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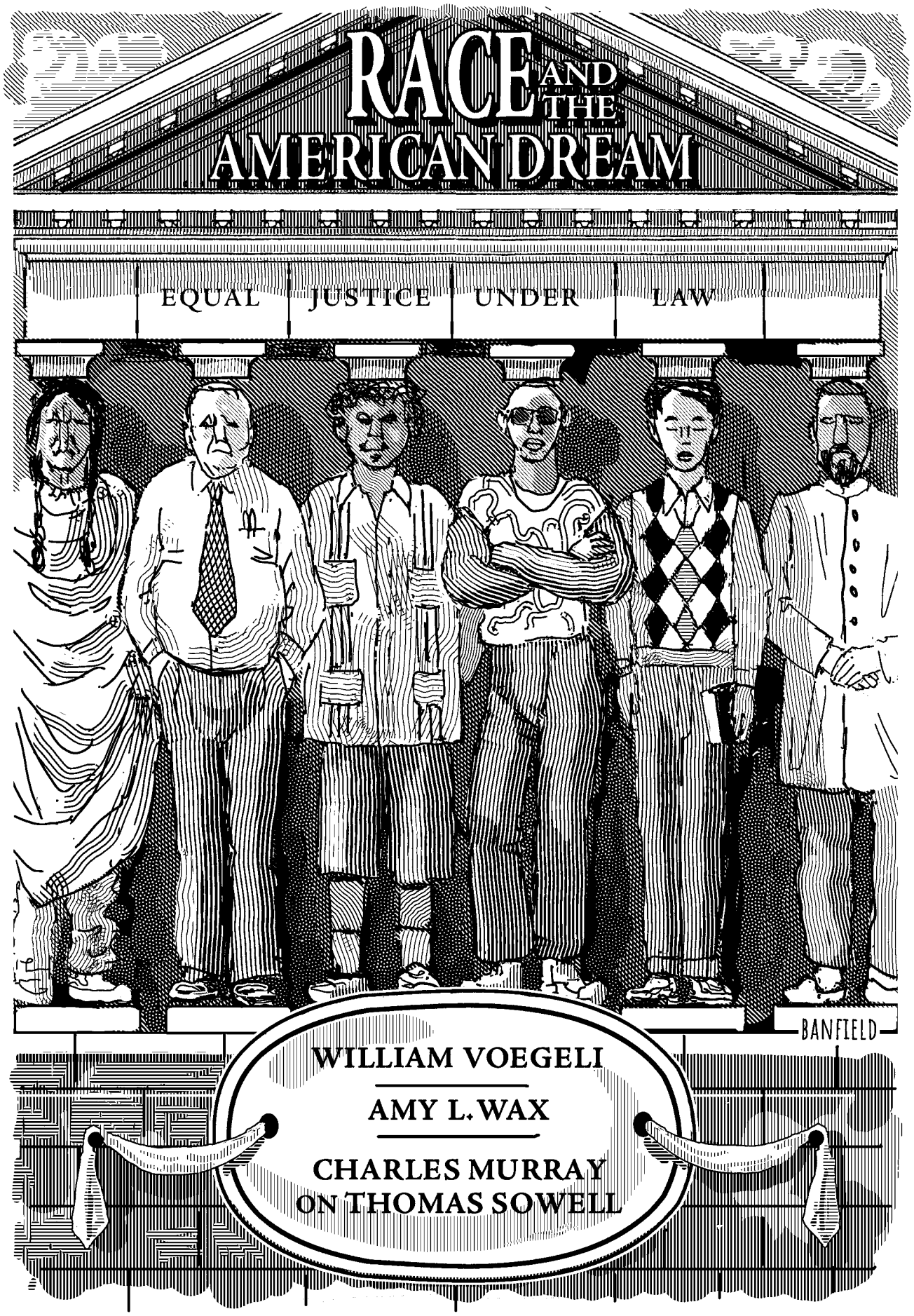

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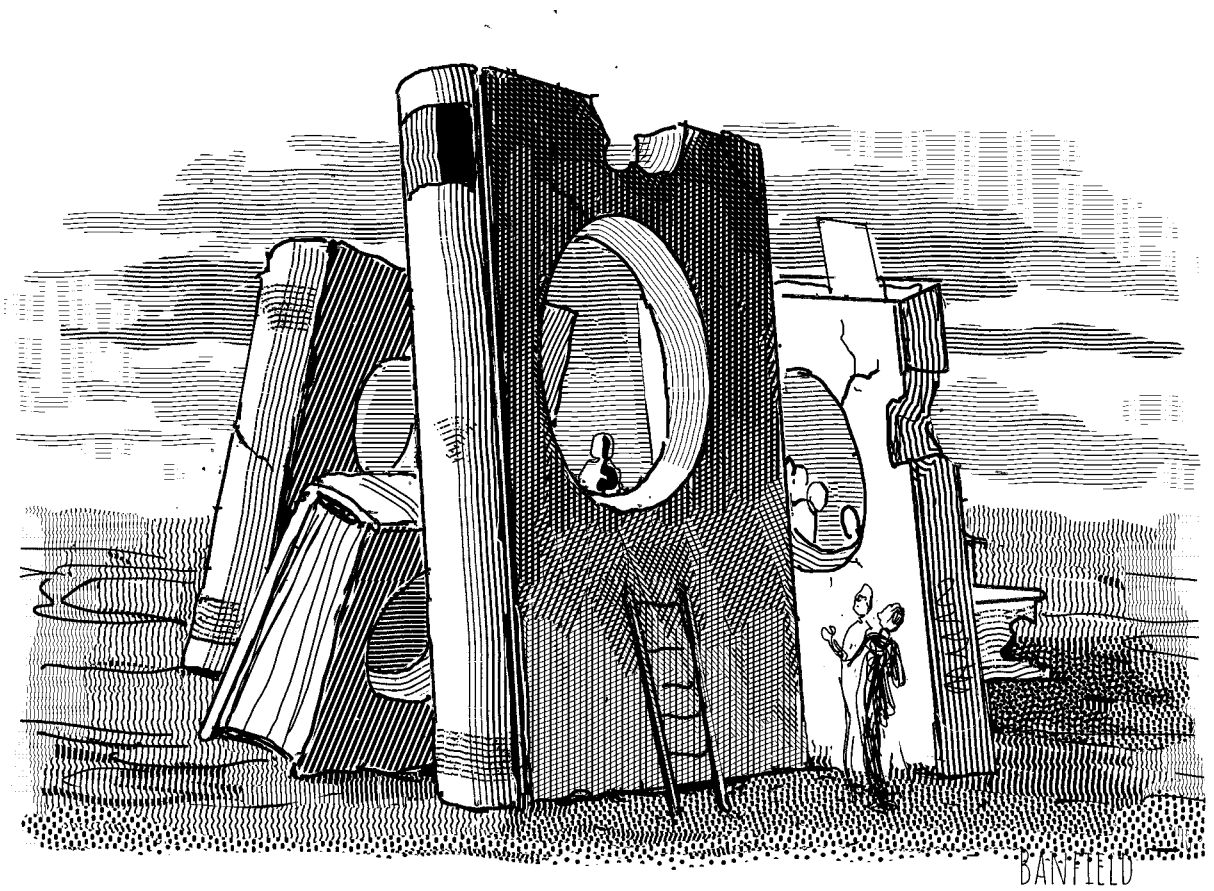
Book Review by Hadley Arkes

Originalism Is Not Enough

The Hollow Core of Constitutional Theory: Why We Need the Framers, by Donald Drakeman.
Cambridge University Press, 225 pages, $32.99



The late Eugene Rostow, our friend of blessed memory and dean of the Law School at Yale, thought the question of Originalism could be put in its proper place with one mind-clearing example: James Madison and Alexander Hamilton, in a strenuous debate in the Helvidius and Pacificus papers. The argument was over the powers of the president and the Congress during the war between England and revolutionary France. It was hard to find two men who were more prominent at the Constitutional Convention in Philadelphia, and they were the two major writers in *The Federalist*. And yet their fierce debate had to stand as a marker: even if we sought to run back to the original understanding of the Constitution, we find that those two true Originalists, who were "present at the Creation," were not always clear on what that document meant in some of its most critical points.

But in the politics of our own day, with the legal cases that have done the most to unsettle the law and disfigure the culture, conservatives have driven themselves to resist the tide by appealing again to that original understanding of the Constitution. They complain that the Supreme Court has invented new rights not contained in the text or understanding of the Constitution. That has been a convenient way of steering around the question, say, of whether the state of Texas has ample grounds, woven of embryology and principled reasoning, that would justify the laws that cast protections on the child in the womb; the laws that are being challenged now in *Dobbs v. Jackson Women's Health Organization*. The leading figures in conservative jurisprudence over the past 40 years have preferred to steer around those questions of moral substance at the heart of these cases, for the moral argument is too contentious and the conservatives despair at reaching answers to moral questions. They have been content to rely instead on the mantra that abortion is mentioned nowhere in the Constitution.

With mock civility, the liberal academics engage their forensic skills now to claim that they too are originalists. In any case the search is on for the original meaning of the Constitution that the framers made. But as Donald Drakeman shows in his new book, *The Hollow Core of Constitutional Theory*, Originalism turns into a hall of mirrors. Drakeman has been strikingly imaginative and successful in business, but he has also kept his hand in teaching constitutional law at Princeton. He is now also a distinguished research professor in constitutional studies at Notre Dame. He knows that we have been flooded by theories of "interpretation," with academic lawyers masquerading as philosophers, and as they follow the threads of their genius, they wrap themselves in conundrums on the "meaning of meaning" itself.

But how do we gauge the understanding we impute to that assemblage of framers, of the Constitution they had wrought? We do have the words of the text, but as Rostow's example would tell us, we would need to be wary of attributing the same understanding to all of those men who drafted and ratified the Constitution. When I teach on the American Founding with the writings of Alexander Hamilton, John Marshall, and James Wilson, I can't assume that everyone in that cir-

writings of these men because they can give the most luminous account of this document and structure they had shaped.

But then a problem arises as well in fixing on the intentions of the framers. Men may be animated by a wide variety of motives, and so Justice Antonin Scalia aptly insisted that he would concentrate on the words in the statute or the text of the Constitution, the words that men settled on and voted into law. Still, there may be a need to fill in the background or the context in which the words were used. In *Morse v. Frederick* (2007), the Supreme Court sustained the authority of a public school principal to bar students from hoisting banners promoting the use of drugs ("Bong Hits 4 Jesus"). In a concurring opinion, Justice Clarence Thomas sought to take things back to the way in which the "rights" of students were understood at the time of the founding. Surveying the conventions and laws, he concluded that there were no such "rights" recognized at the time. Students were young people in need of instruction; they were not to dictate to their elders the terms on which they were to be governed. But when Thomas made that argument, Justice Samuel Alito made it clear that he would have none of it. In a concurring opinion, he drew on a notable, earlier case to affirm what he called the "fundamental principle" that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." My hunch is that Alito was aware of the growing trend in the public schools to catechize children in the new ethic of the homosexual lifestyle and same-sex marriage, and he did not wish to strip parents of any standing to assert the "rights" of their children. And now the question has been sharpened even more by the desperate efforts of parents to resist a curriculum of indoctrination in Critical Race Theory and the encouragement of transgenderism.

But in the whirl of theories, Drakeman finds his way along the path of Scalia to the central truth of the matter: we find the meaning of statutes and constitutional provisions as we realize that the language set down in these instruments reflected the give and take of framers who were trying to arrive at a meaning that most of them would find clear and justified. Drakeman puts it in this way: "Even the Framers who voted against a provision would know what problem it was meant to solve, and why the clause was designed to solve it in that particular fashion, even though they would have preferred to solve it another way." The framers, he said, added provisions to the Constitution "for *reasons*, and those reasons provide an essential foundation not only for interpreters to identify the original meaning of the text" (emphasis added), but on whether those reasons may still bear on the unforeseeable circumstances of our own day. Aristotle said that if the art were in the materials, we would see ships growing out of trees. But ships and constitutional provisions do not fall from trees. They are words that reflect a conscious design, measured to a sense of desirable ends, and explained by nothing other than the *reasons* that brought them forth. Surely no rendition of the meaning of any constitutional provision or statute can possibly improve on that account.

Few clauses in the constitution have been inverted from their original meaning, with wider and more destructive effects, than that clause in the First Amendment that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." We know from the historical record that this amendment did not bar the holding of religious services in the Capitol or prayers in Congress, and it did not bar the federal government from respecting and giving aid to churches.

But with a single sentence in 1947, Justice Hugo Black imparted a wholly new meaning to the Establishment Clause. He proclaimed, in the Everson case, that "[n]o tax in any amount, large or small, can be levied to support any religious activities at institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

We know well enough now that this was a wholly false, made-up reading of the Establishment Clause. And yet, as Drakeman shows in the most illuminating way, there is a serious question of how the Establishment Clause had been understood even at the time of the founding. There is good reason to say that the clause was meant to bar only the federal government from establishing and supporting a religion, while it would leave undisturbed the official support for certain religions in the states. But even when certain religions received special support from a government, that did not foreclose the freedom of other churches to practice their religion. One plausible version, brought forth in the Senate at the time, was that "Congress shall make no law establishing articles of faith or a mode of worship." Drakeman's own reading, after sifting through all those proffered, is the one favored by James Madison: that "Congress should not establish a religion, and enforce the legal observation of it by law." That con-

struction is one we could live plausibly with today, and it wouldn't have had the effect of purging religion from the public square: no need, for example, to withdraw public funds from a deaf student because he enrolls in a Catholic school.

And yet, even if that understanding of the Establishment Clause can be retrieved, it would do little to solve the deeper problem of religion and the law: that even among the defenders of religious freedom there is heated disagreement on what constitutes "religion." Some would try to cast a wide net to protect all religions, and so they shy away from any attempt to distinguish between legitimate and illegitimate religions. And so we find a willingness in some quarters to defend Satanism as a religion. But the affirmation of radical evil could never be reconciled with the God of the Declaration of Independence, the Author of the Laws of Nature, including the moral laws. No understanding of God and religion has been more bound up with our laws and the conventions of our people. Still, the confusion persists, and so local councils, allowed to have prayers before meetings, have felt obliged not to make invidious discriminations. The result is that they invite ministers of the Church of the Flying Spaghetti Monster, and these invocations have created a new growth industry for the Satanists.

This confusion cannot rightly linger. It is a moral question on the freedom of groups claiming, rightfully or wrongfully, the name of "religion." And as a moral question it must be governed then by a standard of moral judgment. But as Drakeman points out, many writers and judges have cited the drift of convention, as words shift their meaning over time, along with the moral sense of things. Practices once regarded as unthinkable (such as the marriage of two men) are now regarded as plausible and legitimate. But are these accomplished jurists not aware that they simply risk backing here into the vice of historicism? Let us suppose that 50 years from now our regime of racial preferences has been preserved and the right to abortion has become further entrenched. Would we be obliged to conclude then that these policies must indeed be constitutional because they have been acquiesced in so long? Would we detach ourselves then from any enduring principles of moral judgment that would challenge the justification for racial preferences or the killing of babies in the womb as policies bound up with the moral logic of the Constitution?

But that drift into historicism alerts us to serious confusion fostered by some of our friends as they use the historical record to show, for example, that senators like Charles Sumner, working to pass the 14th Amendment, were convinced that the amendment barred racial segregation in public schools. If we respect that judgment, though, it is not for a position they held at the time, but because they were able to explain the principle that compelled that judgment. And yet the problem is that even at the time of *Brown v. Board of Education* (1954), on racial segregation, and *Loving v. Virginia* (1967), on laws barring interracial marriage, the Supreme Court could still not explain that principle. If it could, that principle surely would have barred subsequent wide-ranging schemes on racial preference. The problem here is a variant of the old question, suggested by Plato's *Euthyphro*: is a judgment good because it is old, or is it old—is it still with us, to be honored and respected—because it is based on reasoning as compelling now as it was then?

Drakeman speaks the unpleasant truth that rarely speaks its name: instead of taking their lead from the Constitution, many judges simply begin with their own sense of what the right outcome should be. They then simply reach out for any constitutional clauses or commentaries that could give them a cover for their judgments.

And yet, from another angle, this approach is not altogether implausible. As we have seen, even if we could identify the main meaning that the framers attached, say, to the Establishment Clause, that does not keep the moral questions from exploding in our own time as issues never noticed suddenly come into sight: Apart from establishment, what is a legitimate "religion"? And what are the grounds on which the religious may be excused from the laws that are imposed on everyone else, for example, to cover abortions and same-sex couples in medical plans? In other words, no matter how clear we are on the framers' understanding, the times will keep throwing us back on our common sense and the principles that must ever underlie our judgments on the things that are reasonable, fair, decent, and just. Which is to say, judges would need to fall back, along with everyone else, on the native wit and commonsense reasoning of the natural law. But with this telling difference: the judges—the products of the best colleges and schools of law—simply don't take seriously any longer those anchoring truths that formed the ground of the natural law. Hamilton, Marshall, and Wilson traced their judgments back to these anchoring truths, and ordinary folk, not burdened with a legal education, have little trouble grasping them. But now our "lawyer class," flown with power and self-regard, sees itself as untethered to those truths, and free now to wing it on its own. And surely it is the loss of confidence in those truths that explains now what Donald Drakeman aptly calls the "hollow core" in our "constitutional theory."

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