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The Anti-Constitutionality of the Deeply Rooted Test in Dobbs v. Jackson

Reginald Oh
Cleveland State University College of Law, r.oh@csuohio.edu

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REGINALD OH*

ABSTRACT

The deeply rooted in history test used by Justice Alito in *Dobbs v. Jackson* to overturn *Roe v. Wade* is anti-constitutional. In *Dobbs*, Alito concluded that, because a majority of states in 1868 criminalized abortion, abortion is not deeply rooted in history, and is therefore not a fundamental liberty under the Fourteenth Amendment Due Process Clause. However, relying on state laws in 1868 to interpret constitutional text not only has no basis in the Constitution, it goes against the fundamental nature of the Constitution as an integrated whole. What I call the Integrated Constitution is based on Chief Justice John Marshall's theory of the Constitution as a great outline. For Marshall, the text of the Constitution must always be interpreted with the whole Constitution in mind, and any interpretation must be rejected if it disrupts the integrated functioning of the Constitution as a whole. Alito's deeply rooted method of constitutional interpretation does exactly that in multiple ways and must ultimately be rejected by the Court.

First, relying on state laws in 1868 to determine whether the Fourteenth Amendment Due Process Clause restricts state power undermines the core function of the entire Fourteenth Amendment as a systematic and permanent restriction of state power. Second, Alito's use of nineteenth-century history to interpret due process is in direct conflict with the Court's use of history to interpret equal protection in well-established equal protection precedent such as *Frontiero v. Richardson* and *Loving v. Virginia*. Third, relying on state laws enacted by state legislatures that excluded women and racial minorities from voting and holding elected office is inconsistent with the Fifteenth and Nineteenth Amendments. Fourth, relying on state laws to interpret the federal Constitution subverts the principle of federal supremacy over state laws. Finally, relying on state laws in 1868 to interpret the Constitution turns it into a rigid, predetermined legal code, which is precisely what the Constitution is not meant to be, per Chief Justice Marshall. For all of those reasons, Alito's use of history in *Dobbs* is deeply anti-constitutional.

*Alan Miles and Betty Rubin Professor of Law, Cleveland State University College of Law.

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I. INTRODUCTION

What is the future of fundamental rights after the U.S. Supreme Court in *Dobbs v. Jackson*[1] held that the right to terminate a pregnancy is no longer a fundamental right? If Justice Samuel Alito is to be believed, his majority opinion leaves other fundamental rights like the right to use contraceptives and the right to same-sex marriage intact.

However, Justice Clarence Thomas was emboldened to write in his concurrence that, post-*Dobbs*, it is now time to abolish the entire doctrine of fundamental rights.[2] His concurrence seems to imply that *Dobbs* paves the way for that to happen.[3]

Who is to be believed—Thomas or Alito? Should Alito's assurances that *Dobbs* does not affect other fundamental rights be taken seriously?

I suggest that we believe Thomas. People who are concerned that more fundamental rights are in jeopardy have justifiable fears because Alito's analysis in *Dobbs* thoroughly undercuts his words of comfort. The logic of Alito's opinion applies in full force to rights to contraception, interracial marriage, and same-sex marriage. If logic and consistency have any basis for how a court rules, then the logic of *Dobbs compels* the outcome that Thomas desires—the end of the fundamental rights doctrine.

Alito's deeply rooted in history test relies on state laws in 1868 as a "mode of interpretation" to determine the meaning of "liberty" under the Due Process Clause. If that mode is used to assess the right to same-sex marriage, the logical conclusion is that same-sex marriage is not deeply rooted for the same reason that abortion is not—because the majority of state laws in 1868 did not protect either right.[4]

Thus, even if other conservative Justices like Brett Kavanaugh and Amy Coney Barrett would, for pragmatic reasons, like to uphold same-sex marriage as a fundamental right, they may ultimately be convinced that stare decisis forces their

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[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

[2] *Id.* at 2301 (Thomas, J., concurring).

[3] *Id.* at 2301–02.

[4] *Id.* at 2248–50, 2259–61 (majority opinion).

hand and gives them no choice but to strip same-sex marriage of its constitutional status.[5]

One goal of this Article is to persuade conservative Justices besides Alito and Thomas that they can uphold *Dobbs and* still uphold other fundamental rights like same-sex marriage, but *only* if they unequivocally reject Alito's deeply rooted in history analysis in *Dobbs*. Instead, they can and must rely on another, much narrower rationale that is separate and distinct from Alito's historical analysis.

Ultimately, all Justices should reject Alito's deeply rooted analysis because it has no legitimate constitutional basis. It is *anti-constitutional* because it subverts and alters the fundamental nature of the Constitution as an integrated, unified whole.

This Article proceeds in four parts. Part II will discuss the substantive due process doctrine and its key cases. Part III will analyze Alito's opinion in *Dobbs,* and argue that his opinion opens the door wide open for abolishing the substantive due process doctrine of fundamental rights. Part IV will explain the concept of the Integrated Constitution, which is based on Chief Justice John Marshall's understanding of the Constitution as a Great Outline. Part V will argue that Alito's opinion in *Dobbs* is anti-constitutional in multiple ways. His deeply rooted test as the method for interpreting the Due Process Clause does violence to the fundamental nature of the Constitution. This Article will conclude by explaining how conservative Justices can uphold the outcome in *Dobbs* while rejecting Alito's deeply rooted analysis, which will permit them to uphold other fundamental rights besides abortion.

II. IMPLIED CONSTITUTIONAL RIGHTS UNDER SUBSTANTIVE DUE PROCESS

There are two kinds of due process rights under the Constitution, one procedural and one substantive in nature.[6] The Due Process Clause of the Fourteenth Amendment states that no "person shall be deprived of life, liberty, or property without due process of law."[7] The right to procedural due process provides certain procedural protections before the state can take away a person's liberty or property.[8] For example, a person

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[5] Dane Brody Chanove, Note, *A Tough Roe to Hoe: How the Reversal of* Roe v. Wade *Threatens to Destabilize the LGBTQ+ Legal Landscape Today*, 13 U.C. IRVINE L. Rev. 1041, 1054–60 (2023); *see also* Matt Lavietes, *Kavanaugh Cites Landmark Gay Rights Cases in Argument about Abortion Restrictions*, NBC NEWS (Dec. 3, 2021), https://www.nbcnews.com/nbc-out/out-politics-and-policy/kavanaugh-cites-landmark-gay-rights-cases-argument-abortion-restrictio-rcna7404; Mili Godio, *Amy Coney Barrett's Political Views, From Abortion to Gay Marriage*, NEWSWEEK (Oct. 12, 2020), https://www.newsweek.com/amy-coney-barretts-political-views-abortion-gay-marriage-1537849.

[6] *Amdt5.7.1 Overview of Substantive Due Process Requirements*, CONGRESS.GOV, https://constitution.congress.gov/browse/essay/amdt5-7-1/ALDE_00013728/ (last visited Oct. 18, 2023); *Amdt5.6.1 Overview of Due Process Procedural Requirements*, CONGRESS.GOV, https://constitution.congress.gov/browse/essay/amdt5-6-1/ALDE_00013723/ (last visited Oct. 18, 2023).

[7] U.S. CONST. amend. XIV § 1.

[8] CONGRESS.GOV, *supra* note 6.

accused of committing a crime has procedural due process rights to notice, a hearing, and an opportunity to defend herself and contest the charges.[9]

The right to substantive due process, on the other hand, protects a person from state laws that restrict certain special liberty interests.[10] For example, the Court in *Griswold v. Connecticut* held that a law prohibiting married couples from using contraceptives violated substantive due process and could not be enforced against them.[11] The Court reasoned that a ban on the use of contraceptives violated a married couple's right to marital privacy, a fundamental liberty interest protected by the general right of privacy.[12]

Substantive due process doctrine treats certain liberties as constitutional rights, such as the right to use contraceptives, even though they are not enumerated constitutional rights.[13] Enumerated rights are those rights expressly protected in the Constitution, such as the various rights enumerated in the First Amendment.[14] The general right to privacy or the right to use contraceptives, however, appear nowhere in the text of the Constitution.[15] Rather, they are protected as *implied* constitutional rights derived from the Due Process Clause.[16]

The concept of implied rights under substantive due process is subject to much contestation.[17] The difficulty is in determining *which* liberties or rights are implicitly protected by the Due Process Clause.[18] Virtually all laws restrict liberty in some manner, so most liberties cannot be considered implied due process rights. For example, no one would seriously argue that tax evasion laws violate the implied constitutional right to avoid paying taxes.[19]

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[9] *Id.*

[10] *See* Loving v. Virginia, 388 U.S. 1, 17–18 (1967) (holding freedom to marry regardless of one's race cannot be infringed upon by the State due to Fourteenth Amendment protections).

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

[12] *Id.* at 485.

[13] *See id.* at 482, 485–86.

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

[15] *Griswold*, 381 U.S. at 530 (1965) (Black, J., dissenting) ("[F]ind[ing] no such general right of privacy in the Bill of Rights, [or] in any other part of the Constitution . . . .").

[16] *See* Charles W. Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 583–90 (2007).

[17] *Dobbs*, 142 S. Ct. at 2301 (2022) (Thomas, J. concurring).

[18] Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015).

[19] United States v. Hopkins, 927 F. Supp. 2d 1120, 1156–57 (D.N.M. 2013) (explaining that the Fourteenth Amendment Due Process Clause grants people the right to participate in lawful occupations with limitations).

The prevailing view is that only the most *fundamental* liberties deserve to be designated as implied constitutional rights.[20] But, which ones? The right to contract was once deemed so fundamental to a free society that it was declared an implied due process right.[21] But the Court reversed course, stripped the freedom to contract of its status as an implied constitutional right, and found that states are free to place extensive restrictions on the right.[22] Similarly, the right to abortion was once deemed a fundamental right of reproductive autonomy in *Roe v. Wade*,[23] but the Court in *Dobbs* declared that the *Roe* Court made a big mistake, and held that abortion is not implicitly protected by due process, thus giving states near absolute power to restrict abortion.[24]

The fierce dispute over implied constitutional rights is a function of a deceptively straightforward four-part test for determining whether a right is fundamental. First, the right at stake in a case must be articulated at an appropriate level of generality.[25] Second, it must be determined if the right at stake is fundamental.[26] Third, assuming the right at stake is fundamental, then it must be determined if the right has been infringed by the state.[27] If so, then the law infringing upon the fundamental right will be subject to strict means-ends scrutiny.[28] Under strict scrutiny, the law is not presumed to be constitutional, and the state bears the heavy burden of proving that its

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[20] *See Obergefell*, 576 U.S. at 656 (describing marriage as "[r]ising from the most basic needs, . . . essential to our most profound hopes and aspirations").

[21] Lochner v. New York, 198 U.S. 45, 64 (1905).

[22] *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937) (finding ". . . that freedom of contract is a qualified and not an absolute right").

[23] Roe v. Wade, 410 U.S. 113, 153–54 (1973).

[24] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

[25] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) ("[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' . . . such that 'neither liberty nor justice would exist if they were sacrificed.") (citations omitted); *see also* Troxel v. Granville, 530 U.S. 57, 72–73 ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made.").

[26] *Glucksberg*, 521 U.S. 702, 722 (1997); Yussuf Awadir Abdi v. Wray, 942 F.3d 1019, 1028 (10th Cir. 2019); *see* Obergefell v. Hodges, 576 U.S. 644, 647 (2015) (noting that same-sex couples have been refused benefits that heterosexual couples receive as a fundamental right); s*ee also* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) ("[T]he institution of family is deeply rooted in this Nation's history and tradition.").

[27] *See* Reno v. Flores, 507 U.S. 292, 302 (1993) ("[T]he . . . Fourteenth Amendment['s] guarantee of 'due process law' . . . forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided.").

[28] *See* Maehr v. U.S. Dep't of State, 5 F.4th 1100, 1117 (10th Cir. 2021).

law is narrowly tailored to further a compelling state interest.[29] In virtually all cases, the state will fail to meet strict scrutiny and the law will be struck down.[30]

The second step is the heart of fundamental rights analysis, and it is the subject of massive contestation and confusion.[31] How does, or should, the Court go about determining whether a right is fundamental? Is it one test or two? Or three? The answer has always been unclear, and *Dobbs* has only further unsettled an existing unsettled doctrine.[32]

The blackletter law states that a right is fundamental if it is deeply rooted in history and essential to ordered liberty.[33] However, the language of the test is highly abstract, hard to pin down, and subject to manipulation and variations.[34] Further, the Court has never fully explicated the relationship between the deeply rooted test and the ordered liberty test.[35] Is a right fundamental if it is either deeply rooted or essential to ordered liberty? Or is a right fundamental only if it is both deeply rooted *and* essential to ordered liberty?

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29 *Reno*, 507 U.S. at 302 ("[U]nless the infringement is narrowly tailored to serve a compelling state interest."); *see also* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (stating that laws which are content-based are presumed unconstitutional unless the government proves that they are narrowly tailored to serve a compelling state interest).

30 *See Troxel*, 530 U.S. at 67 (holding a Washington statute infringed on fundamental parental right because it was unconstitutionally broad); *see also* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

31 *See* Robert Torres, Note, *Foundational but Not Fundamental: No Right to the Environment*, 31 DUKE ENV'T. L. & POL'Y. F. 175, 204 (2020) (stating there is no tradition of environmental preservation deeply rooted in the U.S., citing *Julianna v. U.S.*). *But see* James R. May & Erin Daly, *Can the U.S. Constitution Encompass a Right to a Stable Climate? (Yes, it Can.)*, 39 UCLA J. ENV'T. L. & POL'Y 39, 49–50 (2021) (stating that there is a rich history in Anglo-Saxon law and U.S. law for a right to a stable climate, also citing *Julianna v. U.S.* and the Magna Carta).

32 *See* Darren Lenard Hutchinson, *Thinly Rooted: Dobbs, Tradition, and Reproductive Justice*, 65 ARIZ. L. REV. 385, 409–11 (2023) (describing how Dobbs has muddied the waters of gay marriage, contraception, and sexual privacy as fundamental rights).

33 Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

34 *See id*. at 722 (stating the substantive due process determination process has never been fully clarified and may be incapable of doing so without concrete examples); *see also* Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015) (stating judges discover their own values when expanding a right suddenly, and listing ways such judges can keep restrained from them).

35 *See* Veronica C. Abreu, Note, *The Malleable Use of History in Substantive Due Process Jurisprudence: How the "Deeply Rooted" Test Should Not Be a Barrier to Finding the Defense of Marriage Act Unconstitutional Under the Fifth Amendment's Due Process Clause*, 44 B.C. L. REV. 177, 188–89 (stating privacy of intimate choices decisions were deemed essential under ordered liberty but were not deeply rooted in the nation's history).

The unsettled and ambiguous nature of the inquiry has led to Court decisions using very different approaches without explanation for why one approach was used but not another.[36] The different variations fall into one of two general categories: The deeply rooted in history approach and the functional ordered liberty approach.

It is important to note that all the tests, whether it is a version of deeply rooted or ordered liberty, are, in theory, methods for interpreting the text of the Constitution. Specifically, the tests are supposed to guide the Court in determining the proper constitutional meaning of the term "liberty" in the Due Process Clause. In reviewing the various tests below, the central question to consider is this—which test or tests *should* be used to interpret the Due Process Clause, and which tests should *not*?

A. The Deeply Rooted in History and Tradition Tests

The Court has held that a right is fundamental if it is deeply rooted in the nation's history and tradition.[37] I identify three different strands of the deeply rooted in history test.

One version of deeply rooted analysis relies on historical-legal sources as evidence of either deep or shallow roots. The Court used this version in *Washington v. Glucksberg*,[38] and in *Dobbs*.[39] In *Glucksberg*, Justice Rehnquist articulated the right at stake as the general "right to commit suicide" broadly, and as the specific "right to commit suicide with another's assistance."[40] Rehnquist then asked if the right to commit suicide is deeply rooted in this nation's history of "legal doctrine and practice."[41] He proceeded to conduct a comprehensive historical review of laws regulate suicide from prior to the founding of the nation up to the present.[42] If the historical review found that most laws permitted or protected suicide, then suicide would be deemed a liberty deeply rooted in history. If laws restricted suicide, then it would not be deeply rooted.

Unsurprisingly, the history demonstrated that, from the distant past to the present, states universally criminalized suicide, and Rehnquist held that suicide is not deeply rooted in history and tradition.[43] He honed in on one particular historical period, the year 1868, and stated, "[b]y the time the Fourteenth Amendment was ratified, it was a

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[36] *See* Griswold v. Connecticut, 381 U.S. 479, 498–99 (1965) (holding married couples have a right to privacy concerning contraception); *see also* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022) (stating ordered liberty has limits and boundaries that precedent balanced, but that States may evaluate those balanced interests differently).

[37] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

[38] *Id.* at 722.

[39] 142 S. Ct. 2228, 2235 (2022).

[40] 521 U.S. 702, 723–25 (1997).

[41] *Id.* at 723.

[42] *Id.* at 774.

[43] *See id.* at 728.

crime in most States to assist a suicide."[44] For Rehnquist, the historical record conclusively demonstrated that suicide is not a liberty deserving of constitutional protection.[45]

A second version of the deeply rooted test also relies on examining historical-legal sources, but, in terms of timing, this version prioritizes recent rather than distant history. In *Lawrence v. Texas*,[46] Justice Kennedy asserted that the "laws and traditions in the past half century are of most relevance,"[47] not the laws of 1868, to determine whether the right to engage in consensual sexual relations is deeply rooted in history and tradition. He noted that the nation's legal tradition of regulating sexual conduct evolved from all states criminalizing sodomy in the nineteenth and early twentieth centuries to just 13 states criminalizing sodomy in 2003.[48] He concluded that the "*emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"[49] made the right deeply rooted in history and tradition.

Unlike in *Glucksberg*, the focus in *Lawrence* was on recent history and evolving legal trends.[50] The *Lawrence* test is best characterized as the deeply rooted in *recent* history and *evolving* tradition test.

Ultimately, Kennedy did not rely solely on his recent history and evolving tradition test for his holding. He also held that the right to consensual-sexual relations is a right protected by the general right of individual autonomy.[51] In relying on multiple bases for holding that the right in *Lawrence* is fundamental, Kennedy did not explain whether both tests had to be met or just one.[52]

A third version of deeply rooted analysis does not examine legal history and traditions, whether historical or current. This version examines America's *cultural* history to determine if a right is deeply rooted in history and tradition. In holding that the right of an extended family to live together is fundamental, the Court in *Moore v. City of East Cleveland* asserted "that the Constitution protects the sanctity of family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[53] Evidence to support that conclusion did not rest on laws or legal sources protecting familial rights throughout history. Rather, the Court referred to the cultural practice of "uncles, aunts, cousins, and especially grandparents sharing a

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[44] *Id.* at 715.

[45] *Id.* at 728.

[46] 539 U.S. 558 (2003).

[47] *Id.* at 571–72.

[48] *Id.* at 573.

[49] *Id.* at 572 (emphasis added).

[50] *See Glucksberg*, 521 U.S. at 710; *see also Lawrence*, 539 U.S. at 571–72.

[51] *Lawrence*, 539 U.S. at 574, 578.

[52] *Id.* at 571–72.

[53] 431 U.S. 494, 503 (1977).

household along with parents and children," and declared that such practices have "venerable" roots in American culture and are "deserving of constitutional recognition."[54]

B. The Ordered Liberty/Right of Autonomy Cases

The ordered liberty test eschews history for function. In the following cases, the Court asked, either explicitly or implicitly, if a right is fundamental because it is essential to ordered liberty or is implicit in the concept of ordered liberty.

In *Griswold v. Connecticut*, the seminal case that established the modern substantive due process doctrine, Justice William Douglas in his plurality opinion held that the general right of privacy is a fundamental right.[55] Douglas did not explicitly invoke the language of ordered liberty, but his analysis fits squarely under that test. He reasoned that the right of privacy is derived from the emanations and penumbras created by the Bill of Rights.[56] In other words, the right of privacy is implied in the rights protected by various amendments such as the First and Fourth Amendments.[57] Because those rights are paradigmatic examples of rights essential for ordered liberty, so too is the right of privacy.

In his opinion, Douglas makes a brief nod to history when he explains that "the right to marital privacy is older than the Bill of Rights."[58] But that is the extent of it. He does not examine a single historical-legal source to justify the constitutional protection of general or marital privacy.[59]

In *Lawrence*, Kennedy held that the right to consensual-sexual relations is fundamental as a right of individual autonomy and dignity.[60] Autonomy is about individual self-definition and meaning, and Kennedy reasoned that choices about consensual sexual intimacy free from government intrusion are about defining oneself through relationships with others and giving one's life meaning.[61] A liberty that functions to give meaning to a person's life is clearly a means of orderly pursuing happiness and thus essential to ordered liberty.[62]

Similarly, in *Obergefell v. Hodges*, Justice Kennedy reasoned the right to same-sex marriage is fundamental because it is a right of individual autonomy.[63] Of course,

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[54] *Id.* at 504.

[55] 381 U.S. 479, 484 (1965).

[56] *Id.*

[57] *Id.*

[58] *Id.* at 486.

[59] *See generally id.* at 479 (Douglas, J., concurring) (plurality opinion) (demonstrating that the court made no examination of the history of protected marital privacy).

[60] 539 U.S. 558, 573–74 (2003).

[61] *See id.* at 577–78.

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

[63] 576 U.S. 644, 666 (2015).

Kennedy knew he could not argue that same-sex marriage is deeply rooted in historical, cultural, or legal traditions. He does discuss the deeply rooted history and tradition of marriage between a man and a woman,[64] but the history serves mainly as backdrop and context in his opinion.[65]

The heart of Kennedy's reasoning is rooted in ordered liberty analysis. He declares that marriage is "'one of the vital personal rights essential to the orderly pursuit of happiness by free men.'"[66] He then relies on four principles to connect same-sex marriage to the orderly pursuit of happiness, the first and most important of which is the concept of individual autonomy and dignity.[67] For Kennedy, the decision to marry enhances autonomy and dignity in multiple ways. For example, marriage enables two people to find "expression, intimacy and spirituality"[68] together, which are freedoms central to self-definition and meaning. Thus, because different-sex marriage is essential to the orderly pursuit of happiness and therefore is a fundamental liberty, then same-sex marriage must be fundamental for the same reason.

C. The Abortion Cases

The two key abortion cases, *Roe v. Wade* and *Planned Parenthood v. Casey*, also rely primarily on functional ordered liberty reasoning for their holdings.

In *Roe v. Wade*, Justice Harry Blackmun does discuss the history of abortion regulation at length, but he does not draw concrete legal conclusions from that history.[69] His main point was to demonstrate that abortion regulations became more stringent in the late-nineteenth and twentieth centuries but that before then, "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today."[70] Like in *Obergefell*, history for Blackmun served mainly as context for his constitutional analysis.[71]

Blackmun expressly invokes the ordered liberty test to hold that the right to abortion is fundamental.[72] Blackmun cites to precedent protecting various enumerated rights and implied rights, and asserts, "[the Court] has held that a liberty interest protected under the . . . Fourteenth Amendment will be deemed fundamental if it is '*implicit in the concept of ordered liberty*'" [and, thus, protected by the general right

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64 *Id.* at 659–60.

65 *See generally id.* at 661 (demonstrating history as mere context for the crux of the opinion).

66 *Id.* at 664 (quoting *Loving*, 388 U.S. at 12).

67 *Id.* at 665.

68 *Id.* at 666.

69 410 U.S. 113, 140 (1973).

70 *Id.*

71 *Id.* at 117 (using history as non-determinative context for a fundamental rights analysis).

72 *Id.* at 153 (determining that fundamental rights cannot be limited by the state without a compelling interest).

of privacy].[73] He does not provide any explanation but summarily concludes that abortion is implicit in the concept of ordered liberty.[74]

In *Planned Parenthood v. Casey*, the three Justices who co-authored the majority opinion reaffirmed *Roe* by relying solely on ordered liberty analysis.[75] *Casey* made no reference at all to history or deeply rooted, and justified the right to abortion squarely as a fundamental right of individual autonomy and dignity.[76] The Court reasoned that reproductive autonomy/the decision whether to have a child is central to individual self-definition and is therefore essential to the orderly pursuit of happiness.[77]

Based on a summary review of key fundamental rights decisions, one key take-away is that the Court has consistently relied on multiple tests to determine if a right is fundamental.[78] To suggest that there is only *one* fundamental rights test is at odds with every precedent analyzed above except for *Glucksberg*. In *Dobbs*, however, Alito reduces fundamental rights analysis to just *one* historical test,[79] which paves the way for the Court to overrule all the cases that did not use his test such as *Lawrence* and *Obergefell*.

III. THE *DOBBS* FUNDAMENTAL RIGHTS ANALYSIS

The thesis of Part III is that, in his *Dobbs* opinion, Alito radically revised fundamental rights doctrine and laid the doctrinal groundwork for overruling virtually all of the major fundamental rights precedent. He did so in four moves. First, he reduced the deeply rooted in history test to *one* question: Did the majority of state laws in 1868 protect or restrict the liberty at issue?[80] Second, he made his deeply rooted in 1868 test a *requirement* for a right to be deemed fundamental. Third, he remade the functional, non-historical ordered liberty test and turned it into a de facto deeply rooted in 1868 test. And finally, he asserted that, for a right of autonomy to be fundamental, it must *also* be deeply rooted in 1868.

If the only relevant question for fundamental rights analysis now is whether a particular right was deeply rooted in 1868, the implications for rights such as same-sex marriage, consensual-sexual relations, and the use of contraceptives are crystal

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[73] *Id.* at 152 (emphasis added) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[74] *Id.* at 153–54 (holding that "the right of personal privacy includes the abortion decision").

[75] 505 U.S. 833, 851–53 (1992).

[76] *Id.* at 851.

[77] *Id.*

[78] *Id.* at 833; *see also* Bowers v. Hardwick, 478 U. S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003); Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 802, 785–814 (1986) (White, J., dissenting) (demonstrating competing methodologies the Court used to deem rights fundamental); *Obergefell*, 576 U.S. at 644*; see also Dobbs*, 142 S. Ct. at 2234.

[79] *Dobbs*, 142 S. Ct. at 2235.

[80] *Id.* at 2240.

clear. Overruled fundamental rights cases like *Roe* and *Casey* will eventually have a lot more company.

Alito begins his fundamental rights analysis simply enough by noting that, to determine whether a right is fundamental, "the Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[81]

A. Alito's First Move: Reducing Deeply Rooted Analysis to the Counting of State Laws in 1868

Alito starts with the deeply rooted in history analysis and holds that abortion is not deeply rooted in history because the overwhelming majority of states criminalized abortion in 1868.[82] Alito applies the historical-legal traditions version of deeply rooted that Justice Rehnquist used in *Glucksberg*. Under this version, the right at stake is articulated at a very specific, concrete level of generality, and then the inquiry asks whether, historically, the right was protected by states through their common or statutory law. A key question for this test is about timing. At what point in history do you examine to determine if a right is deeply rooted in history?

For Alito, there is only one point in time that truly matters—1868, the year that the Fourteenth Amendment was ratified.[83] Alito emphasizes that "how the *States* regulated abortion when the Fourteenth Amendment was adopted" is "the *most important* historical fact" for deeply rooted analysis.[84] What I call Alito's *deeply rooted in 1868* test has two simple steps. First, conduct historical-legal research and find out how each state in 1868 regulated a liberty like abortion.[85]

The second step in the "analysis" requires the Court to *count* how many states in 1868 protected the right and how many restricted it.[86] Alito does the math and states, "[b]y 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statues making abortion a crime. . . . ."[87] Alito then declares that the 75% figure reflects an "overwhelming consensus of state laws" rejecting abortion as a right.[88] Based on the 1868 math, Alito holds that the right to abortion is not deeply rooted in history, declares that *Roe* and *Casey* are overruled, and strips abortion of its fundamental right status.[89]

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81 *Id.* at 2246 (quoting Timbs v. Indiana, 139 U.S. 682, 687 (2019)).

82 *Id.* at 2267.

83 UNITED STATES SENATE, LANDMARK LEGISLATION: THE FOURTEENTH AMENDMENT, https://www.senate.gov/about/origins-foundations/senate-and-constitution/14th-amendment.htm (last visited Nov. 20, 2023).

84 *Dobbs*, 142 S. Ct. at 2267 (emphasis added).

85 *Id.*

86 *Id.* at 2285.

87 *Id.* at 2252–53.

88 *Id.* at 2267.

89 *Id.* at 2253.

While Alito does recount the history of abortion laws prior to and after 1868, the deeply rooted in history inquiry boils down to counting state laws in 1868.[90]

B. Alito's Second Move—Making the Deeply Rooted in 1868 Test a Requirement

Before *Dobbs*, deeply rooted in history or ordered liberty operated as two *independent* bases for determining whether a right is fundamental. A right would be deemed fundamental if it is deeply rooted in history and/*or* essential to ordered liberty. That is no longer true after *Dobbs*.

Alito turned two independent inquiries into a two-part test in which both elements must be met. For a right to be deemed fundamental, it not only has to be essential to ordered liberty, it *must also* be deeply rooted in 1868.[91] He makes this point multiple times in his opinion.[92] He asserts that fundamental rights precedent has "made clear that a fundamental right *must* be 'objectively, deeply rooted in this Nation's history and tradition.'"[93] He reiterates, "[h]istorical inquiries of this nature are *essential whenever* we are asked to recognize a new component of the 'liberty' protected by the Due Process Clause . . . ."[94] Finally, he states, as if it has always been the case, "[w]e have held that the 'established method of substantive-due-process analysis' *requires* that an unenumerated right be 'deeply rooted in this Nation's history and tradition' before it can be recognized" as a fundamental right.[95]

The significance of Alito's second move cannot be understated. The implications are startlingly clear—any previous right declared fundamental without an assessment of how many states protected that right in 1868, such as the right to same-sex marriage, are now in mortal jeopardy.

C. Alito's Third Move: Remaking the Ordered Liberty Test into A De Facto Deeply Rooted in 1868 Test

If the second move did not render the ordered liberty analysis virtually superfluous, Alito truly kills off the functional ordered liberty analysis when he historicizes it. To determine if a right is essential to ordered liberty, Alito quietly asserts that the Court must be "guided by the *history and tradition* that map the essential components of our Nation's concept of ordered liberty . . . ."[96] It is "[o]ur Nation's *historical* understanding of ordered liberty"[97] that truly matters. And by "our Nation," Alito specifies that he is referring to "the *Framers and ratifiers* of the Fourteenth

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90 *Id.* at 2251, 2260.

91 *Id.* at 2257, 2267.

92 *Id.* at 2257, 2260, 2267.

93 *Id.* at 2247.

94 *Id.* (emphasis added).

95 *Id.* at 2260 (emphasis added).

96 *Id.* at 2248 (emphasis added).

97 *Id.* at 2257 (emphasis added).

Amendment," and so the Court must ask whether the Framers and ratifiers believed a right is "necessary to our system of ordered liberty."[98]

How should the Court go about determining what the Framers and ratifiers thought about ordered liberty? Alito has a ready-made answer—count how many states protected or restricted the right in 1868.[99] In short, the ordered liberty inquiry now asks whether a majority of states in 1868 believed that a particular right is essential to ordered liberty.

Alito then applies his newly minted historicized ordered liberty test to abortion, and summarily concludes that abortion fails the test.[100]Alito treats ordered liberty as a way to exclude liberties that engender *disorder* from constitutionally protected status.[101] To determine if a liberty like abortion promotes order or disorder, Alito instructs us to examine how the states of 1868 thought of a particular liberty.[102] If 75% of states in 1868 criminalized abortion, then obviously it means the overwhelming majority of states viewed abortion as a liberty of *disorder* that needs to be restricted, not protected. Alito ends his *ordered liberty in 1868* analysis by concluding, "[o]ur Nation's *historical* understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated."[103]

D. Alito's Fourth Move: Tethering the Right of Autonomy to State Laws of 1868

Alito's final move is to kill off the right of individual autonomy and self-definition as an independent basis for protecting liberties by making its fate depend entirely on history. He compares abortion to illicit drug use and prostitution, and then suggests that all three liberties arguably could be central to individual identity and self-definition. However, all three liberties simply cannot be deemed fundamental rights because "[n]one of these rights has any claim to being *deeply rooted in history*."[104]

And since Alito makes it crystal clear that deeply rooted in history means deeply rooted in 1868, asking if a right is central to individual self-definition is pointless if a majority of state laws restricted that right in 1868. With that move, Alito completes his systematic dismantling of fundamental rights doctrine and reduces it to a singular, myopic focus on counting state laws in 1868.

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98 *Id.* at 2247 (quoting McDonald v. City of Chi., 561 U.S. 742, 778 (2010)).

99 *See id.* (noting that twenty-two of thirty-seven states protected the right to bear arms in their state constitutions in 1868).

100 *Id.* at 2257.

101 *Id.*

102 *Id.* at 2225–53.

103 *Id.* at 2257 (emphasis added).

104 *Id.* at 2258.

E. The Implications of Dobbs for Substantive Due Process Doctrine

Alito takes pain to emphasize that nothing in his opinion threatens fundamental rights like the right to same-sex marriage. However, if logic and consistency have any basis for how the Court decides cases, then the doctrine of fundamental rights may be nearing its end.

Post-*Dobbs*, the only basis for designating a right as fundamental is the deeply rooted in 1868 test. If a right of autonomy like abortion has no "claim to being deeply rooted in history,"[105] then a right of autonomy like same-sex marriage also has no such claim for the same reason. The math is even worse for same-sex marriage than for abortion. In 1868, none of the states recognized same-sex marriage.[106] The fate of interracial marriage as a fundamental right is also grim, as the majority of states in 1868 banned interracial marriage, which means interracial marriage is neither deeply rooted in history or implicit in the 1868 concept of ordered liberty.[107]

If Alito's deeply rooted in 1868 test remains good law going forward, *Roe* and *Casey* will not be the last fundamental rights case to fall. To save the fundamental rights doctrine from the dead weight of the past, Alito's test must be soundly and unambiguously rejected. Parts IV and V will argue that the deeply rooted in 1868 test must be rejected, not just to save fundamental rights, but to protect the entire Constitution itself.

Part IV will first explain that the fundamental nature of the Constitution is that it is an integrated, unified system of principles. That understanding of the Constitution is based on Chief Justice John Marshall's theory of the Constitution as a Great Outline.

Part V of this Article will argue that all of the Justices, even conservative Justices like Kavanaugh and Barrett, should reject Alito's test because the it is *anti-constitutional*. Alito's test is anti-constitutional, not just because it has no constitutional basis, but because it radically subverts and corrupts the fundamental *nature* of Fourteenth Amendment and the Constitution as a unified whole.

IV. CONSTITUTIONAL INTERPRETATION AND THE INTEGRATED CONSTITUTION

Part IV will explicate Chief Justice John Marshall's concept of the Integrated Constitution, which he laid out in his opinion in *McCulloch v. Maryland*.[108]

In *McCulloch*, there were two issues raised by a constitutional challenge to the National Bank of the United States.[109] The first issue was whether Congress had the

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105 *Id.*

106 Obergefell v. Hodges, 576 U.S. 644, 714 (2015) (Scalia, J. dissenting).

107 *See* Matthew R. Greathouse, *Implicit in the Concept of Ordered Liberty: How* Obergefell v. Hodges *Illuminates the Modern Substantive Due Process Debate*, 49 J. MARSHALL L. REV. 1021, 1065 (2016) (analyzing rights deemed not deeply rooted in the past).

108 *See* McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

109 *Id.* at 400.

power to create a national bank in the first place.[110] If Congress did have that power, the second issue was whether states could tax the national bank.[111]

The issue about the power to create a national bank was difficult because of the limited nature of the federal government's power.[112] The power of incorporation and/or establishing a national bank is not one of the enumerated powers in Article I, Section 8 of the Constitution.[113] But Marshall ultimately held that Congress has the constitutional power to establish a national bank—not as an enumerated power—but as an implied power.[114] An implied power is derived from the principles and text of the Constitution.[115] In explaining the nature of implied powers, Marshall explicated his notion of the Integrated Constitution.[116] The Integrated Constitution is a logically organized outline of broad principles that functions as a unified system.[117] In short, the Integrated Constitution is an outline and a system.

A. The Constitution as a Great Outline

What does it mean for a constitution to be an outline? In explaining the fundamental nature of the Constitution, Marshall asserts that it has "only its *great outlines* . . . marked, its important objects designated, and the minor ingredients which compose those be deduced from the nature of the objects themselves."[118]

The Constitution as a Great Outline has two elements. First, it is a logically organized set of general principles. As an outline, the Constitution is organized as main parts, sub-parts, and sub-sub-parts. The main parts are the seven articles, several of which are sub-divided into topical sections (sub-parts) consisting of numbered clauses (sub-sub-parts).

The second element of the Great Outline is that it excludes or omits secondary principles or details, what Marshall calls "minor ingredients."[119] The Constitution is intentionally designed *not* to be comprehensive and detailed.

For Marshall, the design of the Constitution as a Great Outline is what enables it to endure over time.[120] Moreover, it establishes a system of government and provides

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110 *Id.* at 401.

111 *Id.* at 425.

112 *Id.* at 405.

113 U.S. CONST. art. I, § 8.

114 *McCulloch*, 17 U.S. at 424.

115 *See* David Schwartz, *Misreading* McCulloch v. Maryland, 18 U. PA. J. CONST. L. 1, 16 (2015) (setting out the parameters of the implied powers under the U.S. Constitution).

116 *Id.* (describing why the bank was constitutional under an implied power).

117 *McCulloch*, 17 U.S. at 424.

118 *Id.* at 407 (emphasis added).

119 *Id.*

120 *Id.* at 415.

it with the flexibility it needs to adapt to changing circumstances and to act effectively to promote the general welfare of the people.[121]

Marshall contrasts the Constitution as a Great Outline from a constitution written and organized as a legal code.[122] A legal code is the polar opposite of an outline.[123] Instead of consisting of broad principles with the lesser details omitted, a legal code is a comprehensive, highly detailed body of law.[124] For example, the U.S. Criminal Code is a comprehensive legal code of federal crimes.[125]

For Marshall, a constitution that is written and organized as a legal code is completely *dysfunctional* and cannot work as an enduring basis for establishing and maintaining a system of government.[126] A legal code as a constitution would have to comprehensively include every aspect and detail of that system ahead of time. However, Marshall states that a constitution to spell out "an accurate detail of all" aspects of a system of government "could scarcely be embraced by the human mind."[127]

If the human mind cannot grasp all the details of a constitution as a legal code, then the framers of that constitution would inevitably fail to include a multitude of important details. As a result, a constitution as a legal code would have to be constantly revised and updated, making the amendment process a ubiquitous, permanent feature of government.

Moreover, a legal code, instead of providing a government with flexibility, provides a government with a rigid set of rules that constrain governmental functioning and may bring it to a grinding halt. If the rules do not work, then the only recourse is to repeal or amend the constitution. Government would then have to wait until the legal code is revised to then be able to act. If that process plays out for a multitude of rules that require amending, that would completely cripple government functioning. Ultimately, for Marshall, if a constitution is designed as a legal code, then it really is not a constitution at all and is inevitably doomed to failure.[128]

B. The Constitution as an Integrated System

In addition to being organized as an outline, the Integrated Constitution functions as a system. A system is a set of interconnected components that combine together as an integrated whole.[129] The key elements of a system are: (1) components that are (2)

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[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Code*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[125] 18 U.S.C.A. § 18 (West 2023).

[126] *McCulloch*, 17 U.S. at 415.

[127] *Id.* at 407.

[128] *Id.* at 416.

[129] *System*, VOCABULARY.COM, https://www.vocabulary.com/dictionary/system (last visited Oct. 16, 2023).

interconnected, and (3) combine or work together (4) as an integrated whole.[130] A system typically is designed to perform certain functions.[131]

A simple example of a system is a car. A car is a set of interconnected components designed to work together as an integrated whole. As an integrated whole, a car functions as a vehicle. A system is often comprised of components that also operate as a system. A car engine, for example, is itself a system, which also is comprised of components that operate as a system.

The Integrated Constitution is an outline of interconnected provisions (clauses) logically organized to form an integrated whole. As a unified whole, the Integrated Constitution establishes the nation's system of government.

For the Constitution to endure and ensure the smooth, effective functioning of the system of government it governs, Marshall believes it must *always* be understood and interpreted according to its fundamental nature as an integrated system of logically organized principles.[132] What that means in the negative is that the Constitution must *never* be interpreted in a manner that could turn parts of it or even the whole Constitution itself into a legal code.

C. Guidelines for Great Outline Constitutional Interpretation

With that understanding of the nature of the Integrated Constitution, Marshall provides one, central guideline for interpreting the Constitution that must *always* be considered. He states that any constitutional question needs to be answered based on a "fair construction" of the Constitution as a *whole*.[133] That means two things. First, a fair construction of the whole system requires interpretive choices that are consistent with the Constitution as an integrated system of logically organized principles. Stated in the negative, the Constitution should never be interpreted to alter it and turn it into a legal code.[134]

Second, a fair construction of the Constitution as a unified system requires making interpretive choices that promote rather than disrupt the smooth functioning of the system and its interconnected parts. That requires that the words, clauses, sections, and articles are not discrete and isolated provisions, but interconnected and meant to work together to create and function as an integrated whole/system.

Ultimately, any constitutional source, whether it is text, history, general principles, or precedent, must be interpreted in a manner that reinforces the Constitution as a unified or integrated whole. In contrast, any mode of interpretation or interpretive choice must be rejected if it would undermine the integrated whole.

Justice Marshall emphasized that, in interpreting the Constitution, "we must never, forget that it is a *constitution* we are expounding."[135] He meant, in other words, to never forget that the Constitution is a logically organized outline of principles working

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130 *Id.*

131 *Id.*

132 *McCulloch*, 17 U.S. at 407–09.

133 *Id.* at 406 (emphasis added).

134 *See id.* at 415.

135 *Id.* at 407 (emphasis added).

together as a unified system. In short, we must never forget it is an *integrated* constitution that we are expounding.

D. Interpreting the Necessary and Proper Clause in McCulloch

To illustrate how the guidelines for interpreting the Integrated Constitution apply to a constitutional question, I will explain how Marshall in *McCulloch* interpreted the word "necessary" in the Necessary and Proper Clause, which authorizes Congress to enact all laws "necessary and proper" to execute an enumerated power.[136] It is the clause that defines the scope of Congress' implied powers.

In *McCulloch*, the State of Maryland argued that "necessary" means indispensable or essential.[137] Under that reading, Congress could enact legislation pursuant to the Necessary and Proper Clause only if it is essential for the effective exercise of an enumerated power.[138] Thus, with regard to the national bank, the Court must determine if Congress, to effectively regulate interstate commerce, has no choice but to establish and operate a national bank.

Marshall, however, suggested that "necessary" could mean useful or convenient.[139] If necessary means useful, then Congress would have the power to create a national bank as long it was useful or expedient for regulating interstate commerce, an easier standard to meet compared to a standard in which necessary means indispensable.

Marshall held that "necessary" for constitutional purposes means useful, not indispensable.[140] He conceded that the restrictive meaning of necessary as indispensable is the ordinary understanding of the term.[141] But, he asserted that the meaning of the term simply has to mean useful in light of a fair construction of the Constitution as a whole.[142]

First, Marshall sought to determine if the broad interpretation is logically consistent with the Constitution as a Great Outline. A key inquiry in making that determination is to ascertain *where* the clause is located within the Constitution.[143] The Necessary and Proper Clause is located in Article I, Section 8 of the Constitution, the section which includes Congress' enumerated powers.[144]

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136 *See id.* at 413–14.

137 *Id.*

138 *Id.* at 413.

139 *Id.*

140 *Id.* at 413–14.

141 *Id.*

142 *Id.*

143 *Id.* at 418–19.

144 *Id.*

Then, Marshall reasoned that the broad meaning makes the Necessary and Proper Clause consistent with all the other enumerated powers in Section 8.[145] Each clause empowers Congress to enact legislation for various different purposes or ends. Each of the first seventeen clauses enumerate broad powers using broad language, consistent with Congress' plenary authority over how it exercises each enumerated power.

To define necessary to mean useful makes the Necessary and Proper Clause a broadly worded clause granting Congress plenary power to legislate on broad matters, exactly like all the other enumerated powers. Necessary as useful makes the clause a perfect, logical fit in Section 8.[146]

In addition, defining necessary to mean useful makes the Necessary and Proper Clause an effective tool to promote the smooth functioning of each and every enumerated power in Section 8. The central function of each enumerated power is to provide Congress wide discretion and flexibility to use its judgment to enact legislation for the general welfare of the people.[147] The Necessary and Proper Clause is meant to aid and assist Congress in how they exercise their enumerated substantive powers.

Granting Congress wide discretion to determine both means and ends based on their judgment promotes a unified approach to lawmaking. For example, if Congress in its judgment believes that establishing a national bank will be useful to regulate interstate commerce in a particular way of their choosing, then Congress is deploying both powers in a deliberate manner to achieve a singular goal based on their judgment.[148] And that coordinated approach is made available to Congress for all of its legislative powers, promoting the central function of Section 8 as a unified system of lawmaking.[149]

On the other hand, Marshall examined the implications of interpreting necessary to mean indispensable, and ultimately concluded that the narrow interpretation would subvert and disrupt the Constitution as a whole.[150]

Marshall first determined that defining necessary to mean essential would be inconsistent with the Constitution as Great Outline in two ways. If Congress could enact legislation only if it is indispensable to execute an enumerated power, it would make the clause the only one in Section 8 over which Congress effectively *lacks plenary* authority over how to use the power.[151] It would render the Necessary and Proper Clause an anomaly, an outlier, in Section 8.

Specifically, the restrictive reading would render the Necessary and Proper Clause an anomaly in Section 8 because it would function as a de facto *limitation* on

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[145] *Id.* at 420–21.

[146] *Id.*

[147] *Id.* at 386–87.

[148] *Id.* at 368.

[149] *Id.*

[150] *Id.* at 415–18.

[151] *Id.* at 420–21.

Congressional power, rather than as a grant of power. As a limitation, it logically does not fit in a section of *powers*. Instead, this clause logically would then fit in Section 9 of Article I—the section which includes various limitations on Congressional power.[152]

In addition, as a limitation on power, the restrictive reading of necessary would make the Necessary and Proper Clause function to *disrupt* the smooth functioning of Section 8 as a unified or integrated system. How? Because the Necessary and Proper Clause is intertwined with each and every enumerated power in Section 8. The clause is triggered only in conjunction with one of the enumerated powers. So, if the restrictive term acts as a limitation on implied powers, then it acts as a limitation on each and every enumerated power in Section 8 as well. Accordingly, by stripping plenary power out of the Necessary and Proper Clause, the restrictive reading would effectively strip plenary power out of all the other enumerated powers as well.

The ultimate consequence of depriving Congress of plenary authority over its enumerated powers would be to transform Section 8 and the Constitution as a whole into a legal code of rigidly defined powers.[153] Marshall then reasoned that, by turning the entire Section 8 into a legal code, it would cripple the effective functioning of Congress.[154] That would disable Congress from using their judgment to adapt "to the various *crises* of human affairs,"[155] thereby subverting the central project of the Constitution to enable effective governance. In doing so, the restrictive definition would undercut the broad discretion Congress is supposed to have with each and every one of its enumerated powers. The restrictive meaning of "necessary" would render the Necessary and Proper Clause a disruptive anomaly in Section 8.

In addition, the narrow meaning of necessary, by turning Section 8 into a legal code, would disrupt the functioning of the Supreme Court. Congress' implied powers would be defined, not by Congress, but by the federal courts.[156] Section 8 as a legal code, by forcing the Court to write the Section 8 legal code of Congressional powers, would disrupt the proper functioning of the Court by empowering it with the power to legislate from the bench. The courts ultimately would decide whether a piece of legislation was indispensable or essential to execute an enumerated power. The courts would be forced into the role of filling out the permanent details of the Necessary and Proper Clause, details that Congress would have to comply with. In effect, the Court would become the nation's legislative branch, but instead of using judgment based on experience to enact laws, it would enact legislation inappropriately based on legal reasoning, rules, and court precedent.

The narrow interpretation of "necessary," then, would have done great violence to the Constitution as a Great Outline, and as a unified system of government, and had to be rejected.

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[152] *Id.* at 419.

[153] *Id.* at 415.

[154] *Id.*

[155] *Id.* (emphasis added).

[156] *Id.* at 415–16.

E. The Integrated Fourteenth Amendment

In the same way that Marshall interpreted the Necessary and Proper Clause based on a fair construction of Section 8 and the Constitution as a whole, the clauses in the Fourteenth Amendment should be interpreted in the same manner. The Fourteenth Amendment is itself an integrated, unified whole. It is a logically organized outline of broad principles which function together as a unified system. In other words, it is organized and functions in the same manner as the entire Integrated Constitution.

The Fourteenth Amendment is logically organized as an outline of mostly broad principles. It consists of five sections, with each section containing clauses grouped together based on the central theme of each section. Collectively, the five sections are interconnected and work together to serve the central function and purpose of the Integrated Fourteenth Amendment.

Section 1 of the Fourteenth Amendment is comprised of enumerated rights. There are four clauses in Section 1 separated by semi-colons.[157] Of the four, three of them are relevant for purposes of this Article. The first is the Due Process Clause, which protects persons from deprivations of liberty by the state without due process of law.[158] The second is the Equal Protection Clause, which provides persons with equal protection of the laws.[159] The third is the Privileges or Immunities Clause, which protects the fundamental rights of U.S. citizens.[160]

Section 5 of the Fourteenth Amendment grants Congress an enumerated power. Section 5 authorizes Congress to enact legislation to enforce, by appropriate legislation, each of the first four sections of the Fourteenth Amendment.[161] Section 5 operates much like the Necessary and Proper Clause. Both empower Congress to enact legislation to further the ends or purposes of some *other* provision in the Constitution. Just as the Necessary and Proper Clause is logically and functionally interconnected with the all of the other enumerated powers in Section 8, the Section 5 enforcement power is similarly interconnected with the other provisions in the Fourteenth Amendment.

When interpreting a clause in any section of the Fourteenth Amendment, it should be interpreted in light of a fair construction of the whole amendment as a logically organized outline that functions as a unified system. That means a clause like the Due Process Clause should be interpreted in a manner logically and functionally consistent with the other clauses in Section 1, the other four sections, and with the Fourteenth Amendment as a whole.

There is one clear, central function that animates the entire Fourteenth Amendment and its components parts. That function is the systematic and permanent restriction of state power and the simultaneous systematic and permanent expansion of federal

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157 U.S. CONST. amend. XIV, § 1.

158 *Id.*

159 *Id.*

160 *Id.*

161 U.S. CONST. amend. XIV, § 5.

power.[162] Each of the sections in the Fourteenth Amendment restrict state power in some manner. Consequently, each word and clause should be interpreted in a manner consistent with that central function.

In Section 1, the three enumerated rights function independently and together to restrict states from enacting any law that infringes one or more of the rights. As a systematic restriction on state power, Section 1's unifying function is to shift power from the states to the federal courts. Only the federal courts have the power of judicial review, which is the power to interpret the meaning of the Constitution.[163] With that power, the Supreme Court is the final authority on the meaning and scope of the rights in Section 1. And if the Court determines that a state law violates due process, then it will invalidate the law and render it unenforceable. Section 1 makes the Supreme Court operate and function as a federal check on state abuse of power.[164]

V. THE *DOBBS* DEEPLY ROOTED TEST SUBVERTS THE INTEGRATED CONSTITUTION

Alito's deeply rooted in 1868 test is at war with the Due Process Clause, the whole Fourteenth Amendment, and the Constitution as a whole. This Part discusses four ways in which Alito's test subverts the Integrated Fourteenth Amendment and the Constitution as a whole.

It bears repeating that the deeply rooted test is supposed to be a method for interpreting the text of Section 1 of the Fourteenth Amendment. Ultimately, Alito's test is deeply anti-constitutional and an existential threat to the Integrated Constitution.

A. Dobbs*' Use of History Subverts the Fourteenth Amendment's Unified Function as a Federal Check on State Power*

The core function of the Fourteenth Amendment as an integrated whole is to restrict state power. The Due Process Clause, along with the rest of Section 1 of the Fourteenth Amendment, permanently restricts the police power of states. All three rights clauses in Section 1 expressly states that no state shall enact laws that violate certain civil rights and liberties.[165] States must comply with *federal* guidelines that require that all legislation comport with the Fourteenth Amendment.[166] The Fourteenth Amendment effectively amounts to a federal check on state abuse of power.

But the deeply rooted in 1868 test effectively gives states the power to check their own power. To determine if the Due Process Clause checks states from exercising its police power, Alito's test gives states the authority to determine if state power should be checked.

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[162] U.S. CONST. amend. XIV.

[163] *The Power of the Federal* Courts, US HISTORY.ORG, https://www.ushistory.org/gov/9e.asp (last visited Oct. 18, 2023).

[164] Randy E. Barnett, *The Proper Scope of the Police Power*, 70 NOTRE DAME L. REV. 429, 433, 455 (2004) (demonstrating how power was taken away from the states after the Fourteenth Amendment).

[165] U.S. CONST. amend. XIV § 1.

[166] Barnett, *supra* note 164, at 466, 492, 494.

The notion of states functioning as checks on their own power is illogical under the theory of the checking function in the Constitution. Under the Constitution, one branch of government checks another branch. The Supreme Court has the power to check Congress and the President. Congress has the power to check the President. But the President does not have the role and power to serve as a check on him or herself. Yet, Alito's deeply rooted test makes states play the constitutional role of checking themselves.

Not only does the notion of internal self-checking not make sense under traditional constitutional principles, the Fourteenth Amendment does not authorize states to check themselves. It authorizes the federal government to check state power. Specifically, it authorizes the Supreme Court to check states through its interpretation of the meaning and scope of the Fourteenth Amendment restrictions on state power. Section 5 of the Fourteenth Amendment authorizes Congress to enact legislation to check abuses of state power.

Yet, the deeply rooted test takes the checking function away from the Supreme Court and Congress and gives it to the states, which amounts to eviscerating the Due Process Clause's checking function. In effect, Alito's test gives back to the states the power that the Fourteenth Amendment *took away* from them—the plenary police power to enact laws with respect to civil liberties.

Moreover, giving the states of 1868 the power to define the meaning of the Due Process Clause makes little sense given that they enacted their laws without federal due process principles guiding them.[167] The Fourteenth Amendment did not exist when most of the laws in existence in 1868 were enacted, which means none of those laws in 1868 were informed by federal due process concerns. Since that is the case, why should such laws be the basis for defining the scope of due process limits on state power?

B. Dobbs*' Due Process Deeply Rooted Test Conflicts with the* Frontiero *Equal Protection Deeply Rooted Test*

The *Dobbs* Court's use of history to interpret the Due Process Clause conflicts with the Court's use of history to interpret the Equal Protection Clause. While deeply rooted history under the due process doctrine protects state power, deeply rooted history under the equal protection doctrine restricts state power.

Under equal protection suspect class doctrine, laws that discriminate against a suspect class are presumed to be unconstitutional and subject to heightened judicial scrutiny.[168] Suspect classes are politically vulnerable groups subject to prejudice who need special judicial protection from the majoritarian political process. Recognized suspect classes include racial minorities, women, immigrants, and nonmarital children.[169] On the other hand, a non-suspect class is a group that is considered not

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167 Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1302 (2015) (discussing the deeply rooted test and liberty under the due process clause).

168 Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268, 1276, 1319 (2007) (examining different suspect classes and strict scrutiny).

169 *See* Bertram L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CAL. L. REV. 323, 325–26 (2016).

particularly vulnerable to invidious discrimination, and thus laws that discriminate against a non-suspect class such as opticians will be subject to deferential rational basis scrutiny and most likely be upheld.

How does the Court determine which classes should be deemed suspect because they need judicial protection from invidious discrimination by states?

In *Frontiero v. Richardson*,[170] the Court held that women are a suspect class. The case dealt with a Fifth Amendment equal protection challenge to a United States military policy discriminating against women servicemembers with respect to employee benefits.[171] In holding that the policy violated equal protection because it invidiously discriminated against women as a suspect class, the Court devised a multi-factor test for determining suspect class status.[172]

Several of the suspect class factors focus on the nature of the trait defining a class. One factor asks whether the defining trait is "high[ly] visib[le],"[173] making the class easy targets for invidious discrimination. The Court concluded that women are a highly visible class, which helps explain why women have experienced and continue to experience pervasive invidious discrimination in education, the employment market, and in political institutions.[174]

Two additional factors about the nature of the trait asks whether the trait is "immutable" and/or "determined solely by the accident of birth,"[175] and whether the trait "bears no relation to ability to perform or contribute to society."[176] In applying those two factors to women, the Court concluded that a woman's "sex" is fixed and therefore immutable, and that a woman's gender or sex is irrelevant for assessing her abilities.[177]

But, the Court's most in depth explanation for why women are a suspect class centered on *history*.[178] Specifically, the long, "*firmly rooted*" history of invidious discrimination against women in America going back to the 19th century.[179] The Court asserts that "throughout much of the 19th century," women were relegated to a position of inferiority "comparable to that of blacks under the pre-Civil War slave codes."[180]

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[170] Frontiero v. Richardson, 411 U.S. 677, 682 (1973).

[171] *Id.* at 680.

[172] *Id.* at 687.

[173] *Id.* at 686.

[174] *Id.*

[175] *Id.*

[176] *Id.* at 686–87.

[177] *Id.*

[178] *Id.* at 684–85, 687–88.

[179] *Id.* at 684.

[180] *Id.* at 685.

As evidence of women's position of inferiority, the Court explained how 19th century state laws throughout the United States barred women from voting, running for and holding office, serving on juries, or filing a lawsuit.[181] With respect to married women, 19th century state laws rendered them legally incapable of holding or selling property, or being the legal guardian of her children.[182]

For the *Frontiero* Court, the systematic and pervasive discriminatory treatment of women by virtually all states in the 19th century flowed from a deeply sexist, paternalistic attitude.[183] That sexist attitude was so pervasive that it became "*firmly rooted* in our national consciousness."[184] That firmly or even *deeply* rooted tradition resulted in this nation's 19th-century statutes becoming "laden with gross, stereotyped distinctions between the sexes" that effectively "put women . . . in a cage."[185] Consequently, the *Frontiero* Court held that the deeply rooted history and tradition of discrimination against women supported the designation of women as a suspect class.[186]

The two competing versions of deeply rooted in history analysis put two clauses in the same section of the Fourteenth Amendment at odds with each other. The *Frontiero* Court used the deeply rooted history of gender discrimination in 1868 to justify the systematic, permanent restriction of state power under the Equal Protection Clause.[187] On the other hand, the *Dobbs* Court used the deeply rooted history of laws restricting women's reproductive autonomy to protect state power under the Due Process Clause.[188] Virtually the *same* history was used to justify opposing outcomes.

One way to reconcile the competing approaches would be to apply the *Dobbs* deeply rooted test to the equal protection doctrine. As a method for interpreting one clause in Section 1 of the Fourteenth Amendment, there is no clear reason to avoid using it to interpret another clause in the same section.

If the *Frontiero* Court used the *Dobbs* deeply rooted in 1868 test, it would have had to conclude that, because the vast majority of states in 1868 legally discriminated against women in multiple ways, gender discrimination is deeply rooted in history and tradition. The logic of *Dobbs* would mean gender discrimination does not violate equal protection, and states are free to use their police power to discriminate against women however they want.[189]

Ultimately, if the *Dobbs* deeply rooted in 1868 test applied to the equal protection doctrine, Court decisions that held that immigrants and non-marital children are

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[181] *Id.*

[182] *Id.*

[183] *Id.* at 684.

[184] *Id.* (emphasis added).

[185] *Id.* at 685.

[186] *Id.*

[187] *See generally id.* at 687.

[188] *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

[189] *See generally id*.

suspect classes would have to be overruled, because discrimination against those classes were deeply rooted in 1868. *Dobbs* would spell the end of the suspect class doctrine.

C. The Dobbs *Use of History Conflicts with the Use of History in* Loving v. Virginia

The *Dobbs* deeply rooted test for interpreting the Fourteenth Amendment also conflicts with how the Court used history to support *both* the fundamental rights and equal protection analysis in *Loving v. Virginia*; the 1967 decision in which the Court struck down state bans on interracial marriage.[190]

1. The Use of History in *Loving*

The Court in Loving relied on both due process and equal protection doctrine to strike down laws banning interracial marriage.

Before the Court turned to the constitutional issues, it provided a brief review of the long history of anti-miscegenation laws going back to the 17th century.[191] The Court stated, "[p]enalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period."[192] In that statement, the Court pointed to both the temporal and *institutional* origins of anti-miscegenation laws. In other words, the Court explained that anti-miscegenation laws originated in an institution that dated back to the colonial era—the deeply rooted institution of slavery.

The Court then explained that anti-miscegenation laws also have roots in the widespread racism of the early 20th century.[193] The Court noted that Virginia enacted the most stringent ban on interracial marriage in its history, the Racial Integrity Act, in 1924.[194] That year came during an intense "period of extreme nativism which followed the end of the First World War."[195] Although the Court did not mention this point, 1924 was also during the height of Jim Crow racial segregation in Virginia and throughout the south.[196]

The Court's historical recounting then moved further forward in time to the late 20th century. The Court observed that, in 1967, "Virginia is now one of 16 states which prohibit and punish marriages on the basis of racial classifications."[197] In a

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190 Loving v. Virginia, 388 U.S. 1, 12 (1967).

191 *Id.* at 6–7.

192 *Id.* at 6.

193 *Id.*

194 *Id.*

195 *Id.*

196 *The Racial Integrity Act, 1924: An Attack on Indigenous Identity*, NATIONAL PARK SERVICE, https://www.nps.gov/articles/000/racial-integrity-act.htm (June 21, 2023).

197 *Loving*, 388 U.S. at 12.

footnote, the Court referred to the period from 1952 to 1967, when a steady number of states repealed their anti-miscegenation laws.[198]

There are two important takeaways from the Court's historical discussion. First, by tracing an unbroken throughline of laws banning interracial marriage from slavery to Jim Crow to 1967, the Court was emphasizing the *deep roots* of such laws in the long tradition of racism in the United States.[199] Second, the Court was highly *critical* of that deeply rooted tradition of racism.[200] The Court was not honoring that history, but rebuking it. The critical perspective on the deep historical roots of anti-miscegenation laws framed both the equal protection *and* due process analyses that followed.

2. The Court's Integrated Fourteenth Amendment Analysis

After completing its historical review, the Court turned first to the equal protection question. It explained that, because a law banning interracial marriage classifies on the basis of race, the law discriminates against a suspect class and must therefore be subject to "rigid" or strict scrutiny.[201] Under strict scrutiny, a statute's presumption of constitutionality is taken away, and the statute will be upheld only if it is narrowly tailored to further a compelling state interest.[202]

The Court then applied strict scrutiny by examining the state's interests in banning interracial marriage.[203] The State of Virginia offered four interests to justify their ban.[204] The four interests were "'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride.'"[205] Without much explanation, the Court concluded that the four interests endorsed the "doctrine of White Supremacy."[206] As such, the four interests were not compelling, which meant the ban failed strict scrutiny and thus violated equal protection.

While the Court did not explicitly invoke history in its equal protection analysis, the history implicitly supported the Court's determination that banning interracial marriages reinforced White Supremacy.[207] The Court's historical recounting connected anti-miscegenation laws in 1967 back to slavery and Jim Crow, institutions

198 *Id.* at 6 n.5.

199 *Id.* at 7.

200 *Id.* at 8.

201 *Id.* at 11.

202 Fallon, *supra* note 168, at 1273.

203 *Loving*, 388 U.S. at 7–9.

204 *Id.* at 7.

205 *Id*.

206 *Id.*

207 *Id.* at 6–7.

deeply rooted in the doctrine of White Supremacy.[208] The inescapable conclusion, then, was that banning interracial marriages in 1967 was simply a continuation of that deeply rooted racist tradition.

The Court then turned to the due process fundamental rights issue—whether two people in an interracial relationship have the fundamental right to marry each other.[209] The Court first stated that the general right to marry is fundamental as "one of the vital personal rights essential to the orderly pursuit of happiness by free men."[210] Then the Court makes one very important point that is central to its due process analysis. It declared that a ban on interracial marriage is "directly *subversive* of the principle of *equality* at the heart of the Fourteenth Amendment,"[211] and for that reason, the ban violates the fundamental *due process* right to interracial marriage.

In that passage, the Court invoked the whole *Fourteenth Amendment* in conducting its due process analysis.[212] For the Court, furthering equality is the central purpose underlying *all* the provisions of the Fourteenth Amendment, not just the Equal Protection Clause.[213] The principle of equality also underlies the Due Process Clause, which means that, in determining which liberties are protected under due process, the Court must be informed by the unifying principle underlying the entire Fourteenth Amendment.

In short, the *Loving* Court analyzed the due process issue in light of a fair construction of the Fourteenth Amendment as a whole, just as Chief Justice John Marshall instructed in *McCulloch*. In other words, the Court treated due process as an interconnected part of an integrated Fourteenth Amendment unified by the principle of equality. Thus, a law that deprives persons of their liberty *in order* to violate their equality must be held to violate due process.

The Court in *Loving*, by determining that anti-miscegenation laws subvert the principle of equality that infuses the entire Fourteenth Amendment, effectively held that such bans violate the *entire Fourteenth Amendment* as an integrated whole, not just two of its clauses. Consistent with that unified approach, the Court used the deeply rooted history and tradition of White Supremacy to treat due process and equal protection as interconnected parts that must function in conjunction to promote equality.

3. Applying the *Dobbs* Deeply Rooted Test in *Loving*

What if the *Loving* Court used the *Dobb*'s deeply rooted in 1868 test to determine if the right to interracial marriage is fundamental? Under the *Dobbs* test, if a majority of states in 1868 banned interracial marriages, then the right to interracial marriage would not be deeply rooted in history and tradition, and thus not a fundamental

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208 *Id.*

209 *Id.* at 12.

210 *Id.*

211 *Id.* (emphasis added).

212 *Id.*

213 *Id.*

right.[214] In *Loving*, the 1868 math would work against the right to interracial marriage in the same way that the math worked against the right to abortion in *Dobbs*, and *Loving*'s due process holding would have to be overruled.

What if the *Loving* Court used the *Dobb*'s deeply rooted in 1868 test to determine if bans on interracial marriage violate equal protection? Again, the *Dobbs* test is supposedly a method for interpreting the text of a clause in Section 1 of the Fourteenth Amendment. If that method is a sound means of interpreting the Due Process Clause, it should be a sound means of interpreting the Equal Protection Clause.

Of course, using the deeply rooted in 1868 test to analyze the equal protection issue would force the Court to hold that the ban on interracial marriage does not violate equal protection. Because the majority of state laws banned interracial marriages in 1868, discrimination against interracial couples must be deemed deeply rooted in history and tradition. As a deeply rooted tradition, states are free to discriminate freely against interracial couples without running afoul of equal protection.

Applying the *Dobbs* logic to equal protection may seem absurd, even nonsensical. It seems patently outrageous to use the deeply rooted history and tradition of slavery, racial segregation and discrimination in the United States to *permit* states to racially discriminate in 1967 or in 2023.

However, the state defendants in *Brown v. Board of Education*[215] used the *Dobbs* logic to argue that racial segregation of public schools does not violate equal protection. They essentially argued the long history of racial segregation of schools dating back to 1868 demonstrates that the original intent of the Fourteenth Amendment was to permit racial segregation, which is another way of arguing segregation does not violate equal protection because it is a deeply rooted tradition in the United States.

The *Dobbs* test is also virtually the same reasoning used by the Court in *Plessy v. Ferguson*[216] to hold that racial segregation does not violate equal protection. As a reasonable state custom and tradition, the Court reasoned that it should exercise judicial deference and permit states to practice the tradition of racial segregation free from constitutional restrictions.[217]

4. Implications

Of course, it is unlikely that the Court would use the *Dobbs* test to overrule *Brown* and *Loving*'s equal protection holding. The Court will likely try to keep the deeply rooted test restricted to due process analysis. However, there is no clear, logical basis in the Fourteenth Amendment for adopting different interpretive methods for equal protection and due process. And if logic has anything to do with law, then a promise by the Court that it will not apply the *Dobbs* test to equal protection could be overcome by the force of logic.

Moreover, the *Dobbs* deeply rooted test still poses a looming threat to *Loving's* due process holding. What could possibly be a logical basis for *not* applying the deeply

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[214] *Id.* at 6.

[215] Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954).

[216] *See generally* Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896).

[217] *Id.*

rooted in 1868 test to *Loving*? Of course, if *Loving* is overruled or even called into question, that would likely mean that *Obergefell* and same-sex marriage would be the next to fall.

D. The Dobbs *Deeply Rooted Method Conflicts with the Fifteenth and Nineteenth Amendments*

The Fifteenth Amendment protecting the right of racial minorities to vote,[218] and the Nineteenth Amendment protecting the right of women to vote,[219] support the rejection of the *Dobbs* deeply rooted method of interpreting the Fourteenth Amendment.

Constitutional amendments should be integrated into the Constitution as a whole. In other words, amendments should not be treated as add-ons to the Constitution, but as new parts "updating" the previous version of the Constitution into a new iteration. Thus, the Fourteenth Amendment should be understood in light of the Fifteenth and Nineteenth Amendments, in particular, because all three amendments are about promoting the integrity of the democratic political process.

The Fifteenth and Nineteenth Amendments function to include racial minorities and women into the state political processes and empower them with the right to vote. They implicitly call into question laws enacted by states negatively affecting racial minorities and women prior to their political inclusion. Bottom-line: they had no say at all in the enactment of such laws.

Accordingly, the Fifteenth and Nineteenth Amendments bolster the argument that the *Dobbs* deeply rooted method of interpretation should be rejected as fundamentally in conflict with the Fourteenth Amendment itself. It is inconsistent to use the laws enacted by state political processes that excluded women and African Americans to determine their constitutional rights under the Fourteenth Amendment.

Relying on the decision by states governed only by white men to enact racial segregation laws in 1868 to conclude that such invidious discrimination does not violate equal protection for African Americans is anti-democratic. Similarly, relying on the decision by states governed only by white men to enact laws restricting the reproductive autonomy of women as the basis for permitting states in the present to restrict the reproductive autonomy of women is anti-democratic.

Incorporating the democracy principle of the Fifteenth and Nineteenth Amendments into the Fourteenth Amendment provides further support for the critical use of history and tradition in equal protection cases such as *Frontiero* and *Loving*. The two amendments add the anti-democracy perspective for relying on the deeply rooted history and tradition of invidious gender and racial discrimination to restrict state power in the present. Such discrimination was not just racist and sexist, but also anti-democratic and authoritarian in nature. Such laws were abuses of unchecked political power.

And whether or not abortion laws should technically count as gender discrimination under equal protection, bottom-line: abortion laws restricting women's reproductive autonomy are consistent with the other overtly discriminatory laws against women in many instances enacted by the very same legislators. Restricting

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[218] U.S. CONST. amend. XV, § 1.

[219] U.S. CONST. amend. XIX, § 1.

reproductive autonomy of women go hand-in-hand with the restriction of their autonomy in other realms, and could flow from the same paternalistic, authoritarian impulse. Given the dubious nature of those laws, the benefit of the doubt weighs against relying on them to define liberty and equality for constitutional purposes.

E. Alito's Deeply Rooted in 1868 Test is Anti-Constitutional Because it Subverts the Fundamental Nature of the Constitution as an Integrated Whole

The fourth reason why Alito's deeply rooted test should be rejected is because it is deeply anti-constitutional. Something that is anti-constitutional is something that works *against* the Constitution as a whole and turns it or has the potential to turn it into something that it fundamentally is not.

The Alito test is anti-constitutional in two ways. First, the Alito test radically subverts federal supremacy, and second, the Alito test has turned the Due Process Clause of the Fifth and Fourteenth Amendments into a legal code.

1. Alito's Test Makes State Laws of 1868 the Supreme Law of the Land

The *Dobbs* deeply rooted in 1868 test for interpreting the Fourteenth Amendment subverts the federal supremacy principle, one of the foundational principles of the Integrated Constitution. It does so by literally making state laws of 1868 the supreme law of the land.[220]

In *McCulloch*, the second issue before the Court was whether states had the authority to tax the federal government.[221] Marshall held that the power of states to tax the federal government is unconstitutional in violation of the federal supremacy principle.[222]

The Supremacy Clause in Article VI of the Constitution states, "[t]he Constitution, and the law of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land."[223] If there is a conflict between state law and the Constitution and/or federal law, the Constitution overrides and disables state law.[224]

Marshall concluded that if states have the power to tax the federal government, it would transfer supremacy from the federal government to the states.[225] States with the power to tax one part of the federal government, like the national bank, would have the power to tax *any* part of the federal government.[226] States would be able to tax the U.S. Postal Service, the federal courts, the Environmental Protection Agency, the FBI, and every other department, agency, and branch of the federal government.[227]

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[220] *Dobbs*, 142 S. Ct. at 2279.

[221] McCulloch v. Maryland, 17 U.S. 316, 425 (1819).

[222] *Id.* at 436.

[223] U.S. CONST. art. VI, cl. 2.

[224] *See McCulloch*, 17 U.S. at 406.

[225] *Id.* at 432.

[226] *Id.* at 431.

[227] *See id.* at 432.

With the blanket power to tax all aspects of the federal government, states could use that power to obstruct any federal policy they opposed. If a state opposed the Affordable Care Act, it could tax all aspects of that program within its borders. And with fifty states having that power, the state power to tax could cripple the federal government by inflicting thousands and thousands of cuts.

Given the power to tax the federal government, Marshall reasoned that states could change "totally the character"[228] of the Constitution as a whole by "transfer[ing] supremacy . . . to the States."[229] States would be able to control federal law, making the federal government subordinate to them. Even worse, the power to tax the federal government would give just one or a handful of states the ability to significantly obstruct the federal government in its operations.

The Alito deeply rooted test subverts federal supremacy in a manner arguably more subversive than states having the power to tax the federal government. The Alito test does not merely give states supremacy over federal statutes. The test makes a handful of state laws in 1868 supreme over the *Constitution* itself.

Specifically, the Alito deeply rooted test empowers a majority of the thirty-seven states in 1868 to interpret the meaning of the Fourteenth Amendment Due Process Clause. In effect, about twenty states in 1868 have the power to make their understanding of the Due Process Clause become the actual understanding of the Due Process Clause. In *Dobbs*, the laws of twenty-eight states in 1868 determined the meaning of the Due Process Clause, giving fifty states in 2022 virtual plenary power to restrict abortion. The Alito deeply rooted test functionally transfers to a majority of states in 1868 the supreme power to define the scope of the constitutional limits on state power. State laws enacted by state legislatures before and up to 1868 are now the supreme law of the land. Alito effectively has written state laws into the text of the Constitution.

The *Dobbs* deeply rooted test turns *Marbury v. Madison*[230] on its head by giving state legislatures of the 19th century the power to say what the Constitution means. In effect, Alito has delegated or outsourced the Court's power of judicial review to a handful of states in 1868.

2. The *Dobbs* Deeply Rooted Test Turns the Due Process Clause into a Legal Code

Finally, the Alito deeply rooted test violates Marshall's clear instruction not to interpret the Constitution in a manner that turns it into a legal code.[231] The deeply rooted in 1868 test does exactly that—it turns the Due Process Clause into a legal code. Instead of treating the clause as a broad principle that should be broadly construed in light of a "fair construction of the whole" Fourteenth Amendment and Constitution, Alito reduced the Due Process Clause into a rigid, fixed rule determined mechanically by counting the number of 1868 state statutes that restricted a particular liberty.

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228 *Id.*

229 *Id.*

230 Marbury v. Madison, 5 U.S. 137, 173–74 (1803).

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

Moreover, Alito's test means the meaning of the Due Process Clause has been conclusively predetermined in 1868. There is no need for the Supreme Court to issue a ruling, any person can do research now to see if the Due Process Clause protects a liberty like same-sex marriage under his test. In fact, no research even needs to be done to overrule *Obergefell*. If Alito's deeply rooted test continues to make state laws of 1868 the supreme law of the land, then it is only a matter of time before the Supreme Court rules that the state laws of 1868 declared two centuries ago that same-sex marriage categorically is not protected by the Due Process Clause of the Fourteenth Amendment.

In reducing the Due Process Clause into a legal code, Alito either forgot or ignored Marshall's command to "never forget, that it is a *constitution* we are expounding."[232]

3. A Note on Ratifier's Intent

The dissent in *Dobbs* suggests that Alito's deeply rooted in 1868 test is his method for determining the intent of the ratifiers of the Fourteenth Amendment.[233] In other words, if the state laws of 1868 is a legitimate method of discerning ratifier intent, then, it may be a way of getting around some of the critiques made in this Article.

There are several problems with the ratifiers' intent justification for the deeply rooted in 1868 test. First, Alito himself never explicitly states that his test aims to discern ratifiers' intent, so he never explains why and how relying on state statutes in 1868 is the best way of determining ratifier intent.[234] Second, although it is beyond the scope of this Article to do a full critique of the deeply rooted test as a ratifiers' intent test, one critique is that the test doesn't actually consider the intent of the *actual, real life* ratifiers themselves. It does not ask if the actual ratifiers actually approved of the abortion restriction in their state in 1868.

Relying on state laws in 1868 to discern ratifiers' intent is one step removed from the actual intent of the ratifiers. In all likelihood, many of the individual legislators who voted to ratify the Fourteenth Amendment in 1868 did not vote to enact the abortion law on the books in 1868. Rather, the test *imputes* approval of existing laws in 1868 in a state to the specific legislators who ratified the Fourteenth Amendment. It is an argument for *constructive* ratifiers' intent, not actual ratifiers' intent, and it is based on the dubious assumption that a person approves of all existing laws in the state.

But, that assumption simply cannot be true, because the states in 1868 that ratified the Fourteenth Amendment were voting to invalidate some of their very own laws in 1868. One of the purposes of the Fourteenth Amendment was to invalidate a host of state laws in 1868 that violated equal protection and due process.[235] The former slave

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232 *Id.* at 407 (emphasis added).

233 Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 250–52 (2009) (analyzing ratifier's intent in order to understand amendments and laws).

234 *See generally Dobbs*, 142 S. Ct. at 2246, 2248.

235 Bryan H. Wildenthal, *The Fourteenth Amendment and The Bill of Rights: Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-1873*, 18 J. CONTEMP. LEGAL ISSUES 153, 191, 286 (2009) (discussing the repeal of state laws after the privileges and immunities clause was enacted).

states that voted to ratify the Fourteenth Amendment did so knowing it would invalidate their racially discriminatory Black Codes.[236]

In other words, the very act of ratification was a declaration that the states did *not* approve of some of their own laws. Yet, the deeply rooted in 1868 test presumes the legitimacy of *all* existing state statutes at the time of ratification. Ultimately, Alito's deeply rooted in 1868 test is not a sound basis for determining the intent of the ratifiers of the Fourteenth Amendment.

VI. CONCLUSION

When Alito's deeply rooted in 1868 test is examined in light of the Integrated Constitution, the subversiveness of the test as a method of constitutional interpretation exposes itself. A method of interpreting the Due Process Clause that turns it into a legal code goes against the fundamental nature of the Integrated Constitution. According to Chief Justice Marshall, turning the Due Process Clause into a legal code makes it no longer a truly *constitutional* provision.[237] The Due Process Clause has been stripped of its fundamental constitutional nature. Hence, Alito's test is anti-constitutional and must be rejected.

Rejecting Alito's deeply rooted test, however, does not necessarily require overruling *Dobbs* and restoring abortion as a fundamental right. A Justice like Kavanaugh could disavow the deeply rooted reasoning in *Dobbs* while adopting another, much narrower rationale for overruling *Roe* that is not based on Alito's deeply rooted reasoning.

The alternative rationale is the harm-principle which Alito mentions briefly in *Dobbs*.[238] He asserts that abortion is not a fundamental right like rights of autonomy such as marriage and procreation because "[a]bortion destroys . . . the life of an 'unborn human being.'"[239] In other words, because abortion harms prenatal life in a way that same-sex marriage does not, the infliction of harm justifies excluding abortion as a fundamental right of autonomy. The harm principle is ahistorical in nature and therefore could be designated retrospectively as the central rationale for *Dobbs* while jettisoning Alito's history test.

To be sure, I am not arguing that the harm principle *should* be the basis to distinguish abortion from other fundamental rights. Other Justices could and should argue for overruling *Dobbs* entirely and reinstate abortion as a fundamental right.

My plan is to write a follow-up article laying out a test for fundamental rights under due process and/or privileges or immunities that I call the *deeply rooted in the Constitution* test. I will argue that the test supports the conclusion that the general right of reproductive autonomy and the specific right of abortion are implied constitutional rights. I will argue that the deeply rooted in the Constitution test is itself deeply rooted

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236 John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388–89, 1396 (1992) (demonstrating how the Fourteenth Amendment affected the Black Codes).

237 *McCulloch*, 17 U.S. at 415.

238 *Dobbs*, 142 S. Ct. at 2258.

239 *Id.*

in and consistent with the Integrated Constitution. In making the argument, I will make sure to never forget that it is a *constitution*, not a legal code, we are expounding.