THE HERMENEUTICS OF CONSTITUTIONAL AMENDMENT

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ABSTRACT

The practice of constitutional amendment raises numerous issues for understanding and interpreting a written constitution. Do amendments have the same authority as original textual provisions, or less or more authority by virtue of their "last in time" status? Should amendments be read to be consistent with the previously included elements of the text or should the earlier textual provisions be reinterpreted in light of the amendment? This article explores the implications of amendability for questions of constitutional hermeneutics. Three distinct approaches to the relationship between an amendment and the preceding text are described: "pastiche" (each amendment and the original text stand as separate, independently understood texts); "sacred text" (the amendment corrects an error in the earlier text or its understanding and thus restores the original whole); and "palimpsest" (the addition of an amendment and the consequent erasure of elements of the original text creates a new text to be interpreted as a whole). Each of these understandings, in turn, is associated with a particular heremeneutic model: the pastiche approach is associated with an epistemological model based on the work of Francis Lieber; the sacred text understanding is associated with an exegetical model grounded in religious practice based on the work of Jaroslav Pelikan; and the palimpsest version of the amended text is associated with a critical philosophical model of hermeneutics based on the work of Hans-Georg Gadamer and Jurgen Habermas among others. The conclusion is that only a

Constitutional Studies, Volume 7

palimpsest approach, informed by a critical philosophical hermeneutic of constitutional interpretation, is consistent with fundamental principles of constitutional legitimacy grounded in constituent power.

KEYWORDS: *Constitution, constitutional interpretation, hermeneutics, legal hermeneutics, constitutional hermeneutics, constituent power, democratic legitimacy, interpretation, textualism, exegesis, religious texts, amendment, constitutional legitimacy, constitutionalism, sacred text, palimpsest, pastiche, critical theory*

ARTICLE TEXT

This article explores a question of normative political theory applied to a problem of constitutionalism. The political theory in question is philosophical hermeneutics, a theory (or, rather, set of theories) about the ways in which the relationship between reader and text informs the exercise of critical self-reflection in its political context. The problem of constitutionalism is the problem—much discussed in current literature—of how to account for the phenomenon of constitutional amendment as an element of a larger theory of constitutional legitimacy, a topic that has been central to political theory since at least Aristotle.

The question that this article poses is, How does an occurrence of constitutional amendment cause us to understand the amended constitutional text? The argument of this article is that one can simplify the possible responses to this question into three possibilities:

- The amendment may be assimilated into the pre-amendment document, so the interpretation of the amendment becomes an exercise of fitting it within the constraints of the pre-amendment version (the "sacred text" approach).
- The amendment may be treated as effectively a separate document, so "the constitution" now comprises multiple texts (the "pastiche" approach).
- The pre-amendment document may be assimilated into the amendment, so the interpretation of the entire text becomes guided by some understanding of the amendment and its implications with the whole of the amended constitutional text reconsidered (the "palimpsest" approach).

The first approach, reconciling the amendment to the prior text, is referred to here as treating the amended constitution as a "sacred text." The phrase is deliberately evocative of the religious roots of hermeneutics. In Jaroslav Pelikan's phrase it is an approach in which the text is treated as something that "speaks to" the reader (see discussion, section I.B., below). In this view, the act of amendment is essentially

an act of correcting an erroneous recording of a supra-textual message.[1] One area where this approach appears in American constitutionalism is in judicial discussions of state sovereignty, as in the identification of core aspects of state sovereignty that limit the reach of the commerce clause—*National League of Cities v. Usery* (1976); *Printz v. United States* (1997)—or in interpretations of the Eleventh Amendment's guarantee of sovereign immunity. "[W]e 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 of Florida v. Florida* (1996).

To be sure, in American constitutionalism the source of meaning is historical rather than divine, but hermeneutics is all about how one relates to history-as-text, particularly in a constitutional context. The point here is that Justice Rehnquist's comments reveal an approach that is fundamentally exegetical. The goal is to find the "true" meaning that the text was intended to record; the Eleventh Amendment is a correction to an error in that process of recording and a guide to correct exegesis based on first principles. Those first principles, moreover, are "historical" only by description. The approach is not so much justified as a method to accurately discover and veridically describe an historical event as it is treated as the only appropriate way to read a text that effectively stands outside historical time. Consider Justice Scalia's remarkable response to Justice Stevens in *District of Columbia v. Heller* (2008). Scalia declared that Stevens's 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* 2008, at 32). The phrase "unsupported by any evidence" does no evident work here (as well as being demonstrably false). Justice Scalia was not asserting an (unsupportable) historiographical hypothesis; he was explicitly declaring an article of orthodox faith—"our longstanding view"—that he viewed as required of anyone who would undertake the project of interpreting the constitutional text. Scalia's appeal is to a normative standard of a deeper truth that posits the existence of a fixed and unalterable historical consensus and then reifies that construction into an axiomatic principle unconnected to the event of its

1. Pelikan's conception is rooted in Christian interpretive practices. Noam Zohar suggests that in the Jewish rabbinic tradition the use of *midrash*—instructive stories similar to parables—developed into a system of effective amendment. Fittingly, the most famous *midrash* is one in which a group of rabbis are having a debate, the voice of God is heard declaring the correct answer, and the rabbis reject the teaching on the ground that interpretation is a matter for human understanding rather than revelation (Zohar 1995); for an extended discussion of rabbinic practices of amendment to Jewish law (*Halakhah*), see Gross 2014.

imagined genesis. It is this normative commitment that makes sense of reading an amendment to make it consistent with the true understanding of the original text.

The second approach, treating amendments as freestanding and separate texts, views the amended constitution as a "pastiche." This approach separates the relationship of the people to one part of the text—the amendment under consideration—from the relationship of the people to the remainder of the text. In this approach the act of interpretation becomes a forensic exercise aimed at seeking the most veridical portrayal of the object as event, precisely what was (deliberately) omitted in the exegetical approach. What is sacrificed in the process is the ideal of consistency that Justice Scalia invoked. The result can be a single text that contains profoundly contradictory elements in ways that go beyond what Gary Jacobsohn (2010) calls constitutional "disharmony" to outright inconsistency. A good example in American constitutionalism appears, again, in the treatment of states and their sovereignty. This should not be surprising; no subject is more bound up in commitments to orthodoxy of one kind or another nor has any subject been more vigorously contested since literally before the adoption of the United States Constitution. The "pastiche" approach to this question appears in the different treatment of the limits of Congress's power with respect to states under Article 1 and the Fourteenth Amendment. When Congress is acting under its Article 1 powers, states are immune from regulation unless they have voluntarily waived their immunity. When Congress is acting under its Fourteenth Amendment powers, no such immunity exists. In practice, moreover, the distinction may often turn into "when Congress *says* it is acting" under one or another source of authority, as Article 1 and the Fourteenth Amendment overlap in many areas (as evidenced, for example, in the Civil Rights Act of 1964).

In this way, an embrace of formalistic textual positivism becomes the consequence of seeking epistemological accuracy. That outcome, of course, depends on a particular conception of how we relate to history; the "pastiche" approach relies on a "scientific" (or scientistic) style of historiography that treats historical materials as objects of analysis akin to natural objects in a laboratory. Techniques of forensic investigation, intellectual historical analysis, or linguistics may be brought to bear to force the text to reveal its secrets one piece at a time. Historically, this approach appears as far back as the mid-nineteenth century in Francis Lieber's studies of legal hermeneutics.

The "palimpsest" approach, finally, treats the amended constitutional text as a singular whole. The term "palimpsest" was carefully chosen. Palimpsests were pieces of parchment or vellum from which the entirety of a text had been washed off to make space for a new one. Quite often, however, traces of the earlier text

could still be seen and recovered. In a famous instance, the surviving fragments of Cicero's *On the Republic* were discovered in 1819, having been written over with works of Augustine. While the earlier text had been (literally) washed away, its traces remained.

In its more modern uses, the term "palimpsest" refers to a text—not necessarily a piece of writing but an object of interpretation—that bears layers of meaning and signification, as in a modern writer's description of the Louvre Museum in Paris: "Every king's reign involved expansion or demolition, modification or neglect, turning the building into an elaborate *palimpsest* of styles and functions" (Rothstein 2020). Applied to its original reference, a written text, this modern understanding associates the act of interpretation with the tradition of philosophical hermeneutics. Certainly a visitor may study the Louvre forensically, looking for traces of its historical construction, revision, and conceptualizations. Equally, a visitor may look to both the building and its priceless contents as sublime sources of inspiration. Ultimately, however, the "meaning" of the Louvre is a matter of the experience of the visit. The approach of philosophical hermeneutics treats history and historical texts as the same kinds of metaphorical palimpsests, a multilayered container of meaning to which the reader adds a new layer in the process of interpretation.

At this point, however, the concept of constituent power becomes critically important. Applied to a constitutional text, the acceptance of constituent power means that it is "the people" that stands in relation to the text in each of these different hermeneutic approaches. In an exegetical approach, "the people" stands in a relationship of contemplation of the text's deeply true meaning; in an epistemological approach, "the people" relates to the text as an object of analysis. Finally, in a philosophical hermeneutic approach, "the people" stands in relation to the text simultaneously as putative authors and readers, a relationship that defines the framework of understanding and makes that understanding itself the object of interpretation. In the same way that epistemological inquiries call on us to think about thinking, this ontologically informed hermeneutic calls on us to interpret interpretation, a self-reflective exercise that is inherently critical.[2]

2. Hans Lindahl describes the exercise of constituent power as "self-constitution," a process in which originary political authority is expressed in juridical systems of law. Engaging arguments of Hans Kelsen and Carl Schmitt, Lindahl argues that this approach resolves the apparent paradox of the mutual dependency of legal and political authority for legitimation (Lindahl 2007). For a similar argument in the specific context of the American founding, see Thomas Frank (2010). The idea of constituent power as a moment of self-authorship is directly connected to hermeneutic critique in a line of writing running from Alexandre Kojève to Jürgen Habermas (Kojève 2007; Habermas 1996). Bonnie Honig

These different hermeneutic approaches yield different solutions to the challenge of interpreting an amended constitutional text, characterized here as treatment of the amended constitution as "sacred text," "pastiche," or "palimpsest." The argument of this article is that from a hermeneutic perspective, the palimpsest approach to the interpretation of an amended constitution is the only one that is consistent with constituent power. To explain and develop this argument, the article proceeds in four parts. Part I examines the different hermeneutic approaches in more detail. Part II considers some historical debates from two key moments of American constitutional development—the founding era and the adoption of the Fourteenth Amendment—to illustrate the work these different theoretical approaches performed in the practices of constitutional argumentation. Part III comprises some reflections on the significance of constituent power for thinking about amendment and the character of an amended constitutional text. Part IV revisits the three approaches to interpreting constitutional amendments and presents the argument of the article. Finally, a brief concluding section presents some further thoughts on the relationship between "the people" and a constitutional text.

I. HERMENEUTICS AND CONSTITUTIONAL INTERPRETATION

The term "hermeneutics" has ancient Greek roots, but in its more modern usage, beginning in approximately the seventeenth century, it refers to religious and specifically Christian principles of textual 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* (1839). 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 was supplemented in the long twentieth 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. That critical tradition, too, has been fruitfully applied to legal and constitutional interpretation.

explores the particular significance of the performative/constative distinction in her intervention into Hannah Arendt and Jacques Derrida's discussions of the American Declaration of Independence (Honig 1991; Derrida 1986). These debates are central to current thinking about the problem of constituent power from a critical theoretic perspective.

A brief look at each of these conceptions of hermeneutics serves to introduce the argument of this paper.

A. Interpretation as Epistemology: Francis Lieber's *Legal and Political Hermeneutics*

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 1839, 13). Words are one particular subcategory of signs, and written words are a further subcategory 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 1839, 17). Elsewhere, however, Lieber recognized 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'" (Lieber 1839, 22). One reason was what I have described as Lieber's structuralist understanding of language, one with clear connections to Saussure's later description of synchronic linguistic structuralism. "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 1839, 27).

This ambiguity in the meaning of "true meaning" aside, the goal was a normative set of principles describing *correct* interpretation. "Hermeneutics" referred to "the art which teaches us the principles according to which we ought to proceed in order to find the true sense," a definition he took directly from a text on biblical hermeneutics (Lieber 1839, 23–24).

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 (Lieber 1839, 28-9).

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 laws . . . 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 1839, 56–58).

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 un restricted 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 1839, 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 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 (Lieber 1839, 56).

B. Interpretation as Exegesis: 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.[3] 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 v. Maryland* (1819): "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

3. For a different comparison between the United States Constitution and religious texts, see Michael Perry (1985).

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 sixteenth-century Reformation writers' introduction of a full-fledged study of hermeneutics (Pelikan 2004, 47–48). One particularly interesting example he offers 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, in response to which "Neuman formulated the axiom: 'No doctrine is defined till it is violated'" (Pelikan 2004, 55). The implications of Neuman's formula are that the meaning to be sought lies outside the text itself, which is merely an indicator or partial representation of a prior reality. Neuman's approach to textual interpretation is not unknown in modern constitutionalism.[4] For Pelikan, the more important point of connection between the Constitution and the Bible as sacred texts was that each stood as a test that "speaks" to readers—that is, that these are texts possessed of independent meaning separate from the act of their writing.

C. Interpretation as Critical Reflection: Philosophical Hermeneutics

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-nineteenth-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 a historical worldview and by iteratively reading the part and the whole—of the text itself, of the text in relation to its

4. The most obvious example in American constitutional discourse arises in the judicial explanations for the doctrine of sovereign immunity, which reach far beyond the textual requirements of the Constitution (in the Eleventh Amendment). As Justice Kennedy put it in *Alden v. Maine* (1999), "[T]he scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design."

context, of the text in relation to its author—to arrive at a unified understanding through a process known as the "hermeneutic circle."

In twentieth-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* (1972). 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. "[T]he 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 to it (Gadamer 1972, 245). By this understanding, when I interpret Leo Tolstoy's *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, or gender in my interpretations and to articulate alternatives—necessarily takes 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" (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.

As an element of critical theory, the idea of horizons takes on a reflexively critical (*Selbstcritik*) 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 Jürgen Habermas and Paul Ricouer, in particular, extended both the ethical and the social scientific implications of this idea of self-critical engagement, specifically with respect to historical sources. Ricouer, for example, draws a distinction between "understanding" versus "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 (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's less read early works such as the 1972 (first English edition) *Knowledge and Human Interests*).

Gregory Leyh specifically applies the implications of modern philosophical hermeneutics for American constitutional understanding, emphasizing the extent to which the critical turn in philosophical hermeneutics undermines claims to discover "original" understandings. More important, Leyh explores 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. Thus philosophical hermeneutics does not pose as a methodology for accurately reading texts, but instead offers a standard for the evaluation of all methodological practices whose aim is the understanding of textual meaning. Constitutional hermeneutics furnishes us with necessary materials for judging arguments for the constitutionality of any given interpretation of our foundational law" (Leyh 1988, 380). Leyh's call for a theory of constitutionally acceptable modes of constitutional interpretation is the critical hermeneutic project in a nutshell. This approach reveals the inescapably political nature of a hermeneutic choice. Just as Leyh asks what modes of interpretation are consistent with our constitutional commitments, one might ask whether there is a particular theory of hermeneutics or prescribable hermeneutic practices that follow necessarily from, say, a commitment to Lockean liberalism.

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 translation of language 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 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 to consider the implications of starting from one or another position in the specific context of constitutional amendments.

II. CONSTITUTIONAL HERMENEUTICS AND QUESTIONS OF AMENDMENT: HISTORICAL DEBATES

A. The Debate over Amendment in the Founding Era

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 the nature and significance of amendments played an important role.

Differences in hermeneutic approach show up clearly in discussions of amendment and the differing approaches of Federalists and Anti-Federalists 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's influential and controversial pamphlet "Thoughts on Government" (1776). Having described in considerable detail a system of branches of government and national officials, Adams (1776) 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." (It is interesting that in the introduction to *Legal and Political Hermeneutics*, Lieber says he was driven to his project in response to a critical evaluation of Adams's pamphlet.) Federalists in the Congress that considered the Constitution took a similar "ongoing experiment" approach. For example, Benjamin Rush asked, "[W]ho ever saw any thing perfect come from the hands of man?" 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, "[L]et us give it a trial" (quoted at Gienapp 2018, 78–79).

Anti-Federalists, by contrast, insisted that the Constitution be "understood so as" 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 [1788] 1981, 439). Consistent with the view that the text should be written in a way that would limit the scope of possible interpretation, Anti-Federalists also denied

the acceptability of amendment. Both of these views partake of the idea of the Constitution as a "sacred text" subject to exegesis. The objection to amendment, then, was that it meant reshaping the reference text rather than interpreting it. In this way the Anti-Federalists were asserting the supremacy of the text over its readers.

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"—that is, recorded as changes to the constitutional text, thus resulting in a new version of the whole—or added in the form of appendices to a basic document.[5] 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 heterogenous articles, the one contradictory to the other." John Laurence of New York declared that one possible answer—rereading the entire text in the understanding of its most recent addition—would destroy the essential meaning of the text. 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, 180, 181–82). As Gienapp observes, the Anti-Federalists' 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. . . . [O]pponents of incorporation were fully reducing the Constitution to a textual artifact . . . [and] were limning the Constitution's boundaries, defining its essence, and conceptualizing its core attributes" (Gienapp 2018, 182). Those "linguistic terms" were understood to articulate a historically fixed, essentialist identity; in the Anti-Federalist view the constitutional text was a safeguard of a conservative ontology that protected the national identity against experimentation by future generations.

On the Federalist side, defenders of the incorporation approach to amendment 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

5. See also Mehrdad Payandeh (2011).

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. . . [and] it will be difficult to ascertain to what parts of the instrument the amendments particularly refer." Elbridge Gerry declared, "[W]e 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" (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* mean 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, 184–86, 187).

Both Anti-Federalists 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 presented to the people for their understanding, an approach exemplified in Madison's explanation for his change in position on the question of a national Bank. Madison had vehemently opposed the idea when Hamilton first proposed it in 1791, and again as a member of Congress in 1811. In 1816, however, President Madison signed off on the charter of the Second Bank of the United States. In later correspondence he explained his actions as an expression of his theory of popular constitutionalism: "[T]he inconsistency is apparent only not real. . . . [M]y abstract opinion of the text of the Constitution is not changed, and the assent was given in pursuance of my early and unchanged opinion, that in the case of a Constitution, as of a law, a course of authoritative expositions sufficiently deliberate, uniform, and settled, was an evidence of the Public Will necessarily overruling individual opinions" (Madison 1831).

In the end, Sherman's preferred mode of presenting amendments as supplements was adopted by the United States. As Richard Albert (2019) demonstrates, this is far from a universal approach; in many if not most constitutional systems amendments are treated as incorporated into the text. 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, an approach similar

to Lieber's search for epistemological certainty. This move involved a reconception of authorship, from "wisdom of the ages" to "an image of concrete creators at specific moments in time," and so "[h]istorical excavation [was] 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 important, making the hermeneutic frame from which to determine the true meaning one based on the historical past. Modern interpreters, from this perspective, would be called on to imagine the hermeneutic horizons of earlier readers, an approach that adopts the Anti-Federalist view of the Constitution as preservative of ontological identity commitments. To be sure, 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, but it would provide a much greater challenge and requires a much richer and more contestable set of hermeneutic commitments in the modern era.

The move to historical excavation of meaning, like the model of textual exegesis, again treats the text as superior to the reader; the reader is called on to abandon his or 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 crucial to note if we are bound by hermeneutic horizons of an earlier generation—not just by 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 eighteenth-century notions of sovereignty. If a text is understood to encompass a historical set of hermeneutic horizons, then that text cannot 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.

These founding era debates were far from the last effort to define the relation between an amendment and the rest of the constitutional text. In the nineteenth century, however, the locus of the debate shifted to the courts and the terms of the arguments appeared in the form of constitutional doctrine.

B. 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* (1873). 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 a new set of substantive rights were subject to enforcement by the federal courts, under XIV(1), thus profoundly altering the balance between federal and state authority and effectively nationalizing the system of American law.[6] There were two opinions in this seminal 5-4 opinions: the majority opinion by Justice Miller and the dissenting opinion by Justice Field. The debate between Miller and Field illustrated two sharply different approaches to the hermeneutics of constitutional amendment.

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 Fourteenth 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" (*Slaughterhouse Cases*, 83 U.S. at 67). Reviewing the historical context of the post–Civil War era, Miller concluded that the purpose of the Fourteenth 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 4 of the original Constitution: "[T]he citizens of each state shall be entitled to all privileges

6. A closely related question was whether Congress had been given authority to enact legislation protecting these new rights under XIV(5). That issue, in fact, was the more central one at the time, but the treatment of the privileges and immunities clause as a judicially enforceable rights guarantee is more salient to this discussion.

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 while presiding over a district court proceeding. 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" (quoted at *Slaughterhouse Cases*, 83 U.S. at 76). Crucially, Washington did not argue that Article 4 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 noncitizens within its borders. As Millller 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" (*Slaughterhouse Cases*, 83 U.S. at 77).

Turning to the Fourteenth Amendment, Miller concluded that the term "privileges and immunities of citizenship" should have the same meaning that it had in 1823; that is, he read the amendment in a way that conformed it to the preexisting text. The reason was that any other reading would violate the limits not 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 . . . 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" (*Slaughterhouse Cases*, 83 U.S. at 77–78). Ultimately, it was the necessity of reconciling the Fourteenth Amendment's provisions with the late-eighteenth-century understanding of states as "sovereign" that dictated the outcome, an argument squarely located in the preservation of a historical ontological understanding by restricting the scope of linguistic analysis.

Writing in dissent, Field took the opposite tack. Joining with Federalists of the Revolutionary generation, he insisted that the Fourteenth 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. (*Slaughterhouse Cases*, 83 U.S. at 95)

Field was calling for nothing less than an open-ended exploration of the meaning of the rights of "a citizen" and "a free man" and a reconception of the Constitution as a higher law guarantor of those emergent understandings. To say that this reading involved a reconceptualization of the constitutional order is an understatement. In Field's reading, all the provisions of the pre–Fourteenth 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 reimagining the horizons of constitutional understanding, is it properly considered an amendment rather than an outright replacement of the Constitution itself? Employing Richard Albert's (2018, 2019) categories, we might ask, what are the implications, from a hermeneutic perspective, of the tripartite distinctions among constitutional amendment, "dismemberment," and outright replacement? These distinctions raise the problem of the limits of constitutional amendment in light of a grounding commitment to the concept of constituent power. That is, the whole idea of constituent power is that it extends to the replacement of constitutional orders. But what are the limits of the category of "amendments" to which the hermeneutic of constituent power discussed in this article applies (leaving the consequences for incidents of dismemberment or replacement for another discussion)?

III. CONSTITUENT POWER AND THE LIMITS OF AMENDMENT

To repeat a point, at issue in the Miller-Field debate was not only the question of what the Fourteenth Amendment did but also what it *could* do. Can an amendment rewrite the entirety of a constitution or completely redefine the relationship between the text, its history, and its interpreters? Alternatively, the question can be reversed. Can a constitution *limit* the scope of its own subsequent amendments in order to prevent this kind of disruptive change? These questions raise issues of constituent power.

Andreas Kalyvas traces the idea of constituent power to Marsilius of Padua's text, *Defenso Pacis*. Confronted by rival claims of authority by Louis IV, the Holy Roman emperor, and Pope John XXII, Marsilus discovered a paradox. Each had an articulable claim to sovereignty in the sense of being an unruled 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).[7]

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.[8] 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

7. For different accounts of the history of the concept, see N. Srinivassan (1940), identifying the concept as arising in seventeenth-century English radicalism; and Marcia Rubinelli (2020), looking to the modern articulation of the concept beginning in the French Revolution.

8. For a discussion of early American thinking about constituent power see Frank (2010); see also William Partlett (2017).

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*, 2 U.S. at 454 [1793]). 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*, 2 U.S. at 455 (1793)).

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"). That concept is invoked in 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" (1897, 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 constituent power, the power of a people to create sovereignty.[9]

Yaniv Roznai has created a database of 735 constitutions containing unamendability provisions adopted between 1789 and 2013.[10] 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,

9. The relationship between constituent power and sovereignty is a consistent them in explorations of democratic theory, notably in the tradition initiated by Rousseau. For a review of these argument, see Joel Colón-Ríos (2020).

10. Interestingly, Roznai finds that unamendability provisions are becoming more common: between 1789 and 1944, only 17 percent of world constitutions enacted in this period included unamendable provisions (52 out of 306), whereas between 1945 and 1988, 27 percent of world constitutions enacted in those years included such provisions (78 out of 286). Out of the constitutions that 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).

Art. s 340, 342); or "the nature and constituent elements of the state" (Ecuador, 2008, Art. 441). The Indian Supreme Court has identified unamendable "basic structure" principles of the constitution, and the Constitutional 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 amend them" (*United Democratic Movement v. President of the Republic of South Africa and Others* (2002)). When one turns to the content of substantive unamendability provisions, even greater variation appears. Some such provisions preserve religious national identity, others secularism or pluralism. Democratic or monarchial 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. In this view unamendability provisions are preservative of a constitution's "true meaning" against the machinations of later generations. Ulrich Preuss identifies the ontological element implicit in an unamendability provision. Such limitations, he argues, "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, have the people 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?

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. For Wolin, the term "democracy" does not describe a form of government but rather a shared moment in which a people asserts a "political mode of existence" by virtue of their participation in public deliberations in opposition to an existing political order (1994, 23–24). 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 (2015) argues that the contradiction of constituent power contained in unamendability provisions makes them presumptively invalid, expressions that contradict the basic legitimating principles of the constitutional order in which they occur. Alternatively, one might argue that such provisions represent an exercise of constituent power above and beyond ordinary constitutional entrenchment, a kind of super-entrenchment that reserves a certain kind of constitutional change solely to the people rather than their representatives. 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 (Ackerman 2000).[11]

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?

IV. THE HERMENEUTICS OF CONSTITUTIONAL AMENDMENT: THREE APPROACHES REVISITED

At the outset were identified three possible ways of relating an amendment to the prior text. These can now be reformulated to include their implied hermeneutic elements:

- Amendments can be made to conform to the understandings of the original so that the resulting whole is understood within a historically fixed set of hermeneutic horizons (the religious hermeneutic approach in its classical exegetical 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

11. Indeed, it may be argued that the onerous requirements for amendment in accordance with Article 5 of the United States Constitution render the concept of constituent power meaningless except in the case of a complete replacement of the current constitution (Griffin 2007).

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 and others).

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. Exegesis and the Search for Truth: The Amended Text as Sacred Object

Jaroslav Pelikan presented an understanding of a constitution as a sacred text treated as the object of exegesis in accordance with the tradition of religious hermeneutics. "Object" may be the wrong word; in his description of a text that "speaks," Pelikan pointed to the idea of a constitution as an independent subject standing entirely outside the actions of its recorders and its interpreters alike. In this understanding, constitutional amendments must be made to conform to understanding of the original so that an amendment cannot fundamentally contradict the earlier text. Obviously this is not meant literally in terms of specific outcomes; the Fourteenth 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. The changes wrought by amendments are corrections of earlier errors to make the text a more authentic expression of its subjectivity, a concept captured in the phrase "the spirit of the Constitution." Thus specific 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 the description of the Eleventh Amendment as a restoration of a background understanding that the text was presumed to intend and the intentionality that was misrecorded in the drafting process. The same way of thinking informs Miller's *Slaughterhouse* opinion. For Miller the adoption of the Fourteenth 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 was noted earlier that Pelikan's description of a sacred text as a freestanding entity that "speaks" to its readers independent of its recorders appears in certain forms of constitutional argumentation, particularly Justice Scalia's version of textualist originalism. In fact, "recorders" or "redactors" are more appropriate terms than "authors" if one is referring to theories of original public meaning, just as they are the appropriate terms 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"—that is, canonical—constitutional understandings.

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 (Levinson 1988.) There is an irony that justices who engage in this priestlike 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 William Blackstone's description of common law rules as those with respect to which "the memory of man runneth not to the contrary." The legal historian John Baker records a fifteenth-century English magistrate who declared "the common law has been in existence since the creation of the world"; as Baker adds, "he probably meant it" (1979, 2).[12]

12. In the British case principles of constituent power operate in an ambiguous way in relation to the doctrine of parliamentary sovereignty. Historically, British writers argued that parliamentary sovereignty was an expression of constituent power uncontaminated by American-style ideas of republican representation; more recently, critics have argued that parliamentary sovereignty enforces a constrained and limiting conception of constituent power that is essentially undemocratic (Goldsworthy 1999; Green 2021).

B. Historicist Epistemology and the Search for Accuracy: The Amended 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 nineteenth century. Second, confronting the task of interpreting amendments, readers employing this approach will acknowledge that the historical meaning of the Fourteenth 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 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 he or she 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 eighteenth, nineteenth, and twenty-first 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" (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 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 conditions in our pursuit of epistemological rigor.

Another difficulty, already mentioned, is the likelihood that concerned Anti-Federalists 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" the provision (*Blaisdell* 290 U.S. 398, ___ (1934)). 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 constitutional hermeneutics.

C. Critical Engagement and the Search for Understanding: The Amended 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 is 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.

Not all amendments are obviously at issue. By definition, any constitutional amendment reflects the hermeneutic horizons within which it was generated, but 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 contain clear and intentional declarations of interpretive principles: examples include the Nineth Amendment of the United States Constitution, which warns against narrow textualism in the description of rights and the treatment of human dignity as a *Wesengehalt* principle of German constitutionalism.[13] 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 interpretation—specific to the historical self-understanding of "the people" exercising its constituent power. 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

13. (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).

of unamendability provisions, in particular, is clarified. The application of 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 (2015a) has suggested that the term is best understood conceptually rather than literally. In a subsequent exchange Tushnet (2015b) 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. 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 the amendment of a constitution imply a claim of constituent power that may be evaluated or contested. As a result, the question "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. It is 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 world-view 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. 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.

V. CONCLUSION: THE PEOPLE AND THE TEXT

Throughout this article, the discussion has been a level removed from the common debates about the proper role of constitutional judges or lawyers. Ultimately, the argument of this article is addressed to a broader concern, the relation of "the people" to a constitutional text. The treatment of "the people" as a legitimating concept rather than a concretely identifiable population is essential for a theory of constituent power. One can think of the idea in terms of Rousseau's description of three moments of the people: "the State when passive, the Sovereign when active, and Power when compared with others like itself." The active sovereign is the people engaged in constitution-making, "the action of the entire body acting upon itself—that is, the relationship of the whole to the whole, or of the sovereign to the State." While Rousseau uses the language of sovereignty, the concept he is deploying is more precisely captured by the term "constituent power," the power of a people to create sovereignty in the form that it appears in constituted states. Similarly, Rousseau identifies three moments in the political lives of citizens: "[T]hey collectively take the name people; individually they are called citizens, insofar as participants in the sovereign authority, and subjects insofar as they are subjected to the laws of the state" (Rousseau [1778] 1997, 50-1). The identification of individual citizens and legal subjects can be determined by the operation of laws; the identification of the collective "people" cannot be reduced to a positivistic fact precisely because it precedes the constitution of the entity that would generate such facticity.

The recognition of the central role that constituent power plays in the legitimation of constitution-making leads to a recognition of the same phenomenon at work in the process of constitutional amendment. This question arises regardless of which of the many different systems for constitutional amendment one is discussing. The variation among such systems is the subject of a considerable and deeply informative scholarly analysis with significant import for our understanding of the relationship between constitutional amendment and constituent power in a particular system (Albert 2019). For purposes of the present discussion, however, these distinctions are secondary, as the hermeneutic significance of an amendment occurs as an event, an embedded element of the moment of amendment however that moment occurs. This focus on the moment of amendment provides a fruitful point of entry because of the way it brings questions of hermeneutics into sharp focus. Questions about the nature of constitutional textuality that may be elided in discussions of constitutional interpretation *tout court* are inescapable when one confronts the question of the relation of an amendment to the prior text. Whatever

the merits of a philosophical hermeneutic approach for other objects of interpretation, the argument of this article is that in the case of a constitution, this kind of critical, reflective interaction is mandated as a consequence of accepting the idea of constituent power. The adoption of such an hermeneutic perspective, in turn, helps us resolve the problem of interpreting and amended constitutional text.

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