A POSITIVE ANALYSIS OF A NEGATIVE RIGHT

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ABSTRACT

The existence of a civil society is premised on the coming together of individuals. Each of those individuals has certain rights, but some of those rights must be limited in order for a society to function. The eternal struggle of Anglo-American liberalism has been to find the proper balance between the taking of some rights with the protection of others. This tension between two fundamental needs of a democratic society has been thrust into the news recently in the cases of Mullins v. Masterpiece Cakeshop, State v. Arlene's Flowers, and Elane Photography v. Willock. In these cases, a cake-maker, a florist, and a photographer refused to, respectively, create a custom wedding cake, create custom wedding flower arrangements, and photograph a wedding. The couples each brought suit using their state's statute which prohibited refusing service on the basis of sexual orientation. The service providers raised two defenses based in the First Amendment: the right to be free from compelled speech and the right to free exercise of religion. While both arguments are germane to the issues presented in the cases, this Note's purpose is to provide a more thorough and searching analysis of the individual rights that are being threatened. In particular, this Note will examine three potential bases for alternative arguments supporting the liberty interests in those cases. These potential bases include the Thirteenth Amendment and its prohibition of involuntary servitude; property law and the right to exclude; and contract law and the freedom to, or more specifically from, contract. While arguments based on these doctrines are not often raised in modern constitutional jurisprudence, a broader analysis based on these doctrines can shed light on the various interests at stake in these cases and offer new ways of thinking about the timeless struggle to balance rights in American society.

Introduction

Liberty is an illustrious concept, an ideal that fills the hearts and minds of each successive generation with promises of a better tomorrow, and a principle that serves as a foundation of western civilization. However, liberty is as elusive as it is illustrious. Sometimes, liberty is even counterintuitive. In today's world, there are many conflicts between positive rights, those which must be given, and negative rights, those which are there to take away. In order to pursue the greatest liberty for the most people, negative rights must be emphasized, because giving positive rights to some inherently involves taking negative rights from others.

The distinction between positive and negative rights is often at the forefront of political and legal debates. The right to abortion expounded in *Roe v. Wade*[1] is a negative right, and the Court denied the positive right to a required abortion funding in *Maher v. Roe*.[2] The Hobby Lobby case balanced the negative right of the owners of Hobby Lobby, a closely held corporation, to their religious beliefs with the positive rights of the workers to health insurance that covered contraceptives.[3] Every election there seems to be debate about taxes, freedom from which is a negative right, and social safety nets, which are positive rights. These conflicts are common place in today's society. This Note examines one such clash.

I. THE PROBLEM

A. Masterpiece

This case juxtaposes the rights of complainants, Charlie Craig and David Mullins, under Colorado's public accommodation laws to obtain a wedding cake to celebrate their same-sex marriage against the rights of respondents, Masterpiece Cakeshop, Inc., and its owner, Jack C. Phillips, who contend that requiring them to provide such a wedding cake violates their constitutional rights to freedom of speech and the free exercise of religion.[4]

In July 2012, Craig and Mullins, a same-sex couple, entered Masterpiece.[5] Masterpiece, located in Lakewood, Colorado, is owned by Jack Phillips.[6] Mr. Phillips creates custom cakes: "Custom designs are his specialty: if you can think it up, Jack can make it into a cake!"[7] Craig and Mullins asked Phillips to make them a custom cake for their wedding, but Phillips refused due to his religious beliefs.[8] Mr. Phillips made it clear that he would be more than willing to sell or make them any other sort of baked good, just not a cake for their wedding.[9]

Craig's mother later called Phillips; he informed her that Masterpiece did not make cakes for same-sex weddings due to Phillips's religious beliefs and because same-sex marriages were not recognized in Colorado

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[1] Roe v. Wade, 410 U.S. 113 (1973).

[2] Maher v. Roe, 432 U.S. 464 (1977).

[3] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 1 (2014).

[4] Masterpiece Cakeshop, Ltd., v. Colo. Civ. Rts. Commission, 584 U.S. 1 (2018).

[5] *Id.*

[6] *Id.* at 3.

[7] Masterpiece Cakeshop, https://masterpiececakes.com (last visited Oct. 8, 2018).

[8] Masterpiece Cakeshop, 584 U.S. at 1.

[9] *Id.* at 4.

at the time.[10] Craig and Mullins then filed charges of discrimination against Masterpiece.[11]

Colorado's statute, which was the basis for the suit, declared it unlawful for a place of public accommodation to refuse to provide a service for someone, among other reasons, because of sexual orientation.[12] In Colorado, a place of "public accommodation" is "any place offering services . . . to the public . . . ."[13] Mr. Phillips defended himself by claiming the statute, as applied, violated his First Amendment rights to free exercise of religion[14] and freedom from compelled speech.[15] The Court handed down a decision in favor of Mr. Phillips, but it was on limited grounds.[16]

B. Arlene's Flowers

The state of Washington has a similar statute prohibiting discrimination by service providers.[17] This statute is the basis for a case

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[10] *Id.*

[11] *Id.* at 1.

[12] "(2)(a) It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or, directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry." COLO. REV. STAT. § 24-34-601(2)(a)(2018).

[13] Masterpiece Cakeshop, 584 U.S. at 5.

[14] *Id.* at 7.

[15] *Id.*

[16] *See id.* at 18.

[17] "(1) It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sexual orientation, sex, honorably discharged veteran or military status, status as a mother breastfeeding her child, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability: PROVIDED, That this section shall not be construed to require structural changes, modifications, or additions to make any place accessible to a person with a disability except as otherwise required by law: PROVIDED, That behavior or actions constituting a risk to property or other persons can be grounds for refusal and shall not constitute an unfair practice."

WASH. REV. CODE ANN. § 49.60.215(1) (LexisNexis 2011).

similar to *Masterpiece—State v. Arlene's Flowers, Inc.*[18] Barronelle Stutzman owns Arlene's Flowers Inc., located in Washington.[19] Stutzman, though she had been happy to sell the couple flowers in the past, refused to provide flowers for the wedding of Robert Ingersoll and Curt Freed, a same-sex couple.[20] Stutzman says she then gave Ingersoll the name of another florist.[21] Both the flower shop and the couple drew a slew of media attention.[22] Ingersoll received a variety of offers from other florists to do his wedding about twenty times over.[23] But the media coverage was far from unified; Stutzman received threats to her business, and the couple received so much attention that they scaled down their wedding and had it in their own home.[24] Stutzman defended the suit on grounds similar to those in *Masterpiece*.[25]

C. Elane Photography

Yet another similar case dealt with a photographer who refused to photograph a same-sex commitment ceremony.[26] New Mexico's law mirrors those of Washington and Colorado, at least in relevant part,[27] in prohibiting discrimination by service providers against individuals due to their sexual orientation.[28] Elaine Huguenin, the co-owner and lead photographer, declined a request by Vanessa Willock to photograph her commitment ceremony due to her religious beliefs.[29] Huguenin, in defense

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[18] State v. Arlene's Flowers, Inc., 389 P.3d 543, 551 (Wash. 2017).

[19] *Id.* at 548.

[20] *Id.*

[21] *Id.* at 549.

[22] *Id.*

[23] Barronelle Stutzman, *I'm a Florist, but I Refused to Do Flowers for My Gay Friend's Wedding*, THE WASHINGTON POST (Jan. 10, 2018), https://www.washingtonpost.com/posteverything/wp/2015/05/12/im-a-florist-but-i-refused-to-do-flowers-for-my-gay-friends-wedding/?utm_term=.3a3c313b6351).

[24] *Arlene's Flowers*, 389 P.3d at 549.

[25] *Id.* at 552.

[26] Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013).

[27] "It is an unlawful discriminatory practice for: (F) any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap, provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation."

N.M. STAT. ANN. § 28-1-7(F) (LexisNexis 2004).

[28] Elane Photography, 309 P.3d at 58.

[29] *Id.* at 59–60.

of a suit brought against her and the studio by Villock, raised the same First Amendment defenses discussed above.[30]

D. The Arguments and Why They Fail

In all three of the above cases, courts were reluctant to apply the First Amendment in the manner that the defendants were suggesting,[31] but that is not to say that no court ever will. Regardless of whether one thinks these defenses should be allowed, one must concede the possibility that a court could find that they should. If a court, or courts, find these defenses to be adequate, the natural response would be to ask a question: what happens when a less savory group is discriminated against and the individual who is discriminating holds our sympathies?

So why do the arguments fail? The arguments put forward by the defendants in *Masterpiece*,[32] *Arlene's Flowers*,[33] *Elane's Photography*,[34] and other similar cases allow for two potential possibilities. On the one hand, only some people can discriminate while others have to serve everyone. On the other hand, no one can discriminate, even if their reasons for doing so are understandable and legitimate.

On October 1, 2017, individuals who were handing out pamphlets for the group Abolish Human Abortion decided to take a break at Bedlam Coffee in Seattle, Washington.[35] The owner of the cafe, Ben Borgman, was offended by one of the pamphlets and told the individuals to leave.[36] Borgman, who is gay, questioned the individuals about their tolerance of gay individuals.[37] While they professed to have no issue with Borgman's sexuality, he continued in his efforts, and the individuals left.[38]

This kind of discrimination seems roughly equivalent to the kind in the above cases: one individual refusing to serve another due to conflicting beliefs and the actions based upon those beliefs. This circumstance goes further though because Borgman refused to serve the individuals, not just in ways that would support their actions, such as providing snacks on

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[30] *Id.* at 60.

[31] Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 294 (Colo. App. 2015); Arlene's Flowers, 389 P.3d 543, 566 (Wash. 2017); Elane Photography, 309 P.3d 53, 77 (N.M. 2013).

[32] Masterpiece Cakeshop, 584 U.S. at 1–3.

[33] Arlene's Flowers, 389 P.3d at 552.

[34] Elane Photography, 309 P.3d at 60.

[35] Frank Camp, *A Lesson in Free-Market Economics: Gay Shop Owner Kicks Christians Out of His Business Because Their Beliefs 'Offend' Him*, THE DAILY WIRE (Jan. 10, 2018), https://www.dailywire.com/news/22042/lesson-free-market-economics-gay-shop-owner-kicks-frank-camp.

[36] *Id.*

[37] *Id.*

[38] *Id.*

behalf of Abolish Human Abortion.[39] Additionally, while the Constitution explicitly guarantees the right to the free exercise of religion,[40] there is no amendment explicitly protecting the right to freely exercise one's sexuality, although the right has been incorporated into substantive due process.[41] Substantive due process would likely not be an effective defense to Mr. Borgman's discrimination, either. The discrimination had nothing to do with Borgman's sexuality; it was motivated by the protestors' supposed opinions.[42] While he could potentially raise a defense of compelled speech, like the above defendants, the argument seems even more attenuated in this situation. This is because there is no act of speech involved with serving an individual a generic item of food or drink.

Imagine a different scenario: a same-sex couple owns a construction company, the best in the area, and they do the majority of the work themselves. The Westboro Baptist church, or a similarly discriminatory group, approaches them to have a church building constructed and is not dissuaded by their sexuality due to the superiority of their ability. The construction company, reasonably so, refuses to do the work, and the discriminatory group sues. The likelihood of a court applying either of the First Amendment defenses seems slim. It would be discrimination due to the religion of the discriminatee rather than the discriminator. In other words, it would violate the public accommodation statutes,[43] but there would not be a free exercise defense.[44] Also, there does not seem to be any sort of compelled speech in the act of building the frame, pouring a foundation, or siding a building. In the oral arguments for *Masterpiece* before the Supreme Court, those arguing for Masterpiece conceded that some forms of work would not be speech or expressive conduct and that the line was hard to draw.[45]

While different bases for discrimination offend different individuals to different extents, the law should not allow some to discriminate and prohibit others from doing the same. This leads to two potential scenarios. In the first, everyone must serve everyone else, unless the reason for refusing services is completely unrelated to who the individual is. In the second, discrimination, in circumstances like these described above, is allowed. In other words, if the Supreme Court adopts the arguments of

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[39] *Id.*

[40] U.S. CONST. amend. I.

[41] *See* Lawrence v. Texas, 539 U.S. 558, 562–69 (2003).

[42] *See id.*

[43] COLO. REV. STAT. § 24-34-601 (2014); N.M. STAT. ANN. § 28-1-7 (LexisNexis 2004); WASH. REV. CODE ANN. § 49.60.215 (LexisNexis 2009).

[44] *See* U.S. CONST. amend. I.

[45] Transcript of Oral Argument at 13–25, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 137 S. Ct. 2290 (2017) (No. 16-111).

the states, they will be forcing service. If they adopt the arguments of the baker, they will be going in the right direction, but they will not be going far enough. The First Amendment, while practically the best defense for the service providers, limits the application of the defense to situations where there is a religious motive or the conduct is expressive.[46] In order to find a better, more encompassing, argument, other sources must be examined.

Forcing service providers to spend their time and talents on serving those who view the providers as sub-human goes against some of the very foundations of western culture; therefore, the rest of this Note will explore alternative defenses—or, rather, varieties of a single alternative defense with multiple potential bases. These defenses are available to all defendants, regardless of their reasoning or the presence of speech in their work, in the above suits and those like them. Three bases for this right will be examined: the Thirteenth Amendment, contract law, and property law. Each provides a basis for the idea that individuals should not be forced to serve others.

II. THE SOLUTION

In order to avoid either of the aforementioned situations, an alternative must be found. This next section will examine potential bases for this alternative. These potential bases include the Thirteenth Amendment and its prohibition of involuntary servitude, property law and the right to exclude, and contract law and the freedom from contract.

A. The Liberty Amendment

According to the Thirteenth Amendment, "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[47] While there is no denying that the primary purpose of the Amendment was to abolish slavery—and indeed it was likely the sole concern of the drafters—the Supreme Court held in *United States v. Kozminski* that the phrase involuntary servitude gives the Amendment broader meaning.[48] The question, therefore, is not

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[46] *See* U.S. CONST. amend. I.

[47] U.S. CONST. amend. XIII, § 1.

[48] United States v. Kozminski, 487 U.S. 931, 942 (1988). This case dealt with two mentally challenged men who were psychologically coerced into working. *Id*. The government claimed that psychological coercion violated 18 U.S.C.S. § 241 and 18 U.S.C.S. § 1584; both statutes prohibit involuntary servitude. *Id.* at 941. The Court held the phrase means what it means when used in the Thirteenth Amendment. *Id.* The Court said that the Thirteenth Amendment prohibits "involuntary servitude enforced by the use or threatened use of physical or legal coercion." *Id.* at 944.

if the Amendment's reach is greater than a prohibition of slavery. The question is, how much further does it go?[49]

The exception for punishment of a crime offers an insight into what the legislature meant by "involuntary servitude."[50] "The fact that the drafters felt it necessary to exclude this situation indicates that they thought involuntary servitude includes at least situations in which the victim is compelled to work by law."[51] The Court explicitly held that *peonage*—"a condition in which the victim is coerced by threat of legal sanction to work off a debt to a master"—falls within the Amendment's prohibitions.[52] On the other hand, various services have been found to be outside the Amendment's prohibitions.[53] Services, such as contracts of seamen,[54] the draft,[55] jury duty,[56] landlord requirements,[57] injunctions in labor disputes,[58] and other similar services, have been found to be outside of the Amendment's scope.[59] In between these two bookends fall a significant number of situations. The above-mentioned cases, where an individual (even if the business was incorporated, the owner was often the one who did the work in cases like those discussed above) is compelled to enter into a contract, a contract essentially for his or her services, are examples of such situations.[60] This is especially true when one takes into account that the refusals in *Masterpiece*,[61] *Arlene's Flowers*,[62] and *Elane Photography*[63] were not refusals to serve the individuals per se but refusals to provide a specific service.

While Justice O'Connor's opinion in *United States v. Kozminski* is enlightening in that it provides the bookends for the Amendment's coverage, a review of sources concurrent with, and precedent to, the

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[49] *See id.* at 942–43.

[50] *See id.*

[51] *Id.* at 942.

[52] *Id.* at 943.

[53] S. DOC. NO. 112-9, at 1831–32 (2016).

[54] Robertson v. Baldwin, 165 U.S. 275, 282 (1897).

[55] Selective Draft Law Cases, 245 U.S. 366 (1918).

[56] *See* Butler v. Perry, 240 U.S. 328, 333 (1916).

[57] Marcus Brown Co. v. Feldman, 256 U.S. 170, 199 (1921).

[58] UAW v. Wis. Emp't. Relations. Bd., 336 U.S. 245 (1949).

[59] S. DOC. NO. 112-9, at 1831–32 (2016).

[60] *See* Butler, 240 U.S. at 333.

[61] Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).

[62] Arlene's Flowers, 389 P.3d at 549–50.

[63] Elane Photography, 309 P.3d at 61.

Amendment are necessary to fill in the gaps.[64] A good place to start is by looking at the context in which the language has previously been used.[65] The language of the Thirteenth Amendment quotes the Northwest Ordinance,[66] written by Thomas Jefferson, almost verbatim.[67] Supreme Court Justices Scalia and Thomas have looked back into the seventeenth century to interpret parts of the Constitution, such as the First and Second Amendments. [68] Therefore, the meaning of the Northwest Ordinance, passed by the Congress of the Confederation of the United States on July 13, 1787,[69] could be enlightening regarding the breadth of the Amendment's coverage. "[looking] back to the Founding, . . . the word 'slavery' actually has a capacious meaning, far outstripping the practices of radicalized chattel slavery that the Reconstruction era founders sought to end in 1864."[70] Renown Harvard historian Bernard Bailyn[71] quoted a 1747 newspaper stating that individuals "under the absolute and arbitrary direction of one man . . . are all *slaves*, for he that is obliged to act or not to act according to the arbitrary will and pleasure of a governor, or his director, is as much as *slave* as he who is obliged to act of not according to the arbitrary will and pleasure of a master or his overseer."[72] According to Bailyn, "[t]he degradation of chattel slaves—painfully visible and unambiguously established in law—was *only the final realization of what the loss of freedom could mean everywhere*. . . ."[73] Algernon Sydney[74] wrote, "he is a slave who serves the best and gentlest man in the world, as well as he who serves the worst; and he does serve him if he must obey

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[64] *See* ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 31–35 (2017).

[65] *See id.*

[66] Confederation of the U.S., Northwest Ordinance (July 13, 1787) [hereinafter Confederation].

[67] Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1480 (2012).

[68] *Id.* at 1479–80.

[69] Confederation, *supra* note 66.

[70] Balkin & Levinson, *supra* note 67, at 1481.

[71] Bernard Bailyn is a renowned Harvard Historian, focusing on U.S. colonial and revolutionary era history, and the winner of two Pulitzer Prizes for history. *Bernard Bailyn Biography*, AM. HIST. ASS'N, https://www.historians.org/about-aha-and-membership/aha-history-and-archives/presidential-addresses/bernard-bailyn/bernard-bailyn-biography (last visited Oct. 9, 2018)

[72] BERNARD BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 234 (16th ed. 1982) (1967).

[73] *Id.* (Emphasis added).

[74] Algernon Sidney was an English politician and a republican political theorist in the 17th century, an influence of John Locke. Chris Baker, *Algernon Sidney: Forgotten Founding Father* (Oct. 1, 1997), https://fee.org/articles/algernon-sidney-forgotten-founding-father/.

his commands, and depends upon his will."[75] Further, those living during the American Revolution related the situation of the colonist subjects of the British crown to that of slaves.[76]

It would serve neither the furtherance of societal flourishing nor the purpose of the Amendment to expand the term slavery to that degree. However, the Amendment does not only prohibit slavery. As mentioned above, it also prohibits involuntary servitude.[77] *Involuntary servitude* is "the condition of one forced to labor—for pay or not—for another by coercion or imprisonment."[78] *Coercion* is the "compulsion of a free agent by physical, moral, or economic force or threat of physical force."[79] While this is a broad definition, Justice O'Connor's opinion in *Kozminski* serves to guide its application.[80] According to Justice O'Connor, the real focus of involuntary servitude, in the scope of the Amendment, is on "situations in which the victim is compelled to work by law."[81] This is not only a more workable definition for courts, but it also is more workable for society. Economic and moral coercion are ubiquitous in society, but physical and legal coercion, at least with respect to creation of contracts, are less prevalent.[82] This is not to suggest that ubiquity equals acceptability, but it does go to practicality.

The general impression seems to be that the Thirteenth Amendment was meant to eliminate slavery and should be limited as such. Slavery, it could, and likely should, be argued, was only meant to refer to chattel slavery. Involuntary servitude, it could likewise be argued, was meant to refer to slavery by another name. Many would suggest that the meanings should be limited as such, but why?[83] The Fourteenth Amendment, passed shortly after the Thirteenth in the wake of the Civil War, has been used as the basis for expanding individual liberty to people from all

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[75] ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 349–50 (Joseph Cellini ed. 1979) (1698).

[76] Balkin & Levinson, *supra* note 67, at 1483–84.

[77] U.S. CONST. amend. XIII, § 1.

[78] *Servitude*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[79] *Coercion*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[80] Kozminski, 487 U.S. at 942–43.

[81] *Id.* at 942.

[82] *Id.*

[83] The Slaughter-House Cases addressed the Thirteenth Amendment early on, seemingly limited the phrase "involuntary servitude" to "forbid[ding] all shades and conditions of African slavery." Slaughter-House Cases, 83 U.S. 36, 69 (1973). However, the Slaughter-House Cases dealt with butchers having to do their business in a particular place. Id. at 59. They did not deal with individuals having to perform services against their will. Subsequent cases have applied a broader meaning to the phrase. Kozminski, 487 U.S. at 942.

backgrounds.[84] Substantive due process has been used to achieve results such as the right to marry,[85] the right to custody of one's children,[86] the right to keep the family together,[87] the right of parents to control the upbringing of their children,[88] the right to procreate,[89] and a plethora of others.[90] What can easily be gleaned from the use of the Fourteenth Amendment in such a way is that the post-Civil War amendments had one core purpose: to increase freedom and individual liberty.[91] Therefore, it would not be out of character to interpret the Thirteenth Amendment similarly. This is especially true when one considers that the Fourteenth Amendment never explicitly mentions any of the substantive due process rights. It does not even mention *substantive* due process.[92]

The jurisprudence of *substantive* due process has evolved to make up for the Supreme Court effectively writing the privileges and immunities clause out of the Fourteenth Amendment.[93] Perhaps it would be more effective, in lieu of reinstating the privileges and immunities clause, to allow other parts of the Constitution to carry some of the weight placed upon the shoulders of the due process clause.

Additionally, "[i]t cannot be presumed that any clause in the constitution is intended to be without effect."[94] Because of this, "real effect should be given to all the words it uses" in order to be "in accord with the usual canon of interpretation."[95] Following this well-established doctrine, it is much less of a stretch to find that the Thirteenth Amendment prevents forcing individuals to serve one another than to find the Fourteenth guarantees the right to contraceptives as the court did in *Griswold v. Connecticut*.[96]

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[84] *See id.* at 942.

[85] *See* Loving v. Virginia, 388 U.S. 1 (1967).

[86] *See* Santosky v. Kramer, 455 U.S. 745 (1982).

[87] *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977).

[88] *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

[89] *See* Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

[90] *Id.* at 539–540.

[91] *Id.* at 545.

[92] U.S. CONST. amend. XIII, § 1.

[93] *See* Erwin Chemerinsky, *Congress's Broad Powers Under Section 5 of the Fourteenth Amendment*, The Const. Ctr., https://constitutioncenter.org/interactive-constitution/amendments/amendment-xiv/congresss-broad-powers-under-section-5-of-the-fourteenth-amendment/clause/13, (last visited Oct. 5, 2018).

[94] Marbury v. Madison, 5 U.S. 137, 174 (1803).

[95] Myers v. United States, 272 U.S. 52, 151 (1926).

[96] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

The Thirteenth Amendment was dealt a hefty blow by The Slaughter-House Cases,[97] but it did not stay down.[98] As demonstrated by *Kozminski*, the Amendment is alive and well.[99] If applied in this way, the Amendment would limit the laws at issue only to the extent that they require services to be performed. In the case of *Masterpiece*, this argument would apply if the baker was forced to make a cake, but it would not apply if the baker was simply forced to sell one off the shelves.

While this interpretation of the Thirteenth Amendment may be unpersuasive to some, it is not the only potential alternative defense in the above cases. Two other areas of law provide potential bases. These two subjects are taught to first-year law students as fundamental foundations for common law doctrines. Property law and contract law are fundamental to Western society, both are explicitly mentioned in the Constitution,[100] and both were deeply contemplated by the thinkers whose ideas influenced our founding documents. [101] Each provide a potential alternative defense.

B. Property

Any individual interested in politics or history is undoubtedly familiar with the portion of the Declaration of Independence that says, "[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men . . . ."[102] What is also well known, although possibly to a lesser extent, is that this principle of rights and government was taken from many prominent thinkers of the 17th and 18th centuries, including John Locke.[103] Locke refers to "property, that is, his life, liberty and possessions [estate]" in *The Second Treatise of Civil Government*. [104] While there is some debate regarding why Thomas Jefferson replaced "possessions [estate]" or

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[97] *See* Slaughter-House Cases, 83 U.S. 36, 69 (1973).

[98] *See* United States v. Kozminski, 487 U.S. 931, 942 (1988).

[99] *Id.*

[100] "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10; "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." *id.* amend. V.

[101] *See* THOMAS G. WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDING: NATURAL RIGHTS, PUBLIC POLICY, AND THE MORAL CONDITIONS OF FREEDOM (2017).

[102] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[103] Carli N. Conklin, *The Origins of the Pursuit of Happiness*, 7 WASH. U. JURIS. REV. 195, 197–98 (2015).

[104] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 87 (Jonathan Bennett ed. 2017) (http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf).

"property" with "pursuit of happiness,"[105] the debate is not relevant here. It was the exception to the general wording of the phrase.[106] What is important is the concept of property and the purpose of government. Locke's phrase equates property to life, liberty, and estate. In doing so he recognizes that one has a property interest in his life, his liberty, and his tangible assets. While our current understandings of what the word "property" means has seemingly evolved to be more akin to what Locke referred to as "possessions," the underlying principle remains the same. The change is a matter of semantics rather than substance.

Just because one has a property interest in their life, liberty, and estate does not seem to make a difference until one understands the fundamental principle of property rights: the right to exclude.[107] James Madison wrote:

> This term [property] in its particular application means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.'
>
> In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage*.
>
> . . .
>
> [A] man has a property in his opinions and the free communication of them.
>
> . . .
>
> He has a property very dear to him in the safety and liberty of his person.
>
> He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.
>
> . . .
>
> Government is instituted to protect property of every sort . . . .[108]

This passage is yet another recognition that a property interest is much greater an interest than simply one's right to their tangible assets or other items. It is a broader concept that encompasses what is arguably the most important asset that any human being has: time. According to

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[105] Conklin, *supra* note 103.

[106] *Id.*

[107] Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730–31 (1998).

[108] James Madison, *Property*, NAT'L GAZETTE, March 27, 1792 (available online at https://founders.archives.gov/documents/Madison/01-14-02-0238) (emphasis in original).

some, Locke's very idea of property is rooted in the labor theory of property.[109] This is, basically, the idea that one can establish a property right in something that is unowned by exercising his labor on the thing.[110] This could be thought of as exchanging something in which individuals have an inherent right—their time—for a property interest in something that was, up until the exchange, unowned.

Whether one ascribes to the labor theory of property is not of particular importance to this argument. What is important is that one recognizes that without time all other property would be useless; therefore, in order for anyone to have an actual and functional property right in anything one must have a property interest in their time. Once one recognizes this, the idea that the same rules that apply to physical property should apply to time. The right to exclude should, and does, apply to time. Granted, this right, akin to all others, is not absolute.

While the Founding Fathers disagreed on a variety of issues, the ideas surrounding property do not seem to be among them. However they went further than just recognizing that property rights existed, they said that the very purpose of government is to protect these rights.[111] Many of the amendments in the Bill of Rights explicitly protect certain property rights.[112] Some are the exact ones mentioned by Madison in the full test of the above-quoted passage.[113] The First Amendment protects religious rights, speech rights, rights of the press, the right to peacefully assemble, the right to freely associate, and more.[114] Each of these rights fits neatly within those described by Madison.[115] The Second Amendment[116] protects the right to self-defense via armaments.[117] Madison talks about the

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[109] *See* Karen I. Vaughn, *John Locke and the Labor Theory of Value,* 2 J. OF LIBERTARIAN STUD. 311 (1978).

[110] *Id.*

[111] "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, depriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or abolish it, and to institute a new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[112] *See* U.S. CONST. amends. IV–V.

[113] Madison, *supra* note 108.

[114] U.S. CONST. amend. I; NAACP v. Alabama, 377 U.S. 288 (1964).

[115] Madison, *supra* note 108.

[116] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

[117] District of Columbia v. Heller, 554 U.S. 570, 628–30 (2008).

property right in safety.[118] The Third Amendment's property implications are rather obvious.[119] The rights in the Fourth,[120] Fifth,[121] and Sixth Amendments[122]—those that deal with searches and seizures, criminal and civil procedure, and due process—deal with liberty interests that fall under the definition of property.[123] Other key amendments, such as the Thirteenth, discussed above, and the Fourteenth, deal with protecting property interests.[124]

Continuing where he left off, Madison says, "Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[125] The significance of this will be examined more deeply later.

Furthermore, the right to property is not merely a principle we know the founders held dear; they put it in the Constitution. The Fifth Amendment guarantees that an individual shall not be deprived of life, liberty, or property without due process of law.[126] Here, again, it is a variation on Locke's idea of a property interest in life, liberty, and estate.[127] Even if the word "property," in this context, is meant to be limited to mean estate, the Amendment precedes the term with recognition of life and liberty.[128] The Fourteenth Amendment places the same restriction on the states.[129]

If the property-based argument were to be applied to *Masterpiece*, the baker could refuse to serve or sell depending on the property right at issue. The property right focused on here is essentially time. Therefore, the property argument, as made here, would function similarly to the Thirteenth Amendment argument. The difference is that the property argument could be broadened more easily.

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[118] Madison, *supra* note 108.

[119] The Amendment reads, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

[120] U.S. CONST. amend. IV.

[121] U.S. CONST. amend. V.

[122] U.S. CONST. amend. VI.

[123] LOCKE, *supra* note 104, § 87.

[124] U.S. CONST. amend. XIII, XIV.

[125] Madison, *supra* note 108 (emphasis in original).

[126] U.S. CONST. amend. V.

[127] LOCKE, *supra* note 104, § 87; *see also id.*

[128] U.S. CONST. amend. V.

[129] *See* U.S. CONST. amend. XIV.

C. Contracts

Yet another area of law seemingly ignored by the public accommodation statutes described above, at least for the providing of services, is the law of contracts. There are three basic elements of every contract: offer, acceptance, and consideration.[130] There is no question that two of the three elements are easily met, but in these situations the third is missing. The key to acceptance is that it must be voluntary, not coerced.[131] If acceptance is coerced, the contract is not binding.[132]

Before continuing with why these laws violate basic contract principles, it is important to clarify what portion of these laws do the violating. A contract can come in two basic forms: a promise in exchange for a promise or a promise in exchange for performance.[133] If a performance is exchanged for a performance, it is not a contract but a trade.[134] These arguments apply specifically to contracts and not to trades. This is not to say some of the arguments could not be applied to trades, simply that the arguments here are limited to contract formation. Therefore, these arguments only apply to service contracts and not to a simple sale of an already existing good:

> An offer is . . . an act whereby one person confers upon another the power to create contractual relations between them . . . . It must be an act that leads the offeree reasonably to believe that a power to create a contract is conferred upon him . . . . It is on this ground that we must exclude invitations to deal or acts or mere preliminary negotiation, and acts . . . [done] without intent to create legal relationships.[135]

The key to an offer is that it gives the offeree the power to create a contract through acceptance, or as the Second Restatement phrases it, "[a]n offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."[136] Understanding this, if simply being a business that offers a certain category of product is an offer, the

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[130] E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS 33, 140–41 (8th ed. 2013).

[131] *See* Omri Ben-Shahar, *Contracts Without Consent: Exploring a New Basis for Contractual Liability*, 152 U. PA. L. REV. 1829, 1829–30 (2004).

[132] FARNSWORTH ET AL., *supra* note 130, at 357.

[133] *Id.* at 40.

[134] *See generally id.* (Noting the distinctions between different kinds of contract exchanges).

[135] Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 181–82 (1917).

[136] RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 2013).

request to create a service contract would be the acceptance; however, that is not the case. One situation in which courts have found offers to exist is in advertisements. An advertisement can be considered an offer only if it is "clear, definite, and explicit, and leaves nothing open for negotiation."[137] In order for a business to make an advertisement, there must be a business. If the existence of the business was enough to constitute an offer on its own, all business advertisements would simply be an extension of that offer. Because courts have found that not all advertisements are offers,[138] it follows that the mere existence of a business that serves the public in a certain way is not an offer to serve any individual. It is an invitation for offers.

Additionally, courts have extended typical offer rules to advertisements, requiring that they are "clear, definite, and explicit, and leave[] nothing open for negotiation."[139] If that is the case, the mere existence of a service provider, especially one where the service is to create something custom, cannot be an offer. For instance, in the case of *Masterpiece*, the couple was requesting a custom cake.[140] Until the design for the cake was decided upon, there could not be an offer because there was still much up for negotiation. This seems to be recognized in general practice. For example, Colorado does not force all bakeries to make all custom cakes for all customers.[141]

In *Jack v. Azucar Bakery* and its companion cases, the Colorado Civil Rights Division found that bakeries did not discriminate against a Christian patron because he was a Christian but due to the offensiveness of his message.[142] These cases demonstrate Colorado's understanding that service providers have the right to refuse certain contracts; this is a recognition that their mere existence is not an offer.

This means that the earliest an offer could occur is when the patron comes in and requests a service be provided. Once that offer is made, acceptance can occur. "An acceptance is a voluntary act of the offeree whereby he exercises the power conferred upon him by the offer, and thereby creates the set of legal relations called a contract."[143] Because it

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[137] Lefkowitz v. Great Minneapolis Surplus Store, 86 N.W.2d 689, 691 (Minn. 1957).

[138] *See, e.g.*, *id.*

[139] *Id.*

[140] Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276 (Colo. App. 2015).

[141] *See* Jack v. Azucar Bakery, Charge No. P20140069X (Colo. Civil Rights Div. Mar. 24, 2015); Jack v. Le Bakery Sensual, Inc., Charge No. P20140070X (Colo. Civil Rights Div. Mar. 24, 2015); Jack v. Gateaux, Ltd., Charge No. P20140071X (Colo. Civil Rights Div. Mar. 24, 2015).

[142] Azucar Bakery, Charge No. P20140069X; Le Bakery Sensual, Inc., Charge No. P20140070X; Gateaux, Ltd., Charge No. P20140071X.

[143] Corbin, *supra* note 135, at 199.

is the acceptance that creates the legal relationship called a contract, there is no legal relationship before the contract is formed.

Recognizing that no legal relationship is formed until the service provider agrees to serve the patron is key to understanding what these laws do. These laws force acceptance of offers; they force people to enter contracts. This brings the argument back to the Thirteenth Amendment, discussed above. As mentioned, the Supreme Court has held that peonage violates the Thirteenth Amendment.[144] If peonage, "a condition in which the victim is coerced by threat of legal sanction to work off a debt to a master," [145] violates the Thirteenth Amendment, why would forced acceptance be allowed? Peonage is prohibited because if it uses legal threats to force a debt to be worked off, it would follow that forced acceptance of a contract should be prohibited because it uses legal threats to force a debt to be created. It makes no sense to force a debt to be created under the threat of legal sanctions but not to force the same debt to be worked off by the same threat.

"American courts, treatise writers, and commentators frequently justify" lack of court-mandated specific performance of contracts on the grounds that specific performance violates the Thirteenth Amendment,[146] but this has been contested.[147] One of the factors commentators would have courts consider in deciding whether a specific situation of specific performance violates the Thirteenth Amendment is whether "the promisor [entered] the contract while in a state of 'perfect freedom,' or [whether] the promisee ha[d] some overarching power over the promisor."[148] In the situations discussed above, those seeking the services exercised, or are exercising, the power of the government to force the acceptance of an offer.[149] There is no power more overarching than the power of the state.[150] Therefore, even if one accepts the notion that specific performance is not a per se violation of the Thirteenth Amendment, laws forcing the creation of service contracts do violate the Amendment.

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[144] United States v. Kozminski, 487 U.S. 931, 943 (1988).

[145] *Id.*

[146] Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020, 2022–23 (2009) (citations omitted).

[147] *Id.* at 2023.

[148] *Id.* at 2024.

[149] Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276 (Colo. App. 2015); Washington v. Arlene's Flowers, 389 P.3d 543, 548 (Wash. 2017); Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013).

[150] *See generally* Robert Longley, *What is Federalsim? Definition and How it Works in the US*, THOUGHTCO., https://www.thoughtco.com/federalism-powers-national-and-state-governments-3321841 (last updated Aug. 3, 2018) (explaining the powers given by the U.S. Constitution to both the State and National government).

Some might argue that contract law provides no constitutional basis for invalidating the laws at issue. They might mention the doctrines from the *Lockner* Era and how the Court backed away from the harsh scrutiny of economic regulations.[151] But the minimization of economic liberties in Supreme Court doctrine does not lessen the arguments made above. *Lockner* Era jurisprudence, which has been minimized since 1937,[152] emphasized freedom *of* contract.[153] The arguments being made in this Note, relating to contract law, emphasize the freedom *from* contract. Focusing on freedom *from* rather than freedom *of* takes the argument away from an argument about economic liberty and to an argument against forced labor. But even if these rights are as described above, they are not worth much, practically speaking, if a court refuses to enforce them. So do they pass the test?

III. FUNDAMENTAL RIGHTS ANALYSIS

A. Framework

In analyzing whether a particular law violates the Constitution, courts often apply a fundamental rights analysis.[154] The analysis has four parts.[155] First, the analysis looks to whether there is a fundamental right.[156] This Note has so far focused on the existence of the right to discriminate in certain circumstances described at length above. Whether the right be based in the Thirteenth Amendment, property law, contract law, or some combination thereof, it clearly exists. The question becomes whether it is fundamental.[157]

Second, the analysis looks to whether the right is infringed.[158] This is the easiest part of the test to meet here. Once the right is established, government limiting or elimination of the right constitutes infringement.[159]

Third and fourth, courts look to the ends and the means.[160] If the right is fundamental, the government regulations are subject to strict

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[151] Erwin Chemerinsky, *A New Era for the Supreme Court*, THE AM. PROSPECT (July 2, 2018), http://prospect.org/article/new-era-supreme-court-0.

[152] *See id.*

[153] Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1502–03 (1999).

[154] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 827–28 (5th ed. 2015).

[155] *Id.* at 828–31.

[156] *Id.* at 828.

[157] *Id.* at 827–28.

[158] *Id.* at 828, 830.

[159] *Id.* at 830–31.

[160] *Id.* at 828, 831.

scrutiny, in other words the regulation must be narrowly tailored to serve a compelling interest.[161] If the right is not fundamental, the government regulations are only subject to the rational basis test where the ends must be legitimate and the means rationally related. [162]

B. Application

1. Is the right fundamental?

There are various factors used to determine whether any given right is fundamental.[163] One is an originalist approach.[164] While the strictness of the originalism can vary,[165] the basic concept is that those rights explicitly stated in the Constitution, or those clearly intended by the framers, are fundamental.[166] Under this approach, the right at issue here would be fundamental. The Thirteenth Amendment is quite obviously explicitly stated in the Constitution.[167] While the rights to property and contract do not have a dedicated amendment, they are explicitly referenced.[168]

Another approach is whether the right is "deeply rooted in this Nation's history and tradition."[169] While the Thirteenth Amendment was not passed until the late 1800s,[170] it codified principles that were in existence long before.[171] Property and contract law are two of the most deeply rooted aspects of modern American law.[172] This is so true that virtually every law school in the country mandates that students take

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[161] Doug Linder, *Levels of Scrutiny Under the Equal Protection Clause*, EXPLORING CONST. L., http://law2.umkc.edu/FACULTY/PROJECTS/FTRIALS/conlaw/epcscrutiny.htm (last visited Oct. 15, 2018) [hereinafter Linder].

[162] *Id.*

[163] *See id.*

[164] Stephen Calabresi, *On Originalism in Constitutional Interpretation*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/white-pages/on-originalism-in-constitutional-interpretation (last visited Oct. 15, 2018) [hereinafter Calabresi].

[165] *See* Linder, *supra* note 161.

[166] Calabresi, *supra* note 164.

[167] U.S. CONST. amend. XIII.

[168] U.S. CONST. art. I, § 10; *id.* amend. V.

[169] Washington v. Glucksburg, 521 U.S. 702, 721 (1997).

[170] *13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)*, OUR DOCUMENTS INITIATIVE, https://www.ourdocuments.gov/doc.php?flash=true&doc=40 (last visited Oct. 2, 2018).

[171] *E.g.*, Confederation, *supra* note 66.

[172] G. Edward White, *The Path of American Jurisprudence*, 124 U. PA. L. REV. 1212, 1224–29 (1976).

them in their first year.[173] While the rights are not the same as they were at their inception, the core principles—such as the right to exclude in property and the need for acceptance of an offer before a contract is formed—are alive and well today.[174]

There are different approaches that have been followed for whether a right is "deeply rooted in this Nation's history and tradition."[175] In *Michael H. v. Gerald D.*, Justice Scalia argued that, when analyzing whether a right is fundamental, the right must be specifically defined.[176] Justice Brennan, in his dissent, argued that fundamental rights should be more broadly defined.[177] While the particular approach would be relevant to what portion of the right is fundamental, this argument can succeed under either view. Under Scalia's interpretation, the rights would be the right to exclude in property law and the right to be free from forced acceptance in contract law. Under Brennan's view, the rights could be simply the rights to property and contract.

A third approach says that the Court should use natural law principles in determining what rights are fundamental.[178] As discussed above, property law is one of the core principles of natural law. The Thirteenth Amendment flows from the ideas of natural law because it recognizes self-ownership, a property interest in oneself and one's time.[179] Contract law is similarly rooted in natural law because it seeks to allow individuals to mutually order their own affairs, that which they have natural rights to, in the ways they see fit.

If one is not convinced that these rights are fundamental, it might help to look at what has been considered fundamental by the Court. The right to contraception, [180] marriage, [181] travel, [182] refuse medical treatment,[183] and many others have been deemed fundamental. While these rights are all important, they are neither mentioned in the

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[173] Shawn O'Connor, *What to Expect as a First Year Law Student*, U.S. NEWS (May 21, 2012, 10:00 AM), https://www.usnews.com/education/blogs/law-admissions-lowdown/2012/05/21/what-to-expect-as-a-first-year-law-student.

[174] *See* Ben-Shahar, *supra* note 131, at 1829–30; Merrill, *supra* note 107, at 730.

[175] Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

[176] *See* Michael H. v. Gerald D., 491 U.S. 110, 2336–42 (1989).

[177] *See id.* at 2352–53.

[178] Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2269–70 (2001).

[179] *See* Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 REGENT U. L. REV. 33, 51–57 (1997).

[180] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

[181] Loving v. Virginia, 388 U.S. 1, 2–12 (1967).

[182] Shapiro v. Thompson, 394 U.S. 618, 629–631 (1969).

[183] Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 269–287 (1990).

Constitution nor are they as fundamental as the rights underlying the arguments in this Note.

Each argument for the right at issue falls into each potential approach. While there are various other proposed approaches to determining whether a right is fundamental,[184] none are as prevalent as those discussed here.[185]

2. Is the right infringed?

As mentioned above, showing infringement of an established right is rather straightforward. "There, of course, is no doubt that a constitutional right is infringed and the government's action must be justified when the exercise of the right is prohibited."[186] The statutes prohibit the exercise of each of the three rights discussed above.

3. Is the justification sufficient?

Because the right at issue is fundamental, it is subject to strict scrutiny, and therefore the ends must be compelling. [187] Several potentially compelling government interests come to mind: allowing individuals to receive necessary goods and services; punishing individuals who discriminate; and protecting individuals' dignity are among a few.

a. Provision of Services

One of the most obvious justifications for any sort of civil rights law is that people need certain products and services in order to lead a decent life. The issue with this interest is what products and services are necessary to lead a decent life? One would likely consider medical attention, legal services, and housing necessary to an extent where ensuring they are provided is a compelling government interest. On the other hand, boutique clothing, custom hardware, and luxury automobiles are more luxury than necessity. Wherever one thinks the line should be drawn, it would seem that a custom wedding cake, a particular wedding photographer, or particular floral arrangements would fall into the category of luxury rather than that of necessity. Allowing for the acquisition of luxuries, or non-necessities, is a less compelling interest than allowing for the acquisition of necessities, but one could still make the argument that it is compelling enough.[188] For the purposes of this

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[184] *Id.* at 278.

[185] *See id*. at 295–304.

[186] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 937, 937–38 (4th ed. 2013).

[187] Linder, *supra* note 161.

[188] *See Luxury,* MERRIAM-WEBSTER DICTIONARY (11th ed. 2018) (defined as "a condition of abundance or great ease and comfort"); *see also id. Necessary* (defined as "absolutely needed: required").

Note, one can consider allowing for the acquisition of non-necessities to be a compelling interest.

b. Punishing Discriminators

Another potential governmental interest is to punish those the government determines to be bigoted. This interest should not pass even the lowest bar. This justification punishes the motivation instead of the action. Making something illegal based on the thought behind the action rather than the action itself is essentially criminalizing thought. Freedom of thought is protected by the First Amendment.[189]

One might argue that punishing discriminators is not actually punishing thought but punishing action. This does not seem to be the case. In order to understand why punishing discrimination is actually punishing thought, one must consider the structure of anti-discrimination laws. The discrimination laws discussed above, and any other law that prohibits specific kinds of discrimination, provide exceptions to a general rule.[190] In general, individuals can refuse service.[191] Anyone who has gone to a local fast food restaurant has undoubtedly seen a "no shirt, no shoes, no service" sign, or one of similar purpose. This sign would not be acceptable if individuals and companies were not allowed to discriminate.

Once one understands that discrimination, except in those areas covered by statutes, is legal, it follows that the statutes are an exception to the general rule. The next step is to determine what the exception is based upon. The exceptions here are exceptions based upon motivation.[192] The statutes do not prohibit discrimination against a person who is black; they prohibit discriminating against a person *because* he or she is black.[193] They do not prohibit discriminating against someone who is homosexual, they prohibit discriminating against a person *because* he or she is homosexual. [194] This is a regulation of motivation and, therefore, a regulation of thought in violation of the First Amendment.

Another necessary clarification is that this interest is separate and distinct from the previous interest labelled "provision of services." If the goal is to punish those who refuse service for any reason, the previous argument is applicable. If the goal is to punish those who refuse service for a specific reason, this argument can be applied.

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[189] Schneiderman v. United States, 320 U.S. 118, 137 (1943).

[190] *See* COLO. REV. STAT. § 24-34-601 (2014); WASH. REV. CODE ANN. § 49.60.215 (LexisNexis 2009); N.M. STAT. ANN. § 28-1-7 (LexisNexis 2004).

[191] *See* § 24-34-601; § 49.60.215; § 28-1-7.

[192] *See* § 24-34-601; § 28-1-7.

[193] § 24-34-601; § 28-1-7.

[194] § 24-34-601; § 28-1-7.

c. Protecting Dignity

The third end posited above is to protect individuals' dignity. It is quite easy to make an argument saying that discrimination infringes on the disciminatee's dignity. And it could follow that protecting that dignity would be a legitimate government interest; however, to say that protecting someone from an affront to dignity is a compelling government interest significant enough to infringe upon a fundamental right is to go too far.

In order to protect the dignity of the discriminatee, the discriminator's dignity will likely be affronted. The protecting dignity argument is based on the idea that being refused service harms one's dignity.[195] If that is the case, one question follows: why? The most obvious reason that refusal of service could harm one's dignity is that it is restricting their options in a manner they were not expecting.[196] When people are denied that which they feel entitled to, the denial itself can feel like an affront to dignity.

If this is the case, then this potential purpose is counterproductive. If denying people that which they believe they are entitled to can be an affront to dignity, then denying people their right to refuse is likewise harmful. The right to one's own time is more fundamental than the right to the services of another. If this was not the case, every person would be the servant of all others and nobody would be the master of his own destiny.

Other civil rights cases have protected individuals' liberty and in doing so have protected their dignity.[197] Cases dealing with voting,[198] schooling,[199] marriage,[200] and more[201] have all protected individuals' liberty and dignity. However, unlike the statutes at issue here,[202] those cases have protected individual liberty and dignity from infringement by state actors.[203] The statutes here attempt to protect individuals' dignity

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[195] Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 200 (2012).

[196] Louise Melling, *Hobby Lobby and the Dignity of the Refused*, ACLU BLOG (July 17, 2014, 11:12 AM), https://www.aclu.org/blog/religious-liberty/using-religion-discriminate/hobby-lobby-and-dignity-refused.

[197] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

[198] *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 185 (2008).

[199] *See* Brown v. Bd. of Educ., 347 U.S. 483, 487 (1954).

[200] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

[201] *E.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977).

[202] *See* COLO. REV. STAT. § 24-34-601 (2018); WASH. REV. CODE § 49.60.215 (LexisNexis 2011); N.M. STAT. ANN. § 28-1-7 (LexisNexis 2004).

[203] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015); Crawford, 553 U.S. at 204; Moore, 431 U.S. at 506; Loving, 388 U.S. at 12; Brown, 347 U.S. at 495.

from infringement by other individuals[204] and in the process deprive the supposed affronters of their own dignity.

4. Are the means sufficiently related?

a. Provision of Services

The purpose of this Note is not to tear apart all of civil rights law but to acknowledge that some of these laws have gone too far while others are no longer necessary at all. Fifty years ago, this country looked very different than it does today.[205] While people argue over the extent to which racism has been ameliorated, it does not play the same role that it did before the Civil Rights Movement.[206] But even if it did, on a micro level, technology has reshaped society in ways our ancestors could never have imagined.

In decades past, there were many small towns across the country with a single grocer.[207] There were stretches farther than a day's travel with as few as one place for travelers to stay.[208] There were towns without a single restaurant open to non-white travelers.[209] This is not the case today.[210] One of the greatest leaps forward in recent history is the Internet. On sites like Amazon, eBay, or websites for any of the dozens of mega-retailers people are people; there is no room for racism, sexism, or other forms of bigotry when ordering online. For lodging, sites like Airbnb

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[204] *See* COLO. REV. STAT. § 24-34-601 (2018); WASH. REV. CODE § 49.60.215 (LexisNexis 2011); N.M. STAT. ANN. § 28-1-7 (LexisNexis 2004).

[205] *See, e.g.*, Jami Floyd, *1968: 50 Years Later*, N.Y. PUB. RADIO: WNYC (Sept. 25, 2018), https://www.wnyc.org/story/1968-50-years-later/.

[206] *See, e.g.*, Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES (Nov. 4, 2008), http://www.nytimes.com/2008/11/05/us/politics/05elect.html.

[207] *See, e.g.*, Joyce Hoelting, *The Future of Rural Grocery Stores*, U. MINN. EXTENSION: VITAL CONNECTIONS (Reviewed in 2016), https://extension.umn.edu/vital-connections/future-rural-grocery-stores#sources-1014510.

[208] *See* Olga, *A Brief History of Hotels*, BIDROOM: BLOGROOM (Nov. 6, 2017), https://www.bidroom.com/blog/brief-history-hotels/.

[209] *See* Jan Whitaker, *Restaurant-ing as a Civil Right*, RESTAURANT-ING THROUGH HISTORY (Aug. 11, 2014, 3:09 PM), https://restaurant-ingthroughhistory.com/tag/racial-segregation/; Dara Lind, *The Segregation-era Travel Guide Saved Black Americans from Having to Sleep in their Cars*, VOX (Nov. 22, 2016, 10:21 AM), https://www.vox.com/identities/2015/11/29/9813966/green-book-segregation-history; Erin Blackmore, *A Black American's Guide to Travel in the Jim Crow Era*, SMITHSONIAN: SMART NEWS (Nov. 3, 2015), https://www.smithsonianmag.com/smart-news/read-these-chilling-charming-guides-black-travelers-during-jim-crow-era-180957131/.

[210] *See* COLO. REV. STAT. § 24-34-601 (2018); WASH. REV. CODE § 49.60.215 (LexisNexis 2011); N.M. STAT. ANN. § 28-1-7 (LexisNexis 2004).

have exponentially increased options for travelers.[211] Amazon grocery reduces the need for many to go to the store. While these advancements have by no means eliminated the racism in our society, they have at least contributed to the dilution of its effects.[212]

This is not to say that sites like Airbnb have eliminated instances of racism or other forms of bigotry. There have been instances of Airbnb hosts discriminating.[213] It is even possible that the discrimination would not have happened but for Airbnb's existence. To focus on this, however, is to miss the larger point. The beauty of more choices is not that the bad ones are eliminated, but that there is a greater chance of finding a good one. In the case of Airbnb, this is easily demonstrable. Imagine a small town with only one hotel. If the hotel does not serve homosexuals, then homosexuals have no place to stay in the town. On the other hand, the same town could have half a dozen Airbnb hosts. Even if half of them refuse to serve homosexuals, there are still three potential places in the town for homosexuals to stay.

Of course, this is not a perfect analogy. Many small towns do not have a single Airbnb or any equivalent. This does not mean the situation is inadequate, merely that it still has room to improve. Having more providers means that certain providers can discriminate without infringing on the ability of individuals to receive similar services.

To further see the influence of the Internet one can simply browse Twitter. It is not hard to find backlash against those whom the "Twittersphere" deems worthy of reprisal.[214] Whether the backlash to any particular action is justified is not as relevant as the simple fact that social media has changed the landscape for businesses. Whether it was Hobby

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[211] *About Us*, AIRBNB PRESS ROOM, https://press.atairbnb.com/about-us/ (last visited Oct. 11, 2018) ("Airbnb's accommodation marketplace provides access to 5+ million unique places to stay in more than 81,000 cities and 191 countries.")..

[212] *See generally* Charlton McIlwain, *Is There Structural Racism on the Internet?*, THE CONVERSATION (June 12, 2017, 7:02 AM), https://theconversation.com/is-there-structural-racism-on-the-internet-72919 (noting that website spaces are less racially segregated than the physical world because websites can't differentiate between users' skin colors).

[213] *See*, *e.g.*, Hugo Martin, *Airbnb Host Must Pay $5,000 for Canceling Reservation Based on Race*, L.A. TIMES (July 13, 2017, 2:50 PM), http://www.latimes.com/business/la-fi-airbnb-discrimination-20170713-story.html.

[214] *See*, *e.g.*, *Backlash Grows Against N Carolina's Discrimination Law*, BBC NEWS (Mar. 30, 2016), http://www.bbc.com/news/world-us-canada-35928098; Abid Rahman, *H&M Faces Twitter Backlash for "Racist" Hoodie*, HOLLYWOOD REP. (Jan. 10, 2018), https://www.hollywoodreporter.com/news/h-m-faces-twitter-backlash-racist-hoodie-1072791; Kate Taylor, *Kellogg's Apologizes for Cereal Box Following Criticism it "Teaches Kids Racism*," BUS. INSIDER (Oct.26, 2017, 9:18 AM), http://www.businessinsider.com/kelloggs-apologizes-racist-corn-pops-box-backlash-2017-10.

Lobby's refusal to provide certain forms of birth control,[215] or Chick-fil-A and their founder's opposition to gay marriage,[216] the whole world can now see any uncouth action taken by a business. While some campaigns are more effective than others, modern businesses have to be aware of how their actions will be seen by the world instead of just how they would be perceived by their locality.

In other words, it is now much harder to discriminate and succeed in business. Society today is not as willing to accept abhorrent behavior as it was in the past.[217] Even if society had not changed, individuals' ability to access goods has greatly improved.[218] Thanks to the Internet and other advances, virtually any item necessary to live a decent life can be acquired nearly anywhere in the world, including all of the United States, by just about anyone with even modest means.[219]

The only services, that are not immediately required (such as emergency medical attention), that cannot be acquired in a plethora of ways would be those services which are bespoke, in other words those services that are unique. Here, it is not the services that are sought but the server, as in *Masterpiece*.[220] In *Masterpiece*, the couple was seeking a cake;[221] in *Arlene's Flowers*, the couple wanted floral arrangements;[222] in *Elaine Photography*, the couple wanted photographs taken of their commitment ceremony.[223] In each of these cases the couple could have found other providers of the good or service they sought, but the specific provider mattered to them. While it cannot seriously be argued that who provides a service is irrelevant, it also cannot seriously be argued that an individual's rights, as described above, can be trumped by another individual's desire for their services.

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[215] Jaime Fuller, *Here's What You Need to Know About the Hobby Lobby Case*, WASH. POST (Mar. 24, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/03/24/heres-what-you-need-to-know-about-the-hobby-lobby-case/?utm_term=.ed3e2c2c3550.

[216] Hayley Petersen, *'Chick-fil-A is about food': How National Ambitions Led the Chain to Shed its Polarizing Image*, BUS. INSIDER (Aug. 6, 2017, 7:42 AM), http://www.business-insider.com/chick-fil-a-reinvents-itself-liberal-conservative-2017-5.

[217] *See* COLO. REV. STAT. § 24-34-601 (2018); WASH. REV. CODE § 49.60.215 (LexisNexis 2011); N.M. STAT. ANN. § 28-1-7 (LexisNexis 2004).

[218] *See*, *e.g.*, AMAZON, https://www.amazon.com (last visited Oct. 13, 2018); EBAY, https://www.ebay.com (last visited Oct. 13, 2018); GRUBHUB, https://www.grubhub.com (last visited Oct. 13, 2018); POSTMATES, https://postmates.com (last visited Oct. 13, 2018).

[219] *See, e.g.*, *id*.

[220] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).

[221] *Id.*

[222] Washington v. Arlene's Flowers, 389 P.3d 543, 549 (Wash. 2017), *vacated*, 138 S. Ct. 2671 (2018).

[223] Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (2013).

b. Punishing Discriminators

Punishing those the government finds to be bigoted is no better a justification. As discussed above, punishing people for discriminating in a way that punishes thought violates the First Amendment.[224] Thus this justification cannot pass strict scrutiny. Even if a court incorrectly found this to be a compelling end, the laws would still not be narrowly tailored means. In order to be narrowly tailored, the government must show that no less intrusive means would be effective. [225] Instead of forcing individuals to serve those who fall into certain categories, it could be less intrusive to require businesses who refuse service to provide potential alternative service providers. In a California case, a baker who refused to make custom cakes for homosexual weddings had an agreement with a competitor that she would send customers who wanted such cakes to them.[226] In the same case, the judge said, "[t]he fact that Rodriguez-Del Rios feel they will suffer indignity from Miller's choice is not sufficient to deny constitutional protection."[227]

c. Protecting Dignity

As mentioned above, a means is narrowly tailored when the government can show that no less intrusive means would be effective.[228] It would follow that if a means had an effect opposite that which was intended, it would not pass strict scrutiny. Dignity is fickle. There is no guarantee that these laws would protect dignity at all, and there is quite a possibility that these laws would hamper dignity. For instance, the laws require individuals to be served, but they do not require the service providers to do so respectfully or in a manner that would protect dignity. [229] Additionally, laws forcing providers to serve individuals against their will could have a potential harm to the dignity of the providers.

CONCLUSION

"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."[230] Additionally, "Liberty must

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[224] *See* Schneiderman v. United States, 320 U.S. 118, 137 (1943).

[225] *See* Chemerinsky*, supra* note 93, at 6–7.

[226] Minute Order at 3, Dep't of Fair Emp't & Hous. v. Cathy's Creations, Inc., BCV-17-102855 (Super. Ct. of Cal. Cty. of Kern Feb. 5, 2018).

[227] *Id.* at 6.

[228] *Id.* at 5.

[229] *See* COLO. REV. STAT. § 24-34-601 (2018); WASH. REV. CODE § 49.60.215 (LexisNexis 2011), N.M. STAT. ANN. § 28-1-7 (LexisNexis 2004).

[230] Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972).

not be extinguished for want of a line that is clear."[231] This country was founded on an idea of liberty.[232] This idea was one of a limited government, limited in both size and scope. The government was not intended to create a vast plethora of positive rights; it was intended to protect the rights that every person naturally had.[233] Today, the government guarantees many positive rights, that is to say the government gives people many things they would not have otherwise had.[234] While the merits of this are debatable, the hierarchy should not be. Negative rights must have a higher priority than positive rights, at least according to our founding documents.[235] The situations at issue in this Note balance the two. They balance the negative rights of the service providers with the positive rights of the consumers. They are currently placing a greater significance on the positive rights than on the negative rights.[236] In order to acquiesce to this position, one must accept that the positive right to services of another outweighs a slew of negative rights, here exemplified in the form of the constitutional right to be free from involuntary servitude,[237] the property right to exclude,[238] and the contract right to freedom from contract.[239]

Some might dislike the arguments made in this Note. Some may accuse it of being a vessel that defends, or even encourages, discrimination. This, however, is quite the opposite of this Note's actual purpose. As mentioned above, there are two potential outcomes in cases like *Masterpiece*. Either the service provider loses and has to serve others against his will, or the service provider wins, and certain service providers can discriminate while others are left serving others against their will. The arguments in this Note are for liberty and equality, the freedom from forced servitude and the equal application of that freedom to all persons. The arguments made in this Note are, admittedly, not perfect, but they are made in the hope of increasing liberty for every person.

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[231] Planned Parenthood v. Casey, 505 U.S. 833, 869 (1992).

[232] *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

[233] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men . . . ." *Id.*

[234] *See, e.g.*, Drew Desilver, *What does the Federal Government Spend your Tax Dollars on?*, PEW RES. CTR. (Apr. 4, 2017), http://www.pewresearch.org/fact-tank/2017/04/04/what-does-the-federal-government-spend-your-tax-dollars-on-social-insurance-programs-mostly.

[235] *See* THE DECLARATION OF INDEPENDENCE, *supra* note 232.

[236] Desilver, *supra* note 234; Scott Vanatter, *On Obama's Definition of "Rights,"* FRONTIERS OF FREEDOM (Jan. 22, 2013), https://www.ff.org/on-obamas-definition-of-rights.

[237] U.S. CONST. amend. XIII, § 1.

[238] Merrill, *supra* note 107, at 730.

[239] *See* Ben-Shahar, *supra* note 131.