Buckley v. Valeo, 424 U.S. 1, 90–91 (1976) (per curiam), in which the Court "questioned whether 'general welfare' is a judicially enforceable restriction at all").

B. Accepting Limits: Progressive Social Policy in Federalist Times

The Court has narrowed Congress's freedom to enact social legislation, particularly where federal legislation implicates state prerogatives. If Congress wishes to advance the integrationist goal embodied in the ADA, but the Court holds fast, is Congress stymied? If Congress wishes to advance a social agenda, it may do so even within current judicially imposed limits. The Court's constraints have three essential components: Congress must respect the importance of states in the constitutional structure,[255] it must speak clearly when it intends to impinge on states' prerogatives,[256] and it must structure programs so as to foster political accountability for taxing and the administration of social programs. Congress need not abdicate and may contest the Court's vision. But while the battle over the shape of the structural Constitution rages, Congress may pursue a parallel strategy to pursue social legislation—including that necessary to effect the integrationist goals of the ADA. Those needlessly languishing in institutions and denied a place in civil society cannot wait for the tides of political theory to turn.

The Court emphasized the first component—respect for the structural importance of states in the federal system—most forcefully in *Alden v. Maine*,[257] recognizing states' immunity from suit by private citizens in their own courts, and not only in federal courts as indicated by the text of the Eleventh Amendment.[258] The Court attributed to the founders' recognition of "attributes of sovereignty" in the states that survive the adoption of the Constitution unless "there is 'compelling evidence' that the States were required to surrender [sovereignty] to Congress pursuant to the constitutional design."[259] The Court found that the Constitution did not require or effect the surrender of state sovereign immunity from suit in their own courts.[260] The Court clearly expressed its general view that the Constitution preserved a distinct and substantial role for the states:

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255. Refer to notes 201–04 *supra* and accompanying text (demonstrating how the Court in *New York* found the congressional legislation violated structural constitutional guarantees embodied in the Tenth Amendment because it commandeered state legislatures to perform federal functions).

256. Refer to note 210 *supra* and accompanying text (illustrating how the Tenth Amendment "renders visible the lines of responsibility for the implementation of laws and regulations").

257. 527 U.S. 706 (1999).

258. *Id*. at 712–13, 754.

259. *Id*. at 730–31.

260. *Id*. at 733.

> Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document "specifically recognizes the States as sovereign entities." . . . Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment . . . .
>
> . . . The States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere."
>
> . . . .
>
> . . . They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.[261]

Alden built on *Seminole Tribe*, in which the Court expanded Eleventh Amendment immunity from suit by private parties in federal court.[262] In both cases the Court expressed concern that contrary rulings would inappropriately offend the *dignity* of states.[263]

The sovereign and dignitary interests of the states also animated the Court's narrowing of congressional power under Section 5 of the Fourteenth Amendment. *City of Boerne v. Flores*[264] relies in part on the constitutional place of states as a basis for stringent evaluation of congressional action as *enforcing* the Fourteenth Amendment, and not merely regulating to further congressional goals.[265] Similarly, the Court emphasized

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261. *Id*. at 713–15.

262. Seminole Tribe v. Florida, 517 U.S. 44, 72–73 (1996) (noting that "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States[,]" and that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction").

263. *Alden*, 527 U.S. at 749 ("Petitioners contend that immunity from suit in federal court suffices to preserve the dignity of the States. Private suits against nonconsenting States, however, present the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties regardless of forum." (citations omitted) (quotation marks omitted)); *Seminole Tribe*, 517 U.S. at 58 ("The Eleventh Amendment does not exist solely in order to preven[t] federal-court judgments that must be paid out of a State's treasury; it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." (alteration in original) (citations omitted) (quotation marks omitted)).

264. 521 U.S. 507 (1997).

265. *See id*. at 520–22 (describing the Framers' concerns for the continuing sovereignty of the states and finding only legislation remedying unconstitutional acts by the states supported by Section 5). The Court also struck down the federal legislation at issue on separation of powers grounds, finding that Congress had attempted to usurp "the

the structural importance of state sovereignty when addressing cases at the border of Commerce Clause power and the Tenth Amendment.[266] The effect of the Court's recognition of a special and separate state sovereignty has been the narrow construction of any source of congressional power threatening to infringe on that sovereignty. Preserving the dignity of states in their independent exercise of power drives the Court to permit a diminution of state autonomy only on a showing of the clearest evidence that such diminution was intended by the Framers.[267] The tie, and even the close call, will always go to the states. As is more fully described above, this jurisprudential orientation assures that Section 5 will not support disability discrimination law based on equal protection violations.[268]

Further, it suggests some limits on Commerce Clause authority when Congress attempts to regulate states' public welfare and social service functions, functions central to the ADA's mandate to end the segregation of the mentally disabled.

The second component of the Court's federalism program is the requirement of clarity when Congress legislates in areas touching on important state functions. *Gregory v. Ashcroft*[269] found that the Age Discrimination in Employment Act failed with sufficient clarity to impose federal age discrimination on the State of Missouri's employment of judges, and that Missouri was therefore not within the statute's reach when it enforced judicial mandatory retirement requirements.[270] The "plain statement rule" is premised on the observation that states "retain substantial sovereign powers under our constitutional scheme," and the Court's assumption that Congress will not "readily interfere" with those powers.[271] The test has been applied most often to congressional abrogation of states' Eleventh Amendment

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province of the Judicial Branch" to interpret the meaning of constitutional provisions. *Id*. at 535–36.

266. *See* New York v. United States, 505 U.S. 144, 165–66 (1992) (noting that the founders settled on a system in which the federal government could regulate individuals directly, but could not "coerce sovereign bodies, states, in their political capacity" (quoting 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 197 (2d ed. 1863))); *see also* Printz v. United States, 521 U.S. 898, 918–19 (1997) ("Although the States surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty." (quotation marks omitted)).

267. *See Alden*, 527 U.S. at 730–31 ("Congress may subject the States to private suits in their own courts only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design.").

268. Refer to Part II.A.1 *supra* (discussing Congress's Section 5 enforcement power).

269. 501 U.S. 452 (1991).

270. *Id*. at 455–56, 467.

271. *Id*. at 461.

immunity,[272] but it applies whenever Congress intends to alter "the usual constitutional balance between the States and the Federal Government."[273] This component of the federalism roadmap is closely related to the first. Just as the Court honors the separate sovereignty of the states by construing constitutional provisions narrowly to shield states, so will it narrowly construe statutes. The difference, of course, is that Congress is the master of statutory language and can draft statutes precisely when it intends to impose burdens on states.

The third component of the federalism roadmap requires that federal statutes not frustrate political accountability. In *New York v. United States*,[274] the Court found that a statute effectively compelling the New York legislature to adopt legislation consistent with federal blueprint impermissibly interfered with political accountability.[275] The Court observed that Congress may act directly under the Commerce Clause or its spending powers in appropriate cases, but that it violated the Tenth Amendment when it instead acted indirectly, "commandeering" state officials to serve federal purposes.[276] No matter how great the national interest, the Court held, and even where Congress clearly has the power to act directly, it does not have "the authority to require States to regulate."[277] The Court emphasized transparency in government as a central basis for and function of the Tenth Amendment.[278] This last component of the federalism program has thus far only served to invalidate very direct commandeering of state officials. The principle, however, could plausibly be applied to a broader range of federal actions.[279]

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272. *See* Pa. Dep't of Corr. v. Yesky, 524 U.S. 206, 209 (1998) (finding a clear statement of abrogation in Title II of the ADA); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242–43 (1985) (finding no clear statement of abrogation under a prior version of the Rehabilitation Act).

273. *Atascadero*, 473 U.S. at 242.

274. 505 U.S. 144 (1992).

275. *Id*. at 182–83 (noting that a state official could avoid political accountability by blaming unpopular decisions on the direction of Congress).

276. *Id*. at 175–76.

277. *Id*. at 178.

278. "Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." *Id*. at 169. *Printz* extends this accountability point to federal law that "commandeers" state officials in the completion of ministerial tasks. Refer to notes 209–10 *supra* and accompanying text.

279. A broader interpretation suggests itself. Ever since *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court has adhered to the view that states must look in the first instance to the political process for protection from otherwise valid and generally applicable federal legislation, and not to the courts. *See Garcia*, 469 U.S. at 550–51

Consequently, Congress must adhere to three principles when it regulates state conduct in order to escape the Court's searching review. It must employ its power in a manner respectful of the states' place in the constitutional structure, and it must speak clearly and unequivocally to the extent it intends to alter "the usual constitutional balance between the States and the Federal Government";[280] and further, Congress must at least not impede political accountability. A Congress that is both litigation-shy and bent on advancing the ADA's integrationist agenda would not rely on Section 5 of the Fourteenth Amendment as a basis for binding states; would avoid reliance on the Commerce Clause to the extent it sought to regulate the states' provision of welfare benefits or social services; and would speak clearly and create programs transparent in their structure so as to foster political accountability.

Strategic concerns for avoiding judicial obstruction are in tension with political inclination, however. The strength of a claim that a federal program is within Congress's power is inversely related to the political comfort with which Congress can act. When Congress invokes its Section 5 and Commerce Clause powers to regulate states, it is the states that must tax and administer, but congressional authority is subject to close scrutiny.[281] When Congress relies on its direct and conditional spending power, the taxing and administrative burdens are (unpopularly) federal, but its power is nearly certain.[282] This inverse relationship is understandable as a function of the Court's interest in protecting states' dignity and separate sovereignty, and its nascent interest in employing the Tenth Amendment to foster political accountability.[283] But unless and

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(finding that the protection of states from overreaching federal legislation "lies in the structure of the Federal Government itself" as to which states retain a great deal of influence); *see also* Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) ("*Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers . . . ."). When the Court rejected the *National League of Cities* test based on the "integral" or "traditional" nature of state activity impinged upon by federal legislation, it allowed for the future development of other limits to federal action targeting important state prerogatives. *Garcia*, 469 U.S. at 546–47 ("If there are to be limits on the Federal Government's power to interfere with state functions—as undoubtedly there are—we must look elsewhere to find them."). It may be (although it is not so yet) that the Court will generalize the political transparency aspect of the Tenth Amendment and employ it to permit judicial review of circumstances beyond those in which the federal government commandeers state officials.

280. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

281. Refer to Part II.A.1 *supra* (discussing Congress's Section 5 enforcement power), and Part II.A.2 *supra* (discussing Congress's Commerce Clause power).

282. Refer to Part II.A.3 *supra* (discussing Congress's conditional spending power), and Part II.A.4 *supra* (discussing Congress's direct spending power).

283. Refer to notes 201–10 *supra* and accompanying text (discussing violations of the

until the tides of constitutional interpretation shift, Congress must hew to the Court's line or see its programs gutted. Political concerns notwithstanding, it must employ its direct and conditional spending powers to advance the ADA's integrationist goal. The shift suggested here is not one that would abandon Title I and Title III's coverage of private employers and public accommodations under Congress's Commerce Clause authority. It was, after all, one of the motivations for passing the ADA, and one of its triumphs, that it extended federal disability discrimination beyond programs receiving federal funds[284] to employers,[285] public entities,[286] and public accommodations[287] generally.[288] Rather, it suggests that federal spending fills gaps to advance the interests of people with disabilities and that the weakest point of the ADA—its coverage of states—should be addressed through conditional spending. Much of this strategic realignment of federal law can be achieved by amending existing statutes.

Under *Dole*, Congress can condition states' receipt of federal funds on the states' agreement to abide by conditions set for the funds' use.[289] Congress could amend one of two existing statutes to achieve this end. The ADA bars the isolation of people with disabilities, but it is not a spending powers law.[290] Section 504[291] is a spending powers law but it does not bar the isolation of people with disabilities.[292] Congress could either amend the ADA to mandate compliance with its terms as a condition of receipt of federal funds, or amend Section 504 to prohibit the segregation of people with disabilities. Either option would extend *Olmstead* to state programs (like Medicaid) accepting federal funds even if

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Tenth Amendment and diminished political accountability).

284. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796l, a conditional spending statute prohibiting disability discrimination, was the principal federal disability discrimination law prior to the passage of the ADA. *See* Olmstead v. L.C. *ex rel*. Zimring, 527 U.S. 581, 589 n.1 (1999).

285. *See* 42 U.S.C. § 12111(5) (2000).

286. *See id*. § 12131(1).

287. *See id*. § 12181(7).

288. *See id*. § 12101(a) (describing congressional findings that prior disability discrimination laws with lesser scope had failed to address "unfair and unnecessary discrimination" against the disabled).

289. Refer to Part II.A.3 *supra* (discussing Congress's conditional spending power).

290. *See* 42 U.S.C. § 12101(b)(4) (invoking the power to enforce the Fourteenth Amendment and to regulate commerce, but not the spending power).

291. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as 29 U.S.C. §§ 701–796l).

292. *See* Olmstead v. L.C. *ex rel*. Zimring, 527 U.S. 581, 589 n.1 (1999) (noting that "[i]n the ADA, Congress for the first time referred expressly to 'segregation' of persons with disabilities as a 'for[m] of discrimination'" (second alteration in original)).

both Section 5 and Commerce Clause powers are unavailing.[293] A general spending powers statute would more fully fulfill the interests of *Olmstead* plaintiffs, as it would apply to all federally funded programs, not only Medicaid.[294] However, the bulk of funding for community services for the severely mentally disabled is likely to be provided through the Medicaid program.[295]

The limits of *Dole* might well be tested under this scenario. The Court would be asked to determine whether the conditioning of $111.1 billion in Medicaid funds to the states for a program that comprises about 20% of state budgets[296] is coercive. *Dole* found the threat of withholding 5% of federal highway funds not unduly coercive;[297] yet the Court may feel differently about the threat of total de-funding of the federal match for one of the states' biggest budget items. To allay this concern, perhaps Congress should permit "intermediate sanctions," that is, a threat of the withholding of less than all—say 5%—of the federal match should states fail to comply with the ADA.[298]

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293. In the alternative, Congress could simply modify the Medicaid statute to condition participation on states' agreement to abide by nondiscrimination terms as now contained in the ADA. The Secretary of Health and Human Services currently requires states to certify that they will comply with, inter alia, the ADA and Section 504 in their Medicaid programs as a condition of state plan approval, and therefore, of participation in the program. The Secretary is, of course, currently empowered to condition participation on states' compliance with the ADA, as the ADA is (for now) a valid federal law binding states. Were the ADA to become ineffective as beyond Congress's Section 5 and Commerce Clause authority, the Secretary would not be empowered to so condition participation without statutory authorization.

294. *See* Sara Rosenbaum, *The Olmstead Decision: Implications for Medicaid*, at 6 (Mar. 2000) (policy brief prepared for the Kaiser Commission on Medicaid and the Uninsured) (describing the services to be provided in an Olmstead remedy as "*medical*, not just *Medicaid*"), *available at* http://www.kff.org/content/2000/2185/OlmsteadDecision.pdf (last visited Nov. 29, 2002).

295. *Id.*

296. *See* Centers for Medicare and Medicaid Services, *Medicaid: A Brief Summary* (reporting that "[t]he total expenditure for the nation's Medicaid program in 2000, excluding administrative costs, was $194.7 billion ($111.1 billion in Federal and $83.6 billion in State funds)"), *available at* http://www.cms.hhs.gov/publications/overview-medicaid/default4.asp (last modified July 30, 2002); National Association of State Budget Officers, *Policy Resources: Medicaid* (noting that by 1996, Medicaid spending had grown from 10% (in 1987) to about 20% of total state expenditures), *available at* http://www.nasbo.org/Policy_Resources/Medicaid/medicaid/htm (last visited Nov. 24, 2002); *see also* John Holahan et al., *Health Policy for Low-Income People: States' Responses to New Challenges*, HEALTH AFFAIRS, May 23, 2002, at W187–88, *at* http://www.healthaffairs.org/WebExclusives/Holahan_Web_Excl_052202.htm (last visited Jan. 14, 2003) (describing states' budget concerns and efforts to maintain Medicaid functioning).

297. South Carolina v. Dole, 483 U.S. 203, 211 (1987).

298. In other areas, Congress has recognized that "all or nothing" sanctions—in which federal funds are either provided in full or withdrawn entirely—can be counterproductive because the "death penalty" is rarely imposed. *See, e.g.*, Melody Harris, *Hitting 'Em Where It Hurts: Using Title IX Litigation to Bring Gender Equity to Athletics*,

The crucial right of private enforcement of spending powers statutes against states will also be contested. The right is crucial because government agencies charged with enforcement are often understaffed and overworked, and private litigants therefore carry much of the burden of assuring compliance.[299] It is contested because courts have imposed increasingly restrictive tests on litigants asserting the right to enforce directly the provisions of spending powers laws.[300] But the amendment described above would preserve the ADA's explicit private right of action, and no statutory ambiguity would hinder effective private enforcement. Congress's power, under its conditional spending powers, to obtain through persuasion waiver of state immunity from private litigation and other concessions it is not empowered to demand directly from the states, has been questioned.[301] But the Court has certainly, and recently, held that states may waive their immunity.[302] Additionally, the Court has indicated that congressional spending may be conditioned on waiver of that immunity,[303] so long as Congress provides clear

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72 DENV. U. L. REV. 57, 95 (1994) (discussing how the threat of withdrawing federal funds from educational institutions as a result of Title IX noncompliance is ineffective because, in practice, the Office for Civil Rights has never withdrawn federal funds). The tax code has been amended, for example, to provide the Internal Revenue Service the option of imposing a sanction short of withdrawal of charitable status from entities that violate tax principles in a serious but not egregious way. *See* John F. Coverdale, *Preventing Insider Misappropriation of Not-for-Profit Health Care Provider Assets: A Federal Tax Prescription*, 73 WASH. L. REV. 1, 10 (1998). The Centers for Medicare and Medicaid Services is now empowered to impose monetary sanctions against providers that violate Medicare principles; previously, the only sanction was the "death penalty" of revoking provider participation status. *See* Jennifer E. Gladieux, *Medicare+Choice Appeal Procedures: Reconciling Due Process Rights and Cost Containment*, 25 AM. J. L. & MED. 61, 103–04 (1999).

299. *See* Jane Perkins, *Medicaid: Past Successes and Future Challenges*, 12 HEALTH MATRIX 7, 31–38 (2002) (discussing whether Medicaid is an "enforceable legal right").

300. *See* Blessing v. Freestone, 520 U.S. 329, 333, 340–41 (1997) (listing three principal factors to determine whether a statutory provision creates a privately enforceable right and holding that mothers seeking social security support services for their children did not establish that the statute in question gave them individually enforceable rights); *see also* Perkins, *supra* note 299, at 34–36 (discussing the conclusions reached in Westside Motors v. Haveman, 133 F. Supp. 2d 549 (E.D. Mich. 2001), which provide "a basis to bar private enforcement" of legislation based on spending clause authority).

301. *See* Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 462–63 (2002) (proposing "that federal grants to states, including those that are noncoercive, seriously undermine federalism values . . . . [and arguing] in favor of judicial intervention to constrain them").

302. *See* Lapides v. Bd. of Regents, 122 S. Ct. 1640, 1642, 1646 (2002) (holding that a state waives its Eleventh Amendment immunity by removing a lawsuit to federal court).

303. *See* Alden v. Maine, 527 U.S. 706, 755 (1999) (stating that states may waive sovereign immunity to receive federal funds).

notice of the condition.[304] A plain inclusion of a requirement for waiver of immunity from suit would therefore withstand review.

The following Part describes existing federal programs, based on direct or conditional spending powers, that can serve as the core of renewed efforts to further the ADA's integrationist goals. These existing programs form a model for successful social legislation in times of restrictive judicial activism. Successful programs during these times eschew reliance on Section 5 and the Commerce Clause in order to err on the side of caution. It is undeniable that such a bias, while rendering the programs nearly bulletproof when challenged on federalism grounds, also renders them politically difficult. The examples in current law demonstrate the feasibility of such a strategy. The ADA's integrationist goals remain as important today as they were in 1990, and the difficult steps required to realize those goals are worth the congressional effort.

III. INTEGRATION THROUGH SPENDING POWERS LEGISLATION

Integration for people with serious mental illness requires publicly funded social programs, which are necessary to enable transition from the segregated world of institutions and to facilitate full participation in civil life. Much of the litigation on the integration mandate has focused on Medicaid,[305] and rightfully so. Medicaid is the purchaser of health care services for one in seven Americans, including many of America's poor and disabled residents.[306] Medicaid provides essential health care for

304. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 639–40 (1999) (determining that a finding of a private right of action under Title IX requires that Congress clearly provide states with adequate notice of conditions for receiving federal funds).

305. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 601 & n.12 (1999) (addressing the Medicaid waiver program that provides "reimbursement to States for the provision of community-based services to individuals who would otherwise require institutional care"); Lewis v. N.M. Dep't of Health, 261 F.3d 970, 974 (10th Cir. 2001) (noting that plaintiffs, individuals with "physical or developmental disabilities," sued for violation of the Medicaid Act after they were placed on waiting lists for as many as seven years, which did not comply with Medicaid's "reasonable promptness" requirement for waiver of services); Bryson v. Shumway, 177 F. Supp. 2d 78, 82, 86 (D.N.H. 2001) (noting that plaintiffs, a class of persons with acquired brain disorders, claimed denial of "effective services to which they [were] entitled under the Medicaid Act" and New Hampshire's home and community-based care waiver programs), *vacated*, 308 F.3d 79 (1st Cir. 2002); Barthelemy v. La. Dep't of Health & Hosps., No. CIV.A.00-1083, 2001 WL 1254859, at *1 (E.D. La. Oct. 18, 2001) (reciting that plaintiffs claimed a violation of the Medicaid Act "for failing to provide persons a choice between institutional and community services and failing to provide these services with reasonable promptness").

306. *See* Perkins, *supra* note 299, at 8.

people with mental disabilities exiting institutional care.[307] But Medicaid is not the whole story. Those leaving institutions to rejoin society need assistance finding affordable housing[308] and income and employment assistance to achieve and maintain independence.[309] The ADA signaled a commitment to "invoke the [full] sweep of congressional authority" to further a "national mandate for the elimination of discrimination against individuals with disabilities."[310] The realization of an end to discrimination for people with mental disabilities requires the provision of public services. Health care, housing assistance, and income and job support may be provided within the limits set by the Court for federal social legislation.[311] Indeed, federal programs exist in all three areas and, with modifications, can form the basis for a comprehensive desegregation program for the mentally disabled.

A. Conditional Spending: Medicaid

1. A Tool for Integration in Current Law. *Olmstead* turned on the State of Georgia's alleged violation of the ADA and not on the law of Medicaid.[312] The parties focused on Medicaid because that program was the vehicle for an inpatient's transition to community care. If an inpatient was not programmatically appropriate for the community services offered by Georgia Medicaid, she remained hospitalized—no non-Medicaid-funded option was available. If the plaintiffs were not medically appropriate for Medicaid-funded community placements, their ADA claims would fail, as they would not be "qualified individual[s]" for the services they were denied.[313]

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307. *See* Bazelon Center, *supra* note 116 (observing that assertive community treatment (ACT) is an important service "for individuals with serious mental illnesses, particularly in their transition from institutional placements," and that ACT "can be supported under existing Medicaid policies"). The report further observed that "[p]erhaps the most critical need for people moving out of institutions is a decent place to live." *Id*.

308. *See* CARLING, *supra* note 68, at 206–26 (providing information about how a community's capacity "to provide affordable housing for people with psychiatric disabilities can be increased through efforts to secure significant numbers of housing units").

309. *Id*. at 227–48 (describing "strategies that have been successfully used to increase a community's employment opportunities for *all* of its members, including mental health consumers/ex-patients").

310. 42 U.S.C. § 12101(b) (2000).

311. Refer to Part III.B *infra* (discussing a few federal programs that are already in place).

312. *Olmstead*, 527 U.S. at 607 (concluding "States are required to provide community-based treatment for persons with mental disabilities" under Title II of the ADA); *see also* Rosenbaum, *supra* note 294, at 1–2 ("[H]ow states use Medicaid to advance appropriate community care for persons with disabilities should be thought of as a *consequence of*, rather than required by, the decision.").

313. *Olmstead*, 527 U.S. at 601–02 (noting that "Title II provides only that 'qualified

Similarly, whether Georgia could defend against the claim on the grounds that plaintiffs' demands went beyond "reasonable modifications" of its community treatment programs or that the granting of plaintiffs' demands would require Georgia to "fundamentally alter" the program turned on analysis of Georgia's Medicaid program, apparently the only source of public funding for such services in the state.[314]

It is not difficult to understand why Medicaid is such an important factor in *Olmstead* compliance.[315] Medicaid is a very comprehensive health insurance program providing three categories of services important to severely mentally disabled people. First, Medicaid provides for basic services that all states must provide to all Medicaid participants as a condition of participating in the Medicaid program, including core services such as hospital, nursing home, and physician care,[316] and home health services for recipients eligible for the nursing home level

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individuals with a disability' may not 'be subjected to discrimination'"); *see also* 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall . . . be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity . . . .").

314. *Olmstead*, 527 U.S. at 603–06 (declaring that if reasonableness is measured against the State's entire mental health budget, no State likely would prevail; rather, the State should be able to show that with the allocation of available resources, immediate relief for the plaintiffs would be inequitable); 28 C.F.R. § 35.130(b)(7) (2002) (expressing that "[a] public entity shall make reasonable modifications in policies, practices or procedures . . . unless . . . making the modifications would fundamentally alter the nature of the service, program or activity").

315. The Health Care Financing Administration (now the Center for Medicaid Services) issued a series of letters to state Medicaid directors following the *Olmstead* decision explaining the agency's interpretation of the case as it related to Medicaid. The first letter included the following advice:

> *Olmstead* challenges States to prevent and correct inappropriate institutionalization and to review intake and admissions processes to assure that persons with disabilities are served in the most integrated setting appropriate. Medicaid can be an important resource to assist States in meeting these goals. . . . States may choose to utilize their Medicaid funds to provide appropriate services in a range of settings from institutions to fully integrated community support.

Letter from Timothy M. Westmoreland, Director, Center for Medicaid and State Operations, to State Medicaid Director (Jan. 14, 2000), *available at* http://www.hhs.gov/ocv/olms0014.htm (last visited Oct. 28, 2002). A later letter pointed out, however, that *Olmstead* was an ADA, and not a Medicaid case, and that courts could determine that states were required to use non-Medicaid funds to meet the integration mandate. Letter from Timothy M. Westmoreland, Director, Center of Medicaid and State Operations, to State Medicaid Director (Jan. 10, 2001) (responding to an inquiry from a state director regarding states' obligations to go beyond Medicaid requirements to satisfy *Olmstead*, stating that Medicaid law did not require such efforts, but that "[i]f other laws (e.g., ADA) require the States to serve more people, the State may do so using non-Medicaid funds"), *available at* http://www.cms.hhs.gov/states/letters/smd11001.pdf (last visited Nov. 29, 2002).

316. 42 U.S.C. §§ 1396a(a)(10)(A)(i), 1396(a)(xiii).

of care.[317] Second, states may opt to cover a broader range of services in their Medicaid plan, including "rehabilitative services, personal care services, [and] case-management services."[318] Finally, states may apply for waivers to receive federal matching funding for home and community-based services "normally not available to Medicaid beneficiaries, including case management, homemaker/home health aides, personal care, adult day health, habilitation and respite care."[319] This broad range of additional services is available only to the extent that states apply for and receive waivers.[320]

The *Olmstead* plaintiffs argued that access to services provided through Medicaid waiver programs were critical to their ability to achieve community living.[321] They could not care for themselves in the community even with family help.[322] They

317. *Id*. § 1396a(a)(10)(D); *see also* Jane Perkins & Randolph T. Boyle, *Addressing Long Waits for Home and Community-Based Care Through Medicaid and the ADA*, 45 ST. LOUIS U. L.J. 117, 122–23 (2001) ("State Medicaid programs must cover the following home health services: (1) nursing services on a part time or intermittent basis, (2) home health aids, and (3) medical supplies.").

318. Perkins, *supra* note 299, at 123 (citing 42 U.S.C. § 1396d(a)(13), (19), (24) (1994) (footnotes omitted)).

319. Perkins, *supra* note 299, at 125 (citing 42 C.F.R. § 440.180 (1999)). These Home and Community Based Services (HCBS) waivers allow people with medical needs who would otherwise require institutional care to live in the community. *Id*. at 125 (describing the first type of waiver as one that "allows states to provide the services to individuals who, but for the waiver services, would be institutionalized"). Community living is facilitated by providing the personal, therapeutic, and social services needs required to support the person in community life. *See* 42 U.S.C. § 1396n(c).

320. And then, the services are directed to people with mental retardation or people, like the *Olmstead* plaintiffs, with both mental retardation and mental illness, but not to the mentally ill who are not also mentally retarded. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 593 (1999) (describing the *Olmstead* plaintiffs, L.C. and E.W., as mentally retarded and diagnosed, respectively, with schizophrenia and a personality disorder); 42 U.S.C. § 1396n(c) (enumerating the scope of the waiver program and services that may be provided for the mentally retarded); *see also* Perkins, *supra* note 299, at 125 (listing the three types of waivers: one which allows "states to provide the services to individuals who . . . would be institutionalized in a[n] . . . intermediate care facility for the mentally retarded"; a second type for individuals over age sixty-five; and a third for "children under age five who are infected with AIDS or who are drug dependent at birth"). Refer to Part III.A.2 *infra* (discussing disparate treatment of the mentally ill and the uselessness of the waiver program to those who are mentally retarded but not mentally ill).

321. *See Olmstead*, 527 U.S. at 593, 594, 600–03 (noting that L.C. requested placement in a community care residence program and treatment with the goal of being integrated into society through Medicaid waiver programs); Brief for Respondents, *supra* note 2, at *3–*5 (tracing the national shift to community-based services for individuals with mental retardation and other related conditions and Georgia's resistance to the restructuring of its programs).

322. Brief for Respondents, *supra* note 2, at *5–*8 (detailing the *Olmstead* plaintiff's histories and noting both were mildly mentally retarded and could be appropriately served in a community program). The respondents' brief also notes that L.C.'s mother had a long history of being unable to provide appropriate care and the last "trial visit" with her daughter failed. *Id*. at *7.

could, however, thrive in the community with the structural support that happens to be financed through the Medicaid waiver program.[323] Access to services funded through Medicaid waivers permits a person with severe mental disability to use the "constellation of medical and psychosocial services" necessary to permit the person to leave an institutional setting, or to avoid going into an institution in the first instance.[324] These personal, therapeutic, and social services provide the building blocks for a transition to community life. The case management function funded through the waiver programs permits "continuity and integration of services."[325] The tasks of a case manager can range from "simple roles in locating services to more intensive roles in rehabilitation and clinical care."[326] Some models of case management have been demonstrated to "help clients to increase daily-task functioning, residential stability, and independence, and to reduce their hospitalizations."[327]

Medicaid, even with enhanced services available through waiver programs, is not the sole component of a plan to achieve integration for the severely mentally disabled.[328] However, it is, or can be, an enormously positive force in permitting the unnecessarily institutionalized to rejoin the community, and for the severely mentally ill in the community to avoid unnecessarily restrictive care settings.

The erosion of Congress's Section 5 and Commerce Clause powers may make Medicaid an even more important component in the movement to integrate the mentally disabled. *Olmstead*'s mandate was for states to:

> [P]rovide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[329]

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323. *Id*.

324. REPORT OF THE SURGEON GENERAL, *supra* note 116, at 285 (declaring that the "delivery system as a whole . . . dictates the outcome of treatment").

325. *Id*. at 286 (noting the purpose of case management).

326. *Id*.

327. *Id*.

328. Access to housing, jobs, and income supports are also crucial. *See* CARLING, *supra* note 68, at 28–30 (describing the problems faced by "[a] majority of the 5.5 million Americans considered 'long-term mentally ill'" and strategies to prevent repeated hospitalization and relapse).

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

Under *Olmstead*, then, states' obligations under federal law to integrate people with mental disabilities not only encompass the use of Medicaid funding, but also encompass *state* programs funded entirely with *state* dollars.[330] If erosion of Section 5 and Commerce Clause powers weakens current ADA authority, Congress will be dependent on spending powers legislation, like Medicaid, through which it can leverage its public policy initiatives. The next section surveys changes to the Medicaid program that would be necessary should such a power shift come to pass.

2. Enhancing Medicaid for a Spending Powers Era. Medicaid's prominence in the *Olmstead* litigation highlights the centrality of health and health-related services in the array of supports to the achievement of the goal of social integration for people with mental disabilities and Medicaid's position as the dominant funder of health services for the disabled. A federal integrationist policy using spending powers would lean even more heavily on Medicaid. Three changes must be made to Medicaid to permit it to serve this enhanced role.

First, the integration mandate of the ADA must be made applicable to Medicaid through the spending powers. As is more fully described above, states are no longer obliged to comply with the *Olmstead* mandate if Section 5 and the Commerce Clause are determined not to support Congress's power to impose Title II requirements.[331] The spending powers legislation most closely analogous to the ADA—Section 504—is a valid spending powers enactment, but it does not prohibit segregation of the disabled as a form of discrimination.[332] Congress must amend the ADA to extend its requirements through the spending powers to federally funded programs or amend Section 504 to incorporate segregation of the disabled within its definition of discrimination.[333]

Second, the Medicaid statute should be amended to end its disparate treatment of the mentally ill. It is well known that the

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330. Refer to note 315 *supra* (noting that courts could determine that states were required to use non-Medicaid funds to meet the integration mandate).

331. Refer to Part II.B *supra* (discussing judicially imposed restraints on the power of Congress to enact social legislation in the context of the ADA when state prerogatives are implicated).

332. *See Olmstead*, 527 U.S. at 589 n.1 ("In the ADA, Congress for the first time referred expressly to segregation of persons with disabilities as a for[m] of discrimination . . . ." (quotation marks omitted)).

333. Refer to text accompanying notes 291–93 *supra* (proposing two options that condition the receipt of federal funds by states on compliance with congressional mandates).

private insurance system provides "lower levels of coverage for the treatment of mental illness" than for physical illness.[334] Less understood is the bias against the coverage of mental health treatment in Medicaid. Many of the definitions of Medicaid-covered services exclude services provided in an "institution for mental diseases," defined as "a hospital, nursing facility, or other institution of more than 16 beds, that is primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases, including medical attention, nursing care, and related services."[335] For example, the statute provides for payment for nursing facility services "other than services in an institution for mental diseases."[336] Medicaid allows funding for "services in an intermediate care facility for the mentally retarded (other than in an institution for mental diseases),"[337] and permits funding for services provided in a psychiatric hospital only for beneficiaries under the age of twenty-one.[338] It allows funding for community supported living arrangement services for people with mental retardation but not those with mental illness.[339]

Perhaps most significantly for *Olmstead* purposes, the means by which home and community-based services (HCBS) waivers—the waiver programs central in the *Olmstead* dispute—are described in the statute assures that they will be of limited use in integrating the mentally ill. Programs under the HCBS waiver for "certain disabled patients" fund services not ordinarily provided under Medicaid, including "case management services,

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334. *See* U.S. GEN. ACCOUNTING OFFICE, MENTAL HEALTH PARITY ACT: DESPITE NEW FEDERAL STANDARDS, MENTAL HEALTH BENEFITS REMAIN LIMITED, No. GAO/HEHS-00-95 (2000) (detailing discrepancies in parity regarding state and federal treatment of mental health coverage compared with coverage for other illnesses); Samuel H. Zuvekas et al., *Mental Health Parity: What Are the Gaps in Coverage?*, 1 J. MENTAL HEALTH POL'Y & ECON. 135 (1998) (commenting that "private health insurance plans are typically much less generous than benefits for physical health care services" and they can have "separate deductibles, higher coinsurance requirements, and lower annual and lifetime maxima"); David Mechanic & Donna D. McAlpine, *Mission Unfulfilled: Potholes on the Road to Mental Health Parity*, 18 HEALTH AFFAIRS 7, 9 (1999); Sonja B. Starr, *Simple Fairness: Ending Discrimination in Health Insurance Coverage of Addiction Treatment*, 111 YALE L.J. 2321, 3233–24 (2002).

335. 42 U.S.C. § 1396d(i) (2000); *see also* Susan M. Jennen, Note, *The IMD Exclusion: A Discriminatory Denial of Medicaid Funding for Non-Elderly Adults in Institutions for Mental Diseases*, 17 WM. MITCHELL L. REV. 339, 344–47 (1991) (defining institutions for mental diseases and applying the definition to include any facility "established and maintained primarily for the care and treatment of individuals with mental diseases").

336. 42 U.S.C. § 1396d(a)(4)(A).

337. *Id*. § 1396d(a)(15).

338. *Id*. § 1396d(a)(16).

339. *Id*. §§ 1396d(a)(23), 1396u(b) (providing community-supported living arrangement services to developmentally disabled individuals, which include individuals with "mental retardation and related conditions").

homemaker/home health aide services and personal care services, adult day health services, habilitation services, respite care," and under some circumstances, "day treatment or other partial hospitalization services, psychosocial rehabilitation services, and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness."[340] These services, as more fully described above, are exactly those critical to supporting a seriously mentally ill person in the community.[341] But the HCBS waiver programs are useless to the mentally ill population that is not also mentally retarded.[342] Waiver programs must be "budget neutral." That is, a state applying for a waiver must assure that the average cost to Medicaid of the services provided under the waiver will not exceed the average costs to Medicaid of the services that would be provided were the person to be institutionalized.[343] But this budget neutrality is impossible for the non-mentally retarded mentally ill, as services in "institutions for mental diseases" are not paid for by Medicaid.[344] For this reason, HCBS waivers are of almost no use in preventing the unnecessary institutionalization of the non-mentally retarded mentally ill.[345]

The disparate treatment of the mentally ill by the Medicaid program reflects an historical disinclination of the federal government to fund mental health services, a category of services historically regarded as a state function.[346] In addition, the

340. *Id*. § 1396n(c)(4)(B).

341. Refer to Part III.A.1 *supra* (describing Medicaid as a tool for integration that helps individuals, including the *Olmstead* plaintiffs, to transition from an institutional setting to a community-based living environment).

342. Refer to note 320 *supra*.

343. 42 U.S.C. § 1396n(c)(2)(D) (requiring that "the average per capita expenditure estimated by the State in any fiscal year for medical assistance provided with respect to such individuals does not exceed 100[%] of the average per capita expenditure that the State reasonably estimated would have been made in that fiscal year for expenditures under the State plan for such individuals if the waiver had not been granted").

344. Refer to notes 335–39 *supra* (discussing Medicaid's failure to extend coverage to the non-mentally retarded).

345. *See* Steven Lutzky et al., *Review of the Medicaid 1915(c) Home and Community Based Services Waiver Program Literature and Program Data* 10–11 (June 15, 2000) (Final Report: Prepared for: U.S. Department of Health and Human Services Health Care Financing Administration, The Lewin Group, Inc.) (noting that almost no HCBS funds are targeted at the chronically mentally ill); Bazelon Center, *supra* note 116 ("Because of the federal rule that does not allow payment for services in an Institution for Mental Disease (IMD), [the HCBS waiver option] is extremely difficult to use for adults age 22–64 who are in hospitals or specialized nursing facilities that are considered IMD.").

346. *See* John Richard Elpers & Bruce Lubotsky Levin, *Mental Health Services: Epidemiology, Prevention, and Service Delivery Systems*, *in* MENTAL HEALTH SERVICES: A PUBLIC HEALTH PERSPECTIVE 17 (Bruce Lubotsky Levin & John Petrila eds., 1996) (recognizing the "historical reluctance of federal agencies to assume costs [of mental health care] now borne by state and local governments").

perceived uncertainty of controlling the cost of mental health services—the rationale for disparate treatment in the private insurance sector—no doubt played a part in the drafting decisions. This bias now stands in the way of the social integration of people with mental disabilities, and it is time for Congress to address the issue.

The third change in Medicaid law is related to the second. Many of the services critically important to the integration of people with mental disabilities are not mandatory Medicaid services. States can participate in Medicaid and receive federal funds for the core services for Medicaid beneficiaries without including in their state plans such services as rehabilitative, personal care, and case management services.[347] These services can be funded by Medicaid, but at the states' option.[348] Similarly, HCBS waiver services may be funded by Medicaid, but only if a state chooses to apply for a waiver.[349] The effect of these state options is that states can and do pick and choose services in a way that disadvantages the mentally disabled. The services most important to them may well be unavailable simply because a state has chosen not to opt for or apply for permission to offer such services.[350] Congress can greatly improve the impact of Medicaid on the integration of the mentally disabled by including

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347. The Department of Health and Human Services (HHS) has recently taken small steps to recognize the need for states to expand their Medicaid programs' community care components. *See* Press Release, U.S. Dep't of Health & Human Services, *HHS Urges States to Continue to Expand Home and Community Based Care for Disabled Residents: Supports "Funding Follows the Person" Model* (Aug. 12, 2002) (discussing President George W. Bush's "New Freedom Initiative" that devotes "$120 million in Systems Change Grants to support state efforts to institute community-based approaches"), *available at* http://www.hhs.gov/news/prss/2002pres/20020812.html (last visited Nov. 29, 2002); Centers for Medicare & Medicaid Services, *Overview of Promising Practices in Home and Community Based Services* (discussing an information clearinghouse maintained by HHS to inform states of innovative community care models), *available at* http://www.cms.gov/promisingpractices/overview.asp (last modified Oct. 3, 2002). These initiatives include some direct additional funding for community-based services, and strongly encourage the states to reconfigure their Medicaid programs to emphasize community care. However, they do not alter the status of most community-based services for people with mental disabilities as optional and not mandatory services.

348. *See* Perkins & Boyle, *supra* note 317, at 123.

349. *Id*. at 125.

350. This state of affairs is a bit puzzling, as opting for these services would garner for the state the substantial federal match that comes with including option services in a state plan. It may be that states are worried about the "woodwork effect"—a response related to pent-up demand for services that results in a surge of use in a new program. Lutzky et al., *supra* note 345, at 29. If this is the explanation, it amounts to states refusing to provide services because they are needed *too much*. If families are exhausting themselves and their savings caring for mentally disabled family members, they would take up an offer of extended community services readily. But this is a *good* reason to offer the services, and not a reason to avoid doing so.

the services central to the integration of people with mental illness in the schedule of services required by the Medicaid program.

Medicaid is an important part of *Olmstead* compliance now, and it will become more important if Congress has to fall back on its spending powers to advance an integrationist program. With some relatively modest tweaking, Medicaid can continue to serve a vital function in this effort. It also stands as an example of a conditional spending program that can fill a substantial gap in the service needs of people with severe mental disabilities without violating the Court's federalism roadmap. Other services are crucial as well, and are similarly provided through existing programs that can survive judicial review. Two such programs are described in the next section.

B. Direct Spending Powers: Income Supports and Housing

Sometimes simple is good. As is more fully described above, Congress's power to tax and spend directly to promote the public welfare is nearly unreviewable.[351] The problem, of course, is "only" political: as direct spending programs require Congress to raise funds quite visibly for social programs, and to entrust administrative responsibilities to federal officials, it must directly justify the program to voters. I do not intend to minimize the seriousness of these political concerns in the following brief discussion. However, Congress has the authority under the General Welfare Clause[352] to raise funds and spend directly on programs to facilitate the integration of the mentally disabled into society. The programs described below demonstrate that federal programs substantially benefiting people with mental disabilities are politically possible—indeed, they are in place. Housing and income supports in particular have long histories of direct federal financing stretching back to the New Deal.[353] Within federal housing law and Social Security's income support systems, innovative programs for people with disabilities have emerged, funded primarily or entirely with federal funds.

Federal housing programs have since the Depression era addressed the need for affordable housing as a fundamental

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351. Refer to Part II.A.4 *supra* (describing the expansiveness of Congress's power under the General Welfare Clause).

352. U.S. CONST. art. I, § 8, cl. 2.

353. *See* 12 U.S.C. §§ 1701–1750g (2000) (National Housing Act); 42 U.S.C. §§ 301–1397e (2000) (Social Security Act, Supplemental Security Income for the Aged, Blind and Disabled).

human requirement appropriate for national initiatives.[354] Although access to housing has remained problematic,[355] and the means by which federal housing policy has been pursued have varied dramatically,[356] federal financial commitment to public housing programs has been substantial over the decades.[357] During the four decades following the passage of the National Housing Act, the focus of federal housing programs was on the physical production of affordable housing.[358] Since the 1960s, the emphasis has shifted to voucher programs, in which the federal government subsidized but did not produce housing for the poor.[359] Although federal commitment to funding has continued, substantial aspects of the administration of public housing programs for the poor have devolved to the control of state and local government.[360]

One of the important components of current federal housing policy is the "Section 8" program,[361] through which qualified participants may receive certificates or vouchers to fund a substantial portion of their rental payments.[362] Participants in the Section 8 program receive vouchers or certificates from local public housing authorities. These instruments permit them to search in the private housing market for an apartment meeting

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354. *See* 42 U.S.C. § 1437(a) ("It is the policy of the United States . . . to assist States . . . to remedy . . . the acute shortage of decent and safe dwellings for low-income families . . . .").

355. *See* Chester Hartman, *The Case for a Right to Housing*, 9 HOUSING POL'Y DEBATE 223, 229 (1998) ("[B]ecause housing is so central to one's life, it merits attaining the status of a right.").

356. *See* R. ALLEN HAYS, THE FEDERAL GOVERNMENT AND URBAN HOUSING: IDEOLOGY AND CHANGE IN PUBLIC POLICY 85–89 (2d ed. 1995); J. Paul Mitchell, *The Historical Context for Housing Policy*, *in* FEDERAL HOUSING POLICY & PROGRAMS: PAST AND PRESENT 3–17 (J. Paul Mitchell ed., 1985) (chronicling the historical context of federal housing policy).

357. *See* HAYS, *supra* note 356, at 280–84.

358. *See id*. at 85–108; Mark A. Malaspina, Note, *Demanding the Best: How to Restructure the Section 8 Household-Based Rental Assistance Program*, 14 YALE L. & POL'Y REV. 287, 293–94 (1996) (contrasting "supply-side [housing] policies, such as public housing and project-based assistance, that directly increase the number of affordable housing units in the public and private markets[, . . . and] demand-side [housing policies] . . . which provide[] funding assistance to households who choose among existing housing units in the private market" (footnotes omitted)).

359. *See* Charles J. Orlebeke, *The Evolution of Low-Income Housing Policy, 1949 to 1999*, 11 HOUSING POL'Y DEBATE 489, 490–91 (2000); Malaspina, *supra* note 358, at 294.

360. *See* Orlebeke, *supra* note 359, at 491.

361. Section 8 of the National Housing Act of 1974 (codified as amended at 42 U.S.C. § 1437f (2000)).

362. The Section 8 program is complex and multi-faceted. *See* HAYS, *supra* note 356, at 148–68. The discussion in the text focuses on the certificate and voucher aspects of the program and not the project-based aspect, which subsidizes particularly identified units in apartment buildings.

the quality standards set by local and federal regulations.[363] The landlord must agree to participate in Section 8, the apartment must be acceptable to the participant and pass the housing authority's quality inspection, and the lease must be consistent with program standards.[364] If these requirements are met, the participant/tenant signs a lease with the landlord, and the housing authority signs a contract with the landlord.[365] The contract obliges the public housing authority to pay the landlord a substantial portion of the rent with funds reimbursed by the federal Department of Housing and Urban Development (HUD), and the landlord agrees to comply with program requirements.[366]

The Section 8 program has experienced substantial problems over the years. Many landlords, whose participation in the Section 8 program is voluntary, refuse to participate in the program.[367] In addition, the program places conditions on the participant's choice of an apartment that at times limit the program's effectiveness.[368] The most serious problem, however, is the lack of funding.[369] Many eligible people wait for months or years on waiting lists maintained by local housing authorities for the opportunity to use a voucher or certificate to subsidize their housing.[370] The program is flawed, and improvements to its design are called for.[371] But with programmatic amendment and, more significantly, with increased funding, the Section 8 program could substantially improve access to affordable housing for people with mental disabilities.

A streamlined and better-funded Section 8 program would increase the supply of affordable housing for people whose condition is such that they can live independently in community housing. Another federal housing program is designed to provide housing opportunities for people who require a housing setting with some programmatic support. The Section 811 program[372] is

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363. *See* Malaspina, *supra* note 358, at 297–99.

364. *Id*. at 298.

365. *Id*.

366. *Id*. at 298–99.

367. *Id*. at 311. Only Massachusetts bars landlords from refusing to rent to a tenant because the tenant is "a recipient [of federal, state, or local public assistance], or because of any requirement of . . . [a] housing subsidy program." MASS. GEN. LAWS ANN. ch. 151B, § 4(10) (West 2002); *see also* Malaspina, *supra* note 358, at 315–16.

368. Malaspina, *supra* note 358, at 303–14.

369. *Id*. at 301.

370. HAYS, *supra* note 356, at 148–68; Malaspina, *supra* note 358, at 301.

371. *See generally* Malaspina, *supra* note 358, at 288–89 (proposing various reforms for the "seriously-flawed" program).

372. Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 811, 104 Stat. 4324 (1990) (codified as amended at 42 U.S.C. § 8013 (2000)).

intended to "enable persons with disabilities to live with dignity and independence within their communities by expanding the supply of supportive housing that . . . is designed to accommodate the special needs of such persons; and . . . provides supportive services that address the individual health, mental health, and other needs of such persons."[373] The Section 811 program could provide an intermediate step of housing for the mentally disabled not needing institutional care but not (or not yet) capable of living on their own.

Unlike the Section 8 voucher program, the Section 811 program is intended to fund nonprofit organizations that act as sponsors for rental units and small group homes incorporating supportive services for people with disabilities.[374] HUD funds the project through the provision of "capital advances" to nonprofit organizations.[375] These capital advances are grants, and need not be repaid unless the housing no longer serves low-income people with disabilities.[376] HUD also provides periodic rental assistance to make up the shortfall in operating cost left after accounting for the disabled tenant's rent or tenant-based rental assistance.[377] Nonprofit organizations can apply for Section 811 funding to provide supportive housing for people with mental disabilities to live in the community in settings that combine independent living with close access to social and therapeutic services.[378] The program is an ideal adjunct to the Medicaid waiver programs that offer a broad array of therapeutic services but do not fund housing costs.[379]

People with serious mental disabilities often require housing to remain in or rejoin the community. The availability of affordable housing is "[p]erhaps the most critical need for people moving out of institutions,"[380] and the inability to find suitable

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373. 42 U.S.C. § 8013(a).

374. *Id*. § 8013(b)–(c). U.S. Dep't of Housing & Urban Dev. Section 811 Supportive Housing for Persons with Disabilities (Nov. 30, 2001) [hereinafter HUD Section 811], *available at* http://170.97.67.13/offices/hsg/mfh/progdesc/disab811.cfm/ (last modified Nov. 30, 2001); Bazelon Center, *supra* note 116.

375. HUD Section 811, *supra* note 374.

376. 42 U.S.C. § 8013(d)(1); *see also* HUD Section 811, *supra* note 374 (noting that the advance does not have to be repaid if the housing remains available for at least forty years).

377. 42 U.S.C. § 8013(d)(2).

378. HUD Section 811, *supra* note 374.

379. *See* 42 U.S.C. § 1396n(c)(1) (providing that Medicaid waiver funding may not include the cost of room and board). *See generally* Part III.A *supra* (discussing the current and future state of Medicaid).

380. Bazelon Center, *supra* note 116; *see also* REPORT OF THE SURGEON GENERAL, *supra* note 116, at 292 ("Housing ranks as a priority concern of individuals with serious mental illness.").

housing and the means of support is often a contributing factor in the failure of a mentally disabled person's community experience.[381] Expanded attention to the Section 8 and Section 811 housing programs would complement a more disability-friendly Medicaid program, and provide the vehicle for community-based housing needed to facilitate the *Olmstead* integration mandate. With increased funding and the modest remodeling described above, Medicaid and federal housing programs could provide the therapeutic, social services, and housing services needed to facilitate the integration of people with mental disabilities.

But people with serious mental disabilities also need income security and the opportunity to work. Approximately 90% of people with serious mental illness are unemployed.[382] Work has more than mere income importance for people with disabilities. In addition, participation in the workforce appears to correlate positively with improved therapeutic results and quality of life.[383] The principal income support programs for people with disabilities have taken small steps to integrate income support and vocational support in recent years.

The Social Security Disability Insurance program (SSDI) was created in 1956 to provide income support benefits to former workers who have suffered a long-term disability.[384] A separate program, Supplemental Security Income (SSI), was created in 1972 to provide cash support for people with long-term disabilities who did not have a work history to qualify for SSDI benefits.[385] These programs provide vitally needed income to people with serious mental disabilities. In 2000, 27% of SSDI beneficiaries and 35% percent of SSI beneficiaries were categorized as people with mental disorders.[386] Income

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381. *See* CARLING, *supra* note 68, at 27–30 (reviewing housing and employment problems frequently faced by individuals with psychiatric disabilities).

382. REPORT OF THE SURGEON GENERAL, *supra* note 116, at 293.

383. *See id*.; CARLING, *supra* note 68, at 38 (noting that research has concluded "that work is of *profound* importance from both a psychological and an economic perspective" (emphasis added)); U.S. DEP'T OF HEALTH & HUMAN SERVS., WORK AS A PRIORITY: A RESOURCE FOR EMPLOYING PEOPLE WHO HAVE A SERIOUS MENTAL ILLNESS AND WHO ARE HOMELESS 1 (Gary E. Shaheen et al. eds., 2001) (observing that "[f]or many [people with mental illness], work is an adjunct to their recovery from psychiatric disabilities"), *available at* http://www.nrchmi.com/text/work_as_priority/exec_sum.asp (last visited Jan. 14, 2003).

384. 42 U.S.C. §§ 401–433.

385. 42 U.S.C. §§ 1381–1383d.

386. *See* U.S. GEN. ACCOUNTING OFFICE, SSA DISABILITY PROGRAMS: FULLY UPDATING DISABILITY CRITERIA HAS IMPLICATIONS FOR PROGRAM DESIGN, No. GAO-02-919T, at 4–5 (2002) (statement of Robert E. Robertson, Director, Education, Workforce, and Income Security Issues).

maintenance is at the heart of both the SSDI and SSI programs. The creation of SSI was of particular benefit to low-income people with disabilities, as it permitted access to a federal program, indexed to inflation that was distinct from the welfare-related programs on which people with disabilities had previously been dependent.[387]

Eligibility for both SSDI and SSI benefits is related to inability to work.[388] When inability to work is used as a qualifying criterion for cash benefits, however, people with disabilities are locked into a binary system: they can establish themselves as disabled for purposes of the programs and largely exclude themselves from employment, or they can attempt to work but disqualify themselves from the program's benefits.[389] Congress has recognized this problem and has begun to react. States may permit disabled people who would otherwise qualify for SSI but who choose to work for modest wages to retain Medicaid benefits; the 1997 Balance Budget Act expanded the categories of disabled workers able to take advantage of this program.[390] The most promising recent adjustment to the federal disability programs, however, is the Ticket to Work and Work Incentives Improvements Act of 1999.[391]

The Ticket to Work Act attempts to break the dichotomous trap into which SSI and SSDI may place people with disabilities by increasing state options to extend Medicaid coverage to disabled people remaining in or rejoining the workforce;

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387. *See* Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 434–37 (1996).

388. Recipients of both programs must establish that they are unable to engage in "substantial gainful activity." 20 C.F.R. § 416.905 (2002) (outlining the standards for SSI); *id.* § 404.1508 (outlining the standards for SSDI); *see also* Mark McWilliams, *The Ticket to Work and Work Incentives Improvement Act: An "E" Ticket for Adults with Disabilities*, 79 MICH. B.J. 1680, 1681 (2000) (stating that substantial gainful activity "is evaluated using a number of factors, including a threshold earned income . . . , a complex listing of disabilities that presumptively limit a person's ability to work, and a functional analysis of a person's actual ability to do any kind of work").

389. *See* McWilliams, *supra* note 388, at 1681.

> Critics point out at least two fundamental disincentives to work, in the SSDI and SSI programs. First, qualifying for the program[s] requires applicants to demonstrate emphatically that they cannot work in anything but a minimal . . . capacity. . . . Second, the programs carry vitally important health coverage, which surveys show is an 'overriding issue' in a person's ability to work.

Id. (quotation marks omitted).

390. *See* Gina Livermore et al., *The Role of Health Insurance in Successful Labor Force Entry and Employment Retention* 6–7 (Oct. 2001) (Report: Prepared for: U.S. Department of Health and Human Services, The Lewin Group, Inc.), *available at* http://www.aspe.hhs.gov/daltcp/Reports/lfentry.htm (last visited Jan. 14, 2003).

391. Pub. L. No. 106-170, 113 Stat. 1860 (1999) (codified at 42 U.S.C. § 1320b-19 (2000)).

providing employment assistance, job counseling, and supported employment opportunities; extending access to cash benefits; and creating an extended period of reentry into the cash benefits program with no need for reapplication.[392] The changes in the programs created by the Ticket to Work Act are not groundbreaking, but they signal movement in a positive direction. People with disabilities who believe themselves able to reenter the workforce are encouraged to do so with the assurance of some continuing social supports. They need not give up critically important health benefits to take a job. They do not have to sever their ties with the SSI or SSDI programs, but can, should their attempt at employment fail, be reinstated with "no questions asked."[393]

These changes suggest a change in philosophy in federal disability benefits programs that could facilitate coordination of services and promote integration of people with disabilities more fully into society.[394]

They suggest that federal programs can provide needed support to people with disabilities while permitting them and even assisting them in achieving independence. They suggest that the major pieces of the federal support programs can coordinate to provide a bridge to social integration rather than a separate system of maintenance and care. Housing programs can support community living for people with a range of disabilities, providing fully independent living or supported group housing. Medicaid benefits can follow the disabled person to the most appropriate level of care. And income support programs can facilitate employment through programs that offer a bridge from income support to employment assistance. Each of the three pieces of the federal program—health, housing, and income/employment—is in place, and has the capacity to further *Olmstead*'s integration goals. Congress, using its conditional and direct spending powers, has long since created the basic programs and more recently has amended those programs to permit them to facilitate through coordination the integration of people with mental disabilities.

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392. 42 U.S.C. § 1320b-19(a) (providing that under the Ticket to Work Program, "a disabled beneficiary may use a ticket to work and self-sufficiency . . . to obtain employment services, vocational rehabilitation services, or other support services"); McWilliams, *supra* note 388, at 1682.

393. *See* McWilliams, *supra* note 388, at 1682.

394. *See generally* U.S. GEN. ACCOUNTING OFFICE, PEOPLE WITH DISABILITIES: FEDERAL PROGRAMS COULD WORK TOGETHER MORE EFFICIENTLY TO PROMOTE EMPLOYMENT, No. GAO/HEHS-96-126 (1996).

V. CONCLUSION

People with serious mental disabilities have long suffered discrimination and segregation. Congress acted to outlaw disability discrimination with the 1990 passage of the ADA. *Olmstead* affirmed the central meaning of the ADA as including an integration mandate running to state programs responsible for the care of the seriously mentally ill. After *Olmstead*, the path to integration for people with serious disabilities appeared passable if not easy to negotiate. But the Supreme Court has called into question the continuing power of Congress to regulate states in social legislation by sharply narrowing congressional enforcement power under Section 5 of the Fourteenth Amendment and restricting the reach of the Commerce Clause as it impinges on states. These shifts in the balance of constitutional power are controversial, but not likely to be reversed soon.

People with serious mental disabilities are entitled to see an end to segregation regardless of the shifts in constitutional interpretation. Congress need not abdicate its claims to robust social legislative authority and can further the integrationist mandate announced in the ADA and affirmed by *Olmstead* under its conditional and direct spending powers. The shift from Section 5 and Commerce Clause powers to spending power is not cost free, however. In return for relative certainty that its social legislation will withstand judicial scrutiny, Congress acquires the political liability of imposing direct federal taxation and substantial federal administrative regulation. Congress is confronted with an inverse relationship: the more likely social legislation is to survive judicial scrutiny, the sharper will be the political scrutiny to which it subjects itself.

Congress, however, has shown itself willing and able to create the necessary components of an integration program for the mentally disabled through its spending powers. The health insurance, housing, income supports, and employment programs necessary to carry out *Olmstead*'s integration mandate are in place, and with modest modifications and substantial financial support can get the job done. People with mental disabilities have long suffered societal discrimination. The way is clear for Congress to sidestep the roadblocks imposed by the Court and advance the cause of integration.