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POLICY SERIES

Judicial Threats to *Olmstead* and the Americans with Disabilities Act

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Winter 2024

Dear Reader,

Now is the time to solve the growing behavioral health needs in our country by advancing public policies that transform the delivery of mental health and substance use disorder services and address outdated funding mechanisms.

This paper is part of Think Bigger Do Good, a series of papers launched in 2017 through the support and leadership of the Thomas Scattergood Behavioral Health Foundation and Peg's Foundation. While the paper topics continue to evolve, our goal to develop a policy agenda to improve health outcomes for all remains constant.

In partnership with national experts in behavioral health, including our editors, Howard Goldman and Constance Gartner, we identified seven critical topics for this third series of papers. Each paper identifies the problem and provides clear, actionable solutions.

We hope you join us in advocating for stronger behavioral health policies by sharing this paper with your programmatic partners, local, state, and federal decision makers, advocacy organizations, and voters. To learn more about Think Bigger Do Good and to access the other papers in the series, visit **www.thinkbiggerdogood.org**.

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We would like to acknowledge the following individuals for their participation in the meeting that led to the conceptualization of the paper series.

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Judicial Threats to *Olmstead* and the Americans with Disabilities Act

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1 Introduction

The Americans with Disabilities Act (ADA) of 1990 (1) and the decades-old U.S. Supreme Court ruling in the case of *Olmstead v L.C. ex rel. Zimring* (2) established legal protections for people with psychiatric or substance use disorders (3). Together, the ADA and Olmstead ruling have also addressed the role and limits of government agencies in ensuring compliance with these safeguards. Recent Supreme Court rulings, however, suggest that these legal protections could soon be eroded or eliminated. In this article, we review the Olmstead decision

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and subsequent Supreme Court decisions that may raise questions about the determination of a central feature of the original case—care in "integrated settings"—and about which governmental entity's interpretation should be respected when deciding whether a state has met its integration obligation. Also examined here are other Supreme Court cases raising questions about which entity can define the practical meaning of laws when interpretive ambiguities arise and potentially threatening the application of a standard of care in integrated settings as specified in *Olmstead*. Finally, we discuss how the Supreme Court's recent willingness to overturn precedent raises concerns about the future of this landmark case. Although a legal challenge to *Olmstead* is not imminent, measures should be taken to maintain and strengthen protections established by the decision.

2 Legal Protections for People with Mental Impairment: the ADA, *Olmstead*, and *Chevron*

Congress enacted the ADA (1) to protect individuals with disabilities against discrimination, defined as those having "a physical or mental impairment that substantially limits one or more of the major life activities of such individual[s]." The law applies in all places, including medical, educational, professional, and custodial spaces. The term, mental impairment, includes intellectual disabilities, autism, major depressive disorder, bipolar disorder, posttraumatic stress disorder, obsessive-compulsive disorder, schizophrenia, and substance use disorder (3). As is not uncommon with federal statutes, the interpretation and application of the ADA became the subject of a legal challenge that reached the Supreme Court.

In 1999, the Supreme Court reviewed the *Olmstead* case, in which the State of Georgia had kept two women with mental disabilities in "unjustified isolation" (as described by the court), even though they had been medically cleared for treatment in a community setting (2). The State of Georgia argued that financial constraints and the need to alter treatment programs prevented placement of the patients into less restrictive settings. The Supreme Court held that the ADA requires patients experiencing mental illness to be placed in less restrictive, integrated settings, such as in a community rather than in a fully controlled setting, if care providers deem the setting appropriate, patients desire it, and the setting is available (2). Furthermore, the Supreme Court indicated that the state could not justify keeping patients in psychiatric hospitals merely because of the cost to support those patients in the community; rather, the state had to show that allocation of resources to one patient would harm other patients.

The court reasoned that because the U.S. Department of Justice (DOJ) defined unnecessary institutionalization as discrimination, and because the DOJ is "the agency directed by Congress to issue Title II regulations, its views warrant respect" (2). To implement the Supreme Court's holding in *Olmstead*, the DOJ wrote and promulgated an "integration mandate" requiring public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities" (4, 5).

In *Olmstea*d, the Supreme Court explicitly stopped short of deciding whether deference had to be applied to the administrative agency's interpretation of care in an integrated setting, that is, of integration. In doing so, the court indicated that "the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" (2). Fifteen years before *Olmstead*, the Supreme Court had set a standard for executive agency deference. In the case of *Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc.* (1984) (6), the court held that the U.S. Environmental Protection Agency reasonably interpreted a statutory term in the Clean Air Act, that Congress did not have a particular intention for interpretation of the term, and that the regulation provided reasonable accommodations for competing interests. In reaching this conclusion, the Supreme Court articulated what is now known as the *Chevron* deference standard, which affords executive agencies' interpretations of laws some weight when conflicts come before a court, rather than courts having primacy when interpreting statutes.

Two years after *Olmstead*, in the 2001 case *United States v Mead Corporation* (7), the Supreme Court revisited the *Chevron* deference standard. The Supreme Court held that, because Congress had not expressly or implicitly granted the U.S. Customs Service (now U.S. Customs and Border Protection) authority to issue tariff classification rulings that carried the force of law, *Chevron* deference to interpretation of the law by an executive agency was not warranted in this instance. The Supreme Court instead ruled that the Customs Service classification could be respected pursuant to the factors test articulated decades before, in the case of S*kidmore v Swift & Company* (8).

Because the integration mandate is set forth only in a federal regulation and not in a federal statute, this understanding is not guaranteed to last.

The *Chevron*, *Olmstead*, and *Mead* cases have made clear that the Supreme Court justices' views on deference to executive agency interpretation of laws are evolving, potentially threatening the viability of the DOJ integration mandate set forth after *Olmstead*. The definition of "integrated settings," and who determines that definition, is fundamental to the assessment of whether public entities are compliant with ADA standards for this type of care. Furthermore, successful enforcement of ADA antidiscrimination protections—whether by government or private litigation—is understood to depend on the interpretation by executive agencies of the ADA's implementation and compliance requirements and on the authority Congress grants to agency decision makers. Because the integration mandate is set forth only in a federal regulation and not in a federal statute, this understanding is not guaranteed to last.

Recent Supreme Court decisions regarding individual rights and antidiscrimination suggest that, should the question be presented, *Olmstead* could be overturned, despite its almost 25-year existence.

The reasoning used in *Olmstead*, related lower court decisions, and executive agency guidance and decisions regarding ADA compliance are all at risk of being reversed or rejected. The Supreme Court and lower federal appellate court decisions have questioned the *Chevron* deference standard and more generally have questioned how much weight courts should accord executive agency interpretations of federal statutes. Indeed, this coming 2023–2024 term, the Supreme Court may decide to overrule *Chevron* or to at least limit the deference paid to the regulations of an executive agency. Additionally, recent Supreme Court decisions regarding individual rights and antidiscrimination suggest that, should the question be presented, *Olmstead* could be overturned, despite its almost 25-year existence.

3 Threats to *Olmstead* and *Chevron*

Federal judges routinely rely on the *Olmstead* ruling to provide protection for individuals with mental disabilities from discrimination and to mandate provision of services and programs. The positive impact on those with mental disorders is far reaching. Adult patients battling chronic depression have received community-based employment support, allowing them to move from halfway houses to their own apartments. Individuals with severe intellectual and developmental delays and exhibiting aggressive behaviors have transitioned from state institutions to small group homes with caregivers and roommates. Persons with socioemotional challenges have learned independent living skills, with concomitant decreases in sociobehavioral concerns, affording them the opportunity to live in community-based settings.

Adult patients battling chronic depression have received community-based employment support, allowing them to move from halfway houses to their own apartments.

However, *Olmstead*'s reliance on "the well-reasoned views of the agencies implementing a statute" could be jettisoned and with it the protections and positive impacts created by the case's holding. *Chevron* appears close to the end of its nearly 40-year use too. Indeed, *Chevron* deference has been explicitly challenged before the Supreme Court, and the challenge is scheduled to be resolved during the 2023–2024 term (9). Consequently, lower courts may in the future conclude that executive agencies tasked with interpreting and applying the ADA, and with protecting individuals experiencing psychiatric and substance use disorders, are overstepping their legal authority. Courts may also find that agencies are issuing arbitrary or capricious decisions. These lower-court rulings may come as a result of new doctrines concerning agency authority and review of agency decision making.

In 2015, *Chevron* deference was challenged in court in the context of the Patient Protection and Affordable Care Act (ACA) (10). In the case of *King v Burwell* (11), the Supreme Court took up the question whether the Internal Revenue Service permissibly created a regulation that extended the tax credits authorized by the ACA to health insurance exchanges created by the states, as well as to the federal exchange. In its ruling rejecting the challengers' claims, the Supreme Court held in favor of Burwell that "Congress did not delegate the authority to determine whether the tax credits are available through both state-created and federally created exchanges to the Internal Revenue Service, but the language of the statute clearly indicates that Congress intended the tax credits to be available through both types of exchanges" (11). In its opinion, the court set out the two-part *Chevron* approach—"whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable"—and rearticulated "that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." However, the court went on to state that "in extraordinary cases," the court should eschew applying *Chevron* deference because "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." The court in *King v Burwell* (11) created what is now called a step zero for *Chevron* deference, which requires the court to decide whether *Chevron* deference should apply at all or whether the issue being posed in the case is a "major question" that should not be decided on an agency's interpretation. This exception for extraordinary cases has become known as the "major-questions doctrine" (12). This doctrine is intended to address "a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted" (12).

In the past few years, some states—such as Arizona, Ohio, and Wisconsin—have overruled their versions of *Chevron* deference by implementing statutory schemes. For instance, the Ohio Supreme Court (13) recently stated that "it is never mandatory for a court to defer to the judgment of an administrative agency. Under our system of separation of powers, it is not appropriate for a court to turn over its interpretative authority to an administrative agency. But that is exactly what happens when deference is mandatory" (13). The court continued, "When we say that we will defer to an administrative agency's reasonable interpretation of a statute, or its reasonable interpretation of an ambiguous statute, we assign to the agency a range of choices about statutory meaning," but "[w]e police the outer boundaries of those choices" (13).

During the 2023–2024 term, the U.S. Supreme Court will determine the continued validity of the *Chevron* deference in the cases of *Loper Bright Enterprises v Raimondo* (14) and *Relentless, Inc. v Department of Commerce* (15); oral arguments are scheduled to be heard January 17, 2024, and a decision should be issued by late spring 2024. The petitioners in each case have asked the court to limit agency deference or overrule *Chevron*, and the current court appears poised to overrule *Chevron* and to move toward a rule favoring deregulation by administrative agencies (9). Such a ruling would affect a broad array of administrative agencies, including federal and state agencies tasked with enforcing the ADA and *Olmstead*.

4 The Future of *Olmstead*

What might the changing legal landscape mean for *Olmstead*? Although citing *Olmstead* for its position that interpretations by the U.S. Attorney General's Office and the DOJ "warrant respect" by virtue of their status as executive agencies tasked with interpreting the ADA, courts resolving ADA challenges also have noted that the Supreme Court has never decided whether those interpretations are entitled to *Chevron* deference. Thus, if *Chevron* is overturned, the level of deference courts must give agency decisions remains to be seen. Additionally, although Congress granted the U.S. Attorney General the authority to promulgate regulations necessary to the ADA's implementation, those interpretations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute" (6).

In the 2017–2018 Supreme Court term, the court provided an exemplar of the latter. In 2018, the Supreme Court decided the *Masterpiece Cakeshop v Colorado Civil Rights Commission* case, commonly known as the bakery case or the cakeshop case (16). The question was whether the application of Colorado's public accommodations law to compel a baker to design and make a cake for a same-sex marriage ceremony—even if such compulsion violated the baker's sincerely held religious beliefs about same-sex marriage—violated the Free Speech or Free Exercise Clauses of the First Amendment. The court held that the Colorado Civil Rights Commission—a state agency tasked with enforcing the state's public accommodations antidiscrimination law—"violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."

Although much of the public's attention was drawn to the case because of its First Amendment, same-sex marriage, and religious expression issues, the decision also has implications for protections that arise from *Olmstead* and that are based on *Chevron* deference. In the *Masterpiece Cakeshop* case, the court did not focus on whether the state agency properly acted within its statutory legal authority in issuing its decision nor did it grant deference to the state agency's determination to protect same-sex couples. The court's ruling might indicate that—in the context of ADA protections for people with psychiatric or substance use disorders—if agency decisions are in opposition to or based on hostility toward other protected rights or groups, the court may be unwilling to defer to federal or state agencies. This view would constitute a consequential change because these agencies have long interpreted and applied the ADA, and they have created a body of law that is relied on by individuals, governmental and nongovernmental agencies, lawyers, and courts.

Whereas the *Masterpiece Cakeshop* decision reflects the court's willingness to review and denounce agency decision making, another recent case reveals its preparedness to deem unconstitutional and overturn rights that it established almost 50 years ago. In 2022, the Supreme Court ruled in *Dobbs v Jackson Women's Health Organization*, an abortion rights case (17). The question presented in *Dobbs*, specifically, was whether Mississippi's statute banning nearly all abortions after 15 weeks' gestational age was unconstitutional. However, the court decided a broader issue beyond this narrow question. The court held that the U.S. Constitution does not confer a federal right to abortion and that whether abortion is allowable, and under what terms, should be left to each state's citizens to determine through the voting process.

The question presented in *Dobbs*, specifically, was whether Mississippi's statute banning nearly all abortions after 15 weeks' gestational age was unconstitutional.

Furthermore, its decision expressly overruled the *Roe v Wade* (18) case, in which the court had recognized a constitutional right to abortion. The court's expansive holding in *Dobbs* (17) signaled that a majority of the current justices are willing to overturn—at least in the individual-rights abortion context—long-standing doctrine. Thus, should statutory or constitutional legal protections for those with disabilities, including psychiatric and substance use disorders, be challenged as unconstitutional, the present court, or future courts, may not uphold the current protections.

Notwithstanding the concerns raised by *Masterpiece Cakeshop* and *Dobbs*, the Supreme Court's decision in 2020 in the case of *Bostock v Clayton County, Georgia* (19) provides hope that newly enacted legislation can protect the vulnerable. The question presented in Bostock was whether Title VII of the ADA, which prohibits employment discrimination "because of . . . sex" encompasses discrimination that is based on an individual's sexual orientation. The court held that the employers who fired their employees solely because of their lesbian, gay, bisexual, transgender, queer, intersex, asexual, or plus identity violated Title VII. The court explained: "Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations." Thus, with sufficiently clear and explicit legislation, the court will follow "statutory commands" set forth by lawmakers and implemented by agencies.

5 Preserving *Olmstead*

In the hierarchy of law, a statute has greater legal authority than administrative regulations or decisions by an executive agency or a court. Because of the erosion of *Chevron* deference and the rise of the major-questions doctrine, those who work to prevent discrimination against people with mental health needs, and to increase their access to programs, services, and other resources, should advocate for federal and state legislative solutions. We recommend the following actions. First, federal lawmakers and policy makers should strengthen the ADA to particularly delineate the authority of federal agencies. Second, state officials should enact state constitutional and statutory law to ensure that the *Olmstead* protections and the integration mandate remain in place. Third, stakeholders should propose legislative solutions that emphasize a strengths-based approach to viewing disability and that favor inclusive environments and programs providing support and accommodations for all people. Finally, all advocates should avoid language that could be perceived as polemic rhetoric infringing on the rights of, and biased against, groups in opposition to proposed legislation or policies.

Federal lawmakers and policy makers should strengthen the ADA to particularly delineate the authority of federal agencies.

6 Conclusion

There is no guarantee that the *Olmstead* protections will remain without action taken to codify the rule in federal and state statutes.

For the moment, *Olmstead*'s integration mandate remains intact, and there are no imminent legal challenges to the decision. However, there is no guarantee that the *Olmstead* protections will remain without action taken to codify the rule in federal and state statutes. As the Supreme Court stated in the case of *Biden v Nebraska* (20), "The question here is not whether something should be done; it is who has the authority to do it." When the Supreme Court revisits *Chevron* deference in *Loper*, the court's decision likely will determine to what extent the DOJ can define how to ensure compliance with the ADA and *Olmstead*. A negative answer from the court could lead to unpredictability for patients, providers, and advocates seeking to maintain availability of community-based care and treatment, even if *Olmstead* and the integration mandate remain good law.

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How to use this paper to "Think Bigger" and "Do Good"

1 / **Send the paper to your local, state, and federal policy- and decision-makers**

2 / **Share the paper with mental health and substance use advocates and providers**

3 / **Endorse the paper on social media outlets**

4 / **Link to the paper on your organization's website or blog**

5 / **Use the paper in group or classroom presentations**

SCATTERGOOD
THINK|DO|SUPPORT

The Scattergood Foundation believes major disruption is needed to build a stronger, more effective, compassionate, and inclusive health care system — one that improves well-being and quality of life as much as it treats illness and disease. At the Foundation, we THINK, DO, and SUPPORT in order to establish a new paradigm for behavioral health, which values the unique spark and basic dignity in every human.

www.scattergoodfoundation.org

Peg's FOUNDATION

Peg's Foundation believes in relevant and innovative, and at times disruptive ideas to improve access to care and treatment for the seriously mentally ill. We strive to promote the implementation of a stronger, more effective, compassionate, and inclusive health care system for all. Our Founder, Peg Morgan, guided us to "Think Bigger", and to understand recovery from mental illness is the expectation, and mental wellness is integral to a healthy life.

www.pegsfoundation.org

Patrick P. Lee FOUNDATION

The Patrick P. Lee Foundation is a family foundation with two core funding areas - Education and Mental Health. The Foundation's primary investments in education are through its scholarship programs in science, technology, engineering, and math. In mental health, the Foundation's investments focus on strengthening the mental health workforce, supporting community programs and services, advocating for increased public funding, and building the mental health literacy of the community.

www.lee.foundation

PETER & ELIZABETH
TOWER FOUNDATION

As grantmaker, partner, and advocate, the Tower Foundation strengthens organizations and works to change systems to improve the lives of young people with learning disabilities, mental illness, substance use disorders, and intellectual disabilities.

www.thetowerfoundation.org