LIBERTY RECONSIDERED: APPLYING LOCKEAN PRINCIPLES TO SUBSTANTIVE DUE PROCESS

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[A]ll mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.

- *John Locke*[1]

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1. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, bk. II, § 6 (1689).

INTRODUCTION

Recently, the Supreme Court struck down the right to obtain an abortion in *Dobbs v. Jackson Women's Health Organization*.[2] Concurring with the majority opinion in *Dobbs*, Justice Clarence Thomas argues that along with the Fourteenth Amendment due-process right to obtain an abortion recognized in *Roe v. Wade*,[3] other due-process rights recognized in *Roe's* progeny should be reconsidered because "any substantive due-process decision is 'demonstrably erroneous.'"[4] Justice Thomas specifically calls out the Court's decisions in *Lawrence v. Texas*[5] and *Obergefell v. Hodges*[6] in his attack.[7] Additionally, Justice Samuel Alito, the author of the majority opinion in *Dobbs*, has made it clear that he disagrees with the right to same-sex marriage recognized in *Obergefell* because it lacks a foundation in the Nation's history and tradition, which is the current test used in determing fundamental rights under the Fourteenth Amendment's Due Process clause.[8] Thus, Justice Thomas's and Justice Alito's respective commentaries suggest the Court's treatment of the right to have an abortion in *Roe* similarly endangers the current constitutional protection of the same-sex substantive due process rights recognized in *Lawrence* and *Obergefell*. This threat presents a major concern for the autonomy and privacy of American citizens' most intimate decisions.

This Note argues that the US Constitution mandates that the fundamental rights *Lawrence* and *Obergefell* recognize not only should not but cannot be overruled because they *are* rooted in the Nation's history and tradition. Such rights find support from the principles of Enlightenment philosopher and guiding figure in the Nation's governmental ideals, John Locke. Through this connection, the rights *Lawrence* and *Obergefell* recognize are properly established in the Nation's history and tradition and thus deserve enduring constitutional protection. Part I of this Note provides a brief background on

2. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

3. Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. 215.

4. *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring); *see also* United States v. Vaello-Madero, 596 U.S. 159, 169 (2022) ("[T]ext and history provide little support for modern substantive due process doctrine.").

5. Lawrence v. Texas, 539 U.S. 558 (2003) (protecting the right of consenting adults to engage in private, intimate sexual acts, including same-sex acts, without state interference).

6. Obergefell v. Hodges, 576 U.S. 644 (2015) (guaranteeing the fundamental right to same-sex marriage).

7. *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring).

8. *Obergefell*, 576 U.S. at 737 (Alito, J., dissenting) (citation omitted) ("To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that 'liberty' under the Due Process Clause should be understood to protect only those rights that are 'deeply rooted in this Nation's history and tradition.' And it is beyond dispute that the right to same-sex marriage is not among those rights.").

substantive due process, analyzes and critiques how Justice Alito approaches substantive due process cases, asserts a living constitutionalist interpretation, and outlines John Locke's philosophical principles. In Part II, this Note examines Lockean principles and their connection to the Framers of the Constitution. Part III discusses how the Court should apply the Nation's history and tradition test to appropriately honor the intentions of the Founders of the United States and Framers of the Constitution. In doing so, this part argues that the same-sex rights recognized in *Lawrence* and *Obergefell* are rooted in the Nation's history and tradition. This part also examines how the Court could apply the Nation's history and tradition test to other rights, such as access to Assisted Reproductive Technologies (ART), to illustrate the broader relevance of this analysis. Part IV addresses potential concerns regarding this Note's implementation of the Nation's history and tradition test.

I. A BRIEF BACKGROUND OF SUBSTANTIVE DUE PROCESS, ALITO'S APPROACH, AND LOCKEAN PRINCIPLES

This Note will demonstrate that John Locke had a significant influence on the drafters of the Constitution. Additionally, the rights recognized by the Supreme Court in cases like *Lawrence* and *Obergefell*, and the right of access to ART, are all firmly anchored in Lockean principles and intertwined with the country's historical and traditional fabric. They therefore find support within the constitutional framework and original intent of the Framers. Accordingly, these rights endure resolutely and should not be dismissed based on the critique of Justice Alito and many others that they lack support in the Nation's history and tradition. The following sections offer important background information to provide context to the argument presented in this Note.

A. Understanding Substantive Due Process

The Due Process Clause of the Fourteenth Amendment is a crucial component of the United States Constitution and contains significant implications for the rights and protections afforded to American individuals. The Fourteenth Amendment reads:

> 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.[9]

The Due Process Clause comprises both substantive and procedural due process, which collectively serve as safeguards to ensure fairness and protect fundamental rights in the face of government actions. Substantive due process examines whether a legitimate and sufficient purpose justifies the government's deprivation of life, liberty, or property, making it permissible for the government to infringe on the right at issue.[10] Procedural due process, on the other hand, concerns the government following proper procedures when it takes away such life, liberty, or property.[11]

The Court follows a multi-step test to decide cases under the substantive due process doctrine. First, the Court determines whether the liberty interest at issue is a fundamental right.[12] To determine whether a fundamental right is at stake, the Court evaluates whether such a right is deeply rooted in the Nation's history and tradition and is implicit in the concept of ordered liberty.[13] If the Court determines the liberty interest is a fundamental right, then the government action is subject to strict scrutiny and will only be upheld if the infringement is narrowly tailored to achieve a compelling state interest.[14] In the absence of a compelling state interest, the doctrine of substantive due process prohibits the government from infringing on the fundamental right.[15]

B. Justice Alito's Approach to Determining Substantive Due-Process Rights

Justice Alito's conservative approach to substantive due process narrowly defines "liberty" through historical precedent, a method which this Note critiques as inconsistent with the Framers' intent to provide a flexible constitutional framework. This section addresses Justice Alito's approach

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9. U.S. CONST. amend. XIV, § 1 (emphasis added).

10. *See* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501 (1999). For example, the right to travel within the United States has been recognized as a fundamental right protected by substantive due process. In *Saenz v. Roe,* the Supreme Court ruled that states cannot impose durtional residency requirements for welfare benefits, acknowledging the constitutional protection of the right to travel. *Saenz v. Roe*, 526 U.S. 489 (1999).

11. *See Id.* For example, in *Goldberg v. Kelly*, the Supreme Court held that people who are receiving public assistance have the right to a hearing before their benefits can be terminated. *Goldberg v. Kelly*, 397 U.S. 254 (1970). This decision ensured procedural due process by requiring individuals be given notices and an opportunity to context the termination of their benefits.

12. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

13. *Id.* at 720-21.

14. *See id.* at 721.

15. *Id.*

to determing substantive due process rights, critiques his approach, and examines how his methodology impacts rights such as same-sex marriage and consensual relationships.

Justice Alito has been known for taking a more conservative stance while serving on the judiciary, especially in cases about the recognition of rights under substantive due process.[16] He leans toward an originalist interpretation of the Constitution and believes that the Court should not recognize rights as constitutional rights if they are not firmly grounded in what he views as the Nation's history and tradition.[17] In *Obergefell*, the Court held that, under substantive due process, same-sex couples have a constitutional right to marry.[18] Justice Alito dissented in this case and argued that the recognition of same-sex marriage was not consistent with what he asserts to be society's traditional understanding of marriage.[19] He contended that the right to same-sex marriage "lacks deep roots" and "is contrary to long-established tradition."[20] Justice Alito's dissent in *Obergefell* emphasized the historical understanding of marriage as between a man and a woman and questioned whether judicial action should redefine this understanding.[21] His main argument asserted that the recognition of the right to same-sex marriage is not in line with the historical traditions and values of the United States.[22]

With Justice Alito authoring the majority opinion, *Dobbs* overruled the federal right to obtain an abortion *Roe v. Wade*[23] established and *Planned Parenthood v. Casey* further recognized.[24] As he had done before, Justice Alito argued in *Dobbs* that the right to an abortion is not a right that is deeply rooted in American history and tradition.[25] When evaluating the claim in *Dobbs*, Justice Alito said the Court's job is to ask what the Fourteenth Amendment means by the term "liberty." To answer this question, he

16. *See generally* Barbara A. Perry, *The "Bush Twins"? Roberts, Alito, and the Conservative Agenda*, 92 JUDICATURE 302 (2009).

17. *See* Obergefell v. Hodges, 576 U.S. 644, 737 (2015) (Alito, J., dissenting).

18. *Id.* at 681.

19. *Id.* at 738-39 ("This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.").

20. *Id.* at 738.

21. *Id.* at 738-41.

22. *Id.* at 737-40.

23. Roe v. Wade, 410 U.S. 113 (1973).

24. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

25. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (citation omitted) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) ("[The Due Process Clause of the Fourteenth Amendment] has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.' The right to abortion does not fall within this category.").

observed, "the history and tradition that map the essential components of our Nation's concept of ordered liberty" guide this inquiry.[26] After making this statement, however, Justice Alito fails to conduct any historical analysis into what the drafters of the Fourteenth Amendment intended "liberty" to entail.[27] Rather, he considered the Nation's legal precedent surrounding abortions.[28] Finding no constitutional legal support for the right to get an abortion, Justice Alito contended that the right is not deeply rooted in the Nation's history and tradition and concluded thus that the Fourteenth Amendment's Due Process Clause does not protect it.[29]

Conducting the test in this way is flawed and will result in the law recognizing very few rights. It makes sense that Justice Alito could not find constitutional legal support for the right to get an abortion because if he could, there would be no need to ask the Court to give legal protection to that liberty interest. Professor Erwin Chemerinsky articulates this well: "[I]f a right was already protected, there would be no reason to have the Court do it. The fact that the right is not protected shows there is no tradition of protecting the right."[30] Passing the Fourteenth Amendment would be illogical if its drafters knew prior courts would use such an impractical test to construct its meaning. If the inquiry into whether a right has historical legal roots is the test for constitutional protection, it would render the Fourteenth Amendment itself superfluous; its very purpose was and is to provide a means for expanding legal protections to new liberty interests regardless of whether they were historically recognized.

The advent of *Dobbs* challenges the continuing viability of the same-sex relationship rights recognized in *Obergefell* and *Lawrence.* In his opinion, Justice Alito wrote that the decision in *Dobbs* does not threaten other recognized substantive due-process rights, such as those in *Obergefell* and

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26. *Id.* at 240.

27. In fact, the term "liberty" shows up one time in Justice Alito's analysis of the connection between the right to obtain an abortion and the Nation's history and tradition—and that one occurrence is a quote from *Roe*. *See id.* at 240-50.

28. *See id.* at 241.

29. *See id.* at 250.

30. *See* Chemerinsky, *supra* note 10, at 1514. While Chemerinsky's insight pertains to Justice Scalia's requirement of narrowly defining a right at the most specific level of abstraction, *id.* at 1514-15, it finds resonance in the context of Justice Alito's approach to substantive due process. Justice Alito similarly narrows the scope of the historical inquiry by scrutinizing the historical context. *Dobbs*, 597 U.S. at 250. Chemerinsky's observation aligns with the argument that historical legal support may not exist precisely because the Court is being asked to recognize and protect a liberty interest that has not traditionally enjoyed legal recognition. Though Chemerinsky addresses Scalia's approach, the overarching idea supports the contention made here regarding Justice Alito's nuanced historical inquiry.

Lawrence.[31] However, in light of Justice Alito's implementation of the Nation's history and tradition in his *Obergefell* dissent and Justice Thomas's concurring attack on substantive due process in *Dobbs*, the *Dobbs* dissent rightfully acknowledged the very real threat to same-sex relationship rights.[32]

Justice Alito's narrow use of the "Nation's history and tradition" test fails to consider the foundational principles of liberty and adaptability inherent in the Constitution's design. Rather than requiring a showing of historical legal support for the specifically stated liberty interest, the Court should be looking at what "liberty" meant when the United States was founded and the Constitution was ratified. Implementing the test in this way is consistent with the Founders' intention that the Constitution move with society as society's views and practices change. The next section will expand on this.

C. The Founders Intended the Constitution to be a Flexible and Adaptable Document

The Constitution's adaptability is key to its endurance. This section explores how its design allows for evolving interpretations, with mechanisms like the amendment process and features like broad language ensuring it remains relevant to future generations. The proposition that the Framers intended the Constitution to be a flexible and adaptable document that could change with the times is rooted in the Framers' objectives and the language used in the Constitution. For example, the Preamble sets forth the purposes of the document and says one of its goals is to "secure the Blessings of Liberty to ourselves and our Posterity. . . ."[33] Such forward-looking language suggests that the Constitution was intended to benefit future generations, thereby acknowledging the need for flexibility to adapt to changing circumstances. Furthermore, the Framers' use of broad language allows for interpretation and application to new situations. Additionally, the inclusion of a formal amendment process in Article V of the Constitution allows the document to be adapted to reflect changes in societal values, needs, and circumstances.[34] This mechanism for change

31. *See Dobbs*, *supra* note 25, at 290 ("And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

32. *See id.* at 416 (Breyer, Sotomayor & Kagan, J., dissenting) (arguing that the majority "places in jeopardy other rights, from contraception to same-sex intimacy and marriage").

33. U.S. CONST. pmbl.

34. *See* U.S. CONST. art. V.

indicates the Framers' understanding that the Constitution might need adjustments over time.

Not only does the Constitution itself demonstrate the Framers' intention of flexibility over time, but the judiciary has also acknowledged this purpose throughout the Nation's history. In the early 1800s, Chief Justice Marshall declared that the Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[35] Not only has the judiciary acknowledged the Framers' intent of a flexible Constitution, it has further acknowledged that the Constitution's amendments also endure and adapt. Justice Kennedy more recently shared this sentiment in *Lawrence* v. *Texas*:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[36]

The Constitution was also not intended to narrowly limit individual rights and freedoms to its text. Two parts of the Constitution support this proposition: the Necessary and Proper Clause and the Ninth Amendment. The Necessary and Proper Clause grants Congress the power to make all laws "necessary and proper" to carry out its enumerated powers, which are outlined in Article I, Section 8 of the Constitution.[37] This clause provides flexibility and allows for the expansion of federal powers to address new challenges. Similarly, scholars suggest that the Ninth Amendment was added specifically to ensure the Bill of Rights are not the only rights that the Constitution protects.[38] It intentionally reserves unenumerated rights to the people so that their liberties are not limited to those believed to be necessary in 1791.

As mentioned, the Constitution was intended to provide a framework from which the government can build upon, requiring the purpose of its

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35. McCulloch v. Maryland, 17 U.S. 316, 415 (1819).

36. Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

37. *See* U.S. CONST. art. I, § 8, cl. 18 (establishing that Congress has the legislative power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

38. *See infra* Section II.D; *see also* U.S. CONST. amend. IX.

provisions to endure while providing flexibility so as not to limit the growth of the Nation. With this in mind, the Court should implement the Nation's history and tradition test to protect those rights which fit within the scheme and fabric of this Nation's foundation. The principles of Enlightenment philosopher John Locke heavily shaped such ideals, as is evident throughout the Constitution and its related documents. Understanding Locke's influential philosophy provides greater insight into what the Framers envisioned for this country and its people.

D. John Locke's Philosophy

John Locke, a leading Enlightenment philosopher, offered a profound philosophical framework that drove the thinking of the Framers of the US Constitution.[39] His philosophy revolves around core principles, including the concept of natural rights, the social contract, and limited government, all of which laid the groundwork for the development of modern democratic thought.[40]

John Locke's work emphasizes the concept of natural rights, wherein individuals have an inherent right to life, liberty, and property, and he argues that legitimate government is formed to protect such rights.[41] To understand Locke's philosophy of natural rights, it is essential to first understand from where he believes these rights come and what they entail. Locke believed that the state of nature was a condition in which individuals existed without any established political or social order.[42] In this state, people were considered equal and free, but they also lacked security and protection of rights.[43] Locke's state of nature was not necessarily a state of chaos or war, but it lacked the formal institutions that provide stability and justice.[44]

Locke argued that the state of nature was governed by a "law of nature."[45] This law of nature was based on reason and morality and dictated that individuals should not harm others in their life, liberty, health, or possessions.[46] Locke articulated this notion succinctly when he wrote,

> The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind, who

39. *See* Maurice Cranston, *Locke and Liberty*, WILSON Q., Winter 1986, at 82.
40. *See infra* notes 42-63 and accompanying text.
41. *See infra* notes 59-61 and accompanying text.
42. LOCKE, supra note 1, bk. II, ch. II.
43. *See id.*
44. *See id.* § 95.
45. *See id.* § 6.
46. *See id.*

> will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.[47]

The law of nature was a fundamental principle, objective and applicable to all individuals, that guided human behavior in the absence of government.[48] The individual rights to life, liberty, and property were inherent and inalienable, and they preexisted any government or political authority.[49] Locke considered natural rights to be a result of the law of nature and fundamental to the well-being and autonomy of individuals.[50]

Furthermore, according to Locke, liberty in the state of nature is the freedom from arbitrary rule or interference by others.[51] Liberty is the absence of coercion and the absence of being subject to the uncertain will of another person.[52] While Locke emphasizes individual liberty, he also recognizes that liberty is not absolute.[53] It is limited by the law of nature, which is based on reason and prohibits actions that harm others or violate their rights.[54] This definition of liberty does not entail the freedom to harm others or act in a way that destroys the common good.

Central to Locke's philosophy is the concept of the social contract. According to Locke, the state of nature was not ideal due to its lack of security and the potential for conflicts.[55] To overcome these limitations, he urges individuals to enter a social contract to form civil society and government.[56] He posits that individuals voluntarily come together to form

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47. *Id.*

48. *See* Jeffrey S. Koehlinger, *Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 IND. L.J. 723, 726 (1990).

49. *See id.*

50. *See supra* note 47 and accompanying text; *see also* LOCKE, *supra* note 1, bk. II, § 27 ("[E]very man has a 'property' in his own 'person.' This nobody has any right to but himself.").

51. *Id.* § 87 (explaining that man possesses "a Power . . . to preserve his Property, that is, his Life, Liberty and Estate, against the Injuries and Attempts of other Men").

52. *Id.* § 22 ("This freedom from absolute, arbitrary power, is so necessary to, and closely joined with, a man's preservation, that he cannot part with it, but by what forfeits his preservation and life together.").

53. *See id.* § 6. ("But though this be a state of liberty, yet it is not a state of licence; though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession. . . ."); *see also* Cranston, *supra* note 39, at 91 ("Locke did *not* believe in absolute liberty. . . .").

54. *See* Koehlinger, *supra* note 48, at 727.

55. *See* LOCKE, *supra* note 1, bk. II, § 123.

56. *See id.* § 13.

governments to protect their natural rights.[57] As Locke articulates, "[t]he great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property."[58] Governments derive their legitimacy from the consent of the governed, and they have a duty to uphold the law of nature and protect citizens' natural rights.[59] Locke's vision of government is characterized by its "limited" nature. He warns against excessive government intrusion into the lives of individuals:

> [F]reedom of men under government is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where that rule prescribes not, and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.[60]

Additionally, given that Lockean governments derive their authority from the consent of the people, Locke argues that individuals have the right to alter or abolish a government that fails to protect their rights.[61]

In summary, John Locke's view of the state of nature is that of a state where individuals are free and equal but lack adequate protection of their rights. The law of nature, based on reason and morality, governs behavior in this state and emphasizes non-harm to oneself and others. Locke views natural rights, such as life, liberty, and property, as inherent and inalienable, and they serve as the basis for his social contract theory, where

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57. *See id.* § 95 ("Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and unite into a community for their comfortable, safe, and peaceable living, one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it."); *Id.* § 123 ("[I]t is not without reason that he seeks out and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties, and estates . . . .").

58. *Id.* § 124; *see also id.* § 123 (Locke categorizes life, liberty, and estate as one under the term "property"); Cranston, *supra* note 39, at 87 ("[I]n return for justice and mutual security, [men] had agreed to obey their rulers, on condition that their natural rights were respected.").

59. *See* LOCKE, *supra* note 1, bk. II, § 21 ("The natural liberty of man is to be free from any superior power on Earth, and not to be under the will or legislative authority of man, but to have only the law of Nature for his rule."); *see also* Koehlinger, *supra* note 48, at 730 (quoting Andrew J. Reck, *Natural Law in American Revolutionary Thought*, 30 REV. METAPHYSICS 686, 694 (1977)); Cranston, *supra* note 39, at 91 ("The limits [on liberty] are set by the need to protect the life, property, and freedom of each individual from others, and from the society's common enemies. No other limits need be borne, or *should* be.").

60. LOCKE, *supra* note 1, bk. II, § 57.

61. *See id.* § 149 ("And thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even of their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject.").

government's role is to protect and preserve these rights through the consent of the governed.

Locke's philosophy, characterized by the concepts of natural rights, the social contract, limited government, and the right to revolution, laid the intellectual foundation for many of the principles enshrined in the US Constitution. His ideas continue to influence contemporary discussions about individual liberties, the role of government, and the enduring values of constitutional democracy. An account of Locke's role in the formation of the US government and the drafting of the US Constitution follows.

II. JOHN LOCKE'S INFLUENCE ON THE FORMATION OF THE UNITED STATES GOVERNMENT

Locke's ideas shaped the foundation of American governance, from the Declaration of Independence to the Ninth Amendment. This section examines the enduring influence of his principles on the Nation's core documents and their interpretation of liberty.

Locke played a pivotal role in shaping the intellectual landscape that guided the drafters of the Constitution. Locke's profound impact on the Constitution is a testament to the enduring legacy of his ideals, which have become deeply embedded in the Nation's history and tradition. His seminal works, particularly the *Second Treatise of Government*, provided the philosophical underpinnings that inspired the Framers of the Constitution. Locke's belief in the natural rights of life, liberty, and property, as well as his ideas on the social contract and limited government, inspired the Framers as they sought to create a lasting framework for a free and just society. The Constitution's core principles of individual rights, separation of powers, and limited government can be traced back to Locke's philosophy, making him a foundational figure in the development of the American Nation and the embodiment of the Nation's historical commitment to his ideals.

A. Lockean Principles Embodied: The Declaration of Independence

Locke's philosophical influence on the Declaration of Independence is particularly pronounced in Thomas Jefferson's expression of unalienable rights, a concept deeply rooted in Locke's *Second Treatise of Government*.[62] In the *Second Treatise*, Locke posits that individuals are born with natural rights to life, liberty, and property.[63] Jefferson, in drafting the Declaration,

62. *See generally* LOCKE, *supra* note 1.
63. *See id.*

masterfully incorporated these Lockean principles when he wrote, "we hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[64] This direct echo of Locke's ideas emphasizes that individuals possess inherent and inalienable rights from the moment of their existence, which no governing authority can justly infringe.[65]

Moreover, Locke's theory of the social contract and the people's right to alter or abolish a government that violates their rights is repeated in the Declaration. As Thomas Jefferson wrote, to secure the rights to Life, Liberty, and the pursuit of Happiness, "Governments are instituted among Men, deriving their just powers from the consent of the governed."[66] This statement is a direct parallel to Locke's philosophy of the social contract.[67]

Locke also argued that when a government becomes destructive of the people's rights and no longer serves its fundamental purpose of protecting those rights, the people have a right to establish a new government.[68] The Declaration mirrors this sentiment when it proclaims, "[t]hat whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it. . . ."[69]

Thomas Jefferson's writings further cement the belief that the Government's obligation is to protect the people's interest in their inalienable rights when he states that "it is the Right of the People to . . . institute new Government, laying its foundation on such principles and organizing its powers in such for, as to them shall seem most likely to effect their Safety and Happiness."[70] This centrality of the individual's right to safety and happiness is a notion Locke also advances when he says, "Every one as he is bound to preserve himself . . . and may not . . . take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another."[71]

The role of John Locke's philosophy in the Declaration of Independence is not only a historical fact but a foundational element deeply rooted in the Nation's history. The resonance of Lockean principles in the Declaration signifies not just the birth of a new nation but also the birth of a set of

64. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
65. *See supra* note 49 and accompanying text.
66. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
67. *See supra* notes 55-61 and accompanying text.
68. *See* LOCKE, *supra* note 1, § 222.
69. THE DECLARATION OF INDEPENDENCE para 2. (U.S. 1776) ("these ends" referring to unalienable Rights, including Life, Liberty, and the pursuit of Happiness).
70. *Id.*
71. LOCKE, *supra* note 1, § 6.

enduring ideals that serve as the foundation of the United States and define the Nation's prioritization of individual liberty. Thomas Jefferson's recognition of unalienable rights and assertion of the right to alter or abolish a government have become central to the American narrative and have contributed to the Nation's history and tradition. As a result, the Declaration serves as a testament to Locke's enduring impact, etching his ideas into the very core of the American identity, and reinforcing the Nation's commitment to safeguarding individual rights and preserving liberty.

B. Lockean Principles Embodied: The Federalist Papers

Just as John Locke's philosophy deeply informed Thomas Jefferson in drafting the Declaration of Independence, his ideas also guided the authors of the Federalist Papers, whose writings undeniably reflect his principles. The Federalist Papers are a collection of 85 essays that played a crucial role in shaping the American government and its founding principles. Written by Alexander Hamilton, James Madison, and John Jay between 1787 and 1788, these essays provided a detailed and persuasive defense of the Constitution, explaining its various provisions and addressing concerns about its potential impact on individual liberties and state sovereignty.[72] The Federalist Papers remain a foundational resource for understanding the intent and reasoning behind the US Constitution, making them a cornerstone of American political thought and a vital source of insight into the Nation's federal system, the balance of power, and the protection of individual rights.[73]

Locke's ideas are prominently discernible in James Madison's *Federalist Paper No. 10*. In the *Second Treatise of Government*, Locke emphasizes the perils of the State of Nature—where individual rights lack protection—and the necessity of a government to safeguard natural rights.[74] Similarly, Madison addresses the dangers posed by factions that, in the absence of a centralized government, could threaten the rights of other people and, consequently, the stability of a republic.[75] Drawing on Lockean principles, Madison argues that a large, diverse republic would dilute the

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72. *See* Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801 (2007).

73. *See id.* at 802.

74. *See* LOCKE, *supra* note 1, § 13 ("I easily grant that civil government is the proper remedy for the inconveniences of the state of Nature. . . .").

75. *See* THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) ("By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.").

influence of any one faction, thereby protecting individual liberties and minority interests.[76] Locke and Madison share a commitment to safeguarding individual liberty and preventing oppression within a political society.

Moreover, Madison's assertion that the Constitution would create a system designed to prevent any one group from amassing excessive power reflects Locke's belief in a government that serves the common good and protects the rights of individuals.[77] In *Federalist Paper No. 51*, Madison builds on Lockean principles by advocating for a division of government into distinct branches—legislative, executive, and judicial—to prevent any one branch from becoming too powerful and infringing on individual rights.[78] He argues that a well-constructed government would curb the risks of majority rule, ensuring the protection of minority rights and individual liberties.[79] This focus on the separation of powers and checks and balances is consistent with Locke's vision of a government structured to preserve all individual liberties.

Furthermore, Alexander Hamilton's *Federalist Paper No. 78* reflects Locke's influence on American political thought by addressing the judiciary's role in safeguarding individual rights and limiting government authority. Hamilton explicitly articulates the concept of judicial review, asserting that under the Constitution, the judiciary has the power to declare laws unconstitutional.[80] This principle aligns with Locke's broader philosophy of limiting governmental power to protect individual liberties. Hamilton argues that the judiciary's primary role is to uphold the Constitution and the rights it guarantees, ensuring that legislative and executive actions do not violate fundamental principles.[81] While Locke did not explicitly conceive of judicial review, his emphasis on checks and balances and the protection of individual rights provided a philosophical foundation for this essential feature of American constitutional governance.

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76. *See id.* at 83 ("[T]he smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens . . . .").

77. *See* THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

78. *See id.* at 321 (stating that the "separate and distinct exercise of the different powers of government" is "essential to the preservation of liberty").

79. *See id.* at 324.

80. *See* THE FEDERALIST NO. 78, at 464-67 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

81. *See id.* at 467 ("[I]t is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority.").

Federalist Paper No. 78 highlights the importance of an independent judiciary in preserving individual rights and upholding constitutional principles, reflecting the broader impact of Locke's philosophy on the US Constitution.[82] It demonstrates the Nation's commitment to aligning government actions with the protection of individual liberties, reinforcing Locke's ideals within the American constitutional framework. Similarly, *Federalist Papers Nos. 10* and *51* draw on Lockean principles by emphasizing the need for a government structure that prevents the tyranny of the majority, safeguards individual rights, and ensures the protection of all citizens' interests.[83]

C. Lockean Principles Embodied: The Preamble

Locke's influence is also apparent in the first words of the United States Constitution. The Preamble's reference to "securing the Blessings of Liberty" encapsulates Locke's view that the government must be committed to protecting individual freedoms.[84] It signifies that the government is not the source of liberty, but the guardian of the liberties individuals inherently possess. This phrase underscores the impact of Locke's philosophy, where liberty is a paramount concern and a natural right that the government is tasked with protecting.

Furthermore, both the Preamble and Locke's *Second Treatise of Government* emphasize the importance of justice.[85] In Locke's view, justice was central to the legitimacy of government. He argued that the government should protect the rights of individuals and provide a framework for the just resolution of disputes.[86] The Preamble's commitment to establishing justice signifies the intent to establish a government that operates fairly, in accordance with the rule of law and in the best interests of its citizens.

In essence, the Preamble embodies Locke's ideals by declaring the American government's purpose to be the protection of individual rights and the promotion of justice. This connection highlights the lasting imprint of Locke's ideas through the very first words of the US Constitution, making it evident that the Nation's commitment to preserving the rights and freedoms of its citizens is deeply anchored in its historical and philosophical foundations.

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82. *See id*.
83. *See supra* notes 78-79.
84. U.S. CONST. pmbl.
85. *See id.* ("We the People of the United States, in Order to form a more perfect Union, *establish Justice* . . . do ordain and establish this Constitution for the United States of America.") (emphasis added).
86. *See* LOCKE, *supra* note 1, § 13.

D. Lockean Principles Embodied: The Ninth Amendment

The Ninth Amendment further incorporates Locke's resounding insistence on the protection of inalienable natural rights. The first ten amendments, collectively known as the Bill of Rights, enumerate rights that inhere in the people. The Ninth Amendment reads: "[T]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[87]

Understanding the purpose of the ratification of the Bill of Rights, and the Ninth Amendment especially, is crucial to identifying Locke's influence on these seminal declarations. Throughout the ratification debates for the US Constitution, opponents of ratification were primarily concerned by the absence of a bill of rights outlining the people's rights not to be infringed.[88] However, many supporters of the Constitution criticized the idea of a bill of rights; they knew it would be impossible to enumerate all rights of the people and were concerned that listing some rights would imply that the list was exclusive.[89] These supporters of the Constitution pushed for its ratification, pledging that amendments would be added to the Constitution after its ratification. This pledge was enough for the states to ratify the Constitution without a bill of rights finalized at the time of ratification.[90]

At the First Congress, James Madison addressed the need for the House to confront the issue of these promised amendments.[91] He drafted a list of amendments, which included the Ninth Amendment, and said the following:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that may be guarded against.[92]

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87. U.S. CONST. amend. IX.

88. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 7 (2006).

89. *See id.* at 7-8.

90. *See id.* at 8 (citing LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 31-32 (1999)).

91. *See id.*

92. *See id.* at 9 (quoting James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), *in* JAMES MADISON, WRITINGS 437, 448-49 (Jack N. Rakove ed., 1999)).

Subsequently, the House appended a list of ten amendments to the Constitution, which are now recognized as the Bill of Rights, with the Ninth Amendment serving as the guard that protects unenumerated rights from government disparagement.

Locke's philosophy presents itself when the Ninth Amendment's statement of "other rights" is interpreted to protect individual natural rights. As Professor Randy Barnett articulates,

> [T]he Ninth Amendment was meant to preserve the "other" individual, natural, preexisting rights that were "retained by the people" when forming a government but were not included in "the enumeration of certain rights." These other rights retained by the people are as enforceable after the enactment of the Bill of Rights as the retained rights of freedom of speech, press, assembly, and free exercise of religion were enforceable before the enactment of the Bill of Rights when they too were still unenumerated. In other words, the purpose of the Ninth Amendment was to ensure the equal protection of unenumerated individual natural rights on a par with those individual natural rights that came to be listed "for greater caution" in the Bill of Rights.[93]

When coupled with James Madison's strong support for this amendment, considering the Ninth Amendment in this light underscores Locke's profound impact on yet another facet of the Constitution.

The Ninth Amendment, with its explicit declaration that unenumerated rights shall not be disparaged or denied, echoes Locke's conviction that individuals possess inherent, inalienable rights that a just government should protect.[94] Madison's endorsement of this amendment during the drafting of the Bill of Rights reflects his recognition of the need to preserve not only the explicitly listed rights but also the broader spectrum of unenumerated rights fundamental to individual liberty. Thus, when examining the Ninth Amendment, we see a clear convergence of Locke's enduring philosophy and Madison's commitment to ensuring that the Constitution enshrines the principles of natural rights and the limitations on governmental power, further reinforcing Locke's legacy within the constitutional framework.

As noted, Locke's ideas permeate key American historical documents, showcasing the profound influence of his philosophy on the Nation's

93. *Id.* at 13-14.
94. *See supra* notes 42-50 and accompanying text.

foundational principles. Recognizing this impact allows for a more nuanced interpretation of "liberty" within the Fourteenth Amendment, seen through Locke's philosophical lens. Consequently, when examining the Nation's history and tradition test applied to determine the rights safeguarded under the Fourteenth Amendment's due process protection of liberty, one is not bound by past legal precedents alone. Such a constrained approach undermines the true purpose of the Fourteenth Amendment and hampers societal progress as ideals evolve. Instead, the Court can assess rights seeking constitutional protection by referencing well-established philosophical principles that undeniably formed the foundation of the United States. This approach facilitates a more robust inquiry, accommodating societal change and allowing the Nation to evolve alongside its citizens. It also aligns more coherently with the original drafting intent of the Constitution and its amendments. Armed with this contextual understanding, the Court can analyze substantive due-process rights, such as those delineated in landmark cases like *Obergefell* and *Lawrence*, through the lens of the Nation's true history and tradition.

III. IMPLEMENTING THE NATION'S HISTORY AND TRADITION TEST IN ALIGNMENT WITH THE FOUNDING PRINCIPLES OF THE NATION

This section argues for a reimagined implementation of the "Nation's history and tradition" test, emphasizing a principle-based approach rooted in Locke's philosophy to ensure it aligns with the Framers' vision of liberty. Up to this point, this Note has argued the following: the United States was founded upon, in large part, Lockean principles of securing the lives of individuals, respecting personal liberties, and preserving their happiness; this foundation necessarily means these principles are embedded in the Nation's history and tradition; thus, rights derived from these principles are unequivocally supported by the Nation's historical and traditional values. Given this foundation, the Nation's history and tradition test used to define fundamental rights should not focus on whether the specific right at issue can be traced throughout the Nation's historical practice and societal traditions. Instead, it should focus on whether an underlying principle that aligns with the philosophical framework which founded this Nation's understanding of liberty supports the right. Rather than relying on speculative or subjective research, concrete philosophies providing clear guidance toward a just resolution should inform this inquiry.

The rest of this Note will discuss the constitutional protection of the rights safeguarded in *Lawrence* and *Obergefell* and how those rights cannot fail under our substantive due-process jurisprudence, if reconsidered, when

the Nation's history and tradition test is applied in accordance with the intent of the Framers.

A. Other Substantive Due Process Cases are Subject to Attack

This section outlines the potential threats to substantive due-process rights, such as the rights in *Obergefell* and *Lawrence,* and emphasizes the importance of a broader, principles-based approach to safeguard these liberties. While Justice Alito's assertion that the *Dobbs* decision does not directly implicate other substantive due process rights, such as those in *Obergefell*, *Lawrence*, and *Griswold*, Justice Thomas's explicit challenge of the constitutionality of those rights makes the threat to the protection of these rights very real.[95]

Justice Alito's *Obergefell* dissent, where he resisted constitutional recognition of same-sex marriage based on the lack of historical and traditional support, suggests that he may hold similar views on *Lawrence*.[96] Although Justice Alito was not involved in the *Lawrence* case, his dissent in *Obergefell* reveals a broader skepticism about the protection of same-sex intimacies under substantive due process.[97] This skepticism aligns with Justice Thomas's clear challenge to the constitutionality of rights recognized in cases like *Obergefell*, *Lawrence*, and *Griswold*. Given Justice Alito's consistent judicial philosophy, which prioritizes historical legal practice and societal tradition in evaluating constitutional rights, it is logical to infer that he may be inclined to limit protections for same-sex relationships, including those established in *Lawrence*.

The *Dobbs* dissent also expresses genuine concern about the very real threat posed to the rights protected by *Lawrence*, *Obergefell*, and *Griswold*.[98] It notes that the specific rights other substantive due process

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95. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 331-32 (2022) (Thomas, J., concurring) ("As I have previously explained, 'substantive due process' is an oxymoron that lack[s] any basis in the Constitution. . . . [I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.")

96. *See* Obergefell v. Hodges, 576 U.S. 644, 737-38 (2015) (Alito, J., dissenting).

97. *See id.*

98. *See Dobbs*, 597 U.S. at 362-63 (Breyer, Sotomayor & Kagan, J., dissenting) ("And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972). *In turn, those rights led, more recently, to rights of same-sex intimacy and marriage.* See Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015). They are all part of the same constitutional fabric, protecting autonomous decision making over the most personal of life decisions.") (emphasis added).

cases have recognized would not satisfy the "Nation's history and tradition" test, stating:

> The lone rationale for what the majority does today is that the right to elect an abortion is not "deeply rooted in history": Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, "there was no support in American law for a constitutional right to obtain [contraceptives]."[99]

I argue that despite Justice Alito's contentions in *Obergefell* and the dissent's concerns in *Dobbs*, the rights recognized in *Lawrence* and *Obergefell* do not contradict the Nation's history and tradition but are intimately connected to the philosophy underpinning the founding of this country. The proper implementation of the Nation's history and tradition test, which aligns with the visions and goals of those who crafted and contributed to the Constitution's promise to secure the Blessings of Liberty, supports the liberty interests underlying these rights.[100] The following section illustrates this.

B. Applying This Note's Use of the Nation's History and Tradition Test to Lawrence and Obergefell

The rights recognized in *Lawrence* and *Obergefell* are deeply intertwined with the principles of liberty and equality John Locke champions. By applying a principle-centered history and tradition test, this section demonstrates why these rights must remain constitutionally protected. Rather than requiring a showing of historical legal support for the specifically stated right as Justice Alito does, the Court should analyze what "liberty" meant when the Constitution was founded and whether the asserted liberty interest aligns with central principles of that term. This Note makes evident that Lockean principles had a profound impact on the Framers of the Constitution and their vision of what it means for the Constitution to protect individual liberty. Considering this, the rights that could be subject to future attack in *Lawrence* and *Obergefell* should be examined by determining whether they support, and in turn are supported

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99. *Id.* at 363. The constitutional right to obtain contraceptives comes from Griswold v. Connecticut, 381 U.S. 479 (1965).

100. *See* U.S. CONST. pmbl.

by, Lockean principles. Applying the Nation's history and tradition test in this manner leads to the conclusion that these rights should be protected under the Fourteenth Amendment's Due Process Clause.

Upon examining the *Lawrence* and *Obergefell* decisions, it is evident that the majority opinion writer for both cases, Justice Kennedy, aligns his analysis closely with the principles core to Locke's philosophy and the founding of the Nation. In *Lawrence v. Texas*,[101] the Supreme Court struck down a Texas law that criminalized consensual same-sex relations, and in *Obergefell v. Hodges*,[102] the Supreme Court legalized same-sex marriage nationwide. The Court's opinions protecting such rights from government intrusion sound in Lockean principles. In both cases, Justice Kennedy focused on the right to privacy and autonomy in one's private affairs.[103] Justice Kennedy wrote in *Lawrence*, "[t]heir right to liberty under the Due Process Clause gives them the full right to engage in their conduct *without intervention of the government*."[104] In *Obergefell*, Justice Kennedy again aligned the majority opinion with Locke's view that individuals should be free to make personal, private choices when he stated that "the right to marry is a fundamental right inherent in the *liberty of the person.*"[105] While Justice Kennedy's opinions effectively match the rights at issue in *Lawrence* and *Obergefell* with Lockean principles and the Framers' intent, he fails to fit his analysis into the Nation's history and tradition test. Failing to use the test as the standard for determining the rights that liberty protects harms legal precedent which calls for the use of this test when deciding substantive due-process cases.[106] Moving forward, it is essential that majority opinions frame fundamental rights under the Nation's history and tradition test especially considering increased strict adherence to that test in analyzing substantive due-process rights.

Locke's philosophy clearly supports the liberty interests both cases protect, as he argued that the role of government should be minimal in individuals' private lives, especially when their actions do not harm other individuals' natural rights.[107] Locke's writings underscore this perspective: "The end of law is not to abolish or restrain, but to preserve and enlarge

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101. Lawrence v. Texas, 539 U.S. 558 (2003).

102. *Obergefell*, 576 U.S. 644.

103. *See Lawrence*, 539 U.S. at 562 ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."); *see also Obergefell*, 576 U.S. at 663 ("[T]hese liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.").

104. *Lawrence*, 539 U.S. at 578 (emphasis added).

105. *Obergefell*, 576 U.S. at 675 (emphasis added).

106. *See* Moore v. East Cleveland, 431 U.S. 494 (1977); Washington v. Glucksberg, 521 U.S. 702 (1997); Michael H. v. Gerald D., 491 U.S. 110 (1989).

107. *See* LOCKE, *supra* note 1, bk. II, § 6.

freedom."[108] Additionally, Locke emphasizes not just the preservation of life but also the preservation of those ideas, beliefs, actions, and desires that contribute to the preservation of life and liberty.[109] Locke's ideals support preserving an individual's choice to pursue a love and bond that brings support, happiness, and fulfillment to that individual and does not interfere with the life, liberty, health, or property of another. An enduring love with a socially recognized bond and the benefits that follow are those things that "tend to the preservation" of one's life, liberty, and health.[110]

These decisions also honor the principle that the preservation of one's liberties, and what tends to preserve such liberties, should extend only to those rights that do not harm the natural rights of others. [111] Protecting the individual interests of engaging in consensual intimacies with the same sex and entering a marriage with the same sex do no harm to the life, liberty, or property of any other individual who is not a part of that same-sex relationship. Thus, while Locke did not explicitly contemplate these freedoms, his principles nonetheless support the liberty interests addressed by *Lawrence* and *Obergefell*.

Locke's philosophy reflects a commitment to limited government intrusion, the protection of individual autonomy, and the prevention of harm, all of which, as mentioned, the founding of the Nation and the Constitution incorporate.[112] These principles also support the liberty interests *Lawrence* and *Obergefell* address, and granting constitutional protection to these interests upholds the principles upon which the country was founded. The rights in *Lawrence* and *Obergefell* are consistent with the foundational intentions of the United States, are thereby embedded within the Nation's history and tradition, and thus require enduring constitutional protection.

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108. *Id.* § 57.

109. *See id.* § 6 ("Every one as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and *may not*, unless it be to do justice on an offender, *take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another*.") (emphasis added).

110. *Id.*

111. *See* Koehlinger, *supra* note 48, at 730 ("While exercising his capacities for rational deliberation and self-direction, the Lockean individual must also ensure that his course of action does not unduly restrict or interfere with the capacity for rational liberty in others."); *see also* Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."); Obergefell v. Hodges, 576 U.S. 644, 675 (2015) ("Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm.").

112. *See supra* Section II.

C. Applying This Note's Use of the Nation's History and Tradition Test to Access to Assisted Reproductive Technology

Building on the analysis of *Lawrence* and *Obergefell*, this section applies the Nation's history and tradition test to the right to access Assisted Reproductive Technologies (ART), demonstrating how this modern liberty interest aligns with the foundational principles of life, liberty, and property as articulated by Locke and embedded in the Constitution. ART, such as in vitro fertilization (IVF), surrogacy, and other methods of family-building, represent a crucial liberty interest for many individuals. ART empowers those unable to conceive naturally— including members of the LGBTQ+ community, single parents, and couples facing infertility—to pursue the deeply personal and life-affirming goal of creating a family. Recognizing access to ART as a fundamental right honors principles of autonomy and self-determination, aligning closely with Locke's philosophy and the living constitutional framework supporting individual liberties.

As mentioned, Locke's philosophy emphasizes the natural rights of life, liberty, and property, all of which find support in the context of ART.[113] The liberty to make personal choices about reproduction and family creation falls squarely within Locke's concept of individual freedom.[114] The Lockean principle that liberty should be constrained only if it harms others also supports ART, as these technologies enable individuals to build families without infringing on the rights of others.

Moreover, Locke's writings highlight the importance of preserving what "tends to the preservation" of life and liberty.[115] ART fulfills this principle by providing a pathway to achieve familial happiness and fulfillment. For LGBTQ+ individuals, access to ART is particularly significant in ensuring equitable access to the rights and opportunities afforded to heterosexual couples, reinforcing Locke's vision of equality and justice under a legitimate government.[116]

Locke's social contract theory further supports access to ART by positing that governments exist to safeguard natural rights.[117] Access to ART empowers individuals to create life and build families on their own terms, free from societal or governmental constraints that would deny them opportunities available to others. The right of access to ART, therefore, embodies the fundamental rights Locke considered essential to a well-

113. *See supra* Section I.D.
114. *See* sources cited *supra* notes 51-52 and accompanying text.
115. *See* LOCKE, *supra* note 1, bk. II, § 6.
116. *See* sources cited *supra* notes 47, 59 and accompanying text.
117. *See* sources cited *supra* note 59 and accompanying text.

ordered society. Protecting access to ART through substantive due process ensures that the government fulfills its role as a guardian of these liberties.

Historically, societal acceptance of non-traditional family structures has evolved significantly.[118] While the early United States often emphasized conventional family models, contemporary shifts reflect greater inclusivity of LGBTQ+ families and diverse pathways to parenthood.[119] This evolution mirrors the broader societal embrace of autonomy and equality, principles enshrined in foundational documents like the Declaration of Independence, and the Constitution in its Preamble and in the Fourteenth Amendment.

Access to ART aligns seamlessly with the Nation's history and tradition test as reimagined in this Note. Rather than demanding explicit historical recognition of specific rights, the test evaluates whether the asserted right aligns with the principles foundational to the United States and the Constitution. Access to ART fulfills this criterion by advancing individual autonomy, preserving liberty, and enabling the pursuit of familial happiness—all consistent with Lockean philosophy and the foundation of the United States. By recognizing access to ART as a fundamental right, the Court can honor the Constitution's commitment to safeguarding liberties essential to human dignity and flourishing.

Critics may raise ethical concerns about ART, such as the commodification of reproduction or the status of embryos.[120] However, these critiques do not undermine ART's alignment with Lockean principles. Locke's philosophy emphasizes liberty tempered by reason, suggesting that ethical guidelines can address these concerns without impeding the fundamental right to have access to ART.[121] Moreover, ART does not harm the rights of others and instead promotes the preservation of life and happiness, reinforcing its legitimacy as a protected liberty.

Another potential concern is the argument that ART is a modern development and thus lacks a foundation in historical tradition. Recognizing that the Constitution was designed to adapt to societal progress, as articulated above, addresses this critique.[122] ART's alignment with enduring principles of autonomy and liberty ensures its compatibility with the constitutional framework, even as societal contexts evolve.

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118. *See* Umer Saleem, *The Evolution of Family Structures in the 21st Century: A SocioCultural Perspective*, 1 LIBERAL J. LANGUAGE & LITERATURE REV. 64 (2023).

119. *See id.*

120. *See* Narcyz Ghinea et al., *Situating Commercialization of Assisted Reproduction in Its Socio-political Context: A Critical Interpretive Synthesis*, 2022 HUM. REPRODUC. OPEN, no. 4, 2022, at 1; *see also* Susan L. Crockin & Gary A. Debele, *Ethical Issues in Assisted Reproduction: A Primer for Family Law Attorneys*, 27 J. AM. ACAD. MATRIM. LAWS. 289, 297 (2015).

121. *See supra* note 47 and accompanying text.

122. *See supra* Section I.C.

Recognizing access to ART as a fundamental right under substantive due process reflects the Constitution's commitment to preserving individual autonomy, liberty, and the pursuit of happiness. Rooted in Locke's philosophy and supported by evolving societal traditions, access to ART exemplifies the principles that define the Nation's history and values. Just as with the rights protected by *Lawrence* and *Obergefell*, the Court's extending constitutional protection to access to ART can reaffirm its role as a guardian of liberties essential to human dignity and fulfillment.

IV. ADDRESSING POTENTIAL CONCERNS

This Note has argued that the Court and especially Justice Alito have improperly applied the test used to determine whether an asserted right is fundamental and thus deserving of constitutional protection. The narrow scope Justice Alito uses to determine whether a liberty interest is deeply rooted in the Nation's history and tradition erodes the core purposes of the Constitution and the principles the Founders envisioned it to protect. Rights that do no harm to an individual or their neighbors but support the preservation of their life, liberty, property, and happiness are the exact rights that the Constitution was designed to protect against government infringement. Concerns about judicial overreach and unintended consequences often arise when considering the expansion of constitutional rights. This section addresses these critiques, explaining how a principle-guided application of the Nation's history and tradition test avoids these pitfalls while protecting essential liberties.

First, the Court has consistently tried to avoid imposing its views on the people, and some argue that substantive due process does exactly this.[123] In his dissent in *Obergefell,* Justice Alito asserts that in recognizing the right to same-sex marriage, the Court is "invent[ing] a new right and impos[ing] that right on the rest of the country."[124] This thinking demonstrates the core flaw in his use of the Nation's history and tradition test. The Court is not creating a new right. Instead, it is recognizing the need to protect a liberty that has long existed and that has evolved into a new form given social contexts. As society evolved and the desire to marry another person

123. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 239 (2022) ("In interpreting what is meant by the Fourteenth Amendment's reference to 'liberty,' we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy."); *see also* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citation omitted) ("We must . . . 'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.").

124. Obergefell v. Hodges, 576 U.S. 644, 742 (2015) (Alito, J., dissenting).

presented itself more among varying groups, the underlying principles to preserve one's life, liberty, and property directed the Court to expand the law's protection over marriage.[125] The liberty of association has always existed in some form since the founding of America; the Court is not creating that right, it is giving that liberty meaning and protection in the present circumstances as it has done many other times.[126] The same logic applies to ART, as the fundamental right to have children on one's own terms has long been a liberty enjoyed by at least some individuals since the Nation's founding.[127] Rights are not being created out of thin air; they are being acknowledged and afforded the protection they deserve in the context of a changing and evolving society.

Next, there may be the concern that preserving one's life and liberty and those things that tend to the preservation of life and liberty would result in individuals seeking protection for "fundamental rights to illicit drug use, prostitution, and the like."[128] This Note is not to be construed in any way to advocate for constitutional protection of rights that, although they might lead to an individual's definition of happiness, ultimately harm the individual. My proposed implementation of the Nation's history and tradition test supports this as Lockean principles do not call for preserving those things that harm oneself or others.[129] Neither does the Constitution nor the Nation's Founders.[130] Nowhere in the Nation's history and tradition could one find support for preserving one's ability to objectively harm oneself. However, the Court must carefully assess whether the liberty interest results in objective harm to the individual, avoiding reliance on

125. It is also noteworthy that Justice Alito is concerned with expanding the *traditional understanding* of marriage. Again, Justice Alito is focusing on the wrong inquiry. Affording Constitutional protection to a right should not be contingent upon how the underlying liberty was first exercised in a social context, but how that liberty presents itself in *today's* social context. If we did the former, society would forever stay in the 18th century – as made evident earlier, that is not the intention of the Nation's founders.

126. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (expanding protection of liberty to associate with people of different races in schools); Loving v. Virginia, 388 U.S. 1 (1967) (doing the same in marital context).

127. This Note mentions that the right has been enjoyed by some individuals since the Nation's founding because it is true that others did not have the right to bear children or to bear children on their own terms. However, the right to bear children did exist for some people, and throughout history, the Court has recognized that as a fundamental right. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

128. *Dobbs*, 597 U.S. at 257.

129. *See* sources cited *supra* notes 46-54 and accompanying text.

130. One might argue that the right to keep and bear arms gives the right to harm another, which, plausibly it does. However, that is distinguishable because the right to keep and bear arms only applies, or should only apply, when one is presented with the need to protect themselves. This principle is also supported by Locke's philosophy. *See* LOCKE, *supra* note 1, bk. II, § 6 ("Every one *as he is bound to preserve himself*, and not to quit his station wilfully, so by the like reason, *when his own preservation comes not in competition*, ought he as much as he can to preserve the rest of mankind . . . .") (emphasis added).

subjective societal standards or majority-held beliefs, which could risk undermining the principle of individual rights.

Finally, some might argue that looking at the principles that inspired the construction of the Constitution in the 18th century are too attenuated to apply to the present day. For example, one might argue that the Founders could never have anticipated that the right to engage in same-sex relations or to get an abortion would become such a profound topic of debate in society, so what they said back then simply can never support the issue today. That said, the Founders used open-ended language for a reason—to allow the Constitution to apply to changing circumstances. Additionally, this argument fails when the inquiry is whether the principles inspiring the construction of the Constitution, specifically those of preserving life, liberty, happiness, health, and possessions, support the right to engage in same-sex relations. Under the Constitution, there should never be a point where those principles do not apply to society, making this the appropriate inquisition.

CONCLUSION

Justice Alito's implementation of the Nation's history and tradition test when determining whether a right is fundamental under substantive due process doctrine is too narrow and does not account for the core principles upon which the Nation was built, and from which its founding documents were drafted. For this reason, this Note urges a return to the Constitution's foundational principles envisioned by John Locke and the Nation's Framers. Through a reimagined application of the Nation's history and tradition test, the Court can better protect evolving liberties while honoring the original intent of the Constitution. Principles stemming from John Locke's philosophy give clear guidance on what rights lend to the concept of liberty. By examining the intent of the Framers and Locke's philosophy, the Court can give Constitutional protection to those rights that support and are supported by foundational principles without creating rights out of thin air.

Expansive as this application of the Nation's history and tradition test may be, viewing the rights that bring meaning and purpose to one's life with a broad lens is perhaps one of the best ways the Court can protect individuals from governmental intrusion into their personal lives. While the version of the Nation's history and tradition test endorsed by this Note may be viewed as vague or lofty, the current constrained inquiry that Justice Alito applies does great damage to fundamental liberties and imposes more control over individuals. The more the government limits what individuals can do, the more it violates the principles that rest at the foundation of the United States and the purpose of the Constitution. Additionally, the Court would not be

protecting these fundamental rights blindly. There is ample evidence as to the drafters' intent and purpose of the government and goals for the Nation, all of which would guide the Court's decision in these substantive due-process cases.