

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

Timothy Sandefur*

[I]n 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

* College of Public Interest Law Fellow, Pacific Legal Foundation. J.D. 2002, Chapman University School of Law; B.A. 1998, Hillsdale College. I would like to dedicate this article to Clint Bolick, who has served as a constant inspiration to me.

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.

THOMAS PAINE, COMMON SENSE 113-14 (Buccaneer Books 1976) (1776).

1. Frederick Douglass, What the Black Man Wants, in THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: RECONSTRUCTION AND AFTER, 164 (Philip S. Foner ed., 1955).

2. DAVID GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 11-12 (1999).

3. See *id.* at 82.

4. 352 U.S. 903 (1956) (mem.), *aff'g* Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956).

5. *Id.*

boycott of 1953.⁶ 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.⁷

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.⁸ 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 Rouge boycott began when the city decided, in February 1953, to increase the city bus fare.⁹ 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.¹⁰ But the bus company ignored the ordinance, and continued to reserve the front rows of seats for Whites.¹¹ Reverend T.J. Jemison (Rev. Jemison) and others demanded the ordinance be enforced.¹² After a number of conflicts between passengers and bus drivers, the drivers went on strike in June to protest Ordinance 222.¹³ To quell the strike, the State's Attorney General declared the ordinance void, as a violation of Louisiana segregation laws.¹⁴ The drivers went back to work, and Rev. Jemison announced the beginning of the boycott.¹⁵

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.¹⁶ 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.¹⁷ 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.¹⁸ He ran into a legal obstacle.¹⁹ 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.²⁰ Getting a taxi license required the approval of the

9. Mary Price, *Baton Rouge Bus Boycott Background*, at <http://www.lib.lsu.edu/special/exhibits/boycott/background.html> (last visited Sept. 11, 2003).

10. *Id.*; ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT* 18 (1984).

11. Price, *supra* note 9.

12. *Id.*

13. *Id.*

14. MORRIS, *supra* note 10, at 18; Price *supra* note 9.

15. MORRIS, *supra* note 10, at 18; Price *supra* note 9.

16. MORRIS, *supra* note 10, at 19.

17. Price, *supra* note 9.

18. MORRIS, *supra* note 10, at 19.

19. *Id.*

20. BATON ROUGE, LA. PARISH CODE §§ 10:201-:218 (Municode 2003), <http://livepublish.municode.com/11/lpext.dll?f=templates&fn=main-j.htm&vid=10107> (last visited Sept. 25, 2003).

city's regulatory commission.²¹ 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.²² 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.²³ A sympathetic gas station owner, Horatio Thompson, sold gas at cost to the boycott drivers, but the system was still economically weak.²⁴ The boycott lasted ten days before the UDL was forced to agree to a compromise which maintained segregated seating on the buses.²⁵

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.²⁶

Like Rev. Jemison, Dr. King solved the problem by collecting money at church meetings and distributing it to participating drivers.²⁷ 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.

24. Price, *supra* note 9.

25. GARROW, *supra* note 2, at 27; MORRIS, *supra* note 10, at 18, 24.

26. MARTIN LUTHER KING, JR., *Stride Toward Freedom*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 440-41 (James Melvin Washington ed., 1986).

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

28. *Id.* at 146.

29. *Id.* at 145.

30. *Id.* at 192.

31. GARROW, *supra* note 2, at 58-59; Randall Kennedy, *Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1047 n.290 (1989).

32. Kennedy, *supra* note 31, at 1047.

33. *Browder v. Montgomery*, 146 F. Supp. 127, 128 (M.D. Ala. 1956).

34. *City of Montgomery v. Montgomery Improvement Ass’n*, No. 31075 (Cir. Ct. Montgomery County, Ala. Nov. 13, 1956), *reprinted in* 2 RACE REL. L. REP. 123 (1957).

35. 352 U.S. 903 (1956) (mem.), *aff’g* *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956).

36. *Id.*; Kennedy, *supra* note 31, at 1047.

37. BRANCH, *supra* note 8, at 193.

38. *Id.* at 194.

39. *Id.* Branch provides another example of the political power behind licensing laws. In 1959, Tennessee officials, seeking to break the building momentum of the

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.

41. RALPH DAVID ABERNATHY, AND THE WALLS CAME TUMBLING DOWN 165-66 (1989).

42. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 397 (1973).

courts saw such regulations as infringements on citizens' right to earn a living.⁴³ 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.⁴⁴

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."⁴⁵ In subsequent years, the courts held that upholsterers,⁴⁶ plasterers,⁴⁷ and dancing teachers⁴⁸ 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."⁴⁹ 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,"⁵⁰ the law upheld the right of individuals to enter a trade subject only to the government's power to protect consumers.⁵¹

Lord Coke was the leading opponent of royal monopolies in the seventeenth century.⁵² King James I, to whom Coke was a constant pest, frequently used royal power to grant monopolies to his friends and supporters.⁵³ 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.⁵⁴

43. See Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207, 224-31 (2003) (discussing courts' protection of the right to occupational freedom from 1787 through 1870).

44. *Id.* at 213.

45. *City of London's Case*, 77 Eng. Rep. 658, 663 (K.B. 1610).

46. *Allen v. Tooley*, 80 Eng. Rep. 1055, 1055-60 (K.B. 1614).

47. *Les Brick-Layers & Tilers v. Les Plaisterers*, 81 Eng. Rep. 871, 872 (K.B. 1624).

48. *Robinson v. Gros court*, 87 Eng. Rep. 547, 547-50 (K.B. 1695).

49. *Tooley*, 80 Eng. Rep. at 1055.

50. *Id.*

51. *See id.*

52. See Sandefur, *supra* note 43, at 210-17.

53. See CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE OF SIR EDWARD COKE* 436-37 (1957).

54. *Darcy v. Allen*, 77 Eng. Rep. 1260, 1260-61 (K.B. 1602). See Jacob L. Corre,

Nobody except the person with royal permission was allowed to make or sell cards.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.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.⁵⁷ The common law courts struck down these laws as violations of the right to pursue lawful occupations.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.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 woollen cloth; where the manufacturer and wearer of woollen cloth are again forbidden the æconomical use of buttons of that material, in favor of the manufacturer of buttons of other materials!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

The Argument, Decision, And Reports of Darcy v. Allen, 45 EMORY L.J. 1261, 1261-63 (1996).

55. *Darcy*, 77 Eng. Rep. at 1260.

56. 2 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 47 (1642).

57. See Malla Pollack, *The Owned Public Domain: The Constitutional Right Not To Be Excluded—Or the Supreme Court Chose the Right Breakfast Cereal* in *Kellogg v. National Biscuit Co.*, HASTINGS COMM. & ENT. L.J. 265, 289-90 (1999).

58. See, e.g., *Robinson v. Groscurt*, 87 Eng. Rep. 547, 547-50 (K.B. 1695), *Les Brick-Layers & Tilers v. Les Plaisterers*, 81 Eng. Rep. 871, 872 (K.B. 1624), *Allen v. Tooley*, 80 Eng. Rep. 1055, 1055-60 (K.B. 1614); see further Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough*, 24 N. ILL. U.L. REV. ____ (forthcoming, 2004).

59. JAMES MADISON, *Property*, in MADISON: WRITINGS 515, 516 (Jack N. Rakove ed., 1999).

60. *Id.*

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.⁶¹ But after the Civil War, Radical Republicans in Congress sought to extend that right to the freedmen.⁶² One of the most important parts of their program was the passage of the Civil Rights Act of 1866,⁶³ 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.⁶⁴

President Andrew Johnson vetoed the Act on the grounds that Congress had no authority to require states to extend these protections.⁶⁵ But Congress overrode Johnson's veto,⁶⁶ and, to ensure the Act would not be struck down by the courts, passed the Fourteenth Amendment.⁶⁷

The first section of the Amendment contains four important clauses.⁶⁸ The first declares that all persons born in the United States, and not subject to a foreign government, are citizens of the United States.⁶⁹ The second prohibits any state from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States."⁷⁰ 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

61. See, e.g., U.S. CONST. art. I, § 2 (slaves were not even considered individuals, let alone citizens).

62. See, e.g., 43 CONG. REC. app. 363 (1874).

63. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1991)).

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.

67. U.S. CONST. amend. XIV, § 1; MILTON R. KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 4-5 (1977).

68. U.S. CONST. amend. XIV, § 1.

69. See *id.*

70. *Id.*

person's life, liberty, or property without due process of law.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"?⁷² The phrase also appears in Article IV of the Constitution, where it applies to the federal government.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."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.⁷⁵ According to Senator John Sherman, Congress intended the Privileges and Immunities Clause to protect the common law rights of Americans.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."⁷⁷ Senator W. T. Hamilton asked rhetorically,

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?⁷⁸

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

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

71. *See id.*

72. U.S. CONST. amend. XIV, § 1.

73. U.S. 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).

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!

87. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 74-75.

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

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.*

94. *Saenz v. Roe*, 526 U.S. 489, 502-03 (1999).

95. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 39 (1990).

96. See *The Slaughter-House Cases*, 83 U.S. at 96.

97. See Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause To Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 34 (1998).

98. 92 U.S. 542 (1876).

99. Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2151-52 (1993).

100. *Id.* at 2153.

101. *Id.* at 2155-56.

102. Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 144 (1870) (current version at 42 U.S.C. § 1981 (2000)).

States.”¹⁰³ 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.¹⁰⁴ 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.”¹⁰⁵ *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.¹⁰⁶ 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.¹⁰⁷ By that time, the *Civil Rights Cases*¹⁰⁸ and *Plessy v. Ferguson*¹⁰⁹ 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,¹¹⁰ to enact increasing government controls over businesses and occupations in the following decades.¹¹¹ 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.¹¹²

Soon, many American jurisdictions began using the power of government regulation to prevent economic competition from the

103. *Cruikshank*, 92 U.S. at 548.

104. *Id.* at 553.

105. *Id.* at 554.

106. *See id.* 554-55.

107. *Allgeyer v. Louisiana*, 165 U.S. 578, 589-91 (1896).

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.

112. *Chaddock v. Day*, 75 Mich. 527, 531-32 (1889).

former slaves.¹¹³ Louisiana was particularly bold and “takes some sort of prize for fickleness,” going through three state constitutions after the *Slaughter-House Cases* was decided.¹¹⁴ But fickle as some of these constitutions were, they never wavered from one particular goal: disenfranchising the freedmen, politically and economically.¹¹⁵

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.”¹¹⁶ 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.¹¹⁷ Courts further compounded the problem by deferring to the decisions of licensing boards, even when those boards acted with racial animus.¹¹⁸ 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.¹¹⁹ Laws regulating the barbering trade present another striking example of the use of state power to disenfranchise Blacks.¹²⁰ 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.¹²¹ 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.¹²² Thus, government regulatory power, strengthened by judicial deference, gave segregationists their most efficient tool:

113. David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89, 89-92 (1994).

114. FRIEDMAN, *supra* note 42, at 303.

115. J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS* 251-53 (1974).

116. See Bogen, *supra* note 89, at 943.

117. Bernstein, *supra* note 113, at 98.

118. See, e.g., *People ex rel. Nechamcus v. Warden of the City Prison*, 144 N.Y. 529, 539 (1895).

119. Bernstein, *supra* note 113, at 98. See also DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* 36 (2001).

120. Bernstein, *supra* note 113, at 99-103.

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,

123. Kennedy, *supra* note 31, at 1007.

124. JAMES BUCHANON & GEORGE TULLOCK, *THE CALCULUS OF CONSENT* 183-88 (1962).

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 power¹³⁰

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.*

131. Alan Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 42 (1999).

132. *Id.* at 40-43.

133. See PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 12 (1998).

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.")

136. See Bernstein, *supra* note 113, at 91.

137. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

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.*, 304 U.S. 144, 152 (1938)

Although the Court has never overruled *Yick Wo*, it embraced an alternative theory, employing varying levels of scrutiny.¹⁴⁰ 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.¹⁴¹ 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.¹⁴²

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.¹⁴³ *Cornwell v. Hamilton*¹⁴⁴ illustrates the court's analysis using the rational basis test when reviewing licensing laws.¹⁴⁵ In *Hamilton*, JoAnne Cornwell (Dr. Cornwell), chairwoman of the Africana

(deferring to the legislature's rationale for imposing economic regulations on milk products); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (presuming constitutionality of the National Labor Relations Act); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (rebutting the idea of freedom of contract by upholding a minimum wage for women and children).

140. See *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (applying a rational basis test when asking whether the railroad company's retirement plan violated the Equal Protection Clause); *Craig v. Boren*, 492 U.S. 190 (1976) (utilizing an intermediate scrutiny standard in regards to classifications based on race); *Loving v. Virginia*, 388 U.S. 1 (1967) (stating strict scrutiny should be used in issues dealing with the suspect classification of race).

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).

142. See WALTER E. WILLIAMS, *THE STATE AGAINST BLACKS* 67-73 (1982); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 491-93 (1997).

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).

144. 80 F. Supp. 2d 1101 (S.D. Cal. 1999). In an earlier decision, *Cornwell v. Cal. Bd. of Barbering and Cosmetology*, 962 F. Supp. 1260, 1277 (S.D. Cal. 1997), the court dismissed some counts filed against the California Board of Barbering and Cosmetology on Eleventh Amendment grounds.

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.¹⁴⁶ To preserve this living cultural identity, Dr. Cornwell started Sisterlocks, a business that both braids women's hair and teaches the techniques to others.¹⁴⁷ 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.¹⁴⁸ The required curriculum included classes on the proper use of hair-treatment chemicals, but Dr. Cornwell's hairbraiding techniques used no chemicals.¹⁴⁹ The regulations also required her to learn and demonstrate proficiency in what the state referred to as "mainstream hairstyling."¹⁵⁰ 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."¹⁵¹ Worse, the hairstyles that the law required Dr. Cornwell to learn were styles mostly worn by Whites.¹⁵² 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."¹⁵³ But the cosmetology board's requirements embraced hairstyling techniques more appropriate for the hair of other races.¹⁵⁴ 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.¹⁵⁵ Fortunately the court held that these requirements were unconstitutional, even under the lenient rational basis test.¹⁵⁶

Even absent racial animus, bureaucracies are inherently

146. VIRGINIA POSTREL, *THE FUTURE AND ITS ENEMIES* 114-15 (1998).

147. *Cal. Bd.*, 962 F. Supp. at 1264.

148. POSTREL, *supra* note 146, at 115.

149. *Cal. Bd.*, 962 F. Supp. at 1264.

150. *Id.* at 1275.

151. *Id.*

152. *Cornwell v. Hamilton*, 80 F. Supp. 2d. 1101, 1111 (S.D. Cal. 1999).

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.¹⁵⁷ For years he has been forced to add tomato to his pesto sauce in order to sell his frozen pizzas in grocery stores.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 sun¹⁵⁹—because their originators could not get a government license?

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.¹⁶⁰ When a government has power to confer economic benefits on people, that power becomes a valuable prize in the political contest.¹⁶¹ If a bureaucracy can give

157. Carole Sugarman, *Who’s Minding the Store? The Seemingly Senseless Division of Federal Labeling Authority*, WASH. POST, May 11, 1988, at E1.

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.

159. See Langston Hughes, *Harlem*, in THE NORTON ANTHOLOGY OF POETRY 1063 (1st ed., 1970).

160. See generally John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 HARV. J.L. & PUB. POL’Y 195 (1997) (explaining that Framers of the Constitution intended to control special interest group power within a public choice framework through a limited federal government and the separation of powers).

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).

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.¹⁶² As a result, government power falls into the hands, not of the most deserving, but of the most politically adept.¹⁶³ 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.¹⁶⁴ Driving a cab requires few specialized skills and is a common entry-level job for immigrants and members of the lower class.¹⁶⁵ Nevertheless, licenses to operate taxicabs are extremely difficult to obtain, and the taxi market is rife with racial conflict.¹⁶⁶ 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."¹⁶⁷

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.¹⁶⁸ 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.¹⁶⁹ "The other company takes them to Biscayne Boulevard,"¹⁷⁰ one driver said, "We take them

162. *See id.*

163. *See id.*

164. Steven Oxenhandler, *Taxicab Licenses: In Search of a Fifth Amendment, Compensable Property Interest*, 27 *TRANSP. L.J.* 113, 319-20 (2000).

165. *See* Lee A. Harris, *The Freedom to Contract for A Ride*, 1 *GEO. J.L. & PUB. POL'Y* 195, 213 (2002).

166. *See, e.g.*, Rick Bragg, *For Black Taxi Company in Miami, a County Law Is the Latest Threat*, *N.Y. TIMES*, June 8, 1999, at A20.

167. Robert M. Hardaway, *Taxi And Limousines: The Last Bastion of Economic Regulation*, 21 *HAMLIN J. PUB. L. & POL'Y* 319, 319 (2000).

168. *See* Bragg, *supra* note 166. When a reporter asked drivers from the Society Cab Company to name drivers they knew who had been shot to death while driving in the neighborhood, "[t]he men could not recall all the names of the drivers who were killed in robberies in the last 20 years." *Id.*

169. *Id.*

170. *Id.*

from there.”¹⁷¹ “The only Hispanic driver to ever work for Society was robbed and locked in the trunk of his car, in his first week.”¹⁷²

To operate a taxi in Miami, as in every other major city, one must have a license.¹⁷³ Each license (or “medallion”) allows a person to operate one car.¹⁷⁴ These medallions are issued by Dade County’s Consumer Services Department (CSD).¹⁷⁵ CSD has issued 1,856 such medallions.¹⁷⁶ The four largest cab companies control between 34 and 49 percent of the cab market.¹⁷⁷ 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.¹⁷⁸ Starting in June 2004, new licenses will be granted every year to keep a 1:1000 taxicab to population ratio.¹⁷⁹ Entry in the license lottery costs \$400, and this fee is non-refundable.¹⁸⁰ The winner of the lottery must then pay \$15,000 for a license.¹⁸¹ All licensed taxis must be school bus yellow.¹⁸² 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.¹⁸³ All rates are regulated, and drivers are not even technically allowed to accept tips.¹⁸⁴ 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.¹⁸⁵ Further, the ordinance sets forth vehicle standards requiring, among other things, hubcaps, air conditioners, and a functioning interior light.¹⁸⁶ 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.

175. Restrepo v. Miami-Dade County, 15 Fla. L. Weekly Fed. D. 184 (S.D. Fla. 2002), 2002 U.S. Dist. LEXIS 6932 at *3.

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.

178. Restrepo, 2002 U.S. Dist. LEXIS 6932. at *3.

179. *Id.*

180. CODE OF METRO. MIAMI-DADE COUNTY, ch. 31, art. II, § 31-82(o) (2003), available at <http://livepublish.municode.com/4/lpext.dll?f=templates&fn=main-j.htm&vid=10620>.

181. Restrepo, 2002 U.S. Dist. LEXIS 6932. at *3.

182. *Id.* at *6-*8 (giving an exception for “underserved taxicab service areas”).

183. CODE OF METRO. MIAMI-DADE COUNTY, ch. 31, art. II, § 31-85(a) (2003), available at <http://livepublish.municode.com/4/lpext.dll?f=templates&fn=main-j.htm&vid=10620>.

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.¹⁸⁷

A licensed taxi driver must drive one shift per day, at an average of five days per week.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.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.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.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."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.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

187. *Id.* § 31-89(f).

188. *Id.* § 31-82(q)(5).

189. *Id.* § 31-82(r).

190. *Id.* § 31-82(r)(5).

191. Francis X. Gilpin, *Taxi Stand*, WEEKLY PLANET (Sarasota), Jan. 10, 2002, <http://www.weeklyplanet.com/2002-01/news-feature.html> (last visited Sept. 16, 2003); see also Rebecca Wakefield, *Calling All Cabbies: Battered by a Corrupt Industry, Miami's Independent Taxi Drivers Consider Unionizing*, MIAMI NEW TIMES, Oct. 25, 2000, <http://www.miaminewtimes.com/issues/2001-10-25/metro2.html/1/index/html> (discussing the difficult circumstances taxi drivers face) (last visited Sept. 16, 2003).

192. Gilpin, *supra* note 191.

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.¹⁹⁴ So far, constitutional challenges to Florida's taxi regulations have met with no success.¹⁹⁵

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.¹⁹⁶ 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."¹⁹⁷ 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.¹⁹⁸ Jones sued, but the court held that his right to earn a living was not a "fundamental constitutionally-protected value[],"¹⁹⁹ and ruled that, under the rational basis test, the court could do nothing for Jones.²⁰⁰ Fortunately, the State Legislature recognized the injustice, and changed the law.²⁰¹ Today Leroy Jones is operating the company, which he has renamed Freedom Cabs.²⁰²

The drivers in *Ricketts v. City of New York* did not fare as well.²⁰³ 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.²⁰⁴ Ricketts employed fifty-three people and

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.*

195. See *Restrepo v. Miami-Dade County*, 15 Fla. L. Weekly Fed. D. 184 (S.D. Fla. 2002), 2002 U.S. Dist. LEXIS 6932 at *3; *American V.I.P. Limousines, Inc. v. Dade County Comm'rs*, 757 F. Supp. 1382 (S.D. Fla. 1991); *State ex rel. Hosack v. Yocum*, 136 Fla. 246 (1939).

196. *Jones v. Temmer*, 829 F. Supp. 1226 (D. Colo. 1993), *vacated by* 57 F.3d 921 (10th Cir.1995).

197. 4 COLO. CODE REGS. §§ 723-6-2.12, 723-6-3.6 (1984) *quoted in* *Temmer*, 829 F. Supp. at 1234.

198. *Temmer*, 829 F. Supp. at 1230.

199. *Id.* at 1234.

200. *Id.* at 1237.

201. *Jones v. Temmer*, 57 F.3d 921, 922 (10th Cir. 1995).

202. Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 173, 196 (2003).

203. 722 N.Y.S.2d 25 (2001), *appeal dismissed*, 98 N.Y.2d 692 (2002).

204. Mona Charen, *Van Service Imbroglia*, WASH. TIMES, Nov. 23, 1999, at A14.

actually managed to get a license.²⁰⁵ 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.²⁰⁶ This effectively meant Ricketts could not operate on New York City streets.²⁰⁷ 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.²⁰⁸

The holdings of *Temmer* and *Ricketts* are even more striking when compared with an English case from three hundred years ago, *Robinson v. Watkins*.²⁰⁹ 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.²¹⁰ “[I]t cannot be denied that a by-law, made to prevent a nuisance, is good,” said the coachmen’s lawyer.²¹¹ Requiring licenses, the lawyer argued, “check[s] and controul[s] that freedom and liberty, which every man hath by the common law of this kingdom, for the exercising of a lawful employment”²¹² 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 i[t] 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 serpent²¹³

Occupational licensing is the new skin of that serpent. By

205. *Id.*

206. See generally JOHN CARLISLE, NAT’L CTR. FOR PUB. POLICY RESEARCH, REGULATORY ABUSE KILLING EQUAL OPPORTUNITY NATIONWIDE (1998), <http://www.nationalcenter.org/NPA219.html>.

207. See generally *id.*

208. *Ricketts*, 722 N.Y.S.2d at 27.

209. 90 Eng. Rep. 165 (K.B. 1693).

210. *Id.* at 165.

211. *Id.* at 169.

212. *Id.*

213. Speech at Chicago, Illinois (July 10, 1858) in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 500 (Roy P. Basler ed., 1953).

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.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.²¹⁵

One of the primary duties of our courts is to protect minorities against the tyranny of the majority.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.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.²¹⁸ As James Madison once told Thomas Jefferson,

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.²¹⁹

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).

215. *Id.*

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.")

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).

218. See Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 732 (1998).

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.²²⁰ 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.’”²²¹ 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.²²² 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,²²³ 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/11/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.²²⁴

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.”²²⁵ 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 racism²²⁶—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.”²²⁷ 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,²²⁸ 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.²²⁹ 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

224. See generally David E. Bernstein, *Roots of the ‘Underclass’: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85 (1993) (examining how Black workers have historically been negatively effected by union-sponsored labor legislation).

225. Robert D. Bullard et al., *The Costs and Consequences of Suburban Sprawl: The Case of Metro Atlanta*, 17 GA. ST. U. L. REV. 935, 967 (2001).

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

230. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-13, at 1374 (2d ed. 1988).

231. *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

232. *Id.* at 222-23. A Tennessee funeral director’s license costs \$275. TENN. COMP. R. & REGS. 0660-3-.03(1) (2003), available at <http://www.state.tn.us/sos/rules/0660/0660-03.pdf>.

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.

235. Laurie Goodstein, *From Pulpit, Pitches for the Material World: Some Black Congregations Are Using Church to Push Entrepreneurship*, WASH. POST, Dec. 26, 1996, at A1.

236. *Id.*

to the pulpit to give a short talk about his or her business.²³⁷ The list includes painters, accountants, real estate agents, and hairdressers—all licensed occupations in Arkansas.²³⁸

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.²³⁹ 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.”²⁴⁰

Conclusion

“The economic highway to power has few entry lanes for Negroes,” wrote Dr. King in 1967.²⁴¹ 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*²⁴² 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.²⁴³

237. *Id.*

238. See ARK. CODE ANN. §§ 17-25-103, 17-12-106, 17-42-301, 17-20-301 (2003).

239. ARK. CODE ANN. § 17-31-105 (2003).

240. FRIEDMAN, *supra* note 42, at 399.

241. WASHINGTON, *supra* note 26, at 600.

242. 83 U.S. (16 Wall.) 36 (1873).

243. *Barsky v. Board of Regents of University*, 347 U.S. 442, 472-73 (1954) (Douglas, J., dissenting).

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.

244. Frederick Douglass, *What to the Slave is The Fourth of July?* Speech at a meeting of the Rochester Ladies' Anti-Slavery Society (July 5, 1852), http://douglassarchives.org/doug_a10.htm (last visited Sept. 19, 2003).