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Plaintiffs' Legal Strategy

*William Brown*¹

Thank you, Mr. Stephens, I want to begin by thanking the Tennessee College of Law and the Tennessee Journal of Law and Policy for inviting my client and friends, George Lane, Beverly Jones, and me to participate in the symposium on the case. It is also a pleasure to renew acquaintances with Solicitor General Moore, and Attorney General Summers, with whom I had the occasion to share a bit of history with on a cold day in January in Washington, D.C. I am pleased to see Patty Millett visiting with us in Tennessee. I can never say enough about the encouragement and support she gave me during the course of preparation for the argument before the Supreme Court last year. For that I will be eternally grateful. As we approach the anniversary of *Tennessee v. Lane*,² it is appropriate for us to reflect for a few moments on the implications of that decision and appreciate the strategies that were used to develop the issue that was decided. Perhaps the first thing that we should address is: What was the issue that was presented?

That simply stated is whether or not Congress properly abrogated the State's Eleventh Amendment sovereign immunity against money damage claims by average citizens when it passed Title II of the ADA.³ It sounds like money. Little did I know in 1998 when I filed the lawsuit that the implications would be considerably more broad and dramatic. Please understand just how naive

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² 541 U.S. 549 (2004).

³ 42 U.S.C. §§ 12131-12300 (2005).

I really was when I filed this lawsuit. I was a small town lawyer who had primarily had a practice that consisted of doing deeds, wills, and mundane areas of trial practice. Most of my constitutional law experience was an occasional foray into the Fourth Amendment when I had a client that needed a break from criminal prosecution. I heard in law school there was a principle of law kept you from suing the state, but I thought Congress held the trump card. When George Lane rolled into my office in 1996 and told me about his experience in Polk County, Tennessee, where he had to crawl up some steps to get to court because he could not walk, and then was put in jail because he refused to crawl or be carried, I thought that there was a law that said a state could not do that.

I went to the U.S. Code Annotated, and there it was in black and white. A state cannot discriminate against people with disabilities who are otherwise qualified in its programs and services because of that disability, period. In another section, it said that if a state did, then the person who had suffered that discrimination had a right to exercise all remedies including remedies at law and in equity, and that the state could not claim immunity.

Boy, this case looked like a slam dunk. It was obvious. I thought I could file suit, make the State and counties fix the courthouses like they were supposed to, maybe collect some money for George and Beverly, and maybe make some money for myself. Little did I know the road would be a lot longer, and the implications would involve the viability of Title II of the Americans with Disability Act, and the ultimate question of what power Congress really had under Section 5 of the Fourteenth Amendment to make states fulfill their fundamental responsibilities to their citizens under the Constitution.

In August of 1998, I filed suit in federal district court in Nashville on behalf of George and Beverly against the State of Tennessee and twenty-five counties claiming these public entities had discriminated against George,

Beverly, and all other citizens of the State of Tennessee with mobility disabilities because they conducted their judicial program in inaccessible courthouses. I asked the court to make them fix the program, to pay my clients money for damages for the discrimination they suffered, and to pay me some attorney's fees for having to bring the lawsuit.

My secretary told me that the state attorney general's office called and said they wanted to talk to me. I remember thinking to myself, "They want to settle!" I got on the phone, [and] they asked me if the State could have [an] extension of time to answer the complaint. I agreed to the request for an extension and I remember rocking back in my chair and saying, "Why do they want to embarrass themselves by having to admit everything?" The facts were not seriously in dispute, I had pictures of the courthouses and a ton of twists to what had happened to George and Beverly, there really was not a material issue of fact for the plaintiffs. We were not going to settle this month, but maybe soon.

A couple of weeks later, I received the State's motion for the case to be dismissed because of its Eleventh Amendment sovereign immunity, which when I read it through, I thought was silly. After all, didn't Congress pass a law saying that a state's sovereign immunity had been done away when it came to the ADA? Again, I thought this would be a slam dunk in reading over the state's memorandum of news, *City of Boerne v. Flores*.⁴ This case had been issued the year before, and the Court had directly pronounced the meaning of the Constitution, and that Congress could not overturn the Court's interpretation of the Constitution. *Boerne* was the beginning of a steady stream of cases where the Supreme Court began to restrict Congressional power under the Fourteenth Amendment.

⁴ 521 U.S. 507 (1997).

I filed my response to the State's motion to dismiss and [waited] for the decision. Several weeks later I received a copy of a document in the mail from the clerk's office, and noticed at the bottom of the page in longhand that I could barely read, Judge Higgins, our federal district judge, had written "State's motion to dismiss is denied," with his signature. So much for memorandum opinions.

I understood this to mean that he agreed with me and there really was not much to the State's motion to dismiss. A few weeks later I received another pleading from the State. This time they were appealing the case to the Sixth Circuit Court of Appeals in Cincinnati, as well as asking the court to stay all proceedings pending the appeal. I knew then the State really did not want to answer my complaint.

The district court state proceedings resulted in a stay of all the proceedings against the counties. If we could not get injunctive relief to fix the courthouses, we were dead in the water. We were not going to settle the case that month.

[I] went to Cincinnati to argue the case, and the federalism storm clouds were getting darker. The State argued forcefully because Title II involves a class of individuals that are disabled, under *City of Cleburne v. Cleburne Living Center*,⁵ only a rational basis [test was applied] for the state[s] to treat individuals with disability differently under the Fourteenth Amendment.

As such, the State argued that under *Boerne*, Congress had overstepped its authority because it was preventing states from treating people with disabilities differently. As long as their conduct was rational, states were constitutionally permitted to discriminate. This was terribly wrong, especially with reference to our case. After all, we were not just talking about any program, we were talking about the fundamental right of access to the courts.

⁵ 473 U.S. 432 (1985).

It struck me as the ultimate insult to say to disabled citizens that everyone has a fundamental right of access to the courts except you, and that only a rational basis test would be applied to your right to access that program, and if the sovereign cannot afford to fix that program, well, tough luck.

When Congress passed the ADA, they made a specific finding that those with disabilities were a discreet and insular minority that was powerless to defend its rights. When we had oral argument in the Sixth Circuit, the panel hearing the case seemed to be buying into the Congress's argument. While we were waiting for the court to decide our case, the Supreme Court delivered its opinions in *Florida Prepaid v. College Savings Bank*⁶ and *Kimel v. Florida Board of Regents*.⁷ Cases were being delivered by the Court striking down congressional attempts to take away state sovereign immunity. None of these, however, involve the Americans with Disability Act.

Then the Court delivered its opinion in *Board of Trustees v. Garrett*.⁸ This was the first time the court had dealt with the ADA on the issue of money damages against the state. The issue presented for the Court allowed the Court to deal with both Title I and Title II of the ADA.

The Court continued its rightward march. In a vote of five to four with Kennedy and O'Connor concurring, the Court struck down congressional action in abrogating a state's sovereign immunity, but it only resolved Title I claims associated with employment. It specifically deferred Title II and government programs to a different day.

Needless to say, there were few who supported the ADA who had much hope for the continued viability of the

⁶ 527 U.S. 627 (1999).

⁷ 528 U.S. 62 (2000).

⁸ 531 U.S. 356 (2001).

Americans with Disability Act. We did not hear from the Sixth Circuit for over two years.

In July of 2002, the Circuit Court issued a *pro curia* opinion affirming the decision over the district court. We had won again. This was in spite of *Garrett* and clearly bucking the collective trend in the Supreme Court and circuits. For some reason, this conservative circuit court just could not hold that Congress did not have the power to keep people from having to crawl or be carried up steps to get to court.

The State asked the Court to reconsider and the Court took it under advisement. They thought about it until January 10, 2003, and again ruled in our favor. We waited for several months to see what the State was going to do, and we got their application for certiorari to the U.S. Supreme Court. I realized I was not going to get the case settled that month either.

We filed our response and waited for the Court to determine if certiorari would be granted. During that time there was a tremendous pressure from disability rights community on the State to drop their appeal. We, likewise, came under extensive pressure from many in the disability rights community to not go forward and to withdraw our claim for monetary damages.

There was a common feeling that this case could make or break the ADA, and some advocates in the disability community were not willing to take the risk. My attitude was that if we cannot win this one, what could we win? Certiorari was granted, we waited on the State's brief. When we received it, we went to work on ours. I was very fortunate to have the able assistance of Sam who taught constitutional law at Harvard and was an expert on disability rights. Tom Goldstein, of the firm of Goldstein & Howe, also assisted us on our brief. We went round and round about various approaches to take on the brief.

We knew there were two strengths we had. First, there was the fact [that] it does not sound right to have

people having to crawl upstairs to get to court to a bunch of lawyers, especially if the alternative is for the lawyers to carry them. The second thing was that we had the strong counter to the *Cleburne* rational basis standard, the issue of fundamental rights. The problem we confronted was that while our case implicated fundamental rights, Title II implicated everything including, as the State strategically spoke about, rest stops on the interstate. The breadth of Title II posed a difficult problem that would be difficult to cover in a maximum 50 page brief. We ran into the problem of running out of pages before we could finish the second prong if we had to cover everything.

Sam Bagentoss suggested the “as applied” analysis, that is to say that we would ask the Court not to feel compelled to address all aspects of Title II, but only consider whether Title II was constitutional as it applied to the fundamental right of access to the courts. This allowed us to focus the Court’s attention on what was a serious problem with serious facts concerning a fundamental right. It also gave us the strategic advantage of keeping the Court’s attention on access to the courts and not access to rest stops. Besides, Patty Millett and the Justice department would have to cover everything else and we knew they would do a splendid job.

We filed our brief, and I started attending some moot court sessions, all of which Patty Millett participated in. The first one I went to was in December of 2004, about a month before the oral argument. I had a panel of eight experienced constitutional lawyers, all of whom had argued numerous times before the Supreme Court to serve as my moot justices.

It was a grueling experience to say the least. And [it] lasted for about an hour and a half. Then they got to tell me what they really thought of my presentation. Now, you need to understand the moot took six times the length of time I would have before the Court. I did not have a chance to catch my breath or collect my thoughts while

being pounded by a group of lawyers who not only practiced constitutional law, but also argued before the U.S. Supreme Court for a living. You can imagine what they thought of me and it was not good.

It was after that experience that the implications of *Tennessee v. Lane* really hit me square in the face. One of my colleagues sat me down and told me that the future of 55 million Americans with disabilities was riding on my shoulders. He was not optimistic. I filed a lawsuit to get a little money for George and Beverly which had evolved into a question of whether or not 55 million Americans could be denied their fundamental rights of citizenship. My shoulders were really sagging under the responsibilities. This was serious business.

I arrived at the court on the morning of January 13th, 2004, I had worked hard, gone through two or more moots, [and] listened to fifteen Supreme Court arguments that were available online. Ours was the first case on the docket and General Moore opened the argument. Some of the first questions that were posed to him were by Justice Sandra Day O'Connor.

Now, with the five to four split in *Garrett*, we knew we had to change one vote—it had to be either Kennedy or O'Connor, and I was looking to O'Connor. She had a history of being pragmatic with a common sense approach to most of her decisions associated with civil rights. My reading of her was that she wanted people to be treated properly, with respect and dignity without placing a too onerous burden on the states. I was also optimistic about her because she had been a state trial judge that had to deal with real people in a personal way. I suspected that in Arizona she had to deal with old, uncomfortable courthouses, stubborn county commissions, and perhaps had even seen a few people carried up steps in her life's experience. She might not buy everything in Title II, but I felt that she would not be comfortable letting the state get

by with having people crawl up steps to get to court. Justice O'Connor's questions were direct and simple.

She asked, "Mr. Moore, does Tennessee provide any cause of action for the alleged violations here? The lack of access to the courthouse?" He candidly responded, "No — there is no private action under our State Public Buildings Act."⁹ She asked him again, "You're satisfied under Tennessee law there would be no monetary relief available?" He responded, "I think that is right." She then asked him a third question: "And would there be any enforcement actions at all available to compel under Tennessee law the courthouse to be accessible?" He answered, "No, your Honor." The argument went another fifteen minutes including my fifteen minutes, but after those three questions I felt confident our strategy had worked. Sandra Day O'Connor was not about to leave my clients without a remedy against the denial of their fundamental rights.

On May 17th, 2004, the court announced the decision in an opinion by Justice John Paul Stevens. We had won by a 5-4 vote with Justice O'Connor in the majority. Justice Stevens focused on exactly what we had set out for them, [that] access to the courts is a fundamental right and there is ample history in the record that Congress generated that supports the conclusion that the states have unconstitutionally discriminated against people with disabilities in the administration of their programs. In conclusion, the Court need only consider Title II in the context of access to the court and we will leave to another day the abrogation of sovereign immunity with reference to other programs.

Justice O'Connor did not write a word, but her influence and belief in civil rights is clearly there.

There was hope that the purposes for which Title II was passed would be a reality. The potential for disaster,

⁹ Tenn. Code Ann. §§ 68-120-201 to -205 (2005).

for not only disability rights but all aspects of civil rights, is starkly contained in the dissenting opinions of Chief Justice Rehnquist and Scalia. The Chief Justice rejected the “as applied” inquiry. More significantly, the Chief Justice said that there was nothing unconstitutional about George Lane having to crawl up the stairs to get to court, nor was there anything unconstitutional about his being arrested for refusing to be carried. In fact, it was perfectly acceptable. After all, he did get to court. George Lane’s inconvenience, his words, of having to crawl to his day in court was not in his opinion unconstitutional. He commented that, “Jones, a disabled court reporter, does not seriously contend that she suffered a constitutional injury.” I was trying to be as serious as I could get. The principle that bad conduct by states towards its citizens, even if illegal and discriminatory, is never unconstitutional almost became the law of the land.

Justice Scalia’s dissent was even more drastic. His view would, in effect, abolish the ability of Congress to enact prophylactic [legislation] under the Fourteenth Amendment in any area except race. In other words, Congress has no general prospective power under the Fourteenth Amendment to protect citizens from the denial of due process of law or the equal protection of the laws in any area except race. This conclusion, if held by a majority of the Court, would have completely emasculated the Fourteenth Amendment. It provides protection from arbitrary acts by states against their citizens. Those citizens would not be subject to any protection by Congress, without the Fourteenth Amendment, which extends the right of private litigants to bring actions to vindicate their civil rights. It would bring in serious question whether Congress had the power to pass legislation that gave authority to the federal executive branch to intervene in federal courts on behalf of citizens who were being deprived of fundamental rights on grounds other than race. The one caveat was that Congress could conduct trials

directly at specific states and state actors where there had been an identified history of “relevant constitutional violations.” That, of course, would never happen. What senator would ever let his state be singled out for a trial by Congress, let alone allow a finding of relevant constitutional findings?

In addition, remember that under *Boerne*, the Supreme Court decides what is and is not constitutional. If the principle that bad conduct is not unconstitutional conduct was the law of the land, there may not have been any civil rights to protect. This would turn on its head the concept that the role of Congress is to pass laws that regulate conduct, not to make findings of fact in order to punish conduct. The implications of the issue for the Court in *Tennessee v. Lane* were broader than money damages under Title II. The power of Congress to protect citizens with or without disabilities from the denial of fundamental rights was eerily at stake. Because of the shift of one vote by one justice, perhaps the whole concept of civil rights was saved.

I never dreamed my little case to fix the courthouses and get George and Beverly a little money would bring our country back from the brink of the abolition of the power of Congress to guarantee the civil rights of all of us, even in areas other than disabilities. Should a person be denied their rights of citizenship because they are disabled?

Hopefully the answer to that question will never again be seriously in doubt. The real hope for individuals with disabilities under Title II is not that they will be able to collect money from states, it is that they will be treated like any other citizen and they will not have to sue every time they want or need to access a state program. With the decision in *Tennessee v. Lane*, it is clear that they are citizens whose fundamental rights under the Constitution can be protected by congressional action. Hopefully, they will be expanded to other programs and services as applied analysis is developed. The best news for George and

Beverly is the state has adopted procedures that no person has to crawl up steps to get to a court of law. For me, I finally got this case settled.

