HANG TOGETHER

"We must indeed all hang together, or most assuredly we shall all hang separately." – Benjamin Franklin

THE NEW DECLARATION OF INDEPENDENCE

Posted on June 28, 2015 by Daniel Kelly

Imperator Supremum Iudictorium

I wonder what it looked like, the day the Republic ended and Octavius began his reign. Did commerce still move, did crops still grow? Did Romans conduct their affairs the day after Octavius became Augustus in 27 B.C. largely the way they had the previous day? Did they dismiss the arrogation of power to "the August One" as a mundane political intrigue with no immediate significance for the chores to be accomplished before nightfall? Did anything tell them they would go to bed a Republic's citizens but rise an Empire's subjects?

I suspect the answers are Yes, Yes, Yes, and No. Mostly it's difficult to see sea-changes when you are in the midst of them. Those who are busy with the routine of living don't pay close attention to the portents, and those who closely follow the portents are often so far down in the weeds that it's hard to stitch the details into a coherent picture.

But there are times we must set aside routine, we must clamber up from the weeds, and give events our concerted attention. Of these times, I think, are the last few days.

If we are to take them at their word, our Supreme Court justices have announced a new relationship between them and us. It is, in a sense, a new Declaration of Independence. But in contrast to the original, this one declares the State's independence from the people from whom it derives its authority. The justices all seem to agree this has happened, although they are divided on whether it is a positive development. In light of this apparent agreement, we would do well to take some time to digest its meaning in a careful and deliberate way.

There is a terrible secret that lies at the heart of our Constitution, and it is this: It is extraordinarily fragile. When we formed the government of the United States, we furnished it with enough power that, should it wish, it could master us in a moment. So, to maintain our mastery over *it*, we lent it only limited authority to use that power, and what authority we delegated, we divided between three branches that we set at odds with each other. Diffused and finite, we trusted the authority could not be usurped or enlarged.

The weakness lies in the unavoidable fact that the chains we forged to restrain the State are made of nothing but words. We wrote our words into a Constitution, and entrusted it to people who, we believed, would be faithful. We regularly send our representatives to Washington to adopt new words of law with the expectation they will conform to the Constitution and be obeyed by all. We appoint judges, who we commission to do one thing, and one thing only – apply the words of law to the cases before them, subject always to the

words of the Constitution. And finally, we elect a president to carry those words into practice.

But words have no force of their own. Their strength comes entirely from the good faith of those to whom we entrust them. It would be, therefore, a matter of the gravest importance should our public servants decide they are not bound by the words of law we give.

It is true that those servants have been chafing at our words' restrictiveness for decades. But they have at least maintained the pretense that they are subject to them. It appears they may no longer feel the need to do so.

On Thursday, the Supreme Court released its opinion in the case *King v. Burwell*, 576 U.S. ___. The Court's task was to determine whether the law allowed tax credits for those who purchase health insurance from an exchange established by the federal government. The law said the credits were available only for those who purchased a policy from "an Exchange established by the *State*." (Emphasis supplied).

The Court acknowledged that the language, as written, did not include federally-created exchanges. It also admitted that giving the language its natural meaning would make tax credits unavailable to those who purchased their insurance on a federal exchange.

Nonetheless, out of a desire to see Obamacare succeed, the Court chose to loose itself from the statute's words. "Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts," the Court said, which "compel[s] us to depart from what would otherwise be the most natural

reading of the pertinent statutory phrase." Of course, we never gave the Court authority to say what the words of law *ought* to be, only what they *are*.

That distinction means all the world. If the Justices do not understand themselves as bound by the words we give them, that they may instead remake them as they believe they ought to be, then we have no tools by which to make our laws known. No way to inform our public servants of their duties and obligations. No way to constrain the State.

If words can no longer command the Court, then the Court acts independently of us – we, the People, who are the givers of the law. A declaration that the Court will not be constrained by the words of the law is a declaration that it has itself become the law. And if the Court is the law, then we are not a self-governing people.

Which is precisely what Justice Scalia said *has now occurred*. In his dissent from Friday's opinion in *Obergefell v. Hodges* (which mandated the nationwide recognition of same-sex marriages), Justice Scalia observed that, at long last, we have reverted to the status of subjects:

> *Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of*

Independence and won in the Revolution of 1776: the freedom to govern themselves.

We, today, no longer have a democracy, much less a republic. Justice Scalia said the Court's opinion was "a naked claim to legislative – indeed, *super*-legislative – power; a claim fundamentally at odds with our system of government. . . . . A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy."

Justice Thomas sees it too. He recognized that the Court declared its independence from, and mastery over, we who created it: "This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic."

This is the fragility of our system, the powerlessness of our words. All it took for our constitutional order to dissolve was the discovery by a handful of lawyers that they don't really need to submit to the words of law. And so the Court is now our Ruler, and we its subjects.

How big of a problem is this? Well, Justice Scalia puts Friday's decision on the same plane of unlawfulness as the act that catalyzed our Revolution. He says this "judicial Putsch" violates "a principle even more fundamental than no taxation without representation: no social transformation without representation."

Justices Scalia and Thomas left us no room to doubt what has happened. They are both pointing to the gauntlet the Court threw at our feet, the challenge to our claim to be free people. If we allow this usurpation to pass unremedied, if

we do not pick up the gauntlet, then our ancestors and offspring will condemn us as the generation that surrendered the last, best hope of mankind.

So. Is it time to go back to the beach, or should we do something about this?

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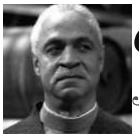

Greg Forster

June 29, 2015 at 2:45 pm

Caught a typo in your post – what the court issued is a Declaration of Dependence, not of Independence. I fear there's no winning this battle by direct action on the legal and electoral front; what's needed is a restoration of public rationality itself. We get the laws and rulers we deserve, and that's what's happening here.

Reply

Daniel Kelly

June 29, 2015 at 4:16 pm

I agree, by the way, that a restoration of public rationality is necessary. But it is not sufficient. Once that is done, we must then address ourselves to the legal question of who is subject to whom. Nothing of any significance will be done until then. Unless, of course, we quickly become comfortable as the Court's subjects. In which case a restoration of public rationality isn't really necessary.

Reply

Greg Forster

June 29, 2015 at 5:05 pm

Indeed, the legal system will need a reformation. Those who separate "culture" from "politics" can unhelpfully obscure that necessity.

Daniel Kelly

June 29, 2015 at 4:10 pm

No, pretty sure it was a Declaration of Independence. A declaration of dependence (if I take your meaning properly) would be a simple statement that, as a factual matter, we are incapable of providing for ourselves. That would be embarrassing, but tolerable.

What the Court actually did was much worse. This was an assertion of the right to rule, a rejection of their erstwhile state of subservience to the People, a statement that we may not constrain what the State does. It is the arrogance of an assumed moral superiority that gives them a right to rule, a right that has nothing to do with the consent of the governed, and that recognizes no need of any such consent.

No, this was no reflection on the quaint notion that we can fend for ourselves. It was as Justice Thomas said: an inversion of the relationship between them and us. They've got the bit in their teeth, and there'll be no stopping them unless we yank it away.

Reply

Greg Forster

June 29, 2015 at 5:03 pm

Point taken! Yet I suspect he who says one really says the other as well.

Reply

Ken

June 30, 2015 at 8:01 am

It seems that Daniel is saying this is a "Declaration of Independence" made by the Supreme Court, declaring that they are now independent from the words of the Constitution and the Legislated laws. Greg was saying that this has turned our "Declaration of Independence" into a "Declaration of

Dependence", putting the people into a position of dependence on the will of the court. So, from each of your own perspectives, you were both right.

Reply

Mark A. LeDoux

June 30, 2015 at 12:20 am

This is a very sobering assessment of the latest in a long line of misguided acts of judicial activism and bald-faced hubris. Unfortunately, it would appear that current American popular culture has embraced these latest actions by the Supreme Court as logical expressions of 'love' and 'compassion' within a woefully ignorant society. This modern age of hedonism has claimed its first victim, the independence of the people of the United States – accompanied by the complete dismissal of the sovereignty of self-determination by citizens of the several states.

The new reality is that the 'consent of the governed' has been supplanted by fuzzy emotions and unclear thinking.

Reply

Daniel Kelly

June 30, 2015 at 9:24 am

Well said Mark, and you've put your finger on one of the Court's (and the culture's) erroneous premises. The State's involvement in marriage has nothing to do with love or compassion. Or dignity. Or happiness, fulfillment, expression, or any other aspect of self-realization. These things

the State cannot provide. All the State can do is protect rights – actual rights, not the State-provided privileges we so often mistake for rights. And in same-sex marriages, there are no rights in need of the State's protection, hence nothing for the State to do. The same-sex marriage movement, in truth, has never been about rights at all. It has been about using the power of the State to compel others to legitimize the same-sex couples' personal arrangements. But that forced legitimization is itself an illegitimate exercise of State power.

Reply

Mark LeDoux

June 30, 2015 at 10:06 am

In an era of public education when all participants at youth sporting events receive medals for 'participation' and 'good sportsmanship', is it any wonder that 'accommodation' is the operative term here? It seems that the Court saw fit to accommodate a group that has been persistent in seeking recognition of what can only be ascribed as normalcy – to your point. It is sad that in my lifetime I have seen the Court pander to so many various interest groups in the sake of securing 'pace populi' and only planting seeds of political expediency devoid of moral value that germinate in later generations with disastrous results. I truly feel the Republic is in peril. When right versus wrong becomes an argument bereft of logic, we get these kind of vapid rulings, bereft of judicial fortitude.

Daniel Kelly

June 30, 2015 at 11:02 am

Just so.

Reply

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