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Tennessee v. Lane: Winning the Battle, Losing the War?

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Good afternoon. I am very happy to be here. I want to thank the dean, and Richard, I want to thank the JOURNAL for hosting this symposium. I feel like the last hitter in a long program with a lot of heavy hitters. It is very difficult to do the follow-up. I am going to steal one of Mr. Lane's mottos here, his K.I.S.S. theory, but I am going to change it to "Keep It Short, Stupid." I will attempt to keep it short.

For some of you who know of the Lawyer's Committee, you may be asking why we are here. For those of you who do not know of the Lawyer's Committee, I will explain. The Committee was founded in 1963. We litigate primarily race discrimination and sex discrimination class actions across the country. While we do not have many cases dealing with disability discrimination, the Lawyer's Committee is concerned about the erosion of Congress' power to legislate in the area of discrimination. The Committee has been involved in many of the sentinel cases dealing with discrimination. We filed an *amicus* brief in the *Lane*[2] case on behalf of NAACP lawyers. We were also involved in the *Boerne*[3] case. Our goal was to put a stake in the ground so the court did not bleed over into the sex discrimination area or possibly the race discrimination area using the same theory. That is the victory in *Lane* is important to us.

When Ms. Jones started the day, she summed up the issue in front of you—you cannot sue the State. It has

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[2] Tennessee v. Lane, 541 U.S. 509 (2004).

[3] City of Boerne v. Flores, 521 U.S. 507 (1997).

sovereign immunity. I think her quote was something like you cannot sue "the high and mighty."

I want to talk about what *Lane* is about in the big perspective. This case represents a constitutional struggle between the federal government's ability to regulate versus the State's claim that they are sovereign and have the power to act alone.

Since we are in a law school, I think we should do a law school exercise. I am going to state a couple principles. You will accept these principles, and then we will decide the *Lane* case based on these principles. After that, we will determine what it means for the future.

1. That the civil war amendments were passed to take power away from the state and give it to the federal government is not in debate. It has been the law for centuries.

2. That Section 5 of the Fourteenth Amendment is an affirmative grant of power to the federal government to regulate the states. That is not in debate.

The debate is centered on the standard used to shift power. Chief Justice Marshall expressed his standard by stating, "Let the end be legitimate and all means are appropriate." This sentiment was the beginning of what we call the "rational means" test. The test asks "are Congress' actions a rational means to accomplish its goals?" For almost two centuries, the rational means test had been the law. A more modern example of this rational means test can be found in *Katzenbach.*[4] In 1966, the Supreme Court held that the legislative choice is not subject to courtroom fact-finding and may be based on a rational speculation, again as long as what Congress does is by rational means.

Now if you take that constitutional test and apply it to the *Lane* situation, is what Congress did rational? I think almost everybody has to come to the conclusion that it is rational.

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[4] Katzenbach v. Morgan, 384 U.S. 641 (1966).

So why is that not the end of the case? Because in 1997 the Court adopted a "congruence in proportionality" test. What does that mean? We talked about some of the cases—*City of Boerne*, *Kimel*,[5] and *Garrett*.[6] These cases held that there needs to be a very close match between what is in the legislative record and how Congress chooses to regulate it.

What does that do? It has the courts examining the legislative record.

I believe there are a lot of things wrong with the "congruence of proportionality." Unfortunately, it is clear from the current jurisprudence that this Court is not going to move away from it. So we are trying to convince the Court that when they say "congruence in proportionality," what they really mean is "rational means." We need to because the new test ignores how Congress works. Congress is not a courtroom; it is not a factfinder. For any of you who have done legislative work, it resembles a sausage factory. You do not want to see what goes in there and probably cannot imagine what goes into it. So, trying to look at the record and come up with a coherent pattern is really tying Congress' hands in two ways.

One way is to justify statutes that have already been passed, which the solicitor's office is going to have to fight continually. It limits Congress in what they can do in future legislation, like in areas of sexual orientation or other areas of controversial legislation. Second, determine what kind of record Congress has to adopt to move into controversial areas. It is virtually impossible for them to adopt this test.

Where does *Tennessee v. Lane* fit in this? Obviously it is a victory for Ms. Jones, Mr. Lane, and Mr. Brown. I think it is a tremendous victory to get the Court

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[5] Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).

[6] Bd. of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001).

to use the "as applied" test. The Plaintiffs took an extremely hard case against an extremely hard jurisprudence and won it.

Where does *Lane* fit in the larger constitutional area? For us, it is another step along the way that the Court here said, "Yes, as applied here, it is constitutional."

Why was it constitutional? Because we are dealing with one of the most fundamental rights we have, the access to courts.

What does this case say about the hockey rink or the ice skating rink? We are not sure and that will be the problem with the case moving forward. It guarantees each and every one of these issues will continue to be litigated.

There was a comment made earlier, I think it was by Mr. Lane, that we are taking a ton of money and putting it in litigation and defending it. We could take a lot of money and put it in disability rights issues and solve these issues. It is not a hypothetical concern, and given our time I will quickly move through this. Right now the courts are grappling with it. You used the example of a skating rink. I am not sure a skating rink will survive the same constitutional challenge that we did here.

Recently, in the case of *Association for Disabled Americans v. Florida International University*,[7] the Eleventh Circuit Court said education did survive the test, and that it was different from other rights that are only subject to rational review. Again, focusing on either classifications like race or sex, they are subjected to a higher level of scrutiny or a fundamental right. But in *Cochran v. Pinchak*,[8] the Third Circuit held that a disabled prisoner was not denied a fundamental right when he was not allowed access to books, a talking watch, and a usable

[7] 405 F.3d 954 (11th Cir. 2005).

[8] 401 F.3d 184 (3rd Cir. 2005). Note, after this symposium, rehearing was granted and the judgment vacated. *See* 412 F.3d 500 (3rd Cir. 2005).

walking cane. Therefore, the *Tennessee v. Lane* analysis did not apply.

The Fourth Circuit in 2004, in another claim by a prisoner that he was not provided with timely refills of his prescriptions, went to the *Lane* decision.[9] The quote was, "it appears that the actual holding [in *Lane*] is fairly narrow and is limited to the class of cases implicating the fundamental right of access to the courts."[10] A district court case took the opposite view in education and said the right to education was not a fundamental right. Another case, out of the Southern District of New York, held that a person with disability seeking admission to the bar did not pose a challenge implicating a fundamental right, and therefore, *Tennessee v. Lane* did not apply. So what we are left with is unfortunately litigating a lot of these issues on a case by case basis unless the Supreme Court can somehow be pushed back into some rational means of review where they are not second guessing the wisdom of Congress.

Unfortunately, given today's climate and where we are going, I do not see it happening. I would hope that the states decide, rather than putting the money into the litigation of these cases, to put it into improving accessibility. The need for these cases would hopefully evaporate as we move forward. Thank you very much.

[9] *See* Spencer v. Easter, 109 Fed. Appx. 571 (Va. 2004).
[10] *Id.* at 573.