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AFTER *PATEL*: STATE CONSTITUTIONAL LAW & TWENTY-FIRST CENTURY DEFENSE OF ECONOMIC LIBERTY

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The vast majority of today's citizens have no inkling to what they owe their liberty and prosperity, namely a long and successful

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struggle for rights of which the right to property is the most fundamental.[1]

INTRODUCTION

When it comes to defending economic liberties and property rights in the modern era, the United States Supreme Court — the institution which Americans expect to defend their most precious liberties — has by and large completely failed. For the better part of seven decades, popular complacency toward the gradual chipping away of constitutionally guaranteed property rights ruled the day.[2] But the bubble burst in 2005. The scale of the popular outrage in reaction to *Kelo v. New London* (opposed by up to 95% of Americans in polls taken that year) was most visible at the state level, as state legislatures and state courts in forty-five states rushed to establish stronger protections for property owner.[3]

Thus, federal constitutional law's folly became state constitutional law's gain, making it clear that state constitutional law was a viable means to achieve greater protection for economic liberties than was possible through federal constitutional law, even in the context of interpreting similarly worded takings clauses.[4]

However, eminent domain and physical takings of property are but one category of economic liberties cases that concern constitutional law, both at the federal and state level. Moreover, protections against uncompensated takings of private property for private benefit are a specifically enumerated right in the constitutions

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[1] RICHARD PIPES, PROPERTY AND FREEDOM 291 (1999).

[2] RICHARD A. EPSTEIN, SUPREME NEGLECT 3 (2008).

[3] Kelo v. New London, 545 U.S. 469 (2005); ILYA SOMIN, THE GRASPING HAND 135, 139, 181-203 (2015); *See, e.g.*, City of Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006).

[4] *See City of Norwood*, 853 N.E.2d at 365-72 (disagreeing with the U.S. Supreme Court's jurisprudence of the "public use" requirement of eminent domain).

of the United States and forty-nine States.[5] In contrast, plaintiffs challenging occupational licensing restrictions and other protectionist laws must rely on unenumerated, constitutionally protected liberties in the constitution's "glittering generalities," such as the "due process of law," equal protection," or "privileges or immunities."[6]

Challenges to occupational licensing laws on the basis of state constitutions have been at the forefront of these efforts, with plaintiffs finding their greatest success at the Texas and Pennsylvania Supreme Courts in *Patel v. Tex. Department of Licensing & Regulation*

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[5] *See* Steven G. Calabresi et al., *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in a Modern-Day Consensus of the States?*, 94 NOTRE DAME L. REV 49, 103-04, 103 n.262 (2018) [hereinafter Calabresi et al., *State Constitutions in 2018*]. *See* U.S. CONST. amend. V, §4. *See* ALA. CONST. art. I, § 23; ALASKA CONST. art. I, § 18; ARIZ. CONST. art. II, § 17; ARK. CONST. art. II, §§ 22–23; id. art. XII, § 9; CAL. CONST. art. I, § 19; COLO. CONST. art. II, §§ 14–15; CONN. CONST. art. I, § 11; DEL. CONST. art. I, § 8; FLA. CONST. art. X, § 6; GA. CONST. art. I, § 3, para. 1; HAW. CONST. art. I, § 20; IDAHO CONST. art. I, § 14; ILL. CONST. art. I, § 15; IND. CONST. art. I, § 21; IOWA CONST. art. I, § 18; KAN. CONST. art. XII, § 4; KY. CONST. Bill of Rights, § 13; LA. CONST. art. I, § 4; ME. CONST. art. I, § 21; MD. CONST. art. III, § 40; MASS. CONST. pt. 1, art. X; MICH. CONST. art. X, § 2; MINN. CONST. art. I, § 13; MISS. CONST. art. III, § 17; MO. CONST. art. I, § 26; MONT. CONST. art. II, § 29; NEB. CONST. art. I, § 21; NEV. CONST. art. I, § 8; N.H. CONST. pt. 1, arts. XII(a), XIV; N.J. CONST. art. I, para. 20; N.M. CONST. art. II, § 20; N.Y. CONST. art. I, § 7; N.D. CONST. art. I, § 16; OHIO CONST. art. I, § 19; OKLA. CONST. art. II, §§ 23–24; OR. CONST. art. I, § 18; PA. CONST. art. I, § 10; R.I. CONST. art. I, § 16; S.C. CONST. art. I, § 13; S.D. CONST. art. VI, § 13; TENN. CONST. art. I, § 21; TEX. CONST. art. I, § 17(d); UTAH CONST. art. I, § 22; VT. CONST. ch. 1, arts. II, IX; VA. CONST. art. I, §§ 6, 11; WASH. CONST. art. I, § 16; W. VA. CONST. art. III, § 9; WIS. CONST. art. I, § 13; WYO. CONST. art. I, §§ 32–33. The only State Constitution without a takings clause is North Carolina's. However, the North Carolina Constitution does mention eminent domain on multiple occasions, and procedures for condemning property are laid out in Chapters 40A and 136 of the North Carolina General Statutes.

[6] John Paul Stevens, *Glittering Generalities and Historical Myths*, 51 U. LOUISVILLE L. REV. 419 (2013) (describing the U.S. Constitution's "glittering generalities").

and *Ladd v. Real Estate Commission*.[7] Both states explicitly repudiated the "anything goes" hypothetical rational basis test that dominates at the federal level for judicial review of economic regulations in favor of a more demanding standard — all whilst asserting the importance of property rights in their state constitutions.[8]

Perhaps even more importantly, however, the Texas and Pennsylvania courts' willingness to assert greater judicial protection for economic liberties did not arise in a vacuum. Instead — in the context of the much more conservative Texas Supreme Court — it arrived amidst much greater willingness among originalist and conservative legal scholars to engage with greater judicial protection for unenumerated rights through doctrines like substantive due process.[9] This represented a sea-change from the views of figures such as Justice Antonin Scalia and Judge Robert Bork, both of whom objected to substantive due process as a legal doctrine, and were partial to more deferential judicial review of legislation on separation-of-powers and institutional grounds.[10]

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[7] Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69 (Tex. 2015); Ladd v. Real Estate Comm'n, 230 A.3d 1096 (Pa. 2020).

[8] *See Ladd*, 230 A.3d at 1108; *Patel*, 469 S.W.3d at 82,87; *see also* Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898 (2005).

[9] *See* RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 225-45 (2016) [hereinafter BARNETT, OUR REPUBLICAN CONSTITUTION]. Timothy M. Tymkovich et al., *A Workable Substantive Due Process,* 95 NOTRE DAME L. REV. 1961, 1964 (2020) (finding "a small kernel of originalist truth within current forms of substantive due process"); Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599 (2019) [hereinafter Barnett & Bernick, *No Arbitrary Power*]; *see also* Hettinga v. United States, 677 F.3d 471, 480-83 (D.C. Cir. 2011) (Brown, J., concurring) (criticizing the rational basis test for providing insufficient judicial protection for economic liberties); Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055 (2014).

[10] Vivek Krisnamurthy, *Live Blogging: Nino Scalia*, THE REACTION (November 10, 2006, 9:24 AM), archived at https://perma.cc/ZXD5-P6CT (Scalia describing

The Scalia-Bork position, however, still continues to have great resonance and has been articulated most recently by now-Justice Amy Coney Barrett.[11] Justice Barrett's strong institutionalist defense of more deferential judicial review of economic legislation goes to the heart of concern about judicial power — a series of concerns that advocates for more robust constitutional protections for economic liberties will have to overcome.[12] However, as this paper will show, Justice Barrett's institutional critique is far more applicable to the Federal Constitution and federal judicial review of state and local legislation under the Fourteenth Amendment than judicial review of state constitutional claims by state judges.[13] Concurrently, although the extent to which Justice Clarence Thomas would be willing to embrace greater judicial protection of unenumerated economic liberty rights remains unclear, he, alongside other well-known originalists such as Professors Michael McConnell, Steven Calabresi, and Ilan Wurman, believes that only the Privileges or Immunities Clause, rather than the Due Process Clause, is the appropriate vehicle for the protection of substantive individual rights in the U.S. Constitution.[14]

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substantive due process as "idiotic" and "babble," and privilege or immunities as "flotsam"); ROBERT H. BORK, THE TEMPTING OF AMERICA 31, 120-21 (1990) (describing substantive due process as a "sham" and critiquing the Supreme Court's decisions in *Griswold* and *Roe*).

[11] Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61 (2017).

[12] *Id.* at 70, 74-82.

[13] "Legislation" in this context includes regulations promulgated by state and local administrative agencies as well as laws passed by municipal governments, such as city council ordinances.

[14] *See* Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 881 (2020) ("[F]or legal support, the proponents of substantive due process must turn away from the Due Process Clause and toward the Privileges or Immunities Clause."); *see also* Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 152-53 ("[W]e believe that the state constitutional law fundamental rights of all Americans are equally

Together, these institutional and doctrinal concerns present a potent obstacle to greater protection of economic liberties in constitutional law at the Federal level. However, both of these concerns could be substantially ameliorated if the doctrine gained a stronghold in state constitutional law. Indeed, state supreme court judges interpreting similar, if not identical, provisions of their state constitutions and engaging in rigorous, empirical analysis of past precedent and history seem like ideal candidates to lead the national conversation about the appropriate scope of judicial protection for unenumerated economic liberties. Moreover, given the far more abundant democratic checks on those judges as opposed to U.S. Supreme Court Justices and the more localized impact of their decisions, the risk level in these legal experiments is much lower — a sure attraction for skeptics of judicial power.

As such, advocates of expanding constitutional protection for economic liberties should concentrate their efforts on exporting the *Patel-Ladd* standards to the other forty-eight states in the coming years, allowing these doctrines to better ripen before moving toward federalizing these standards.

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After exploring the interaction between federal and state constitutional law, Part I-A will describe how state constitutionalism offers a superior path for inculcating protections of economic liberties into American constitutional law. The subsequent segments

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protected by the Privileges or Immunities Clause of the Federal Fourteenth Amendment."); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 692 (1997) [hereinafter McConnell, *The Right to Die*] ("[I]f there is any textually and historically plausible authorization for the protection of unenumerated rights, it is to be found in [the Privileges or Immunities Clause] — not the Due Process Clause.").

of the paper will be dedicated to understanding the constitutional doctrines and provisions that would offer protections for economic liberties. Part I-B briefly elaborate on conservative and originalist legal scholarship regarding the role of Substantive Due Process, Privileges or Immunities, and other doctrines in American (mostly federal) constitutional law and its interaction with economic liberties. This will provide valuable context for understanding *Patel, Ladd,* and other important state and federal cases about the constitutionality of economically protectionist legislation.

Part II will describe the various provisions in state constitutions, some of which do and some of which do not have analogues in the Federal Constitution, that may offer textual protections for economic liberties. Understanding these is vital to filling-in the gap between the existing literature on constitutional protections for economic liberties and state constitutional law. This is because the bulk of the most recent literature concerned with constitutional, judicially enforced protection of economic liberties focuses on the text and history of the Federal Constitution, as interpreted by federal judges in federal courts. However, state constitutional offer not only a viable, but superior path forward. Part II will demonstrate that while there is an abundance of textual "hooks" in which protections for economic liberties can be protected in state constitutions, the most widespread and meaningful of these are due process clauses and contract clauses, as privileges or immunities clauses in state constitutions are rarer and more doctrinally complex. This section will also show the textual diversity of state constitutions, naturally implying that advocates' milage may vary between states and provisions on the weight of both text and precedent.

This textual background will provide vital color for the discussion of the *Patel/Ladd* "rational basis with bite" standard in Part III. Through an analysis of the facts and key holdings of both cases, this portion of the paper will show how state supreme courts can build on one another's innovations in developing judicially manageable, textually and historically supported standards for evaluating economic liberty claims under state constitutions.

Moreover, it will underscore the fact that state with wildly different constitutions, histories, geographies, and partisan configurations on their high courts can learn from one another and advance judicial protections that will meaningfully improve peoples' lives.

The heart of this case, and of this paper, lies in Part IV, where the institutional, legal, and empirical reasons for using State Constitutional law as the primary vehicle — at least in the medium term — to advance greater judicial protections for economic liberties are laid out in-depth. Part IV will contrast the approaches of federal and state courts to economic liberty claims, asserting that state courts have been superior forums for presenting economic liberty claims even when they do not explicitly apply a heightened rational basis test. This portion of the paper will also demonstrate the fact-finding value that engaging with economic liberty claims under state constitutional law can bring to a national, and potentially even federal discussion through the analysis of a 2018 dissent by Justice Rebecca Grassl Bradley of the Wisconsin Supreme Court.

Lastly, Part IV will show how the institutional concerns addressed by Justice Barrett in her 2016 article, and consistently alluded to by skeptics of judicial power, are significantly less applicable to state courts. This will primarily be done by treating Justice Barrett's 2016 article and Justice Willett's 2015 *Patel* concurrence as intellectual foils on matters of judicial deference to legislatures.

Finally, Part V will establish that while occupational licensing cases like *Patel* and *Ladd* are the best means for attacking economic protectionism given occupational licensing's deep unpopularity and negative impact on the most vulnerable in society, there is no doctrinal or historical reason for treating them as an exceptionally egregious form of economic protectionism. As such, contrary to some suggestions, "rational basis with bite," should be advanced as the general standard for judicial analysis of state and local economic legislation.

PART I-A

State Constitutions establish an independent source of rights for the citizens of each of the country's fifty states. Defining the contours of those rights is ultimately the exclusive domain of state supreme courts.[15] "As a matter of power, the fifty-one highest courts in the system may each come to different conclusions about the meaning of, say, due process in their own jurisdictions," and "as a matter of reason, there are often sound grounds for interpreting the two sets of guarantees differently."[16] Indeed, the Supremacy Clause does not authorize federal judges, including justices of the U.S. Supreme Court, to define the meaning of rights under state constitutions. As Justice William Brennan wrote in his seminal 1977 article on state constitutional law:

> The [U.S.] Supreme Court's jurisdiction over state cases is limited to the correction of errors related solely to questions of federal law. It cannot review state court determinations of state law even when the case also involves federal issues….Moreover, if a state ground is independent and adequate to support a judgement, the [U.S. Supreme] Court has no jurisdiction at all over the decision despite the presence of federal issues.[17]

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[15] *See* JEFFREY S. SUTTON, FIFTY-ONE IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 16 (2018) [hereinafter SUTTON, FIFTY-ONE IMPERFECT SOLUTIONS].

[16] *Id.*

[17] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 n.80 (1977).

This has most recently been affirmed in the 1983 *Michigan v. Long* rule, which holds that "if the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds," it will not be reviewed.[18] Further, to the extent that state courts wish to rely on federal precedents, they only need "make clear by a plain statement in its judgement or opinion that the federal cases are being used only for the purposes of guidance, and do not themselves compel the result that the court has reached."[19]

This independent source of right means that plaintiffs have "two arrows in their quiver — two chances, not just one, to invalidate a state or local law."[20] Further, because they are truly independent sources of right, state constitutions can provide more or less protections for constitutional claims than under the Federal Constitution. As Iowa Supreme Court Justice Christopher McDonald wrote in a 2019 concurrence:

> State courts are not required to incorporate federally-created principles into their state constitutional analysis; the only requirement is that in the event of an irreconcilable conflict between federal law and state law principles, the federal principles must prevail. Such courts must undertake an independent determination of the merits of each claim based solely on principles of state constitutional law. If the state court begins its analysis with the view that the federal practice establishes a "floor," the state court is allowing a federal governmental body—the United States Supreme

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[18] Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).

[19] *Id.*

[20] Jeffrey S. Sutton, *What Does — and Does Not — Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 711 (2011) [hereinafter Sutton, *Ail State Constitutional Law*].

> Court—to define, at least in part, rights guaranteed by the state constitution.[21]

However, such deviation is rarer than expected. Although state constitutionalism and diversity of constitutional doctrine are at the heart of federalism, today most state constitutional guarantees are interpreted in lockstep with federal ones — in stark contrast to the first 150 years of this country's existence, when most constitutional-rights litigation took place in the States." [22] This "top-down constitutional world" unnecessarily aggrandizes the power of the federal government, forfeiting a key part of Federalism, which has, alongside horizontal separation of powers, been "the soundest protection of liberty any people has known." [23] Not only does the "top-down constitutional world" stifle innovation in constitutional law and the application of established doctrines to emerging fact patterns, it brings two further enormous drawbacks. Firstly, it dramatically amplifies the stakes in U.S. Supreme Court decisions, as in the most high-powered controversies, the nine Justices must develop a uniform rule for a union of fifty states that vary dramatically in culture, history, and geography, as they are treated as the only people in the country "capable of offering an insightful solution to a difficult problem." [24] As Professor Roderick M. Hills, Jr. has pointed out, such national solutions on "reasonable and deep disagreements," even when they involve compromises, invariably promote democratic equality less effectively than geographic decentralization. [25] Further, the decisions reached by the U.S.

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[21] State v. Brown, 930 N.W.2d 840, 860 (Iowa 2019) (McDonald, J., concurring).

[22] SUTTON, FIFTY-ONE IMPERFECT SOLUTIONS, *supra* note 15, at 13, 178.

[23] *Id.* at 178.

[24] *Id.* at 17-18.

[25] Roderick M. Hills, Jr., *Federalism, Democracy, and Deep Disagreement*, 69 ALA. L. REV. 913, 950-59 (2018).

Supreme Court often involve a "federalism discount," as the Justices "generally appreciate the risks associated with rulings that prevent the democratic process in fifty-one different jurisdictions," creating a watered-down, national rule that is typically underenforced in at least some jurisdictions.[26] Thus, not only does lock-stepping undermine democratic equality and core principles of good governance, it also crystalizes second-rate constitutional principles when applied with broad strokes across all the country's fifty-one sovereigns.

Nowhere have the results of lock-stepping and "top-down constitutionalism" created a more harmful cocktail than the failure to protect economic liberties through judicial enforcement of constitutional guarantees as state courts have largely been unwilling to rebuff the highly deferential, rational basis review that has been dominant in federal (and because of lock-stepping, state) constitutional law since the New Deal. This status quo, however, has come under withering criticism, particularly in recent decades, from various influential conservative and originalist legal scholars. This group of scholars, including Profs. Randy Barnett and Steven Calabresi, as well as Judges Douglas Ginsburg and Steven Menashi, have dedicated substantial attention to the deficiencies of rational basis review for economic legislation, almost exclusively in the federal context.[27] The emergence of this new approach marks a significant change from the views of Justice Antonin Scalia and Judge Robert Bork, both of whom were broadly skeptical of judicial power and favored deference to the political branches — a view that Justice Barrett has recently defended on institutionalist grounds.[28] As Judge Bork famously put it, "Being at the mercy of legislative majorities is

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[26] SUTTON, FIFTY-ONE IMPERFECT SOLUTIONS, *supra* note 15, at 17.
[27] *See infra* p. 20 and notes 47-48.
[28] *Id.*

merely another way of describing the basic American plan: representative democracy. We may all deplore its results from time to time but that does not empower judges to set them aside; the Constitution allows only voters to do that."[29]

However, what is good for the goose is not always good for the gander. Or, in this case, concern with judicial power writ-large is only as good as its ability to differentiate between federal and state judges and between assertions of federal judicial power in the name of federal constitutional claims as opposed to assertion of state judicial power in the name of state constitutional claims. But this is precisely what the effectively monolithic focus on both sides of the judicial review debate in conservative and originalist circles on federal courts, federal judges, and the Federal Constitution fails to do. This ongoing failure puts the goal of finding a coherent balance between protecting economic liberties from the ravages of protectionism without radically expanding the boundaries of federal judicial power further out of reach. And, it is precisely this oversight that this paper aims to correct.

Put bluntly, state judges interpreting state constitutional claims can grant less deferential review to laws that harm economic liberties with far fewer negative institutional and doctrinal side effects than their colleagues interpreting federal claims in federal courts. Judicial innovation in state constitutionalism, including the application of broad rights guarantees and appropriate standards of review, is far less risky than in federal constitutionalism because it facially affects far fewer people, can be reversed much more easily because of a far less onerous amendment process at the state level, and in forty-nine

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[29] BORK, THE TEMPTING OF AMERICA, *supra* note 10, at 49.

states, does not involve lifetime, unelected appointees.[30] To the extent that the counter-majoritarian difficulty is omnipresent at the federal level, at the state level, it registers as no more than a counter-majoritarian mediocrity.[31]

When it comes to scrutinizing state and local legislation that impairs economic liberties, state courts relying on state constitutional claims are simply better positioned to provide plaintiffs with relief. Not only can they pursue more cutting-edge legal doctrines and assertions of greater judicial power with greater ease and legitimacy than their colleagues at the federal level, they can also, upon committing to judicial innovation (including greater judicial intervention on behalf of economic liberties), demonstrate the viability of the enterprise for future integration into federal law. Indeed, this process of "reverse incorporation," as described by Professor Paul Blocher, is precisely what the U.S. Supreme Court relied upon in crafting the *Mapp v. Ohio* exclusionary rule.[32]

As such, the *Patel* and *Ladd* models for judicial review of economic liberty cases, as developed by the Texas and Pennsylvania Supreme Courts, deserve much greater attention. Not only do both decisions feature sophisticated legal analysis that systematically rejects the federal approach and prioritizes state constitutional claims, the institutional backdrop state judicial review as opposed to federal judicial review should go a long way to assuaging conservative and originalist critics of judicial power. It would be wise

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[30] *See Judicial Selection, Significant Figures*, BRENNAN CENTER FOR JUSTICE (May 8, 2015), archived at http://perma.cc/JZM4-JZ7D (describing state supreme court selection); Anna Permaloff, *Methods of Altering State Constitutions*, 33 CUMB. L. REV. 217 (2003) (describing the various amendment processes for states); *see also* SUTTON ET AL., STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE 881-83 (3rd ed. 2020).

[31] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) (originally describing the counter-majoritarian difficulty).

[32] *See* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323 (2011); SUTTON, FIFTY-ONE IMPERFECT SOLUTIONS, *supra* note 15, at 58-59.

to de-prioritize the effort to inculcate less deferential judicial review of state and local economic legislation in federal courts and dedicate greater resources to demonstrating that judges on the state level can apply this model competently, consistently, and without fundamentally disrupting the separation of powers in their home states. Indeed, just as competitive federalism creates opportunities for states to innovate in private law, it should also allow state courts to innovate in constitutional law.[33]

If things were not complicated enough already, there is one further wrinkle. It happens to be the most controversial doctrine in the entirety of American constitutional law: substantive due process. It is not my aim in this article to resolve the question of whether or not substantive due process is or is not "a greater risk to fair interpretation than the referee who flips a coin," or even to delve into the differences between substantive due process in state and federal constitutional law.[34] Separating out objections to contemporary substantive due process because it is intellectually incoherent, inconsistent with the original public meaning and/or intent of the Fourteenth Amendment are hard to separate from critiques that it violates core constitutional principles by aggrandizing judicial power — which, more likely than not, principally refers to federal judicial power. In fact, Judge Bork referenced all these arguments in the space of seven short pages of *The Tempting of America*.[35] No doubt, the history of substantive due process is also the history of the aggrandizement of judicial power — which at the federal level, has disturbed the precarious balance between the horizontal and vertical

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[33] SUTTON, FIFTY-ONE IMPERFECT SOLUTIONS, *supra* note 15, at 20.

[34] Zeon Chems., L.P. v. United Food & Commercial Workers, Local 72D, 949 F.3d 980 (6th Cir. 2020).

[35] BORK, *supra* note 10, at 43-50.

separation of powers to the benefit of the federal government and the judiciary.

PART I-B

For decades, rejection of substantive due process as a constitutional doctrine was a touchstone of conservative and originalist legal thought. Justice Antonin Scalia considered it idiotic "babble" and for Judge Robert Bork, it was a sham notion without limits and without legitimacy — forever complicit in the worst excesses of the Warren and Burger Courts' left-liberal rights-expanding jurisprudence in the mold of *Griswold v. Connecticut* and *Roe v. Wade*.[36] In responding to these overreaches, Scalia and Bork grounded their jurisprudence in a rejection of substantive due process on both philosophical and institutional grounds. Indeed, Scalia and Bork were the intellectual successors of a broader critique of judicial power that ran through the jurisprudence of early twentieth century progressives such as Justice Felix Frankfurter and found its strongest articulation in the work of Alexander Bickel in the 1960s and 70s. This intellectual tradition consistently attacked judicial protection of unenumerated rights in the Due Process Clause of the Fourteenth Amendment and the striking of state legislation.[37]

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[36] *See* Krisnamurthy, *supra* note 10, at 9:24 AM; *see also* BORK, THE TEMPTING OF AMERICA, *supra* note 10, at 31, 120-21 (describing substantive due process as a "sham" and critiquing the Supreme Court's decisions in *Griswold* and *Roe*).

[37] DAVID BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 6, 44, 119 (2011) [hereinafter BERNSTEIN, REHABILITATING LOCHNER] (describing the opposition of early Twentieth Century Progressives such as Felix Frankfurter to judicial power and the doctrine of substantive due process and how conservative jurists today often favorably cite these writing "in support of judicial restraint"); Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 558 (2015) (describing Frankfurter and

Scalia, Bork, and others in their camp justified their skepticism of substantive due process on textual and historical arguments along the lines of John Hart Ely's retort that substantive due process was a "contradiction in terms" akin to "green pastel redness."[38] Moreover, institutional concerns about the ability of judges to properly ascertain legislative intent sat well with ardent textualism that rejected legislative history and a "small c" conservatism that was inherently cautious of the counter-majoritarian difficulty at the heart of judicial review.[39] These institutional red flags, however, should logically apply to all of the "glittering generalities" of the U.S. Constitution, including the Ninth Amendment and the Privileges or Immunities and Equal Protection clauses of the Fourteenth Amendment.[40] Yet, the record is undeniable that the Due Process Clause of the Fourteenth Amendment in particular has been singled out for special scrutiny. This is largely the legacy of the United States Supreme Court's narrow reading of the Privileges or Immunities Clause in 1873 and the Due Process Clause's role in controversial assertions of

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Bickel as adherents to an earlier stream of Progressive legal thought, who came to be thought of as 'conservatives' because of the shift in liberal legal thought from the 1940s until the mid-1960s); *see also* BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS, *supra* note 31.

[38] BORK, THE TEMPTING OF AMERICA, *supra* note 10, at 32 (describing substantive due process as a "contradiction in terms"); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 18 (1980) (describing substantive due process as akin to "green pastel redness").

[39] Barrett, *Countering the Majoritarian Difficulty*, *supra* note 11, at 74-80 (critiquing Prof. Randy Barnett's proposal for expanded judicial review of economic legislation as beyond the institutional capacities of judges from an originalist perspective); *see also* Colby & Smith, *The Return of Lochner, supra* note 37, at 565-69 (describing judicial conservatives' opposition to expanded judicial review on institutional and ideological grounds from the 1980s into the 2010s).

[40] BORK, THE TEMPTING OF AMERICA, *supra* note 10, at 178-86 (critiquing John Hart Ely's proposals to "resurrect" the Privileges or Immunities Clause and expand judicial reliance on the Equal Protection Clause and the Ninth Amendment); *see also* Stevens, *Glittering Generalities, supra* note 6.

judicial power from *Lochner v. New York* to *Roe v. Wade* —naturally making it a target for broader criticisms of federal judicial power.[41]

In recent years, however, there has been a revival of originalist and conservative interest in the Federal Constitution's "glittering generalities" and greater openness to judicial protection of unenumerated rights.[42] Notably, within the last decade, Justice Clarence Thomas held that the Privileges or Immunities Clause incorporates both the individual rights to bear arms and the prohibition against excessive fines against the states.[43] While both of

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[41] *See* Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J.L. & LIBERTY 115, 141-47 (2010) [hereinafter Sandefur, *Priviliges, Immunities*] (describing the Supreme Court's "fundamental error" in its narrow interpretation of the Privileges or Immunities Clause in The Slaughter-House Cases); *see also* RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 308 (2014) (describing how although the Privileges or Immunities Clause "looks to be the most plausible candidate" for the task of protecting fundamental rights at the Federal level from intrusion by the States, "it was given so narrow an interpretation in the Slaughter-House Cases in 1873 that the link between the Bill of Rights…and the states had to be forged, if at all, through the Due Process Clause whose procedural orientation looks ill-suited for that task."); David Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead*, 126 YALE L.J.F. 287, 294-96 (2016) [hereinafter Bernstein, *Right to Pursue a Lawful Occupation*] ("[A]s long as 'substantive' due process with regard to unenumerated rights is associated with abortion and same-sex marriage, however, the use of the Due Process Clause to pursue an occupation will likely have difficulty gaining traction among conservatives."); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

[42] *See* Colby & Smith, *The Return of Lochner, supra* note 37, at 568-71 (describing renewed interest among conservative and originalist legal scholars in reviving greater constitutional protections for unenumerated liberties, including economic ones).

[43] McDonald v. City of Chicago, 561 U.S. 742, 805-58 (2010) (Thomas, J., concurring) (holding that the Second Amendment is fully applicable to the states because the right to keep and bear arms is guaranteed by the Fourteenth Amendment's Privileges or Immunities Clause as a privilege of American citizenship); Timbs v. Indiana, 139 S. Ct. 682, 691-98 (2019) (Thomas, J., concurring) (holding that the Eight Amendment's prohibition on excessive fines is incorporated against the States via the Privileges or Immunities Clause); Ramos v. Louisiana, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring) ("I have already rejected our due process incorporation cases as

these concern enumerated constitutional rights, Justice Thomas has been careful in not limiting his view of the Privileges or Immunities Clause to only enumerated rights. Instead, the limiting principle of the Privileges or Immunities Clause for Justice Thomas appears to be a close cousin to the limiting principle for the Due Process clause embraced by Justice Rehnquist in *Washington v. Glucksberg* — namely "inalienable rights of citizens that had been long recognized and that the ratifying public [in 1868] understood to protect…against interference by the States."[44] This understanding of the Privileges or Immunities Clause, also endorsed by Professor Michael McConnell, would fundamentally require a deep empirical dive into the types of rights that American courts have traditionally recognized and would leave plenty of room for unenumerated rights, including economic liberties.[45]

In the past several years, originalist and conservative engagement with the Fourteenth Amendment and Substantive Due Process has moved further away from Bork and Scalia's hostility toward lukewarm embrace by Judge Timothy Tymkovich, and unbridled enthusiasm by an increasingly vocal segment of conservative and originalist scholars led by Professor Randy

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demonstrably erroneous, and I fundamentally disagree with applying that theory of incorporation simply because it reaches the same result in the case before us. Close enough is for horseshoes and hand grenades, not constitutional interpretation. The textual difference between protecting 'citizens' (in the Privileges or Immunities Clause) and 'person[s]' (in the Due Process Clause) will surely be relevant in another case. And our judicial duty— not to mention the candor we owe to our fellow citizens — requires us to put an end to this Court's due process prestidigitation, which no one is willing to defend on the merits.").

[44] *Timbs,* 139 S. Ct. at 692; *see also* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (holding that the Due Process Clause "specifically protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition").

[45] McConnell, *The Right to Die*, *supra* note 14, at 692.

Barnett.[46] Others, including Professors Ilan Wurman, Steven G. Calabresi, and Michael McConnell, while skeptical of the due process clause of the Fourteenth Amendment as a vehicle for protecting unenumerated rights (i.e. liberty of contract), are open to using the Privileges or Immunities clause to do so.[47] Finally, yet another view, also advanced by Professor Calabresi, would interpret the Federal Constitution against a background norm of anti-monopoly principles, through which Federal Courts could more aggressively strike legislation restraining economic liberty.[48]

In short, while there is broad agreement among originalist scholars that protections for economic liberties, including liberty of contract and freedom to pursue a lawful occupation, do exist within American constitutional doctrine, establishing a consensus about the precise language through which these unenumerated rights are protected remains elusive. Hence, for originalist jurists, who by and large are devotees of a particular species of textualism and are best persuaded by hearty, historical arguments, such doctrinal confusion is alarming.[49] Moreover, when these jurists are faced with

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[46] Tymkovich, *supra* note 9, at 1964 (finding "a small kernel of originalist truth within current forms of substantive due process"); *see also* Barnett & Bernick, *No Arbitrary Power*, *supra* note 9.

[47] *See* Wurman, *supra* note 14, at 881 ("[F]or legal support, the proponents of substantive due process must turn away from the Due Process Clause and toward the Privileges or Immunities Clause."); *see also* Steven G. Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 152-53 ("[W]e believe that the state constitutional law fundamental rights of all Americans are equally protected by the Privileges or Immunities Clause of the Federal Fourteenth Amendment."); McConnell, *The Right to Die*, *supra* note 14, at 692 ("[I]f there is any textually and historically plausible authorization for the protection of unenumerated rights, it is to be found in [the Privileges or Immunities Clause] — not the Due Process Clause.").

[48] Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983 (2013) [hereinafter Calabresi & Leibowitz, *Monopolies and the Constitution*].

[49] Barrett, *Countering the Majoritarian Difficulty*, *supra* note 11, at 82 (describing the originalist "commitment to textual fidelity").

institutionalist critiques about the capacity of judges — especially federal, lifetime appointee — the pressure simply becomes overwhelming for many property-protective but cautious originalist and conservative jurists, leading them to retreat toward judicial restraint and leave deeply flawed, monopolistic, and confiscatory legislation in place.[50]

However, state courts concerned with asserting greater judicial protections for economic liberties through interpretations of their state constitutions do not appear content to sit and wait for the U.S. Supreme Court to resolve the intricacies of this ongoing doctrinal confusion about the meaning of the various clauses of Section One of the Fourteenth Amendment. In 2015, five of the nine Justices of the Texas Supreme Court held in *Patel v. Texas Department of Licensing & Regulation* that cosmetology licensing requirements as applied to threaders ran afoul of the Texas Constitution's "due course of law" protections because they were "unreasonable," "harsh," and overly "oppressive" to the threaders.[51] The standard distilled by the Texas Supreme Court, which then-Justice Don Willett described in his concurrence as "rational basis with bite," held that an economic regulation may be struck as unconstitutional if a plaintiff can demonstrate that:

> Either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world

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[50] *Id.* at 75 (noting that life tenure means that judges are unaccountable for bad decisions); *id.* at 78 (arguing that "more vigorous enforcement of the Due Process and Equal Protection Clauses may increase the risk of over-nationalizing policy preferences at the hands of the Supreme Court," leaving the "entire nation…bound and the opportunity for regional differences…extinguished").

[51] Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 90 (Texas 2015) (Justice Boyd concurred in the result but did not join the majority opinion and specifically disagreed with the majority's "oppression" test).

> effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest.[52]

Although the *Patel* majority denied it was "unleashing the Lochner monster," of extensive judicial second-guessing of legislative determinations about economic policy, it unambiguously rejected the federal rational basis test at the state level as insufficiently protective of Texans' Constitutional liberties — thus questioning the last eighty years of the U.S. Supreme Court's substantive due process and police powers jurisprudence.[53]

Justice Don Willett, however, joined by Justices Lehrmann and Devine, was willing to go further — offering arguably the most compelling, full-throated defense of *Lochner v. New York* and principled judicial intervention on behalf of economic liberty to come from a sitting jurist in twenty-first century.[54] Yet, 1500 miles away on the same day, Chief Justice John Roberts was delivering one of the most powerful polemics against *Lochner* in modern times in his *Obergefell v. Hodges* dissent — painting the *Obergefell* majority as the ideological successor of *Lochner*, and yet another example of judges illegitimately substituting their own preferences for the requirements of the law and usurping legitimate state legislative judgements.[55]

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[52] *Id.* at 87

[53] *Id.* at 86-87, 91 (rejecting the more permissive federal test for as-applied substantive "due course of law" challenges to economic regulation statutes in Texas); *see also id.* at 112 (Willett, J., concurring) (condemning the federal rational basis test as overly deferential and arguing that "when constitutional rights are imperiled, Texans deserve actual scrutiny of actual assertions with actual evidence").

[54] *Id.* at 92-123 (Willett, J., concurring).

[55] Notably, Chief Justice Roberts referenced *Lochner* no less than sixteen times in his dissent in *Obergefell v. Hodges*. 576 U.S. 644, 686-713 (2015) (Roberts, C.J., dissenting). *See also* David Bernstein, *Chief Justice Roberts: Same-Sex Marriage Not Constitutional Protected Because Lochner*, THE VOLOKH CONSPIRACY (June 26, 2015, 12:57 PM), archived

However, much as it may trouble Chief Justice Roberts, the views of the *Patel* majority did not arise in a vacuum, nor are they likely to disappear anytime soon. By 2015, the Fifth, Sixth, and Ninth U.S. Circuit Courts of Appeals had found that naked economic protectionism could not withstand Fourteenth Amendment scrutiny under the rational basis test, and leading jurists and scholars — including Judge Douglas Ginsburg, now-Judge Steven Menashi, and Judge Janice Rogers Brown, were outright calling for abandoning the rational basis test and systematic deference to legislatures by judges when reviewing economic regulations.[56] At core, these decisions, as well as the growing mountain of scholarship, stand as fundamental criticisms of the U.S. Supreme Court's 1938 bifurcation of liberties into favored "social" ones and disfavored economic ones, born in footnote four of *Carolene Products* and reaching its apex in the "anything goes" standards of *Williamson v. Lee Optical*.[57]

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at https://perma.cc/VH9H-SDM8. *See* Steven G. Calabresi & Hannah M. Begley, *Justice Oliver Wendell Holmes and Chief Justice John Roberts' Dissent in* Obergefell v. Hodges, 8 ELON L. REV. 1 (2016) (Calabresi and Begley, as well as Bernstein, roundly criticize Roberts' invocation of *Lochner*).

[56] *See* Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002); Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008); St. Joseph Abbey v. Castille, 712 F.3d 215, 223 (5th Cir. 2013) (holding that mere economic protectionism was not a legitimate government interest); *see also* Hettinga v. United States, 677 F.3d 471, 480-83 (D.C. Cir. 2011) (Brown, J., concurring) (criticizing the rational basis test for providing insufficient judicial protection for economic liberties); Menashi & Ginsburg, *Rational Basis with Economic Bite*, *supra* note 9.

[57] *See* Randy E. Barnett, *Judicial Engagement Through the Lens of* Lee Optical, 19 GEO. MASON L. REV. 845, 860 (2012) [hereinafter Barnett, *Judicial Engagement*] (criticizing the modern rational basis approach as "hypothetical" rational basis, characterized by a "highly unrealistic and formalist irrebuttable presumption" with a "judicially invented distinction between economic and personal liberties found nowhere in the Constitution"); *see also* Neily, *supra* note 8; United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4; Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

Moreover, *Patel*'s explicit renunciation of both *Carolene Products* and *Lee Optical* has legs — and has already traveled. In May 2020, the Pennsylvania Supreme Court enthusiastically embraced the *Patel* majority's analysis in striking licensing requirements for short-term vacation property managers in *Ladd v. Real Estate Commission*.[58] Notably, the Pennsylvania Supreme Court held that, consistent with caselaw since 1954, it would analyze state exercises of police powers under "heightened rational basis review," that was "similar" to the *Patel* test, requiring that the "Commonwealth's police power must be exercised in a constitutional manner, one that is not unreasonable, unduly oppressive, or potentially beyond the necessities of the case, and bears a real and substantial relation to the purported policy objectives."[59] Also, in September 2020 Justice Bolick of the Arizona Supreme Court lauded Justice Willett's concurrence in *Patel* as an example of the "pro-liberty presumption" that was as "hardwired" into Arizona's Constitution as it was into Texas' — and which state judges should enforce as "neutral arbiters, not bend-over-backwards advocates for the government."[60]

The Texas and Pennsylvania Supreme Courts have unequivocally shown that there is a way to establish coherent judicial protections for economic liberty, grounded in American constitutional law. Yet, barring a few exceptions, the bulk of originalist research into constitutional protections for economic liberty has concerned the Federal Constitution and the U.S. Supreme Court's jurisprudence, with little investigation into the protections state courts and state constitutions have provided litigants. In my view, this is a gross error. Not only have state courts empirically been far more willing to embrace constitutional economic liberty

[58] Ladd v. Real Estate Comm'n, 230 A.3d 1096, 1106, 1111-13 (Pa. 2020) (integrating *Patel*'s analysis into the Pennsylvania test).

[59] *Id.* at 1108, 1112, 1116.

[60] State v. Arevalo, 470 P.3d 644, 655 (Ariz. 2020) (Bolick, J., concurring).

arguments — both historically and in recent decades — than their federal counterparts, but the textual provisions under which challengers to protectionist and burdensome economic regulations have been victorious directly parallel provisions in the Federal Constitution.

Indeed, not only are state courts relying on local sources and local understandings of state constitutions more likely to offer relief that advances the cause of economic liberty — a notion worth celebrating in its own right — they can also offer a wealth of information about the meaning of the Due Process, Privileges or Immunities, and Equal Protection clauses of the Fourteenth Amendment in the economic liberties context. This, in short, would echo the "single discourse" between state high courts and the U.S. Supreme Court about constitutional jurisprudence recently embraced by Justice Goodwin Liu of the California Supreme Court.[61] Additionally, putting state courts in the driver's seat of economic liberty constitutionalism would address the core institutionalist critiques of federal courts advanced recently by now-Justice Amy Coney Barrett and Prof. Roderick Hills, Jr..[62] Simply put,

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[61] Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1311 (2019) (describing a "single discourse in which state and federal courts are jointly engaged in interpreting shared texts or shared principles within a common historical tradition or common framework of constitutional reasoning").

[62] Barrett, *Countering the Majoritarian Difficulty*, *supra* note 11, at 73-80 (describing limits to courts' institutional capacity to review economic regulations); Roderick Hills, *Is the Federal Judicial Cure for Protectionism Worse than the Disease?*, 43 HARV. J.L. & PUB. POL'Y 13 (2020) (arguing that "having federal courts try to figure out whether protectionist means are actually protectionist ends is a fool's game," and therefore "federalism and separation of powers" is the appropriate solution). *Contra* Antonin Scalia, *Two Faces of Federalism*, *in* THE ESSENTIAL SCALIA 76, 79-80 (Jeffrey S. Sutton & Edward Whelan, eds., 2020) (arguing conservatives should "seek establishment of federal policies excluding state regulation," and regard the federal government as "a legitimate and useful instrument of policy," rather than just "something to be resisted").

institutionalist "small c" conservatives are less likely to have heartburn over judges overturning legislation when they:

1. are elected for terms rather than appointed for life,
2. are closer to the source of the legislation and more likely to successfully probe legislative intent,
3. can have their decisions overturned more easily through a more robust constitutional amendment process at the state level,[63] and
4. do not have to wrestle with concerns about a "federalism discount."[64]

On these facts, advocates of expanded constitutional protections by the judiciary for economic liberties should concentrate on exporting the Texas Supreme Court's *Patel* jurisprudence for the near future. This would allow a more coherent doctrine to develop in state constitutional law. Only then should these advocates, now armed with a critical mass of states and reems of empirical evidence documenting the viability of such protections, proceed to import these doctrines into federal courts and federal constitutional law.

PART II

This section will provide an overview of the relevant clauses found in state constitutions and the key textual and structural similarities and differences amongst them and with the Federal Constitution. My empirical research mostly relies on Professor Calabresi's 2018 article in the Notre Dame Law Review, which appears to be the most up-to-date study of these clauses,

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[63] *See supra* note 30 and accompanying sources.

[64] Sutton, *Ail State Constitutional Law*, *supra* note 20, at 708; *see also supra* pp. 11-12 (defining the federalism discount).

supplemented by my own independent review.[65] The object of this section is not to provide a comprehensive overview of the history, case law, and key dynamics of each state constitutional provision, much less to assert which one I believe is the "most optimal" for advancing property rights as a matter of state constitutional law. Not only is such a project well beyond the means of this paper, it is also inappropriate to the notion of states as sovereigns — and if sovereignty means anything, it is the right to be different and the right to assert those differences in one's fundamental governing document.

Instead, it is designed to demonstrate the abundance of clauses in state constitutions that provide textual support for greater judicial protection of economic liberties, apart from whatever protections can be gleaned from their equivalents (to the extent that they exist) in the Federal Constitution. Even more importantly, I take no position on the vigorous scholarly debate about which provision of Section One of the Fourteenth Amendment to the Federal Constitution is best suited to provide protection of enumerated and unenumerated rights, including economic liberties from being impaired by state and local governments.

However, as the following will show, reviving "Privileges or Immunities" as a form of substantive protection for unenumerated rights is arguably a more onerous task in the state constitutional context than in the federal constitutional context. The same is true to an arguably even greater extent with Equal Protection Clauses. Due Process Clauses appear textually more durable — but inspire the same fundamental challenges about the "oxymoron" of substantive due process as they do at the federal level. This is not to say, of course, that all of these cannot be interpreted in light of well-established anti-monopoly principles in the Anglophone

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[65] Calabresi et al., *State Constitutions in 2018*, *supra* note 5.

constitutional condition — and even more so in the states that have anti-monopoly clauses in their constitutions. Perhaps the most surprising development is how widespread, textually uncluttered, and uniform clauses prohibiting government from impairing the obligations of contracts are in state constitutions. Indeed, to the extent the revival of pre-New Deal constitutional norms protecting economic liberties is possible, a Contracts Clause renaissance in state constitutionalism may be among the most textually committed, pragmatic, and intellectually honest options on the table.

In short, all of the clauses mentioned in this section are, textually speaking, potential candidates that plaintiffs can turn to in presenting state constitutional claims. However, the various categories of clauses can textually vary greatly amongst themselves, even before the gloss of precedent and legislative history is applied. Further, some state constitutions have all of the clauses mentioned in this section, others may only have one or two. Moreover, not all of the clauses have direct analogues in the Federal Constitution, including some of those that may be the most textually on-point (like the anti-monopoly clauses) or those that have been applied with success in support of state constitutional economic liberty claims, such as Pennsylvania's Lockean Rights Clause (the core provision at issue in *Ladd*).

Collectively, this affirms that state constitutionalism is a "they," and not an "it." And while state constitutionalism historically has been, is, and ought to be, in dialogue with federal constitutionalism, the textual distinctions between these fifty-one documents complicate the notion of a single, coherent narrative. As such, there is not, and cannot be, a single "playbook' for plaintiffs hoping to raise state constitutional claims in order to assert their economic liberties. Claimants will have to understand the subtleties of the text and history of these various provisions as applied in their state, and through this process they will almost certainly discover that they can call upon more than one provision of their state constitution. But most importantly, the more deeply claimants, lawyers, and judges engage with the text, history, and meaning of these state

constitutional provisions, the stronger will grow their respect for the independent construction of these documents, the sovereignty of the states, and the durability of American federalism.

A. DUE PROCESS CLAUSES

Forty-nine states — all but New Jersey — have due process clauses in their state constitutions.[66] At the most basic textual level, these may be divided into three categories based on the key operating terms in the clause. The first category closely tracks the Federal Constitution and invokes the "due process of law." Today,

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[66] Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 100 n.245. *See* ALA. CONST. art. I, §§ 6, 13; ALASKA CONST. art. I, § 7; ARIZ. CONST. art. II, § 4; ARK. CONST. art. II, §§ 8, 21; CAL. CONST. art. I, §§ 7(a), 15, 24, 29; COLO. CONST. art. II, § 25; CONN. CONST. art. I, § 8; DEL. CONST. art. I, §§ 7, 9; FLA. CONST. art. I, § 9; GA. CONST. art. I, § 1, para. 1; HAW. CONST. art. I, § 5; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 2; IND. CONST. art. I, § 12; IOWA CONST. art. I, § 9; KAN. CONST. Bill of Rights, § 18; KY. CONST. Bill of Rights, §§ 11, 14; LA. CONST. art. I, §§ 2, 22; ME. CONST. art. I, §§ 6, 6-A; MD. CONST. Declaration of Rights, arts. XIX, XXIV; MASS. CONST. pt. 1, arts. XI, XII; MICH. CONST. art. I, § 17; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 14; MO. CONST. art. I, § 10; MONT. CONST. art. II, § 17; NEB. CONST. art. I, § 3; NEV. CONST. art. I, § 8; N.H. CONST. pt. 1, art. XV; N.M. CONST. art. II, § 18; N.Y. CONST. art. I, §§ 1, 6; N.C. CONST. art. I, § 19; N.D. CONST. art. I, §§ 9, 12; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, §§ 7, 29; OR. CONST. art. I, § 10; PA. CONST. art. I, §§ 9, 11; R.I. CONST. art. I, §§ 2, 10; S.C. CONST. art. I, § 3; S.D. CONST. art. VI, § 2; TENN. CONST. art. I, § 8; TEX. CONST. art. I, §§ 13, 19; UTAH CONST. art. I, §§ 7, 11; VT. CONST. ch. 1, art. X; VA. CONST. art. I, §§ 8, 11; WASH. CONST. art. I, § 3; W. VA. CONST. art. III, § 10; WIS. CONST. art. I, § 8(1); WYO. CONST. art. I, § 6. *See also* N.J. STAT. ANN. § 10:6-2(c) (West 2020) (creating a statutory cause of action under the New Jersey Civil Rights Act, allowing individuals who have been deprived of "any substantive due process or equal protection rights, privileges or immunities" secured by the Federal or New Jersey Constitutions to bring a suit for relief in New Jersey state courts).

thirty-seven states use this language, typified by the Colorado Constitution — which holds that "no person shall be deprived of life, liberty, or property, without due process of law."[67]

Category two invokes the much older phrasing of Chapter 39 of the 1215 Magna Carta and protected the deprivation of life, liberty, or property except for by "law of the land."[68] One of the sixteen state constitutions adhering to this formulation today is Arkansas, whose constitution states that that "no person shall be taken, or imprisoned, or disseized of his estate, freehold, liberties, or privileges; or outlaws; or in any manner destroyed, or deprived of his life, liberty, or property; except by the judgement of his peers, or the law of the land."[69]

Finally, category three, adopted by seventeen states including Texas, uses due course of law language, declaring that "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any way disfranchised, except by the due course of the law of the land."[70] As Texas' formulation (and the math) indicates, the Lone Star State is far from alone in invoking two different formulations in the same clause (here mixing "due course of law" language with "law of the land" language).[71] Also, as will be seen later, Texas is also far from alone in placing its due process

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[67] COLO. CONST. art. II, § 25. *See also* Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 102.

[68] DAVID STARKEY, MAGNA CARTA: THE TRUE STORY BEHIND THE CHARTER 206-09 (2015).

[69] ARK. CONST. art. II, § 21. *See also* Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 102.

[70] TEX. CONST. art. I, § 19. *See also* Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 102.

[71] Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 102 n.257 (noting that Kentucky, Texas, and Virginia all use multiple formulations of due process language).

clause in the same section as its privileges or immunities clause or equal protection clause.[72]

Professor Calabresi's 2018 study notes that since 1868, the Magna Carta-esque "law of the land" formulation has fallen out of favor as more states have moved towards the "due process of law" language that mirror the federal constitution.[73] In 1791, nine out of the twelve state constitutions written between 1776 and 1791 had due process clauses — all of them using the Magna Carta language.[74] In 1868, when the Fourteenth Amendment was ratified, thirty of the thirty seven states had due process clauses in their state constitutions.[75] Eighteen had Magna Carta "law of the land" language, fourteen had federal "due process" language, New York and Minnesota had both, and it appears that Texas alone may have mixed "law of the land" with "due course of law," language.[76]

B. BANS ON CLASS LEGISLATION

The underlying purpose of state constitutional bans on class legislation is to "promote the underlying value of ensuring that laws do not benefit certain groups to the exclusion of others, both because these laws must have a uniform operation and because they must be made for the good of the whole."[77] Thus, as far as intent is concerned — so far, so good. On a textual level, however, the diverse array of

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[72] *See, e.g.*, CAL. CONST. art. I, § 7(a) (placing the due process and equal protection clauses in the same section).

[73] Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 101-02.

[74] *Id.*

[75] Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 66 (2008) [hereinafter Calabresi & Agudo, *Individual Rights Under State Constitutions in 1868*].

[76] *Id.*

[77] Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 140.

anti-class legislation clauses in state constitutions presents the doctrinal beauty and complexity of the subject better than anything else. These forty-six imperfect solutions are sufficiently alike, different, and overlapping to send any textualist afficionado of the anti-redundancy canon to bed with a headache.[78]

C. PRIVILEGES OR IMMUNITIES CLAUSES

Among the forty-six states that have bans on class legislation, by the widest possible reading, forty-four have some variety of a Privileges or Immunities Clause.[79] These forty-four privileges and

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[78] *Id.* at 136 n.439. *See* ALA. CONST. art. I, §§ 22, 29; ALASKA CONST. art. I, §§ 3, 15; ARIZ. CONST. art. II, §§ 9, 13, 16, 29; ARK. CONST. art. II, §§ 3, 17, 18, 19; CAL. CONST. art. I, §§ 7, 8, 22, 31; COLO. CONST. art. II, § 11; CONN. CONST. art. I, §§ 1, 18, 20; DEL. CONST. art. I, §§ 15, 19; GA. CONST. art. I, § 1, paras. 2, 7, 10, 20, 25; HAW. CONST. art. I, §§ 3, 5, 8, 9, 21; IDAHO CONST. art. I, §§ 2, 4; ILL. CONST. art. I, §§ 3, 16, 17, 18, 19; *id.* art. III, § 8; IND. CONST. art. I, §§ 23, 30, 35; IOWA CONST. art. I, § 6; KAN. CONST. Bill of Rights, § 12, 19; KY. CONST. Bill of Rights, § 3, 5; LA. CONST. art. I, §§ 3, 12; *id.* art. III, § 12; *id.* art. XII, § 12; ME. CONST. art. I, §§ 6-A, 11, 23; MD. CONST. Declaration of Rights, arts. XXVII, XLII; MASS. CONST. pt. I, arts. VI, VII; MINN. CONST. art. I, §§ 2, 15; *id.* art. XII, § 1; MO. CONST. art. I, §§ 2, 13, 30; MONT. CONST. art. II, §§ 4, 31; NEB. CONST. art. I, §§ 3, 15, 16, 25, 30; N.H. CONST. pt. I, arts. II, IX, X; N.J. CONST. art. I, para. 5; *id.* art. IV, § 7, paras. 7-10; N.M. CONST. art. II, § 18; *id.* art. IV, § 26; *id.* art. VII, § 3; N.Y. CONST. art. I, §§ 1, 11; N.C. CONST. art. I, §§ 11, 19, 29, 32, 33; N.D. CONST. art. I, §§ 21, 22; OHIO CONST. art. I, §§ 2, 12, 17; OKLA. CONST. art. II, §§ 15, 36; *id.* art. V, § 51; OR. CONST. art. I, §§ 20, 25, 29; PA. CONST. art. I, §§ 17, 19, 24, 26; R.I. CONST. art. I, § 2; S.C. CONST. art. I, §§ 3, 4; S.D. CONST. art. VI, §§ 3, 12, 18; TENN. CONST. art. I, §§ 12, 30; *id.* art. XI, § 8; TEX. CONST. art. I, §§ 3, 4, 16, 19, 21; UTAH CONST. art. I, §§ 23, 24; *id.* art. IV, § 1; VT. CONST. ch. I, art. VII; VA. CONST. art. I, §§ 3, 4, 11; WASH. CONST. art. I, §§ 8, 12, 15, 28; W. VA. CONST. art. II, § 4; *id.* art. III, §§ 18, 19; WIS. CONST. art. I, §§ 12, 14; WYO. CONST. art. I, §§ 2, 3, 34; *id.* art. III, § 27; *id.* art. VI, § 1. *See also* Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 82-83 (Tex. 2015).

[79] Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 137 n.444, 138 n.447. *See* ALA. CONST. art. I, § 22; ALASKA CONST. art. I, § 15; ARIZ. CONST. art. II, §§ 9, 13, 29;

immunities clauses come in a variety of flavors, complicating things enormously from a textualist perspective, where the revival of the Privileges or Immunities clause as the true protector of substantive rights at the federal level has been one of the leading legal intellectual revolutions of recent decades. Much of the legitimacy for this Privileges or Immunities revisionism has been built on contrasting "Privileges or Immunities" as a legal term of art from "due process of law," which for these scholars, at its most generous reading, merely provides protection against deprivations of common law procedural rights and usurpations of the separation of powers.[80]

As such, it is difficult by the same strand to argue that Professor Calabresi's analysis of widely varying "Privileges or Immunities" clauses in state constitutions, many of which do not even use the "Privileges or Immunities" term of art should be treated as merely different-shaped seeds of the same plant. These would include, the five clauses from east coast states that Prof. Calabresi treats as a variety of "Privileges or Immunities" clause, despite the absence of

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ARK. CONST. art. II, §§ 18, 19; CAL. CONST. art. I, § 7; COLO. CONST. art. II, § 11; CONN. CONST. art. I, § 1; GA. CONST. art. I, § 1, para. 10; HAW. CONST. art. I, § 21; IDAHO CONST. art. I, § 2; ILL. CONST. art. I, § 16; IND. CONST. art. I, § 23; IOWA CONST. art. I, § 6; KAN. CONST. Bill of Rights, § 2; KY. CONST. Bill of Rights, § 3; LA. CONST. art. I, § 12; id. art. XII, § 12; ME. CONST. art. I, § 23; MASS. CONST. pt. I, art. VI, VII; MINN. CONST. art. XII, § 1; MO. CONST. art. I, § 13; MONT. CONST. art. II, § 31; NEB. CONST. art. I, § 16; N.H. CONST. pt. I, art. X; N.J. CONST. art. IV, § 7, paras. 7-10; N.M. CONST. art. IV, § 26; N.C. CONST. art. I, § 32; N.D. CONST. art. I, § 21; OHIO CONST. art. I, §§ 2, 17; OKLA. CONST. art. V, § 51; OR. CONST. art. I, § 20; PA. CONST. art. I, § 17; R.I. CONST. art. I, § 2; S.C. CONST. art. I, § 3; S.D. CONST. art. VI, § 12; TENN. CONST. art. XI, § 8; TEX. CONST. art. I, § 3; UTAH CONST. art. I, § 23; VT. CONST. ch. I, art. VII; VA. CONST. art. I, §§ 3,4; WASH. CONST. art. I, §§ 8, 12; W. VA. CONST. art. III, § 19; WYO. CONST. art. III, § 27.

[80] Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1677-80, 1796, 1801 (2012).

the words "privileges," "immunities," or their close cousins "franchises" and "emoluments" in the text of those provisions.[81]

This puts us back at the "core" thirty-nine Privileges or Immunities Clauses identified by Professor Calabresi, under the broader, and I think justified, view that for our purposes, "franchises" and "emoluments" mean the same thing as "privileges" or "immunities."[82] I am further inclined to strike out Maine's provision, as to me it reads far more naturally as only a prohibition on the granting of hereditary titles and not also a ban on class legislation.[83] Thus we are left with thirty-eight or thirty seven, depending on whether or not to include the pertinent New Jersey clause — textually an edge case, but on substance probably more a "Privileges or Immunities" clause than not.[84]

The much bigger obstacle seems to be that textually, thirteen of these "Privileges or Immunities" clauses only provide textual protections against irrevocable or perpetual grants of privileges or immunities.[85] A further textual wrinkle appears in the Texas,

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[81] I justify including "franchises" and "emoluments" as de-facto synonyms for "privileges" and "immunities," as I believe them to be analogous to including the "due course of law," and "law of the land" language in the due process cases; simply put, they have been used sufficiently interchangeably for a sufficiently long period of time in state constitutions that splitting those hairs is a formalist bridge too far for me. The five clauses in question are: MASS. CONST. pt. I, art. VII; N.H. CONST. pt. I, art. X; R.I. CONST. art. I, § 2; VT. CONST. ch. I, art. VII; VA. CONST. art. I, § 3.

[82] Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 137 n.444.

[83] ME. CONST. art. I, § 23 (The "Title of nobility prohibited; tenure of offices" provision reads "No title of nobility or hereditary distinction, privilege, honor, or emolument, shall ever be granted or confirmed, nor shall any office be created, the appointment to which shall be for a longer time than during good behavior.").

[84] N.J. CONST. art. IV, § 7, para. 7 ("No general laws shall embrace a provision of a private, special, or local character.").

[85] COLO. CONST. art. II, § 11; HAW. CONST. art. I, § 21; IDAHO CONST. art. I, § 2; ILL. CONST. art. I, § 16; KAN. CONST. Bill of Rights, § 2; LA. CONST. art. XII, § 12; MO. CONST. art. I, § 13; MONT. CONST. art. II, § 31; OHIO CONST. art. I, §§ 2; PA. CONST. art. I, § 17; S.D. CONST. art. VI, § 12; UTAH CONST. art. I, § 23; WASH. CONST. art. I, § 8.

Virginia, North Carolina, and Kentucky Constitutions, which create textual exceptions to the ban on special privileges and immunities in "consideration of public services."[86] In the context of litigating cases that turn on interpretations of such glittering generalities, as "Privileges or Immunities" is, every word has significance, especially when it stands in stark contrast to analogous provisions in the Federal Constitution. There are significant consequences to how one draws these lines. Indeed, if one disqualifies New Jersey's provision and finds significance in the use of "emoluments" and "franchises," the critical, Article V-level mass of states that appeared at the beginning of this sub-section slips away into an almost even split — if not an outright minority.

D. EQUAL PROTECTION CLAUSES

Textually speaking, the confusion doesn't get much better in the context of the equal protection clauses in state constitutions. Professor Calabresi does not have a clear accounting of these in his 2018 article. Thus, for these purposes, I turned to Professor Jennifer Friesen's treatise on State Constitutional Law, which I further supplemented with my additional research.[87]

Professor Friesen identifies thirteen "mandatory," equal protection clauses — which, as she appears to acknowledge in her footnotes, with a more generous reading would grow to fifteen with

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[86] KY. CONST. Bill of Rights, § 3; N.C. CONST. ART. I, § 32; TEX. CONST. art. I, § 3; VA. CONST. art. I, § 4 ("…that no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services.").

[87] JENNIFER FREISAN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES (4th ed.) (2015) [hereinafter FREISAN, STATE CONSTITUTIONAL LAW].

the inclusion of Ohio and Nebraska.[88] These largely echo the federal language in the Fourteenth Amendment, as South Carolina's language states that no person shall "be denied the equal protection of the laws."[89]

Other state constitutions generally "declare, recognize, or secure legal equality among persons generally," a commitment that is typified by the Wyoming Constitution, which states that "in their inherent right to life, liberty, and the pursuit of happiness, all members of the human race are equal."[90] As Professor Freisan notes, the strength and enforceability of these provisions can vary drastically, and getting an accurate count on them — much less actually distinguishing them from the Lockean Rights clauses noted by Professor Calabresi (and discussed herein in short order) — appears to be almost impossible.[91]

More importantly, however, there is a set of provisions that prohibit interferences with the 'civil and political rights' of persons or prohibit "discrimination in the exercise of basic rights."[92] Notably, there is tremendous overlap in the number of states that have both this type of provision and a "mandatory" equal protection clause; thus, by my count, approximately seventeen states seem to have

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[88] *Id.* at 3-7 n.24. *See* CAL. CONST. art. I, § 7(A); CONN. CONST. art. I, § 20; GA. CONST. art. I., § 1 para. 2, HAW. CONST. art. I, § 5; ILL. CONST. art. I. § 2; LA. CONST. art. I § 3; ME. CONST. art. I § 6-A; MICH. CONST. art. I § 2; MONT. CONST. art. II, § 4; NEB. CONST. art. I § 3; N.M. CONST. art. II § 18; N.Y. CONST. art. I § 11; N.C. art. I § 19; OHIO CONST. art. I § 2; S.C. CONST. art. I § 3.

[89] S.C. CONST. art. I § 3.

[90] WY. CONST. art. I § 2.

[91] *See, e.g.*, FLA. CONST. art. 1 § 2.

[92] FREISAN, STATE CONSTITUTIONAL LAW, *supra* note 87, at 3-8, 3-9. *See* ALASKA CONST. art. I § 3; CONN. CONST. art. I, § 20; FLA. CONST art. I § 2; HAW. CONST. art. I, § 5; LA. CONST. art. I § 3; ME. CONST. art. I § 6-A; MICH. CONST. art. I § 2; MONT. CONST. art. II, § 4; N.Y. CONST. art. I § 11; N.C. art. I § 19; PA CONST. art. I § 26.

"equal protection" clauses in the true sense of the term.[93] This is obviously a far cry from an Article V supermajority.

E. CONTRACTS CLAUSES

A major category of state constitutional clauses that are analyzed by neither Professor Calabresi nor Professor Freisan in much depth are state constitutional provisions prohibiting laws that impair the obligations of contracts. Although the Contracts Clause at the federal level was effectively eviscerated in 1934 with the U.S. Supreme Court's decision in *Home Building & Loan Association v. Blaisdell*, contracts clauses have managed to avoid being entirely written out of state constitutions, despite the litany of constitutional conventions that have taken place since the New Deal.[94] By my count, forty states — well north of an Article V consensus — have contracts clauses in their state constitutions.[95] All but two of the ten states without

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[93] A further three states (New Jersey, Virginia, and Wyoming) appear to have constitutional equal protection guarantees on the basis of protected categories (race, sex, religion, etc.). I do not count these as relevant for our purposes, given that they would not be the focus of economic liberty and class legislation litigation.

[94] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). *See e.g.* MICH. CONST. art. 1, § 10 (included in the Michigan Constitution of 1963).

[95] *See* ALA. CONST. art. I, § 22; ALASKA CONST art. I, § 15; ARIZ. CONST. art. II, § 25; ARK. CONST. art. II, § 17; CAL. CONST art. I, § 9; COLO. CONST. art. II, § 11; FLA. CONST. art. I, § 10; GA. CONST. art. I, § 1, para. X; IDAHO CONST. art. I, § 16; ILL. CONST. art. I, § 16; IND. CONST. art. I, § 24; IOWA CONST. art. I, § 21; KY. CONST. BILL OF RIGHTS, § 19(1); LA. CONST. art. I, § 23; ME. CONST. art. I, § 11; MICH. CONST. art. 1, § 10; MINN. CONST. art. I, § 11; MISS. CONST. art. III, § 16; MO. CONST. art. I, § 13; MONT. CONST. art. II, § 31; NEB. CONST. art. I, § 16; NEV. CONST. art. I, § 15; N.J. CONST. art. IV, § 7, para. III; N.M. CONST. art. II, § 19; N.D. CONST. art. I, § 18; OHIO CONST. art. I, § 18; OKLA. CONST. art. II, § 15; OR. CONST. art. I, § 21; PA. CONST. art. I, § 17; R.I. CONST. art. I, § 12; S.C. CONST. art. I, § 4; S.D. CONST. art. VI, § 12; TENN. CONST. art. I, § 20; TEX. CONST. art. I, § 16; UTAH CONST. art. I, § 18; VA. CONST. art. I, § 11; WASH. CONST. art. I, § 23; W. VA. CONST. art. III, § 10; WIS. CONST. art. I, § 12; WYO. CONST. art. I, §35.

contracts clauses in their constitutions are in the Northeast/Mid-Atlantic — Hawaii and Kansas being the exceptions.[96]

Most notably, contracts clauses in state constitutions track the language of the Federal Constitution almost exactly; indeed, they bear none of the textual wrinkles and caveats discussed in earlier sections describing due process clauses, equal protection, or privileges or immunities clauses. This makes them arguably the ideal candidates for engaging in a "single discourse" between state and federal constitutional law — especially as far as greater constitutional protections for economic liberties go.[97]

Consider the contracts clause of the Nevada Constitution: "No bill of attainder, ex-post-facto law, or law impairing the obligation of contracts shall ever be passed."[98] Sadly, perhaps taking the cue from Washington, state supreme courts have also done great damage to the textual protections their contracts clauses provide for economic liberties through their interpretations of these clauses. For instance, in 1974 the Nevada Supreme Court sent the legal equivalent of a cannonball through the sails of its contracts clause when it declared that the Nevada State Constitution's contracts clause does not prohibit the state legislature from restricting or prohibiting legitimate occupations or restraining contracts if doing so is "in the public interest."[99] And, to make this vague and deeply deferential test even worse, the court also declared that "every reasonable presumption must be indulged in support of the controverted statute

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[96] The ten states in question are: Connecticut, Delaware, Hawaii, Kansas, Maryland, Massachusetts, New Hampshire, New York, North Carolina, and Vermont. *But see* Opinion of Justices, 609 A.2d 1204, 1207 (N.H. 1992) (holding that Part 1, section 23 of the New Hampshire Constitution offers the same protection from laws impairing the obligation of contracts as the Contracts Clause of the Federal Constitution despite the absence of clear textual language to that effect in the clause);

[97] Liu, *State Courts and Constitutional Structure*, *supra* note 61, at 1311.

[98] NEV. CONST. art. I, § 15.

[99] Koscot Interplanetary v. Draney, 530 P.2d 108, 112 (Nev. 1974).

with any doubts being resolved against the challenging party, who has the substantial burden of proof of showing that the act is constitutionally unsound."[100]

As a result of this gradual chipping away of both state and federal contracts clauses, the most notable arena where state constitutional contracts clauses are invoked today are challenges to public employee pension reforms. Several years ago, Professor Richard A. Epstein put this front and center in describing the "double-edged sword" of state constitutional law, which is "all too apparent, given the short-shrift that some, but not all, state courts give to the protection of the state's interest in the enforcement of its own charter provisions and pension arrangements."[101] In particular, the states which Prof. Epstein singled out for giving this short-shrift were Illinois and California, which seemed to symbolize that "state constitutions can be used to vest rights against the state in ways that are clearly antithetical to the general efforts to create a system of more limited and responsive government."[102]

While I share the underlying nature of these concerns, it is worth noting that not all state courts, even in historically union-friendly, mostly Democratic states land on the "dark side of state constitutional law," as Professor Epstein understands it.[103] Notably, the Michigan Supreme Court unanimously rejected a challenge to the state's pension reforms in 2015, with now-Chief Justice (and elected Democrat) Bridget M. McCormack joining the majority.[104] While the Justices did conduct a searching review of all the plaintiffs' claims

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[100] *Id.*

[101] Richard A. Epstein, *The Double-Edged Sword of State Constitutional Law*, 9 N.Y.U. J.L. & LIBERTY 723, 743-44 (2015) [hereinafter Epstein, *The Double-Edged Sword*].

[102] *Id.* at 742-43. *See also* Kanerva v. Weems, 13 N.E.3d 1228 (Ill. 2014); Allen v. City of Long Beach, 287 P.2d 765 (Cal. 1955).

[103] Epstein, *The Double-Edged Sword, supra* note 101, at 743.

[104] AFT Mich. v. State, 866 N.W.2d 782 (Mich. 2015).

under the Michigan and United States Constitutions, including both contracts clauses, they unambiguously found that "public school employees…possess no contractual rights to accruing pension benefits."[105] Importantly, the Michigan Supreme Court interpreted the two contracts clauses coextensively in this case, even whilst noting that that they were not bound to do so; of course, this is not the best news for critics of lock-stepping between state and federal constitutional law, but it does help assuage the concerns of Professor Epstein and others about state courts hollowing out police powers exceptions when interpreting contract clauses in their state constitutions.[106]

In short, while contract clause doctrine in state constitutional law is far from clear or perfect — and does present sufficient public policy difficulties to make a "double-edged sword" in important circumstances, it is also all too valuable a field to be left fallow. Indeed, from a textual standpoint, it is the area of constitutional law arguably best suited to be part of a "single discourse" of providing greater constitutional protections for economic liberty — and on a normative level, arguably the best vehicle for restoring the contracts clause to its original meaning.[107] To paraphrase a well-known Soviet proverb: "he who does not risk, doesn't get to drink champagne." So, too, with state constitutionalism, a field that for decades was treated as no more than a "liberal ratchet," in the words of Justice Liu.[108] For originalists and textualists who have no penumbra to hide behind and no emanations to dance around, and have for decades witnessed

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[105] *Id.* at 808.

[106] *Id.* at 802 n.20.

[107] Liu, *State Courts and Constitutional Structure*, *supra* note 61, at 1311. *See also* Chapman & McConnell, *Due Process as Separation of Powers*, *supra* note 80, at 1763-64 (describing Chief Justice John Marshall's use of the contracts clause to invalidate a state law in the seminal case of *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810)).

[108] Liu, *State Courts and Constitutional Structure*, *supra* note 61, at 1324.

fiery debates about the meaning of glittering generalities like "due process of law" or "privileges or immunities," the lack of attention paid to the comparatively much more clear-cut language of "impairing the obligation of contracts," is simply inexplicable.

F. LOCKEAN RIGHTS CLAUSES AND "BABY NINTH AMENDMENTS"

Thirty-nine states included Lockean rights clauses in their state constitutions, essentially declaring that that there are natural rights that proceed the formation of political communities.[109]

These typically echo the structure and language of the preamble to the Declaration of Independence and the natural rights philosophy of John Locke. At core, the inclusion of these clauses in the vast majority of state constitutions indicates that they are more textually committed to a natural rights based, rather than purely positivist, understanding of law than the Federal Constitution. Additionally, these typically include explicit references to property as a

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[109] Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 125 n.379. *See* ALA. CONST. art. I, § 1; ALASKA CONST. art. I, § 1; ARK. CONST. art. II, § 2; CAL. CONST. art. I, § 1; COLO. CONST. art. II, § 3; CONN. CONST. art. I, § 1; DEL. CONST. pmbl.; FLA. CONST. art. I, § 2; HAW. CONST. art. I, § 2; IDAHO CONST. art. I, § 1; ILL. CONST. art. I, § 1; IND. CONST. art. I, § 1; IOWA CONST. art. I, § 1; KAN. CONST. BILL OF RIGHTS, § 1; KY. CONST. Bill of Rights, § 1; LA. CONST. art. I, § 1; ME. CONST. art. I, § 1; MASS. CONST. amend. art. CVI; MO. CONST. art. I, § 2; MON. CONST. art. II, § 3; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § 1; N.H. CONST. pt. 1, arts. I, II, III; N.J. CONST. art. I, para. 1; N.M. CONST. art. II, § 4; N.C. CONST. art. I, § 1; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 1; OKLA. CONST. art. II, § 2; OR. CONST. art. I, § 1; PA. CONST. art. I, § 1; S.D. CONST. art. VI, § 1; TEX. CONST. art. I, § 3; UTAH CONST. art. I, § 1; VT. CONST. ch. 1, art. I; VA. CONST. art. I, § 1; W. VA. CONST. art. III, § 1; WIS. CONST. art. I, § 1; WYO. CONST. art. I, § 2.

fundamental right, but the language is subject to wide variation.[110] A typical example of a Lockean Rights Clause comes from the Illinois Constitution:

> Art I §1: All men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed.

As Professor Calabresi notes, these clauses are not antiquated relics; rather, since 1974, at least three states have added Lockean Rights Clauses to their state constitutions.[111] These Lockean Rights Clauses have been part of the American constitutional tradition from the earliest days of the Republic, and were present in twenty-four out of thirty-seven state constitutions in 1868; if one counts three further "quasi" Lockean Rights Clauses, the total reaches twenty-seven.[112]

Calabresi and Vickery's 2015 Texas Law Review article digs deep into the antebellum jurisprudence surrounding these Lockean Rights Guarantees in a number of subjects, including property rights in a number of areas: liquor laws, Sabbath trading rules, test oaths,

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[110] I take no position on whether the right to the "pursuit of happiness" that is very popular in these clauses ought to be treated as a functional equivalent of a declaring property a fundamental right.

[111] Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 127 n.386. *See* CAL. CONST. art. I, § 1 (added in 1974); FLA. CONST. art. I, § 2 (added in 1998); HAW. CONST. art. I, § 2 (added in 1978).

[112] Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1440-52 (2015) [hereinafter Calabresi & Vickery, *Lockean Natural Rights Guarantees*].

slaughterhouse regulations, property transfer and inheritance regulations, and various taxation schemes.[113] For the most part, Calabresi and Vickery's research indicates that antebellum courts were largely unwilling to use the Lockean Rights Clauses to strike down various economic regulations, or as they put it:

> In nearly every case, the courts acknowledged that the Lockean Natural Rights Guarantees protected rights but then proceeded to defer to the legislature to regulate those rights. Therefore, the courts did not rely on the Lockean Natural Rights Guarantees as strong limitations on legislative powers and were content to allow the legislature flexibility and discretion in regulating those issues.[114]

Calabresi and Vickery also note that state supreme courts largely vindicated liquor laws — the paradigm of "noxious goods" regulation in American law.[115] On these inferences, Calabresi and Vickery went as far as to argue that:

> A review of these cases suggests that the Lochner dissenters may very well have been right, and that the majority opinion in that case was wrong, with respect to the level of scrutiny historically afforded to regulations of business in American constitutional law. This history lends some support to the idea that the rational basis test of *Nebbia v. New York* and *Williamson v. Lee Optical Co.* is more deeply grounded in U.S.

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[113] *Id.* at 1391-1437.
[114] *Id.* at 1437.
[115] *Id.*

> constitutional practice than is the reasonableness test of *Lochner*.[116]

In my view, this is a bridge too far, even in light of the evidence presented in Calabresi and Vickery's article. Notably, the Indiana Supreme Court vigorously resisted the legislature's alcohol control laws throughout the antebellum period and construed the state's Lockean Rights Clause to create a more demanding standard of review in economic liberties cases.[117]

Additionally, to use a further example, although the Kentucky, Florida, and Ohio supreme courts upheld taxes on railroad stock subscriptions, all three cases featured vigorous dissents.[118] Thus, to the extent there was deference to legislatures on antebellum economic liberty cases construed in light of the Lockean Rights Clauses, it was still broadly contested, as many judges adhered to a natural rights-driven, property-rights-protective view that resembles the "presumption of liberty" today endorsed by Professor Randy Barnett.[119]

Moreover, none of the cases identified by Calabresi and Vickery's 2015 article appear to resemble the blatant economic protectionism involving non-noxious goods that is authorized by today's rational basis test and the progeny of *Lee Optical*. Instead, to the extent the jurisprudence identified by Calabresi and Vickery resembles anything on the table today, it appears to be reasonably

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[116] *Id.* at 1417-18. Immediately thereafter, however, Calabresi and Vickery acknowledge that these cases do not take account of the presumption of liberty inherited from foundational English cases such as *The Case of the Monopolies* and *Dr. Bonham's Case*, which certainly do not employ a "mere rational basis test."

[117] *Id.* at 1395.

[118] *Id.* at 1431.

[119] RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

close to the primary dissent in *Lochner*, authored by the elder Justice Harlan, which recognized liberty of contract, but held that it should only be used to invalidate laws that had "no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[120] Notably, the elder Justice Harlan's view is essentially the position embraced by at least the *Patel* court — and it, like the antebellum cases, in no way, shape, or form resembles the systematic deference endorsed by the Justice Holmes' lone dissent in *Lochner*, which has guided most economic liberty jurisprudence since the New Deal.[121]

In light of this, perhaps it is not all that surprising that by 2018 Professor Calabresi repudiated his earlier view, instead arguing in favor of a position that more closely resembles Professor Barnett's:

> Professor Calabresi now thinks that when the government deprives someone of life, liberty, or property, it must show, by a preponderance of the evidence (i.e., by 51% of the evidence), that the law it has passed, as *Corfield v. Coryell* said in dicta, is a just law enacted "for the general good of the whole" people. Professor Calabresi thus thinks that where the evidence of unconstitutionality is 50% to 50%, there should be a presumption of constitutionality for departmentalist reasons. We disagree with the rational basis test as it was used in *Williamson v. Lee Optical* and with *United States v. Carolene Products Co.*, since they do not recognize the presumption of liberty. We agree on presumption of liberty

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[120] BERNSTEIN, REHABILITATING LOCHNER, *supra* note 37, at 35. *See also* Lochner v. New York, 198 U.S. 45, 68 (1905) (Harlan, J., dissenting).

[121] *See* Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 99 n.46 (Tex. 2015) (Willett, J., concurring) ("The court today agrees, adopting an approach some might say tracks the principal Lochner dissent more than the Lochner majority.").

> grounds with *Lochner v. New York*, *Griswold v. Connecticut*, and *Lawrence v. Texas*, and with *Obergefell v. Hodges*.[122]

The additional category of clauses in state constitutions that seem to affirm the existence of natural rights principles — and thus serve as another source of textual support for economic liberties — are the Ninth Amendment Analogues in thirty-three state constitutions as of 2018.[123] The bulk of these appear to have been adopted in the antebellum period, but none were present in state constitutions in 1791.[124] A typical "Baby Ninth Amendment" can be found in the 1851 Ohio Constitution: "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people." [125] However, the state "Baby Ninth Amendments," particularly in the contemporary context, and particularly as applied

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[122] Calabresi et al., *State Constitutions in 2018, supra* note 5, at 129 (emphasis added).

[123] *Id.* at 132 n.418. *See* ALA. CONST. art. I, § 36; ALASKA CONST. art. I, § 21; ARIZ. CONST. art. II, § 33; ARK. CONST. art. II, § 29; CAL. CONST. art. I, § 24; COLO. CONST. art. II, § 28; FLA. CONST. art. I, § 1; GA. CONST. art. I, § 1, para. 29; HAW. CONST. art. I, §§ 15, 22; IDAHO CONST. art. I, § 21; ILL. CONST. art. I, § 24; ID. art. II, § 2; IOWA CONST. art. I, § 25; KAN. CONST. Bill of Rights, § 20; LA. CONST. art. I, § 24; ME. CONST. art. I, § 24; MD. CONST. Declaration of Rights, art. III; MICH. CONST. art. I, § 23; MINN. CONST. art. I, § 16; MISS. CONST. art. III, § 32; MONT. CONST. art. II, § 34; NEB. CONST. art. I, § 26; NEV. CONST. art. I, § 20; N.J. CONST. art. I, para. 21; N.M. CONST. art. II, § 23; N.C. CONST. art. I, § 36; OHIO CONST. art. I, § 20; OKLA. CONST. art. II, § 33; OR. CONST. art. II, § 33; R.I. CONST. art. I, § 24; UTAH CONST. art. I, § 25; VA. CONST. art. I, § 17; WASH. CONST. art. I, § 30; WYO. CONST. art. I, § 36.

[124] Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 132-33.

[125] OHIO CONST. art. I, § 20.

to defense of economic liberties, do not appear to have been the focus of either much judicial inquiry or scholarship.[126]

G. ANTI-MONOPOLY CLAUSES

Twenty-one state constitutions, unlike the Federal Constitution, have clauses explicitly referencing monopolies or monopolistic power structures.[127] This represents a striking increase from 1868, when only five states had such explicit anti-monopoly clauses.[128] The state with the longest-standing anti-monopoly provision is North Carolina — one of six states to advocate (unsuccessfully) on behalf of a federal anti-monopoly provision in the early days of the Republic, but surprisingly the only one to follow through with one in its own constitution.[129]

North Carolina's anti-monopoly clause reads "Perpetuities and monopolies are contrary to the genius of a free state and shall not be

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[126] *See* Anthony B. Sanders, *Baby Ninth Amendments since 1860: The Unenumerated Rights Americans Repeatedly Want (and Judges Often Don't)*, 70 RUTGERS U.L. REV. 859 (2018); Anthony B. Sanders, *Baby Ninth and Unenumerated Individual Rights in State Constitutions before the Civil War*, 26 GEO. MASON L. REV. 1059 (2019) (the most recent and complete analyses of the history and meaning of the Baby Ninth Amendment). *See also* Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 132-33 (noting that Professor Akhil Reed Amar has worked at the edges of the issue in the context of his research into the Federal Constitution); BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 119.

[127] Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 106 n.280. *See* ALA. CONST. art. IV, § 103; ARIZ. CONST. art. XIV, § 15; ARK. CONST. art. II, § 19; GA. CONST. art. III, § 6, PARA. 5(C)(1); MD. CONST. Declaration of Rights, art. XLI; MINN. CONST. art. XIII, § 6; MISS. CONST. art. VII, §§ 198, 198-A; MONT. CONST. art. XIII, § 6; NEV. CONST. art. XV, § 4; N.H. CONST. PT. 2, art. LXXXIII; N.M. CONST. art. IV, § 38; N.C. CONST. art. I, § 34; N.D. CONST. art. XII, § 16; OHIO CONST. art. II, § 1E(B)(1); OKLA. CONST. art. II, § 32; ID. art. V, § 44; TENN. CONST. art. I, § 22; TEX. CONST. art. I, § 26; UTAH CONST. art. XII, § 20; VT. CONST. CH. 2, § 63; WASH. CONST. art. XII, § 22; WYO. CONST. art. I, § 30.

[128] Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 108-09.

[129] Calabresi & Leibowitz, *Monopolies and the Constitution*, supra note 48, at 1013-15.

allowed." [130] The history of these provisions, which scholars including Timothy Sanfedur, Steven Calabresi, and Richard Epstein have devoted tremendous attention to on a historical and practical level, have deep roots in the Anglo-American legal tradition and a longstanding history of being used to invalidate economically protectionist laws that unreasonably encumber economic liberties.[131] One of the states that has been most active in this arena is Arkansas, whose State Supreme Court struck price control laws for barbers at the height of the New Deal — basing its analysis on historic analysis of anti-monopoly principles. [132] More recently, an Arkansas trial court invalidated the taxicab monopoly in Little Rock, finding it was in violation of the anti-monopoly clause of the state constitution.[133]

On substance, I believe that the anti-monopoly provisions present a powerful tool for attacking protectionist legislation that impairs commerce and longstanding economic liberties, as they have been defined in centuries of law in the English-speaking world. Apart from the twenty-one states that have these textual provisions, others can turn to the anti-monopoly concept as a powerful background principal in their interpretation of other constitutional provisions. This appears to be the core of Professor Calabresi's more expensive reading of anti-monopoly provisions in state constitutions, which reaches clauses that prohibit "the state from granting any corporation or group special privileges or immunities that are not equally granted to all other civilians."[134]

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[130] N.C. CONST. art. I, § 34.

[131] *See* TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW 17-39 (2010); Calabresi & Leibowitz, *Monopolies and the Constitution, supra* note 48; EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION, *supra* note 41, at 36-56.

[132] *See* Calabresi & Leibowitz, *Monopolies and the Constitution*, supra note 48, at 1092-93. *See also* Noble v. Davis, 161 S.W.2d 189 (Ark. 1942).

[133] Ken's Cab, LLC v. City of Little Rock, No. 60CV-16-1260, 2017 WL 1362047, at *2 (Ark. Cir. Jan. 25, 2017).

[134] Calabresi et al., *State Constitutions in 2018*, *supra* note 5, at 106.

In other words, these are the various types of class legislation and Privileges or Immunities clauses discussed at length in Part II-A(c). While I agree that these clauses can be read in light of anti-monopoly principles, so can other clauses found in abundance in state constitutions and in the Federal Constitution — including Takings Clauses, Contracts Clauses, and Ex-Post Facto Clauses. As such, I limit my count of anti-monopoly clauses to only the twenty-one state constitutions that have them, and not the expanded pool of forty-five that Professor Calabresi has identified.[135]

PART III

This portion of the article will examine the critical dynamics of the Texas Supreme Court's decision in *Patel* and the Pennsylvania Supreme Court's Decision in *Ladd*.[136] Herein, I will describe the key facts, state constitutional provisions, core thesis of the "rational basis with bite" test (and how it can be distinguished from traditional rational basis, strict scrutiny, and intermediate review), and lastly, the nature of *Patel*'s integration into the *Ladd* decision. This section will be devoted solely to the majority opinions, and briefly, Justice Wecht's dissent in *Ladd*. I will reserve my analysis of Justice Willett's *Patel* concurrence until Part III, as I believe it is best paired as a foil to many of the institutional and normative arguments advanced by Justice Barrett in her 2016 article.

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[135] *Id.* at 106-08.

[136] Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69 (Tex. 2015); Ladd v. Real Estate Comm'n, 230 A.3d 1096 (Pa. 2020).

A. PATEL — FACTS

In April 2009, the Texas Department of Licensing and Regulation (TDLR) first took the position that threaders — practitioners of a traditional South Asian form of hair removal — required esthetician licenses.[137] Notably, this change of course was precipitated by no changes in state law or administrative agency rules.[138] Indeed, with no notice or warning, TDLR inspectors decided to begin issuing administrative fines of $2,000 to individual threaders and $5,000 per business per day throughout Texas.[139] Moreover, the esthetician licenses TDLR demanded the threaders obtain were not cheap, fast, or easy; instead, they required 750 hours of instruction and cost on-average $9,000 at private cosmetology schools and $3,500 at public cosmetology schools.[140] Understanding that these new licensing regulations put the survival of their businesses in jeopardy, several threading salon owners, including Ashish Patel, co-owner of a threading business with locations in San Antonio, Houston, and Corpus Christi, sued TDLR.[141]

Patel and his co-plaintiffs, with attorneys from the public interest law firm The Institute for Justice, filed their suit in Austin.[142] The plaintiffs' core claim was that the licensing regulations violated their substantive due process rights under the "due course of law" provisions of the Texas Constitution, as they had "no real and substantial connection to a legitimate governmental objective."[143]

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[137] *Texas Eyebrow Threading*, INSTITUTE FOR JUSTICE, archived at https://perma.cc/4TBR-DTAV; *Patel*, 469 S.W.3d at 73 (Tex. 2015).

[138] *Texas Eyebrow Threading*, INSTITUTE FOR JUSTICE, *supra* note 137.

[139] *Id.*

[140] *Patel*, 469 S.W.3d at 73, 90.

[141] *Texas Eyebrow Threading*, INSTITUTE FOR JUSTICE, *supra* note 137.

[142] *Patel*, 469 S.W.3d at 75.

[143] *Id.*

Patel lost on a summary judgement motion in trial court, which the Texas Court of Appeals for the Third District affirmed.[144]

B. THE TEXAS SUPREME COURT INTRODUCES THE 'OPPRESSION' TEST

After agreeing with the threaders on a variety of procedural issues, including justiciability, ripeness, and standing, the Texas Supreme Court reached the merits of the threaders' substantive due process rights under the Texas Constitution.[145] Perhaps even more importantly, however, the court had to decide on the apt standard of review from a menu of three options that Texas courts had "mixed and matched through the years." [146] As Justice Phil Johnson's majority opinion acknowledged, prior to *Patel*, the evaluation of as-applied substantive due process challenges to economic regulations was an area of doctrinal confusion.[147]

The three different standards, as labeled by Justice Johnson were: 1) "real and substantial" 2) "rational basis including consideration of evidence," and 3) "no-evidence rational basis," with the threaders arguing that "real and substantial" was the appropriate test.[148] This labeling, however, seems somewhat out of step with most of the literature on the subject. Hence, to avoid confusion, going forward I shall describe the "real and substantial" standard as "heightened

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[144] *Id.*

[145] *Id* at 75-80.

[146] *Id.* at 80.

[147] *Id.* ("We have at least twice noted that Texas courts have not been entirely consistent in the standard of review applied when economic legislation is challenged under Section 19's substantive due course of law protections.").

[148] *Id. See also supra* note 120 (describing the "real or substantial" language of Justice John Marshall Harlan's *Lochner* dissent).

rational basis" or "rational basis with bite."[149] "Rational basis including consideration of evidence" will less-clunkily be described as "actual rational basis review."[150] And lastly, "no-evidence rational basis," will be referred to as "hypothetical rational basis."[151]

To provide real-world examples, "heightened rational basis" was the test consistently applied to economic substantive due process challenges in Pennsylvania from 1954 to the present day, in Wisconsin from 2005 until 2018, inconsistently in various other states — and, as I will show, in Texas from 2015 onwards.[152] "Actual rational basis" is akin to actual means-ends analysis, performed sporadically by both federal and state courts in response to

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[149] *See* Ferdon v. Wis. Patients Comp. Fund, 701 N.W.2d 440, 460-61 (Wis. 2005) ("[R]ational basis with bite focuses on the legislative means used to achieve the ends. This standard simply requires the court to conduct an inquiry to determine whether the legislation has more than a speculative tendency as the means for furthering a valid legislative purpose."); Menashi & Ginsburg, *Rational Basis with Economic Bite, supra* note 9.

[150] *See* Barnett, *Judicial Engagement, supra* note 57, at 860 (describing the analysis of the lower court in *Lee Optical* as an example of judicial scrutiny about potentially improper motivation behind some economic legislation, even when a rebuttable presumption of constitutionality is applied). In my view, the line between "actual rational basis" and "heightened rational basis," in practice can be very thin, with the key distinguishing difference being the willingness of the court to describe it as "heightened rational basis," in one form or another, as above all this would involve an admission that the rational basis test is not much of a test at all.

[151] *See* Barnett, *Judicial Engagement*, *supra* note 57, at 860 (criticizing the "hypothetical" rational basis approach of Justice Douglas and the Warren Court in *Lee Optical*); Neily, *No Such Thing: Litigating Under the Rational Basis Test*, *supra* note 8, at 897 ("[T]he rational basis test is concerned not with the actual basis for challenged legislation, but with speculative and hypothetical purposes instead.").

[152] *See* Ladd v. Real Estate Comm'n, 230 A.3d 1096, 1096 (Pa. 2020); Gambone v. Commonwealth, 101 A.2d 634, 637 (Pa. 1954). *See also Ferdon*, 701 N.W.2d at 460-61; Mayo v. Wis. Injured Patients & Families Comp. Fund, 914 N.W.2d 678, 690 (Wis. 2018) ("[W]e hereby overrule *Ferdon*. Rational basis with teeth has no standards for application, usurps the policy forming role of the legislature and creates uncertainty under the law."). *See, e.g.*, Louis Finocchiaro, Inc. v. Neb. Liquor Control Comm'n, 351 N.W.2d 701, 703 (Neb. 1984) ("[T]here must be some clear and real connection between the assumed purpose of the law and its actual provisions.").

compelling fact patterns and particularly egregious protectionist laws; some of the most prominent examples include the Sixth Circuit's decision in *Craigmiles* and the Arkansas Supreme Court's decision in *Ports Petroleum Co. v. Tucker*.[153] Finally, the "hypothetical rational basis test" remains the rule of thumb in federal substantive due process challenges involving economic liberties claims such as in *Hettinga v. United States* —which also featured Judge Janice Rogers Brown's concurrence condemning judicial deference in economic liberties cases, stating that "rational basis review means property is at the mercy of the pillagers."[154]

Ultimately, five Justices sided with the threaders and held that a heightened rational basis test would be the standard used for future substantive due process challenges to economic legislation.[155] More importantly, they substantially clarified the overused and arguably abused "real and substantial" test into something far more textually durable — and even more favorable to the plaintiffs than the test they were proposing.[156] Thus, the *Patel* test was born:

> Either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2)

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[153] *See* Craigmiles v. Giles, 312 F.3d 220, 228-29 (6th Cir. 2002) ("[N]one of the justifications offered by the state satisfied the slight review by rational basis review under the Due Process and Equal Protection clauses of the Fourteenth Amendment."). *See also* Ports Petroleum Co. v. Tucker, 916 S.W.2d 749, 755 (Ark. 1996) ("[W]e cannot agree that legislation which hampers innocent and legitimate competition can in any way be deemed to be rational irrespective of the goal to be accomplished.").

[154] Hettinga v. United States, 677 F.3d 471, 482 (D.C. Cir. 2012) (Brown, J., concurring).

[155] Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 86 (Tex. 2015).

[156] *Id.* at 80 (The Threaders' original argument called for a three-pronged, wordier test in which "the reviewing court considers whether (1) the legislative purpose for the statute is a proper one, (2) there is a real and substantial connection between that purpose and the language of the statute as the statute functions in practice, and (3) the statute works an excessive or undue burden on the person challenging the statute in relation to the statutory purpose.").

> when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest.[157]

This appears to be the first time a court has declared that proving the standalone "oppressiveness" of an economic regulation will be sufficient to overturn the rebuttable presumption of constitutionality.[158] Moreover, the test essentially means that instead of having to prove multiple elements per the "real and substantial" test introduced earlier, in order to overturn a statute, litigants need only demonstrate that either: 1) the statute's purpose is not rationally related to a legitimate governmental interest, or 2) the statute's actual effect is not rationally related to a legitimate governmental interest, or 3) the statute's actual effect is overly burdensome in light of the legitimate governmental interest. Notably, it is this third, more innovative option offered to them by the Texas Supreme Court on which the threaders triumphed.[159]

While the *Patel* majority declined to set bright-line rules, it did make clear that both the proportion of licensing hours that were "arguably relevant to the activities threaders perform," in this case at most 58% (to use TDLR's figures), as well as the total number of hours in question was relevant.[160] Thus, if the state had required only 10 hours of training and 5.8 of those hours were "relevant to what threaders do, the burden of the irrelevant hours would weigh less heavily in determining whether the effect of the requirements as a

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[157] *Id.* at 87 (emphasis added).
[158] *Id.*
[159] *Id.* at 90.
[160] *Id.* at 89.

whole on aspiring threaders is oppressive."[161] What weighed much more heavily on the Justices' minds was "the large number of hours not arguably related to the actual practice of threading, the associated costs of those hours in out-of-pocket expenses, and the delayed employment opportunities while taking the hours." [162] Finally, although they only noted it "in passing," the *Patel* majority also brought attention to the comparative licensing requirements for eyelash-extension specialists, who only undergo 320 hours of training despite their specialty "involving the use of chemicals and a high rate of adverse reactions," and for hair braiders, who, prior to their profession's deregulation by the Texas Legislature, only had to undergo thirty-five hours of training.[163]

It is also worth examining the *Patel* majority's reasoning in favor of the heightened rational basis test. The core principle underlying the majority was State Constitutional Originalism, drawing on the original meaning of the Due Process Clause of the Texas Constitution.[164] Although similar language had been part of Texas law from the Republic of Texas' 1836 Declaration of Rights, which in turn made its way into the state's 1845, 1861, 1866, and 1869 Constitutions, the phrasing of the Due Process Clause of the Texas Constitution as it stands today was only finalized at the 1875 Constitutional Convention.[165]

Article I, § 16 of the 1845 Texas Constitution held that "No citizen of this state shall be deprived of life, liberty, property, or privileges, outlawed, exiled, or in any manner disenfranchised, except by due course of the law of the land." In contrast, the Article I, § 19 of the

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[161] *Id.* at 90.

[162] *Id.*

[163] *Id.* at 89.

[164] *Id.* at 82-87. *See also* Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL'Y 341 (2017).

[165] *Patel*, 469 S.W.3d at 82-83.

1875 Texas Constitution holds that "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land."

Thus, textually speaking, the differences are quite minimal. Essentially, the 1875 Convention removed "outlawed and exiled" and added "or immunities" to "privileges." Yet, the *Patel* majority did not cite any antebellum cases or devote any attention to what the key phrase "due course of law," meant prior to 1875, choosing to concentrate solely on post-Civil War text and jurisprudence.[166] This appears to be a stricter construction than the type of State Constitutional Originalism which is practiced in other states, such as Georgia. The Georgia Supreme Court also applies a "presumption of constitutional continuity," in which it generally presumes that "a constitutional provision retained from a previous constitution without material change has retained the original public meaning that provision had at the time it entered a Georgia Constitution, absent some indication to the contrary."[167]

To the extent that the *Patel* majority declared there was a material change between the 1845 and the 1875 phrasing, it did so in its discussion of how the 1875 Texas Constitutional Convention debated how to best secure the rights of Texans in the aftermath of the *Slaughter-House Cases* of 1873.[168] Indeed, for the *Patel* majority, the original meaning of the Due Process Clause of the Texas Constitution, and thus the extent of the economic liberty guarantees secured for Texans in their State Constitution, turned on the 1875 Convention's reaction to the *Slaughter-House Cases*' gutting of the federal Privileges or Immunities Clause.[169] As the *Patel* majority put

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[166] *Id.*
[167] Elliot v. State, 824 S.E.2d 265, 269 (Ga. 2019).
[168] *Patel*, 469 S.W.3d at 83.
[169] *Id.*

it, the *Slaughter-House Cases* created an obligation for the states to "protect the privileges or immunities found in state citizenship, including even such fundamental rights as the right to acquire and possess property and to pursue and obtain happiness and safety."[170]

Thus, facially speaking, the *Patel* majority does nothing to move the needle one way or another in the debate about the original meaning of Section One of the Fourteenth Amendment and understandings of "due process of law" or "privileges or immunities" in 1868. Whether this was incidental or the intended product of a very elaborate duck to avoid getting mired in Federal Constitutional debates is speculation beyond the limits of this article. But, that does not mean that further inquiries cannot, and should not, be made into the content of the antebellum understandings of the Texas Constitution's Due Process guarantee and into the 1875 Convention Debates — particularly the appearance of the "privileges or immunities," term of art — despite it not being included in the clause in the 1869 Constitution, which was ratified most recently after the adoption of the Fourteenth Amendment.[171]

At the same time, by presenting the Texas Constitution's Substantive Due Process guarantee as an unambiguous creature of the post-*Slaughter-House* era, the *Patel* majority put themselves on track to create a test remarkably similar to the prevailing, late nineteenth century consensus — which was remarkably similar to the aforementioned *Lochner* dissent by Justice John Marshall Harlan.[172] As David Mayer has written, liberty-of-contract cases from the 1870s through the 1930s by and large were not the radical, ultra-libertarian activist decisions that Justice Holmes' *Lochner* dissent

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[170] *Id.*

[171] *Id.*

[172] *See supra* note 120 describing the "real or substantial" language of Justice John Marshall Harlan's *Lochner* dissent.

made them out to be.[173] Instead, the liberty interests guaranteed by courts during this period fell well short of more stridently libertarian approaches and limitations on the police power.[174] On a consistent basis, courts were willing to provide a large carve-out to traditional police powers and protections for public health, safety, order, and morality, with the U.S. Supreme Court notably upholding bans on the sale of oleomargarine, maximum hours for miners, Sunday-closing laws, anti-lottery laws, and alcohol regulations.[175] Another empirical analysis noted that of the 150 cases decided under the Due Process Clause from 1913 to 1927 "involving substantive legislation of a social or economic character," the court only invalidated laws in 22 of them — a ratio of less than 15%.[176] Thus, a heightened rational basis test that calls for actual means-ends analysis and provides for a rebuttable presumption of constitutionality seems like a perfect modern-day vehicle to return to the mainstream, pre-New Deal understanding of constitutional protections for economic liberties.

Although the *Patel* majority is not in a position to weigh in on the original meaning of the Fourteenth Amendment's Due Process guarantee, its understanding of the Texas Due Process guarantee should weigh on how Due Process was understood from 1875 onwards.[177] This would throw cold water on many traditional

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[173] David N. Meyer, *The Myth of Laissez-Faire Constitutionalism: Liberty of Contract During the Lochner Era*, 36 HASTINGS CONST. L. Q. 217 (2009).

[174] *Id.* at 262.

[175] *Id.* at 261-63.

[176] *See* Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 944 (1927). *See also* Menashi & Ginsburg, *Rational Basis with Economic Bite*, *supra* note 9, at 1061-65 (discussing the early origins and application of the rational basis test).

[177] Given that the Texas language dates to 1875 while the Federal language dates to 1868, any congruous understanding between the Texas and U.S. Constitution's Due Process guarantee can only be dated to 1875 at the earliest. I caution that the value of this could be highly uncertain, as the *Slaughter House Cases* of 1873 happened in the

arguments about Due Process guarantees only protecting procedural, rather than substantive rights, and would date widespread acceptance of substantive due process to an earlier date than many of its opponents would concede. The following segment of the *Patel* majority's opinion is instructive:

> Texas judicial decisions in the nineteenth and early twentieth century indicated that the Texas Due Course of Law Clause and the federal Due Process Clause were nearly, if not exactly, coextensive. Such decisions generally tracked the thinking expressed by the Court in *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249, 252-53 (Tex. 1887), where the Court held that Article I, § 19 was not violated under the facts of that case because of the United States Supreme Court's interpretation of the Fourteenth Amendment in a similar case. During this period, Texas courts frequently addressed whether a legislative enactment was a proper exercise of the governmental unit's police power, examining justifications for the enactment and typically relying on decisions from the United States Supreme Court as guidance.[178]

Thus, providing one of the earlier examples of state supreme courts acting in "lockstep" with the U.S. Supreme Court, the *Patel* majority appears to argue that to the extent its understanding of the Due Process Clause of the Texas Constitution is correct, it would also apply to a proper interpretation of the Due Process Clause of the Fourteenth Amendment, if the latter was construed today according

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interim and fundamentally changed American constitutional law — on top of the many changes in American law, politics, and society during the tumultuous 1868-1875 period.

[178] Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 84 (Tex. 2015).

to late nineteenth and early twentieth century decisions. In essence: if the two provisions were originally understood to mean nearly the same thing but mean very different things after *Patel* restored Texas Constitution's Due Process Clause to its original meaning, then a U.S. Supreme Court seeking to restore the Due Process Clause to a meaning that it held in 1875 would adopt the *Patel* test for the Federal Constitution. Indeed, the core historical narrative of the *Patel* majority is that it was the U.S. Supreme Court that strayed in *Carolene Products*, sending Texas courts into a dizzy of doctrinal confusion about how to interpret their own Due Process Clause for the next 80 years, until the Texas guarantee finally properly re-emerged in 2015, understood in the same way as it was in 1875.[179]

This last point is worth commenting on as it represents the *Patel* majority's understanding of stare decisis. In a nutshell, for them any potential disruptiveness stemming from their opinion was worth the cost of getting the right constitutional answer. As far as they were concerned, previous decisions over decades of doctrinal confusion got wrong answers by applying a more deferential standard of review and failing to appropriately carry the burden that the *Slaughter-House Cases* had imposed on State Constitutions to protect economic liberties.[180]

C. LADD — FACTS

In contrast to *Patel*, the Pennsylvania Supreme Court's decision in *Ladd* was an altogether more low-key affair. Unlike *Patel,* it received comparatively little press coverage or significant attention in the legal community, even though Ms. Ladd was also represented

[179] *Id.* at 86.
[180] *See id.* at 87.

by The Institute for Justice. The Goldwater Institute also filed an amicus brief on behalf of Ms. Ladd, which was noted in-passing by the majority opinion in a footnote.[181] The facts, however, are no less stark as an example of burdensome and irrational government regulation of entrepreneurs than *Patel*.

Sara Ladd lost her job as a digital marketer during the Great Recession. [182] In her early 50s at the time and facing an understandable need for extra income, she began leasing one of the two vacation properties she owned in the Pocono Mountains and marketing it online, making use of her digital marketing skills to create an online reservation system.[183] In 2013, she began doing the same with her other property; soon, her neighbors noticed and asked Ms. Ladd to begin marketing their properties as well.[184] Sensing an entrepreneurial opportunity, Ms. Ladd formed a New Jersey limited liability company called Pocono Mountain Vacation Properties, LLC ("PMVP") and launched a website in 2016.[185]

Through PMVP, Ladd entered into contracts with property owners to handle the digital marketing and customer-facing end of the short-term holiday rental business.[186] While operating PMVP, Ms. Ladd was a self-employed an independent contractor who merely handled logistics and marketing on behalf of her clients; further, by operating out of her New Jersey home, she was able to keep overhead costs low and provide her clients with competitively-

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[181] Ladd v. Real Estate Comm'n, 230 A.3d 1096, 1106, 1108 n.12 (Pa. 2020). The other interesting amicus brief in Ms. Ladd's case was filed by Ashish Patel — who analogized Ms. Ladd's case to his own. Thus, rather unsurprisingly, the section of Ms. Ladd's brief that addressed the hours requirement cited extensively from the *Patel* majority opinion.

[182] *Id.* at 1100.

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

priced services.[187] Ms. Ladd was never a party to any of the contracts between the renters and the other property owners; she never managed more than five clients' properties at one time, never managed a property outside the Poconos, and never took on rental agreements that lasted more than thirty days.[188] Indeed, she even advised her clients of their obligations to pay the Commonwealth of Pennsylvania's "hotel tax." [189] In short, she was the model entrepreneur in the short-term vacation rental industry — nothing even close to a traditional real estate agent or real estate broker engaged in complicated transactions worth hundreds of thousands of dollars and the transfer of long-term interests in real property.[190]

However, in January 2017, the Pennsylvania Bureau of Occupational and Professional Affairs ("Bureau") decided that the then-sixty-one-year-old Ms. Ladd was engaged in the "unlicensed practice of real estate."[191] As the Bureau made clear to her, if she did not comply with Pennsylvania's licensing requirements for real estate brokers, she would find herself facing civil and criminal penalties — the latter carrying a maximum penalty of up to 3 months in jail.[192] The requirements Ms. Ladd faced in order to be properly licensed as a broker were daunting: 315 hours of coursework, passage of two exams on real-estate practice, three years of apprenticeship as a real estate salesperson, and a brick-and-mortar location in the Commonwealth of Pennsylvania.[193] Notably, these requirements were well and above those that the statute in question applied to rental listing referral agents and timeshare salespersons —

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[187] *Id.* at 1100-01.
[188] *Id.*
[189] *Id.* at 1100 n.6.
[190] *Id.* at 1101.
[191] *Id.*
[192] *Id. at 1100.*
[193] *Id.* at 1105, 1112.

jobs that were closer to Ms. Ladd's busines model than traditional real estate brokers.[194] Faced with the cost of these burdensome requirements — including at least three years of lost income and unknown quantities of time and money to obtain a license she clearly did not need, Ms. Ladd sued for relief under the original jurisdiction of the Pennsylvania Commonwealth Court (the state's intermediate appeals court).[195] Ms. Ladd argued that the application of the licensing requirements to her violated her substantive due process rights under the Pennsylvania Constitution by "imposing unlawful burdens on her right to pursue her chosen occupation."[196]

The Commonwealth Court, however, denied Ms. Ladd relief. Although they claimed to be applying the heightened rational basis test required under Pennsylvania law since the *Gambone* decision in 1954 (and affirmed repeatedly by the Pennsylvania Supreme Court since), the Commonwealth Court panel effectively refused to consider the law as-applied to Ms. Ladd.[197] The Commonwealth Court insisted on noting that the "purpose" of the Real Estate licensing statute Ms. Ladd was challenging was protecting "buyers and sellers of real estate, the most expensive item many persons ever buy or sell, from abuse by persons engaged in the business."[198] Thus, because of this appropriate purpose, and the fact that "licensing requirements are generally accepted across professions to ensure competency, regardless of the number of hours worked or the

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[194] *Id.* at 1105. Ms. Ladd further noted that there were no licensing requirements in the Commonwealth of Pennsylvania whatsoever for hotel and apartment complex managers and travel agents — jobs that she argued were very similar to her own. *See id.* at 1114-15.

[195] *Id.* at 1101.

[196] *Id.*

[197] *Id.* at 1102.

[198] *Id.*

number of clients," it was wholly irrelevant that the law's requirements were in fact "unduly burdensome" to Ms. Ladd.[199]

D. LADD — THE PENNSYLVANIA SUPREME COURT EMBRACES *PATEL'S* 'OPPRESSION' TEST AND AFFIRMS 'RATIONAL BASIS WITH BITE' FOR ECONOMIC LIBERTIES

Justice Kevin Dougherty's opinion began by analyzing the constitutional provision Ms. Ladd sued under — Article I, § 1 of the Pennsylvania Constitution.[200] Notably, although this is the provision that Pennsylvania Courts have consistently identified as containing a substantive due process guarantee for economic liberties since *Gambone*, textually speaking it contains no mention of "due process" or its functional equivalents. As such, Article I, § 1 is not treated as a due process guarantee in Professor Calabresi's research, nor is it identified as such earlier in this article; instead, the due process guarantee in civil suits appears in Article I, § 11 of the Pennsylvania Constitution.[201] Rather, as the text of Article I, § 1 confirms, it appears to be written as a Lockean Rights Clause — and it is identified as such earlier in this paper:[202]

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring,

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[199] *Id.*

[200] *Id.* at 1108.

[201] *See supra* note 66. Article 1, section 11 of the Pennsylvania Constitution states in pertinent part that "every man for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law."

[202] *See supra* note 109.

> possessing and protecting property and reputation, and of pursuing their own happiness.

Nonetheless, the *Ladd* majority noted that this clause did give rise to colorable substantive due process claims for deprivations of the right to pursue a chosen occupation — which is included within the right to possess property and pursue happiness.[203] However, this right, "unlike the rights to privacy, marry, or procreate," although "undeniably important," was not fundamental, and thus subject to a heightened rational basis" test rather than strict scrutiny.[204] But heightened rational basis, as the Pennsylvania Supreme Court made clear, was not a *carte-blanche* to the government, as it was "less deferential to the legislature" than the federal rational basis test and expressly held that the legislature's police powers were "limited and subject to judicial review."[205]

Heightened rational basis involving means-ends review, as defined in the 1954 *Gambone* decision, required that:

> [A] law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. The question whether any particular statutory provision is so related to the public good and so reasonable in the means it prescribes as to justify the exercise of the police power, is one

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[203] *Ladd*, 230 A.3d at 1108.
[204] *Id.*
[205] *Id.*

> for the judgment, in the first instance, of the law-making branch of the government, but its final determination is for the courts.[206]

However, the *Ladd* majority also recognized that "there is a strong presumption that the statutory scheme is constitutional; the presumption may be rebutted only by proof that the law clearly, palpably, and plainly violates the Constitution."[207] Hence, in comparison with *Patel*, the heightened rational basis test that the Pennsylvania Supreme Court intended to apply from the get-go was identical to the test that the *Patel* majority independently settled on through analysis of Texas law.

From early on in the Pennsylvania Supreme Court's opinion, the majority's view that the Commonwealth Court had fundamentally misapplied the test was clear. Although the *Ladd* majority agreed that the statute was in furtherance of a legitimate government interest, "the present appeal implicates Ladd's as-applied challenge rather than the proposition that the RELRA licensing scheme is properly aimed at a legitimate government purpose."[208] Thus, the court was obligated to consider the law's "specific application to Ladd's actual business model," in the context of her substantive due process challenge. And in that context, the Pennsylvania Supreme Court held that the real estate licensing requirements as applied to Ms. Ladd were "unreasonably, unduly oppressive, and patently beyond the necessities of the case…thus outweighing the government's legitimate policy objective."[209]

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[206] *Id.* at 1109.
[207] *Id.* at 1110.
[208] *Id.* at 1111.
[209] *Id.*

Justice Dougherty's majority opinion noted that although a substantive due process challenge to occupational licensing requirements was an issue of first impression for the Pennsylvania Supreme Court, "decisions from other jurisdictions that have conducted a Gambone-like analysis in the context of occupational licensing requirements are instructive."[210] Unsurprisingly, first and foremost among these cases was the majority opinion in *Patel*.[211] The *Ladd* court spent nearly two full pages of its opinion comparing Sara Ladd's predicament to Ashish Patel's, along the way thoroughly endorsing the *Patel* majority's "oppression" test.[212] Critically, the Pennsylvania Supreme Court held that that in applying the *Patel* "metric," Sarah Ladd had asserted that the real estate licensing statute's instructional requirements, as applied to her "are an unreasonable and unduly oppressive means to achieve the statutory objective."[213] Thus, the *Ladd* court ended up longstanding principles of Pennsylvania state constitutional law through the lens of the more recent analysis of the Supreme Court of Texas in *Patel*.

However, while *Patel* was instructive in defeating the instructional hours requirements, Ladd was also faced with the three-year apprenticeship requirement and brick-and-mortar office requirement — "which obviously increases the economic burden."[214] The apprenticeship requirement, arguably the most oppressive of all, was disposed of by the Court in literally half a paragraph.[215] The *Ladd* majority found that the quantity and cost of hours for acquiring this practical knowledge "would be neither relevant nor directly applicable" to Ladd's business model, and when "the lost opportunity cost

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[210] *Id.*
[211] *Id.* at 1112-13.
[212] *Id.* at 1112.
[213] *Id.*
[214] *Id.* at 1113.
[215] *Id.*

of shuttering PMVP during the apprenticeship" was added to the equation, the broker licensing requirements as applied to Ladd were "unreasonable, unduly oppressive, and patently beyond the necessities of the case."[216]

More interesting was the section devoted to the brick-and-mortar office requirement that accompanied the real estate licensing laws' designation of Ms. Ladd's business as a real estate brokerage. Ms. Ladd argued that these requirements were "tantamount to an excessive fee for entry into a profession," which would destroy her business model that relied on operating with limited overhead out of her New Jersey home, with only a web presence in Pennsylvania.[217] The primary case cited by the *Ladd* majority in its analysis of the brick-and-mortar requirement was a 1957 Connecticut Supreme Court case striking down an overly broad definition of real estate brokers, which ended up including the owners of a periodical that solicited real estate advertisements for their publication.[218] By taking this turn, the *Ladd* majority opted to narrow its analysis of the brick-and-mortar requirement specifically to the real estate context, holding that the *Spellacy* court's "rationale that a real estate broker licensing scheme's most onerous requirements are unconstitutional when applied to individuals who do not provide traditional broker services is useful and relevant to our analysis."[219]

However, there is a more recent and arguably more on-point occupational licensing case involving a successful challenge to facility requirements that went uncited by the *Ladd* Court. *Brantley v. Kuntz*, a 2015 case from the Western District of Texas, struck the facility requirements for Texas' licensing of African hair braiding schools, which required the school to have at least ten chairs, five sinks, and

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[216] *Id.*
[217] *Id.*
[218] *Id.* (citing United Interchange, Inc. v. Spellacy, 136 A.2d 801 (Conn. 1957)).
[219] *Id.*

have at least 2,000 square feet of floor space as a licensing scheme that failed the federal rational basis test.[220] This is somewhat surprising given that the *Ladd* court was aware of the longstanding controversy associated with licensing schemes for African hair braiding — as its citations to *Cornwell v. Hamilton*, the earliest of several African hair braiding cases include *Brantley*, demonstrate.[221]

However, what appeared to most sway the court in holding the brick-and-mortar requirements "unreasonable, unduly oppressive, and patently beyond the necessities of the case," was the exemption of professions "so closely analogous" to Ladd's from the requirements — namely property managers at apartment complexes and hotels.[222] The nature of these significant exceptions proved fatal to the Commonwealth's strongest argument: that a ruling in Ladd's favor would "undermine all professional licensing schemes and subject them to challenges from individuals seeking tier licensing regimes to practice their trade part-time or in limited subject areas."[223] The court responded by writing that there already was a tiered licensing scheme in the regulation of "real estate," as hotel and apartment complex managers were subject to the much less burdensome regulations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law.[224] This much less restrictive law, which "prohibits unfair methods of competition and unfair or deceptive acts or practices in the

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[220] Brantley v. Kuntz, 98 F. Supp. 3d 884, 886, 891 (W.D. Tex. 2015).

[221] Cornwell v. Hamilton, 80 F. Supp. 2d 1101 (S.D. Cal. 1999); *see also Ladd*, 230 A.3d at 1105, 1112, 1113 (citing *Cornwell* as an application of the federal rational basis test where licensing hours requirements for African hair braiders were deemed so burdensome that they violated substantive due process and equal protection rights of the braiders).

[222] *Ladd*, 230 A.3d at 1114. Ladd's argument on this score was significantly aided by her advising of her clients to pay Pennsylvania's 6% hotel tax.

[223] *Id.* at 1115.

[224] *Id.*

conduct of any trade or commerce," goes to the heart of the Commonwealth's reasons for imposing the regulations on Ladd's business in the first place (consumer protections) without running afoul of any of the real estate licensing law's unconstitutional requirements.[225] Indeed, as the majority put it, treating Ladd as a broker subject to the real estate licensing law was an unconstitutional category error, akin to applying a regulatory scheme designed for dentists to dental hygienists.[226] Thus, the Pennsylvania Supreme Court concluded, echoing the language of both *Patel* and *Gambone* that Ladd's allegations present a colorable claim that RELRA's requirements, as applied to her self-described services, are unreasonable, unduly oppressive and patently beyond the necessities of the case, and it is not clear and "without a doubt" those requirements bear a real and substantial relation to the statutory goal of protecting the public from fraud.[227]

The portion of the *Ladd* opinion that considers the extensive carveouts from the statutory scheme challenged by Ms. Ladd is fundamentally distinct from the rest of the opinion, as well as from portions of the *Patel* opinion spent comparing regulations on hair threaders with those on other professions such as eyelash extension specialists.[228] Instead, it reads much more like a typical class-legislation analysis done in the context of Privileges or Immunities or Equal Protection clauses, which are often invalidated on the basis of overly

[225] *Id.*
[226] *Id.* at 1115 n.19.
[227] *Id.* at 1116.
[228] Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 89 (Tex. 2015).

plentiful and arbitrary exceptions.[229] Moreover, the fact that Ladd appeared to have based the entirety of her constitutional argument on the basis of a substantive due process theory, rooted in a clause of the Pennsylvania Constitution that nowhere mentions "due process" or any of its functional equivalents is a genuine oddity. From a purely textualist reading, at least two other provisions of the Pennsylvania Constitution provide grounds for Ladd to challenge the application of the real estate licensing law to her business: the aforementioned civil Due Process Clause of the Pennsylvania Constitution in Article I, § 11 and the Contracts Clause in in Article I, § 17. By any proper understanding of the phrase, the severe disruption to Ms. Ladd's business that was effectuated by the Real Estate Commission's actions impaired the obligation of existing contracts between Ms. Ladd and her customers whilst forcing her to spend three and a half years litigating a farcically overbroad, oppressive, and over-zealously enforced law that brought the people of the Commonwealth of Pennsylvania no benefit whatsoever.

Yet, somewhat bewilderingly, this doesn't seem to have disturbed Justice David Wecht of the Pennsylvania Supreme Court in the slightest. Wecht, author of a lone, principal dissent in *Ladd*, featured typically left-wing anti-*Lochner* rhetoric that condemned the Court's "substantive due process jurisprudence" as a "historical relic

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[229] *See, e.g.*, Hug v. City of Omaha, 749 N.W.2d 884, 890-91 (Neb. 2008) (striking down exceptions to a city anti-smoking ordinance because the exceptions for standalone bars, keno establishments, horseracing simulcast locations, and tobacco retail outlets created an "arbitrary and unreasonable method of classification" and thus violated the Special Privileges and Immunities Clause of the Nebraska Constitution). *See also* Merrifield v. Lockyer, 547 F.3d 978, 991-92 (9th Cir. 2008) (striking down part of a California pest control law because it irrationally singled out "three types of vertebrates from all other vertebrate animals [and] was designed to favor economically certain constituents at the expense of others similarly situated," and was thus in violation of the Equal Protection Clause of the Fourteenth Amendment).

of an era when the United States Supreme Court insisted that the Constitution forbids lawmakers from interfering with 'economic liberty' and the 'freedom of contract."[230] As far as Justice Wecht was concerned, this was an easy case, where "the only constitutional question is whether the RELRA's [real estate licensing law's] broker licensing requirements are rationally related to a legitimate government interest."[231] Of course, such a reading leaves no room whatsoever for as-applied constitutional challenges and completely disregards the long-standing American tradition of courts — particularly state supreme courts — striking down class legislation. Thus, rather than allowing "the citizens of this Commonwealth the right to govern themselves," this amounts to complete abrogation of the judicial duty by judges elected by the people of Pennsylvania to uphold their constitutional freedoms.[232]

Moreover, it is this as-applied constitutional analysis where the overlap between *Ladd* and *Patel* is strongest. Mere insistence on a "real and substantial relationship" between means and ends means nothing when it can be so easily watered down by inflating the denominator of ends that a statute creates by grasping at ever more tenuous, but "real" manifestations of the means. And "substantial," particularly given the presumption of constitutionality in both *Ladd* and *Patel* and nearly a century of wholesale, judicial deference to legislative judgements under the federal rational basis test, is a term all too much in the eye of the beholder. To use a Scalia-ism, it becomes all too much like asking whether a "particular line is longer than a particular rock is heavy."[233] In contrast, the much blunter question of whether or not a law applied to a particular party in the

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[230] *Ladd*, 230 A.3d at 1116 (Wecht, J., dissenting).

[231] *Id.* at 1122.

[232] *Id.* at 1123.

[233] Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

particular circumstances before the court is "oppressive" or not sets a much brighter line, limiting a court's ability to yield to the sophistry of hypothetical arguments, and forces it to engage with the specific fact pattern it has before it.[234] Hence, the "oppression" language from *Patel* presents a much more powerful tool, and the Pennsylvania Supreme Court's enthusiastic embrace of it, despite fundamental differences in the text of the constitutional provision at issue, the industry being regulated, geography, and partisan makeup of the relevant courts, offers a powerful endorsement of the test's viability.

While Justice Wecht's view is all too common in many circles, it was unambiguously rejected by six other Justices on the Pennsylvania Supreme Court, including four of the court's five elected Democrats (every one other than Justice Wecht himself) as well as the lawyers defending the Commonwealth, none of whom argued that the heightened rational basis test for economic liberties (stemming from *Gambone*) should be overruled. [235] Instead, the Justices in the *Ladd* majority condemned Wecht for advocating for an "essentially toothless" rational basis test that would ignore as-applied constitutional challenges entirely.[236]

This brings me to the final, and arguably most crucial aspect of *Ladd*. Not only did it show that a heighted rational basis test can be applied consistently in economic liberty cases for more than six decades within a jurisdiction — it also showed a broad, genuinely bi-partisan consensus in favor of protecting property rights through meaningful judicial review in Pennsylvania. The seven justices of the

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[234] *See Ladd*, 230 A.3d at 1116 (the statutory scheme challenged by Ladd is "unreasonable, unduly oppressive, and patently beyond the necessities of the case."); *see also* Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 90 (Tex. 2015) (finding that the 750 hours requirement for the threaders was "so oppressive" that it violated the Texas Constitution).

[235] *See Ladd*, 230 A.3d at 1109 n.15.

[236] *Id.* at 1113 n.18.

Pennsylvania Supreme Court, one of only eight states to elect its Supreme Court justices in partisan elections, include five elected Democrats and two elected Republicans.[237] The *Ladd* majority opinion was written by Justice Kevin Dougherty, a Democrat, and joined by Republican Chief Justice Thomas Saylor and Democrat Justices Max Baer, Debra Todd, and Christine Donohue.[238] The court's other Republican, Justice Sarah Updyke Mundy, wrote a short dissent that did not in any way reject the heightened rational basis test or judicial protection for economic liberties; instead, Justice Mundy simply interpreted the facts differently, arguing that Ms. Ladd only operated a "smaller scale business," that did not give rise to a "colorable claim that the RELRA's requirements are so unreasonably oppressive as to violate the Pennsylvania Constitution."[239]

Clearly, the breakdown of the Pennsylvania Justices' positions in *Ladd* genuinely appeared to have nothing to do with partisan considerations. There was no intent on the part of a conservative, Republican wing of the court (to the extent two justices on a court of seven can be called a 'wing') to drastically push the envelope in favor of economic libertarianism. Nor was there a massive pushback, beyond Justice Wecht's standalone dissent, from the left, to the Court's opinion. Instead, there was a good-faith, bi-partisan majority following longstanding precedent, faithfully considering the views of its sister courts, incorporating those opinions into its final decision, and using the liberty-affirming language of the Lockean Rights

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[237] *See* Stephen Caruso, *How Pa.'s Supreme Court Moved Left, And What It Means for the GOP*, PENNSYLVANIA CAPITAL-STAR (Aug. 9, 2019), archived at https://perma.cc/BK6T-MFP4; *Who Are the Members of the Pennsylvania Supreme Court?*, LANCASTER ONLINE (Feb. 19, 2018), archived at https://perma.cc/Z648-TMCB.

[238] *See Ladd*, 230 A.3d at 1116.

[239] *Id.* at 1123-24 (Mundy, J., dissenting).

Clause of the Pennsylvania Constitution to strike an absurdly unjust law. This is, and ought to be, celebrated as a great victory for American Constitutional Law and definitively put to bed any discussion of state constitutional law in defense of economic liberty being transformed into a "right-wing rachet."

PART IV

As shown in the preceding section, *Patel* and *Ladd* both offer compelling visions for a dynamic, twenty-first century vision of state constitutional law that ought to make any defender of state constitutionalism blush. Both cases show an unambiguous willingness to buck lock-stepping and independently construe their own constitutional guarantees — even the most general and controversial ones.[240] Both are also at the leading edge of some of the key doctrinal concepts in state constitutional law; *Patel* in its insistence on interpreting state constitutional conventions and a distinct Texan view of state originalism, and *Ladd* in its willingness to dive headfirst into Lockean Rights Guarantees and expand unenumerated rights jurisprudence whilst also heavily leaning into the decisions of sister state supreme courts.

Sadly, the *Patel*-*Ladd* heightened rational basis test would grant plaintiffs relief against economic regulations that are unduly "oppressive" as-applied to them is presently unavailable in the other forty-eight states. Naturally, defenders of economic liberty, like all other passionate advocates for ideological causes, will find this disheartening. This advocacy movement, like most others, will find the pull towards federalizing *Ladd* and *Patel* almost irresistible. And in some ways, federalization of state constitutional law is not

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[240] *See* SUTTON, FIFTY-ONE IMPERFECT SOLUTIONS, *supra* note 15, at 174-78.

necessarily the worst thing. Indeed, Judge Jeffrey S. Sutton explains in *Fifty-One Imperfect Solutions* that the development of state constitutional law may be the "best thing" to help facilitate the development of federal constitutional law, helping break "top down constitutional law," into a more natural "bottom up arrangement."[241] As Judge Sutton argues, "let the state courts be the initial innovators of constitutional doctrines if and when they wish, and allow the U.S. Supreme Court to pick and choose from the emerging options."[242] Notably, this is precisely what the U.S. Supreme Court did in developing the doctrine of the exclusionary rule in *Mapp v. Ohio*.[243]

But, as this section will demonstrate, *Patel* and *Ladd* alone, for both doctrinal and normative reasons, are simply not strong enough at present to convince a majority of Justices on the U.S. Supreme Court to follow in Pennsylvania and Texas' footsteps and re-establish stronger protections for economic liberty within the Federal Constitution. Instead, as this section will argue, in the medium term, advocates should continue to focus on the organic development of stronger protections for economic liberties in state supreme courts, helping the doctrine develop, providing a richer history of case law and local history, and proving that a greater judicial role in the protection of economic liberties need not mean usurping legislative power and endorsing unbridled judicial discretion. In short: at present, economic liberty doctrine in state constitutional law, as best exemplified in *Patel* and *Ladd*, is simply "not ready for primetime" and needs to prove that it can actually work in practice in the laboratories of democracy before federal judges start lining up to buy stock in it.

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[241] *Id.* at 19-20.
[242] *Id.* at 20.
[243] *Id.* at 59-62.

A. STATE COURTS ARE MORE LIKELY TO PROVIDE RELIEF TO PLAINTIFFS IN ECONOMIC LIBERTY CASES

In his 1999 article, *The Myth of Superiority*, William Rubenstein rebuked the notion of federal courts being inherently superior to state courts in protecting counter-majoritarian rights.[244] This was as much the case for the gay rights cases Rubenstein analyzed two decades as it is for economic liberties today, as evidenced by *Patel* and *Ladd*, as well as the rebukes to *Kelo* that came within a year of that decision from both the Ohio and Oklahoma Supreme Courts.[245]

So do a pair of cases concerned with licensing restrictions for interior designers, in which the Alabama Supreme Court struck down a licensing law while the Eleventh Circuit upheld it. [246] Moreover, the key reason why the Alabama Supreme Court struck the statute in *State v. Lupo* was the retail sales exception, under which retailers providing interior design advice did not need to comply

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[244] William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999).

[245] *See* City of Norwood v. Horney, 853 N.E.2d 1115, 1141 (Ohio 2006) ("Rather, we find that the analysis by the Supreme Court of Michigan in *Hathcock,* 471 Mich. 445, 684 N.W.2d 765, and those presented by the dissenting judges of the Supreme Court of Connecticut and the dissenting justices of the United States Supreme Court in *Kelo* are better models for interpreting Section 19, Article I of Ohio's Constitution."); Bd. Of Cty. Comm'rs v. Lowery, 136 P.3d 639, 651 (Okla. 2006) ("To the extent that our determination may be interpreted as inconsistent with the U.S. Supreme Court's holding in *Kelo v. City of New London,* today's pronouncement is reached on the basis of Oklahoma's own special constitutional eminent domain provisions, Art. 2, §§ 23 & 24 of the Oklahoma Constitution, which we conclude provide private property protection to Oklahoma citizens beyond that which is afforded them by the Fifth Amendment to the U.S. Constitution. . . . We join other jurisdictions including Arizona, Arkansas, Florida, Illinois, South Carolina, Michigan, and Maine, which have reached similar determinations on state constitutional grounds.").

[246] *See* State v. Lupo, 984 So.2d 395 (Ala. 2007); Locke v. Shore, 634 F.3d 1185 (11th Cir. 2011).

with the licensing requirements.[247] As the court explained, "if the position of the [Alabama State] Board [for Interior Design] is correct, we do not understand how acting 'pursuant to a retail sale' qualifies a nonregistered individual" to make recommendations about interior design.[248] Thus, the Alabama Supreme Court held the licensing scheme is not reasonable and "imposes restrictions that are unnecessary and unreasonable upon the pursuit of useful activities" and thus violates the Alabama Constitution.[249] Notably, the Alabama Supreme Court's applied the softest possible version of the "real and substantial test," holding that the restrictions "do not bear some substantial relation to the public health, safety, or morals, or to the general welfare, the public conveniences, or to the general prosperity."[250] Of course, this is a far cry from the "oppressive test" of *Ladd* and *Patel* but it is unambiguously better than the federal rational basis test, which as the Eleventh Circuit's opinion in *Locke* shows, amounts to nothing other than sophistry of the "I smoked but didn't inhale" variety.

Indeed, the Eleventh Circuit examining Florida's licensing law for interior designers in *Locke v. Shore* saw things very differently, even though that licensing scheme also exempted "retail establishments and manufacturers of commercial food service equipment…even if it seems unwise or illogical in light of the safety concerns behind the statute."[251] This is because under the federal rational basis test, "a law may be based on rational speculation unsupported by evidence or empirical data," and is presumed constitutional, with the burden on the plaintiff to "negate every conceivable basis that might support it, even if that basis has no

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[247] *Lupo*, 984 So.2d at 406.
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] *Locke*, 634 F.3d at 1196.

foundation in the record."[252] As Judge Janice Rogers Brown noted in her *Hettinga* concurrence, the federal rational basis test is an impossible hill for plaintiffs to climb by design. Above all, what the contrasting experiences of *Locke* and *Lupo* demonstrate is that the only standard by which the most explicitly protectionist, unreasonable, and oppressive regulations can survive is under the federal rational basis test. When even a modicum of actual accountability is applied, even with the Swiss-cheese-like holes and wide police power exceptions under the Alabama test, these all too common protectionist regulations fall.

B. THERE IS SUBSTANTIAL MATERIAL TO WORK WITH IN DEVELOPING BETTER, JUDICIALLY MANAGEABLE STANDARDS FOR PROTECTION OF ECONOMIC LIBERTIES IN STATE CONSTITUTIONS OUTSIDE OF TEXAS AND PENNSYLVANIA.

The good news is that while only Texas and Pennsylvania have endorsed an "oppressive" test for economic liberty cases, in practice, many states have applied a level of scrutiny well beyond the hypothetical rational basis standard that plaintiffs typically find in federal court. Notably, in 2016, the Oklahoma Supreme Court used actual rational basis review in invalidating parts of the state's workers compensation law, arguing that its "overinclusive and underinclusive classifications are not rationally related to the asserted State interests," and thus violated the workers' substantive due process rights under the Oklahoma Constitution.[253] In another case that hits even closer to *Patel* and *Ladd*, earlier this year the Georgia Supreme Court unanimously reversed a trial court that had

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[252] *Id.*

[253] Torres v. Seaboard Foods, LLC., 373 P.3d 1057, 1062 (Okla. 2016).

dismissed a challenge to the state's licensing scheme for lactation consultants for failure to state a claim.[254] By applying a more searching inquiry that looked for actual rational basis in the state's favoring of one private certification program for lactation consultants over another, the Georgia Supreme Court found that the plaintiffs had raised colorable claims for violations of their equal protection and substantive due process rights under the Georgia Constitution.[255]

The Georgia lactation consultants' reliance on equal protection claims also brings to mind the Iowa Supreme Court's famous 2004 decision in *Racing Association of Central Iowa v. Fitzgerald*, where the court invalidated the state's gambling tax regime that taxed racetracks at a higher rate than riverboat casinos as an equal protection violation under the Iowa State Constitution.[256] These cases go to show that the doctrinal richness of state constitutions provides a large number of different provisions under which plaintiffs can challenge oppressive and irrational economic regulations, so long as courts are willing to conduct actual means-ends analysis and focus on how these regulations have actually been applied to the plaintiffs. On this score, advocates should seek to re-embolden state supreme courts that have at one point or another embraced more exacting inquiries into protectionist economic legislation, such as Arkansas, whose Supreme Court in 1996 reiterated that:

> The exercise of the [police] power must have a substantial basis and cannot be made a mere pretext for legislation that does not fall within it. The Legislature has no power, under the guise of police regulations, arbitrarily to invade the

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[254] Jackson v. Raffensperger, 843 S.E.2d 576 (Ga. 2020).
[255] *Id.* at 580.
[256] Racing Ass'n of Cent. Iowa v. Fitzgerald 675 N.W.2d 1 (Iowa 2004).

> personal rights and liberty of the individual citizen, to interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations, or to invade property rights.[257]

Other state supreme courts that have previously embraced less deferential review in economic liberty cases include Nebraska and South Dakota.[258] The experience of Wisconsin, which applied a heightened rational basis test between 2005 and 2018 is also instructive.[259] The rise of the heightened rational basis test in Wisconsin was linked to the Wisconsin Supreme Court's efforts to frustrate the state legislature's medical malpractice tort reforms in 2005.[260] Thirteen years later, the Wisconsin Supreme Court, in a different configuration, reversed itself — overruling the heighted rational basis test for constitutional challenges to economic regulations and allowing the legislature's caps on non-economic damages in medical malpractice judgements to stand.[261] The same day the *Mayo* decision overruling the heightened rational basis test

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[257] Ports Petroleum Co. v. Tucker, 916 S.W.2d 749, 754 (Ark. 1996).

[258] *See* Louis Finocchiaro, Inc. v. Neb. Liquor Control Comm'n, 351 N.W.2d 701, 703 (Neb. 1984) ("[T]here must be some clear and real connection between the assumed purpose of the law and its actual provisions."); *see also* State v. Nuss, 114 N.W.2d 633, 636 (S.D. 1962) ("[D]ue process still requires that any exercise of the police power be reasonable and the regulatory means adopted by the legislature must bear a real and substantial relation to some actual or manifest evil."). *Contra* Cheyanne River Sioux Tribe Tel. Auth. v. Pub. Utils. Comm'n of S.D., 595 N.W.2d 604, 613 (S.D. 1999) ("[G]enerally any legislative act is accorded a presumption in favor of constitutionality and that presumption is not overcome until the act is clearly and unmistakably shown beyond a reasonable doubt to violate fundamental constitutional principles.") (emphasis added).

[259] *See supra* p. 51.

[260] Ferdon v. Wis. Patients Comp. Fund, 701 N.W.2d 440, 447 (Wis. 2005).

[261] Mayo v. Wis. Injured Patients & Families Comp. Fund, 914 N.W.2d 678, 684 (Wis. 2018).

was announced, five Wisconsin Supreme Court Justices used the court's newly-minted, more lax rational basis standard to deny relief to E. Glenn Porter from the state's anti-combination laws.[262] Porter was one of the principal owners of a cemetery in New Berlin, Wisconsin, and sought to expand his business by opening a funeral home — running afoul of Wisconsin "anti-combination laws" that prohibited individuals to have a financial interest in both a funeral establishment and a cemetery.[263] Porter challenged the state's anti-combination laws on equal protection and substantive due process grounds, arguing that they arbitrarily and irrationally prevented cemetery operators from owning an interest in funeral establishments and vice-versa.[264] Although Porter's facial challenge was distinct from the as-applied challenges presented by *Patel* and *Ladd*, it still harkened to many of the same core themes of economic liberty jurisprudence in state constitutional law.[265]

Despite the fact that Porter's claims failed on a 5-2 vote, for our purposes, the blistering dissent of Justice Rebecca Grassl Bradley, which was joined by Justice Daniel Kelly, was arguably the most interesting part of the case.[266] Justice Grassl Bradley's dissent was a powerful defense of economic liberty, mixing discussion of American constitutional law and history writ-large with an emphasis on local sources and decisions of the Wisconsin Supreme Court. Among other things, Justice Grassl Bradley noted the corrupt history of the anti-combination law, which was literally drafted by funeral directors and originally submitted to the legislature on the official

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[262] Porter v. State, 913 N.W.2d 842 (Wis. 2018).

[263] *Id.* at 845.

[264] *Id.*

[265] *Id.* at 849.

[266] *Id.* at 852 (Bradley, J., dissenting) (among other texts, Justice Grassl Bradley invoked both Justice Willett's *Patel* concurrence and Judge Janice Rogers Brown's *Hettinga* concurrence).

letterhead of the Wisconsin Funeral Directors and Embalmers Association.[267] Justice Grassl Bradley also described the strength of Porter's supporting evidence, which showed that the "thirty-nine states without these laws experience no monopolistic or price-fixing behavior in the industry," with the laws serving as nothing other than protectionist favoritism in favor of funeral directors and at the expense of cemetery owners.[268]

Legally speaking, one of the most remarkable things about Justice Grassl Bradley's opinion was its in-depth analysis of nineteenth and twentieth century decisions of the Wisconsin Supreme Court and the meaning of various provisions of the Wisconsin Constitution. For instance, citing a 1902 decision of the Wisconsin Supreme Court, Grassl Bradley wrote that "the term 'liberty' in our constitution does not mean merely immunity from imprisonment, [but] include[s] the opportunity to do those things which are ordinarily done by free men, and the right of each individual to regulate his own affairs, so far as consistent with the rights of others."[269] The second touchpoint decision in Justice Grassl Bradley's dissent was the Wisconsin Supreme Court's 1859 decision in *Maxwell v. Reed*, where the Court held that the right to earn a living was "one of the great bulwarks of individual freedom…guarded by fundamental law."[270]

Finally, the last of the Wisconsin Supreme Court's economic liberty cases cited by Justice Grassl Bradley that is worth special mentioning is the 1927 decision *in John F. Jelke Co. v. Emery*, which struck down as unconstitutional the state legislature's ban on the sale of oleomargarine.[271] This decision by the high court of America's

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[267] *Id.* at 854 (Bradley, J., dissenting).
[268] *Id.*
[269] *Id.* at 856; *see also* State ex rel. Zilmer v. Kreutzberg, 90 N.W. 1098 (1902).
[270] *Porter*, 913 N.W.2d at 857 (Bradley, J., dissenting). *See also* 7 Wis. 582.
[271] *Porter*, 913 N.W.2d 857 (Bradley, J., dissenting). *See also* 214 N.W. 369.

Dairyland, striking down a protectionist law that was favored by one of the most powerful constituencies in the state — which was also home to one of the most powerful and popular Progressive movements in the country — cannot be understated. Indeed, regulation of oleomargarine was one of the fiercest battles between proponents and opponents of economic protectionism during the late nineteenth and early twentieth centuries, one where the U.S. Supreme Court, led by Justice John Marshall Harlan, had very early on taken the side of the dairy lobby protectionists in *Powell v. Pennsylvania*.[272]

Ultimately, Justice Grassl Bradley's powerful dissent is everything that state constitutional law ought to be — a view grounded first and foremost in thorough research of local sources and local precedent, but which cuts to the heart of a national constitutional controversy. As such, it is yet another powerful addition to the modern canon of judicial opinions extolling greater judicial protection for economic liberties, an intellectual and legal contribution that ought not be taken lightly. And, while it may not command anything close to a majority of the Wisconsin Supreme Court at this time, it may not stand as a dissent forever — certainly, Justice Holmes' *Lochner* dissent did not.[273]

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[272] *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND FALL OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 73-75 (1993) [hereinafter GILLMAN, THE CONSTITUTION BESIEGED] (describing the context of the early oleomargarine bans); 127 U.S. 678 (1888); *see also* James W. Ely, Jr., *To Pursue Any Lawful Trade or Avocation: The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 943 (2006) (describing *People v. Marx*, a New York Court of Appeals case from 1885 that invalidated the state's ban on oleomargarine and was one of the key, pre-*Lochner* economic liberties cases); Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83 (1989).

[273] The same of course applies to Justice Wecht's completely ideologically contrary dissent in *Ladd*.

C. THE STATE OF THE FEDERAL CIRCUITS

The substance of *Porter* offers a strong segue into the state of economic liberty jurisprudence in the federal circuits, where two of the most successful economic liberty challenges in modern history have also involved the death industry. Protectionism in this industry, as Lawrence Freidman's 1965 article on occupational licensing around the turn of the twentieth century showed, is nothing new.[274] One of the notable cases from this time was a 1910 case called *People v. Ringe*, in which the New York Court of Appeals invalidated a licensing law that required a person to be a licensed embalmer in order to be licensed as an undertaker.[275] In essence, a protectionist law forcing the combination of two related, but distinct, professions — the inverse of the Wisconsin laws challenged by Mr. Porter.

More recently, both the Fifth and Sixth Circuits have invalidated laws that protected casket-selling monopolies in *Craigmiles* and *St. Joseph's Abbey*.[276] Both decisions were remarkably similar on facts, substance, and reasoning, holding that licensing schemes in Louisiana and Tennessee that prevented non-funeral directors from selling caskets violated the Fourteenth Amendment's Equal Protection and Due Process Clauses.[277] However, the Tenth Circuit saw things differently when it upheld Oklahoma's very similar

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[274] Lawrence M. Freidman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CAL. L. REV. 487, at 501, 512-13 (1965).

[275] 90 N.E. 451.

[276] *See* Craigmiles v. Giles, 312 F.3d 220, at 220 (6th Cir. 2002); St. Joseph Abbey v. Castille, 712 F.3d 215, 215 (5th Cir. 2013).

[277] *Craigmiles*, 312 F.3d at 228-29 ("[N]one of the justifications offered by the state satisfied the slight review required by rational basis review under the Due Process and Equal Protection clauses of the Fourteenth Amendment."); *St. Joseph Abbey*, 712 F.3d at 227 ("[W]e insist only that Louisiana's regulation not be irrational — the outer-most limits of due process and equal protection.").

monopoly in *Powers v. Harris*.[278] The crux of the disagreement between these three panels, as the *Powers* court put most bluntly, was whether an "intra-state economic protectionism, absent a violation of a specific federal statutory or constitutional provision, is a legitimate state interest."[279] And as far as the Tenth Circuit was concerned — it absolutely was, and thus they had little difficulty determining that the Oklahoma casket-sales monopoly satisfied rational basis review to any relevant constitutional challenge.[280]

Both the Fifth and Sixth Circuits disagreed with this vehemently. As Judge Patrick Higginbotham put it in *St. Joseph Abbey*, "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose."[281] Thus, these three cases alone gave rise to a significant circuit split on the narrower fact pattern of casket-sales monopolies. The broader question of whether economic protectionism is a legitimate government interest that *per se* survives substantive due process and equal protection scrutiny, however, has given rise to an even broader circuit split, as both the Ninth and Second Circuits have entered the fray on opposing sides.

Notably, in *Merrifield*, where the Ninth Circuit invalidated part of a California pest control law because the structure of one of its exemptions was found to violate the Equal Protection Clause, in a footnote, Judge Diarmuid O'Scannlain noted the panel's agreement with *Craigmiles* and rejection of *Powers*: "we conclude that mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review."[282] However, the Second Circuit, the most

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[278] 379 F.3d 1208 (10th Cir. 2004).
[279] *Id.* at 1222.
[280] *Id.*
[281] *St. Joseph Abbey*, 712 F.3d at 222-23.
[282] Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008).

recent to weigh in on the issue, has joined the Tenth Circuit by siding in favor of economic protectionism. In *Sensational Smiles, LLC. v. Mullen*, Judge Guido Calabresi wrote that Connecticut's teeth whitening monopoly could stand, because "much of what states do is to favor certain groups over others on economic grounds. We call this politics. Whether the results are wise or terrible is not for us to say, as favoritism is certainly rational in the constitutional sense."[283]

The two primary reasons given by Judge Calabresi in support of this conclusion were:

1. Allowing federal courts to hold otherwise would be "destructive to federalism and the power of the sovereign states to regulate their internal economic affairs," and
2. The "difficulty in distinguishing between a protectionist purpose and a more 'legitimate' public propose."[284]

Unsurprisingly, these are also the core critiques of Justice Barrett's 2016 article, which shall be analyzed in the subsequent sub-section. However abhorrent one may find the notion of naked protectionism, Judge Calabresi's core institutionalist concerns cannot be taken lightly. But above all, I read them as a challenge, which other state supreme courts can rise to in due course. First and foremost, if state courts can demonstrate their clear and unambiguous willingness to use their own state constitutions as a tool against protectionist laws, parties seeking relief will be far less inclined to seek relief from federal judges concerned about running roughshod over federalism. Indeed, those who are justifiably concerned about the health of federalism in the United States will find no greater cure for this malady than the renaissance of state constitutional law and the re-assertion of independent, state-based rights guarantees.

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[283] 793 F.3d 281, 286 (2d Cir. 2015).
[284] *Id.*

The second of Judge Calabresi's qualms goes to the heart of concerns about judicial review and the fundamental appeal of the rational basis test to judges concerned with the counter-majoritarian difficulty. This is precisely where the *Patel-Ladd* heightened rational basis test is most valuable — demonstrating that a judicially manageable standard for means-ends analysis in economic liberty cases does exist and can be fairly applied. For instance, if the *Patel* standard were applied to the *Sensational Smiles* plaintiffs, the Court would not have to determine whether the legislature's purposes were "legitimate" or not and go on a fishing expedition for pretext or a letter with the dentists' letterhead to the Connecticut General Assembly asking for a monopoly on teeth whitening. Instead, the plaintiffs would simply have to show that in light of their real-world circumstances, the effect of the statute was "so burdensome as to be oppressive in light of, the governmental interest." [285] No endless hypotheticals, no attempts at mind-reading, and no impossible hill to climb for the plaintiffs. Instead, a completely reasonable, run-of-the-mill judicial balancing test.

Further exporting this "oppression" test to other states and proving its empirical effectiveness would be valuable for the judiciary as a whole, demonstrating that there is a viable alternative to the current dominance of the rational basis test, which if applied with all its veracity makes the plaintiff's case plainly unwinnable. Unsurprisingly, the evidence indicates that both Judge Danny Boggs and Judge Higginbotham's *Craigmiles* and *St. Joseph Abbey* opinions, respectively, were applications of a more stringent "actual" rational basis test. [286] I would go even further to say that Judge Higginbotham's application of the rational basis test may have been

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[285] Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 87 (Tex. 2015).
[286] Alexander L. Klein, Note, *The Freedom to Pursue a Common Calling: Applying Intermediate Scrutiny to Licensing Statutes*, 73 WASH. & LEE L. REV. 411, 453-55 (2016).

the most forthright example of judicial rebellion against the Supreme Court's hypothetical rational basis test in economic liberties to make it into a binding, majority opinion in the Federal Circuit Courts of Appeal. Compare, for instance, "our analysis does not proceed with abstraction for hypothesized ends and means do not include post-hoc hypothesized facts," from *St. Joseph Abbey* with an analysis that must "negate every conceivable basis that might support [the law being challenged], even if that basis has no foundation in the record," from *Locke v. Shore*.[287] Yet, both of these courts claimed to be faithfully applying the U.S. Supreme Court's rational basis jurisprudence. This seems to affirm the argument that "increasing [judicial] deference to legislation, particularly in the postwar period, results more from the application of the [rational basis] standard than from the standard itself."[288] By presenting a model of heightened rational basis review, state supreme courts adopting the *Patel-Ladd* model can provide an effective way to remove the hypothesizing and abstraction from the current rational basis model. Hence, if ultimately adopted by the U.S. Supreme Court, heightened rational basis would allow federal judges to lean on a ready-made and intellectually honest way of approaching review of state and local legislation that impacts individuals' economic liberties.

Beyond the standard of review, however, there is a fundamental doctrinal discontinuity between *Patel* and *Ladd* on the one hand, and *St. Joseph Abbey*, *Craigmiles*, and *Merrifield*, on the other. Neither the Texas nor Pennsylvania Supreme Courts relied on equal protection or privileges or immunities doctrine in applying their heightened rational basis test and instead were solely focused on substantive due process. In contrast, all three federal cases (*St. Joseph Abbey*,

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[287] *See St. Joseph Abbey*, 712 F.3d at 223; Locke v. Shore, 634 F.3d 1185, 1196 (11th Cir. 2011).

[288] Menashi & Ginsburg, *Rational Basis with Economic Bite, supra* note 9, at 1065.

Craigmiles, and *Merrifield*) concerned application of the rational basis test to equal protection violations.[289] Further, neither *St. Joseph Abbey* nor *Craigmiles* distinguished between equal protection and substantive due process in holding that protectionist legislation was *per-se* not rational for the purposes of both clauses of the Fourteenth Amendment. [290] Thus, there is presently no state supreme court model for applying the heightened rational basis "oppression" test to an equal protection challenge to a law that infringes on economic liberties.

This discontinuity between the two sets of decisions cannot be easily dismissed, as it shows some significant doctrinal daylight and may make the U.S. Supreme Court more uneasy about adopting the heightened rational basis standard into federal jurisprudence. So, too, may the lack of independent analysis of substantive due process from equal protection in *St. Joseph Abbey* and *Craigmiles*, with the two doctrines interpreted as essentially coterminous in both decisions. Of course, this isn't necessarily unprecedented in state supreme courts, as the Georgia Supreme Court's reliance on both substantive due process and equal protection in the *Jackson v. Raffensperger* lactation consultant case demonstrates. [291] However, as Justice Thomas' Fourteenth Amendment jurisprudence and the pitched debate about the original meaning of the Privileges or Immunities Clause vis-à-vis the Due Process Clause shows, the textual source of the rights being litigated does matter a great deal.[292] On this score as well, then, there

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[289] *See supra* Part IV-C.

[290] *Id.*

[291] *See supra* Part IV-B.

[292] *See supra* Part I-B. *See also* Ramos v. Louisiana, 140 S. Ct. 1390 (notably, Justice Gorsuch's majority opinion in *Ramos* was implicitly based on the U.S. Supreme Court's Due Process incorporation jurisprudence, as one of the court's self-described Originalist justices did not explicitly respond to Justice Thomas' lone concurrence calling for the Court to end incorporation through the Due Process Clause in favor of the Privileges or Immunities Clause).

is much more work to be done. But luckily, as several of the decisions highlighted in this paper have shown, there are already state supreme court decisions paving the right path: Justice Rebecca Grassl Bradley's *Porter* dissent describing an 1859 Wisconsin Supreme Court decision upholding the right to earn a living as fundamental, and the insistence of the Texas and Georgia Supreme Courts to inquire into the original meaning of the relevant clause of their state constitutions by analyzing the records of their state constitutional conventions.[293] But there is much still left to do, not least in uncovering sources from the vital 1868-1873 period between the ratification of the Fourteenth Amendment and the *Slaughter-House Cases* about the publicly understood meaning of terms of art such as "due process," "privileges or immunities," "equal protection," "monopolies," and "class legislation." So, too, with antebellum cases that broadly relate to economic liberties and the right to earn a living in the mold of *Maxwell v. Reed*.[294] No doubt, these questions are hard. But they are also the very types of questions that state supreme courts are institutionally best suited to answer, and as many of the decisions previously cited indicate, ones they are more than capable of taking on.

D. INSTITUTIONAL COMPETENCY AND FEDERALISM: THE BARRETT V. WILLETT DEBATE.

Then-Justice Willett's *Patel* concurrence and now-Justice Amy Coney Barrett's review of Prof. Randy Barnett's *Our Republican Constitution* entered the public arena within two years of each

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[293] *See supra* Part III-B.
[294] *See supra* note 270.

other.[295] However, Justice Barrett's article does not cite *Patel*, any of the other major works of *Lochner* revisionism, or any of the other major recent economic liberty cases from federal or state courts. Instead, Justice Barrett directs her fire squarely at Prof. Randy Barnett and the body of conservative and originalist legal thought which *Our Republican Constitution* exemplifies: namely, the use of judicial power to provide greater protection for economic liberties in constitutional law.[296] Prof. Barnett's core argument, as Justice Barrett defines it, is that courts "should return in Due Process and Equal Protection challenges to the more demanding form of "rational basis" review practiced by courts in the *Lochner* era."[297] This task, now-Justice Barrett contends, "fails to account for the realities for the legislative process and overestimates the institutional capacity of courts."[298]

Curiously, throughout the entire article, all the key institutions are discussed in an exclusively federal context: all the courts in question are federal, the only constitution is the Federal Constitution, and the only legislature discussed in any depth is the United States Congress. The only time Justice Barrett mentions the state level is in a short and rudimentary discussion of the "federalism discount," even if she does not use the term:

> "At the state level, moreover, the harm of an ill-advised statute is regionally confined. Even if one state legislature makes a mistake, the other forty-nine remain free to choose

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[295] *See* Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 92-123 (Willett, J. concurring) (Tex. 2015); Barrett, *Countering the Majoritarian Difficulty, supra* note 11.

[296] Barrett, *Countering the Majoritarian Difficulty, supra* note 11. *See supra* note 9 (describing several sources by conservative and originalist legal scholars, including Prof. Barnett, advocating for less deferential judicial review of economic legislation).

[297] Barrett, *Countering the Majoritarian Difficulty*, *supra* note 11, at 65.

[298] *Id.* at 65.

> a different course. A Supreme Court constitutional error, however, applies nationwide."[299]

This exclusively-federal focus envelops the whole of Justice Barrett's argument — but to be fair, it is not surprising. After all, Justice Barrett was writing as a Professor of Federal Constitutional Law critiquing the book of another Professor of Federal Constitutional Law that discussed the Federal Constitution. However, all of Justice Barrett's arguments are implicitly addressed by Justice Willett's concurrence, which has a very different understanding of the judicial role, a discussion of the actual nature of the *Patel* test, notes the reformist function of greater judicial scrutiny, and underscores the importance of local knowledge.

At the time of his *Patel* concurrence, Justice Willett was an elected state judge halfway through his term on a state Supreme Court where the Justices face the voters every six years in statewide, partisan elections. [300] Unsurprisingly, his understanding of American constitutional law writ-large left a much larger role for state constitutionalism: "Texans are doubly blessed, living under two constitutions sharing a singular purpose: to secure human individual freedom, the essential condition of human flourishing." [301] Nor

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[299] *Id.* at 78.

[300] Don Cruse, *2012 Judicial Election Results: One Party Sweeps Around the State, But a Divided San Antonio Court*, SCOTXBLOG (Nov. 7, 2012), archived at https://perma.cc/624Y-NEJV.

[301] Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 92 (Willett, J. concurring) (Tex. 2015); *see also* Doe v. Mckesson, 945 F.3d 818, 839 (5th Cir. 2019) (Willet, J., concurring in part and dissenting in part) (calling for certification of a state-law question to the Supreme Court of Louisiana, as "avoiding unnecessary federal constitutional rulings honors our bedrock commitment to federalism." This demonstrates that now-Judge Willett's commitment to federalism, state constitutionalism, and state supreme courts, has followed him to the Federal bench).

would anyone accuse Justice Willett's concurrence of underestimating the institutional capacity of courts:

> Our supreme duty to our dual constitutions and to their shared purpose—to "secure the Blessings of Liberty"—requires us to check constitutionally verboten actions, not rubber-stamp them under the banner of majoritarianism. For people to live their lives as they see fit, a government of limited powers must exercise that power not with force but with reason. And an independent judiciary must judge government actions, not merely rationalize them. Judicial restraint doesn't require courts to ignore the nonrestraint of the other branches, not when their actions imperil the constitutional liberties of people increasingly hamstrung in their enjoyment of "Life, Liberty and the pursuit of Happiness.[302]

But a "where you sit is where you stand" reductionism alone does not explain the dueling philosophical approaches of two of the country's most distinguished jurists, who are more or less representative of the two poles in what Justice Willett's concurrence described as the "judicial review debate, both raucous and reasoned, [that] is particularly pitched today within the broader conservative legal movement."[303] Instead, what the Barrett/Willett dichotomy illustrates is that institutional concerns and constraints are fundamentally different for state and federal courts — and even more so in the case of federal courts reviewing state legislation. In broad terms, this "pitched debate" within the conservative legal movement, where both now-Fifth Circuit Judge Willett and now-U.S.

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[302] *Id.* at 120.
[303] *Id.* at 96.

Supreme Court Justice Barrett are major figures is about the judicial role vis-à-vis federalism, counter-majoritarianism, and separation of powers. While these are — and ought to be — pre-eminent concerns, they do not weigh equally on every single judge in every single court in every single constitutional case. Just as an image reflected in a straight mirror will appear differently from one reflected in a curved mirror, so, too, will federalism, counter-majoritarianism, and separation of powers concerns feature completely differently in the calculus of a state court hearing a state constitutional claim from a federal court hearing a federal constitutional claim — even if they involve the same fact pattern and textually identical constitutional provisions.

For instance, consider Justice Barrett's contention that it is difficult to overstate "the complexity of identifying legislative intent. It is extraordinarily difficult — if possible at all — for a court to glean what was 'really' going on behind the scenes of a statute."[304] Echoing a familiar textualist skepticism of legislative history, Justice Barrett asks whether the "rent-seeking motives of some legislators corrupt the statute if other legislators act with the public welfare in view? Where, moreover, would a court look to discover the legislature's true motive?" On these grounds, Justice Barrett defends the rational basis test, arguing that "current doctrine accepts a possible, rational purpose — i.e. one that can be inferred from the statutory text — rather than engaging in a hunt for the actual subjective purpose precisely because the latter is illusory."[305]

While Justice Willett does not expressly consider this point in his concurrence, at least three portions of his opinion offer partial retorts to Justice Barrett. First and foremost, Justice Willett has a fundamentally different conception of the judicial role than Justice

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[304] Barrett, *Countering the Majoritarian Difficulty*, *supra* note 11, at 70.
[305] *Id.* (emphasis added).

Barrett does. For him, hunting for the legislature's actual rationale is not a foolish enterprise — it is the very essence of a judge's responsibility:

> I would not have Texas judges condone government's dreamed-up justifications (or dream up post hoc justifications themselves) for interfering with citizens' constitutional guarantees. As in other constitutional settings, we should be neutral arbiters, not bend-over-backwards advocates for the government. Texas judges weighing state constitutional challenges should scrutinize government's actual justifications for a law—what policymakers really had in mind at the time, not something they dreamed up after litigation erupted. And judges should not be obliged to concoct speculative or far-fetched rationalizations to save the government's case.[306]

But these arguments taken alone are circular, as they start with two different and irreconcilable sets of premises about the actual capacity of judges to probe legislative intent. More to the point is the actual nature of the *Patel* test. As noted at length at various points in this article, a plaintiff seeking relief under *Patel* need not prove that the legislature's intent was to pass an expressly rent-seeking, irrational, and/or arbitrary law. Instead, the test would be satisfied if the plaintiffs were able to prove that as applied to them, the consequences of that statute were not just unreasonable or harsh, but actually oppressive.[307] In order for this test to work, the court need not always try to dig for the legislature's "true" intent. Instead, it would merely have to take the legislature's stated purpose in the

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[306] *Patel,* 469 S.W.3d at 115 (Willett, J. concurring).
[307] *Id.* at 90.

original statute at face value and in good faith (such as protecting consumers from fraud or maintaining public health and sanitation standards), then ask whether in the circumstances of the particular defendant before the court those objectives have actually been achieved, and then evaluate if its application to a particular plaintiff is justified in light of the statute's effects. This is not a bull-in-a-china shop approach to judicial review — it is in fact something far more deliberate and particularized.

Third, Justice Willett argues that effective judicial enforcement of constitutional norms against irrational and protectionist legislation can serve an important reformist function that forces the legislature to produce higher-quality laws. The example Justice Willett elaborates on most is the state's unwillingness to appeal the (then very recent) ruling from the Western District of Texas in *Brantley v. Kuntz*, where Judge Sam Sparks struck the state's licensing requirements for African hair braiders.[308] As Justice Willett put it:

> The state declined to appeal, saying it would instead launch "a comprehensive review of the barber and cosmetology statutes" and "work with [the] legislative oversight committees on proposals to remove unnecessary regulatory burdens for Texas businesses and entrepreneurs." Legislative response was swift— and unanimous—and Governor Abbott 15 days ago signed House Bill 2717 to deregulate hair braiding. But as with many matters (e.g., public school finance), it took a judicial ruling on constitutionality to spark legislative action.[309]

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[308] 98 F. Supp. 3d 884. *See also supra* Part III-D.
[309] *Patel,* 469 S.W.3d at 106 (Willett, J. concurring).

Viewed in this light, assertions of judicial power when the legislature oversteps its bounds serves a valuable reformist function and affirms the separation of powers — a principle at the heart of all fifty-one constitutions in our federal system.

The other example, cited briefly above, the school funding cases, is not elaborated on in much depth, but goes to one of the fundamental threads in modern state constitutionalism. In the aftermath of the U.S. Supreme Court's 1973 decision in *San Antonio Independent School District v. Rodriguez*, which declined to federalize constitutional concerns about the equality and adequacy of school funding, the issue has largely been one of state constitutional law.[310] Indeed, as of 2018, roughly forty-four states had faced state constitutional challenges to their funding of public schools, and plaintiffs have won at least twenty-seven of these challenges at some point.[311] Moreover, the Texas Supreme Court struck down the same school funding system that was upheld in *Rodriguez* on three occasions in the 1980s and 1990s, spurring the legislature into action, and ultimately creating a system that, even if imperfect, appeared to have improved significantly on both equality and quality.[312]

However, the experience of the school funding cases would serve to negate at least one of Justice Barrett's points about the ability of courts to pierce opaque legislative intent: the importance of local knowledge. This was a point of extreme concern to Justice Powell in *Rodriguez*, as he wrote in the majority opinion that the Justices of the U.S. Supreme Court lacked "both the expertise and the familiarity with local problems," which required "specialized knowledge" and "informed judgements made at the state and local levels."[313] To put

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[310] SUTTON, FIFTY-ONE IMPERFECT SOLUTIONS, *supra* note 15, at 22-41; *see also* 411 U.S. 1 (1973).

[311] SUTTON, FIFTY-ONE IMPERFECT SOLUTIONS, *supra* note 15, at 30.

[312] *Id.* at 31.

[313] 411 U.S. at 41-42.

things in the perspective of this paper: if the Justices of the Texas Supreme Court have deemed themselves, and been deemed to be by the United States Supreme Court, sufficiently versed in local knowledge to examine the school funding scheme for the El Paso Independent School District, located 572 miles away from the Texas Supreme Court's chambers in Austin, are they also not sufficiently well versed with local knowledge to understand the motives driving the Texas State Legislature that meets literally next door?

The remainder of Justice Barrett's institutional concerns are key to the structure of federal courts — but completely different in the context of state courts. The greatest source of the counter-majoritarian difficulty for Justice Barrett, life-tenured judges with no term limits, is a non-starter in forty-nine states (all but Rhode Island).[314] So, too, with her concern about the infallibility of judicial supremacy and concerns about unchecked judicial activism. Not only are these addressed in thirty-eight states through judicial elections, but the ease of the constitutional amendment process for state constitutions also negates many of these difficulties.[315] As Judge Sutton notes, "the state constitutions are readily amenable to adaptation, as most of them can be amended through popular majoritarian votes, and all of them can be amended more easily than the federal charter."[316]

The final one of Justice Barrett's points is, in context, nothing other than a massive affirmation of state constitutionalism. Justice Barrett describes her unease with U.S. Supreme Court actions that stand "as a national rule that precludes local variation," thus making "battles in high profile cases…incredibly pitched and their results…politically polarizing."[317] Hence, the U.S. Supreme Court

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[314] *Supra* note 30.
[315] *Id.*
[316] SUTTON, FIFTY-ONE IMPERFECT SOLUTIONS, *supra* note 15, at 213.
[317] Barrett, *Countering the Majoritarian Difficulty*, *supra* note 11, at 78.

should avoid "the risk of over-nationalizing policy preferences," as this would extinguish the opportunity for regional differences.[318] These are, without directly invoking the term, "federalism discount" concerns about the U.S. Supreme Court constitutionalizing an area with a ruling that extinguishes the democratic process in fifty states (and with it, opportunities to account for differences in culture, geography, and history) in favor of an ersatz rule that is more likely than not to be underenforced.[319] To take these implications one step further, experimentation in American constitutional law is better done at the state level and proven as a viable, mainstream, and judicially administrable doctrine before it can even be considered for federalization. Or, some may argue, in cases of reasonable and deep disagreement, it may be wise to leave the issue up to the states entirely.[320] So, too, may it be for the *Patel*-*Ladd* test — and for now, plaintiffs will have to find state supreme court justices who will heed Justice Willett's call to secure for their citizens the blessing of liberty guaranteed by both of their constitutions.

PART V

"When conservative libertarians focus on occupational licensing victories to claim success for stronger economic rights in general, they are using a very small tail to wag a very large dog" as occupational licensing schemes are "increasingly outrageous and increasingly unpopular."[321] On one level, at least as far as *Patel*, *Ladd*,

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[318] *Id.*

[319] SUTTON, FIFTY-ONE IMPERFECT SOLUTIONS, *supra* note 15, at 17.

[320] *See generally* Hills, *Federalism, Democracy, and Deep Disagreement*, *supra* note 25.

[321] Rebecca Haw Allensworth, *The (Limited) Constitutional Right to Compete in an Occupation*, 60 WM. & MARY L. REV. 1111, 1138 (2019).

Craigmiles, *St. Joseph Abbey*, and most of the other cases cited throughout this article as making beachheads for greater constitutional protection of economic liberties are concerned, this is accurate. Further, this is ample empirical evidence — a cursory overview of which is presented in this part — indicating that occupational licensing laws are particularly pernicious and have a long history of harming the most vulnerable in our society.[322]

But presenting the growth of contemporary economic liberty constitutional jurisprudence as exclusively an occupational licensing project is a grave misrepresentation. So, too, is it appropriate to reject "occupational licensing exceptionalism" in terms of legal standards by granting it a unique — and higher — level of judicial scrutiny than other economic liberties. In particular, "occupational licensing exceptionalism" would ignore the fact that in practice, occupational licensing — and economic liberties jurisprudence writ-large — is inextricably intertwined with takings doctrine. Thus, increasing judicial scrutiny of occupational licensing laws may offer a viable long-term means of overturning decades of poor regulatory takings doctrine under the *Penn Central* test.[323]

Firstly, it would be an act of extraordinary historical nearsightedness to ignore the impact of the post-*Kelo* revolt over eminent domain overreach on the intellectual and legal movement to provide greater judicial protections for property rights.[324] So, too, would one be remiss to ignore the record (somewhat overstated by Professor Calabresi) of the Rehnquist and Roberts Courts enforcing "the Takings clause with a pre-1937 vigor in *Dolan v. City of Tigard*, *Lucas v. South Carolina Coastal Council*, and *Nollan v. California Coastal Commission*," a line of cases to which one may add the more recent

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[322] *See infra* text accompanying notes 340-353.
[323] *See infra* text accompanying notes 337-339.
[324] *See supra* Part 0.

Koontz v. St. Johns River Water Management District, *Horne v. Department of Agriculture*, and *Knick v. Township of Scott.*[325] Hence, in context, rather than being seen as a small tail wagging a large dog, emerging economic liberties jurisprudence in the occupational licensing cases ought to be conceptualized as fruit of a large — and growing —tree planted by Profs. Richard Epstein and Bernard Siegen in the 1980s and carefully tended to since, first and foremost by Prof. Epstein himself.[326]

As a result, I am broadly skeptical of an "occupational licensing exceptionalism" that emphasizes, among other things, elevating occupational licensing cases to an intermediate review level of scrutiny while other economic liberty challenges, whether at the state or federal level, are left to flounder under hypothetical rational basis.[327] Above all, occupational licensing statutes impair "the right to earn a living," — a right which is no less impaired by a variety of monopolistic schemes that have come under blistering criticisms and likely not survived "rational basis with teeth" *Patel*-*Ladd* review.

Consider, for instance, the case of the Hettingas — the Arizona couple who were targeted by the government's dairy cartel price control scheme — which so enraged Judge Janice Rogers Brown that she wrote a concurrence excoriating "the political temptation to exploit the public appetite for other people's money," and courts' unwillingness to stop it." [328] Simply put, any protectionist racket that infringes on individuals' right to earn a living denies them their economic liberties and constitutional rights by virtue of its very

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[325] Calabresi & Leibowitz, *Monopolies and the* Constitution*, supra* note 48, at 1054; 570 U.S. 595 (2013); 576 U.S. 351 (2015); 139 S. Ct. 2162 (2019).

[326] Colby & Smith, *The Return of Lochner, supra* note 37, at 564-68; *see also* RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION, *supra* note 41.

[327] *See* Alexander L. Klein, *The Freedom to Pursue a Common Calling: Applying Intermediate Scrutiny to Licensing Statutes*, *supra* note 286.

[328] Hettinga v. United States, 677 F.3d 471, 481 (Brown, J., concurring) (D.C. Cir. 2011).

existence; the only question is its primary means of doing so. Sometimes it is by fixing the price of milk.[329] Other times, it is by arbitrarily imposing market share caps on taxi operators, making it impossible for firms to fairly compete with each another.[330] In yet another category of cases — which are increasingly being challenged by the Institute for Justice — it is by imposing stringent, anti-competitive regulations on food trucks (such as those banning them from operating near brick-and-mortar restaurants or near parks).[331]

Moreover, as *Ladd* and *Brantley* show, the role of facility requirements — a brick and mortar location in Ladd's case, and a minimum number of chairs, sinks, and square feet in Brantley's case — in occupational licensing schemes is deeply disturbing to courts.[332] From a doctrinal perspective, putting the facility requirements in a constitutional lane is a deep intellectual challenge. If viewed solely through the lens of occupational licensing, they are substantive due process and equal protection violations. Slightly readjust one's angle of observation, and they become part of the exactions doctrine under the *Nolan-Dollan-Koontz* line of cases, where local governments used their police powers to impose onerous regulations on the development of one's property.[333] Notably, in *Koontz*, which is

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[329] *Id.* at 481-82.

[330] Greater Houston Small Taxicab Co. Owners Ass'n. v. City of Houston, 660 F.3d 235, 241 (5th Cir. 2011).

[331] *See* White Cottage Red Door v. Town of Gibraltar, No. 18 CV 191, 2020 Wisc. Cir. LEXIS 10, at *8 (Wis. Cir. Ct. Sept. 3, 2020); Diaz v. City of Fort Pierce, No. 2018-CA-2259, 2019 WL 1141117, at *1 (Fla. Cir. Ct. Feb. 22, 2019); *see also Carolina Beach Food Trucks,* INSTITUTE FOR JUSTICE, archived at https://perma.cc/A4NQ-KMV4; *Baltimore Vending*, INSTITUTE FOR JUSTICE, archived at https://perma.cc/6NU6-VPEK .

[332] *See supra* Part III-B.

[333] *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 599 (noting that the exactions doctrine protects property owners from government officials' "misuse of the power of land use regulation") (2013). Of course, *Ladd* is a harder fit with the exactions doctrine because Ms. Ladd was not seeking to develop any real-property

arguably the most property-protective opinion issued by the U.S. Supreme Court in several generations, Justice Alito noted that the exactions doctrine is merely a derivative of the doctrine of unconstitutional conditions.[334] In the *Nolan-Dollan-Koontz* line of cases, these are designed to protect real-property owners from circumstances where "so long as the building permit is more valuable…. the owner is likely to accede to the government's demand, no matter how unreasonable."[335] Conceived this way, facility requirements for an individual or business owner are just another type of extortionate demand: the state may require investment in unnecessary types of equipment (including physical space) so long as the cost of these is less than the value of continuing to practice their occupation and/or operate their business. Of course, these kinds of facility requirements, in one form or another, are not particularly new in the economic liberties/"right to earn a living" context. Notably, one of the earliest liberty-of-contract, pre-Lochner cases, *In re Jacobs*, involved the New York Court of Appeals invalidating a law that banned cigar manufacturing in tenements.[336]

Or, from another angle, facility requirements, and maybe even occupational licensing requirements wholesale, are regulatory takings by another name — especially in cases where licensing requirements are imposed on a profession that was previously open to all. In fact, it is precisely what happened with *Patel*, where Ashish Patel and his employees were suddenly faced with no licensing requirements pursuant to no actual change in legislation or

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interest—instead the government's exaction there was designed to force her to acquire some kind of real property interest in the Commonwealth of Pennsylvania in order to practice her occupation.

[334] *Id.* at 606.

[335] *Id.* at 605.

[336] 98 N.Y. 98 (1885).

regulation. [337] Is this not precisely the type of sudden, uncompensated change in property rights that should give rise to a takings clause violation? Suppose further — in a not too far-fetched hypothetical — that licensing requirements for a previously open field (such as eyebrow threading was in Texas before 2009) are imposed alongside facility requirements (akin to those faced by the African hair braiders). Is not a facility requirement, such as the compulsory installation of sinks, chairs, and other equipment an encumbrance on the use of real property, precisely along the lines of Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*?[338] And, if one is to abstract even further and assume that regulatory takings should apply to more than just real property and embrace the broader category of property rights, including labor — which presumably one interested in protecting the right to earn a living would — then one has built a bridge for a heightened standard of review in occupational licensing cases to travel across into takings clauses and economic liberties wholesale.

As such, it seems to me that from a purely doctrinal point of view there is absolutely nothing exceptional about occupational licensing that would make it command a higher tier of judicial scrutiny under intermediate review. Such a position would be supremely unprincipled and would disparage the broader category of economic liberties jurisprudence, making it harder to export heightened rational basis review to all cases where economic liberties are at issue. Perhaps, through state constitutionalism, a well-nurtured and sufficiently widespread heightened rational basis test may one day even supplant the most-hated (as far as property rights advocates go) judicial balancing test of all time: the *ad hoc Penn Central* standard,

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[337] *See supra* Part III-A.
[338] 260 U.S. 393 (1922).

under which the U.S. Supreme Court has never invalidated a state regulation.[339]

But I would be remiss not to point out that occupational licensing laws are, in fact justifiably uniquely unpopular because of their particularly pernicious and oppressive nature. As the Obama Administration's 2015 report indicated, more than a quarter of the American workforce requires a license to do their jobs — a share that has risen five-fold since the 1950s, and overwhelmingly from an increase in the number of licensed professions rather than the changing composition of the workforce.[340] Yet, although over 1,100 occupations are regulated in at least one state, fewer than sixty are regulated across all states, making the inconsistency enormous.[341] Nor is there much consistency in the standards required by states in those fields they do chose to license; for instance, while most states require eleven days or less of training and education to qualify as a security guard, Michigan requires three years.[342]

A more recent Institute for Justice report, focused on the 102 lower-income occupations most impacted by the licensing requirements, yielded more bad news.[343] The report demonstrated that the licensing burdens that are imposed typically are "disproportionate to the actual public health and safety risks of an occupation," with cosmetologists typically having to complete over a year of education or experience, and emergency medical technicians only about one month.[344] Nor is there any obvious

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[339] Thomas W. Merrrill and Henry E. Smith, PROPERTY: PRINCIPLES AND POLICIES 1252 (3rd ed. 2017).

[340] *Occupational Licensing: A Framework for Policymakers*, Dep't Treasury Off. Econ. Pol'y, et al., at 3 (July 2015).

[341] *Id.*

[342] *Id.*

[343] *License to Work (2d ed.)*, INSTITUTE FOR JUSTICE, Nov. 2017, https://perma.cc/UFA8-B9BH .

[344] *Id.* at 7.

regional or political consistency in the states where occupational licensing is most burdensome and the most pervasive; per the Institute for Justice's 2017 report, California, Nevada, Arkansas, and Arizona were the nation's worst offenders, while Wyoming, Vermont, Montana, and South Dakota were the least restrictive overall.[345]

Indeed, it is difficult to look at the empirical evidence and not conclude that protectionist measures have many admirers in state legislatures and administrative agencies across red, blue, and purple states. And although these restrictions raise prices for all consumers and generally limit opportunities for workers in both wages and employment, the distributional requirements are uneven, harming military spouses, immigrants, and formerly incarcerated individuals most of all.[346] Unsurprisingly, then, the targets of the occupational licensing laws struck down as-applied in *Patel* and *Ladd* concerned two longtime favorite punching bags for state legislatures and bureaucrats: out-of-state residents and immigrant entrepreneurs. This is not a particularly new development. After all, the cigar factory law struck down in *Jacobs* was explicitly "passed at the behest of the German-dominated Cigar Makers union to stifle competition from new Bohemian immigrants," and New York's brief at the U.S. Supreme Court in *Lochner* openly acknowledged that the law targeted Jewish, Italian, and French immigrant bakeries operated by "foreigners" that had "come to [New York]….with habits which must be changed."[347]

With this in mind, it is no wonder that the emerging public choice theory critique of *Carolene Products*' bifurcation into favored social rights and disfavored economic has garnered as much support

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[345] *Id.* at 23 ("Table 6: States Ranked by Number and Average Burden of Licensing Requirements Combined.").

[346] *Occupational Licensing: A Framework for Policymakers, supra* note 340, at 7-8.

[347] BERNSTEIN, REHABILITATING LOCHNER, *supra* note 37, at 24, 33, 138.

in recent decades as it has — especially when the victims of economic liberty deprivations are members of precisely those social classes that *Carolene Products* and its progeny were supposed to protect.[348] In fact, reams of empirical evidence indicate that the harms stemming from protectionist legislation are "unlikely to be cured through electoral politics."[349] Instead, the electoral process is much more likely to perpetuate such abuses, as an ongoing debacle in New York State confirms. A *New York Post* investigation from August 2020 revealed a new push by the cosmetology lobby to create a new shampoo assistant license requiring 500 hours of training (at an average cost of $13,354).[350] Not only is New York's cosmetology licensing board, which was pushing the State Assembly to approve the bill creating the new licensing requirements, mostly composed of cosmetology school owners and lobbyists, but a key industry trade group that was pushing the bill had an intimate connection to the bill's lead sponsor.[351] The Executive Director of the trade group was the father of the legislative director for the State Assemblywoman pushing the legislation.[352] This is not merely distasteful in the expected, Bismarckian sausage-making sense. It is as distasteful as an unironic production of "Springtime for Hitler."[353]

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[348] Menashi & Ginsburg, *Rational Basis with Economic Bite*, *supra* note 9, at 1087-95.

[349] *Id.* at 1088.

[350] Jon Levine, Melissa Klein, and Sara Dorn, *New York Shampoo Assistant Bill is Dripping with Special Interests*, N.Y. POST (Aug. 15, 2020), archived at https://perma.cc/6847-HDP3; *see also License to Work (2d ed.)*, *supra* note 343, at 108, 209 (according to the Institute for Justice's 2017 report, shampooers in New York were required to get barber licenses, which only require 231 clock hours of training).

[351] Levine et al., *New York Shampoo Assistant Bill*, *supra* note 350.

[352] *Id.*

[353] *See* THE PRODUCERS (EMBASSY PICTURES 1967) (starring Zero Mostel and Gene Wilder as Broadway producers who scheme to put on the worst play ever written, *Springtime for Hitler*, as part of a scam to defraud their elderly female investors and escape to Rio de Janeiro).

In a world of such blatant cronyism, is it truly that unreasonable to hope that judges, especially at the state, but also federal level, take into account the "new realism about the political process instead of indulging the fictions of *Lee Optical* rational basis review" and actually "engage in more rather than less searching scrutiny"?[354] The tradition of "looking the other way" at naked preferences may be a "longstanding part of our constitutional tradition," but as Judges Ginsburg and Menashi have written, "a court cannot look such preferences in the face without balking."[355] Americans deserve more from their judges than to allow this rank protectionism to run riot through their states. Nor is it unreasonable for them to hold their judges to at least as high a standard as journalists from the *New York Post* when it comes to investigating the inner workings of their legislature and the actual basis of legislative intent. And if they don't — perhaps it is time to exercise the greatest powers that Americans have over their state judges, which they lack over their federal ones: vote them out and amend the flawed state constitutions they rode in on.

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[354] Menashi & Ginsburg, *Rational Basis with Economic Bite, supra* note 9, at 1095.
[355] *Id.* at 1095-96.