

CASE COMMENTS

Constitutional Law—Congress’s Authority to Abrogate State’s Eleventh Amendment Immunity Under Title II—*Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006), *cert. denied* No. 06-779, 2007 WL 789372 (U.S. Mar. 19, 2007)

The Eleventh Amendment prohibits private individuals from suing non-consenting states in federal court.¹ Congress, however, may abrogate a state’s Eleventh Amendment immunity under certain conditions.² In *Toledo v. Sanchez*,³ the United States First Circuit Court of Appeals examined whether the Eleventh Amendment prevented a disabled student from suing a state university for damages under Title II of the Americans with Disabilities Act (ADA).⁴ The court held that the state could not assert the Eleventh Amendment as an affirmative defense to a private action brought under Title II of the ADA because Congress validly abrogated state sovereign immunity within the parameters of its Fourteenth Amendment enforcement power.⁵

The Plaintiff, Ivan Toledo, attended the University of Puerto Rico while suffering from a schizoaffective disorder.⁶ As Toledo’s mental and physical health declined, he was unable to attend class regularly and subsequently fell into poor academic standing.⁷ The University denied Toledo’s repeated requests for accommodation.⁸ Toledo withdrew after the University denied him the opportunity to maintain his academic standing by taking classes at

1. See U.S. CONST. amend. XI (protecting states from suit). “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” *Id.*; see also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) (stating Eleventh Amendment protects non-consenting states from private suit in federal court); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72-73 (2000) (explaining Eleventh Amendment’s application to citizens’ suits against own states).

2. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003) (outlining criteria for Congress to abrogate state sovereign immunity validly); see also *infra* note 21 and accompanying text (listing factors to be determined for Congress to abrogate state immunity).

3. 454 F.3d 24 (1st Cir. 2006), *cert. denied* No. 06-779, 2007 WL 789372 (U.S. Mar. 19, 2007).

4. See *id.* at 35 (framing constitutional issue for court to address); *Pinto v. Univ. of P.R.*, 895 F.2d 18, 18 (1st Cir. 1990) (considering University of Puerto Rico to be an arm of the state within purview of Eleventh Amendment).

5. 454 F.3d at 40 (determining Title II constitutes valid exercise of Congress’s Fourteenth Amendment authority to abrogate state sovereign immunity).

6. *Id.* at 29 (identifying Toledo’s status as disabled student for Title II protection).

7. *Id.* at 30 (illustrating effect of Toledo’s condition on his academic studies). Because the case is at the motion to dismiss stage, the court accepted all of Toledo’s allegations as true. *Id.* Toledo took a leave of absence after being hospitalized for attempting to commit suicide. *Id.* He suffered side effects from his medication that prevented him from attending class on time. *Id.*

8. *Id.* (listing Toledo’s requests for accommodation). Toledo’s requests included extended time for written work and opening an afternoon session for a required course. *Id.* at 34.

another university.⁹ Later, Toledo sued the University under Title II of the ADA, alleging that the University discriminated against him because of his disability and by failing to reasonably accommodate him.¹⁰

After Toledo filed the complaint, the University moved to dismiss the Title II claims pursuant to Federal Rule of Civil Procedure (12)(b)(6) and the Eleventh Amendment.¹¹ The district court granted the motion based on the Eleventh Amendment, but reversed after the Supreme Court's decision in *Tennessee v. Lane*.¹² Finally, the court denied the University's motion for reconsideration, and the school filed an interlocutory appeal.¹³

Congress enacted Title II of the ADA to combat discrimination by governmental entities in the operation of public services, programs, and activities.¹⁴ The ADA mandates that "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."¹⁵ The Eleventh Amendment insulates states from suits brought by private citizens unless Congress validly abrogated state sovereign immunity.¹⁶ Courts may find that state immunity has been abrogated when Congress unequivocally intends to do so and acts within the constitutional parameters of section five of the Fourteenth Amendment.¹⁷

9. 454 F.3d at 30 (explaining Toledo voluntarily left University). Toledo had difficulty registering for classes because of his poor academic standing, but the University never dismissed him. *Id.* Because Toledo voluntarily left the University, his Title II claims did not raise Due Process concerns. *Id.* at 33.

10. *Id.* at 32 (setting forth allegations in Toledo's complaint). Toledo alleged that the University failed to accommodate his disability in the following ways: a professor refused to allow him to arrive late to class while making class participation a substantial portion of the grade; two other professors refused to extend deadlines for written work; and the University declined to open an evening section for a required course. *Id.* at 34. The court concluded that none of Toledo's allegations violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*

11. *Id.* at 29 (asserting affirmative defense from liability).

12. *See id.* (noting dismissal originally predicated on state immunity and reversed in light of *Tennessee v. Lane*'s uncertainty); *see also* *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (holding state sovereign immunity abrogated "as applied" to cases implicating right of access to courts).

13. 454 F.3d at 29 (describing University's response to reinstatement of Toledo's claims).

14. *See* 42 U.S.C. § 12101 (2000) (stating purpose of ADA). Congress stated that its purpose in passing the ADA was "to provide a clear and comprehensive national mandate for elimination of discrimination" against the disabled, provide "enforceable standards" addressing discrimination against the disabled, and "ensure that the federal government plays a central role in enforcing standards established" by the ADA. *Id.* Congress found a historical pattern of discrimination against the disabled in such critical areas as employment, public accommodations, education, and access to public services. *Id.*

15. 42 U.S.C. § 12132 (2000) (setting forth ADA's principles and mandates).

16. *See* U.S. CONST. amend. XI (codifying state sovereign immunity); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) (declaring Eleventh Amendment's "ultimate guarantee" protects states from private lawsuits in federal court).

17. *See* U.S. CONST. amend. XIV § 5 (granting Congress power to enforce Fourteenth Amendment through appropriate legislation); *see also* *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003) (setting forth standards under which Congress may abrogate state sovereign immunity). "Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the state and acts pursuant to a valid exercise of power under § 5 of the Fourteenth Amendment."

In passing the ADA, Congress unequivocally expressed its intention to abrogate state sovereign immunity.¹⁸

The Supreme Court previously held that Title II of the ADA may abrogate state sovereign immunity regarding state conduct that violates the Constitution, as well as some conduct that is not facially unconstitutional, but is prohibited by Title II “to prevent and deter unconstitutional conduct.”¹⁹ When Congress acts to prohibit facially constitutional conduct, a court must distinguish appropriate prophylactic legislation from “substantive redefinition of the Fourteenth Amendment right at issue.”²⁰ To determine the validity of prophylactic legislation pursuant to section five, a court must evaluate the constitutional right or rights that Congress sought to protect when it enacted the statute, whether there was a history of constitutional violations to support Congress’s determination that prophylactic legislation was necessary, and whether the statute is a “congruent and proportional” response to the history and pattern of constitutional violations.²¹ The determination regarding Congress’s enactment of “appropriate prophylactic legislation” largely hinges upon whether the factual circumstances require the court to apply a heightened standard of scrutiny, as in cases involving fundamental rights or suspect

Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 726 (2003); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001) (illustrating Eleventh Amendment immunity not absolute).

18. See 42 U.S.C. § 12133 (2000) (asserting ADA authorizes private suits against public entities). The ADA also allows plaintiffs to seek injunctive relief. *Id.*; see also *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (recognizing Congress unequivocally expressed intent to abrogate sovereign immunity in ADA).

19. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003) (articulating Congress’s authority to enact prophylactic legislation to proscribe facially constitutional conduct); see *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (applying Congress’s authority to enact prophylactic legislation to ADA); see also *United States v. Georgia*, 546 U.S. 151, 159 (2006) (holding Title II abrogates state sovereign immunity where state conduct violates Fourteenth Amendment). The Supreme Court noted that Congress may enact prophylactic legislation that proscribes facially constitutional conduct to prevent and deter unconstitutional conduct. *United States v. Georgia*, 546 U.S. 151, 159 (2006).

20. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (distinguishing permissible prophylactic legislation from usurping Court’s power to interpret and determine Fourteenth Amendment’s meaning). Section five of the Fourteenth Amendment serves both to grant and limit Congress’s power. *Id.*; see also *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (holding Congress has power “to enforce” but not to determine what constitutes constitutional violation). *But see Tennessee v. Lane*, 541 U.S. 509, 551-53 (2004) (Rehnquist, C.J., dissenting) (questioning whether majority’s “as applied” approach encroaches into realm of judicial lawmaking). Rehnquist argues that the “as applied” approach is a departure from the “congruence and proportionality” test as it is traditionally applied. *Id.* In previous jurisprudence, the congruence and proportionality has only been answered by measuring the breadth of the statutes against the first two inquiries in *City of Boerne*. *Id.*; David L. Schwan, Note, “When You Come to a Fork in the Road, Take It!”: *Tennessee v. Lane Takes a New Approach to Section Five Enforcement Powers*, 43 HOUS. L. REV. 235, 260-61 (2006) (arguing narrowing of *Boerne* test creates “hypothetical statute” created by Court and not Congress).

21. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 522-31 (2004) (describing elements of *City of Boerne* test); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (reasoning Family Medical Leave Act narrowly tailored to meet “congruence and proportionality” test); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (holding Title I of ADA did not pass “congruence and proportionality” test); *Kimel v. State of Fla. Bd. of Regents*, 528 U.S. 62, 82-83 (2000) (holding ADEA inappropriate prophylactic legislation under “congruence and proportionality” test); *City of Boerne v. Flores*, 521 U.S. 507, 529-36 (1997) (requiring need for congruent and proportional legislative remedy for constitutional violations).

classes.²² The Supreme Court maintains that when it applies rational basis scrutiny to state conduct, Congress cannot impose more than equal protection liability.²³

The Supreme Court's decision in *Lane* caused confusion in the circuit courts regarding the extent to which the ADA validly abrogates state sovereign immunity.²⁴ The confusion largely arose from the Court's adoption of an "as applied" approach that limited its holding to cases implicating an individual's fundamental right of access to courts.²⁵ The Court noted that because its

22. *Compare* Bd. of Trs. of the Univ. of Ala. v. Garret, 531 U.S. 356, 374 (2001) (upholding state sovereign immunity under rational basis review of state conduct), *and* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (upholding state sovereign immunity where state conduct reviewed under rational basis scrutiny), *with* Tennessee v. Lane, 541 U.S. 509, 531 (2004) (abrogating state sovereign immunity as applied to fundamental right of access to courts), *and* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 738 (2003) (abrogating state sovereign immunity where sex discrimination required Court to review under heightened scrutiny). See Timothy J. Cahill & Betsy Malloy, *Overcoming the Obstacles of Garrett: An "As Applied" Savings Construction For the ADA's Title II*, 39 WAKE FOREST L. REV. 133, 161 (2004) (suggesting heightened level of review tips Supreme Court's decisions in abrogating state sovereign immunity); Peter J. Molesso, Note, *Critical Point In the Disabilities Movement: How Will Tennessee v. Lane Affect Claims Brought Under Title II of the Americans With Disabilities Act?*, 80 ST. JOHN'S L. REV. 693, 714 (2006) (recognizing scrutiny level key factor in abrogation analyses by Supreme Court). *But see* Erwin Chemerinsky, *Real Discrimination?*, 16 WASH. U. J.L. & POL'Y 97, 117 (2004) (arguing Congress's power to act should not depend on level of scrutiny). Chemerinsky argues that congressional power is most important when no fundamental right is implicated because discrimination that does not receive heightened scrutiny is very difficult to challenge successfully. *Id.* at 108.

23. See Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367-68 (2001) (stating states not required to accommodate disabled if discriminatory actions deemed rational). The Court recognized that rational discrimination against the disabled is permissible under the Fourteenth Amendment. *Id.* at 367; *see also* Popovich v. Cuyahoga County Court of Common Appeals, 276 F.3d 808, 812 (6th Cir. 2002) (illustrating Due Process protection not implicated in absence of fundamental right); Bernard W. Bell, *Legislatively Revising Kelo v. City of London: Eminent Domain, Federalism, and Congressional Powers*, 32 J. LEGIS. 165, 196 (2006) (stating Supreme Court relaxes "congruence and proportionality" test when state action subjected to heightened scrutiny); Schwan, *supra* note 20, at 250 (stating discriminatory conduct constitutional when applying rational basis scrutiny).

24. See, e.g., Klingler v. Dir., Dep't of Revenue, State of Mo., 455 F.3d 888, 897 (8th Cir. 2006) (holding Title II fails to abrogate state sovereign immunity in issuing surcharge on disabled parking); Haas v. Quest Recovery Serv., Inc. 174 Fed. App'x 265, 271 (6th Cir. 2006) (reasoning *Lane* decision limited to cases implicating fundamental right of court access); Constantine v. Rectors and Visitors of George Mason Univ., 411 F.3d 474, 490 (4th Cir. 2005) (extending abrogation of state sovereign immunity to public education); *see also* Mollie Nolan, Note, *A Difference of Opinion: Reconciling the Court's Decision in Tennessee v. Lane, 541 U.S. 509 (2004)*, 30 S. ILL. U. L.J. 357, 391 (2006) (forecasting circuit splits after *Lane*). Nolan believes that the holdings in *Lane* and *Garrett* are irreconcilable because *Garrett* examined Title I as a whole, rather than the "as applied" approach. Nolan, *supra*, at 391.

25. See Tennessee v. Lane, 541 U.S. 509, 552 (2004) (Rehnquist, C.J., dissenting) (condemning majority's adoption of "as applied" approach); *see also* Nolan, *supra* note 24, at 391 (arguing *Lane*'s failure to resolve abrogation question would create circuit split); Schwan, *supra* note 20, at 238 (criticizing *Lane*'s "as applied" approach). The "as applied" approach adopted in *Lane* departed from the traditional "as applied" approach that focuses upon the distinct facts of the case. Schwan, *supra* note 20, at 238. In *Lane*, the Court determined the congruence and proportionality of Title II's enforcement of the Due Process right of access to the courts without regard for the facts of the case or other rights Title II protects. *Id.* Rehnquist argued the "as applied" approach artificially fixes the outcome of the "congruence and proportionality" test by constricting the scope of the statute to mirror a constitutional right. Tennessee v. Lane, 541 U.S. 509, 551 (2004) (Rehnquist, C.J., dissenting). The effect, according to the dissent, is that the court does not assess whether the statute is

holding only reached cases involving access to courts, it would remain silent on cases implicating rational basis scrutiny.²⁶ Courts and commentators have argued whether the Court's footnote in *Lane* distinguishes the treatment of fundamental rights from non-fundamental rights in abrogating state sovereign immunity.²⁷ The divergent interpretations of the *Lane* decision have caused lower courts to reach opposite conclusions when determining whether Title II validly abrogates state sovereign immunity in the public education context.²⁸

The First Circuit Court of Appeals in *Toledo v. Sanchez* had to determine whether the state could be sued for damages under Title II of the ADA.²⁹ The court held that Congress validly abrogated state sovereign immunity "as applied" to cases concerning access to higher public education under Title II of the ADA.³⁰ Because the Plaintiff failed to allege any state conduct that independently violated the Equal Protection or Due Process Clauses, the court limited its analysis to whether Title II was valid prophylactic legislation under section five of the Fourteenth Amendment.³¹ To make the determination, the court evaluated each of the *City of Boerne* factors.³²

appropriate prophylactic legislation, but a test of whether the court can create a hypothetical statute to pass the congruence and proportionality test. *Id.*

26. See *Tennessee v. Lane*, 541 U.S. 509, 533 n.20 (2004) (stating Court need not consider whether Title II exceeds section five parameters when applied to rational basis scrutiny).

27. See Chemerinsky, *supra* note 22, at 117 (theorizing Title II suits may only go forward when fundamental right involved); see also Marcia Coyle, *More Litigation Seen Over Court Access*, NAT'L L.J., May 24, 2004, at 1 (signaling distinction between fundamental and non-fundamental rights because of footnote in *Lane*). Compare *Carrasquillo v. City of New York*, 324 F. Supp. 2d 428, 442 (S.D.N.Y. 2004) (construing *Lane* as "upholding ADA's abrogation of a [s]tate's Eleventh Amendment immunity"), with *Johnson v. S. Conn. State Univ.*, No. 02-CV-2065, 2004 WL 2377225, at *4 (D. Conn. Sept. 30, 2004) (finding it "appears" fundamental right must be at issue for Title II to abrogate immunity validly), and *McNulty v. Bd. of Educ.*, No. Civ.A. DKC 2003-2520, 2004 WL 1554401, at *3 (D. Md. July 8, 2004) (holding state sovereign immunity not abrogated for education claims under Title II).

28. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (declaring disabled not suspect class for equal protection purposes); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding no fundamental right to public education); Valerie Jablow, *Court-Access Decision Narrow Scope Worries Advocates For Disabled*, TRIAL, July 2004, at 92 (forecasting piecemeal litigation concerning Title II in aftermath of *Lane*). Compare *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 490 (4th Cir. 2005) (concluding Title II validly abrogates state sovereign immunity as applied to public higher education), and *Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ.*, 405 F.3d 954, 957 (11th Cir. 2001) (distinguishing public education from other rights subject to rational basis review), with *Press v. State Univ. of N.Y.* at *Stony Brook*, 388 F. Supp. 2d 127, 135 (2005) (declining to extend scope of Title II to non-fundamental right of access to higher education), and *McNulty v. Bd. of Educ.*, No. Civ.A. DKC 2003-2520, 2004 WL 1554401, at *3 (D. Md. July 8, 2004) (holding state sovereign immunity stays intact for education claims under Title II). But see William D. Araiza, *The Section 5 Power After Tennessee v. Lane*, 32 PEPP. L. REV. 39, 66-69 (2004) (arguing concern over piecemeal litigation does not warrant adoption of facial approach as Rehnquist suggests).

29. 454 F.3d at 29 (stating the issue on appeal).

30. *Id.* at 40 (articulating First Circuit's holding).

31. *Id.* at 32-34 (concluding none of Toledo's allegations amounted to constitutional violations). Thus, the court's examination turned on whether Congress's abrogation of state sovereign immunity was valid prophylactic legislation within its section five authority. *Id.* at 34.

32. *Id.* at 35 (resisting temptation to conclude Title II survives first two *City of Boerne* inquiries). Other

Staying faithful to the *City of Boerne* test, the court evaluated the constitutional rights Title II sought to protect, the history of constitutional violations in public education, and whether Title II was “congruent and proportional” to the history and pattern of constitutional violations.³³ The court stated that Congress enacted Title II to protect the disabled from arbitrary exclusion and irrational discrimination.³⁴ To support the need for the ADA, the court cited the record of persistent unconstitutional state action and the inability of earlier legislation to address irrational discrimination against the disabled.³⁵ Finally, the court determined that Title II, “as applied” to public education institutions, was both proportional and congruent to the objective of eliminating categorical exclusion and discrimination against the disabled.³⁶ Accordingly, the court held that Title II satisfied the *City of Boerne* test and that Congress validly abrogated state sovereign immunity under Title II in the context of public education.³⁷

The court correctly resisted the temptation to bypass the first two prongs in the *City of Boerne* analysis and only commented on the “congruence and proportionality” aspect of the test.³⁸ While other circuit courts have determined that Title II conclusively satisfies the first two *City of Boerne* prongs, the Supreme Court has analyzed each step when determining whether state sovereign immunity has been abrogated in a variety of legislative acts.³⁹ Given the breadth of Title II, it would be an error for the court not to focus the *City of*

circuit courts interpreted *Lane* as holding that Title II satisfies the first two inquiries of the *City of Boerne* test, leaving only the “congruence and proportionality” test. *Id.*

33. 454 F.3d at 34-35 (setting forth *City of Boerne* factors).

34. *Id.* at 36-37 (satisfying *City of Boerne*'s initial inquiry).

35. *Id.* at 38-39 (examining history of discrimination against disabled). In satisfying the second prong of the *City of Boerne* test, the court relied on the same sources as the *Lane* Court: state statutes, court decisions, and examples from the legislative history of the ADA. *Id.* at 37-39.

36. *Id.* at 39-40 (reasoning Title II passes “proportional and congruent” test in public education context). The court followed the Eleventh and Fourth Circuits in finding that Title II “validly abrogated state sovereign immunity in the context of public education.” *Id.* at 40. The court emphasized that Title II only imposes “reasonable accommodations” on public education institutions, which will reduce financial and administrative burdens. *Id.* at 39.

37. 454 F.3d at 40 (holding Title II is a valid exercise of congressional authority after considering *City of Boerne* factors).

38. *See id.* at 35 (recognizing importance of understanding specific constitutional rights and violations for “congruence and proportionality” test); *see also* *Tennessee v. Lane*, 541 U.S. 509, 530 (2004) (recognizing Title II reaches wide variety of official conduct). *But see* *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 487-88 (4th Cir. 2005) (deferring to findings of *Lane* Court for first two prongs of *City of Boerne* test); *Ass'n for Disabled Americans, Inc. v. Fla. Int'l Univ.*, 405 F.3d 954, 958 (11th Cir. 2005) (holding *Lane* findings controlling for first two prongs of *Boerne* test).

39. *See, e.g., Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728-37 (2005) (evaluating all three *City of Boerne* factors); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365-74 (2001) (identifying and examining history of constitutional rights and violations under Title I of ADA); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (citing lack of historical discrimination as factor in holding ADEA disproportional prophylactic legislation).

Boerne factors on the particular state conduct at issue.⁴⁰ Failure to identify the protected constitutional rights under Title II, and the detailed history of constitutional violations, would inhibit the court from applying a meaningful “congruence and proportionality” test.⁴¹

While the court applied the correct standard, it ultimately drew the wrong conclusion by failing to recognize the distinction between fundamental and non-fundamental rights when applying the “congruence and proportionality” test.⁴² The Supreme Court, in *Lane*’s footnote twenty, distinguished the treatment of fundamental and non-fundamental rights by stating the Court “need not consider” whether Title II exceeds section five parameters when the government actions are subjected to rational basis scrutiny.⁴³ The footnote stands for the proposition that only when heightened scrutiny is triggered may Congress validly abrogate state sovereign immunity under the *City of Boerne* test.⁴⁴ The Supreme Court’s ratcheting up of the “congruence and proportionality” test where rational basis scrutiny is warranted makes it nearly impossible for state sovereign immunity to be abrogated under the circumstances in *Toledo v. Sanchez*.⁴⁵ Because the disabled are not a suspect class for purposes of heightened scrutiny, and higher education is not a fundamental right, the court should not have abrogated state sovereign immunity where the discriminatory acts were subject to rational basis

40. See *Tennessee v. Lane*, 541 U.S. 509, 530 (2004) (discussing Title II’s wide scope); see also 454 F.3d at 35 (stating history of discrimination and need for prophylaxis vary greatly in different contexts).

41. See 454 F.3d at 35 (declaring first two prongs necessary to answer congruence and proportionality inquiry); see also *Tennessee v. Lane*, 541 U.S. 509, 523-30 (2004) (addressing particular rights at stake and record of constitutional violations).

42. See *Johnson v. S. Conn. State Univ.*, No. CIV3:02-CV-2065(CFD), 2004 WL 2377225, at *4 (D. Conn. Sept. 30, 2004) (theorizing only fundamental right could pass “congruence and proportionality” test); see also *Chemerinsky*, *supra* note 22, at 117 (positing suits may only move forward if fundamental right at issue); *Coyle*, *supra* note 27, at 1 (explaining *Lane* footnote as distinction between treatment of fundamental and non-fundamental rights).

43. See *Tennessee v. Lane*, 541 U.S. 509, 533 n.20 (2004) (refraining from commenting on whether rational basis scrutiny abrogates state sovereign immunity).

44. See *Johnson v. S. Conn. State Univ.*, No. CIV3:02-CV-2065(CFD), 2004 WL 2377225, at *4 (D. Conn. Sept. 30, 2004) (reasoning rational basis scrutiny not enough to pass “congruence and proportionality” test); see also *McNulty v. Bd. of Educ.*, No. Civ.A. DKC 2003-2520, 2004 WL 1554401, at *3 (D. Md. July 8, 2004) (holding state sovereign immunity stays intact for education claims under Title II); *Molesso*, *supra* note 22, at 714 (recognizing scrutiny level as key factor in abrogation analyses by Supreme Court). *But see* *Chemerinsky*, *supra* note 22, at 108 (arguing statutory protection most important where rational basis scrutiny applied).

45. See *Bd. of Trs. of the Univ. of Ala. v. Garret*, 531 U.S. 356, 374 (2001) (upholding state sovereign immunity where rational basis factored into “congruence and proportionality” test); see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (holding rational basis scrutiny fails “congruence and proportionality” test); *Bell*, *supra* note 23, at 193 (stating Congress has weaker authority to legislate against state action subject to rational basis review). *Bell* states that when comparing the decisions in *Garrett*, *Kimel*, *Hibbs*, and *Lane*, it is evident that that Supreme Court significantly relaxes the rigors of the “congruence and proportionality” test where heightened scrutiny is triggered, as opposed to rational basis. *Bell* *supra* note 23, at 196; see also *Cahill & Malloy*, *supra* note 22, at 161-62 (highlighting rational scrutiny as determinative factor in failing to abrogate state sovereign immunity).

scrutiny.⁴⁶

The court also erred by adopting the “as applied” approach articulated in *Lane*, which led to judicial lawmaking by rewriting the substantive terms of an overbroad statute.⁴⁷ This approach enabled the court in *Lane* to create a “hypothetical statute” narrowly tailored to pass the *City of Boerne* test, rather than evaluating the act passed by Congress.⁴⁸ Contrary to the Supreme Court’s jurisprudence prior to *Lane*, the adoption of the “as applied” approach impermissibly severs the statute.⁴⁹ This method will create piecemeal litigation, leading to inconsistent judgments regarding abrogation of state sovereignty.⁵⁰ Even without the ability to sue states for damages, plaintiffs can enforce Title II’s protections and obligations through injunctive relief.⁵¹

The First Circuit Court of Appeals determined that Title II validly abrogated state sovereign immunity as applied to the right of access to higher public education. In rendering its decision, the court failed to recognize the difference between fundamental and non-fundamental rights in applying the “congruence and proportionality” test, and to appreciate the pitfalls of the “as applied” approach. As a result, the court’s endorsement of the “as applied” approach will lead to further judicial lawmaking outside the powers of the judicial branch.

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46. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (declaring disabled not suspect class for Equal Protection purposes); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding no fundamental right to public education). But see *Ass’n for Disabled Ams. v. Fla. Int’l Univ.*, 405 F.3d 954, 957 (11th Cir. 2001) (distinguishing public education from other rights subject to rational basis review). Although the Eleventh Circuit did not consider the right to equality in education as fundamental, they did note that harms in denying individuals the right to an education can be devastating. *Id.* at 957-58.

47. See *Tennessee v. Lane*, 541 U.S. 509, 551-53 (2004) (Rehnquist, C.J., dissenting) (questioning whether “as applied” approach encroaches into realm of judicial lawmaking); see also 454 F.3d at 39 (adopting “as applied” approach articulated in *Lane*); Schwan, *supra* note 20, at 260-61 (arguing “as applied” approach creates and examines fictional statute created by Court and not Congress).

48. See *Tennessee v. Lane*, 541 U.S. 509, 551-53 (2004) (Rehnquist, C.J., dissenting) (arguing Court should measure Title II’s breadth against constitutional rights it means to protect); see also Schwan, *supra* note 20, at 260-61 (agreeing with Rehnquist’s view “as applied” approach offends Court’s overbreadth jurisprudence).

49. See *Tennessee v. Lane*, 541 U.S. 509, 551 (2004) (Rehnquist, C.J., dissenting) (rejecting majority’s conclusion regarding Title II’s massive overbreadth solved by “as applied” approach).

50. See *Tennessee v. Lane*, 541 U.S. 509, 552 (2004) (Rehnquist, C.J., dissenting) (arguing “as applied” approach will subject states to litigation attempting to vindicate Eleventh Amendment rights); see also Jablow, *supra* note 28, at 92 (forecasting piecemeal litigation concerning Title II in aftermath of *Tennessee v. Lane* decision). But see Araiza, *supra* note 28, at 66 (arguing concern over piecemeal litigation does not warrant adopting facial approach Rehnquist suggests).

51. See 42 U.S.C. § 12101 (2000) (setting forth availability of injunctive relief to injured parties).