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To Protect Human Rights, Look to State Constitutions

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Migrants to the United States are unlawfully imprisoned in other countries' jails.

A state National Guard is federalized illegally to stop protests by supporters of immigrant due process rights.

Foreign students and faculty, legally in this country, who engage in pro-Palestinian advocacy are threatened with deportation.

The Supreme Court has eliminated the constitutional right to abortion, invalidated a key part of the Voting Rights Act, and weakened laws protecting LGBTQ+ people from discrimination.

In the face of the Trump administration's hostility to human rights and federal retrenchment in the protection of those rights, what are Americans dedicated to human rights to do?

Our answer? Look increasingly to the states to provide those protections.

Certainly, many states have taken the lead in denying rights of women, LGBTQ+ individuals, union members, and minority voters. So, how can those same states be viewed as potential frontline protectors of those, and other, rights? Here's how.

Enumerated State Constitutional Rights

Freedom of speech. Protection of habeas corpus. Right to reproductive freedom. Right of workers to organize. Rights to fair and open elections. Free access to public beaches.

This is just a small sampling of provisions, enumerated in various state constitutions, that articulate rights of citizens and non-citizens beyond those found in the U.S. Constitution. Some of these explicit protections go back to the early days of our Republic. Others are of more recent vintage. Common to these enumerated state constitutional rights, however, is that they provide additional layers of human rights protections beyond those provided by the federal government, as called for in Justice William J. Brennan Jr.'s celebrated 1977 law review article, "State Constitutions and the Protection of Individual Rights."

Unenumerated State Constitutional Rights

The Ninth Amendment to the U.S. Constitution states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." To be sure, there are few instances in our nation's history in which federal rights have been secured under this amendment. At the state level, however, things may be different.

Some two-thirds of the states have placed language similar to the Ninth Amendment in their state constitutions. And it is to those state-based constitutional protections of unenumerated rights to which human rights advocates increasingly should turn for support.

In Georgia, for example, where newly proposed legislative maps were designed to dilute the representation of minorities, the state constitution states that "[t]he enumeration of rights herein contained . . . shall not be construed to deny to the people any inherent rights. . . ." Couldn't the right to have equal representation by all voters be deemed an "inherent right," albeit unenumerated?

In Florida, which has fought to ban gender-affirming care for transgender minors, the state constitution says that "[t]he enunciation herein of certain rights shall not be construed to deny or impair others retained by the people." Couldn't the right to access necessary medical treatment regardless of sexual expression be deemed an unenumerated right not to be denied or impaired?

International Law

Jus cogens is a fundamental principle of international common law from which no deviation is permitted, anywhere. Torture, slavery, and genocide are examples of activities generally regarded as being banned globally under the principle of jus cogens. And the United Nations' Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948 and regarded as a foundational document in the history of human rights' protections, sets forth a wide variety of rights to be regarded as universal.

Though the United States has often shied away from signing international human rights treaties and other agreements, international law could play a much more important role in informing interpretations of state constitutional law. As Justice Anthony Kennedy noted in his 2005 decision in *Roper v. Simmons*, which made it unconstitutional to impose capital punishment for crimes committed before the age of 18: "The opinion of the world community, while not controlling outcome, does provide respected and significant confirmation for our own conclusions."

In Idaho, where lawyers for a homicide suspect are fighting prosecutors' desire to include the death penalty as punishment if their client is convicted, the state constitution bans cruel and unusual punishments. Couldn't the principle of jus cogens be raised by defense counsel as demonstrating the evolving opinion of the world community that capital punishment is morally wrong? It's not legal precedent in Idaho, but it's certainly relevant.

In Ohio, which is seeking to restrict public sector unions, the state constitution notes that "all powers, not herein delegated, remain with the people." Couldn't the right to join a labor union, noted within the United Nations' Universal Declaration of Human Rights as a global human right, be deemed a retained right that remains with the people of Ohio?

In short, state constitutional tools to protect increasingly vulnerable human rights are available. Now is the time that human rights advocates need to use them creatively.

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