FREEDOM OF CONTRACT VERSUS THE ANTIDISCRIMINATION PRINCIPLE: A CRITICAL LOOK AT THE TENSION BETWEEN CONTRACTUAL FREEDOM AND ANTIDISCRIMINATION PROVISIONS

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"An antidiscrimination law is the antithesis of freedom of contract."[1]

I. INTRODUCTION

The freedom to enter into contracts is a basic right reserved to the people under Article I, Section 10 of the United States Constitution.[2] Furthermore, the right of an individual to make a contract relating to his or her business is a liberty interest protected by the Fourteenth Amendment of the Constitution.[3] These constitutional provisions are the classic sources of the freedom of contract.

While historically considered extremely important, the significance of freedom of contract has diminished substantially over the past 100 years.[4] This decline in the importance of contractual freedom has paralleled the decline in the significance of contracts in general.[5] In this country, however, the decline of freedom of contract seems to be more indicative of changing social mores with respect to the right of persons to determine

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[1]RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 3 (1992).

[2]U.S. CONST. art. I, § 10, cl. 1. Article I, Section 10 provides that "[n]o State shall . . . pass any . . . law impairing the obligation of Contracts." *Id.*

[3]*See* Lochner v. New York, 198 U.S. 45 (1905) (holding that a New York labor law prohibiting baker employees from working more than 60 hours per week unconstitutionally interfered with employees' freedom to contract).

[4]PATRICK S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 717 (1979).

[5]*Id.* at 726-27. This decline is evidenced by the numerous equitable contract principles (such as reliance and promissory estoppel) that purportedly give effect to the "intent" of the parties or to further equitable goals, while often disregarding the text of the written contract itself, or imposing contractual duties where no written contract exists at all. *See generally* ARTHUR L. CORBIN, CORBIN ON CONTRACTS 277-300 (1952).

unilaterally that they will not deal with another individual.[6]

With the advent of the civil rights movement,[7] a conflict between the principles of freedom of contract and antidiscrimination emerged.[8] The Thirteenth[9] and Fifteenth[10] Amendments prohibit the states from persecuting African-Americans by prohibiting slavery and certain types of voting discrimination.[11] Numerous state and federal antidiscrimination statutes have been enacted to implement the dictates of these amendments.[12]

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[6]*See infra* notes 140-146 and accompanying text.

[7]For an analysis of the sources and effect of the civil rights movement, see Michael John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889 (1995); J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

[8]*See infra* notes 9-18 and accompanying text.

[9]The Thirteenth Amendment provides:

> Section 1. Neither 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.
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

[10]The Fifteenth Amendment provides:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV.

[11]For an in-depth analysis of the impact of the Thirteenth Amendment, see Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1 (1995). For an analysis of the impact of the voting rights guaranteed by the Fifteenth Amendment, see Emma C. Jordan, *The Future of the Fifteenth Amendment*, 28 HOW. L.J. 541 (1985).

[12]Examples of these statutes include The Americans with Disabilities Act, 42 U.S.C. §§ 12101-213 (1990), The Fair Housing Act of 1968, 42 U.S.C. §§ 3601-31 (1968), The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1967), The Voting Rights Act of 1965, 42 U.S.C. § 1971, §§ 1973(a)-(p) (1965), and The Civil Rights Act of 1964, 42 U.S.C. §§ 2000(a)-(h)6 (1964).

Many of these statutes, however, go far beyond what was expressly mandated under the amendments.[13] Cases interpreting antidiscrimination laws have held that even some *private* actors are prohibited from discriminating, in certain contexts.[14] At common law this was referred to as the "duty to serve" doctrine,[15] and has since been termed the "public accommodations doctrine."[16] Yet, courts and commentators have long argued that persons have the right to choose with whom they will contract.[17] Antidiscrimination laws substantially limit this "choice" by prohibiting certain types of refusals to serve based upon "bad" motives.[18]

This Comment will examine the decline of the doctrine of freedom of contract and the associated increase in the importance of antidiscrimination in the United States. It will argue that the statutory implementation of the antidiscrimination principle promotes economic and racial justice without suppressing other important interests. Part II will examine the origins of freedom of contract. Part III will describe the source of the antidiscrimination principle in the United States and the tension between antidiscrimination and freedom of contract. Part IV will examine the shift in national priorities that led to the rise of antidiscrimination legislation and

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[13]The Thirteenth and Fifteenth Amendments explicitly prohibited only slavery (and involuntary servitude) and voting discrimination. U.S. CONST. amend. XIII & XV. *See supra* notes 9-10.

[14]*See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

[15]*See infra* notes 61-66 and accompanying text.

[16]42 U.S.C. § 2000(a)(b) defines "public accommodation" as a place of business that either affects interstate commerce or is supported by State action and provides meals, housing, and entertainment and is open to the public.

[17]*See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953 (1984). Epstein approvingly cited Payne v. Western & Atl. R.R. *Id.* at 954. In *Payne*, the court declared that:

> Men must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*.

81 Tenn. 507, 518-19 (1884).

[18]The "bad" motive Congress sought to discourage through the Civil Rights Acts was racial discrimination. *See infra* notes 75, 77, and 81. However, Congress extended "bad" motive status to *economic* discrimination as well. *See infra* Section III.B.2.

the associated decline of the importance of contractual freedom. It will conclude that there is a causal relationship between the rise of antidiscrimination legislation and the decline of contractual freedom. Finally, Part V will conclude that society has correctly determined that the principles underlying antidiscrimination legislation are more important than those underlying contractual freedom; therefore, the balance should properly be struck in favor of the antidiscrimination legislation.

II. THE CONCEPT OF FREEDOM OF CONTRACT

Although the concept can be traced to ancient Greece, in this country freedom of contract originated in the Declaration of Independence and Jeffersonian Democracy.[19] Contractual freedom was viewed as an extension of the concept of individual political freedom and human will from the public to the private arena.[20] The desirability of individual autonomy and economic efficiency lies at the core of freedom of contract.[21] Many theorists view freedom of contract as essential to economic progress.[22] It is almost universally agreed that having a legal mechanism for the

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[19]Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 366 (1921). The principle itself is included in the "sweeping generalities of the Declaration of Independence." *Id.* Jeffersonian democracy has as one of its essential tenets the limitation of governmental activity thus "allowing the individual free play." *Id.* The importance of contractual freedom at the time this country was founded can be inferred from its mention in the text of the Federal Constitution. U.S. CONST. art. I, § 10, cl. 1. The Article I, Section 10 prohibition on laws "impairing the obligation of contracts" demonstrates the importance to the founding fathers of limiting the government's ability to impinge upon contractual freedom. *Id.*

[20]Williston, *supra* note 19, at 366.

[21]Sandra J. Levin, Note, *Examining Restraints on Freedom to Contract as an Approach to Purchaser Dissatisfaction in the Computer Industry*, 74 CALIF. L. REV. 2101, 2115 (1986) (citing E. FARNSWORTH, CONTRACTS 21 (1982)). *See also* text accompanying notes 111-113.

[22]*Id.* at 2115. John Stuart Mill and Adam Smith are examples of two such theorists who have adopted the *laissez faire* principle. Williston, *supra* note 19, at 366. *Laissez faire* is the term developed to describe the policy of allowing parties to bargain freely without the governmental intervention inherent in all antidiscrimination legislation. *Id.* *Laissez faire* is defined as freedom from governmental intrusion into the bargaining process. *Id.* To John Stuart Mill, *laissez faire* emphasizes the idea that production and trade should progress unimpeded and the individual should be allowed to develop freely. *Id.* As Williston noted, however, that term has since come to mean "a careless assent to let things run along as best they may than any nobler idea." *Id.*

enforcement of contractual promises furthers the goal of economic efficiency.[23]

Freedom of contract did not achieve the status of quasi-constitutional right until the passage of the Fourteenth Amendment in 1868.[24] Prior to 1935, the United States Supreme Court held that one's right to contract in relation to his or her business is an individual liberty interest protected by the Fourteenth Amendment.[25] In the landmark case of *Lochner v. New York*,[26] the Court acknowledged the fundamental nature of the freedom to contract

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[23]Levin, *supra* note 21, at 2115-16.

[24]Williston, *supra* note 19, at 375. The 14th Amendment provides in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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; nor deny to any person within its jurisdiction the equal protection of the laws.
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.

[25]*See* Allgeyer v. Louisiana, 165 U.S. 578 (1897). In *Allgeyer*, the Court reviewed a Louisiana statute prohibiting persons from dealing with marine insurance companies which had not complied with all the laws of the state. *Id.* at 584. The Defendant was charged with violating the statute by mailing a letter of advice or certificate of marine insurance to the Atlantic Mutual Insurance Company of New York which advised Atlantic Mutual of the shipment of goods overseas in accordance with the terms of the contract. *Id.* at 584. The court held that while states could prohibit the making of certain contracts that violated public policy (for example, by passing statutes prohibiting persons from procuring insurance in the state from companies that were not incorporated under the laws of that state), the state could not prohibit persons from making a contract outside the state, to be performed outside the state, even though the insured item was temporarily within the state. *Id.* at 591-92. Because the contract was valid where it was made and performed, the state could not constitutionally prohibit performance of an act necessary for compliance with the contract. *Id.* at 592. The Court therefore struck down the Louisiana statute for violating the Fourteenth Amendment. *Id.* at 589.

[26]198 U.S. 45 (1905). In *Lochner*, the Court reviewed a challenge to a New York labor law prohibiting individuals from working more than sixty hours per week in a bakery or confectionery establishment. *Id.* at 52. After noting that the right of an individual to make contracts relating to his business is a Fourteenth Amendment liberty interest, the Court struck down the law as an unwarranted interference with that liberty interest. *Id.* at 53, 57.

by stating that "[i]t is a question of which of two powers or rights shall prevail — the power of the State to legislate or the right of the individual to liberty of person and freedom of contract."[27] The Court held that the right to purchase or sell labor was a liberty interest protected by the Fourteenth Amendment.[28] The "liberty of person and freedom of contract" referred to by the Court in *Lochner* became better known as economic due process.[29]

The Court's decisions in two cases, *Nebbia v. New York*[30] and *West Coast Hotel Company v. Parrish*,[31] signaled the end of the dominance of *Lochner's* economic liberty of contract view.[32] In *Nebbia*, the Court stated that "[t]he Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases."[33] The Court determined that certain types of businesses could be prohibited or their practice conditioned.[34] Ultimately, the Court concluded that since the regulation at issue was neither unreasonable nor arbitrary, and was related

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[27]*Id.* at 57.

[28]*Id.* at 53. This liberty interest was subject only to the legitimate exercise of the state's police powers relating to the protection of the "safety, health, morals, and general welfare" of the public. *Id.* Where such a police power is claimed, the court must balance the interests of the individual against the interests of the state. *Id.* at 54. In *Lochner*, the Court held that the regulation of bakers' hours was not a valid exercise of the state's police power because there was no reasonable ground for singling out and interfering with the judgment of bakers as a class as unable to protect their rights "without the protective arm of the state." *Id.* at 57.

[29]*See* Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1366 (1990).

[30]291 U.S. 502 (1934). In *Nebbia*, the Court addressed the question of whether the Constitution permitted a state to fix the selling price of milk. *Id.* at 515.

[31]300 U.S. 379 (1937). In *Parrish*, the Court dealt with the constitutionality of Washington's minimum wage law, which authorized the setting of minimum wage levels for women and children. *Id.* at 386.

[32]Although *Lochner* has never explicitly been overturned, the economic due process doctrine has been almost universally condemned by legal scholars as "constitutionally improper." J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14 (1980). *See* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 36-37.

[33]291 U.S. at 527-28.

[34]*Id.* at 528.

to the stated purpose of preventing destructive competition,[35] it was constitutionally permissible.[36]

In *Parrish*, the Court again engaged in a less stringent review of statutes aimed at protecting particular groups.[37] In upholding a minimum wage statute, the Court reasoned that, while deprivation of the freedom to contract is forbidden by the Due Process Clause of the Constitution, a regulation is permissible if it is reasonably related to its purpose and adopted for the protection of the community's health, safety, and welfare.[38]

This relaxed level of review developed in *Parrish* became known as "rational basis" review.[39] Since *Nebbia* and *Parrish*, the Court has consistently applied a rational basis standard of review to nearly all economic

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[35]*Id.* at 530. The stated purpose of the price-fixing statute was to "prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk." *Id.* A legislative investigation had reached the conclusion that "the normal law of supply and demand" could not correct the destructive competition and unfair trade practices that were rampant in the industry. *Id.*

[36]*Id.*

[37]300 U.S. at 391.

[38]*Id.* at 398. In this case, the Court held that the state had a "special interest" in protecting women from unscrupulous employers because women's health was important to society, and women as a class were especially likely to be taken advantage of in the employment context. *Id.* at 394, 398.

[39]Under the rational basis test, "an appellate court will not second-guess the legislature as to the wisdom or rationality of a particular statute if there is a rational basis for its enactment, and if the challenged law bears a reasonable relationship to the attainment of some legitimate governmental objective." BLACK'S LAW DICTIONARY 872 (6th ed. 1990). This level of scrutiny stands in contrast to the other two standards the Court employs, intermediate (or mid-level) and strict scrutiny review, which do not entail the same almost irrebuttable presumption of the constitutionality of the government's actions. If a statute employs a suspect classification or involves the deprivation of a constitutional right, the court will strictly scrutinize the statute, assuming its unconstitutionality unless the government establishes that the law is narrowly tailored to meet a compelling public interest. *Id.* at 992. Intermediate review, employed mainly when the court reviews statutes containing gender, illegitimacy, and alienage classifications, requires the court to reject a law unless it is "substantially related to an important or substantial state interest." Oklahoma Educ. Ass'n. v. Alcoholic Beverage Laws Enforcement Comm'n., 889 F.2d 929, 932 (1989) (citations omitted).

and social legislation, tacitly approving Congress' legislation.[40] The adoption of the rational basis test has resulted in unprecedented congressional activity in the discrimination area.[41]

III. THE ANTIDISCRIMINATION PRINCIPLE

The antidiscrimination principle represents the concept that persons should not be classified on the basis of certain characteristics.[42] The antidiscrimination movement did not truly begin to develop in the United States until the late 1800's,[43] when Congress began to codify key common-law concepts.[44] The antidiscrimination principle, on its face, actually conflicts with the traditional right to freedom of contract. Antidiscrimination laws prohibit freedom of choice when that freedom is exercised in a manner

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[40]*See, e.g.*, Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270 (1940); Borden's Farm Products Co., Inc. v. Ten Eych, Commissioner of Agriculture & Markets of New York, 297 U.S. 251 (1936).

[41]*See supra* note 12 for examples of federal antidiscrimination statutes passed in the wake of the court's adoption of rational basis review. This congressional activity has resulted not only in statutes prohibiting racial discrimination, but other types of discrimination as well. *See, e.g.*, The Fair Housing Act of 1968, 42 U.S.C. §§ 3601-31 (1968), The Americans with Disabilities Act, 42 U.S.C. §§ 12101-213 (1990), and The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1967).

[42]Professor Paul Brest defined the antidiscrimination principle as "the general principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties affected." Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1 (1976). However, recent legislation has expanded protection to other classes as well. *See supra* note 12 for examples of such legislation. In addition, this comment will argue that economic discrimination not based on immutable characteristics should also be included in this concept. *See infra* Section III.B.2.

[43]*See infra* notes 61-66 and accompanying text. As the Court pointed out in 1883, the purpose of the post-Civil War Amendments and accompanying legislation was to eliminate slavery, not discrimination, and the Court refused to allow congressional activity in the discrimination context. *See also In re* Civil Rights Cases, 109 U.S. 3, 23 (1883).

[44]*See* Note, *The Antidiscrimination Principle in the Common Law*, 102 HARV. L. REV. 1993 (1989) (discussing the values underlying the antidiscrimination principle in the common law, contrasting federal antidiscrimination statutes, and concluding that the interests in fairness and equal opportunity often override the liberty and property interests inherent in the freedom of contract doctrine).

which discriminates against persons on the basis of impermissible criteria.[45]

Professor Paul Brest[46] has discussed two rationales that lie at the core of the antidiscrimination principle.[47] First, Professor Brest argues that antidiscrimination statutes guard against flaws in the process by which persons make decisions that are race-dependent.[48] Race-dependent preferences can take a number of forms: a statute that classifies people by race, a racially motivated administrative decision;[49] a racially-motivated regulation;[50] or racially selective indifference.[51] Fairness being the ultimate goal, decisions that negatively impact members of a minority group due to their minority status fail the fairness test unless justified by a finding that one group is in fact different, thereby deserving different treatment.[52]

Second, the antidiscrimination principle protects individuals against the

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[45]*See* Civil Rights Act of 1964, 42 U.S.C. § 2000(a)-(h)6 (1964); *infra* note 81. These criteria were initially defined by Congress as including race, religion, color, and national origin. *Id.* Congress has since added age and disability. *See also infra* notes 91-92. Congress has also broadened the traditional meaning of antidiscrimination by prohibiting discrimination which uses economic power to restrain trade or monopolize competition. *See generally* Section III.B.2.

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[47]Brest, *supra* note 42, at 6-12.

[48]Brest, *supra* note 42, at 6.

[49]Brest, *supra* note 42, at 12. Brest cites *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), as an example of this type of race-based decision. In *Yick Wo*, the San Francisco Board of Supervisors required that the owners of certain types of laundromats apply for permits. *Id.* at 357. The requirement was used to systematically deny the permits to 200 Chinese laundromats operating in the city. *Id.* at 374. The Court held that, even though the requirement itself was not discriminatory, its discriminatory application violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 373-74.

[50]Brest, *supra* note 42, at 13. A racially-motivated regulation is one which the legislature passed for discriminatory purposes but which does not actually classify on the basis of race. *Id.* The example offered by Brest was a historical one: the "voting test" widely employed subsequent to the passage of the Fifteenth Amendment in order to disenfranchise blacks. *Id.* Whites routinely "passed" the voting test while blacks routinely "failed" it, for inexplicable reasons. *Id.*

[51]*Id.* at 14. Racially selective indifference does not reflect conscious discrimination, but rather results in the denial of benefits or imposition of burdens upon minorities due to unconscious racially selective passivity. *Id.* (citations omitted).

[52]*Id.* at 8.

harmful results of race-dependent decisions.[53] The most flagrant harm is the denial of an opportunity to the victim of discrimination.[54] As Professor Brest noted, this may include anything — a job opportunity, motel lodging, or the right to vote.[55] Further, discriminatory acts may inflict psychological harm as well.[56] In this regard, Professor Brest notes that pattern discrimination usually leads to repetitive psychological injury to victims.[57] Acknowledgement of stigmatic harm is especially important where, as in *Brown v. Board of Education*,[58] overt economic or material harm appears immeasurable, minimal, or nonexistent, or where racially neutral policies perpetuate past discrimination.[59]

A. THE COMMON LAW SOURCES OF THE ANTIDISCRIMINATION PRINCIPLE - THE DUTY TO SERVE DOCTRINE

Since the early 1900's, the common law has become less important when examining the modern-day parameters of the antidiscrimination principle.[60] However, the common law provides valuable insight into the origins of the antidiscrimination principle.

Despite the significance of the concept of freedom of contract in the late 1800's, the common law was not completely unsympathetic toward the plight of spurned customers.[61] Gradually, the common law began to acknowledge the intrinsic unfairness of allowing shopkeepers to discriminate

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[53]*Id.* at 6.

[54]*Id.* at 8.

[55]*Id.*

[56]*Id.* *See* Brown v. Board of Education, 347 U.S. 483, 494 (1954) (holding that segregated schools for black and white children "generate[] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

[57]*See* Brest, *supra* note 42, at 8; *see also supra* note 56.

[58]347 U.S. 483 (1954).

[59]Brest, *supra* note 42, at 9-10.

[60]The extent of the antidiscrimination principle is now defined mainly by statute. *See supra* note 12 for examples of such statutes.

[61]Note, *supra* note 44, at 2004.

against potential customers.[62] A common law principle soon arose to deal with this problem: the duty to serve.[63] Closely paralleling modern public accommodations[64] law, the duty to serve doctrine required companies engaged in public service to serve all persons. Under this doctrine, public service companies were required to serve the public generally, without discriminating, and could refuse service only based upon non-discriminatory grounds.[65] Discrimination was viewed not only as offensive to the victim, but also violative of the company's obligation to serve the public.[66]

The duty to serve doctrine has rarely been employed in recent years, generally due to the advent of more comprehensive state and federal laws codifying the antidiscrimination principle.[67] Further, in the racial discrimination context, the doctrine's use by African-American plaintiffs was severely limited by the fact that many states also had statutes denying common-law rights to African-Americans.[68]

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[62]*Id.*

[63]*Id.*

[64]*See infra* note 81. The Civil Rights Act of 1964 defines modern public accommodations law, prohibiting discrimination in places of public accommodation. 42 U.S.C. § 2000(a)-(h)6.

[65]*See supra* note 44, at 2004. For examples of cases employing the duty to serve doctrine, see Ferguson v. Gies, 46 N.W. 718 (Mich. 1890) and James v. Marinship Corp., 155 P.2d 329 (Cal. 1944) (recognizing a common law remedy for victims of discrimination in public accommodations).

[66]*See supra* note 44, at 1196.

[67]*Id.* For examples of federal statutes codifying the antidiscrimination principle, see *supra* note 12.

[68]*See supra* note 44, at 2003. These statutes were commonly known as "Jim Crow" laws. After the Supreme Court's decision in *Plessy v. Ferguson*, states expanded the scope of their segregationist laws (which had previously been mainly limited to passenger trains and schools) to include:

> residential areas, parks, hospitals, theaters, waiting rooms and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts.

Regents of the University of California v. Bakke, 438 U.S. 265, 393 (1978) (Marshall, J., dissenting).

The duty to serve doctrine was an early harbinger of the numerous state and federal discrimination statutes that later followed.[69] In addition, Congress soon began to address economic discrimination. Since the Civil Rights Act of 1866,[70] Congress has enacted legislation consistent with a policy that neither economic nor racial discrimination in the marketplace will be tolerated.[71]

B. CODIFICATION OF THE ANTIDISCRIMINATION PRINCIPLE

1. DISCRIMINATION BASED ON IMMUTABLE CHARACTERISTICS

The Fifteenth Amendment[72] is the only constitutional provision that explicitly embodies the antidiscrimination principle.[73] Through the Civil Rights Act of 1866,[74] Congress read this principle into the Thirteenth Amendment.[75] As Professor Brest noted, since that time numerous state and federal civil rights statutes have been passed.[76]

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[69]For examples of federal antidiscrimination statutes, see *supra* note 12.

[70]14 Stat. 27 (1866).

[71]*See infra* Section III.B.2.

[72]*See supra* note 10.

[73]Brest, *infra* note 42, at 1.

[74]Civil Rights Act of 1866, 14 Stat. 27 (1866).

[75]*Id.* *See* Brest, *supra* note 42, at 1. The Civil Rights Act of 1866 states in part:

> (a) Statement of equal rights
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. . . . All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property

14 Stat. 27 (1866).

[76]For examples of federal civil rights statutes, see *supra* note 12.

The Civil Rights Act of 1875[77] was subsequently enacted to prohibit racial discrimination in places of public accommodation.[78] In 1883, however, the Supreme Court declared the Civil Rights Act of 1875 unconstitutional as violating the Thirteenth and Fourteenth Amendments.[79] The Court held that the recently enacted Thirteenth and Fourteenth Amendments did not authorize the Civil Rights Act because the amendments proscribed only slavery (or involuntary servitude) and voting discrimination.[80] The Court was not yet ready to expand the protections of the amendments past their literal boundaries.

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[77]The Civil Rights Act of 1875 provided:

> Section 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of conditions of servitude.
> Section 2. That any person who shall violate the foregoing section . . . shall . . . be deemed guilty of a misdemeanor. . . .

Civil Rights Act of 1875, 18 Stat. 335-337 (1875).

[78]*See id.*

[79]*See* In re Civil Rights Cases, 109 U.S. 3 (1883); *infra* note 80. *See also supra* note 9 for text of Thirteenth Amendment. The Fourteenth Amendment provides 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; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

[80]*See* In re Civil Rights Cases, 109 U.S. at 24-25. The Court held that the Thirteenth Amendment only authorized Congress to pass laws directly enforcing its provisions regarding slavery and its incidents, and that the denial of equal accommodations did not impose a "badge of slavery" or involuntary servitude upon the individual. *Id.* The Court noted that the Fourteenth Amendment's prohibitions, *supra* note 79, were only applicable to the states (not private individuals), and that the Act impermissibly stepped "into the domain of local jurisprudence." *Id.* at 14. This intrusion violated the Tenth Amendment, which declares that all powers not delegated to the federal government are reserved to the states (or people). *Id.* at 15 (citing U.S. CONST. amend. X). The Court noted that "civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." *Id.* at 17.

Congress did not respond until 1964, with another Civil Rights Act. The Civil Rights Act of 1964[81] prohibited discrimination in places of public accommodation, defining a "place of public accommodation" as one whose "operations affect commerce, or if discrimination or segregation by it is supported by State Action" and specifically included inns, motels, and places

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[81]The Civil Rights Act of 1964 provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities . . . and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000(a)-(h)6 (1964). The Act continues:

> (b) . . . Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment at his residence;
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
> (4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.
> (c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, 'commerce' means travel, trade, traffic, commerce, transportation, or communication . . . .

Id.

which sell food for consumption."[82] Persons operating public accommodations and acting in a discriminatory fashion "affect commerce" when they serve interstate travelers or when a substantial portion of the food they serve has moved in commerce.[83]

The Court upheld this novel use of the Commerce Clause[84] to attain antidiscrimination goals in two cases, *Heart of Atlanta Motel v. United States*[85] and *Katzenbach v. McClung*.[86] The Court upheld Section 201 of the Civil Rights Act of 1964 as a valid exercise of Congress's commerce power.[87]

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[82]*Id.*

[83]Heart of Atlanta Motel v. United States, 379 U.S. 241, 250 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). *See also infra* notes 85-86.

[84]U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause provides that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[85]379 U.S. at 241. In *Heart of Atlanta*, the appellant sought to enjoin enforcement of the Civil Rights Act of 1964, claiming that the statute was unconstitutional. *Id.* at 242. The appellant operated a hotel that refused to rent rooms to non-white customers. *Id.* at 243. The Court upheld the constitutionality of the Civil Rights Act of 1964 and enjoined appellant from continuing to operate on a discriminatory basis. *Id.* at 261. The Court held that the statute was a valid exercise of Congress's power to regulate commerce because Congress had a rational basis for concluding that the motel's racial discrimination impacted interstate commerce. *Id.* at 258.

[86]379 U.S. 294 (1964). In *Katzenbach*, a companion case to *Heart of Atlanta*, *supra* note 85, the Court again upheld Section 201 of the Civil Rights Act of 1964. *Id.* at 305. The appellees owned a restaurant that allowed whites to eat in but provided take-out service only for African-Americans. *Id.* at 297. The restaurant annually received about $70,000 worth of food, which had moved in interstate commerce. *Id.* at 298. The Court concluded that the congressional testimony that this type of discrimination constituted "an artificial restriction on the market" amply supported the conclusion that "established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it." *Id.* at 299-300 (citations omitted). Furthermore, the Court cited as additional support the congressional finding that discrimination in restaurants resulted in a reduction in travel by African-Americans. *Id.* at 300.

[87]*Katzenbach*, 379 U.S. at 250. The Court disregarded the holding in *In re Civil Rights Cases* as inapposite, stating that the 1875 Act, unlike the 1964 Act, "broadly proscribed discrimination in inns, public conveyances on land and water, theaters, and other places of public amusement, without limiting the categories of affected businesses to

In addition, the Court singled out the fundamental freedom to travel as a protection against the effects of discrimination.[88] In *Heart of Atlanta* and *Katzenbach*, the Court concluded that African-American's freedom to travel was a fundamental right outweighing the right of the individual to choose whom he wished to serve in his place of business.[89] This freedom to travel right was impeded by the discriminatory practices of the hotel (in *Heart of Atlanta*) and restaurant (in *Katzenbach*) because, without ready access to accommodations and food, the ability of African-Americans to travel at their leisure or on business would be seriously impaired.[90]

The limits on contractual freedom in the antidiscrimination context have not always involved race, having expanded to the age and disability contexts in the past few decades. The most recent examples of this expansion are the Age Discrimination in Employment Act ("ADEA")[91] and Americans with Disabilities Act ("ADA").[92] Through these statutes, Congress has attempted

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those impinging upon interstate commerce." *Id.*

[88]*See Heart of Atlanta*, 379 U.S. at 253; *Katzenbach*, 379 U.S. at 300.

[89]*See id.*

[90]*See id.*

[91]29 U.S.C. §§ 621-34 (1967). The purpose of the ADEA is to "promote employability of older persons based on their ability rather than age, to prohibit arbitrary age discrimination in employment," and "help employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.* at § 621(b). Congress passed the ADEA after a finding that age discrimination in employment was rampant, and that the practice burdened the free flow of goods in commerce. *Id.*

[92]42 U.S.C. §§ 12101-213 (1990). A broad antidiscrimination measure that became effective in 1992, the ADA seeks to prevent discrimination in three contexts: 1) employment; 2) access to public services, programs, and activities; and 3) access to public accommodations. *Id.* at § 12101 (a). *See* Scott S. Moore, *The Americans with Disabilities Act Title III—The "New" Building Code*, 71 NEV. L. REV. 1145, 1147 (1992). For an analysis of the success of accommodations provisions of the ADA in the employment context, see Sue N. Krenek, Note, *Beyond Reasonable Accommodation*, 72 TEX. L. REV. 1969 (1994). Section 12112(a) is typical of the ADA's provisions:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (1990).

to prevent the injustice that results when persons are denied equal opportunity based solely upon an immutable characteristic.[93]

2. ECONOMIC DISCRIMINATION

Congress' actions in prohibiting discrimination by sellers of goods and services have not been limited to the prohibition of racial discrimination and other forms of discrimination based on immutable characteristics. The Sherman and Clayton Acts[94] are examples of antidiscrimination measures

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[93]*See* The Age Discrimination in Employment Act, 29 U.S.C. § 621(a) (1967), in which Congress found that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice . . . the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers . . . and their employment problems grave . . . ."

[94]The Sherman Act, 15 U.S.C. §§ 1-7 (1890). Sections 1-2 provide as follows:

> Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id. at §§ 1-2. The Clayton Act is codified at 15 U.S.C. §§ 12-27 (1914). Section 13 of the Clayton Act, entitled the Robinson-Patman Act, provides in pertinent part:

> [I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or

not involving race, but rather involving the use of economic power and coercion.[95] When passed, the acts consisted of unprecedented restrictions on contractual freedom.[96]

The Sherman Act criminalized actions of individual persons or corporations which are monopolistic or otherwise restrain trade or commerce.[97] The Clayton Act forbids sellers of commodities involved in commerce to price discriminate between purchasers where the effect of such discrimination is to weaken competition or create a monopoly.[98] Although the Clayton Act makes it clear that legitimate competition is permissible or desirable and that price differences are acceptable under certain situations, the government may step in where it appears that price changes are meant to eliminate, not meet, competition.[99] The Clayton Act also prohibits lease or

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> knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a) (1936).

[95]*See supra* note 94 for the text of the Sherman and Clayton Acts.

[96]*See supra* note 94 and text accompanying notes 97-100. The Acts essentially prohibit price discrimination and other restraints of free trade. *Id.*

[97]*See supra* note 94.

[98]*Id.*

[99]*Id.* The Robinson-Patman Act, a subsection of the Clayton Act, continues:

> *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . *[a]nd provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *[a]nd provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

sales contract provisions that restrict a lessee or purchaser from dealing with the lessor or sellers' competitors' goods or services when such provisions would have the effect of weakening competition or creating a monopoly.[100]

Such practices violate the fundamental principles behind both the Sherman and Clayton Act because a seller/lessor's freedom of contract should not extend to practices that tend to thwart competition and create monopolies. Such anticompetitive and monopolistic practices, if allowed to go unchecked, could have economically disastrous consequences, both for consumers individually and the economy as a whole.[101]

The government's ability to enforce these statutes, however, was questionable. In response to these concerns, Congress passed the Federal Trade Commission Act,[102] which established the Federal Trade Commission and made unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[103] The Federal Trade Commission, empowered to prevent such unfair and deceptive competitive practices in or affecting commerce, was established as an enforcement mechanism of the Federal Trade Commission Act.[104]

Once again, the congressional policy behind the passage of these three Acts was clear — the public policy of preventing discrimination and unfair competitive practices was clearly deemed more important than the traditional notion of business freedom.[105] These are just a few examples of the "tendency of legislatures . . . to limit freedom of contract where it is

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15 U.S.C. § 13(a) (emphasis in original).

[100]Clayton Act, 15 U.S.C. § 14 (1988); *see supra* note 94.

[101]Monopoly and other activities which restrain trade harm the economy by artificially inflating prices in the monopolized or restrained market, resulting in loss to the consumer. Comment, *Ornamental Use of Trademarks: The Judicial Development and Economic Implications of an Exclusive Merchandising Right*, 69 TUL. L. REV. 1311, 1347 (1995).

[102]15 U.S.C. § 45 (1988).

[103]*Id.*

[104]15 U.S.C. § 41 (1988).

[105]*See supra* note 94. This purpose is evidenced by the language of the Acts, which even prohibit discrimination that can be explained on a rational economic basis. *Id.*

conceived that public policy requires it."[106]

Antidiscrimination provisions based upon economic equality progressed naturally from statutes prohibiting racial discrimination. To theorists like Richard Epstein,[107] however, economic discrimination statutes are even more objectionable because they prohibit any discrimination, regardless of whether it can be explained on a rational economic (though perhaps predatory) basis.[108]

IV. THE CONFLICT BETWEEN THE PRINCIPLES OF FREEDOM OF CONTRACT AND ANTIDISCRIMINATION

The purpose of the common-law duty to serve, Civil Rights Acts, and numerous other state and federal statutes is the same: to prohibit *private* (as opposed to *government*) discrimination.[109] Yet this concededly valid purpose contradicts the constitutional principle of allowing all persons, private business owners included, the right to choose with whom they will contract.[110]

Individual autonomy or freedom from coercion is the single overriding value courts seek to protect when prohibiting discrimination.[111] Essentially, this value acknowledges that individuals are often vulnerable to the power that private companies wield due to the individual's reliance on certain goods and services.[112] In a sense, this freedom from coercion can be compared to the private entity's freedom to refuse to serve certain

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[106]Epstein, *supra* note 1, at 378. The public policy here is implementation of the antidiscrimination principle. *Id.*

[107]James Parker Hall Distinguished Service Professor of Law, University of Chicago Law School.

[108]Epstein, *supra* note 1, at 378.

[109]*See supra* notes 75, 77, and 81. Government discrimination had presumably been sufficiently addressed by the passage of the Thirteenth and Fifteenth Amendments, *supra* notes 9-10.

[110]*See* U.S. CONST. art. I., § 10, cl. 1; *see also supra* note 2.

[111]Note, *supra* note 44, at 2001.

[112]*Id.*

individuals — freedom of choice. Though this right was once predominant,[113] modern mores acknowledge the increasing reliance of individuals on the market mechanism to provide a basic existence. For those individuals, then, to be refused access to basic goods and services on anything less than a "reasonable" basis is simply unacceptable.

Freedom of contract is a concept dating back to the Declaration of Independence in this country.[114] It is linked to the concepts of autonomy and liberty.[115] Though at first glance these terms might be considered synonyms, Gerald Dworkin argued that the two are actually quite distinct.[116] Dworkin believed that persons who consent to a certain amount of control over their lives are not necessarily less autonomous.[117] He also warned that different authors mean different things when discussing autonomy.[118]

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[113]*See supra* notes 24-29 and accompanying text.

[114]*See supra* note 19 and accompanying text.

[115]*See supra* note 21 and accompanying text.

[116]GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 18 (1988).

[117]Dworkin said:

> [A] person who wishes to be restricted in various ways, whether by the discipline of the monastery, regimentation of the army, or even by coercion, is not, on that account alone, less autonomous . . . [l]iberty, power, control over important aspects of one's life are not the same as autonomy, but are necessary conditions for individuals to develop their own aims and interests and to make their values effective in the living of their lives.

Dworkin, *supra* note 116, at 18.

[118]Dworkin provided the following examples, drawn from various philosophical publications:

> To regard himself as autonomous in the sense I have in mind, a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action.
> As Kant argued, moral autonomy is a combination of freedom and responsibility; it is a submission to laws that one has made for oneself. The autonomous man, insofar as he is autonomous, is not subject to the will of another. . . .
> I am autonomous if I rule me, and no one else rules I.
> Human beings are commonly spoken of as autonomous creatures. We have suggested that their autonomy consists in their ability to choose whether to

The American public, through its elected representatives, has chosen in some areas to restrict contractual freedoms in order to obtain other desirable benefits, such as equality of rights and treatment under the law.[119] The statutes that limit our freedom were created by us — or, more accurately, by our representatives.[120] However, their existence does not render Americans less autonomous.[121] In fact, it demonstrates the unique autonomy of the American public, for it was an exercise of autonomy that led to the enactment of antidiscrimination legislation.[122]

Perhaps the apparent incompatibility of the concepts of antidiscrimination and freedom of contract can be reconciled. The "persistent tension between private ordering and government regulation [that] exists in virtually every area known to the law,"[123] observed Epstein, is somewhat in the eye of the beholder. The United States has now truly become a society of individuals who must conduct business with each other on a daily basis. This country's "spheres of allowable or tolerated activity" leave room for some traditional contractual freedoms, but not included are discriminatory and unfair activities.[124] The "mutual agreement" consists of Acts passed by our congressional representatives. These Acts generally

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> think in a certain way insofar as thinking is acting; in their freedom from obligation within certain spheres of life; and in their moral individuality. . . . [A]cting autonomously is acting from principles that we would consent to as free and equal rational beings.
> I, and I alone, am ultimately responsible for the decisions I make, and am in that sense autonomous.

Dworkin, *supra* note 116, at 5-6 (citations omitted).

[119]For examples of federal antidiscrimination statutes, see *supra* note 12.

[120]As James Buchanan notes:

> The reconciliation of individual's desires to "do their own things" with the fact that they live together in society is accomplished largely by mutual agreement on spheres of allowable or tolerated activity.

JAMES M. BUCHANAN, THE LIMITS OF LIBERTY 20 (1975).

[121]*See* Dworkin, *supra* note 116, at 18.

[122]*See* BUCHANAN, *supra* note 120.

[123]Epstein, *supra* note 17, at 947.

[124]*See* BUCHANAN, *supra* note 120.

define the "spheres of allowable or tolerated activity" in negative terms, describing what is disallowed while omitting what is allowed.[125] In a sense, then, our society has made a choice to exercise its power to limit the ability to contract freely.[126]

If this is the case, then viewing government regulation as some sort of evil inflicted upon us is a fallacy. Government regulation is the natural result of American's exercise of their right to choose a representative government which enacts laws for the public good. This is not a limitation of autonomy. It is an exercise of it.

V. THE DECLINE OF FREEDOM OF CONTRACT AND FREE CHOICE

After reaching an apogee in 1870, freedom of contract began a slow decline.[127] In his book *The Rise and Fall of Freedom of Contract*, Professor Patrick S. Atiyah examined three causes of the decline, two of which are relevant to the present discussion.[128] These are (1) the decline in the economic importance of contract in society, and (2) the decline in the value of free choice as a source of legal rights and liabilities (and associated increase in the importance of antidiscrimination laws).[129]

A. THE FALL OF THE ECONOMIC AND SOCIETAL IMPORTANCE OF CONTRACT

The first factor Atiyah cited was the declining role of the contract as a source of everyday rights and obligations.[130] Atiyah observed that in the British economy the government allocates the majority of resources and that the economy is largely driven by administrative law and political practice rather than contract law.[131] The same observation may be made of the

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[125]*See* Civil Rights Act of 1964, 42 U.S.C. § 2000(a)-(h)6; *see also supra* note 81.

[126]*See* BUCHANAN, *supra* note 120.

[127]ATIYAH, *supra* note 4, at 716.

[128]*Id.*

[129]*Id.*

[130]ATIYAH, *supra* note 4, at 717-18.

[131]ATIYAH, *supra* note 4, at 719, 722.

United States' economy. The United States' economy, like England's, no longer consists of simple exchanges of services or products between two individuals, but rather is manipulated by numerous government regulations that serve to depress and augment demand for certain services and products based, not on individual, but rather on the government's societal goals.[132]

In addition, for over three quarters of a century, numerous federal and state statutes governing such diverse areas as insurance and loans have infringed significantly on the individual's right to contract freely.[133] For example, congressional enactments such as the Sherman and Clayton Acts,[134] minimum wage laws, and other employment-related legislation demonstrate the "tendency of legislatures . . . to limit freedom of contract where it is conceived that public policy requires it."[135]

An individual's right to choose with whom he does business has been usurped by other societal and economic interests that have overtaken the free choice right.[136] Over the last several decades, nationwide interest in ensuring basic civil rights for all Americans has been deemed far more important than the individual freedom to contract — or freedom to discriminate, as evidenced by the volume of legislation produced in the area. As the Supreme Court noted in *Heart of Atlanta Motel*[137] and *Katzenbach*,[138] an individual's discriminatory exercise of his freedom of contract can impact many rights of the persons discriminated against, such as the freedom to travel.[139]

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[132]For example, the government offers farmers price supports in order to encourage or discourage the planting of certain crops, which in turn affects prices due to the change in supply. Thus, the government tampers with the ordinary operation of the laissez-faire supply-demand mechanism. *See* Paul B. Rasor and James B. Wadley, *The Secured Farm Creditor's Interest in Federal Price Supports: Policies and Priorities*, 73 KY. L.J. 595, 595 (1984). *See generally* C. SCHULTZE, THE DISTRIBUTION OF FARM SUBSIDIES: WHO GETS THE BENEFITS? (1971).

[133]*See* Williston, *supra* note 19, at 374-75.

[134]*See supra* notes 94-100 and accompanying text.

[135]Williston, *supra* note 19, at 378.

[136]*See infra* notes 143-146 and accompanying text.

[137]Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); *see supra* note 85.

[138]Katzenbach v. McClung, 379 U.S. 294 (1964); *see supra* note 86.

[139]*See* text accompanying notes 88-90.

It is impossible to determine whether the decline of the economic and societal importance of free choice led to the rise of the antidiscrimination movement, or vice versa, or even if there is a direct causal relationship at all. But certainly there is an association between the two concepts.

B. THE DECLINING IMPORTANCE OF FREE CHOICE

Professor Atiyah next discussed the declining importance of freedom of choice as a source of legal rights and liabilities.[140] Over the last century, the significance of freedom of choice has declined worldwide, and this decline is reflected in our antidiscrimination laws.[141] In certain situations, then, an individual's freedom of choice is subordinated to other majority interests.

Antidiscrimination laws are just one example of this decline of the importance of freedom of choice.[142] Essentially, the importance of contractual freedom of choice has been replaced by the public policy against discrimination.[143] This replacement is significant. Freedom of contract and free choice are essentially common-law concepts that nevertheless achieved almost constitutional status towards the latter part of the nineteenth century.[144] Meanwhile, early attempts at antidiscrimination legislation during the late 1800's were struck down by the Supreme Court as violations

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[140]ATIYAH, *supra* note 4, at 726. Atiyah specifically excludes, however, matters concerning sexual reproduction and morality. The rights of consenting adults to freely choose have expanded over the past century. *Id.* at 726-27. Thus, the decline of contractual freedom is generally limited to the economic and commercial arenas. *Id.* at 727.

[141]*Id.* at 726.

[142]*Id.* at 735-36.

[143]*Id.* at 736.

[144]Williston, *supra* note 19, at 375. The Article I, Section 10, clause 1 prohibition on laws "impairing the obligation of contracts" was construed broadly and statutes constricting contractual freedoms were generally struck down under the "economic due process" doctrine until the United States Supreme Court's decisions in Nebbia v. New York, 291 U.S. 502 (1934) and West Coast Hotel Company v. Parrish, 300 U.S. 379 (1937). *See supra* notes 30-41 and accompanying text.

of the Constitution.[145] Absent a shift in the importance society placed on the competing goals of freedom of contract and free choice versus prohibition of discriminatory practices, modern antidiscrimination law as we know it might never have come into existence.[146]

VI. CONCLUSION: STRIKING A BALANCE

Antidiscrimination laws have changed the face of this nation. By remedying racial and economic inequities, the nation as a whole has taken bold steps forward and provided unprecedented opportunities for traditionally oppressed groups. In the economic sphere, these laws have also led to predictability and have removed doubt and fear from numerous economic transactions, from a simple meal at a restaurant to a large commercial transaction.

Although contractual freedom is a noble goal, it must give way to the modern realities of discriminatory and predatory practices. Importantly, each antidiscrimination measure was enacted after a congressional finding that its absence resulted in inequity, generally toward a group least able to afford it.

Antidiscrimination laws have not completely ravaged the traditional freedom to contract. These laws provide that decisions by businesses about whom they will serve are illegal if they result in discrimination against protected classes, but decisions not to serve made on other grounds are still protected by freedom of contract.[147] Some scholars seem to believe that a freedom to contract with exceptions is no freedom at all.[148] However,

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[145]*See* In re Civil Rights Cases, 109 U.S. 3 (1883) (striking down Civil Rights Act of 1875 which essentially prohibited discrimination in places of public accommodation); *see also supra* note 80.

[146]Epstein himself recognized this shift:

> During the last 50 years, the balance of power has shifted heavily in favor of direct public regulation, which has been thought strictly necessary to redress the perceived imbalance between the individual and the firm.

EPSTEIN, *supra* note 17, at 947 (discussing the importance of freedom of contract in the employer-employee context).

[147]For example, see the provisions of the Civil Rights Act of 1964, which codified the duty to serve principle by forbidding discrimination in places of public accommodation. 42 U.S.C. § 2000(a)-(h)6. *See also supra* note 81.

[148]*See, e.g.*, Epstein, *supra* note 1 and accompanying text.

few freedoms are unconditional. Antidiscrimination laws merely reflect this nation's interests and principles. These interests and principles wax and wane with each generation.

The antidiscrimination principle is vital to the continuance of economic and social reform in this country. As Paul Brest noted, the antidiscrimination principle is the only intelligible source of civil rights policy independent of congressional legislation itself.[149] Courts should continue to apply the antidiscrimination principle in a way consistent with its goal of equality while attempting to minimize impact on other traditional rights such as freedom of contract.

[149]Brest, *supra* note 42, at 53.