

A Review of *Men in Black: How the Supreme Court Is Destroying America* (Hardcover)

Levin, Mark R. Regnery Publishing, Inc. 2005. 256 pp., with bibliographical references and an index.

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'It is true that you have missed everything of importance,' Holmes once said to Watson, 'but you have hit upon the method, and you have a keen eye for colour.'

That statement wouldn't quite be fair as a review of *Men in Black*, because Mark R. Levin hasn't missed *everything* of importance; he just hasn't assembled it into a cogent argument. (So it's really the 'method' that he's missed.) But he does have a keen eye for color, or at least for various shades of black.

What he claims to be showing us in this book is that we have a runaway Supreme Court that, via 'judicial activism', is practicing 'judicial tyranny' and tearing the U.S. away from its Constitutional roots. What he actually shows is that the federal government has done some things Levin doesn't agree with.

He begins by discussing four cases that, in his view, illustrate 'judicial activism' and what's wrong with it. It's unfortunate that he elects to present his argument in terms of 'judicial activism', and his illustrations—selected with the entirety of U.S. judicial history to choose from—really illustrate nothing more than the wonderful malleability of this vacuous term.

One of the cases is *Plessy v. Ferguson*, in which the Supreme Court refrained from striking down (under the Fourteenth Amendment's Equal Protection Clause) a state-level racial-segregation law. Okay, it was a bad decision—but it amounts to 'judicial activism' the way sitting really still amounts to vigorous exercise. (Indeed, it was overturned by *Brown v. Board of Education*, which I'd regard as a pretty 'activist' decision—and so would Levin, if it had involved a state law he *liked*.)

Another of his selections is *Korematsu v. U.S.*, the 1944 case in which the SCOTUS upheld the constitutionality of an executive order (issued by FDR) to relocate and intern people of Japanese descent. Whatever you think of the result, surely the problem Levin has with it is that it shows undue deference to the executive. Calling this 'judicial activism' sheds no real light and even obscures the fact that the order in question came not from the judiciary but from the executive branch.

In this respect the example is typical of much of his argument. Given his focus, you'd expect his targets to be strictly judicial matters. Yet he devotes entire chapters to problems that touch only tangentially on the judiciary—and therefore are far from showing 'How the Supreme Court [as opposed to, say, Congress] Is Destroying America'. (In fact he never gets around to showing us how *anybody* is actually 'destroying America', so I guess that's just hyperbole for the sake of a catchy title.)

For example, we get a full chapter on the McCain-Feingold Act, a campaign-contributions law that, on Levin's view, violates the First Amendment. Okay, I agree. But Congress passed it and President Bush signed it; all the SCOTUS did was refrain from striking it down out of (over-) deference to the other branches of the government. How is this an example specifically of a *judiciary* run unconstitutionally amok?

(By the way: since Levin also makes occasional derisive allusions to SCOTUS rulings that flag-burning constitutes 'speech', you might expect him to tackle that issue as well. But not only does he never analyze the flag-burning issue—in which case he'd have had to point out that Justice Antonin Scalia regards flag-burning as protected speech—he also never bothers telling us why campaign contributions *do* constitute 'speech'.)

Likewise, we've got a full chapter on the way the Interstate Commerce Clause has been stretched out of shape to give Congress authority over things you wouldn't ordinarily think of as interstate commerce. Again, the point is valid—but it's really hard to see why this is an example of *judicial* activism/tyranny, since it's Congress passing the laws and exercising the additional authority. (Indeed, in other contexts Levin regards it as 'judicial tyranny' for the SCOTUS to *limit* what the state and federal legislatures can do.)

Nor—and quite surprisingly in this context—does Levin see fit to mention *Lochner v. New York* or the way an incredibly 'activist' SCOTUS used to strike down New Deal legislation as unconstitutional. *That* 'judicial activism' stopped soon after FDR tried to increase the number of justices to fifteen and pack the Court with New Deal Democrats. Ironically, Levin remarks on FDR's court-packing plan in his closing chapter (apparently as an example of a *good* way to rein in the Supreme Court) and never ties it in either to his discussion of economic regulation or to his discussion of *Korematsu* (a decision issued by an extremely 'reined-in' Court).

Even more incredibly, he spends a full chapter complaining about the allegedly extraconstitutional 'right to privacy' without ever once mentioning the Fourth Amendment or *Katz v. U.S.*—the 1967 decision in which the Court (the same 'activist' Court that gave us *Griswold*) extended Fourth Amendment protection against 'unreasonable searches' to cover wiretapping. (In fact, the Fourth Amendment isn't mentioned anywhere in the entire book.) By his usual argument ('the Constitution doesn't mention electronic surveillance'), he *ought* to favor a tremendous expansion of police power against our allegedly fictional 'right to privacy'. But I'll bet he doesn't (or else does and knows better than to say so to an audience of conservatives)—and I'll bet that's why he doesn't bring it up.

Problems like this pervade the book, even in its good parts. His quotations tend to be out of context and to fail to illustrate his points. For example, he quotes four sitting Justices in order to show that they are somehow relying on international law in their rulings. But his quotations show no such thing.

Justice Anthony Kennedy refers to international law in *Lawrence v. Texas* because the decision he was overruling (*Bowers v. Hardwick*, a decision Levin likes) had already done so in defense of state laws criminalizing 'sodomy'. Kennedy merely points out that, to whatever degree such matters are relevant at all, the *Bowers* decision didn't include all pertinent examples. Then, too, we're supposed to be shocked, shocked, at Justice Sandra Day O'Connor's suggestion that U.S. courts might reasonably look to court decisions in other nations for (nonbinding) guidance under some circumstances. And omigosh, she thinks we might *especially* have reason to do so if other nations adopt our Constitutional system and undertake their own deliberations about what e.g. 'due process' and 'equal protection' mean!

Call me a raging leftie, but I'm going to go with (Republicans) Kennedy and O'Connor here. At any rate, neither quotation shows that either justice is making rulings based on international law. His quotations from Justices John Paul Stevens (also a Republican) and Ruth Bader Ginsburg (the only Democrat among his examples) don't show that they're doing so either, but I don't have room to discuss them here.

Too often, Levin's treatment of legal issues is irremediably muddy. In one chapter, for example, he discusses the *Hamdi* and *Rasul* cases, dealing with the military's detaining of possible enemy combatants—and never quite manages to get clear that the due-process right at issue is the right to due process on the question whether one is an 'enemy combatant' in the first place. Obviously this is an issue that distinguishes current cases from those in which a detainee is wearing, say, a German Army uniform; when you're detaining suspected terrorists, it can be hard to tell which ones are really innocent civilians. But Levin doesn't even recognize that this is an issue, and his arguments suffer for it. (Nor does Levin notice any inconsistency here with his opposition to *Korematsu*, in which a highly deferent Court let the Roosevelt Administration do to Japanese-Americans approximately what the Bush Administration wanted to do to Messrs. Hamdi and Rasul. Apparently the Court is activist if they do and activist if they don't.)

For a 'strict constructionist', he also seems unaccountably surprised that the SCOTUS interprets the word 'person' in the Fifth Amendment to mean person. He seems to be one of those folks who think that the U.S. Constitution applies only to citizens and that the government can, without Constitutional restriction, do whatever it pleases to everyone else. (Not that he bothers supporting this opinion; he just assumes it, and writes as though his readers are assuming it too.) But the Constitution 'applies' to the *government*—and restrains its powers with respect to *everyone's* rights.

Moreover, and in this context crucially, Levin continually blurs (and at times altogether eradicates) the distinction between (a) placing Constitutional limits on the laws the federal and state legislatures can make and (b) actually making laws. Time and again he accuses the SCOTUS of doing the latter when it's doing the former. And the former is its job, whether Levin likes it or not.

It's hard to *tell* whether he likes it or not. On the one hand, he thinks the power of judicial review, established once and for all (though hardly invented) in *Marbury v. Madison* (1803), destroyed the delicate balance of powers the framers had in mind (a conclusion he reaches by

failing to distinguish between a judicial veto as part of the legislative process—which the framers did reject—and judicial review of legislation already enacted, which they overwhelmingly approved). But somehow that doesn't keep him from excoriating supposedly 'activist' Courts for *not* overturning unconstitutional legislation (or executive orders) by exercising the power he thinks they're not supposed to have.

The result is an absolute mess of an argument that seems to go something like this: The Supreme Court is destroying America by failing to impose Constitutional limitations on the other branches of the government through the exercise of a power (judicial review) that the Constitution doesn't confer on it anyway—except that in *some* cases it *is* imposing such limitations, and *that's* how it's destroying America.

What Levin probably means -- or would mean if he were reasoning clearly -- is that he wants the Court to interpret the Constitution more strictly (by his own not entirely consistent standard of strictness) when it exercises judicial review. But of course if he'd put it that way, he couldn't have tapped into the conservative Zeitgeist on the pseudo-issue of 'judicial activism' by blaming the current state of America on a rogue judiciary, let alone claimed that the power of judicial review itself was unconstitutional.

These shortcomings are too bad, because there really is some worthwhile material in this book. The problem is that so much of it is polemic masquerading as legal scholarship. I like right-wing polemic; Ann Coulter is one of my favorites. But her polemic is clearly identified (or easily identifiable) *as* polemic and she doesn't pretend to be 'scholarly' when she's dropping rhetorical bombshells. However, people can (and do) mistakenly read Levin's book as a balanced, educated look at the way the Supreme Court really operates.

In fact, in its *analysis*, it's little more than pandering to the crowd that starts hollering, 'Those judicial activists are destroying America!' whenever the SCOTUS curbs federal and state governments' ability to restrict, infringe, or impose on personal liberty. (You know the ones. They carry on about the Constitution and states' rights as though these were their real issues, but they don't really give a damn about liberty; they want to pass laws restricting your private behavior, and they're mad because the SCOTUS won't let them. For these folks, 'judicial tyranny' is rightspeak for 'not letting *us* be tyrants'.)

*Men in Black* is a near-total failure as an attack specifically on the Court, but it's not bad as a partial (in both senses of the word) overview of some questionable exercises/expansions of federal power. (And, for some readers, it will be a valuable illustration of some important differences between libertarians and conservatives.) If you read it, don't regard it as a primer on how the SCOTUS works or how it's supposed to work.