

## CONTRIBUTIONS

### WILLIAM GARDINER HAMMOND AND THE LIEBER REVIVAL

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#### INTRODUCTION

Francis Lieber's *Legal and Political Hermeneutics* was first published in serial form in 1837.<sup>1</sup> Jacksonian populism was then at high water and American judges and lawyers were acknowledged as politicians. Interpretation of legal texts was seen as a political activity. His work was so well received that a hard cover edition was published in 1839.<sup>2</sup>

The edition presented in this issue was prepared by William Gardiner Hammond in 1880.<sup>3</sup> Jacksonian politics were then in retreat before a rising tide of technocratic professionalism. Many lawyers and judges were disowning the political mission of American law and aspiring to be technocrats. To them, interpretation of legal texts was to be an apolitical activity. Both the 1837 and 1880 editions were responsive to their contrasting environments.

#### I. LIEBER, 1837

*Hermeneutics* recounts the moral obligations of officers who must interpret legal texts and was written in full recognition that those who interpret are engaged in creative work. A judicial duty that Lieber identified is an obligation to strive for equality among like cases decided by different judges. Judges performing that duty must necessarily communicate and share meanings, lessening the indeterminacy of controlling texts: "Words may mean very indefi-

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<sup>1</sup> Francis Lieber, *On Political Hermeneutics, or on Political Interpretation and Construction, and also on Precedents*, 18 AM. JURIST & L. MAG. 37 (1837); Francis Lieber, *On Political Hermeneutics—Precedents*, 18 AM. JURIST & L. MAG. 281 (1838).

<sup>2</sup> FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* (photo. reprint 1970) (2d ed., Boston, Charles C. Little & James Brown 1839).

<sup>3</sup> FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS* (William G. Hammond ed., 3d ed., St. Louis, F.H. Thomas & Co. 1880) (1837), *republished in* 16 *CARDOZO L. REV.* 1883 (1995). [In subsequent citations, the page number as it appears in the republication will be given in brackets following the page citation to the third edition.]

nite things; it is by practice only, that they acquire definite significations."<sup>4</sup>

Whether judges communicating and sharing interpretations of legal texts, as Lieber describes, are thereby "making law" is, I suppose, a question as old as Hammurabi. Lieber did not find it necessary to answer it;<sup>5</sup> if pressed, he likely would have said that the answer depends on when and where you ask and, of course, what you mean by "law."

In 1837, few American lawyers and judges had read John Austin,<sup>6</sup> but all had cut their teeth on Blackstone.<sup>7</sup> If pressed to answer the enduring question, most would have said with Blackstone that judges do not make law, but find it. Yet few who thought about law in America doubted that their judges while finding law were creating meanings of legal texts, or that finding law was at least in part a political act. Anyone who read could see that new meanings of legal texts were the product of the labors of the Marshall Court, and as such embodied political judgments. The same could be seen in the work of James Kent and his colleagues on the New York Court of Appeals, or of the Shaw Court in Massachusetts, or the Robertson Court in Kentucky, or their brethren on other state supreme courts, all of whom were busily filling legal voids left by the rupture with England. Visibility was assured by the advent of published opinions of the court, an invention of Justice Marshall, quickly adopted in every state,<sup>8</sup> and a form of com-

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<sup>4</sup> *Id.* at 197 [at 2028].

<sup>5</sup> He straddled thus: "If there has been a series of uniform decisions on the same point, they ought to have the force of law, because in this case they have become conclusive evidence of the law." *Id.* [at 2028-29].

<sup>6</sup> Austin was an associate of Jeremy Bentham and thus a severe critic of Blackstone. In brief, he advanced the theory that the sovereign has commissioned judges to make law according to a system of internal logic, eschewing considerations of natural law. "The existence of law is one thing, its merit or demerit another." 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 214 (Robert Campbell ed., 5th ed., rev. & ed., London, John Murray 1885) (*The Province of Jurisprudence Determined*, Lecture 5). The work was first published in 1832, but was not circulated in the United States until 1861.

<sup>7</sup> William Blackstone's *Commentaries on the Laws of England* was published in London in 1765. It was the most widely read law book in America in Lieber's time, usually in an edition prepared by St. George Tucker and published in Philadelphia in 1803.

<sup>8</sup> The first appearance of the opinion of the court came in the first decision rendered after the appointment of Justice Marshall. The story is told in 2 GEORGE L. HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815, at 382-87 (Paul A. Freund ed., 1981). There was a precedent for such a device in the opinions of the Privy Council giving advice to the Crown, but the Council was not primarily a judicial institution, at least until the Privy Council Appeals Act of 1832. See REPORT OF THE SELECT COMMITTEE OF THE HOUSE OF LORDS ON THE APPELLATE JURISDICTION 27 (1872). See generally John P.

munication leaving no room to doubt the political content of a court's decisions. For example, while Justice Story's opinion in *Swift v. Tyson*<sup>9</sup> did not put the matter so plainly, no reader could doubt that the real issue was *which* judges should make the political decisions at issue.

Judicial lawmaking was a sore point with many. The Marshall Court was lambasted for its alleged abuses of power in freely interpreting the Constitution.<sup>10</sup> State constitutional crises arose in New Hampshire in 1816<sup>11</sup> and in Kentucky in 1825<sup>12</sup> from strong differences of view on the role and responsibility of the courts. Some of those offended by the perceived arrogance of judges pressed for codification as a means of curbing their lawmaking activity; they succeeded in causing many a statute to be written,<sup>13</sup> and in 1837, they were making steady progress. Many codifiers were Jacksonians who also pushed two other schemes to cabin the power of professional judges: one was to make them accountable to the democratic electorate, the other was to entrench the jury's role in deciding issues of fact, such issues being defined broadly.<sup>14</sup> Also a part of the Jacksonian program was the reduction or elimination of standards for admission to the bar; a purpose of this initiative was to equalize among citizens and factions the opportunity to influence political decisions being made by courts.<sup>15</sup>

Lieber, although viewed as a dangerous radical in his native Prussia, was in America a Whig befriended by Henry Clay,<sup>16</sup> Jo-

Dawson, *The Privy Council and Private Law in the Tudor and Stuart Period: II*, 48 MICH. L. REV. 627 (1950).

<sup>9</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>10</sup> See, e.g., JOHN TAYLOR, CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED (photo. reprint 1970) (Richmond, Shepard & Pollard 1820).

<sup>11</sup> The New Hampshire legislature, in its effort to secure control of Dartmouth College, fired every Federalist judge in the state. The story is told in LEON B. RICHARDSON, HISTORY OF DARTMOUTH COLLEGE 330-31 (1932).

<sup>12</sup> Angered at a decision favoring the rights of creditors, the legislature dismissed the Supreme Court and established a new one. The story is told in THOMAS C. CHERRY & ARNDT M. STICKLES, THE STORY OF KENTUCKY 218-19 (2d ed. 1945).

<sup>13</sup> See generally CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981).

<sup>14</sup> See generally MARVIN MEYERS, THE JACKSONIAN PERSUASION: POLITICS AND BELIEF (1957).

<sup>15</sup> See *id.* at 174-75, 184; see also ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 232-37 (1953).

<sup>16</sup> Henry Clay wrote Lieber in 1838 extolling the *Hermeneutics* volume in some detail. See THOMAS S. PERRY, THE LIFE AND LETTERS OF FRANCIS LIEBER 126-28 (Boston, James R. Osgood 1882).

seph Story,<sup>17</sup> and James Kent.<sup>18</sup> *Hermeneutics* was warmly applauded by such eminent friends of the author and the work may therefore be read as an effort to calm the waters roiled by Jacksonian assaults on the elite status and power of judges. Lieber did not oppose all Jacksonian reforms<sup>19</sup> and was much too wise to deny the creative role of judges, but in *Hermeneutics* he made it less threatening to populist interests by expressing the moral constraints which set parameters to the power of interpretation. His central point was that judges and others interpreting legal texts have moral duties to subordinate their personal preferences and to determine textual meanings disinterestedly, abiding by the values and expectations of the people they govern.

The duties of judges interpreting legal texts are distinct from those applicable to legislators elected by the people to make law. This is most clear in chapter 7, where Lieber is careful to distinguish legal from political precedent, and judges from executives. Lieber more fully recounted the duties of legislators in his *Manual of Political Ethics*, published in 1838, but these are less restrictive.<sup>20</sup> Legislators are elected to advance a particular point of view and have no duty of obedience to the decisions of their predecessors. In the constitutional scheme, it ought to make a difference who our legislators are.

On the other hand, Lieber argues, there is but one correct meaning for each legal text, one that can and should be perceived by all faithful and thoughtful interpreters whatever their class or faction.<sup>21</sup> The correct interpretation is the one giving the text the meaning best reflecting the aims and values of the culture served. In this view, the springs of creativity flow chiefly from the culture, not from the individual judge. To the extent that Lieber was right

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<sup>17</sup> Justice Story commended the creativity of Lieber's *Manual of Political Ethics*, calling it "one of the best theoretical treatises on the true nature and objects of government," and he accordingly recommended an appointment for Lieber at Harvard University. Theodore D. Woolsey, *Preface to the Second Edition* of 1 FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* 3 (Theodore D. Woolsey ed., 2d ed. rev., Philadelphia, J.B. Lippincott & Co. 1875) (1838) (quoting Justice Story).

<sup>18</sup> Chancellor Kent commended Lieber's work "in the strongest terms," observing that "when he read Lieber's works he always felt that he had a sure pilot on board, however dangerous the navigation." *Id.* (Woolsey quoting Chancellor Kent).

<sup>19</sup> He was for a time supportive of the election of judges, but changed his mind. See FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* 238-45 (Theodore D. Woolsey ed., 3d ed. rev., Philadelphia, J.B. Lippincott 1874) (1853). His defense of the institution of the jury was ardent.

<sup>20</sup> 1 FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* (Boston, Charles C. Little & James Brown 1838).

<sup>21</sup> LIEBER, *supra* note 3, at 108 [at 1966].

in this central point, Jacksonians mistrusting the judiciary could relax their concerns because it mattered little whether judges were Clay Whigs or Jacksonian Democrats.

Lieber recognized that this reassurance required qualification. That judges have moral duties to suppress their personal impulses does not tell them which meaning among alternatives to derive from a particular text. The aims and values of the culture are not always obvious, and are seldom so in matters of earnest conflict. It matters who decides since Whigs and Democrats do not read texts in precisely the same way. Nevertheless, a unifying aim of *Hermeneutics* is to make it matter as little as possible whether a judge is personally of one persuasion or another. If his principles are universally observed, it will still matter who the judges are, but it will matter less, maybe much less, than mistrustful Jacksonians suppose. For Lieber, this was the meaning of the supremacy of law.<sup>22</sup>

In identifying principles of interpretation, Lieber drew not only on classical sources, but on Protestant theological works. As a young man in Germany, Lieber had studied the works of, and was influenced by, Protestant theologians<sup>23</sup> who were at pains to convince themselves that divine texts can be correctly interpreted by faithful intelligence, that allowing ordinary believers access to newly printed scriptures would not result in wildly various interpretations destructive of religious faith. Lieber recognized that the discipline theologians had developed to standardize interpretation of the Bible applied as well to the work of courts, especially the courts of a republic enforcing the commands of a self-governing people. If Lutheran ministers preaching false doctrine from the Bible were viewed as faithless heretics, Lieber could disdain self-indulgent judges who disregarded correct meanings as "faithless" usurpers.

Despite widespread admiration for his work, Lieber could scarcely have hoped to lay the ancient and ubiquitous issues of judicial lawmaking to rest. Indeed, in the years following publication of his *Hermeneutics*, even greater political interest was focused on his subject. Morton Horwitz reports a general "shift from an instrumental to a formalist legal consciousness"<sup>24</sup> that began about

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<sup>22</sup> LIEBER, *supra* note 17, at 128.

<sup>23</sup> FRANK FREIDEL, FRANCIS LIEBER: NINETEENTH-CENTURY LIBERAL 21-22 (photo. reprint 1968) (1947).

<sup>24</sup> MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 261 (1977). Perhaps Lieber contributed to such a shift if it occurred; while he cannot be aptly described as a formalist, *Hermeneutics* may have helped constrain rampant instrumentalism.

1840. Many judges required to enforce the Fugitive Slave Law were faced with a moral dilemma when their professional obligations to obey legal texts conflicted with their deeply held convictions about slavery. Whichever choice they made, they were not only distressed, but also often pilloried.<sup>25</sup> In 1854, Edward Loring was denied confirmation of his appointment as a professor of law at Harvard University because he had enforced the law in obedience to its command despite its brutal result.<sup>26</sup> Then, in 1857, came the decision of the Supreme Court of the United States in *Scott v. Sandford*,<sup>27</sup> a supreme example of what Lieber had depicted as faithless interpretation.<sup>28</sup> That decision became an important item in the Lincoln-Douglas debates of 1858, and one can therefore find traces of hermeneutical contentions sprinkled throughout them.<sup>29</sup> For more than a generation, that case would stand in the minds of American lawyers as a premier example of the abuse of power through judicial misinterpretation of the constitutional text.

## II. HAMMOND, 1880

The 1880 edition, however, cannot be explained as a belated response to populism or the issue of slavery. Hammond had something else in mind.<sup>30</sup>

Although his name is no longer known to many, Hammond was an eminent person in 1880. Born in 1829,<sup>31</sup> he was the son of a Rhode Island lawyer who was among the leaders of the Demo-

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<sup>25</sup> See William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

<sup>26</sup> The story is told in 2 CHARLES WARREN, *HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 187-200* (1908).

<sup>27</sup> 60 U.S. (19 How.) 393 (1856).

<sup>28</sup> The elasticity of Lieber's teaching is illustrated by this case. Thomas Barnes finds support for the opinion of the Court in Lieber's injunction against free construction of the Constitution. Thomas G. Barnes, *Introduction to FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS* 18 (Thomas G. Barnes ed., 1994) (2d ed. 1839) (introduction separately published).

<sup>29</sup> See particularly Abraham Lincoln, Speech at Springfield (June 17, 1858), in *POLITICAL DEBATES BETWEEN HON. ABRAHAM LINCOLN AND HON. STEPHEN DOUGLAS* 54 (Columbus, Follett, Foster & Co. 1860).

<sup>30</sup> LIEBER, *supra* note 3. Perhaps an authoritative answer to the question of Hammond's purpose in 1880 could be supplied by a person exploring his collected papers residing in the archives of the University of Iowa. That task is labor intensive and could well yield no answer better than the speculative one that I provide here. I salute the patience and courage of the person who gives those papers the sustained attention they deserve.

<sup>31</sup> The biographical information is drawn from Arnold J. Lien, *William Gardiner Hammond*, in 4 *DICTIONARY OF AMERICAN BIOGRAPHY* 211 (Allen Johnson & Dumas Malone eds., 1960); Emlin M'Clain, *William Gardiner Hammond*, in 7 *GREAT AMERICAN LAWYERS* 191, 230 (William D. Lewis ed., 1909).

cratic Party in that state. Democrats of that time and place were animated by the populism of Andrew Jackson. They were generally of the "Barnburner" persuasion,<sup>32</sup> favoring "free soil, free schools, free trade and free labor."<sup>33</sup> The senior Hammond was, despite this rustic populist connection, a man of impressive learning who transmitted to his son a strong attraction to the lamp.

At an early age, young Hammond was a reader of serious work; before he was thirteen, he and his father read Edward Gibbon's *Decline and Fall of the Roman Empire* aloud to one another.<sup>34</sup> He became fluent not only in Latin and Greek, but also in French and German, and could read other European languages as well. He attended Amherst College, and was the valedictorian of his class in 1849. Another distinguished member of that class as well as intimate friend of Hammond was Julius Seelye, later a distinguished political scientist and president of Amherst.

After college, Hammond prepared for the bar in the office of a Brooklyn lawyer; while there, he contributed to the editorial page of Walt Whitman's newspaper and attended divine services conducted by Henry Ward Beecher. He remained and practiced law in Brooklyn long enough to form a modest opinion of the talents and energies of his brothers at the bar. In 1856, he left his practice to study at Heidelberg, where for two years he indulged an interest in legal history. Deprived of means by the financial crash of 1857, he returned to his practice for several years, this time in Manhattan, where he found his brothers at the bar no more competent than those of the Brooklyn bar. By this time, his Jacksonian sentiments had been moderated by an overlay of elitism.

In 1860, his brother, then a civil engineer building a railroad in Iowa, offered him employment on the construction project. Entranced by an outdoor life, he laid aside his stovepipe hat and kid gloves for physical endeavor. After sufficient exposure to hard labor to see the deficiencies of that form of existence, he tried prac-

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<sup>32</sup> For an account, see HERBERT D.A. DONOVAN, *THE BARNBURNERS* (1925).

<sup>33</sup> This slogan was the expression of William Leggett. He was a seaman, poet, and theater critic before becoming the editorialist for the *New York Evening Post*, which he owned with William Cullen Bryant. He died in 1839 at the age of 38. His friend and admirer, Theodore Sedgwick Jr., promptly collected and published his work in *A COLLECTION OF THE POLITICAL WRITINGS OF WILLIAM LEGGETT* (Theodore Sedgwick Jr. ed., New York, Taylor & Dodd 1840). Leggett's influence was assessed in Richard Hofstadter, *William Leggett, Spokesman of Jacksonian Democracy*, 58 *POL. SCI. Q.* 581 (1943). For a sampling of his work, see *DEMOCRATICK EDITORIALS: ESSAYS IN JACKSONIAN POLITICAL ECONOMY BY WILLIAM LEGGETT* (Lawrence H. White ed., 1984).

<sup>34</sup> EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* (Modern Library n.d.) (1826).

ticing law in an Iowa village. He soon interested himself in Iowa politics, married an Iowa woman, and in 1863 opened a law practice in Des Moines. He was promptly designated as the official Reporter to the Supreme Court of Iowa, and sought to build a practice as an advocate before that court. In 1867, he established a new journal, *The Western Jurist*, then the only legal periodical published west of the Alleghenies. He also joined two members of the Iowa Supreme Court as a teacher at the Iowa Law School established by them. Among the subjects he taught his students were legal history and comparative law. In this activity, designed to prepare his students for public life, he followed the path of many distinguished antebellum American law teachers, including Lieber.<sup>35</sup>

In 1869, the Regents of the State University at Iowa City invited Hammond to bring the school and its students to the university. He moved to Iowa City and was appointed "chancellor" of the university's law department. It may be of interest to know that in its first year the new school became the first university law school to admit women. We are told that "women in society" in Dubuque, presumably with Hammond's blessing, promptly enrolled in order to give "countenance" to the younger women studying law.<sup>36</sup>

Although somewhat reclusive in relation to his colleagues on the university faculty, Hammond was a magnetic teacher who manifested a keen interest in his students. He was a competent lecturer, prone to rely upon open discussion of reported cases as the primary component of his instruction. In this, he in some measure anticipated Christopher Columbus Langdell's invention of the case method.<sup>37</sup>

In 1870, Hammond was appointed to a commission to revise Iowa's statutes. The work was done admirably, and the tight organization of the Iowa Code of 1873 that Hammond prescribed withstood repeated recodifications. Despite this involvement in legislative work, and his familiarity with the Roman law tradition, Hammond disfavored the comprehensive codification proposed by

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<sup>35</sup> See Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 DUKE L.J. 741, 757-63 (1992); Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527 (1990); Paul D. Carrington, *Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years*, 41 MERCER L. REV. 673 (1990); Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 J. LEGAL EDUC. 339 (1992).

<sup>36</sup> Isabella M. Pettus, *The Legal Education of Women*, 38 J. SOC. SCI. 234, 239 (1900).

<sup>37</sup> See Paul D. Carrington, *Hail! Langdell!*, 20 LAW & SOC. INQUIRY (forthcoming Summer 1995).



Jeremy Bentham, and advocated by David Dudley Field<sup>38</sup> as well as others of the Jacksonian persuasion. In this view, he followed Lieber.

Hammond resolved to work on legal history "with a secret hope of leaving something by which I could be remembered after I am gone."<sup>39</sup> He commenced a study of Anglo-Saxon and carefully examined the English Year Books, making copious notes and translating many cases. In 1876, he published a new American edition of the *Institutes of Justinian*.<sup>40</sup> His introduction was recognized as a masterful comparison of the classification or organizational structures of the English common law set forth in Hale and Blackstone with the civil law set forth by Justinian.<sup>41</sup> He found the organization of Justinian no less unsystematic than that of Blackstone, and described both systems as expressions of the distinctive cultures from which they emerged.<sup>42</sup>

It is evident from that introduction that Hammond was a confirmed relativist, regarding law as an expression of culture and the product of a historical (as distinguished from a logical) process. This would have been expected, given his German training. On the basis of this work, he was recognized as the premier American legal historian of the time and was invited to lecture in such distant places as Boston and Ann Arbor.<sup>43</sup>

Given Hammond's high status in the legal profession and his ambition to do memorable work of his own, it is on its face surprising that he undertook a posthumous edition of a work written four decades earlier at the University of South Carolina. One reason is that he was asked to do so by the author's widow, Matilda Lieber,<sup>44</sup> but there was, of course, more to it than that. In fact, Hammond's work on *Hermeneutics* was part of a Lieber revival.

Lieber had died in 1872. His two largest works were posthumously edited by no less a person than Theodore Dwight Woolsey, who had just completed three decades of service as a successful president of Yale University.<sup>45</sup> One of these works was *On Civil*

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<sup>38</sup> See COOK, *supra* note 13, at 185-200.

<sup>39</sup> M'Clain, *supra* note 31, at 230.

<sup>40</sup> William G. Hammond, *Introduction to THE INSTITUTES OF JUSTINIAN* (Thomas C. Sandars trans., Amer. ed., Chicago, Callahan & Co. 1876) (5th ed. n.d.).

<sup>41</sup> M'Clain, *supra* note 31, at 227.

<sup>42</sup> *Id.* at 228.

<sup>43</sup> *Id.* at 232.

<sup>44</sup> LIEBER, *supra* note 3, at iii [at 1887].

<sup>45</sup> See Harris E. Starr, *Theodore Dwight Woolsey*, in 10 *DICTIONARY OF AMERICAN BIOGRAPHY* 519-20 (Dumas Malone ed., 1964).

*Liberty and Self-Government*, originally published in 1853 and then republished in Woolsey's edition in 1874;<sup>46</sup> the other was his *Political Ethics*, republished in 1875.<sup>47</sup> *Hermeneutics* was originally written as part of *Political Ethics*, but was separated when the latter bulked too large. Also appearing in 1880 with Hammond's edition of *Hermeneutics* was a volume of the *Miscellaneous Writings of Francis Lieber*, edited by the equally eminent president of Johns Hopkins University, Daniel Coit Gilman, perhaps the most influential educator of his age.<sup>48</sup> Hammond was thus honored to participate in this Lieber revival, for it was led by two of the most elite academics in America.

The question remains, why did these three men share a willingness to respond to the requests of Matilda Lieber? President Gilman, President Woolsey, and Chancellor Hammond were all active scholars with agendas of their own and little need for the distinction of associating their names with that of Lieber, notable though Lieber was. Clearly, they believed that what Lieber had to say was not merely pertinent, but important to their world of 1880.

It might go without saying that these men shared esteem for Lieber's work. In their regard for their author, they were far from alone. When Lieber died, he had retired as professor of law at Columbia University, but was without serious question the most eminent legal scholar in America. Cooley, who had begun to displace Lieber with the publication of his *Constitutional Limitations* in 1868,<sup>49</sup> saluted Lieber as "that deep thinker" and was clearly indebted to Lieber for much of his own thinking, as well as for an important chapter of *Constitutional Limitations* that drew heavily from Lieber's *Hermeneutics*.<sup>50</sup>

All three of Lieber's posthumous editors had known him through membership in the American Social Science Association ("ASSA"). That organization was at least a partial source of the impetus to the Lieber revival. Lieber had been one of its founders when it first met in Boston in 1865, a few months after Appomattox. From 1865 to 1885, it prospered as a group sharing an interest

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<sup>46</sup> FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* (Philadelphia, Lippincott, Grambo & Co. 1853); LIEBER, *supra* note 19.

<sup>47</sup> LIEBER, *supra* note 17.

<sup>48</sup> FRANCIS LIEBER, *THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER* (Daniel C. Gilman ed., Philadelphia, J.B. Lippincott & Co. 1881); *see also* Samuel C. Mitchell, *Daniel Coit Gilman*, in 4 *DICTIONARY OF AMERICAN BIOGRAPHY*, *supra* note 31, at 299.

<sup>49</sup> THOMAS M. COOLEY, *A TREATISE ON THE LAW OF CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (2d ed., Boston, Little, Brown, and Company 1871).

<sup>50</sup> *Id.* at 38-83.

in the use of social science to effect social reform.<sup>51</sup> It was not a large body, rarely exceeding 300 members, but these included many of the most eminent educators of the time, and more than a few aspiring statesmen. It published the *Journal of Social Science* and held annual meetings at which scholarly papers were read. Hammond read a major paper at the 1876 annual meeting.<sup>52</sup> ASSA had four departments, one of them devoted to jurisprudence. That department could be described as the first "Law and Society Movement."<sup>53</sup>

Dorothy Ross describes the membership of ASSA as "gentry intellectuals."<sup>54</sup> Perhaps the leading spirit in the beginning was Francis Wayland, the president of Brown University and the author of a work on higher education<sup>55</sup> in America that had helped to open minds to new possibilities and set the stage for the Morrill Act of 1862,<sup>56</sup> providing federal support for applied academic work in many public universities. Wayland was perhaps the most eminent educator in America in the late antebellum years.<sup>57</sup> Many of the group were acolytes to Lieber. One was Julius Seelye, Hammond's classmate and friend, who studied with Lieber after leaving Amherst.<sup>58</sup> Another was Seelye's student, John William Burgess, who succeeded Lieber on the Columbia Law School faculty, and in 1880 established the Columbia School of Political Science. Burgess brought along his student and colleague, Frank Goodnow, who later succeeded Gilman as President at Johns Hopkins. Another Lieber disciple was Henry Carter Adams, an ethical economist, long the junior associate of Thomas Cooley. Another was Andrew

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<sup>51</sup> ASSA survived for decades after 1885, but its importance declined as it spawned other professional groups, such as the American Economics Association and the American Political Science Association. See generally MARY O. FURNER, *ADVOCACY & OBJECTIVITY: A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE, 1865-1905* (1975); THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY* (1977).

<sup>52</sup> See William G. Hammond, *Legal Education and the Study of Jurisprudence in the West and North-West*, 8 J. SOC. SCI. 165 (1876).

<sup>53</sup> Cf. Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993 (1990).

<sup>54</sup> DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* 63 (1991).

<sup>55</sup> FRANCIS WAYLAND, *THOUGHTS ON THE PRESENT COLLEGIATE SYSTEM IN THE UNITED STATES* (Boston, Gould, Kendall & Lincoln 1842). He died not long after the first meeting of the ASSA.

<sup>56</sup> 7 U.S.C. § 301 (1988) (originally enacted as Act of July 2, 1862, ch. 130, § 1, 12 Stat. 503).

<sup>57</sup> THEODORE R. CRANE, *FRANCIS WAYLAND: POLITICAL ECONOMIST AS EDUCATOR* 3-4 (1962).

<sup>58</sup> ROSS, *supra* note 54, at 68.

Dickson White, Cooley's colleague at Michigan who became the founding president of Cornell University<sup>59</sup> and then Ambassador to Germany. Another was Charles Kendall Adams, also a colleague of Cooley, who succeeded White at Cornell before moving on to the presidency of University of Wisconsin. Woolsey was president of Yale when he joined the group, and was teaching constitutional law, often by the light of Lieber's *Civil Liberty and Self-Government* (that he edited in 1876).

In addition to these followers of Lieber, there were other representatives of the legal profession. The Yale Law School was represented not only by Woolsey, but also by Francis Wayland Jr., a law professor. By 1878, the junior Wayland was the leader of the Jurisprudence Department.<sup>60</sup> In 1879, Simeon Eben Baldwin, also a Yale law professor and by then a founder of the American Bar Association, appeared at the ASSA meeting; he would become President of ASSA in later years.<sup>61</sup> Theodore Dwight, Lieber's colleague at Columbia, and the spirit behind the post-War revival of the Columbia Law School, was also an active member of ASSA.<sup>62</sup> Charles Eliot, the president of Harvard after 1869, was long active, and was joined by his law colleagues, notably James Bradley Thayer.<sup>63</sup>

The founders of ASSA included many who had before the War been involved in the antislavery movement. In 1865, they were animated by extreme optimism. They nourished the hope that careful empirical work would inform the reformation of American law and society. They did not reckon, as perhaps they should have, that the experts on whom they counted to do the empirical work would be limited in their resources and capacities, that empirical data would oft-times be too difficult to acquire, too limited, too complex, or too ephemeral to sustain sound judgment, that experts would have divergent and conflicting personal agendas making their opinions unreliable or even suspect, or that people and their politicians could and would retain beliefs even in the face of overwhelming scientific disproof. Nevertheless, despite these and other limitations, ASSA was for at least two decades the

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<sup>59</sup> GLENN C. ALTSCHULER, ANDREW WHITE—EDUCATOR, HISTORIAN, DIPLOMAT 64 (1979).

<sup>60</sup> HASKELL, *supra* note 51, at 221.

<sup>61</sup> *Id.* at 216.

<sup>62</sup> *Id.* at 221.

<sup>63</sup> *Id.* at 192 n.2, 221. Emory Washburn was also a founder of the ASSA. He was a former governor of Massachusetts as well as a professor of law. See FURNER, *supra* note 51, at 28.

center of thought and discussion about the role of law in American society and government. Their ebullient optimism was expressed by Gilman, who forecast that America was through the efforts of the ASSA soon to become "an earthly paradise," void of crime, poverty, and unjust discrimination or privilege.<sup>64</sup>

A further clue to the purpose of the revivalists may lie in the fact that all three of the books they republished, and much of the Lieber writing collected by President Gilman, addressed the role and responsibility of law, judges, and the legal profession in democratic government in America. These works were the primary available American material dealing systematically with that broad subject. The revivalists thought that Americans needed to do some serious thinking about law and courts and their role in the governance of the republic.

They had reason to think so. There was abroad in America in the 1870s our recurring deep anxiety about the prospects for the continuation of democratic institutions. The Supreme Court of the United States was convalescent from the grievous wounds it had inflicted upon itself in *Scott v. Sandford*,<sup>65</sup> which had alarmed many thoughtful lawyers about the threat that judicial arrogance posed to the traditions of self-government. More importantly, the nation was convalescent from a war that had proved to be sanguinary beyond anyone's bleakest imaginings and weakened confidence in the benevolence of democratic government. There was widespread revulsion at the moral condition of the federal government in the administrations of President Grant and his successors. There was in many American cities even greater desperation at the corruption of local government. There was awareness of the failure of Reconstruction to achieve the promise of the postwar constitutional amendments. Railroads and the industrialization they brought had created scores of seemingly insoluble problems regarding the status and security of farmers, workers, and consumers. Robert Wiebe characterized the time as one devoted to a search for order,<sup>66</sup> and in the American context, a search for order was a search for law, law with meaning and structure.

All roads may therefore have seemed to lead to Lieber. He had been a consummate optimist about the fate of the republic. A Prussian emigré, he was more American than the natives. His

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<sup>64</sup> Daniel C. Gilman, *President Gilman's Opening Address at Saratoga*, 12 J. Soc. Sci. at xxii, xxiii (1880).

<sup>65</sup> 60 U.S. (19 How.) 393 (1856).

<sup>66</sup> See ROBERT H. WIEBE, *THE SEARCH FOR ORDER 1877-1920* (1967).

posthumously republished works are one grand encomium. In his *Civil Liberty*, he celebrated the individual rights embedded in the Constitution of the United States, but emphasized that it, and all law, is a product of a historical process driven by the evolving culture.<sup>67</sup> In his view of law as cultural artifact, Lieber was conventional for his time and reported what he had learned from such German observers as Carl Friedrich von Savigny and other classical sources. Lieber applied this conventional wisdom to explain our exceptional respect for individual rights. More originally, Lieber explained that this mutual respect was institutionalized in the forms of self-government, notably in the structures of local government and in the right to jury trial.<sup>68</sup> People who govern themselves responsibly, Lieber argued, will govern a free society in which individual rights are assured. He repeatedly juxtaposed self-government to centralized government which he described as "Gallican."<sup>69</sup> Gallican government draws power away from local communities and citizens and is, in Lieber's view, destined to become Napoleonic.

But a key to effective, enduring self-government, he explained in his *Political Ethics*, is prudent leadership.<sup>70</sup> *Political Ethics* is an account of what prudent leadership entails; its requirements closely resemble classical civic virtue. Leaders of a self-governing people must above all govern themselves, and remain calm.<sup>71</sup> They must, he detailed, respect the limits of their official roles and responsibilities and be prepared to challenge followers striving to push them beyond the prescribed limits.<sup>72</sup> Linking *Hermeneutics* to his *Civil Liberty*, Lieber saw the undisciplined and faithless judge as the embodiment of the antidemocratic spirit he depicted as Gallican, i.e., favoring Napoleonic centralization of power and disregard for individual rights.<sup>73</sup>

What Woolsey, Gilman, and Hammond must have been striving to do in republishing these works was to rehabilitate the confidence of Americans in their political institutions. If this could be achieved, then perhaps the agenda of social reform being developed by ASSA would be enacted and America would indeed be-

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<sup>67</sup> See LIEBER, *supra* note 19, at 256-69.

<sup>68</sup> See *id.* at 232-38, 247-55.

<sup>69</sup> See *id.* at 279-96.

<sup>70</sup> 2 FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* 284-87 (Theodore D. Woolsey ed., 2d ed. rev., Philadelphia, J.B. Lippincott & Co. 1875) (1839).

<sup>71</sup> *Id.* at 287-91.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 401-07.

come paradise on earth. Hammond's edition of *Hermeneutics* was thus part of a larger effort to make democratic law work. The editor hoped that the book would help restore faith in the republic and its institutions, and thus relieve the deep malaise infecting American law in their time.

But the environment was very different in 1880 than it had been in 1837. One difference was a new locution which was in use to describe the product of judicial interpretation. John Austin's work was first circulated in America in 1861; it depicted as "childish fiction" Blackstone's traditional view that judges do not make law, but find it.<sup>74</sup> Austin declared that the creative interpreter of legal texts "makes law."<sup>75</sup> Thus, some thoughtful American lawyers had begun to use the word "lawmaking" to describe what judges sometimes do.

In 1870, Christopher Columbus Langdell had commenced his deanship at Harvard with ideas seemingly connected not only to Austin's locution, but also to Austin's conception of "pure law," i.e., law divorced from politics.<sup>76</sup> Pure law might have been a reasonably accurate account of the work product of English judges in Austin's time, for seldom were they concerned with the social or economic consequences of their decisions, such concerns being in the English Constitution the exclusive business of Parliament. As Charles Dickens depicted English judges, they were wrapped in jeweler's wool and took refuge from the world behind their crimson curtain.<sup>77</sup> Pure law was not, however, an accurate account of the work product of any American court, especially those most subject to the influence of Jacksonian reforms in Lieber's time. Nevertheless, Langdell aimed to train his students to think of law as a pure discipline unalloyed with any other.

Most of Langdell's contemporaries dismissed his idea out of hand. Nevertheless, in 1880, his pure law was making progress because Langdell's educational agenda, whatever its theoretical flaws, fit the spirit of his times. That spirit was a rejection of many of the reforms of the Jacksonian era. America was embracing the idea of technical competence and every profession was striving to identify a body of technical information to be its exclusive preserve and

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<sup>74</sup> 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW, *supra* note 6, at 634 (*Law in Relation to Its Sources*, Lecture 37).

<sup>75</sup> See *id.* generally.

<sup>76</sup> See generally WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994).

<sup>77</sup> CHARLES DICKENS, BLEAK HOUSE 6 (George Ford & Sylvère Monod eds., W.W. Norton & Co. 1977) (1853).

thus the basis of a competence and of professional status. The embrace took the form of rapidly growing universities engaged in certifying an increasing number of professions imposing rising academic standards as preconditions to entry. The invention of a science of pure law undiscernible by lay persons was therefore attractive to the legal profession competing with other professions for status.

Langdell's theory threatened the American legal tradition from a direction precisely opposite to that from which the Jacksonians had made their assault. Where Jacksonians opened the legal profession, Langdell sought to make it an elite preserve. Where the Jacksonians had in their mistrust sought to enlarge the opportunities for the people and their representatives to influence and control the courts, Langdell sought to isolate the law and courts from all such influences.

For members of the ASSA, there was an alarming aspect to the reforms set in motion by Langdell. True, they were all university men and enthusiastic about the growth of higher education. Higher education, they hoped, would supply the experts to solve America's problems and enable it to become paradise. And Hammond would, after 1880, become a leader of the American Bar Association's efforts to elevate academic requirements for admission to the bar, thus sharing Langdell's objective. Nevertheless, the idea of pure law threatened to disable the profession from playing its traditional role of mediating democratic law and politics, and diminished the prospects for effective social reform. Perhaps as offensive to the followers of Lieber, Langdell was denying the relation between law and culture that was the intellectual rock on which Lieber and so many others before him had built.

Hammond's 1880 edition was thus inspired, at least in part, by a need to correct Langdell's increasingly attractive nonsense. Where Lieber had written in 1837 to calm the fears of Jacksonian politicizers of judicial institutions, Hammond seemingly hoped to use his work forty-three years later to resist the excesses of those hoping to depoliticize them and make American law as narrowly technocratic as the English courts in the time of Blackstone, Bentham, Austin, and Dickens.

Hammond's purpose is reflected in a lengthy appendix attached to his 1880 edition that is republished in part in this issue. Most demonstrative is a nineteen-page note expanding on Lieber's



chapter 7.<sup>78</sup> Hammond there defended Blackstone's dogma that judges find law, and challenged Austin's characterization of that dogma as a "childish fiction."<sup>79</sup> But his defense is one not likely to have been offered by Blackstone, for it emphasizes the moral obligations of those who interpret legal texts as distinguished from those commissioned to write the texts they interpret.<sup>80</sup> His concern was that the statement, "judges make law," might unwisely encourage judges to disregard or even deny their moral duties to seek and obey the correct meanings of texts, i.e., those most compatible with the culture served.<sup>81</sup> Indeed, if judges "make law," it is not theirs, Lieber and Hammond hold, to make according to a system of sterile logic which they invent for their own use anymore than it is theirs to make according to their own personal political predilections.<sup>82</sup>

The argument made in that appendix was repeated by Hammond in his 1890 edition of Blackstone,<sup>83</sup> and drew fire from John Chipman Gray in his 1909 lectures at Columbia.<sup>84</sup> An adherent of German thought who asserted the relativity of law to culture, Gray shared many of the ideas of Lieber and Hammond. But, in an era of Progressive politics, Gray emphasized the personal responsibility of judges for the social and political consequences of their decisions. In that spirit, he proclaimed that judges do indeed make law. They ought therefore to make good law serving public aims. Whether there is genuine substance in Austin's attack on Blackstone, or Hammond's attack on Austin, or Gray's attack on Hammond, is a question that Lieber's readers need not consider, for Lieber's moral directives depend not at all on the answer.

#### CONCLUSION

This brief account of the history of Lieber's *Hermeneutics* tends to confirm a premise of that work. What thoughtful people

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<sup>78</sup> Note N: *On Precedent and the Doctrine of Authority in Law*, in LIEBER, *supra* note 3, at 312 [at 2093].

<sup>79</sup> See *id.* at 327 [at 2103].

<sup>80</sup> *Id.* at 323-24 [at 2099-2100].

<sup>81</sup> *Id.* at 324 [at 2100].

<sup>82</sup> Hammond recognized, however, that his view of the doctrine of precedent differed materially from Lieber's. *Id.* at 182-212 [at 2019-38]; LIEBER, *supra* note 3, at 182-212 [at 2019-2038].

<sup>83</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 213-26 (William G. Hammond ed., San Francisco, Bancroft-Whitney Co. 1890) (8th ed. 1778).

<sup>84</sup> JOHN C. GRAY, THE NATURE AND SOURCES OF THE LAW 222-34 (Beacon Press 1963) (2d ed. 1921).

think and say about law and its interpretation depends heavily upon when and where they are.

Readers of *Hermeneutics* might wish to consider, however, whether Lieber's purpose in 1837, and Hammond's in 1880, could both be sensible. Can the same text on legal interpretation be useful for seemingly contradictory purposes in 1837 and 1880? Or were the understandings of the 1837 author and the 1880 editor at odds? There is perhaps no contradiction if Lieber struck an appropriate balance between the technocratic and the political elements of American law; for then his principles of interpretation may rightly be viewed as a bulwark both against political manipulation of law by the likes of the Jacksonians, on the one hand, and against its apolitical sterilization by the likes of professional technocrats such as Langdell, on the other. And if he got it right, then perhaps the reader will agree that it is indeed time for another Lieber revival.