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## United States's Legal Strategy

*Patricia Millett*<sup>1</sup>

First of all, I want to thank you for inviting me here today. It is a privilege to be here, and I hope all of you law students realize that something very exceptional is happening here. You all have probably spent one, two, or three years talking about legal issues like those we litigated in the Supreme Court. When I went to law school, nobody spent much time teaching that there are real people behind cases, and that before you get to go to the Supreme Court, you have to have a client willing to make that fight. That is how it works. Law school is a wonderful place, but you always have to remember that there are real people behind every case, and I think that has really come home today. It has been a privilege to hear these stories.

When Mr. Lane said that he was a small part of a big case, he was wrong. He and Ms. Jones are the case. It is too easy, particularly for those of us that practice in front of the Supreme Court, to forget that and just get wrapped up in the legal issues. I hope you will take that message home with you. It is certainly something that I will remember.

I work in the Solicitor General's Office of the United States Department of Justice and we represent the U.S. government in the Supreme Court. While it is always a privilege to handle a case in the Supreme Court, there are some cases—and this is one—that I will remember throughout my career. That is not only because of the interesting legal issues, but most importantly the human implications of the case for people who face exceptional challenges and ask for nothing more than fair treatment and consideration by their government.

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This case was between Beverly Jones, George Lane, and the State of Tennessee. Why was the U.S. government in this case? “We’re your government, we are here to help,” I told Mr. Brown. He did not seem to believe me at first. One of the jobs the Justice Department and the Solicitor General’s office do is defend the constitutionality of federal law. So, while Mr. Brown just happened to get a case with this great issue—great federal courts and constitutional law issues—we had been battling with the Supreme Court on these issues for years, although we had not been doing very well. Mr. Brown could be justifiably unenthusiastic at our arrival on the scene—we came to him armed with losses in *City of Boerne v. Flores*,<sup>2</sup> *Kimel v. Florida Board of Regents*,<sup>3</sup> and *Board of Trustees v. Garrett*.<sup>4</sup> Although, to our credit, in *Nevada Department of Human Resources v. Hibbs*,<sup>5</sup> we finally won one. So maybe we had a little credibility with him.

*Tennessee v. Lane*<sup>6</sup> was case number five in what thus far had been an ever-expanding list of federalism losses. The Supreme Court had been cutting back on Congress’s power to enact laws that applied to the states, both under Section 5, the civil rights power, and the Commerce Clause power as well. So, at some level, we were beginning to feel that our job had become to show up every term of the Supreme Court with a “kick me again” sign. Title II of the Americans with Disabilities Act,<sup>7</sup> while finally decided in part in this case—still not totally resolved, which I will get to—had already been before the court multiple times. They had granted certiorari to decide this issue since the year 2000 in *Kimel*, in which the Supreme Court decided Congress did not have the power to

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<sup>2</sup> 521 U.S. 507 (1997).

<sup>3</sup> 528 U.S. 62 (2000).

<sup>4</sup> 531 U.S. 356 (2001).

<sup>5</sup> 538 U.S. 721 (2003).

<sup>6</sup> 541 U.S. 509 (2004).

<sup>7</sup> 42 U.S.C. §§ 12131-12300 (2005).

require the states to pay damages for violations of the Age Discrimination in Employment Act.<sup>8</sup> There was also a disability claim in that case. After they decided the age issue, they granted certiorari to decide the disability issue. That case was settled.

Then they granted review in a case coming out of the Eighth Circuit involving a police officer who had somewhat limited vision, but performed perfectly fine on a shooting test. That case was settled.

Then there was the Court's decision in *Garrett*, where the Supreme Court decided that Title I of the Americans with Disabilities Act, which applies to employment, was not a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment. Finally, the term before *Lane*, we briefed the constitutionality of Title II in a case coming out of California that dealt with medical licenses for doctors. That case was dismissed by California shortly before oral argument. We had been dealing with this issue for quite some time, and Supreme Court precedent gave little reason for optimism. We were very conscious of the barriers that we faced in front of the Supreme Court. Now we do not have individual clients in the sense that Mr. Brown did. Our client is the U.S. government and the power of Congress to enact its laws. Our goal was to stop the hemorrhaging of congressional power to enforce civil rights. We accordingly wanted to have Title II of the Americans with Disabilities Act upheld as broadly as possible. Because of what had gone before, there were some important decisions that needed to be made. After all, when we first briefed this issue, we did not have *Garrett* on the books.

In *Garrett*, the Supreme Court had held that just a couple pages in the U.S. Code before Title II there is another section of the Americans with Disabilities Act—

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<sup>8</sup> 29 U.S.C. §§ 621-34 (2005).

Title I—that is not Section 5 legislation. That is a really hard precedent to wrestle with. Have you ever been in a case where they have already held that another part of the act is unconstitutional? But there was more.

How many of you have heard of a case called *Buck v. Bell*?<sup>9</sup> Did you hear about that case in favorable terms? Probably not. *Buck* was an old Justice Holmes decision upholding the power of government to sterilize the mentally retarded. It is generally consigned to the *Dred Scott*<sup>10</sup> trash bin of judicial decision-making. At least that is how I learned it in law school, because the Court, in *Buck*, seemed to sign onto the whole eugenics movement. They endorsed the notion that, if you are mentally retarded, you are the product of bad blood and we should try to purify society by preventing you from reproducing and, in that mindset, perpetuating the so-called “problem.” It is terrible language.

In *Garrett*, the Supreme Court cited that decision, but not with much blushing. In response to our argument in that case about a history of discrimination on the basis of disability and our arguments about the history of sterilization, the Court responded with “We upheld those. See *Buck v. Bell*.” Now, I am not suggesting the Court would decide the case the same today. It would not. But *Buck* is evidence of discrimination in our history.

That is where we found ourselves when *Lane* arose, which is why we were so cautionary while Mr. Brown was so optimistic. To Mr. Brown, disability discrimination seemed so self-evidently a problem. But we were very conscious that we had to establish special protections for people with disabilities to overcome a history of discrimination.

That is what had been recognized in the race discrimination area. Congress had to have special powers

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<sup>9</sup> 274 U.S. 200 (1927).

<sup>10</sup> *Scott v. Sandford*, 60 U.S. 393 (1856).

to overcome race discrimination because it was so embedded. Gender discrimination was the same in *Hibbs*.

I had thought it was simple at first, too, when I first came to the Americans with Disabilities Act. I thought the Religious Freedom Restoration Act<sup>11</sup> was largely Congress in a turf fight with the Supreme Court, eyeball to eyeball and toe to toe over fundamental conceptions of religious freedom. But if anything it is Section 5 legislation. If there is anything Congress is especially equipped to do, it is protecting the rights of individuals with disabilities because there is a real history of discrimination in this country. Sterilization, institutionalization, preventing people from voting, refusing employment, excluding them from schools—it is all chronicled in our brief. There is a real, undeniable history of discrimination here, a complex history.

In *Cleburne*,<sup>12</sup> the reason the Supreme Court applied rational basis analysis was not because they did not think disability discrimination was a problem. The rationale in *Cleburne* was, instead, that the legislature needs to deal with the recognized problem of disability discrimination. It is very complicated, and it entails careful line-drawing and balancing a lot of information that courts do not have. *Cleburne* was an institutional decision about who was better positioned to protect people with disabilities. I thought Title II is exactly what Section 5 legislation should be. But then along came *Garrett*.

Since *Garrett*, the Supreme Court had upheld the Family Medical Leave Act<sup>13</sup> in *Hibbs*. That was our first law upheld as proper Section 5 legislation since *City of Boerne*, and that involved gender discrimination. The opinion accepted the argument that where there is a recognized history of discrimination such that the Supreme

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<sup>11</sup> 42 U.S.C §§ 2000bb to 2000bb-4 (2005).

<sup>12</sup> *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

<sup>13</sup> 29 U.S.C. §§ 2601-54 (2005).

Court itself has applied heightened scrutiny and thus has recognized the problem, Congress has greater leeway under Section 5 of the Fourteenth Amendment. When you see the briefs and the arguments in *Tennessee v. Lane*, there was a lot of focus on rights subject to heightened security.

Yes, we made the straightforward argument about disability discrimination under the equal protection clause. The oral argument also brought up questions about the right to go to the ice skating rink, though. Quite frankly, why shouldn't somebody be able to go to a public skating rink just because they have a disability? If it only costs fifty cents to make the doors wider, do it so that all your citizens—all the people government is supposed to work for—can go ice skating. But we also spent a lot of time focusing on the fundamental rights that are implicated by disability discrimination, whether access to the courts, Eighth Amendment violations in prisons and mental institutions, First Amendment rights, or the right to vote. In framing the arguments, there was a focus on the fundamental rights aspect because it had worked so far under Section 5 of the Fourteenth Amendment.

When you read the briefs, the other thing that becomes clear is that the prior cases where the Supreme Court had held Congress lacked Section 5 authority (other than *Boerne*) involved only claims for damages. They generally involved employment cases, where the substance of the law could be sustained as Commerce Clause legislation. There, thus, was no question that Congress could pass the law and make the states comply with the law. The Court just held that states do not have to pay damages. That is the import of the Section 5 ruling in those cases. The same was true for Title I of the Americans with Disabilities Act. It is not totally unconstitutional. It still applies to the states as Commerce Clause legislation, however no damages can be awarded.

The difficulty with Title II, as we saw it, is it is less clear. It would be an open question in the Supreme Court's

view—whether the Title is Commerce Clause legislation. We defend it as Commerce Clause legislation, but it is challenging in some applications to identify the Commerce Clause nexus. Access to polling place cases is difficult to justify as commerce. However, we would win the ice skating rink—that is commerce. In the brief we tried to paint a picture of where an adverse holding on the Section 5 power would leave us.

If the Supreme Court says Title II is not valid Section 5 legislation, and if they were to say that its application to state capital buildings, state courthouses, and state polling places is not Commerce Clause legislation, then where would that leave our country? You would be able to get into any building, any McDonald's in the country, and any private building of a requisite size. You could get into your ice skating rink and your county park facilities. But you could not get into your capital or your courthouse, and you could not get into polling places to vote. How can that be how our Constitution leaves things? How could a constitutional amendment enacted after the Civil War to empower then predominantly African-Americans, freed slaves, have that result? Certainly the concern of the Fourteenth Amendment's framers was not to get freed slaves into ice skating rinks.

That was the image our brief attempted to leave in the Supreme Court's mind.

One more thing about strategies in the case: there was a significant distinction between our brief and Mr. Brown's. I think it was helpful for the Supreme Court to have the two approaches. He focused heavily on access to the courts and on the "as applied" challenge. You can argue that something is unconstitutional facially anyway that it is applied. You also can argue that a law is unconstitutional in one application and not another.

What Mr. Brown argued is that the court did not have to decide congressional power to enact all of Title II. After all, it is a big statute, and it covers everything the



government does—ice skating rinks to courthouses. All he needed for his clients to win was access to the courts, which is a clear fundamental right that is not subject to rational basis scrutiny under *Cleburne*. It is specially protected by the Constitution and the Court, and so Congress has leeway.

Our job is to defend Title II as a whole, from ice skating rinks to courthouses. So we argued in our brief that the Court should decide the constitutionality of Title II as a whole. After all, the whole concept of Section 5 legislation is that Congress can do more than outlaw things that are unconstitutional. All of your rights against race and gender discrimination in employment encompass a lot more than just what the Constitution requires.

The Family Medical Leave Act certainly provides more than what the Constitution requires. Congress can give more under Section 5 of the Fourteenth Amendment than the bare minimum constitutional protection. Our view was, as some of the states had argued, that the “as applied” approach would be used to divide and conquer congressional legislation. Our concern was if you tear this statute apart and look at it in each application, and ask if we really need it in each context, the Court will say that you do not really need it here, or here, or here. Certainly not in this day and age. If they could do that, they might also say a ban on intentional gender discrimination is appropriate Section 5 legislation, but a ban on employment practices with a disparate impact is not. Given our general lack of success in the Supreme Court in recent cases, we thought it was dangerous to argue that Title II should be divided up that way and start scrutinizing each application of the statute. So the Supreme Court had both proposed approaches before it.

As you know, the Supreme Court did uphold Title II, but only as applied to access to the courts claims. It was a great victory, it is a wonderful opinion, it decided a lot of important issues, and will help with the defense of other

statutes. But we still have the question of where do we go after *Tennessee v. Lane*.

We now have to defend Title II in all of its other applications. We just filed a petition for a writ of certiorari last month for the Supreme Court to address the constitutionality of Title II in the context of prison administration. There is a division in the circuit courts. One has upheld it, two have struck it down. There was a recent decision from the Eleventh Circuit a few days ago upholding Title II as applied to education, but the same issue is also being litigated elsewhere. We cannot sit back and say we are done. There are still many more applications to be dealt with, and it will be up to the Supreme Court to sort out exactly what lines it wants to draw on congressional power or whether it will, at the end of the day, hold, as it should, that Title II in all of its applications is constitutional. Thank you very much.

