

PART TWO

The Erosion of Liberty

In this part, I set forth a number of examples of abuses of rights inflicted by state and local governments upon their residents (or, in some instances, upon residents of other states). Within the areas I have selected, these examples barely scratch the surface; and I have not covered entire categories, such as police brutality, abuses of taxpayer rights, and interference with religious liberty. The purpose of these examples is to illustrate some of the many manifestations of grassroots tyranny that deeply and adversely affect the real lives of real people. Many of them are somewhat aberrational because they have happy endings, either due to extensive media coverage or successful legal challenges. Most people who fight city hall toil in obscurity and lack the resources to overcome the often overwhelming odds and reach a successful outcome.

Not all readers will agree that all of the examples constitute abuses of individual rights; but I am confident that nearly every reader will see much that is troublesome and outside the bounds of appropriate government power.

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Freedom of Commerce and Enterprise

It is quite common in these later days for certain classes of citizens—those engaged in this or that business—to appeal to the government—national, state, or municipal—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, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and devised. This kind of legislation should receive no encouragement at the hands of the courts.

—Michigan Supreme Court, 1889¹

IF THERE WERE ever a nostalgic television show about small-town America, Garland Allen would be the barber. For decades, the elderly black practitioner has been cutting hair in rural Lebanon, Tennessee, in a barbershop that draws old-timers to play a game of pool, get a haircut and a shoeshine, and swap stories. Allen has worked in the shop since he was a young boy, when he learned to cut hair at his father's side.

In July 1996, however, Garland Allen was arrested in his shop. His crime: “impersonating a professional,” a felony under Tennessee law punishable by up to six years in prison.

Allen was “impersonating a professional” not because he had caused harm to anyone but because he lacked a barbering

license from the state of Tennessee. No one, including the Tennessee Board of Barbering Examiners or the rival barber who turned him in, claimed that Allen was unqualified. Rather, he lacked the requisite license, and that was enough to get him arrested.

When Allen was a young man, there were no Tennessee barber colleges that admitted blacks, so he learned to cut hair informally but professionally. As an adult, Allen could not afford the nine months or five thousand dollars necessary to go to school or get his license. So, for the heinous crime of lacking a license, Allen was arrested.

The ordeal attracted attention throughout the state as well as the threat of a lawsuit from the Institute for Justice. Happily, the state backed down and allowed Garland Allen to continue practicing his craft. The spectacle of a man faced with prison merely for earning an honest living in a profession he had engaged in for decades seemed decidedly un-American. But unfortunately, barriers to enterprise erected by state and local governments are all too common today in a nation doctrinally committed to opportunity.

The Statue of Liberty is one of the most resonant symbols of the American experiment. For generations, it has stood as a beacon to millions of oppressed people around the world, many of whom sought political freedom, but many more of whom sought economic opportunity.

Freedom of enterprise is a fundamental right that most Americans believe they possess, yet in reality it receives almost no legal protection at all. It is a sobering commentary on our constitutional evolution that if the government tries to take away someone's welfare check, the taxpayer-financed Legal Services Corporation will come to the rescue and tie it up in knots; but if government decides to arbitrarily limit

access to a business or profession, even for the benefit of sheltered special interests, it may do so with impunity.

Two California entrepreneurs could be excused for thinking that not only the symbolism but the tangible promise of opportunity has tarnished a bit. Joanne Cornwell is the chairperson of the African Studies Department at San Diego State University. But she also created a hairstyling technique that she patented as “Sisterlocks.” It is a highly intricate style that requires specialized training and tools to perform and several hours to complete for each client. Dr. Cornwell opened a salon in her own home, and the style became very popular. Meanwhile, she compiled a training program and franchised Sisterlocks to dozens of other stylists. Her business model created lucrative opportunities for herself and her franchisees, while providing a popular service that drew upon traditional African culture and hairstyles.

At the same time, Ali Rasheed and his African-born wife, Assiyah, were operating a salon in San Diego called The Braiderie. There several stylists, mostly African immigrants, engaged in hair braiding and other traditional styles that trace their African roots thousands of years. But The Braiderie was slapped with a citation from the California State Board of Barbering and Cosmetology on the grounds that the business was not a licensed cosmetology salon and the braiders were not licensed cosmetologists. Dr. Cornwell likewise was operating without a license, and therefore outside the law.²

At the time, California required 1,600 hours of prescribed training for anyone engaged in cosmetology—substantially more than the training required for an emergency medical technician or a police officer. As Taalib-din Uqdah, president of the American Hairbraiding and Natural Haircare Association exclaimed, “We’re braiding hair, not practicing brain surgery!” Almost none of the curriculum related in the

slightest to African hairstyling. About half of the required training dealt with the use of chemicals in the hair. But African hairstylists militantly believe that chemicals have destroyed black hair and are used primarily to alter its natural state, and they never use chemicals. Furthermore, cosmetologists are required to learn about white hairstyles that haven't been popular in decades, along with fingernail-painting and the use of cosmetics—services that African hairstylists do not provide. The training must take place in a licensed school, which costs several thousand dollars and takes nearly a year to complete. After the training, cosmetologists must pass an examination demonstrating mastery of knowledge that is irrelevant or antithetical to African hairstyling; as well as techniques that, if applied to a black subject, require the straightening of hair, something that an African hairstylist would never do. About the only hairstyling skill that a would-be cosmetologist does not have to learn anything about or demonstrate any proficiency in performing is—you guessed it—African hairstyling. Anyone purporting to teach African styling would have to qualify for a separate instructor's license, which requires even more of the same. Few traditionally licensed cosmetology instructors know much if anything about the specialized art of hair braiding; yet they possess exclusive jurisdiction to “train” even those who have been braiding for decades.

Until recently, rules of that type predominated in all 50 states and the District of Columbia, turning aspiring entrepreneurs like Joanne Cornwell and Ali Rasheed into outlaws. The rules typically are enforced by licensing boards composed primarily of members of the regulated profession, who of course have a vested interest in stifling competition from newcomers. Most hair braiders in such states operate underground—thereby depriving the stylists of opportunities to

operate openly in the mainstream economy, while preventing law-enforcement officials from enforcing valid health and safety regulations and destroying precious employment opportunities for people with few skills.

The regime makes little sense from the standpoint of entrepreneurs, stylists, consumers, or even the government; but the regulations, like many others, are kept in place by the regulated industry as a means of sheltering it from competition. Represented by the Institute for Justice, Cornwell and Rasheed took the Board of Barbering and Cosmetology to federal court—and won.³ Fortunately, instead of appealing, the state deregulated African hairstyling, requiring only the completion of courses in hygiene, sanitation, and public safety. Cornwell, Rasheed, and thousands of other African hairstylists now can operate flourishing enterprises in the light of day. But similar laws remain on the books in dozens of other states, needlessly thwarting economic opportunities, primarily in the inner city.

Through a series of studies on state and local regulatory barriers to entrepreneurship,⁴ my colleagues and I have documented myriad state and local regulations that stymie bootstraps capitalism—the opportunity for people with good ideas but little capital or formal training to begin climbing the rungs of the economic ladder. Government regulates everything from home-based businesses to day-care centers to alternative transit systems—the type of infrastructure occupations that could offer abundant entrepreneurial and employment opportunities to people of modest means. The sheer bureaucracy that awaits anyone wanting to open a business—from business licenses to zoning permits—can defeat enterprising individuals before they even start their businesses. The rules often force aspiring entrepreneurs into illegal occupations—the captains of industry in the inner city are

often drug merchants—or into the black market, where their access to capital and governments’ ability to regulate or tax them are nonexistent.

In all, at least 500 occupations, representing 10 percent of all professions, require government licenses, often conferred by boards composed of members of the regulated profession, invested with the coercive power to limit entry and competition.⁵ Additionally, entry into many businesses, such as residential trash collection and taxicabs, is limited by local government, often for the purpose of protecting monopolies or oligopolies. Such restrictions, declares economist Walter Williams, “discriminate against certain people,” particularly “outsiders, latecomers, and [the] resourceless,” among whom members of minority groups “are disproportionately represented.”⁶ For many who fervently desire the path of self-help, pursuit of the American Dream has become a nightmare.⁷

And law provides little respite. Despite the fact that economic liberty—the right to pursue a business or profession free from arbitrary or excessive government regulation—was one of the foremost rights intended to be protected among the “privileges or immunities” of citizens under the 14th Amendment, federal courts traditionally have provided little refuge, even if the government wipes an entire industry out of existence for apparently protectionist purposes.⁸ The courts apply the misnamed “rational basis” test, which requires neither that the government articulate a basis for regulation nor that it be rational. Rather, the courts will infer a rational basis for economic regulation, even if it did not motivate the legislature’s actions.⁹

One industry in which entry-level entrepreneurial opportunities are thwarted by protectionist government regulation is transportation. In the early part of the 20th century, “jitneys” provided the principal form of public transportation in

American cities. Jitneys were privately owned vehicles that would transport passengers anywhere along a fixed route for a flat fee. But when streetcars came into existence, the streetcar industry went from city to city enacting anti-jitney ordinances that wiped out the competition, not through market competition but by government fiat.

Today, the streetcars are long gone, but the laws against commuter vans—the modern-day successors to jitneys—remain on the local books, supported by heavily subsidized, unionized, and often inefficient government bus monopolies. (By contrast, commuter vans often efficiently provide airport transportation services because they are regulated by states or airport authorities rather than cities.)

In Jamaica, Queens, however, thousands of mostly illegal commuter vans operate, providing a highly personalized and inexpensive alternative to the public bus monopoly. The vans are vital to the heavily immigrant working-class community because they not only take people to work, they also put people to work. The city forbids transit alternatives on streets that are bus routes—which is pretty much every public thoroughfare in New York City. The police constantly ticket and harass the van drivers, even though the city anxiously turns to the vans to fill in for its public-transit system every time the bus drivers go on strike.

Two van owners, Vincent Cummins and Hector Ricketts, challenged the law in a suit filed by the Institute for Justice, and were supported by a second lawsuit filed by then-mayor Rudy Giuliani. In 1999, a state judge stripped the city council—which was heavily influenced by and responsive to the public transit union—of its power to control van licenses.¹⁰ The ruling removed some of the barriers that limited entry into the van business, but other restrictions remain—as they do in many other cities, arbitrarily limiting entrepreneurial

opportunities and highly desired consumer options while forcing taxpayers to subsidize bloated, monopolistic transit systems.

In most cities, the one relatively unregulated transit service (again, because they typically are regulated by states rather than cities) are private limousine services. They are usually forbidden from picking up hailing passengers, but are available for prearranged transportation. But not in Las Vegas, where the limousine industry is largely controlled by a handful of politically powerful companies. Independent limousine drivers were required by state law to secure a certificate of public convenience and necessity, and existing companies were allowed to intervene in opposition to their applications. The oligopolists' legal demands upon applicants were so onerous that they usually bled the newcomers financially dry before the process was even completed. The standard in Nevada required demonstration that the new business would not adversely affect existing businesses—again, an absurd and impossible standard to meet.¹¹ Again, an Institute for Justice lawsuit was largely successful in removing regulatory barriers, with a state court ruling in 2001 that the regime “amounted to an onerous and unduly burdensome process,”¹² but not before several independent limousine operators went out of business.

State and local governments impede access to other entry-level businesses as well. In several states, the government forbids the direct sale of caskets to consumers. In Tennessee, the Rev. Nathaniel Craigmiles was tired of his parishioners having to pay exorbitant prices to funeral homes for caskets, so he started his own storefront casket business. But the store was shut down by state regulators, because state law required anyone selling caskets to hold a funeral manager license. The license required extensive training in embalming and other

activities totally unrelated to selling caskets. The regulations were supported, naturally, by the funeral home industry, which extracts huge monopoly profits from the sale of caskets to grieving families.

The state defended the law on, among other grounds, the unproven contention that leakage from caskets could cause public health or safety problems. But in Tennessee, the law does not even require burial in caskets at all. Again, the Institute for Justice filed suit. Finding the law palpably irrational, both the federal district court¹³ and the U.S. Court of Appeals for the Sixth Circuit struck down the law¹⁴—though an Oklahoma district court upheld a similar law, which is now pending on appeal in the Tenth Circuit.¹⁵

While advocates of economic liberty were battling casket monopolists in Tennessee and Oklahoma, a similar fight was raging in Seattle, over trash. The java-loving city's official website boasts, "Welcome to Seattle, an excellent place for business." But despite its liberal reputation, the city's policies often promote big business to the detriment of free enterprise.

That predilection was evident in 2003 when the city council voted on a "housekeeping" measure, acting to change the definition of municipal waste to include waste generated by construction, demolition, and land-clearing. The subtle change had the effect of expanding the scope of the city's waste-collection contract with two garbage-hauling behemoths, Waste Management and Allied Waste/Robanco, so that they now had a monopoly on the hauling of construction waste that previously they were forced to share in an open market with a number of small haulers. "Overnight, the small haulers were put out of business," reported *Seattle Post-Intelligencer* columnist Chi-Doo Li. "Their way of earning a liv-

ing, honorable and useful one day, became a criminal offense the next day.”¹⁶

Many cities confer monopolies for collection of residential or commercial trash. The rationale is that having several competing firms operate on overlapping routes causes congestion and inefficiencies. Such logic precludes competition in most of the trash-hauling business. But whatever the logic for monopolies in that context, it doesn’t extend to the hauling of construction waste, which takes place strictly on an on-call basis. The only reason for putting construction waste within the trash-hauling monopoly was to benefit the monopolists — not to advance environmental objectives or create economies of scale. My colleague Bill Mauer, executive director of the Institute for Justice Washington Chapter, pointed out that “the same construction waste ends up in the same transfer station. The only difference is with a monopoly, there are no choices for consumers and no opportunities for would-be entrepreneurs.”¹⁷

Recognizing the economic insanity of its own rules, the city exempted its own construction waste from the monopoly.¹⁸ Instead, it only forbade private developers from hiring independent contractors. Joe Ventenbergs, owner of Kendall Trucking, voiced fear that the monopoly would drive his small company, into which he had invested his life savings, out of business. One of his customers, developer Ron Haider, complained that the law prevented him from patronizing Ventenbergs’s company, which he preferred over the monopolists’ because of its lower prices and more reliable service. The two business owners joined in a lawsuit arguing that the monopoly violated their constitutional rights.¹⁹ Unless David can prevail over Goliath in this case and others like it, cities like Seattle will be able to continue to destroy businesses with impunity for no better purpose than economic protectionism.

In our free society, consumer choice should be the rule, not the object of governmental disdain and displacement. With the advent of the Internet, consumer choices are more abundant than ever before. But the process of disintermediation—the elimination of the middleman—threatens existing economic interests, leading businesses to turn to the state’s regulatory power to seek protectionist shelter from competition. As a result, from the sale of contact lenses to automobiles to insurance, state laws often frustrate the vast commercial potential of the Internet. That is especially anomalous given that the original constitution was enacted in large measure to eliminate and prevent parochial trade barriers and to guarantee free trade among the states.

Juanita Swedenburg is the owner of a small winery in Middleburg, Virginia. As is the case with many small wineries, most of her sales are to visitors to the winery or to those attracted by word of mouth. But when customers from out of state ask her to ship wine to their homes, Swedenburg tells them she can’t. Most states declare such shipping a criminal misdemeanor, and if Swedenburg were to ship wine to Florida, Maryland, or Utah, she would be committing a felony.

All told, about half the states prohibit the direct interstate sale and shipment of wine to consumers. Many of the same states permit direct shipping by their own wineries. The purpose of the restrictions is to protect the monopoly profits—often amounting to a third of the price of a bottle of wine—of liquor distributors, who tenaciously defend the laws. Over the past few decades, the number of American wineries has grown exponentially, and the overwhelming majority are small, family-owned enterprises with small distribution. At the same time, the wholesaler industry has experienced severe consolidation. That has created an economic mismatch, with thousands of wines produced that cannot find a

place within limited distributor inventories or on store shelves. The result: Wineries are deprived of market access, consumers are deprived of otherwise readily available choices, prices are artificially higher, and states are deprived of potential new tax revenues.²⁰ But the multibillion-dollar liquor distributor oligopolists are fat and happy.

The Institute for Justice and others have filed lawsuits challenging the protectionist bans on direct interstate wine shipping. Thus far, bans have been struck down in Virginia, North Carolina, Texas, and Michigan as violations of the Constitution's commerce clause, but upheld in Indiana and New York as valid exercises of the states' regulatory power over alcohol under the 21st Amendment.²¹ The U.S. Supreme Court accepted review of Juanita Swedenburg's case and a companion case in spring 2004, and a ruling is expected by summer 2005. If the Supreme Court remains true to the core promise of free trade among the states, its ruling will help vindicate the great promise of consumer freedom in the Internet age. If not, a new era of government-sanctioned economic protectionism will dim that potential.

The lesson that traditional avenues of entrepreneurship are steadily being choked off by oppressive government intrusion is trickling down even to young people. As I was growing up, paper routes, lemonade stands, and even selling eggs from my Easter basket were mainstays of my disposable income.

Following recently in that great American tradition was a high school student from Tempe, Arizona, named Christian Alf. The Phoenix area is infested with roof rats, which eat fruit from trees and often enter homes through chimneys and other openings. First as a favor to friends, then as a lucrative part-time enterprise, Alf began covering such openings with wire mesh to prevent rodent intrusion. He provided this ser-

vice for \$30, while pest control companies charged ten times that amount.

Then the Arizona Structural Pest Control Commission stepped in. The boy was engaged in pest control without a license, the commission charged, and it ordered Alf to stop. He did.

A public outcry ensued, and the Institute for Justice Arizona Chapter threatened to sue. The commission backed down, and Alf went back to work. As the *East Valley Tribune* editorialized, “Alf now has a whole new dimension opening up for his future. At first all he wanted to be is an aerospace engineer. Thanks to this experience with our on-the-ball government, he’s becoming something far more important: A civil libertarian.”²² The whole story goes to show that sometimes the worst type of rat is a bureaucrat.

Myriad regulations also thwart opportunities for home-based businesses, whose potential also has expanded in the Internet era. Home-based businesses provide an especially good outlet for stay-at-home parents to earn income while caring for their children. But zoning and other regulations often impede that potential and turn legitimate small businesspeople into outlaws.

I encountered two extremely unlikely outlaws when I was researching for my study on barriers to entrepreneurship in Charlotte, North Carolina. Two elderly women, Mrs. Connell and Mrs. Koller, were crocheting pillows and canning preserves in their homes for sale at the local farmers’ market. The local zoning administrator advised them that their activities were illegal because a city zoning ordinance forbade the manufacture of goods for sale within a home.

Incredulous that the city would construe such a law against those ladies, I wrote to the zoning administrator asking him to tell me that it wasn’t so. No response. I wrote him

a second time, this time threatening a lawsuit. No response. I wrote a third letter, this time announcing the date the lawsuit would be filed and copying the city attorney. Within days, I received a letter from the city attorney assuring me that the zoning ordinance would certainly not apply to pillows and preserves. Mrs. Connell and Mrs. Koller could operate freely in society again.

Over the brief course of the controversy, I knew my clients only by their surnames. Only when I subsequently received a sweet thank-you note did I realize that their first names, appropriately enough for the rebels they had become, were Thelma and Louise.

Fortunately Thelma and Louise didn't have to go to the same lengths as the movie characters to protect their dignity. But others do. Few start-up entrepreneurs have the money, time, or sophistication to fight city hall. When they try, they find the odds overwhelmingly against them. And despite some optimistic recent victories, the courts remain generally hostile forums in which to present economic-liberty claims. The plethora of laws that stifle economic opportunity make a mockery of our nation's promise of opportunity.

Still, freedom of enterprise is one of the most profoundly shared values that bring Americans together. With Americans united in common cause behind the courageous determination of aspiring entrepreneurs, we can restore economic liberty as a fundamental civil right. As Hector Ricketts proclaimed when he won the right to operate his van service, "Even in New York City it's possible for little people to have their concerns addressed. People in other cities should try this."²³

He's right. Economic liberty might just prove contagious.