Can You Get There from Here: How the Law Still Threaten's King's Dream

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Can You Get There from Here?:
How the Law Still Threatens King's Dream

Timothy Sandefur*

[IN] regard to the colored people there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the Negro is not benevolence, not pity, not sympathy, but simply justice... All I ask is, give him a chance to stand on his own legs!... If the Negro cannot live by the line of eternal justice... the fault will not be yours, it will be his who made the Negro, and established that line for his government. Let him live or die by that. If you will only untie his hands, and give him a chance, I think he will live.1

Introduction

On December 1, 1955, Rosa Parks refused to leave her seat on the orders of a White bus driver in Montgomery, Alabama.2 Her arrest led to an almost year-long boycott against city buses led by Martin Luther King, Jr. (Dr. King),3 and a Supreme Court decision, Gayle v. Browder,4 which struck down the city's segregation ordinance.5 Less well known is the Baton Rouge bus

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We have it in our power to begin the world over again. The birthday of a new world is at hand, and a race of men... are to receive their portion of freedom from the events of a few months. The reflection is awful, and in this point of view, how trifling, how ridiculous, do the little paltry cavilings of a few weak or interested men appear, when weighed against the business of a world.


3. See id. at 82.


5. Id.
boycott of 1953. Although it lasted just ten days, it provided a model of organization that the Montgomery Improvement Association (MIA) and its leader, Dr. King, would use two years later in building the Montgomery boycott.

These boycotts were not just about segregated buses. The story of their organization reveals a lesson about economic regulations that, sadly, has still not been learned. Like so much of the history of racial conflict in America, segregation involved a complex mixture of law and social organization. One of the greatest obstacles confronting both boycotts was the fact that the network of drivers organized to provide alternative transportation for the boycotters could not legally charge fares for rides. Taxicab regulations in both Baton Rouge and Montgomery proved a powerful tool in the hands of segregationists. Unfortunately, such regulations continue to have a significant impact on the way racial groups live their lives every day in America.

This Essay explores some of the racial and economic implications of transportation regulations by examining the law's power to manipulate economic relationships and the profound effect this power has on the civil rights of Americans, of all races, to pursue happiness. The Essay begins by discussing the threats taxicab regulations posed to the success of the Baton Rouge and Montgomery bus boycotts. Part II surveys the history of occupational licensing in America, particularly with respect to the use of licensing statutes as a means of oppressing minorities, and the evolution of constitutional jurisprudence with respect to licensing schemes. In Part III, the Essay highlights the fallacies in the modern judiciary's approach to analyzing licensing statutes and constitutional protections of the right to work. The Essay then focuses specifically on the impact licensing schemes have had on minority involvement in the taxicab industry. Part V discusses attributes of current licensing systems and addresses some of the ways in which the current system should be challenged. Ultimately, this Essay concludes that licensing schemes perpetuate impermissible monopolies and repress minorities.

6. Garrow, supra note 2, at 27.
7. See id.
8. Taylor Branch, Parting the Waters: America in the King Years 145 (1988).
I. Licensing Laws Prolong the Segregationists’ Fight Against Civil Rights

The series of events that led to the Baton Rogue boycott began when the city decided, in February 1953, to increase the city bus fare. On February 25, the city council passed Ordinance 222, which abolished the former practice of explicitly reserving seats for Whites on city buses, in response to lobbying by Black leaders. But the bus company ignored the ordinance, and continued to reserve the front rows of seats for Whites. Reverend T.J. Jemison (Rev. Jemison) and others demanded the ordinance be enforced. After a number of conflicts between passengers and bus drivers, the drivers went on strike in June to protest Ordinance 222. To quell the strike, the State’s Attorney General declared the ordinance void, as a violation of Louisiana segregation laws. The drivers went back to work, and Rev. Jemison announced the beginning of the boycott.

The boycott was difficult to maintain because so many of the city’s Black workers relied on the buses to get to and from work. Eighty percent of the Baton Rouge bus company’s riders were Black, and while the riders resented segregation, they (particularly the elderly) had no effective alternative. Needing to provide alternative transportation if he wanted to keep the boycott alive, Rev. Jemison solicited volunteers to drive boycott participants to their destinations in cars. He ran into a legal obstacle. Baton Rouge city ordinances required, and still require, a taxicab license for any person paid in exchange for giving a person a ride in a car, and also regulated the fares that drivers could charge. Getting a taxi license required the approval of the
city’s regulatory commission. Such commissions were routinely staffed by political appointees, who it can be imagined, were not especially sympathetic to desegregation. Such commissions are generally much more congenial to already-existing taxi companies, and have no incentive to create more competition in the taxi market, let alone to assist in making political statements.

Rev. Jemison could not legally allow the passengers of his makeshift driving network to pay their drivers, and volunteer drivers could not afford to drive people around for free. Gas and maintenance costs alone would have been prohibitive. Rev. Jemison's solution was to collect contributions at meetings of his United Defense League (UDL), the organization he founded to run the boycott, and then distributed the money to the drivers. A sympathetic gas station owner, Horatio Thompson, sold gas at cost to the boycott drivers, but the system was still economically weak. The boycott lasted ten days before the UDL was forced to agree to a compromise which maintained segregated seating on the buses.

The Baton Rouge taxicab regulations immeasurably strengthened the city's ability to withstand the boycott. Two years later, Dr. King confronted the same obstacle when he led the famous Montgomery boycott. He later recalled:

In the early stages of the protest the problem of transportation demanded most of our attention. The labor and ingenuity that went into that task is one of the most interesting sides of the Montgomery story. For the first few days we had depended on the Negro taxi companies who had agreed to transport the people for the same ten-cent fare that they paid on the buses... But... Police Commissioner Sellers mentioned in passing that there was a law that limited the taxis to a minimum fare. I caught this hint and realized that Commissioner Sellers would probably use this point to stop the taxis from assisting in the protest.

Like Rev. Jemison, Dr. King solved the problem by collecting money at church meetings and distributing it to participating drivers. This was no small feat since the Montgomery carpool

21. Id. at §10:204.
22. MORRIS, supra note 10, at 23.
23. Id.; Price, supra note 9.
25. GARROW, supra note 2, at 27; MORRIS, supra note 10, at 18, 24.
27. BRANCH, supra note 8, at 145.
“would have to supply 20,000 rides, which worked out to more than 130 rides a day for each of the volunteered cars.”28 Although the MIA met this challenge, the burden was extreme and could have been avoided entirely if Montgomery ordinances had not required a forty-five cent minimum taxi fare.29

As the Montgomery boycott approached the one-year mark, the city government attacked it with “the legal weapon King’s lawyers had feared most,” an injunction against the MIA for running a transportation network without a license.30 The MIA, perhaps naively, actually sought a license for operating a transportation system, but of course, city leaders denied this request.31 The licensing requirement posed such a serious threat to the boycott that the MIA asked a federal court to prevent the state from shutting the system down.32 Since federal courts usually abstain from taking cases that are already proceeding in state court, the federal court refused to interfere.33 The state court actually issued the injunction,34 but fortunately for Dr. King, the Supreme Court announced its decision in Gayle v. Browder,35 striking down bus segregation, the same day.36

The injunction alone would have destroyed the boycott; in addition, city ordinances allowed the court to fine the MIA $15,000 for its lost taxes.37 In fact, the state court’s injunction combined with the slow implementation of the Browder decision meant that for more than a month after the Supreme Court struck down bus segregation, the Montgomery boycotters were forced to walk.38 The boycotters did not want to return to the buses until the Browder decision was enforced, but the injunction prevented them from using alternative transportation.39 These considerations led
one commentator to state that although

[t]he Montgomery Bus Boycott has attained a secure and honored niche in the Nation's public memory . . . [t]he concerted withdrawal of Negro patronage is not what finally desegregated the buses; successful litigation constituted the decisive action . . . [T]he boycott on its own did not succeed in inducing the political authorities to make any substantial concessions. 40

This is not meant to denigrate the boycotts. On the contrary, only remarkable community spirit allowed the Montgomery boycott to survive. It is a testament to the dedication of thousands of people whose names are no longer remembered, in large part the elderly and poor, who chose to walk rather than be subjected any longer to the demeaning treatment of segregation. But Montgomery authorities held the most powerful trump card: the power to shut down the MIA's alternative transportation network. As Ralph Abernathy later recalled, "[w]ith the machinery of the law in their control, the white establishment could make our [boycott] so costly that we might eventually have to give up the struggle or else spend a good portion of our lives in jail." 41 That same machinery had forced the leaders of the 1953 boycott in Baton Rouge to agree to a compromise solution. Had the City of Montgomery used its weapons more effectively, the boycott likely would not have lasted as long as it did or had the effects that it had.

II. Tradition of Discouraging Monopolies in Employment Gradually Erodes

A. Colonies Follow British Policy of Disfavoring Occupational Licenses

Taxicab licenses are a type of occupational licensing, a government mechanism that grew to prominence in the period following the American Civil War. 42 Before the 1870s, courts restricted the government's ability to regulate professions because

civil rights movement, shut down the Highlander Folk School, where many civil rights activists had trained in nonviolent protest techniques—by charging the school for serving liquor without a license. The school had provided students with a cooler full of refreshments, including beer, and put out a jar for contributions. This was all the state needed, under the liquor licensing laws, to seize the school, revoke its charter, and auction off all its assets. Id. at 289-90.

40. Kennedy, supra note 31, at 1054.
42. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 397 (1973).
Courts saw such regulations as infringements on citizens' right to earn a living. As early as the seventeenth century, courts had held that while government could regulate in order to protect consumers, it could not do so in a manner that reduced competition or infringed on the right of tradesmen to pursue their trade.

As the Court of King's Bench said in 1610, "[T]he King may erect guildam mercatoriam, i.e., a fraternity or society or corporation of merchants, to the end that good order and rule should be by them observed for the increase and advancement of trade and merchandise, and not for the hindrance of it." In subsequent years, the courts held that upholsterers, plasterers, and dancing teachers did not have to be licensed in order to practice their trades. At common law, explained England's Chief Justice, Sir Edward Coke, "it was lawful for any man to use any trade thereby to maintain himself and his family; this was both lawful, and also very commendable." Although individual freedom to practice a trade was not entirely unregulated, for "if a man will take upon him to use any trade, in the which he hath no skill; the law provides a punishment for such offenders, and such persons," the law upheld the right of individuals to enter a trade subject only to the government's power to protect consumers.

Lord Coke was the leading opponent of royal monopolies in the seventeenth century. King James I, to whom Coke was a constant pest, frequently used royal power to grant monopolies to his friends and supporters. These monopolies were similar to today's patents; they made it illegal for anyone to compete with the owner of the monopoly, and they were granted on a variety of things, including, in one case, the making of playing cards.

44. Id. at 213.
50. Id.
51. See id.
52. See Sandefur, supra note 43, at 210-17.
Nobody except the person with royal permission was allowed to make or sell cards.\textsuperscript{55} The court struck down this monopoly, and Coke explained that:

if a graunt be made to any man, to have the sole making of Cards, or the sole dealing with any other trade, that graunt is against the liberty, and freedome of the Subject, that before did, or lawfully might have used that trade, and consequently against [the Magna Carta].

Generally all monopolies are against this great Charter, because they are against the liberty and freedome of the Subject, and against the Law of the Land.\textsuperscript{56}

Coke, and the generations that followed him, were highly suspicious of economic regulations because they often were used to give market preferences to those whom the government wanted to support.\textsuperscript{57} The common law courts struck down these laws as violations of the right to pursue lawful occupations.\textsuperscript{58}

Likewise, the founders of the United States were wary of economic regulations because they were often perverted into a tool for making it illegal for entrepreneurs to compete, or for customers to shop elsewhere.\textsuperscript{59} As James Madison stated:

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens [the] free use of their faculties, and free choice of their occupations . . . . What must be the spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favour his neighbour who manufactures woolen cloth; where the manufacturer and wearer of woolen cloth are again forbidden the economical use of buttons of that material, in favor of the manufacturer of buttons of other materials!\textsuperscript{60}

Such power would become an important prize in the political game since it gave politicians the power to make or break a person's
right to earn a living.

B. Freed Slaves Afforded Equal Rights Through Constitutional Protections

Of course, in Coke's and Madison's day, the right to earn a living extended only to White men, not slaves. But after the Civil War, Radical Republicans in Congress sought to extend that right to the freedmen. One of the most important parts of their program was the passage of the Civil Rights Act of 1866, which stated that

all persons born in the United States . . . of every race and color . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.

President Andrew Johnson vetoed the Act on the grounds that Congress had no authority to require states to extend these protections. But Congress overrode Johnson's veto, and, to ensure the Act would not be struck down by the courts, passed the Fourteenth Amendment.

The first section of the Amendment contains four important clauses. The first declares that all persons born in the United States, and not subject to a foreign government, are citizens of the United States. The second prohibits any state from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States." The third requires states to extend the equal protection of the laws to all people in their jurisdiction. The fourth prohibits states from taking a

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61. See, e.g., U.S. Const. art. I, § 2 (slaves were not even considered individuals, let alone citizens).
64. Id.
65. Edward McPherson, The Political History of the United States of America During the Period of Reconstruction 81-83 (1871) (detailing the Congressional vote to override Presidential veto and President Johnson's comments regarding the constitutionality of the amendment).
66. Id. at 74.
68. U.S. Const. amend. XIV, § 1.
69. See id.
70. Id.
person's life, liberty, or property without due process of law.\textsuperscript{71} While the last two clauses were particularly important during the Civil Rights movement, consider for a moment the Privileges and Immunities Clause.

What are "Privileges and Immunities"?\textsuperscript{72} The phrase also appears in Article IV of the Constitution, where it applies to the federal government.\textsuperscript{73} In an early case involving Article IV, Justice Bushrod Washington explained that Privileges and Immunities include "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."\textsuperscript{74} The drafters of the Fourteenth Amendment relied on Justice Washington's explanation when they added a Privileges and Immunities Clause to the Fourteenth Amendment.\textsuperscript{75} According to Senator John Sherman, Congress intended the Privileges and Immunities Clause to protect the common law rights of Americans.\textsuperscript{76} Representative John Bingham explained that the Clause protected "the liberty . . . to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen and to be secure in the enjoyment of the fruits of your toil."\textsuperscript{77} Senator W. T. Hamilton asked rhetorically,

\begin{quote}
Has not every person a right to carry on his own occupation, to secure the fruits of his own industry, and appropriate them as best suits himself, as long as it is a legitimate exercise of this right and not vicious in itself, or against public policy, or morally wrong, or against the natural rights of other?\textsuperscript{78}
\end{quote}

In short, the Fourteenth Amendment was intended, in part, to stop states from depriving people of this essential freedom.

\textbf{C. Courts Quickly Undermine the Newly Established Protections}

Ratified in 1872, the Amendment almost immediately became the subject of litigation in what came to be known as the

\begin{flushleft}
71. \textit{See id.} \\
72. U.S. \textit{Const.} amend. XIV, § 1. \\
73. U.S. \textit{Const.} art IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). \\
74. Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.E.D. Pa. 1823). \\
75. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). \\
76. CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872). \\
77. CONG. GLOBE, 42d Cong., 1st Sess. app. 86 (1871). \\
78. 43 CONG. REC. app. 363 (1874).
\end{flushleft}
Slaughter-House Cases. 79 Louisiana passed a law requiring all butchering in New Orleans to be done, not at private butcher shops, but at a single state-owned butcher shop. 80 The monopoly put many butchers out of business; so they sued arguing that the law violated the Privileges and Immunities Clause by depriving them of their right to earn a living. 81 The Supreme Court rejected the butchers' argument. 82 Writing for the majority, Justice Samuel Miller asked rhetorically, "[w]as it the purpose of the fourteenth amendment ... to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?" 83 Miller answered his own question with a resounding no. 84 Although the Court recognized the right to earn a living, it regarded that right as deriving from state, not federal, citizenship. 85 The two kinds of citizenship, and the two kinds of rights, are distinct from each other, and the Fourteenth Amendment only protected the "privileges or immunities of citizens of the United States." 86 Therefore, the Amendment did not allow federal protection of the right to earn a living since it was a right incident to state citizenship. 87

The tortured interpretation in the Slaughter-House Cases completely undermined the purpose of the Fourteenth Amendment. 88 Congress passed the Amendment precisely to create federal protection for individual rights, particularly as protection against state legislatures, which in the post-Civil War era were devising ever more ingenious ways to keep freed slaves from attaining equality. 89 The Slaughter-House Cases reduced the Privileges and Immunities Clause to what dissenting Justice Stephen Field called "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress.

79. 83 U.S. (16 Wall.) 36, 36-130 (1873).
80. See id. at 38.
81. Id. at 45-46.
82. Id. at 83.
83. Id. at 77.
84. Id.
85. See The Slaughter-House Cases, 83 U.S. (16 Wall.) at 77.
86. Id. at 74. But see John Harrison, Reconstructing the Privileges or Immunities Clause, 101 YALE L.J. 1385, 1415 (1992) (suggesting that Justice Miller, who wrote the majority opinion in the Slaughter-House Cases, was misled, in part, by the italicization used by the printers of the U.S. Reports). Little things mean a lot!
88. See, e.g., CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872).
89. See David S. Bogen, The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers, 44 MD. L. REV. 939, 943 (1985).
and the people on its passage." 90 Under the Court's interpretation, the Clause merely prevented states from interfering with rights granted by the federal government. 91 However, the Supremacy Clause already did this. 92 The Slaughter-House Cases effectively erased the Privileges and Immunities clause from the Constitution. 93 Since 1872, only one Supreme Court case has struck down a law for conflicting with the Privileges and Immunities clause. 94 Although Judge Robert Bork has called the Slaughter-House Cases a "narrow victory for judicial moderation," 95 the truth is that in the Slaughter-House Cases, the Court managed effectively to overrule an entire constitutional amendment. 96 To reduce an entire clause of the Constitution—particularly a clause of the extremely important Fourteenth Amendment—to a practical nullity was an act of extreme judicial activism. 97

The poison tree of the Slaughter-House Cases promptly bore fruit. Only four years later, the Court relied on the Slaughter-House Cases to undermine federal authority to prosecute civil rights crimes in United States v. Cruikshank. 98 Cruikshank arose from a truly unbelievable act of racial violence called the "Colfax Massacre," in which more than 250 Black Louisianans were murdered by a White mob that burned down the building in which they had assembled, and shot those who tried to escape the flames. 99 Only a handful of the murderers were convicted, 100 but the Supreme Court reversed their convictions, 101 holding inapplicable the Civil Rights Act of 1870, 102 which protected the "free exercise and enjoyment of rights and privileges 'granted and secured' to [citizens] . . . by the constitution and laws of the United

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90. The Slaughter-House Cases, 83 U.S. (16 Wall) at 96 (Field, J., dissenting).
91. Id. at 74.
92. Id. at 96.
93. Id.
96. See The Slaughter-House Cases, 83 U.S. at 96.
98. 92 U.S. 542 (1876).
100. Id. at 2153.
101. Id. at 2155-56.
The right to assemble peaceably and the right not to be deprived of life or liberty without due process are rights incident to state citizenship, said the Court, and therefore, the Fourteenth Amendment gave Congress no power to protect that right against the states. Since the duty of protecting lives "rests alone with the States, [i]t is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself." Cruikshank and the Slaughter-House Cases effectively gutted federal authority to protect former slaves from, respectively, criminal or civil violations of their rights by their home states. Decades passed before the Court developed a theory to protect individual rights from state interference by using, not the Privileges and Immunities Clause, but the Due Process Clause instead. By that time, the Civil Rights Cases and Plessy v. Ferguson had reduced the Reconstruction commitment to civil rights to a bitter joke.

D. States Assert Licensing Authority to Oppress Minorities

The Slaughter-House decision encouraged state legislatures, and state constitutional conventions, to enact increasing government controls over businesses and occupations in the following decades. The Michigan Supreme Court noted in 1889 that it was quite common in these latter days for certain classes of citizens—those engaged in this or that business—to appeal to the government ... to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted. Soon, many American jurisdictions began using the power of government regulation to prevent economic competition from the

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103. Cruikshank, 92 U.S. at 548.
104. Id. at 553.
105. Id. at 554.
106. See id. 554-55.
108. 109 U.S. 3 (1883).
109. 163 U.S. 537 (1896).
110. Almost all states called constitutional conventions in the 1870s and 1880s. See FRIEDMAN, supra note 42, at 302-18.
111. See Bogen, supra note 89, at 942-44.
former slaves. But fickle as some of these constitutions were, they never wavered from one particular goal: disenfranchising the freedmen, politically and economically.  

Maryland soon prohibited Blacks from practicing law, recognizing that "the Supreme Court's interpretation of the privileges and immunities clause [in the Slaughter-House Cases] was a response to, and a rejection of, congressional claims of power to prohibit racial discrimination." This statute was only one of what became a flood of licensing statutes that were either explicitly intended to prevent Blacks from earning a living, or which had that effect. Courts further compounded the problem by deferring to the decisions of licensing boards, even when those boards acted with racial animus. For example, Maryland courts upheld the licensing of plumbers in 1890; by the 1950s only two of the state's 3,200 licensed plumbers were Black. Laws regulating the barbering trade present another striking example of the use of state power to disenfranchise Blacks. Although in the 1890s more than twenty percent of America's barbers were Black, that number dropped dramatically over the next three decades as cities began to use their regulatory and licensing power to exclude Black competition. A 1927 Georgia Supreme Court decision to strike down such a regulation on Equal Protection grounds was most unusual, and despite its holding, the court took pains to rationalize the legitimacy of segregation laws. Thus, government regulatory power, strengthened by judicial deference, gave segregationists their most efficient tool:

114. FRIEDMAN, supra note 42, at 303.
116. See Bogen, supra note 89, at 943.
118. See, e.g., People ex rel. Nechamuc v. Warden of the City Prison, 144 N.Y. 529, 539 (1895).
121. Id. at 99.
122. Chaires v. Atlanta, 164 Ga. 755, 769-70 (1927) (Segregation laws "are merely regulatory and do not destroy nor impinge upon property rights").
White officials, reflecting their own personal biases as well as the social dynamics that placed them in office, exercised discretion in ways that almost invariably slighted black interests. What this meant concretely was that blacks typically received inferior public goods and services. The separate and unequal character of segregated public schooling has been well publicized. But what has not been adequately appreciated is the all-inclusive extent of systematic inequity. From sewer service to lighting to the upkeep of streets to law enforcement to recreational facilities, blacks could realistically expect to receive fewer resources because of racial bias.\(^{123}\)

Of course, not all economic regulations were passed by racist groups trying to eliminate competition. But because racial minorities are, by definition, in the minority, their voice in the regulatory process is limited.\(^{124}\)

**E. Brief Judicial Reprieve for the Right to Earn a Living**

In the years following the *Slaughter-House Cases*, the Supreme Court began once again to restrict government authority to interfere with the right to earn a living. In *Allgeyer v. Louisiana*,\(^ {125}\) the Court recognized that the Fourteenth Amendment protects the right to earn a living, but found such protection stemmed from the Due Process Clause rather than the Privileges and Immunities Clause.\(^ {126}\) Over the next few decades, the Court struck down a number of economic regulations under what came to be called "economic substantive due process".\(^ {127}\) In the most famous of these cases, *Lochner v. New York*,\(^ {128}\) the Court held that the Fourteenth Amendment did not allow the State of New York to forbid bakers from working overtime.\(^ {129}\) Any kind of labor, said the Court,

may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business,

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125. 165 U.S. 578 (1896).
126. See id. at 591.
127. See Barry Cushman, *Lost Fidelities*, 41 WM. & MARY L. REV. 95, 100-04 (1999); see also BERNARD SIEGAN, *PROPERTY RIGHTS FROM THE MAGNA CARTA TO THE FOURTEENTH AMENDMENT* 267 (2001) (showing that despite the focus in this time period, the clause had actually been interpreted as including a substantive component long before).
128. 198 U.S. 45 (1905).
129. *Id.* at 59.
would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all pervading power ... 130

In fact, the statute in *Lochner* was part of an attempt by the owners of new, mechanized bakeries to shut down competition from small, upstart bakeries.131 Since the mechanized bakeries could run all night, the law against working overtime only affected the smaller bakeries that made their goods by hand.132 These bakeries were primarily staffed by recently arrived immigrants.133

The Court also employed the Equal Protection Clause in protecting the right of livelihood against legislation enacted by hostile majorities. In *Yick Wo v. Hopkins*,134 for instance, the Supreme Court struck down a San Francisco ordinance aimed at shutting down the Chinese laundries in the city.135 But *Yick Wo* did not end such practices; rather, racist bureaucracies just sought out more clever methods of achieving the same end. For example, they devised statutes which avoided mentioning race, but were still aimed at disfavored races.136 As Justice Potter Stewart once said, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."137 Arguing a case before the Supreme Court is a huge undertaking. One can imagine that many entrepreneurs burdened by a racially discriminatory licensing restriction instead just gave up, or tried to run a business under the table.138 In any case, the power to regulate was, and remains, the power to destroy. That power has frequently been used against racial minorities.

III. The Devastating Legacy of Rational Basis Scrutiny

In a series of cases in the 1930s, the Supreme Court repudiated the doctrine of economic substantive due process.139

130. Id.
132. Id. at 40-43.
134. 118 U.S. 356 (1886).
135. Id. at 368-69; see also *Plessy*, 163 U.S. at 550 (Harlan, J., dissenting) ("[The law in *Yick Wo*] was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race.").
138. See Bernstein, *supra* note 113, at 40 (describing the black market in the barber trade that sprang up as a result of discriminatory licensing).
139. See United States v. Carolene Products Co., 394 U.S. 144, 152 (1938)
Although the Court has never overruled *Yick Wo*, it embraced an alternative theory, employing varying levels of scrutiny. Under this theory, which prevails today, government regulation of certain rights called fundamental rights or of groups called suspect classes, is required to satisfy the legal test of strict scrutiny, while regulations of rights such as property rights or the right to earn a living, need only bear a rational relationship to a conceivably legitimate government purpose. The bottom line is that courts defer to the legislature's judgment as it relates to government intrusions on those rights that were actually the primary concern of the authors of the Fourteenth Amendment and the original civil rights acts. The result of the Supreme Court's adoption of the rational relationship test is today's regulatory nightmare, giving the government authority to manipulate the transportation market at the behest of the politically powerful.

**A. "Rational" Bureaucracy in Action**

Adoption of the rational basis test has often resulted in perverse consequences for minorities given the low threshold required for government action to be deemed reasonable. *Cornwell v. Hamilton* illustrates the court's analysis using the rational basis test when reviewing licensing laws. In *Hamilton*, JoAnne Cornwell (Dr. Cornwell), chairwoman of the Africana

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141. See also *Kathleen M. Sullivan & Gerald Gunther, Constitutional Law* 605-09 (14th ed. 2001) (discussing how a court determines if a law is reasonably related to the legislative intent).


143. See, e.g., Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252 (1977) (upholding a law which had a discriminatory effect because there was no discriminatory motive).


145. *Id.*
Studies Department at San Diego State University, decided to preserve a fascinating bit of Black history, in the form of African hair-braiding techniques, some of which date back several centuries. To preserve this living cultural identity, Dr. Cornwell started Sisterlocks, a business that both braids women’s hair and teaches the techniques to others. She ran up against a problem: California law mandated she get a cosmetology license, which requires as much as $7,000 and 1600 hours of classes in a variety of hairstyling techniques inapplicable to hairbraiding. The required curriculum included classes on the proper use of hair-treatment chemicals, but Dr. Cornwell’s hairbraiding techniques used no chemicals. The regulations also required her to learn and demonstrate proficiency in what the state referred to as “mainstream hairstyling.” As the court explained, “[t]his places an almost insurmountable barrier in front of anyone who seeks to practice African hair styling. [Students] are required to spend nine months attending a cosmetology school, at a cost of $5,000 - $7,000, learning skills, 96% of which, they will never use.” Worse, the hairstyles that the law required Dr. Cornwell to learn were styles mostly worn by Whites. As the Plaintiffs argued, “African hair styling is uniquely performed on hair that is physically different—alternatively described as tightly textured or coily hair—and that this physical difference is genetically determined to be in close correlation with race.” But the cosmetology board’s requirements embraced hairstyling techniques more appropriate for the hair of other races. Although the court found no evidence that the curriculum had actually been written with the intent to exclude Black hairstyling techniques, it noted “the obvious racial impact” of the regulations. Fortunately the court held that these requirements were unconstitutional, even under the lenient rational basis test.

Even absent racial animus, bureaucracies are inherently

148. POSTREL, supra note 146, at 115.
150. Id. at 1275.
151. Id.
153. Id.
154. Id. at 1117.
155. Id. at 1105.
156. Id. at 1118.
conservative and frequently stifle innovation. A new business idea originates among a small group of entrepreneurs, or even a single one, but the opportunity to implement that idea is then complicated by the inertia of regulatory agencies. To cite one odd example, the famous chef Wolfgang Puck never convinced federal authorities to permit him to label his original specialty pizzas "pizzas" because, under federal regulations, the word "pizza" could not be used unless the pie had tomato sauce on it.\footnote{157} For years he has been forced to add tomato to his pesto sauce in order to sell his frozen pizzas in grocery stores.\footnote{158} Puck, a wealthy, world-famous innovator, had a hard enough time attempting to convince a regulatory agency to accept his innovation in the absence of racial hostility. Imagine the fate of a Black man in 1900, who, having devised some clever new business technique, was legally required to go before a board comprised of segregationists to have his idea certified before going into business. He would most likely have found it impossible. How many ideas have been lost before ever being born—have, as Langston Hughes put it, dried up like a raisin in the sun\footnote{159}—because their originators could not get a government license?

\textbf{B. Public Choice Problem}

Under the rational basis test, courts defer to the decisions of regulatory agencies based on the assumption that if people do not like the agency’s performance, the people have the power to remove decision-makers through the electoral process. But racial minorities, have no such power.

The judiciary’s approach fails to account for what economists call the “public-choice” problem.\footnote{160} When a government has power to confer economic benefits on people, that power becomes a valuable prize in the political contest.\footnote{161} If a bureaucracy can give

\begin{footnotesize}
\footnote{158. See id.; POSTREL, supra note 146, at 105; Marian Burros, Environmental Politics Is Making the Kitchen Hotter, N. Y. TIMES, Sept. 30, 1992, at C1.}
\footnote{159. See Langston Hughes, Harlem, in THE NORTON ANTHOLOGY OF POETRY 1063 (1st ed., 1970).}
\footnote{161. See BUCHANAN & TULLOCK, supra note 124, at 286-87 (discussing the rise of special interest groups as a result of the growing profitability of the political process).}
\end{footnotesize}
X dollars worth of benefits to whomever wins control over that bureaucracy, political groups will find it in their interest to spend anything up to X in order to gain control. As a result, government power falls into the hands, not of the most deserving, but of the most politically adept. Wealthy or powerful groups capture government authority and use it to live at the expense of those less able to compete politically: people who cannot muster as many votes, or who are the targets of racist hostility.

IV. Taxicab Licensing as a Racial Issue

The government’s regulatory power became pivotal to those running the bus boycotts of 1953 and 1955 because the taxicab industry is one of the most heavily regulated industries in the United States. Driving a cab requires few specialized skills and is a common entry-level job for immigrants and members of the lower class. Nevertheless, licenses to operate taxicabs are extremely difficult to obtain, and the taxi market is rife with racial conflict. The limousine industry is an area where, in some remaining jurisdictions, the law “transparently regulate[s]... for the specific purpose of limiting competition and protecting an incumbent oligopoly.”

One striking example is Miami, Florida, where the taxi market is not only monopolized, but extremely hazardous. Some areas of Dade County—for instance, the inaptly named “Liberty City”—are so dangerous most cab companies refuse to enter the neighborhood. Society Cab, the sole Black-owned and Black-operated cab company in Dade County, is usually the only cab company that will serve Liberty City. “The other company takes them to Biscayne Boulevard,” one driver said, “We take them
from there.”  “The only Hispanic driver to ever work for Society was robbed and locked in the trunk of his car, in his first week.”

To operate a taxi in Miami, as in every other major city, one must have a license. Each license (or “medallion”) allows a person to operate one car. These medallions are issued by Dade County’s Consumer Services Department (CSD). CSD has issued 1,856 such medallions. The four largest cab companies control between 34 and 49 percent of the cab market. For about twenty years, the county heavily restricted the taxi market, but in 1998, a new ordinance provided for the issuance of twenty-five new taxi licenses over the next five years, using a lottery system. Starting in June 2004, new licenses will be granted every year to keep a 1:1000 taxicab to population ratio. Entry in the license lottery costs $400, and this fee is non-refundable. The winner of the lottery must then pay $15,000 for a license. All licensed taxis must be school bus yellow. A licensee who drives a taxi that is not yellow can lose the licenses on other taxis owned by the licensee even if those taxis are yellow. All rates are regulated, and drivers are not even technically allowed to accept tips. When deciding what rates to allow a taxi company to charge, the CSD does not consider any costs incurred in the acquisition of a license. Further, the ordinance sets forth vehicle standards requiring, among other things, hubcaps, air conditioners, and a functioning interior light. Drivers are not allowed to use a car

171. Id.
172. Id.
173. See Oxenhandler, supra note 164, at 118.
174. See id. at 118.
176. Id. at *2.
177. Carol Marbin Miller, Taken for a Ride? Taxi Drivers Renew Fight over Ordinance They Say Favors Cab Owners, BROWARD DAILY BUS. REV., Mar. 30, 2000, at 1.
179. Id.
182. Id. at *6-*8 (giving an exception for “underserved taxicab service areas”).
184. Id. § 31-87(B).
185. Id. § 31-87(C).
186. Id. § 31-89(a).
more than five years old, and they are required to complete a county prescribed apprentice program.\textsuperscript{187}

A licensed taxi driver must drive one shift per day, at an average of five days per week.\textsuperscript{188} A licensed driver cannot transfer a medallion to anyone else for the first five years and, after that, transfers can only be made with permission from the county.\textsuperscript{189} But a medallion holder can give his medallion to an "immediate family member" or anyone meeting residency requirements who is not a member of a corporation already holding a taxi license.\textsuperscript{190} A medallion-holder can also lease out the medallions, and as a result, many taxi drivers in Miami do not own, but lease medallions at rates of sometimes more than $500 per week.\textsuperscript{191} As one driver put it: "You'll spend up to Thursday making that money. Then, you're forced to work the weekend if you want any money for yourself."\textsuperscript{192} In the early 1980s, Walter Williams commented on the devastating impact of taxicab license regulations, explaining that:

A free market in the taxicab industry will not produce a panacea for the disadvantaged. However, it is one small way to upward mobility for some, which has been cut off by government. As such, it demonstrates again one of the key differences between disadvantaged blacks and disadvantaged ethnic groups of the past. A poor illiterate Italian, for example, arriving in our cities in 1925 or 1930 could, if he had ambition and industry, go out and buy a car and write TAXI on it. Thus he could provide upward mobility for his family. Today a poor person of any race would find that industry and ambition are not enough, if he sought the same path to upward mobility. He would find the path barricaded by a license costing $20, $30, or $60 thousand—a considerable barrier.\textsuperscript{193}

Taxi regulation has a profound effect on the underprivileged who want nothing more than to earn a living for themselves and their families; it also affects customers, who are often poor

\textsuperscript{187} Id. § 31-89(f).
\textsuperscript{188} Id. § 31-82(q)(5).
\textsuperscript{189} Id. § 31-82(r).
\textsuperscript{190} Id. § 31-82(r)(5).
\textsuperscript{192} Gilpin, supra note 191.
\textsuperscript{193} WILLIAMS, supra note 142, at 86-87.
minorities themselves. For instance, the new requirement that all cars be less than five years old poses a real threat to the Society Cab Company. Many of Society's cars are older than five years, and its customers cannot afford to pay the higher prices Society Cab Company would need to charge to buy new cars. So far, constitutional challenges to Florida's taxi regulations have met with no success.

In Colorado, one group of would-be cab drivers decided to defend their right to earn a living when their application for a taxi license was denied. The license process required the petitioner, Leroy Jones, to prove to the State Public Utilities Commission that there needed to be a new taxi company in Denver, and obtain a "certificate of public convenience and necessity." When Jones applied for a certificate, the other taxi companies in Denver, fearful of increased competition, protested to the Commission, which then denied the certificate. Jones sued, but the court held that his right to earn a living was not a "fundamental constitutionally-protected value," and ruled that, under the rational basis test, the court could do nothing for Jones. Fortunately, the State Legislature recognized the injustice, and changed the law. Today Leroy Jones is operating the company, which he has renamed Freedom Cabs.

The drivers in Ricketts v. City of New York did not fare as well. Hector Ricketts established Queens Van Plan Inc., a community-based "jitney" service, which provided rides in areas not served by taxi companies, or for riders who could not afford the higher taxi fares. Ricketts employed fifty-three people and

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194. County Relaxes the Rules for Inner-City Cab Service, SUN-SENTINEL, June 27, 1999, at 9B. Society was ultimately exempted from the regulations. Id.
199. Id. at 1234.
200. Id. at 1237.
actually managed to get a license. However, he soon found himself the target of a campaign by New York bus and taxi companies that sought to enforce ordinances prohibiting vans from picking up passengers from the sidewalk and from using bus routes. This effectively meant Ricketts could not operate on New York City streets. He sued, arguing that this regulatory system unfairly benefited the bus companies by depriving him of his right to earn a living, but the court ruled against him.

The holdings of Temmer and Ricketts are even more striking when compared with an English case from three hundred years ago, Robinson v. Watkins. There, London carriage drivers challenged a law that prohibited driving a carriage without a license, and permitted only four hundred licenses to be issued in London. “[I]t cannot be denied that a by-law, made to prevent a nuisance, is good,” said the coachmen’s lawyer. Requiring licenses, the lawyer argued, “check[s] and control[s] that freedom and liberty, which every man hath by the common law of this kingdom, for the exercising of a lawful employment . . . .” Apparently courts today are not nearly so concerned about the right to earn a living through fair competition.

V. Where Do We Go From Here?

It is a travesty that a half-century after the government’s regulatory power almost crushed the Baton Rouge bus boycott, that same power continues to obstruct real racial equality. In the 1860s, Abraham Lincoln described slavery as

the same old serpent that says you work and I eat, you toil and I will enjoy the fruits of it. Turn it whatever way you will—whether it come from the mouth of a King, an excuse for enslaving the people of his country, or from the mouth of men of one race as a reason for enslaving the men of another race, it is all the same old serpent . . . .

Occupational licensing is the new skin of that serpent. By

205. Id.
207. See generally id.
208. Ricketts, 722 N.Y.S.2d at 27.
210. Id. at 165.
211. Id. at 169.
212. Id.
restricting competition, established taxi companies can raise their prices, leaving customers with few alternatives; these companies get rich by making it illegal to shop somewhere else.\footnote{214} They thus increase their profits not only at the expense of consumers, but at the expense of people like Leroy Jones, who just want to compete fairly.\footnote{215}

One of the primary duties of our courts is to protect minorities against the tyranny of the majority.\footnote{216} But the legal theory of "rational basis scrutiny" is dangerous because it leads courts to abandon that duty in precisely those situations that are most important to the economically disadvantaged. When the court uses this level of analysis it is assuming that the political process will somehow inherently protect the rights of minorities. That assumption is a blatant fiction, as is proven by the fact that courts apply strict scrutiny when the law touches upon something that courts consider important, such as free speech rights.\footnote{217} Courts are right to impose strict scrutiny in such cases, and in doing so courts have done much to help the progress of race relations in this country. Those of us who are concerned with the economic opportunities for minorities believe this strict scrutiny analysis should also be used when government infringes on economic liberty. Even when government is not acting with overt racial bias, the effects of infringements have always fallen hardest on minority groups who lack the political power to take over the bureaucracy or to convince the bureaucracy to change its ways.\footnote{218}

As James Madison once told Thomas Jefferson,

\begin{quote}
In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly [sic] to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.\footnote{219}
\end{quote}

\footnote{214. Cf. Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion, 96 YALE L.J. 209, 293 n.132 (1986) (describing how the taxicab market can be affected by competition).}
\footnote{215. Id.}
\footnote{216. See generally THE FEDERALIST No. 51 at 351 (James Madison) (J. E. Cooke ed., 1961) ("It is of great importance in a republic . . . to guard one part of the society against the injustice of the other part. . . . If a majority be united by a common interest, the rights of the minority will be insecure.").}
\footnote{217. See, e.g., Gitlow v. New York, 268 U.S. 652, 660 (1925) (assuming freedom of speech is a fundamental right under the Due Process Clause of the Fourteenth Amendment).}
\footnote{219. Letter from James Madison (Oct. 17, 1788), in MADISON, supra note 59, at
Since bureaucracy resists innovation, it is always the enemy of those who hope to rise in society, but who lack political influence. Courts ought to apply a high standard of scrutiny to such decisions, in order to stop the serpent from biting.

When the administrative state was first being created at the beginning of the twentieth century, Max Weber explained that "[b]ureaucratization offers above all the optimum possibility for carrying through the principle of specializing administrative functions according to purely objective considerations . . . [with business being discharged] according to calculable rules and 'without regard for persons.'" The reality has been the opposite. At its best, bureaucracy stands in the way of innovation and entrepreneurialism of people like Hector Ricketts or Dr. Cornwell. At its worst, bureaucracy provides the political majority with a powerful weapon against the minority. That weapon was unleashed against the boycotts of 1953 and 1955. The ordinance that caused Dr. King trouble in Montgomery, for instance, required taxis to charge at least forty-five cents per ride, which no doubt kept many people on the city's segregated buses who would have chosen otherwise, given the opportunity. And by outlawing alternative transportation, the city prevented would-be entrepreneurs from starting up non-segregated alternatives.

421.

220. See, e.g., Hench, supra note 218, at 730-31. Williams describes another problem with licensing statutes called the "Cadillac effect." WILLIAMS, supra note 142, at 97. Because licensing laws increase the cost of providing a service, they ensure high quality services to those with high incomes. Id. The increased service costs make it more difficult for the poor to hire labor, which encourages the poor to engage in self-help. Id. Thus, "there is a significant relationship between occupational licensing and the number of accidental deaths by electrocution . . . ." Id. Since such laws make the services of electricians more expensive, people are more willing "to undertake electrical wiring tasks and risk electrocution in the process." Id.

221. MAX WEBER, Bureaucracy, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 215 (H. H. Gerth & C. Wright Mills, eds., 1946) (emphasis omitted).

222. An example of this powerful weapon is eminent domain. See, e.g., Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981). Lower class, minority neighborhoods are far more likely to be condemned to make way for influential corporations to locate their businesses. See Timothy Sandefur, A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use," 32 SW. U. L. REV. 569, 598-599 (2003) (arguing that poor minority landowners are often at the mercy of redevelopment agencies).

223. BATON ROUGE, LA. PARISH CODE § 10:210(2) (Municode 2003), http://livepublish.municode.com/1/lpext.dll?f=templates&fn=main-j.htm&vid=10107 (last visited Sept. 25, 2003). The Ordinance now allows taxi drivers to charge "up to thirty-two dollars ($32.00) per hour (two-hour minimum); eight dollars ($8.00) for each additional quarter hour, or fraction thereof." Id.
It is impossible to tell today how much innovation is stifled by bureaucratic harassment. In many parts of the United States, the pursuit of happiness is rendered a sham by government regulations that cost jobs, increase prices, and put the property rights of minorities at the mercy of the majority.

Government regulatory power is the most effective tool proponents of segregation have ever had. Commentators rightly point out that what they call "transportation racism" is "just as real as the racism that is found in the housing industry, educational institutions, the employment arena, and the judicial system." But by failing to address the profoundly negative impact that government regulation has on the social mobility of racial groups—like taxi licensing laws, which perpetuate transportation racism—these critics seem to endorse the prevailing belief that discrimination can only be solved by government intervention. Critics acknowledge that "[p]lanning agencies, such as the Atlanta Regional Commission and the Georgia Department of Transportation, have been unwilling to 'bite the bullet' needed to address the mounting traffic, air quality, and cross-jurisdictional land use problems associated with the region's transportation needs." Surely it is more important to emphasize the way government regulation of the transportation market consistently deprives underprivileged minorities of economic opportunity. Although in some cases government action can help alleviate the problems of racial discrimination, such intervention can just as often work in the opposite direction. When government has the power to distribute economic benefits, the government itself becomes an asset that factions in society seek to control. In the resulting scramble for that power, racial minorities are always at a distinct disadvantage.

An increasing number of lawyers, including such famous names as Laurence Tribe, have argued for a restoration of the right to earn a living because the current law "overlooks the

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226. See id. at 966-67.

227. Id. at 998.

228. See, e.g., Shelley v. Kraemer, 334 U.S. 1, 23 (1948) (finding restrictive covenants preventing homeowners from selling property to Blacks invalid under Equal Protection and therefore unenforceable by state courts).

229. See supra Part III.B and accompanying footnotes.
importance of property and contract in protecting the dispossessed no less than the established; it forgets the political impotence of the isolated job-seeker who has been fenced out of an occupation . . . "230 Some courts appear to have heard this call and are paying closer attention to the tendency of interest groups to use occupational licensing to benefit themselves at the expense of others. For instance, a federal court recently stopped the State of Tennessee from shutting down a minority-run coffin retailer.231 Even though the plaintiff, Rev. Nathaniel Craigmiles, did not want to run a funeral parlor, but only sell a box, state law required him to have a funeral director's license, which required fees of several thousand dollars and years of classes in subjects such as embalming.232 The State's lawyers made the usual argument that the law protected consumers, but the court rejected that reasoning, saying "Tennessee's justifications for the 1972 amendment come close to striking us with 'the force of a five-week-old, unrefrigerated dead fish.'"233 Although the court shied away from discussing the Privileges and Immunities Clause,234 this case represents great progress.

In addition, some community groups are also making heroic efforts to bring entrepreneurialism to the neighborhoods where it is needed most. The Congress of National Black Churches (CNBC) has established a Community and Economic Development Program that trains would-be entrepreneurs in starting and running their own businesses, and gives them seed money grants to start operating.235 CNBC's chairman, Bishop Roy L.H. Winbush, explained, "'[y]ou sure can't turn to the government to do this job . . . . And if the church doesn't do it, we're going to have problems that we can't do anything about.'"236 Rev. James R. Samuel, pastor of the AME Zion Church in Charlotte, North Carolina, compiled a list of church members who run their own businesses, and every Sunday he calls one of these entrepreneurs

233. Craigmiles, 312 F.3d at 225 (quoting Parts and Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988)).
234. Id. at 229.
236. Id.
to the pulpit to give a short talk about his or her business. The list includes painters, accountants, real estate agents, and hairdressers—all licensed occupations in Arkansas.

Bishop Winbush, Rev. Samuel, Dr. Cornwell, Leroy Jones, and other entrepreneurs are not asking for government favors or handouts. They simply want to be left alone to earn a living without unreasonable government interference. But too often, these attempts to foster community development, which ought to be commended, are instead shut down by politically powerful groups seeking to dominate trade to the exclusion of others. Occupational licensing inhibits competition among painters, accountants, real estate agents, hairdressers, and more. It may seem strange to use a phrase such as "forestry cartel," but it is true: it is illegal to practice forestry without a license in Arkansas. These licensing laws are frequently passed in the name of the government's "power to safeguard the public health and safety. But the real motivation, or part of it, [is] economic. Trade groups [are] anxious to control competition."

Conclusion

"The economic highway to power has few entry lanes for Negroes," wrote Dr. King in 1967. Opening those entry lanes means stopping the monopoly power that political groups wield in United States law and restoring the right to earn a living as a fundamental right under the Constitution. Such action requires overturning the Slaughter-House Cases and restoring the Privileges and Immunities Clause to its rightful place. It requires ending the reign of the "rational basis test." Justice William O. Douglas called the right to earn a living

the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property . . . . It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live . . . . [S]o the question here is not what government must give, but rather what it may not take away.

237. Id.
240. FRIEDMAN, supra note 42, at 399.
241. WASHINGTON, supra note 26, at 600.
242. 83 U.S. (16 Wall.) 36 (1873).
Unfortunately, the government violates that right every day in order to serve political constituencies. If the right to pursue happiness is to be accorded to all people, government must be made to serve the actual public interest, not the private interest of politically powerful factions trying to insulate themselves from competition.

At an Independence Day celebration in 1852, Frederick Douglass told his audience that, "interpreted as it ought to be interpreted, the Constitution is a GLORIOUS LIBERTY DOCUMENT."244 Such an interpretation requires higher scrutiny for economic regulations. Economic liberty and private property are fundamental rights of every United States citizen, and the continuing struggle for civil rights must place the right to earn a living at the forefront of the agenda.