THE DIRTY DOZEN

How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom

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PREFACE

Guns, Bailouts, and Empathetic Judges

First, the good news: Less than 60 days after publication of *The Dirty Dozen*, the Supreme Court issued its opinion in *District of Columbia v. Heller*,[1] the successful Second Amendment challenge to Washington, D.C.'s handgun ban. As a result, *United States v. Miller*,[2] discussed in Chapter 6, is no longer controlling legal authority on gun owners' rights. That's a big step in the right direction for residents of the nation's capital who want to be able to defend themselves in their own homes. Equally important, the Supreme Court has signaled its willingness to bind local legislatures with the chains of the Constitution – an example of principled judicial engagement. More about *Heller* in a moment.

We can also report modest progress in another area: political speech (Chapter 5). In June 2008, Justice Samuel Alito, the most recent Supreme Court appointee, joined by his conservative allies – Chief Justice John Roberts and Justices Clarence Thomas and Antonin Scalia, along with swing vote Anthony Kennedy – held that section 319 of the Bipartisan Campaign Reform Act, popularly known as McCain-Feingold, was unconstitutional. That section – the so-called Millionaire's Amend-

ment – provided that maximum campaign contributions to a candidate, but not to his opponent, could be tripled from $2,300 to $6,900 if the opponent spent more than $350,000 of his own money trying to get elected. In *Davis v. Federal Election Commission*,[3] the Court declared that discriminatory burdens on rich adversaries could not prevent corruption or even the appearance of corruption. Rich candidates do not corrupt themselves when they dip into their own pockets. Instead, stated the Court, the real purpose of the Millionaire's Amendment was to level the financial playing field by punishing more affluent candidates. That purpose is anathema to the First Amendment.

Regrettably, the bad news outweighs the good. President Barack Obama and his supporters in Congress, taking full advantage of the Supreme Court's misguided interpretations of the General Welfare Clause (Chapter 1) and Commerce Clause (Chapter 2), have embarked on an unprecedented expansion of federal power. "You never want a serious crisis to go to waste," said Rahm Emanuel, Obama's chief of staff, to a Washington, D.C. gathering of top executives.[4] Evidently, Emanuel's boss sensed a golden opportunity. He has seized on the current economic turmoil to justify a radical redistributionist and regulatory agenda encompassing a far-reaching array of projects having little to do with the crisis itself.

The massive $787 billion stimulus package, enacted in February 2009, and the nearly-as-massive $410 billion omnibus spending bill, signed a month later, contemplate programs ranging from local mass transit to child care, the National Endowment for the Arts, health insurance, the Smithsonian, food stamps, and, of course, public education – none of which is authorized by Article I, section 8 of the Constitution, where the powers of Congress are enumerated and thereby limited.

If that avalanche of new spending weren't bad enough, consider how the Non-Delegation Clause (Chapter 4) has been shredded by two successive administrations with help from Congress. Both George W. Bush and Barack Obama decided to provide liquidity to the financial system by bailing out institutions that bet heavily on sub-prime mort-

gages and lost. The salvage operations required enactment of new laws, which are supposed to emanate from Congress. Tragically, at such a crucial time, our federal legislature simply ignored the crystalline pronouncement in the first clause of Article I of the Constitution: "All legislative Powers herein granted shall be vested in a Congress."

Note the key terms "All" and "shall." They indicate that application of the clause is neither selective nor discretionary. Yet Bush and Obama relied not on the legislature but on their secretaries of the treasury, who had been granted vast lawmaking powers by a Congress oblivious to the plain command of Article I. Some calls are tough. The unconstitutionality of the bailout is not one of them. Let's take a closer look.

Unconstitutional Relief for Troubled Assets[5]

The Troubled Asset Relief Program, known as TARP, has survived numerous transformations. Originally enacted in October 2008 as a rescue program under EESA, the Emergency Economic Stabilization Act,[6] TARP authorized former Treasury Secretary Henry Paulsen to buy toxic assets from insolvent banks. That plan morphed into a scheme to inject capital directly by acquiring stock in selected financial institutions. Shortly thereafter, the plan reverted to asset purchases. Along the way, Bush raised the stakes by allotting billions to bail out the automobile industry. Then the Treasury Department floated the idea of government insurance to guarantee private debt and restore market confidence.

None of that worked, so taxpayers and investors eagerly awaited a fresh look from Obama's new Treasury Secretary, Timothy Geithner. But Geithner, like Paulsen, seemed to be improvising. He rejected nationalization, eschewed a "bad bank" for toxic assets, and downplayed government guarantees. Instead, he proposed a public-private partnership to purchase assets by means undisclosed for prices undetermined, at a total cost of roughly $1 trillion – the vast bulk of which would come from taxpayers. Many economists and investors remained skeptical.

Perhaps they realized that more government meddling in the financial sector might make a bad situation worse. After all, a succession of misguided government policies over many years helped cause the current mess. First, Congress enacted double taxation of dividends and deductibility of interest, which gave rise to more borrowing and greater leverage. Then Alan Greenspan's Federal Reserve System fueled the credit crisis with artificially low interest rates. That was compounded by political pressure for affordable housing and implicit taxpayer guarantees to Fannie Mae and Freddie Mac – all of which led to sub-prime lending and high-risk securitized mortgages. Not a bad deal for private financial institutions: Heads, the banks win; tails, the taxpayer loses.

Of course, if we don't like the outcome when federal officials call the shots, we can vote the bums out of office. Or can we? Not if the new policies are spawned by unelected bureaucrats, unaccountable to the voters. Almost no one in the media or the policy community raised this obvious question: Where was Congress during the crafting of TARP's various iterations? Each version of the bailout was engineered, announced, and implemented unilaterally by the Secretary of the Treasury.

Congressional delegation of lawmaking power is permissible, said the Supreme Court in 1928, but only if Congress legislates "an *intelligible principle* to which the person or body authorized ... is directed to conform."[7] As we observed in Chapter 4, the intelligible principle does not have to be very precise: Not a single post-New Deal statutory program has been invalidated as an unconstitutional delegation of legislative power to the executive branch. Then again, the extent of TARP's delegation was unthinkable until now. What was the intelligible principle to which Henry Paulsen and Timothy Geithner were to conform? No one knows – least of all the taxpayers, who are bearing the cost. "Make things better" is not an intelligible principle.

According to the preamble of EESA, the objective of the law was "to purchase ... troubled assets for the purposes of providing stability to and preventing disruption in the economy and financial system" – a noble ambition, but utterly inadequate as a guide for the Treasury Sec-

retary in promulgating specific rules for the bailout. TARP's unpredictability, fits and starts, and total lack of transparency demonstrate that Paulsen and Geithner could do whatever they wanted – unimpeded by any congressional directive. Indeed, Section 101 of EESA specifies that asset purchases can be undertaken "on such terms and conditions as are determined by the Secretary."

Essentially, the bailout reallocates resources from taxpayers to those individuals and corporations who incurred excessive risks and made bad decisions; it substitutes politicians for shareholders in running financial institutions; and it prevents capitalism from performing its periodic restorative function, which is to purge inefficient businesses and inept management. Those are major defects of TARP; yet Congress has abdicated its responsibility and conferred nearly total discretion on the secretary of the treasury.

We are not suggesting that Congress must devise and structure every aspect of the bailout. That job can still be done by "experts" in the executive branch. But Congress, at a minimum, has to review the output and give its stamp of approval. Instead, Congress enacted legislation relegating itself to the role of mere observer. Paulsen, then Geithner, was given *carte blanche*. Consequently, TARP's details were opaque – not only to the public but to Congress itself. Which of 535 legislators accepted responsibility when Geithner developed his public-private partnership? How do we know that opposing views were adequately aired in the corridors of the Treasury? Where is the record of deliberations? What factors were considered? Who is accountable to the voters and taxpayers if Geithner's plan does not work? It's hard to imagine a more secretive process or a more unconstitutional delegation of legislative power.

The scale and immediacy of the financial crisis caused many in Congress and the executive branch to dismiss constitutional concerns. But a debate over unconstitutionality serves three vital purposes: It imposes a heavy burden on proponents of the bailout to explain why the Constitution can be violated with impunity. It reinforces the case for abandoning the program once any true emergency has passed. And it

helps establish a presumption against adopting similar measures that might be proposed to resolve future crises.

Maybe TARP is necessary. Maybe it will even help. But necessary or not, temporarily effective or not, the bailout is unconstitutional. And constitutionality is not restored merely by an invocation of "emergency powers" by the administration and Congress. Conservatives should have learned that lesson when the Great Depression triggered the New Deal expansion of government. Liberals should have learned it more recently when civil liberties were compromised in pursuit of real and illusory terrorists. To preserve the rule of law, we must condemn legislation that offends the Constitution – no matter how unlikely the prospect that courts will invalidate the offending acts – even if, from a policy perspective, we believe that the programs are needed.

When policy is allowed to trump constitutionality, three choices are available to honest citizens. They can abandon the proposal and try to accomplish the desired ends using alternative but constitutional means. They can change the Constitution so that the proposal is no longer unlawful. Or they can acknowledge the truth – that they are violating the Constitution in pursuit of ends that could not be otherwise attained.

But the Bush and Obama administrations chose none of the above. Instead, they launched the bailout without a word about its unconstitutionality. That's a recipe for lawlessness, not to mention a precedent that will rear its ugly head every time there's trouble that the federal government thinks it can fix.

Empathy on the Bench[8]

What about the courts? Won't they overturn an executive branch program that blatantly contravenes the text of the Constitution? Sad to say, probably not. The technical problem is finding someone who is both willing and legally qualified to sue. The larger substantive problem is that most judges no longer treat the text of the Constitution as sacrosanct, even when its meaning is unmistakably clear. That predica-

ment is likely to get worse before it gets better. Based on his public pronouncements, Obama's judicial appointments will not be jurists who assign predominant weight to the original meaning of the constitutional text.

With 12 years under his belt as lecturer and senior lecturer at the estimable University of Chicago Law School, Obama is no stranger to the Constitution. Nonetheless, he accepts the fashionable yet flawed notion of a malleable, "living" document, which has sufficient structural flexibility to accommodate rapidly changing social, economic, and technological conditions. Obama's implementation of that theory will be to appoint judges who "stand up for social and economic justice"[9] and have "empathy ... to understand what it's like to be poor, or African-American, or gay, or disabled, or old."[10] Obviously, empathy is a virtue, and a judge who places his or her vision of social and economic justice above the rule of law may confer benefits on some litigants. The question, however, is whether empathy and social consciousness should dictate how a judge interprets the Constitution.

The editors of the *New Jersey Lawyer*, for example, want judges to issue decisions that reflect the "felt necessities of the time."[11] In a July 2008 editorial, the *NJL* criticized the *Heller* decision, not because it misinterpreted the Second Amendment but rather because "gun violence plaguing our nation's cities is, in a word, deplorable.... [G]overnmental gun control is needed now more than ever."[12] In response, one reader wondered whether the editors would endorse "conservatives who might find among the 'felt necessities of the time' a reason to restrict reproductive rights."[13] Another reader asked whether the editorial board would have judges "prohibit the free exercise of religion by Muslim citizens because of recent acts of terrorism."[14] Evidently, one person's "felt necessities" are another person's despotism.

As the confirmation hearings for Obama's judicial nominees unfold, ask yourself whether you like the notion of a living Constitution that can be construed by empathetic judges with a social consciousness, who will render subjective judgments about felt necessities. Consider as well the alternative of "originalists" who are anchored by the written

text of the founding documents. The hearings should be instructive. While senators should not seek a commitment from the nominee to rule a particular way on an issue, they should insist on an explication of the candidate's judicial philosophy. A good starting point would be to ask each nominee to identify all – or even a few – provisions of the Constitution that impose meaningful constraints on federal executive or legislative authority.

Near-term, unless something unpredictable happens to Justice Kennedy or one of the four conservative justices, Obama will not have much impact on the ideological mix of the Supreme Court. Liberal justice David Souter has announced his retirement, to be effective before the start of the October 2009 term. The next two most likely retirees are also liberal: John Paul Stevens, who's 89; and Ruth Bader Ginsburg, who's not in good health. Obama will probably nominate liberals to replace liberals.

On the other hand, Justice Scalia is 73, and two Obama terms might be more than Scalia is willing to serve. Moreover, Obama will have an enormous impact on the trial and appellate courts. George W. Bush and Bill Clinton each made roughly 300 appointments over their eight-year terms. Today, waiting to be filled are 54 trial court openings and 15 vacancies on the appellate courts,[15] where thousands of cases are decided each year. Only 70 to 80 of those cases typically make it to the Supreme Court. So appellate appointments are critically important.

A Victory for Individual Rights[16]

Naturally, we would like to end this Preface on an optimistic note. And so we return to *District of Columbia v. Heller*, the blockbuster Second Amendment case that we mentioned at the outset. The Supreme Court released the *Heller* opinion on June 26, 2008 – the last day of the Court's 2007-08 term. Nearly six years earlier, the case had been filed under the name *Parker v. District of Columbia*, but Ms. Parker and four other plaintiffs were dismissed for lack of standing – a complicated legal question that we need not explore here. Fortunately, the sixth plaintiff,

Dick Heller, had standing and was able to continue the litigation under his own name.

In Chapter 6, we wrote that *Parker* (later, *Heller*) "could well be headed to the Supreme Court; and that is where it belongs. The citizens of this country deserve a foursquare pronouncement from the nation's highest court about the real meaning of the Second Amendment." We also wrote, "the Constitution is on our side." Thankfully, the Supreme Court agreed. It took years of litigation,[17] a feckless 32-year handgun ban in the nation's capital, and a 69-year-old Supreme Court case, muddled and misinterpreted by appellate courts across the country. When it was over, the Supreme Court, by a razor thin 5-4 vote, proclaimed unequivocally that the Second Amendment secured an individual right to keep and bear arms in the home for self-defense. That was the happy ending in *Heller*, the most important Second Amendment case in U.S. history.

Essentially, Justice Scalia reinvigorated the Second Amendment. Joined by Roberts, Alito, Kennedy, and Thomas, Scalia held that the militia clause ("A well regulated Militia, being necessary to the security of a free State") announces one purpose of the Second Amendment but does not limit the right expressly stated in the operative clause ("the right of the people to keep and bear Arms, shall not be infringed"). Nor did the Court's prior precedent, *United States v. Miller*, say otherwise. It established simply that some weapons – e.g., sawed-off shotguns – are not protected unless they can be shown to have military utility and be in common use. Moreover, declared Scalia, the District of Columbia may not categorically ban "an entire class of 'arms'" that Americans overwhelmingly choose for the lawful purpose of self-defense.[18]

In his dissenting opinion, Stevens – joined by Justices Stephen Breyer, Ginsburg, and Souter – not only quarreled with Scalia's interpretation of historical events but also implied that Scalia had abandoned true judicial conservatism by dragging the Court into the "political thicket" of gun control. "Judicial restraint would be far wiser," wrote Stevens, than mediating a political process that is "working exactly as it

should."[19] That's quite an astonishing statement coming from Stevens – the same justice who had no such reservations just one day earlier when he voted to invalidate Louisiana's death penalty for child rape and substitute an outright ban on capital punishment for any crime that isn't fatal to its victim.[20]

Breyer, who filed a separate dissent in *Heller*, proffered this extraordinary statement: "The decision threatens to throw into doubt the constitutionality of gun laws throughout the United States."[21] Not so. Forty-four states have constitutional provisions protecting an individual right to keep and bear arms. Legislatures in all 50 states have rejected bans on private handgun ownership. Concealed carry is permitted, with varying degrees of administrative discretion, in all states except Wisconsin and Illinois. Any of the "gun laws throughout the United States" that are now unconstitutional pursuant to *Heller* would already have been overturned under the robust pro-gun-rights legal framework existing in most states. Thus, the major impact of the *Heller* opinion will be felt not "throughout the United States" but in a few cities and other political subdivisions that were authorized by their states to enact gun control laws different from those prevailing elsewhere in the state.

In any event, *Heller* is merely the opening salvo in a series of cases that will ultimately resolve what weapons and persons can be regulated and what restrictions are permissible. The Court will also have to decide whether Second Amendment rights can be enforced against state and local governments outside of Washington, D.C., a federal enclave that is controlled by Congress.[22] Despite those remaining hurdles, it's fair to say that the Court's landmark decision in *Heller* makes the prospects for reviving the original meaning of the Second Amendment substantially brighter. Not even seven decades of uncertain precedent under *United States v. Miller* kept the Court from expanding individual liberty. For readers of *The Dirty Dozen*, that's one case down, 11 to go.

Notes

1 *District of Columbia v. Heller*, 554 U.S. ___; 128 S. Ct. 2783 (2008).
2 *United States v. Miller*, 307 U.S. 174 (1939).
3 *Davis v. Federal Election Commission*, 554 U.S. ___; 128 S. Ct. 2759 (2008).
4 Rahm Emanuel, addressing the *Wall Street Journal* CEO Council, Washington, DC, November 18, 2008. See http://www.youtube.com/watch?v=_mzcbXi1Tkk.
5 This section is extracted, in part, from three articles by Robert A. Levy: "Is the Bailout Constitutional?" *Legal Times*, October 20, 2008; "Constitutionally Troubled: 'TARP' and Its Delegation of Legislative Power," *Legal Opinion Letter*, Vol. 19, No. 4, Washington Legal Foundation, February 27, 2009; "Constitutional Basics for President Obama," *Cato Policy Report,* March-April, 2009.
6 Public Law 110-343.
7 *J.W. Hampton Jr. Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis added).
8 See Robert A. Levy, "Judicial Appointments: What's on Tap from Obama or McCain?" *FindLaw Writ Legal News & Commentary*, October 2, 2008, http://writ.news.findlaw.com/commentary/20081002_levy.html; Robert A. Levy, "Constitutional Basics for President Obama," *Cato Policy Report,* March-April, 2009.
9 Quoted in Juliet Eilperin, "McCain Says He Would Put Conservatives on Supreme Court," *Washington Post*, May 7, 2008.
10 Quoted in Jonah Goldberg, "Courting Disaster," *National Review Online*, April 18, 2008.
11 Editorial, "Original Intent and Right to Bear Arms," *New Jersey Lawyer*, July 21, 2008.
12 Ibid.
13 Letter to the Editor, "A Hint of Orwell," *New Jersey Lawyer*, August 4, 2008.
14 Letter to the Editor, "'Felt Necessities': The Wrong Reason," *New Jersey Lawyer*, August 4, 2008.
15 "Vacancies in the Federal Judiciary – 111th Congress," May 3, 2009, http://www.uscourts.gov/cfapps/webnovada/CF_FB_301/index.cfm?fuseaction=Reports.ViewVacancies.
16 This section is drawn from Robert A. Levy: "Second Amendment Aftermath," *Washington Times*, July 3, 2008.
17 One of the authors, Robert A. Levy, served as co-counsel to Mr. Heller.
18 *Heller*, 128 S. Ct. at 2817.
19 *Heller*, 128 S. Ct. at 2846 (Stevens, J., dissenting).

20 *Kennedy v. Louisiana*, 554 U.S. ___; 128 S. Ct. 2641 (2008).

21 *Heller*, 128 S. Ct. at 2870 (Breyer, J., dissenting).

22 Most rights in the Bill of Rights, but not yet the Second Amendment, have been enforced against state and local governments using the Due Process Clause of the 14th Amendment. The legal doctrine is known as "incorporation." A majority of legal scholars expect the Supreme Court to incorporate the Second Amendment as well. When the Court takes up that issue, it will have an opportunity to reconsider whether a different provision of the 14th Amendment – the Privileges or Immunities Clause – is a more appropriate basis for incorporation than the Due Process Clause. As we noted in Chapter 11, one principal purpose of the Privileges or Immunities Clause was to ensure that newly freed slaves would enjoy economic liberty, including the right to contract and own property. Regrettably, a mere five years after the 14th Amendment's ratification, the Privileges or Immunities Clause was stripped of its intended meaning in the *Slaughter-House Cases*, 83 U.S. 36 (1873) – an egregious example of judicial activism that ushered in Jim Crow laws and state-enforced violations of economic liberty. One hopes the Court will revisit *Slaughter-House*, the pernicious effects of which continue to this day.

FOREWORD

Many of the most harmful decisions of the U.S. Supreme Court have been subject to sustained attack in separate places. But I am not aware of any volume whose major function is to identify, gather, and systematically critique the worst of those decisions in one place. Such an effort is especially valuable because Supreme Court cases often involve complicated facts or obscure constitutional provisions but have sweeping national impact. Regrettably, the Court has too often taken the plain wording of the Constitution and interpreted it to mean exactly the opposite of what the Founding Fathers intended. By that process the Court profoundly altered the American legal, political, and economic landscape.

Into this void step two fearless writers, Bob Levy and Chip Mellor, who through their work at, respectively, the Cato Institute and the Institute for Justice, have been deeply involved in shaping our legal and political culture. Commendably, they act with one consistent objective: to increase the protection of individual rights by limiting the size and functions of government. That singular and admirable vision exerts a profound influence on their selection of cases for inclusion in *The Dirty Dozen*—the most damaging decisions of the Supreme Court since the New Deal. For many readers, lawyers and nonlawyers alike, this will be their first critical exposure to these cases.

Levy and Mellor apply two standards to select cases for inclusion in *The Dirty Dozen*. First, the constitutional foundations for the decision must be weak—measured, of course, against the theory of limited government that they and I defend. Second, the social consequences of the decision must be negative. While I am in complete agreement with the authors on the virtues of limited government, my agreement on cases worthy of inclusion is very high but not perfect. That is one reason why this book is so important. Its value lies in its ability to provoke debate and prompt the reader to check his or her assumptions about liberty and the rule of law. Whether in the context of legislation, political reform, or selection of judges, such debate will be very healthy for the future of our nation.

Let me briefly discuss each of the cases, and explain in a sentence or two my position on their inclusion.

The first case, *Helvering v. Davis* (1937), which upheld the Social Security system as a public expenditure for the general welfare, clearly meets the authors' two-part test. By endorsing Social Security as a supposed means to counter massive unemployment, the Court essentially transformed the Constitution's General Welfare Clause from a limitation on government power to a source of added power. Moreover, by taking a highly deferential view toward the constitutionality of congressional enactments—basically giving Congress carte blanche to legislate without rigorous judicial review—*Helvering* frustrated the development of comprehensive private pension systems, imposed tax barriers to new job creation, and created intergenerational inequities under a scheme that has proved virtually impossible to change now that it is embedded in the social fabric.

Unquestioned kudos also go to the authors' second selection, *Wickard v. Filburn* (1942), for its extravagant reading of the Commerce Clause. By extending federal regulatory authority to nearly every productive economic activity, *Wickard* eviscerated the principle that the federal government has only those powers expressly granted to it in the Constitution. And for this reason: to sustain an ill-conceived cartel whose chief purpose was to keep the domestic price of wheat close to three times the world price. Thereafter, federal authority spread like wildfire into countless areas of economic and personal activity.

The third case, *Home Building & Loan Association v. Blaisdell* (1934), also has a secure place on the list of ill fame. Until that decision, contracts between private parties were protected from state government interference by express constitutional provision. The Court, by holding that the Constitution allowed states to excuse defaults on home mortgages, made banks and their depositors bear the brunt of unwise federal monetary policies that were the source of deflation during the Hoover and Roosevelt administrations. And going forward, *Blaisdell* ushered in widespread state intervention regarding contracts that had no pretense of dealing with a system-wide economic breakdown.

Next, the authors critique the concentration of legislative, executive, and judicial powers in the hands of unelected administrative agencies. That development has vastly increased the size, ambition, and unaccountability of the federal bureaucracy in ways that would have been incomprehensible to the Founders. Levy and Mellor explain how *Whitman v. American Trucking Associations, Inc.* (2001) exacerbated this fundamentally antidemocratic growth of government. Still, the more significant case on administrative lawmaking, in my view, is *Chevron U.S.A., Inc. v. Natural Resources Defense Council* (1984). It was *Chevron* that inaugurated the principle of high judicial deference to administrative agencies on practically all questions of law. Those agencies—which are nowhere to be found in the original assignment of powers to the legislative, executive, or judicial branches—were allowed to push the law to its limits and beyond.

McConnell v. Federal Election Commission (2003) also holds a secure place on the roll call of most dubious Supreme Court decisions. In the name of campaign finance reform, basic principles of the First Amendment were sacrificed. It is quite simply perverse to think that political speech should be more vulnerable to government regulation than obscenity. And it is naïve at best to think that any legislative reform could somehow keep money out of politics. There is only one way to move in that direction: reduce the significance of politics by reining in the power of the federal government. Lacking the courage to do that, the Supreme Court has endorsed legislation that protects incumbents, blocks organized dissent, undermines political parties, and in general invites the massive degradation of the political process.

United States v. Miller (1939), with its cavalier dismissal of the right to bear arms, is surely an example of poor Supreme Court reasoning, but it would not make my personal list of *The Dirty Dozen* decisions. Even if we assume, as modern scholarship suggests, that the right to bear arms was held by all individual members of the unorganized militia, gun ownership—with the obvious risks that weapons pose to innocent persons—cannot escape regulation altogether. State police power clearly extends to the protection of health and safety, which may entail some firearms restrictions. Exactly where the lines should be drawn is a hard question that needs intensive reexamination. Inevitably, the Supreme Court will have to clarify its position, and this chapter does an excellent job of explaining why.

Levy and Mellor are emphatically right, however, to condemn *Korematsu v. United States* (1944). To this day it never ceases to amaze that wartime hysteria and political opportunism could allow this nation to intern 120,000 loyal citizens of Japanese descent without a shred of evidence of individual wrongdoing. It is equally incomprehensible that the Court, in slavish deference to the political branches, stood idly by. There is one silver lining: Whatever the wrongs—and there are many—of the current national policy toward enemy combatants, no future Supreme Court is likely to repeat the wholesale shame of *Korematsu*. But that case nonetheless provides a strong object lesson in what can happen when the rule of law breaks down.

Bennis v. Michigan (1996), dealing with matters of asset forfeiture, also merits inclusion in a compendium of most-dubious decisions. Why the Supreme Court should yield to the use of arbitrary police power that takes the property of innocent persons without a hearing is a mystery. One can imagine many subtleties in trying to figure out when the government denies people their property without due process of law. But denying innocent people their property without *any* process of law is not one of them.

No catalog of Supreme Court outrages would be complete without *Kelo v. City of New London* (2005), which left private property owners without meaningful constitutional protection to resist the use of eminent domain in the name of economic development. The Court again

displayed a supine deference to legislative bodies by allowing local planners to run roughshod over isolated and vulnerable members of society. Eminent domain used for economic development imposes an enormous drain on taxpayer dollars for no discernible benefit. Yes, there is room at the margin for reasonable people to disagree about the purposes for which governments should exercise their eminent domain powers, but the transfer of one person's property to another private party, merely for an illusory promise of more jobs and a higher tax base, lies beyond the pale.

Hats off again to our authors for putting *Penn Central Transport Co. v. New York* (1978) on their list. *Penn Central* sustained the power of the state to designate historical landmarks without paying just compensation. But it did far more than that. The decision authorized government to regulate the use of property in myriad ways, from confiscatory environmental restrictions to zoning laws that favor those with political connections. Under the standards established in *Penn Central*, owners often receive no compensation for devastating reductions in their property's value caused by state restrictions on its use.

United States v. Carolene Products (1938) also fits on any register of infamous decisions because of a single footnote in a ten-page opinion. The decision is wholly indefensible for the proposition that no infringement of economic liberties, however egregious, is subject to meaningful constitutional review. The offending footnote literally invites countless opportunities for mischievous government intervention. But in this context *Nebbia v. New York* (1934) deserves more than dishonorable mention. Prior to *Nebbia* the power to regulate activities "affected with the public interest" had been limited to state control of monopolies. *Nebbia* reversed course by allowing states to set minimum prices, thereby *creating* monopolies, not eliminating them—a shabby performance indeed.

Coming to the last case, I must voice a dissent, for I do not think that *Grutter v. Bollinger* (2003) is, ultimately, a misguided decision. The use of racial preferences is fraught with sensitivities for historic and moral reasons. Levy and Mellor make a strong case, but I would not criticize the Court for upholding the use of preferences in university

admissions. I would argue a different point—namely, that the Court should *not* diligently scrutinize affirmative action programs when the state is engaged in running businesses such as universities. The right measuring stick for evaluating the conduct of a public university, in my opinion, is the unregulated behavior of the private institutions with which they compete. Nearly all private universities have implemented some measure of voluntary affirmative action. Such measures are not required, but neither are they forbidden. That should be the standard.

The overall pattern is clear. A free society requires judges to enforce, and political actors to respect, the principles of limited government. That vital objective can only be achieved if courts understand that government regulation should be examined, in most constitutional contexts, under a presumption that the regulation is impermissible. Instead, the Supreme Court has changed the rules to rubber-stamp legislative and executive actions that expand the power of government. The result: open season for political bodies to trample the personal liberties and property rights that good government should be sworn to protect. Liberty cannot endure under such a regime.

The key, as Levy and Mellor pointedly note in their afterword, is responsible judicial engagement. For the dire consequences of disregarding that commandment, the reader need only inquire within.

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INTRODUCTION

Too often Americans take for granted that they are free.

But if America truly is the land of the free, should we have to ask for government permission to participate in an election? Or pursue an honest occupation? And should our government be empowered to take someone's home only to turn the property over to others for their private use?

Of course not.

So why are we less free now, in many respects, than we were two hundred years ago? How did we get from our Founders' Constitution, which established a strictly limited government, to today's Constitution, which has expanded government and curtailed individual rights? That's the story of *The Dirty Dozen*.

This book is about twelve Supreme Court cases that changed the course of American history—away from constitutional government. Surprisingly, few of these cases are widely known despite their enormous impact. Maybe *McConnell v. Federal Election Commission* (2003), because of its recent vintage, is recognized as the case that gave political speech less First Amendment protection than flag burning or Internet pornography. But how many of us recall that *Wickard v. Filburn* (1942) paved the way for the noxious notion that Congress, under the guise of regulating interstate commerce, can criminalize the use by critically ill

patients of medical marijuana, grown and distributed in a single state, free of charge, under a doctor's prescription, in accordance with state law? And how many of us have heard of *United States v. Carolene Products* (1938), in which an obscure footnote virtually eliminated judicial review—that is, the power of the courts to examine, modify, and even overturn acts of the executive and legislative branches—when government restricts key liberties such as the right to earn an honest living?

Whether it is political speech, economic liberties, property rights, welfare, racial preferences, gun owners' rights, or imprisonment without charge, the U.S. Supreme Court has behaved in a manner that would have stunned, mystified, and outraged our Founding Fathers. Alexander Hamilton labeled the judiciary "the weakest of the three departments." If only he had been correct when he wrote in *Federalist No. 78* that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution."

Nor could James Madison have envisioned that the Court would be complicit in the exponential growth of the federal government. "The powers delegated by the proposed Constitution to the Federal Government," said Madison in *Federalist No. 45*, "are few and defined. Those which are to remain in the State Governments are numerous and indefinite." Would that it were so. Over the twelve-month period ending March 31, 2006, the federal government published more than seventy-seven thousand pages of new rules that had been proposed or implemented by various regulatory agencies.[1] That is not the way America was meant to operate. From our founding we were supposed to have a government of limited power and maximum freedom for the individual. Instead, we have been afflicted by a vast enlargement of federal power, condoned by a Supreme Court that has selectively protected some—but not all—of our constitutionally guaranteed rights.

Expanding government and eroding freedom: Here's the sad tale.

How the Supreme Court Has Amended the Constitution

On September 17, 1787, a convention of representatives from twelve states—all except Rhode Island—completed four months of work

drafting the U.S. Constitution and then submitted it to delegates in the individual states for ratification. Less than two years later, after approval by eleven states—two more than required at the time—the Constitution was formally adopted. Some of the states that ratified the Constitution insisted that further "declaratory and restrictive clauses" be added. Accordingly, on September 25, 1789, Congress transmitted to the state legislatures twelve proposed amendments. Two of those—having to do with congressional representation and congressional pay—were not adopted.[2] The remaining ten amendments were ratified effective December 15, 1791, and became known as the Bill of Rights.

Since the Bill of Rights was adopted in 1791, the Constitution has been amended *only seventeen times*. Yet the framers could never have imagined what our twenty-first-century world would resemble. How, then, did they manage to devise a document that would be changed on so few occasions over such a dynamic and tumultuous two centuries? Three explanations come to mind—two good and one bad.

The first good explanation for the stability of the Constitution is that it is an incredibly well crafted document comprising broad principles written by brilliant legal minds who had a vision of liberty that is every bit as relevant today as it was in 1791. The second good explanation is that the framers established an amendment process in Article V of the Constitution that was designed to discourage frequent revisions. Essentially, amendments are proposed by two-thirds of both the House and the Senate, after which they have to be ratified by three-fourths of the states.[3] Not surprisingly, those demanding requirements have not been satisfied very often. The result: a stable constitutional framework that has endured hot and cold wars, recessions and depressions, and scandals the likes of which have destroyed many foreign governments.

The third reason we have not seen very many amendments is more disturbing. Basically, the Supreme Court has imposed through the back door what the Congress and the states could not accomplish through the amendment process. By misinterpreting cases that have raised key constitutional questions, the Court has expanded government and curbed individual rights in a manner never intended by the framers, with profound implications for all Americans. Seldom has the ratchet of

the Court's decisions turned toward greater individual liberty. To the contrary, the Court has further and further restricted the freedoms that Americans should enjoy as a birthright.

Perhaps some of the "amendments" engineered by the Supreme Court would have been ratified if constitutionally prescribed procedures had been followed. Perhaps not. We will never know. What we do know is that the framers intended for the elected representatives of the people, not the Supreme Court, to change the Constitution if and when it needed to be changed. Instead, a Court consisting of unelected justices with lifetime appointments has rewritten the Constitution without input from, or accountability to, the people of the United States.

Georgetown University law professor Randy E. Barnett graphically illustrates that point by recounting the story of Laszlo Toth, who in 1972 dashed past the guards in Saint Peter's Basilica and attacked Michelangelo's *Pietà* with a sledgehammer. With fifteen blows the madman removed the Virgin's arm at the elbow, knocked off a chunk of her nose, and chipped one of her eyelids. But suppose, asks Professor Barnett, Toth had evaded security in the National Archives and attacked the Constitution on display there. What if, using a razor, he managed to cut out key parts of the original document—such as the Ninth and Tenth Amendments, which we will soon discuss. The nation would surely be horrified, and yet, concludes Professor Barnett, "the Supreme Court has done what someone like Laszlo Toth could never do: take a razor to the text of the Constitution to *remake it from the thing it was to something quite different*. . . . At the Court's hands, what was once a system of islands of power in a sea of individual liberty . . . has become islands of rights in a sea of state and federal power."[4]

Some of the damage occurred long ago. For example, in *Dred Scott v. Sandford* (1857)—probably the Court's most infamous decision—Chief Justice Roger B. Taney held, among other things, that black slaves were property, not citizens of the United States. And in *Plessy v. Ferguson* (1890), the Court upheld a Louisiana statute requiring railroads to provide equal but separate accommodations for the "white and colored races." As repugnant as those cases were, they are no longer the law of the land. *Scott* was superseded by the Fourteenth Amendment (1868),

and *Plessy* was overruled by a series of cases beginning with *Brown v. Board of Education* (1954).

Much of the Court's real mischief arose later, during the New Deal, and continues today. That period—from 1934 until today—is the focus of *The Dirty Dozen*. In the next twelve chapters we identify and dissect the worst of the Court's post-1933 decisions. The goal is to untangle those complex legal opinions and explain how they affect each and every one of us. We gear our discussion primarily to nonlawyers, with the hope they will gain a greater appreciation for the crucial role of the Supreme Court in securing liberty.

Friends of the Constitution who cherish personal freedom and limited government have good reason for concern about the modern Court. *The Dirty Dozen* is a litany of concerns—using twelve cases to demonstrate how the Court has too often abandoned the principles that were painstakingly and ingeniously shaped by our Founding Fathers. But before getting to the meat of the matter, here is a quick review of how we selected the cases, how the book is organized, and how we personally interpret the Constitution.

How We Selected the Cases

So many bad cases; so little space to examine them. That was the dilemma we faced in picking the dozen worst Supreme Court cases of the modern era. We sought help from our colleagues—specifically, seventy-four like-minded legal scholars whom we surveyed informally by email. We promised anonymity and asked them to name the post-1933 cases that had the most destructive effect on law and public policy, either by expanding government powers beyond those that are constitutionally authorized or by imperiling individual liberties that are constitutionally protected. We also requested that our survey recipients choose only those cases that have ongoing impact—that is, cases not already overturned by a subsequent Supreme Court opinion or constitutional amendment.

Further, we stipulated that the "worst" cases should be defined in terms of their outcomes, not merely bad legal reasoning. For example,

many of our lawyer friends believe that the Court's school desegregation decision, *Brown v. Board of Education* (1954), was poorly reasoned. Chief Justice Earl Warren limited his opinion to public schools rather than apply the Fourteenth Amendment's Equal Protection Clause more broadly to all laws that mandated segregation; he relied on dubious psychological studies purporting to show that black students learn more efficiently in an integrated environment. That said, none of the legal scholars we surveyed believes that public schools should have remained segregated. Thus, in terms of its outcome, *Brown* was pro-liberty even if its legal rationale might have been suspect.

The scholars responding to our survey identified many awful cases, but just twenty of those were clear consensus picks, of which nine were obvious favorites. From among the leading vote-getters, we selected the cases that we thought were most egregious. Most of them are probably unfamiliar to nonlawyers by name. Still, they have vital real-life consequences consistent with the dual themes of this book: Our liberties have gradually eroded while government has expanded its control over our day-to-day lives.

In making our final selections, we were guided but not bound by the results of our survey. All of our selections received multiple votes except for *Kelo v. City of New London* (2005), which was decided after the survey was finalized. *Kelo* addresses government's authority to seize a person's land, home, or business—known as the power of eminent domain. The case stands for the shocking proposition that private property can be taken from its existing owners for transfer to new owners as part of an economic development project. Yes, the government has to pay "just compensation" when property is condemned under eminent domain, but when all is said and done, if the owner doesn't like the compensation, he'll be forced to sell anyway.

Of the top nine picks in the survey, we include all but one—*Roe v. Wade* (1973)—in *The Dirty Dozen*. Because *Roe* received considerable survey support, it deserves special comment. We discuss *Roe* in Postscript #1 at the end of the book. Also at the end of the book, in Postscript #2, we discuss *Bush v. Gore* (2000). Like *Roe*, *Bush* is excluded

from *The Dirty Dozen*. Unlike *Roe*, *Bush* did not receive a single vote in our survey. Yet its importance and the popular misconception that the Court had no business involving itself in the 2000 election compel us to offer our own brief analysis.

How the Book Is Organized

Once we had identified *The Dirty Dozen* cases, our next task was to determine the sequence in which they should be discussed. We decided on a thematic approach, using the cases as a springboard to discuss various provisions of the Constitution—beginning with four chapters under the caption "Expanding Government" and then eight chapters under the caption "Eroding Freedom." Each chapter is linked to one of the twelve cases.

Here is the layout of the chapters together with their associated cases, constitutional provisions, and a preview of what is at stake just.

Part One: Expanding Government

1. Promoting the General Welfare—*Helvering v. Davis*
   Article I, sec. 8 (General Welfare Clause): Congress can tax and spend to promote the general welfare, said the Court. That opened the floodgates, through which the redistributive state was ready to pour—taking money from some, giving it to others, without any meaningful constitutional constraints.
2. Regulating Interstate Commerce—*Wickard v. Filburn*
   Article I, sec. 8 (Commerce Clause): Can Congress's power to regulate interstate commerce be extended to activities that are not interstate, not commerce, and not even regulated but prohibited? Apparently so.
3. Rescinding Private Contracts—*Home Building & Loan Association v. Blaisdell*
   Article I, sec. 10 (Contracts Clause): "No State shall . . . pass any . . . Law impairing the Obligation of Contracts," says the

Constitution. Clear enough? Not for the Supreme Court, which upheld a Minnesota statute postponing mortgage payments for financially troubled homeowners. Never mind the contract between the lender and the customer.

4. Lawmaking by Administrative Agencies—*Whitman v. American Trucking Associations, Inc.*
   Article I, sec. 1 (Non-Delegation Doctrine): If Congress passes an oppressive law, the voters can respond by throwing the bums out. But if the law is murky, and Congress lets an unelected regulatory agency fill in the oppressive details, the courts won't do much about it, and the voters can't.

Part Two: Eroding Freedom

5. Campaign Finance Reform and Free Speech—*McConnell v. Federal Election Commission*
   First Amendment (Free Speech): In pursuit of the quixotic idea that money and elections should not mix, the Court has curtailed our most basic expressive right: to support or criticize political candidates.
6. Gun Owners' Rights—*United States v. Miller*
   Second Amendment (Keep and Bear Arms): Almost seven decades ago the Supreme Court established a legal regime that has been interpreted by appellate courts across the country to mean that individuals do not have an individual right to possess firearms.
7. Civil Liberties Versus National Security—*Korematsu v. United States*
   Fifth Amendment (Due Process Clause): Guarantees of liberty, fair treatment, and equal protection of the laws may be waived during wartime—even if American citizens are arrested and imprisoned without charge indefinitely.
8. Asset Forfeiture Without Due Process—*Bennis v. Michigan*
   Fifth and Fourteenth Amendments (Due Process Clauses): It is not bad enough that your husband engages in a sexual act with a prostitute in the front seat of your car. The Court says that the criminal

offense extends to the car itself, which the government can seize, and you cannot recover either the car or its value.

9. Eminent Domain for Private Use—*Kelo v. City of New London*
   Fifth Amendment (Public Use Doctrine): Suppose you have a cherished home in which you've lived for many years. Along comes a private developer who promises the government more jobs and higher taxes if your home is turned over to him. Do you think your property is safe from the bulldozer? Think again.
10. Taking Property by Regulation—*Penn Central Transport Co. v. New York*
    Fifth Amendment (Takings Clause): When the value of your property plummets due to government regulations, you won't be compensated unless the regulations go "too far." How far is too far? Evidently, Penn Central's $150 million loss wasn't far enough.
11. Earning an Honest Living—*United States v. Carolene Products*
    Ninth Amendment (Unenumerated Rights): Do your economic liberties include a right to form your own business without unwarranted government restrictions? Not if the legislature decides to protect your rivals; then the courts pitch in and rubber-stamp the anticompetitive regulations.
12. Equal Protection and Racial Preferences—*Grutter v. Bollinger*
    Fourteenth Amendment (Equal Protection Clause): No racial discrimination. That is the rule—unless, of course, a state university uses race as a mere "plus factor," part of a "holistic" approach to attain diversity. Then somehow racial preferences are not discriminatory.

Those are the cases—appalling examples of Supreme Court gaffes. To treat the cases systematically and uniformly, in each chapter, we have followed a structured format with four subheadings: (1) What Is the Constitutional Issue? (2) What Were the Facts? (3) Where Did the Court Go Wrong? (4) What Are the Implications?

The fourth subsection is especially important. Many of the cases deal with novel and narrow facts, yet the Court's holdings have repercussions that extend far beyond any one case. To illustrate: *Bennis v.*

Michigan, described briefly above, entailed the forfeiture of a car in which an illegal sex act had occurred. But the Court's opinion established a more sweeping proposition: States may seize any asset involved in criminal activity without compensation to the owner even if the owner had no knowledge of the activity. Imagine how far that pernicious doctrine could reach.

Naturally, in exploring some cases that we include in *The Dirty Dozen*, our analyses will touch on related cases as well. With help from the legal scholars who responded to our survey, we identified several post-1933 cases that were linked to, and nearly as bad as, the Dirty Dozen. We list them at the beginning of selected chapters as "Dishonorable Mentions" and then discuss them in more detail within the text.

Finally, in an afterword to *The Dirty Dozen*, we comment on judicial activism, too loosely defined as intervention by the courts to overturn decisions by our elected representatives. Judicial activism has become the denunciation *du jour* by both liberals and conservatives who want to influence judicial appointments—especially to the Supreme Court—that will shape the legal landscape over the coming decades. To a great extent today's appointments will determine whether tomorrow's Court enforces the Constitution that the framers designed or conjures up an unratified version of the Constitution that reflects the policy preferences of nine justices. We explain the vital difference between inappropriate judicial activism and the proper, indeed essential, practice of judicial engagement.

How We Interpret the Constitution

As a prelude to our discussion of the Dirty Dozen, we want our readers to know and understand the constitutional perspective that animates this book. Accordingly, we offer this synopsis of our views relating to the design, meaning, and purpose of the U.S. Constitution. For starters, we are committed to the values of individual liberty, private property, and free markets. Perhaps most significant from a constitutional perspective, we are advocates of strictly limited government.[5]

Consider, for example, the post-9/11 environment. The exercise by government of its national security powers will sometimes be incompatible with the exercise by individuals of their broad civil liberties. No one disputes that national security is a legitimate function of government. The state is responsible, first and foremost, for the protection of life, liberty, and property. The Constitution, as Justice Robert H. Jackson warned, is not a suicide pact. Even fervent champions of the Bill of Rights concede that it would be foolish to treat civil liberties as inviolable when the lives of innocent thousands may be at stake. So where to draw the line?

Paradoxically, in the current climate, normally limited-government conservatives tend to endorse an ever-increasing role for the federal government, while big-government liberals express their frustration over a federal government that commands too much power. What, then, are the contrasting perceptions that explain those apparent paradoxes? Is there an underlying constitutional theory that supports one view or another?

The framers designed the Constitution to achieve two basic ends. First, the national government had to be strong enough to impose civil order, protect citizens from foreign invaders, and secure individual rights. But second, the powers of government were to be strictly limited, thereby ensuring that government itself would not violate the rights of the people. To reconcile those potentially conflicting goals, the Constitution was crafted with great care. On one hand, the framers assigned far broader powers to the federal government than it had exercised under the Articles of Confederation. Yet, on the other hand, the powers were confined to those specifically listed in the Constitution and were divided among three branches of government.

Thus, the Constitution is often referred to as a document of "enumerated and separated powers," which means, first, that all powers of the federal government not enumerated are assumed not to exist; and second, that the executive, legislative, and judicial branches are each authorized to exercise designated powers and no others. In that way each branch was to act as a check and balance on the other two. Two

years after ratification, to reinforce and reaffirm the Constitution's mandate for limited government, the framers added a Bill of Rights that provided affirmative safeguards against government excess.

Indeed, the essential structure of our federal system is captured by the final two provisions of the Bill of Rights: the Ninth and Tenth Amendments. The Ninth Amendment addresses individual rights. It provides that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Tenth Amendment addresses federal powers. It tells us that the national government may exercise only those powers enumerated in the Constitution—such as the power to coin money and establish post offices. The powers not delegated and enumerated are reserved to the states or, depending on state law, to the people.

In considering federal power, conservatives generally agree on a tightly constrained central government, but with two conspicuous exceptions:

First, some conservatives are willing to federalize a significant amount of criminal law (for example, the war on drugs) and civil law (for example, much of Congress's tort reform agenda). We invoke a different principle: No matter how worthwhile a goal may be, if there is no constitutional authority to pursue it, then the federal government must step aside and leave the matter to the states or to private parties. The president and Congress can proceed only from constitutional authority, not from good intentions alone. If Congress deems it necessary to add to its enumerated powers, there is an amendment process crafted by the framers for that purpose. Too often Congress has simply disregarded the limits set by the Constitution.

Second, some conservatives are disposed toward excessive concentrations of national security power in the executive branch. Yet unchecked authority in the hands of the executive threatens the separation of powers, which has been a cornerstone of our Constitution since 1789. The administration may not by itself set the rules, prosecute infractions, determine guilt or innocence, and then review the results of its own actions. Congress, not the executive branch, is charged with

legislative responsibility, and courts are charged with constitutional oversight. On that score, judges should defer to the executive branch on matters of national security, but the rights of citizens under the Constitution, including the right to judicial review, must be respected. When the executive, legislative, and judicial branches agree on the framework, the potential for abuse is not eliminated, but it is diminished. When only the executive acts, the foundation of a free society can too easily erode.

That is the powers-of-government perspective—grounded in the Tenth Amendment and the separation-of-powers doctrine. The Ninth Amendment imposes another powerful discipline on federal behavior: In exercising its legitimate powers, the federal government may not do so in a manner that violates our rights. And in determining what rights government may not violate, the Ninth Amendment instructs that we look both to those that are expressly enumerated, such as free speech, and to those that are unenumerated as well, such as the right to privacy.

Many conservatives treat the Ninth Amendment as an "inkblot," to use the memorable term coined by former judge Robert Bork in his 1987 confirmation hearings. He asserted that the amendment should be ignored because no one can determine what it means. It is as if someone had spilled ink on the portion of the amendment that would have identified our unenumerated rights. Bork is silent as to why the same treatment should not be accorded to other imprecise phrases in the Bill of Rights, such as unreasonable searches, probable cause, and due process.

We treat the Ninth Amendment as if it meant something. It refers to our natural rights—those rights that we had "by nature," before government was formed, and still retain. In short, the Ninth Amendment's unenumerated rights include all the rights associated with individual liberty, with two constraints. First, our exercise of such rights must not interfere with the exercise of those same rights by others. Second, we may not act in a manner that imposes obligations on others except their obligation not to use force or fraud against us.

The Ninth Amendment does not encompass "entitlements" or welfare rights, which require others to act for our benefit. Thus, your right to *pursue* happiness is a liberty right, because it imposes no affirmative duty on anyone else. By contrast, if you had a right to *attain* happiness, that would require others to act on your behalf—to make you happy or, at a minimum, to refrain from making you unhappy. That obligation might thereby restrict their own pursuit of happiness.

Entitlements, such as rights to a minimum wage or welfare, are integral to the modern liberal position on the proper role of government. Naturally, the enforcement of such entitlements presupposes government force—usually in the form of higher taxes or more regulations—when the persons who are supposed to bestow the benefits do not do so voluntarily. The result: overarching and coercive government that worms its way into every aspect of our daily lives.

Surprisingly, we are now hearing from today's liberals that big government cannot be trusted—at least not on civil liberties. But where does the left stand on government control over our retirement system, welfare, schools, and the private economy? Why hasn't the left's healthy distrust of government extended to support for privatized Social Security, school choice, and elimination of regulations that control everything from the size of a navel orange to the ergonomics of office furniture? Why can't liberals see past the Defense Department and the Justice Department when they bemoan excessive government?

Oddly enough, those two agencies are the very ones charged with protecting us against domestic and foreign predators—an appropriate job for government. If Congress were to delegate to the Justice Department the power to enact regulations over national security and civil liberties, with no more guidance than "keep us safe from terrorists," people on the left would be justifiably apoplectic. But when that same Congress delegates to the Environmental Protection Agency the power to enact environmental regulations with no more guidance than "keep us safe from pollutants," the left applauds enthusiastically. Could it be that pollutants are a greater risk than terrorists? Or is it more likely that the left's selective indignation reflects the inconsistency of the liberal mind-set on the proper role of government?

In resolving that foundational question—the proper role of government—the Constitution can be viewed through both a powers-of-government prism (the Tenth Amendment) and a rights-of-individuals prism (the Ninth Amendment). We view the powers of government narrowly and the rights of individuals broadly. That, we believe, was precisely the vision of the framers.