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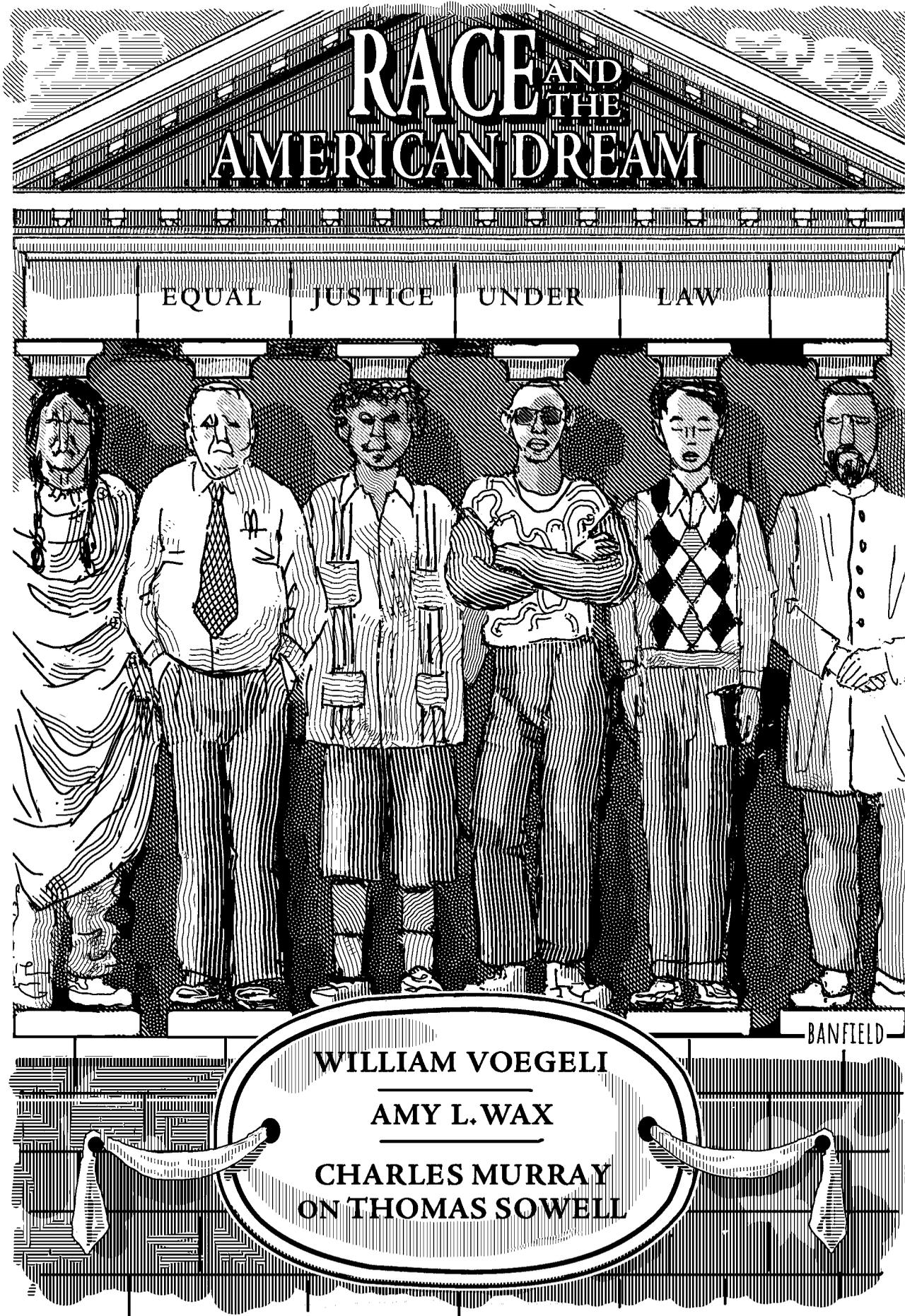
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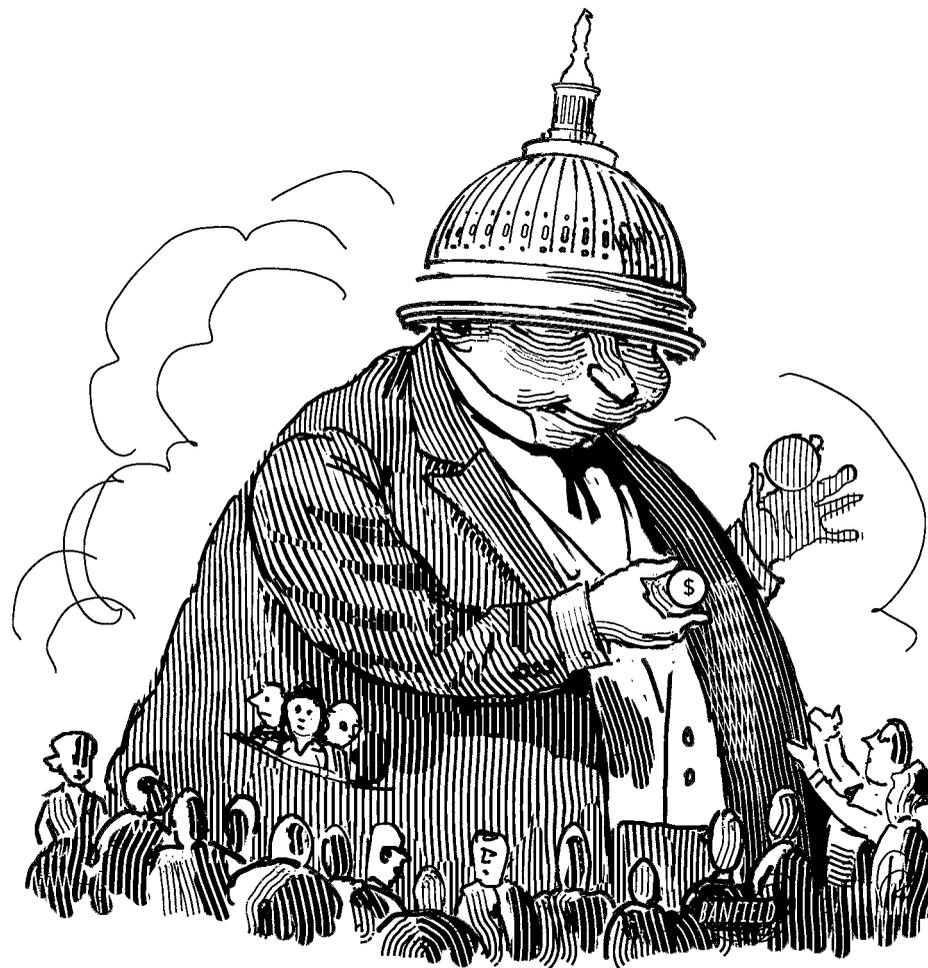


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Book Review by Robert F. Nagel

THE CARROT AND THE STICK

Purchasing Submission: Conditions, Power, and Freedom, by Philip Hamburger.
Harvard University Press, 336 pages, \$35



HAVE THE SUPREME COURT'S INTERPRETATIONS facilitated unjustified distortions in our constitutional system? Philip Hamburger's new book, *Purchasing Submission*, certainly engages this question, a staple of legal and political debates, and in doing so builds upon previous groundbreaking books from the Maurice & Hilda Friedman Professor of Law at Columbia Law School, including *Law and Judicial Duty* (2008) and *Is Administrative Law Unlawful?* (2014). But its core contention is that the American people themselves have sold fundamental elements of their constitutional heritage, submitting to violations of their rights and the undermining of basic political structures, including federalism and separation of powers, in return for money. Ultimately, though, Hamburger rejoins the mainstream by calling on the courts to save us from our folly.

Although this book is addressed primarily to lawyers, its best insights go beyond strictly legal problems to identify structural damage

to our political system. When, for example, private universities accept federal funding and in return adopt federal guidelines designed to control dating practices, the first effect is to regulate students' speech and the second to expose them to punishment after inadequate hearings designed and conducted by the institution. Were the government to impose such rules and procedures directly, they would be widely understood as violations of the rights to free speech and due process.

Less blatant but no less important is that federal funding conditions also undermine the separation of powers by delegating legislative and judicial functions to private institutions. Beyond being an important formal and legal problem, this outsourcing also radically alters the constellation of forces that influence rules' provisions and the manner of their implementation. Ultimately, writes Hamburger, "this divesting and privatization of regulations threatens the freedom of Americans to govern themselves through elective consent."

Federal expenditures also undermine another of the Constitution's structural principles, federalism. Modern constitutional scholarship is generally hostile to the role of states and their subdivisions, appreciating the dispersal of power only when state governments accept federal funding and the accompanying mandates. This "cooperative federalism" misses and even inverts the important function of states in our federal system: to provide a counterpoise to the national government's power, what Hamburger refers to as "combative federalism." To compete with centralized power, states need the ability to engage in localized policymaking that can provide alternatives to national policies. State government can provide such alternatives in part because, as Hamburger notes, policies develop in communities where ties are relatively intimate, communication more personal, and aspirations sometimes distinctive.

By undermining the capacity of state governments to organize their own decision-



Let's Be Reasonable

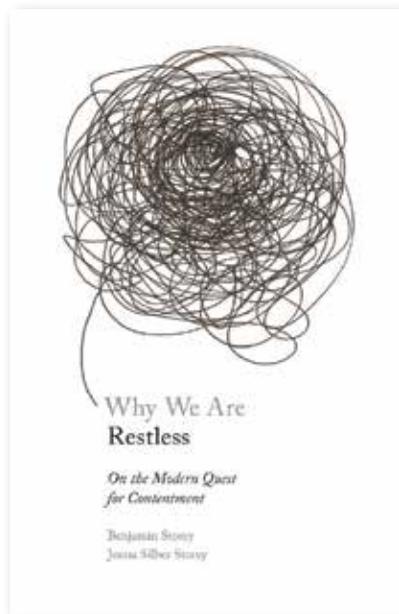
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making structures, the conditions attached to federal funding limit the influence of local communities. Frequently, states shift authority away from localities to centralized, bureaucratic offices where rationalistic, nationalistic instincts dominate, thereby reducing local and state elected officials' power and legitimacy. States become the national government's agents or appendages rather than a counterpoise to its power.

IN SHORT, HAMBURGER PROVIDES A radically new perspective on our constitutional system's condition. Until now, scholars have focused on alterations in the definition of rights, the expansion of congressional regulatory power, the existence of a vast administrative apparatus, and the outsized role of the federal judiciary. All these are indeed significant, but they are also set against the reassuring background of recognizable constitutional forms. We think we are governed by public institutions: the three branches of the national government and dispersed public bodies at the state and local level, forming a complex governing system limited by law and accountable to the people. But the explosive growth of federal spending in modern times has created a different system. In it, behavior is controlled by purchasing consent, and then through largely informal negotiations, threats, and beneficiaries' private actions.

If the familiar albeit imperfectly maintained constitutional system is being undermined or even replaced by purchase, the prime suspect would be the people's preference for whatever is gained from federal expenditures over those aspects of the system being jeopardized. But we have institutions that are expected to remind Americans of the critical importance of their Constitution. It was once thought that the educational system, both public and private, could fulfill this role. No longer. It might be supposed that our political leaders—especially the president or members of Congress—might help us all value the fundamental law. But they are the source of the temptation. That seems to leave only the Supreme Court, which explains why *Purchasing Submission* is addressed to lawyers and judges rather than to the general public.

One problem with indulging Americans' instinct to seek salvation from the Court is that, despite Hamburger's intricate legal arguments, the Constitution may be imperfect, like all human endeavors. It might even allow for its own displacement. (If this seems perverse, recall that Oliver Wendell Holmes, Jr., once wrote that the principle of free speech requires tolerance for ideas that might, "in the long run," subvert the whole Constitution.)

The beginning of the problem is that the federal government may legally obtain enormous amounts of money. This has been true ever since the income tax was authorized by the 16th Amendment in 1913. Moreover, Article I, Section 8, clause 1 appears to authorize the expenditure of this money. Finally, the Necessary and Proper Clause permits, as would be implicit in any event, attaching conditions to the expenditures to ensure that the intended purposes are achieved.

AS A RESULT, *PURCHASING SUBMISSION* argues that despite these aspects of our fundamental law, the document as a whole does not authorize the kinds of expenditure programs now threatening other basic elements of our constitutional system. Hamburger cannot, of course, deny the national government's authority to tax income "from whatever source derived." But he does deny that this money can be spent for any purpose deemed part of "the general welfare." Indeed, he asserts that "the Constitution... does not actually contain a spending power." The words in the text referring to Congress's power to "provide for the...general Welfare of the United States" only define the purposes for which taxes may be imposed. Thus, he concludes, the power to spend money derives from, and is limited by, the other enumerated powers.

Those powers, however, are potentially very broad, as skeptics have been contending since the ratification debates began in 1787. The power to regulate commerce among the states, as every law student learns, has long been thought broad enough to authorize laws prohibiting racial discrimination in out-of-the-way restaurants and to regulate the amount of wheat a farmer grows for his own use. Moreover, Congress's broad powers are supplemented by the Necessary and Proper Clause, which has been understood for centuries to allow Congress wide latitude in determining how to achieve its legislative objectives.

Hamburger, however, maintains that Congress's discretion does not extend to vesting governmental powers, such as the authority to adjudicate legal claims or regulate citizens' behavior, in institutions or individuals not authorized by the Constitution. If he's right, then the subversion of the Constitution now underway is not traceable to its textual deficiencies but to the Supreme Court's misinterpretations. Indeed, despite occasional efforts to soft-pedal its assessment of the Court's record, *Purchasing Submission* is a compendium of severe criticisms. The Court, it argues, has: wrongly found an independent power in Congress to spend for



the general welfare, interpreted the power to regulate commerce too broadly, understood the guarantee that the states should have a republican form of government too narrowly, incorrectly held that the fair adjudications required by due process of law are possible in administrative agencies, and assumed without warrant that the national government can alter constitutional limits or delegate its constitutional responsibilities by gaining the consent of states or individuals. And it has been wrong to think that conditions attached to federal grants by agency action are superior to state laws simply because state officials have accepted those conditions.

WHEN THE COURT DOES ARRIVE at the right answer, according to Hamburger, it often does so for the wrong constitutional reason. Under the so-called anti-commandeering principle, the Court has restricted congressional power to require state officials to administer or legislate federal mandates. As a general matter, however, this limits congressional power to condition federal grants only in the rare instances where the courts are willing to find that the amount of money involved amounts to a coercive requirement. Hamburger argues that coercion is not required by the constitutional principle involved, since the underlying question is whether the grant condition undermines state sovereignty. This, he argues, can occur without any economic pressure. Therefore, even the Court's choice of the word "commandeering" is a distraction from correct constitutional analysis.

Nevertheless, like any lawyer arguing before judges, Hamburger attempts to align his proposals with the Court's precedents. He claims, faintly, that in many areas his book "more or less echoes precedent." But he is far more convincing when he acknowledges that judicial doctrines have "failed to stem the tide" and, indeed, that often the Court does not even have doctrines "that recognize the problem."

The question raised, then, is why the Court has been wrong or oblivious on so many fundamental constitutional issues. Advocates

by training and role, lawyers are inclined (at least in public) to attribute deficiencies in judicial decisions to a failure of understanding. The solution, then, is to present the Justices with cogent arguments, thereby advancing a fuller understanding and the correction of mistakes.

BUT HAMBURGER'S RADICAL CRITIQUE of our constitutional system's disrepair, along with his sweeping depiction of the judicial failure to appreciate the distortions in that system, calls for a wider inquiry. And, indeed, some reasons for the judiciary's failure are readily apparent. For one, spending programs are politically popular and often (as Hamburger acknowledges) useful. If the Court were to undertake a wide-ranging campaign to limit those programs, it would eventually risk political reprisals. Even a remote possibility of such reprisals has presumably been a reason that, as Princeton political scientist Keith Whittington has authoritatively demonstrated, the Supreme Court from the beginning of our history has not stood for long against the will of strong national majorities.

This record is only partly attributable to political pressure. Judicial doctrines often comprise abstract distinctions that are difficult to maintain in the face of raw events. The Court's early efforts to limit congressional power to regulate commerce, for instance, depended for a time on distinguishing between direct and indirect effects on commerce. When, however, the indirect effects were massive, the Court's distinction lost its persuasive force and yielded to reality.

More generally, legal reasons are expected to be authoritative, not mere matters of opinion or degree. Hence, when Hamburger criticizes the Court for failing to provide restrictive content to words such as "the general welfare," he is asking for the justices to jeopardize their claims to speak for more than their own personal opinions. Similarly, when he urges that consent to a funding condition does not excuse violating a right if that consent is induced "with constitutionally significant pressure," he

is demanding judgments of degree that are often difficult to justify authoritatively.

Finally, consider the general tendency of the doctrinal errors Hamburger identifies. The Court's misinterpretations, he argues, include: creating a congressional power to spend for the general welfare, enlarging other congressional powers in part by misconstruing the words "necessary and proper," permitting the federal government to enlist states and even private individuals in carrying out federal functions, and allowing federal grants to interfere with state sovereignty by nationalizing state decision-making structures. In short, the Court has allowed the central government's tentacles to infiltrate institutional arrangements and private lives. Meanwhile, the Court has been adding to its own power by aggressively striking down state and local laws that infringe on constitutional rights both real and imagined. This record is what should be expected when we entrust primary responsibility for enforcing constitutional limits to an institution that is very much a part of the national government.

Political pressures, intellectual limitations, and institutional biases are only among the reasons why the Supreme Court has not defended important constitutional structures. Philip Hamburger's brave, insightful book is nevertheless addressed primarily to lawyers and jurists for the same reason that the Supreme Court has gradually come to substitute for political safeguards—derived from the people themselves—as the source of constitutional legitimacy and meaning. We trust lawyers because we do not trust one another. All the same, it is worth remembering that political power decentralized among the states was intended to curb national excesses. If Hamburger's powerful insights somehow filter out to those at the state and local level whose rights and power are being undermined, perhaps political resistance can reclaim parts of our constitutional heritage.

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