

## Olmstead's Fundamental Alteration Defense – A Circuit Review

Christopher Sleeper

### I. Introduction

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court held that under Title II of the Americans with Disabilities Act ("ADA") unjustified segregation of individuals with disabilities in institutions constitutes discrimination. The Court's opinion reinvigorated the deinstitutionalization movement, spawning litigation brought by the Department of Justice, the institutionalized and their advocates, and those on the verge of institutionalization. Many consider *Olmstead* to be the *Brown v. Board of Education* for the disabled; however, unlike *Brown*, the Supreme Court provided states with an excuse to not comply with the integration mandate – the fundamental alteration defense. Further, the Supreme Court did not define fundamental alteration, but only gave vague guidance. This omission has left the lower courts to grapple with the complex issue of what constitutes a fundamental alteration. This paper summarizes lower courts' interpretations of the fundamental alteration defense, particularly the three appellate courts that have ruled upon the issue – the second, third and ninth circuits – and suggests that *Olmstead* is so internally flawed that uniform application is nearly impossible.

### II. Fundamental Alteration According to *Olmstead*

In 1990, Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>1</sup> Congress recognized that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination

<sup>1</sup> *Olmstead v. L.C.*, 527 U.S. 581, 599 (1999).

# Olmstead Reclaiming Institutionalized Lives

**R Barnett**

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,2003      **Strategies to Improve Access to Medicaid Home- and Community-based Services** United States. Congress.  
Senate. Committee on Finance,2004      *Olmstead, Reclaiming Institutionalized Lives* National Council on Disability  
(U.S.),2003      Olmstead Lex Frieden,2004-01 Measures progress to date in the implementation of the landmark U S  
Supreme Court decision in Olmstead v L C identify commit the necessary resources for community based service options  
sustain collaborative action toward creating real choice for people with disabil living in institutions      Creating Healthy  
Communities ,2007      **On Target** ,1999      *Law & Inequality* ,2010      *Columbia Law Review* ,2004      *Changes in*  
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Smyer have brought together a notable team of international contributors to provide you with a unique framework of the  
legal social and psychological approaches to assessing the ability of older adults to make decisions      *BNA's Health Care*  
*Policy Report* ,2003      *Legislative Calendar* United States. Congress. House. Committee on Education and the Workforce,  
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## **Table of Contents Olmstead Reclaiming Institutionalized Live**

1. Understanding the eBook Olmstead Reclaiming Institutionalized Live
  - The Rise of Digital Reading Olmstead Reclaiming Institutionalized Live
  - Advantages of eBooks Over Traditional Books
2. Identifying Olmstead Reclaiming Institutionalized Live
  - Exploring Different Genres
  - Considering Fiction vs. Non-Fiction
  - Determining Your Reading Goals
3. Choosing the Right eBook Platform
  - Popular eBook Platforms
  - Features to Look for in an Olmstead Reclaiming Institutionalized Live
  - User-Friendly Interface
4. Exploring eBook Recommendations from Olmstead Reclaiming Institutionalized Live
  - Personalized Recommendations
  - Olmstead Reclaiming Institutionalized Live User Reviews and Ratings
  - Olmstead Reclaiming Institutionalized Live and Bestseller Lists

5. Accessing Olmstead Reclaiming Institutionalized Live Free and Paid eBooks
  - Olmstead Reclaiming Institutionalized Live Public Domain eBooks
  - Olmstead Reclaiming Institutionalized Live eBook Subscription Services
  - Olmstead Reclaiming Institutionalized Live Budget-Friendly Options
6. Navigating Olmstead Reclaiming Institutionalized Live eBook Formats
  - ePUB, PDF, MOBI, and More
  - Olmstead Reclaiming Institutionalized Live Compatibility with Devices
  - Olmstead Reclaiming Institutionalized Live Enhanced eBook Features
7. Enhancing Your Reading Experience
  - Adjustable Fonts and Text Sizes of Olmstead Reclaiming Institutionalized Live
  - Highlighting and Note-Taking Olmstead Reclaiming Institutionalized Live
  - Interactive Elements Olmstead Reclaiming Institutionalized Live
8. Staying Engaged with Olmstead Reclaiming Institutionalized Live
  - Joining Online Reading Communities
  - Participating in Virtual Book Clubs
  - Following Authors and Publishers Olmstead Reclaiming Institutionalized Live
9. Balancing eBooks and Physical Books Olmstead Reclaiming Institutionalized Live
  - Benefits of a Digital Library
  - Creating a Diverse Reading Collection Olmstead Reclaiming Institutionalized Live
10. Overcoming Reading Challenges
  - Dealing with Digital Eye Strain
  - Minimizing Distractions
  - Managing Screen Time
11. Cultivating a Reading Routine Olmstead Reclaiming Institutionalized Live
  - Setting Reading Goals Olmstead Reclaiming Institutionalized Live
  - Carving Out Dedicated Reading Time
12. Sourcing Reliable Information of Olmstead Reclaiming Institutionalized Live
  - Fact-Checking eBook Content of Olmstead Reclaiming Institutionalized Live
  - Distinguishing Credible Sources
13. Promoting Lifelong Learning

- Utilizing eBooks for Skill Development
- Exploring Educational eBooks

14. Embracing eBook Trends

- Integration of Multimedia Elements
- Interactive and Gamified eBooks

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