Equal Protection for People with Disabilities

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DELAWARE VOICE
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One hundred fifty years ago, the United States Congress completed its work on a proposed Fourteenth Amendment to the United States Constitution.

That amendment, ratified by the states in 1868, contained the first equality guarantee in the history of the Constitution: It obliged the states to afford to a person the “equal protection of the law.”

The Fourteenth Amendment is generally considered the greatest legal achievement of the first Reconstruction, the effort to rebuild the nation after the Civil War. Delaware, alas, missed out on Reconstruction. When the Fourteenth Amendment was considered by the Delaware Legislature, the General Assembly rejected it, just as it had the Thirteenth Amendment, abolishing slavery, and just as it would the Fifteenth Amendment, extending suffrage to the Freedmen. (Years later, it would reject the Nineteenth Amendment, extending suffrage to women; the state, at least, earned high marks for consistency.) And it wasn’t just the Reconstruction Amendments that Delaware rejected. It was the entirety of the effort to promote racial equality.

As it evolved, that struggle for equality needed a second Reconstruction, and this time Delaware was at the forefront. Chancellor Seitz’s 1950 opinion ordering the desegregation of the University of Delaware was the first of its kind in the nation. Two years later, Chancellor Seitz ordered the desegregation of Delaware public schools, and the Delaware Supreme Court affirmed. A second Reconstruction was indeed underway.

It is with this history in mind that we observe with such pride our home state’s leadership in what might be a third Reconstruction, one more attempt to realize the promise of equality to all our people. The proposed Equal Protection Amendment to the Delaware Constitution manifests our enduring commitment to the heart of Reconstruction, the struggle for equality.

And it is vitally needed, especially for Delawareans with disabilities.

The federal Equal Protection guarantee, as it has been interpreted by the United States Supreme Court, has offered frightfully little protection to people with disabilities. In 1927, the Court ruled that the Fourteenth Amendment permitted the sterilization of a woman who, like her mother and daughter, was believed to be intellectually disabled. “Three generations of imbeciles are enough,” Justice Holmes wrote, and his decision has never been overturned. In 1985, a divided court ruled that people with intellectual disabilities are entitled only to minimal protection under the Fourteenth Amendment; discrimination against them is permitted, the majority ruled, as long as it is “reasonable.” That protection is so minimal that in 2001, the Supreme Court, in another controversial 5-4 decision, ruled that portions of the Americans with Disabilities Act were unconstitutional because Congress was giving too much protection to people with disabilities.

The act required accommodations for employees with disabilities, but the Constitution requires no such thing: It is reasonable, the court ruled, for employers to refuse to make those accommodations for employees with disabilities, and to refuse to hire any people with disabilities who need them.

The weakening of federal constitutional protection is especially unfortunate in light of the many disadvantages still confronting people with disabilities. According to the Census Bureau, the poverty rate for people with disabilities is a staggering 28.5 percent, more than double the rate (12.3 percent) for people without disabilities. A recent review of studies concluded that the life expectancy of people with disabilities is correlated not only with their underlying impairments, but also with their employment status, their income, and their degree of community integration. And people with disabilities are still routinely denied the right to work, the right to an inclusive education, and the right to live in our communities.

Federal civil rights laws, like the ADA and IDEA, have helped, and so too have Delaware laws like the Persons With Disabilities Employment Protections Act.

They embrace the great transformation in our understanding of disability that it is located not exclusively in the mind or body of an individual with an impairment, but rather in the gap between that individual’s abilities and the demands we place on them. They recognize, for example, that a mobility impairment can really become a disability when we demand that people enter our buildings by climbing steps, rather than ramps, and so they require accommodations and adjustments and special educational services, to avoid the disabling effects of our unthinking demands. They require, in short, a modest reconstruction.

But much is left uncovered by legislation, and even that which is covered has been subject to the whims of a hostile Supreme Court. A state guarantee of equal protection thus fills some of the void. The proposed Equal Protection Amendment would offer to Delawareans with disabilities more than just minimal protection against discrimination.

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