Book Reviews

THE DIRTY DOZEN[1]

REVIEWED BY MAJOR JONATHAN HIRSCH[2]

We are not final because we are infallible, but we are infallible only because we are final.[3]

I. Introduction

In *The Dirty Dozen*, legal academician Robert A. Levy,[4] has teamed up with seasoned litigator William Mellor,[5] to show the danger of the Supreme Court's commonly fallible and practically final authority. Based on their experience and a completely unscientific opinion survey, the authors examined Supreme Court opinions since 1933, labeling twelve of them the "dirty dozen."[6] Levy and Mellor contend that these twelve decisions have led to the greatest amount of harm to American society.[7] The authors make compelling arguments concerning the far reaching impact of each of the decisions from three perspectives: the immediate impact of the case, the impact of the case on coordinate elements of the federal and state governments, and the impact of the case in question on subsequent cases.[8] They advocate a change to the Supreme Court's method of interpreting the Constitution, giving greater respect to the words in the document.[9]

This review analyzes some of the book's legal and historical analysis. It will show that while the authors succeed in sounding an alarm, they undercut the arguments for their proposed solution in three ways. First, they examine constitutional texts in relative isolation, rather than considering the interpretation of textual portions in light of other articles and amendments. Second, they do not discuss alternate causes for the societal problems they claim the Supreme Court has caused through the case in question. Third, they limit the historical scope of the study too much. This review also presents an alternative thesis. Through considering this alternative thesis, the reader of the *Dirty Dozen* may develop an independent understanding of the role of the Constitution, the law, and the courts in our society.

II. Summary and Background

The authors set out to show that since 1933 the Supreme Court has harmed our society by abandoning the Founding Fathers' concept of social order.[10] Levy and Mellor argue that judicial amendments to the Constitution have resulted in an expanded federal government and contracted individual liberties.[11] The authors show how the twelve chosen decisions have each judicially excised words, phrases, clauses, and entire amendments from the Constitution.[12] By following an expansive view of judicial supremacy, the authors show how the Supreme Court has done this.[13] As they examine each case, the

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[1] ROBERT A. LEVY & WILLIAM MELLOR, THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY EXPANDED GOVERNMENT AND ERODED FREEDOM (2008).

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[3] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[4] LEVY & MELLOR, *supra* note 1, at 301. Mr. Levy is a senior fellow in constitutional studies with the Cato Institute, a policy institute. *Id*.

[5] *Id*. at 302. Mr. Mellor is President, General Counsel, and co-founder of the Institute for Justice and a participant in the litigation at the Supreme Court of *Kelo v. City of New London*. 545 U.S. 469 (2005).

[6] LEVY & MELLOR, *supra* note 1, at 5. Before 2005, the authors asked "seventy-four like-minded legal scholars" to name the worst post-1933 cases. *Id*.

[7] *Id*. The authors, while guided by the poll, did not exclude their personal selections, including post-poll cases. *Id*.

[8] *Id*. at 10. The authors also excluded decisions explicitly overruled. *Id*.

[9] *Id*. at 222.

[10] *Id*. at 5.

[11] *Id*. at 4.

[12] *Id*. at 5.

[13] *Id*. at 51.

authors look at the constitutional issue involved, the facts of the case, the Court's reasoning and its flaws, and the continuing impact of the decision involved.[14]

The authors devote one chapter of the book to each of the twelve cases. They have divided the cases into two types—those that expand the power of government at all levels, and those that diminish the liberty of individuals.[15] Before diving into a discussion of the cases themselves, the authors present their theory of constitutional interpretation.[16] After full discussion of the selected cases, the authors then go on to comment on the appropriate place of judicial activism under the Constitution.[17] A full copy of the Constitution is provided in an appendix, so readers can see the full text of the provisions being discussed.[18]

A. Expanding Government

In the first section of the book, Levy and Mellor show how four Supreme Court decisions and their progeny removed the constitutional shackles from the federal government. The first case, *Comm'r v. Davis*, expanded the power of Congress under Article 1, Section 8, to spend funds for the general welfare, specifically the Social Security Administration and its programs, absent a specific grant of authority anywhere else in the Section.[19] The second decision, *Wickard v. Fillburn*, redefined interstate commerce, allowing Congress to prohibit a vastly expanded set of activities, all of which had been previously outside of Congress' reach.[20] In the third case, *Home Building & Loan Ass'n v. Blaisdell*, the Supreme Court authorized Congress and state legislatures to invalidate contracts based on intent to address a social problem.[21] Finally, in *Whitman v. American Trucking Ass'ns, Inc.*, the Supreme Court failed to halt the power of federal agencies to promulgate regulatory laws under a congressional delegation of authority.[22]

B. Diminishing Freedom

The second set of cases examined by Levy and Mellor took away constitutional protections from individuals. The case of *McConnell v. Federal Election Commission* reclassified campaign contributions as quasi-speech, not entitled to protection under the First Amendment.[23] In *United States v. Miller*, the Court threw the individual right to bear arms on the scrap heap by failing to sufficiently support it.[24] Next, *Korematsu v. United States* demonstrated how the Executive branch, supported by Congress, can infringe on civil liberties during a perceived national emergency.[25] In *Bennis v. Michigan*, the authors showed how the Court has constricted protection against deprivation of property without due process of law through affirming asset forfeiture laws not containing an "innocent" owner defense.[26] With the fifth case, *Kelo v. City of New*

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[14] *Id*. at 9.

[15] *Id*. at 7.

[16] *Id*. at 10. As a starting point, the authors see the Constitution as a document devoted to limiting federal government, enhancing individual rights, and providing a properly balanced set of powers within government at all levels. *Id*.

[17] *Id*. The authors advocate a return to the original understanding and intent of the Constitution. *Id*.

[18] *Id*. at 235.

[19] 301 U.S. 619 (1937); LEVY & MELLOR, *supra* note 1, at 21. The discussion revolves around the views of the General Welfare Clause from Alexander Hamilton and James Madison. *Id*. at 21–22.

[20] 317 U.S. 111 (1942); LEVY & MELLOR, *supra* note 1, at 39. While the authors admit some retrenchment during 1995 to 2005, they see the ultimate harm of the case coming to rest with *Gonzales v. Raich*, 545 U.S. 1 (2005), affirming the prohibition of medical marijuana. LEVY & MELLOR, *supra* note 1, at 47.

[21] 290 U.S. 398 (1934); LEVY & MELLOR, *supra* note 1, at 54. They further show the damage done to the Contracts Clause, Article I, Section 10, in the *Gold Clause Cases*, starting with *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935). LEVY & MELLOR, *supra* note 1, at 51.

[22] 531 U.S. 457 (2001); LEVY & MELLOR, *supra* note 1, at 70. The discussion of the nondelegation doctrine starts in 1825. *Id*. at 71.

[23] 540 U.S. 93 (2003); LEVY & MELLOR, *supra* note 1, at 91. The authors also discuss how the door was opened for the regulation of contributions in *Buckley v. Valeo*, 424 U.S. 1 (1976). LEVY & MELLOR, *supra* note 1, at 94.

[24] 307 U.S. 174 (1939); LEVY & MELLOR, *supra* note 1, at 111.

[25] 323 U.S. 214 (1944); LEVY & MELLOR, *supra* note 1, at 129. This chapter will interest Judge Advocates, as it deals with military decisions that may have corollaries to the current operating environment. The authors believe the case of Jose Padilla is a direct consequence. *Id*. at 141.

[26] 516 U.S. 442 (1996); LEVY & MELLOR, *supra* note 1, at 145. This chapter contains one of the more interesting sidelights, a discussion of the historical development of the "guilty property" fiction emanating from the law of admiralty. *Id*.

London, the authors protested against the abuse apparent in the current understanding of the power of eminent domain.[27] In *Penn Central Transportation Co. v. New York*, the authors show how the power to restrict property use by regulation has led to the taking of property without just compensation.[28] Through *United States v. Carolene Products Co.*, the authors discussed how the Court has allowed the states to infringe on unenumerated rights, including the right to earn a living, through licensing requirements and other methods, effectively destroying the concept of constitutionally protected natural rights.[29] Finally, in *Grutter v. Bollinger*, the authors examined how the Court has turned the right to equal protection of the law on its head through the prism of racial preferences.[30]

In the afterword, Levy and Mellor give an impassioned plea for a particular type of judicial activism they call "judicial engagement" to restore the Constitution to the framers' understanding of the document.[31] They propose to achieve this through appointment of "textualist" justices.[32] As postscripts, the authors briefly discuss two additional cases. First, they discuss the controversial *Roe v. Wade*[33] as modified by *Planned Parenthood v. Casey*.[34] They forgive the Supreme Court for engaging in judicial legislation by concluding the case resulted in the same compromise the states would have arrived at anyway.[35] Second, they discuss *Bush v. Gore*, concluding that decision was not only legally correct, but also a proper example of judicial engagement.[36]

III. Analsyis

Levy and Mellor use questionable methods to make their points. First, they frame the constitutional issues, discuss the facts, and show the faults of the Court's reasoning from only one point of view, favoring a government of strictly limited and enumerated powers.[37] In certain cases, they selectively rely on facts developed by their internal sources to show the continuing harm being done to society by these decisions.[38] In other cases, they parade the potential harms which could occur if the reasoning in the Court's decision were followed to its logical end.[39] This style weakens the overall impact of the book by showing bias and using slippery slope arguments.

In one chapter, the authors ignore a key provision of the Constitution. While discussing the General Welfare Clause, the authors use an ellipsis for the phrase "to pay the Debts."[40] Like the rest of the General Welfare Clause, the Debt Payment provision is not included in the enumerated powers appearing later.[41] Yet, Congress still has, and must have, the power to

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[27] 545 U.S. 469 (2005); LEVY & MELLOR, *supra* note 1, at 159. The authors use the progressive change of the meaning of the Takings Clause, being read as shifting from "public use" to "public purpose" under *Berman v. Parker*, 348 U.S. 26 (1954), as background. LEVY & MELLOR, *supra* note 1, at 157.

[28] 438 U.S. 104 (1978); LEVY & MELLOR, *supra* note 1, at 170. As the basis for their discussion, the authors assert the definition of property without providing authority. *Id*. at 169. They do not take into consideration the role of the sovereign authority of each state in determining the exact nature of "property."

[29] 304 U.S. 144 (1938); LEVY & MELLOR, *supra* note 1, at 189. In this chapter, the authors finally mention the Civil War Amendments, the effect of the *Slaughter-House Cases*, 83 U.S. 36 (1873), and how the Court has since attempted to mitigate that decision. LEVY & MELLOR, *supra* note 1, at 187.

[30] 539 U.S. 306 (2003). LEVY & MELLOR, *supra* note 1, at 201. The authors conclude the effort to apply strict scrutiny has resulted in a system that continues to allow racial classification and preferences, as long as they are hidden within some other stated aim. *Id*. at 212.

[31] *Id*. at 215.

[32] *Id*. The authors further explain their position by showing the difference between originalists, judges who interpret the Constitution as it was understood by the framers, and textualists, who will interpret ambiguous terms with the original framework of the Constitution as their guide. *Id*. at 216. Textualists tend to employ a more holistic approach, and are the direct opposite of the living Constitution theorists. *Id*. at 217.

[33] 410 U.S. 113 (1973).

[34] 505 U.S. 833 (1992); LEVY & MELLOR, *supra* note 1, at 225.

[35] LEVY & MELLOR, *supra* note 1, at 227.

[36] 531 U.S. 98 (2000); LEVY & MELLOR, *supra* note 1, at 229. The authors also examined the Court's basis for jurisdiction, under the Fourteenth Amendment. *Id*. at 229.

[37] *Id*. at 11. The authors completely ignore the ability of the relatively unlimited authority of full parliamentary democracies to operate effectively and still protect the electorate's liberty interest.

[38] *E.g.*, *id*. at 35, 84. The authors quote from Roger Pilon, the vice-president for legal affairs at the Cato Institute in his testimony before Congress. *Id*. at 262 (quoting Roger Pilon, Vice President for Legal Affairs, Cato Institute).

[39] *E.g.*, *id*. at 45, 63, 82, 106, 140, 152, 179, 196, 212.

[40] *Compare id.* at 30, *with id*. at 238.

[41] U.S. CONST. art I, § 8, cl. 1.

make expenditures to pay national debts. The authors engage in exactly the type of intellectual misconduct they accuse the Supreme Court of performing.

While the authors use consistent analysis throughout each chapter, they give almost no consideration to the effect of the Civil War and the Wartime Amendments on the structure of the Constitution and government. The effect of these events forms a middle thesis between textualists and living Constitution theorists, arguing the Fourteenth Amendment represented a revolutionary change in the structure of government.[42] In discussing the Commerce Clause,[43] for example, the authors bemoan the expansion of Congressional authority since the New Deal.[44] They examine the words of the Commerce Clause in isolation.[45] The authors do not consider whether the grant of authority in the Fourteenth Amendment, to enforce provisions of that Amendment through appropriate legislation, increased Congress' authority to regulate interstate commerce.[46] If the protection of laws under the Commerce Clause are to be applied equally to all citizens, and Congress may pass laws to enforce that equality, then it follows that congressional authority extends beyond the purely interstate into the intrastate. The authors only briefly mention the fundamental shift in the relationship between federal and state government in the afterword, while discussing *Bush v. Gore*.[47] Had they applied this concept earlier, they may have granted greater respect to the majority opinions in the cases expanding the role of government, presenting a more balanced work.

The scope of the study ignores many significant decisions. The authors showed a tendency to concentrate on those decisions addressing the area of property rights or economic activity. Out of the twelve cases, Levy and Mellor examined just one case involving the right of free speech, but only in the context of the use of money as an instrument of that speech.[48] Also, the authors examine one case in the criminal law area, but only through the lens of government interference in property rights through asset forfeiture.[49]

When examining gun control, the authors imply state imposed gun control has increased inner-city lawlessness without examining alternate causes.[50] The authors completely ignore cases involving criminal law and police procedure. They do not address the impact of the Exclusionary Rule in *Mapp v. Ohio*,[51] the expansion of the zone of reasonable privacy granted in *Katz v. United States*[52] and its progeny, and the wholly prophylactic application of the principle against self-incrimination in *Miranda v. Arizona*.[53] These cases, taken together, increase the liberty interests of all citizens with respect to the state. Increasing criminal activity can just as easily be explained as resulting from the abuse by the few of this increased liberty as coming from state restrictions on household weapons.[54]

In discussing unenumerated rights, the authors again argue for giving the Constitution its "original understanding" without looking at how the words in the document play upon each other across Articles and Amendments.[55] If the authors

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[42] Walter F. Murphy, *Slaughter-House, Civil Rights, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1, 13 (1987).

[43] U.S. CONST. art I, § 8, cl. 3.

[44] LEVY & MELLOR, *supra* note 1, at 48–49.

[45] *Id.* at 38–39.

[46] U.S. CONST. amend. XIV, § 5. *See generally* Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971 (2008). In Part I of his article, Blocher elaborates the point that "constitutional amendments can, and usually do, trump provisions of the original constitutional text, even though they rarely identify the specific section of the Constitution that they alter." *Id.* at 978.

[47] LEVY & MELLOR, *supra* note 1, at 231.

[48] *Id*. at 90.

[49] *Id*. at 142.

[50] *Id*. at 124. The authors cited crime statistics from the District of Columbia to support this proposition. *Id*. at 125.

[51] 367 U.S. 643 (1961).

[52] 389 U.S. 347 (1967).

[53] 384 U.S. 436 (1966).

[54] This revolution in criminal procedure has had a profound impact on public security. The creation of these judicial remedies has up to this point generally escaped criticism. Donald A. Dripps, *The Warren Court Criminal Justice Revolution*, 3 OHIO ST. J. CRIM. L. 125, 126–27 (Fall 2005). Since the authors measured cases by their effect on law and public policy by expanding government powers or imperiling individual liberties, and these cases tend to expand individual liberties, they do not fit in the analytical scheme. LEVY & MELLOR, *supra* note 1, at 5. Because they do not fit into the analytical scheme, the authors do not examine the effects of those cases. The increase in crime can be attributed to any number of alternate causes, including, for example, more acquittals due to police adjusting to the new restrictions leading to even bolder criminals. Pointing to one cause, gun control, ignores the complexity of criminal behavior.

[55] LEVY & MELLOR, *supra* note 1, at 216.

gave the Fourteenth Amendment its full effect upon the other provisions of the Constitution, the rest of the Constitution looks very different.[56] The authors agree the Fourteenth Amendment applied rights specified in the Bill of Rights against the states.[57] The authors also correctly identify *The Slaughter-House Cases* as eviscerating the Privileges and Immunities Clause of the same Amendment.[58] But the authors stop there. If the authors had extended their own arguments further, they would have discovered the flaw.[59] They do not examine the implication of the Fourteenth Amendment against, for example, the various rights of the Ninth Amendment. If the Fourteenth Amendment is seen as affecting all other words in the Constitution, a reasonable interpretation could be that the clauses of the Fourteenth Amendment specify the natural rights of the Ninth Amendment. A list of examples can be looked at as either a non-exclusive or exclusive list. In this case, since Congress could have included as many specific rights as needed in the Fourteenth Amendment, one could conclude this is now the exclusive list of our natural rights.

Going further down the same analysis, the authors do not consider whether *Wickard v. Fillburn*[60] could be understood as the Court finally coming to grips with the effect of the Due Process and Equal Protection clauses on the Commerce Clause, increasing Congress' enforcement powers. This is especially the case in light of Congress' explicit power under the Fourteenth Amendment to pass legislation to enforce those provisions.

IV. Conclusion

This volume, while a provocative discussion of general interest, will be of limited interest to Judge Advocates. The chapter concerning *Korematsu* can certainly inform military attorneys in the field of the dangers of internment and the potential abuse of executive authority. In some respects, the volume is already out of date, as *District of Columbia v. Heller*[61] has overruled one of the dirty dozen cases, *United States v. Miller*.[62] As well, in the area of greatest interest to Judge Advocates, the balance between civil liberties and national security, the cases of *Hamdan v. Rumsfeld*[63] and *Boumediene v. Bush*[64] were decided after this book was published.

As commentary on Constitutional Law, the work is also of limited value. The arbitrary cut-off of 1933 limits the way the authors discuss cause and effect. They could have included a full criticism of the judicial doctrines of *stare decisis* and judicial supremacy.[65] Justice Jackson observed the Supreme Court, if subjected to a super-appellate review, would no doubt be reversed.[66] To their credit, the writers of *The Dirty Dozen* do not advocate for the extreme end of their analysis, namely subjecting the Supreme Court to this super-appellate review and overruling the Supreme Court by amendment,[67] stripping it of the ability to judicially amend the Constitution in the future. This ultimately demonstrates the authors avoided legal extremism, keeping themselves within our legal tradition.

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[56] *See generally* Blocher, *supra* note 46.

[57] LEVY & MELLOR, *supra* note 1, at 186.

[58] *Id*. The authors acknowledge the effect of this decision. They also acknowledge many subsequent decisions are an attempt by the Court to use the Equal Protection and Due Process clauses of the Fourteenth Amendment to counteract *The Slaughter-House Cases*. *Id*.

[59] The authors miss analyzing the fundamental nature of jural rights. When Congress is given a power by Constitutional amendment, it creates liabilities for all citizens, thus diminishing individual rights. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Legal Reasoning*, 23 YALE L.J. 16, 46 (1913). In Hohfeld's analysis, when one person has a right, such as a right to speak, another person has a liability that is correlative to it, such as a liability of silence. *Id*. If this analysis is applied to constitutional rights, then every right granted by all of us imposes a correlative liability upon all of us to allow for the exercise of that right. If one person has a right of equal protection, another has a liability to give up any privilege that would interfere with that equality of protection. *Id*. Without specifically granted privileges and immunities, the right of equal protection strips individuals of many perceived fundamental rights.

[60] 317 U.S. 111 (1942).

[61] 128 S. Ct. 2783 (2008) (Second Amendment right for an individual to bear arms.).

[62] 307 U.S. 174 (1939).

[63] 548 U.S. 557 (2006).

[64] 128 S. Ct. 2229 (2008) (holding that those held by Executive at Guantanamo Bay entitled to request habeas corpus review in Article III courts).

[65] *See generally* MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA 29 (Regnery Publishing 2005).

[66] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[67] *E.g.*, U.S. CONST. amend. XI (overruling Chisolm v. Georgia, 2 U.S. 419 (1793)).