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

* *Paul Horwitz is an Associate Professor at the University of Alabama School of Law.*

the very absence which signals its presence as a "void" that nevertheless "form[s] the core of a basic human right."

The toolkit is a simple one. Seidman examines the scope and limits of the legal right to silence through the lens of four political and philosophical concepts. The republican position emphasizes "deliberation about the common welfare as a common good," and sees active deliberation as the key to sound self-governance. With their encouragement of active public participation, republicans "are more comfortable defending the opposite of silence—that is, speech." To this he contrasts liberal thought, with its emphasis on autonomy, and its refusal to privilege the universalist aims of the state over a variety of personal commitments—to a faith, a community, or a set of individual values and beliefs. Liberals are more likely to champion silence, as "an absence that individuals can fill with plans for their own lives."

Along a rather different dimension, he plies silence with two more schools of thought, more expressions of skepticism than positive programs. First, pervasive determinists argue against the very notion of a genuine freedom to choose, emphasizing instead the psychological forces and power relations that constrain or deny human agency. For determinists, it is hard to talk about a right to silence "if all of human conduct can be reduced to unchosen or unconscious manipulation of others." Yet a determinist may ultimately see silence as the only "choice" left open to us. Finally, radical libertarians believe that none of these answers finally fills the void of meaning. In that void, we are left with nothing but the absolute freedom to choose. While a radical libertarian cannot champion a right to silence as such, he may believe that "it is better to remain silent than to attempt to fool others into believing that anything we say will require a particular choice."

These concepts are mere sketches, and somewhat thinly drawn ones at that. Those who work frequently with concepts like liberal and republican thought may find them but dimly represented here; and certainly it is true that most of us act with some combination of all of these concepts in mind. But Seidman does not pretend otherwise. These concepts are simply heuristic devices, tools by which he can examine some of the paradoxes and contradictions inherent in standard arguments for the right to silence.

Thus, Seidman argues that the growing movement to provide some safe harbor for a right of apology in the law, whether in civil or criminal settings, is beset by a host of contradictions when examined more closely. Republicans might favor the legal use of apologies, since an apology is a form of active engagement with others. But once we treat an apology as a legally significant fact, with mitigating consequences for the apologizer, we allow insincere and self-serving motives to enter the picture. Thus, Seidman observes, "there is a sense in which counting apologies as a mitigating circumstance destroys the possibility of apology." Similarly, liberals might be said to favor a right to withhold an apology, on the ground that such actions are quintessentially private and should not be subject to the coercive pressures of public life. But some apologies are quite genuine; if we do not honor them in the public sphere, we may end up discouraging praiseworthy private choices. Similar tensions are unearthed when Seidman applies the worldview of the determinists and the libertarians to the legal treatment of apology. Although he ultimately finds that the right to withhold an apology—the right to remain silent in the face of one's own wrongdoing—is the best outcome, he suggests that the path to that conclusion is strewn with doubt and contradiction.

Seidman works a similar legerdemain across a range of other topics involving silence and freedom. In two chapters, he reaches a surprising set of conclusions about the Constitution's most explicit treatment of silence: the right against self-incrimination. He questions whether the use of that right in courtrooms and other formal proceedings genuinely serves human freedom. Indeed, he argues, too much attention has been paid to the right against self-incrimination in formal settings, and not enough to its role in police interrogation. Here, too, he applies his acid bath to the received wisdom, arguing that the usual question courts ask, whether a suspect's statements are voluntary, is less important than the question of *how* police interrogate suspects. Here, his concern is that "police interrogative techniques invade a protected private sphere by abusing intimacy and illusions of intimacy." He proposes a tough remedy: permitting police to formally apply to a judge for an order requiring the suspect's cooperation, and holding the suspect in contempt if he resists.

In another chapter, Seidman skillfully dissects the Supreme Court's confused doctrine regarding compelled speech and its reverse, the right to silence in the face of compulsions to speak. Elsewhere, he suggests that we must enjoy some right to choose death, the ultimate silence. Outside the self-incrimination chapters, however, perhaps his most elegant performance is his treatment of torture. The problem with torture, he suggests, is not simply that an individual is compelled by force to reveal something; the state often coerces information from unwilling individuals. It is something deeper. Physical torture strips from us the illusion of choice and intellect, reducing us to nothing more than frail and mortal bodies. Torture thus removes our ability to maintain the sustaining illusion of human agency, and to remain silent about the gross physical nature of our existence. Seidman closes by urging us "to end our silence about torture's terrifying truth. We need to understand torture and all that it tells us about ourselves, rather than simply outlaw it."

It goes without saying that such passages do not provide an easy route to legal reform. This is just not that sort of book, although his chapter on free speech makes clear Seidman's skill at such conventional exercises. To venture one modest criticism, it seems to me that Seidman focuses too much on the individual who is subject to compulsions to speak or remain silent, and not enough on the entity that makes those demands: the state. He does address this question from time to time, but much more could be said about the question of when and whether the state may seek to compel speech or silence. What does it mean for the state, in the criminal context, to seek to elicit the thoughts of its citizens? Is the state's only concern about the use of torture purely instrumental, or does it fundamentally distort or degrade the moral legitimacy of the state when it attempts to pry the truth from a human body? Is it appropriate for the state to speak through its citizens' mouths, whether through compelled patriotic exercises or through such trivialities as the use of the motto "Live Free or Die" on a license plate? Such

questions may tell us relatively little about silence itself. But they might force us to think harder about the nature of a state that seeks to compel silence, or to break it.

This cavil notwithstanding, Seidman offers a thoughtful, and thought-provoking, exploration of the questions raised by the "right" to silence. Although he is often persuasive, he does not intend, I think, to push us to concrete conclusions. Rather, he hopes to persuade us to "reassert and think carefully about the value of silence." In this he is eminently successful.

The Constitution's Text in Foreign Affairs

By Michael D. Ramsey

*Reviewed by Jeremy Rabkin**

Michael Ramsey's new book is not likely to become a best seller. The book is probably too scrupulous in its scholarship for those whose interest in these constitutional questions is entangled in political debates of the day. Professor Ramsey, who teaches at San Diego University School of Law, seems to have no larger agenda than establishing the historical truth, as clearly as he can discern it. And truth, whatever its ultimate strength, does not always have a large market.

Two decades from now, however, when partisans have moved on to new claims, and most of today's big books are relegated to remote library annexes, serious scholars will still be consulting Ramsey. We are not likely to see *The Constitution's Text* displaced any time soon by a more penetrating or exhaustive set of historical inquiries on the subjects it covers.

As the title suggests, the book is an exercise in recovering the "original understanding" of constitutional provisions relating to the conduct of foreign affairs. It is not the kind of account a professional historian might offer with a chronological narrative of "formation" or "development." *The Constitution's Text* is very much a lawyer's history, in the sense that it is organized around claims advanced by lawyers or judges in recent decades, invoking specific constitutional provisions. Almost every chapter begins with a prominent Supreme Court ruling, and then measures the Court's assumptions against the intentions or expectations of the Founders, as Ramsey has reconstructed them.

And, on the whole, Ramsey's scholarship demonstrates that the Supreme Court did not do very well in the twentieth century in expounding the Constitution if their work is judged by the understandings of its Framers. Yet the book is not primarily a polemical debunking. Among other things, the Supreme Court itself has seemed to endorse quite different interpretations in different cases. Correcting the Court's errors may keep scholars busy, but it does not force an originalist critic into relentless reproaches against the same mistakes. Ramsey gets to look at quite a number of different issues, because the Court has made so many—and, sometimes, mutually contrary—mistakes.

Quite apart from what it contributes to specific debates regarding foreign affairs powers, the book makes a valuable addition to the literature on originalism. It does so by demonstrating that serious inquiry can help to reconstruct a quite compelling account of "original meaning," even when it comes to the clauses of the Constitution dealing with the conduct of foreign policy. That, in itself, is a notable achievement.

After all, the scattered clauses in the Constitution that make some passing reference to the conduct of foreign policy do not stand out in bold headings. For the most part they seem incidental, elliptical, perhaps even evasive. Influential commentators, such as Professor Louis Henkin, chief reporter for *the Restatement (Third) of Foreign Relations Law*, have emphasized the "strange laconic" character of constitutional provisions in this field, requiring subsequent generations (as commentators urge) to rely on imagination or experience, more than textual exegesis. Others, starting with Edward Corwin, the Princeton scholar who began what is today's *Annotated Constitution*, characterize balancing provisions in this area as "an invitation to struggle" among the different branches of government for the dominant say in foreign affairs. Historians, in fact, trace the origins of the first party system, pitting "Federalists" (or "Hamiltonians") against "Republicans" (or "Jeffersonians"), to disputes about foreign policy in President Washington's second term.

What Ramsey shows is that, if we look closely at contemporary sources, we can reconstruct reasonably definite understandings of each claim—definite enough to endorse some interpretations and exclude others. These interpretations seem to have been generally accepted at the time. Even Jefferson (as Secretary of State) agreed that the President had exclusive authority in articulating American policy to foreign governments, while Hamilton acknowledged that inherent presidential authority did not extend to ordering interference with domestic commerce without a statutory authorization. The accepted understandings add up to a framework that may seem, even today, sufficiently coherent and reasonable that we can feel some confidence in attributing them—as a shared, conscious, considered structure—to the understanding of the Framers as a collective entity.

Ramsey's method is to start with a question raised by subsequent litigation, such as the scope (or existence) of inherent executive powers, look at what was said at the Philadelphia Convention, what was endorsed or rejected in the course of the Convention, how this did or did not parallel arrangements under the Articles of Confederation or the British Constitution, and how these choices echoed (or repudiated) doctrines set out in the major "authorities" of the day—Blackstone, Montequieu, Locke, etc. Then, he compares these "literary" sources with actual practice in the first few administrations under the Constitution, and what was or was not accepted at that time as proper.

The Constitution's Text proceeds in this way through six broad topics: the general source of national authority in foreign affairs, the specific powers of the President in this area, the powers of the Senate, the powers of Congress, the powers of the states, the powers of the courts. As there are several chapters under each heading (for a total of eighteen), the exposition could easily have become wearisomely repetitive or

* *Jeremy Rabkin is a Professor of Law at George Mason University.*