

Who Was Francis Lieber?

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IT WAS LATE JUNE of 1827. It had been virtually a year to the day since Jefferson had written his last letter, to Roger Weightman, proclaiming that "all eyes are opened, or opening, to the rights of man." In these words, he summed up the natural rights teaching that he, more than any other figure in history, bequeathed to America and the world. He would die a week later at Monticello, within hours of his old nemesis, John Adams, who, as a staunch Federalist, had shared Jefferson's doctrine as he cautioned against utopian extensions of it. The cosmopolitan prodigy Jefferson and the often dyspeptic but equally gifted Adams were as much united on matters of principle as they were divided on matters of practice. The same can be said of so many of the equal or lesser lights of the founding generation, the passing of which was symbolically marked by the near simultaneous deaths of these two old men. 1826 thus bracketed, as well as any year can bracket, this time and this generation.

In June of 1827, America, always a country obsessed with future, was looking forward more than backward. It was the middle of the hapless administration of

John Adams's son, John Quincy. The younger Adams had been elected in 1824 by the House, after losing the popular and electoral college votes in the first election in which popular votes really mattered. The era of Jacksonian democracy and the "popular mandate" lay in the immediate future and would change the course of American politics forever.

In this month, in Boston, Francis Lieber (1798-1872) stepped off a boat and into the New World, of which he would become a chronicler, as would his contemporary, Tocqueville, or, at the turn of next century, the Scotsman James Bryce. He was not quite 30 years old, with a doctorate earned after a brief enrollment at the great University of Jena (he had also attended Hegel's lectures at Berlin). This man, who as a boy had watched Napoleon's entry into Berlin in 1807 and been wounded eight years later at Waterloo, also found himself at a symbolic break with his, and Europe's, past.

Although perhaps the leading political scientist that America produced in the nineteenth century, next to Tocqueville himself, Lieber's life and works are virtually unknown, even to contemporary political scientists. This anonymity is especially surprising in light of the fact that Lieber was the first political scientist to be named as such, choosing for himself the title of Professor of

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History and Political Science when he accepted a chair at Columbia in 1857. Even a minor renaissance in Lieber scholarship¹ in the last decade or so has done little to bring Lieber's life and works to the attention of the scholarly community. If he is known at all, it is as a result of his authorship of what is colloquially referred to as "Lieber's Code" (1863), the manual of battlefield ethics he drafted at the behest of Lincoln and which still occupies a prominent place in the literature of military ethics and the legal conduct of war. But from his earliest days in America, Lieber was an intellectual force to be reckoned with. His origination and editing of the first major multi-volume American encyclopedia, the *Encyclopaedia Americana* (13 vols., 1829-1833), enabled him to enlist the aid and to secure the friendship of some of the leading minds of his time. The many contributions on legal topics in this set were written by none other than Joseph Story, one of the greatest jurists and legal commentators of the century.

At the broadest level, it can be said that Lieber's primary interest was in the conditions conducive to the maintenance of political liberty and the rule of law, both in his adopted country and generally. The best access to Lieber's thought is provided by his three most significant scholarly works.² He wrote his *Manual of Political Ethics* (2 vols., 1838-1839; I will henceforth refer to this work as his *Ethics*) while still teaching at what is now the University of South Carolina. In this work, he discussed the moral formation and obligations associated with citizenship in a free society. An outgrowth of this work appeared in the form of his *Legal and Political Hermeneutics* (referred to henceforth as his *Hermeneutics*). Various redactions of this work were published in 1837, 1839, and, posthumously, in 1880. Lieber's goal in the *Hermeneutics* was to provide rules of interpretation useful to the jurist, politician, and citizen, which would at once increase veneration for constitu-

tional government as it minimized the danger of arbitrary government. Neither of these matters was of merely academic concern in an era marked by the nullification crisis, uncertainties about the federal principle in general, and the continued existence and possible spread of slavery, especially throughout the as yet unsettled West. Finally, Lieber penned his most mature reflections on political philosophy in *On Civil Liberty and Self-Government* (2 vols., 1853; referred to henceforth as his *Civil Liberty*), a work designed to bring to light the vital importance of decentralized institutions for political liberty.

It is the most overtly political dimensions of Lieber's *Ethics*, rather than its extensive discussions of the moral character, that most clearly enable us to see the relationship of this work to the *Hermeneutics* and *Civil Liberty*, and therefore to assess the main currents of Lieber's thought as a whole. In the *Ethics* we see Lieber's concern for constitutionalism as a check on power *and* as a mechanism to give "civic dignity and political consciousness to a people." In Lieber, as in Aristotle, the individual is not rigidly autonomous from politics. Constitutions may form a people who have not otherwise been formed by traditional ties. Constitutions play this formative role even in times when patriotism runs low and apathy is the order of the day. The constitution is only a means rather than an end in itself, the latter being the good life for man in his social context. The centrality of the state and its sovereign power (including the nationalist ties that bind the people to this sovereign power) is in keeping with much political thought in the aftermath of the French Revolution, which encouraged the already developing modern view that the state is responsible for all aspects of human life, and must be invested with the power to discharge this responsibility. Later in the nineteenth and early twentieth century, this argument would

be adopted, with a much more consciously progressive twist, by another great political scientist—Woodrow Wilson.

If the constitution is the heart, a system of arteries is needed to disperse society's lifeblood. All decent societies require mediating institutions, and constitutional democracies in particular require an independent judicial branch, which is the most important conciliating mechanism in the state so long as it is a "serf" of the laws. Only in this way can human individuality prevail in the face of strong government and abstract, general laws. It is only in the application of the law that particulars become important, to the point of allowing jury nullification when a law or its application is contrary to man's "original and natural" sentiments and, therefore, to the very purposes for which government is established.

Aristotle's notion of man as political animal possessing the gift of speech resurfaces, in partial form, in Lieber's *Hermeneutics*, which states that there "is a primeval principle in man which ever urges him with irresistible power to represent outwardly what moves him strongly within, a pressing urgency of utterance." Lieber seems here (unlike Aristotle) to be talking about speech *qua* speech, not speech as a manifestation of universal reason. As Lieber says that words are the primary "signs"—that is, outward manifestations of the soul's inner workings and intentions—used in political expression, his *Hermeneutics* purports to be a general theory of interpretation for things political. The word hermeneutics is derived from Hermes, the messenger of the Greek gods, and refers to the art of interpretation and construction. In contemporary parlance, it is most often associated with European thinkers such as Schleiermacher (Lieber's teacher), Dilthey, and their followers, who insist on the impossibility of any interpretive enterprise reaching finality. In what has become the

accepted "postmodern" position, we lack knowledge of the meaning of words and the things to which they apparently refer because of our incomplete knowledge of human discourse (which is inherently conventional), and psychology, among other things.

Lieber, by contrast, wants above all to provide a system whereby words can retain common meanings that, in turn, sustain a common political life. This is not to say that he does not recognize, and indeed, he explicitly recognizes, that words must bear new meanings as social circumstances and relations change. Nevertheless, he believes politics to be the science of sustaining the state as an organism that is more than the sum of its parts and that requires a vocabulary that is not subject, at any given time, to as many renderings as there are individuals to render it. In this sense, he anticipates, and rejects, postmodern conceptions of politics. For Lieber, political hermeneutics ought not to be a function of partisanship, commitment, or power, but objective science (albeit, an historicized science).

Lieber's first and third substantive principles of interpretation are, respectively, that words in a given context can only have "one true sense," and that true sense is what the utterer of the words *intended* to convey by them. While Lieber's insistence that there is only *one* such sense may unnecessarily and wrongly constrict his theory, there is clearly no room in Lieber for the disappearance of authorial intent altogether. Lieber also insists we apply common sense and good faith to our interpretive endeavors (a desideratum that many would find conspicuously lacking in fashionable legal and literary interpretive enterprises today). Caprice in politics can be prevented through obeisance to properly interpreted law, although, as Lieber notes, "lawyers have at times formed an almost invincible legion of harpies." Hence the

need for interpretive rules to constrain the interpreters. An imprudent judge exemplifies an anti-democratic sentiment, and, in failing to be controlled or self-controlled, violates the desiderata of the *Ethics* as well as the *Hermeneutics*.

Lieber would have been unsympathetic to, but perhaps not surprised by, the strained and frankly bizarre interpretations that have given us such constitutional doctrines as the “high wall of separation” between church and state and the broad “right to privacy,” neither of which doctrines is to be found in the words or intent of the Constitution. His sixth principle of interpretation holds that the intentions behind words are to be understood as those that are “probable, fair, and customary,” which puts him squarely at odds with exponents of a “living Constitution.” Lieber also postulates that the most general or highest intent of a text is to govern over particular words or sets of words which seem at odds with this intent. As Aquinas would say, the lawgiver’s general intent—the good of the common weal—should not be frustrated by the too literal construing of a particular.

Of course, Lieber does not deny that hermeneutics at some point must move out of the realm of *interpretation*, strictly speaking, and into the realm of *construction*. As historical circumstances change, cases not provided for by a text are bound to crop up. It is certainly the case, for example, that constitutional construction requires “drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text.” (To give but one simple example, the U.S. Constitution provides that “The President shall be Commander in Chief of the Army and Navy of the United States.” The only reasonable construction of the Constitution is that he is also Commander in Chief of the Air Force, although one could not

conclude this from mere interpretation of the words themselves.) As the key to proper interpretation is reliance on intention, so the key to proper construction is reliance on analogy.

The state for Lieber is an organism, and it is an organism that can only survive in recognizable form by the essentially conservative interpretation and construction of its basic law, which expresses the national consciousness. Thus conceived, the state, and the discipline of political science which ministers to it, cannot be neutral. Lawgivers create a being with a distinct *telos* (fully revealed only with the passage of time), and subsequent interpreters of these lawgivers, including most especially citizens, must be conscious of the fact that their purpose is to preserve this being so they themselves might live as who they are. In one sense, as James Farr has pointed out, Lieber represents the original understanding of American political science. “In the period roughly from the debates over the ratification of the Constitution in 1787-1788 to the creation of the American Political Science Association in 1903, we witness a transformation in the most fundamental understanding of the nature and purposes of political science. It undergoes a metamorphosis from a popular, pre-professional discourse in the service of republican principles to an institutionalized, academic discipline attentive to the expansion of the administrative state.”³

In another sense, however, Lieber is peculiarly outside the original understanding, largely due to his Germanic emphasis on the state as historical organism rather than product of rational human choice. In this organic conception, he portends the growth and justification of the administrative state, whose job is to tend to the organism on the assumption that its molecules, including individuals, can and ought to be controlled through the scientific application of political and economic stimuli. Indeed, the

importance Lieber places on the “public welfare” and construction that favors the “nonprivileged or “unfavored” reinforces this portent.

His hermeneutics, whatever their merits, do not appear to disclose any horizon of natural right, natural law, or natural rights outside and above the ends of a particular state. A free state requires the mediation of historically situated texts and institutions. The Declaration of Independence helps establish American national consciousness, according to Lieber, albeit it is merely an expression of the Enlightenment *Zeitgeist*, which must be understood as a regulative principle of interpretation in its own right. Interestingly, in a passage describing moral obligations as eternal and immutable, but requiring acts that change with circumstances, Lieber once again sounds distinctly Aristotelian. But the moral obligation to which he refers is patriotism. Lieber thus obliterates the distinction—essential for classical natural right—between the good citizen and the good man.

Another line of conservative critique of Lieber might juxtapose his hermeneutics with those of present-day Supreme Court Justice Antonin Scalia, clearly a leader among conservative jurists. Scalia subscribes to a “text and tradition approach” to constitutional interpretation. Scalia argues for an “objectified intent” that is not dependent on the motives or specific intent of the authors of the constitution (Lieber seems less rigid in his insistence on objectified intent, although he sometimes embraces it). For Scalia, the art of constitutional hermeneutics involves the study of contemporaneous writings (e.g., *The Federalist*) only because they show how the text was originally understood, not what the intentions of the framers were, for such intentions can never be authoritative. He maintains that a court’s delving into specific intent or motives is the jurisprudential equivalent of Nero’s posting edicts on high so that

they cannot be read by the common folk.

Traditions—the actual political choices made by citizens—also show how a constitution was and is understood. Contrary to Lieber, tradition depends not on an organic wholeness that somehow has existence outside the actual political choices of citizens. While postmodernists and contemporary liberal exponents of a “living Constitution” approach to jurisprudence will resent Lieber’s efforts to establish that words do, in fact, have meaning, conservatives such as Scalia might reasonably ask if Lieber’s *Hermeneutics*, in its emphasis on text and the character of the utterer, is all text—understood as interpreted intent in the service of the organism—and no tradition. Such an approach would probably not be out of keeping with the civil law system still dominant on the continent of Lieber’s birth, or the German idealism evident in his thought. But does it have quite the same grounding in reason, common sense, and experience as a constitutional or statutory interpretation in which both text—understood clearly as *objectified* intent—and tradition remain important? It is possible that Lieber’s is an idealist conservatism that obliterates the individual as it attempts to serve the greater good.

Lieber’s *Civil Liberty* raises the same questions in its insistence on the organic development of law out of the pluralism of institutions and centers of power that define America. Lieber emphasizes his concern for individual rights realized by the U.S. Constitution, but claims that these rights are to be understood as time-bound artifacts, as is the Constitution itself. The relationship between nationalism (which Lieber favors) and centralization (which he opposes) can only be described as obscure, but there are Tocquevillian elements to his thought. There is no question that he is engaged in the essentially conservative effort to conceive nationalism in terms of decen-

tralized spontaneity that allows private actors not to be overwhelmed by centralized institutions.

Lieber makes much of the contrast between Gallican and Anglican liberty, American liberty being a species of the latter. The former is a liberty sought through government and organization generally, with a minimum of mediating institutions and an undivided popular sovereignty. Without love of institutions, the Gallican tends to love but one man, or all individuals equally, and "all extremes in politics meet." With respect to the art of judging, lack of prudence and lack of the discipline that rules can provide are nothing other than the Gallican spirit made real. Anglican liberty, by contrast, is a liberty of decentralization, pluralism, self-reliance, and voluntary association, wherein the government does not act as a leader of men. It relies on, among other things, representative institutions, trial by jury, and the common law. American liberty is unique, and one might say further "Anglicanized," in the concern of American institutions and ideals for federalism, separation of church and state, *written* constitutionalism, political equality, and qualified but broad democracy. Anglican liberty is, in short, conservatively grounded in the here and now:

There is an immense difference between admiring liberty as a philosophical speculation, loving her like an imaginary beauty by sonnet and madrigal, and uniting with her in real wedlock for better and for worse. Liberty is the loved wife and honored companion, through this earthly life, of every true American and Englishman, and no mistress for sentimental sport or the gratification of spasmodic passion, nor is she for them a misty nymph with whom a mortal falls in consuming love, nor is she the antiquated portrait of an ancestor, looked upon with respect, perhaps even with factitious reverence, but without life-imparting actuality.

In emphasizing the organic character of individuals, institutions, and the state, Lieber is indeed a conservative antidote to the desiccated liberalism of theorists of abstract individual rights, such as John Rawls, who would root our liberties in nothing more than social consensus and a privileging of human autonomy. Nationhood, like marriage, is more than an agreement among fully independent consenting adults. However, Lieber's writings also mark perhaps the beginning of the end of America's weddedness to the laws of nature and nature's God, insofar as they fail to disclose transhistorical standards. The very interpretive enterprise to which Lieber seeks to give direction has come to be, under the impetus of such historicism, Frankenstein's monster. In our (especially our courts') hermeneutic extension of the equality principle, do we not become more and more Gallican with each passing year?

The most fascinating aspect of Lieber's thinking is that it straddles two worlds. In one sense Lieber is rooted in the concrete and appears to be an advocate of a traditional political science of Aristotelian prudence; in another, he subscribes to a kind of Hegelian dialectic of historical unfolding. The discipline of political science, and America itself, has still not resolved the tension between these two streams of thought. Leo Strauss, most notably, warned us of the dangers of German thought by reminding us of its creation of the "historical sense" at the expense of natural right, which sense leads quickly enough to "unqualified relativism." Francis Lieber shows how this thought—even when it most fully Americanizes itself, grounds itself in a concern for political liberty, and claims conservative credentials—nonetheless remains highly ambiguous. For this reason alone, he is worthy of our reconsideration.

1. See, for example, James Farr, "Francis Lieber and the Interpretation of American Political Science," *Journal of Politics*, Vol. 52, No. 4 (November 1990), 1027-1049; Steven Alan Samson, "Francis Lieber on the Sources of Civil Liberty," *Humanitas*, Vol. 9, No. 2 (1996); "A Symposium on Legal and Political Hermeneutics," *Cardozo Law Review*, Vol. 16, No. 6 (April 1995), 1879-2351, which reprints the third edition of Lieber's *Legal and Political Hermeneutics* and includes ten interpretive essays and articles, along with an annotated bibliography of Lieber's works. 2. These works are available as follows: Francis Lieber, *Manual of Political Ethics*, 2nd rev. ed., 2 vols., ed. Theodore D. Woolsey (Philadelphia, 1875); Francis Lieber,

Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics, with Remarks on Precedents and Authorities, 3rd. ed., as reprinted in *Cardozo Law Review*, Vol. 16, No. 6 (April 1995), 1883-2105; Francis Lieber, *On Civil Liberty and Self-Government*, 3rd. rev. ed., Theodore D. Woolsey (Philadelphia, 1877; photo reprint, New York, 1972). See also *The Miscellaneous Writings of Francis Lieber*, 2 vols., ed. Daniel C. Gilman (Philadelphia, 1880) for his "Instructions for the Government of Armies of the United States in the Field" ("Lieber's Code") and various other works. 3. James Farr, "Francis Lieber and the Interpretation of American Political Science," 1028.

The Swords of Imagination: Russell Kirk's Battle With Modernity

Gleaves Whitney

"IMAGINATION RULES THE WORLD," Russell Kirk used to say.¹ He meant that imagination is a force that molds the clay of our sentiments and understanding.² It is not chiefly through calculations, formulas, and syllogisms, but by means of images, myths, and stories that we comprehend our relation to God, to nature, to others, and to the self. That is why William Wordsworth referred to the imagination as "The mightiest lever known to the moral world." And that is why Dr. Johnson, in an earthier definition, quipped that imagination is "The thing which prevents [a man] from being as happy in the arms of a chambermaid as in the arms of a duchess."

In his memoirs—titled, significantly, *The Sword of Imagination*—Kirk recurs to martial imagery to characterize his life. Early on, Kirk (writing in the third person) says that he drew "the sword of imagination" to assail the "sensual errors of his time." "In the heat of combat, he learned how to love what ought to be loved and how to hate what ought to be hated." He described his battle against modernity as a "Fifty Years' War" that was "hard fought." To the end, he de-

picted himself as a "battered knight-errant who meant to die in the saddle."³

Readers of these lines may be tempted to think of Kirk as a type of Don Quixote—not an illogical association.⁴ There was something undeniably quixotic about Kirk's life-work. He was, after all, a conservative writing in a liberal nation; a premodern tilting at the modern. There was also a self-deprecating quality about his manner. He wrote that, as his talents were largely limited to writing, speaking, and editing, "The only weapon with which he was skilled was the sword of imagination." With it, "he might demolish some molehills, if not move mountains."⁵

It is thus fitting to identify Kirk with Quixote, arguably the most imaginative character ever created. Cervantes's knight-errant imagined his role into existence, strapped on a sword, and embarked on a journey that was at once anachronistic and timeless—anachronistic in that the age of feudalism had passed; timeless in that the code of chivalry embodied the "Permanent Things," and thus had lost none of its relevance with the passage of time.

Likewise the knight-errant Russell Kirk imagined his role in existence, set out on a modern-day crusade, and wielded the sword of imagination to defend the permanent things. Kirk was no stranger to military service—he was a soldier during

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