CANONIZING JUSTICE GINSBURG'S OLMSTEAD DECISION: A DISABILITY RIGHTS TRIBUTE

Derek Warden[*]

Within American jurisprudence, there exists what is sometimes referred as "the Constitutional Canon." It consists of documents and decisions that go to the heart of what it means to be an American; and often these documents and decisions express the ideals of the society for which we are all striving. The Constitution of the United States, the Declaration of Independence, the "I Have a Dream Speech," *Marbury v. Madison*,[1] and *Brown v. Board of Education*[2] are all seen as part of the Constitutional Canon.[3] Juxtaposed to this are decisions and documents collectively called the anti-canon.[4] Such cases are often said to be *Dred Scott*,[5] *Plessy*,[6] *Korematsu*,[7] and *Lochner*.[8]

While authors of the anti-canon are often shunned or forgotten, those jurists who author a canonical decision or document ring in the American consciousness for generations to come. This essay, as the title suggests, offers a short justification as to why the recently departed Justice Ginsburg should be regarded as having authored a piece of the Constitutional Canon. In so doing, it acts as a tribute to the Justice who, though I had strong disagreements with her on many occasions, has fundamentally altered the course of my life and the lives of countless Americans with disabilities. Stripped of her title as "Notorious RBG," assuming the error of her abortion jurisprudence; and imagining a world where she had never authored or argued a sex discrimination case, it remains true that Justice Ginsburg's impact on the world through her *Olmstead v. L.C. ex rel. Zimring*[9]

[*] Attorney with Burns Charest L.L.P. in New Orleans. J.D. & D.C.L. LSU Paul M. Hebert Law Center 2016. LL.M. Tulane Law School 2020. S.J.D. Candidate at Tulane Law School. This essay is dedicated to my recently departed grandfather, Jimmie "Pops" Ross.

1. 5 U.S. 137 (1803).
2. 348 U.S. 886 (1954).
3. Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 PEPP. L. REV. 75, 76 (2011).
4. Jamal Green, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011). Of course, I do not mean to say that each of these decisions are of the same caliber of error. Few would doubt that *Dred Scott* is worse than *Lochner*. Thus, the qualities that make a decision "anti-canonical" is a sliding scale.
5. Dred Scott v. Sandford, 60 U.S. 393 (1857).
6. Plessy v. Ferguson, 163 U.S. 537 (1896).
7. Korematsu v. United States, 323 U.S. 214 (1944).
8. Lochner v. New York, 198 U.S. 45 (1905).
9. 527 U.S. 581 (1999).

opinion ranks alongside Chief Justice Earl Warren and his opinion in *Brown v. Board of Education*, alongside Chief Justice John Marshall and his *Marbury v. Madison* opinion, and alongside Dr. King and his "I have a dream speech."

Part I of this essay discusses disability rights generally and the path it took leading up to The Americans with Disabilities Act. Part II discusses the actual opinion in *Olmstead*. Finally, Part III discusses why Justice Ginsburg's opinion in *Olmstead* is Constitutional Canon.

I

As has been noted on many occasions before, the history of disability rights is terrifying. Throughout history, those with disabilities were marginalized, euthanized, and regarded as being the product sin.[10] Though, with the introduction of Christianity, the notion of sin born illness largely vanished, it was often replaced by fears of demonic possession for those suffering from mental or developmental illness. From time to time, though, light shown in the darkness, and some people with severe disabilities were adopted into their communicates and became canonized saints.[11]

But the world—and particularly the western world—continued to mistreat those with various disabilities. People with disabilities were often housed in home and not allowed to socialize with others; public places, restaurants, government offices, streets, and sidewalks were all non-accessible. And after Darwin published in *On the Origin of Species*, the eugenics movement took off.[12] Thousands of people with disabilities were forcibly sterilized in the United States.[13] The U.S. Supreme Court ordained this forced sterilization in *Buck v. Bell*, where Justice Holmes declared "three generations of imbeciles are enough."[14] *Buck* remains good law,[15] was cited by *Roe v. Wade* approvingly,[16] was used by the Nazi's to support their eugenic practices,[17] and many states still have forced sterilization laws.[18]

Fortunately, the world began to turn. Reporters exposed the horrors of mental health asylums.[19] Congress passed the Rehabilitation Act of 1973 that prohibited disability discrimination by all entities that received federal financial

10. Derek Warden, *Methods of Administration*, 10 HOUS. L. REV.: OFF RECORD 39, 42–43 (2020).

11. *Id.* at 43.

12. Robert J. Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1420–21 (1981).

13. Shelia C. Cummings, *Foreword: Is Crack the Cure?*, 5 J.L. SOC'Y 1, 4 (2003).

14. Buck v. Bell, 274 U.S. 200, 207 (1927).

15. Derek Warden, *Ex Tenebris Lux: Buck v. Bell and the Americans with Disabilities Act*, 51 U. TOL. L. REV. 57, 58 (2019).

16. Roe v. Wade, 410 U.S. 113, 154 (1973).

17. Warden, *supra* note 15, at 62.

18. *Id.*

19. Derek Warden, *The Americans with Disabilities Act at Thirty*, 11 CALIF. L. REV. ONLINE 308, 309–10 (2020), https://www.californialawreview.org/americans-with-disabilities-act-thirty/ [https://perma.cc/N3JJ-WKZH].

assistance;[20] and enacted what is now known as the Individuals with Disabilities Education Act that prohibited disability discrimination in educational settings.[21] Further, Congress created the protection and advocacy system that now has entities in every state and territory in the country. These non-profits advocate for the human and civil rights of people with disabilities in their respective territories.[22]

But, even with these advances, much work remained. The Rehabilitation Act, the IDEA, and various state laws had largely failed to advance the rights of people with disabilities. The Supreme Court held that state laws protecting people with disabilities were virtually unenforceable in federal court.[23] Court houses, private employers, and many other areas of life were not accessible. States were still warehousing people with disabilities in terrible conditions. Finally, and perhaps most disheartening, the Supreme held, in *Cleburne*, that people with disabilities were neither a suspect nor quasi-suspect classification; and, as such, any law discriminating against them would pass constitutional muster so long as it was rationally related to a legitimate government interest.[24] In part, the Court reasoned that people with disabilities simply were not facing the type of discrimination faced by racial minorities or women.[25] In perhaps his most power dissent, however, Thurgood Marshall replied to majority in *Cleburne*:

> A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race."[26]

He went further and squarely placed many of the ills that people with disabilities faced onto the practice of institutionalization: "[b]ut most important, lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them."[27]

Seeing these failures, and seeing the inability of the Court to act, Congress began debating a new law. That law, the Americans with Disabilities Act, was designed to address the numerous social ills that people with disabilities continued to face. Thanks to an episode of strong political activism, known as the Capitol Crawl, where individuals with disabilities crawled up the Capitol Building's steps, the law passed by sweeping margins in both chambers.[28] On July 26, 1990 President George H. W. Bush signed the ADA into law declaring "let the shameful wall of exclusion finally come tumbling down."[29]

20. 29 U.S.C. § 794 (2018).
21. 20 U.S.C. §§ 1400–1482 (West 2019).
22. Warden, *supra* note 19, at 310.
23. *See* Pennhurst State Sch. v. Halderman, 465 U.S. 89 (1984).
24. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985).
25. *See id.* at 443.
26. *Id.* at 462 (Marshall, J., concurring in part and dissenting in part).
27. *Id.* at 464 (Marshall, J., concurring in part and dissenting in part).
28. Warden, *supra* note 19, at 311.
29. *Id.* at 308.

As the law stands, it is divided int five titles.[30] Title I covers employment. Title II covers public entities. Title III covers places of public accommodations. Title IV concerns telecommunications. Finally, Title V acts like storage shed to the ADA and deals with various miscellaneous matters. Title II of the ADA was the provision at issue in *Olmstead*, to which this essay now turns.

II

The facts of *Olmstead* are fairly straight forward. The plaintiffs in the case, L.C. and E.W. were two women, each with a developmental disability as well as a psychiatric diagnosis. L.C. was diagnosed with schizophrenia and E.W. with a personality disorder. Both women had histories of treatment in the institutional setting.[31]

L.C. was voluntarily institutionalized in May of 1992 due to here psychiatric condition. When her condition stabilized in 1993 and her treatment team agreed she could benefit from community placement, she was still confined until 1996. In February of 1995, E.W. was likewise voluntarily admitted to the same psychiatric unit, Georgia Regional Hospital in Atlanta. However, when her condition stabilized the hospital tried to discharge her to a homeless shelter, without treatment. After her attorney filed a complaint, they decided not to put her in a homeless shelter, but instead continued to confine her in the hospital for several more years until 1997. In May of 1995, L.C. filed a lawsuit against her continued confinement, and E.W. intervened as a plaintiff.

The women alleged two causes of action: Title II of the ADA and §1983.[32] The §1983 aspect alleged that unjustified institutionalization violated the Due Process Clause of the Fourteenth Amendment and its guarantee of minimally adequate care and freedom from undue restraint.[33] As the case came to the Supreme Court, however, the only issue for consideration was "whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions."[34] According to Justice Ginsburg, the answer was a qualified "yes." The rule and its qualification were stated as follows:

> Such action [community integration] is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[35]

It is important to note that under Title II of the ADA, plaintiffs typically only have a few traditional theories of discrimination they can assert: disparate

30. *Id.* at 311–12 (discussing the various Titles of the ADA).
31. The facts are summarized in Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 593–94 (1999).
32. *Id.* at 593.
33. *Id.* at 588.
34. *Id.* at 587.
35. *Id.*

treatment, disparate impact, and failure to make reasonable accommodation. From a theoretical standpoint, however, there are actually numerous claims that do not fit neatly in either of these theories such as methods of administration claims, surcharge claims, integration claims, failure to make buildings physically accessible, and *Olmstead* claims.[36] Oddly enough, in *Olmstead*, the reasonable accommodation rule was not used as a separate right or theory; but rather as a limiting principle on the right to be free from institutionalization.[37]

In order to reach the ultimate conclusion that unjustified institutionalization violates Title II of the ADA, Justice Ginsburg needed to confront a number of problems. First, the claims may have been moot because both women were already receiving community treatment.[38] Second, the ADA was based on the Rehabilitation Act of 1973, that law has a similar anti-discrimination mandate that had been construed as not requiring community-based treatment.[39] Third, *Olmstead* dealt with discrimination among those with disabilities and not between those with disabilities and those without; thus, it did not have the type of disparate treatment between members of a protected class and others outside that class as found in other civil rights laws.[40] Fourth, many were concerned that the ADA would end institutionalization altogether, even for those who may not want community placement or could not function in the community.[41] Finally, Ginsburg had to deal with the ever present reality of limited state finances.[42]

As to the first issue, Ginsburg applied the "capable of repetition yet evading review" exception to mootness.[43] The plaintiffs in *Olmstead* both had histories of institutionalization, so the Court reasoned that they could face institutionalization again.[44]

The other problems were answered throughout the opinion, by reading various clauses of the ADA and its implementing regulations together. For example, the operative portion of the Title II states:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[45]

Ginsburg drew the meaning of the word "discrimination" in this provision from several other sources in the ADA. For example, she cited three provisions of the introduction to the ADA that described "isolate and segregate," "institutionalization," "intentional exclusion..[and] segregation" as being forms of

36. *See* Warden, *supra* note 15, at 67 (discussing the various theories of discrimination as well as forms and types of discrimination), and 72 (discussing *Olmstead*'s not being a standard form of discrimination).

37. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 604 (1999).

38. *Id.* at 594 n.6.

39. *See id.* at 599–600.

40. *See id.* at 598 n.10.

41. *Id.* at 601–02, 604.

42. *Id.* at 594.

43. *Id.* at 594 n.6.

44. *Id.*

45. *Id.* at 589 (citing 42 U.S.C. § 12132).

discrimination.[46] She then confirmed what many had long believed about the ADA—that Congress had a far more comprehensive view of discrimination in mind when it enacted the law than when it enacted other famous anti-discrimination laws.[47] Thus, the ADA was not bound by the reasoning or precedents regarding those other statutes. Furthermore, Ginsburg noted that the Attorney General's interpretation of the law was that it contained a prohibition on unjustified institutionalization, and because the Attorney General is responsible for implementing Title II's regulations, such opinion warranted respect.[48] Justice Ginsburg found further support for her holding when she echoed what many advocates had been saying for some time (and indeed at the Supreme Court), that institutionalization constitutes dissimilar treatment in one major respect:

> In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.[49]

That reasoning alone would have been enough to hold that institutionalization violates the ADA. However, Ginsburg gave us more. She reached back in time and echoed what Justice Thurgood Marshall said in his dissent in *Cleburne*:

> Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life… Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.[50]

But the case did not end there. Justice Ginsburg had to deal with how to limit the right she had just announced. This is important for a few reasons. At the time, it was not clear how strong of a constitutional basis there was for Title II of the ADA;[51] nor was it known how strong the law would remain politically.[52] Thus, a too wide-reaching ruling could have jeopardized the law as a whole. Second, Ginsburg believed, rightly or wrongly, that some people would either prefer not to be in community placement or could not function in community placement. To solve this issue, Ginsburg turned back to the regulatory provisions of the ADA for guidance. Writing for a plurality of the Court, Ginsburg concluded that

46. *Id.* at 588–89 (citing 42 U.S.C. §§ 12101(a)(2), (3), (5)).

47. *Id.* at 598.

48. *Id.* at 597–98.

49. *Id.* at 601.

50. *Id.* at 600–01 (citations omitted).

51. The greatest constitutional challenges would not happen for several more years. The ADA failed one and passed two. *See* Warden, *supra* note 19, at 313 (discussing Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001), Tennessee v. Lane, 541 U.S. 509 (2004), and U.S. v. Georgia, 546 U.S. 151 (2006)).

52. Indeed, while there have been some attacks on the law, it remains extremely popular and respected. Warden, *supra*, note 19 at 314–15.

the reasonable modification provision and its "fundamental alteration component" limited the right to community placement; thus, the ADA only required community placement where, *inter alia*, such placement could be reasonably accommodated. To this, Ginsburg, writing for the plurality, concluded:

> Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.[53]

In the end, *Olmstead* has now come to be its own theory of liability under Title II of the ADA.[54] It has been even further extended to mean that people with disabilities cannot be subject to the risk of unjustified institutionalization;[55] and it has been held applicable to large state programs such as Medicaid.[56] The opinion ensures that people with disabilities have a community to be a part of. It ensures that the horrors our community faced during the days of mass institutions will not return. And it continues to impact our world today.

III

Having reviewed the decision in *Olmstead*, it is now appropriate to discuss why Ginsburg's *Olmstead* belongs in the Constitutional Canon, even though it did not concern a constitutional question. For guidance, I turn to the words of Professor Akhil Reed Amar, who stated in reference to the Constitutional Canon:

> I am looking for symbols that are textual, like the Constitution. I want to focus on texts that have propositions that are in some sense deeply connected to the Constitution, proximate to it, that have been ratified in some profound way, formally or informally, by the American people in the same manner that the Constitution has come to abide in our hearts and minds.
>
> Accepting these criteria, something outside the Constitution and yet absolutely iconic, there are probably a couple of dozen textual symbols that conform. I offer six examples: The Declaration of Independence, Federalist Papers, The Gettysburg Address,' Martin Luther King Jr.'s "I Have a Dream" speech, Brown v. Board of Education, and the Northwest Ordinance. Of course, we could also talk just about iconic cases: Marbury v. Madison and McCulloch v. Maryland are the big ones. The point is that these documents and cases form a constitutional canon.[57]

Thus, something can be part of the Constitutional Canon even if it is not an express constitutional decision. *Olmstead* certainly meets the criteria Professor Amar lists. Indeed, it exceeds relevant aspects of several items listed as being part of the Constitutional Canon already.

53. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 604 (1999).
54. *See* Brown v. District of Columbia, 928 F. 3d 1070, 1076 (D.C. Cir. 2019).
55. Davis v. Shah, 821 F. 3d 231, 262–63 (2d Cir. 2016).
56. *Id.* at 238; *see also* Townsend v. Quasim, 328 F.3d 511, 518 (9th Cir. 2003).
57. Amar*, supra* note 3, at 76 (internal citations omitted).

For example, *Olmstead* has a very deep and proximate connection to the Constitution. Title II of the ADA is Section 5 legislation under the Fourteenth Amendment,[58] and as such, it was designed to enforce numerous constitutional rights.[59] *Olmstead*'s prohibition on unjustified institutionalization can be seen as enforcing and protecting various constitutional rights. Indeed, *Olmstead*, even though it may extend beyond these constitutional rights, is no doubt "congruent and proportional" to these rights given the nature of the rights and the history of disability discrimination.[60] Institutionalization prevents marriage, hampers the right to privacy, hampers the right to access court houses, limits the right to petition one's government, and constrains the freedom of association.[61] Indeed, the history of institutionalization has been so horrific that the practice has been used to deny virtually every conceivable constitutional right persons with disabilities have, including the right to life itself.[62] Thus, *Olmstead* may be more than "congruent and proportional" to the protection of various constitutional rights. It may be absolutely necessary for their existence in many situations.

Moreover, it can easily be said that *Olmstead* has been ratified by the American people informally, and now abides in the hearts. First, it is part of a very popular and famous Congressional statute, that has "integrated itself into [our] society."[63] Second, literally every state of the union has law or policy favoring integration and deinstitutionalization.[64]

Further still, let us compare *Olmstead* to other parts of the Constitutional Canon. While the Declaration of Independence is important, it does not have the force of law;[65] *Olmstead* does. The same can be said of the Federalist Papers and the "I Have A Dream Speech." This is, of course, not to take away from their importance. Reflecting its importance in our society, *Olmstead* has been called

58. *See* U.S. v. Georgia, 546 U.S. 151, 158–59 (2006).

59. Tenness v. Lane, 541 U.S. 509, 522–23 (2004) (noting the Title II of ADA was meant to "enforce a variety of basic constitutional guarantees").

60. For a discussion on the doctrine of "congruence and proportionality" and how it relates to the enforcement power of Title II of the ADA, see Derek Warden, *Four Pathways of Undermining Board of Trustees of the University of Alabama v. Garrett*, 42 U. ARK. LITTLE ROCK L. REV. 555, 566–82 (2020). To be sure, however, the issue of whether *Olmstead* represents valid abrogation of sovereign immunity or enforcement legislation has not been squarely answered by the Supreme Court.

61. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 601 (1999) (discussing impact on, *inter alia*, "family relations, social contacts…and cultural enrichment"), City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 461–64 (1985) (Marshall, J., concurring in part and dissenting in part) (discussing institutionalization, discrimination, segregation and deinstitutionalization in relation to various rights: right to establish a home, marriage, voting, sterilization, and citizenship itself).

62. *Cleburne*, 473 U.S. at 461–64 (Marshall, J., concurring in part and dissenting in part) (noting that mass institutionalization was aimed at ending reproduction of those with disabilities and to extinguish them from the gene pool); *see generally* Louise Harmon, *Honoring our Silent Neighbors to the South: The Problem of Abandoned Or forgotten Asylum Cemeteries*, 34 TOURO L. REV. 901 (2018) (discussing history and death at American mental health institutions).

63. Warden, *supra* note 19, at 315; *see also id.* at 311 (discussing ADA being passed by sweeping majorities).

64. For a list of such policies or laws in every state, see Brief for Petitioners, Appendix A, Bd. Of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (No. 99-1240).

65. Jonathan Lowy & Kelly Sampson, *The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 GEO. J.L. & PUB. POL'Y 187, 197 (2016).

the *Brown v. Board of Education* of the Disability Rights movement.[66] That being said, while *Brown* was undoubtably correct, it had little impact for several years after it was rendered.[67] *Olmstead*, on the other hand, immediately took aim at State institutions and vast state programs. Nonetheless, both decisions helped end mass segregation, attacked the stigma associated with such segregation, and were paradigm shifts in the way the law understood discrimination. As to *Marbury*, it is important to note that, like *Brown*, it was largely ineffective for years. Most Americans would be shocked to know that after *Marbury*, the second time the Supreme Court struck down an act of Congress was decades later in *Dred Scott*.[68] *Olmstead*, again, was almost immediately changing the nation; and it does not appear to run the risk of having a *Dred Scott* moment.

But *Olmstead* impacted more than institutionalization. By relying on the Attorney General's regulations, Ginsburg's *Olmstead* opinion has solidified the legitimacy and legality of numerous regulatory provisions as well as the relevant Attorney General opinions of the law that have tremendous impact on people with disabilities.[69] Moreover, by allowing a claim of intra-class discrimination, Ginsburg forced lower courts of appeal to overruled their prior decisions that had previously required interclass discrimination be shown.[70] The implications of this last point are astronomical.

Thus, there can be little doubt that Ginsburg gave us a truly monumental decision in *Olmstead*. It seems only fair that we repay her legacy by having her be the first woman to author a piece of the American Constitutional Canon. Therefore, it is time we place Justice Ginsburg's *Olmstead* opinion among the ranks of Chief Justice Marshall's *Marbury*, and Chief Justice Warren's *Brown*.

Goodbye and thank you, Justice Ginsburg. We got it from here.

66. Mary C. Cerreto, *Olmstead: The Brown v. Board of Education for Disability Rights: Promises, Limits, and Issues*, 3 LOY. J. PUB. INT. L. 47 (2000).

67. Michal R. Belknap, *The Real Significance of Brown v. Board of Education: The Genesis of the Warren Court's Quest for Equality*, 50 WAYNE L. REV. 863, 875 n.90 (2004) (citation omitted).

68. Derek Warden, *The Ninth Cause: Using the Ninth Amendment as a Cause of Action to Cure Incongruence in Current Civil Rights Litigation Law*, 64 WAYNE L. REV. 403, 408 (2019).

69. *See* Frame v. City of Arlington, 657 F.3d 215, 225, 235 (5th Cir. 2011); Wis. Cmty. Servs., Inc. v. City of Milwaukee, 465 F.3d 737, 751 n.10 (7th Cir. 2006) (noting that DOJ regulations are entitled to respect and citing *Olmstead*). *See also* M.R. v. Dreyfus, 697 F.3d 706 (9th Cir. 2012); Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1181–82 (10th Cir. 2003).

70. Amundson *ex rel.* Amundson v. Wis. Dept. of Health Servs., 721 F. 3d 871, 874 (7th Cir. 2013) (overruling prior precedent, acknowledging there no longer being any need to show a comparison to others outside the protected class, recognizing *Olmstead* rule that "undue institutionalization of disabled persons" constitutes discrimination "*no matter how anyone else is treated*," and recognizing that other Circuits had done the same) (italics in original).