

# The Hermeneutic Implications of Constitutional Amendment

Paper presented at the American Political Science Association annual conference, Sept. 2020

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## Abstract

This paper explores the implications of applying a philosophical hermeneutic approach to the interpretation of constitutional texts, and more specifically to the interpretation of an *amended* constitutional text. My conclusion is that the exploration of this question leads to the conclusion that the fact of amendment (as opposed to mere amendability) has normative consequences for the way we read the constitutional text. Specifically, I will argue that an amended constitution should be read as a “palimpsest”, meaning the reading of the text as a coherent whole despite the recognition that multiple elements have been added, removed, or overwritten over time. In this way, I will argue, application of the methods of philosophical hermeneutics to constitutional interpretation demonstrates the inadequacy of other familiar approaches such as clause-based textualism or historicism.

## **I. Hermeneutics and Constitutional interpretation**

This paper explores the implications of applying a philosophical hermeneutic approach to the interpretation of constitutional texts, and more specifically to the interpretation of an *amended* constitutional text. My conclusion is that the exploration of this question leads to the conclusion that the fact of amendment (as opposed to mere amendability) has normative consequences for the way we read the constitutional text. Specifically, I will argue that an amended constitution should be read as a “palimpsest”, meaning the reading of the text as a coherent whole despite the recognition that multiple elements have been added, removed, or overwritten over time. In this way, I will argue, application of the methods of philosophical hermeneutics to constitutional interpretation demonstrates the inadequacy of other familiar approaches such as clause-based textualism or historicism.

“Hermeneutics” refers to formally developed techniques of interpretation. The roots of the practice (by that name, at least) lie in the interpretation of religious texts beginning in the 17<sup>th</sup> century (referring to specifically Protestant Christian approaches to interpretation). The idea that

there may be analogous principles of interpretations appropriate for legal and constitutional texts is not new; one important articulation of the idea appears in Francis Lieber's *Legal and Political Hermeneutics* (1853). Lieber drew less on specific religious practices of interpretation and more on general theories of language, but the great religious scholar Jaroslav Pelikan drew a more direct analogy in *Interpreting the Bible and the Constitution* (2004).

This classical tradition of hermeneutics, however, was supplemented in the long 20<sup>th</sup> century by a series of writers who explored the relationship between reader and text in less structuralist, more critical terms, a process that explicitly invoked "hermeneutics" with Hans-Georg Gadamer's *Truth and Method* and was then built upon and critiqued by subsequent writers. (Gadamer, it should be noted, talked about the interpretation of legal as well as historical and literary texts, although his specific discussions of those issues is not a focus of this paper). Following Gadamer, Jurgen Habermas (1972) and Paul Ricoeur (1981) tried in different ways to make the hermeneutic enterprise more critical by making it an approach that enables the reader to identify her own ideological precommitments, lacunae in her own narratives of understanding, and implicit biases embedded in putatively objective ways of knowing. That critical impulse was carried forward further with deconstructionism, an approach that seeks to discover what has been elided or suppressed in the construction of a narrative and by exposing those elements to demonstrate the violence of exclusion that is intrinsic to the construction of a "text". Traditionalists frequently accuse deconstructionists of removing value judgments from the act of reading; deconstructionists insist that they are doing just the opposite; as Jacques Derrida put it "deconstruction is entirely about justice". As the example of deconstructionism shows, one element in all of these approaches is the rejection of "text-fetishism", the attitude that a (legal) text has a single, readily ascertainable, historically fixed meaning. In the hermeneutic tradition the "meaning" of a text does not exist until it is read, and is then a product of an interaction between text and reader. As a result, the act of reading a text is an exercise in self-understanding as well as an exercise in exploration of an other perspective.

There is a small but significant modern literature that attempts to apply the methods and approaches of philosophical hermeneutics to questions of legal and constitutional interpretation. Unsurprisingly, among writers in this area there are numerous points of disagreement: ranging from an essentially nihilistic interpretation that the displacement of claims to certainty (beginning with Nietzsche) renders comparisons among interpretive approaches

meaningless except as expressions of power to approaches that seek to use hermeneutics to recover dimensions of the justice that Derrida spoke of in shared constitutional understandings. (Mootz 207; Levinson and Maillaux 1988 ; Leyh ed. 1992; Leyh 1988; Dallmayr 1990). Gregory Leyh, for example, emphasizes the ways in which philosophical hermeneutics provides a basis for critique of interpretive approaches generally. “To the degree an interpretation is inconsistent with the background conditions of human understanding, we may adjudge such an interpretation to be lacking a sufficient justification for itself.” (Leyh 1988, 380) Leyh’s call for a normatively prescriptive theory of acceptable modes of constitutional interpretation is the critical hermeneutic project in a nutshell.

There are good reasons to question whether it is useful to apply the more deconstructive approaches to literature, in particular, to the question of constitutional interpretation. For one thing, the assumption of a shared worldview is essential for the language of constitutionalism to be coherent. That does not mean that we must adopt the fallacious assumption of historical unanimity, only that the “meaning” of law cannot reside entirely in the *individual* reader’s interaction with the text. On the other hand, the Habermasian critical impulse is necessarily present if constitutional interpretation is to move beyond the obvious pretense of strict textualism. That critical impulse, in turn, requires a “meaning” that is sufficiently fixed to be capable of interpretation and critique.

The discussions of philosophical hermeneutics as applied to constitutional interpretation tend to focus on very high levels of philosophical abstraction, trying to tease out universally generalizable principles of the relationship between text and meaning and applying them to the grand project of constitutionalism. The approach of this paper is much more minimalist. I proposed to apply an essentially Gadamerian version of philosophical hermeneutics and ask what specific consequences that form of inquiry leads to when we recognize the quality of amendability. That is, I begin by recognizing that in addition to their formal status and normative weight, constitutional texts have another quality that sets them apart from works of literature or history: they are subject to formal revision. The question that this paper explores, then, is what do we learn about the merits of different approaches to interpreting an *amended* constitutional text?

To conduct this exploration I begin by going back to the religious roots of hermeneutic practice and its 19<sup>th</sup> century application to the study of law. From there I turn to recent historical

scholarship on the significance of amendability in the early understanding of the US Constitution. With those two elements as informing background, in the third section I turn to the application of philosophical hermeneutics to an amended constitution. In a classic work William F. Harris II asked what would have to be true about a constitution in order for it to be susceptible of interpretation? In this paper I ask what would have to be true about an *amended* constitution in order for it to be susceptible of *hermeneutic* interpretation? My conclusion is that this specific question leads to the conclusion that constitutional texts should be read as “palimpsests”, meaning a text that has been partially rewritten over a period of years that is nonetheless read as a single coherent whole in order to find its “meaning”. That conclusion emerges from a consideration of the relationship between an amendment and the prior text, but leads to more general considerations about normative standards for the evaluation of modes of constitutional interpretation, thus (impertinently) answering Levinson’s question.

#### **A. An Early Approach: Francis Lieber’s “Legal and Political Hermeneutics”**

Francis Lieber began with an understanding of the role of language in human communication that goes back at least to Locke’s *Essay Concerning Human Understanding*: the idea that communication occurs by way of signs. “[W]e cannot obtain our object without resorting to the outward manifestation of that which moves us inwardly, that is, to signs” (Lieber, 13) Words are one particular sub-category of signs, and written words are a further sub-category with certain specific properties. Interpretation of signs was a matter of discerning the “true meaning” of an expression. At this point, however, a complication appears, as “true meaning” seems to sometimes refer to the speaker’s intention and at other times to refer to an objective, fundamentally structuralist understanding of language. So early on Lieber refers to the speaker’s intention as the essential test. “Interpretation, in its widest meaning, is the discovery and representation of the true meaning of any signs, used to convey ideas. The ‘true meaning’ of any signs is that meaning which those who used them were desirous of expressing. (Lieber 1837, 17)”. The goal of a system of hermeneutics, then was to derive a normative set of principles that would lead to the one *correct* interpretation, “the art which teaches us the principles according to which we ought to proceed in order to find the true sense” (a definition Lieber took directly from a text on biblical hermeneutics). (Lieber 1837, 23-4)

Elsewhere, Lieber recognizes that the intended meaning and the “actual” meaning might differ. “Thus a teacher will say to his pupil, who has unskillfully expressed himself: ‘you meant to say such a thing, but the true meaning of your period is quite a different one.’” One reason was what I have described as Lieber’s structuralist understanding of language, one with clear connections to the “map” metaphor in Ferdinand de Saussure’s classic 20<sup>th</sup> century description of structural linguistics. “Terms receive a meaning, distinct indeed as to some points, but indistinct as to others, or, to use a simile, they may be distinct as to the central point of the space they cover, but become less so the farther we remove from that center, somewhat like certain territories of civilized people bordering on wild regions” (Lieber 1837, 22, 27; Saussure (1916) 1988).<sup>1</sup>

Further ambiguity arises from social context and practice. Applied in a legal context, in particular, both social and legal conventions of understanding apply. “In the case of a compact, for instance, a treaty, a contract, or any act of the nature of an agreement, the party, who avowedly adopts the contract, treaty, &c., or gives his tacit assent to it, makes as much use of the signs declaratory of the agreement, as the party who originated them. Forced silence, or the impossibility of expressing dissent, is, of course not comprehended within the term ‘tacit assent.’” By way of illustration, Lieber provides a lengthy deconstruction of the imagined instruction “go and buy some soupmeat” including various possible implied elements such as “leave immediately, the money given is intended for that purpose, he should buy meat appropriate for making soup according to the understanding of the household, he should buy the best such meat he can, he should go to the usual butcher, he should return any change left over” and so on.

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<sup>1</sup> *Course in General Linguistics* Saussure depended on a series of binary distinctions: *langue* vs. *parole* (language versus speech practices); sign vs. signified; synchrony vs. diachrone (the “map” of a language at one time versus its changes over time). Later writers challenged the static and formalistic character of structural linguistics. I have elsewhere explored the implications of Willard van Orman Quine’s poststructuralist, phenomenological approach to language for constitutional language (Schweber 2007); here I restrict myself to the less theoretically sophisticated but more readily familiar structuralist version that informs Anglo-American analytical philosophy. See Carnap. \*\*\*

A recurring concern for Lieber was how to deal with contradictions in a text. He used the term “construction” to describe a form of interpretation that could deal with the appearance of such contradiction or the need to extrapolate and apply principles to circumstances not described in the source. “[I]t happens that a part of a writing or declaration contradicts the rest...When this is the case, and the nature of the document ... is such as not to allow us to consider the whole as being invalidated by a partial or other contradiction, we must resort to construction. Construction is likewise our guide, if we are bound to act in cases which have not been foreseen by the framers of those rules by which we are nevertheless obliged” In either of those circumstances, what is required is “the drawing of conclusions...from elements known from and given in the text—conclusions which are in the spirit, though not within the letter or the text.” “It is,...construction alone which saves us, in many instances, from sacrificing the spirit of a text or the object, to the letter of the text, or the means by which that object was to be obtained; and without construction, written law...would, in many cases, become fearfully destructive to the best and wisest intentions, nay, frequently, produce the very opposite of what it was purposed to effect.” (Lieber 56-8)<sup>2</sup>

Applied to written texts, Lieber notes a further complication that may arise. “If, for instance, an individual were to say, 'I neither believe nor disbelieve the bible, but intend to find out its true sense, and then to be determined whether I shall believe in it or not,' it would be an unrestricted interpretation. If, however, the inquirer has already come to the conclusion, that the scriptures were written by inspired men, that, therefore, no real contradiction can exist in the bible, and he interprets certain passages accordingly, which *prima facie* may appear to involve a contradiction, it would be limited interpretation.” (Lieber 1837, 71)

Lieber thus presents an approach to constitutional hermeneutics by which we are bound to find the “true sense” of the text, with the caveat that the writer’s intention may express that intended sense only imperfectly. In areas in which there are established norms of expression and understanding—what today might be called “epistemic communities”, of which constitutional lawyers and academics are unquestionably an example--those norms must be taken into account in the practice of interpretation. And where the interpretation of a written text “and the nature of

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<sup>2</sup> The distinction between interpretation and construction continues to play a major role in discussions of constitutionalism. See, e.g., Whittington \*\*\*

the document is such as not to allow us to consider the whole as being invalidated by a partial...contradiction” then practices of construction are required.

## **B. Constitution as Sacred Text: Jaroslav Pelikan**

In 2004, Jaroslav Pelikan published *Interpreting the Bible and the Constitution*. Pelikan’s concern was to bring the insights of a long and extremely distinguished career as a scholar of religion to bear on an understanding of the practice of American constitutionalism. To begin with, responding to Pauline Maier, Pelikan asserts that only the Constitution is properly considered an American sacred text on the grounds that it is the only one of the usual contenders (Declaration of Independence, Gettysburg Address) that is regularly treated as a subject of exegesis. (Pelikan 2004, 21-22) Pelikan provides an interesting take on John Marshall’s famous comment in *McCulloch*: “A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.”

For Pelikan, the key point of this quotation is not “prolixity” but the expectation that the Constitution should be understood by the public. That element, for Pelikan, identifies a fundamental similarity with Protestantism, as in the declaration of the Westminster Confession of 1647. “Those things which are necessary to be known, believed, and observed for salvation, are so clearly propounded and opened in some place of Scripture or other, that not only the learned, but the unlearned, in a due use of the ordinary means, may attain unto a sufficient understanding of them.” Other Protestant statements define specific canons of interpretation, as in the 1566 Second Helvetic Confession: “We hold that interpretation of the Scriptures to be orthodox and genuine which is gleaned from the Scriptures themselves [1] from the nature of the language in which they were written, [2] likewise according to the circumstances in which they were set down, and [3] expounded in the light of like and unlike passages and of many and clearer passages and [4] which agrees with the rule of faith and love, and [5] contributes much to the glory of God and man’s salvation”. Pelikan identifies these and other examples as indicia of

16<sup>th</sup> century Reformation writers introduction of full-fledged study of hermeneutics (Pelikan 2004, 47-48) One particularly interesting example is John Henry Neuman's account of "the puzzling, or even (to him, at any rate) troubling discovery "that there was no formal acknowledgement on the part of the Church of the doctrine of the Holy Trinity till the fourth [century],' namely at the First Council of Nicea in 325, John Henry Newman formulated the axiom: 'No doctrine is defined till it is violated.'" (Pelikan 2004, 55)

For Pelikan the connection between the Constitution and the Bible as sacred texts was that each stood as a text that "speaks" to readers, that is that these are texts possessed of independent meaning separate from the act of their writing.

To say that the Declaration of Independence is not subjected to exegesis is, of course, empirically false. But Pelikan had something more specific in mind. The Constitution, uniquely in the American canon, is subject to exegesis in order to reach *authoritative* and *public* results. The text is "religious" in its original Latin sense of "binding" (*religare*) and the subject of its obligations is the polity. No other American text is given that "religious" quality.

### C. Philosophical Hermeneutical approaches

Pelikan is interested in demonstrating similarities between the hermeneutic approaches of constitutional and (Protestant) Christian religious readers. In Continental philosophy, however, a different hermeneutic tradition developed. In its early form among late-19<sup>th</sup> century *Lebensphilosophen* (e.g. Wilhelm Dilthey, Georges Simmel), the idea remained a project of finding the scientifically "true" meaning of a text by situating it within an historical worldview and by reading the part and the whole—of the text itself, of the text in relation to its context, of the text in relation to its author—iteratively to arrive at a unified understanding through a process known as the "hermeneutic circle."

In 20<sup>th</sup> century understandings, however, this epistemological approach took on an ontological character, as hermeneutics came to be seen as an exercise in self-understanding, and the reader's relation to the text as a form of dialogue. The starting point for this later approach is Hans-Georg Gadamer's *Truth and Method* (1975). Gadamer deployed the concept of hermeneutic "horizons", boundaries on the capacity of readers to understand concepts. Since



each reader or generation of readers works within its own horizons, the understanding of historical texts that emerges reflects the limitations of that perspective. Is not, rather all human existence, even the freest, limited and qualified in various ways? If this is true, then the idea of an absolute reason is impossible for historical humanity. Reason exists for us only in concrete, historical terms, i.e., it is not its own master, but remains constantly dependent on the given circumstances in which it operates. . . . In fact history does not belong to us, but we belong to it.” (Gadamer 1975, 245) By this understanding, when I interpret *War and Peace*, what I am really asking is “what meaning can be derived from War and Peace from a position within my hermeneutic horizons?” Whatever capacity for critical self-dislocation I might possess—the ability to recognize the role of race, class, gender in my interpretations and to articulate alternatives—necessarily take place within those horizons. As Benjamin Cardozo says, “We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.” (Cardozo 1921, 13.)

. Hermeneutic analysis asks not what is said but what can be said from the position of an historically specific subjectivity. In Gadamer’s metaphor, since both text and reader are bound by horizons of understanding, a reader’s engagement with a text takes the form of a dialogue in which a “fusion” of horizons occurs. But the hermeneutic horizons in question are not idiosyncratic, they reflect the shared understandings of an interpretive community; in constitutional terms, a polity.

As an element of Critical Theory, the idea of horizons takes on a reflexively critical (*Selbstkritik*) element. The experience of a text, with its different and unfamiliar landscape of meaning, provides a moment of insight into our own, previously unexamined horizons. The dialogue between reader and text becomes an exercise of self-understanding rather than a method for scientifically ascertaining the text’s “true meaning” (it is in this sense that Gadamer’s approach is described as ontological rather than epistemological). Writers such as Jurgen Habermas and Paul Ricoeur, in particular, extended both the ethical and the social scientific implications of this idea of self-critical engagement, particularly with respect to historical sources, although they do so in different ways. Ricoeur draws a distinction between “understanding” and “interpretation”, in which “understanding” reflects a recognition that written texts stand outside their authors’ *epoche* and are subject to being interpreted within the readers’ own hermeneutic horizons (Ricoeur 1981, 22), while Habermas focuses primarily on the

idea of dialogue and the conditions of productive discourse for which textual engagement stands as an ideal form. (The focus on texts is particularly important in Habermas' less-read early works such as the 1972 (first English edition) *Knowledge and Human Interests*).

We are thus confronted with three different and distinct approaches to constitutional hermeneutics: the search for the “true meaning” of the language as it appears in the text; principles for hearing the text “speak to us” in its own authentic voice that exists separate and independent of our interpretation; and self-critical evaluation of our textual readings to inform our understandings of our own hermeneutic horizons in the exercise of translating a text that was generated within the constraints of a different and potentially incommensurate worldview.

These three different approaches to hermeneutics have cognates in different approaches to constitutional interpretation, which the authors mentioned above explicitly explore in their discussions. For purposes of this paper, however, it is sufficient to note the range of possibilities as starting-points rather than as possible outcomes, and consider the implications of starting from one or another position in the specific context of what might be called “the Amendment Problem for constitutional interpretation”. The Amendment problem goes like this: whatever our theory of constitutional interpretation, it is likely to run into confusion when confronted with the fact and possibility of amendment.

Consideration of a few possible ways to interpret a constitutional amendment suggest some of the complications:

- One might declare that meaning of the prior text—however derived—should constrain our interpretation of the amendment (treating amendments as commentaries on a primary text in the manner of Talmudic exegesis, although the traditional creativity of Talmudic rabbis may test the limits of “constraint”)
- One might conclude that the two pieces of the text can and should be understood as different and accept the possibility of contradictory meanings within a single text (a pastiche approach)

- One might consider that the entire understanding of the text must be reconciled with the amendment, or that *some* amendments require reconception of the whole while others do not (a theory about kinds of “amendments” and their significance)

On the one hand these are simply iterations of the general question of constitutional interpretation. On the other hand, however, consideration of these questions can provide a moment of critical engagement with our initial hermeneutic commitments. In the sections that follow we will explore some of the arguments that have been raised about the significance of amendments for constitutional interpretation, and consider the implications of those arguments for constitutional hermeneutics.

## **II. Constitutional Hermeneutics and Questions of Amendment**

In *The Second Creation: Fixing the American Constitution in the Founding Era* (2018) Jonathan Gienapp focuses on the move toward a “fixed” understanding of the Constitution as an authoritative text as opposed to a record of an ongoing experiment. In the debates that led to that development (discussed further below) the nature and significance of amendments played a critical role.

### **A. Should there be amendments at all?**

Differences in hermeneutic approach show up clearly in discussions of amendment and the differing approaches of Federalists and Antifederalists in the 1790s. Federalists conceived of the new Constitution as an inherently temporary, improvable, and incomplete. This way of thinking received an early articulation in John Adams’ influential and controversial pamphlet, “Thoughts on Government” (1776). Having described in considerable detail a system of branches of government and national officials, Adams added a caveat. ““This mode of constituting the great offices of state will answer very well for the present, but if, by experiment, it should be found inconvenient, the legislature may at its leisure devise other methods of creating them, by elections of the people at large, as in Connecticut, or it may enlarge the term for which they shall be chosen to seven years, or three years, or for life”. (Interestingly, in the

Introduction to *Legal and Political Hermeneutics* Lieber says that he was driven to his project in response to a critical evaluation of Adams' pamphlet). Gienapp provides extensive evidence that Federalists in the Congress that considered the Constitution took a similar "ongoing experiment" approach. For example, Benjamin Rush asked "who ever saw any thing perfect come from the hands of man?", and Edward Carrington pointed to the possibility of amendment as the remedy for human imperfection. "The system yet requires much to make it perfect, and I hope experience will be our guide in taking from or adding to it". Tenche Coxe, echoing Adams, said "let us give it a trial". (quoted at Gienapp 2018, 78-9).

Antifederalists, by contrast, insisted that the Constitution be seen "as a text" (82) to avoid the boundless possibilities of interpretation, especially by the judiciary. Robert Yates, writing as "Brutus", articulated his objection to the idea of broad judicial review that he saw as intrinsic to the proposed text. "The judicial are not only to decide question arising upon the meaning of the constitution in law, but also in equity. By this they are empowered to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter". (*Brutus, Letter 11* (1788)). Consistent with the view that the text should be written in a way that would limit the scope of possible interpretation, Antifederalists also denied the acceptability of amendment. An Old Whig: "this appears to me to be only a cunning way of saying that no alteration shall ever be made"; Patrick Henry, "the way to amendment is, in my conception, shut" (Quoted at Gienapp 2018, 85). Both of these views partake of the idea of the Constitution as a "sacred text", a statement of orthodoxy subject to exegesis but to be protected against eisegesis. The objection to amendment, then, was that it meant reshaping the reference text rather than interpreting it. In this way the Antifederalists were asserting the supremacy of the text over its readers, while Federalists took the opposite position and treated the Constitution as a record of a dialogue rather than as a fixed "text" to be interpreted.

The analogy between the Antifederalists' approach and Pelikan's description of the Constitution as "sacred text" is clear. By contrast, the Federalist position depended on a conception of dialogue among readers, between readers and text, and between present and future readers. There are also analogies at work to the difference between epistemological and ontological readings. Federalists' eager anticipation of future amendments reflected an ontological view in which "the text" must be continually adjusted to reflect "us", as opposed to the Antifederalists' fundamental treatment of interpretation as an epistemological exercise

intended to derive its fixed true/intended meaning. In the latter view, proposing “amendment” takes on an unacceptable role of exercising authority over the text.

### **B. The historical debate continued: *How Should Amendments be Included?***

Beyond the question of whether amendments would be permitted, Gienapp points to a remarkable debate about how amendments should be recorded in relation to the prior text, a debate with immediate implications for constitutional hermeneutics. The most important question was whether amendments should be “incorporated”—recorded as changes the constitutional text thus resulting in a new version of the whole—or added in the form of appendices to a basic document. Antifederalists such as Roger Sherman insisted that only the latter approach could avoid the possibility of a Constitution containing self-contradictions. “We might as well endeavor to mix brass, iron and clay, as to incorporate such heterogeneous articles, the one contradictory to the other” (Quoted at Gienapp 2018, 180) John Laurence of New York declared that one possible answer—rereading the entirety of the text in the understanding of its most recent addition—would destroy the essential meaning of the text by altering its hermeneutic horizons. He declared that he “could not conceive how gentlemen meant to ingraft the amendments into the constitution...the original lodged in the archives of the late congress, it was impossible for this house to take and correct and interpolate that without making it speak a different language” (Quoted at Gienapp 2018, 181-82)

As Gienapp observes, the Antifederalists’ fundamental concern being expressed in these comments was ontological rather than epistemological. “Forget what the Constitution meant or what language it spoke, its basic ontological makeup would remain forever in flux...Between Laurence’s anxiety about making the Constitution speak a new language and Jackson’s concern about the people’s confusion over its substance, opponents of incorporation were fully reducing the Constitution to a textual artifact....they were limning the Constitution’s boundaries, defining its essence, and conceptualizing its core attributes in strikingly linguistic terms” (Gienapp 2018, 182)

On the Federalist side, defenders of incorporation employed similar arguments to an opposite effect. John Vining opposed Sherman’s idea of listing amendments as postscripts on the grounds that “the system would be distorted...like a careless written letter...The Constitution being a great and important work, it ought all to be brought into one view, and made as

intelligible as possible”. Madison observed that if amendments were “supplementary” then their meaning could “only be ascertained by a comparison of the two instruments”. The result “will be a very considerable embarrassment...it will be difficult to ascertain to what parts of the instrument the amendments particularly refer”. Elbridge Gerry declared, “we shall have five or six constitutions, perhaps differing in material points from each other, but all equally valid” – it would “require a man of science to determine what is or is not in the constitution”. Gerry continued, “the title to our first amendment will be, a supplement to the constitutions of the United States; the next a supplement to the supplement, and so on, until we have supplements annexed five times in five years, wrapping up the constitution in a maze of perplexity” (Quoted at Gienapp 2018, 184-86)

At the same time, defenders of incorporation confirmed some of their critics suppositions by asserting that the adoption of an amendment *did* think it meant reconceiving the whole. In the case of an amendment, said William Loughton Smith, “the present constitution was to be done away, and a new one substituted in its stead” Gerry insisted that the same would be true regardless of how amendments were presented. “[I]f the amendments are incorporated it will be a virtual repeal of the constitution...I say the effect will be the same in a supplementary way” (Quoted at Gienapp 2018, 187)

Both Antifederalists and Federalists worried that an amended text would pose difficulties of interpretation such that only experts would be able to disentangle the complicated relationships among elements of the text. For the Federalists, the solution was to treat the amended constitution as a new, unitary whole; for the Antifederalists, by contrast, the solution was to distinguish between the original text and later, presumably secondary, additions and corrections.

In the end, Sherman’s preferred mode of presenting amendments as supplements was adopted by the US, although as Albert notes practices in other places tend to favor incorporation. In addition, by the end of the debates over the Jay Treaty in the late 1790s, says Gienapp, there was agreement on “historical excavation” as mode of interpretation. This move involved a reconception of authorship, from “wisdom of the ages” to “an image of concrete creators at specific moments in time”. “Historical excavation as increasingly imagined as a means of sharply distinguishing between past and present Constitutions, rather than a means of uniting the two” (Gienapp 2018, 290). This was a combination of treating the Constitution as a “fixed” text,

treating amendments as sedimentary additions to an unchanged core, and perhaps most importantly making the hermeneutic frame from which to determine the “true” meaning one based in the historical past. (Gienapp 2018, 322-24) Modern interpreters, from this perspective, would be called upon to imagine the hermeneutic horizons of earlier readers, a form of constitutional imagination (in Gienapp’s term) that sits uneasily with the simultaneous insistence that historical excavation is a purely epistemological undertaking. The challenge of what historians call “the pastness of the past” was not a great one in the first ten years following adoption of the Constitution; it provides a much greater challenge and requires a much richer and more contestable set of hermeneutic commitments in the modern era.

Another way of thinking about the move to historical excavation of a fixed text as the preferred mode of interpretation is to consider the implications of that choice for the relation between text and reader. In essence, this approach treats the text as superior to the reader; the reader is called upon to abandon her own hermeneutic horizons and attempt to move into the imagined horizons of an earlier generation. Rather than an ontologically critical exercise of fusing horizons, this approach is one characteristic of religious hermeneutics in which the text stands for an external authority superior to its readers, “the people” of a present generation. IT is also the case that the debates over removal and the Jay Treaty were specific and technical. What happens to the reliance on historical excavation when the debate is about the appropriate hermeneutic approach in the first place? It is crucial to note if we are bound by hermeneutic horizons of an earlier generation – not just specific definitions of terms – then the question is not what the Constitution does but what it *can* do. This is precisely the kind of argument that is occasionally invoked to “prove” that the Constitution cannot be read in a way that would conflict with 18<sup>th</sup> century notions of sovereignty. If a text is understood epistemologically to encompass an historical set of hermeneutic horizons, then that text can not express anything that would have required moving beyond those horizons. To say otherwise would involve one of two difficult claims: that the generation of authorship was made up of individuals who, uniquely, had perspectives unbound by their historical epoch; or that the exercise of constitution-making occupies a unique and specific position with respect to questions of hermeneutics.

### **C. Revisiting the Hermeneutics of Amendment: the *Slaughterhouse Cases***

Fittingly, it was in debates over the meaning of amendments that later generations reopened the debates that Gienapp describes. One particularly important exploration occurs in the context of the first case to interpret the Fourteenth Amendment, the *Slaughterhouse Cases*. The case is both too familiar to students of American constitutionalism and too complicated to present in any depth. The fundamental question was whether the Fourteenth Amendment's guarantee of "the privileges and immunities of citizenship" meant that States were now required to recognize a new set of substantive rights, thus profoundly altering the balance between federal and state authority and effectively nationalizing the system of American law. There were two opinions in this seminal 5-4 opinions: the majority opinion by Miller and the dissenting opinion by Field.

Writing for the majority, Miller declared that the case presented the most important questions. "We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, of the several States to each other, and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members." To answer the question, Miller turned to the approach of historical excavation to determine the "purposes" of the XIVth Amendment. "The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning." Reviewing the historical context of the post-Civil War era, Miller concluded that the purpose of the XIVth Amendment was to secure equality.

From there, Miller turned to a form of analysis that directly implicated a theory of the constitutional hermeneutics of amendments. The phrase "privileges and immunities" was not new; a century earlier it had been included in Article IV of the original Constitution: "'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.'" In that form, the clause had been interpreted by a Supreme Court justice (Bushrod Washington, nephew of George) in 1823. Justice Washington had determined that the provision required neutrality only. That is, if a State guaranteed certain rights to its own citizens, citizens of other states were entitled to the same rights. But not all rights were subject to this requirement of equal treatment; only those that were "fundamental". "What these fundamental principles are



it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole..." *Corfield v. Coryell* (1823). Crucially, Washington had not argued that Article IV required any State to protect any of these rights, only that if a State chose to protect "fundamental" rights for its own citizens it would be required to give equal protection to non-citizens within its borders. As Milller said, "The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised...Its sole purpose was to declare to the several States that, whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

Turning to the XIVth Amendment, Miller concluded that the term "privileges and immunities of citizenship" should have the same meaning in 1873 and the XIVth Amendment that it had in 1823 and Article IV; that is, he read the amendment in a way that conformed it to the pre-existing text. Miller's reasoning was that any other reading would violate the limits of what the Constitution did but what it *could* do. Specifically, the Constitution of 1868 could not alter the hermeneutic horizons of the Constitution of 1791 with respect to the conception of "sovereignty".

"Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?...[W]as it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? All this and more must follow if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever, in its discretion, any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects."

Ultimately it was the necessity of reconciling the XIVth Amendment's provisions with the political background understanding ("sovereignty") of the late 18<sup>th</sup> century that dictated the outcome.

Writing in dissent, Field took the opposite tack. Joining with Federalists of the Revolutionary generation, he insisted that the XIVth Amendment was precisely intended to create a new constitutional order.

"The first clause of the fourteenth amendment changes this whole subject, and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State...

Field was calling for nothing less than an open-ended exploration of the meaning of the rights of "a free man." To say that this reading involved a reconception of the constitutional order is an understatement. In Field's reading, all the provisions of the pre-XIVth Amendment Constitution had to be reconceived and reconciled with the understandings of the new epoch. The new Constitution was a successor text to the old, one that contained all the implications and significations of its own hermeneutic horizons; looking forward, subsequent interpretations or interpretations of amendments would have to wrestle with this new perspective. All of which raises a question: if an amendment truly requires this level of reconception of the horizons of constitutional understanding, it is properly considered an "amendment" rather than an outright replacement of the Constitution itself?

#### **D. Amendments and Constituent Power**

At issue in Miller-Field debate was not only the question of what the XIVth Amendment did but what it *could* do. Can an "amendment" rewrite the entirety of a constitution? Alternatively, the question can be reversed. Can a constitution limit the scope of its own

subsequent amendments? The issue is complicated by the observation that the power to amend a constitution is not dissimilar to the power to create a constitution in the first place. In 1895 Albert Venn Dicey declared, “To know how the constitution of a given State is amended is almost equivalent to knowing who is the person or who are the body of persons in whom, under the laws of that State, sovereignty is vested.” (Dicey 1895, 388). Dicey’s use of the term “sovereignty” is misplaced, however. Rather than the sovereign power, what is at stake in determining the limits of constitutional amendment is the constituent power.

Andreas Kalyvas traces the idea of constituent power to Marsilius of Padua’s text, *Defensio Pacis*. Confronted by rival claims of authority by Louis IVth the Holy Roman Emperor and Pope John XXII, Marsilius discovered a paradox: each had an articulable claim to “sovereignty” in the sense of being an unruléd ruler, yet the asserted sources of sovereignty were entirely separate and entirely overlapping in practice. “In this extreme situation, Marsilius argued, there is always a final authority that decides the matter: it is the multitude, he asserted, that possesses the right to appoint its secular and spiritual rulers, that is, to authorize them to rule. In the space separating the two instituted sovereigns, in the void opened up by their struggle for supremacy—between the secular and the spiritual—a new political subject made its appearance: the multitude with its supreme right to appoint its Emperors and Popes.” (Kalyvas 2013, 2). Furthermore, Marsilius argued, the authority of the “multitude” extended not only to appointing persons to act as rulers but to the very formation of government itself, and when appropriate to its reformation.. “[I]t pertains to the legislator [i.e. the multitude] to correct governments or to *change* them completely, just as to *establish* them.” (Quoted at Kalyvas 2013, 4)

The idea that traditional conceptions of sovereignty rest in the first instance on the authority of “the people” represented a new conception of political legitimacy, one central to the development of ideas of social contract theory and democracy. Among Federalist writers, no one understood the implications of this theoretical development as well as James Wilson. “To the Constitution of the United States, the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But even in that place, it would not, perhaps, have comported with the delicacy of those who ordained and established that Constitution. They might have announced themselves "SOVEREIGN" people of the United States. But serenely conscious of the fact, they avoided the ostentatious declaration.” (*Chisholm v. Georgia*, 454) This was Wilson’s answer to challenges based on limits to what the Constitution could do, as

opposed to what it had actually done. Such arguments, he insisted, were based on a fundamental misunderstanding. “[I]n the practice, and even at length, in the science of politics, there has very frequently been a strong current against the natural order of things, and an inconsiderate or an interested disposition to sacrifice the end to the means. As the state has claimed precedence of the people, so, in the same inverted course of things, the government has often claimed precedence of the state, and to this perversion in the second degree, many of the volumes of confusion concerning sovereignty owe their existence (*Chisholm v. Georgia*, 455)

To reiterate, Wilson was invoking the concept of “constituent power”, the idea that there exists an inherent power in the people to determine the forms of “sovereign” power by an act of creation (“constitution”). In light of that conception, what is the authority of a constitution to limit the possibilities of its own amendment, either procedurally as in Article V of the US Constitution) or substantively as in the case of “unamendability” provisions?

Yaniv Roznai has created a database of 735 constitutions adopted between 1789 and 2013.<sup>3</sup> Both procedural and substantive limits to amendment are frequently defined in very broad terms: ‘spirit of the constitution’ (Norway, 1814, art. 112(1)); ‘spirit of the preamble’ (Nepal, 1990, Art 116(1)); ‘fundamental structure of the constitution’ (Venezuela, 1999, art.s 340, 342); or ‘the nature and constituent elements of the state’ (Ecuador 2008, art. 441). The Indian high court has identified unamendable “basic structure” principles of the constitution, and the Supreme Court of South Africa has identified similar principles. In the words of Justice Abie Sachs, “There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not them.” *United Democratic Movement v. President of the Republic of South Africa and Others*, BCLR 1179 (October 4, 2002). When one turns to the content of substantive

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<sup>3</sup> Interestingly, Roznai finds that unamendability provisions are becoming more common: between 1789 and 1944, only 17% of world constitutions enacted in this period included unamendable provisions (52 out of 306), whereas between 1945 and 1988, 27% of world constitutions enacted in those years included such provisions (78 out of 286). Out of the constitutions which were enacted between 1989 and 2013 already more than half (53%) included unamendable provisions (76 out of 143). In total, out of 735 examined constitutions, 206 constitutions (28%) include or included unamendable provisions. (Roznai 2017.)

unamendability provisions, even greater variation appears. Some such provisions preserve religious national identity, others preserve secularism or pluralism. Democratic or monarchical forms of government, basic rights, and in some cases rules that allow amendments to expand but not contract rights protections all appear in different versions.

Commentators who have considered unamendability provisions have tended to consider them as articulations of deep constitutional values. Richard Kay refers to the idea that “there is something wrong with the idea that an “amendment” might alter the essential character of a constitution while simultaneously invoking its authority.” In this view unamendability provisions are preservative of a constitution’s “true meaning” against the machinations of later generations. Ulrich Preuss declares that unamendability provisions “define the essential elements of the foundation myth. In other words, they define the collective “self” of the polity—the “we the people.” If the “eternal” normative stipulations were changed, the collective self—or identity—of the polity as embodied in the constitution would collapse.” (Preuss 2011, 445).

The difficulty with these theories arises in describing the operation of constituent power subsequent to the adoption of a constitution. Have “the people” lost their power to create a new constitution? Or is it all or nothing; that is, the people have the power to create a new constitution but short of that should not be conceived as having the power to alter its essential meaning through amendment?

Ulrich Preuss attempts to resolve the problem by conceiving of sovereignty as active prior to the adoption of a constitution and “dormant” thereafter, a description similar to Sheldon Wolin’s idea of “fugitive” (episodic) democracy. In this formulation, moments of amendment would be episodic assertions of constituent power, woken from its slumber by a defect in the working of a constitutional order analogous to an unsolvable problem of defining sovereignty. Whatever the other merits of this approach, it cannot account for the practice of including unamendability provisions in a constitutional text. Mark Tushnet argues that the contradiction of constituent power contained in unamendability provisions makes them are presumptively invalid, expressions that contradict the basic legitimating principles of the constitutional order in which they occur. (Tushnet 2015). Alternatively, one might argue that such provisions represent an exercise of constituent power above and beyond ordinary constitutional entrenchment, a kind of super-entrenchment. From this perspective the argument would be that constituent power of the people remains available to replace the constitutional entirely, as occurred with the replacement

of the Articles of Confederation by procedures those same Articles did not recognize. These considerations point to the question of when an “amendment” is actually something more, a replacement of one constitution with another?

Answering these questions is directly relevant to the hermeneutics of constitutional amendment; if amendments are understood as exercises of constituent power, how does that affect arguments about their interpretation?

### **III. Amendments, Constituent Power, and the Nature of the Text: Three Theories of the Hermeneutics of Constitutional Amendment**

Even from these few examples, we can see US courts wrestling with at least three different theories of constitutional hermeneutics in the context of interpreting amendments. At the outset, we identified three (among many) possible ways of relating an amendment to the prior text. These can now be reformulated to include hermeneutic elements:

- Amendments can be made to conform to the understandings of the original so that the resulting whole is understood within an historically fixed set of hermeneutic horizons (the religious hermeneutic approach in its classical form, described by Pelikan);
- An amendment and the pre-amendment text—or specific portions of the text—can be independently interpreted each within its hermeneutic horizons, accepting the possibility that the results will be contradictory as one moves from one part of the text to another (the historical excavation/epistemological hermeneutic approach described by Lieber and in its historicist form by the *Lebensphilosophen*);
- The adoption of an amendment can be understood to require a reconception of the entirety of the constitutional text to bring the whole into a coherent understanding based on a fusing of hermeneutic horizons (the critical theoretic ontological approach described by Gadamer, et. al.).

But while drawing these analogies may (or may not) be an interesting exercise, the real goal is to move from an analytic to a normatively critical argument. That is, on what basis should one of these approaches be preferred to another, and what is the outcome of that analysis?

#### **A. The Constitution as Sacred Text**

In this understanding, Amendments made to conform to understanding of original so that an amendment cannot fundamentally contradict the earlier text. Obviously this is not meant literally in terms of specific outcomes; the XIIth Amendment unquestionably alters the outcomes dictated by the pre-amendment text. Rather, the idea is that amendments remained hermeneutically bound by the horizons of the original text. Outcomes may change, but the fundamental categories that determine what *can* be said—the horizons of comprehensibility—are preserved. One can see this approach in Miller’s *Slaughterhouse* opinion. For Miller the adoption of the XIVth Amendment assumed a continuation of the system of sovereignty, with the proviso that participation in the national entity is conditioned in equal treatment of subjects. By contrast, consider, Field’s abandonment of sovereignty in favor of a single national community of “citizens” exercising constituent power, a revival of Wilson’s project that requires a sharp break.

It should be emphasized that this approach is not simply epistemological. That is, the approach is not so much justified as a method to accurately discover an historical understanding as it is treated as the only appropriate way to read a text that effectively stands outside of historical time even as arguments are couched in the vocabulary of historical understandings. Justice Scalia provided a clear declaration of this approach in his *Heller* opinion: “Justice Stevens’ view...relies on the proposition, unsupported by any evidence, that different people of the founding period had vastly different conceptions of the right to keep and bear arms. That simply does not comport with our longstanding view that the Bill of Rights codified venerable, widely understood liberties.” (*Heller*, at 32.) The phrase “unsupported by evidence” does no evident work here; Scalia is not asserting an (unsupportable) historiographical understanding, he is explicitly declaring an article of orthodox faith—“our longstanding view”—that he views as required of anyone who would undertake the project of interpreting the constitutional text.

Scalia's understanding is consistent with Pelikan's description of a sacred text as a freestanding entity that "speaks" to its readers independent of its recorders. Indeed, "recorders" (or "redactors") is a more appropriate term than "authors" if one is referring to theories of original public meaning just as it is the appropriate term for those who recorded divine revelation in biblical texts. In this view the act of constitutional adoption was less about the creation of meaning than about the closing of the canon, with items such as Madison's Virginia Plan left to the category of apocrypha. Apocryphal texts are interesting artifacts of earlier ways of thinking, but they are not elements of the authoritative "venerable, widely understood"—i.e., canonical—constitutional understandings.

This distinction is suggested in references to concepts such as "the ancient traditions of our people" unrooted in specific references, or in the appeal to "background understandings" to correct what the Court sees as the deficiencies in the actual text. One example of the latter is the identification of core sovereign functions of "states as states" that limit the reach of the Commerce Clause (*Usery, Printz*). Another is the Court's reading of the XIth Amendment's guarantee of sovereign immunity. "'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms" wrote Justice Rehnquist in *Seminole Tribe* (1995). In 1999 Justice Kennedy wrote, "the sovereign immunity of the States neither derives from nor is limited by the XIth Amendment. Rather, . . . the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today...except as altered by the plan of the Convention or certain constitutional amendments" (*Alden v. Maine* 1999)

The latter examples are particularly telling, as it is not only contemporaneous readers but also the original recorders whose understandings are tested against a separate, objective "text" and corrected as necessary to ensure compliance with the "true meaning" behind the choice of language. Moreover, the possibility of recovering the "true" meaning of the text beyond the work of its recorders is likewise treated as a matter of faith. For Anglicans, this faith was expressed in the description of the St. James Bible as a miracle, a literally humanly impossible perfect recovery of the true text through the barriers of time and linguistic translation. For constitutional interpreters who employ this approach the miracle is the recovery of the hermeneutic horizons being the text and the ability of modern readers to reconcile the text to its "true" meaning within that interpretive frame.



The difficulty is that this approach is not easily reconciled with the idea that the Constitution today should have a publicly accessible meaning. For one thing, those who do not share in the prescribed articles of constitutional faith find this mode of interpretation mysterious and arbitrary. For another, it is truly only a trained cadre of the faithful who are able to engage in this form of interpretation, a more Catholic than Protestant approach to the text (as Sandy Levinson has described). There is an irony that justices who engage in this priest-like assertion of authority over access to true meaning assert that they are exercising judicial restraint. From an hermeneutic standpoint this is the opposite of humility. Perhaps most important, the fixed/sacred text approach raises the question of the location of constituent power. In this view constituent power appears to exist outside the people. For a religious text, that power lies in the divine source of law. For a constitutional text, constituent power appears to be fixed in disembodied “traditions” and “principles,” as in Blackstone’s description of common law rules as those “the memory of man runneth not to the contrary”. The legal historian John Baker records an English magistrate in the 15<sup>th</sup> century who declared “the common law has been in existence since the creation of the world”; as Baker adds, “he probably meant it.”

### **B. Historicist Epistemology: the Text as Pastiche**

A second approach, also common in American constitutional interpretation, partakes of the epistemological projects of Lieber and the early philosophical hermeneuticists, the project Gienapp called “historical excavation”. Two things separate this approach from the mode of reading sacred texts. First, the emphasis from the outset is on the historical specificity of the understanding being recovered. That is, modern readers have no authority to assert the existence of a unified understanding or an otherwise mysterious set of background principles; these elements must be demonstrated by careful and critical analysis of the historical record. This is an approach that features the historiographical understanding of “scientific history” as described in the late 19<sup>th</sup> century. Second, confronting the task of interpreting amendments readers employing this approach will acknowledge that the historical meaning of the XIV<sup>th</sup> Amendment is different from the historical meaning of the Constitution of 1791. In *Slaughterhouse*, this was Field’s approach to understanding the phrase “privileges and immunities”; despite the repetition of the language, its meanings at different historical points were potentially incommensurate.

This project presents itself as purely epistemological, without concern for the ontological implications for either reader or writer. But even accepting the concept of the possibility of recovering historical understandings by application of the “hermeneutic circle” approach, the ontological element is not banished by the fact of ignoring it. In this approach, the judge’s choice of historical reference dictates the applicable horizons. Far from deferential, the judge asserts the authority to dictate the eyes through which the polity is required to see the world, and does so based on a selection among an available range of choices. That imposition, in turn, dictates without discussing commitments about the ontological status of the current generation as a “people” willing to allow itself to be bound by a series of different, potentially incommensurate, systems of understanding. The question that Field posed—what are the rights of American citizens?—cannot be answered in the same way in the vocabulary of 18<sup>th</sup>, 19<sup>th</sup>, and 21<sup>st</sup> century discourse, yet this historicist approach requires that modern day Americans accept the commitment to accept one or another as the “correct” hermeneutic frame for the discussion. Whether this is understood as a surrender of authority or merely the people holding their authority in abeyance, that decision goes to the core of the concept of constituent power.

As a purely epistemological argument, moreover, the approach is one that is unlikely to be taken seriously in any modern intellectual context other than the study of constitutional law, as it is an approach grounded in what Leyh calls “the hermeneutical howler that we can understand the past largely apart from our present.” (Leyh 1988, 378). As a mode of textual analysis, moreover, this approach is the apotheosis of reductionist, clause-by-clause reading. Consistency is preserved with respect to time as the meaning of a provision is fixed at a point of historical understanding. What is sacrificed is synchronic consistency, the possibility of reading the Constitution as a coherent whole at any given moment despite the fact of its authorship across different periods. So any constitutional argument should be identified by a pair of coordinates: textual reference (the x axis), and the historical horizons that are to be applied to that reference (the y axis). None of these various methodological commitments are justified by any obvious appeal to constitutional norms. From a democratic perspective, this historicist approach presents a particularly sharp version of the “dead hand of the past” objection; we are trapped by others’ (past) ontological conceptions in our pursuit of epistemological rigor.

Another difficulty, already mentioned, is the likelihood that concerned Antifederalists and Federalists alike: the inevitability of contradictions in the interpretations of different

provisions. Justice Sutherland, in his dissenting opinion in *Home Building and Loan Association v. Blaisdell*, argued that this concern motivated his embrace of historical excavation. “A provision of the constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different at another time...As nearly as possible we should place ourselves in the condition of those who framed and adopted” (quoted by Leyh 1988, 378). In fact, consideration of the challenges involved in interpreting amendments demonstrate that Justice Sutherland has it wrong. The project of determining the “intent of its framers” may lead to an internally consistent interpretation of a particular clause or provision, but it effectively guarantees that in the reading of the Constitution as a whole the text will necessarily be found to “admit of two distinctly opposite interpretations”.

One implication of this possibility is that there is not one constituent power—one “people—but rather multiple constituent powers at different moments of time, working at cross purposes. Aside from being an aesthetically displeasing conception, this situation created precisely the kind of conflict among allegedly supreme authorities that the idea of constituent power was created to resolve. One might be tempted to adopt something like a “last in time” rule, where in cases of outright contradiction the amendment trumps the inconsistent earlier text, but this is at best a partial solution. What happens when different pieces of text in amendments or elsewhere do not directly contradict but appeal to historically bounded understandings that conflict? Is there a “last in time” principle for constitutional hermeneutics? That, essentially, is the assumption that underlies the critical theoretical approach, referred to here as the “Palimpsest Approach” to the constitutional hermeneutics.

### **C. The Critical Ontological Approach: Constitutional Text as Palimpsest.**

The remaining approach is to treat the constitutional text with its amendments as a palimpsest. This is, essentially, the “incorporation” model favored by early Federalists and employed in most constitutional systems, in which amendments are introduced directly into the text and overruled elements are removed from the text. John Laurence suggested that the text cannot be amended “without making it speak a different language”; what he failed to understand

was that the project of preventing that act of translation represented a usurpation, the reversal in priority of people and government that Wilson had warned against.

A good example is the Fourteenth Amendment to the US Constitution. The classic debate over the consequences of the Fourteenth Amendment occurred in the *Slaughterhouse Cases* in 1873. Writing for the majority, Justice Miller insisted that the Privileges and Immunities Clause of the new amendment meant nothing different than what had been meant by the same clause in Article IV. Justice Field, by contrast, insisted that the courts were confronted by the need to undertake a brand new project of identifying the rights of free citizens and securing those rights to all Americans. Field was very much employing a critical ontological approach, implicitly arguing that the Civil War and the adoption of the Reconstruction Amendments represented a “second founding”. Miller, by contrast, insisted that his approach was to be preferred precisely because it would preserve “the general system” of State-federal relations.

*Slaughterhouse* is unquestionably a classic case, and the Privileges and Immunities Clause undoubtedly represented an opportunity to engage in a “palimpsest” reading of the post-amendment text. But there is another, less discussed element of the Fourteenth Amendment that presents the question even more clearly. Section 2 of the Fourteenth Amendment undoes the Three Fifths Clause that provided overrepresentation to slaveowners by establishing that where a class of otherwise eligible voters is denied the right of political participation their numbers will not be counted for purposes of apportionment. “[W]hen the right to vote at any election...is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.” Imagine a case in which a State were found to have abridged the voting privileges only of women. Unquestionably this practice would be found to violate the Equal Protection Clause, and it is possible that a violation of the XIXth Amendment would be found, but what about the effects of Section 2 of the XIVth Amendment? Would the same constitutional remedy be triggered? Treating the amended text as a palimpsest would lead us to answer “yes”. The adoption of the XIXth Amendment, in particular, requires us to reread descriptions of voting rights in a gender-neutral way in response to an exercise of constituent power.

## Conclusion

Not all amendments raise the issues discussed in this paper to an equal degree. But any amendment raises the prospect of navigating among three different sets of hermeneutic horizons: those of the pre-amendment text, those of the amendment, and those of the readers. But while any constitutional amendment reflects the hermeneutic horizons within which it was generated, it is not the case that all amendments bear the marks of that environment equally clearly. By the same token, not all provisions of a constitutional text prior to amendment provide equally clear indicia of a worldview specific to their epoch. But some provisions—original text or amendment—contain clear and intentional declarations of interpretive principles: examples include the IXth Amendment of the UW Constitution which warns against narrow textualism in the description of rights and the treatment of human dignity as a *Wesengehalt* principle of German constitutionalism.<sup>4</sup> Each of these provisions declares an interpretive principle in light of which the text should be read, and in doing so each incorporates the understanding of that principle—the hermeneutically bounded understanding of constitutional hermeneutics—specific to the historical self-understanding of the People exercising its constituent power. And the same is true of the XIXth Amendment’s guarantee of voting rights for women. To say otherwise would be to deny the capacity of constituent power to adopt hermeneutic principles as an element of constitutionalism, a position that does not so much ask what a constitutional provision does as it asserts limits on what a constitution *can* do based on the decisions of earlier versions of the People.

It is this last observation, that the exercise of constituent power extends to if it does not begin with the exercise of authority over hermeneutic principles, that is the critical observation for understanding the hermeneutics of amendment. The act of amendment, then, asserts at least the possibility of an exercise of the same constituent power over the text short of constitutional revolution. The status of unamendability provisions, in particular, is clarified. The application of

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<sup>4</sup> German Basic Law Article 19(2)); see *Regarding the Luftsicherheitsgesetz*, German Constitutional Court, Judgment of 15 February 2006, 1 BvR 357/05, BVerfGE 115, 118.

such provisions to proposed amendments may be justified, but doing so raises the question of a clash between exercises of constituent power. For that reason, unamendability provisions themselves must be amendable; the hermeneutics of amendment thus provide a way to unify the two expressions of constituent power into a single and coherent whole by subjecting the unamendability provision to interpretation within the horizons of the “people” acting in its present capacity.

An obvious question is how to conceive of “the people” in this (or any) formulation. Mark Tushnet has suggested that the term is best understood conceptually rather than literally (Tushnet 2015); in a subsequent exchange Tushnet has acknowledge the ambiguity that results from trying to avoid a nationalist or ethnic starting point but at the same time treating “people” as a concept prior to democratic constitutionalism. (Tushnet 2015(2)). This is what Robert Dahl called the chicken-egg problem of democratic theory: how can we employ democratic means to determine the *demos* that engages in democracy? The hermeneutic approach suggests a different way of answering the question. In order to act as a constituent power, a “people” is required to share a set of hermeneutic horizons, or as I have elsewhere argued a common constitutional language (Schweber 2007). That is, both the creation and amendment of a constitution imply a claim of constituent power that may be evaluated or contested. As a result, the question of “what is the people?” is best answered in terms of conditions necessary for engaging in constitution-making.

This formulation of “the people” recognizes a further point. Acting as a constituent power, the people exercise authority over hermeneutics rather than being subjected to the rule of a sacred text. In the creation and amendment of a constitutional text the people exercise the capacity to imagine the possibility of constitutional objects that are not articulable in their own frame of reference. The act of amendment is an act of authorship, and the resulting text is a palimpsest. Not simply a “last in time rule” in which the amendment dictates meaning to the pre-amendment text, because that is impossible; directly translation from one worldview to another is not available. Instead the entire text is capable of interpretation by future readers in engagement with their hermeneutic understandings, a fusion of horizons that requires the critical examination of both and results in a synthesis not perfectly consonant—not comfortable or easily assimilated—with either. This is the deeper sense of Marshall’s “it is a constitution we are interpreting” statement in *McCulloch* or Justice McKenna’s statement in *Weems v. United States*

that “[i]n the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.” The act of interpretation is an exercise of imagination and criticism, not merely epistemological excavation. Amending a constitution involves a self-aware people to exercise constituent power over the construction of meaning of an existing text and extending an invitation to its future collective self to engage in the inescapable hermeneutics of constitutional amendment.

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