Book Reviews

The Dirty Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom

By Robert A. Levy & William Mellor

*Reviewed by Edwin Meese III**

The authors of *The Dirty Dozen* are leaders of the freedom-based public-interest law movement, Robert Levy as Senior Fellow in Constitutional Studies at the Cato Institute and William Mellor as President and General Counsel of the Institute for Justice. This movement has developed over the past forty years to protect ordinary Americans—law-abiding citizens, property holders, taxpayers, small-business owners, and the like—from the oppression of government overregulation and the attacks of special-interest lawyers funded by the federal government at taxpayers' expense. This gives the two legal scholars a special credibility in the their evaluation of Supreme Court jurisprudence

The American people generally regard the Supreme Court and the justices who sit upon it with high esteem, compared to that with which they hold the political branches—Congress and the Presidency. Surveys, however, show that most citizens know distressingly little about the Court and its activities, save that it emerges from its marble crypt from time to time to intercede in high-profile issues like guns and abortion, often with fractious decisions that carry the weight of the Constitution and so are the law of the land. It is perhaps little surprise, then, that the more the Court and its justices are in the news, the less the public thinks of them. For example, the Court's decision in *Boumediene v. Bush*, dealing with the detention of enemy combatants, immediately preceded a drop in its favorability ratings. In short, when the Court strays beyond the bounds of the Constitution, its rulings are all but indistinguishable from the work of the political branches, and the American people, according to opinion polls, often take a dim view of politicians.

But if they only knew! The public's ignorance of the High Court—(that forty-three percent of American adults cannot name a single justice is a symptom of the failure of civics education)—indisputably shields it from much warranted criticism and disapproval. Most news media reporting on the Court strips the rule of law from the outcome of any case and focuses on the perceived political consequences of the decision. The relationship of judicial opinion to constitutional mandate is virtually ignored.

Fleeting despair gives way to optimism, however, upon reading Robert Levy and William Mellor's *The Dirty Dozen*. Through the recounting of twelve particularly regrettable cases, the book offers an engaging and accessible primer on constitutional law, both how it is and how it ought to be, and takes the Court to task for abdicating its duty to safeguard Americans' rights.

The book opens with *Helvering v. Davis*, in which the Court leaned on the General Welfare Clause of the Constitution to uphold President Franklin Roosevelt's Social Security scheme, a clear violation of the limitation inherent in the carefully enumerated powers of Article I, Section 8. This was not merely bad law, Levy and Mellor explain, but also bad policy. Americans are now saddled with a one-size-fits-nobody retirement scheme that, for so many workers' reliance on it, is all but impossible to shake off or modify in any significant way. It is both too big to fail and too unbalanced to survive in its current form, given lengthening lifespans. Perhaps the Framers had a point when they sought to limit the federal government's reach to those areas where it was likely to be competent, leaving the rest to the states and to the people.

If any doubt remained after *Helvering* that Congress's powers were no longer "few and defined," as the father of the Constitution put it, *Wickard v. Fillburn* dispelled it. According to the *Wickard* court, grain grown at home for personal consumption amounted to interstate commerce, and was therefore susceptible to Congress's regulation, for the effect that it could have on grain prices in the aggregate. For the fifty years following *Wickard*, not one federal law was struck down for exceeding Congress's Commerce Clause power. Only in 1995, in *U.S. v. Lopez* (a federal prosecution for possession of a gun in a local school), followed by *U.S. v. Morrison* (a federal cause of action for individual gender-motivated violence) in 2000, was there a glimmer of a "federalism revolution." But as the authors point out, in 2005's *Gonzales v. Raich*, the Court reverted to its *Wickard* theory, allowing Congress virtually unlimited power to legislate in any matter, no matter how little its national significance.

The Dirty Dozen goes on to give further examples of the Court ignoring constitutional limitation and allowing the vast expansion of governmental power, such as a state's impairing private contracts and the demise of the nondelegation doctrine, which created a whole new body of unelected lawmakers.

The book's focus then shifts from the expansion of government to the erosion of individual freedom, leading with the still-fresh *McConnell v. the Federal Election Commission*, which upheld the contribution limits and other regulations on political speech of the McCain-Feingold campaign finance legislation. This demonstrates the odd judicial logic that political speech should be far less protected than obscenity under current constitutional doctrine.

In an interesting twist of history, one of the book's dozen has already been rendered irrelevant due to the leadership of one of the authors. *U.S. v. Miller*, a 1939 case limiting the rights of gun owners, was pushed aside this year by *District of Columbia v. Heller*, which strongly affirmed the Second Amendment right of individuals to keep and bear arms. Robert Levy was the driving force in this victory, developing the strategy, overseeing the litigation, and directing the massive public information effort that accompanied it.

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Like *Miller*, the next case, *Korematsu*, is also a dead letter today. In *Korematsu v. U.S.*, the Court sanctioned a flagrant violation of civil liberties, declining to strike down the internment of 120,000 Japanese Americans, on the basis of plain legal and factual fictions concerning the orders by the government, the loyalty of those interred, and the "urgent need" of the government. The case stands today as a warning to any Court too inclined to ignore civil liberties in a time of war. I must disagree, however, with Levy and Mellor's invocation of *Korematsu* to protest the Bush Administration's prosecution of the war on terrorism and specifically the treatment of Jose Padilla, who, unlike those interred during World War II, was detained with individualized evidence of ties to hostile foreign powers. Despite the difficulties and complexities of the war against terrorism, the Bush Administration has largely succeeded in the constitutional balancing of civil liberties and security.

At this point, the book turns to the topic of the taking of private property by government, an area where William Mellor is the visionary. In a trio of cases, the authors lament government's Court-granted power to seize the property of the innocent, take homes to give the land away to developers, and destroy property value through regulation without providing any compensation. Particularly significant is *Kelo v. City of New London*, which has rejuvenated a political movement, largely due to the prowess of Mellor's Institute for Justice, which served as counsel and public relations for the plaintiff. The taking of a private home and giving the property to a private developer, supposedly to increase tax revenues, outraged the public and resulted in new legislation in many states to limit property takings to actual *public uses*, as the Fifth Amendment requires.

U.S. v. Carolene Products is another case concerning individual's economic rights. It illustrates how special interests are able to capture the legislative process and direct it from the general welfare to their own benefit, a particular concern of James Madison in crafting the Constitution. In *Carolene*, the Court gave its sanction to this mischief, with the result that today "special interest legislation and protectionist laws stifle or prohibit outright the pursuit of productive livelihoods in a vast array of occupations ranging from African hair braiders to casket retailers to taxicab drivers."

The last of the dirty dozen unfortunately sanctions government discrimination on the basis of race in the name of somehow furthering equal protection, another instance of the Court turning a clear constitutional mandate on its head. *Grutter v. Bollinger* concerned the use of racial preferences by a public university to advance "diversity." Levy and Mellor rightly label this reasoning "pure sophistry" to allow a *de facto* quota, thus authorizing a public institution to engage in racial discrimination.

So that's the twelve, and a well-chosen group it is, but is it *the* dirty dozen? Levy and Mellor are honest from the start that their approach to selecting cases is bounded, focusing on those that violated the principles of limited government and have an ongoing and negative social impact. The reader may well think of other cases that might have been included. This is a target-rich environment.

Certain cases are conspicuous by their absence. *Roe v. Wade*, for example, is tucked into an appendix. Though the decision is "wrongheaded," the authors do not count *Roe* among the worst cases because the Court's result "may well be the middle ground that many states would adopt." This is an unsettling conclusion that diminishes the importance of the rule of law and fidelity to the constitutional text across the board.

My minor criticisms do not detract from an excellent book that deserves, and I hope will receive, wide public attention and readership. And I hope as well that it will prompt others to consider their own "dirty dozen" lists and, in that way, be the first in a series that holds the promise to give our sometimes esoteric constitutional debates greater practical and public relevance.

The Rise of the Conservative Legal Movement: The Battle for Control of the Law

By Steven M. Teles

*Reviewed by Daniel H. Lowenstein**

In the penultimate chapter of this excellent book, Steven M. Teles contrasts the prevailing moods at two public interest law firms which he regards as among the top achievements of the conservative legal movement (or CLM, as I shall abbreviate it). At the Center for Individual Rights (CIR), the founders "d[o] not believe that history [i]s on their side," liberalism having "already corrupted the fundamental forms of law, politics, and society." This "dark, sardonic" mood contrasts markedly with the "sunny optimism" at the Institute for Justice (IJ).

Throughout the book, Teles seeks to cast the CLM as a success story, but some conservative readers may conclude that there is more of CIR's darkness than of IJ's sunshine in the big picture. True, Teles describes impressive, even remarkable achievements, but "The Battle for Control of the Law" is still a pretty one-sided affair.

Teles' determination to tell a success story may account for the sense that there are two books between these covers. The first, consisting primarily of the first two chapters, contains astute observations on changes in American policymaking processes, illustrated in Teles' illuminating description of the ascendancy of what the author calls the liberal legal network. The second provides an account of the failure of early conservative legal ventures in the 1970s, followed by with detailed descriptions of what Teles regards as the movement's greatest successes: the Law and Economics movement, the Federalist Society, and the aforementioned public interest law firms, CIR and IJ.

Teles intends to unify the book by showing, in the chapters describing these different aspects of the CLM, how conservatives responded to the strategic and tactical demands of the American political system, adapting the strategy and tactics of the liberal legal network to the conservatives' own situation. But he succeeds only partially, as long stretches go by with few or no

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