THE GHOST SHIP CONSTITUTION

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Falsehood, says Aristotle, comes in two varieties: what does not exist at all, and those actual existences which appear as non-existent. It is in this second sense that Larry Tribe plumbs the truth of an "invisible" Constitution while Robert Bork decries the cultural and moral falsity of the Constitution we see. These perceptions of invisible truth and apparent falsehood do not so much reflect the Constitution itself as the constitutional judgments of a Supreme Court. Here Aristotle's first iteration of falsehood surfaces for, as Alexander Bickel plainly states "the authority to determine the meaning and application of a written constitution is nowhere defined or even mentioned in the document itself." If this non-existent judicial review is a fallacy who can truly say what the Constitution is? How are we to know it as it is? and to recognize ourselves there? The Framers, ex ante, could do little more than position themselves before a picture of justice as the end of government already imagined at the beginning, and then set off in hot pursuit through the looking glass of liberty; but they had no illusions about the process or the result. Citing David Hume they maintain that chance not "reason" will be determinative; that the true Constitution is not yet at hand but will rather, in the fullness of "time," emerge from "mistakes," failed "trials," and the "FEELING of inconveniences." The Constitution they thus "behold" – in extending the sphere of faction and counteracting ambition with ambition – is negation itself: "the republican remedy for the diseases most incident to republican government." This essay, ex post, aspires only to restate the Framers' inversion in the idiom of philosophy as Aristotle introduces it when he observes that "we say even of non-being that it is non-being."

Le faux, selon Aristote, est de deux sortes : ce qui n'existe pas du tout et ce qui existe mais n'est pas observable. C'est grâce à ce second sens que Larry Tribe sonde la vérité d'une Constitution américaine dite « invisible » tandis que Robert Bork décrie la fausseté culturelle et morale de la Constitution actuelle. Ces images de la vérité invisible et de la fausseté apparente reflètent moins la Constitution même que les décisions constitutionnelles d'une cour suprême. Nous observons ici la première itération de fausseté d'Aristote car, comme l'affirme clairement Alexander Bickel, « l'autorité pour déterminer le sens et l'application d'une constitution écrite n'est pas définie, ni même mentionnée dans le document». Si ce contrôle judiciaire inexistant est donc une erreur aristotélicienne, qui peut véritablement affirmer ce qu'est la Constitution? Comment faire pour bien la comprendre? Pour s'y reconnaître? Les artisans de la Constitution américaine ne pouvaient que se placer devant un tableau de la justice représentant la fin de leur gouvernement déjà imaginé au début puis se lancer dans une course effrénée pour réussir la traversée du miroir nommé liberté. Cependant, ils n'avaient point d'illusions quant au processus et au résultat. Ils citent David Hume et soutiennent que ce n'est pas la « raison » mais la chance qui est déterminante; que la vraie Constitution n'est pas là mais plutôt, qu'avec le temps, elle apparaîtra grâce aux « erreurs », aux « ratés » et à « l'impression de désagrément ». La Constitution qu'ils ont devant eux – en élargissant la faction pour que les ambitions s'annulent – est donc une négation pur et simple qu'ils reconnaissent comme tel : « Le remède républicain pour les maladies républicaine ». Moi, je n'aspire qu'à réaffirmer cette inversion dans la langue philosophique telle qu'Aristote l'enseigna lorsqu'il constata « qu'on dit même du non-être qu'il est non-être ».

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I. INTRODUCTION

This essay about the American Constitution as being — and as a being — endeavours to steer a course clear of the Kantian *a priori* (the singularly intractable frame of being that precedes and strictly delimits all manner of subsequent beings) and around Heidegger's *Dasein* (the more organic, atemporal frame of *being-there* existentially concerned to sustain any life form). These now all-too-familiar ideations do little but rehearse on the stage of philosophy the irresolvable and intemperate legal debate raging between those who insist that the portrait of being — framed at America's inception — is the only true constitutional likeness, and those who claim this to be a false perception that leaves today's Americans with a dusty and antiquated picture, which we no longer want because it no longer represents what is. If there is a way through or around the impasse,[1] America's constitutional Framers — following the Socratic prescription for finding the republic in the man and the man in the republic — point the way in evoking government in general, and theirs in particular, as the "greatest of all reflections of human nature."[2]

1 Everyone seriously practicing constitutional law in America today must, it would seem, ascribe to the practice of grounding the actual rights or duties he seeks to vindicate or enforce on behalf of a party on precedents contained in the constitutional text. Constitutional theorists, relieved of the real time burden of so proving their claims by matching the actual they seek to establish with what is constitutionally possible are no less constrained to remain within the constitutional *a priori*. The constitutional *res* "already antecedently lies at the ground" and is encountered, earlier in time, before any determination about *being free* or *being equal* today or in the future can be hazarded. If the jurists and scholars can see what constitutional being is at present it is only because, even Heidegger concedes, following Socrates, it is precedent, which is to say "something already previously seen." See Martin Heidegger, *The Basic Problems of Phenomenology* (Bloomington: Indiana University Press, 1988) at 97, 324, and 326 [Heidegger].

2 *The Federalist Papers*, No. 51. All citations to *The Federalist Papers* are accessible at the Avalon Project, online: Yale Law School <avalon.law.yale.edu/subject_menus/fed.asp> [*Federalist* No. 51]. I am indebted to my editor Greg Clarke for suggesting a more exacting iteration, one that explains - in keeping with the basic tenets of phenomenology — how the ghost ship Constitution can still be in active service while its "real world" counterpart is a relic, a museum piece in dry-dock at the Boston Navy Yard, where America's citizens come not so much to pay their respects to the past as to imagine themselves present at the Republic's origin. The Constitution, as distinguished from the sailing ship that bares its name and once defended it, is the likeness of being unto beings. As such, it charts its own course from the many to the one (*e pluribus unum*), and back again. This essay can do no more than mark some of the more salient points of call in this round-trip passage. Dr. Clarke's further perception and constructive criticism that I have "anthropomorphized the Constitution" underscores the fact that people simply do not believe in ghosts any more, and anticipates the objections readers are sure to raise on that score. Unfortunately phenomenology — the recognition of presence as the living reality of a ghost inhabiting the dead shell of a past that is forever gone and the empty promise of a future forever coming to be — is inevitably and invariably conflated with anthropology: the disbelief in ghosts and concomitant insistence that the haunting presence of being is of human kind, novel perhaps, but no more foreign than the "new" forms of humanity anthropologists claim still to be meeting (and marveling over) in such far way and inaccessible

This preliminary remark about that reflection would be superfluous but for the framing with which it cannot but have to contend, a framing that has thoroughly confounded the scholarly lawyers and locked down the state of American constitutional law in a sterile epistemological debate about the frame and its determinative consequences for what it contains. The Constitution as an ordination[3] of self-governance — the synchronically reflected likeness of my being unto an assembly of representative beings — is not compatible with this kind of diachronic treatment of form and substance. While the perceived necessity to distinguish identity from itself is as old as Socrates asserting that "the form [of a bed] is our term for the being of a bed,"[4] the Framers made one thing, not two, and all at the same time. There is no visible or otherwise discernable difference between the frame and the Constitution. If what they made was one whole constitution, why do they refer to themselves, and we to them, not as creators but as Framers, and to it as the merest frame even as

climes as the rain forests of South America. The incapacity to appreciate *ontology* other than as an *anthropology* should not, however, be laid solely at the feet of the social sciences and the empirical methodologies they embrace alone. The French poet Arthur Rimbaud's protest: "*C'est faut de dire je pense. On devrait dire: On me pense*," in similarly infirm, for the "*on*" and the "*je*" both remain in the register of what is human, no matter how insistently the poet would wish to separate them. Rimbaud's conclusion that "*je est un autre*" is no conclusion at all but the redacted version of anthropology's trap: *je est un autre je*. See Arthur Rimbaud, "Lettre à Georges Izambar 13 May 1871" in *Oeuvres* (Paris: Edition Garnier Freres, 1960) at 344. When Andre Breton comes a century later to revisit Rimbaud's declarations and to ask "*Qui suis-je ?*," his answer, "*tout ne reviendrait-it pas a savoir qui je hante*," does nothing so much as confirm that the passage of time can do nothing to loosen anthropology's strangle-hold on being. The haunting *I* and the haunted *him* linger in *personam* and endure unscathed as the subject and the object of anthropology. See André Breton, *Nadja* (Paris: Editions Gallimard, 1964) at 9. If, following Martin Heidegger, "[a]nthropology means the science of man… and embraces all that is knowable relative to the nature of man," then Heidegger is surely correct to blame the conflation of anthropology and ontology on Immanuel Kant's "hasty" determination to reduce the problems of metaphysics to the single inquiry "what is man." Martin Heidegger, *Kant and the Problem of Metaphysics*, 5th ed. (Bloomington, Indiana University Press, 1997) at 146 and 149 [*Problem of Metaphysics*]. If this is the question, the answer, man is man, like recognized by like, belongs exclusively to anthropology. This species-specific line of inquiry, however interesting in the particular, leads nowhere at all. Successful perhaps in delimiting, over time, the being of man, it forecloses, *ab initio*, any investigation "concerning beings in general," (*ibid.* at 55) and more to the point for us does not acknowledge, and cannot ever hope to account for, the core of the constitutional premise and consequence: that there can be and that there is, in America at least, such a thing as the being of beings, irrespective of man. Is Socrates' reminiscence of the time when "to listen to an oak or to a stone" was enough "so long as it was telling the truth," any different from the Israelites' deference to rock slabs? If, as he insists "the first prophecies were the words of an oak," do not ours — words on parchment paper — simply follow suit? Plato, *Phaedrus* in John Cooper, ed., *Plato: Complete Works* (Indianapolis: Hackett Publishing Company, 1997) at 552 [Cooper]. Such is the extant precedent, and if the rule of law is our creed we are obliged to follow it, however improbable or implausible it may appear to the reason of man which is to say the domain and the limit of anthropology.

3 United States Constitution, preamble [U.S. Const.].

4 Plato, *The Republic* in Cooper, *supra* note 2 at 1201.

it is identically one with what is said to be framed — fundamental, supreme law substantively empowered to trump and to nullify whatever presumes to contradict it? This is no Frame but, in the candid assessment of America's first chief justice, the awesome and unprecedented power of man, not as a Moses but like God himself, to be and to say what is.[5] If anything is corrosive to John Marshall's still controlling theory of a unitary written constitution (against which everything can be compared and adjudged like or unlike) it is the idea of internal schism. So why does the duality of Frame and Constitution persist? Perhaps more to the point, does it or does it not control? Do we have one Constitution or two? To what or to whom does it pay allegiance? To the objective voice of beings' majority? To the subjective being that I am and that everyone else is as well? Or — purporting to "secure the Blessings of Liberty"[6] — to nothing at all?

As it is virtually impossible to speak about the Constitution without at once referring to the Framers and their frame, so this opening statement seeks to frame the nature of that entrapment: how can a frame function both as form and substance, as a structure "merely intended to regulate the general political interests of the nation," and an essence that penetrates and informs "every species of personal and private concerns"?[7] The question is forever asked and goes forever unanswered. Like the giants waging perpetual war over *existentia* and *essentia* in Plato's *Sophist*, America's constitutional judges and scholars debate but cannot resolve the enigma of form and substance. Every assertion that procedural due process (the opportunity to appear and to be heard) is all the Constitution affords is immediately and bluntly countered by an equally intransigent declaration of substantive right "transcendent" in its "dimensions."[8]

5 Only an ontological being can think to assert in theory and to manifest in fact the power "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 at 177 (1803) [*Marbury*]. This remarkable statement, at once self-evident and entirely obscure, stirs the entire drink of constitutional law in America, yet it has never been fully appreciated because it has never been understood as an *ontological* declaration.

6 U.S. Const., *supra* note 3.

7 *Federalist* No. 84.

8 *Lawrence v. Texas*, 539 U.S. 558 at 562 (2003) [*Lawrence*]. The incendiary history of substantive due process fills at least three chapters of American law. Chief Justice Taney wrote the first one in affirming that a master has a constitutionally protected property right in his slave no matter how far they may have wandered into the Northwest Territories that Congress, through the Missouri Compromise, had determined to be free. *Dred Scott v. Sanford*, 60 U.S. 393 (1857) [*Dred Scott*]. Next come the *Lochner*-era decisions privileging the property rights of business over public health safeguards mandated by the people's representatives. See, *Lochner v. New York*, 198 U.S. 45 (1905) [*Lochner*]. Today's abortion and sodomy decisions mark the third episode. See, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) [*Casey*] and *Lawrence*, *ibid.* Whether or not the decision in *Dred Scott* vindicates Socrates' judgment that "[t]he excess of liberty whether in States or individuals, seems only to pass into excess of slavery"; whether or not Justice Scalia is right to say

Each of these claims entirely preempts the other's field. Whether or not we can get past this tiresome either/or it behooves us to do more than perpetuate it. We should rather be curious and endeavour to comprehend. It is in this vein that I propose to approach the American Constitution, not as a science of politics but as an ontology, and thus squarely situate it within the philosophical question of being.

To address America's colonial heritage by repairing to continental style philosophy may appear at first blush to be a total disconnect. Certainly that is the thought behind Alexis de Tocqueville's initial observation that "in all the civilized world there is no country that occupies itself less with philosophy than the United States." A closer association with the country and its citizens, however, revealed something different. While Americans may not read philosophy, de Tocqueville goes on, they all follow a distinct "philosophical method." In America each person seeks "the reason of things by himself and inside himself."[9] In America "everything comes from [the people] and returns to them." They are "the cause and the end of all things."[10] Whence he concludes that America "is one of the countries in the world where one least studies and most follows the precepts of Descartes."[11] As the founder of modern philosophy established certainty in himself as a thinking subject, so every American "closes himself tightly around himself and from there presumes to judge the world."[12] In further asserting that America's "Union is an ideal nation which only exists in the individual spirits of the citizens whose intelligence alone marks the metes and bounds,"[13] de Tocqueville extends the sphere of ideation from individual being to beings' collectivity where personality and property inextricably combine after the fashion of feudal England's *Sergeant of the Law*, about whom Chaucer perspicaciously affirmed that "[a]l was fee symple to hym in effect."[14]

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that Dred Scott was the proximate cause of the Civil War, the abortion wars of today confirm that the tinder box frame of due process is excessively brittle and highly flammable. See, *Casey*, *ibid.* at 1001-2 (Scalia, J. dissenting); Plato, *The Republic and Other Works* (New York: Anchor Books, 1989) at 257 [*Republic*].

9 Alexis de Tocqueville, *De la démocratie en Amérique*, vol. 2 (Paris: Garnier-Flammarion, 1981) at 9 [*Tocqueville*].

10 *Ibid.*, vol. 1 at 120.

11 *Ibid.*, vol. 2 at 9.

12 *Ibid.* at 10.

13 *Ibid.*, vol. 1 at 243.

14 Geoffrey Chaucer, "The Canterbury Tales, General Prologue in *Selections from the Tales of Canterbury and Short Poems* (Boston: Houghton, Mifflin, 1966) at 11. Given a) America's election to adopt English common law except where it conflicts with the Constitution and b) the Constitution's controlling premise of self-governance Chaucer's insight applies *a fortiori* in America. While in England and America alike "[t]he poorest man may in his cottage bid defiance to all the forces of

Before dismissing de Tocqueville's understanding as an apocryphal vision attributable to French enthusiasm we should recall that the Constitution was conceived and written in America to transform the nature of government (by confounding it with self-governance) at the same time the German idealists were transforming the nature of philosophy in Europe on the very same ground of subjectivity: an "absolute self posited as wholly unconditioned."[15] There seems nothing substantive to distinguish Georg Hegel's unassailably sovereign subject — apodictically determined by the fact that every person is first and foremost an *I* whose will gives the law to itself — from the Framers' prototypical man defined by self-interest and consumed with self-love. Their appreciation of the fact that any program to curtail this selfishness would run against the grain of human nature and be fatal to freedom, and their concomitant resolve to extend the "sphere" of faction[16] is akin to Friedrich Schelling's: to devise a system of law compatible with the subjective volition of every person.[17] Their conception of government and human nature as mirror images of the same otherwise fragmentary being is akin to his "principle that 'what has reality merely in our intuition,' must be 'reflected to us as present outside us,'" that "[s]peculation and empiricism should not be permitted to contradict one another, but must remain in harmony."[18] Johann Fichte's claim, that at least so far as the "idea" is concerned, "the will of any single person is actually universal law for all persons will the same thing"[19] is consistent with our individual and collective constitutional resolve to be free. Most striking is how transparently the Framers and the German idealists connect freedom and justice through the constitutional mirror of being. Justice, for Hegel (as the mind striving for self-realization), is the experience of freedom. However, as Plato first had the genius to see, only in a state where the constitution of the one individual and of the many citizens (the People) reflect one another can this justice appear. Today's appreciation that "to perform its high function in the best way, justice must 'satisfy the appearance of justice,'"[20]

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the Crown," in England parliament may do (or authorize to be done) what the King of England cannot. In America, the Constitution ties the hands of both Congress and the President's men. *Miller. v. United States*, 357 U.S. 301 at 307 (1958) (citation omitted); *supra* note 3, amendment IV.

15 Johann C. Fichte, *Science of Knowledge* (New York: Cambridge University Press, 1982) at 106.

16 *Federalist* No. 10.

17 See, Michael Halley, "Breaking the Law in America" (2007) 19:3 Law and Literature at 471.

18 Michael Halley, "Schelling's Empiricism: A Transcendentalist's Conversion" (2007) 37:2 Idealistic Studies at 110 ["Schelling's Empiricism"].

19 Johann C. Fichte, *System of Ethics* (New York: Cambridge University Press, 2005) at 241-42. To show that this conception of the universal in the particular and the particular in the universal is not mere theory, but already controls, at least in the negative, Fichte points out that the reason "one is not allowed to do certain things" is "because one cannot know" exactly what it is "everyone wills."

20 *In re Murchison*, 349 U.S., 133, 136 (1955), citing *Offutt v. United States*, 348 U.S. 11 at 13-14 (1954).

acknowledges this necessity. A judgment must not only be impartial. It must be seen and be recognized as such. The Framers' assertion that "justice is the end of government" and that "it ever has been and ever will be pursued until it be obtained or until liberty be lost in the pursuit"[21] comprehends this phenomenon. Freedom and justice are alike, but for this likeness to appear they must be made to look the same as one another across the perfectly polished surface of a constitution, the very mirror Hamilton proffers to the people of America, inviting and exhorting them to "deliberate on a new Constitution for the United States of America,"[22] to look into it and recognize themselves there as indivisibly and perpetually one.

Hegel expressly repaired to the *terra firma* of the *Cogito* to ground this reflexivity. The Framers reached back further still, to Socrates who "after much tossing" finally "reached land" with the discovery that "the same principles which exist in the State exist also in the individual."[23] "In each of us," Socrates maintains, "there are the same principles and habits which there are in the State," and they pass from one to the other.[24] "As the government is, such will be the man."[25] Far from doubting the "great eyed" Plato and distrusting the Constitution's double door as an unfortunate, misleading, and equivocal consequence of imperfect language and inapt analogy, the Framers walked

21 *Federalist* No. 51.

22 *Federalist* No. 1.

23 *Republic, supra* note 8 at 132.

24 Where else could they have come from, Socrates incredulously inquires? *Republic, ibid.* at 125-26. Once established, this hermeneutically closed circle of thought accounts for everything: the business of administering a state and of ordering an individual life are "the same." The "virtues" of the one are the "same," are "alike" in the state and in the individual. See Plato, B. Jowett, ed., *Dialogues, Vol. 5 – Laws, Index to the Writings of Plato*, 3d ed. (Oxford University Press, 1892) at 84 [*Laws*]. Working the principle of non-contradiction to the limit, Socrates goes on to assert "if this is right, every other is wrong." So the "evil" which disorders the State is the same which destroys the individual soul. *Republic, ibid.* at 138. As the "imitative poet implants an evil constitution" in the man, so do bad men destroy the state. *Ibid.* at 299-300. "He who is devoid of reason is the destroyer of his house and the very opposite of a saviour of the state." *Laws, ibid.* at 70. As in the state, so in the individual there are two parts, "[t]he better and superior which rules, and the worse and inferior, which serves." Accordingly, "[e]xcess is apt to be a source of hatred and divisions among states and individuals." *Republic, supra* note 8 at 108 and 110. Nor is this theme of identity limited to moral or ethical qualities. It applies to sensation itself: "The principle which feels pleasure or pain in the individual is like the mass or populace in a state." *Laws, ibid.* at 70. As for love, which "implants" honor, "if there were only some way of contriving that a state, or an army should be made up of lovers and their loves, they would be the very best governors of their own city, abstaining from all dishonor, and emulating one another in honor." Plato, "Symposium" in *Republic, ibid.* at 325-26. On this point Plato equivocates. In the *Laws* he asserts that "the lover is blind about the beloved, so that he judges wrongly of the just, the good, and the honorable, and thinks that he ought always to prefer himself to the truth." *Laws, ibid.* at 113.

25 *Republic, supra* note 8 at 249.

though it to embrace the constitution of man and the state as alike,[26] the one grounding the other and vice versa.[27] Crediting the Socratic conception of "the city which is within the man,"[28] the Framers approached and appreciated government and human nature indifferently.[29] "[B]odies of men," Hamilton asserts, "act" with no more or less "rectitude," no more or less "disinterestedness than individuals."[30] In the same way a man comports himself, so will a state of men. As Ralph Waldo Emerson later termed Plato "the most representative man," marveling at a "double consciousness" capable of simultaneously seeing "the state in the citizen and the citizen in the state,"[31] the Framers first bridged the gap in conceiving a constitution for the state like that of man himself, "the most interesting in the world."[32] So sheer was the likeness Plato drew that Emerson could not but wonder whether the *Republic* was not rather an "allegory on the education of the private soul."[33] In the same way, when John Jay admonishes "every good citizen that whenever the dissolution of the Union arrives, America will have reason to exclaim, in the words of the poet: 'FAREWELL! A LONG FAREWELL TO ALL MY GREATNESS,'" it is impossible to discern whether the greatness to which he is referring inures

26 This "doctrine" of identity, that like is recognized by like, is "very ancient." Friedrich W.J. Schelling, *Philosophical Investigations into the Essence of Human Freedom* (Albany: State University of New York Press, 2006) at 10. As the ground of logic and the essence of apodictic certitude (A=A) it still holds sway as the fundamental principle of common law and constitutional "justice that like cases should be decided alike," and all cases like to the Constitution. *Martin v. Franklin Capital Corp.*, 546 U.S. 132 at 139 (2005); *Ebay v. Mercexchange*, 547 U.S. 388 at 395 (2006) (Roberts, C.J. concurring). Following this chain the next question is to ask: what is like unto the Constitution? If apodicticity — what "discloses itself, to a critical reflection, as having the singular peculiarity ["*ausgezeichnete Eigenheit*"] of being at the same time the absolute unimaginableness ["*Unausdenkbarkeit*"] of its non-being" — is the only just measure , the Constitution, what the law is, can only be justly likened to being itself because being is the only self-likeness. Edmund Husserl, *Cartesian Meditations*, trans. by Dorion Cairns (The Hague: Nijhoff, 1960) at 15-16. This is the import of Aristotle's assertion that "we say even of non-being that it is non-being." Aristotle, *Metaphysics* in *The Basic Works of Aristotle* (New York: Modern Library, 2001) at 731 [*Metaphysics*]. Only this being of what is not can explain how a final judgment of the United States Supreme Court can be the law even where dissenting justices expressly say it is not the law, that it cannot be the law. "What the people who make these judgments dispute about is not" the principle of justice — like recognized by like — for what is and what is not the law both are. The judges "are merely unable to agree, in particular cases, on the correct way to apply" the principle. See Immanuel Kant, *Critique of Judgment*, trans. by Werner S. Pluhar (Indianapolis: Hackett Publishing Company, 1987) at 57-58 [*Judgment*].

27 Georg W.F. Hegel, *The Encyclopedia Logic*, trans. by T.F. Geraets, W.A. Suchting, & H.S. Harris (Indianapolis: Hackett Publishing Company, 1991) at 189.

28 *Republic*, *supra* note 8 at 299, 300 and 303.

29 *Federalist* No. 51.

30 *Ibid.* No. 15.

31 Ralph Waldo Emerson, "Plato: New Readings" in *Representative Men* (1850), online: Ralph Waldo Emerson Texts <www.emersoncentral.com/repmen.htm> ["New Readings"].

32 *Federalist* No. 1.

33 "New Readings," *supra* note 31.

to the place or belongs to the person.[34] Hamilton makes this unlikely likeness explicit in connecting as equivalent "the interests of the man" and "the constitutional rights of the place."[35] These constitutional likenesses and others confirm that what Emerson asserted with respect to the man and the state in Plato's *Republic* applies with equal force in America: "being from one, things correspond."[36] While this origination appears ineffable and has undoubtedly been obscured by the blinders which space[37] and time[38] impose, it remains operable. This essay purports first to track this beginning backwards[39] from periodic sightings of invisibility by three of America's most influential constitution scholars: Larry Tribe in 2008, Robert Bork in 1984, and Alexander Bickel in 1962. The essay then proceeds to sound this unseen and unseeable Constitution — as sheerly invisible — as being itself.

34 *Federalist* No. 2 [caps in original].

35 *Federalist* No. 51.

36 Ralph Waldo Emerson, "Plato; or the Philosopher" in *Representative Men* (1850) online: Ralph Waldo Emerson Texts <www.emersoncentral.com/repmen.htm> ["Philosopher"].

37 "Space does not represent any property of things in themselves." It is "nothing but the form of all appearances of outer sense." Immanuel Kant, *Critique of Pure Reason* (New York: Palgrave Macmillan, 2003) at 71 [*Reason*].

38 Time as the *a priori* form of our inner sense is similarly constraining. Its so-called presence can only be intuited "through limitation," the past that always was and the future that is forever coming to be. *Ibid.* at 75.

39 My election to proceed in inverse order, to work backwards in time, proceeds from a belief that the command of being is to proceed from where one is. The historical approach, to begin with Bickel, pass through Bork and arrive at Tribe would undoubtedly provide the reader with a clearer understanding at the outset: that the invisible constitution embraced by Tribe as a vehicle of transcendence and despised by Bork as the path that sends us "slouching" to our "new home not Bethlehem but Gomorrah," emanates from the empirical fact, articulated by Bickel, that while the power of "constitutional review of actions of the other branches of government, state and federal" by the United States Supreme Court can "be placed in the Constitution… *it cannot be found there*" [emphasis added]. See Robert H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (New York: Regan Books, 1996) [Bork]; Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986) at 1 [Bickel]. This history lesson, however reassuring to begin with, would in the end, not only tell us nothing or nothing we did not already know, but elide the central question. How can this judicial review — which has made the United States Supreme Court the most extraordinarily powerful court of law the world has ever known — *be* if it cannot be found? Bickel, *ibid.* Everyone should come to realize sooner or later — feats of prestidigitation notwithstanding – that to pull a rabbit out of a hat the rabbit must first have been placed inside the hat. Bickel's acknowledgment of an empty Constitution which a magician has privately filled with stuff he can then publicly pull out to amaze the people would seem categorically to condemn judicial review as a cheap trick. What he does not and cannot explain, however, is why such an obvious sleight of hand not only endures but stands defiant in America as the Supreme Law of the land.

II. BEING

Over two hundred years ago Hegel raised the red warning flag about prefatory remarks on the subject of being. Being, by its nature, broaches no introduction. It's not something you ease into or prepare for. Being isn't derived from something else. Resistant to demonstration, being doesn't even require language. As Gottfried Leibniz observed, remote tribal peoples with no word corresponding to it know what being is every bit as well as we do. Blaise Pascal points out that as soon as we attempt to define being we lapse into comical absurdities. Aristotle, master of the definite, was reduced to babbling that even of nonbeing we say that it is. Socrates, wisest of all, declined the invitation to speak upon being directly. He referred inquiring minds to the great Parmenides, who, having been too much and too long, tried to beg off on account of old age. Those nevertheless inclined to preview being bare an affinity to the eighteenth-century English gentleman seizing the occasion of a dinner party to declaim on his integrity. As Doctor Johnson (hardly a partisan of being but a keen observer of beings) admonished that the hostess would do well to count the spoons before her guest's departure, so readers should question any presentation of being in advance of what is.

III. A DECLARATION OF INDEPENDENT BEING

For Friedrich Nietzsche, Immanuel Kant is the worst offender. His *a priori* synthetic judgment, a preface so ubiquitous, so entirely determinative before the fact as to dispense entirely with the possibility of being as a thing in itself, is amongst the worst of offences. Equally offending (at the time) was America's Declaration of Independence, a constitutional preface purporting to express self-evident truths about being. Why, one is tempted to ask, if it is apodictically the case that every being is created equal and endowed with the inalienable right of liberty, is it necessary to say so? Congress' response, that to "secure these rights, Governments are instituted among Men"[40] is no answer. The Declaration did not create a government but threw one off, leaving equality and liberty to fend for themselves and, incredibly, to fend off the British.

To Socrates' question — can a man attain truth who fails to attain of being? — Congress answered no, and on that ontological ground its Declaration provides a momentary and necessarily fleeting glimpse of what it is to be before the time comes for government to intercede and frame a constitution not

40 Declaration of Independence, online <www.ushistory.org/Declaration/> at para. 2 [Declaration].

of that unfettered singularity but of multiple beings, free in and for themselves and equal to one another. The Framers naively assumed this passage from being to beings would be unproblematic. On that basis they formed a loose consensual federation. Looking back on that ingenuousness, Hamilton mused: "There was a time when we were told that breaches, by the States, of the regulations of the federal authority were not to be expected; that a sense of common interest would preside over the conduct of the respective members, and would beget a full compliance with all the constitutional requisitions of the Union." However, "experience" proved that "language" to be "wild."[41] The truth of equality and the rights of life, liberty, and happiness — however self-evident and inalienable — did not suffice to bind disparate beings together as one. Hence the Constitution, but it too proved inadequate to the prerogative of being. While Hamilton successfully argued, before the fact, that a bill of rights was "unnecessary" and might — by implication — prove "dangerous,"[42] as soon as Congress assembled pursuant to the Constitution, the people's representatives amended it to formalize the substantive rights the Declaration did not so much establish as preface. That substance remains as elusive today as it was then. Whether, or to what extent, Hamilton was correct in his judgment that the Declaration's intimation of being as truth indistinguishable from right cannot be instituted, and that every attempt to do so "rests merely on verbal and nominal distinctions entirely foreign from the substance of the thing,"[43] is the open question today for both constitutional law and the constitution of being otherwise known as ontology.

IV. THE ONTOLOGY OF LAWRENCE TRIBE

When, in his recent book, Lawrence Tribe makes out an "invisible constitution" whose provisions are written "not in ink but in blood,"[44] he draws the connection and highlights the immeasurable distance between visceral and constitutional beings. When he goes on to avow that the text of the Constitution "resides only in much that one cannot perceive from reading it,"[45] his seems far more aligned with Martin Heidegger's conception that "thought works to construct the house of being"[46] than the actual building

41 *Federalist* No. 15.

42 "For why declare that things shall not be done which there is no power to do?" *Federalist* No. 84.

43 *Ibid.*

44 Laurence. H. Tribe, *The Invisible Constitution* (New York, Oxford, 2008) at 29, note 8 [Tribe].

45 *Ibid.* at 21.

46 See Michael Halley, "PAS A SA PLACE" (1980) 4:1 Enclitic at 97 (citing and discussing Martin Heidegger, "Letter on Humanism") ["PAS"].

project to which the Constitution's opponents analogized the proposed framing, and criticized as either so lacking in human accommodations and amenities as to be entirely unsuitable for habitation,[47] or, worse still, so faultily designed as to be structurally unsafe.[48] When Tribe says his "interest is less in what's invisible around the Constitution than in what is invisible within it,"[49] he mirrors Heidegger's insistence that "[t]he discourse on the house of being is not a metaphor transporting the image of the house toward being," but an imperative: that "it is from the essence of being suitably pondered that we will one day be able to know what house and to inhabit are."[50] When Tribe says "[e]verything that we see is a shadow cast by that which we do not see,"[51] he reaches into the very core of ontology and suggests that we, like Plato's indentured cave dwellers, misapprehend what James Madison variously characterized as the "principle," the "great mechanical power,"[52] and the "scheme of representation" facilitating the passage of my being through "the medium of a chosen body of citizens."[53] A constitution that may appear to some as an arithmetic lesson devoted to perfecting the prosaic "mechanisms of democratic choice"[54] — what the Framers calls the "different modes of election"[55] — may, Tribe seems to suggest, veil a truer reckoning of our fundamental law, the "distribution of mind" which Plato proposed.[56] Is it through this ontological lens that Madison "behold[s]" with approbation the ontic divisiveness on fierce display in the all too raucous people's house as the "republican remedy for the diseases most incident to republican government"?[57] In exhorting us to "extend the sphere" of faction, Madison is surely promoting an ontological union, not resigning himself and condemning America to the empirical propagation of a notoriously ontic "race of devils" where "selfish inclination" rules supreme, each "destroy[ing] the ruinous effect of the other"[58] in a holocaust of negativity.[59]

47 John DeWitt, *To the Free Citizens of Massachusetts* (27 October 1787).

48 *Ibid.*, *To the Citizens of the State of New-York* (15 November 1787).

49 Tribe, *supra* note 44 at 10.

50 "PAS," *supra* note 46 at 97.

51 Tribe, *supra* note 44 at 211.

52 *Federalist* No. 14.

53 *Federalist* No. 10.

54 Robert H. Bork, "Tradition and Morality in Constitutional Law, American Enterprise Institute for Public Policy Research" (The Francis Boyer Lectures on Public Policy, 1984) at 3-6 ["Tradition"].

55 *Federalist* No. 51.

56 Laws, *supra* note 24 at 96-98.

57 *Federalist* No. 10.

58 Immanuel Kant, "First Supplement of the Guarantee for Perpetual Peace" (1795), online: <http://www.constitution.org/kant/1stsup.htm>.

59 While the Framers refuse to analogize self-interested men and women to devils they also decline the inverse comparison of men to angels and of the earth to heaven. In affirming that "[i]f men were

In further aligning himself with modern theoretical physics and asserting that "dark matter" structures the visible constitution,[60] Tribe ventures far beyond anything we can understand, given our current state of knowledge. While everyone relates to the idea that the separation of powers was an effort to "split the atom of sovereignty,"[61] few can fathom the origin of the trinity at the core of Christianity and the Framers' "science of politics"[62] alike: "*la distribution des trois pouvoirs dans le gouvernement d'un seul.*"[63] Is Madison conceding just such complete mystification in asserting that "no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, [the] three great provinces — the legislative, executive and judiciary"?[64] More baffling still is that each of these imperfectly drawn beings is "perfectly coordinate by the terms of their common commission" such that "none of them... can pretend to an exclusive or superior right of settling the boundaries between their respective powers." While it would seem "strictly consonant to the republican theory to recur" to the people themselves as the "only legitimate fountain of power" to balance the equation just as we must recur to them "whenever it may be necessary to enlarge, diminish, or new-model the powers of the government,"[65] Madison raises "insuperable objections,[66] leaving

angels, no government would be necessary," and that "[i]f angels were to govern men, neither external nor internal controls on government would be necessary" yet at the same time perceiving justice as the end of government and liberty its avatar they anticipate and answer the question Heidegger cannot: what transcendence means for finite beings. *Federalist* No. 51.

60 Tribe, *supra* note 44 at 170-71.

61 Cynthia Cates, "Splitting the Atom of Sovereignty, Term Limits, Inc.'s Conflicting Views of Popular Autonomy in A Federal Republic" (1996) 26 Publius at 127-40.

62 *Federalist* No. 9.

63 Charles de Secondat Montesquieu, *De l'Esprit des Lois*, vol. 1 (Paris: Editions Gallimard, 1995) at 345 [Montesquieu]. The structural identity between a) the division into three discrete quantities of the monarch's ontic being, and b) the holy trinity of God's one ontological being is patent, and enough to have alerted the Framers to the very real possibility of confusion and grave danger, whence the necessity of definitively separating the existence of man and of men in constitutional statehood and the essence of God exiled to the Church. The record of human history attests to the fact that the border which men and God jointly occupy as beings and as being is the most volatile of all.

64 *Federalist* No. 37.

65 *Federalist* No. 49.

66 Popular resolution of power struggles arising within the government must be foreclosed, not just because the logistics of such referenda are unmanageable, but because even if the practical details could be worked out, plebiscites aimed to keep "the several departments of power within their constitutional limits" could "never be expected to turn on the true merits of the question." The "PASSIONS...not the REASON, of the public, would sit in judgment." *Ibid.* [caps in original] The people's representatives elected to the convention called to resolve a constitutional conflict between the three departments of their government would all be pre-committed to and overtly backing one or the other of the constitutional departments on trial. Their ensuing judgment would be pronounced not by the people as impartial and disinterested non-parties but by the parties themselves, indirectly, or in the case of the legislators, directly. In most cases the legislators, as the

the departments of constitutional being — as Thomas Jefferson's Declaration left being itself — to fend for themselves, *sauve qui peut*. If each of the three departments standing trial must recuse itself because its "interest" in the outcome biases its "judgment,"[67] and if the public is likewise unable to "sit in judgment,"[68] then exactly who or what is competent to preside? Here we find the true invisibility of justice: a law case that will be decided by no one, a cause entirely free to pursue its own justice indifferently from freedom itself. Tribe's analogous endorsement of an ungrounded constitution, one that "necessarily floats in a vast and deep — and, crucially, invisible — ocean"[69] again returns us to Heidegger whose "ontological difference" states that "a being is always characterized by a specific constitution of being. Such being is not itself a being . . . [W]hat it is that belongs to the being of a being remains obscure"[70]

V. THE EMPIRICISM OF ROBERT BORK

Just here, on the high seas, where one would have supposed Tribe to have irreparably parted ways with the "strict constructionists," they meet as fellow travelers. Long before Tribe's *Invisible Constitution* came along, Robert Bork glimpsed it as ghost ship. He criticized the "emptiness" within the constitutional frame, likening it to a body without a "core."[71] Despite the fact that it is a very "old" field, "intensely cultivated by men and women of first-rate

branch of government most closely aligned with the people, and drawn from the people, would "be able to plead their cause most successfully with the people." Indeed, "[t]hey would probably be constituted themselves the judges," as "[t]he same influence which had gained them an election into the legislature, would gain them a seat in the convention... The convention, in short, would be composed chiefly of men who had been, who actually were, or who expected to be, members of the department whose conduct was arraigned. They would consequently be parties to the very question to be decided by them." *Ibid.* Even in cases where [t]he usurpations of the legislature might be so flagrant and sudden as to admit of no specious coloring" and "the executive power might be in the hands of a particular favorite of the people," such that the President and his minions controlled the convention, still the matter would adjudicated by one of the parties, contrary to the first rule of impartial justice. *Ibid.* Madison does not even entertain the notion, extant today, that the judiciary should decide. As unelected officials with no connection to the people judges surely cannot be fit to represent the people and to decide in their stead. To vest the power of decision in any of the three departments is to facilitate a party with no better claim in principle to rise above its peers and to control and dominate them in right and privilege.

67 *Federalist* No. 10.

68 *Ibid.*, No. 49. The franchise, intended to protect and safeguard the constitutional being would — by empowering and endorsing a *coup d'etat* either by Congress or the President — destroy it.

69 Tribe, *supra* note 44 at 9, note 8.

70 Heidegger, *supra* note 1 at 78.

71 "Tradition," *supra* note 54 at 5-6.

intelligence,"[72] and apart from "a few scattered insights here or there,"[73] our law persists, in Bork's estimation, as a haunting enigma, a singularly rudderless vessel, adrift. For Bork, the constitutional frame has long since come to resembles "the ship Argo, each piece of which the Argonauts gradually replaced so that they ended up with an entirely new ship without having to alter either its name or its form." The Argo, like the Constitution, exemplifies the "eminently structural object" because "it has no other cause than its name, no other identity than its form."[74] Like a river that never holds the same water, such a vessel lacks any discernibly unifying principle. One consequence of this empty frame and skeletal body is, Bork says, that the Constitution is forever "borrowing from the social sciences," and continually "catching colds from the intellectual fevers of the general society." In the same way that Aristotle says "if each thing is to be relative to that which thinks, that which thinks will be relative to an infinity of specifically different things,"[75] the "winds of intellectual or moral fashion" blow through the empty window pane of the Constitution to endow "our most basic compact" with only chilling cold.[76]

VI. INVISIBILITY AFFIRMED AND REVERSED

Tribe and Bork are perceiving the same invisibility. Almost fifty years ago now, Alexander Bickel plainly and correctly asserted that "the authority to determine the meaning and application of a written constitution is nowhere defined or even mentioned in the document itself."[77] In the face of this empty letter, Tribe and Bork cast their lots differently. What Kant says about a pure judgment of taste applies equally to them: Tribe and Bork not only know what they like "but require . . . the same liking from others." They cannot but claim their judgment to be "valid for everyone."[78] Their assessments, however contrary, are informed by a certitude no argument to the contrary can shake. However diverse, their views rest on the same compelling basis which demands that they hold true for everyone. Commanding strictly equal dignity, their determinations bear the identical brand of "exemplary validity."[79] This alone is noteworthy. Why is it that such accomplished scholars, acknowledg-

72 *Ibid.*
73 *Ibid.* at 6.
74 Roland Barthes, *Roland Barthes* (New York: Hill and Wang, 1977) at 46. See Michael Halley, "Argo Sum" (1982) 12:4 Diacritics 69.
75 *Metaphysics*, *supra* note 26 at 749.
76 "Tradition," *supra* note 54 at 5-6.
77 Bickel, *supra* note 39 at 1.
78 *Judgment*, *supra* note 26 at 54 and 55.
79 *Ibid.* at 89.

ing the same gaping emptiness, contradict one another with impunity, impertinence, and absolute certainty about how to proceed?

Where Tribe is eager to promote the obscurity and penetrate the darkness, Bork no less categorically recoils in horror to summon the exorcist of original intent. Is the invisibility a boon, as Tribe suggests, or a life threatening disease, as Bork augurs? Is Bork correct to insist that whatever being may or may not be, it adds nothing to existence; that whatever is constitutionally possible must arise out of what is actually contained in the document; that "the framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed?"[80] Is Justice Scalia, following in Bork's train, correct to erect a firewall between the belief that women like everyone else have "liberty in the absolute sense," and the juridical assertion of such freedom *simpliciter* as a constitutional right?[81] Kant surely thought so. Should we seek "to frame quite new concepts," he cautioned, "without experience itself yielding the example of their connection, we should be occupying ourselves with mere fancies" for which there is no "criterion."[82] Kant reserves the problem of what may "lie beyond the field of possible experience, that is, outside the world" for what he calls "ideal reason."[83]

Tribe is not convinced. Crediting Hegel's insight that there is intrinsic truth in what a constitution expresses as the truth, and recognizing in the visible alone a limit so obdurate and irrefragable as to bring freedom, equality, justice, and truth itself into utter disrepute as a standstill and backwater of historicism, he proffers a virtual constitution for which Heidegger's German language provides the model — a frame (*Fassung*) of being (*Sein*) whose sheer identity renders a constitution of being (*Seinsverfassung*) transparently present and ready-at-hand to welcome being *simpliciter*, however unseen. This invisible constitution and Bork's all too visibly framed portrait of the unchanging and unchangeable mores of late-eighteenth century gentlemen and their brides seem irreconcilably at odds. Yet they coexist. This remains to be explained. If, as Eric Segal suggests, there is something "dreadfully wrong with the state of constitutional law and constitutional scholarship,"[84] it is neither Bork's empiricism nor Tribe's idealism, but a failure to explore their common root — the pervasive invisibility or emptiness which Bickel identified

80 Bork, *supra* note 39 at 10.

81 *Casey*, *supra* note 8 at 980 (Scalia, J. dissenting).

82 *Reason*, *supra* note 37 at 241.

83 *Ibid.* at 244.

84 Eric J. Segal, "Lost in Space: Laurence Tribe's Invisible Constitution" (2009) 103 Northwestern Univ. Law Rev. Colloquy.

— and the inevitable consequence, that the vacuum, as intolerably inscrutable as being itself, demands to be filled. Justice Antonin Scalia acknowledges this phenomenon — that the empty field of being cannot hold — when, observing that something other than the Constitution itself is now firmly in control, he reports that "If you go into a constitutional law class, or study a constitutional case law book, or read a brief filed in a constitutional law case, you will rarely find the discussion addressed to the text of the constitutional provision that is at issue." Why is it, Justice Scalia goes on to ask, that "the starting point of the analysis will be Supreme Court cases," and that "the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, has extended us from the original text and understanding"?[85] Madison — again demonstrating his past mastery of what Heidegger came to call the ontological difference between what is and what is seen — provides the too evident answer: "All new laws," he says, "though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." So great is the chasm separating "objects" and their "definition" that even when "the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated."[86] If God can't convey a clear message, how can a constitution?

Alternatively, to embrace or to bemoan the discrepancy is hardly worthwhile. While Hegel may or may not have been right to equate what is actual with what is rational in every instance, surely reasoning minds should aspire to grasp what is before presuming to pass judgment. Rather than choose between Tribe's undisclosed secret of the Constitution as ontological being and the well worn and proven means of Bork's ontic beings, we should — crediting the ancient jurist's insight that whatever is honestly said about justice must "always remain perfectly the same by dint of the same spirit or soul that accounts for the I in those who think"[87] — reflect on the very real possibility that Tribe and Bork may be holding (or attempting to hold) an identity in common rather than isolating and exacerbating irresolvable differences. Their either/or is dialectic. As the reverse or downward facing side of a coin always

85 Antonin Scalia, *A Matter of Interpretation*, ed. by Amy Gutmann (New Jersey: Princeton University Press, 1997) at 39.

86 *Federalist* No. 37.

87 Gottfried W. Leibniz and Jacques Brunschwig, *Nouveaux Essais sur l'Entendement Humain* (Paris: Flammarion, 1990) at 180.

lies concealed,[88] so the one (Bork) "bring[s] forth realism out of idealism," and the other (Tribe) "brings forth idealism out of realism."[89] If only the scholars could imagine the coin in the air "flying of its own will," not theirs,[90] they would capture the identical source of this divergence.

VII. THE IMAGE-GIVING IMAGINATION

Alexander Hamilton points the way. His extraordinary reverence for the modest state courthouse as "the immediate and visible guardian of life and property" and the "great cement of society" ever present "before the public eye"[91] could not be more prosaic, more concrete, more definitive. No less visibly apparent are the "strict rules and precedents," which bind down the judge and "serve to define and point out" his "duty in every particular case."[92] But before this side of justice falls irremediably to the ground, Hamilton glimpses the other, what Tribe ascribes to dark matter. Justice, Hamilton says, has no "force," no "will," but only "judgment," which is "next to nothing."[93] From

88 "Tell us, Master whether it is lawful to pay taxes to Cesar?" In response Jesus called for the Pharisees to produce a coin whereupon he asked them to identify its likeness and its inscription: "Of Cesar," they replied. In reliance on the unseen side, which they could not but acknowledge and credit, Jesus acquitted himself: "Give to Cesar what is Cesar's and to God what is God's." Matthew 22:21.

89 Friedrich W.J. Schelling, *System of Transcendental Idealism* (Charlottesville: University Press of Virginia, 2001) at 14. See "Schelling's Empiricism," *supra* note 18 at 110-11.

90 Arthur Schopenhauer, *The World as Will and Representation*, vol. 1 (New York: Dover Publications, 1969) at 126.

91 *Federalist* No. 17.

92 *Federalist* No. 78.

93 *Ibid.* at note 1. In characterizing the judiciary as *next to nothing*, Hamilton cites Montesquieu. Hamilton's meaning however, that judgment, as nothing, can never endanger liberty, is precisely the opposite of Montequieu's. Montesquieu feared human judgment as something "terrible," and what he said was that to avoid the terror it must be made to *look* "invisible and nul." To achieve this end Montesquieu did not praise the courthouse but expressly advised that fixed or permanent tribunals should be eliminated altogether. Courts should convene from time to time and move from place to place, and then adjourn, vanish from the scene as if they had never been. Their judgments should not be made and handed down by professional judges following strict precedents and rules, but by lay jurors selected from amongst the anonymous body of the people for the momentary task, after which they should sink back — unrecognized and unmarked — into the great undifferentiated mass from which they were temporarily spirited away to do terror's business. Like the hooded hangman — the famously anonymous *Bourreau de Paris* detailed to carry out the capital sentence too gruesome and arbitrary to be attributed to and associated with any identifiable human personality or agency — judgment must be veiled in invisibility. In this way the people can be led to believe that majesty and not the magistrate is the source of the law. Montesquieu, *supra* note 63 at 330. Removal of the bar of justice and the all too identifiable black robed jurist presiding over it will, Montesquieu hypothesized, hide the subjectivity inherent in the act of judgment and interpose the illusion of divine objectivity, substitute the instrumentality and decree of God for the crude pen and penmanship of man, only a step removed from our ancestors' sticks and stones. In implicit recognition of all this scripture likewise endeavors to annul the terrible injustice of human justice,

this nothingness it follows that "the general liberty of the people can never be endangered."[94] What, then, do the citizens appear to see with such perspicacity in this nullity? What is this mere judgment which does everything with nothing? Why does Hamilton refer to these marvelous courts as *visible* guardians when their sole quality — judgment — is so decidedly *invisible*? Hamilton does not say, but he does articulate some of the feelings the vision of invisibility provokes: "benefits" and "terrors," "affection, esteem and reverence."[95] Gazing outward at who know what, we project what's inside — Tribe's "self-made representations and concepts"[96] — which Bork, freezing them into time and place, then anoints as our empirical bulwark and saviour. This law, the rule of law in America, is strictly speaking an *ens imaginarium*, which, as "image giving," renders what appears to be a prosaic compendium of all "the possible forms" of the invisible.[97]

VIII. GROUND AND TRANSCENDENCE

These forms — the hall of justice, the dead hand of the law — are not empirical determinations separate and distinct from a transcendent imagination. They are rather the transcendent product of a faculty of mind more fundamental than reason itself. Were this not the case Hamilton would not have upended our common sense understanding in characterizing the stick-and-stone materiality of buildings as "transcendent."[98] What he saw, in plain view, were visible images transcending the invisible ground of imagination. What we now call empirical, he saw as transcendent and vice versa. His unequivocal assertion that liberty can never be endangered by the "courts of justice,"[99] that the people "hold the scales in their own hands,"[100] rests on an *a priori* bedrock of certitude more empirical than anything an empiricist could ever hope to find or classify. What else can explain Hamilton's absolute disdain for Magna Carta wrested "sword in hand, from King John?"[101] Such contrivances are unfit for free people who "surrender nothing; and as they retain everything they have no need of particular reservations"[102] laid out in nicely recorded metes

prescribing thus: "Let he who has never sinned cast the first stone." John 8:32.

94 *Ibid.*

95 *Ibid.*

96 *Supra* note 44 at 108.

97 *Ibid.* at 101.

98 *Federalist* No. 78.

99 *Ibid.*

100 *Federalist* No. 31.

101 *Federalist* No. 84.

102 *Ibid.*

and bounds. If that be empiricism, this is a higher empiricism: an impenetrably fortified teleological system of impeccable symmetry and exact proportion whose self-evident certainty speaks for itself. "Why," Hamilton inquires, "should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" Words, however well crafted, would only compromise "the only solid basis of all our rights," the invisible, wordless "spirit of the people and of the government."[103] Such judgment is more certain by far than anything a court, even a supreme court, could ever hold. Self-certainty controls, and stands clear and distinct as the one irrefutably knowable thing, precedent to and for everything else.

In affirming, as positive law, the liberty of the person in its "transcendent dimensions,"[104] our jurisprudence places the cart before the horse. This certitude, indistinguishable from freedom, of self-determination is not transcendent, but the pre-existent "image-giving" ground out of which the visible rules of law arise transcendent. Those who dissent because they cannot find transcendence either in the Constitution or the Declaration of Independence[105] only compound the problem. Transcendence is staring them in the face, but the image they see of beings coming together to transcend the only thing each of them knows first and most certainly — that I am — cannot but appear to be the opposite. This material transcendence of ground informs de Tocqueville's image of America as "one of the countries in the world where one least studies and most follows the precepts of Descartes."[106]

Madison's assertion that never before in the course of recorded history had "the task of framing" been committed, not to "some individual citizen of preeminent wisdom and approved integrity," but to "an assembly of men," and his admonition — as a "great imprudence" — of "unnecessarily multiplying" the unprecedented attempt, [107] stands testament to a constitutional framing by imperfect beings dynamically transcending the static perfection of being. In recognizing the finished document as imperfect, and recommending it on that basis, Madison distinguishes his from Plato's vision of the framer who must be allowed "to perfect his design."[108] With the embrace of imperfect men as constitutionally just, Madison leads us to the true meaning of transcen-

103 *Ibid.*

104 Lawrence, *supra* note 8 at 562.

105 *Ibid.* at 605-06 (Thomas J. dissenting).

106 Tocqueville, *supra* note 9, vol. 2 at 9. For a discussion of Descartes' empiricism, see Friedrich W. J. Schelling, *On the History of Modern Philosophy* (Cambridge: Cambridge University Press, 1994) at 42 and 44 [History]; "Schelling's Empiricism," *supra* note 18.

107 *Federalist* No. 38.

108 *Laws*, *supra* note 24 at 129.

dence for finite beings: not a platonic *Republic* never proceeding past the stage of ideation,[109] but a fully functioning government committed, not *in personam* to a "race of philosopher kings,"[110] but to an all too human "posterity," in *res*, and, like any other creditable conveyance, in writing.

IX. THE CONSTITUTION AS IMAGE

What the Framers leave somewhat unexplained, and us stumbling to discover, is the nature of this writing. They say "government" in general and theirs in particular is "the greatest of all reflections of human nature,"[111] and they endeavour to capture that reflection in a written constitution. Yet when we think of reflection we think of mirror images, of exact reproductions captured instantaneously, not texts which are first and foremost voluminous,[112] and which convey meaning sequentially in the time consuming, compendious process of turning pages, themselves subdivided into articles and sections. The contrary idea of the constitutional text as an image, which has been framed for immediate and accessible viewing, is consistent with Tribe and Bork's common perception of an underlying ground of invisibility (the blank canvas, screen or film on which the image is painted, projected, or transcribed), and, more fundamentally, informs John Marshall's imagistic theory of the written Constitution. If the Constitution were not a picture that has been framed for all to see, Marshall's still controlling understanding of constitutional law as an elementary match game would not be possible. If the text of the Constitution were not, first and foremost, an image, his method of simple visual comparison — of setting the Constitution side by side with mere "acts" to see if they appear alike or "repugnant" — would not be conceivable.[113] The reason verbal "declarations" however "fine"[114] cannot do justice to the Constitution is that it is not a text which is written, but a picture which, as everyone seems to agree, has been *framed* by a frame maker.

The faithful constitutionalist must *bring back*, retrieve — unaltered and intact — what the constitutional text, as framed portraiture, *brings forth* in the first instance.[115] This is textually impossible. If the judge's opinion is an exact,

109 See Gianfranco Maglio, *L'Idea Costituzionale Nel Medioevo* (Verona: Gabrielli Editori, 2006) at 5.
110 *Federalist* No. 49.
111 *Federalist* No. 1.
112 See Jacques Derrida, "Force et Signification" in *l'Ecriture et la Difference* (Paris: Seul, 1967) at 42 [Derrida].
113 *Marbury*, *supra* note 5 at 177-78.
114 *Federalist* No. 84.
115 Derrida, *supra* note 112 at 11-12, footnote 1.

verbatim transcription of the constitutional text, there is no communication just the vacuous echo of repetition.[116] Some mechanism must allow the one to reflect the other.[117] Hegel captures it in theory when he says "*Reflexion... Gegensatz . . . aufhebt.*" Reflection brings and brings back difference all at once.[118] Only by reflection, in the sense of visual mirroring, can the different texts of the judge and the Constitution be deemed the same. While the words may appear diverse, the picture they make is identical. Like the constitutional jurist *ex post*, the constitutional framer *ex ante*, is on the look-out to capture this mirror image. As Socrates' carpenter does not "make... the ideas" whence his bedframe derives but proceeds "in accordance with the idea,"[119] the Framers of the American Constitution could only position themselves before the picture of justice as the end of government already imagined at the beginning, and then set off in hot pursuit through the looking glass of liberty.

X. REPUBLIC TO REPUBLIC

As Hegel reminds us, Plato's *Republic* begins with a search for justice akin to ours.[120] After much tossing and turning Socrates happens upon the best way to discern it. Suppose, he says, "lacking keen eyesight, we were told to read small letters from a distance and then noticed that the same letters existed elsewhere in a larger size on a larger surface. We'd consider it a godsend," and, Socrates continues, the state provides it. The characters of justice written there are the

116 This is the flip side to Madison's observation that language is inherently imperfect, imprecise. To communicate anything at all a text must be subjected to interpretation which is to say altered, rewritten.

117 Henri Beyle Stendhal's celebrated characterization of the novel as a "*miroir qui se promene sur une grade route*" captures the aspiration. *Le Rouge et le Noir*, vol. 2 (Paris: A. Levavasseur, 1830) at chapter 19. Whether the reflection that ensures is *of reality* or only an *appearance* is the question that remains unresolved. Stendhal maintains (in defense of reality) that the novelist whose mirror reflects the mud at his feat will be falsely blamed; that the fault lies not in the mirror but the road or those charged with maintaining it. Socrates, to the contrary, says that nothing is easier than to "carry a mirror." By turning it round and round one can make anything and everything "appear" but not "the things themselves as they truly are." *Republic*, *supra* note 8 at 1201.

118 G.W.F. Hegel, *Phaenomenolgie des Geistes* (Hamburg: Felix Meiner Ferlag, 1952) at 21 [*Phaenomenologie*]. In his first encounter with the word, Jean Hyppolite, the legendary French translator of Hegel's *Phenomenology*, nearly threw up his hands in despair: "The translation of the Hegelian terms 'Aufheben, Aufhebung' is particularly delicate in French. In common usage the meanings are diverse, even contradictory: to suppress, to conserve, to raise, to raise up, to revolt." See *La Phenonenologie de l'Esprit*, trans. by Jean Hyppolite, vol. 1 (Paris: Aubier, 1941) at 19, footnote 34.

119 *Republic*, *supra* note 8 at 289.

120 "Justice," the Framers declare, "is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." *Federalist* No. 51. This is precisely what Socrates means when he conflates the principle of justice with the interest of the government in theory and elects to be put to death in fact.

same as those inscribed in man himself only larger, easier to make out.[121]

Were we to have proceeded on this basis of scriptural identity, text to indifferent text, the rule of law, distinguishable from the rule of man, could not be. Were the constitution of the judge identical to the document before his eyes, he or she could decide by simply turning inward with a magnifying glass to scrutinize the lettering of his own constitution, scripturally indifferent from that of the state, now a superfluous repetition. Absent the formation of an object, an image different in kind from this internal writing and transcending it, objectivity would be foreclosed. Without a theory of the written constitution as external image transcending internal writing, Marshall could never have spoken anything but his own mind, his presumptive ability to "say what the law is"[122] separate and apart from his own particular way of thinking, notwithstanding. Calculating the devastating effects of Plato's contrary proposition, Madison admonishes: "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."[123] While Plato, applying the law of identity, exactingly "proportioned the lights and shades" of the state "after the genius" of the internal being each of us is, [124] the Framers, conceding the fact of difference, projected this singularly subjective self-certainty outward to appear as the collective "genius of the people of America,"[125] where every citizen recognizes himself as free and equal not only to himself but also to everyone else.

121 *Republic, supra* note 8 at 1007-08.

122 *Marbury, supra* note 5.

123 *Federalist* No. 55.

124 "Philosopher," *supra* note 36. Socrates imagines the first incarnation of the state in perhaps "some lofty soul born in a mean city, the politics of which he contemns or neglects," or "peradventure," in someone whose "ill health kept him away from politics." This state incarnate in the man will have "seen enough of the madness of the multitude [to] know that no politician is honest..." Having concluding that "he would be of no use to the [existing] State... he holds his peace and goes his own way... he is content if only he can live his own life and be pure from evil or unrighteousness, and depart in peace and good-will with bright hopes." When Glaucon responds that by so conducting his affairs "he will have done a great work," Socrates responds: "A great work — yes; but not the greatest, unless he find a State suitable to him; for in a State which is suitable to him, he will have a larger growth and be the savior of his country as well as himself." *Republic, supra* note 8 at 187-88. The Framers, anticipating the disastrous *external* cost to the nation of Socrates' uncompromising pursuit of internality, fairly taunted the people of America not only to reject the Constitution, but to "recall all the powers they have heretofore parted with and to divide themselves into as many States as there are counties, in order that they may be able to manage their own concerns in person." *Federalist* No. 26.

125 *Federalist* Nos. 12, 39, and 55.

XI. ARISING OUT OF AND ARISING UNDER

Heidegger reminds us that if the unknown were simply "that of which we know nothing," it would attract no notice. The unknown, rather, "is what pushes against us as disquieting in what is known."[126] The theoretical expression of this disquiet by Tribe and by Bork is symptomatic of something far more palpable: the shaking we experience whenever we endeavour to stand on firm constitutional ground. Cases, we are expressly apprised, do not *arise out of* the constitution, but *under* it. This is strange. Ordinarily things emerge from the ground on which they then are said to stand upon. What does it mean for each of us to have to establish his or her standing under the Constitution; and if that is the canopy above our heads, what, if anything, are we standing on? Is the arising under jurisdiction prescribed by article III of the U.S. Constitution a candid acknowledgment of the invisibility that grounds the visible Constitution? Do cases arise under this umbrella in the same way volcanoes appear to arise under the visible sea, while in fact they arise out of the invisible ground underneath?

That the ground out of which the Constitution first arose, and the existence of a Constitution under which cases and controversies now arise, are different would seem incontrovertible. There was a convention and a document was drafted. It was circulated, debated, and ratified. Those charged with the work referred to themselves as Framers and we today still see them in this light: as having built a structure arising out of the ground. So pervasive is this visible frame that no one can distinguish it — as Hamilton once urged — from what it borders and contains. Frame and Constitution, now as then, are interchangeable, inextricably intertwined. The scholarship recognizes no visible or cognitively credible difference. Nor is there any. There is no frame other than the Constitution, no Constitution distinct from the frame. A frame of constitutional being that once in historical time arose out of the empirical ground now hovers in a transcendent space under which Americans do not so much take shelter as arise in their own right.

While Hamilton's colonial beings may have enjoyed "the transcendent advantage" of seeing justice done under English common law in courts of general jurisdiction, Americans, as constitutional beings, find this transcendence in a limit of their own construction,[127] on manifest display in the textually

126 *Problem of Metaphysics*, *supra* note 2 at 112.

127 That law, as practiced every day in America, occupies the space between ground and transcendence is reflected by the fact that lawyers commonly plead their cases as arising out of the facts and under

explicit restrictions on the judicial power of the United States, recited in article III of the Constitution. What we don't see written there, however, is any language affirmatively commanding Congress to authorize the establishment of inferior courts of original jurisdiction, absent which the expressly established appellate jurisdiction of the Supreme Court would further underscore the Constitution's perceived invisibility. The prospect of a federal court of last resort with no federal cases to review[128] has attracted the attention of a great many prominent constitutional scholars.[129] The open question they cannot but entertain is whether Congress could have elected not to create federal courts of original jurisdiction without at once shattering the constitutional frame and eclipsing the constitutional image of justice it encloses.

This apocalyptic line of inquiry does little to acclimatize our senses to the invisible constitution. All the theoretical insistence in the world that the text of the Constitution invisibly requires (by implication of one kind or another) the establishment of inferior federal tribunals cannot change the fact that it does not say so. What cannot be debated is that there is no longer any real

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the law.

128 While article III declines to establish any federal courts of original jurisdiction, it does not preclude and indeed authorizes the United States Supreme Court to review final judgments arising out of the state courts if the ground of decision is the Constitution or a federal statute. This jurisdictional grant, Hamilton and Marshall argue in unison, is compelled by the "axiom" that "the propriety of the judicial power of a government [must be] coextensive with its legislative" power. *Federalist* No. 80. "If any proposition may be considered as a political axiom, this, we think, may be so considered." *Cohens v. Virginia*, 19 U.S. 264 at 383 (1821) [*Cohens*]. "The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." *Federalist* No. 80. Marshall persuasively rebuts the claim that the states can be entrusted to uphold the Constitution and the laws as well as him with the observation, which history has proven correct, that "We have no assurance that we shall be less divided than we have been." *Cohens*, *ibid.* at 386.

129 Paul Bator, "Congressional Power over the Jurisdiction of Federal Courts" (1982) 27:5 Villanova Law Rev. 1030; Akhil Amar, "A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction" (1985) 65 Boston Univ. Law Rev. 205; Robert L. Clinton, "A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding" (1984) 132 Univ. Pennsylvania Law Rev. 741; Theodore Eisenberg, "Congressional Authority to Restrict Lower Federal Court Jurisdiction" (1974) 83 Yale Law J. 498; Gerald Gunther, "Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate" (1984) 36 Stanford Law Rev. 895; Henry M. Hart, Jr., "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic" (1953) 66 Harvard Law Rev. 1362; Martin H. Redish & Curtis E. Woods, "Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis" (1975) 124 Univ. Pennsylvania Law Rev. 45; Lawrence G. Sager, "Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts" (1981) 95 Harvard Law Rev. 17; Laurence H. Tribe, "Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts" (1981) 16 Harvard Civil Rights-Civil Liberties Law Rev. 129; Herbert Wechsler, "The Courts and the Constitution" (1965) 65 Columbia Law Rev. 1001.

danger that the appellate jurisdiction of the Supreme Court will be effectively stripped for lack of federal cases to entertain. Congress has chosen by a free accounting of the yeas and nays, not by prescription, to create inferior federal courts. Their original jurisdiction and the Supreme Court's appellate jurisdiction flowing from it are now firmly established, a few self-contained jurisdiction-stripping skirmishes and brushfires notwithstanding.[130] So the imaginary end of justice to be "pursued until it be obtained, or until liberty be lost,"[131] conjured at the framing is now afforded an entirely concrete and discernable starting place. This empirical placement of our own devising marks the essence of transcendence in constitutional America. An original jurisdiction that might never have been, and whose necessity is far from obvious,[132] is now as ubiquitous as it is obligatory, while the appellate jurisdiction whence it arose — as end demands beginning — has become a matter of virtually absolute discretion.[133] Policy may presume to explain the why and the wherefore of this reversal but only ontology can ever hope to discern how the beginning and the end have proven so interchangeable, the one presupposing the other which engulfs it. This circle, "having its end also at its beginning,"[134] is the frame that constitutes *ex ante* the Constitution *ex post*.

XII. JURISDICTION AND JUDICIAL REVIEW

Recent efforts to get to the bottom of jurisdiction's changeable front brush up against — then shy away from — the "self-*restoring* sameness," the "reflection of otherness within itself"[135] of frame and Constitution. Frederic Bloom steers in the right direction when he analogizes what he terms jurisdiction's "noble lie" to the preposterously audacious falsehood Socrates wanted to perpetrate on first the guardians, then the soldiers, and lastly the people of the

130 Congressional efforts to withhold or withdraw jurisdiction have a long and checkered history. See *Ex Parte Yeager*, 8 Wall. 85 at 102-03 (1868). The latest episode in the "jurisdiction stripping" saga centres on the fate of alleged terrorists held at Guantanamo Bay, and whether Congress can strip the courts of jurisdiction to hear their habeas actions. See *Boumediene v. Bush*, 553 U.S. (2008) [*Boumediene*].

131 *Federalist* No. 51.

132 Article III's limited "arising under" jurisdiction does not supplant or displace, but exists together with the pre-established ground of the state courts' unlimited or general jurisdiction. Absent a few congressionally mandated exceptions, where the requirements of Article III are satisfied a litigant can elect, in the first instance, to pursue a constitutional or federal law claim in either state or federal court.

133 In 1988, the United States Congress foreclosed appeals "as of right" to the Supreme Court from final state court judgments. See Act of 27 June 1988, Pub. L. No. 100-352, 102 Stat. 662.

134 Georg W.F. Hegel, *Phenomenology of Spirit* (Oxford: Oxford University Press, 1977) at 10 [*Phenomenology*].

135 *Ibid.* at 10; for the original *German*, see *Phaenomenologie*, *supra* note 118 at 20: "*sich* wiederherstellende *Gleichheit*"; "*die Reflexion im Anderssein in sich selbst.*"

Republic by telling them all their youth was a dream and the education they remember an illusion; that in reality their constitution is not different from that of their mother the Earth who delivered all of them up into the world as brothers and sisters. This "one royal lie" — necessary to establish the ontological rule of beings like unto being — is, Socrates assures us, "nothing new." It has, rather, "happened in many places" where, handed down over the course of generations,[136] the falsehood's visibility fades to black where it appears as visible truth.[137] Against this inscrutable backdrop of beings' appearance in the invisible ground of being, the one all too discernable exception to the otherwise inviolable rule that a "*true* falsehood… is hated by all gods and humans,"[138] Bloom concedes that jurisdiction's lie, its "rigid front" betrayed by rampant flexibility, serves "broader social — and, in this case, adjudicative interests."[139] Yet, unlike Socrates, who endorses the one true falsehood of an ontological constitution (beings bound to one another through the heritage they share, the being of ground) without cavil or equivocation, Bloom insists that he "does not mean to excuse the inexcusable."[140] Jurisdiction, Bloom says, "tells a troubling lie," which "invites moral condemnation." He figures that we pay "heavy costs" for "jurisdiction's lie" at the expense of "judicial candor."[141] But he also says something else which he deems "important," but on which he does not elaborate: that jurisdiction's lies are not "incompatible" with the Constitution which leaves "ample room" for the "pragmatic" justifications that invariably accompany a lie.[142] Nor does the Constitution "prohibit" the maddeningly "innovative logic"[143] characteristic of lying. With this acknowledg-

136 *Republic, supra* note 8 at 1050-51.

137 Famously attacking the "philosophy of identity" extant in his times Hegel likens thinking which demands that diverse things be deemed identical, to "the night . . . in which all cows are black." *Phenomenology, supra* note 134 at 9. See, Michael Halley, "Thoughts on the Churn Law" Northwestern Univ. Law Rev., Colloquy [forthcoming]. It may appear to be absolutely true and visibly so that all these cows are indeed black, but only in the dark. Or does Schelling — in a rejoinder that brings us back around to Tribe's invisibility in se — demonstrate a better understanding of beings' truth and the truth of being when he asserts that "Darkness which was *seen* would not be darkness anymore." See *History, supra* note 106 at 171 [emphasis in original]. See, "Schelling's Empiricism," *supra* note 18 at 111.

138 *Republic, supra* note 8 at 1020. As we have seen Socrates is generally keen to separate appearance from reality. See *supra* note 117 at 22. It is only in the matter of the guardians' education he is willing, indeed eager, to conflate them.

139 Frederic Bloom "A Noble Lie" (2009) 61 Stanford Law Rev. 971 at 971, 975, and note 12 [Bloom].

140 *Ibid.* at 971.

141 *Ibid.* at 1026-27.

142 These "functional, deliberative, and structural benefits" serve, in Bloom's opinion, to justify "jurisdiction's long-running trick." *Ibid.* at 971.

143 *Ibid.* at 1025-26.

ment that jurisdictional lying is constitutional[144] and perfectly legal;[145] that so far as jurisdiction — "the authority by which courts and judicial officers take cognizance of and decide cases"[146] — is concerned, judges may (in the name of what may well appear to them as the truth) lie with impunity, Bloom endorses *sotto voce* Socrates' judgment that to lie about the singularity of being and beings, about their constitution in common and in common with the earth itself, the ground as being, *is the truth.*

The constitutional lying in America begins, as we have seen, with "the celebrated Montesquieu" (to whom the Framers reverentially repaired as to an "oracle")[147] forthrightly advising that, because in truth the judgment of man over men is a horrific prospect, the people must be deliberately deceived into believing that legal judgments do not come from or inure to the magistrate but to majesty itself. Hamilton ups the ante by lying twice. He says first that a legal judgment — contrary to what we all know to be true[148] — is nothing to be afraid of; and then he attributes this false palliative to Montesquieu who, in fact, said just the opposite. Only with Madison do we arrive at the truth: that there is no such thing as a constitutional essence called jurisdiction, that no-one and nothing has the juridical authority to take cognizance of and decide a dispute amongst the three co-equal departments of constitutional governance. Yet this truth, like Montesquieu's, is impossible to bear and must be made invisible, replaced by the visible practice of judicial review to keep the departments in constitutional order. This is the most remarkable lie of all: for while the Constitution is express in affording some protection for both individual[149] and states' rights,[150] and so provides at least an arguably safe harbour for the Supreme Court to review alleged infringements pursuant to the American Constitution's express grant of appellate jurisdiction in article III,[151] the Framers were deliberate in their firm decision *not* to write a separation of powers provision into the Constitution. While they acknowledged "the emphatic and, in some instances, the unqualified terms in which this axiom

144 Nothing in the "Full Faith and Credit [clause], Due Process, or the whole of Article III" prohibits lying. *Ibid.* at 1025.

145 Jurisdictional lying, Bloom goes on to say, is not "plainly inconsistent with pertinent statutory law." *Ibid.*

146 *Black's Law Dictionary*, 4th ed. (St. Paul: West Publishing, 1961) at 991.

147 *Federalist* No. 47.

148 As Bickel asserts, what Hamilton disingenuously characterized as "the least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known." Bickel, *supra* note 39 at 1.

149 See U.S. Const., *supra* note 3, Amendments I through VIII.

150 *Ibid.* at Amendment X.

151 Article III provides in relevant part that "The judicial power shall extend to all cases, in law and equity, arising under this Constitution." *Ibid.* at Article III, Section 2.

has been laid down, in some of the state constitutions," they considered it a dead letter because they could not find "a single instance in which the several departments of power have been kept absolutely separate and distinct."[152]

When the Justices of the United States Supreme Court most committed to visibility, to the words of the Constitution, and to their original unchanging intent come to criticize their brethren for taking jurisdiction over separation-of-power disputes, and presuming to decide them on "principles" derived "from some judicially imagined matrix," they truly see the nothing that's there.[153] When they go on to say that they themselves can take jurisdiction and decide these disputes by reckoning from "the sum total of the individual separation-of-powers provisions that the Constitution sets forth,"[154] they falsely perceive and propagate something that's not. This is the true story of jurisdiction's lie and the invisible Constitution that compels its promulgation.

That story begins and this essay ends with Nietzsche's assertion that "every powerful man lies when he speaks and lies all the more when he writes."[155] This is no Machiavellian doctrine of *real politik* but an ontological premise, no different from Madison's. In asserting that "[n]o man is allowed to be a judge in his own cause because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity,"[156] the Framers acknowledge the endemic nature of lying. Their further assertion — that justice, as the end of government, and liberty, its avatar, cannot abide a lie[157] — is itself belied by Marshall's still controlling assertion of his own jurisdiction, not just "to say what the law is" but to survey and superintend the structure of the entire government.[158] If the truth is that the judicial branch, as one of the parties, may not decide a boundary dispute between itself and the other branches,[159] what

152 *Federalist* No. 47.

153 Wallace Stevens, "The Snow Man" in Holly Stevens, ed., *The Palm at the End of the Mind* (New York: Vintage, 1972) at 54.

154 *Boumediene*, *supra* note 130 at 8 (Scalia J. dissenting).

155 Friedrich Nietzsche, *The Will to Power* (New York: Vintage, 1968) at 293, note 17 [*Will to Power*].

156 *Federalist* No. 51. Lest anyone doubt their intention or their resolve, or attempt to misconstrue them, they makes the point several times in several ways. People, they insist, may not be "parties to the very question to be decided by them." *Ibid.* No. 15. Emphasizing that this fundamental condition of justice applies both to individuals and collectivities, they go on to say "[w]ith equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time." *Ibid.* No. 51.

157 *Ibid.*

158 *Marbury*, *supra* note 5 at 177-78.

159 The jurisdictional quandary is not limited to policing the boundaries of the American Constitution. If a juridical act is, in essence and structure, a controversy between A and B to be resolved by "a disinterested and impartial C," and if the third-party judge C is (lifetime tenure and guaranteed salary notwithstanding) an agent of the state, how can a constitutional claim against the state ever be adjudicated consistently with justice? See Alexander Kojeve, *Esquisse d'Une Phenomenologie du*

is Marshall's declaration other than the lie of an all powerful person? Does this visible falsehood, handed down from generation to generation for over two hundred years, now stand as the unassailably and indispensably visible truth absent which constitutional being could not be? Is it, as Socrates maintains, the one true falsehood we must, as constitutional beings, not only allow but embrace? Or, as "a bad cause seldom fails to betray itself," and as every usurpation of constitutional power provides "precedent" for and carries the "germ" of "multiplied repetitions,"[160] is the institutionalization of this original lie by successive generations of jurists increasingly profligate in its exercise of an unconscionable deception (the truth which consequence is that neither the synthesized "REASON of the public," which should "control,"[161] nor the self-canceling competition between the departments, but the self-interested lies of judges[162] and "jurisdiction's untruth"[163] determine and re-determine, at pleasure, the constitutional framework)? Rather than condoning or condemning this status quo and adding it to the long list of invective arguments for or against judicial review,[164] we should attend to Bloom's observation that

Droit (Paris: Editions Gallimard, 1981) at 28 [Kojeve]; *Federalist* No. 78; One European way to lie about the apparent truth — that in such cases the state is both party and judge to the action — is to say that the constitutional claim is not against the state itself but the person of the king. The falsehood proceeds thus: constitutions are "imposed on kings with the goal of prohibiting the king from confounding the interests of the state with those of his dynasty, which is to say his Family, or with his other private interests." The constitution "annul[s] the action of the king when he act[s] as a private person in the name of the state." An action by an individual to enforce the constitution is thus transformed into a controversy between that individual and another individual, the person of the king. So when an individual claims that a governmental act is contrary to the constitution, the lie which confers jurisdiction says that what he is actually claiming is that the government, or its agent, is acting beyond the bounds of the constitution and instead as a private person. Kojeve, *ibid.* at 162. If this is so "[t]he Government can legitimately act as an impartial third party in a Constitutional matter because the governmental actor whose conduct is challenged is conceived as a private person other than the Government even if this person is also, unconstitutionally the Government... When so acting as a private person this actor is not acting as the government and so the State can be a disinterested third party with regard to him and its action against him can be that of a Judge." *Ibid.*

160 *Federalist* No. 41.

161 *Federalist* No. 49 [caps in original].

162 Bloom, *supra* note 139 at 972 and note 1.

163 *Ibid.* at 1018.

164 In his recent article arguing against judicial review, Jeremy Waldron cares only to attack what he calls rights review. He expressly declines to pass judgment on so-called structural review. Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 Yale Law J. 1346. In rebuttal, Richard Fallon defends rights review, but follows Waldron's lead in declining to pass on the propriety of structural review. Richard Fallon, "The Core of an Uneasy Case for Judicial Review" (2008) 121:7 Harvard Law Rev. 1693. Reading these so obviously truncated treatises on judicial review, one gets the same disorienting feeling Alice must have had when she first looked through the glass to discover Wonderland: that something's not quite right. Any treatment of judicial review purporting to see clearly must remove these rose-colored glasses and begin with an honest undertaking to understand afresh how John Marshall succeeded in expanding the perfectly logical, self-

jurisdictional lying is constitutional and consider the consequences, not just that lying is inherent to "human nature" psychologically considered, but, as Socrates tells us, indispensable to ontological nature, and to the ground as being and of beings that indifferently constitutes (as form constitutes substance) the American Constitution. Is it then the case, as I have come to suspect, that just as Socrates could not but lie to ground his Republic in theory, we cannot but lie to perpetuate ours in fact? Contemplating this lie, we can begin to appreciate what the invisible constitution really is: unseen, not because there is something "within it"[165] we are ill-equipped to see, but because, as Bickel told us long ago (but we have never cared or dared enough to appreciate), there's nothing to see.[166] If the Constitution is a lie, the hard truth it conceals is that the Constitution's not there at all. This absence is why Madison, seeing clearly and speaking the truth, can envisage no constitutional means to resolve a constitutional crisis. Hamilton's corollary, that the people "hold the scales in their own hands," thus stands refuted by the fact that there are no scales.

XIII. CONCLUSION

At the outset of his *Critique of Pure Reason*, Kant analogizes his philosophical search for the truth to a legal "cause" demanding the resolution of questions of law (*quid juris*) and questions of fact (*quid facti*). The fact questions are unproblematic "because we have always experience at hand to demonstrate [or refute] their objective reality." The questions of law, however, pose a "great difficulty" because there is no such "manifest ground" by which to decide their truth or falsehood.[167] When Kant next repairs to the hermetically sealed Star Chamber of critical philosophy for "the laborious interrogation of all those dialectical witnesses that a transcendental reason" rounds up and "brings forward" to make its case for the truth,[168] he condemns them all as lies "perhaps honestly meant"[169] but "absolutely groundless in as much as they

evident, and uncontroversial proposition that the judicial role is to "say what the law is," to include a superintendence of the entire structure government, which no-one since Lincoln — ignoring Chief Justice Taney's judgment that the suspension of the writ of *habeas corpus* by Presidential decree was unconstitutional - has really dared to contradict. See *Ex parte Merryman*, 17 F. Cas. 144 (1861). See Michael Halley, "La Vie en Rose: Jeffrey Waldron and Richard Fallon's Meander Through the Wonderland of Judicial Review" (2009) Cardozo Law Rev. [forthcoming].

165 Tribe, *supra* note 44 at 10.

166 The "authority" for judical review, Bickel tells us, is never "even mentioned" in the Constitution. Bickel, *supra* note 39 at 1.

167 Reason, *supra* note 37 at 120.

168 *Ibid.* at 570.

169 While Kant gives the benefit of the doubt to the dialectical witnesses he calls, Hamilton, in laying out his arguments why the people should ratify the Constitution, suggests that he may be lying with

relate to a kind of knowledge that man can never attain." If Kant nevertheless asks us to acknowledge the jurisdiction of this "highest tribunal" for the resolution of truth's "rights and claims,"[170] if he "draw[s] up in full detail" the "records of this lawsuit" and "deposit[s] them" as controlling precedent in the archives of human reason, it is only "with a view to the prevention of such errors in the future." Yet his compendium only perpetuates the lying because, the weight of his collected authority notwithstanding, reason's "dialectical illusion" will always deceive us and the judgments which ensue will always be compromised by an interest of some kind or other, and forever be at odds with the disinterest justice requires — and liberty demands — if the one truth, and not an endless string of mutually contradictory and self-incriminating falsehoods is ever to prevail.[171]

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deliberation. He insists that while his "arguments will be open to all," his "motives must remain" hidden "in the depository of [his] own breast." Rather than forthrightly assert that he is telling the truth, he says only, and enigmatically, that the arguments will be offered "in a spirit which will not disgrace the cause of truth." *Federalist* No. 1. If this is really so why is he so adamant on hiding his motives? *Caveat emptor*!

170 *Reason*, *supra* note 37 at 549.

171 When Kant finally comes to address the nature of judgment in his *third critique*, the conclusion he reaches is startling. He begins innocently enough by stating that when a person judges freely, without the restraint of conditions externally imposed in advance, and without "any other considered interest whatever," his act is self-generating and the resultant judgment is self-generated. Kant calls this "reflective judgment." *Ibid.* at 19. But when he goes on to say that such a judgment "cannot borrow from experience" because then it would be determined in advance; that if it were to take its law "from somewhere else," it would then cede its self-identity and become identified with, and beholden to some "determining basis" the trouble begins. *Ibid.* A disinterested judgment, Kant insists, cannot repair either to the letter or the spirit of the laws as we know them but must rather provide its own basis. "[I]n using this principle judgment gives a law only to itself." *Ibid.* at 19-20. As such, it is "transcendental," an *a priori* condition which does not provide but rather excludes the black letter precedents on which lawyers and judges depend. *Ibid.* at 58-59. Kant goes on to say: "What matters is what I do with this presentation within myself, and not the respect in which I depend on the object's existence" or on anything else external to me. *Ibid.* at 46. Resort to externalities of any stripe "can play no part in a pure reflective judgment." Any such interest "presupposes a need or gives rise to one, and, because interest is the basis that determines approval, it [would] make... the judgment about the object unfree." *Ibid.* at 52. The real stumbling block occurs when it comes time for Kant to identify what a disinterested judgment actually is. Only a pure judgment of taste, of the beautiful, is in fact "disinterested and free." *Ibid.* Lest anyone mistake his meaning, Kant goes on to emphasize that a "[l]iking for the good" is neither "disinterested nor free." *Ibid.* at 48. A judgment based on what is good or right, no matter how noble, is necessarily accompanied by and infected with "interest." When we judge something to be intrinsically good and so "like it for its own sake," we betray an interest in it for "the good is the object of the will," and "to will something and to have a liking for its existence, i.e., to take an interest in it, are identical." *Ibid.* at 48 and 51. Such a display or imposition of interest makes "the judgment about the object unfree." *Ibid.* at 52. Only when we "play the judge in matters of taste" are we "not in the least biased in favour of the thing's existence" but rather are "wholly indifferent about it." *Ibid.* at 46. When, on the other hand, we esteem or endorse the good we attribute "an objective value to it." When the "moral law speaks we are objectively no longer free to select what we must do," but are rather compelled to act in accordance with its command. *Ibid.* at 52-53. Black letter law, however divorced from right, is

Heidegger, reflecting on Kant's likening of philosophy to a lawsuit, comes to ask whether "a legal action underlie[s] the problem of the intrinsic possibility of ontology."[172] If we have reversed the order and questioned whether ontology underlies the American Constitution, is it to arrive at the same place by completing the circle? Whether philosophy's perceptions are not original but rather derive from "something" the law has "previously seen,"[173] or whether the reverse is so makes no difference. Working in tandem, each of these iterations underlies the other, which is why neither is visible alone. Socrates says, on behalf of the view that philosophy underlies the law, that "[n]o-one in a law court... cares at all about the truth... [;t]hey only care about what is convincing. This is called the likely."[174] However, Socrates goes on: "people get the idea of what's likely through its similarity to the truth," and "in every case the person who knows the truth knows best how to determine similarities."[175] So philosophy — possession of truth — determines and controls the law's pursuit of likenesses. When, however, the self-exiled Plato returns in the guise of an Athenian stranger to arrest the sophist "on the royal warrant of reason, report the capture, and hand him over to the sovereign,"[176] does he not pursue the obverse and subject the truth of philosophy to the jurisdiction of the law's likelihood? It is one thing for Plato — witness to how the rule of thirty attempted to "connect Socrates with their government" by ordering him to go "fetch" a man for execution; and to how Socrates was later "put on trial for impiety . . . condemned . . . and put to death" — to have abandoned a "political career"[177] in favour of exile and the exogenous pursuit of philosophy abroad; it is quite another for him to return incognito to the scene of these crimes and avail himself of the same jurisdiction to detain and condemn someone else. The one underscores the fact of the law's precedence in time and space, for had

similarly interested. Whether its basis is "empirical understanding" or "moral reason," interest determines the outcome. *Ibid.* at 46. One might readily conclude that all this is entirely incompatible with the law as we understand it except for the fact that Kant's analysis provides the rule of decision for the Supreme Court's decision in *Cohen v. California* [403 U.S. 15 at 26 (1971)] reversing the petitioner's state court conviction for parading around a courthouse with a jacket inscribed with the epithet "Fuck the Draft." As "[o]ne man's vulgarity is another man's lyric," so the "Constitution leaves matters of taste and style... largely to the individual." Is this constitutional judgment not to judge — *de gustibus non est disputandem* — any different than Madison's that in the end, in extremis, justice precludes any objectively determined judgment as fatally infused with interest? Or Hamilton's that the people "hold the scales in their own hands?" *Federalist* No. 31.

172 *Problem of Metaphysics*, *supra* note 2 at 90.

173 Heidegger, *supra* note 1 at 326.

174 *Phaedrus,* in Cooper, *supra* note 2 at 549.

175 *Ibid.* at 550.

176 Plato, *The Sophist* (Fairfield, IA: 1st World Library Literary Society, 2008) at 235.

177 Plato, "Letter VII" in Edith Hamilton and Huntington Cairns, eds., *The Collected Dialogues of Plato*, trans. by Lane Cooper et al. (New York: Pantheon Books, 1961) at 1575.

Socrates not been tried, convicted, and executed at law, western philosophy might never have been written. The *other* highlights philosophy's prerogative because reason is sufficient justification to issue the extraordinary warrant of truth to detain and try the sophist under the jurisdiction and the laws of likelihood.

If any of this can be credited — if law and philosophy each relies on the other's ground — is there not some validity to the judgment of those who equate Plato and Kant, or worse, see "Plato as a Kantian who didn't quite make it?"[178] The jurisdiction of reason and the rule of truth that Plato uncritically divined as controlling are exposed by Kant as "theoretically incomprehensible"[179] and critically unattainable. What unites Plato and Kant is their common inability not to evoke it, not to assert the rightful authority of reason as the "highest tribunal,"[180] the "court of courts,"[181] even if its rule is an irremediable and intractably "deceptive illusion," indistinguishable from the likenesses that control at law. Kant's best justification, that absent a controlling rule of reason the "mob of sophists" could never persuasively "inveigh against its prescriptions" and expose its "contradictions and absurdities,"[182] that without reason's precedent the sophists would have no grounds to denounce reason, rings ominously hollow. That echo or sounding remains perceptible today, and like sonar, affords perhaps our very best chance to locate and delimit a visually imperceptible Constitution.

Reciting the Kantian creed *verbatim*, no less an accomplished and effective advocate than Joseph Goebbels has forthrightly declared in our time that

> "[w]hen democracy granted democratic methods for us in times of opposition... we National Socialists never asserted that we represented a democratic point of view, but we have declared openly that we have used democratic methods only in order to gain the power and that, after assuming the power, we would deny to our adversaries without any consideration the means which were granted to us in the times of [our] opposition."[183]

Justice Henry Jackson, the Nuremberg prosecutor, is surely correct to have

178 *Will to Power, supra* note 155 at 206.

179 Martin Heidegger, *Schelling's Treatise on the Essence of Human Freedom* (Athens: Ohio University Press, 1985) at 61.

180 *Reason, supra* note 37 at 549.

181 Friedrich Nietzsche, "Beyond Good and Evil" in *Basic Writings of Nietzsche* (New York: Modern Library, 2000) at 330.

182 *Reason, supra* note 37 at 549.

183 *Terminiello v. Chicago*, 337 U.S. 1 at 35 (1949) (Jackson J. dissenting) (citing 1 *Nazi Conspiracy and Aggression* [GPO, 1946] 202, Doc. 2412-PS) [*Terminiello*].

concluded that this latter day ascendency of the sophists' rule of inverse reason, the "[i]nvocation of constitutional liberties as part of the strategy for overthrowing them presents a dilemma to a free people which may not be soluble by constitutional logic alone."[184] The alternative, however — to deny constitutional liberties as part of a strategy to preserve them[185] — is equally perplexing. It is in this crucible of indecision that the one true falsehood of constitutional being floats in suspension. Passing judgment on the philosopher who would endorse such nonsense as a "little wretch" who "hardly know[ing] whether his neighbor is a man or an animal," makes "himself ridiculous" and a "joke" when "he appears in a law court or anywhere else," and tries to "draw the quick-witted lawyer out of his pleas and enjoinders to the contemplation of absolute justice or injustice in their own nature," Socrates recounts, in dead earnestness, the jest of the witty Thracian handmaid who, witnessing the misstep of Thales, remarked that "he was so eager to know what was going on in heaven that he could not see what was before his feet."[186] The wise men of America today likewise admonish those who would insist on unswerving allegiance to the invisible truth of the Constitution's visible falsehood to "take heed," lest they "walk into a well from looking at the stars."[187] As one commentator proffers Socrates' witticism as evidence of the fact that "the history of western philosophy begins with a joke" exposed in open court,[188] so America's supreme justices warn us not to pursue it. As surely as Socrates voluntarily elected to drink the hemlock prescribed by law for his profligate pursuit of ontological being's invisible ontology, those following his unyielding example in the pursuit of this one true falsehood — the invisible constitution — would "convert" the "Blessings of Liberty"[189] it bestows into a "suicide pact."[190]

While Socrates, holding court in his prison cell, conceived and embodied philosophy as indistinguishable from "the practice of death,"[191] and while Hegel — acknowledging death's phenomenally most dreadful (*Furthbarste*) irreality (*Unwirklichkeit*)[192] — instructed that to entertain it in earnest re-

184 *Ibid.* at 36.

185 This is what Justice Jackson would elect to do in denying first amendment protection to those like Mr. Terminiello, the suspended Catholic priest speaking in Chicago who "taunt[ed] democracy with its stupidity in furnishing them the weapons to destroy it." *Ibid.* at 35. Before taking any of this too seriously, we should recall that all that was at stake in *Terminiello* was a hundred dollar fine levied against the petitioner for disturbing the peace pursuant to a city ordinance.

186 Plato, *Theaetetus* (Charleston, SC: BiblioBazaar, 2007) at 174b.

187 *Terminiello, supra* note 183 at 14.

188 Neil Cornwell, *The Absurd in Literature* (Manchester University Press, 2006) at 22.

189 U.S. Const., *supra* note 3.

190 *Terminiello, supra* note 183 at 36-37.

191 Plato, *Phaedo* in *Republic, supra* note 8 at 514 [*Phaedo*].

192 Montesquieu's dread of men passing death sentences on other men pales in comparison to the

quires the greatest strength (*die groesste Kraft erfordet*), that "the life of Spirit is not the life that shrinks from death and keeps itself untouched by devastation, but rather the life that endures it and maintains itself in it,"[193] American constitutional law turns a deaf ear and washes its hands.

This contrary resolve makes the fate of Socrates *at law* all the more problematic. The reports of his trial, conviction, and execution stand against him as inalterably as the crime presumes to speak in his favour. The Socratic method, then held responsible for corrupting the youth of Athens, is now the standard and unyielding protocol of instruction at America's law schools. No mere curriculum of instruction, the method is embraced as a vehicle of transformation: The law-school initiate arrives thinking in the normal manner and leaves, three years later, *thinking like a lawyer*. Socrates, the University of Chicago Law School tells us, "engaged in questioning of his students in an unending search for truth." So, the inquiring law professor seeks "to get to the foundations of his students' and colleagues' views by asking continual questions until a contradiction [is] exposed, thus proving the fallacy of the initial assumption."[194] Chicago speaks as if the positive search for truth and the negative proof of fallacy were so obviously alike as to dispense with any need for discussion or explanation. Yet if Kant is to be believed, the abyss between the ground of truth positive and the negative critique of reason's vainglorious attempts to reach it is unfathomable. Any serious effort to come to grips with the embrace of the Socratic method as grounding the rule of law in America will need to reckon with this as yet unbridgeable chasm by attending to the extraordinary coincidence that the reasoning America's law schools would attribute to Socrates, and impart to their students, stands unrefuted as the *adequate and independent* ground for his epochal demise as a mortal enemy of the state, and also for their no less exemplary ascendancy as officers and judges of constitutional courts more powerful than any "the world has ever known."[195]

dreadfulness of death itself, which, as the one thing no-one has ever lived to experience, stands alone, without precedent, and unlike anything we know or can ever know. The study and practice of such purely unadulterated "abstraction" is, at once, the only true business of philosophy and anathema to the law. If the law's first precept is that like is known by like, the abstraction of death, like nothing at all, has no place and can play no part. See *Phaedo*, *ibid.* at 514.

193 *Phaenomenologie*, *supra* note 118 at 29; Heidegger, *supra* note 1 at 19.

194 See "The Socratic Method," online: The University of Chicago Law School <http://www.law.uchicago.edu/prospectives/lifeofthemind/socraticmethod>.

195 Bickel, *supra* note 39 at 1.