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High Court Humpty Dumptys

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HIGH COURT HUMPTY DUMPTYS

By Lester Jackson

At least as far back as Woodrow Wilson, progressives and liberals have seen our anti-tyranny Constitution as an obstacle to imposing their self-presumed superior morality and wisdom on everyone else. So it was unremarkable when, in February, *The New York Times* disgorged an article trashing the Constitution as an unworthy model for the rest of the world. Remarkable is what was omitted from the responses, which focused on Justice Ginsburg's urging drafters of new foreign constitutions not to consult the one she took an oath to defend. She and others complained that it did not provide sufficient "rights."

Unanswered by various critics was law professor Sanford Levinson's claim that "the U.S. Constitution is the most difficult to amend of any ... in the world[.]"

Actually, because justices must be lawyers, the Constitution is easy to amend.

Lawyers in Action: What Justices Do All Too Often

In *Holocaust* (394), facing defeat, SS Nazi Erik Dorf avers: "We will be able to make a logical case for Auschwitz. As a lawyer, I know that any action can be defended." And Attorney Mark Pulliam, discussing Justice Brennan, observed: "Nothing, even words whose meaning should be clear, is free from doubt in a courtroom, and no argument is too preposterous for a lawyer to make with a straight face" (WSJ, Jan. 4, 1999).

Entrusted to lawyers, no word is safe from ravaging -- and no lawyer ever made this more easily understood than President Clinton, who famously contended: "it all depends on what the meaning of 'is' is." Also, by redefining "sexual relations," he claimed that he did not have sex with Monica Lewinsky when she had sex with him.

Far less reported or easily grasped is what skillful justices do: manipulate words to mean whatever they want them to mean, often depriving the clearest language of any and all reliable meaning. Indeed, people could not converse if justices were present to dispute the meaning of every word mere mortals readily understand.

In the spirit of Bill Clinton and Humpty Dumpty (a word "means just what I choose it to mean"), seeing why the Constitution is not hard to amend requires a "definition" of "amend."

The Incognito Super-Amendment

Accepting the Levinson/*Times* view requires belief that the Constitution is amended only by formally adding written language as explicitly provided by Article V, usually a proposal by 2/3 of each house of congress and ratification by 3/4 of the states. This is what schoolchildren are taught. On paper, Article V still exists.

However, with scant public awareness or debate, the Supreme Court has imposed probably the most far-reaching amendment ever adopted: that of the very amendment process itself.

Although likely not his intent, that was the end result of Chief Justice Marshall's famous statement of what he considered obvious: "It is emphatically the province and duty of the judicial

department to ***say what the law is***. Those who apply the rule to particular cases, must of necessity expound and ***interpret*** that rule." This seems like common sense. But there is actually a vast difference between saying and interpreting what the law is. In practice, lawyer-justices have ***"interpreted" the very word "interpret" to be a license*** for them not only "to say what the law is," but to say it isn't what it is and is what it isn't.

First, they ignore laws they don't like by "find[ing] ambiguity in ... utterly clear language." Justice Rehnquist once complained that Congress "would be hard pressed to draft language better tailored" to achieve what an Orwellian majority of justices said was not clear enough. Notwithstanding repeated provisions clearly authorizing the death penalty, Justice Brennan asserted: "As I interpret the Constitution, capital punishment is under all circumstances ... prohibited[.]" Justice Sutherland would say this "is not to interpret that instrument, but to disregard it." Nevertheless, faux legitimacy is conferred on blatant disregard by mislabeling it "interpretation."

Second, justices claim clarity in ambiguous or vague language. Even liberals, such as Archibald Cox, Laurence Tribe, and Jeffrey Rosen, have conceded that the written Constitution really contains nothing supporting the abortion "right" invented in detail by *Roe v. Wade*.

Third, although *Roe* at least feigned a constitutional basis, right now on the court are four extremist justices -- one short of a majority -- so arrogantly contemptuous of constitutional representative democracy that they have "interpreted" interpretation as a power to "apply" not only duly enacted laws, but also phantom laws they themselves admit do not even exist -- in order to save barbaric murderers!

Of course, many lawyers do not try to evade accepted meanings. So every now and then, an honest justice exposes the interpretation emperor's nakedness. Before his 1971 death, Hugo Black stated with rare judicial humility: "Although some people have urged that this Court should ***amend*** the Constitution ***by interpretation*** to keep it abreast of modern ideas, I have never believed that lifetime judges ... have any such legislative power" (emphasis added). Decades earlier, Justice Sutherland protested "amendment under the guise of interpretation[.] ... [T]o say ... the words of the Constitution mean today what they did not mean when written ... is to rob [it of its] essential element[.]"

Without humility or contrition, Justice Stevens said just that: constitutional provisions "have been interpreted more broadly than ... ever intended or expected" by those who adopted them. In plain English, instead of "saying what the law is," justices drastically changed its meaning and got away with this "jurisprudential jujitsu" by calling it "interpretation."

If the purpose of an amendment is to delete or change what is in the Constitution or add what is not, why bother with a formal process when there is a far easier alternative? Flying under the false flag of "interpretation," grotesquely redefining the clearest words in which law can be written, lawyer-justices long ago seized for themselves the awesome power of amendment -- thereby effectively amending the very amendment process itself and mutating Article V into a constitutional eunuch.

Article V has been so eunuchized that some resist its use. For example, future Barack Obama advocate Colin Powell, when courted by Republicans, opposed an Article V balanced budget amendment because "I hate fooling with the Constitution" (NYT, Feb. 1, 1995). He evidently considered it illegitimate to utilize the Constitution's very provision for legitimate change, apparently unaware of routine "fooling" by as few as five rogue justices. Abusing the need to apply the law by deliberately perverting its meaning, they repeatedly exercise the functional equivalent of the power to amend.

So if an "amendment" is only change by writing new language as provided by Article V, the Constitution is indeed difficult to amend, with only 27 formal amendments in 225 years (17 after the Bill of Rights). But if an amendment is any change ***equivalent*** to what could be effected by

Article V procedure, amending the document is very easy; in this sense, it has been amended innumerable times.

The Congressional Research Service provides 2,600 pages (plus 200) of detailed constitutional clause-by-clause analysis, including myriad *de facto* amendments masquerading as "interpretations."

Rights "Frozen in Amber"?

Although, in 1997, Justice Brennan was eulogized as having led an "expan[sion of] individual rights and press freedoms to an extent found nowhere else in the world," Adam Liptak's *New York Times* anti-Constitution diatribe, parroting Justice Ginsburg, asserted: "The rights guaranteed by the American Constitution are parsimonious by international standards, and they are frozen in amber." Really?!

If this were even remotely true, there obviously would not be a federal abortion right, as noted. Here, we can barely scratch the surface of the tip of the massive iceberg of "rights" created by court amendments.

Redefining "use" as "purpose," five self-styled "compassion/fairness" justices created a reverse-Robin Hood right of rich and powerful private corporations to induce corrupt politicians to confiscate (12-13) private property from the poor (17) to give to the rich and powerful for their own private use.

Many may think that all race and sex discrimination is barred. Not so! Long ago, the court announced a constitutional right to engage in good discrimination (against whites and males), prohibiting only bad discrimination (against designated minorities and females). Of course, linguistically gifted justices would never put it so crassly; instead, they elegantly distinguish "benign" from "malign" discrimination. Ginsburg and Stevens used these terms. Using Harvard lawyer skills, Justice Blackmun camouflaged the double-talk with a clever turn of phrase: to "get beyond racism, we must first take account of race. ... [I]n order to treat some persons equally, we must treat them differently."

Justice Stevens himself objected to the court-created right to engage in "deliberate, malicious character assassination."

Framers of the Bill of Rights could not have dreamed it would be turned into "a detailed Code of Criminal Procedure," objected to by Judge Friendly (954) in 1965 and vastly expanded ever since. The complexity, delays, and costs thus created helped increase the need for plea bargaining. Yet, just recently, the court created a right for a fairly convicted defendant to a lesser sentence he rejected in hope of acquittal.

The most depraved convicted murderers enjoy the invented right to commit new violent crimes free from fear of punishment. Students have a right to hide illicit drugs in their underwear but not in backpacks. Three-hundred-pound men have a right to rape 8-year-old girls without fear of capital punishment.

Change without Change

Of special interest are rights created after being rejected (209) -- ***with not a word changed in the Constitution***. Nothing could better show judicial amendment by changing previously accepted meaning.

As *Law and Order* viewers know, defendants have a right to seek exclusion of reliable evidence probative of their guilt. Justices imposed this "exclusionary rule" upon the states in 1961 after refusing to do so in 1949. Sold as protecting everyone's privacy against police misconduct, this was actually a right exclusively for criminals. As Justice Frankfurter observed: "exclusion of evidence ... serves only to protect those upon whose person or premises something incriminating

has been found." The innocent may sue for privacy violations but cannot reap the special court-created benefit of being freed despite clear proof of guilt of even the worst crimes.

Other changes without a single Article V amendment include the following. In 1971, unfettered jury discretion in deciding both guilt and whether to impose a death sentence was held constitutional. But in 1972, the death penalty was held unconstitutional because juries had ***too much*** discretion; in 1976, death penalty statutes were held unconstitutional for providing ***too little*** discretion. States were required to determine how many discretion angels could dance on the head of a Supreme Court pin. In short order, mandatory death sentences for especially "grievous" crimes were possibly constitutional and then not. In 1989, it was constitutional to execute murderers under the age of exactly 18 or allegedly mentally retarded; in 2002 and 2005, it wasn't.

Justice Scalia denounced "bait and switch" death penalty decisions that Justice Rehnquist said had gone from "pillar to post."

In a rare move in the other direction, murder-victim impact statements were unconstitutional in 1987, but they became constitutional in 1991. Avid murderer-sympathizer Justice Marshall, in an "angry dissent" hours before retiring, denounced this reversal of his unprecedented new precedent: "Power, not reason, is the new currency of this Court's decisionmaking[.] ... Neither the law nor the facts ... underwent any change in the last four years. Only the personnel of this Court did."

This highlights key aspects of the interpretation shell game. First, exercising "power, not reason," constitutional provisions are severely altered or invented based on no precedent whatsoever. (Marshall himself wielded "raw judicial power" to proclaim the abortion right.) Second, the Humpty Dumptys who concocted these unprecedented amendments demand that they be immediately treated as sacred precedents -- accorded more respect and weight (19) than the actual original written Constitution.

Most importantly, Marshall makes clear how critical is selecting "the personnel of this Court."

Amendment by Proxy Fighting

The founding fathers openly waged a political struggle to substitute their Constitution for the Articles of Confederation. Now, however, judicial nominations are proxy fights over how the Constitution will or will not be amended -- whether and how the Constitution is going to be ignored and mangled to impose justices' values.

This is why liberal political activists have turned judicial confirmations into a blood sport. By contrast, slow-learning genteel conservatives have recoiled from campaigning to publicize the truth about nominees likely to debase the Constitution. Witness the overwhelming confirmations of radical Justices Ginsburg (96-3) and Breyer (87-9) in the wake of the vicious libelous character assassinations of Judges Bork and Thomas.

Two decades ago, Justice Scalia sorrowfully wrote: "Value judgments ... should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward. ... [C]onfirmation hearings for new Justices ***should*** deteriorate into question-and-answer sessions ... seek[ing] the nominee's commitment[s.]"

Conclusion

In early 2011, after acquiring a majority largely by promising to end ObamaCare, feckless House Republicans refused to use their absolute power to defund it. Now, the Supreme Court is the last hope of the law's opponents. In June, the court will decide whether to retain anything at all from the Constitution's lynchpin of freedom -- or to obliterate the last vestige of limited federal government.

The anomalous upshot is that the president is attacking the Court in anticipation of an adverse ruling, while conservatives defend it. No one should be deceived by this probably temporary role-reversal. Even if the Court rules ObamaCare unconstitutional, it already has disfigured the Constitution beyond recognition by its framers. Otherwise, there would have been no law and no case.

Turning "interpretation" into a scam, justices repeatedly have authorized what is constitutionally prohibited and prohibited what is authorized or required. Justice Scalia famously agonized: "While the present Court sits, a major, undemocratic restructuring of our national institutions and mores is constantly in progress. ... Day by day, case by case, it is busy designing a Constitution for a country I do not recognize."

The next election will determine whether, for another generation, clear constitutional language will continue to be manipulated beyond recognition in defiance of the people -- whether there will be three to five new justices who will finish the job of granting President Obama and his successors unlimited power to rule over the most minute details of the lives of the American people.

In no small measure, American freedom from Supreme Court-enabled authoritarian federal tyranny is what the next election is about.

Lester Jackson, Ph.D., a former college political science teacher, views mainstream media suppression of the truth as essential to harmful judicial activism. His recent articles are collected here.