Requiring a License to Braid Hair Isn't Just Bad Policy - It Violates the 14th Amendment

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The Fourteenth Amendment states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." Passed during Reconstruction, these provisions held the promise that freedman would finally be granted the same rights and protections as their white brethren. Yet less than five years after this amendment was enacted, the Supreme Court eviscerated the Privileges or Immunities Clause in what became known as the *Slaughter-House Cases* (1873).

Fourteenth Amendment Jurisprudence

There the Court held that the clause—which was supposed to protect substantive rights against state infringement—only guaranteed a limited set of federal rights, such as the right to access seaports, to use navigable waters, and to demand protection on the high seas (not exactly the key motivations for the Civil War). The ruling not only delayed the protection of African Americans' civil rights, it left the Court's Fourteenth Amendment jurisprudence hopelessly confused and contradictory.

Slaughter-House eventually led to the development of modern "substantive" due process doctrine as a makeshift bandage over the hole in the Fourteenth Amendment left by the unprotected privileges and immunities. While allowing the Court to protect some rights, the "incorporation" of certain rights through the Due Process Clause relegated other, often "economic" rights to second-class status.

Instead of judges' taking a hard look at the actual reasons a law was passed and asking whether the government has overstepped its constitutional bounds, infringements of the right to earn a living or the freedom of contract barely receive a passing glance. They are upheld unless nobody—not even the judge hearing the case!—could possibly imagine a legitimate rationale for the law. Suffice it to say, hardly any laws are struck down under this so-called rational-basis test.

What It Has to Do with Hair-Braiding

Enter Ndioba Niang and Tameka Stigers, both of whom are traditional African-style hair braiders attempting to support themselves by offering their services to willing customers. The Missouri Board of Cosmetology and Barber Examiners, however, demands that they first pay thousands of dollars to receive completely irrelevant training that has virtually nothing to do with hair-braiding. Applying the usual government-can-do-whatever-it-wants-regarding-economic-regulations level of judicial scrutiny, both the federal district court and the U.S. Court of Appeals for the Eighth Circuit upheld the licensing scheme.

This approach is wrong: ethically, historically, and legally. There is a long and well-documented history recognizing the right to earn an honest living as being at the center of the Anglo-American legal tradition and indispensable to the maintenance of a free and open society. Industry insiders often lobby for licensing laws and regulations—and then populate the boards or agencies tasked with enforcing the new rules as a means of limiting their competition.

By contrast, those harmed are often politically powerless groups with limited means to fight back. But as long as the government says the magic words of "safety," "health," or "consumer protection" in asserting its restrictions, courts are content to turn a blind eye.

Because the right to earn a living is one of the basic rights that our Constitution was formed to protect, Cato has filed an amicus brief supporting the hair-braiders' petition to the Supreme Court. We ask that the Court take *Niang v. Tomblinson* and establish that courts must meaningfully examine government incursions against this essential liberty, regardless where in the Fourteenth Amendment it finds the relevant right.

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