No. 19-1392

In The Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL.,
Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE LONANG INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

LONANG Institute is a Michigan-based, nonprofit and nonpartisan research and educational institute. Application of the "Laws Of Nature And Nature's God" to contemporary legal disputes is its specialty. The "Laws Of Nature And Nature's God" serves as the legal foundation of the government of the States and United States. The law was adopted and referenced in the Declaration of Independence of 1776. It enshrined into our civil laws principles of equality, unalienable rights and limited government by consent. See https://lonang.com/

This same law also presupposes that any civil government or branch thereof thereafter must adhere to those principles, defend such rights, and exercise only that power textually given. Likewise, the law of nature provides that a government's judicial branches are limited to declaring what is the law, not its codification. The concept of judicial review affirms that the province of a judge is to declare the law, not to make it.

As friend of the Court, the LONANG Institute offers insight into the legal implications of the Law of Nature, unalienable rights and judicial review inherent in limited government. It applies these

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[1] It is hereby certified that counsel for Petitioner and for Respondents have filed blanket consents to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than *amicus curiae*, or their counsel made a monetary contribution to its preparation or submission.

concepts to this Court's substantive due process decisions illuminating their atextual basis.

Amicus aids the Court in recognizing that un-enumerated fundamental rights elevated to a constitutional status by the Court because they are "implicit," "inherent" or "rooted in history" have no basis in the law of nature, and no textual basis in Article III, or in the power of judicial review. The Court's discovery in the "concept of personal liberty" of a right to abortion is therefore, with no such support, which ultimately bears upon the question before the Court about Mississippi's abortion law.[2]

SUMMARY OF ARGUMENT

The Supreme Court is routinely presented with the legal arguments that certain statutory or constitutional words or phrases have no fixed meaning. The Court is then called upon to supply a new meaning other than the one stated in the text. This process adjusts the words or phrases chosen by the lawgiver, to establish as precedent the Court's desired meaning. Denying the textual meaning of legal words is not a novel invention of the Court. Instead, it has historical precedent going back to the first recorded case in human history.

At issue in that case, In Re: Adam, Eve & the Devil, 3 Genesis 1 (0001), was the intent and meaning of a statute prohibiting consumption of fruit from a specific tree in a Garden in Eden. A statute

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[2] Roe v. Wade, 410 U.S. 113, 153 (1973).

prohibiting such consumption was at issue. Two of the parties violated the statute and entered a guilty plea. A second statute prohibited various forms of fraud and deception. A third party was charged under this statute alleging he used deception to induce co-defendants to consume the prohibited fruit.

At trial, he argued that he was not liable on the theory that the first statute did not actually prohibit consumption—that the words in the statute did not mean what the text declared. As such he argued that he did not engage in deceit in his statements to the other parties. The Court was unpersuaded. It rejected the argument, finding that the prohibition was clear and unambiguous, reflected the drafter's original intent and was, therefore, enforceable as written.[3]

This Court's fourteenth amendment substantive due process jurisprudence is based on the same argument first made in Eden—*the words of the law do not mean what they say*. The Court has maintained the amendment itself contains a substantive due process clause into which the Court is empowered to pour un-enumerated fundamental rights of its own divination. The Court's atextual adjustments, purportedly limited by the outcome-flexible concept of "judicial restraint," have been internally justified by its moral appeals to novel high-sounding phrases such as "implicit in the

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[3] "Now the serpent was more crafty than any other beast of the field that the Lord God had made. He said to the woman, 'Did God actually say, "You shall not eat of any tree in the garden"?'" Genesis 3:1 (ESV).

concept of ordered liberty,"[4] or the "concept of personal liberty,"[5] or "deeply rooted in this nation's history and tradition,"[6] or "inherent in the concept of individual autonomy."[7]

Alas, none of these phrases have textual support in the amendment itself. Nor has the Court been granted any state legislative power in Article III to define ordered or personal liberty, individual

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[4] Judicial decisions finding that a state statute violates fundamental values discovered as "implicit in the concept of ordered liberty" are without textual support. See Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan. J., concurring) (quoting Palko v. Connecticut, 302 U. S. 319, 325 (1937) (Cardozo, J.) overruled on other grounds, Benton v. Maryland, 395 U.S. 784 (1969)).

[5] Judicial decisions finding that a state statute violates a woman's right to abortion discovered in the "concept of personal liberty" are without textual support. See Roe v. Wade, 410 U.S. 113, 153 (1973).

[6] Judicial decisions finding that a state statute violates rights discovered as "deeply rooted in this nation's history and tradition" are without textual support. See Washington v. Glucksberg, 521 U.S. 702, 721 (1997) "The Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." Palko, 302 U.S. 325. The Court looks to principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental') (quoting Snyder v. Massachusetts, 291 U. S. 97, 105 (1934) overruled in part on other grounds by Malloy v. Hogan, 378 U.S. 1 (1964)).

[7] Judicial decisions finding that a state statute violates a fundamental right which is "inherent in the concept of individual autonomy" without regard to history or tradition is without textual support. See Obergefell v. Hodges, 576 US 644; 135 S. Ct. at 2629 (2015).

autonomy, or traipse through history and tradition to discover and append any un-enumerated substantive individual rights into the amendment's textually non-existent "substantive" due process clause. Nor does the law of nature of judicial review empower this Court to write new Constitutional text. The authority of a judge is to declare what written law already exists. The standard legal maxim is, *Jus dicere, et non jus dare*, also known as *judicis est jus dicere non dare*. The province of a judge is to declare the law, not to make it.[8] At what point in time and on whose authority did that rule, binding on judges in England and America for centuries, become non-binding?

Even if fundamental rights are so demonstrably "implicit, inherent and rooted" as the Court maintains, the power of judicial review, nevertheless, does not carry with it the power to insert those rights into the fourteenth amendment. Amending the Constitution is governed by Article V in which the Court plays no part.

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[8] "When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends." United States v. Butler, 297 U.S. 1, 62-63 (1936).

Even assuming *arguendo* that the Court's "implicit, inherent and rooted" approach to discovering un-enumerated fundamental rights is superior to legislative debate and enactment, or preferable to the Constitution's chosen method of amendment, or that the Court's wisdom and judgment in divining such rights is the manifestation of jurisprudential perfection, the fact remains that such an approach is without textual Constitutional support. Whether or not un-enumerated fundamental rights are or are not "implicit, inherent and rooted" in the Constitution's fourteenth amendment, they are not found in the text itself. As such their discovery and incorporation into the law of the land is for the States and the People to decide.[9]

The case now before the Court provides an opportunity to restore judicial review to declaring what the text says. It provides an opportunity to resist anew the temptation first argued at Eden to opine to the contrary. The restoration will leave the State of Mississippi free to adopt laws protecting a pregnant woman by prohibiting conduct inducing a miscarriage or procuring an abortion. Such a determination would not merely return the law of abortion to its pre-1973 status. It would return judicial review itself to pre-substantive due process status.

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[9] See U.S. Const. amend. IX, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." See also U.S. Const. amend. X, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

ARGUMENT

I. PRE-VIABILITY PROHIBITIONS ON ELECTIVE ABORTIONS ARE CONSTITUTIONAL

The Court asks whether all pre-viability state prohibitions on elective abortions are unconstitutional. Amicus answer that question in the negative, but not for the reasons advanced by the petitioners.

A. The Declaration Of Independence Affirms That The States Enjoy Police Power Which Carries With It The Power To Prohibit Abortion.

The question posed by the Court pertains to the power of a state, in this case Mississippi. The Declaration of Independence not only declared the States to be free and independent, but also declared the legal basis and extent of their power. No understanding of state power is complete without consideration of the Declaration. The Declaration grounded civil power itself on the "laws of nature and of nature's God." That is what it says. It further declared this law of nature affirmed that every person may lawfully enjoy those rights which God has given. The laws of nature and its God pledges to guarantee to each person:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among

> these are Life, Liberty and the pursuit of Happiness.–That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . .

Remember that under the Declaration, the "governments instituted among men," whose job it is to secure the rights of the people, exclusively referred to the several state governments, as no federal or national government then existed. Accordingly, the duty to declare and secure the rights of the people belongs to the States themselves, not to any branch, department or agency of the federal government later created.

Even if this Court's search for new fundamental un-enumerated substantive due process rights was constitutionally legitimate, it has neglected to look carefully at the "laws of nature and of nature's God" as a source of those rights. Any legitimate search even for rights "deeply rooted" in American history and tradition would consider unalienable rights granted by the Creator as asserted in such a quintessential founding American document. In other words, the first place to look for any rights of the people would be to examine those rights granted by the Creator, not any purported rights invented by people. And if the Creator has not deemed it necessary or advisable to confer a particular right, then the logical conclusion would be that such a right does not exist.

Nevertheless the state governments' purpose is to secure these natural and unalienable rights and

as we have seen, any un-enumerated rights are reserved to the People (not the judicial branch) to find, identify, and assert, and their States to enact. The People created their state governments for this purpose and their national government for a much more limited purpose. The People did not establish a national government with a judicial branch given any power to make law or discover un-enumerated rights.

As to the power of the States, the Declaration declared:

> That these United Colonies are, and of Right ought to be, Free and Independent States; . . . and that as Free and Independent States, *they have full Power* to levy War, conclude Peace, contract Alliances, establish Commerce, and *to do all other Acts and Things which Independent States may of right do*. (emphasis added).

The States in the union have all power to do all "Acts and Things which Independent States may of right do." The Constitution of a state may further limit this power. The United States Constitution including the fourteenth amendment also limits the power of States. But neither the framers nor text of that amendment contain any substantive due process limitation on a state's police power.

The Declaration's recognition of the power of the States not only applies to the original thirteen States, the Declaration's principles apply to States newly admitted into the Union. One precedent for

this rule is evidenced by Virginia's pre-constitutional cession of its land claims northwest of the Ohio River. Virginia stipulated that States formed within that territory would have to be "distinct republican states, and admitted members of the federal Union, having the same rights of sovereignty, freedom and independence as the other states." The Northwest Compact subsequently crystallized the agreement between the States and national government and provided for the formation of future States out of the Northwest Territory under certain conditions.[10]

The subsequent Congressional admission statutes for Louisiana, Mississippi, Alabama, and Tennessee refer to the Articles of the Northwest Ordinance as authoritative even though those States are clearly south of the Ohio River. The Articles declared that all such States "shall be republican, and in conformity to the principles contained in these articles," and furthermore, shall stand on "equal footing" with the original States. All admission statutes contain the words "equal footing" or, to identical effect, "same footing."[11] By affirming "equal

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[10] The states of Michigan, Ohio, Indiana, Illinois and Wisconsin are required to continually acknowledge: "the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed . . . and for their admission . . . on equal footing with the original states." The Northwest Ordinance of 1787, quoted in Richard Perry, ed., Sources of Our Liberties (American Bar Foundation: Chicago, Ill., 1978) 246.

[11] Federal enabling legislation including state restoration legislation for Mississippi can be found at Mar. 1, 1817, c. 23, 3

footing with the original states" in subsequent admission statutes, the framers intended to bind new States to the principles of the Declaration the same as the original thirteen signatory States.[12]

Mississippi is such a state. It stands on equal footing with the original States. It enjoys the police power to adopt laws prohibiting abortion because the Declaration of Independence recognizes it may do such acts according to the law of nature. Nothing in the text of the Fourteenth amendment legitimately articulates a substantive due process limitation on that power.

Even if a right to privacy implicit in the concept of ordered liberty translates into a right to abortion, nothing in the text of Article III, or the power of judicial review, extends to this Court a power to interlineate that right into the

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Stat. 348, Dec. 10, 1817, Res. 1, 3 Stat. 472, Feb. 23, 1870, c. 19, 16 Stat. 67.

[12] The admission statutes of several states expressly provide that their respective state Constitutions shall be both republican in form and "not repugnant to the principles of the Declaration of Independence." These states include Nevada (1864), Nebraska (1867), Colorado (1876), Washington (1889), Montana (1889), Utah (1896), North and South Dakota (1899), Arizona, New Mexico (1912), Alaska (1958) and Hawaii (1959). For instance, the requirement that a state Constitution shall be republican and "not repugnant to the principles of the Declaration of Independence" is found at 72 Stat. 339 (P.L. 85-508 July 7, 1958) for Alaska and at 73 Stat. 4 (P.L. 86-3, March 18, 1959) for Hawaii. See Edward Dumbald, The Declaration of Independence and What it Means Today (Norman: University of Oklahoma Press, 1950), p. 63.

Constitution's text. If the People of Mississippi determine that a right to abortion exists, they are constitutionally free to enact whatever protections the exercise of that right warrants at any stage of a woman's pregnancy.

B. The Fourteenth Amendment Requires Only Procedural Due Process, not Substantive Due Process.

The fourteenth amendment states in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, *without due process of law*; . . . (emphasis added). U.S. Const., amend XIV.

Due process pertains entirely to matters of procedure. "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." Carey v. Piphus, 435 U.S. 247, 259 (1978). "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding *process* as applied to the generality of cases." Mathews v. Eldridge, 424 U.S. 319, 344 (1976) (emphasis added).

The core of these requirements is notice and an opportunity to be heard (often a hearing) before an impartial tribunal. Due process may also require

an opportunity for confrontation and cross-examination, and for discovery; that a decision be made based on the record, and that a party be allowed to be represented by counsel.

A review of the text of the fourteenth amendment reflects no textual support for any "substantive due process" clause. Even the term is an oxymoron. If we took the words in their ordinary meaning, "due process" merely signifies a proper procedure. The word "substantive," on the other hand, means rights and duties *as opposed to* the procedural rules by which such things are established or enforced. Thus, the term "substantive due process," in plain English, means *non-procedural proper procedure*.

Logically, "substantive due process" is a type of "A = Not A" statement, where something is procedural and not procedural simultaneously. But unlike philosophy or mathematics, An "A = Not A" statement in a legal context is just plain illogical. Either the Court, when invoking substantive due process, is talking about procedure or it is not. If yes, then due process as a legal doctrine stands on its own and there is no need to resort to substantive due process. If no, then due process does not affect the matter, for it does not relate to procedure.

This brings us back to Eden where the argument was first made that the words of the law do not mean what they say. While we acknowledge the argument has the weight of time behind it, originating in great antiquity, we respectfully urge the Court not to follow that ancient precedent.

C. Courts Are The Mere Instruments Of The Law, And Can Will Nothing.

Applying a dialectical interpretation to words is not an element of judicial power. Nothing in the case or controversy jurisdiction of the Supreme Court in Article III, sec. 2, extends any power to the Court to identify un-enumerated fundamental rights "implicit in the concept of ordered liberty," or in the "concept of personal liberty," or "deeply rooted in this nation's history and tradition," or "inherent in the concept of individual autonomy."[13]

Alexander Hamilton affirmed this view, writing in Federalist No. 78, that the judicial branch of government is the least dangerous because it has neither force nor will, only judgment. Chief Justice Marshall agreed, noting that: "Judicial power, as contradistinguished from the powers of the law, has no existence. Courts are the mere instruments of the law, and can will nothing." Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824) (Chief Justice Marshall).[14] In other words, the Court

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[13] See U.S. Const., Art III, sec. 2, cl. 1.

[14] See also United States v. Butler, 297 U.S. 1, 78-79 (1936) ("The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts, but to the ballot and to the processes of

cannot will un-enumerated fundamental rights into Constitutional existence. It has no judicial power to will rights "implicit in the concept of ordered liberty," or in the "concept of personal liberty," or "deeply rooted in this nation's history and tradition," or "inherent in the concept of individual autonomy" into textual existence.

The high watermark of the Supreme Court misuse of judicial review came in Cooper v. Aaron, 358 U.S. 1 (1958). In its opinion, the court remarked that Article VI of the Constitution makes the Constitution the "supreme Law of the Land." So far, so good. In 1803, Chief Justice Marshall, speaking for a unanimous Court, calling the Constitution "the fundamental and paramount law of the nation," declared in Marbury v. Madison, 1 Cranch 137 (1803) that "It is emphatically the province and duty of the judicial department to say what the law is." This is a description of the legitimate power of judicial review found in Article III, Section 2.

From this legitimate recognition of the power of judicial review, the Cooper v. Aaron Court stepped back to Eden. The Court first expanded its own opinion in Marbury asserting that Marbury actually "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution." 358 U.S. at 18 (emphasis added). Recall that Chief Justice Marshall said the judiciary

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democratic government.") The instant case calls for self-restraint.

has a duty to say what the law is. He said nothing, however, about the Court's opinions as supreme. Cooper added the "supreme" element.

In its ruling, the Court in Cooper made the egregious error of misconstruing the Supremacy Clause of Art VI that "This constitution and the laws of the United States which shall be made in pursuance thereof" shall be "the supreme law of the land." The Court, without either textual or historical support, construed "the laws of the United States" to include judicial opinions of the Court, when clearly, historically and textually, it only referred to acts of Congress which became law when made in pursuance of the Constitution.

Further, the Constitution grants no "supreme" expository power to the Court. It is not found in Articles III or VI. It is not there. What is found in Article VI is that the Constitution, laws and treaties "shall be the supreme law of the land." Nothing is said about Supreme Court opinions being supreme law, let alone being law at all. The Constitution extends no power to the Court to claim that even its legitimate constitutionally based opinions, are the sole and exclusive meaning of the Constitution itself.

The judicial power to review cases arising under the constitution, laws and treaties is stated in Article III, section 2, but that power is not the power to rewrite the Constitution itself. It is not the power to authorize the court to sit as a perpetual constitutional convention. It is not the power for the court to write into the Constitution whatever it wants, or the power to strike from the Constitution

whatever it does not want. Constitutional insertions and deletions are a power retained by the People. This textual judicial power renders the Court's opinion in Roe without support in the fourteenth amendment.

D. According to The Law Of Nature, Judicial Power Extends To Issuing Orders In Cases And Controversies, Not To Making Rules Of General Applicability.

This exercise of judicial power is reflected in the difference between a "rule" and an "order." A court cannot issue a rule under the law of nature, because the nature of any rule is that it is an action of general application. Rules apply not only to parties in a case, but to everyone. The court's judgment on the other hand must be confined to an order for its contempt power to be exercised lawfully. Otherwise, a court could hold anyone in contempt for simply disagreeing with its opinion. This distinguishes judicial power from legislative power. Only the legislative power can make laws; the judiciary can merely apply pre-existing laws to the facts in a given case.

Not only is the law of nature of judicial power responsive rather than initiative, and limited to giving orders to parties rather than rules to all persons, the law of nature of judicial power is restricted to judgment, not will. All the judge has is judgment to make known the statute or Constitution's text. This distinguishes judicial power from executive power.

It follows that if judges do not make law, which by definition is a "rule," then judges cannot issue "rules," and may only issue orders. A rule binds the people generally, and is by nature legislative, whereas an order binds only the person to whom it is directed. Thus, Article III extends the judicial power of the courts of the United States only to "cases" and "controversies." If a judge could issue a rule which governed such disputes, the judicial power would not be limited to actual cases and controversies.

> [I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers....[15]

This Court's substantive due process jurisprudence is an example of rulemaking simply because it purports to add new text to the Constitution itself. For this reason, it is contrary to the law of nature of judicial power. The opinion in Roe v. Wade can also be examined to determine whether it was in the nature of an order or a rule.

Remarkably, the Court did not issue an instruction to Texas declaring its statute unconstitutional and unenforceable. Rather, it specified a trimester formula was essentially a legislative rule purporting to bind all future statutes

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[15] Abraham Lincoln, First Inaugural Address, March 4, 1861.

governing abortion in every state. Yet only Texas was a party to the case. Hence, the Court's opinion again lacked an essential element of the exercise of judicial power, that is, the issuance of an order, not a rule.[16]

E. Judicial Decisions Articulating Substantive Due Process Rights Are Without Constitutional Textual Support.

Besides the lack of concrete, textual constitutional language, the limited nature of judicial power and its lack of authority to make rules, the Court has felt constrained to adjust rather than abandon its substantive due process practice of atextual fundamental rights rulemaking. These cases reflect its "go to" linguistic justifications, all of which neither have textual support nor are found enumerated among the judicial powers in Article III.

Judicial decisions finding that a state statute violates fundamental values "implicit in the concept of ordered liberty" are without textual support. See Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan. J., concurring) (quoting Palko v. Connecticut, 302 U. S. 319, 325 (1937) (Cardozo, J.) overruled on other grounds, Benton v. Maryland, 395 U.S. 784 (1969)). A judicial decision finding that a state statute violates a woman's right to abortion

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[16] For a more extensive review of the law of nature regarding judicial power and judicial review, see Herbert W. Titus & Gerald R. Thompson, America's Heritage: Constitutional Liberty, Judicial Power And Judicial Review, The LONANG Institute (2006).

discovered in the "concept of personal liberty" is without textual support. See Roe v. Wade, 410 U.S. 113, 153 (1973).

Likewise, judicial decisions finding that a state statute violates rights "deeply rooted in this nation's history and tradition" are without textual support. See Washington v. Glucksberg, 521 U.S. 702, 721 (1997). "The Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." Palko, 302 U.S. at 325. The Court looks to principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental") (quoting Snyder v. Massachusetts, 291 U. S. 97, 105 (1934) overruled in part on other grounds by Malloy v. Hogan, 378 U.S. 1 (1964)).

So too, a judicial decision finding that a state statute violates a fundamental right which is "inherent in the concept of individual autonomy" without regard to history or tradition, is equally without textual support. See Obergefell v. Hodges, 576 U.S. 644; 135 S. Ct. at 2629 (2015).[17]

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[17] Chief Justice Roberts, with whom Justice Scalia and Justice Thomas joined in dissent, further underscored the lack of any textual support for the court's decision.

> The majority purports to identify four "principles and traditions" in this Court's due process precedents that support a fundamental right for same-sex couples to marry. Ante, at 12. In reality, however, the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking

Let us be clear here. What we mean when we say the Court is utilizing doctrines or rules of interpretation which have no textual support, is that the Court is just declaring its own majoritarian judicial will as the Supreme Law of the Land without regard to the Constitution's text, form of government, separation of powers, or any known legal doctrine except the arbitrary will of a Despot. Rather than celebrating and continuing this "long train of abuses and usurpations pursuing invariably the same object, a design to reduce" the People "under absolute Despotism," there is still a window of time in which to quash this judicial abuse and usurpation.

Finally, Amicus would be remiss in failing to address a future judicial decision which would discover a fundamental "right to life" "implicit in the

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> that characterized discredited decisions such as Lochner v. New York, 198 U.S. 45. Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

The same reasoning applies with equal force and effect to Griswold v. Connecticut, 381 U.S. 479, 500 (1965); Palko v. Connecticut, 302 U. S. 319, 325 (1937) (overruled on other grounds, Benton v. Maryland, 395 U.S. 784 (1969)); Roe v. Wade, 410 U.S. 113, 153 (1973), Washington v. Glucksberg, 521 U.S. 702, 721 (1997) and Snyder v. Massachusetts, 291 U. S. 97, 105 (1934) (overruled in part on other grounds by Malloy v. Hogan, 378 U.S. 1 (1964)).

Concept of ordered liberty", or in the "concept of personal liberty," or "deeply rooted in this nation's history and tradition" or "inherent in the concept of individual autonomy," or existing in any other linguistic contrivance yet to be animated from the spirit of the original argument in Eden (that the words do not mean what they say). Such a decision would also lack textual support in the non-existent substantive due process clause. Its advocates would perpetuate judicial Despotism and continue to wrongly nationalize, state jurisdiction.

II. ONLY THE STATES AND THE PEOPLE ENJOY THE LAWFUL AUTHORITY, TO CONSTITUTIONALIZE FUNDAMENTAL RIGHTS "IMPLICIT IN LIBERTY", OR "DEEPLY ROOTED", OR "INHERENT IN INDIVIDUAL AUTONOMY."

A. The People Or The States May Amend Their Constitutions Or State Law To Protect Their Rights.

Objecting to the Court's holding in Obergefell v. Hodges, 576 U.S. 644; 135 S. Ct. at 2629 (2015) Justice Scalia, with whom Justice Thomas joined in dissenting observed: "This is a naked judicial claim to legislative—indeed, super-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People

subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy." Id.

Not only are the States free to adopt whatever laws they like subject only to the express textual limits of the national constitution, Congressional laws made in pursuance thereof, and their own state constitutions, they are also free to amend any constitution as provided, and enumerate, define, regulate or adjust any fundamental right of the people, as well as textually affirm without limit any preexisting unalienable right.

The ninth amendment presupposes such a scheme in declaring that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The tenth amendment follows suit for the States and people as regards to powers. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The power and process of amending the national Constitution is well provided for in Article V. That Article assigns no place for the federal judiciary in its text.[18]

The powers reserved to the States and people include the power to decide if they shall constitutionalize or not, fundamental rights "implicit in the concept of ordered liberty," or within the "concept of personal liberty," or "deeply rooted in this nation's history and tradition," or "inherent in the concept of individual autonomy." It also includes the

[18] See U.S. Const. Art. V.

power to amend the fourteenth amendment if so desired to incorporate any fundamental or unalienable rights they may choose.

B. The Federal Courts Possess No Article III Power To Discover Or Constitutionalize Textually Unsupported Rights Or Impose A Duty To Enforce Those Rights On The States.

On the other hand, the powers assigned to the Supreme Court do not include the power to decide if, when or how they shall constitutionalize or not, un-enumerated fundamental rights "implicit in the concept of ordered liberty," or within the "concept of personal liberty," or "deeply rooted in this nation's history and tradition," or "inherent in the concept of individual autonomy." Nor does it include the power to amend the fourteen amendments to incorporate any fundamental rights they may choose.

Yet having done so, the Court trampled down the separation of powers. It also exceeded the law of nature of judicial power, because it does not declare the written law, but rather says what the law should be. That goes beyond judicial review. Nor is constitutionalizing un-enumerated fundamental rights found among the jurisdiction of the Court in Article III. In such cases the court acts politically, not judicially. In his dissent, Justice Curtis provided insight into the phenomenon when he observed:

> Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in

> different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men who, for the time being, have power to declare what the Constitution is according to their own views of what it ought to mean.[19]

This quotation well describes the current lay of the land--we no longer have a meaningful Constitution; we are under the government of individual men and women who, for the time being, have power to declare what the Constitution is according to their own views of what it ought to mean.

Even more important, the claimed judicial power to constitutionalize un-enumerated fundamental rights contradicts an *honest observance* of constitutional compacts. Thomas Jefferson

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[19] Dred Scott v. Sandford, 60 U.S. 393, 620-621 (1856) (J. Curtis, dissenting). He concluded that: "When such a method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a Government which is merely an exponent of the will of Congress; or, what in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court." Id.

observed that judges were subject to temptation just like all other persons. The particular temptation that besets the judicial branch is to enlarge their jurisdiction and their power. He wrote:

> Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is "*boni judicis est ampliare jurisdictionem*," and their power the more dangerous as they are in office for life, . . . The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots.[20]

Years later in referring to the Resolutions Relative to the Alien and Sedition Acts, Jefferson observed: "In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."[21] In light of this realistic assessment of human nature, the Court's self-assurance that its modern substantive

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[20] Thomas Jefferson, Letter to William Charles Jarvis, (28 September 1820).

[21] Thomas Jefferson, Resolutions Relative to the Alien and Sedition Acts, 10 Nov. 1798 Writings 17:379--80, 385—91.

due process cases are limited by "judicial self-restraint" is a deceptive legal fiction.[22]

President Jackson echoed this theme about honesty. He observed that:

> When an honest observance of constitutional compacts cannot be obtained from communities like ours, it need not be anticipated elsewhere, and . . . this will be the case if expediency be made a rule of construction in interpreting the Constitution. Power in no government could desire a better shield for the insidious advances which it is ever ready to make upon the checks that are designed to restrain its action.[23]

What approach shall the People of Mississippi expect to find in the Court's decision to be rendered? An "honest observance" of the Constitution's actual

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[22] Collins v. Harker Heights, 503 U.S. 115, 125 (1992). The Court also acknowledged that its substantive due process jurisprudence required wading into unknown waters but assured itself that it was free from human passion, party and mischief because it pledge self-restraint. "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended. . . . The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." Id. Alas, Courts have no authority to "break new ground."

[23] President Andrew Jackson, Veto Message Regarding Funding of Infrastructure Development, May 27, 1830.

text? Perhaps the spirit of Eden further adjusting the meaning of constitutional words? The reliable "corruption of time and party"? More "mischief" about "trimesters" and "viability"? "Insidious advances" under the banner of "judicial restraint"? "Despot[ism]" posing as the power of judicial review?

CONCLUSION

The Court should abandon its substantive due process jurisprudence, affirm the Constitutionality of Mississippi's 2018 Gestational Age Act, hold Roe v. Wade is non-precedential, reverse and set aside the injunction.

Put the days of Eden behind. There is no place for incremental rulings to restore first principles which now lie in ruin. The signers of the Declaration of Independence appealed for the rectitude of their intentions to the Supreme Judge of the world whose rulings are binding and un-appealable. But all that is required here is for the Court to submit to the Constitution's text.

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