

Levy, Robert and William Mellor. *The Dirty Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom*. New York: Sentinel, 2008.

Several years ago, law professor Gary Lawson published an article asking what should be done about the fact that American legal and political institutions have now drifted so far from the actual meaning of the Constitution.<sup>1</sup> Returning to the Framers' design of limited and decentralized government would require such extreme political measures at this point that it seems unrealistic even to suggest the possibility. The best that can now be done, Lawson concludes, is for America's political leaders to declare honestly that the Constitution no longer figures into their decisions in a serious way. Admitting it, as they say, is the first step.

Robert Levy and William Mellor are not quite so resigned. As practicing attorneys who have won significant Supreme Court victories in recent years, they still have confidence in the legal system's ability to reform. But looking over their list of the twelve worst Supreme Court decisions of the twentieth century, and seeing how deeply lie the errors in those decisions, is enough to shake anybody's faith. How could so much law be so backward, and what can we do about it?

Levy and Mellor present twelve Supreme Court flops, along with eight runners-up. They categorize the cases by the individual right or constitutional provision at stake. In the hands of less sophisticated writers, this format would degenerate into a list of partisan complaints, but Levy and Mellor approach their task from a solid theoretical base. As a result, their book is actually more of a rigorous critique of the current state of constitutional law than the title might suggest. The "dozen" format is a device that draws readers into understanding the nature of some of the fundamental errors that have been absorbed into constitutional law. It is not surprising, therefore, that six of the dozen and three of the runners-up date from the period of the New Deal, when the Supreme Court formally adopted the jurisprudence first formulated during the Progressive Era, a jurisprudence that overthrew the classical liberal model of American law. The Court's embrace of the new approach in the 1930s marked a geological shift in law, uprooting

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<sup>1</sup> Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review* 107 (April 1994), pp. 1231-54.

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centuries-old protections for property rights and economic freedoms and fundamentally altering the American political process.

The American Founders believe that individual liberty is a fundamental good; they even refer to it as a “blessing” in the text of the Constitution itself. As the Declaration of Independence makes clear, government exists only as a tool to protect that blessing, and if it ever becomes destructive of natural rights, the people retain the right to alter or to abolish it. In their view, freedom is a primary principle, and government a secondary institution, designed to serve that end, and kept in harness by a variety of complicated checks and balances.

The Progressives inverted this model. For them, the authority of the collective is primary; indeed, it is the source of the individual’s “freedom.” To suit this scheme, the Progressives redefined the very word freedom. No longer did it mean, in John Locke’s words, a citizen’s ability “to dispose and order freely as he lists his person, actions, [and] possessions . . . and . . . not to be subject to the arbitrary will of another, but freely follow his own.”<sup>2</sup> Instead, in the words of John Dewey, the leading philosopher of Progressivism, freedom means the individual’s ability to grow as a full member of the collective. “[T]he problem of achieving freedom,” in his eyes, is “a problem of establishing an entire social order, possessed of a spiritual authority that would nurture and direct the inner as well as the outer life of individuals,” and the goal is to create a “form of social organization, extending to all the areas and ways of living, in which the powers of individuals shall not be merely released from mechanical external constraint but shall be fed, sustained and directed.”<sup>3</sup>

Thus did the Progressives replace liberty with democracy as the central constitutional value—with democracy understood not simply as a form of politics allowing citizen participation, but as a style of nationality, a way of living, in which the individual is simultaneously subsumed and fostered by the collective. Individual rights are recast as privileges (revocable ones) that the state gives to individuals to serve social needs. “Any merely individual right,” writes Dewey,

must yield to the general welfare. As long as freedom of thought and speech is claimed as a merely individual right, it will give way, as to other merely personal claims, when it is, or is successfully represented to be, in opposition to the general welfare. Liberalism

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<sup>2</sup> John Locke, *Second Treatise of Civil Government*, ed. Peter Laslett, rev. ed. (Oxford: Oxford University Press, 1963), ch. 6, para. 57, p. 348.

<sup>3</sup> John Dewey, *Liberalism and Social Action* (New York: Capricorn Books, 1963), pp. 30-31.

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has to assume the responsibility for making it clear that intelligence is a social asset and is clothed with a function as public as its origin, in the concrete, in social cooperation.<sup>4</sup>

It took a while for the Progressive model to be adopted by the legal profession, and its epigones on the Supreme Court, such as Louis Brandeis and Oliver Wendell Holmes, regularly found themselves writing dissenting opinions. But between 1934 and 1938, the Supreme Court gave it a formal imprimatur in a series of decisions upholding the constitutionality of New Deal programs and announcing that in the future, judges would simply presume the constitutionality of restrictions on individual rights in all but the most extreme cases. It devised the so-called “rational basis” test, under which laws are held to be constitutional if any rational person could have believed they would advance some public goal. And it declared that certain categories of rights, such as free speech or the right to vote, would receive greater judicial protection than other rights, such as private property or economic liberty. With some slight modifications, this scheme still governs the judiciary today.

Levy and Mellor’s theme is the impact of these Progressive premises on American constitutional law. This is obvious in chapters 1, 2, and 3, in which they criticize New Deal-era decisions that expanded Congress’s powers under the General Welfare and Interstate Commerce clauses, and allowed states to override the language of private contracts despite the explicit prohibition of such acts in Article I, section 10, of the Constitution. This is also clear in chapters 7 and 11, which discuss the 1944 *Korematsu* case, upholding the internment of Japanese-Americans in prison camps during World War II, and the 1938 *Carolene Products* case, allowing legislatures almost limitless power to deprive citizens of the freedom to make economic choices.

But this impact is seen even in chapters that address more recent decisions. In Chapter 5, for example, they criticize *McConnell v. Federal Elections Commission*, the 2003 decision upholding the constitutionality of the Bipartisan Campaign Reform Act (commonly known as “McCain-Feingold”). The Constitution forbids Congress from enacting any law which shall abridge the freedom of speech, and the ability to make financial contributions to a political candidate or organization is the most effective means of political speech that most Americans have. Yet the justices upheld the law’s restrictions on financial contributions to political candidates, partly on the ground that they represent an improper influence on democratic government. Such contributions, the Court notes, are often “motivated by a

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<sup>4</sup> *Ibid.*, pp. 66-67.

desire for access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors, rather than by ideological support for the candidates and parties.”<sup>5</sup>

What could possibly be wrong with citizens in a democracy seeking to influence political representatives and to avoid being placed at a disadvantage in the legislative process? As Levy and Mellor observe, this can be considered corrupt only by those who interpret the First Amendment as requiring “*fair* speech . . . instead of ensuring *free* speech, as intended by the framers. That egalitarian impulse, utterly at odds with the idea of individual liberty that animates the Bill of Rights, was at the core of the Court’s opinion” (p. 97). That impulse was the product of Progressive intellectuals like Dewey, who argue for the overthrow of “the old habit of defending liberty of thought and expression as something inhering in individuals apart from and even in opposition to social claims.”<sup>6</sup> When he and other Progressives argue that freedom of thought and speech are “social assets” rather than individual rights, they mean that citizens’ ability to criticize political policy is an instrumental good serving the goal of effective democratic management. Freedom of speech is therefore a license given to citizens by the state for the state’s own purposes. And, on those premises, it makes sense that government should expand or contract the citizens’ freedom of political expression in order to make it serve social goals. The problem is that government itself determines what those goals are, so the state will ultimately decide which criticisms are and are not “good for society,” and restrict freedom accordingly. In short, the government becomes the judge in its own case. “[T]he real effect of the regulations upheld in *McConnell*,” Levy and Mellor conclude, “has been to protect incumbents from upstart challengers. The careers of sitting politicians can more easily be perpetuated if the speech of their opponents can be repressed” (p. 106).

In the end, it is not surprising that so much constitutional law could turn out to be so wrong. The prevalence of error is the result of certain fundamental intellectual missteps taken at a particular time, which have reverberated in the form of judicial decisions ever since. Given the legal system’s reliance on precedent, it is predictable that specific, central errors would have long-lasting and unanticipated consequences.

The authors’ criticisms are principled and effectively argued in terms accessible equally to lawyers and laymen. Nor can one quibble much with their choice of targets; specialists might add less influential cases to the list, and one might argue that such nineteenth-century disasters as *Dred Scott* and

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<sup>5</sup> *McConnell v. Federal Elections Commission*, 540 U.S. 93, 124-25 (2003).

<sup>6</sup> Dewey, *Liberalism and Social Action*, p. 67.

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*The Slaughterhouse Cases* deserve to be addressed also, but the authors' selections are well made to avoid reducing the book to a parlor game.

And yet the book leaves us with a very difficult problem. If so much law is so deeply wrong, and if the flaws have stayed in place for more than seven decades, what if any remedy can be hoped for? Levy and Mellor conclude with a "call for the appointment of justices who are willing to take clear and consistent stands in favor of the framers' understanding of the Constitution" (p. 215). Such a change in personnel, however, is unlikely, given a political standoff that turns every Court nomination into a frenzy. That problem is complicated by the fact that many political leaders are ignorant of important intellectual disputes within the legal profession. The differences between the jurisprudence of Justice Scalia and Justice Thomas, for example, are important ones, but they are beyond the understanding of many presidents and congressmen. As a consequence, judicial nominations are often managed without any serious understanding of a nominee's intellectual orientation: witness the nomination of Justice David Souter.<sup>7</sup>

More fundamentally, though, Levy and Mellor urge courts to employ textualism—the commonsense willingness to enforce the meaning of the Constitution's text—rather than seeking clever ways to reconcile the Constitution with perverse modern institutions, or to ignore the text when inconvenient, as today's judges do. "[W]hat is the purpose of a written document—whether a private contract or a Constitution—if we act as though it does not exist?" (p. 217). The "cavalier attitude toward government powers" that prevails today should be replaced by a jurisprudence that enforces the Constitution's promises, puts real limits on government, and protects individual rights—both "economic" and participatory rights—not as privileges but as inviolable and universal principles. The authors acknowledge that this would lead courts to practice so-called "judicial activism," if activism means "willing engagement in applying the law and the Constitution to scrutinize the acts (or omissions) of the executive and legislative branches" (p. 222). Nothing less is called for by the Constitution.

But as Gary Lawson recognizes, reengaging with our nation's political principles would be a major undertaking. This is true in the crude sense that federal agencies have proliferated since the New Deal, acquiring concentrated constituencies made up not only of citizens who benefit from their largesse, but also of government employees and their unions. A graph measuring the size of the government payroll since 1934 would be tilted steeply upward, due both to voter ignorance and to the inertial effects of self-

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<sup>7</sup> See, e.g., Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York: Penguin Press, 2007).

seeking by interest groups. It is also true in the broader sense that American intellectuals, and particularly lawyers, have by now lost even the memory that there ever was another way. The very concept of a free society is alien to them; few understand how it might even be possible for free markets to provide bridges, health care, or safe airline travel. Having been raised within the New Deal paradigm, they mistake it for the very handiwork of nature, and regard any proposal for change as irresponsible radicalism. Cass Sunstein even titled his recent book attacking conservative judges *Radicals in Robes*.<sup>8</sup>

This fact suggests an important lesson for those who hope for a change in the jurisprudential *status quo*: libertarians are *not* looking to set America back in time or to return to some long-lost Eden. Talk of a “constitution in exile” is both self-defeating and inaccurate. The United States has never in fact had a political system that accorded in all respects with the Constitution’s promises. Whether it be the deprivation of women’s right to equality, or the institutions of slavery and segregation, the American nation has long shown a capacity for institutional dissonance—a willingness, whatever the motive, to allow political leaders to violate those principles to which the nation has explicitly pledged itself in its founding documents. Making our government obey those principles would be a step forward, not backward. And the path of reform might follow the route of the Second Amendment decision issued after *The Dirty Dozen* was published (*DC v. Heller* [2008]). Before then, the Court had never decided whether and to what degree the Constitution protected an individual’s right to possess firearms. But a strong consensus had congealed in the legal community, to the effect that it protected only a collective right of political entities, not of individual citizens. This consensus, however, was overthrown with a strong opinion relying heavily on the original meaning of the Second Amendment and asserting strong protections for individual rights against government encroachment. It did so as a result of energetic and creative litigation by principled and scholarly attorneys, one of whom was Robert Levy.

Yet, central to any reform attempt is the need for a philosophical reorientation, particularly with regard to individual rights. Among the Progressives’ most important victories was their redefinition of rights as privileges which exist for social purposes, rather than as central political principles to which all human beings have a just claim. This idea is now ubiquitous in the law and in the academies, where the Declaration of Independence is studied only for its “influence,” rather than its truth value. But regular Americans still cherish the belief that it is indeed the case that all men are created equal, with certain inalienable rights which any just

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<sup>8</sup> Cass R. Sunstein, *Radicals in Robes: Why Extreme Right Wing Courts Are Wrong for America* (New York: Basic Books, 2005).

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government must protect. It is only by restoring that principle to its rightful place in our intellectual commitments that lasting change for the better can come.

Our legal institutions, like everything else about the government of the United States, are ultimately the products of public opinion. The Progressives' attack on the classical liberal foundations of the U.S. Constitution was extraordinarily successful and its effects are today deeply rooted. But even that was a gradual effort; starting in the late-nineteenth century, the Progressive revolution culminated only fifty years later. Libertarians, too, must patiently and gradually influence the public's understanding of the role of government and the fundamental importance of individual liberty, both in the courtroom and in the public arena. This will be a long and sometimes seemingly hopeless task, but in the end a restoration of our constitutional commitment to individual freedom and limited government is possible. Levy and Mellor's intelligent critique of the prevailing theories of constitutional law is an excellent contribution to that effort.

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