

# BOOK REVIEWS

David's Hammer:

## The Case For An Activist Judiciary

By CLINT BOLICK

First Review by Timothy Sandefur\*

Second Review by Craig S. Lerner\*\*

In all the recent debates over "judicial activism," Clint Bolick appears to be the only writer who begins by asking what the judiciary was actually designed to do. This is profoundly refreshing, given that both liberals and conservatives have embraced the slogan of "judicial restraint"—fashioned almost a century ago as part of the Progressives's ultimately successful effort to remold the Constitution in the service of the administrative state. The one thing everyone knows about judges today is that they are "legislating from the bench," imposing elitist liberal social theories on a captive populace in violation of democratic principle. Mark Levin's *Men in Black*, and Robert Bork's *The Tempting of America* are typical examples of this genre. Yet their interpretation reflects such a warped understanding of the Judiciary's constitutional role, it is impossible to address the issue without starting, as Bolick does, at the beginning: with the Founders' vision.

In *Federalist 78*, Hamilton explains that the judiciary will act as an intermediary between the people and their legislatures, to ensure that electoral majorities do not trample on liberty. Judicial independence, he explains, is "requisite to guard the Constitution and the rights of individuals" from the "ill humors" which sometimes lead officials into "dangerous innovations in the government, and serious oppressions of the minor party in the community."

Note the logical order that Hamilton assumes: individual rights are primary to, and the justification for, democratic decision-making. *Liberty*, not *democracy*, was his primary concern, and his colleagues agreed. The Declaration of Independence, for example, holds that all men are endowed with certain rights, which government is then instituted "to secure," and that when it violates those rights, the people may alter or abolish it. The Constitution, too, unambiguously declares liberty a "blessing"—yet it imposes powerful limits on democracy. The ontological order could not be more clear. As Jefferson put it, "an *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced... that no one could transcend their legal limits, without being effectually checked and constrained by the others."

It was the Progressives who inverted this scheme. They focused their attention on mechanisms of collective decision-making, which they saw as both the source and limit of

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freedom. As Justice Louis Brandeis put it, "rights of property and the liberty of the individual must be remolded, from time to time, to meet the changing needs of society." You have got to love that euphemism: "remold." The Progressives forged the idea of "judicial restraint" as a way of allowing legislatures the broadest possible discretion to "remold" individual rights at will and to control realms of life that the Founders had considered off-limits. In 1934, with the adoption of "rational basis scrutiny," the Progressives won the day. Under this theory, courts simply look the other way when legislatures trample on individual rights.

But what is remarkable is the way that alleged opponents of such chicanery—including Bork—have embraced these heresies. Notwithstanding his protestations, Bork's critique of the judiciary is not rooted in the Founders' views but in the views of the Progressives. Madison held that "the sovereignty of the society as vested in & exercisable by the majority, may do anything that could be *rightfully* done by the unanimous concurrence of the members; the reserved rights of individuals (of conscience for example) in becoming parties to the original compact being beyond the legitimate reach of sovereignty." Bork, however, like his Progressive forebears, sees society as primary, the rights of individuals as secondary: as basically permissions granted by the majority, retractable when it chooses. Thus he invokes what he absurdly calls a "Madisonian" proposition: that "in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities." In fact, Madison and his contemporaries believed majorities were never *entitled* to rule: they were instead *authorized* to rule, and there were natural moral limits to that authority—limits which the judiciary, like the other branches of government, ought to enforce.

Where Bork, Levin, and other writers on "judicial activism" have ignored these matters entirely, Bolick begins with a welcome refresher on constitutional theory, supported by examples which prove his assertion that "the gravest deprivations of liberty have occurred not when the courts have exercised too much power but when they have exercised too much restraint." Indeed, a list of "great moments in judicial humility" would have to include such abominations as *Plessy v. Ferguson*, *Buck v. Bell*, *Korematsu v. United States*, and *Kelo v. New London*—all cases in which courts looked the other way, and allowed legislative majorities to act at will. (And it is typical of the murky thinking on this subject that Levin calls *Plessy* and *Korematsu* "activist" decisions. As Bolick points out, the Court in these cases *deferred* to the elected branches!)

By way of contrast, Bolick provides a series of examples from the case files of the Institute for Justice, in which courts have done their duty to enforce the Constitution, even when that meant stopping legislatures from serving the prejudices of the moment. There are three important lessons to be drawn from such cases.

First, it is legislative activism—not judicial activism—that presents the gravest threat to Americans generally. Certainly there are cases of judicial overreaching—outlandish ones, in which judges have gone beyond even the boundaries of reason—but they are insignificant compared to the mountains of unconstitutional and oppressive legislation that oozes out daily from under the domes of fifty state capitols and

Washington, D.C. This is not even to mention the reams of regulation propounded by unelected lifetime bureaucrats in countless barely-known agencies, from the California Raisin Administrative Committee to the Migratory Bird Conservation Commission. It is by enforcing, not by nullifying, the orders of these thousand petty Caesars, that Americans lose their freedom.

Moreover, a judicial decision that wrongly upholds a law is far more dangerous than a decision that wrongly strikes one down. When a court declares a law unconstitutional, that decision leaves the legislature free to choose any number of alternative ways to accomplish a legitimate goal. But when the court upholds an unconstitutional law, there is practically no way to fix the damage done. The challenger is subjected to an irreparable violation of her freedom, legislatures go on to enact follow-on legislation, and dissenters are smugly told that if they want to change things, they must use the political process—a process that in reality is dominated by hostile majorities, safe incumbents, unaccountable regulatory agencies, and labyrinthine campaign finance laws that make grassroots political activism virtually impossible.

Second, deference often *is* activism. Consider an example not mentioned in Bolick's book: *Guinn v. Legislature of Nevada*. In that case, the Nevada Supreme Court ordered the state legislature simply to "disregard" the state constitution's requirement that tax increases receive a two-thirds vote of each house. The court explained that it was "concerned with the interest of preserving the democratic process," and so, because "a majority of legislators" had voted in favor of the tax increase, the court would simply set aside the two-thirds requirement just this once. Although this lawless decision was overruled only a few years later, *Guinn* stands as a stark reminder that some of the worst incidents of "judicial activism" occur when courts stand back and allow legislatures free rein.

Obviously, the judiciary has the power to manipulate the political process unfairly—and it has often abused its power. Recent cases like *Kelo*, *Atkins v. Virginia*, or *Roper v. Simmons*, illustrate that all too well. But the label of "judicial activism" is inadequate to address the real problem with such cases. Judges ought to be "active" when enforcing the Constitution. That is why they take an oath to support and defend it—not passively to allow legislators to do what they please. Courts ought only to defer when the legislature acts within its legitimate boundaries. But the choice of when to act and when to defer must be guided by an understanding of the Constitution—and that is a task for political philosophy. It is the betrayal of the Constitution's philosophy that is the real heart of our problem. To dismiss such questions as arbitrary, outdated, or matters for majorities to settle—or, worse, to say that majorities "are entitled to rule simply because they are majorities"—is to betray not only the Constitution's framers, but the purpose of the judiciary, and the rule of law itself.

It is therefore no surprise that we find the very concept of judicial review attacked by Bork and Levin, who characterize *Marbury v. Madison* as an "activist," politically motivated decision. Theirs is the natural conclusion of a political philosophy that puts majority will—and not individual freedom—at its center. A true democracy has no use for judges,

or even for a constitution, which will simply get in the way of the majority's desires.

Thus the third lesson to take from Bolick's book is, once again, that liberty must come before democracy. It is because we are naturally free that we are entitled to participate in a constitutional order, and that it is wise for us to do so. It is because we have liberties that need protection from others that we employ a rule of law—and it is because those liberties are as vulnerable to the state as to our fellow citizens that we impose law on the government itself, through a Constitution. As Madison wrote, "In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger." Preserving individual rights—both enumerated and unenumerated—from wrongful and impassioned majorities is the proper role for our judiciary. To countenance their violation, whether actively or passively, is to do violence to those blessings of liberty that our Founders preserved for us.

Clint Bolick is an asset to the nation. He and the Institute for Justice, the organization he helped found, have rescued Americans from the entangling web of government regulations time and again. One must admire a man who has entered the arena, battled the odds, and often emerged victorious. But this is all by way of introduction. For present purposes, he is a laudable man who has written a misguided book.

Bolick weaves the David-and-Goliath metaphor through *David's Hammer: The Case for an Activist Judiciary*. The first false note is the title. The Biblical David's preferred weapon was the slingshot. The hammer would have been far too direct and open-handed for the famously devious and underhanded David. Reading this book had one odd result: I found my sympathy swelling for the much-maligned Goliath, a point to which I will return.

Bolick's David has three senses. First, there is the humble citizen denied a fair chance by government bureaucrats, working in tandem with, or at the behest of, labor unions and corporations. Bolick is at his best capturing the plight of students seeking to escape monopolistic government schools and would-be entrepreneurs frustrated by special interest laws prescribing the number of taxicabs or the licensing of hairdressers.

Problems arise when we turn to the second sense of David, which is the "public-interest" litigator: constitutional lawyer as "hero." Bolick writes that he shares the public's "disdain" for the broader (for-profit) legal profession, which he characterizes as a "mercenary profession." But when lawyers help people manage their affairs in a private and peaceful way—*e.g.*, resolving contract disputes, forming corporations, navigating through mazes of government regulations—they are performing a public service. That they are paid for their efforts does not negate this fact. As Adam Smith long ago observed, a dollop of enlightened self-interest can go a long way toward promoting the public good.

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Bolick is intoxicated by the vision of the “creative lawyer [who] can change the world in one fell swoop,” but he glosses over the mischief sometimes committed by lawyers grandiosely pursuing the public interest. Touting the “black and white” results that can be obtained through litigation, Bolick exudes impatience with modern American democracy and its high levels of voter ignorance and low levels of participation. He complains that “[m]uch of government power at every level today is exercised by unelected agencies and authorities that have only the barest democratic accountability.”

But Bolick’s own experiences suggest that the corruption is not that endemic. Although his efforts to overturn government regulations have met with mixed success in the courts, the supposedly apathetic public was stirred to act, with resulting triumphs in city councils and state legislatures. The school choice programs Bolick has so effectively promoted were enacted through the democratic process, only then to be imperiled in the courts. “Public-interest lawyers” at the NAACP Legal Defense Fund, ACLU, and elsewhere have been Bolick’s antagonists in these cases and others throughout his career.

It is, however, when we come to the third sense of David-and-Goliath that the book becomes most problematic. On the cover of the book is a blurred gavel crashing into a wooden block. The judge, seemingly, is David and the gavel is his hammer. According to Bolick, “[j]udges should see themselves as what they are intended to be: fearless guardians of individual liberty.”

Bolick criticizes meek judges who cling to a “presumption of constitutionality” when considering challenges to government policies. Like Randy Barnett, Bolick argues that the very opposite presumption, the “presumption of liberty,” is rooted in the Ninth and Tenth Amendments, as well as in the Privileges or Immunities Clause of the Fourteenth Amendment.

Claiming Clarence Thomas as his model Supreme Court Justice, Bolick adopts an interpretative method that emphasizes textualism and originalism. With respect to the Constitution’s Commerce Clause, for example, Bolick convincingly shows how flawed the modern jurisprudence is in failing to pay careful attention to the text and original meaning of this congressional power. Yet Bolick charges conservatives, and even Justice Thomas to some extent, with being fair-weather textualists and originalists. “[I]f conservatives want courts to protect economic liberties,” he writes, “they must accept that the courts must protect the rights of people to engage in nonharmful, consensual activities in their own homes and of political dissenters to burn the American flag.”

On the one hand, Bolick concedes that there is such a category as bad judicial activism. Most of his adduced examples, however, are instances of in-activism—that is, a judicial failure to invalidate a law or executive action. Notably missing from his roll of dishonor is *Roe v. Wade*. On the other hand, his catalog of “good judicial activism” includes *Lawrence v. Texas*. Bolick contends that there is no “principled basis” upon which conservatives could uphold the right of an organization to exclude homosexuals (as in *Boy Scouts v. Dale*) and then uphold a state law criminalizing homosexual sodomy (as in *Lawrence*). As Bolick sees it, “freedom of association” means that “a zone of privacy exists into which the government may not intrude.”

Not surprisingly, then, Thomas, who dissented in *Lawrence*, fades as a model justice in the book’s conclusion, with a new hero of judicial activism emerging: “[P]atrolling the Court’s libertarian center is Justice Anthony Kennedy, who has shown himself in many cases to be extremely mindful of the need for an activist judiciary to protect individual rights.”

Bolick reserves special disdain for Robert Bork, the famous critic of judicial activism. Bork’s arguments are intermittently mocked: he is an “absolutist” and an advocate of “judicial castration;” his views are “radical” and even “chilling.” By contrast, Jonathan Rauch, Jeffrey Rosen, and Cass Sunstein are all described at various points as “thoughtful.” They often are, of course. But so is Bork. Unfortunately, Bolick does not meaningfully engage Bork or the many thoughtful conservative scholars with whom he disagrees.

For starters, although Bolick taxes others with inconsistency in their constitutional interpretations, he might want to storm-proof his own glass house. The close attention to actual language and historical understandings that does credit to his interpretation of the Commerce Clause is jettisoned when Bolick turns to favored constitutional provisions. Bolick stretches the Ninth Amendment (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”) to create a judicially enforceable right to privacy, extending to contraceptives and homosexual sodomy. A more natural, textually rooted interpretation of the Ninth Amendment, especially when viewed in tandem with the Tenth Amendment’s reservation of powers to the states, has been suggested by Nelson Lund, drawing upon the historical work of Kurt Lash. Lund has argued that under the Ninth Amendment, “the federal government (including the federal judiciary) lacks the authority to impose its views of natural or inherent rights on the states: one of the rights ‘retained by the people’ is the right to govern themselves as they see fit in their own states.”

With respect to the Privileges or Immunities Clause, Bolick confidently opines that “any believer in original intent who devotes even the most cursory attention to legislative history and to the problem Congress sought to correct will conclude that Congress unambiguously meant to protect economic liberty against excessive state regulation.” Bolick may be unfamiliar with the work of originalists such as David Currie and John Harrison. They have argued that the Privileges or Immunities Clause is an anti-discrimination provision, not a substantive guarantee. It prevents states from discriminating against certain classes of citizens in the same way that the privileges and immunities clause of Article IV prevents states from discriminating against non-citizens.

Bolick’s grand theory of constitutional design—the “presumption of liberty”—has at best a tenuous relationship with the Constitution’s text. A more nuanced, textually rooted rule of presumption is suggested by Steven Calabresi and Gary Lawson. Given that the federal government is vested with enumerated powers, whereas the state governments enjoy general jurisdiction, perhaps one should say that federal courts should apply a presumption of liberty when reviewing federal laws, but a presumption of constitutionality when reviewing state laws. More generally, Bolick’s advocacy of a muscular

Supreme Court strains the Constitution beyond recognition. As Calabresi has written, "There is simply no way to read the bare-bones language of Article III, in contrast to the detailed language of Article I, and conclude that the Framers meant for the Court to be a powerful institution."

The thorniest problem raised by *David's Hammer* is its treatment of the question of precedent. Supreme Court decisions in many areas of law have strayed so far from the Constitution's text that there is a question of what can or should be done to redress the matter. Bolick says: Follow the text and ignore the precedent. There are respectable arguments for this point of view, and Justice Thomas has been a forceful advocate. "Justice Thomas exhibits several qualities that make him the type of justice the Framers must have had in mind when they invested the judiciary with its central role in protecting freedom," Bolick writes. "In almost every constitutional case, he begins by examining not the Court's precedents but the language and intent of the Constitution itself."

It would strengthen Bolick's argument if he acknowledged that the issue is a complicated one. It is true that Article VI, section 2, states that "The Constitution, and the Laws of the United States [are] the supreme Law of the Land," which suggests that judges should continually repair to the text of the Constitution. But Article III places the "judicial Power" in the federal courts. And "judicial power" has long included a respect for precedent. Hamilton's *Federalist* No. 78 notes that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents." Given that the number of precedents will grow to a "very considerable bulk," Hamilton suggests that only those who have committed themselves to "long and laborious study" will be eligible for service on the federal judiciary. The image of a judge that emerges from *Federalist* No. 78 is a far cry from Bolick's hero. Hamilton's judge is a cautious old man, worn down by all those mind-numbing years immersed in the study of precedents. A few more such humble judges might serve America well.

Libertarian judicial activists are oddly confident that swashbuckling judges will enact their policy preferences. As Nelson Lund and John McGinnis have argued, this may be true with respect to sexual matters, but there is reason to doubt that judges in the future will be widely using the Contracts Clause to invalidate rent control laws, or the Privileges or Immunities Clause to overturn government regulations. It is more likely that judges, encouraged to view themselves as "fearless guardians of individual liberty," will see in a distended Ninth Amendment the sort of "rights" that inevitably herald an expansion of government power—a right to quality education, a right to health care, etc.

Which brings me back to the sad case of Goliath. If Bolick can write a book eulogizing judicial activism, I can manage a (tongue-in-cheek) paragraph in defense of this misunderstood giant. The Israelites won the war and got to write the definitive history, according to which he was a nine-foot ogre, but let us imagine this from the Philistine perspective. Goliath displayed himself openly and was prepared to fight honorably. David was a sneak and a weakling who could not win through honorable means and so employed deceit (which is why Machiavelli was

such a fan). Those who seek to overturn laws through judicial activism can occasionally be likened to David, but not in the flattering sense that Bolick intends. Unable to win directly and honorably, *through the political process*, they have opted for an underhanded alternative. Perhaps libertarians, and all Americans, should fight in the tradition of Goliath, openly and honorably—in the state legislatures. After all, the Constitution created a framework of competitive federalism that resembles Bolick's beloved free market far more closely than the activist judiciary held out as the nation's potential messiah.

## Silence and Freedom

By LOUIS MICHAEL SEIDMAN

Reviewed by Paul Horwitz\*

“Silence,” A.A. Attanasio wrote, “is a text easy to misread.”

It is all the more brave and impressive, then, that Louis

Michael Seidman has undertaken a project that places silence at its very heart. As Seidman observes, somewhat paradoxically, ever since *Miranda v. Arizona*, the words “You have the right to remain silent” have become the most famous in our popular constitutional culture. And yet, “What a strange right this is. Of all the activities that are especially worthy of human beings... why privilege silence?”

Seidman makes two basic claims in this relatively short, but wide-ranging, volume. First, he argues, silence can be a liberating “expression of freedom.” It supplies meaning when our clumsy tools of language run out. And when silence is an active refusal to speak or act in the face of demands that we do so, it is something more than an absence: it is an act of defiance. Thomas More, the King's good servant, but God's first, never spoke more loudly than when he refused to acknowledge the King's marriage, on pain of his own doom. Second, Seidman claims we must protect silence “in order to give meaning to speech.” While silence sometimes is a freedom worth preserving for its own sake, at other times “it is the necessary frame for freedom.... It is [ ] important to remain silent when there is nothing to say. When one confronts an ineffable mystery, breaking a silence only brings speech into disrepute.”

Such oracular language certainly lets us know that we are not in for a typical doctrinal monograph. Seidman offers more of a meditation on the nature of silence and its place within the law, ranging from the mundane precincts of the police station interrogation room to the hushed mysteries of the end of life. One would do wrong to look for definitive answers to the questions he poses. As he warns, “Readers who like the hard edges of legal argument and have no taste for paradox are bound to be disappointed.” For those with a taste for a more catholic and tentative journey, however, he is a faithful and careful guide, and offers what resolutions he can.

To examine a subject that is, well, *silent* is a difficult task. Seidman thus proceeds like a scientist attempting to observe a black hole: he applies his observational toolkit to what cannot be seen directly in order to perceive it by indirection—to detect

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