TOWARDS DUE PROCESS FOR THE FAITHFUL, AND FOR EVERYONE ELSE, TOO: ALL OF THE RELIGIOUS FREEDOM, NONE OF THE RELIGIOUS FAVORITISM

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CONTENTS

I. INTRODUCTION

Some of today's most heated litigation revolves around religious freedom. This summer, the Supreme Court decided *Burwell v. Hobby Lobby*, a landmark case holding that the Religious Freedom Restoration Act protects closely held corporations against being forced to subsidize contraceptive products that the owners of the corporations view as immoral.[1] Critics of the ruling claimed, with some justification, that it gave some corporations an unfair advantage over others that had to comply with the law.

This debate is reminiscent of legal battles raging around the country over school choice, criminalization of polygamy, and liberty of conscience for wedding photographers, bakers, and ministers. In most of these cases, courts apply a nuanced—and at times, convoluted—series of tests to determine the extent of religious protections afforded by the First Amendment's Free Exercise Clause.[2] These seemingly malleable tests, along with the tensions between enforcing the Free Exercise and Establishment Clauses, often leave no one satisfied with the state of the law. On the one hand, it seems unjust to enable the government to force citizens to violate their religious beliefs, but on the other, it seems equally unsatisfactory to hold nonreligious citizens to a different standard than religious ones.[3]

This paper argues that Free Exercise doctrine is in crisis, plagued by complicated exceptions that all but swallow the constitutional rule. It suggests that the root of this dysfunction is, in fact, the Supreme Court's dramatic curtailment of Fourteenth Amendment rights, which necessitated a corresponding constriction of Free Exercise rights so as to avoid providing substantially more freedom for select religious groups than for the general public. It

[1] *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014).
[2] *See* U.S. CONST. amend. I, cl. 1-2.
[3] *E.g.*, Robby Soave, *If Sikh Kids Can Bring Knives to School, Why Can't Everyone Else?*, REASON (Oct. 27, 2014), *available at* http://reason.com/blog/2014/10/27/if-sikhs-can-bring-knives-into-schools-w.

would be, for example, a much less formidable endeavor for the Supreme Court to find that the Free Exercise clause protects peyote use in an alternate constitutional universe wherein the Fourteenth Amendment already protected at least some drug use for medicinal purposes.

Having framed the problem along these lines, this paper offers a new approach to religious freedom cases that mitigates much of the criticism leveled at current Free Exercise jurisprudence. It proposes a restoration of meaningful, inclusive Due Process rights, combined with a Free Exercise construction that reflects those broad Due Process protections in the religious context.[4] Under this framework, the analysis would be the same whether a litigant asserted a religious right under the Free Exercise Clause or a parallel liberty under the Due Process Clause.

Part II provides a background of the Free Exercise and Due Process Clauses, along with more details on this paper's proposal. Part III then surveys three primary examples of religious freedom litigation that present tough First Amendment questions, but could constitute relatively straightforward issues under a robust application of the Due Process Clause of the Fourteenth Amendment.[5] Specifically, this paper focuses on anti-polygamy laws, employment regulations, and parental prerogative in the education context. It examines the current state of the law for each example, identifies the difficulties associated with the First Amendment regime under which they are currently analyzed, and offers a Due Process framework that could alleviate those problems.

[4] *See* U.S. CONST. amend XIV, § 1; *see also id*. amend. V.
[5] In challenges to federal statutes, this analysis would take place under the Fifth Amendment.

II. BACKGROUND

A. The Muddled History of the Free Exercise Clause

The history of the First Amendment's religious freedom protections is largely a 20th and 21st century story. One of the earliest significant cases involved an 1878 Free Exercise challenge to Utah's criminalization of polygamy.[6] In *Reynolds v. United States*, a member of the Church of Jesus Christ of the Latter Day Saints ("LDS") challenged the application of the Morrill Anti-Bigamy Act to his second concurrent marriage.[7] Signed by President Lincoln in 1862, the Act criminalized the practice of polygamy in the United States, targeting a subset of the LDS church that endorsed the practice.[8] Reynolds argued that polygamy constituted a tenet of his faith, and therefore the Free Exercise Clause foreclosed enforcement of the criminal prohibition against him.[9] Writing for the Supreme Court, Justice Morrison Waite brushed aside this argument, asserting that under the Free Exercise Clause, "while [laws] cannot interfere with mere religious belief and opinions, they may with practices."[10] Justice Waite begrudgingly allowed that "[a]n exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it."[11] Nevertheless, Justice Waite found himself unable to identify an analytical distinction between the practice of polygamous marriage and the offering of human sacrifices.[12] He therefore concluded that the Morrill Anti-Bigamy Act was as constitutional as laws against

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[6] *Reynolds v. United States*, 98 U.S. 145.
[7] *Id*.
[8] *See* Library of Congress, *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 – 1875*, 37 Cong. 2d. Sess. 501, *available at* http://rs6.loc.gov/cgi-bin/ampage?collId=llsl&fileName=012/llsl012.db&recNum=532.
[9] *Reynolds*, 98 U.S. at 161.
[10] *Id*. at 166.
[11] *Id*. at 166.
[12] See *id*. Justice Waite was not alone in struggling to differentiate nontraditional marriages from horrific violence; just two decades earlier, the Republican Party platform referenced the "twin relics of barbarism, polygamy and slavery." Independence Hall Association, *GOP Convention of 1856 in Philadelphia*, USHISTORY.ORG (last visited Oct. 27, 2014), http://www.ushistory.org/gop/convention_1856.htm.

murder, and upheld Reynolds' conviction.[13] Accordingly, early Free Exercise jurisprudence provided meager protection for religious practices.

A second landmark Free Exercise case came in 1940 when the Supreme Court handed down *Cantwell v. Connecticut*, striking down a Connecticut consumer protection law that imposed a licensing scheme on those soliciting donations for religious or charitable causes.[14] The statute required the state's Secretary of the Public Welfare Council to approve each charitable or religious cause to ensure that it was a "bona fide object of charity."[15] In a unanimous opinion, the Court reasoned that the First Amendment's religious protections were among the rights that the Fourteenth Amendment incorporated against the states.[16] Moreover, the Court held that the licensing law was an unconstitutional burden on the exercise of religion because it vested in the Secretary the power to judge whether a cause qualified as a "religious" one, and to permit or criminalize solicitation pursuant to that determination.[17] After *Cantwell*, the Free Exercise Clause at least prohibited regulations that target a practice based on its religious nature.

More recently, in *Employment Division v. Smith*, the Court upheld a state's denial of benefits to a worker fired for engaging in religious use of peyote.[18] Justice Scalia's opinion for the majority ruled broadly that neutral laws of general applicability are immune to Free Exercise challenges.[19] Confronted with examples of previous cases in which the Free Exercise Clause did indeed bar application of neutral laws of general applicability, Justice Scalia qualified the rule by claiming that these cases relied on the Free Exercise Clause "in conjunction with other

[13] *Id*. at 167.
[14] *Cantwell v. Connecticut*, 310 U.S. 296.
[15] *Id*. at 302.
[16] *Id*. at 303.
[17] *Id*. at 305
[18] *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).
[19] *Id*. at 878.

constitutional protections, such as freedom of speech and of the press."[20] This distinction has perplexed judges and constitutional scholars, who point out that it is an odd constitutional protection that may be heightened by the existence of a related constitutional interest.[21] Opposition to the decision was so intense that Congress has moved to statutorily limit *Smith*'s implications.[22]

Other criticism abounds.[23] Professor Douglas Laycock described the fundamental problem with *Smith* in the following way:

> The Court said that Oregon could criminally punish a worship service, and that this raised no issue under the Free Exercise Clause—that it required no justification—that there was nothing for judicial review beyond the simple determination that the law against peyote applied to all uses and not just religious uses. I do not say this hyperbolically; I have thought about the choice of words carefully before using them. *Smith* creates the legal framework for persecution. What prevents Oregon from creating a special task force to hunt down peyote worshipers, break up their services, prosecute all those in attendance, and send them all to prison for long terms? The answer is the lack of stomach for persecution and the likelihood of political backlash from Americans who still believe in religious liberty.[24]

To Professor Laycock, *Smith* did violence to the meaning of Free Exercise by rendering it practically ineffectual in its commission to protect religious exercise. Likewise, Professor

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[20] *Id*. at 881.

[21] *E.g*., *Smith*, 494 U.S. at 891 (O'Connor, J., concurring) (rejecting the hybrid rights construct); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 566-67 (1992) (Souter, J., concurring):

> [T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the Smith rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual.

See also Janet V. Rugg & Andria A. Simone, *The Free Exercise Clause: Employment Division v. Smith's Inexplicable Departure from the Strict Scrutiny Standard*, 6 ST. JOHN'S J. LEGAL COMMENT. 117, 139 (1990) (discussing the pattern of application of strict scrutiny for enumerated constitutional rights); Vance M. Croney, *Secondary Right: Protection of the Free Exercise Clause Reduced by Oregon v. Smith*, 27 WILLAMETTE L. REV. 173, 191 (1991) (discussing confusion after Smith regarding the appropriate level of scrutiny).

[22] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993).

[23] *Angela C. Carmella, Exemptions and the Establishment Clause*, 32 CARDOZO L. REV. 1731 (2011) ("The [*Smith*] decision immediately provoked reaction (almost entirely negative) from the legal academy . . .").

[24] *Douglas Laycock, Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 849 (1992).

Michael McConnell lamented that "[u]nder *Smith*, the state is more powerful, the forces of homogenization are more powerful, and the ability of churches to maintain their distinctive ways of life depends upon their skill at self-protection in the halls of Congress."[25] Professor McConnell continued: "as the *Smith* opinion candidly acknowledges, its interpretation will place 'those religious practices that are not widely engaged in' at a 'relative disadvantage'. . . . That bias may not displease those who believe in the wisdom and virtue of majoritarian culture, but it is not consistent with the original theory of the Religion Clauses."[26] Similarly, Professor Ira Lupu described *Smith* as "substantively wrong and institutionally irresponsible."[27] She argued that the decision drew such extensive academic ire because it stripped away the myth that the Court's previous limitations on Free Exercise were merely targeted exceptions that observers could be sure would not affect them, and left in its place a Free Exercise Clause bereft of meaningful protections for anyone.

What seems clear is that the future of religious exceptions is uncertain. The concurring and dissenting justices in *Smith* rejected its hybrid rights theory as unhelpful,[28] and the Court has failed to clarify it in subsequent cases.[29] Commentators complain that the Court's reasoning behind the hybrid rights distinction "amounts to no explanation at all,"[30] and as a result, any protection of religious practices "seems to have become vestigial, or at most a luxury."[31]

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[25] *Michael W. McConnell, Religious Freedom at A Crossroads*, 59 U. CHI. L. REV. 115, 138-39 (1992).
[26] *Id*. (quoting *Smith*, 494 U.S. at 890).
[27] Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 B.Y.U. L. REV. 259, 260 (1993).
[28] *See Smith*, 494 U.S. at 896 (O'Connor, J., concurring); *id*. at 908 (Blackmun, J., concurring).
[29] *E.g*., Lupu, *supra* note 27, at 266 ("Nothing in *Church of the Lukumi* expands, narrows, or clarifies Smith's pronouncement concerning so-called hybrid right claims.").
[30] Sarah J. Gralen Rous, *Why Free Exercise Jurisprudence in Relation to Zoning Restrictions Remains Unsettled After Boerne v. Flores*, 52 SMU L. REV. 305, 317 (1999).
[31] Richard K. Sherwin, *Rhetorical Pluralism and the Discourse Ideal: Countering Division of Employment v. Smith, A Parable of Pagans, Politics, and Majoritarian Rule*, 85 NW. U. L. REV. 388, 427 (1991).

Predictably, the doctrine is in a state of disarray in the lower courts.[32] Worse, with broad swaths of law summarily shielded from Free Exercise attacks, it seems unclear what *other* loopholes may be lurking within Free Exercise doctrine, waiting to be discovered. In light of these obstacles, Professor Frederick Gedicks has called for a new approach to Free Exercise protections: "I suggest that those who value religious liberty make a virtue of necessity by abandoning the effort to restore exemptions and looking elsewhere for more fruitful means of protecting religious freedom. Some protection of religious free exercise is better than none at all."[33]

B. The Shrinking Fourteenth Amendment and Its Effect on Free Exercise

In fact, it may be that the Court has been relegated to this regrettable state of affairs by its own doing, and not as a matter of constitutional inevitability. This paper suggests that, by meager and selective enforcement of the Due Process Clauses of the Fifth and Fourteenth Amendments, the Court has forced litigants to resort to Free Exercise challenges to legislation that should have presented comparatively simple cases under a Due Process analysis. And because it had no means of providing equal protections to citizens who did not share the litigants' religions, the Court found it necessary to fabricate increasingly nuanced rules, tests, exceptions, and exceptions to those exceptions as required to reach tenable First Amendment outcomes—often at the cost of criminalizing sincere religious practices or exempting religious people from laws to which nonbelievers must adhere. Restoration of a genuine Due Process regime could substantially lessen these problems, because Due Process represents a

[32] Timothy Santoli, *A Decade After Employment Division v. Smith: Examining How Courts Are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649, 665 (2001).
[33] Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 574 (1998)

nondiscriminatory rights framework that applies equally to believers and nonbelievers alike. Due Process is capable of protecting many a religious practice, all the while ensuring that nonbelievers and believers of all creeds are guaranteed the same constitutional freedoms.

Yet, given the chance to protect these rights and others, the Court has repeatedly jettisoned provision after constitutional provision that promised to rescue it from the quandaries it now finds itself in as a matter of applying First Amendment law. Consider, for example, the Court's treatment of the Privileges or Immunities Clause.[34] In one of the most significant and aspirational moments in American history, the nation adopted the Fourteenth Amendment to the Constitution in response to state discrimination against blacks and other civil rights advocates leading up to and following the civil war.[35] In particular, state officials suppressed abolitionist speech and outlawed the abolitionist press.[36] They refused to recognize the rights of blacks to enter into contracts, and they refused to protect abolitionists and blacks from mob violence.[37] After passing the Thirteenth Amendment to outlaw slavery, Congress sought to remedy these wrongs.[38] In explaining the need for the Fourteenth Amendment, one of its drafters, Jacob Howard, noted that the Amendment protected "the personal rights guaranteed and secured by the first eight amendments to the Constitution," in addition to the "privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature."[39]

After the passage of the Fourteenth Amendment, Supreme Court Justice Joseph Bradley wrote that "the fourteenth amendment prohibits any state from abridging the privileges or

[34] U.S. CONST. amend. 14, cl. 2.
[35] *See* RANDY BARNETT, RESTORING THE LOST CONSTITUTION 193-95 (Rev. ed. 2014).
[36] *Id*.
[37] *Id*.
[38] *Id*. at 196.
[39] Cong. Globe, 39th Cong., 1st Sess. 2765 (May 23, 1866).

immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges; but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired."[40] As Professor Randy Barnett has demonstrated, these privileges and immunities referred not to specific rights that could be enumerated, but to a general presumption in favor of the citizen's right to life, liberty, and property—and against laws constraining those things—except in such cases as the citizen sought to harm the life, liberty, or property of others.[41] Justice Bradley's lofty language seems to support this broad interpretation.[42] The Privileges or Immunities Clause thus perfected the Ninth Amendment's promise left theretofore unfulfilled.[43] Consequently, when the *Slaughterhouse Cases* reached the Supreme Court in 1873, challenging a Louisiana law that gave a meat butchering company a monopoly by criminalizing its competitors, the Supreme Court was perfectly positioned to employ this fundamental presumption of liberty and protect the competitor butchers' unenumerated right to pursue their trade.[44] Instead, the Court scuttled the Privileges or Immunities Clause as a source of protection for constitutional rights.[45] Writing for the Court, Justice Samuel Freeman Miller asserted that the Privileges or Immunities Clause

[40] *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co*., 15 F. Cas. 649, 652 (C.C.D. La. 1870) (Bradley, J., sitting as Circuit Justice).
[41] *See* BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 35 at 53-70.
[42] *Id*. at 196.
[43] Before his elevation to the Supreme Court, James Iredell articulated the Ninth Amendment's purpose in similar language; *see* JONATHAN ELLIOT & JAMES MADISON, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 167 (J. B. Lippincott Company ed., 1891), *available at* http://books.google.com/books?id=tzkOAAAAIAAJ&pg=PA167&lpg=PA167&dq#v=onepage&q&f=false ("It would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurption; and it would be impossible to enumerate every one. Let anyone make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.").
[44] *Slaughter-House Cases*, 83 U.S. 36 (1872).
[45] *Id*. at 74-76.

protected only a narrow subset of mostly inconsequential rights associated with citizenship of the United States, like freedom of travel between the states.[46]

Having abdicated its duty to give effect to the promise of the Privileges or Immunities Clause, the Court was faced with a conundrum. Without the Privileges or Immunities Clause, the Fourteenth Amendment's purpose of securing liberty from interference by state governments seemed all but lost when, in the 1897 case of *Allgeyer v. Louisiana*, the Court was forced to address a burdensome insurance licensing law that the Justices unanimously agreed infringed on an unenumerated liberty of the citizen.[47] In that case, the right at issue was the liberty to contract free from arbitrary restrictions.[48] Rather than overturn *Slaughterhouse*, however, the Court sought to ground this unenumerated right in the Fourteenth Amendment's Due Process Clause, leaving the Privileges or Immunities Clause devoid of significant meaning—even as the Court heavily excerpted Justice Bradley's *Slaughterhouse* dissent.[49]

Tragically, the Due Process Clause fared only slightly better than the Privileges or Immunities Clause as a source of substantive liberties.[50] The doctrine developed apace for a couple of decades, but when it threatened to protect citizens from President Franklin Roosevelt's New Deal programs, he devised a scheme to abandon the traditional nine-justice model for the Court, instead nominating justices until it contained a sufficient number of obedient jurists to

[46] *Id*. at 76.
[47] *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).
[48] *Id*.
[49] *Id*. at 589-90.
[50] Early Due Process jurisprudence, and in particular, the *Lochner* decision, is a contentious subject; *compare* David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373 (2003) and Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987) *with* David E. Bernstein, *Lochner's Legacy's Legacy*, 82 Tex. L. Rev. 1 (2003) and DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT (2011). Nevertheless, this paper focuses on the implications of robust Due Process protections for Free Exercise jurisprudence, leaving the discussion of *Lochner*'s merits to David Bernstein and the other capable scholars who have written extensively on the topic.

uphold his initiatives.[51] FDR's execution of the nominating scheme ultimately failed, but it succeeded in sending a clear message to the justices that the Court would either defer to his programs or face obsoletion in one form or another.[52] Shortly thereafter, the Court stripped Due Process doctrine of most of its vitality so as to avoid invalidating New Deal legislation, beginning by reversing its anti-protectionist precedent to uphold a Washington state minimum wage law in *West Coast Hotel Co. v. Parrish*.[53] The realignment culminated in *Williamson v. Lee Optical*, which upheld a patently arbitrary and transparently protectionist law criminalizing lens-fitting by any medical professionals besides licensed optometrists.[54] Despite the conflict with *Allgeyer's* precedent, the Court did not—and has not since—overruled *Allgeyer*.[55]

However, what is old is soon new again, and the Court realized in short order that the Fourteenth Amendment must protect at least *some* unenumerated rights—after all, the New Deal agenda was primarily an economic one, and there existed noneconomic rights that the Court was interested in protecting. Enter *Carolene Products*, in which the Court, while upholding a piece of protectionist economic legislation, took care to differentiate these economic cases from those affecting certain classes of other rights.[56] This bifurcation of Due Process into favored and disfavored rights found no support in previous jurisprudence, but it had the practical advantage of enabling the Court to apply strict scrutiny to laws infringing the favored class of rights, while

[51] *See* Roger Pilon, *Restoring Constitutional Government*, CATO SUP. CT. REV., 2001-2002, at VII, xii; History Channel, *Feb 5, 1937: Roosevelt announces "court-packing" plan*, HISTORY.COM (last visited Oct. 27, 2014), www.history.com/this-day-in-history/roosevelt-announces-court-packing-plan. FDR also sought to remove the older justices who resisted his plans by removing justices over 70 years old. *Id.*
[52] Roger Pilon, *How Constitutional Corruption Has Led to Ideological Litmus Tests for Judicial Nominees*, 15 REGENT U. L. REV. 41, 48 (2003).
[53] *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overturning Adkins v. Children's Hospital, 261 U.S. 525 (1923)).
[54] *Williamson v. Lee Optical Co*., 348 U.S. 483 (1955).
[55] *E.g*., *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134 (2011) (citing *Allgeyer*).
[56] *See United States v. Carolene Products Co*., 304 U.S. 144, 152 fn.4 (1938).

simultaneously rubber stamping laws infringing disfavored ones through a process that has become known as rational basis scrutiny.[57]

Undoubtedly, within the carefully circumscribed class of favored rights, the Due Process Clause retains some vitality. These rights tend to revolve around familial privacy: the right to send one's children to a private school; to educate one's children in a foreign language; to exclude others from spending time with one's children; to purchase contraceptives; to engage in consensual intimacy with partners of one's choosing; and so forth. This paper will draw on these precedents to support the Due Process rights it seeks to establish.

Despite occasionally reaching the right result, however, current Due Process jurisprudence fundamentally misconceives the Fourteenth Amendment's directive. Properly understood, the Fourteenth Amendment enacts an inclusive presumption of liberty, under which *all* of the citizen's innumerable rights are fundamental, and the government has the burden to demonstrate the constitutionality of its laws.[58] Modern Due Process jurisprudence, by contrast, begins with the presumption that the citizen's liberty interests must yield to any "rational" legislative whims, and affords greater protection only after the citizen demonstrates that her interest is, in fact, a "fundamental" liberty. In the years following *Carolene Products*, the Court has increasingly justified this doctrinal inversion with soaring rhetoric of democracy's primacy

[57] *See id*. at 152:

> There is no need to consider it here as more than a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power, aiding informed judicial review, as do the reports of legislative committees, by revealing the rationale of the legislation. Even in the absence of such aids, the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

[58] *See supra* notes 35-43 and accompanying text; *see also* CLARK NEILY, TERMS OF ENGAGEMENT 143-46 (2013).

over liberty, consistently deferring to legislatures rather than weighing the seriousness of government interests or citizen liberties implicated in a given case.[59]

While this ideal of a humbled judiciary reigned supreme in the post-*Lee Optical* years, it hardly began then, and it has not since abated. It is this pattern of extreme deference—this legacy of judicial abdication—that gave us *Dred Scott*, and perhaps a bloody civil war thereafter.[60] The Court abdicated and we got *Plessy*.[61] The Court abdicated and we got *Buck v. Bell*.[62] The Court abdicated and we got *Korematsu*.[63] Now, today, with substantive Due Process in tatters and the police power run amok, the Court abdicates and we get slapdash First Amendment doctrine so shortsighted that that it "denigrate[s] the very purpose of a Bill of Rights" and deems religious freedom "a luxury."[64]

As the following pages will demonstrate, this process—the Court's denial of liberty under one provision, followed by a subsequent attempt to shoehorn bits and pieces of it into a different provision—appears eerily similar to the modern Court's attempts to derive from a

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[59] *E.g.*, *United States v. Darby*, 312 U.S. 100, 125 (1941) ("[I]t is no longer open to question that the fixing of a minimum wage is within the legislative power"); for a more recent example, *see Washington v. Glucksberg*, 521 U.S. 702, 735 (1997) ("Our holding permits this debate to continue, as it should in a democratic society."); *see also infra* note 62.

[60] *Dred Scott v. Sandford*, 60 U.S. 393 (1856); *see also* Dr. Roberta Alexander, *Dred Scott: The Decision That Sparked A Civil War*, 34 N. KY. L. REV. 643 (2007).

[61] *Plessy v. Ferguson*, 163 U.S. 537 (1896) *overruled by Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954).

[62] *Buck v. Bell*, 274 U.S. 200 (1927):

> In view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as matter of law that the grounds do not exist, and, if they exist, they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

[63] *Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944); *see also Hirabayashi v. United States*, 320 U.S. 81 (1943).

[64] *Smith*, 494 U.S. at 903 (O'Connor, J., concurring).

stripped-down Free Exercise Clause rights that might more naturally and fully be protected under the Fourteenth Amendment. This paper submits that, in future religious freedom cases, it may behoove the Court to reexamine its Due Process precedent in lieu of cobbling together caselaw from progressively more knotted First Amendment theories.

C. A Word on the Contours of This Paper's Proposal

Before proceeding, it is important to emphasize two limiting features of the proposal set forth in this paper. First, it does not require one to take any particular position on the proper scope of the Establishment Clause. Rather, to the extent that any rights asserted under this paper's vision of the Due Process and Free Exercise Clauses would arguably require governmental advancement of a particular religion, that government action should still face Establishment Clause scrutiny—in whichever form the reader wishes.[65] Compliance with the Establishment Clause would be a compelling governmental interest[66] that could justify limiting a constitutional right. For example, this paper will argue that Due Process protects the right of parents to direct their children's education, including (under certain conditions) demanding their children's exemption from participation in offensive curriculum. Notwithstanding that right, any further parental demand to have state schools devote resources affirmatively to teach their religion to their children would probably run afoul of the Establishment Clause, and could therefore be denied.

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[65] For example, the Court is divided on the propriety of the *Lemon* test in Establishment Clause jurisprudence, *see Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384 (1993) (Scalia, J., concurring):

> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will . . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him. For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.

[66] *See Widmar v. Vincent*, 454 U.S. 263, 271 (1981) ("We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling.").

Second, this paper does not advocate abandoning the Free Exercise Clause as a source of protection for religious rights. Rather, it suggests that courts should apply the same analysis under Free Exercise challenges as they would under a rejuvenated Due Process regime. Accordingly, courts would reach the same conclusion whether a religious litigant asserted a right to polygamous marriage as a tenet of her faith, or an atheist one asserted the same right as a matter of her privacy and personal autonomy.

This new paradigm would have two interrelated benefits for doctrinal clarity. First, it would eliminate the need for courts to narrowly construe a provision that is facially rather broad ("Congress shall make *no law* . . ."). [67] Such unnaturally constrained interpretations can lead to abstruse reasoning and perplexing constitutional results, as in the case of *Smith*. Second, it would reduce the friction between the Free Exercise and Establishment Clauses by eliminating any legal disparity between people of different (or no) religions. Courts occasionally observe that, under the current framework, Free Exercise rights must be carefully limited to avoid providing an unfair advantage that would resemble an unconstitutional religious endorsement. [68] If, however, the Free Exercise Clause granted to litigants rights that all citizens could assert under a robust Due Process regime, this complication would disappear, thereby freeing judges to construe the Free Exercise Clause as broadly as its language insists.

The obvious originalist rejoinder to these points is that the Free Exercise Clause must add *something* to the constitutional canon, so any proposal that construes it as coterminous with

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

[68] *E.g.*, *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668-69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."); *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005) ("At some point, accommodation may devolve into an unlawful fostering of religion.") (quotations omitted); *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1070 (6th Cir. 1987) ("We do point out that under certain circumstances the plaintiffs, by their own testimony, would only accept accommodations that would violate the Establishment Clause.")

components of the Due Process Clause must be rejected. This paper submits that, far from undermining its thesis, originalist precepts support this redundant protection of Free Exercise rights. The redundancy is consistent with the early debates over the adoption of a Bill of Rights: while opponents argued that the Constitution already protected any rights that a Bill of Rights would contain, supporters (mainly Antifederalists) felt that explicit enumeration was warranted for certain rights that presented uniquely high risks of government infringement.[69] Opponents, however, expressed concerns that such an enumeration would invite governmental arguments that the people retained only those rights listed therein.[70]

The Ninth Amendment was an attempt to achieve consensus by preempting that pro-government argument, clearly stipulating that the enumeration of certain rights "shall not be construed to deny or disparage others retained by the people."[71] Ultimately, then, the Bill of Rights was enacted not to *expand* liberty relative to existing constitutional protections (including the explicit enumeration of government powers)[72] but rather to provide an extra layer of unmistakable protection to a core set of particularly vulnerable rights.[73] The Fourteenth

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[69] Thomas Jefferson, *Letter to James Madison* (Mar. 15, 1789) *available at* http://press-pubs.uchicago.edu/founders/print_documents/v1ch14s49.html:

> [I]n a constitutive act which leaves some precious articles unnoticed, and raises implications against others, a declaration of rights becomes necessary by way of supplement. This is the case of our new federal constitution. This instrument forms us into one state as to certain objects, and gives us a legislative and executive body for these objects. It should therefore guard us against their abuses of power within the field submitted to them.

[70] *E.g.*, James Wilson, *Speech Before the Pennsylvania Ratification Convention* (Nov. 28, 1978) *available at* http://csac.history.wisc.edu/james_wilson_speech11.28.pdf:

> In all societies, there are many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given.

[71] U.S. CONST. amend. IX.

[72] *Cf.* THE FEDERALIST NO. 84 (Alexander Hamilton) (May 28, 1788) ("[W]hy declare that things shall not be done which there is no power to do? . . . [T]he constitution is itself in every rational sense, and to every useful purpose, a Bill of Rights.").

[73] *E.g.*, VIRGINIA RATIFICATION RESOLUTION (June 26, 1788), *available at* http://avalon.law.yale.edu/18th_century/ratva.asp:

> That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed

Amendment, which reiterates the Ninth Amendment's overarching constitutional presumption of liberty by means of unenumerated rights, is bound to encompass the enumerated rights already listed in the Bill of Rights.

Finally, none of this is to say that Congress could not, under a proper understanding of the Fourteenth Amendment, enact laws that are necessary and proper to effectuating its enumerated powers. Under the vision presented here, the plaintiff would not always prevail. Instead, this framework would simply shift the burden of demonstrating the constitutionality of a challenged law onto the government, requiring it to articulate a compelling justification for restricting the liberty of its citizens and a narrow tailoring of its means to fit that purpose—just as it does today in the context of laws restricting judicially favored rights. The government, consequently, would no longer have the benefit of a judiciary that is "*obligated* to seek out other conceivable reasons for validating [a state statute]" even when its own asserted interests fail.[74]

> either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.

See also James Madison, *Speech Introducing Bill of Rights* (June 8, 1789) *available at* http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss11.html:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

One may reasonably ask whether this defense is too broad: would this paper's thesis require replacing *all* current Bill of Rights doctrines with a Due Process-style analysis? In fact, such a broad departure is not necessary under this proposal because the Free Exercise Clause is *sui generis* in a crucial respect: it alone conditions its protections on membership in a particular group of people. The resulting distinction may be framed in the following way: It makes sense to retain the present jurisprudence tailored to particular enumerated rights because the language of those rights is illuminating with respect to the precise protections envisioned by the founding generation in the relevant field. Accordingly, right-specific jurisprudence normally gets us closer to the original meaning than applying a generalized Due Process analysis would. While those same benefits may conceivably apply to current Free Exercise jurisprudence, they are outweighed by the aforementioned problems associated with judicial attempts to balance Free Exercise against perceptions of unfairness, all the while avoiding Establishment Clause violations. These problems are unique to the Free Exercise Clause and justify an idiosyncratic approach to Free Exercise law.

[74] *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004) (*citing Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 146 (1st Cir. 2001)) [emphasis and alteration in original].

Nevertheless, courts can and do uphold laws under heightened scrutiny when the government has a good answer for why it must encroachment on a litigant's freedom.

III. ANALYSIS

A. Due Process and Polygamous Marriage

Polygamy has long been a religious freedom issue in the United States. Indeed, as the previous section noted, the earliest significant Free Exercise case was an unsuccessful challenge to the Morrill Anti-Bigamy Act.[75] Courts have repeatedly addressed this issue from a First Amendment perspective.[76] It seems unlikely that the Court will soon consider a Due Process challenge to laws discriminating against polygamy, but precedent may support a right to engage in polygamous relationships without government persecution—including persecution in the form of a refusal to recognize polygamous marriages.

Relevant jurisprudence on this point begins with one of the monumental cases arising from the Warren Court, *Griswold v. Connecticut*.[77] In *Griswold*, the plaintiffs challenged a state law that criminalized the use of contraceptives.[78] The Court invalidated the statute under the Fourteenth Amendment's Due Process Clause, finding that it protects an unenumerated "right to marital privacy" as a result of several similar liberties such as the freedom of association, the Fourth Amendment's guarantee of privacy against unreasonable search and seizure, and the Ninth Amendment's reservation of unenumerated rights.[79] Calling marriage "an association for as noble a purpose as any involved in our prior decisions," the Court concluded that the

[75] *See Reynolds*, 98 U.S. 145.
[76] *Id.*; *see also The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890).
[77] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[78] *Id*.
[79] *Id*. at 485-86.

contraceptive ban represented a state encroachment into marital privacy the "very idea" of which is "repulsive to the notions of privacy surrounding the marriage relationship."[80]

Likewise, three decades later, the Court invalidated a state anti-sodomy law in *Lawrence v. Texas*, again ruling that citizens have a privacy right against state intrusions on fundamentally intimate and personal decisions.[81] Justice Anthony Kennedy wrote for the Court.[82] In *Lawrence*, the Justice Kennedy applied the post-*Carolene Products* bifurcated Due Process analysis.[83] First, the Court determined whether the right at issue is a "fundamental right" or a "liberty interest."[84] The Court performs that inquiry by looking to whether the right is deeply rooted in our nation's history or culture.[85] Justice Kennedy determined that homosexual intimacy had long been condoned under the law—despite laws against sodomy, these rarely signed out homosexual conduct for discrimination, and they were rarely enforced against consenting adults, but rather against rapists.[86] Contrary to the Court's prior conclusion in *Bowers v. Hardwick*, which relied on the mere existence of anti-sodomy laws and did not consider their traditional nonenforcement, Justice Kennedy determined that the right at issue found sufficient historical support to be

[80] *Id*. at 486. The Court continued to build out this Due Process privacy right in *Roe v. Wade*, 410 U.S. 113 (1973), which invalidated a Texas ban on abortions. The Court determined that the government's interest in regulating abortion becomes progressively broader over the course of a pregnancy. *Id*. Consequently, the Court held that any regulation of first trimester abortions would run afoul of the Fourteenth Amendment, but that the government could impose certain health regulations thereafter, and could even ban abortions entirely following fetal viability. *Id*. The Court later modified that holding in *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Casey* abandoned the trimester framework in favor of the rule that an abortion regulation violates Due Process if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id*. at 877. These cases both emphasize that the liberty guaranteed by the Due Process Clause is not constrained to a mere checklist of rights previously recognized by the Court, nor does it protect "only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified." *Id*. at 847. Although the Court's holdings have been narrower than this reasoning may suggest, *Roe* and *Casey* employ the language of a presumption of liberty, and counsel in favor of a robust reading of the Due Process Clause.

[81] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[82] *Id*.

[83] *Id*. at 584-87.

[84] *Id*.

[85] *Id*.

[86] *Id*. at 569-70.

considered fundamental.[87] Consequently, Justice Kennedy applied analysis resembling strict scrutiny, which requires that the challenged law represent the least restrictive means to further a compelling government interest.[88] Here, the government interest served by the anti-sodomy law failed the threshold inquiry—moral condemnation and discrimination against homosexuals could hardly be considered a legitimate governmental interest, let alone a compelling one.[89] Justice Kennedy accordingly did not need to reach the tailoring question.[90]

A decade later, in *Windsor v. United States*, the Court heard a challenge to the Defense of Marriage Act ("DOMA"), which denied federal benefits to same sex couples.[91] This time, the law was a federal one, so the challenge fell under the Fifth Amendment Due Process Clause.[92] Once again writing for the Court, Justice Kennedy drew heavily on *Lawrence*, reiterating that bare animus cannot constitute a legitimate government interest.[93] Accordingly, DOMA was unconstitutional "for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[94]

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[87] *Id*. at 578:

> The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

[88] *Id*.

[89] *Id*. at 577 ("There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.").

[90] *Id*.

[91] *United States v. Windsor*, 133 S. Ct. 2675 (2013).

[92] *Id*.

[93] *Id*. at 2693-94 ("DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government . . . . The principal purpose is to impose inequality, not for other reasons like governmental efficiency."); *see also Romer v. Evans*, 517 U.S. 620 (1996).

[94] *Id*. at 2696.

These precedents suggest that, even after the repression of Due Process in the post-*Lee Optical* years, there remains a strong argument that anti-polygamy laws are unconstitutional. Recall that, under the *Reynolds* First Amendment challenge to the Morrill Anti-Bigamy Act, Justice Waite refused to recognize a Free Exercise right to polygamy because he apparently could not conceive of a way to do so in which the underlying reasoning could not also support a Free Exercise right of offering human sacrifices.[95] Whatever the merits of Justice Waite's fears of enabling human sacrifices under the First Amendment, after *Griswold*, *Lawrence*, and *Windsor*, those fears are plainly unsupportable in a Due Process regime. Unlike bare animus toward polygamous families, prevention of murder is commonly considered a compelling government interest, which would be capable of overriding any "right" to murder others.[96] More fundamentally, harkening back to the natural rights underpinnings of the Fourteenth Amendment, the liberties protected under Due Process do not embrace attempts to harm the life, liberty, or property of others; thus, there can exist no "right to murder" in the first instance.[97] It is a contradiction in terms.

Meanwhile, polygamy fits squarely into the *Griswold-Lawrence-Windsor* protections of intimacy and marital autonomy. The "zone of privacy" surrounding intimate choices finds strong support in the historical records, including with respect to poly families. For example, despite signing the Morrill Anti-Bigamy Act, President Lincoln subsequently reversed course, promising to respect the privacy of poly families in exchange for Utah's neutrality in the Civil War.[98] Thus, poly families' right to exist free from government discrimination is established in

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[95] *Reynolds*, 98 U.S. at 166.
[96] *E.g.*, *United States v. Salerno*, 481 U.S. 739 (1987) (treating as a compelling interest "a concern for the safety and indeed the lives of its citizens").
[97] *Cf.* Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 Ark. L. Rev. 347 (1995).
[98] EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS 139 (2001), *available at* http://books.google.com/books?id=mzlVLyebEz8C&q=%22too+hard+to+split%22#v=snippet&q=%22too%20hard

the history and culture of the United States, in a similar way to that of same-sex intimacy: laws to the contrary were left systemically unenforced.[99] Just as same-sex intimacy, then, the right to privacy in the practice of polygamy should be considered a fundamental one. Accordingly, the government must show that, for example, the Morrill Anti-Bigamy Act is narrowly tailored to serve a compelling government interest. But there is no government interest served in denying poly families the right to marriage recognition beyond animus and moral condemnation.[100] If these purported interests sound familiar, it is because they are the same ones the Court has already rejected in *Lawrence* and *Windsor*.[101] One may suggest that, for example, the government also retains an interest in protecting the tax code from complications that could arise were poly families to receive federal recognition. However, this argument proves too much: under such a rationale, the government could easily discriminate against any minority by enacting a tax code that targets them, or that exempts the majority from certain obligations. When challenged to respect the rights of that minority, the government could then simply point to the manufactured administrative complications of recognizing equal rights, thereby satisfying the government interest prong of Due Process scrutiny. It seems unlikely that the same constitutional provision that protects unenumerated fundamental rights simultaneously negates that protection by rewarding governments that enact discriminatory tax policies with more power than they would otherwise possess. Therefore, tax complications cannot save the constitutionality of otherwise unconstitutional laws based on bare animus.

%20to%20split%22&f=false ("Having signed the Morrill Act, Abraham Lincoln reportedly compared the LDS Church to a log he had encountered as a farmer that was 'too hard to split, too wet to burn and too heavy to move, so we plow around it. That's what I intend to do with the Mormons. You go back and tell Brigham Young that if he will let me alone, I will let him alone.").

[99] *Compare id. with supra* note 86 and accompanying text.

[100] *Cf. supra* note 94 and accompanying text.

[101] *Lawrence*, 539 U.S. 558; *Windsor*, 133 S. Ct. 2675.

The criminalization of holding more than one simultaneous marriage license, as was the basis for *Reynolds'* conviction, does not even comprise the extent of discrimination against poly families, however. In fact, some states even have laws criminalizing the act of *holding oneself out* as being married to multiple individuals in spirit, even if legally married to only one.[102] It is this scenario that recently led Kody Brown and his family to challenge Utah's anti-poly cohabitation statute.[103] In a remarkably thorough and well-reasoned decision, the district court demonstrated the workability of this paper's thesis by striking the law on *both* Free Exercise and Due Process grounds.[104] First applying Free Exercise analysis, the court determined that the anti-poly cohabitation law was not a neutral law because, as the Court inadvertently admitted while deferring to the legislature in *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, the anti-polygamy forces precipitating its enactment sought to effect bigoted ends: "[t]he organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world."[105] Thus, the law was susceptible to a Free Exercise challenge, which the court found fatal to the poly cohabitation ban.[106]

Next, the *Brown* court analyzed the law under Due Process.[107] The court was constrained by circuit precedent to treat the right to religious cohabitation as nonfundamental.[108] However, as in *Lawrence* and *Windsor*, the court recognized that moral disapproval was not a legitimate government interest.[109] Therefore, the court ruled that the statute was unconstitutional under the

[102] Utah Code Ann. § 76-7-101.
[103] *Brown v. Buhman*, Case No. 2:11-cv-0652-CW (Dist. Utah 2013).
[104] *Id*.
[105] *Id*. at 20 (*quoting Late Corp*., 136 U.S. at 49).
[106] *Id*. at 21.
[107] *Id*. at 28.
[108] *Id*. at 40; *see also Seegmiller v. Laverkin City*, 528 F.3d 762 (10th Cir. 2008).
[109] *Id*. at 37-43.

Due Process Clause.[110] Tellingly, the court's analysis in this regard appears more direct and structured than the analysis in the Free Exercise section, with the latter section bobbing and weaving in a valiant effort to unify Supreme Court precedent.

The *Brown* approach is a strong one, and it can be replicated. As Professor Jonathan Turley, counsel for Brown, has noted, "[p]lural families present the same privacy and due process concerns faced by gay and lesbian community over criminalization [prior to *Lawrence*]."[111] Thus, the Brown decision "secured for plural families the promise of privacy recognized for same-sex couples in *Lawrence v. Texas*."[112] Indeed—and *Brown* accomplished all this in a way that does not confer special privilege on any single creed. The Supreme Court would do well to emulate this commendable approach.

B. Due Process and Religious Freedom in the Workplace

Next, this paper examines freedom of contract issues as they implicate religious liberties. In a recent case, *Burwell v. Hobby Lobby*, the Supreme Court held unconstitutional a law requiring for-profit employers to enable subsidized access to contraceptives for their employees in violation the employers' religious convictions.[113] The Court first determined that citizens do not forfeit their Free Exercise rights when they form for-profit corporations, so the statute implicated religious liberty.[114] The remainder of the *Burwell* decision turned on another artifact of complicated First Amendment doctrine—the Religious Freedom Restoration Act ("RFRA").[115]

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[110] *Id*.
[111] Jonathan Turley, *Federal Court Strikes Down Criminalization of Polygamy In Utah*, JONATHANTURLEY.COM (Dec. 13, 2013), http://jonathanturley.org/2013/12/13/federal-court-strikes-down-polygamy-law-in-utah/.
[112] *Id*.
[113] *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751 (2014).
[114] *Id*.
[115] *Id*.; *see also* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

Enacted in 1993 following the Court's decision in *Employment Division v. Smith*, RFRA represented a congressional attempt to recalibrate courts' treatment of Free Exercise rights.[116] *Smith*, as noted *supra*, had carved out neutral laws of general applicability from the purview of the Free Exercise Clause (unless additional rights are at issue).[117] Under RFRA, the *Burwell* Court was required to apply strict scrutiny to the contraceptive coverage mandate.[118] Even assuming that the provision of contraceptives were a compelling government interest, the Court held that it failed the tailoring prong because there were two less restrictive alternatives for the government to enable access to contraceptives without burdening free exercise rights: first, the government could directly undertake a contraceptive distribution program itself; and second, the government could permit private actors to supply subsidized contraceptives.[119] Accordingly, the mandate could not survive RFRA's required strict scrutiny standard.[120]

Setting aside questions about the actual effect of RFRA in relation to pre-*Smith* Free Exercise jurisprudence, the principled constitutional criticisms of *Burwell*'s Free Exercise analysis tended to center on the fact that it permitted certain corporations to escape obligations that the law imposed on others, effectively resulting in a windfall (or, more accurately, something of a *de minimis* competitive advantage) for corporations owned by citizens with particular religious beliefs.[121] From a corresponding—but less constitutionally relevant—

[116] Michael P. Farris & Jordan W. Lorence, *Employment Division v. Smith and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65 (1995).
[117] *Smith*, 494 U.S. at 879.
[118] *Burwell*, 134 S. Ct. at 2759.
[119] *Id*. at 2779-83.
[120] *Id*.
[121] *E.g.*, *id*. at 2787 (Ginsburg, J., dissenting) (lamenting that business owners "can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs" despite "[c]ompelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others").

perspective, the *Burwell* ruling resulted in employees of certain corporations receiving fewer government mandated benefits than employees of other corporations.[122]

Just as in the preceding section, however, the Court could have avoided these vexing questions by analyzing the pattern under substantive Due Process. Here, however, the right at issue would be liberty of contract, rather than marital privacy. Thus, the Court would be faced with two options: first, it could revive sincere, consistent Due Process protection by revisiting its *West Coast Hotel* decision;[123] and second, it could preserve the fundamental/nonfundamental rights distinction and analyze the law under rational basis. Under the first route, the Court could invoke the *Allgeyer* right to liberty of contract, the explication of which warrants in-depth quotation here:

> The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the constitution of the Union. The 'liberty' mentioned in that [Fourteenth] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.[124]

That is, under liberty of contract, there would be a fundamental right for citizens to hire employees under the terms that are "proper, necessary, and essential" to their pursuit of an honest living.[125] Were those citizens to determine that enabling contraceptive coverage violated their conscience, they would be free to decline to offer that benefit, and bear the consequences in the labor market for their decision. To constrain that right, a law would have to face strict

[122] *Id*.
[123] *See West Coast Hotel*, 300 U.S. 379.
[124] *Allgeyer*, 165 U.S. at 589.
[125] *Id*.

scrutiny. In this respect, the analysis would not differ significantly from the Court's actual reasoning under RFRA,[126] except in one crucial respect: the result would be that all citizens alike have the right to offer or decline to offer contraceptive benefits, regardless of their religion. Accordingly, the revival of intellectually sincere Due Process analysis, free from the *Lee Optical-Carolene Products* rights-bifurcation exercise, could protect the liberty of all citizens to enter into the contracts of their choosing. It would, of course, also obviate the need in this case to grapple with the ambiguous meaning of statutes like RFRA, a source of considerable contention in the *Burwell* decision.[127]

There remains, however, a second path for the Court. If the Court wished to preserve the *Carolene Products* vision of bifurcated liberty to distance itself from that hobgoblin of the collective deferential judiciary, *Lochner v. New York*,[128] it could analyze the contraceptive mandate as a nonfundamental economic right (or "liberty interest"). While this analysis would utilize "rational basis" analysis, under which courts often simply rubber stamp challenged legislation, there may be a way to salvage rational basis into an earnest evaluation of the merits and burdens of a law.[129] First, the Court would have to consider what it assumed in *Burwell*: whether the legislation served a legitimate legislative interest.[130] Health and safety-type rationales have generally been accepted as legitimate bases for legislation, and the government would likely assert that the contraceptive mandate served such an interest.[131]

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[126] *See Burwell*, 134 S. Ct. at 2780-83 (applying strict scrutiny under RFRA).
[127] *See id*. at 2791-92 (Ginsburg, J., dissenting) (advocating a narrower meaning of RFRA).
[128] *Lochner v. New York*, 198 U.S. 45 (1905).
[129] *See generally* CLARK NEILY, TERMS OF ENGAGEMENT (2013).
[130] *See Burwell*, 134 S. Ct. at 2779-80 (assuming health is a compelling—and by implication, legitimate—government interest).
[131] *E.g.*, *United States v. Rutherford*, 442 U.S. 544 (1979) (treating health and safety as a legitimate interest even with respect to terminally ill patients who would die after the state denied access to 'unsafe' experimental pharmaceuticals).

Then, however, the Court would need to reach the tailoring prong, which requires the law to be rationally related to the stated interest.[132] Here, as the Fifth Circuit has noted in *St. Joseph Abbey v. Castille*, "the great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation."[133] In *St. Joseph Abbey*, the court struck down a Louisiana law that purported to serve health and safety by regulating the casket manufacturing industry because the state did not even require caskets for burials.[134] Even under rational basis, the court concluded that the regulation at issue bore no rational relation to the asserted health and safety interests because even burials involving a faulty casket would entail fewer health and safety risks than the already-legal casket-free alternative.[135] For the contraceptive mandate, the context of its adoption includes availability of contraceptives through private actors.[136] Nevertheless, the law eschews government or third party provision of contraceptives in favor of forced coverage by employers.[137] Like the casket regulation, the contraceptive mandate seems to target a set class of people—employers—more than it does a specific problem. The Supreme Court has stated that such "class legislation" is "obnoxious to the prohibitions of the Fourteenth Amendment."[138] Thus, it seems that the contraceptive mandate may have tailoring flaws under even rational basis. Admittedly, the reasoning behind that conclusion feels more attenuated than that supporting a full liberty-of-contract approach, but

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[132] *See City of Cleburne, Tex. v. Cleburne Living Ctr*., 473 U.S. 432, 446 (1985).
[133] *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226 (5th Cir.) *cert. denied*, 134 S. Ct. 423 (2013).
[134] *Id*. at 227.
[135] *Id*. at 226.
[136] *E.g.*, Meghan Casserly, *Melinda Gates' $4.3 Billion Prayer For Contraception Crosses Politics And Religion*, FORBES (July 12, 2012), available at http://www.forbes.com/sites/meghancasserly/2012/07/12/melinda-gates-4-3-billion-prayer-for-contraception-crosses-politics-and-religion/. This fact goes to the tailoring prong, too, because the availability of private solutions constitutes a less restrictive alternative than government mandates; *see* Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 667-69 (2004).
[137] *Burwell*, 134 S. Ct. at 2780.
[138] *Civil Rights Cases*, 109 U.S. 3, 23 (1883).

either solution avoids the favoritism critique of the Free Exercise framework employed in *Burwell*, and either both are likely simpler to apply than the *Burwell* analysis.

In any case, sincere Due Process analysis for all liberties, not just those favored by the post-*Carolene Products* Court, could go a long way toward protecting religious liberty in the workplace context—and not just for employers. Consider that Sunday forced-closing laws, which the Court has repeatedly upheld as constitutional, have disproportionate impact on employees whose religions adhere to a non-Sunday Sabbath.[139] These employees (including the self-employed) must abstain from working during at least two days a week—their religious Sabbath and the state's designated day of rest, Sunday.[140] This requirement imposes substantial economic hardship on members of these religions, but the Supreme Court has rebuffed their Establishment and Free Exercise Clause challenges, deferring to legislatures on determinations including the alleged legislative interests and their effect on those in the plaintiffs' position.[141] Liberty of contract could ensure that these members of minority religions are permitted to work enough to put food on their tables. This protection would preserve the same range of economic choices for members of Saturday Sabbatarian religions, members of non-Sabbatarian religions, and for those who adhere to no religion at all. Consequently, liberty of contract would relieve the First Amendment of the sole burden of protecting American's freedom to exercise whatever religions to which they adhere.

C. Due Process and Parental Prerogative in Education

Finally, this paper turns to issues involving parental rights in their children's education. In a seminal 1972 case, *Wisconsin v. Yoder*, the Supreme Court struck down a statute that would

[139] *See Gallagher v. Crown Kosher Super Market of Massachusetts, Inc*., 366 U.S. 617 (1961).
[140] *Id*.
[141] *Id*.; *Braunfeld v. Brown*, 366 U.S. 599 (1961).

have forced Amish children to remain in school past eighth grade in violation of their parents' religious principles.[142] Employing a Free Exercise analysis, the Court determined that the state's purported interest in education must be considered in context of the alternate education provided by the Amish community, and concluded that the state's interest was insufficiently compelling to justify the violation of Amish beliefs.[143]

But other Free Exercise plaintiffs have not fared so well in the educational setting. For example, in *Mozert v. Hawkins County Public Schools*, a group of parents challenged a school district's use of a reading primer that offended the parents' religious beliefs.[144] The parents argued that their beliefs compelled them to avoid exposure with reading materials that discussed, among other things, witchcraft and idol worship.[145] They sought the right for their children to read alternative materials instead.[146] The Sixth Circuit, however, reasoned that while mandatory participation in acts or statements might violate the Free Exercise Clause, mandatory exposure to offensive ideas could not be unconstitutional—even if the religion required adherents to abstain from exposure to those ideas.[147] Accordingly, under *Mozert*, parents do not have a constitutional right to prevent their children from encountering offensive ideas.

Similarly, in *Parker v. Hurley*, the First Circuit addressed a similar question when two sets of parents challenged a teacher's in-class reading of books that portrayed homosexuality as acceptable, a notion that conflicted with the parents' beliefs.[148] The *Parker* court employed a similar analysis to that supporting the *Mozert* decision, but it also went one step further, holding that even if the exposure to offensive ideas is calculated to inculcate values contrary to the

[142] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[143] *Id*. at 226-28, 236.
[144] *Mozert v. Hawkins Cnty. Bd. of Educ*., 827 F.2d 1058 (6th Cir. 1987).
[145] *Id*. at 1062.
[146] *Id*. at 1060.
[147] *Id*. at 1065.
[148] *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008).

parents' religious beliefs, they still have no Free Exercise right to withdraw their children from the curriculum.[149] The court reasoned that parents' exercise of religion is protected by their freedom instruct their children on their own religious beliefs at home.[150] Consequently, under *Parker*, parents cannot challenge a school's deliberate subversion of their belief systems as a Free Exercise violation.

These results underscore the convoluted inquiries in which courts must engage under current Free Exercise doctrine. In particular, one can at least understand why the Fifth and First Circuits felt they needed to draw the distinction between religiously-required acts and omissions on one hand, and mere exposure to ideas on the other. To hold otherwise might require the courts to review the core mandate of public schools—exposing students to new ideas—to determine just which parental accommodations are constitutionally required, and which are not.[151] Nevertheless, the distinction feels somewhat disingenuous—is it really the case that passive exposure to ideas is any different than other acts from which believers say they must abstain? If the exposure were to more graphic descriptions or images, would these courts still maintain that mandatory exposure cannot implicate Free Exercise? Moreover, should not the concern about paralyzing schools in their core mission of teaching ideas go to the tailoring prong of a strict scrutiny analysis, rather than simply counseling against recognizing any Free Exercise right in the first instance?

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[149] *Id*. at 106 ("It is a fair inference that the reading of *King and King* was precisely intended to influence the listening children toward tolerance of gay marriage. That was the point of why that book was chosen and used. Even assuming there is a continuum along which an intent to influence could become an attempt to indoctrinate, however, this case is firmly on the influence-toward-tolerance end. There is no evidence of systemic indoctrination. There is no allegation that Joey was asked to affirm gay marriage. Requiring a student to read a particular book is generally not coercive of free exercise rights.").

[150] *Id*. at 105 ("[A]s to the parents' free exercise rights, the mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently.").

[151] *Id*. at 107 (noting that "[p]ublic schools often walk a tightrope between the many competing constitutional demands made by parents, students, teachers, and the schools' other constituents").

Here too, Due Process precedent supplies a framework that may prove more workable than the current First Amendment regime. In fact, some of the landmark cases in Due Process jurisprudence arose out of disputes over parents' rights in the education context. First, in *Meyer v. Nebraska*, the Court invalidated a Nebraska law that sought to force children of immigrants to assimilate more quickly and fully by prohibiting instruction in foreign languages.[152] Observing that in both ancient Sparta and in Plato's Ideal Commonwealth, governmental decisions on the education of children were seen as superior to private decisions at the family level and were therefore enforced by the state, the Court roundly rejected the idea for modern society.[153] In no uncertain terms, the Court affirmed that "their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution."[154] The Court concluded that the right of private instructors to teach foreign languages to children, "long freely enjoyed," could not be curtailed by substituting the judgment of the legislature for that of families and their private teachers.[155]

Shortly thereafter, in *Pierce v. Society of Sisters*, the Court again affirmed parental rights to direct the education of their children, striking an Oregon statute that sought to eliminate private schools.[156] Oregon had passed the law in attempt to force students into public schools, which sought to imbue values that the legislature considered pro-American.[157] The Court, however, held that it was "entirely plain that the Act of 1922 unreasonably interferes with the

[152] *Meyer v. Nebraska*, 262 U.S. 390 (1923).
[153] *Id*. at 401-02.
[154] *Id*. at 402.
[155] *Id*. at 403.
[156] *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).
[157] DAVID E. BERNSTEIN, REHABILITATING LOCHNER 93 (2011) (describing the "nativist and anti-Catholic origins of these laws").

liberty of parents and guardians to direct the upbringing and education of children under their control."[158] It continued:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[159]

Consequently, the Court concluded that Oregon's public education mandate was unconstitutional.[160]

Taken together, these "two sturdiest pillars of the substantive due process temple"[161] lay the foundation for a Due Process right to direct the education of one's children in the public school context.[162] The sweeping libertarian language in *Pierce*, coupled with *Meyer's* hostility to the state's assumption of supremacy in educational decisions, supports an inference of a broader right to direct the education of one's children that would not dissipate upon entrusting some portion of that education to the state.

Indeed, in other contexts, the Court has long recognized that citizens retain constitutional rights when they voluntarily transact with the government. For example, those who place themselves under the direction of the state by virtue of accepting a job in the government retain Fourth Amendment protections from workplace searches that would be entirely legal were they performed by a private employer.[163] Further, students retain Fourth Amendment protection in

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[158] *Pierce*, 268 U.S. at 534-35.
[159] *Id*. at 535.
[160] *Id*. at 536.
[161] Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1934 (2004).
[162] *See also Troxel v. Granville*, 530 U.S. 57 (2000) (reversing the trial court's grant of visitation rights to grandparents against the wishes of the mother on parental autonomy grounds).
[163] *See O'Connor v. Ortega*, 480 U.S. 709 (1987).

their own enclosed areas at public schools, including lockers.[164] There is no reason that this presumption against total forfeiture of rights in government transactions would not extend to the realm of public education.

For all these reasons, the right of the parent to direct the education of her children appears to be a fundamental right, and it likely persists even after a parent has chosen to send her children to public school. Accordingly, in a Due Process challenge to a fact pattern like *Parker* or *Mozert*, courts would assess the school policies under strict scrutiny. The government likely has a compelling interest in educating children.[165] However, the tailoring element seems to be lacking under both scenarios. First, in *Mozert*, the plaintiffs merely sought an alternative reading group utilizing nonoffensive materials.[166] It is difficult to imagine how the state's interest in educating children would be substantially harmed were parents to have the option to place their children in reading groups that did not cover materials contrary to their faith.

Second, in Parker, the parents sought advanced notice and the ability to remove their children from class on days in which especially controversial topics would be discussed (and it bears repeating that the discussions for which the parents sought forewarning transpired for the purpose of instilling values antithetical to those of the plaintiffs).[167] Perhaps, as noted earlier, the state could make a practicability argument, claiming that it would be burdensome to resort to judicial review at each juncture to determine whether any given topic warrants alternative reading groups or advanced warning to accommodate parents who find the materials

[164] *See New Jersey v. T.L.O.*, 469 U.S. 325 (1985).
[165] *See, e.g.*, *Pierce*, 268 U.S. at 534 ("No question is raised concerning the power of the state reasonably to regulate all schools . . . .").
[166] *Mozert*, 827 F.2d at 1060.
[167] *Parker*, 514 F.3d at 93.

objectionable.[168] However, this argument seems weak because school administrators could defer to parents rather than litigate each case.

Moreover, the principle of Due Process regularly imposes administrative burdens on the state (as when, for example, recognition of same-sex marriages necessitates changes in the application of tax law).[169] Generally, these administrative burdens do not preclude recognition of a Due Process right.[170] And to the extent that the administrative burden of a given accommodation proved genuinely insurmountable, that fact would weigh in the administrators' favor during the tailoring prong of the Due Process analysis.[171] The rights thereby recognized would, of course, extend to religious and nonreligious parents equally. Better still, this framework would avoid placing courts in a position to evaluate whether exposure to offensive ideas truly represents an affront to the exercise of a citizen's religious imperatives after that citizen has clearly asserted that it does —an inquiry that should make courts and citizens alike very uneasy. Thus, as in the case of polygamy and workplace regulations, Due Process analysis can also protect the religious components parental rights in the education context even better, perhaps, than a Free Exercise regime.

IV. CONCLUSION

This paper has sought to summarize the difficulties and shortcomings of First Amendment religious freedom jurisprudence on the issues of polygamy, workplace regulations, and parental educational prerogative. It suggests that complex and fickle Free Exercise doctrine

[168] *Cf. id*. at 96 fn. 8 (noting practicability objections raised by amici).
[169] *See, e.g., Windsor*, 133 S. Ct. 2675, 2694 ("The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.").
[170] *See id*.
[171] *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 29-30 (2010) (addressing the tailoring prong in a heightened scrutiny analysis, and finding it was satisfied where less restrictive alternatives would have been unworkable in light of the government interest).

was not the inevitable result of an unequivocal First Amendment, but rather the consequence of judicial abdication in other areas of constitutional law, effectively forcing the First Amendment to protect for religious citizens the rights that the Fifth, Ninth, and Fourteenth should have protected for everyone. This paper emphatically *does not* assert that the rights in the Free Exercise cases discussed are not actually protected as matters of religious freedom. Rather, it submits that these rights may also be grounded in the Fourteenth Amendment in a way that secures them for all Americans. Further, it does not assert that the Due Process Clause presents a better home for unenumerated liberties than does the Privileges or Immunities Clause. However, this paper has documented that, unlike Privileges or Immunities doctrine, Due Process doctrine has once protected an expansive vision of liberty, glimpses of which have persevered throughout the past century in the form of select "fundamental" unenumerated rights. This paper suggests that Due Process can once again provide a real defense for the founders' notion of liberty—and in so doing, it can provide a superior framework for the protection of religious freedom than can the doctrines tasked with safekeeping it today.