THE THREEPENNY CONSTITUTION
(AND THE QUESTION OF JUSTICE)

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"[T]he best way of understanding any group of ideas in the history of thought is to bring all the contradictions into sharp relief."

Georges Sorel, Reflections on Violence

Though for more than thirty years a historian of, in largest part, America, I have spent comparatively little time in contemplation of the moment of production of the United States Constitution, also known as the "founding." In part this choice expresses a certain skepticism of that moment's real historical importance, in part a certain impatience with the genre of American constitutional commentary, particularly that dealing with the founding era, which tends toward the didactic, the hagiographic, the triumphal. None strikes me as a particularly useful mode for historical discourse. Of course there are exceptions to this as to any sweeping generalization. But even the exceptions seem to me, in many cases, to make a significant error—that of presuming the Constitution. First, constitutional commentary does not differentiate between the Constitution and constitutional interpretation: the former becomes subsumed in the latter. In legal circles, as Daniel Hulsebosch has recently observed, the move is "implicit in the editorial choice to begin a constitutional law casebook with Marbury while relegating the Constitution itself to an appendix." Why not begin with "the Constitution itself?" Because the Constitution has been declared in essence unknowable absent its intervening episcopacy, which begins telling us almost immediately (starting in The Federalist Papers) what the substance of the text "really" means. Second, constitutional commentary operates within the

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3. Id.
4. See The Federalist (James Madison, Alexander Hamilton, and John Jay). In 1798, declaiming against interpreters of the Constitution’s meaning, William Manning wrote, "[t]he peopel [sic] excepted
parameters of a holistic ideology, constitutionalism, created by the strategic intervention of interpretation. As a discourse, constitutionalism is an incessant quarrel over who shall be the interpreters—who in the American case shall express what Derrida calls the ‘Mystical Foundation of Authority.’”

But as an ideology, constitutionalism contains every imaginable species of interpretation. It has no outside.

Now, though, I feel required to question my own abstention, not because I have a sudden desire to become one more interpreter, but because I am puzzled by where the mystical foundation of authority actually inheres. Constitutionalism will not help me, for its quarreling intermediaries obscure the place my instincts tell me to start, “the Constitution itself” (that is, the text created at “the founding”). And so I will pull the document out of the appendix and examine it shorn, so far as possible, of its accumulated fleece of interpretation.

Walter Benjamin, writing of Bertolt Brecht’s Threepenny Novel, calls this an exercise in satire. To “strip[ ] the conditions in which we live,” to “remov[e] the drappings of legal concepts,” is to expose their human content. The task of the satirist “is to undress his fellow citizen.” Law, politics, analysis of all kinds, are exercises in undressing but also in redressing. Hence, the satirist may encounter successive suits of clothes tailored for the citizen, as Thomas Carlyle did in Sartor Resartus. In re-tailoring, Carlyle and Benjamin both emphasized, interpretation is at work, a move that the satirist must always confront for new clothes no less than the old are mete for removal. “[H]is real concern,” wrote Benjamin, “is . . . only with the posture in which his subject stands naked between his costumes. The satirist confines himself to the nakedness . . . Beyond this his duty does not go.”

I shall return to Carlyle presently, but Walter Benjamin will be my principal guide in what follows. For those who do not know who he was, Benjamin was a brilliantly idiosyncratic German Jewish Marxist literary and linguistic theorist, whose work flowered in the 1920s and 1930s. He died in September 1940 in Port Bou on the Franco-Spanish border attempting to

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8. Id. at 201.
9. Id.
12. See Peter Demetz, Introduction to Reflections, supra note 7, at vii-xlii.

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of it as it is, & no other way.” William Manning, The Key of Libberty (1798), reprinted in 13 WM. & Mary Q. 202, 235 (Samuel Eliot Morison ed., 1956).
escape Nazism.  

Benjamin is a peculiarly apt guide on this occasion, in that in honoring Wythe Holt we honor someone who is himself an idiosyncratic Marxist. Indeed, I was drawn to my subject in part to celebrate that aspect of Wythe Holt’s substantial career as a legal historian that has addressed itself precisely to the creation of the American republic and the legal history of that moment.

My point of departure here will be Benjamin’s essay on Threepenny Novel. I am drawn to that essay by its irresistible opening paragraph, which allows me an opportunity to cut in, as it were, on a history with which I would otherwise be obliged by scholarly decorum to negotiate at some length for an opening.

Eight years separate Threepenny Opera from Threepenny Novel. The new work has developed from the old. But this did not happen in the quaint manner in which the maturing of a work of art is usually imagined. For these were politically decisive years. The author made their lesson his own, called their misdeeds by their name, lit a light for their victims.

So also the U.S. Constitution. The Constitution took the place of the Articles of Confederation eight years, politically decisive years, after the Articles’ final ratification in 1781. The Constitution was a new work that developed from the old, but it was not the old in “mature” form. Its authors made the lessons of those years their own, and in their conclave, in their own way, called those years’ misdeeds by name and lit lights for their victims.

Hence this Essay’s title: “The Threepenny Constitution.”

I. CLOTHING HUMANITY

Benjamin calls Threepenny Novel a “major satirical novel.” In the proper sense of satire that I have defended here, one may not describe the
Constitution per se as a work of satire. It is tempting to do so, for by appearances the body of the Constitution—the seven unamended articles adopted by the Philadelphia convention—is a bare and spare text whose aesthetic seems at first sight precisely one of a stripping down to the essential shapes, the naked modalities, of governance that will be required if the object of attention, humanity, is to subsist in the Founders’ new nation. A clothing of those first principles, the dense clothing of interpretation—of constitutionalism—will begin immediately, but it still comes after the event. Nevertheless one should resist the temptation, for the Constitution is already itself a clothing, the first of all, a new outfit for mankind. The duty of the satirist was performed for the first time during the initial phase of the federal convention, when the narratives that would make way for the project of the Framers were swiftly and surely established. For the satirist at work, we have only to turn to Edmund Randolph’s opening speech to the delegates assembled—a tale of misdeeds and their victims, of lessons learned during those politically decisive years after the Confederation was established; a tale of crisis and imminent downfall, of overwhelming weakness in the face of foreign threats, of dissension among states, of sedition, indeed of open rebellion; a tale of commercial discord, of the urgent necessity to provide for foreign indebtedness where no provision prevailed; a tale of corruption, of violated treaties, of the havoc wrought by paper money upon honest men, of everywhere looming anarchy bred by the laxity of government. The audience agrees, the subjects for its attention have been exposed. The Constitution they make will be salvation. It is the first outfit that comes after the satiric narrative, for which the narrative clears the way.

The new outfit clothes two entities—“the people” and “the states.” Both were made objects of attention and benefit in the Articles of Confederation, but in reverse order: the states foremost, for the Articles had encountered them as pre-existing jurisdictions, successors of colonies, and had aggregated them into a perpetual union of states to be known as the United States; the people known only as “the people of the different States in this Union.”22 The mobility of the people and that of their property was enhanced; the privileges and immunities of each state’s free citizens granted to all other states’ free citizens residing therein but, consequently, as third

19. James M. Beck, as Solicitor General of the United States, observed that, “[T]he Constitution, in which there is not a wasted word, is as cold and dry a document as a problem in mathematics or a manual of parliamentary law. Its mandates have the simplicity and directness of the Ten Commandments . . . .” JAMES M. BECK, THE CONSTITUTION OF THE UNITED STATES: A BRIEF STUDY OF THE GENESIS, FORMULATION AND POLITICAL PHILOSOPHY OF THE CONSTITUTION OF THE UNITED STATES 113 (1924).


21. ARTICLES OF CONFEDERATION (agreed to by Congress Nov. 15, 1777, and in force after ratification by the state of Maryland on Mar. 1, 1781).

22. See ARTICLES OF CONFEDERATION art. IV. One should note that the reference is to the “people” of the different states, not “peoples.” See also art. IX (“[N]o treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to . . . .”) (emphasis added)).
party beneficiaries of the union agreed among the pre-existing states. Although consequent, the appearance that the people made in the Articles was nevertheless sufficient to create a "people of the United States." And it is precisely this people that can now be mobilized, after eight years have passed, as an initiating metaphysical force, to reverse the order of attention, to speak from outside the states, and to "ordain and establish" the Constitution on its own recognizance.

In the wake of Randolph's narrative, the people's decision "to form a more perfect Union" is one that disciplines the states by enfoldng them in the restraints of a federalism that will moderate their capacity to act as they had hitherto. But the people's decision is also an act of supreme self-discipline, that is, not just an act against the depredations of the states but against those of the people themselves. For the people undertake explicitly to establish Justice—at large, that is, in place of illegality and injustice; to insure domestic tranquility—again, at large, in place of anarchic chaos, sedition and rebellion; and to promote the general welfare. These are their a priori commitments, the Constitution's reasons for being, established as such in the Preamble. The mechanism itself comes in the text—the articles and sections that enumerate the distributions of power and create the relations of priority, "the practical and essential details of government," to make federalism work and institute effective governance.

But here, in the belly of the machine "that would go of itself," the transcendent collectivity that called it into being disappears. "We the People" have no presence as such—not as the machine's governors, or even as an abstraction, but only here and there as the occasional "person," who being of a certain age and a certain status is declared fit to perform this or that authorized role. In the seven articles of the unamended text, "the people" no longer exists. It is returned whence it came, to the several states, and

24. Id.
25. Id. (emphasis added).
26. Id. "[E]stablish Justice" is the first specific commitment into which the people enter in consequence of their general objective of "a more perfect Union." See id.
27. They are "the foundation for all that followed." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 5 (2005).
28. BECK, supra note 19, at 113.
29. "After our Constitution got fairly into working order it really seemed as if we had invented a machine that would go of itself, and this begot a faith in our luck which even the civil war itself but momentarily disturbed." JAMES RUSSELL LOWELL, The Place of the Independent in Politics, in POLITICAL ESSAYS 295, 312 (1888); see also KAMMEN, supra note 6, at 18 (noting growing resort to the language of "mechanism" in constitutional discourse during the first century of the Republic); Benjamin Rush, Thoughts upon the Mode of Education Proper in a Republic, reprinted in ESSAYS ON EDUCATION IN THE EARLY REPUBLIC 9, 17 (Frederick Rudolph ed., 1965) ("[I]t is plain that I consider it as possible to convert men into republican machines. This must be done if we expect them to perform their parts properly in the great machine of the government of the state."). See generally THOMAS CARLYLE, Signs of the Times, reprinted in CARLYLE: SELECTED WORKS, REMINISCENCES AND LETTERS 19 (Julian Symons ed., 1967).
31. The words "the people" appear only once in the seven articles, in Article I, § 2, which provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the
broken up into "persons" to be enumerated for purposes of representation and taxation.\textsuperscript{32} And here in a spectral encounter, these persons mingle with others, who are present but absent, not "us" but "them," fit to be no one for their purposes but only for ours. Their place is no place; they can be counted but cannot live. They are the Constitution's living dead, its zombies. I will return to them.

The absence of "We the people" from the unamended text is underscored by the reappearance of the people (but not of "We") in the Bill of Rights.\textsuperscript{33} Their reappearance signifies an alchemy wrought in the course of the Constitution. When in the Bill of Rights "the people" reappear, they emerge as if from a tunnel dug through a hill that separates two states of being. The animating and active people of the Preamble have become, in this first—this very first—commentary on the text, the objects of governance; the only question remaining, taken up in the Bill of Rights, is to what precise extent. The self-disciplining gesture of the Preamble has in the interval been seized upon as a concession and acted upon; the machine is going of itself, the issue has now become one of protections and freedoms that will sufficiently inure its objects to their fate.

Or so it seems to one reading a text.

II. TELESCOPING TIME

Reading \textit{Threepenny Novel}, Benjamin remarks on how Brecht "draws the epochs together."\textsuperscript{34} What does he mean? Benjamin calls displacement "part of the optics of satire."\textsuperscript{35} Brecht's gangster protagonists, Peachum and MacHeath, live in a twentieth century London "that has the rhythm and appearance of the age of Dickens. Private life is subject to the earlier conditions, the class struggle to those of today. These Londoners have no telephones, but their police already have tanks."\textsuperscript{36} In their manner, his protagonists are patriarchal, "in their methods always modern."\textsuperscript{37} So too, the Constitution invokes history, claims timelessness, places past, present, and future alongside each other in different conjunctions to different ends.

The Constitution's animating spirit, we are repeatedly told, is "for the ages."\textsuperscript{38} The people ordain and establish it to secure the blessings of liberty,

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\textsuperscript{32} People of the several States." \textit{Id.}
\textsuperscript{33} \textit{Id.} "As Foucault never tired of clarifying, the very same processes that give us subjectivity and agency—individualization, most notably—also enable the authorities to subject us. In liberal societies, we are trained to maximize our capacities for free action, but we are simultaneously governed through that very freedom." Mariana Valverde, \textit{Derrida's Justice and Foucault's Freedom: Ethics, History, and Social Movements}, \textit{24 LAW & SOC. INQUIRY} 655, 666 (1999).
\textsuperscript{34} \textit{Id.} at 193.
\textsuperscript{35} \textit{Id.} at 194.
\textsuperscript{36} \textit{Id.} at 193.
\textsuperscript{37} \textit{Id.} at 194.
\textsuperscript{38} "One of England's greatest Prime Ministers, William Pitt, shortly after the adoption of the Constitution, prophetically said that it would be the admiration of the future ages and the pattern for future constitution building. Time has verified his prediction . . ." \textit{Id.} at 194.
“to ourselves” but also to “our posterity.”39 In the Preamble, present and future sit together in remembrance of the past. “We” the people recognize the past’s injustice and disorder, seek betterment, and pledge commonality for all and for generations to come. The words of the Preamble fill the emptiness left by what has not been done with redemptive intent: 40 the Preamble’s verbs are active—“establish . . . insure . . . provide . . . promote . . . secure . . . ”41 In the unamended text, though, a decisive ontological break occurs. In the text, the relationship of past and present is not one of remembrance or redemption but, frankly, indifference. The text is a formula for new modalities of governance and practice—what federal governance shall consist in, what it shall have authority to do, what state governance (in the Constitution “the states” have become one phenomenon, no longer individualities) shall be prevented from doing, what governments shall do together. Where it need not disturb a sleeping dog it does not, incorporating and adopting elements of the Articles of Confederation where convenient. But memory has been obscured: what shall be dictates what elements of past practice are deemed useful and what are tossed aside.

So, for example, Article IV of the Articles of Confederation, becomes, with certain supplements, Article IV of the U.S. Constitution.42 But those supplements are signs of the temporal havoc wrought in the framing of the unamended text: they are creatures of past, present, and prediction, expressed quite precisely in ways that “draw[] the epochs together.”43 One, in a sudden effusion of empirical specificity that exists nowhere else in the text, explores a particular human condition, its inhabitants, and the consequences of being there. The condition is service and labor; its inhabitants any and every person held to that condition; and the consequence, to any who depart that condition, is to be restored to it. We should note that this most public of texts grants jurisdiction and makes restoration not to a state whose laws may have been offended by the departure but to a private per-
son, "the Party to whom such Service or Labour may be due." The criminal who flees public justice in the previous clause shall be returned to face public justice; the laborer who flees a master shall be returned to face the master. To each his own, says the text. Private life, as Benjamin well observes, is lived according "to the earlier conditions," conditions prior to the new modes of governance. The laborer, fleetingly public, shall be returned to privacy. We can answer an old conundrum here. There is, after all, an unambiguous right to privacy in the Constitution—to the seigneurial right of the household master, helpfully secured by the Fugitive Clause. These mannered patriarchs have been modern in their methods. They have created a new federal government to ensure, the Preamble notwithstanding, that those earlier conditions (inequalities) will persist—to do, as it were, the dirty work of class struggle.

And what of struggle? Article IV, in one clause a security pact amongst patriarchs, in another is a security pact amongst governments. The new government guarantees each state government against threats from without—invasion—but also from within—domestic violence, treason, the violence of persons against the state. Here is a memory of sedition and rebellion that has flashed up at a moment of danger—we know this from Edmund Randolph, for this is his narrative. Not quite trusting that "We the people" have committed themselves to domestic tranquility, governments must band together. These Londoners indeed have no telephones—they cannot communicate, they are not even in the text. "[B]ut their police already have tanks."  

III. ORGANIZING ABSENCE

Threepenny Novel is a crime novel. "[B]y the rules of the crime novel," Benjamin writes, "legality and crime . . . are . . . opposites." But in Threepenny Novel the case is altered. Brecht "retain[s] the highly developed technique of the crime novel but discard[s] its rules. In this crime novel," Benjamin continues, "the actual relation between bourgeois legality and crime is presented. The latter is shown to be a special case of exploitation sanctioned by the former." What are the rules of the Constitution? It is time to return to my zombies.

Who are the living dead of the United States Constitution and where do we encounter them? They are slaves, of course; this is no great surprise. They appear swiftly, startlingly, 165 words after the opening of Article I,
only to disappear almost immediately—a tiny fragment (1/1000th) of the
text, six words of six thousand52—as if the authors are so haunted by them
that they must rush them out of the way as soon as possible lest even so
brief and ambiguous a manifestation rot the whole enterprise through. These
spectral figures will make two other cameos, and in all three, they are heav-
ily disguised, as persons.53 But their first appearance is fatal to the disguise;
even so named they are strikingly distinct from every person in the text. For
they are not entire. They are cripples, radically incomplete, disfigured, per-
sons missing parts. For the purposes of framing, they are each of them allotted
three-fifths of a personage. The fraction arises in higgle and barter on
the floor. It is recorded, as all transactions on a trading floor must be. And
as quickly as it is introduced, the matter is done with. But the bargain has
been sealed, and it is the true founding act, for without it, the traders know,
there will be no text at all.54

Slavery haunts the convention, but what the convention produces in its
text are not exactly ghosts but zombies, for these “other persons” exist in
the text for no purpose of their own. And the text allows them no presence
while counting them as present. Plainly, then, they are alive, for they are to
be enumerated, and only living persons are enumerated. Just as plainly they
are dead, for they are slaves, the socially dead, so dead that they are not to
be named, so horrific in the nature of their death that these persons are liter-
ally “other.”55 They are other even to those persons most like them, those
persons bound to service or labor and yoked to them as soul mates in Article
IV. Here in Article I, those soul mates are allowed their living difference
and so are acknowledged to be both free and whole.56 One may go further:
the text not only unnames the slave but camouflages her by surrounding her
with enumeration. For Article I is a sea of numbers and fractions. To be a
representative you have to be 25 (years old), 7 (years a citizen), and no
more than 1/30,000, although exceptions are allowed.57 You must also, but
only temporarily, be 1 in 3, 8, 1, 5, 6, 4, 8, 1, 6, 10, 5, 5, or 3, depending
where you come from.58 A more precise and homogenized fraction is pend-
ing. To be a senator you must be 30 and 9 and 1 of 2, and you will be placed

52. U.S. Const. art. I, § 2, cl. 3 (“three fifths of all other Persons”).
53. Id. § 9, cl. 1; id. art. IV, § 2, cl. 3.
54. It is commonly agreed that without the Three-Fifths Clause there would have been no Constitu-
56. U.S. Const. art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the
several States which may be included within this Union, according to their respective Numbers, which
shall be determined by adding to the whole Number of free Persons, including those bound to Service for
a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.” (emphasis added)).
57. Id. § 2, cl. 2-3.
58. Id. § 2, cl. 3 (providing for the number of representatives per state prior to enumeration under
Article I, with New Hampshire having three representatives, “Massachusetts eight, Rhode-Island and
Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight,
Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three”).
in class 1, 2, or 3.\textsuperscript{59} When everyone is being counted and fractured, why shouldn’t some be rendered 3 of 5, to help elect leaders whom “habitue[s] of statistics” may trust will rule for the good of the whole?\textsuperscript{60} But camouflage is unnecessary. No disguise is needed to hide the place of the slave in the unamended text, for the place of the slave is no place at all; it is a veiled secret place from which denizens are summoned only to be smashed into each other in a great experiment that produces fractured particles to be counted in that 1/1000th moment before they flame out of observable existence. Among the states in this text, this is the state of exception.\textsuperscript{61} Exception is thus the foundation upon which this founding text is built, as well as the foundation it supplies.

“[A] special case of exploitation sanctioned by [bourgeois legality]”\textsuperscript{62} thus seems an entirely appropriate description of the three-fifths compromise. But to show that the rules are not as they seem is still to remain within the genre of rules. Yet the Constitution is not written according to rules. It cannot be, for it is the founding text, the basic law. Constitutionalism may have its rules, but not the constitution itself, for it makes the rules. That was its opportunity, and so its tragedy.

IV. SARTOR RESARTUS

“Where are we going?” you may ask. All this may seem totally incomprehensible when compared with the traditions—the rules—of constitutional history and commentary. Suddenly they seem safe, their quarrels innocuous. What profits the separation of Constitution from interpretation? How can we learn anything useful from allegory? What on earth does satire have to do with the creation of the American republic?

As I have defined it (and I have defined it correctly), satire has much to do with the creation. Two centuries after the first intrusions of the English, the Constitution stands for a momentous transition to modernity and individualism, an epochal representation of social formation as contract. It stands for a \textit{nomos} of right intent and self-fashioning through law.\textsuperscript{63} It pro-

\textsuperscript{59} Id. § 3, cl. 1-3.
\textsuperscript{60} BENJAMIN, supra note 7, at 198. “Ruled by hundreds of authorities, tossed on the waves of price increases, the victim of crises, this habitue of statistics seeks an individual to whom he can hold on.” Id.
\textsuperscript{61} Giorgio Agamben describes the state of exception as “the original structure in which law encompasses living beings by means of its own suspension.” GIORGIO AGAMBEN, STATE OF EXCEPTION 3 (Kevin Attell trans., 2005). This is a shortened version of an earlier and more expansive definition Agamben offers in GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 18 (Daniel Heller-Roazen trans., 1998), where he states: “The particular ‘force’ of law consists in the capacity of law to maintain itself in relation to an exteriority. We shall give the name relation of exception to the extreme form of relation by which something is included solely through its exclusion.” Agamben here draws upon the theory of sovereignty developed in the early 1920s by Carl Schmitt, who held that “[f]or a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists,” but also and necessarily that “[s]overeign is he who decides on the exception.” CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., 1985).
\textsuperscript{62} BENJAMIN, supra note 7, at 201.
\textsuperscript{63} Christopher Tomlins, \textit{Law’s Wilderness: The Discourse of English Colonizing, the Violence of...
roduces a new nation and a people that shall live by the rule of law. Like all forms of social contractualism, indeed all moments of founding, it appropriates to its creators an original and exclusive generative capacity—nothing else at this point shall be said; no one else at this point shall be heard. What the Founders engaged in was in those terms a sacred act—an act of universal jurisdiction—at a Messianic moment. Indeed, this is an act of creation that could not have occurred without a stripping away of what was—precisely the work of satire. Hence the distinctly questionable status of the Philadelphia Convention and its product, which had no formal constitutional-legal standing according to established process. Hence Randolph’s narrative, which opened it. Hence the invisibility, in the unamended text, of anything associated with the two previous centuries: a living and present indigenous population, a living and present enslaved population, appropriated territories, one-time colonies. Instead slaves are simply parts of persons, and the indigenous are generic “Indian Tribes” without any definitive location, neither “foreign” nor “domestic,” existing in their own state of exception, for territory outside “the states” is by definition that which belongs to the United States, land without line or limit. There is virtually no point of historical reference in the unamended text. Why should there be? It is a rejection of history, a beginning, a founding ex ni-


65. Ten years after the Philadelphia convention, the Founders’ secretiveness still generated bitter antipathy: The meaning of the Constitution lay in its letter . . . & the sence & meening of the peopel when they excepted it. As to the meening of the Convention that formed it, it has nothing to do in the question, & it was an insult on the peopel to keep their debates secret at that time, & a grater one to site us to them now for an explanation, as Worshington did to the house of Representitivites. MANNING, supra note 4, at 235.

66. Fifty-five delegates from all states but Rhode Island assembled in May 1787 in Philadelphia at the invitation of the Confederation Congress to attend a convention called at the express instigation of the Annapolis Convention (in September 1786) for the advertised purpose of revising the Articles of Confederation. The process for amending the Articles of Confederation, however, required action in Congress and agreement thereto, followed by unanimous consent of the states—a vote of approval in each and every state legislature—not agreement by nine of thirteen ratifying conventions. ARTICLES OF CONFEDERATION art. XIII (“Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.”). On receiving the draft Constitution from the Philadelphia Convention, the Confederation Congress did not “agree” to it but resolved simply to refer it to the state legislatures without endorsement or recommendation. The state legislatures were themselves instructed that the Constitution was to be submitted to ratifying conventions called “in conformity to the resolves of the Convention made and provided.” CARL VAN DOREN, THE GREAT REHEARSAL: THE STORY OF THE MAKING AND RATIFYING OF THE CONSTITUTION OF THE UNITED STATES 178 (1948); MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 7-12, 61 (21st prtg. 1965).

67. See U.S. CONST. art. I, § 2, cl. 3; id. § 8, cl. 3; id. art. IV, § 3.

68. What is there is a matter of purely temporary necessity, such as the names of individual states and the number of representatives each shall have in the House of Representatives until Article I’s formula for representation shall come into being. Id. art. I, § 2, cl. 3.
hilo, what shall be. In the sublime moment of founding exists a victor’s arbitrariness.

We cannot find this out by treating the Constitution interpretively, as an instance of constitutionalism, that is to say retroactively. We find it out only by realizing the necessities of satire to the circumstances of creation. And we can use satire again to understand for ourselves what the text has built in the place of what satire rendered moot. For satire undresses all texts. As Benjamin wrote of Marx, “[he] was the first to undertake to bring back the relations between people from their debasement and obfuscation in capitalist economics into the light of criticism, [and] became in so doing a teacher of satire who was not far from being a master of it.”

Benjamin says the same of Brecht. In Brecht, satire “which was always a materialistic art, has . . . now become a dialectical one, too.” What does this mean? A materialistic art is one that accepts a world beyond consciousness as the foundation for consciousness, hence for ideas about the world, knowledge. A materialistic art is empirical. A dialectical art will insist, as Lenin wrote in Materialism and Empirio-Criticism, “on the approximate, relative character of every scientific theory of the structure of matter and its properties; it insists on the absence of absolute boundaries in nature, on the transformation of moving matter from one state into another, which [may be] to us apparently irreconcilable with it, and so forth.” An art that is dialectical and material, in other words, is an art animated by a philosophy that is relational in all perspectives, from the behavior of matter to the structure of social life.

Nothing is to us as it absolutely appears, for “[n]othing [is] final, absolute[,] . . . sacred.” This is dialectical materialism’s praxis. It “reveals the transitory character of everything and in everything and nothing can endure [before it] except the uninterrupted process of becoming and of passing away,” of life and death.

69. As Chief Justice Marshall would later put it, in related circumstances, “Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.” Johnson v. McIntosh, 21 U.S. 543, 588 (1823).
70. BENJAMIN, supra note 7, at 202.
71. Id.
72. V.I. LENIN, MATERIALISM AND EMPIRIO-CRITICISM 312 (1972).
73. Engels states:
   It is an eternal cycle in which matter moves, a cycle that certainly only completes its orbit in periods of time for which our terrestrial year is no adequate measure, a cycle in which the time of highest development, the time of organic life and still more that of the life of beings conscious of nature and of themselves, is just as narrowly restricted as the space in which life and self-consciousness come into operation; a cycle in which every finite mode of existence of matter, whether it be sun or nebular vapour, single animal or genus of animals, chemical combination or dissociation, is equally transient, and wherein nothing is eternal but eternally changing, eternally moving matter and the laws according to which it moves and changes.
74. FREDERICK ENGELS, DIALECTICS OF NATURE 24 (Clemens Dutt trans., Int'l Publishers Co. 4th prtg. 1960) (1940).
75. Id.; see also Walter Benjamin, Theologico-Political Fragment, in REFLECTIONS, supra note 7, at 312, 312-13.
To begin to understand what this can do for us, and specifically its implications for interpretation, let me now return for a moment to that other master satirist, Thomas Carlyle.

Thomas Carlyle was an early Victorian literary intellectual who lived the first part of his life in poverty on remote farmsteads in the Scottish borderlands.\(^76\) Carlyle’s great satire, *Sartor Resartus*, was published in its complete version seriatim, between November 1833 and August 1834, in *Fraser’s Magazine*.\(^77\) As a work of imagination, it bears a strong resemblance to a babushka doll. *Sartor Resartus*, literally “the tailor retailored,” purported to be an account of an acclaimed but controversial German masterwork entitled *Die Kleider, ihr Werden und Wirken, or Clothes: Their Origin and Influence*, by a professor “Of Things in General” named Diogenes Teufelsdröckh. The account was represented as written by an earnest but somewhat confused admirer of Teufelsdröckh whose desire it was to convince an English audience of the great significance of his work. Inevitably, *Sartor* has been the subject of much commentary, but Carlyle’s objective appears to have been to engage with modalities of representation and critique through the fictive device of an account of a history of appearances, a philosophy of clothes, which turns out in its fictive author’s hands actually to be a history and philosophy of life, that is, of the forms of representation and analysis of the human condition. Teufelsdröckh is the initial fictive satirist, the philosopher of clothes whose book strips them to their “true” meaning as metaphors for human self-presentation and thus covers for our nakedness. But by inventing Teufelsdröckh and his book, Carlyle “reveals” the philosophy of clothes and then, through the enthusiastic but sadly clumsy and unsuccessful interventions of the fictive admirer, both “explains” what Teufelsdröckh is up to, while simultaneously “revealing” the inability of successive canons of explanation and interpretation actually to explain anything at all adequately.

In *Sartor*, Carlyle pursues three such canons—the empirical, the contextual, and the metaphysical. As Nathan Uglow has put it, in the first instance Teufelsdröckh’s admirer attempts to explain the philosophy of clothes through exegesis, closely analyzing and restating its component elements—statements, beliefs, and arguments; in the second, he purports to explain by situating the philosophy of clothes in the precise circumstances of its emergence—its intellectual and social history, the content of the author’s own life and times that determined how his book would turn out, and so forth; the third explains by divining the philosophy’s transformative purpose, its lesson for action.\(^78\) Each canon breaks down in confusion and inadequacy, stimulating the turn to the next. Through successive satires of exposure, Carlyle has, in other words, raised a series of doubts about the capacity of

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76. See generally CARLYLE, supra note 29, at 11.
78. See Uglow, supra note 77.
acts of interpretation fully to comprehend or explain the force of an original creative act.\(^\text{79}\)

The three modes of interpretation that Carlyle criticizes are precisely the modes that characterize the jurisprudence and ideology of constitutionalism: a formalist or mechanical jurisprudence that produces meanings from the Constitution by strict construction of its original components—statements of facts and logic—as explicated in authoritative commentary, such as the written words of the Framers, certain “texts” such as *The Federalist Papers*, and (cautiously) the *ratio decidendi* of courts;\(^\text{80}\) a contextual (that is a historical and sociological) jurisprudence that attributes meanings to the Constitution through intense inquiry into and reflection upon its times—intellectual, social, cultural, economic—and our own;\(^\text{81}\) and a metaphysical or normative jurisprudence that discovers in the Constitution the potential for transcendental meanings or purposes or messages, loosed from form or history.\(^\text{82}\) These modes tend to melt into each other at the edges, as do the various techniques employed in their expression—techniques of history and sociology, after all, can be used as much to produce mechanistic as contextual results; other historical and sociological techniques inform claims of abiding purpose as much as moral philosophy does. And so forth. None of the modes of interpretation, however, can close the gap between explanation of the Constitution and the question of law and justice in the Constitution—the mystical foundation of its authority.

For this we must go elsewhere, to the creative act itself.

V. THE CREATIVE ACT

*The Sublime (The Preamble)*

Already I have begun to talk of the Preamble, the unamended text, and the Bill of Rights (the first ten amendments) as distinct elements, rather than the single text assumed by constitutionalism. I should now make this separation explicit. In bypassing constitutionalism, I wish to bypass not only the sufficiency of interpretation but also its conception of the object of interpretation. For “the Constitution” is not a thing entire but three distinct texts: a preamble, a body of rules, and a remonstrance that responds to the body of

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79. *Id.*
80. Robert Bork asserts:
   Originalism simply means that the judge must discern from the relevant materials—debates at the Constitutional Convention, the Federalist Papers and Anti-Federalist Papers, newspaper accounts of the time, debates in the state ratifying conventions, and the like—the principles the ratifiers understood themselves to be enacting. The remainder of the task is to apply those principles to unforeseen circumstances, a task that law performs all the time. Any philosophy that does not confine judges to the original understanding inevitably makes the Constitution the plaything of willful judges.
81. This is, essentially, the mode of most constitutional history.
rules. The first I will call the moment of justice; the second, force-of-law; the third—provoked by the second—an attempt at redress. These three elements exist in tension. They are entirely different in character and performance. As both sign and proof of this, each exhibits a distinct philosophy of history, each embraces a different form of time.

Why do I call the Preamble the moment of justice? In the Preamble, "We the People of the United States"—everyone—stand naked, stripped by satire, awaiting new clothes. In this frozen moment, which comes between everything that has happened and everything that will, the people remember and acknowledge what has been and speak their fundamental desires for what will be—to do better, to realize fundamental solidarities, to seek "a more perfect Union, [to] establish Justice," to provide for the protection and well being of all, to secure liberty for those now living and for those to come. This is the clearest revolutionary moment in the entire revolutionary epoch. The moment is one articulated historically—not in the (pseudo-) Rankean fashion that articulates the past as gone, the past that therefore can be charted in all the ways it really was, folded neatly and put away; rather, this is the past that "can be seized only as an image which flashes up at the instant when it can be recognized," the past from which we fan hopes of better things to come only by the realization that the dead are present and by embracing what is owed them, particularly protection from the deadly insecurity of forgetfulness. I name this the moment of justice in this succession of texts, for as Derrida says, in the continuation of his inspired encounter with Benjamin, "[i]f I am getting ready to speak at length about ghosts, inheritance, and generations, generations of ghosts, which is to say about certain others who are not present, nor presently living . . . it is in the name of justice." "Remembering the dead," Mariana Valverde says in her own commentary on Derrida, "especially those who are dead as a

83. U.S. CONST. pmbl.
84. Such a moment is "a spectral moment, a moment that no longer belongs to time," JACQUES DERRIDA, SPECTERS OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING, AND THE NEW INTERNATIONAL xx (Peggy Kamuf trans., 1994), a moment, for Derrida, following Shakespeare, when "time is out of joint," WILLIAM SHAKESPEARE, HAMLET, PRINCE OF DENMARK act I, sc. 5., [a] moment that no ethics, no politics, whether revolutionary or not, seems possible and thinkable and just that does not recognize in its principle the respect for those others who are no longer or for those others who are not yet there, presently living, whether they are already dead or not yet born. No justice . . . seems possible or thinkable without the principle of some responsibility, beyond all living present, within that which disjoins the living present, before the ghosts of those who are not yet born or who are already dead . . . . Without this non-contemporaneity with itself of the living present, without that which secretly unhinges it, without this responsibility and this respect for justice concerning those who are not there, of those who are no longer or who are not yet present and living, what sense would there be to ask the question "where?" "where tomorrow?" "whither?"

DERRIDA, supra, at xix-xx.
85. U.S. CONST. pmbl. (emphasis added).
86. AMAR, supra note 27, at 5.
87. BENJAMIN, supra note 40, at 255.
88. DERRIDA, supra note 84, at xix.
result of the political and economic forces that are rarely examined by ethical philosophers, is necessary for the work of justice.\(^8\)

**Something Rotten (The Unamended Text)**

But if the Preamble can be said to be of the moment in between, of time out of joint, when revolutions occur—and with them remembrance in the service of life\(^9\) and recognition of the possibility of justice\(^9\) —the text that follows, the unamended seven articles, is its antithesis, the shaking off of memory, the embrace of force-of-law, and the specific articulation of what shall be the social-legal mechanics of the new order’s realization. And as such, it is a fundamentally different expression of history—a forgetting, occluding history, a history that altogether eschews the dead. If revolutions are a contest between remembrance and forgetting\(^9\) (although it is in no sense necessary that they should be\(^9\)), this is where the forgetting begins and the ontological claim to originate without remembrance—to undertake the “pure act of untrammeled creation,”\(^9\) to weave the first cloth—is underlined. Willard Hurst captured this, uncritically, in his own allegory of American origin, transposed to the upper Mississippi Valley of the 1830s, where law denied history, released energy, and created “conditions of freedom,” where “we” articulated ideas of “special significance for the future of mankind.”\(^9\)

The unamended text necessarily fails as an “untrammeled act of creation”—to create that appearance for some, as we have seen, one must displace others.\(^9\) This is the reason for its forgetfulness. But it cannot shake

\(^8\) Valverde, *supra* note 32, at 661.

\(^9\) Nietzsche put it this way:

> [M]en and ages which serve life by judging and destroying a past are always dangerous and endangered men and ages. For since we are the outcome of earlier generations, we are also the outcome of their aberrations, passions and errors, and indeed of their crimes; it is not possible wholly to free oneself from this chain. If we condemn these aberrations and regard ourselves as free of them, this does not alter the fact that we originate in them. The best we can do is to confront our inherited and hereditary nature with our knowledge of it, and through a new, stern discipline combat our inborn heritage and implant in ourselves a new habit, a new instinct, a second nature, so that our first nature withers away. . . . [It is] always a dangerous attempt because it is so hard to know the limit to denial of the past and because second natures are usually weaker than first. What happens all too often is that we know the good but do not do it, because we also know the better but cannot do it. But here and there a victory is nonetheless achieved, and for the combatants, for those who employ critical history for the sake of life, there is even a noteworthy consolation: that of knowing that this first nature was once a second nature and that every victorious second nature will become a first.

**FRIEDRICH NIETZSCHE, On the Uses and Disadvantages of History for Life, in UNTIMELY MEDITATIONS, 57, 76-77 (R.J. Hollingdale trans., 1983).**

\(^9\) On which, see particularly MARIANNE CONSTABLE, JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW 12, 54-55, 175-78 (2005).


\(^9\) For, as Benjamin puts it, the moment of revolution is precisely the moment of greatest opportunity “in the fight for the oppressed past.” BENJAMIN, *supra* note 40, at 263.

**STEPHEN GREENBLATT, SHAKESPEAREAN NEGOTIATIONS: THE CIRCULATION OF SOCIAL ENERGY IN RENAISSANCE ENGLAND 7 (1988); see also PATEMAN, *supra* note 64, at 87.**

**JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 3-6 (1956).**

\(^9\) As Locke wrote in his *Second Treatise*, American land was for the "use of the industrious and
off the dead so easily. For even where there is no memory of them, the dead will still haunt. And eventually, we know, they will return with a vengeance.97

The residual and inadvertent (to the Framers) presence of the dead amongst the living in the unamended text signifies that, unlike the Preamble (where we encounter the people’s sublime commitment to justice), it is a document written by victors who feel free to use the dead as they please, for their own purposes, to whom they exercise no responsibility. It is precisely in that use, that indifference, that their force-of-law expresses itself most unambiguously, and most clearly in opposition to the justice of the Preamble. But we also find it in their attempts to appropriate the Preamble’s justice to selfish ends. Victors, says Benjamin, always conduct a “triumphal procession [that] step[s] over those who are lying prostrate. [By tradition], the spoils are carried along in the procession. They are called cultural treasures . . . .”98 He means to count justice among the spoils. As Valverde explains, “[t]he appropriation of philosophies of justice by the ruling classes of each generation was the greatest concern of Walter Benjamin’s thoughts on history.”99

Benjamin elaborates on the meaning of law that I am imputing to the Constitution’s unamended text in the course of his 1921 essay, “Critique of Violence.”100 The essay explores law as the expression of violence, or official force (hence force-of-law).101 Law is made by violence; law is also preserved by violence.

[T]he function of violence in lawmaking is twofold, in the sense that lawmaking pursues as its end, with violence as the means, what

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97. “But as it is, we have the wolf by the ears, and we can neither hold him, nor safely let him go. Justice is in one scale, and self-preservation in the other.” Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), in 12 THE WORKS OF THOMAS JEFFERSON 159 (Paul Leicester Ford ed., 1905) (discussing the Missouri question and slavery).
98. BENJAMIN, supra note 40, at 256.
100. WALTER BENJAMIN, Critique of Violence, in REFLECTIONS, supra note 7, at 277, 277-300.
101. Id. at 285. The title of Benjamin’s essay in its original German publication was “Zur Kritik der Gewalt.” See Walter Benjamin, Zur Kritik der Gewalt, 47 ARCHIV FÜR SOZIALWISSENSCHAFT UND SOZIALPOLITIK 809 (1920/21). The original title differs in implication from the English translation in two respects. First, and less important, “Zur Kritik . . .” might better be rendered as “On the Matter of the Critique of . . .” or “Toward a Critique of . . . .” This reinforces the appropriate sense of Kritik/Critique, which is evaluative rather than condemnatory. Benjamin is undertaking a critique and simultaneously exploring how the critique may be undertaken; his text is perhaps more experimental than the flatly assertive English title implies. Second, and more important, “Gewalt” can also be translated as “legitimate power” or “authority” or “public force.” What is translated as “violence” thus can mean state action to exert pressure, threaten or coerce in the name of authority (force-of-law) rather than physical onslaught and destruction from any source. See also DERRIDA, supra note 5, at 230-93. Derrida’s Force of Law is in large part an extended commentary on Benjamin’s Critique of Violence.
102. See BENJAMIN, supra note 100, at 295; see also id. at 283-86.
is to be established as law, but at the moment of instatement does not dismiss violence; rather, at this very moment of lawmaking, it specifically establishes as law not an end unalloyed by violence, but one necessarily and intimately bound to it, under the title of power.\(^{103}\)

Law uses that violence to which it is "intimately bound" to preserve itself as a modality of rule, a "juridical order,"\(^{104}\) from threats—specifically the threat constituted by violence lying outside itself. "[T]he law's interest in a monopoly of violence vis-à-vis individuals is not explained by the intention of preserving legal ends [for then violence as such would not be condemned but only that directed to illegal ends]\(^{105}\) but, rather, by that of preserving the law itself . . . ."\(^{106}\)

The task of a critique of violence, Benjamin says, is to "expound[ ] its relation to law and justice. For a cause, however effective, becomes violent, in the precise sense of the word, only when it bears on moral issues. The sphere of these issues is defined by the concepts of law and justice."\(^{107}\) Studying law and justice entails studying the relationship of means and ends.\(^{108}\) If violence is means, to critique violence as such requires that one isolate it from ends, otherwise the critique is simply absorbed by the greater justness of the end.\(^{109}\) Thus, where (as in natural law theories) ends are paramount and violence is a phenomenon of nature, only violent means to an end antithetical to natural law may be termed unjustified.\(^{110}\) Positive law, on the other hand, scrutinizes not ends but means.\(^{111}\) It treats violence not as a phenomenon of nature but of history.\(^{112}\) Positive law thus distinguishes sanctioned—"historically acknowledged"—violence from unsanctioned violence independent of any assessment of ends.\(^{113}\) But positive law still assures us that ends reached by sanctioned means are justified: "positive law . . . 'guarantee[s]' the justness of the ends through the justification of the means."\(^{114}\) Obviously, at this point, the question becomes whether the distinction between different kinds of violence is meaningful.\(^{115}\)

Positive law checks resort to violence by the individual as legal subject by ignoring the criterion of naturally just ends.\(^{116}\) Instead it erects legal ends (one of which is the subjection of citizens to law)—that is, ends pursued by
legalized power. Resorting to violence outside legality undermines the system of legalization and must therefore be suppressed, not because it threatens legal ends (for then not violence per se but only violence directed to an illegal end would be controversial) but because violence when not sanctioned, "when not in the hands of the law, threatens it . . . by its mere existence outside the law."\footnote{118}

The concrete threat of unsanctioned violence is that in contesting "the order of existing law"\footnote{119} it has the effect of creating new law. That is, violence is law-making. Indeed, Benjamin may be seen as arguing that violence is foundational to law, in that no act of creation of a legal order can have an anterior legitimation to which it can turn.\footnote{120} Rather, law-making—acts of creation or acts against existing laws to transform them—can only begin from the point of absence of legitimation, or against what exists. Once law is made, violence preserves law, in that law uses the threat and actuality of its monopoly of legal violence as the means to its own safe-keeping.\footnote{121}

Law’s declared power over life, power declared especially in the act of punishment and punishment’s particular power to end life, is the ultimate law-preserving violence. But law-making violence is also present in the same moment, as it were alongside, for in sheeting home this highest claim, law must marshal its most feared resources. Punishment is supremely creative. It proliferates endlessly. "Its purpose is not to punish the infringement of law but to establish new law. For in the exercise of violence over life and death more than in any other legal act, law reaffirms itself," it declares itself anew.\footnote{122} Hence "it may be readily supposed that where the highest violence, that over life and death, occurs in the legal system, the origins of law jut manifestly and fearsomely into existence."\footnote{123} And here we make a trenchant discovery. "[I]n this very violence" (the violence over life and death), Benjamin says, "something rotten in law is revealed."\footnote{124} It is perhaps unnecessary to say, but I will say it in any case, that the "something rotten" in the unamended text is revealed most completely in the figure of the slave-zombie that haunts it and in the state of exception from which these living dead are so quickly—a mere 165 words into this great text—summoned for our purposes, maimed, and as quickly returned to invisibility.

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117. See id.
118. Id. at 281.
119. DERRIDA, supra note 5, at 269.
120. Id.; see also id. at 267-72. The origins of law lie in a violence that Benjamin calls “mythic” or imposed by fate. See id. at 293-97; see also infra Part VII.
121. BENJAMIN, supra note 100, at 281; DERRIDA, supra note 5, at 267.
122. BENJAMIN, supra note 100, at 286.
123. Id.
124. Id.
Benjamin’s insistence in *Critique of Violence* on maintaining a distinction between law-making and law-preserving violence buckles under the weight of law’s power over life and death. Benjamin acknowledges this, but only hesitantly, only in fact after moving from “law” to another and purportedly distinct “institution of the modern state”—police. Here also, he states, both law-making and law-preserving violence exist alongside each other. But here, their separation is entirely suspended, and they flow into each other. “Police violence is emancipated from [the restraints that distinct orders of violence imply]. It is lawmaking, for its characteristic function is not the promulgation of laws but the assertion of legal claims for any decree, and law-preserving, because it is at the disposal of these ends.” But if this suspension of the distinction is what enables police, it is also for Benjamin what distinguishes police from law. Police and law are, to Benjamin, different phenomena. Hence this crucial statement:

> The assertion that the ends of police violence are always identical or even connected to those of general law is entirely untrue. Rather, the “law” of the police really marks the point at which the state . . . can no longer guarantee through the legal system the empirical ends that it desires at any price to attain.

What is “rotten” in the state of law, it would appear, is the step too far, the corruption that spreads from police, for it is police that instantiates the collapse of the law-making/law-preserving distinction. (This is actually substantiated by the unamended text, for it is police that maims and enumerates the slave).

Can such a distinction between the ends of law and police be maintained? Ultimately, which is to say conceptually, I think not, which perhaps explains what I perceive as a moment of hesitation in *Critique of Violence* over law’s “reaffirmation” of itself, a hesitation that manifests itself in Benjamin’s unconvincing insistence on a philosophical separation existing in the very soul of the modern state. For reaffirmation is both creation and preservation—new production and reproduction. It is the praxis of the state. Derrida calls it the law of iterability, meaning that iteration and reiteration cannot be distinguished.

125. *Id.*
126. *See id.*
127. *See id.* at 286-87.
128. *Id.*
129. *See id.* at 287.
130. *See id.*
[T]he very violence of the foundation or *positing of law* (*Rechtssetzende Gewalt*) must envelop the violence of the *preservation of law* (*Rechtserhaltende Gewalt*) and cannot break with it. It belongs to the structure of fundamental violence in that it calls for the repetition of itself and founds what ought to be preserved . . . . [T]here is no more pure foundation or pure position of law, and so a pure founding violence, than there is a purely preserving violence. Positioning is already iterability, a call for self-preserving repetition. Preservation in its turn refounds, so that it can preserve what it claims to found. Thus there can be no rigorous opposition between positing and preserving, [production and reproduction].

Benjamin argues that law-making and law-preserving violence are different species of violence. But in this, Derrida has shown, he is unsuccessful. Benjamin argues that the suspension of the distinction occurs in police. But the suspension cannot be cabined. "He never gives up trying to contain in a pair of concepts and to bring back down to distinctions the very thing that incessantly exceeds them and overflows them." Law and police may be strategically differentiated—hence heteronymous—but in their common conceptual relation to a common violence they are, in the last instance, of a piece.

But only in the last instance. For the point is that law and police may be *strategically* differentiated. They can exist alongside each other and in fact they do. And this is manifest in the Constitution. For what is the unamended text but a political geography of police, the first map of the new state? And what is the Bill of Rights but a premonition of danger, of apprehension at the law-making violence that has been done, of determination to contain the operation of police upon the people, to remedy its effects, to be, in a Kantian sense, law?

It is important to be clear that I do not use “police” here in the purposively narrowed discourse of conventional American constitutionalism, in which police has been restated as a delimited fragment of the legal capacity of the state known as “police power,” which the federal government is proscribed not to possess but which of course it does through the mobilization of various proxies. Here I mean police as understood by the Framers and

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133. See *Benjamin, supra* note 100, at 287.
134. See *id.* at 286.
135. *Derrida, supra* note 5, at 279.
136. In Benjamin’s terms, a separation between law-making and law-preserving violence is maintained in the case of law but not in the case of police. *Benjamin, supra* note 100, at 286.
137. *Derrida, supra* note 5, at 279.
139. See *Dubber, supra* note 138, at 86-88.
their contemporaries as governance itself, the state in action, undertaking, in Blackstone's classic statement, the production of "due regulation and domestic order," the management of men, and things, and as we have seen, of men as things.

Now, it is important to note that "the people" have already implicated themselves in a conception of police. The Preamble exhibits the people's commitment to objectives that invoke police in Enlightenment fashion—tranquility, security, welfare. Yet in the name, I would argue, of justice. Nor have the people implicated themselves in the unamended text. Indeed, when the people emerge anew in the Bill of Rights, they emerge scenting danger, for the self-disciplining people of the Preamble have become, while they were not looking, the objects of police, of supervision and discipline, of interventions "for security reasons." And so they attempt to impose prohibitions upon state action. But in the process they embrace a new historical consciousness that is one neither of remembrance nor of purposeful forgetting. This is no frozen moment of reflection, of commitment to the establishment of justice, as in the preamble; nor a moment of action and occlusion, of making and preserving, as in the unamended text. It is instead a moment of selfish premonition, in which the people both accept that they have become objects of governance and simultaneously seek to avoid its effects by exempting their future selves from what has been created in their name. It is, I believe, a use of history that in Foucault's words "severs its connection to memory . . . and constructs a counter-memory—a transformation of history into a totally different form of time," a time not of justice but

140. William Blackstone, 4 Commentaries *162.
142. Manning asserts:
   The Federal Constitution by a fair construction is a good one prinsapaly, but I have no dout [sic] but that the Convention who made it intended to destroy our free governments by it, or they neaver would have spent 4 Months in making such an inexpelset thing. As one said at the time of its adoption, it is made like a Fiddle, with but few Strings, but so that the ruling Majority could play any tune upon it they pleased.
   Manning, supra note 4, at 234.
143. Benjamin, supra note 100, at 287. One is reminded of Thomas Jefferson's thoughts on Claypool's Rebellion (April 1781), an obscure protest centered on Hardy and Hampshire Counties in western Virginia against statutes passed by the Virginia Assembly to levy taxes to subsidize the recruitment of troops for the Continental Army and to requisition supplies. See Letter from Thomas Jefferson to Garret Van Meter (Apr. 27, 1781), in 1 The Founders' Constitution 92, 92 (Philip B. Kurland & Ralph Lerner eds., 1987). "[M]en on horseback have been found the most certain Instrument of public punishment," Jefferson, then Virginia's governor, wrote to Garret Van Meter of Hardy County. Id.
   Their best way too perhaps is not to go against the mutineers when embodied which would bring on perhaps an open Rebellion or Bloodshed most certainly, but when they shall have dispersed to go and take them out of their Beds, singly and without Noise, or if they be not found the first time to go again and again so that they may never be able to remain in quiet at home.
   Id.
of freedom.\textsuperscript{144} It is a schizophrenic moment, an abandonment of the Preamble to save the people’s necks, easily understandable, for its moment is on the far side of the ontological break created by the unamended text, but it is also irresponsible, for it is an attempt to escape power that uses a different power, a resistance that speaks up for itself while abandoning others who are in no position to speak.\textsuperscript{145} This is why the Bill of Rights can never restrain the state in the last instance.\textsuperscript{146} It is too compromised. Yet its strategic capacities as an instance of freedom make it worth something.

VI. CONCLUSION: THE MYSTICAL FOUNDATION OF AUTHORITY

At the end we rejoin Brecht, who has been waiting for us impatiently. \textit{Threepenny Novel} narrates the old form of the state (the ways of Jonathan Peachum), the new form (the ways of MacHeath), and the fate of the people, the London masses—“[t]he impoverished shopkeepers, the soldiers crammed into leaky ships, the burglars whose employer has the police president in his pay”\textsuperscript{147}—upon whom the state in its successive forms is visited. “It is natural,” says Benjamin, “that this borderline case of the crime novel has no room for the detective. The role of preserver of the legal order allotted to him by the rules is here taken over by competition,”\textsuperscript{148} that is, the struggle between the ways of Peachum and MacHeath, old and new. Their struggle results in “a gentlemen’s agreement that gives legal sanction to the distribution of the spoils.”\textsuperscript{149} Another parade of victors. But this is surely prelude, just like the parade of spoils at the beginning of \textit{Titus Andronicus}.\textsuperscript{150} For Peachum’s ways—organizing the petty crimes of the street, profiteering from a commerce in rotten ships in which soldiers will drown, teetering fearfully on the edge of the slums, “always keep[ing] his hat on because there is no roof that he does not expect to crash on his head”\textsuperscript{151}—are done with. Peachum’s time is up. MacHeath knows this. He has moved

\textsuperscript{144} Valverde, \textit{supra} note 32, at 669 (quoting MICHEL FOUCAULT, \textit{LANGUAGE, COUNTER-MEMORY, PRACTICE} 160 (Donald Bouchard & Sherry Simon trans., 1977)) (internal quotation marks omitted).

\textsuperscript{145} Valverde draws attention to Foucault’s “lame” refusal to acknowledge the full consequences of trading the ethics of justice (care for others) for those of “freedom” (care for self). Foucault argued that proper care for the self must necessarily lead to care for others:

\[\text{[I]f you care for yourself correctly, i.e., if you know ontologically what you are, if you also know of what you are capable, if you know what it means for you to be a citizen in a city, to be the head of a household in an \textit{oikos}, if you know those things you must fear and those that you should not fear . . . then you cannot abuse your power over others. There is therefore no danger.}\]

\textit{Id.} at 671 (quoting MICHEL FOUCAULT, \textit{The Ethic of the Care for Self as a Practice of Freedom, in The Final FOUCAULT} 8 (John Bernauer & D. Rasmussen eds., 1988)) (internal quotation marks omitted). One can detect little historical support for this contention.

\textsuperscript{146} \textit{See generally} DUBBER, \textit{supra} note 138, at 190-210; Tomlins, \textit{supra} note 141.

\textsuperscript{147} BENJAMIN, \textit{supra} note 7, at 195.

\textsuperscript{148} \textit{Id.} at 201.

\textsuperscript{149} \textit{Id.}

\textsuperscript{150} WILLIAM SHAKESPEARE, \textit{TITUS ANDRONICUS} act 1, sc. 1.

\textsuperscript{151} BENJAMIN, \textit{supra} note 7, at 194.
with the times, become a man of business.\textsuperscript{152} The elderly Peachum comes to realize it too. "Before his infallible gaze the conditions of his successful speculations lie exposed to view like the errors of those that failed. No veil, not the slightest illusion hides from him the laws of exploitation."\textsuperscript{153} His has been the moment awaiting satire. His career as a criminal is what has happened. MacHeath’s is the way of the future, what \textit{will} happen. For MacHeath "is a born leader... statesmanlike... businesslike."\textsuperscript{154} Close to the end of \textit{Threepenny Novel} he tells us what to expect.

In my opinion, which is the opinion of a hard-working businessman, we haven’t got the right men at the head of the country. They all belong to some party or other, and parties are, of necessity, self-seeking and egotistic. Their outlook is one-sided. We need men who stand above all parties, something like us businessmen... The government of the state is a moral task. Everything must be so organised that the entrepreneur is a good entrepreneur, the worker a good worker, in short, that the rich are good rich and the poor good poor. I am convinced that in time that form of government will come.\textsuperscript{155}

Peachum sees the light, joins MacHeath. Their agreement extinguishes the old and embraces the new.

And what of the masses? For a moment they stand in-between, between what has happened and what will, in the revolutionary moment that I have called the moment of justice. \textit{Threepenny Novel} ends (but not quite) in a "Day of Judgment"\textsuperscript{156} dreamed by one of the people, "[a] soldier by the name of George Fewkoombey... shot in the leg in the Boer War."\textsuperscript{157} In Fewkoombey’s dream the past flashes up and is recognized.\textsuperscript{158}

\begin{footnotesize}

\begin{itemize}
\item \textsuperscript{152} Addressing his associate, Grooch, MacHeath speaks as follows:
\begin{quote}
Grooch... you are an old burglar. Your profession is burglary. I wouldn’t think of suggesting that your profession, in itself, is out of date. That would be going too far. Only in its form, Grooch, does it lag behind the times. You are an artisan, a hack, and that’s all there is to it. That class is on the wane—you can’t deny that. What is a pick-lock compared to a debenture share? What is the burgling of a bank compared to the founding of a bank? What, my dear Grooch, is the murder of a man compared to the employment of a man?... Brute force is out of date. Why send out murderers when one can employ bailiffs? We must build up, not pull down; that is, we must build up for profit.
\end{quote}

\item \textsuperscript{153} BERLITT BRECHT, \textit{THREEPENNY NOVEL} 246-47 (Desmond I. Vesey trans., 1958) (italics removed).

\item \textsuperscript{154} BENJAMIN, \textit{supra} note 7, at 200. With the dawning of this realization, “this old-fashioned, unrealistic little man proves himself a highly modern thinker.” \textit{Id.}

\item \textsuperscript{155} \textit{Id.} at 197.

\item \textsuperscript{156} BRECHT, \textit{supra} note 152, at 345.

\item \textsuperscript{157} \textit{Id.} at 384 (emphasis omitted).

\item \textsuperscript{158} \textit{Id.} at 9. Fewkoombey, says Benjamin, is “transparent and faceless,” like the millions who fill barracks and basement apartments. Hard against the frame, he is a lifesize figure pointing into the picture.” BENJAMIN, \textit{supra} note 7, at 196.

\item \textsuperscript{159} \textit{See} BENJAMIN, \textit{supra} note 40, at 255; \textit{see also} \textit{id.} at 254 (“A chronicler who recites events without distinguishing between major and minor ones acts in accordance with the following truth: nothing that has ever happened should be regarded as lost for history. To be sure, only a redeemed mankind receives the fullness of its past—which is to say, only for a redeemed mankind has its past become..."
\end{itemize}
\end{footnotesize}
After the years of misery came the day of triumph.

The masses arose; shook off at last their tormentors; with a single ablution rid themselves of their comforters—perhaps the most terrible of their enemies; finally gave up all hope, and won the victory. Everything was changed. Vulgarity lost its glory, usefulness attained renown, stupidity lost its privileges, brutality was no longer the key to success.\textsuperscript{159}

The masses have torn off their veils, their comforters. They have cleansed themselves; they are stripped and ready. And at last the moment of justice arrives. "There could be no question of the judgment day coming at the end of all life, because, after all, it was to be a prelude to life. Before this great judgment had taken place, there could naturally be no talk of real life."\textsuperscript{160} It was to be "the greatest arraignment of all times... the only really essential, comprehensive and just tribunal that has ever existed."\textsuperscript{161} It would "judge not only the living, but also the dead; all who had in any way wronged the poor and defenceless."\textsuperscript{162} The poorest and most defenceless of all, Fewkoombey himself, is the judge "because no one can stop a dreamer from getting what he wants."\textsuperscript{163}

But the moment passes, the dreamer wakes, time begins anew.\textsuperscript{164} Fewkoombey is arrested, charged, condemned, hanged.\textsuperscript{165} Fewkoombey dreamed of justice outside law, and for that, just like the clown in \textit{Andronicus}, he is strung up, astonished.\textsuperscript{166} "Ever upwards!" exclaims the triumphant MacHeath in his final appearance.\textsuperscript{167} "\textit{Per aspera ad astra!}"\textsuperscript{168} Justice has been appropriated.\textsuperscript{169} A new legal order begins. The masses give their approval.\textsuperscript{170} What else can they do? They have risen once, if only in their dreams. Now they must look to themselves. \textit{Threepenny Novel} can finally end. And so it does.
Paul Klee *Angelus Novus* (1920)

Collection, The Israel Museum, Jerusalem
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Angelus Novus is the ninth of Walter Benjamin’s Theses on the Philosophy of History, and perhaps the most extraordinary. It is a meditation upon Paul Klee’s painting of the same name, which Benjamin acquired in 1921. Of the painting, Benjamin writes as follows:

A Klee painting named “Angelus Novus” shows an angel looking as though he is about to move away from something he is fixedly contemplating. His eyes are staring, his mouth is open, his wings are spread. This is how one pictures the angel of history. His face is turned toward the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such violence that the angel can no longer close them. This storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.

Can one interrupt the storm, recover the moment of justice? Georges Sorel thought so. The means to interruption, for Sorel, was the revolutionary violence of the general strike, the final uprising of the proletariat for itself and for no other. Benjamin—whose Critique of Violence was in crucial aspects a meditation upon Sorel’s Reflections on Violence—thought so too, but for him the possibilities for men of their own revolutionary violence were not so clear cut. Like Sorel, Benjamin “wants to conceive of a finality, a justice of ends . . . no longer tied to the possibility of law.” But for Ben-

171. See BENJAMIN, supra note 40, at 257.
172. Id. at 257-58.
173. See generally SOREL, supra note 1. Sorel counterposed the sublime violence of the proletarian general strike—“a revolt, pure and simple,” id. at 138, a “serious, formidable and sublime,” id. at 139, act of the class for itself—with the manipulations of working class institutions undertaken by parliamentary socialists to produce forms of force and pressure (the “political strike”) to their own advantage, id. at 93-103, 171-201. He distanced the violence of the proletarian general strike from Jacobinism, emphasizing in fact the continuity of ancien régime, revolution, and early twentieth century socialism in a single “theory of the predominance of the State,” id. at 109, against which proletarian violence was to be arrayed. id. Jeremy Jennings comments: “If the object of State force was to impose a social order based upon inequality and exploitation, the purpose of proletarian violence was ‘the destruction of that order.’” Jeremy Jennings, Introduction to GEORGES SOREL, REFLECTIONS ON VIOLENCE xviii (Jeremy Jennings ed., 1999). See generally id. at vii-xxi. It was to be animated “by a conception of war drawn from the ancient Greeks . . . unselfish, heroic, disciplined, devoid of all material considerations. It would be informed by ethical values engendering ‘an entirely epic state of mind.’” Id. at xxviii-xix.
174. DERRIDA, supra note 5, at 286. Thus both may be seen as identifying sublime moments of justice in which finality is achieved. For Sorel, the proletarian general strike is “the myth in which Socialism is wholly comprised . . . [I]t colours with an intense life all the details of the composition presented to consciousness. We thus obtain that intuition of Socialism which language cannot give us with perfect clearness—and we obtain it as a whole, perceived instantaneously.” SOREL, supra note 173, at 127-28. Elsewhere Sorel describes “the proletarian general strike [as] awaken[ing] in the depths of the
jamin all species of violence (save only one) were implicated in the making and preserving of the storm of progress and law that was to be interrupted. Law's foundation lay in the mythical violence visited by the gods upon humanity, which is to say that the "positing of law . . . is in its fundamental principle a power (Macht), a force, a positing of authority," originating then in a moment of "privilege [and] prerogative," of sovereignty, before which no justice, neither of retribution nor distribution, takes place, but only expiation—the seeking of forgiveness, the making of atonement. The possibility of interruption lay only in something very different, divine violence, the violence of God, opposite in every respect to the mythic violence of the gods, which "[i]nstead of founding law . . . destroys it." The complaint is unwarranted—although it is true that Benjamin could not answer with any certainty but only conditionally. Benjamin, says Derrida, "stands up vigorously against all sacralization of life for itself, natural life, the simple fact of living." The "how" to live, worth of life, lies in "the potential, the possibility of justice . . . of his being-just, of his having-to-be just. What is sacred in his life is not his life but the justice of his life." So (in Benjamin's words) if "the rule of myth is broken occasionally in the present age, the coming age is not so unimaginably remote that an attack on law is altogether futile." And if "the existence of violence outside the law, as pure immediate violence, is assured, this furnishes the proof that revolutionary violence, the highest manifestation of unalloyed violence by man, is possible." Then, on the final interruption "of law with all the forces on which it depends as they depend on it, finally therefore on the abolition of state power, a new historical epoch is founded," the epoch of justice. Men, in short, might indeed find revolutionary opportunity in that frozen, Messianic moment of interruption—but only if, and only then.

soul a sentiment of the sublime proportionate to the conditions of a gigantic struggle." Id. at 165.
175. DERRIDA, supra note 5, at 287.
176. Id.
177. Id.
178. Id.
179. Peter Demetz, Introduction to REFLECTIONS, supra note 7, at xxvii.
180. DERRIDA, supra note 5, at 288.
181. Id. at 289.
182. BENJAMIN, supra note 100, at 300.
183. Id.
184. Id.
185. Benjamin writes:

Historicism rightly culminates in universal history. Materialistic historiography differs from it as to method more clearly than from any other kind. Universal history has no theoretical armature. Its method is additive; it musters a mass of data to fill the homogenous, empty time. Materialistic historiography, on the other hand, is based on a constructive principle.
Jacques Derrida, though critically inspired by Benjamin’s analysis of the opposition of law and the possibility of justice, is nonetheless less eschatological in his conclusions. The question of justice he has learned from Benjamin, Valverde says of Derrida, is a question not of grand definitions or concepts but of a praxis for men—little struggles, earthly engagements. “How can we, in our particular time and place, work toward justice?”

“Justice is not . . . a blueprint for a state of affairs. It does not have any particular essence.” Nevertheless it exists—“[a]s inspiration, as force, as desire.” And as such a praxis, justice may even (but only may) be realized strategically through the tactics of law.

It might seem, then, that, after all, law might be persuaded to remember the dead. But those that we must remember with a particular urgency, because they are so easily forgotten, “those who are dead as a result of the political and economic forces that are rarely examined by ethical philosophers”—Article I’s slaves, Brecht’s soldiers sent to war in rotten ships, drowned “in the impenetrable fog”—are never law’s favorites. We have seen this in the unamended text, where the Preamble’s pledges of remembrance and justice are unrealized, where the dead are consigned to an oblivion from which they are recalled momentarily only for the most selfish of purposes. And then those purposes, the force of our law, alarm us, and for the possibility of justice, we substitute apprehension, apprehension inspired precisely by the law-making law-preserving violence of the Convention. In our apprehension, we abandon that solidarity with the dead and with each other, everyone, that we declared in our original commitment to justice, peace, and welfare for all. We look instead to ourselves, to our freedoms, and their protection. Thus the Preamble, thus the unamended text, thus the Bill of Rights. Thus the Threepenny Constitution.

Thinking involves not only the flow of thoughts, but their arrest as well. Where thinking suddenly stops in a configuration pregnant with tensions, it gives that configuration a shock, by which it crystallizes into a monad. A historical materialist approaches a historical subject only where he encounters it as a monad. In this structure he recognizes the sign of a Messianic cessation of happening, or, put differently, a revolutionary chance in the fight for the oppressed past.

BENJAMIN, supra note 40, at 262-63 (emphasis added).

186. Valverde, supra note 32, at 657 (second emphasis added).
187. Id.
188. Id.
189. See id. at 658-59.
190. Id. at 661.
191. See U.S. CONST. art. I, § 2, cl.3.
192. BRECHT, supra note 152, at 377.
193. We may note, however, that while freedom in its liberal individualist construction “is indeed counterposed to the claims of substantive justice,” Valverde, supra note 32, at 672, this is not the case in the relationship of freedom and justice existing outside the liberal tradition.

[F]reedom in Foucault’s sense, while not automatically leading to or producing what Derrida calls justice, is nevertheless not at all incompatible with it. The work of mourning that Derrida so eloquently portrays as an essential condition of justice is among other things a practice of self, and it is a practice of freedom in the Foucaultian sense of enabling us to act upon our own selves, constituting ourselves as free precisely as we acknowledge the weight of our inheritance.
Id.