Disability Advocacy: Strategizing a Comprehensive and Contextual Path Forward

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Date : October 12, 2015

Michael E. Waterstone, *Disability Constitutional Law*, 63 **Emory L.J.** 527 (2014).

Constitutional Law should be harnessed in the service of disability law. That it has not been a central site for the advocacy of the disability rights movement is something that Professor Waterstone bemoans. In this Emory Law Journal article, he traces the seemingly bifurcated trajectories of the LGBT and Disability Rights movements, insofar as their use of constitutional strategy is concerned. Through a careful analysis of these moves, Prof. Waterstone concludes that the Disability Rights movement has suffered setbacks through constitutional law, but the time is ripe to recoup the use of constitutional law to advance the umbrella of disability rights. Harkening to recent victories in LGBT movements, this article seeks to lay a foundation for Disability Constitutional Law.

Prof. Waterstone acknowledges that there likely exists amongst disability rights advocates an understandable reluctance to engage constitutional law stemming from the *Cleburne*[1] case, and its unfortunate legacy for the disability rights movement. While the holding in *Cleburne*[2] struck down an ordinance infringing the Equal Protection rights of persons with "mental retardation," the case has proven less progressive and unsupportive of disability rights broadly speaking. In holding that this disability classification was only entitled to rational basis scrutiny, the decision has become concretized in a way that, for practical purposes, has meant that "the most restrictive aspects" of the majority decision have "stayed frozen in time for people with disabilities." (P. 529.) Additionally, subsequent Supreme Court decisions have stretched *Cleburne*'s application to include a "diverse universe of people with disabilities," thereby casting too long a shadow of rational basis scrutiny in the disability rights arena. (P. 542.) Specifically, in holding that the decision in *Cleburne* on mental retardation included a vastly expanded category of "the disabled," the Court in *University of Alabama v. Garrett*[3] significantly expanded the reach of *Cleburne* in a way that has proven hard to overcome.

This legacy of constitutional opaqueness is disconcerting, especially given the ways in which LGBT advocates have successfully utilized the constitutional arena. Clearly there are opportunities to push forward a disability constitutional agenda in intentional ways.

Though there have been setbacks for the movement, Prof. Waterstone analyzes the more rapid pace and progress of the LGBT movement through carefully strategized constitutional law advocacy. He suggests that, while there are obviously differences in the movements ("LGBT and disability causes are of course different, operating in different political and legal spaces" (P. 531) disability law can and should do more to, similarly, push for fulfillment of the Constitution's guarantees of equal protection and full citizenship. Drawing analogies to the LGBT movement, Prof. Waterstone notes both, admittedly umbrella, groups have a history of prejudice and segregation, and continue to experience stigma due to their long histories of discrimination. (P. 533.)

Prof. Waterstone believes a rejuvenated constitutional law strategy for disability rights might correct a central error in *Cleburne* by creating a space for Equal Protection Clause jurisprudence that is uncoupled from pity and benevolence, and which is instead moored to historical oppression and a commitment to "contextualized Equal Protection review for state laws that facially discriminate against people with

disabilities." (P. 533.) While *Cleburne* is far from perfect (i.e. the majority stated, "while racial minorities and women are all monolithic for purposes of state classification, people with mental retardation are not 'cut from the same pattern.'" (P. 538.) and the majority opinion has been interpreted as assuming mentally retarded people to "be a class of naturally inferior people." (P. 541.) and has proven to be challenging precedent for disability rights advocates, proponents of marriage equality have faired better at harnessing the power of this precedent. LGBT activists "have mobilized more effectively and done more with *Cleburne* and the Equal Protection Clause in both federal and state courts." (P. 564.) As such, Prof. Waterstone urges that "[t]heir campaigns offer important lessons for disability advocates." (P. 564.)[4]

Prof. Waterstone surfaces several examples of statutes that facially discriminate, particularly in the areas of "family law, voting, commitment proceedings [] the provision of benefits," bars to professional licensing, and of course employment and public accommodation. (P. 548–55.) As daunting as it might seem, and despite the majority decision in *Cleburne*, there remains a glimmer of hope not just from the progressive vision articulated in *Cleburne* by the respective concurrences and dissents of Justices Marshall and Blackmun, who preferred heightened scrutiny of state action on the basis of disability, but also because of the compelling dissent of Justice Breyer in *Garrett*, which "demonstrated an amenability to a more nuanced consideration of the constitutional dimension of state discrimination on the basis of disability."[5]

Thus Prof. Waterstone's piece sheds light on a more comprehensive and contextual path for disability rights advocacy, one that recognizes the constitutional building blocks in a similar way as have "LGBT advocates [] proven particularly adept at showing what is possible under state law [by using] *Cleburne* to help secure heightened scrutiny for marriage laws that discriminate on the basis of sexual orientation." To demonstrate this potential, Prof. Waterstone highlights a promising Connecticut case.

In *Kerrigan v. Commissioner of Public Health*,[6] a marriage equality case, the Supreme Court of Connecticut recognized its authority to evolve the Connecticut constitution as "an instrument of progress, [] intended to stand for a great length of time and [] not [to…] interpret[] [it] too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens."[7] In so doing, the Connecticut court acknowledged its "greater latitude" to weigh additional factors beyond the more narrow Supreme Court focus on the history of invidious discrimination and whether the distinguishing characteristic relates to one's ability to contribute to society, but also to consider immutability and political powerlessness. (P. 573–74.) Using Justice Marshall's concurrence and dissent in *Cleburne* as a roadmap, the Connecticut court interpreted the Equal Protection Clause by focusing on "the social and cultural isolation of the excluded group." (P. 574.) Importantly, the court also took the view that protective legislation acknowledged, and did not indicate the end of, intentional discrimination. (P. 574.) Together with a few other cases,[8] Prof. Waterstone holds the *Kerrigan* case up for disability rights activists – its embrace of four constitutional factors, instead of just two, offers a more robust analysis which he interprets as boding well for disabled individuals. I hope he is right.

1. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).
2. *Id.*
3. 531 U.S. 356 (2001) finding that, "[s]tates are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." [Emphasis added]
4. See pp. 564–73, noting, "The application of *Windsor* to disability rights cases is inexact but, I would suggest promising. In striking down section 3 of DOMA, the Court considered the nature of the right (marriage), the severe impact on same-sex couples and their families, and the intentional nature of the law."

5. University of Alabama v. Garrett, 531 U.S. 356, 376-77 (2001).
6. 957 A.2d 407, 411 (Conn. 2008).
7. *Id*. 421, quoted at P. 573.
8. *See* Daly v. DelPonte, 624 A. 2d 876 (Conn. 1993); Breen v. Carlsbad Municipal Schools, 2005-NMSC-028, S 1, 138 N.M. 331, 130 P. 3d 413; People v. Green, 561 N.Y. 2d. 130, 131 (Westchester Cnty. Ct. 1990).

Cite as: Camille Nelson, *Disability Advocacy: Strategizing a Comprehensive and Contextual Path Forward*, JOTWELL (October 12, 2015) (reviewing Michael E. Waterstone, *Disability Constitutional Law*, 63 **Emory L.J.** 527 (2014)), https://equality.jotwell.com/disability-advocacy-strategizing-a-comprehensive-and-contextual-path-forward/.