

# USING DOMESTIC LAW TO MOVE TOWARD A RECOGNITION OF UNIVERSAL LEGAL CAPACITY FOR PERSONS WITH DISABILITIES

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## INTRODUCTION

This Symposium explores the meaning of *personhood* as it is or should be applied to persons with disabilities. This panel focused on the concept of legal capacity: the ability to make decisions about one's life—to exercise agency—and to have those decisions recognized by third parties. For my part, I would like to discuss how we might push the boundaries of domestic law—specifically the integration mandate of Title II of the Americans with Disabilities Act (ADA) and substantive due process—to help us move toward a recognition of universal legal capacity regardless of disability and bring meaningful changes to domestic guardianship regimes. While Article 12 of the United Nation (UN) Convention on the Rights of Persons with Disabilities<sup>1</sup> recognizes the right to universal legal capacity, the United States has not ratified that treaty, and domestic law in this area is still underdeveloped. In this Essay I will argue, as I have in the past, that guardianship constitutes a failure to provide assistance with decision-making in the least restrictive manner in violation of the ADA.<sup>2</sup> I will also discuss how principles of substantive due process may hold promise for helping to both reconceptualize our thinking about guardianship and to bring changes to guardianship practice. The ultimate goal is to view our social and legal obligation to persons with limitations in decision-making abilities in the same way that we understand our obligation to remove barriers affecting individuals with physical disabilities—that we are obligated to provide necessary accommodations in the form of services and supports that enable individuals with cognitive limitations to live as independently as possible. In this way, individuals with disabilities affecting decision-making can meaningfully participate in social and civic life and flourish as full citizens. The right to exercise legal capacity must be understood as a basic right of personhood.

Since the Supreme Court decided in *Cleburne* that individuals with intellectual disabilities were not entitled to any special protection for

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<sup>1</sup> See G.A. Res. 61/106, art. 12, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006) [hereinafter CRPD].

<sup>2</sup> Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–213 (2012). The ADA's integration mandate requires states to “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d) (2016). The U.S. Department of Justice (DOJ) has interpreted this mandate to require that government services are provided in “a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible . . . .” 28 C.F.R. pt. 35, App. B (2011).

purposes of equal protection analysis,<sup>3</sup> disability rights advocates have focused on statutory rather than constitutional claims in cases before the Supreme Court.<sup>4</sup> With respect to litigation to establish and secure the rights of persons with disabilities, however, there is some debate among scholars about whether it is more productive and more consistent with the overall disability rights project to pursue constitutional claims to advance the rights of individuals with disabilities or to rely exclusively on statutory arguments under the ADA. As Michael Waterstone persuasively argues: “by abandoning constitutional claiming,” advocates leave courts to “articulat[e] . . . constitutional values without the Constitution,” losing out on the greater social and legal significance of constitutional rulings.<sup>5</sup> In short, we simply pay more attention when the Court articulates constitutional principles defining citizenship and personhood.

Notably, in *Olmstead*, the Court grounded its conclusion that the ADA provides broad-based protection to individuals with mental disabilities in references to the historical segregation and resulting stigma that undergirds the Court’s granting of constitutional protection to excluded groups.<sup>6</sup> The *Olmstead* decision is grounded in a conception of individuals with disabilities as persons entitled to fully participate in civic life<sup>7</sup> and is often referred to as the *Brown v. Board of Education* for individuals with disabilities. So, one could debate whether the type of vigorous examination of “a group’s claim for full citizenship under our nation’s governing charter” requires a full-on constitutional analysis, or whether that same acknowledgement of “the depth of historical prejudice against people with disabilities”<sup>8</sup> can occur in an ADA framework.

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<sup>3</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) (re-affirming that conclusion); *see also Cleburne*, 473 U.S. at 445–46 (noting that no class of persons with any type of disability would be entitled to quasi-suspect equal protection classification).

<sup>4</sup> *See* Michael Waterstone, *Backlash, Courts, and Disability Rights*, 95 B.U. L. REV. 833, 841–42 (2015) [hereinafter Waterstone, *Backlash*]. *But see* *Heller v. Doe*, 509 U.S. 312 (1993).

<sup>5</sup> Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 558 (2014) [hereinafter Waterstone, *Disability Constitutional Law*]. While Waterstone focuses on constitutional arguments under the Equal Protection Clause, the same arguments should apply to arguments relying on the Substantive Due Process Clause, and in fact, the lines between equal protection and substantive due process are often blurred by the courts. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>6</sup> *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598–601 (1999) (discussing the stigmatizing injury resulting from discrimination and segregation of individuals with disabilities but also noting that the ADA itself was intended to be a comprehensive prohibition of disability-based discrimination designed to address the statutorily recognized historical segregation, isolation, and stigma experienced by individuals with mental disabilities); *id.* at 608 (Kennedy, J., concurring) (citing to Justice Marshall’s dissent in *Cleburne*).

<sup>7</sup> *See id.*; *see also Tennessee v. Lane*, 541 U.S. 509, 524–26 (2004) (discussing the history of discrimination against individuals with disabilities in the context of an ADA challenge).

<sup>8</sup> *See* Waterstone, *Disability Constitutional Law*, *supra* note 5, at 557.

Without question, the *Olmstead*<sup>9</sup> decision affirms the philosophical and legal significance of the ADA's integration mandate as a mechanism for achieving recognition and participation of individuals with disabilities and provides an important legal basis for challenging guardianship. Guardianship implicates a person's ability to participate in those interactions central to citizenship and one's self-definition. In the context of the Symposium's focus on personhood and the fundamentally legitimizing power of the Constitution, I would like to push us beyond the ADA to consider how or why guardianship's impermissible and overly broad restrictions on the exercise of autonomy conflict with principles of substantive due process. Substantive due process continues to be an essential jurisprudential basis for protecting the dignity and autonomy of all citizens.<sup>10</sup> For this reason, it is worth considering how we might use substantive due process principles to advance the movement toward recognition of universal legal capacity.

My argument here will be based on three ways of viewing guardianship. The first is that guardianship, and particularly plenary guardianship, operates as a wholesale restriction on the exercise of many of the specific liberty interests that have been recognized by our courts. This would include the rights to contract, work, marry, procreate, raise a family, vote, make medical treatment decisions, etc. When guardianship restricts an individual's ability to exercise these fundamental liberty interests it constitutes a "massive curtailment of liberty,"<sup>11</sup> akin to that of involuntary civil commitment. The Supreme Court has determined that, consistent with substantive due process, the nature and duration of civil confinement must be reasonably related to its purpose.<sup>12</sup> Under this view of guardianship, due process places limits on the scope and duration of a guardianship order.

Second, guardianship is an exercise of State power that removes the individual's ability to act on her own behalf to protect herself and her own interests. In *Youngberg v. Romeo*, the Supreme Court determined that when the State involuntarily places a person with a disability in a state institution, preventing the individual from protecting herself, due process requires that the State provide her with some modicum of training to keep her safe and free from restraints.<sup>13</sup> By analogy, once the State appoints a guardian, thereby limiting the individual's ability to

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<sup>9</sup> *Olmstead*, 527 U.S. 581.

<sup>10</sup> See, e.g., Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 833 (2003).

<sup>11</sup> *In re Guardianship of Deere*, 708 P.2d 1123, 1125 (Okla. 1985); see also, e.g., *In re Hedin*, 528 N.W.2d 567, 575 (Iowa 1995) (finding that guardianship results in a significant loss of liberty); *In re Boyer*, 636 P.2d 1085, 1090 (Utah 1981) (noting that guardianship results in a substantial loss of personal freedom).

<sup>12</sup> *Jackson v. Indiana*, 406 U.S. 715 (1972); *Youngberg v. Romeo*, 457 U.S. 307 (1982).

<sup>13</sup> See *Youngberg*, 457 U.S. at 324.

protect her own interests, under principles of substantive due process, the State is obligated to provide that individual with some level of training to prevent deterioration in decision-making abilities and potentially help restore or enhance the individual's ability to manage her personal and financial needs and regain her right to exercise legal capacity.

Finally, guardianship is a mechanism that isolates the individual by making the guardian the conduit for many, or all, of the individual's interactions with public and private actors in the community. So, the person who has a guardian is not the person talking to and interacting with the doctor or health care provider about medical treatment and decisions; the person is not the one engaging in financial transactions; the person is not the one interacting with the landlord and signing the lease. Rather, the guardian will engage in these interactions on the individual's behalf. By functioning in this way, guardianship denies or seriously restricts the individual's opportunity for important interactions with others in the community in violation of the integration mandate of the ADA.

This Essay will consider these three conceptions of guardianship and argue that guardianship violates the integration mandate of the ADA and implicates substantive due process in ways that require changes in state guardianship regimes, moving us closer to the recognition of universal legal capacity. The object is to close the front door to guardianship so that fewer people enter, and open the back door<sup>14</sup> so that those who neither need nor want guardianship can exit and ultimately benefit from meaningful and appropriate supports and services available outside of the guardianship construct.

The Essay will proceed as follows. Part I will summarize the argument I have made elsewhere—that guardianship is a mechanism of unnecessary isolation that violates the integration mandate of the ADA. Much of Part I will focus on more recent cases that apply the integration mandate to prohibit government policies and practices that isolate individuals with disabilities living in the community, where there is no asserted or identified risk of institutionalization. Part II addresses the substantive due process arguments, explaining why the Supreme Court decisions in *Jackson v. Indiana* and *Youngberg v. Romeo* may be read to require restrictions on the scope and duration of guardianship and how *Youngberg's* training requirement may require active efforts to restore the capabilities of an individual subject to guardianship. To be sure, this Essay will not address all the complexities of the Supreme Court's

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<sup>14</sup> See Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 12 (2012) [hereinafter Bagenstos, *Deinstitutionalization Litigation*] (employing this characterization of deinstitutionalization litigation).

evolving substantive due process doctrine. The purpose here is to provoke some new thinking about guardianship and to provide some legal tools to remove or limit guardianships that are rarely empowering, and in some number of cases, are experienced as demoralizing or oppressive.<sup>15</sup>

In the context of guardianship, we are swimming upstream. The notion that the State should protect its vulnerable citizens by designating or appointing someone else to make decisions for them—that it has an *obligation* to do so—is one that is deeply rooted in our historic tradition. It will likely take both constitutional and statutory arguments to reverse this long-standing *parens patriae* tradition and move us toward the recognition of universal legal capacity, with a right to support if needed.<sup>16</sup>

#### I. GUARDIANSHIP AS A VIOLATION OF THE INTEGRATION MANDATE OF THE ADA

I have previously written extensively on the topic of guardianship as an impermissible mechanism of constructive isolation that violates

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<sup>15</sup> Clients in our clinical program have reported to the author that as a result of the guardianship they felt that they had lost all self-esteem and self-confidence, that they were able to manage their affairs and did not need nor want the guardian's assistance, and that they felt as though they were always "under the guardian's thumb" with no ability to do what they wanted when they wanted. In a recent case in our clinic, a clergyperson referred a client whose ability to manage her finances was taken away. After the restoration of those rights, the clergyperson wrote about the client: "The change in her is striking to me. She has more confidence, is taking better care of herself, and looks much better." E-mail from Rabbi Jill Hausman, Rabbi, The Actors' Temple, New York City, to Leslie Salzman (Aug. 18, 2017, 16:25 EST) (on file with author); see also Elizabeth Pell & Virginia Mulkern, *Supported Decision Making Pilot: Pilot Program Evaluation Year 2 Report*, HUM. SERVICES RES. INST. 5 [hereinafter Pell, *Pilot Program Evaluation*], [http://supporteddecisions.org/wp-content/uploads/2016/11/Evaluation-Year-2-Report\\_HSRI-2016\\_FINAL-2-1.pdf](http://supporteddecisions.org/wp-content/uploads/2016/11/Evaluation-Year-2-Report_HSRI-2016_FINAL-2-1.pdf) (finding "[o]bservable differences were noticed in the personal growth of SDM [supported decision making] adopters, along with increased self-esteem and self-advocacy, more engagement in decision making, and increased happiness").

<sup>16</sup> It is worth noting that the trend is in this direction. In August 2017, the American Bar Association House of Delegates adopted Resolution 113 on Supported Decision Making urging states to amend their guardianship statutes to provide that supported decision-making is a less restrictive alternative that must be considered prior to the imposition of guardianship and that the availability of decision-making supports be considered a basis for the termination of guardianship and the restoration of the individual's rights. See 113, A.B.A. [hereinafter ABA Resolution 113], [https://www.americanbar.org/news/reporter\\_resources/annual-meeting-2017/house-of-delegates-resolutions/113.html](https://www.americanbar.org/news/reporter_resources/annual-meeting-2017/house-of-delegates-resolutions/113.html) (last visited Oct. 28, 2017); see also Nat'l Conference of Comm'rs on Unif. State Laws, *Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act*, UNIFORM L. COMMISSION 36 (July 2017) [hereinafter UGCOPAA], [http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/2017AM\\_UGCOPPA\\_AsApproved.pdf](http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/2017AM_UGCOPPA_AsApproved.pdf) (providing that guardianship court must find by clear and convincing evidence that the individual cannot receive and evaluate information or make or communicate decisions with supportive services, technological assistance or supported decision making).

the integration mandate of the ADA.<sup>17</sup> Consequently, here I will summarize that argument that guardianship violates the disability-discrimination prohibition of the ADA's integration mandate. The integration mandate requires that public entities "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."<sup>18</sup> The "most integrated setting" is defined as "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible."<sup>19</sup>

A finding that guardianship violates the ADA<sup>20</sup> is consistent with the ADA's statutory purpose to prohibit both active and passive discrimination and address the continuing and pervasive segregation and isolation of individuals with disabilities.<sup>21</sup> In *Olmstead*, the Supreme Court identified two evils that the ADA's prohibition against segregation was designed to address. The first is the assumption that the individual segregated by society is either incapable or unworthy of participation in civic and social activities. The second is that the isolated individual is prevented from engaging in all the important activities and interactions that give our lives meaning and enrich our existence.<sup>22</sup> Both of those "evils" exist in the guardianship context.

The ADA claim is predicated on the assumption that guardianship constitutes a type of constructive isolation of the individual from many important interactions with persons without disabilities. As I explained in *Rethinking Guardianship*:

With the loss of decision-making rights, the individual may be deprived of opportunities to engage in a range of activities that enable him or her to interact with others. The individual without the right to make financial decisions becomes gradually disengaged from the management of his or her finances and then loses opportunities for interactions with others involved in that management. This might mean that the person stops banking because he cannot make

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<sup>17</sup> For a more extensive discussion of this argument, the reader is referred to Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157 (2010) [hereinafter Salzman, *Rethinking Guardianship*]; Leslie Salzman, *Guardianship for Persons with Mental Illness—a Legal and Appropriate Alternative?*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 279 (2011) [hereinafter Salzman, *Guardianship for Persons with Mental Illness*].

<sup>18</sup> 28 C.F.R. § 35.130(d) (2016). Public entities must "make reasonable modifications in policies, practices, or procedures" to avoid such disability-based discrimination, unless those modifications would "fundamentally alter . . . the service, program, or activity" at issue. 28 C.F.R. § 35.130(b)(7)(i).

<sup>19</sup> 28 C.F.R. pt. 35, app. B(b).

<sup>20</sup> ADA, 42 U.S.C. §§ 12101–213 (2012).

<sup>21</sup> See generally Samuel R. Bagenstos, *From Integrationism to Equal Protection: TenBroek and the Next 25 Years of Disability Rights*, 13 U. ST. THOMAS L.J. 13, 16–17 [hereinafter Bagenstos, *The ADA at 25*] (discussing the relationship between *Olmstead* and tenBroek's earlier integrationist writings).

<sup>22</sup> See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600–01 (1999).

withdrawals; stops shopping or going to restaurants because he is unable to make his own purchases; or stops purchasing gifts for, or giving monetary gifts to, loved ones because he is unable to do so without a guardian's intervention. As a result, the individual is less likely to interact with shopkeepers, store patrons, vendors, bankers and even friends. Similarly, if this individual loses the right to make medical decisions, the providers of medical and health-related services will likely seek guidance from the guardian rather than from the individual. The individual may get little information about his or her condition or treatment options, eventually becoming disregarded as a participant in the decision-making process and losing opportunities for important interactions with health professionals and others working in the healthcare system. Restrictions on the individual's ability to travel freely or engage in social interactions and activities will also have a direct impact on the individual's ability to interact with others. In all of these ways, the loss of decision-making rights can have an isolating effect on the individual with the disability.<sup>23</sup>

Once the constructive isolation of guardianship is established, there are several additional challenges in trying to state a claim under Title II's integration mandate with respect to guardianship. The first challenge is to characterize guardianship as a governmental service, program, or activity covered by Title II.<sup>24</sup> Next, the individual involved in the guardianship challenge must establish that she is a "qualified"<sup>25</sup> individual with a disability. The individual must then establish that the isolation of guardianship violates the integration mandate even though the exclusion occurs in the community setting and there is arguably no risk of institutionalization. In addition, the individual must persuade a court that the request to move from guardianship to a relationship of support is not a request for "new services" but only a request that the services already provided in guardianship be provided in a less isolating manner. Finally, the individual may need to address an affirmative defense that the requested change in the State's service, program, or activity would not cause a fundamental alteration of the State's program for assisting individuals with limitations in decision-making and self-care.

#### A. *Government Service, Program, or Activity*

The first element of the integration mandate claim that must be addressed is whether guardianship is a governmental service, program,

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<sup>23</sup> Salzman, *Rethinking Guardianship*, *supra* note 17, at 168–69.

<sup>24</sup> See 42 U.S.C. § 12132.

<sup>25</sup> *Id.*



or activity covered by Title II. Guardianship may be characterized as a covered public service in several ways. It can be characterized as a government's service, program, or activity that assists citizens who are deemed incapable of managing their affairs due to limitations in decision-making abilities. It can also be characterized as a government's service, program, or activity that regulates when a citizen can make legally cognizable decisions or its deliberative process for determining the same. Finally, guardianship may be characterized as the "statutorily created" assignment of decision-making rights to a guardian that is then "recognized and followed" by third parties.<sup>26</sup> However one conceptualizes the governmental activity involved in guardianship, there is a reasonable claim that it does constitute a service, program, or activity under Title II, as the courts have found that Title II covers virtually everything that a government does.<sup>27</sup>

To my knowledge, no court has directly addressed the issue of whether guardianship is a state service, program, or activity covered by Title II of the ADA. The ADA challenges that have touched on guardianship have focused on other activities affected by the guardianship restriction. For example, in *Missouri Protection & Advocacy Services v. Carnahan*, a case where Missouri residents challenged state laws that disenfranchised individuals subject to plenary guardianship, the court found the relevant state activity to be that of voting.<sup>28</sup> Notably, at least one state has listed the modification of its

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<sup>26</sup> See *Hargrave v. Vermont*, 340 F.3d 27, 38 (2d Cir. 2003) (quoting *Hargrave v. State*, No. 99-128, 2011 U.S. App. LEXIS 26901, at \*23 (D. Vt. Oct. 11, 2001)) (concluding in a case challenging a state law amendment allowing override of a durable power of attorney for health care upon civil commitment, that Title II covers the statutorily created opportunity to execute a durable power of attorney for health care and have it be recognized and followed by third parties).

<sup>27</sup> See *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209–10 (1998). Cases have concluded that Title II covers zoning laws, code enforcement activities, the State's mental health services program administered in private adult homes, the substantive decision-making process of parole proceedings, professional licensing, public contracting, involuntary commitment, and assisted outpatient treatment laws or processes. See *Scharff v. Cty. of Nassau*, No. 10-4208, 2014 U.S. Dist. LEXIS 74787, at \*16–22 (E.D.N.Y. June 2, 2014) (concluding that installing and maintaining pedestrian crossing signals at crosswalks are activities covered by Title II and collecting cases); Salzman, *Rethinking Guardianship*, *supra* note 17, at 202–05; Salzman, *Guardianship for Persons with Mental Illness*, *supra* note 17, at 318–20.

<sup>28</sup> See *Mo. Prot. & Advocacy Servs. V. Carnahan*, 499 F.3d 803, 812 (8th Cir. 2007). Last year, Disability Rights New York (DRNY) filed a federal constitutional and ADA challenge to New York's law providing plenary guardianships for persons with intellectual and developmental disabilities that directly presented the question of whether guardianship—there characterizing the relevant governmental activity as the operation of the New York courts by the Office of Court Administration—constitutes a service, program, or activity within the meaning of Title II. Complaint, *Disability Rights New York v. New York State*, No. 16-07363 (S.D.N.Y. dismissed Aug. 8, 2017, appeal docketed Sept. 11, 2017) [hereinafter DRNY Complaint] (challenging Article 17A of the New York Surrogate Court Procedure Act). Unfortunately, the District Court granted the Defendants' motion to dismiss the pleadings, finding that the federal court should abstain from hearing a matter that sought injunctive relief

guardianship laws as a recommended action in its *Olmstead* planning process, suggesting that the State considers guardianship a governmental activity properly covered by Title II of the ADA.<sup>29</sup>

With the exception of public guardianship programs, which are typically funded and administered by the State, guardianship is not a government service, program, or activity as we typically understand those terms. In most (nonpublic) guardianships, the State creates the statutory construct for guardianship, adjudicates the petition, appoints the guardian, and is responsible for monitoring the relationship but neither funds nor directly administers the guardianship. Generally, the court appoints a private individual to provide the guardianship “services” and implement the court’s order.

In *Tennessee v. Lane*, the Supreme Court broadly determined that the ADA reaches the public services of the administration of justice and provision of access to the courts.<sup>30</sup> Some courts have been asked to consider whether Title II covers the substance of proceedings to terminate parental rights. Those courts have reached different conclusions for different reasons, with some courts holding that proceedings to terminate parental rights may constitute a public service, program, or activity under the ADA.<sup>31</sup> While there are significant differences between child welfare and guardianship proceedings, to the extent that courts have found that the former proceedings are covered by Title II, those cases will be helpful in establishing that guardianship is a public service covered by the ADA.

Although the courts have not yet addressed the question of whether a State’s guardianship program is covered by Title II,

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that would “improperly interfere with state court proceedings.” Order Granting Defendants’ Motion for Judgment on the Pleadings, No. 16-07363, at 5 (2017) [hereinafter DRNY Order]; *see id.* at 4 (concluding that the case falls within the *Sprint Communications* abstention category of “civil proceedings involving certain orders uniquely in furtherance of the state courts’ ability to perform their judicial functions” (quoting *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013))). DRNY filed a notice of appeal on September 11, 2017.

<sup>29</sup> *See, e.g.*, REPORT AND RECOMMENDATIONS OF THE OLMSTEAD CABINET: A COMPREHENSIVE PLAN FOR SERVING NEW YORKERS WITH DISABILITIES IN THE MOST INTEGRATED SETTING 26–27 (Oct. 2013), <http://www.criminaljustice.ny.gov/opca/pdfs/9-Olmstead-Cabinet-Report101013.pdf>. *But see generally* DRNY Order, *supra* note 28 (dismissing ADA challenge to state guardianship law on abstention grounds without directly addressing the question of whether guardianship might be a governmental activity subject to the mandates of Title II of the ADA).

<sup>30</sup> *See Tennessee v. Lane*, 541 U.S. 509, 524–29, 531–34 (2004) (determining that Congress had the authority under the Fourteenth Amendment to abrogate state sovereign immunity to permit federal suits to challenge state actions “implicating the fundamental right of access to the courts”).

<sup>31</sup> *See In re Doe*, 60 P.3d 285, 292–93 (Haw. 2002); Dale Margolin, *No Chance to Prove Themselves: The Rights of Mentally Disabled Parents Under the Americans with Disabilities Act and State Law*, 15 VA. J. SOC. POL’Y & L. 112, 117 (2007) (observing that the Supreme Court has not ruled on the applicability of Title II to proceedings to terminate parental rights and collecting state cases).

guardianship should fall within the ambit of the ADA's public services provisions based on the Supreme Court's broad interpretation of covered governmental activity.

B. "Qualified Individuals with Disabilities"

To establish the Title II claim, the individual challenging a guardianship must demonstrate that she is a "qualified individual with a disability"<sup>32</sup> who is eligible for supports or assistance that may be needed to engage in personal and financial activities outside of the guardianship construct.<sup>33</sup> To effectively oppose any potential opposition on this element of the Title II claim, advocates must be prepared to demonstrate that individuals with cognitive limitations can function outside the guardianship construct with adequate supports. Advocates faced a similar challenge in the early deinstitutionalization litigation. At that time, institutionalization was seen as the proper way to "treat" and care for individuals with severe disabilities. Consequently, it was necessary to educate many to understand that life in the community was possible with sufficient supports, and in fact much more therapeutic and humane. Similarly, advocates now are engaged in a process to get the relevant actors to understand that guardianship must no longer be seen as the only or the best tool for assisting individuals with significant cognitive limitations.<sup>34</sup> The lessons gained from existing pilot projects, current research, and the experience of individuals using support as an alternative to guardianship under existing state laws will be critical to demonstrating that individuals can succeed and flourish with supports and do not need guardians.<sup>35</sup> The experience of individuals using

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<sup>32</sup> A "qualified individual with a disability" is someone who "with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2) (2012).

<sup>33</sup> A very significant number of individuals with limitations in cognitive abilities affecting self-care and financial management should be able to meet this standard. *See, e.g., McGary v. City of Portland*, 386 F.3d 1259, 1264–65, 1269–70 (9th Cir. 2004) (concluding that a man with AIDS needing additional time to clean his yard to comply with the city's nuisance abatement law was a qualified individual with a disability who could assert a Title II ADA claim); *see also Williams v. Wasserman*, 164 F. Supp. 2d 591, 629–31 (D. Md. 2001) (finding plaintiffs in deinstitutionalization litigation were "qualified individuals with disabilities" despite the fact that existing community placements were not sufficient to meet the plaintiffs' needs).

<sup>34</sup> *See* ABA Resolution 113, *supra* note 16; UGCOPAA, *supra* note 16, at § 102(13) (including supported decision making in definition of less restrictive alternative); *id.* at § 102(31) (defining "Supported decision making"); *id.* at § 301 (requiring clear and convincing evidence that physical health, safety or self-care needs cannot be met with supported decision making).

<sup>35</sup> As various pilot projects move forward and analyze the results, we will begin to have a body of information about how to design and carry out effective mechanisms for decision-making support. *See, e.g., Pell, Pilot Program Evaluation, supra* note 15. Supported Decision-

support to make decisions can also help demonstrate the many benefits that come from the individual's exercise of autonomy and her greater integration in social and civic activities. It will also be useful to develop a cadre of professionals who understand the ways to support decision-making outside guardianship to serve as allies in this political and legal effort.

*C. Is the Integration Mandate Properly Applied to the Experience of Individuals Living in the Community If They Are Not at Real Risk of Institutionalization?*

Since the decision in *Olmstead*, advocates have been quite successful in persuading courts that the integration mandate should be broadly construed to achieve meaningful integration of individuals with disabilities.<sup>36</sup> There has been steady progress in the judicial recognition that the integration mandate prohibits not just institutionalization but a wide range of practices that isolate individuals with disabilities.

In *Olmstead*, which involved confinement in a state mental institution, the Court concluded that unnecessary institutional confinement could violate the integration mandate.<sup>37</sup> After *Olmstead*, courts found that the integration mandate applied to challenges by individuals living outside of institutions seeking services in the community to avoid the *risk* of institutionalization.<sup>38</sup> Now we have

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Making New York (SDMNY) recently began a five-year pilot to design and implement a program to divert individuals with intellectual and developmental disabilities (I/DD) from guardianship and to restore the rights of individuals with I/DD who had been subjected to guardianship. For a full description of SDMNY's project, goals and news see *Education*, SDMNY [hereinafter SDMNY], <http://sdmny.org/about-sdmny/our-goals/education> (last visited Oct. 2, 2017). Professor Christine Bigby at La Trobe University in Australia is currently researching what "processes work best for providing support for decisions making, including what kind of training and education works for people who are supporting others to make decisions." For discussion of the research project, see *Effective Decision-Making Support*, LA TROBE UNIVERSITY, <http://www.latrobe.edu.au/lids/research/support-for-decision-making/decision-making-support> (last visited Oct. 2, 2017). See generally Nina Kohn et al., *Supported Decision-Making: A Viable Alternative to Guardianship*, 117 PENN ST. L. REV. 1111 (2013) (noting the need for further research on the efficacy of supported decision-making processes).

<sup>36</sup> See, e.g., Bagenstos, *The ADA at 25*, *supra* note 21, at 17 (discussing how post-*Olmstead* efforts have sought full and equal participation in "all of the key arenas of everyday life, from [work to] attending court and other government proceedings, to patronizing stores and businesses, to recreational activities like going to the movies or the ball game, patronizing casinos, or going on a cruise").

<sup>37</sup> See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999) (observing that case raises the question "whether the [ADA's] proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions").

<sup>38</sup> See *Davis v. Shah*, 821 F.3d 231, 259–64 (2d Cir. 2016) (concluding that policy causing risk of institutionalization and unnecessary isolation supports an integration mandate claim); *Pashby v. Delia*, 709 F.3d 307, 321–22 (4th Cir. 2013); *M.R. v. Dreyfus*, 663 F.3d 1100, 1118 (9th Cir. 2011), *amended by* 697 F.3d 706 (9th Cir. 2012); *Radaszewski ex rel. Radaszewski v.*

decisions that have applied the integration mandate in contexts where there is no demonstrated risk of institutionalization or any question of institutionalization in the particular context.<sup>39</sup> In these cases, the courts have recognized, consistent with the Justice Department's guidance, that the most integrated setting is the setting that provides an individual with disabilities the greatest opportunity for interaction with other people who do not have disabilities.<sup>40</sup>

And this progression in the case law has allowed integration mandate challenges to go forward in challenges to placements in community-based adult homes<sup>41</sup> and to segregation of individuals with disabilities in community-based sheltered employment and day

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Maram, 383 F.3d 599, 609 (7th Cir. 2004); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003) (finding that "there is nothing in the plain language of the regulations that limits protection to persons who are currently institutionalized"); *Townsend v. Quasim*, 328 F.3d 511, 517–18 (9th Cir. 2003); *Hiltibran v. Levy*, 793 F. Supp. 2d 1108, 1115–16 (W.D. Mo. 2011) (finding that the State Medicaid program's provision of adult diapers only to persons living in institutions places beneficiaries living in the community at risk of institutionalization in violation of the integration mandate). One can argue that guardianship may actually increase the risk of institutionalization. Anecdotal evidence suggests that individuals subject to guardianship may be at greater risk of institutionalization than those without guardians either because the guardians may be more likely to select institutional settings for their "wards" than the individuals would themselves or because the potential anti-therapeutic nature of guardianship causes functional deterioration that might lead to institutionalization. See, e.g., Salzman, *Rethinking Guardianship*, *supra* note 17, at 207 n.164.

<sup>39</sup> See, e.g., *Steimel v. Wernert*, 823 F.3d 902, 910–14, 918 (7th Cir. 2016); *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973 (D. Minn. 2016); *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1202–06 (D. Or. 2012); *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 224–27 (E.D.N.Y. 2009); *Lovely H. v. Eggleston*, 235 F.R.D. 248, 261 (S.D.N.Y. 2006); *K.M. v. Hyde*, 381 F. Supp. 2d 343 (S.D.N.Y. 2005).

<sup>40</sup> States "shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (2016). The regulations' preamble defines "the most integrated setting appropriate to the needs of qualified individuals with disabilities" as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. pt. 35, app. B. The DOJ issued a guidance statement in 2011 reiterating this same conclusion. *Statement of the Dep't of Justice on the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.*, U.S. DEP'T JUSTICE (June 22, 2011), [https://www.ada.gov/olmstead/q&a\\_olmstead.pdf](https://www.ada.gov/olmstead/q&a_olmstead.pdf). The DOJ notes that "[i]ntegrated settings are located in mainstream society" and "offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; afford individuals choice in their daily life activities; and, provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible." *Id.* The Guidance notes that a state might violate the integration mandate if it "operates . . . programs that segregate individuals with disabilities" or "through its planning, service system design, funding choices, or service implementation practices, promotes or relies upon the segregation of individuals with disabilities in private facilities or programs." *Id.* The Justice Department explicitly notes that the mandate applies outside of institutions or other segregated settings. *Id.*

<sup>41</sup> See *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 224–27 (E.D.N.Y. 2009) (noting that supported housing may provide greater opportunities for interactions with non-disabled persons than adult homes and concluding that supported housing would be a more integrated setting than an adult home within the meaning of the integration mandate); see also Salzman, *Rethinking Guardianship*, *supra* note 17, at 206–09.

programs.<sup>42</sup> More recently, courts have found that state Medicaid policies that reduced the ability of recipients to leave their homes with assistance from their home attendants potentially violated the integration mandate.<sup>43</sup> In reaching that conclusion in *Steimel v. Wernert*, the Seventh Circuit explained: “Given the integration mandate’s maximalist language . . . [it] logically applies to all settings, not just to institutional settings [and] bars unjustified segregation of persons with disabilities, wherever it takes place.”<sup>44</sup>

The courts have been increasingly liberal in finding integration mandate violations, and the conclusion that guardianship violates this mandate is a logical next step in this progression towards full integration under the ADA. Whether the courts are ready for such a challenge now, or in four years or in a decade, it is a concept whose time will come eventually. Because guardianship can be an extremely isolating mechanism that is often imposed without due consideration of its isolating effects, it is important to challenge guardianship as a violation of the ADA’s integration mandate.

#### D. *Remaining Hurdles in Olmstead Challenges to Guardianship*

There are two final hurdles to an *Olmstead* challenge to guardianship. The first is the possible defense that the plaintiff is seeking new services (or a new level of services) that the State does not provide to anyone, rather than requesting that currently available services be provided in a more integrated manner or setting.<sup>45</sup> The second

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<sup>42</sup> See *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1202–06 (D. Or. 2012); see also *Olmstead Enforcement*, ADA.GOV, [http://www.ada.gov/olmstead/olmstead\\_enforcement.htm](http://www.ada.gov/olmstead/olmstead_enforcement.htm) (last visited July 23, 2017) (discussing DOJ settlements in *Olmstead* litigation and investigations including, e.g., *U.S. v. Rhode Island*, 14-175 (D.R.I. 2014) (prohibiting unnecessary isolation in sheltered workshops and facility-based day programs for individuals living in the community)).

<sup>43</sup> See *Steimel v. Wernert*, 823 F.3d 902, 910–14, 918 (7th Cir. 2016) (concluding that restructuring of State Medicaid waiver program that reduced the time an individual could spend with her home attendant outside of her home may violate the integration mandate because it reduces interactions with individuals without disabilities even where there is no risk of institutionalization); *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973 (D. Minn. 2016) (concluding that State’s denial of Medicaid waiver services that would enable plaintiffs to go out of their homes and interact with others in community may violate integration mandate); see also *Lovely H. v. Eggleston*, 235 F.R.D. 248, 261 (S.D.N.Y. 2006) (finding that requiring individuals with disabilities to use three welfare hub stations that are difficult for them to reach, rather than the local welfare offices more accessible to their homes, likely constitutes unjustified segregation in violation of the ADA’s integration mandate); *K.M. v. Hyde*, 381 F. Supp. 2d 343 (S.D.N.Y. 2005) (finding unnecessary social isolation of a student with disabilities during his school lunch hour is actionable disability-based discrimination).

<sup>44</sup> *Steimel*, 823 F.3d at 911.

<sup>45</sup> This argument comes from a footnote in *Olmstead* noting that while the ADA prohibited states from discriminating with respect to services that the state “in fact, provide[s],” states were not required to “provide a certain level of benefits to individuals with disabilities.”

remaining hurdle is the likely State affirmative defense that providing the requested alternative to guardianship would cause a fundamental program alteration.<sup>46</sup>

Courts have understood that services provided in an integrated setting may not look exactly as they did in the segregated setting and have rejected the State's "new services" defense based on the argument that the integrated services are "different" from the segregated form of those services.<sup>47</sup> Nevertheless, the new services argument continues to be a defense that advocates must be prepared to address. For example, although the court in *Lane v. Kitzhaber* found that the State violated the integration mandate by providing sheltered, rather than supported, employment services, and could be ordered to provide significant community-based supported employment services, the court would not direct the State to provide certain new services that the State did not provide to anyone.<sup>48</sup> Despite the court's line drawing in *Lane v. Kitzhaber*, the plaintiffs nevertheless were able to use the integration

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Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 603 n.14 (1999) (responding to Justice Thomas's dissent based on the Court's limitation in *Alexander v. Choate* on the right of people with disabilities to meaningful access to health care under Section 504 of the Rehabilitation Act). *See generally* Leslie Pickering Francis & Anita Silvers, *Debilitating Alexander v. Choate: "Meaningful Access" to Health Care for People with Disabilities*, 35 *FORDHAM URB. L.J.* 447, 451–52 (2008) (distinguishing the respective purposes of Section 504 and the ADA and arguing that the "meaningful access" limitation set out in *Choate* is less appropriate when addressing claims under the ADA, which is a broad civil rights act); Samuel R. Bagenstos, *The Future of Disability Law*, 114 *YALE L.J.* 1, 45–50 (2004) (observing that the Court's access/content distinction in ADA claims seeking accommodations or program modifications is false and inconsistent with the ADA's goal of full integration).

<sup>46</sup> *See* 28 C.F.R. § 35.130(b)(7) (2016) (requiring public entities to make reasonable modifications in policies, practices or procedures to avoid disability-based discrimination, unless those modifications would "fundamentally alter" the service, program or activity at issue).

<sup>47</sup> *See, e.g.,* Radaszewski v. Maram, 383 F.3d 599, 609–11 (7th Cir. 2004); Salzman, *Rethinking Guardianship*, *supra* note 17, at 212 n.174 (citing cases).

<sup>48</sup> In *Lane v. Kitzhaber*, the district court found that plaintiffs stated an integration mandate claim challenging defendants' allocation of available resources in a way that unjustifiably favored segregated employment in sheltered workshops at the expense of providing supported employment services to qualified individuals and that defendants could be required to provide supported employment services to those individuals who qualify for and are interested in them. *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1206–08 (D. Or. 2012). However, the court rejected plaintiffs' claim that defendants must "offer an adequate array of integrated employment and supported employment services" and "provide . . . support[ed] employment services that would enable [plaintiffs] to work in integrated employment settings," because the court viewed this as an impermissible effort to establish a "certain standard of care or level of benefits." *Id.* at 1208. The court distinguished these services from the employment services for which they are currently eligible in a less segregated setting than sheltered workshops. *Id.* at 1206–08. *See generally* Davis v. Shah, 821 F.3d 231, 264 (2d Cir. 2016) (concluding that challenged policy explicitly excluded individuals with certain disabilities but stating in dicta that "although the ADA cannot and does not 'require[ ] States to provide a certain level of benefits to individuals with disabilities,' it can and does require states to 'adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide'" (quoting *Olmstead*, 527 U.S. at 603 n.14 (1999))).

mandate to successfully shift services from a segregated to an integrated setting.

In the guardianship context, when arguing that the State should be required to provide the “services” of guardianship in a more integrated manner, advocates may have to confront a new services defense. This hurdle should not be insurmountable. Most states have public guardianship programs, and there would be a compelling argument that the services currently provided by the public guardian must be provided in a more integrated manner outside guardianship. Further, there are currently many services provided by states that help individuals manage their personal and property affairs including, Medicaid home and community-based waiver services, mental health and developmental disabilities services, and person-centered supports, supported housing, recovery-based services, community support networks, case management services, assertive community treatment, crisis management assistance, personal assistance, and independent living services. Advocates can point to this range of community-based services and supports currently provided by the State that could provide the assistance with personal and financial management that is currently provided in the guardianship construct.<sup>49</sup> Thus, there are legal and factual ways to overcome any potential new services roadblock to an integration mandate challenge to the unnecessary isolation of individuals in the guardianship setting. The real challenge for advocates will be to avoid a new services defense while trying to bring meaningful changes to the way our society assists individuals in making decisions and caring for their own personal and financial needs.

Finally, because the State need not provide services in the most integrated setting if doing so would entail a fundamental program alteration, this affirmative defense will continue to provide a litigation challenge to individuals seeking more integrated services that the State perceives to be administratively or financially burdensome.<sup>50</sup> In *Olmstead*, the Supreme Court reiterated this limitation on the State’s obligation to provide accommodations<sup>51</sup> but did not set out a clear standard for establishing a fundamental program alteration.<sup>52</sup> Courts

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<sup>49</sup> See generally *Olmstead Enforcement*, ADA.gov, [https://www.ada.gov/olmstead/olmstead\\_cases\\_list2.htm#marion](https://www.ada.gov/olmstead/olmstead_cases_list2.htm#marion) (last visited Sept. 19, 2017) (requiring provision of assertive community treatment teams, community support teams, intensive case management teams, case management service providers, crisis services centers, mobile crisis teams, a crisis hotline, supported housing, supported employment, and peer support services).

<sup>50</sup> See Salzman, *Rethinking Guardianship*, *supra* note 17, at 220–31. See generally Bagenstos, *Deinstitutionalization Litigation*, *supra* note 14 (discussing the economics of deinstitutionalization and the challenges of obtaining community-based services in difficult economic times).

<sup>51</sup> *Olmstead*, 527 U.S. at 603.

<sup>52</sup> For a fuller explanation of this defense, see Salzman, *Rethinking Guardianship*, *supra* note 17, at 220–31.



understand that integration will almost always involve substantial short-term burdens, both financial and administrative, and cost alone will not establish a fundamental alteration defense.<sup>53</sup> We know that courts will require a State to demonstrate that the requested program modification actually interferes with the State's ability to provide services to others with disabilities.<sup>54</sup> At the same time, the *Olmstead* Court concluded that a State could meet the fundamental alteration defense by demonstrating that it has "a comprehensive, effectively working plan for . . . [the integration of individuals] with . . . disabilities . . . and a waiting list that move[s] at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated . . ."<sup>55</sup> Courts addressing fundamental alteration defenses after *Olmstead* have required that the State have a comprehensive, concrete, and viable integration plan for placing eligible individuals in community-based programs by a target date that is sufficiently specific for a court to review the adequacy of the State's ongoing "commitment to action."<sup>56</sup>

Although the cases that have addressed the fundamental alteration defense have not been entirely consistent in their analyses, to succeed on a fundamental alteration defense, the State must demonstrate—specifically and concretely—that the administrative and financial costs of providing supported decision-making options would prevent the State from providing assistance with decision-making to other individuals with diminished mental abilities. This will not be easy for the State to prove. A State could also try to show that it has a "comprehensive, effectively working plan" to move individuals from guardianship to the status of exercising legal capacity, with or without support. States are moving forward in developing and making available the types of supports that some individuals with cognitive limitations might need and desire to make decisions and manage their personal and financial needs, but it is unlikely that any State could demonstrate that it currently has a "comprehensive and effectively working plan" moving individuals out of guardianship. By the time they can, we may be well on our way to the recognition of universal legal capacity.

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<sup>53</sup> See *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1183 (10th Cir. 2003).

<sup>54</sup> *Olmstead*, 527 U.S. at 603–04.

<sup>55</sup> *Id.* at 605–06.

<sup>56</sup> *Pa. Prot. & Advocacy, Inc. v. Pa. Dept. of Pub. Welfare*, 402 F.3d 374, 382–83 (3d Cir. 2005); *Disability Advocates Inc. v. Paterson*, 653 F. Supp. 2d 184, 267–69, 305 (E.D.N.Y. 2009).

## II. USING SUBSTANTIVE DUE PROCESS TO CHALLENGE OR LIMIT GUARDIANSHIP

The integration mandate claim is particularly appealing because it holds the promise of expanding community-based services and supports for individuals with disabilities so they may successfully direct their own lives.<sup>57</sup> While I recognize that our substantive due process jurisprudence remains highly contested and has its limitations with regard to the range of potential relief, it is worth considering the ways in which the doctrine might be used to challenge guardianship or limit its scope.<sup>58</sup> Such an analysis seems particularly appropriate in a Symposium dedicated to the personhood of individuals with disabilities.<sup>59</sup>

Why bother going down this road? Why reach for an elusive doctrine that continues to be the subject of significant scholarly debate?<sup>60</sup> Substantive due process doctrine seeks to define those rights

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<sup>57</sup> The appropriate remedy in an integration mandate case is for the State to provide the services at issue in a less restrictive manner or setting. Thus, litigation under the *Olmstead* doctrine holds greater promise for the provision of supports and services in a less restrictive setting, than does constitutional litigation that asserts the right to be free of guardianship. By way of comparison, in the deinstitutionalization context, statutory discrimination theories ultimately proved more promising than the constitutional due process theories used by advocates in the earlier deinstitutionalization litigation. See Bagenstos, *Deinstitutionalization Litigation*, *supra* note 14, at 6 (noting that the “anti-discrimination theory relying on the ADA and *Olmstead* . . . focuses directly on state resource-allocation decisions and, far more than due process, affords states a powerful incentive to create and fund adequate community services”); see also discussion *supra* Part I.

<sup>58</sup> Pursuit of such a constitutional claim would admittedly run counter to the wisdom of most disability advocates to strategically avoid pursuing constitutional claims on behalf of their clients. See Michael E. Waterstone, Michael Ashley Stein & David B. Wilkins, *Disability Cause Lawyers*, 53 WM. & MARY L. REV. 1287, 1317 (2012) (“A poll [of disability lawyers] showed a near-uniform consensus among [them] that constitutional litigation was not a priority or even a significant item on the litigation agenda.”). But see DRNY Complaint, *supra* note 28 (raising substantive and procedural due process claims, along with statutory claims in a challenge to New York’s plenary guardianship law for individuals with intellectual and developmental disabilities). This case was recently dismissed in its entirety on abstention grounds. See DRNY Order, *supra* note 28, at 5.

<sup>59</sup> See Waterstone, *Disability Constitutional Law*, *supra* note 5, at 556–57 (urging disability advocates to consider using constitutional theories to underscore the profound history of discrimination against individuals with disabilities and ultimately achieve “a more progressive vision of society” than is possible by relying on statutory theories alone).

<sup>60</sup> The contours and basis of substantive due process is the subject of much scholarly debate and is beyond the scope of this essay. See, e.g., Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1531–32 (2008); Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63 (2006) (discussing the theories of substantive due process: “historical tradition,” “reasoned judgment,” and “evolving national values”); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 320–27 (1999) Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010) (discussing debate over the basis for substantive due process).

and liberties that define us as citizens under our founding document<sup>61</sup>; it protects those important liberty interests that allow us to express our humanity and our personhood. By forcing the courts to struggle with the constitutional dimensions of disability rights, we have an opportunity for more robust engagement with issues of importance to individuals with disabilities.<sup>62</sup>

Persons with cognitive limitations have often been excluded from recognition as full legal persons, and that is done, at least in part, through guardianship. It is true that, as articulated in *Olmstead*, the integration mandate at its heart rests on an essential right to participate as a full person, and its use may help reverse the exclusion and segregation of guardianship. Nonetheless, statutory recognition of personhood would be reinforced and substantiated by the recognition of a substantive due process liberty interest in the exercise of legal capacity. By claiming a substantive due process right to make those decisions central to one's identity, advocates would keep the recognition of full citizenship and personhood in a place of prominence in the guardianship debate.

Although the Supreme Court has generally cautioned courts about finding new constitutionally protected liberty interests,<sup>63</sup> in its 2015 decision in *Obergefell*, the Court recognized the judicial obligation to identify and protect fundamental rights and correct injustices that may not be immediately apparent "in our own times."<sup>64</sup> Writing for the majority, Justice Kennedy explained that when identifying constitutionally protected liberty interests courts should employ

reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect . . . History and tradition guide and discipline the inquiry but do not set its outer boundaries. [This] method respects our history and learns from it without allowing the past alone to rule the present.<sup>65</sup>

This Part will set forth three ways in which substantive due process may be implicated in guardianship and how it might be used to limit the incidence or scope of guardianship. The first relates to the nature and duration of guardianship. Substantive due process limits the scope and

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<sup>61</sup> See Waterstone, *Disability Constitutional Law*, *supra* note 5.

<sup>62</sup> See Waterstone, *Backlash*, *supra* note 4, at 843 (noting that "one consequence [of avoiding Supreme Court litigation and constitutional challenges more generally in disability cases] is that the opportunity for backlash against judicial decisions, pushing the frontiers of disability rights beyond where the public is willing to take them, has been minimized").

<sup>63</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (stating that courts must exercise caution in finding new constitutionally protected liberty interests lest we "subtly transform" the Due Process Clause into little more than a statement of judicial policy preferences).

<sup>64</sup> See *Obergefell v. Hodges* 135 S. Ct. 2584, 2598 (2015).

<sup>65</sup> *Id.* (citation omitted).

duration of a restriction on liberty to that reasonably related to the purpose for which it is imposed. The second relates to the State's obligation to the individual when it imposes guardianship on the individual and removes the individual's ability to act on her own. Under such circumstances, substantive due process requires the State to provide the individual subject to guardianship with some level of treatment to restore her decision-making abilities and self-care skills.

Finally, carrying the substantive due process analysis in *Obergefell v. Hodges* one step further, I suggest that one day the Court will recognize a liberty interest in making one's own decisions and charting one's destiny and will conclude that substantive due process precludes restrictions on the exercise of legal capacity. Both the analytic methodology used by the Court (historic tradition plus evolving standards) and the statements in dicta recognizing the centrality of personal choices to autonomy and dignity<sup>66</sup> provide a sliver of hope that one day the Court might find a fundamental right or liberty interest in the exercise of legal capacity.

A. *Nature and Duration of Guardianship: Jackson v. Indiana and Youngberg v. Romeo*

Substantive due process principles set out in *Jackson v. Indiana* and *Youngberg v. Romeo*<sup>67</sup> can help us think more critically about the nature and duration of guardianship and reinforce the requirement of many state laws to specifically limit the scope of guardianship to the individual's need for assistance. Substantive due process also can impose an ongoing obligation on the State to provide the individual subject to guardianship with some training and skill development to gain or regain the ability to exercise legal capacity on her own behalf.

1. Scope of Order Must Bear Some Reasonable Relationship to Its Purpose

The Supreme Court has repeatedly emphasized that institutional confinement constitutes a "massive curtailment of liberty" and that this limitation on the individual's liberty represents more than just the loss of physical freedom.<sup>68</sup> The recognition that civil commitment infringes

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<sup>66</sup> *Id.* at 2589.

<sup>67</sup> *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Jackson v. Indiana*, 406 U.S. 715 (1972). See generally *Tennessee v. Lane*, 541 U.S. 509, 524–25 (2004) (reaffirming the viability of the Court's decisions in *Jackson* and *Youngberg*).

<sup>68</sup> *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)); see *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992). Although some more recent decisions

on liberty interests beyond the restrictions on physical freedom inherent in institutionalization supports the analogy between civil commitment and guardianship.

In *Jackson v. Indiana*, an individual found incompetent to stand trial on criminal charges challenged his indefinite commitment to a state mental facility. The Supreme Court concluded that the State could not hold the man indefinitely when the evidence indicated that he would not regain the competence to stand trial, declaring that “due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.”<sup>69</sup>

Ten years later, when the Court had the opportunity to further elaborate on the constitutional limits on involuntary commitment in *Youngberg v. Romeo*, it concluded that substantive due process requires the State to provide an involuntarily committed person with reasonably safe and non-restrictive conditions of confinement.<sup>70</sup> Together *Jackson* and *Youngberg* require that involuntary commitment be reasonably related to its purpose and provide reasonably non-restrictive conditions of confinement.<sup>71</sup> Because guardianship, particularly plenary guardianship, constitutes a restraint on liberty analogous to that of civil commitment, under the dictates of *Jackson* and *Youngberg*, guardianship’s restrictions may be justified only to the extent they are reasonably non-restrictive and proportionate to the need for decision-making assistance the allegedly incapacitated person requires.

The question is whether the restrictions on liberty in guardianship are sufficiently similar to those presented by institutional confinement

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in cases involving institutionalization tie the relevant due process liberty interest more specifically to the freedom from bodily restraint, *see, e.g.*, *Turner v. Rogers*, 564 U.S. 431, 445 (2011) (citing *Foucha*, 504 U.S. at 80), that discussion is appropriately limited to the circumstances of those cases and should do not detract from the Court’s recognition in *Foucha* and *Vitek* that institutionalization restricts a broad range of liberty interests.

<sup>69</sup> *Jackson*, 406 U.S. at 738.

<sup>70</sup> *Youngberg*, 457 U.S. at 315–16 (challenging institutional conditions in developmental disabilities center to which young man was involuntarily committed).

<sup>71</sup> The Supreme Court, however, has never found a constitutional right to conditions of confinement that are the *least restrictive* of the individual’s liberty. *See, e.g.*, 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, 1040–44 (2000) [hereinafter Perlin, *Promises of Paradise*]; Bagenstos, *Deinstitutionalization Litigation*, *supra* note 14, at 24–25. While most state civil commitment statutes require consideration of whether institutionalization would be the least restrictive alternative for the individual, *see* Ingo Keilitz et al., *Least Restrictive Treatment of Involuntary Patients: Translating Concepts into Practice*, 29 ST. LOUIS U. L.J. 691, 709–10 n.101 (1985) (listing statutes in thirty-nine states that, as of 1985, required courts to consider alternatives to hospitalization at time of involuntary civil commitment proceeding), the courts have not vigorously enforced this statutory requirement and have not effectively diverted individuals to community-based settings or required development of community-based alternatives. *See* Perlin, *Promises of Paradise*, *supra* note 71, at 1054.

to draw the parallel between these contexts for substantive due process purposes. At least in part because guardianship is a creature of state law, the Supreme Court has never been asked to determine whether guardianship restricts fundamental liberty interests or consider what limitations substantive due process may impose on guardianship orders. In *Olmstead*, Justice Ginsberg provides at least indirect support for the involuntary civil commitment/guardianship analogy. In *Olmstead*, the Justice highlighted the ways in which the restrictions of institutionalization go beyond the restraint on physical freedom, observing that institutionalization also impacts “family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”<sup>72</sup> Most of these cited deprivations impact liberty interests protected by substantive due process, and are restrictions that often flow from broad guardianship orders.<sup>73</sup> Such orders can divest the individual of the ability to determine where she lives, what medical treatment she receives, who she can associate with, whether and where she works, and whether and how she can manage her finances. These limitations are the same as those that Justice Ginsberg cited as flowing from institutionalization.

High state courts, however, have addressed the substantive due process implications of guardianship. In the latter 1980s and 1990s, several state courts of last resort concluded that guardianship represented such a substantial intrusion on individual liberty that it resembled the loss of liberty flowing from involuntary civil commitment.<sup>74</sup> Recognizing the significant loss of liberty inherent in guardianship, these high state courts concluded that States could impose a guardianship only to the extent it could demonstrate by clear and convincing evidence that there were no less restrictive arrangements to assist an individual with decision-making in those areas of functioning

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<sup>72</sup> *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 601 (1999).

<sup>73</sup> See, e.g., *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *State ex rel. Shamblin v. Collier*, 445 S.E.2d 736, 739 (W. Va. 1994) (finding that the declaration of incompetency and guardianship appointment “may affect constitutionally-guaranteed liberty interests . . . [including] the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security,” the right to travel, to decide where to live, to conduct one’s personal and business affairs, and to establish one’s legal relationship with others); *In re Guardianship of Deere*, 708 P.2d 1123, 1125–26 (Okla. 1985) (concluding that guardianship represents a “massive curtailment of liberty” and implicates historically recognized liberties including the right to practice a profession, marry, refuse medical treatment, possess a driver’s license, and vote); *In re Boyer*, 636 P.2d 1085, 1089–91 (Utah 1981) (recognizing guardianship order causes significant loss of personal liberty and infringement on right to self-determination and right of privacy, right to travel, and the right to make medical decisions).

<sup>74</sup> *In re Guardianship of Reyes*, 731 P.2d 130, 131 (Ariz. 1986); *In re Hedin*, 528 N.W.2d 567 (Iowa 1995); *In re Braaten*, 502 N.W.2d 512 (N.D. 1993); *In re M.R.*, 638 A.2d 1274, 1282 (N.J. 1994); *Deere*, 708 P.2d at 1125–26.; *In re Peery*, 727 A.2d 539 (Pa. 1999); *Shamblin*, 445 S.E.2d at 739; *Boyer*, 636 P.2d at 1089–91.

in which the individual needed assistance.<sup>75</sup>

These judicially recognized substantive limitations, along with the procedural due process rights that also flow from the liberty interests implicated by guardianship,<sup>76</sup> have most likely resulted in the imposition of fewer guardianships, with some guardianship orders that are limited in scope. Yet, despite these expansive state court decisions finding that guardianship implicates important liberty interests in ways similar to involuntary commitment, and despite the statutory language of many state guardianship statutes requiring that guardianship orders be carefully tailored so that they are the least restrictive of individual liberty, state guardianship regimes have not been dramatically altered. The evidence indicates that guardianship orders continue to be entered when they are not needed and are rarely limited in scope.<sup>77</sup>

Thus, the question is whether the effort to use *Jackson* and *Youngberg's* substantive due process limitations requiring proportionality between the purpose of the State's intervention and the restrictions on individual liberty, along with the requirement of reasonably non-restrictive conditions of confinement will lead to more meaningful reform of guardianship than we have seen to date, and get us closer to the recognition of universal legal capacity. Even if the efforts are not immediately successful, however, it seems worth continuing to remind the courts that guardianship restricts fundamental liberties in violation of substantive due process. Certainly, the argument is critical

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<sup>75</sup> *In re Estate of Early*, 673 P.2d 209, 215 (Cal. 1983) (holding that court must consider evidence that third-party assistance is available to meet basic needs of proposed conservatee); *In re Estate of McPeak*, 386 N.E.2d 957, 960 (Ill. App. Ct. 1977) (recognizing that alleged incompetent person should have right to demonstrate that he can meet his needs "through whatever device is reasonably available under the circumstances"); *Hedin*, 528 N.W.2d at 578–79 (requiring consideration of available third party assistance to meet an alleged incapacitated ward's needs); *Braaten*, 502 N.W.2d at 515, 520–21 (requiring heightened standards of decision-making comparable to that provided in involuntary commitment and prohibiting plenary guardianship); *Shamblin*, 445 S.E.2d at 739 (finding that court must scrutinize state's determination of incompetency and consider less restrictive means of assistance). It is, however, discouraging to note that for decades many state laws and the Uniform Guardianship and Protective Proceedings Act have explicitly required consideration of less restrictive alternatives to guardianship. See, e.g., N.Y. MENTAL HYG. § 81.01(a)(2) (McKinney 2006); see also David M. English, *Amending the UGPPA to Implement the 3rd National Guardianship Summit*, UNIFORM L. COMMISSION 9–10 (2015), [http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/2015apr\\_Amending%20UGPPA%20to%20Impl.%20Third%20Nat'l%20Guardianship%20Summit\\_English.pdf](http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/2015apr_Amending%20UGPPA%20to%20Impl.%20Third%20Nat'l%20Guardianship%20Summit_English.pdf) (discussing 1997 uniform law).

<sup>76</sup> State courts have declared that because the appointment of a guardian infringes on multiple liberty interests, the state must provide "the full panoply of procedural due process rights comparable to those present in involuntary civil commitment proceedings." *Hedin*, 528 N.W.2d at 575; see also *Shamblin*, 445 S.E.2d at 740–41. See generally *Deere*, 708 P.2d at 1125–26 (finding due process requires written notice and opportunity to be heard before state may deprive individual of the "right to personal freedom").

<sup>77</sup> See Salzman, *Rethinking Guardianship*, *supra* note 17, at 174–75; Salzman, *Guardianship for Persons with Mental Illness*, *supra* note 17, at 295–96.

in challenging the remaining plenary guardianship laws.<sup>78</sup>

The push in this direction seems important for the rights of individuals with limitations in cognitive abilities.<sup>79</sup> The hope is that by continuing to assert constitutional limits on the scope of guardianship, advocates will force guardianship courts to take the restrictions imposed by guardianship more seriously. In more recent guardianship cases in our State of New York, courts have grappled with the deprivation of liberty interests in guardianship and, in some courageous decisions, have been willing to deny petitions in favor of alternatives that permit the individual to exercise legal capacity, with support if needed.<sup>80</sup>

## 2. The Obligation To Provide Training and Skills Development and To Limit the Duration of Guardianship

Two particularly disturbing aspects of guardianship orders are that: (1) they do not come with a mandate to train or habilitate the individual found to be incapacitated; and (2) they are usually of unlimited duration, with little-to-nothing in the way of meaningful periodic review of any continuing need for guardianship.<sup>81</sup> It would be fair to say that as a matter of reality, in states throughout the nation, once we have a guardianship proceeding and a guardian is appointed, we say to ourselves: “great, we have taken care of that problem—that person is now protected. Goal is achieved, case is closed.”<sup>82</sup> But guardianships of

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<sup>78</sup> We had hoped to learn about the viability of a federal substantive due process challenge to New York’s plenary guardianship law for persons with intellectual and developmental disabilities. See DRNY Complaint, *supra* note 28 (raising a claim under *Jackson* that the guardianship court must use a least restrictive alternative standard and carefully tailor its orders). The District Court, however, dismissed the complaint on abstention grounds. See DRNY Order, *supra* note 28, at 4–5. The plaintiff has filed a notice of appeal, so we may yet have federal guidance on this issue.

<sup>79</sup> See Waterstone, *Backlash*, *supra* note 4, at 848 (arguing in favor of applying sufficient pressure on courts to make them partners in the effort to “[marshal] in a new era of disability equality”).

<sup>80</sup> See, e.g., *In re Guardianship of Dameris L.*, 956 N.Y.S.2d 848 (Sur. Ct. N.Y. Cty. 2012); *In re Meir*, No. 1202768822684, 2016 Sur. Ct. King’s Cnty. NYLJ, at \*1 (Sur. Ct. King’s Cty. Sept. 21, 2016); *Guardianship of Sean O.*, 2016 NYLJ LEXIS 3455, at \*11–12 (N.Y. Sur. Ct. 2016) (guardian denied); *In re D.D.*, 19 N.Y.S.3d 867 (Sur. Ct. King’s Cty. 2016); *In re Michelle M.*, 41 N.Y.S.3d 719 (Sur. Ct. King’s Cty. 2016) (denying guardianship petition finding that decision making support arrangement was least restrictive alternative).

<sup>81</sup> See, e.g., Salzman, *Rethinking Guardianship*, *supra* note 17, at 175–76 n.54, 55; Salzman, *Guardianship for Persons with Mental Illness*, *supra* note 17, at 296–97, 305.

<sup>82</sup> Many will argue that this is completely appropriate in cases where a person has chronic, mid-late stage Alzheimer’s or other severe and chronic dementia. *But see* Rebekah Diller, *Legal Capacity for All: What the Shift from Adult Guardianship to Supported Decision-Making Has To Offer Older Adults*, 43 FORDHAM URB. L.J. (forthcoming 2017) (on file with author) (citations omitted) (citing social science research finding that older adults with chronic illness and disabilities can (often with assistance) learn to optimize their remaining abilities to compensate for those that have been lost).



unlimited duration with no requirement for training or skills development tremendously undervalue human potential and conflict with two constitutional imperatives from the institutional commitment context. First, that once the State assumes control over the individual and removes her ability to care for herself, it has an obligation to provide some modicum of training. Second, that involuntary, State-imposed restrictions on liberty must be limited in duration.

a. Training and Skills Development

As noted in Section II.A.1, *Youngberg* gave the Supreme Court the opportunity to further define the minimal level of institutional care mandated by substantive due process. In addition to finding the liberty interest in reasonably safe and non-restrictive conditions of involuntary confinement discussed above, the Court concluded that substantive due process also requires the State to provide minimally adequate habilitation sufficient to ensure safety and freedom from restraints.<sup>83</sup> It is this constitutional requirement for habilitation and training during involuntary state confinement that provides a promising analogue to the guardianship context.

The Court in *Youngberg* tied the required level of training to that needed to keep the person safe and free of restraints, but there is some room for debate about the exact parameters of the training mandate.<sup>84</sup> In a thoughtful analysis of the level of training demanded by the Supreme Court in *Youngberg*, Susan Stefan notes that the right to treatment rests on an obligation to enhance the recognized liberty interests of the institutionalized person and may place a fairly broad treatment obligation on the State, depending on the liberty interests involved in the particular case.<sup>85</sup> Stefan notes that some courts have adopted a broad approach to minimally adequate training for institutionalized individuals as that “which will tend to render unnecessary . . . prolonged isolation from one’s normal community.”<sup>86</sup>

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<sup>83</sup> *Youngberg v. Romeo*, 457 U.S. 307, 315–20, 324–25 (1982).

<sup>84</sup> In their concurrence in *Youngberg*, Justices Blackmun, Brennan, and O’Connor criticize the Court’s articulation of the required standard, suggesting that under *Jackson*’s proportionality mandate, some level of treatment is required, whether it is needed to ensure safety and freedom from undue restraint or not. *Youngberg*, 457 U.S. at 326–30 (Blackmun, J., concurring) (suggesting that the state provide the minimal training required to prevent the deterioration of the individual’s pre-existing self-care skills). See generally *United States v. Tennessee*, 615 F.3d 646 (6th Cir. 2010) (providing a more recent discussion of the requirement to provide care to individuals who have been institutionalized).

<sup>85</sup> Susan Stefan, *Leaving Civil Rights to the “Experts”*: From Deference to Abdication Under the Professional Judgment Standard, 102 YALE L.J. 639, 688–89 (1992) [hereinafter Stefan, *Leaving Civil Rights*].

<sup>86</sup> Stefan, *Leaving Civil Rights*, *supra* note 85, at 688–90, n.237. While recognizing that *Youngberg* has been useful to many who have been subjected to harsh institutional conditions, scholars note that the impact of the decision has been undermined by the Court’s deference to

By analogy to the guardianship context, a broad reading of *Youngberg's* training obligation would support a substantive due process argument that the State has an obligation to provide an individual subject to guardianship with training and skills development to enhance capabilities, reduce the restraints of guardianship, and enable the individual to regain legal capacity.<sup>87</sup> From a theoretical perspective, imposing such a requirement is completely consistent with the notion of universal legal capacity and the obligation to limit any restrictions on its exercise while all steps are taken to restore the person's decision-making abilities.<sup>88</sup> Whether the imposition of such a requirement within the context of a guardianship relationship could actually help end or avoid particular guardianships would remain to be seen.<sup>89</sup> The hope is that by elevating the obligation to assist with the enhancement of the individual's maximum decision-making abilities to a constitutional right, the individual subject to guardianship would be at the center of the decision-making process, moving us closer to the recognition of universal legal capacity.

b. Challenge to Unlimited Duration of the Guardianship Order

In the context of institutional commitment, courts have heeded the Supreme Court's holding in *Jackson v. Indiana*<sup>90</sup> that the *duration* of

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professional judgment, which can be particularly problematic when the treating professional is a state or institutional employee. *Id.*; Bagenstos, *Deinstitutionalization Litigation*, *supra* note 14, at 28.

<sup>87</sup> In guardianship, while the State does not assume physical custody over the incapacitated person, as in the civil commitment context of *Youngberg*, the State guardianship order restrains the individual's liberty and limits her legal right to act on her own. Consequently, *DeShaney* should not pose a barrier to asserting the substantive due process claim in this context. *See DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (explaining that in *Youngberg* the state had a constitutional obligation to the plaintiff because it assumed physical custody and placed him in a position where he could not act on his own behalf). *See generally*, Rosalie B. Levinson, *Wherefore Art Thou Romeo: Revitalizing Youngberg's Protection of Liberty for the Civilly Committed*, 54 B.C. L. REV. 535, 549–50 (2013).

<sup>88</sup> *See* CRPD, *supra* note 1, at art. 12(3).

<sup>89</sup> Evidence indicates that more is needed than just a change in the guardian's legal obligation to engage in activities to restore the capabilities of the person under guardianship. For example, despite legislation in Florida requiring the guardian to annually report on activities to restore the ward's capacity and creating a specific mechanism to seek the restoration of legal capacity, there has been little real change in practice. *See* FLORIDA DEVELOPMENTAL DISABILITIES COUNCIL & GUARDIAN TRUST, RESTORATION OF CAPACITY STUDY AND WORK GROUP REPORT (2014) [hereinafter *Work Group Report*], [http://www.guardianship.org/IRL/Resources/Handouts/Charting%20a%20New%20Course\\_Restoration%20Report.pdf](http://www.guardianship.org/IRL/Resources/Handouts/Charting%20a%20New%20Course_Restoration%20Report.pdf). Although this evaluation of the early impact of legislative change is not promising, pilot projects are demonstrating real improvements in individual capabilities when individuals in the role of guardian move from substitute decision-maker to that of true decision-making supporter or facilitator. *Id.*; *see, e.g.*, Pell, *Pilot Program Evaluation*, *supra* note 15, at 31–34 (describing how support in decision making has enhanced individual capabilities).

<sup>90</sup> *Jackson v. Indiana*, 406 U.S. 715 (1972). The Supreme Court has concluded that even if an involuntary commitment was initially permissible on *parens patriae* grounds, "it could not

commitment must bear some reasonable relationship to its purpose and have required periodic review of the continued need for involuntary commitment in institutions as well as long-term involuntary outpatient treatment orders.<sup>91</sup> In a more recent decision by New York Surrogate Judge Kristin Booth Glen, the court found a similar due process right to periodic review of guardianship orders.<sup>92</sup> The harsh reality is that few people who are placed under guardianship ever have their legal capacity restored. Existing mechanisms that place the onus on the individual to petition for termination of guardianship are simply inadequate to appropriately limit the duration of a guardianship order.<sup>93</sup>

Just as we should not be institutionalizing individuals indefinitely as a matter of constitutional principle, we should not be subjecting them to guardianships of unlimited durations. Instead, in the guardianship context, there should be a constitutionally required mandate for periodic review with the burden of persuasion on the person wishing to obtain a renewed order. The benefit of this restriction may be only theoretical—doing little more than increasing the number of guardianship hearings, without any better or more meaningful decisions than we have now in the first instance. Many would correctly argue that the periodic review hearings in the involuntary commitment process are stacked against the individual seeking release and not very meaningful. And some would argue that periodic review hearings in the few states that require them in the guardianship context<sup>94</sup> are little more than

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constitutionally continue after that basis no longer existed.” *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

<sup>91</sup> See *Rivers v. Katz*, 495 N.E.2d 337 (N.Y. 1986) (recognizing a liberty interest and requirement of periodic review in cases of forced administration of psychotropic medication); see also N.Y. MENTAL HYG. LAW § 9.33 (McKinney 2011) (requiring judicial review of involuntary commitment in most cases within sixty days of commitment).

<sup>92</sup> *Matter of Mark C.H.*, 906 N.Y.S.2d 419, 425–27 (N.Y. Sur. Ct. 2010) (citing cases and finding a due process right to periodic review in guardianship context); see *Matter of Buttonow*, 23 N.Y.2d 385, 394 (1968) (concluding that as a matter of due process, a confined “mentally ill person” has a right to “periodic review of the propriety and suitability of the confinement before some impartial forum in which the incompetent is represented by a person or agency wholly committed to that person’s interest”).

<sup>93</sup> A recent ABA report found significant barriers to the restoration of rights in guardianship. See Erica Wood, Pamela Teaster & Jenica Cassidy, *Restoration of Rights in Adult Guardianship: Research & Recommendations*, AM. BAR ASS’N 37–67 (2017), [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/restoration%20report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration%20report.authcheckdam.pdf).

<sup>94</sup> Some state laws restrict the duration of guardianship orders, but set minimal requirements for renewal. See, e.g., CAL. WELF. & INST. CODE §§ 5350–72 (West 2017) (conservatorships of persons deemed “gravely ill” that terminate in one year, unless renewed by the court); TEX. EST. CODE ANN. § 1106.002–.003 (West 2015) (guardianship orders of sixteen-month duration, renewable after filing the annual report of the person and/or annual accounting). Compare MICH. COMP. LAWS ANN. § 700.5308 (West 2000) (providing that guardianship continues until death of guardian or ward or guardian’s incapacity, removal or resignation), with MICH. COMP. LAWS ANN. § 700.5309 (West 2000) (requiring court to evaluate the continuing need for guardianship after the first year and after the subsequent

rubberstamps on the initial guardianship decision.<sup>95</sup> Nevertheless, guardianships of unlimited duration seem only minimally distinguishable from involuntary commitments of unlimited duration, and the Constitution should recognize that both constitute an impermissible restriction on basic liberty interests.

While change will likely come slowly in the guardianship context,<sup>96</sup> we should continue to protect the important liberty interests of those subject to guardianship and argue that the *Jackson* and *Youngberg* mandates that the nature and duration of a state restriction on liberty bear some reasonable relationship to its purpose and that the State provide some modicum of training and habilitation during the period of involuntary commitment are properly applied in the guardianship context.

B. *Does the Court's Decision in Obergefell v. Hodges Provide a Substantive Due Process Path to the Recognition of Universal Legal Capacity?*

The analytic methodology used by the Court in *Obergefell v. Hodges* and the Court's focus on the importance of exercising autonomy and making intimate decisions together provide a slim reed of hope that the Court would one day find a fundamental liberty interest in the right of all individuals to exercise legal capacity. In *Obergefell*, the Court employed an analytic methodology that examined the historic importance of the liberty interest of marriage in the context of evolving national standards and opened that institution to previously excluded same-sex couples. Rather than focusing on the long-standing tradition of marriage as the union between persons of opposite sexes, the Court looked more broadly at the general importance of that institution in our historical tradition and national psyche. The Court then concluded that

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three-year periods).

<sup>95</sup> Telephone Interview with Dohn Hoyle, Dir. of Pub. Policy, The Arc Mich. (Oct. 17, 2017). Mr. Hoyle explained that Michigan law provides for partial guardianship with a maximum duration of five years. *Id.*; MICH. COMP. LAWS ANN. §§ 330.1620, 30.1626. In his considerable experience, however, courts rarely appoint partial guardians with orders of limited duration, and those few time-limited guardianships are easily renewed in practice. In most cases, the courts appoint plenary guardianships of unlimited duration. *See* MICH. COMP. LAWS ANN. §§ 330.1618(5), 330.1626(1).

<sup>96</sup> *See* Pell, *Pilot Program Evaluation*, *supra* note 15 (discussing the fact that despite a Florida statutory requirement for the guardian to assist the individual subject to guardianship in developing decision-making skills, review the continuing need for guardianship, and report to the court annually, there was no evidence that any individual had her rights restored); *Work Group Report*, *supra* note 89.

this fundamental interest in marriage should extend to permit marriage of same-sex couples, recognizing that the Constitution has the flexibility to allow “future generations [to] protect . . . the right of all persons to enjoy liberty *as we learn its meaning*.”<sup>97</sup> Clearly, *Obergefell* represents a dramatic evolution in the Court’s substantive due process jurisprudence and in its recognition of the rights of same-sex couples. The latter jurisprudence has taken us from *Bowers v. Hardwick*, allowing States to criminalize sodomy,<sup>98</sup> to *Obergefell*, recognizing the fundamental right to same-sex marriage, in a period of less than thirty years. Might we achieve similar gains over the next few decades in the recognition of rights of persons with limitations in decision-making abilities?

With respect to evolving national standards regarding same-sex marriage—the Court found its evidence in the national attitude reflected in the many state laws opening marriage to same-sex couples. Although the movement towards recognition of universal legal capacity is not as evolved as the movement to recognize same-sex marriage was at the time *Obergefell* was litigated, we are beginning to see some real social and political recognition that individuals with mental disabilities have the ability to make decisions for themselves (with support if necessary) and do not need a guardian to make decisions *for* them. The young, but burgeoning national movement to limit guardianship and pursue support arrangements instead<sup>99</sup> may grow to one day justify such a

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<sup>97</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (emphasis added). *Obergefell* instructs that the “identification and protection of fundamental rights” is not a static, but rather “is an enduring part of the judicial duty to interpret the Constitution.” *Id.* If future courts follow its instruction, in compelling future circumstances, courts will be required to exercise reasoned judgment in identifying personal interests so fundamental that the State must accord them its respect. *Id.*

<sup>98</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>99</sup> Two states have now adopted laws permitting the use of supported decision-making as an alternative to guardianship. See Supported Decision-Making Agreement Act, TEX. ESTATES CODE ANN. § 1357 (West 2015); Supported Decision-Making Act, DEL. CODE ANN. tit. 16, § 94A (West 2016). There are at least two significant pilot programs currently underway. See Pell, *Pilot Program Evaluation*, *supra* note 15; SDMNY, *supra* note 35. In 2014, the Administration for Community Living (ACL) of the U.S. Department of Health and Human Services offered a significant grant to fund a project is to create a training and technical assistance/resource center on supported decision making. See NAT’L RESOURCE CTR. FOR SUPPORTED DECISION-MAKING, <http://www.supporteddecisionmaking.org> (last visited Oct. 28, 2017). In August 2017, the ABA House of Delegates adopted Resolution 113 on supported decision making urging states to amend their guardianship statutes to consider supported decision making as a less restrictive alternative to guardianship and a basis for the termination of guardianship and the restoration of the individual’s rights. See ABA Resolution 113, *supra* note 16; see also UGCOPAA, *supra* note 16, at art. 3, § 301(a)(1)(A) (providing that the guardianship court must find by clear and convincing evidence that the individual cannot make decisions with supportive services, technological assistance, or supported decision making). In addition, courts have begun to terminate or deny guardianships where there is evidence that the individual has the ability to make decisions with support. See, e.g., *In re D.D.*, 19 N.Y.S.3d 867, 876 (N.Y. Surr. Ct. 2015); *Guardianship of Cory C.*, No. BE09PO253 (Mass. Prob. & Fam. Ct., Berkshire Cty. Dec. 7, 2015); *Ross v. Hatch*, No. CWF120000426P-03 (Va. Cir. Ct. Aug. 2,

conclusion.

To benefit from the Court's decision in *Obergefell* advocates of the recognition of universal legal capacity would need to do two things. First, they would need to get the Court to recognize a more general right to make decisions and exercise autonomy and self-determination as a fundamental liberty interest grounded in our national tradition. Second, advocates would need to persuade the Court to re-calculate its understanding of the State's *parens patriae* obligation to protect individuals needing assistance with decision-making.

With respect to the recognition of a general right to make decisions and exercise autonomy and self-determination, one could reasonably argue that our nation was founded on such a principle or right. The Supreme Court, however, has never gone this far.

In dicta, the *Obergefell* majority repeatedly noted the importance of exercising autonomy, making intimate choices and defining and expressing one's identity.<sup>100</sup> The Court's language dangles the possibility that one day the Court will recognize a fundamental right for all individuals to make their own decisions and have those recognized by third parties. But we are not there yet, and the *Obergefell* holding ultimately rests on the right to make the specific decision to marry.<sup>101</sup>

While both the right to same-sex marriage and the right of persons with limitations in cognitive abilities to exercise legal capacity are fraught social issues, there is a legal impediment to the recognition of a substantive due process right for individuals with mental disabilities to exercise legal capacity, however, that makes it qualitatively different from the same-sex marriage context. The substantive component of due process bars certain government actions, regardless of the adequacy of the procedures used to implement them,<sup>102</sup> and government actions

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2013); *In re Dameris L.*, 956 N.Y.S.2d 848, 856 (N.Y. Sur. Ct. 2012). Finally, the international community has endorsed the concept of the universal right to legal capacity and the right to support with decision making if needed. See CRPD, *supra* note 1.

<sup>100</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (emphasis added) (discussing the importance of "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs"); *id.* at 2593 (finding that the recognized liberty interest includes "certain specific rights that allow persons, within a lawful realm, to define and express their identity"); *id.* at 2608 (observing that same-sex couples "ask for equal dignity in the eyes of the law. The Constitution grants them that right"); *id.* at 2594 (referring to the "dignity" of same-sex couples).

<sup>101</sup> See *Obergefell*, 135 S. Ct. at 2599 (finding a "right to personal choice regarding marriage") (emphasis added); 2608 (grounding decision in right to marry). It is important to acknowledge that in *Glucksberg*, the Court declined the Respondents' invitation to read its prior jurisprudence to recognize a constitutionally-protected right to exercise "self-sovereignty" and "basic and intimate exercises of personal autonomy." *Washington v. Glucksberg*, 521 U.S. 702, 724 (1997). Instead, the Court strategically limited its holding to the question of whether there was a fundamental liberty interest in "the right to commit suicide with another's assistance." *Id.*

<sup>102</sup> *Zinermon v. Burch*, 494 U.S. 113, 125-27 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)) (distinguishing rights protected by substantive and procedural due process but

restricting liberty interests must be “narrowly tailored to serve a compelling state interest.”<sup>103</sup> In the same-sex marriage context, the Court concluded that the right to marriage was deemed so fundamental that no state interest could justify a limitation on that right for same-sex couples.<sup>104</sup> There was simply no compelling state interest for excluding same-sex couples from the fundamental liberty to marry.

In contrast to the same-sex marriage context, in the guardianship context, the State has a long-standing *parens patriae* interest in protecting its citizens from harm. This recognized state interest gives the State a thumb on the scale in the substantive due process analysis in the guardianship context.<sup>105</sup> Although courts have recognized that guardianship implicates numerous liberty interests that are constitutionally protected,<sup>106</sup> courts have never wholly rejected the *parens patriae* underpinnings of guardianship or the general legitimacy

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deciding case on procedural due grounds set forth in the certiorari petition). See generally D.B. v. Dardall, 826 F.3d 721 (4th Cir. 2016).

<sup>103</sup> Reno v. Flores, 507 US 292, 302 (1993); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

<sup>104</sup> Obergefell, 135 S. Ct. 2584.

<sup>105</sup> See Washington v. Harper, 494 U.S. 210, 236 (1990) (concluding that regulation permitting state to treat a mentally ill prisoner with antipsychotic medications against his will may be a constitutionally permissible “accommodation between an inmate’s liberty interest in avoiding the forced administration of antipsychotic drugs and the State’s interests in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others”); Rivers v. Katz, 495 N.E.2d 337 (1986) (recognizing that the State has compelling interest in exercising *parens patriae* power to protect persons unable to care for themselves though there are some limitations on that power). See generally D.B. v. Cardall, 826 F.3d 721, 740–41 (4th Cir. 2016) (recognizing the fundamental right to raise one’s child, but concluding that this right is subject to the State’s *parens patriae* interest in protecting the welfare and safety of children). For state cases recognizing the tension between the individual’s liberty interest and the State’s *parens patriae* interest in the guardianship context, see *In re Boyer*, 636 P.2d 1085, 1089–91 (Utah 1981) (recognizing the need to balance the important personal rights and liberties that may be compromised by an incompetency determination with the State’s legitimate interest of ensuring that individuals are able to care for themselves and do not harm themselves or others); see Salzman, *Rethinking Guardianship*, *supra* note 17.

<sup>106</sup> See cases cited *supra* note 74. Guardianship may infringe on many particular liberty interests recognized by the courts. See, e.g., Lawrence v. Texas, 539 U.S. 558, 578 (2003) (right to privacy); Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (right to make personal decisions regarding marriage, procreation, contraception, family relationship, child rearing, and education); Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261, 278–79 (1990) (right to refuse unwanted medical treatment); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (freedom from bodily restraint; right to contract, engage in an occupation, acquire useful knowledge, marry, establish a home and bring up children); see Matter of Leon, 43 N.Y.S.3d 769 (N.Y. Sur. Ct. 2016) (recognizing fundamental liberty interests implicated in guardianship); *In re St. Luke’s-Roosevelt Hosp. Ctr.*, 607 N.Y.S.2d 574, 578 (Sup. Ct. 1993), *decision modified and remanded sub nom.*, *In re St. Luke’s-Roosevelt Hosp. Ctr.*, 627 N.Y.S.2d 357 (1995) (finding right to make medical and health-related decisions is protected by state and federal constitutions). Courts have also recognized the separately identifiable liberty interest in avoiding the stigma of incompetency and mental illness. See, e.g., Parham v. J.R., 442 U.S. 584, 600–01 (1979); Addington v. Texas, 441 U.S. 418, 425–26 (1979); *In re Hedin*, 528 N.W.2d 567, 574 (Iowa 1995).

of, and need for, the institution of guardianship. Still, *Obergefell*'s analytic methodology of identifying fundamental liberties in light of evolving national understandings offers some hope that the Court could one day recognize a fundamental liberty interest in the general exercise of legal capacity to make one's own decisions and have them recognized by others that would either outweigh or be equivalent to any governmental interest in protecting individuals from harm.

While the decision in *Obergefell* presents some cause for hope, that hope may prove illusory for several reasons. First, not only was the decision highly contested when it was issued in 2015,<sup>107</sup> but the composition of the Court could easily become more conservative in the foreseeable future. Any change in composition could reverse *Obergefell*'s consideration of evolving standards, reverting to the recognition of a more limited scope of liberty interests securely grounded in historic tradition. If the Court became unwilling to determine liberty interests in light of evolving national standards there is little hope that the Court would recognize a liberty interest in the exercise of legal capacity by all citizens. Further, while the *Obergefell* Court uses lofty language about the right to make choices, exercise autonomy, make intimate choices, and define and express one's identity, as noted above, the Court's decision is carefully tied to the right to marry and its recognized sanctity as a matter of long-standing national tradition.<sup>108</sup> No court has recognized a general constitutionally protected liberty interest in

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<sup>107</sup> Even liberal scholars present compelling critiques of the Court's decision. Though sympathetic to the indignity experienced by same-sex couples excluded from marriage, some criticize *Obergefell*'s reliance on an undefined and elastic concept of dignity that can be used to support a liberty interest in potentially undesirable expressions of autonomy and self-determination. See Jeffrey Rosen, *The Dangers of the Constitutional 'Right to Dignity'*, ATLANTIC (Apr. 29, 2015), <https://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796> (discussing the tenuous basis for the liberty interest recognized in *Lawrence* and *Obergefell* and citing to Justice Scalia's undesirable invocation of the dignitary interest in *McDonald* to find a liberty interest to bear arms as an expression of "self-determination," "dignity [or] respect"); Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011) (reviewing cases and observing that dignity has various "conceptions and functions [that] are dynamic and context-driven"). The line drawing could prove difficult. *But see, e.g., Burr v. Navarro*, 641 F. App'x 194, 196 (3d Cir. 2016) (concluding that *Obergefell*'s fundamental liberty interest does not protect decision not to wear seatbelt).

<sup>108</sup> Compare, e.g., *Obergefell*, 135 S. Ct. at 2599–2602, 2604–05 (grounding decision in right to marry), with *Obergefell*, 135 S. Ct. at 2597–98 (discussing concept of liberty that encompasses the right to make choices, etc.), 2599 (describing marriage as an act of self-definition). In *Obergefell*, as in *Glucksberg*, the Court explicitly noted that the right to self-definition, autonomy, and expression of identity is not limitless. See *Obergefell*, 135 S. Ct. at 2602; *Washington v. Glucksberg*, 521 U.S. 702, 722 (“[W]e have a tradition of carefully formulating the interest at stake in substantive-due-process cases.”); *Glucksberg*, 521 U.S. at 725 (noting that while many of the constitutionally-protected liberties have roots in personal autonomy, the constitution does not necessarily protect the “abstract concept of personal autonomy”); *Glucksberg*, 521 U.S. at 727 (“That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . .” (citation omitted)).



exercising autonomy or making choices that define one's identity. And, any future court that might be willing to embrace a fundamental liberty interest in a general right to make choices and exercise autonomy would have to deviate from prior decisions that have suggested that individuals found to be "incapacitated" may be excluded from the exercise of certain specific, previously recognized fundamental rights such as the right to make medical decisions.<sup>109</sup> In a future challenge, however, perhaps the Court could be persuaded that the question is not whether persons lacking capacity have a right to make decisions, but whether there is an adequate basis, considering evolving standards, for persons with limitations in cognitive abilities to be wholly excluded from the enterprise of expressing personal identity, making choices, and exercising autonomy.

Finally, there are some individuals who will need supports and services to thrive outside of guardianship. It is important to bear in mind that it is not enough to use constitutional liberty claims to move people out of guardianship but fail to ensure the availability of adequate supports and services outside of guardianship. As noted above, this was a limitation in the earlier efforts to move individuals out of institutions based on a constitutional right to decline treatment deemed inadequate or unwanted. In those cases, the constitutional claims provided a sufficient legal basis for orders to discharge institutional residents but not to ensure that they had sufficient services in the community.<sup>110</sup> The hope is that the constitutional recognition of a right to make the range of personal decisions outside of guardianship will generate support for the provision of formal and informal supports and services for those with limitations in decision-making abilities. Certainly, we as a nation are recognizing the value of community-based services that are person-centered and the imperative to provide these mechanisms for support as a matter of social obligation. The goal would be that once there is a recognition of a constitutional right to exercise legal capacity and be free from guardianship, disability rights activists will follow the example of those who have worked to develop adequate community resources so that individuals with disabilities have a meaningful opportunity to

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<sup>109</sup> See *Glucksberg*, 521 U.S. at 723–25 (noting repeatedly that the Court's jurisprudence protects the right of a *competent* person to make medical decisions or reject life-sustaining treatment). See *generally id.* at 731 (recognizing the legitimate tradition of protecting vulnerable groups from abuse, neglect, and mistakes).

<sup>110</sup> See Bagenstos, *Deinstitutionalization Litigation*, *supra* note 14, at 10–13 (noting that while deinstitutionalization did move many people from segregated and often inhumane conditions to richer lives in the community, the due process challenges to involuntary institutionalization gave states far greater incentives to move people out of institutions than to fund adequate services in the community, leaving many in the community to fend for themselves without adequate support).

participate in all aspects of life as full citizens.<sup>111</sup>

#### CONCLUSION

Even if individuals with disabilities could successfully obtain legal recognition of the right to be fully integrated in social and community life and their right to make decisions as persons entitled to dignity and self-determination, change will not be immediate—the pull of protectionism and *parens patriae* are incredibly strong and guardianship (and its historical antecedents) are well accepted as a matter of law and policy. But if we could eradicate broad guardianships of unlimited duration, and resist the presumption that individuals with disabilities cannot maintain, develop, or regain capabilities and skills, we could upset the current guardianship construct and begin moving toward the recognition of universal legal capacity. The integration mandate of the ADA is an important tool in the effort toward full participation of individuals with some limitations in decision-making abilities. But is that statutory tool sufficient in this context that defines our fundamental personhood?

As noted by Michael Waterstone, “[t]here is something important—some would say redemptive—about using the Constitution to try to achieve a more progressive vision of society.”<sup>112</sup> This is why I feel the need to reach for the Constitution in the guardianship context where the courts consider a person’s right to make legally recognized decisions, define one’s self, and participate in those interactions central to citizenship. The use of both constitutional principles of liberty and the ADA’s integration mandate can help move us away from restrictive guardianship regimes and toward the provision of assistance that enhances capabilities and recognizes the right to legal capacity for all. We may need both to resist the centuries-old legitimacy of *parens patriae* and the State’s obligation to manage the affairs of those deemed vulnerable.

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<sup>111</sup> See Bagenstos, *Deinstitutionalization Litigation*, *supra* note 14, at 10–13.

<sup>112</sup> See Waterstone, *Disability Constitutional Law*, *supra* note 5, at 557.