The Elephant in the Room: Inequality

Rodney A Smolla
The Delaware Constitution currently contains no equal protection provision of any kind. This is an unfortunate omission, and should be corrected. ¶ Consider, first, the broader American landscape. ¶ The Fourteenth Amendment to the Constitution of the United States forbids denial “of the equal protection of the laws.” Many other states similarly include a guarantee of equality in their state constitutions. Consider, second, that Delaware has enshrined many other fundamental rights in the Delaware Constitution, including freedom of religion, free and equal elections, freedom of speech and press, protection against unreasonable searches and seizures, multiple protections for those accused of crimes, protection against unlawful deprivation of life, liberty or property, the writ of habeas corpus, freedom of assembly, the right to petition the government for a redress of grievances, and the right to bear and keep arms. ¶

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Rod Smolla Dean of the Widener University Delaware Law School

The Delaware Constitution currently turns its back on equal protection, but that could all change with a proposed General Assembly amendment stating:

“Equal protection under the law shall not be denied or abridged because of race, sex, age, religion, creed, color, familial status, disability, sexual orientation, gender identity, or national origin.”

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In contrast to both the national picture and those other revered protections already recognized in Delaware, the silence of the Delaware Constitution on the fundamental issue of human equality is striking.

The time has come to openly declare Delaware’s commitment to equality for all.

This is a matter of both substance and symbol. Although the federal Constitution does guarantee the equal protection of the laws, decisions of the United States Supreme Court limit the power of that guarantee. Age discrimination is a prime example. The Supreme Court has ruled that the federal Equal Protection Clause provides no meaningful protection against age discrimination. Gender equality is another. The Supreme Court has not elevated gender equality to the same high level of protection that now exists for racial equality. (This would have been remedied had the proposed Equal Rights Amendment to the United States Constitution been ratified, but the national ERA never gained the requisite ratification of three-fourths of the states.)

In our American federal system the states have a sovereignty of their own, distinct from the national government, and the people of a state have the right and the duty to ensure that the fundamental values of the state are protected in the state’s basic charter.

Delaware is Delaware, and its people have a right to equal protection as deep and as wide as the people of Delaware seek and deserve, whether or not the federal government “is there yet.” The proposed Delaware equal rights amendment would thus place the First State back in the constitutional lead in America, declaring Delaware’s commitment to banning a broad range of discrimination across the spectrum of human identity and experience.

There are, fortunately, already many federal, state, and local laws on the books that do provide statutory prohibitions of various kinds against certain types of discrimination.

There are specific laws, for example, dealing with discrimination on grounds of disability or age. These statutory civil rights laws, however, do not have the same resiliency or resonance as constitutional protections. Ordinary legislation, whether passed by the United States Congress or the General Assembly of Delaware, may be amended or entirely repealed as majorities come and go.

The whole point of a constitutional guarantee is to elevate certain foundational principles above the fray. Constitutional rights exist to insulate core values from the vicissitudes of politics, imbuing certain fundamental rights with higher moral and legal stature.

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The facts are still unfolding, but there is no question that Omer Mateen’s terrible act of violence is a hate crime. As is evident from the outpouring of approbation involved in being Muslim, we must condemn those who teach and preach such hate. As is evident from the outpouring of hate. As is evident from the outpouring of approbation involved in being Muslim, we must condemn those who teach and preach such hate, as is evident from the outpouring of approbation involved in being Muslim, we must condemn those who teach and preach such hate. As is evident from the outpouring of hate, we must condemn the values that inspire such hate.

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The United States and Delaware Constitutions severely limit the power of government to tinker with and make ongoing adjustments to freedom of speech or freedom of religion precisely because we deem such rights so inalienable and fundamental that we do not want them discarded or diluted by simple majority votes.

The same should be true of the elemental human dignity possessed by all people in Delaware, a dignity that ought to guarantee them equality before the law, whatever their race, sex, age, religion, creed, color, familial status, disability, sexual orientation, gender identity or national origin.

It is hard to imagine the First State being first in anything more noble and enduring.

Rod Smolla is Dean of the Widener University Delaware Law School, and a nationally known constitutional law scholar and lawyer.