

ARE STATES PROTECTING ECONOMIC LIBERTY?

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A lot of people have referred to, and Justice Clint Bolick just talked about, the *Patel* case.¹ It is definitely true that much of the action right now in economic liberty is in state constitutions, state judicial decisions, and state legislation, and we do a lot of that at the Institute for Justice. I am going to talk about some of those developments. I have to respond to Professor Roderick Hills, even though he is not here, who said very strongly that we should pursue only state constitutional litigation, because there's no federal protection whatsoever for economic liberty.

I do not agree at all with the conclusion that there is no federal constitutional protection for economic liberty, but there is a lot of opportunity for state constitutional litigation now. First, it is important to realize that state constitutional texts are not little copies of the U.S. Constitution. Some of them were written even before the U.S. Constitution.² Some were written in the 1970s.³ The rest were written in between.⁴ Some are based on the Northwest Ordinance.⁵ Some have due course of law provi-

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1. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015).

2. Albert L. Sturm, *The Development of American State Constitutions*, 12 *PUBLIUS* 57, 58 (1982) (showing that the constitutions of Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, and Virginia were written prior to the United States Constitution).

3. *Id.* (listing Georgia, Illinois, Louisiana, Montana, North Carolina, and Virginia as states with constitutions written in the 1970s).

4. *Id.*

5. Matthew J. Hegreness, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 *YALE L.J.* 1820, 1855 (2011) (discussing which state constitutions originated from the Northwest Ordinance).

sions.⁶ Some have anti-monopoly clauses.⁷ Some have anti-gift clauses.⁸ Some have anti-favoritism clauses.⁹ They contain various provisions that are not in the U.S. Constitution, and Professor Steven Calabresi is someone who writes about that and catalogs different kinds of state constitutional provisions in his work.¹⁰

In addition, most states have at least two, and often as many as four, different lines of interpretation of the rational basis test, or the equivalent thereof.¹¹ So most states are a total mess on this. There will be one line of cases that strictly follows federal law under the state constitution. There will be one line of cases that uses, perhaps, the real and substantial test, which was an influential test that a lot of states used in the middle of the 1900s.¹² And that, like you might think, involves real evidence and a real and substantial relationship.

6. Michael J. DeBoer, *The Right to Remedy by Due Course of Law—A Historical Exploration and an Appeal for Reconsideration*, 6 FAULKNER L. REV. 135, 135 n.3 (2014) (listing state constitutions with due course of law provisions).

7. Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 1067 n.516 (2013) (listing state constitutions with anti-monopoly clauses).

8. Nicholas J. Houpt, Note, *Shopping for State Constitutions: Gift Clauses as Obstacles to State Encouragement of Carbon Sequestration*, 36 COLUM. J. ENVTL. L. 359, 379–80 nn.117–18 (2011) (listing state constitutions with anti-gift clause provisions).

9. John Martinez, *Getting Back the Public's Money: The Anti-Favoritism Norm in American Property Law*, 58 BUFF. L. REV. 619, 649–59, 653 n.144, 657 n.162 (2010) (describing the four different types of favoritism clauses—state taxing and spending clauses, state just compensation clauses, state due process clauses, and uniquely state constitutional prohibitions—listing example state constitutions); see also DeBoer, *supra* note 6, at 135 n.3.

10. See, e.g., Steven Gow 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 (2018); 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 (2008); Calabresi & Leibowitz, *supra* note 7; Steven G. Calabresi, et al., *The U.S. and the State Constitutions: An Unnoticed Dialogue*, 9 N.Y.U. J.L. & LIBERTY 685 (2015).

11. See, e.g., *Schultz v. Lakewood Elec. Corp.*, 841 N.E.2d 37, 42–43 (Ill. 2005) (describing the rational basis test for Illinois); *People v. Idziak*, 773 N.W.2d 616, 628–29 (Mich. 2009) (describing the three levels of the rational basis test Michigan employs); 11A ILLINOIS LAW AND PRACTICE CONSTITUTIONAL LAW §§ 257, 305 (2019) (describing the different lines of the rational basis test for Illinois); 5 MICHIGAN CIVIL JURISPRUDENCE CONSTITUTIONAL LAW §§ 262–263 (2019) (describing the rational basis test for Michigan).

12. See, e.g., *Caviglia v. Royal Tours of America*, 842 A.2d 125, 132–33 (N.J. 2004); *Gambone v. Commonwealth*, 101 A.2d 634, 636–37 (Pa. 1954).

There are other states that have a line of reasonable relationship cases, which do not tend to be rational basis.¹³ Then there are states that have things in between. As I said, most states have several of these different lines of cases going on at once that involve complicated tests with multiple factors. In Texas, the way that we were granted Supreme Court review was by saying, “You have three lines of cases that are all in conflict with each other and never cite each other. You should resolve that.” And they did.¹⁴

But that is true of virtually every state court right now, which means there is a huge opportunity to develop economic liberty jurisprudence and unique state tests. I do want to talk for a second about what the *Patel* test is, because it is not the federal test. First, the court looks at legitimate government interest, but not just a conceivable government interest.¹⁵ The court instead looks to what the government interest for the law actually was. Then the court looks at actual facts—real facts in the real world—to determine if there is a relationship between those facts and the actual purpose of the statute.¹⁶ Then, even if there is a real relationship, the court looks to see whether the law is so oppressive or burdensome to the individual that it does not justify the achievement of its supposed public purpose.¹⁷

Patel is a completely different test. It is a three-part test. I do not think any other state has that exact formulation, but they could. So we are litigating in many different state high courts. We currently have one case at the Pennsylvania Supreme Court.¹⁸ Pennsylvania is usually more protective of economic liberty than other states. We also had one recent case at the Illinois

13. *See, e.g.*, *Tip Top Foods, Inc. v. Lyng*, 104 Cal. Rptr. 718, 723 (Cal. Ct. App. 1972) (describing how California uses the reasonable relationship test); *Home Builders Ass’n of Dayton & the Miami Valley v. Beavercreek*, 729 N.E.2d 349, 354–56 (Ohio 2000) (applying a reasonable relationship test to property questions in Ohio); *Gary Concrete Prods., Inc. v. Riley*, 331 S.E.2d 335, 338–39 (S.C. 1985) (using the reasonable relationship test for a contracts case in South Carolina); 19 SOUTH CAROLINA JURISPRUDENCE CONSTITUTIONAL LAW § 89 (2019) (describing how South Carolina uses the rational basis test in some circumstances and the reasonable relationship test in other circumstances).

14. *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 86–87 (Tex. 2015).

15. *Id.* at 87.

16. *Id.*

17. *Id.*

18. Brief for Appellants, *Ladd v. Real Estate Comm’n*, No. 33 MAP 2018 (Pa. Oct. 9, 2018).

Supreme Court.¹⁹ Illinois is usually not more protective of economic liberty than other states, and it rubber stamped the law in question.²⁰ Both of those cases are really about the question of whether economic protectionism is a legitimate government interest, a question that has largely not been decided by almost any state court. It is a wide-open area.

There is currently one other case, which is in South Carolina, where we are essentially bringing *Lee Optical*²¹ again and saying, “Do not follow the U.S. Constitution on this. Go with your own constitution.”²² Under the South Carolina constitution, in *Lee Optical*, the plaintiffs would have won. That is a fun case. I cannot wait to see what happens.

This is what is currently happening in state constitutional law. I also want to point out the influx of activity right now with state statutes. For one thing, we previously talked a lot about licensing laws. Licensing is extremely varied across states. The Institute for Justice completed a study called *License to Work* where we catalogued the statutory requirements to practice 102 lower-income occupations.²³ Of those, only thirteen are licensed in every state, and only twenty-three are licensed in forty states.²⁴ For almost every occupation, there are at least a few states that do not license it. And the burdens and requirements to obtain a license vary widely from state to state.

In almost every state, there is no experience requirement for the licensing of residential landscapers, with the exception of four states where it takes an individual four years to get the license.²⁵ This difference is something that states can use to de-

19. *Chicago Foot Trucks: Sweet Home Chicago?: Food Trucks Get the Cold Shoulder in the Windy City*, INST. FOR JUST., <https://ij.org/case/chicagofoodtrucks/> [https://perma.cc/XL8E-AW2F].

20. Since this speech was delivered, the Illinois Supreme Court issued its ruling in this case, holding that favoring restaurants and protecting them from competition was a proper governmental purpose in Illinois. See *LMP Servs., Inc. v. Chicago*, No. 123123, 2019 WL 2218923, at *3–4, *8 (Ill. 2019).

21. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955).

22. Plaintiff’s Motion for Summary Judgment, *Opternative v. S.C. Bd. of Med. Exam’rs*, No. 2016-CP-40-06276 (S.C. Ct. Com. Pl. Sept. 6, 2017).

23. DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, *LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING* (2d ed. 2017), https://ij.org/wp-content/themes/ijorg/images/lw2/License_to_Work_2nd_Edition.pdf [https://perma.cc/RJ8U-KXJP].

24. *Id.* at 6, 13.

25. See *id.* at 7.

termine whether they actually need the licenses they are imposing, and whether they need them at that level of burden. Two states have now passed laws to do exactly that.²⁶ Nebraska and Ohio have passed the broadest economic liberty legislation in recent years. Both states are doing what is called sunset review where, on a rolling basis, they review all licensing laws and determine whether the regulation is truly necessary, and whether the regulation is the least restrictive way of achieving the health and safety purpose it was designed to achieve.²⁷

Ohio has passed sunrise review, which means each time a whole new set of regulations is proposed, a government body will assess whether it is, in fact, necessary.²⁸ This is important because there is always pressure to have new licensing regulations. Right now, there are nationwide lobbying efforts on music therapy, interior design, and lactation consultants to make licensing of those occupations much more restrictive, and to make it difficult for those not already in these occupations to enter. Under these proposed laws, the existing practitioners, of course, will get to continue their occupations, but newcomers will be excluded or severely limited.²⁹

Nebraska and Ohio have the broadest recent statutes that improve economic liberty. But it is not always possible to get bills passed, as extensively discussed in the earlier panel today. Florida has been trying to pass a bill to repeal licenses for twelve occupations, including things like auctioneer and interior design, and some other even more uncommon occupations, but the legislature has not managed to pass it. They have already failed three years in a row to get it passed.³⁰ They are trying again this year. We will see.

26. See Occupational Board Reform Act, NEB. REV. STAT. §§ 84-933 to -948 (Supp. 2018); Nick Sibilla, *New Ohio Law Takes Aim At Occupational Licenses, Which Cost State \$6 Billion*, FORBES (Jan. 9, 2019, 3:15 PM), <https://www.forbes.com/sites/nicksibilla/2019/01/09/new-ohio-law-takes-aim-at-occupational-licenses-which-cost-state-6-billion/#2ffb6b996e95> [<https://perma.cc/DJ9K-ZLD5>].

27. See CARPENTER ET AL., *supra* note 23, at 38–39.

28. Sibilla, *supra* note 26.

29. CARPENTER ET AL., *supra* note 23, at 29; see also J. Justin Wilson, *Ga. Lactation Consultants Sue to Save Their Jobs and End Unconstitutional Licensing Law*, INST. FOR JUST. (June 25, 2018), <https://ij.org/press-release/ga-lactation-consultants-sue-to-save-their-jobs-and-end-unconstitutional-licensing-law/> [<https://perma.cc/4K7T-KTAT>].

30. See H.B. 7047, 2017 Leg. Reg. Sess. (Fla. 2017); H.B. 15, 2018 Leg. Reg. Sess. (Fla. 2018); see also S.B. 1640, 2019 Leg. Reg. Sess. (Fla. 2019) (died on the calendar May 3, 2019, attempting to repeal licensing for twenty-three occupations).

It is difficult to get such repeals passed because of the intense pressure from the people who are benefiting from the licensing laws. One area in which there has been significant improvement, which we heard about in the panel in the middle of the day today, is that many states—twenty-eight in the last four years—have reduced the barriers for ex-offenders to get licenses in different occupations.³¹ In some states, where it is uncertain if one might be excluded from an occupational license, the state provides an early opportunity to find out whether past offenses would prevent the person from getting the license. This is extremely useful, as it avoids the situation where someone has completed the educational and testing requirements only to find out that the license will be denied anyway.

Other states have promulgated statutes requiring the crime to be related to the occupation before you can prohibit someone from going into the field. That would seem obvious, but it is not. We have a case in Pennsylvania where a woman has an assault conviction from twenty years ago as part of a domestic dispute and she is not being allowed to become an esthetician.³² There is absolutely no relationship—and no claim even of a relationship—between the original offense and doing makeup and facials, but she nevertheless was prohibited from working.

The change from preventing ex-offenders from entering licensed occupations is a really interesting development. I believe significant legislative pressure to make that change exists—probably more even than licensing change overall, but I am hoping it bleeds over into licensing change too.

One other area where there has been significant development is in food freedom and the ability of people to make food in their homes to then sell. Three states—Wyoming, North Dakota, and Utah—have passed sweeping reforms that, in essence, say that as long as it is not meat then you can produce the food in your

31. See *State Occupational Licensing Reforms for Workers with Criminal Records*, INST. FOR JUST., <https://ij.org/activism/legislation/state-occupational-licensing-reforms-for-people-with-criminal-records/> [https://perma.cc/F2VN-N92N] (last visited Sept. 11, 2019).

32. *Pennsylvania Fresh Start: Law Denies Women Right to Work Because of Irrelevant Criminal Convictions*, INST. FOR JUST., <https://ij.org/case/pennsylvania-collateral-consequences/> [https://perma.cc/7EYA-8DVH] (last visited Dec. 25, 2019).

home and sell it.³³ This includes perishable items, including foods like pies that contain milk.

Since those laws have gone into effect—the first one four years ago—there has not been one single report of a foodborne illness from one of these home-prepared foods.³⁴ This showcases that these incredible barriers for home food preparation are likely not necessary. States could have significantly fewer regulations to achieve the same result (to the extent they are achieving any result).

That change has been made, and many states also have made it possible to sell shelf stable foods, like cookies and cakes, directly from your home. This has a huge impact, of course, on people who can finally work. I hope the more regulated states will observe that the less regulated states are doing something totally different and less restrictive, and that there have been absolutely no adverse consequences from it.

I would love for this to spread as a legislative matter. It is something we are working on and that I am hopeful about. At the same time though, we cannot escape the need for actual judicial constitutional decisions protecting economic liberty at the state and federal level. That is the only way that these rights are truly guaranteed, and not subject to repeal.

Thank you.

33. See Home Consumption and Homemade Food Act, UTAH CODE ANN. §§ 4-5a-101 to -105 (LexisNexis Supp. 2019); Wyoming Food Freedom Act, WYO. STAT. ANN. §§ 11-49-101 to -103 (2019); N.D. CENT. CODE §§ 23-09.5-01 to -02 (Supp. 2019); see also MODEL FOOD FREEDOM ACT (INST. FOR JUST. 2018).

34. Nick Sibilla, *Hundreds Of Homemade Food Businesses Flourish Under State Food Freedom Laws*, FORBES (Jan. 22, 2019, 10:00 AM), <https://www.forbes.com/sites/nicksibilla/2019/01/22/hundreds-of-homemade-food-businesses-flourish-under-state-food-freedom-laws/#37eab6e12226> [https://perma.cc/S93R-5FYG].