TO JUDGE OR NOT TO JUDGE

By Robert A. Levy and William Mellor

"The courts of justice," wrote Alexander Hamilton in *Federalist 78*, "are to be considered as the bulwarks of a limited Constitution against legislative encroachments." That role was significantly expanded with the ratification of the 14th Amendment after the Civil War. Until then, the Constitution constrained only the federal government. Americans discovered, however, that states more than occasionally violated the rights of their citizens – slavery being the obvious example. And so a second generation of Framers revisited the federalist model and added a new power for the national government – above and beyond the powers enumerated in the original Constitution: Whenever any state "shall abridge the privileges or immunities of citizens ... [or] deprive any person of life, liberty, or property, without due process ... [or] deny to any person ... the equal protection of the laws," the federal government is authorized to intervene and stop the offending state acts.

Both the Congress and the federal courts are empowered by the 14th Amendment to prevent state and local governments from misbehaving. Regrettably, the courts have been derelict in their duty. They have acquiesced in a vast enlargement of state power and a corresponding diminution in individual rights. That, in major part, is why we wrote *The Dirty Dozen*, which catalogs the twelve worst Supreme Court cases of the modern era.

In his review of our book ("Supreme Injustice," October 2008), J.H. Huebert applauds our "genuine concern for personal and economic liberty" and acknowledges that the "Supreme Court has done a lot of damage to liberty, interpreting government powers broadly and many constitutionally protected rights narrowly." But he nonetheless disparages our thesis that judges must be more vigorously engaged in securing those rights. Huebert's critique is threefold: First, judges have abused their 14th Amendment powers to find "various positive 'rights' that they like

even more than libertarian rights." Second, judicial engagement is "doomed to failure" because "federal courts, after all, are the government." Third, "the important work to be done is in the realm of education.... When people understand and want liberty's benefits, they'll cast off their government entirely, or at least elect representatives who will respect their rights."

We examine each of those arguments in turn.

The Abuse of Judicial Engagement

For starters, Mr. Huebert protests that we "unquestioningly embrace the idea that the 14th Amendment allows federal courts to strike down laws that don't comport with liberty." Guilty as charged. Like it or not, the 14th Amendment is part of the Constitution. It unambiguously declares that no state can abridge privileges or immunities, or deny due process or equal protection. Unless the text of the Amendment is ignored or the institution of judicial review is discarded, federal courts can and should "strike down laws that don't comport with liberty."

That said, we agree with Huebert's warning against merely giving federal judges more power. When guarantees of equal protection and due process are misused to restrict private rather than state conduct (*Shelley v. Kraemer*, 1948), or discover a constitutionally sheltered property interest in expected welfare receipts (*Goldberg v. Kelly*, 1970), the anti-liberty implications are obvious. But abuse of the 5th and 14th Amendments – by both Congress and the courts – is no reason to pretend that the amendments do not exist.

The answer to bad judging is good judging. That means we need to appoint judges who have a theory of rights and an understanding of the Constitution grounded in the principles that animated the Framers: federalism, separation of powers, individual rights, and limited government. *The Dirty Dozen* is dedicated to that goal – not so much as a teaching device for misguided judges, who may be irredeemable, but rather as a means to influence politicians who select judges, and voters who select politicians.

Notably, if judges overreach, our system of checks and balances provides numerous remedies – including Senate confirmation and impeachment, restrictions on the Supreme Court's appellate jurisdiction, re-passed legislation that satisfies the Court's objections, discretion in enforcement, and constitutional amendments.

Moreover, the 14th Amendment is not an open-ended invitation for Congress to make mischief that the courts must undo. The amendment confers on Congress a preventive or remedial power, not a power to create law from whole cloth. First, Congress must find evidence that states have systemically violated constitutionally secured rights. Only then may the federal legislature intrude on the states' traditional police power to regulate health, safety, and welfare. And if Congress does intrude, its remedy must be congruent with and proportional to the observed violation. (See *City of Boerne v. Flores*, 1997.) Those safeguards are no guarantee against abuse of our federalist scheme, but they do suggest that the Supreme Court is conscious of the potential for federal meddling.

The Futility of Judicial Engagement

Having reminded us that judicial engagement can be abused, Huebert goes a step further: He contends that even responsible engagement by the federal courts will prove to be an exercise in futility. Huebert cautions that restoring liberty is not just "a matter of overturning a handful of bad court precedents." Indeed, he notes, presidents will not "choose a judge who will severely limit that president's own power." And senators will not "confirm a judge who won't just let them do whatever they want." A judge is "employed by the very federal government he's expected to restrain"; he's part of a "rigged game."

That assessment is far too cynical. In the real world, for the foreseeable future, federal judges will continue to work for the government: the president will nominate them and legislators will confirm them. Federal judges are, however, substantially insulated from the

political process by lifetime tenure. And no one, to our knowledge, has suggested a better structure that would immunize government employer and judicial employee from possible conflicts. Nor has anyone suggested that blanket deference to the executive and legislative branches would neutralize, rather than exacerbate, undue influence from politicians. The cure for judicial abuse is most certainly not legislative and executive abuse. If we've learned anything in more than two centuries, it's that input from multiple branches inhibits excesses.

To illustrate his futility hypothesis, Huebert points to several cases. First, he claims that *Raich v. Gonzales* (the 2005 Commerce Clause case involving medical marijuana) "failed, creating terrible anti-liberty precedents." But *Raich* relied almost entirely on *Wickard v. Filburn*, another Commerce Clause case from 1942 that is one of *The Dirty Dozen*. That precedent is 66 years old, not newly created. Second, Huebert points to *Kelo v. City of New London* (2005), in which eminent domain was utilized (unconstitutionally) to take private property for private use. Huebert facilely dismisses the public outcry that *Kelo* prompted – asserting that post-decision events merely prove that state courts would have been a better venue than federal courts. Nonsense. State-level reforms in 43 states, including a unanimous opinion from the Ohio Supreme Court, could never have happened were it not for the Supreme Court's outrageous decision in *Kelo*.

For his third example of futile judicial engagement, Huebert strangely targets *District of Columbia* v. *Heller,* this year's blockbuster Second Amendment case invalidating Washington, DC's gun ban. *Heller*, insists Huebert, "is likely to be a very limited victory" because restrictions other than a ban on certain types of weapons "probably will pass muster." Hmm. *Heller* challenged three provisions of the D.C. code – the most extreme provisions – and sought no relief beyond a declaration that those three provisions were unconstitutional. The Supreme Court granted Heller 100 percent of the relief that he requested. Not bad for a limited

victory. Before *Heller*, federal appeals courts covering 47 out of 50 states had ruled that litigants have no redress under the Second Amendment if their right to keep and bear arms is violated by state law. Now, after *Heller* – and after incorporation, which is imminent – litigants in every state will have redress under the Second Amendment if their rights are violated. That means Chicago's gun ban will fall; many of San Francisco's laws will fall; parts of New York's regulations will fall. If that's an example of futile judicial engagement, we embrace it.

Finally, Huebert mentions *United States v. Lopez*, the 1995 case that temporarily limited Congress's power under the Commerce Clause to regulate the possession of guns near schools. After the Supreme Court did its job, Congress circumvented the Court's decision by re-enacting a nearly identical law requiring that the weapon must first have traveled in interstate commerce. Judicial engagement yielded the right result, until the legislative branch contemptuously undid the Court's handiwork.

That single example of judicial engagement turned sour must be weighed against multiple examples of constructive actions by the Supreme Court ameliorating the pernicious effects of several cases in *The Dirty Dozen.* Consider the Court's recent decisions in the areas of campaign finance reform (*Wisconsin Right to Life v. Federal Election Commission*, 2006; *Davis v. Federal Election Commission*, 2008), racial preferences (*Parents Involved in Community Schools v. Seattle School District No. 1*, 2007; *Meredith v. Jefferson County Board of Education*, 2007), and civil liberties (*Hamdan v. Rumsfeld*, 2006; *Boumediene v. Bush*, 2008). The past three years have demonstrated that judicial engagement can work.

Education as an Alternative Approach

According to Huebert, it is "silly ... to think you can make the government want liberty before many or most of the people want it." His solution: education. Forget about litigation as a means to promote liberty. Reject the "naïve view ... that government officials are really

reasonable, serious people who are just waiting to have the right ideas put in front of them." Instead, advises Huebert, teach the masses to appreciate a free society and they will bind the politicians with the chains of the Constitution.

If you're seeking real naiveté, here's the Huebert manifesto: Advocates for liberty should educate the public, wait until the newly-educated public reaches voting age, rely on the voters to elect pro-liberty politicians, assume the democratic process will yield pro-liberty outcomes (despite gerrymandering, special interests, and public choice theory), and set aside efforts to engage the judiciary in the fight for limited government and individual rights. In return, the anti-liberty forces will fold their tents, ditch their own brand of education, and happily abandon the judicial battle that has enlarged the power of government and invented rights nowhere secured by the Constitution. If that's the Huebert program, it's a recipe for failure.

Education can play an important role, of course, but not the exclusive role. First, a quantum change in the educational climate could take a generation or two to implement. Second, statists will press vigorously for their opposing views. Third, books like *The Dirty Dozen* are essentially educational – directed at non-lawyers, not only the community of legal scholars. Fourth, if the public can be educated to elect politicians who respect liberty, those politicians can be expected to appoint judges who are philosophically sympathetic. Much is gained, and nothing is lost, by inter-positioning one more set of hurdles, in the form of judicial review, between the citizenry and the laws to which we must conform.

When it comes to law and public policy, education is not a self-fulfilling end. There must be an objective. If our Constitution is to be restored to its rightful place as the guardian of our freedoms, some corrective process must be put in place. We have urged constitutional amendment as the most principled route – presumably where effective education must lead – with judicial engagement as a fallback alternative. The third route is business as usual with its

continued upward ratchet of government powers and erosion of personal liberty.

It is indeed alluring to depend on the voters rather than the courts. Yet we have experienced the destructive downside of that process, which pits majoritarian rule against inalienable rights. In *The Tempting of America*, Judge Robert Bork characterized the clash as the Madisonian Dilemma: "In wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. … [T]here are nonetheless *some* things majorities must not do to minorities, *some* areas of life in which the individual must be free of majority rule." The vindication of inalienable rights, which are often counter-majoritarian, is what constitutions and courts are all about.

Yet Judge Bork understates the problem and reverses the priorities. The Framers plan – limited government with delegated and enumerated powers – preserved liberty in "wide areas" while constitutionalizing majority rule over "some areas," not the opposite. Since 1789, the Supreme Court has overturned 150 acts of Congress and roughly 1200 state and municipal laws. We haven't looked at each of those cases, but we're confident that libertarians who believe in tightly constrained federal and state government powers, coupled with expansive individual liberty, have been well-served by the Court's invalidation of (mostly) oppressive laws.

# # #

Robert A. Levy is chairman of the Cato Institute.
William Mellor is president and general counsel of the Institute for Justice.