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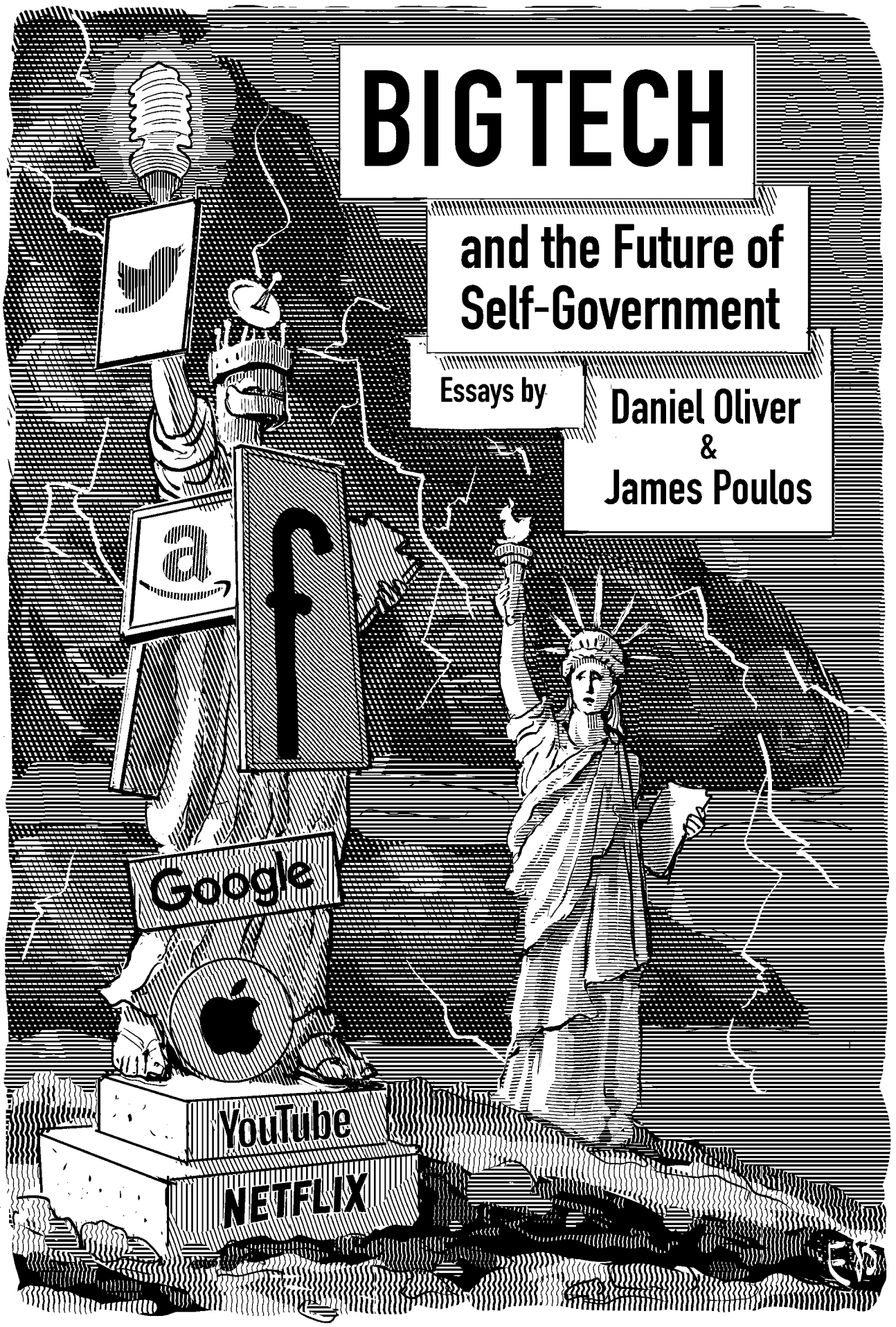

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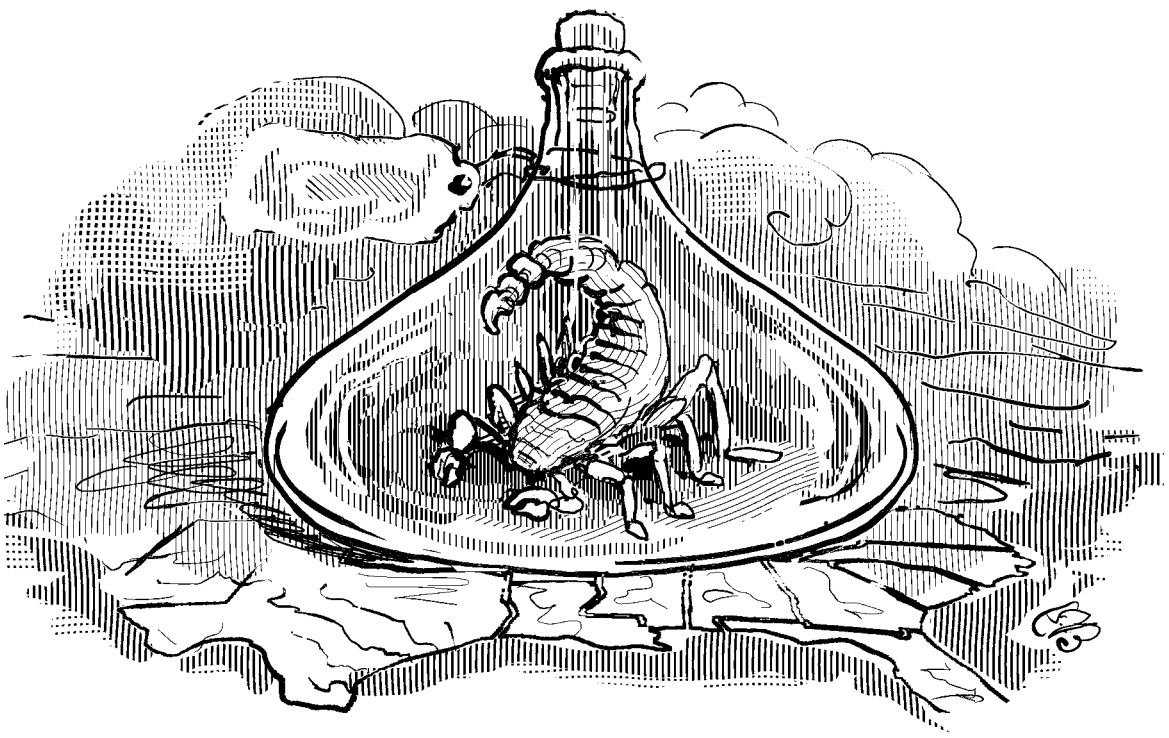
Book Review by Allen C. Guelzo

The Antislavery Project

The Crooked Path to Abolition: Abraham Lincoln and the Antislavery Constitution,
by James Oakes. W.W. Norton & Co., 288 pages, $26.95



It is a marker of how deeply uncertainty has been run into the American soul by the events of the past year that not even Abraham Lincoln has escaped the drapery of doubt and obloquy. A statue in Boston's Park Square, celebrating his emancipation of millions of black slaves in 1863, has been removed as "degrading." The San Francisco United School District voted to erase Lincoln's name from a high school in the Sunset District (along with 43 other school-name changes), only to reverse itself in the face of public outcry. The most famous outdoor statue of Lincoln—Augustus Saint-Gaudens's "Standing Lincoln"—is now up for review by the Chicago Monuments project.

Still, there are yet historians' voices crying in this wilderness of political self-parody against the public obliteration of Abraham Lincoln, not the least of which belongs to James Oakes, whose *The Crooked Path to Abolition* tracks the difficult, wrenching path trod by Lincoln in particular and the anti-slavery movement in general toward the final abolition of human trafficking and the chattel ownership of human beings in the United States. Although Oakes, who teaches at the City University of New York's Graduate Center, will certainly not be mistaken for a political conservative, in 2013 he dropped a 500-page bombshell of historical honesty in *Freedom National: The Destruction of Slavery in the United States, 1861–1865*, which did what conservative historians ought to have done long before. Oakes proclaimed from the housetops that the Constitution was written by a convention which assumed the demise of slavery and that Lincoln was the chief agent in slavery's downfall. The Constitutional Convention, Oakes insisted, established what was understood as "the federal consensus"—that the federal and state governments operated in separate spheres, the one national and the other local. But far from the federal consensus operating to protect slavery, it energized the anti-slavery movement to use the national sphere to set up impenetrable roadblocks all around the expansion of slavery, a legal siege that would end only with slavery's last breath.

Oakes's thesis stood in stark contrast to the gloom that skeptics like Paul Finkelman, David Waldstreicher, and George Van Cleve had gathered around the Constitution as a document hopelessly palsied by slavery, in a republic hopelessly ensnared in slavery's power. But Oakes unapologetically elaborated on a number of these themes a year later in his brief *The Scorpion's Sting: Antislavery and the Coming of the Civil War*. Taking up again the conviction of the anti-slavery standard-bearers that slavery was merely a local ordinance which had no national standing in constitutional law, Oakes described the basic anti-slavery strategy in the decades before the Civil War as something similar to imprisoning a scorpion in a bottle and watching it sting itself to death in frustration. On that analogy, if Congress would ensure that no new slave territories were added to the Union—if the scorpion of slavery could be bottled—slavery's intrinsic need for new land would be its own undoing, and the scorpion could proceed to work its own self-destruction.

This allowed anti-slavery leaders, including Lincoln, to insist that they had no intention of overriding the Southern state ordinances which legalized slavery, something which Lincoln, in his First Inaugural Address, even of-

fered to endorse in the form of the so-called Corwin Amendment (which would have added to the Constitution a 13th Amendment promising no federal interference with slavery in the slave states). But it also triggered panic among slavery's partisans, who increasingly demanded the opening of the western territories to legalized slavery as a matter of due process (this was the basic argument of the infamous *Dred Scott v. Sandford* decision in 1857) as well as simple survival. The scorpion wanted more, much more, than either the Corwin Amendment or the federal consensus would give it.

The Corwin Amendment has been read by Lincoln-doubters like Daniel Crofts as proof that the president had no particularly radical intentions about abolishing slavery. (In *Lincoln and the Politics of Slavery* [2016], Crofts dismisses Oakes's theory of "the scorpion's sting" as taking mere "theatrics at face value.") Yet, any reading of the Corwin Amendment underscores that it gave the slave South absolutely nothing in the way of any guarantee it didn't already have under the federal consensus. Slaveholders knew that the Corwin Amendment was an empty suit that offered them neither the protection they needed nor the new spaces they craved, and they acted accordingly.

The crooked path to abolition is yet another brief spin-off from *Freedom National*, this time tracing the emergence of a coherent constitutional argument against slavery based on the federal consensus and showing how Lincoln inhabited and deployed that argument. Oakes calls this emergence "The Antislavery Project," and no one will miss how this name sets up Oakes's argument in defiance of the 1619 Project. The Antislavery Project began with the Constitution itself, since at its ratification "nearly everyone agreed that Congress had no power to 'interfere' with—that is, abolish—slavery in a state," but they likewise agreed that "the same principle protected *abolition* in the states" as well. The only practical exception which the Convention left in place was the provision for reclaiming fugitives "held to Service or Labour" (Article 4, section 2). But even there, the Constitution coyly failed to specify whether this reclaiming was a federal responsibility (in other words, *rendition*) or merely allowed slaveowners from a slave state to attempt *recaption*, if they could manage it, in a free one.

The Antislavery Project eventually developed a three-part constitutional argument, arising from the basic contention that the Constitution was presumptively constructed in favor of freedom. The first element of this argument concerned the territories: the Constitution granted Congress governing authority over the western territories, and as the Constitution was a freedom document, slaves carried into the territories were to be considered free, or at least entitled to due process and suits for freedom. (This was the logic behind Dred and Harriet Scott's freedom suit in 1857.) The slaveholders' response was to claim that slaves were property, like horses or cattle, and therefore banning slavery from the territories was a denial of *slaveowners'* due process. The fatal flaw in this response, as the Antislavery Project delighted to remind slaveholders, was that the Constitution nowhere referred to slaves as *property*; to the contrary, the Constitutional Convention had been at pains to insist (in the words of Roger Sherman and James Madison) that there could be no "property in men." The Antislavery Project pressed this advantage in 1823 to contest South Carolina's Negro Seaman Acts (which imprisoned black sailors from the crews of ships calling at Charleston) in the federal courts (in *Elkison v. Deliesseline*), adding to due process an appeal to habeas corpus, the Commerce Clause, and access to jury trials for free blacks deprived of their rights and for fugitives.

A second weapon in the antislavery Project's arsenal emerged in the late 1830s and '40s, in the theory of congressional "war powers." John Quincy Adams, in a memorable series of speeches in the House of Representatives, argued that in the event of insurrections or invasions, the federal government could invoke emergency military powers which included emancipating slaves (either to recruit them or to remove incentives for treachery). By 1848, yet a third argument had been advanced: that Congress not only had the authority to exclude slavery from the territories, but had no power to *allow* it there at all.

The year 1848 also marked Abraham Lincoln's solitary term in Congress, and the moment when he made his first moves against slavery on the national stage. Lincoln would later describe himself as "naturally anti-slavery" and an opponent of slavery for as long as he could remember. But until that term in Congress, his only significant statement against slavery had been as a co-sponsor of a resolution in the Illinois legislature, denouncing slavery as an embodiment of "injustice and bad policy." It was in Congress that he established connections with major figures in the Antislavery Project and made his first tentative proposals for banning slavery and the slave trade from the District of Columbia. Lincoln, writes Oakes, was "an eloquent, if unoriginal advocate for the antislavery constitutional tradition"—which should be read as a resounding compliment, since Lincoln's "unoriginality" aligns him entirely with the Antislavery Project. Like other proponents of the Antislavery Project, he was convinced that the federal consensus had to be respected, but if it was respected fully, it would fence in slavery so securely that it would be doomed. To oppose slavery extension was, quite literally, identical with opposing slavery itself.

Just how unoriginal Lincoln was in his anti-slavery constitutionalism becomes even clearer for Oakes once Lincoln became president. He warned from the beginning that secession would cost slaveholders the protection of the federal consensus, and allow him to invoke Adams's emergency powers. Similarly, due process came into play within weeks of the firing on Fort Sumter in April 1861, as fugitive slaves who fled north were first transformed into "contraband," then into soldiers, and then finally, with the *real* 13th Amendment, into free Americans. And Oakes is willing to take Lincoln at his word when he speaks about "the natural rights of life, liberty, and property, or the privileges and immunities of citizenship." That meant nothing other than that "whites and Blacks were fundamentally equal." Oakes acknowledges that Lincoln was no radical overturner, and that it is possible to read him as racially unenlightened and more concerned with slavery as a moral and political evil than a racial one. But in a single statement which throws the 16th president into clear relief, Oakes says: "It is sometimes said that Lincoln's commitment to emancipation was held in check by his racial prejudice, but the evidence suggests something like the opposite."

And in the end, it really was the strategy of the Antislavery Project—and Lincoln—which triumphed. His Emancipation Proclamation of January 1, 1863, only freed *slaves* rather than eliminating *slavery*, and only in the rebel Confederacy, and there was no predicting what might happen to the Proclamation in the federal courts once the wartime emergency was over. An amendment to the Constitution, however, would be "a king's cure for all the evils" of slavery, as Lincoln himself put it—and that "cure" would become possible by restricting the expansion of slavery from the western territories, by ensuring the admission of new territories as free states, and thus running up the tally of free states to the number where an abolition amendment could at last be adopted and ratified.

What must impress any reader of *The Crooked Path to Abolition* is the consistency with which an anti-slavery constitutionalism was developed and applied from the very first. Slavery was not killed by overturning the Constitution and starting over again with the Reconstruction amendments, in the manner touted by Bruce Ackerman, Eric Foner, David Blight, and George Fletcher; it was strangled by relentlessly applying the logic the Constitution already contained, animated by the hovering spirit of natural law and the Declaration of Independence. If there was any party to the controversy which desired a new Constitution, it was the slaveholding Confederacy—which is why they rebelled against the old one, and wrote another to suit themselves.

For all its wisdom, there are a few wrong turns in *The Crooked Path*. Roger Taney was already the Supreme Court's Chief Justice in 1842 at the time of *Prigg v. Pennsylvania*, not an Associate Justice; Lincoln's famous meeting with "a delegation of free Blacks" occurred in 1862, not 1863; the Constitution actually contains no "war powers clause"; the American Colonization Society was founded in 1816, not 1817; and Lincoln's understanding of natural law certainly did not include the New-Dealish idea that "every living man and woman was entitled to a decent life…free from the debilitating effects of poverty."

But if there is a really serious flaw anywhere in Oakes's *Crooked Path*, it is that he makes the path almost too straight, too easy, too logical. Even he has to admit that "at every step…as each new controversy arose, a proslavery Constitution developed, dialectically as it were, alongside its antislavery counterpart." There was no "inexorable unfolding of the libertarian premises of the founding generation." Lincoln himself frequently confessed to bouts of pessimism in the 1850s about the success of the anti-slavery movement, and ironically, never did its possibilities look bleaker than on the brink of the Civil War. Lincoln feared, and rightly, that the *Dred Scott* decision would not only rationalize the transplanting of slavery to the territories, but that it would trigger a second test which would overturn the free-state anti-slavery statutes as well. (Such a case—*Lemmon v. New York*—was actually working its way to the Supreme Court even as Lincoln was nominated for the presidency.) The farcical but deadly raid of John Brown at Harpers Ferry in 1859 only seemed further to embarrass and eclipse anti-slavery hopes, to the point where Frederick Douglass contemplated self-exile to Haiti.

By secession and rebellion the slaveholders conveniently delivered their own heads to the block. But that would certainly not have happened but for the decades of the Antislavery Project's persistence, and its most highly unoriginal representative, Abraham Lincoln. Perhaps the San Francisco school district and the statue-erasers in Boston and Chicago have something more they should think about than puritanical impulse.

Allen C. Guelzo is the senior research scholar in the Council of the Humanities and director of the James Madison Program's Initiative on Politics and Statesmanship at Princeton University, a senior fellow of the Claremont Institute, and a visiting fellow of The Heritage Foundation.