

THE DIRTY DOZEN

How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom



Robert A. Levy



Center of the American Experiment is a nonpartisan, tax-exempt, public policy and educational institution that brings conservative and free market ideas to bear on the hardest problems facing Minnesota and the nation.



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Preface

Mitch Pearlstein, Founder & President, Center of the American Experiment: As my friend Lee McGrath of the Minnesota outpost of the Institute for Justice said in introducing him at an American Experiment Dinner Forum in March, Bob Levy is a constitutional scholar with an “extraordinary gift of making esoteric Supreme Court cases understandable, compelling, and applicable to our daily lives.” All true, as you can read in this oral essay based on his remarks that evening in St. Louis Park.

Mr. Levy drew from his new book, *The Dirty Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom*, coauthored with another old IJ friend, William H. (Chip) Mellor — who, not incidentally, led an American Experiment Forum on a related topic in November 2007.

In Lee’s words, *The Dirty Dozen* shows how the Supreme Court has “blinded itself to the original meaning of the words of the Constitution,” giving parts of the document a “completely new, and at times, opposite meaning.” In essence, he continued, “for the past 75 years, the Supreme Court has been the Supreme Amender to the Constitution — not by the way in which the initial 27 amendments were added, but by judicial fiat.”

Bob Levy has been a remarkably eclectic and productive fellow. An entrepreneur with a doctorate in business, he founded and ran an investment technology company for 25 years — when, at age 50, he decided to become a lawyer, too. Since graduating the George Mason University School of Law in 1994, he has clerked for two federal judges, written extensively, and joined the boards of various and distinguished institutions such as the Institute for Justice and Federalist Society — as well as the libertarian Cato Institute in Washington, of which he is currently chairman.

It was an honor hosting Bob, especially since American Experiment did so in collaboration with two other vital Minnesota organizations: The Federalist Society — Minneapolis Lawyers Chapter (led by a still-another friend, Kim Crockett); and the Institute for Justice — Minnesota Chapter (led by Mr. McGrath).

My thanks to all, and stay tuned, as our three organizations will co-sponsor more intellectually substantial and rightly contentious programs down the road.

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Robert Levy: I'm going to talk about *The Dirty Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom*. I want to use the 12 court cases as a platform to discuss some of the issues we're facing today. But first, I want to set the stage with a few comments on how liberals and conservatives look differently at the Constitution and, in particular, how both of them look at the Constitution differently than libertarians, like my colleagues at the Cato Institute and I do.

When I talk about libertarians, I'm not talking about the Libertarian political party. I'm talking about libertarianism as a political philosophy focused on free markets, private property, individual liberty, and, most of all, strictly limited government. At the Cato Institute, we do not endorse candidates. We do not endorse parties, and, indeed, we are equally critical of conservatives and liberals, Democrats and Republicans. We do have a consistently minimalist view of the proper role of government. Thus, conservatives will agree with us on some issues — generally, the domestic, regulatory, tax, and economic issues. And, liberals will agree with us on other issues — generally, the social issues. That's because, in the libertarian view, both liberals and conservatives are inconsistent.

Ninth and Tenth Amendments

To illustrate that point, I want to offer this constitutional framework. The structure of our federal system, and, indeed, our Constitution, can best be captured by looking at the final two provisions of the Bill of Rights, the Ninth and Tenth Amendments. The Tenth Amendment says quite clearly that the federal government is authorized to exercise only certain enumerated powers, the ones that are listed there and that are specifically delegated to the national government. The Tenth Amendment goes on to say, if the power is not listed there, if it's not enumerated and delegated to the national government, then it is reserved to the states or, depending on the provisions of state constitutions and state laws, to the people. These powers — we're talking, for example, about the power to coin money, to establish post offices, to

regulate interstate commerce — are very tightly defined.

Conservatives and libertarians generally agree on that narrow view of federal power, but there are a couple of key exceptions, one of which is that conservatives, but generally not libertarians, are willing to federalize a significant amount of criminal law. If you want an example of that, just take a look at our totally ineffective war on drugs. If you want an example in the area of civil law, take a look at tort reform — an area that traditionally and constitutionally is reserved to the states. Some conservatives have encouraged the U.S. Congress to get involved in such things as medical malpractice caps — even in cases that involve in-state patients suing in-state doctors for injuries that occurred wholly within one state — by suggesting, somehow or another, that it constitutes a regulation of interstate commerce and is, therefore, justified under the commerce clause of the U.S. Constitution.

Libertarians invoke a different principle: No matter how worthwhile the goal, no matter how much Congress thinks that it has identified a really important problem, and no matter how sure Congress is that it knows how to fix the problem, if there's no constitutional authority to pursue it, then the federal government has to step aside and leave the matter to the states or private parties. Today, of course, the federal government immerses itself in matters ranging from public schools to hurricane relief, drug enforcement, welfare, retirement systems, medical care, family planning, housing, and aid to the arts. I challenge you to find any of those that are authorized in the Constitution. None can be found among Congress's enumerated powers.

There's a second area where conservatives and libertarians differ on powers of government: concentrating national security in the executive branch. Libertarians remind their conservative friends that too much power concentrated in one branch, particularly in the executive branch, threatens the notion of separation of powers, which has been a cornerstone of our Constitution for more than two centuries. Thus, the administration — and

I mean in particular the previous administration, the Bush Administration — may not by itself unilaterally set the rules, because that's not an executive function. It's a legislative function. While the administration may enforce the rules and prosecute infractions, it may not, after the fact, decide whether it has itself misbehaved by violating the statutes and the Constitution, because that is a judicial function.

So that's the powers-of-government perspective grounded in the Tenth Amendment and the separation of powers doctrine.

I also mentioned the Ninth Amendment. The Ninth Amendment doesn't talk about powers. It talks about rights, and it says that the enumeration of certain rights in the Constitution doesn't mean that those are all the rights we have. We have lots of other rights — rights that existed before the Constitution was written, rights that existed before the U.S. government was even formed. That safeguard imposes another powerful discipline on federal behavior, because the Ninth Amendment says, even if the federal government is exercising its legitimate powers in accordance with the Tenth Amendment, it may *not* exercise those powers in a manner that violates our rights. The Ninth Amendment goes on to say that the rights which can't be violated include all the ones that are enumerated, like free speech, the exercise of religion, protection against unreasonable searches, etc., as well as unenumerated rights that include, in the libertarian view, the right to do things like gamble or smoke marijuana.

Now, notice that the presumptions of the Ninth and Tenth Amendments are exactly opposite of one another in a fashion, and if you understand that concept, I think you capture the whole federal system. The Tenth Amendment says if the power isn't there, the government doesn't have it. The Ninth Amendment says just the reverse: Merely because the right isn't explicitly listed there doesn't mean that individuals don't have it.

Consequently, if one wanted to identify one

provision in the Constitution that separates the libertarians from the conservatives, I think it would be the Ninth Amendment. Conservatives treat the Ninth Amendment as, to use former Judge Robert Bork's memorable term, "an ink blot." Judge Bork said, "The Ninth Amendment should be ignored. Nobody knows what it means. It's as if someone spilled ink on the portion of the amendment that would have identified these unenumerated rights that the libertarians insist that we have." I think it's odd that Judge Bork did not have difficulty in coming to grips with other equally amorphous terms in the Constitution like "probable cause," "due process," "just compensation," and "unreasonable searches." Yet, for whatever reason, Judge Bork and his conservative allies do have a difficult time in coming to grips with the concept of an unenumerated right.

Libertarians treat the Ninth Amendment like it means something. They argue that it refers to our natural rights — the rights that we had by nature, pre-government, and pre-Constitution and that we still retain. What are these natural rights? In short, they're all the so-called negative rights; even though that term has a pejorative connotation, it shouldn't be interpreted that way. A negative right is just a right that doesn't impose an affirmative obligation on anyone else, and it can be contrasted with positive rights or what really ought to be called entitlements, which do impose affirmative obligations on other people.

If we were to take, for example, the right to the pursuit of happiness, that's a negative right, because I can pursue happiness, and I don't need your help. I simply need you to stay out of my way and not exercise force or fraud against me. But suppose I had a right to happiness, not the pursuit of happiness, but a right to the achievement, the attainment, the realization of happiness. (Bear in mind, if I say I have a right, that presupposes that I have a remedy if the right is violated, because a right without a remedy is no right at all.) Thus, if I have an enforceable right to the achievement of happiness, that's obviously a positive right because it does impose affirmative obligations on each of



you. At a minimum, you would not be able to do anything that makes me unhappy. If you did, I would be able to go to court and seek redress. These positive rights are integral to the liberal view of the proper role of government.

Now that I have spent some time being somewhat critical of conservatives, I want to talk about liberals for a moment.

The positive rights that liberals invoke, for the most part, are things like welfare, a minimum wage, the right to housing, the right to health care. All of these, as you can see, are positive in the sense that they impose affirmative obligations. If I have a right — an enforceable right — to welfare, then somebody somewhere has the affirmative obligation to come up with the money to pay for it.

Paradoxically, we're now hearing from liberals, particularly in the post-9/11 environment, that big government can't be trusted. Ordinarily, liberals embrace every proposal for big government that one could imagine, but there's one area where liberals don't trust big government: civil liberties. Why doesn't the Left's healthy distrust of big government in the civil liberties area extend to distrust of big government when it comes to government control over things like our retirement system, our welfare system, our public school system, and the private economy? Why hasn't the Left's healthy distrust of big government extended to support for privatized Social Security or school choice or the elimination of regulations that seem to control everything from the size of a navel orange to the ergonomics of office equipment?

In the Left's view, almost all government agencies are fine, but two are not: the U.S. Department of Justice and the U.S. Department of Defense. Oddly enough, those two agencies are charged with an indisputably legitimate function of government: to protect us from domestic and foreign predators. Imagine if the Congress were to delegate to the Justice Department — particularly if it were still under the control of, say, John Ashcroft or Alberto Gonzales — the power to enact regulations regarding the tradeoff between

national security and civil liberties, and it gave the Justice Department no more guidance than to keep us safe from terrorists. People on the Left would be apoplectic, and they would have every right to be. But when the same Congress delegates to the Environmental Protection Agency the power to enact regulations regarding the tradeoff between economic growth and the environment, and it gives the EPA no more guidance than to keep us safe from pollutants, the Left applauds enthusiastically. Could it be that pollutants are a greater threat than terrorists? Not likely. More likely, the Left has a selective indignation about too much government, and I think that reveals an inconsistency in the liberal mindset. There's a similar inconsistency, as I mentioned, in the conservative view of the proper role of government.

It's in resolving that foundational question — What is the proper role of government? — that the Constitution is best viewed through two prisms: the powers-of-government prism (the Tenth Amendment) and the rights-of-individuals prism (the Ninth Amendment). If you want to encapsulate the libertarian view in a nutshell, it is this: Libertarians view the powers of government very, very narrowly and the rights of individuals very, very broadly. That was precisely the vision of the Framers. That's the background.

A Few Cases Short of a *Dirty Dozen*

Now, I want to talk about *The Dirty Dozen*. Interestingly, as a prologue to this, we've had only 27 amendments. After the Bill of Rights — the first ten amendments — we've had only 17 amendments to the Constitution since 1791. That's 218 years and 17 amendments. Why is it that there have been so few changes, even though the Framers could never have imagined what our 21st-century world would look like? Well, there are probably lots of reasons, but I think three are particularly relevant here. Two of those are good reasons; one is not so good.

The first good reason is that the Framers were geniuses. They came up with this simply incredible document. Their vision of liberty was every bit as relevant in

1791 as it is today. The second good reason is that in exercising their genius, they had the foresight to craft an amendment process in Article V that's very difficult. Essentially, two-thirds of both houses have to propose amendments. They have to be ratified by three-fourths of the states. Not surprisingly, that hasn't happened very often. As a result, we have a very stable constitutional framework.

The one bad reason is that the Supreme Court has accomplished through the back door what the states and the Congress could not have accomplished through the prescribed amendment process. Regrettably, I think, the modern court has lost its compass, and that has profound implications for all of us. That is the subject that Chip Mellor and I address in *The Dirty Dozen*. Some of this damage occurred many years ago. Perhaps, the worst case of all is the infamous *Dred Scott v. Sanford* case in 1857, where Chief Justice Roger Taney held, among other things, that black slaves were property and not citizens of the United States. There's the almost equally infamous *Plessy v. Ferguson* in 1896 where the court upheld a Louisiana statute that required—not just permitted, but required — railroads to provide equal but separate accommodations for the black and white races.

Now as repugnant as those cases were, they're not in the book because they're no longer the law of the land. *Dred Scott* was superseded by the Fourteenth Amendment in 1868, and *Plessy* was overturned by a whole series of cases, beginning with the school-desegregation case *Brown v. Board of Education* in 1954. Much of the court's enduring mischief that has lasting significance occurred much later, started during the New Deal and continues today. So it's *that* period on which the book focuses, the period from 1934 to the present.

I'm not going to have time to examine each of these cases, but I would like to identify most of them and give you a few paragraphs about each one. I'm not going to do this in any particular order. It's not worst case to next worst, etc., but rather it's the powers-of-government cases first and then the rights-of-individuals cases. As I do this, I'll try to

mention the modern-day importance of these cases, particularly in this environment that we currently find ourselves.

Helvering v. Davis

The first case is about the general welfare clause. The case is called *Helvering v. Davis* (1937). The issue in the case is whether the Social Security system was constitutional. As a judge, you're not supposed to decide whether the Social Security system is a good idea. You're not supposed to decide whether it's well funded, whether it makes sense for some people to be paying for the retirement for other people, whether it will ever achieve solvency, or whether it will get the job done. Those are not questions for the judge. The question for the judge was pretty simple: Does the Social Security system have some constitutional authorization? Where would this authorization come from? The proponents said it comes from the general welfare clause — that Congress has the power in the Constitution to tax in order to promote the general welfare.

This turned out to be a big battle between Alexander Hamilton and James Madison.

There are powers in the Constitution to establish post offices, coin money, and so on. Hamilton said (I paraphrase), “The general welfare clause is an extra power of Congress. In addition, there is the power to tax in order to promote the general welfare.”

Madison said, “That cannot be the case! The whole structure of the Constitution, the whole design of our federal plan, was to create a system of enumerated powers and limited government. After all, if you give Congress the power to promote the general welfare — which could include anything and everything — that would be an unbounded power which would totally eviscerate the notion of enumerated powers.”

Madison went even further. He said, “Not only isn't the general welfare clause an extra power of Congress, it's actually a *restriction* on Congress.”



Here's how he thought the general welfare clause ought to be interpreted: Congress has the power to do all these things that are listed in Article I, Section 8, and if they do those things and *only* those things, in addition, they *must* exercise those limited powers in a manner that promotes the general welfare and not the welfare of what Madison called factions and what we today call special interests.

The court looked at this and roughly said, "Hamilton is right; Madison is wrong. The Social Security system is perfectly constitutional." That opened the floodgates through which the redistributive state was ready to pour, taking money from some people and giving it to others. Take a look at President Obama's stimulus package, if you want today's manifestation of the outcome — the predictable outcome — of a case like *Helvering v. Davis*.

Wickard v. Filburn

Just about as bad is the second case, *Wickard v. Filburn* (1942). It's about the commerce clause. Congress has an expressed power to regulate interstate commerce. The issue in *Wickard v. Filburn* was: Does the power to regulate interstate commerce extend to activities that are not interstate and not commerce? It sounds like a pretty simple question. It wasn't so simple for the Supreme Court.

Mr. Filburn was growing crops on his farm, all within one state. He wasn't buying them; he was growing them. And he didn't sell them; he ate them and he gave them to his farm animals. President Franklin Roosevelt said, "We have to limit the amount of crops you're growing, Filburn." Filburn said, "Under what authority?" Roosevelt said, "Regulating interstate commerce." Filburn, quite sensibly said, "How can that be? It's on my farm and all within one state. I'm not buying anything; I'm growing it. I'm not selling anything; I'm eating it."

The Supreme Court looked at the case and said, "Mr. Filburn, you just do not understand. After all, if you hadn't been growing these crops, you would have to have been out there buying them. If you hadn't eaten everything you grew, you would have had a

lot left over you could have sold. So by not buying and not selling, you have influenced the supply and demand for crops on the interstate markets, and, therefore, we can regulate you." Sounds just amazing, doesn't it? That, of course, opened up a set of floodgates through which the regulatory state was ready to flow. As a result, Congress can now regulate *anything* and *everything* under the auspices of the commerce clause.

Home Building and Loan Association v. Blaisdell

Let's look at a third case, which concerns the contracts clause, *Home Building and Loan Association v. Blaisdell* — a 1934 Minnesota case, by the way. The contracts clause is pretty clear. As a matter of fact, it's crystalline. This is what it says: "No state shall pass any law impairing the Obligation of Contracts." Even I can understand that, but it wasn't clear enough for the Supreme Court. The court upheld a Minnesota statute that postponed — see if this sounds familiar — mortgage payments for financially troubled homeowners. Never mind the contract. Never mind whether there was any fraudulent inducement in the negotiations for the contract. There are lots of laws on the books that prevent contracts from being enforced if they were fraudulently induced, but that didn't have anything to do with this. This was a blanket, across-the-board prohibition on foreclosures, and we are now seeing a replay as creditors are forced to waive foreclosure on mortgages today — again, without any regard to whether there was fraudulent inducement in the negotiation of the mortgage.

Whitman v. American Trucking Association

The next case, also with current implications, is about a doctrine that most people have never even heard of, unless you went to law school, called the "non-delegation" doctrine. The case is *Whitman v. American Trucking Association* (2001). The very first sentence of the Constitution, right after the Preamble, says, "All legislative power is vested in Congress." The Framers did that for a reason.

They knew that if we didn't like the laws Congress was passing, we could vote the bums out of office. But suppose Congress passes laws and nobody knows what they mean, and they delegate the responsibility to flesh out the details to one of those 320 or so "alphabet agencies" in Washington, D.C. The voters have no recourse then, because these agencies are not run by elected representatives, but by unelected bureaucrats. The voters have no recourse, and apparently, the courts are not going to do much about it, notwithstanding the fact that Congress, not an administrative agency, is supposed to make the law.

If you think delegation by Congress is OK then you will love TARP, the Troubled Assets Relief Program, under which, first, Henry Paulson, and, now, Timothy Geithner have had virtually plenary power to do whatever they want. For the first week or so, TARP was a program that purchased troubled assets from financial institutions. That morphed, in a very short period of time, to a direct injection of capital into those institutions, and then morphed right back again to the purchase of troubled assets. Along the way, the White House expropriated a few tens of billions of dollars to bail out the automobile industry, notwithstanding that Congress had said, "Don't do that." So all of this was lawmaking by the executive branch, in particular by the Secretary of Treasury — an impermissible delegation of legislative power.

McConnell v. Federal Election Commission

The next case also had implications regarding the recent election, as it's about free speech; specifically, campaign finance reform. The case was *McConnell v. Federal Election Commission* (2003) and it was about the constitutionality of BCRA, the Bipartisan Campaign Reform Act, which we know as McCain-Feingold. The reformers had this quixotic idea that we need to separate money from politics, so they passed BCRA, and you can see how well it worked. We recently had an election in which more money was spent than in any election in the history of the universe. In the process, our most core, protected

speech — the right to support or criticize candidates for political office — got less protection under the First Amendment than the court gives to gangster rap, pornography, and flag burning. All of those are protected under the First Amendment, but if you're running a broadcast ad and you happen to be associated with a union or a corporation, you cannot name a candidate within 30 days of a primary or 60 days of an election.

All of this is because Congress doesn't understand that politics is about a bargain between the candidate and the electorate. The candidate says, "I'm willing to support certain policies, and I want something from you, Mr. Voter, in return." It should not have any constitutional significance whether the voter's reciprocal promise is, "In return for supporting these policies, Mr. Candidate, I promise to vote for you"; or "I promise to convince my friends to vote for you"; or "I promise to write a letter to the editor in support of your candidacy"; or "I promise to run an ad in the newspaper in support of your candidacy"; or, finally, "I promise to give you money so you can run your own ad." All of those have the same end result in mind — getting the candidate elected — and all of them come about through constitutionally protected political speech.

This exchange of promises is not corruption. It is democracy at work. It doesn't mean that *nothing* is illegal. Certainly, some things are illegal; for example, trading support for certain policies by the candidate in return for personal aggrandizement, like a new car or a trip to Cancun. Favoring contributors in the award of government contracts or benefits is a breach of fiduciary responsibility; that, too, is illegal. But there are plenty of laws on the books that govern that. You don't need campaign finance laws that truncate and compromise political speech to accomplish those ends.

Korematsu v. United States

The next case is a case you've probably all heard of, even if you didn't go to law school: the 1944 case of *Korematsu v. United States*. The Constitution says we all have guarantees of liberty, fair treatment,



and equal protection under the law. The Supreme Court in this instance said, “Well, maybe not. Maybe we can waive that during wartime, even if it means that a lot of American citizens are arrested and imprisoned indefinitely without charge and given no opportunity to contest their detention.” Mr. Korematsu had the misfortune of having Japanese ancestry. He’d never been to Japan. He spoke Japanese haltingly. He couldn’t read it. Yet, he was detained without any suspicion of disloyalty whatsoever for *years*, along with 120,000 other Japanese Americans. Seventy thousand of them were U.S. citizens — 18,000 Japanese Americans were later decorated for valor fighting for the United States in World War II.

If you think that all ended with World War II, just take a look at the case of Jose Padilla, a U.S. citizen seized from the streets of Chicago in 2002, whisked away, put into solitary confinement, and held for the better part of five years with no access to a lawyer, no way to talk with his family, no charges filed, and no opportunity to contest his detention. It was only after the Supreme Court threatened to intervene that the Justice Department found charges — criminal charges unrelated to the War on Terror — to bring against Jose Padilla. He was convicted. I don’t make apologies for Padilla. He’s probably a bad guy. He probably deserved worse than he got. But we do have a rule of law, and one would expect that the rule of law at least extends to a prohibition against whisking U.S. citizens off the streets of a major city and putting them into solitary confinement for five years without access to anyone, including a lawyer, without charges being filed, and without an opportunity to protest their detention.

Bennis v. Michigan

The next case has an extraordinary factual background. It’s called *Bennis v. Michigan* (1996) and it’s about something again which very few people know about: “civil asset forfeiture.” The interesting facts were these: Mrs. Bennis owned a car. Her husband took the car and didn’t ask her. If he had asked her, she wouldn’t have agreed. He

picked up a prostitute and had sexual relations in the car. He was arrested, the prostitute was arrested, and the car was arrested. How do you arrest a car? Well, you can arrest the car because the civil asset forfeiture laws say that any asset that facilitates the commission of crime is subject to confiscation, and there was no innocent-owner defense at the time in the State of Michigan, which meant that Mrs. Bennis had no recourse.

She said, “Listen! This was my car. He didn’t ask me. If he had asked me, I would have said no. He took it without my consent, without my knowledge. Indeed, I am the victim. He picked up a prostitute. I would like my car back. If you insist on keeping my car, I would like money in compensation.” The court said, “You don’t get the car, and you don’t get the money, because the car has facilitated the commission of a crime.” This has become a very big money raiser for a lot of law enforcement agencies in the war on drugs. That’s where this has come from, and that’s why it is so popular. The federal laws have been changed somewhat, but many states still have no innocent-owner defense.

Kelo v. City of New London

You’ve probably heard of the next case, which is about eminent domain: *Kelo v. City of New London* (2005). The Institute for Justice litigated this case and lost — yet won, as I’ll explain in just a moment. Mrs. Kelo had a cherished home in which she lived, and she wanted to stay there. A private developer went to the city of New London, Connecticut, and said, “Let me have her home.” The city said, “Why do you want it?” The developer said, “I’ve got some contacts at Pfizer. I think we can put up a pharmaceutical plant. If that doesn’t work out, we’ll put up some hotel and office buildings. In any event, what we’re going to do is expand the tax base, and we’re going to create a bunch of jobs.”

Mrs. Kelo said, “Whoa! What about the Fifth Amendment? It says, ‘...nor shall private property be taken except for *public* use.’ We ordinarily think of public use as pertaining to things like roads and military bases, not giving private property — a

private home — to a private developer for a factory, hotel or an office building.” The Supreme Court said, “Well, you know, the Framers didn’t really mean public *use*. They may have said it, but they didn’t mean it. What they really meant was public *purpose*. After all, Pfizer can do more with that property than you can by just living in it. More jobs and tax revenue may not be a public use but surely they serve a public purpose.” So if you think your home is safe from the government bulldozer, think again.”

The *Kelo* case was an enormous loss because of the Court’s *horrible* opinion. But the Institute for Justice, a public interest law firm, knowing that you could fight battles in more than one venue – one being the courtroom, the second being the court of public opinion – took this case to the media and to the people. As a result of the Institute’s crusade, 43 states have now passed laws or constitutional amendments of their own that, to one degree or another, have trumped the effects of the *Kelo* opinion. That’s a reminder, by the way, that states sometimes do a better job of protecting your rights than the federal government does. The federal Constitution sets a floor. The states can always go beyond that.

Three More

For the other three cases in the book, let me give you just a few sentences about each of them.

While *Kelo* was a physical taking — the physical seizure of property — *Penn Central Transport v. New York City* (1978) was a regulatory taking. The rule established in the case is that unless a regulation reduces the value of your property to just about zero, you’re going to get no monetary compensation. Penn Central lost \$150 million because they couldn’t build on top of a facility they had in New York City. They got zero monetary compensation.

United States v. Carolene Products (1938) deals with the right to earn an honest living: This case divided our rights into two categories. The first is composed of certain fundamental rights such as voting, access

to the courts, some parts of the Bill of Rights, and a recently-discovered right to privacy. The courts are going to protect these rights rigorously and vigorously. On the other hand, the courts are not going to protect economic liberties such as the right to contract, the right to property, the right to work for an honest wage that you and your employer find acceptable, and the right to start your own business.

The final case is *Grutter v. Bollinger* (2003), the University of Michigan Law School affirmative action case where the general rule against discrimination by race was set aside in the name of diversity. One would think an educational institution would be mostly interested in diversity of intellectual and ideological viewpoint. Yet if you surveyed law professors at the nation’s law schools, including the University of Michigan, you’d find that Democrats outnumber Republicans about seven to one. Whatever your political persuasion, seven to one is not diverse, and it’s certainly not a reflection of the general population. One would think that if we’re to have affirmative action at the nation’s law schools, it would be an affirmative program in support of hiring Republican law professors. Don’t hold your breath.

Those are the 12 worst cases — the much-abbreviated version. In a free society, we shouldn’t have to ask government permission to participate in an election or to start our own business, and government shouldn’t be authorized to take away somebody’s private property and give it to some other private owner.

The only way those abuses of government power can be curtailed is if the judicial branch is vigorously engaged — if the judicial branch binds the legislative and executive branch in the chains of the Constitution. I think, regrettably, the Supreme Court has more than occasionally been derelict in fulfilling that obligation, and that’s the story of *The Dirty Dozen*.

After his remarks, Mr. Levy answered questions from the audience.



Carr Hagerman: I've been reading about Proposition Eight, dealing with the issue of gay marriage in California. I think what's happening there has the potential — at least it looks like it — to lead to the Supreme Court. I'm wondering if you have insight on any of what's going on.

Levy: The Supreme Court of California decided that gay marriages would be permissible. As a result the public decided in Proposition Eight that they were going to trump what the Supreme Court had said and that marriage would be applicable only to the union of a man and a woman. There was a challenge to Proposition Eight, and that's what's now pending in the court and was just recently argued. The challenge is not about whether gay marriage is OK or not OK; it's rather about whether Proposition Eight was conducted properly from a procedural perspective. That's what the court is going to decide. Proposition Eight will probably stand — at least that's what people who listened to the oral argument surmise. [The California Supreme Court did, in fact, uphold the constitutionality of Proposition Eight in May 2009. Ed.] Maybe there will be a later challenge about whether the equal protection clause in the 14th Amendment of the U.S. Constitution requires that same-sex couples be treated the same as heterosexual marriages. I don't expect anything in the U.S. Supreme Court for quite some time, and it may never get there.

Milo Schield: You gave us great negative examples. Do you see any positive signs at the Supreme Court level?

Levy: I do see some positive signs. First of all, there was *District of Columbia v. Heller* in 2008. A previous case in 1939, *United States v. Miller*, established that individuals did not have a right to keep and bear firearms, privately owned, in their homes for self-defense. But in June 2008, the U.S. Supreme Court, with Justice Scalia writing a five-to-four majority opinion, effectively rewrote Second Amendment jurisprudence and said that the Second Amendment *does* secure an individual right to keep and bear arms for self-defense in the home, even if totally unrelated to militia service. Thus, the *Heller*

case, even though it didn't officially overturn *Miller*, has really rewritten the Second Amendment for the good. That's a mark of some movement in the right direction.

We've also had two campaign finance cases that have constituted movement in the correct direction. *Wisconsin v. Federal Elections Commission* regarding the legality of issue ads, and the Millionaire's Amendment case, *Davis v. Federal Elections Commission*, regarding limits put on contributions to candidates. Both of those decisions went the right way. We've also had two affirmative action decisions that went the right way, one in Seattle and one in Louisville.

So there has been some progress. I don't expect there will be a whole lot of progress in the direction that I would like to see under the current administration. But I don't dismiss the possibility that more of these *Dirty Dozen* cases might, at some stage, be at least chipped away, if not overturned.

Matthew Meyer: My question focuses on the European Union Constitution. Do you have any observations about it and its focus on positive rights and, maybe, the populist resistance to the Constitution as being a reflection of the political leanings of the Europeans?

Levy: I don't know much about that topic. I am very much against any focus on positive rights. Again, you may recall that positive rights are those that impose affirmative obligations on other people. Positive rights really ought to be called entitlements. The U.N. Declaration of Human Rights was *loaded* with positive rights. Any focus on positive rights is anti-liberty. But I don't know enough about the EU Constitution to comment any further than that.

Sondra Erickson: Why didn't *Roe v. Wade* make *The Dirty Dozen*?

Levy: We surveyed 74 like-minded legal scholars to give us some guidance. We weren't bound by the results, but we were guided by the results. I must say that *Roe v. Wade* was high on the list to

be included, and we did not include it. Why not? Well, to understand the abortion issue, I think you have to separate it into two questions. The first question is whose rights trump? The rights of the mother or the rights, if there are any rights, of the fetus? That's the threshold question: When does life begin? But there's another question: Who gets to decide the first question? I have an opinion about the first question, and I think everybody in this room has an opinion about the first question. But the first question is *not* within the purview of judges.

Justice Blackmun, oddly enough, who wrote *Roe v. Wade*, got it exactly right. I happen to have his quotation here. He said in the *Roe v. Wade* opinion, "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any conclusion, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." Now, having made that powerful point, he went ahead to do *exactly* what he said the court shouldn't do. He decided that life begins after the first trimester. That was later modified by *Planned Parenthood v. Casey*, the 1992 case that substituted, instead of trimester, "pre-viability" and "post-viability."

I think what's interesting here is to compare the conservative and liberal positions on *Roe v. Wade* juxtaposed against their positions on Terri Schiavo. This gets to the question of who makes the decision about when life begins and ends. Terri Schiavo, you may recall, is the lady who was in a persistent vegetative state in Florida for 15 years. There was a big battle between her parents and her husband about ending her life. Consider two sides of the same coin. *Roe v. Wade*, when does life begin? And Terri Schiavo, when does life end?

What was the conservative position? The conservative position on *Roe v. Wade* was we don't want the federal government dictating to the states what the law should be. This should be a matter for the states to decide. The states should serve as

50 experimental laboratories. Disaffected voters then have the option to vote with their feet: They can go where the laws are congenial. We don't want federal involvement, least of all by the U.S. Supreme Court. But along comes Terri Schiavo. What's the conservative position? The conservative position is we want the Congress and the executive branch to instruct the courts and, ultimately, the Supreme Court to tell the State of Florida what the rule should be. Now, you can't have it both ways. Either it is a federal responsibility, or it is not.

The liberal position, by the way, was every bit as inconsistent, and I think hypocritical. It was just the flipside. The liberal position on *Roe v. Wade* was that we need the federal government to dictate to the states, because we can't trust these states to establish a pro-choice regime. We need the U.S. Supreme Court to step in and set the rules for *everybody*. But along comes Terri Schiavo. What's the liberal position? Why in the world is the Supreme Court stepping in here and trying to tell the State of Florida how to run things?

My position — the libertarian position — is that these are not matters for the courts to decide. These are matters for state legislatures to decide, because there are no objective legal standards that judges — who are not vested with any particular moral authority — can apply. That said, many libertarians, myself included, tend to be pro-choice.

The criteria we had for including cases in the book were that they had to be wrong on two counts. First, they had to be wrongly reasoned as a legal matter. But second, they had to lead to outcomes that we libertarians consider to be anti-liberty. Many, perhaps most libertarians *don't* consider the outcome in *Roe v. Wade* to be anti-liberty. It wasn't included for that reason.

Bill Gatton: What was the final upshot of *Kelo*? Did Mrs. Kelo get to keep her house in the long run?

Levy: One interesting upshot is that after all the talk about a Pfizer pharmaceutical plant, hotels and

office buildings replacing the homes in New London, if you take a look at the property, there has been no development *whatsoever*. It all fell through. All of the talk about how important it was to increase the tax base and to create jobs went for naught.

What about Mrs. Kelo? Her house has been moved lock, stock, and barrel to a new location that she found to be OK, even though, of course, she would have preferred to stay where she was. The person who funded this has agreed to make the house available as sort of a museum, so people can come in and celebrate how tyrannical the government can be when it wants to be. That's an outcome that Mrs. Kelo finds to be very satisfactory, and she's fully supportive of it.

Bob Babione: We have an African-American president. How will the court treat affirmative action going forward?

Levy: One would hope that the election of Barack Obama should drive the final nail into the coffin of racial preferences. If judges paid attention to these things, it would. Of course, judges should have decided that the final nail was driven a long time ago, but they have not decided that. So I don't know what's likely to transpire. I do think that Obama will have an effect on the judiciary, and that effect will tend toward an extension of affirmative action programs, rather than a truncation. As you probably know, Obama has indicated that he wants to appoint judges who have a social consciousness, that experience the felt necessities, that have the empathy to know what it's like to be poor or black or gay.

No one in the conservative or libertarian movement that I know is saying we want judges who don't have empathy. What they are saying is that empathy must not dictate a judge's jurisprudence. The words in the Constitution are what matter, and a social consciousness and empathy are *not* substitutes for constitutional interpretation.

Nonetheless, President Obama is likely to appoint those kinds of judges. He's not going to have much effect on the Supreme Court in the near term,

because the three vacancies—assuming that nothing untoward happens to one of the conservatives or Justice Anthony Kennedy — are likely to be John Paul Stevens, who is 88, Ruth Bader Ginsburg, who is not in good health, and David Souter, who reportedly doesn't like the work. Even if we have "Living Constitutionalists" appointed to fill those positions, the court is not going to move very much to the left.

On the other hand, Obama will have an *enormous* impact on the appellate and trial courts. Bill Clinton and George W. Bush each had roughly 300 appointments to the appellate and trial courts. That's a lot, and there are many openings on the appellate court. Those appointments will make a big difference because the appellate courts handle about 3,000 cases a year. The Supreme Court handles about 70. So you've got 2,930 out of 3,000 cases where the appellate court is the final word. I think Obama *will* have a very significant effect moving the courts to the left.

Getting back to your original question, that probably will mean that affirmative action, or what really ought to be called racial preferences, is going to last a lot longer than it should.

Pearlstein: Bob, all three of our sponsors — the Institute for Justice, the Federalist Society, and Center of the American Experiment — live for the kind of intellectual richness, bravery, and appropriate contentiousness you have brought to the podium this evening. We are very thankful. ■

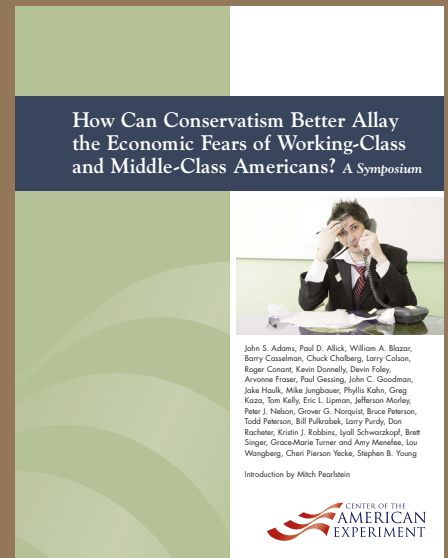
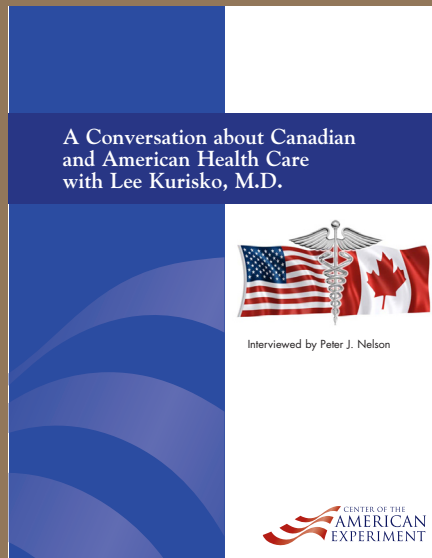
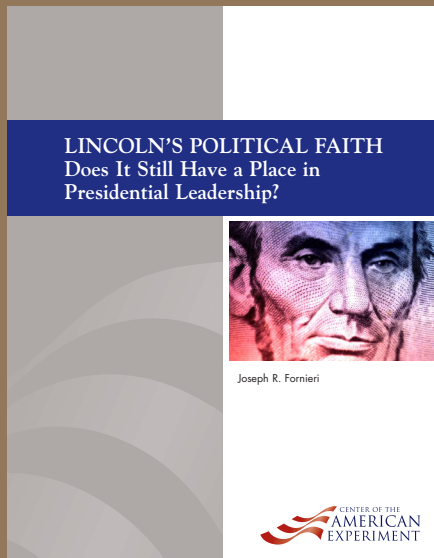


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