

To Protect Rights Under Assault, Turn To The States

Paul Bardack and Patrick Nichols

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“I must lose myself in action,” wrote Alfred Lord Tennyson, “lest I wither in despair.”

That quote came to us one recent morning as we turned on our laptops and began to read the overnight news and email.

We learned about the terror ICE arrests have engendered in communities throughout our nation. We saw an article about Justice Department weaponization of government against perceived political opponents. We read about efforts to gerrymander voting districts to reduce minority voting power. And, pressing on, we learned of new proposals to further marginalize members of the LGBTQ community.

But, most distressingly, we read an email thread from some friends. All are political centrists. All are active in their communities, volunteering their time and energies to help those in need. None are ideologues. And each noted that they are losing hope for our country.

Our friends are not alone. As a recent report issued by the Carnegie Endowment for International Peace noted, “US democracy is being put to the test as never before in the country’s modern history.” An autocratic President, an absent Congress, and a supine Supreme Court got us to this point. Hard earned rights taken for granted by generations of Americans, thanks to prior federal protection of those rights, can no longer be assumed.

And everywhere one turns outside the MAGA echo chamber, despair is palpable. At the dinner table. In our houses of worship. And at family gatherings.

Yet, as we responded to our friends, there is another more hopeful path ahead of us, one that does not inexorably lead to despair. And, perhaps surprisingly, it runs through the states.

For just as our US constitution has a Bill of Rights, now tragically under federal and private assault, each and every state has its own constitution. Each of those state constitutions contains a cluster of protected rights for those who live and work within the state, sometimes explicitly enumerated and other times not. And quite often those state rights protections are more powerful, and broader, than the rights protected federally.

For example, after the Supreme Court in 2022, in the case of *Dobbs v Jackson Women's Health Organization*, effectively ended the federal constitutional right to abortion, numerous states --- including California, Michigan, Ohio, Vermont, Arizona, Colorado, Maryland, Missouri, Montana, and New York --- established state constitutional protection of the right abandoned by our federal government.

Nor do states have to wait reactively for the federal government to limit or to create rights before they will act to protect those rights. After all, the precedent for a federal Bill of Rights, enacted in 1791 some two years after the US Constitution was ratified, was the numerous pre-existing rights found in the constitutions of Virginia, Delaware, Pennsylvania, Maryland, North Carolina, Massachusetts, and New Hampshire.

So to cite just one instance in which a state didn't wait for federal action to protect a right, in 1912 Oregon's constitution was amended to allow Oregon's women the right to vote, eight years before ratification in 1920 of the 19th Amendment to the US Constitution which allowed women of all states to do so.

Moreover, some states even constitutionally protect rights which never have been protected federally. Beginning in 1972, for example, Montanans have had a constitutional right to a clean and healthful environment. And since 2009, Texans have had the constitutional right to access public beaches.

This is as it should be. As University of Wisconsin law professor Miriam Seifter has argued persuasively, because they are closer to the people state institutions offer democratic opportunity that federal institutions do not. And as Anthony Sanders has written in his book "*Baby Ninth Amendments: How Americans Embraced Unenumerated Rights and Why It Matters*," state judges often have far more latitude to identify and protect rights than do federal judges.

This is not to say that we can assume states will serve automatically as protectors of civil rights. Far from it, we acknowledge. Recall that in 1963 Alabama Governor George Wallace blocked Black students from entering the University of Alabama by asserting his state's right to maintain segregation. And today the American Civil Liberties Union is tracking some 616 anti-LGBTQ pieces of state legislation nationwide.

But at a time of unparalleled federal retrenchment in its protection of long assumed civil rights, action must shift --- however imperfectly --- from federal protection of rights to state protection of rights.

For as Tennyson wrote, and as we told our despairing friends, action is the only antidote to despair. And today much of that action, we contend, must take place in our states.

Paul Bardack and Patrick Nichols are co-founders of the nonpartisan StatesRise: The State and Local Human Rights Center. Their commentaries on state constitutions as protectors of rights have appeared in *The Washington Post*, *The Baltimore Sun*, *The Champaign-Urbana*

Source links supplied with the manuscript

1. Tennyson quote: Quote: I must lose myself in action, lest I wither in despair...
<https://publicquotes.com/quote/44027/i-must-lose-myself-in-action-lest-i-wither-in-despair.html>
2. Carnegie Endowment quote: U.S. Democratic Backsliding in Comparative Perspective | Carnegie Endowment for International Peace
<https://carnegieendowment.org/research/2025/08/us-democratic-backsliding-in-comparative-perspective?lang=en>
3. Miriam Seifter: "State Institutions and Democratic Opportunity" by Miriam Seifter
<https://scholarship.law.duke.edu/dlj/vol72/iss2/1/>
4. Anthony Sanders: Baby Ninth Amendments: How Americans Embraced Unenumerated Rights and Why It Matters - Institute for Justice
<https://ij.org/books/baby-ninth-amendments-how-americans-embraced-unenumerated-rights-and-why-it-matters/>