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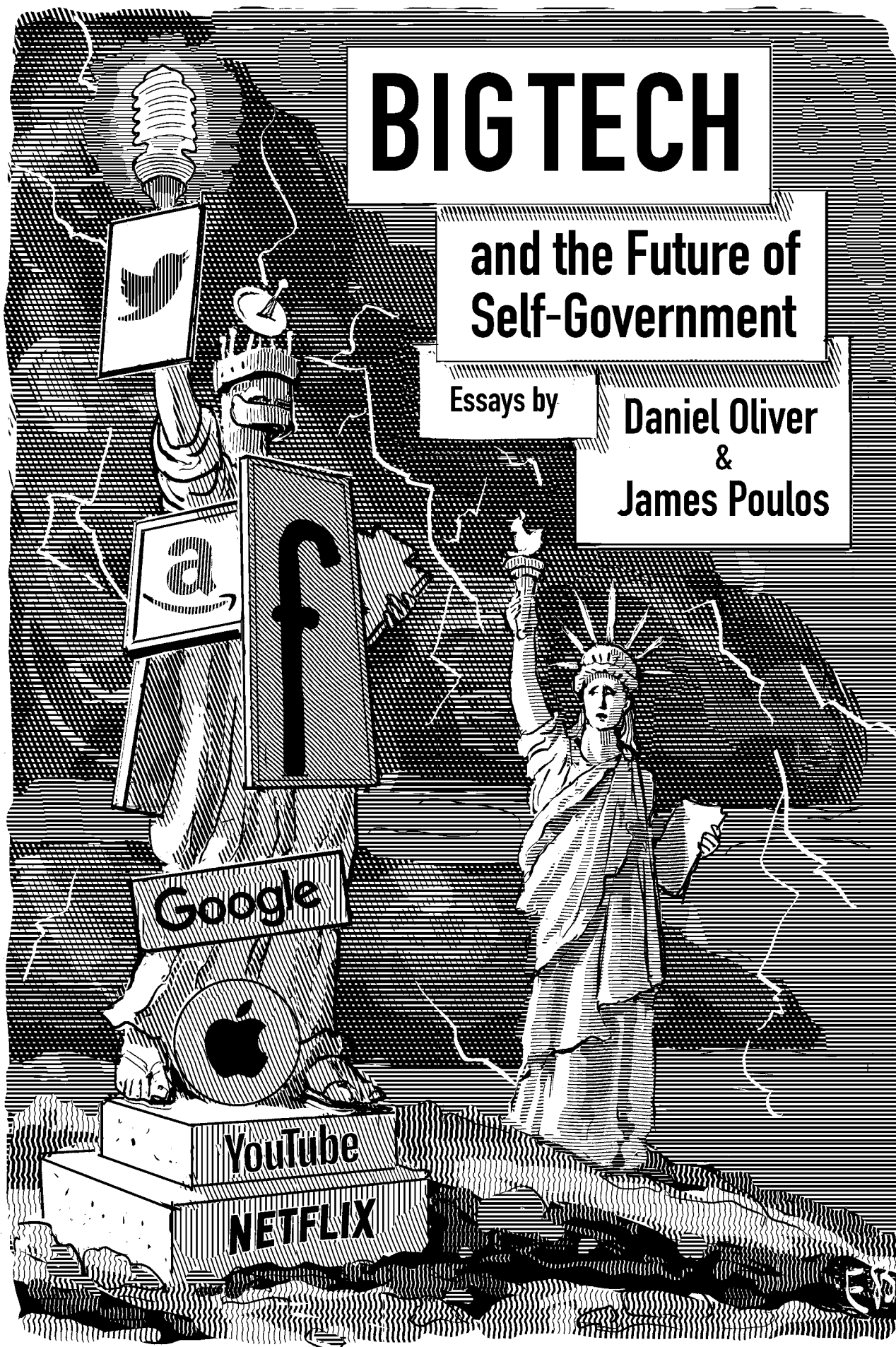
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PACKING THE COURT

Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court,
by Ilya Shapiro. Regnery Publishing, 256 pages, \$28.99

ON OCTOBER 26, A WEEK BEFORE the 2020 presidential election, the United States Senate voted 52 to 48 to confirm Amy Coney Barrett, President Trump's third nominee to the United States Supreme Court. Every single Democrat voted against her, and every single Republican, save one, voted for her. Barrett was one of the most qualified nominees ever, with a stellar academic record, prestigious service in judicial clerkships, several years on the federal appellate bench, and before that a distinguished career as a Notre Dame law professor.

And yet, as the vote approached, Senate Minority Leader Chuck Schumer gravely intoned that were Barrett confirmed, "Generations yet unborn will suffer the consequences...[a]s the globe gets warmer, as workers continue to fall behind, as unlimited, dark money floods our politics, as reactionary state legislatures curtail a woman's right to choose, gerrymander districts, and limit the rights of minorities to vote."

This was not the first time the American people had heard such language from a Democratic senator. Mere minutes after Ronald Reagan nominated Judge Robert Bork to the Supreme Court on July 1, 1987, Ted Kennedy took to the Senate floor to declare that if Bork were confirmed,

women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.

Kennedy's remarks were as much pure fabrication as Schumer's, but his hyperbole and Bork's unappealing demeanor sank the nomination and inaugurated an era of poisonous political confirmation battles. How that happened, and what might be done about it, is the subject of Ilya Shapiro's *Supreme Disorder*.

The director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute, Shapiro argues that a serious break-

down in the functioning of our constitutional order has led us to a point where our two major political parties, for the first time in our history, now embrace two starkly different visions of the task of the Court and the nature of the Constitution. Republicans now adhere to a judicial philosophy that sees the Court's role as one of discerning the original understanding of the constitutional text, and interpreting statutes according to their plain meaning. Democrats, by contrast, believe that the Court should infuse the Constitution with new meaning in order to accommodate what they believe to be the evolving standards of decency, morality, equality, and inclusion. They celebrate the Court's wholecloth creation of rights to use contraceptives, terminate pregnancies, marry someone of the same sex, and a myriad of other newly minted entitlements. Rejecting this "living constitution," Republicans believe making new law or policy should be left to the people's representatives in Congress and the state legislatures.

SINCE KENNEDY'S REMARKS ABOUT Bork, Democrats like Schumer have employed similar rhetoric to frighten Americans into believing that Republican-appointed judges and Justices will reverse what Democrats hold to be essential American rights. And yet, the Republican argument against having nine black-robed archons make the rules for all Americans has a certain appeal, and, as Shapiro correctly observes, Donald Trump won the 2016 election, and ran again in 2020, on a promise to appoint Justices like the late Antonin Scalia—perhaps the most important promise he kept.

Although Shapiro's ostensible subject is the politics that now surrounds judicial appointments, his book is a splendid historical review of appointments to the Supreme Court, key constitutional cases and doctrines, and almost two and a half centuries of political tension among the three branches of government. What's more, this is a lively look not only at judicial politics, but also at the growth of the administrative state and the manner in which Congress has shirked its responsibilities, leaving law and policymaking to agencies and the courts. It's no wonder, then, that the Justices now find themselves

thrust into the partisan maelstrom, which further undermines the rule of law. Shapiro understands that bringing the courts back to their historic role of enforcing the law and Constitution *as originally understood* is the crucial problem of our time.

ONE STEP TOWARD THAT GOAL would be to reform the Supreme Court confirmation process, and Shapiro offers some sensible suggestions, such as ending televised confirmation hearings, which serve as little more than grandstanding forums for Democrats to tarnish Republican nominees—as the Bork, Clarence Thomas, and Brett Kavanaugh hearings demonstrated, each deftly dissected here.

Shapiro also explores other proposals to which Joe Biden alluded while running for president, such as increasing the number of Justices, limiting their terms, or staffing the Supreme Court by rotating through a succession of lower court judges. Most of these would likely reduce the Justices' effectiveness and diminish the judiciary's independence, and some would require a constitutional amendment, so they are improbable in the short term.

Precisely how, even if the Supreme Court is dominated by originalists for the next few decades, these competing visions get sorted out is unclear. One thing that Shapiro gets completely correct, however, is that the cramped constitutional philosophy of Chief Justice John Roberts—often called "institutionalism," and designed to insulate the Court, as far as possible, from political attack—is headed for history's dustbin.

Supreme Disorder is a useful guidebook for steering through the coming threats to the rule of law—and, indeed, for preserving the Constitution—by saving the Court, the Congress, and the agencies from themselves. If there is any hope of a return to an originalist application of the Constitution and the slaying of the federal Leviathan, it will come from such thoughtful, informed efforts.

Stephen B. Presser is the Raoul Berger Professor of Legal History Emeritus at Northwestern University, the legal affairs editor for Chronicles: A Magazine of American Culture, and the author of Law Professors: Three Centuries of Shaping American Law (West Publishing).

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