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# INSTITUTIONS AND LINGUISTIC CONVENTIONS: THE PRAGMATISM OF LIEBER'S LEGAL HERMENEUTICS

*Guyora Binder\**

## I. LEGAL HERMENEUTICS TODAY

Like many other forms of social thought, legal theory has, over the last quarter century, taken an "interpretive" turn. Recent and contemporary writing on legal hermeneutics may be credited with two sensible but unsurprising claims about legal language.

First, much of this literature repeats the now familiar objections to empiricist conceptions of linguistic meaning developed by Ludwig Wittgenstein, W.V.O. Quine, and other pragmatist philosophers: that all thought is mediated by language, that language is conventional, that there can be no private language of sensation, that there can be no theory-free description of sense-data, that meaning is use. Generally these ideas are deployed in ritually slaughtering imaginary proponents of the view that the meaning of legal texts can be authoritatively fixed by reference to the intentions or other mental states of their authors.

Second, much of the recent legal hermeneutics also repeats the pragmatist attack on rationalist conceptions of linguistic meaning. Thus, from the maxim that all thought is in language, it follows that concepts are always conventional categories, to be used and interpreted in light of the experiences and expectations of communities of language-users; that the contents of such conventional categories may be linked by historical association rather than any shared characteristic; that the domains of concepts are therefore inherently instable and their boundaries indeterminate. Generally legal hermeneutic scholarship applies these points in ritually slaughtering imaginary proponents of the view that the meaning of legal texts is fixed by their language.

From these sensible claims about the indeterminacy of legal meaning, legal hermeneutic scholars frequently derive a third, more dubious claim: that the indeterminacy of legal texts undermines the legitimacy of legal interpretation. The more subversive efforts at legal hermeneutics tend to leave off at this point, their

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critical task completed. The more meliorative efforts proceed with performative demonstrations that sensitivity and imagination can produce persuasive interpretive arguments nonetheless. Yet both share a sense that legal indeterminacy necessitates a legitimation crisis.

When legal hermeneuticists equate indeterminacy with illegitimacy they forget the lessons of their own pragmatism. Linguistic meaning is indeterminate only in the sense that it is conventional, and so contingent on the evolving practice of a community of language users. Legal interpretation similarly is a conventional practice. Moreover, a convention is precisely the sort of entity to which the adjective legitimate applies. When conventions cease to be legitimate, they cease to be conventions. So why does the admission that interpretation is conventional delegitimize it? Even granting that the conventions of legal argument include the invocation of "legislative intent" and "plain meaning," lawyers can and do perform these conventions while recognizing them as such.

The crisis of judicial legitimacy to which contemporary legal hermeneutics responds is real enough, but its sources are not philosophical. The legitimacy crisis with which American legal scholarship has struggled for the better part of a century is not occasioned by the resistance of language in general to interpretation. It is occasioned by the resistance to interpretation of the Civil War Amendments in particular. Until American society accepts its constitutional obligation to disestablish racial hierarchy, the Civil War Amendments are inevitably meaningless. Since these amendments define the constitutional status of the states, this toxin of meaninglessness circulates through every organ of American government, reducing every policy issue to nonsense. The roots of our crisis of constitutional hermeneutics are in enduring cleavages in American society and politics—race foremost—and its challenges are political rather than technical.

## II. LIEBER'S CONTEMPORARY SIGNIFICANCE

Francis Lieber's remarkable treatise, *Legal and Political Hermeneutics*,<sup>1</sup> was written before the Civil War was even imaginable. Its politics are complacent, conventional, conservative. But it

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<sup>1</sup> FRANCES 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.]

would be a mistake to retroject into his time our own anxieties about the judicial enforcement of constitutional rights that did not yet exist. Nor should we mistake his lack of historical prescience for philosophical naiveté. To the contrary: Lieber's antebellum account of legal interpretation as a conventional practice illustrates how contemporary pragmatist legal theorists might well think about interpretation if our society and constitution were not so fundamentally opposed. Indeed, contemporary legal pragmatists would sound more like Lieber if they thought about any subject other than constitutional law.<sup>2</sup> Reading Lieber's sensible account of legal interpretation therefore teaches the salutary lesson that our difficulties are political, not epistemological; so that for the past quarter century, legal theory has been barking up the wrong tree.

### III. LIEBER'S ORIGINS AND INTELLECTUAL MILIEU

Born in turn-of-the-century Prussia to a family of ardent nationalists, Lieber fought Napoleon, and later studied at Jena, Halle, and Berlin during the tenure there of Friedrich Schleiermacher, G.W.F. Hegel, and Friedrich Karl von Savigny. Lieber became an ardent enthusiast of Schleiermacher's preaching,<sup>3</sup> a participant in reformist political intrigue, and a mediocre poet. After joining other romantic intellectuals from all over Europe in the Greek rebellion against the Ottomans, Lieber became a protege of the Prussian Ambassador in Rome, Barthold Niebuhr, a classical philologist devoted to Burkean ideas.<sup>4</sup> A brief sojourn in England before his emigration to the United States brought him in contact with utilitarianism. In the United States, he became an author and lecturer on many subjects, a professor of politics and law (at the University of South Carolina and Columbia University), and a contributor of belletristic essays to literary reviews.

Like many German liberals of this generation, Lieber opposed natural law theory on the ground that democracy must be mediated

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<sup>2</sup> Dennis Patterson provides an example of a legal pragmatist whose primary focus on private law seems to have inspired a conventionalism reminiscent of Lieber's. See, e.g., Dennis M. Patterson, *Law's Pragmatism: Law as Practice and Narrative*, 76 VA. L. REV. 937 (1990); Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335 (1988).

<sup>3</sup> FRANK FREIDEL, *FRANCIS LIEBER: NINETEENTH-CENTURY LIBERAL* 21-22 (Peter Smith 1968) (1947).

<sup>4</sup> *Id.* at 35-37.

by historically evolved institutions.<sup>5</sup> Upon emigrating to the United States in the Jacksonian era, Lieber came to identify common law judicial precedent with the historical jurisprudence advocated by romantic German jurists like Savigny, and to identify the complex American constitutional structure with the mediating institutions advocated by Hegel and other romantic political theorists. Lieber's many intellectual projects included the editorship of the phenomenally popular *Encyclopedia Americana* (1829-1833),<sup>6</sup> for which Justice Story supplied the legal entries; and his *Civil Liberty and Self-Government* (1853),<sup>7</sup> the leading American political science textbook of the nineteenth century. The latter book argued that institutionally-mediated disciplines, educates, and ennobles the citizen—transforming democratic self-government into government *of* as well as *by* the self. In his *Manual of Political Ethics* (1838-1839),<sup>8</sup> Lieber developed a conception of a pluralistic polity in which the diffusion of sovereignty among multiple institutions would develop law “organically.” Lieber’s historicism and institutional positivism resonated with the Whig-Federalist conservatism of Story and Chancellor Kent, who had recommended him for his first academic post,<sup>9</sup> and to each of whom he dedicated a book.<sup>10</sup> Story praised the *Manual* as “one of the best Theoretical treatises on . . . Government, which has been produced in modern times . . . when so many . . . disturbing Doctrines are promulgated,” while Kent enthused to Lieber, “I love you; you are so sound, so conservative . . . so very safe.”<sup>11</sup>

Lieber’s remarkable treatise is rightly regarded as a synthesis of the theological hermeneutics of his spiritual mentor in Germany, Schleiermacher, and the Whig legal science of his American patrons, Kent and Story. Lieber’s synthesis was enabled by convergent and surprisingly contemporary themes in these two

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<sup>5</sup> Indeed, Vernon Parrington held him responsible for the demise of natural law thought in America. 2 VERNON PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* bk. 1, pt. 2, ch. 4 (1927).

<sup>6</sup> *ENCYCLOPEDIA AMERICANA* (Francis Lieber ed., Philadelphia, Carey, Lea & Blanchard 1829).

<sup>7</sup> FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* (Philadelphia, Lippincott, Grambo & Co. 1853).

<sup>8</sup> FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* (Boston, Charles C. Little & James Brown 1839).

<sup>9</sup> FREIDEL, *supra* note 3, at 118-19.

<sup>10</sup> ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 138 (1975).

<sup>11</sup> FREIDEL, *supra* note 3, at 164-65.

intellectual currents. Let us examine each of these influences in turn.

#### IV. SCHLEIERMACHER'S THEOLOGICAL HERMENEUTICS

The term "hermeneutics" derives from Hermes, messenger of the Gods, and it referred exclusively to the interpretation of religious Scripture before the nineteenth century. Generally, hermeneutics embraced dogmatic methods of interpretation, that is, methods oriented to conforming the text to extratextual theological commitments. The term applied to the construction of texts that were symbolic or encoded, requiring some key to unlock their esoteric meaning. Hermeneutics was a particular focus of interest in Protestant Germany, where scripture needed to be made more widely accessible for interpretation.<sup>12</sup> The eighteenth century saw the emergence of a market among Protestant ministers for manuals of scriptural interpretation to use in preparing sermons. As the century wore on, the dogma governing scriptural interpretation increasingly came to be Enlightenment rationalism—philologically trained theologians hoped that a proper understanding of biblical texts in their historical context would reveal that they gave expression to the invariant truths of reason. The idea of *Geist* arose as part of this effort to justify biblical texts to Enlightenment rationalists. A form of metaphysical knowledge available from human cultural products, the concept of *Geist* seemed to reconcile reason and revelation.

Friedrich Schleiermacher (1768-1834), generally considered the originator of secular hermeneutics, was also the leading Protestant theologian of the nineteenth century, and a major figure of German romanticism. Schleiermacher initiated a double revolt against the eighteenth-century conception of hermeneutics. First, he denied that hermeneutics consisted only of specialized rules or keys to obscure texts. Instead, he presented hermeneutics as a general science of understanding for all writings—with the implication that religious and secular texts were of a common kind. In this way he prepared the way for treating literary works as canonical texts, functioning for a national culture as Scripture did for faith. Second, he argued that hermeneutics was not about exposing the rational content of texts for inspection, but of experiencing them in a more fully human or affective way. The *Geist* immanent in texts of

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<sup>12</sup> THE HERMENEUTICS READER: TEXTS OF THE GERMAN TRADITION FROM THE ENLIGHTENMENT TO THE PRESENT 2 (Kurt Mueller-Vollmer ed., 1985) [hereinafter THE HERMENEUTICS READER].

all kinds was an historically situated, subjective, and particular *human* spirit. To understand a text was to experience the emotion it expressed. By thus replacing metaphysics with emotional experience, Schleiermacher initiated modern theology's psychological turn and anticipated many of the themes of existentialist philosophy. He also preserved the eighteenth-century notion that religion was an innate human capacity. Schleiermacher's call for a general hermeneutics stemmed from his view that this capacity to emotionally apprehend spirit was the font of all culture and communication. Religious sensibility therefore enabled the appreciation of art and literature. Accepting the new romantic account of aesthetic experience, Schleiermacher sought a place for religion in the modern world as art rather than science. Thus the tensions between individual religious experience and shared religious faith in Schleiermacher's Protestantism were the same tensions between individual subjectivity and collective culture that characterized romantic thought generally.

Schleiermacher's account of interpretation, as revealed in the notes he compiled for his influential lectures at the University of Berlin, is similarly eclectic: it makes meaning both a function of individual subjectivity and cultural convention.<sup>13</sup>

Before the art of hermeneutics can be practiced, the interpreter must put himself both objectively and subjectively in the position of the author. On the objective side this requires knowing the language as the author knew it. . . . On the subjective side this requires knowing the inner and outer aspects of the author's life.<sup>14</sup>

While interpretation is an effort at empathetic and respectful understanding of the author, to understand an author is to ascribe conventional meanings to her actions in a known cultural context rather than to identify her interior psychological states. "[T]hat we must consciously grasp the author's linguistic sphere . . . implies that we understand the author better than he understood himself."<sup>15</sup> Schleiermacher identifies the "idea of the work" with "the content of the text and its range of effects."<sup>16</sup> Knowing which au-

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<sup>13</sup> FRIEDRICH D. E. SCHLEIERMACHER, *The Compendium of 1819 and the Marginal Notes of 1828*, in *HERMENEUTICS: THE HANDWRITTEN MANUSCRIPTS 95* (Heinz Kimmerle ed., James Duke & Jack Forstman trans., 1977).

<sup>14</sup> *Id.* at 113.

<sup>15</sup> *Id.* at 118.

<sup>16</sup> *Id.* at 151.

dience was being addressed and what effect the work was to have on them, "the interpreter knows everything that is necessary."<sup>17</sup>

Thus Schleiermacher rejects any simple identification of meaning with the intent of a speaker, anticipating the modernist view that all thought is mediated by language. Meaning is at once conventional and intentional, presupposing the availability of a particular linguistic medium:

Every act of speaking presupposes a given language. This statement could also be reversed . . . because language develops through speaking. In every case communication presupposes a shared language and therefore some knowledge of the language.<sup>18</sup>

[E]ach person[']s . . . speech can be understood only in the context of the totality of the language. . . . An act of speaking cannot . . . be understood as a moment in a person's development unless it is also understood in relation to the language. This is because the linguistic heritage modifies the spirit.<sup>19</sup>

Anticipating structuralism, Schleiermacher sees language as a system of relations, so that the conventional or "grammatical" meaning of a sign depends not on an author's mental state, but on its difference from other signs within the system. On the other hand, anticipating poststructuralism, Schleiermacher sees grammatical meaning as ultimately indeterminate because languages are not static or closed systems: they have past and future histories which "trail off into infinity."<sup>20</sup> "Grammatical" interpretation is not a logical investigation, but an historical one—the grammatical meaning of a text consists in the meanings ascribed to its language by all its possible readers, who are themselves assessing the likely meaning of the text to possible readers, past and future. Hence, the contextual factors relevant to the meaning of any given sign are "infinite."<sup>21</sup>

Accordingly, grammatical, or what we today call structuralist, interpretation is necessary but insufficient for understanding a particular text. A text can be given a more determinate meaning by supplementing grammatical with "psychological" interpretation. Psychological interpretation concerns itself with the effect the author intended to produce on her intended audience. Yet these intentions also depend on a context that is infinite and indefinite.

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 98.

<sup>19</sup> *Id.* at 99.

<sup>20</sup> *Id.* at 100.

<sup>21</sup> *Id.* at 112.



The author is not likely to have intimate knowledge of every member of her intended audience. Hence her expectations for how her work will be read are mostly determined by her knowledge of the same linguistic conventions that govern grammatical interpretation. For this reason, Schleiermacher anticipated the New Critical position that the text itself is the best evidence of the author's intended meaning. "[O]nly from a person's writings can one learn his vocabulary, and so, too, his character and his circumstances."<sup>22</sup> If the author hopes that the work will be read in future generations, she may have little clue as to how the work will effect her intended audience.

Neither grammatical nor psychological interpretation could yield determinate results on its own:

Language is infinite because every element is determinable in a special way by the other elements. This statement also applies to psychological interpretation, for every intuition of a person is itself infinite. Moreover, external influences on a person will have ramifications which trail off into infinity. . . . In order to complete the grammatical side of interpretation it would be necessary to have a complete knowledge of the language. In order to complete the psychological side it would be necessary to have a complete knowledge of the person. Since in both cases such complete knowledge is impossible, it is necessary to move back and forth between the grammatical and psychological sides, and no rules can stipulate how to do this.<sup>23</sup>

In Schleiermacher's view, however, grammatical and psychological interpretation could constrain and discipline each other. Rather than speculating about all possible reactions to the text by future readers, the grammatical interpreter should concern herself only with the views of future psychological interpreters, those who strive in good faith to understand the aims of the author. Rather than worrying about the uncommunicated intentions of the author, however, psychological interpreters should assume that authors intended the likely import of their text to those readers to whom it seems addressed.

Schleiermacher reasons that for both grammatical and psychological interpreters, the likely effect of the text on its *original* readers is centrally, although by no means exclusively, important. "[I]nterpretation cannot begin until [the] relationship [between speaker and original audience] has been established."<sup>24</sup> Why, we

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<sup>22</sup> *Id.* at 113.

<sup>23</sup> *Id.* at 100.

<sup>24</sup> *Id.* at 104.

may wonder, is the meaning-determinative audience the "original" one rather than all subsequent audiences? Schleiermacher's answer is that posterities—temporally remote audiences—are assured only if a work is canonized in an *institutional* context. Works must initiate or join a tradition of reading to achieve longevity. Hence, the first purpose of any text is necessarily the maintenance of an institutionalized community of readers, which means motivating a current, particular audience to reproduce itself by disseminating a text:

We must not make a distinction between what the apostles spoke and what they wrote, for the church had to be built on their speeches. . . . For this reason we must not suppose that their writings were addressed to all of Christendom, for in fact each text was addressed to a specific people, and their writings could not be properly understood in the future unless these first readers could understand them. But these first readers would have looked for what was specifically related to their own situations, and from this material they had to derive the whole truth of Christianity. Our interpretation must take this fact into account, and we must assume that even if the authors had been merely passive tools of the Holy Spirit, the Holy Spirit could have spoken through them only as they themselves would have spoken.<sup>25</sup>

Despite this emphasis on the original audience, original meaning turns out to depend on future meaning. Schleiermacher argues that interpretation requires seeing a statement in relation to the language as a whole and to "sense how the statement itself will stimulate further developments in the language."<sup>26</sup> It is primarily because the availability of a text to future audiences depends on its canonization by previous audiences that the original audience is of greatest interest: later generations of readers have more information about previous than future generations of readers, and each generation has the first generation in common with all other generations. Thus, despite the dynamism of language, future readers of a text are likely to have a good deal in common with its author and original readers—else they would not identify it as worthy of attentive reading in the first place.

For Schleiermacher, then, interpretation is not a search for a mental or metaphysical entity, the author's or the text's "true" meaning. Instead, interpretation is a conventional practice of constructing meaning, disciplined by two assumptions: first, that to

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<sup>25</sup> *Id.* at 107 (footnote omitted).

<sup>26</sup> *Id.* at 112.

write a text is to intend whatever meanings are ascribed to it by future readers; second, that to read is to ascribe to the text whatever someone in the author's position would likely have meant by such language to the people that then appeared likely to read it. In short, interpretation assumes that writers and readers participate in a shared convention.

Schleiermacher used two influential metaphors in describing this practice of interpretation. First, he described the author's cultural context—the linguistic conventions familiar to the author, the audiences available and known to the author, the purposes, projects, and commitments available to a person of the author's social position—as the author's "sphere" or "circle."<sup>27</sup> Interpretation should begin by "determining the sphere common to the author and the readers"<sup>28</sup> and identifying "the whole circle of literature to which a writing belongs."<sup>29</sup> Later contributors to the hermeneutic tradition employed such similar metaphors as "horizon," "worldview," and "lifeworld."<sup>30</sup>

A second, and related metaphor describes the interpreter's movement between grammatical and psychological interpretation, and between the perspectives of original and contemporary readers as "circular." Each of these perspectives is instable by itself: the text's "grammatical" or conventional meaning depends upon the meaning ascribed to the text by future readers, which depends upon their perceptions of the author's intentions, which depends in turn upon the conventional meanings likely available to the text's original readers, and so on. The context for each contingent interpretive judgment is supplied by other equally contingent interpretive judgments. "Complete knowledge always involves an apparent circle, that each part can only be understood out of the whole to which it belongs, and vice versa."<sup>31</sup> "Also within each given text, its part can only be understood in terms of the whole. . . . Here, too, there seems to be a circle."<sup>32</sup>

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<sup>27</sup> *Id.* at 115, 118.

<sup>28</sup> *Id.* at 118.

<sup>29</sup> *Id.* at 115.

<sup>30</sup> HANS-GEORG GADAMER, *TRUTH AND METHOD* 217, 269 (Garrett Garden & John Cumming eds., Seaburn Press 1975) (2d ed. 1965) (importance of concept of a "horizon" in thought of Friedrich Nietzsche and Edmund Husserl); *THE HERMENEUTIC READER*, *supra* note 12, at 28 (Husserl's introduction of the concept of "life-world"); RUDOLF A. MAKREEL, *DILTHEY: PHILOSOPHER OF THE HUMAN STUDIES* 345-84 (1975) (role of the concept "world view" in Wilhelm Dilthey's thought).

<sup>31</sup> SCHLEIERMACHER, *supra* note 13, at 113.

<sup>32</sup> *Id.* at 115-16.

These circular metaphors have three important connotations. First, they convey that interpretive judgments are validated by coherence rather than correspondence. Interpretive judgments cannot be straightforwardly confirmed by data, since they construct or select the data on which they rely. Hence interpretive arguments are inevitably circular, in the sense of being without foundations.

Second, in the romantic intellectual milieu, the value of coherence typically characterizes artistic rather than scientific endeavors. The aim is harmony or symmetry among judgments, all of which involve creative construction or invention: "The task [of interpretation] is infinite, because in a statement we want to trace a past and a future which stretch into infinity. Consequently, inspiration is as much a part of this art as of any other."<sup>33</sup> Interpretations are judged by aesthetic criteria.

Third, the hermeneutic circle is cozy. None of the judgments on which a comprehensive interpretation depends can withstand skeptical critique. Each must support the other. The world of the author is similarly fragile, dependent on the interpreter's indulgence. The text can only be brought to life and the author's horizon recovered if each is approached tenderly and sympathetically. Schleiermacher was raised in the Moravian reformed church and educated in an insular religious community characterized by demonstrative fellowship and song. The hermeneutic circle implies that communication is based on a similar kind of community. Linguistic understanding requires empathic understanding; and literacy depends on the virtue of Christian love.

Yet, what is perhaps most striking to the contemporary reader is the extent to which Schleiermacher sees this empathy as an artifact of the imagination, necessarily mediated by a sophisticated knowledge of linguistic conventions and institutional contexts. Hermeneutic understanding requires the construction of, not communion with, the other.

## V. WHIG LEGAL THOUGHT

Lieber excepted, Whig legal thinkers were not greatly interested in language. But they did tend to assume that meaning was conventional and publicly available rather than psychological and recondite. And they were as explicit as Schleiermacher in their view of interpretation as an institutional practice.

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<sup>33</sup> *Id.* at 112.

Whiggism can be seen as a response to the striking contrast between John Marshall's success in judicial politics and the failures of the Federalist party in electoral politics. With the electoral and cultural triumphs of Jefferson and Jackson, adherents to the Federalist persuasion lost their taste for the rhetoric of popular sovereignty, even as competitive electioneering compelled them to mouth it. Fundamentally, the nationalism of the Whigs was a nationalism of elites and institutions; their nation was constituted by law, into which popular will had been exhausted.<sup>34</sup> Their positivism was more like H.L.A. Hart's than John Austin's: more concerned with identifying authoritative law than with identifying the sovereign. Typical of this institutional positivism was Whig leader Daniel Webster's response in *Luther v. Borden*<sup>35</sup> to claims that a popularly organized referendum had dissolved Rhode Island's malapportioned legislature and broadened its restrictive franchise.

The people of a State is the *political body—the corporate unit*—in which are vested . . . the ultimate powers of sovereignty; not its inhabitants or population, considered as individuals. . . . Except as an *organized body*, that is, *except when acting by its recognized organs*, the entire population of a state already constituted, were it assembled on some vast plain, could not constitutionally pass a law or try an offender.<sup>36</sup>

Webster's institutionalist argument anticipated the posture toward Southern secession of erstwhile Whig Abraham Lincoln.

Legal interpretation lay at the heart of the institutional positivism that Whig lawyers developed in response to the populist challenges of the antebellum period. Interpretation would enable far-seeing stewards of America's institutions to preserve them from periodic overthrow by adapting them to changing circumstances and social needs. Successful accommodation of social change would insulate prudent stewards against demagogic mobilization of the populace, while institutional preservation would serve the overarching social need of ensuring commercial development by providing a stable and predictable environment for investment. Paul Kahn has usefully summarized Justice Story's formulation of this conservative hermeneutic program in his *Commentaries on the Constitution of the United States*:

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<sup>34</sup> PAUL KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 38 (1992).

<sup>35</sup> 48 U.S. (7 How.) 1 (1849).

<sup>36</sup> JOHN A. JAMESON, A TREATISE ON THE CONSTITUTIONAL CONVENTIONS 233 (1867).

Constitutional interpretation must begin with the text as an expression of popular consent, but . . . [t]he text will often not be self-explanatory. The necessity for interpretation creates the possibility for judicial arbitrariness. To combat judicial arbitrariness, a science of law is required. Story, therefore, sets out the "true rules of interpretation applicable to the constitution; so that we may have some fixed standard." . . . [These] rules emphasize the need for openness to change in constitutional interpretation. If the ends of the Constitution are to be attained, the means available must be responsive to the changing "manners, habits and institutions of society, which are never stationary." Unless the Constitution permits change, the whole of society will be "revolutionized at every critical period, and remodeled in every generation." Maintenance thus requires a science of law that can distinguish the permanent from the transitory.<sup>37</sup>

Story's view of interpretation as adaptation did not prevent his embrace of the antebellum commonplace that "[t]he first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and the intentions of the parties."<sup>38</sup> Yet, like later legal formalists, he insisted that the only discernible "intent" of legal authors was to adopt the language chosen: "Nothing but the text itself was adopted by the people."<sup>39</sup> The vagueness of constitutional language and its function in framing a government for the ages left interpreters a wide latitude to develop its meaning over time. Rather than resorting to contemporaneous interpretations of constitutional language, interpreters were better guided by subsequent judicial glosses, especially if acquiesced in by other governmental authorities. If the people objected to their judicially elaborated constitutional law, they could amend the Constitution through these other political organs of government.<sup>40</sup>

If "scientific" interpretation of the Constitution could preempt the Jeffersonian program of recurrent revolution, the scientific interpretation of common law precedent could similarly preclude Sysiphean cycles of codification and recodification. The codifiers' dream of circumscribing the future in legislative language clear and accessible to the common man was chimerical and self-defeating. Codes would inevitably be overly rigid and insufficiently complete; once consulted, popular majorities could be counted upon neither to keep silent nor keep a steady course. But if fickle majorities

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<sup>37</sup> KAHN, *supra* note 34, at 41 (quoting Story in 1833) (footnotes omitted).

<sup>38</sup> 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 283 (3d ed., Boston, Little, Brown & Co. 1858).

<sup>39</sup> *Id.* at 287-88.

<sup>40</sup> *Cf.* COVER, *supra* note 10, at 136-37; KAHN, *supra* note 34, at 41.

were incompetent to improve upon the common law's fusty technicality, prudent interpreters like Kent and Story were confident they could meet the challenge. As Robert Gordon explains, their common law treatises and decisions assumed that

[t]he corrective for the occasional irrationality of custom was to submit its principles to a critical and creative control technique, a complex amalgam of (1) a special theory of history, (2) a comparative method, (3) and an appeal to certain extrahistorical criteria of reason. Lord Mansfield was acknowledged to be the all-time master of this method. (1) The special historical theory was that history had direction, especially in the American republic, away from hierarchy, superstition, technicality, and restraints on disposition of property and labor and towards political equality, rationality, free disposition, and liberality in rights definition. . . . (2) The comparative method consisted of looking to the practices of other civilized nations—especially, in matters of commercial law, to international commercial custom and European civilian writers on it. (3) The final component of the technique was . . . a highly educated reason steeped in classical and historical studies, political theory, and the law of nations. There were also metarules about when to apply the technique liberally (when one was trying to facilitate commercial convenience) and when to hold strictly to precedent (when one was trying to protect vested rights).<sup>41</sup>

Custom retained an important place within the institutional positivism of the Whig lawyers, especially in the area of commercial law. This fusion of custom and positive law was permitted by their peculiarly institutional conception of custom itself as experience digested by legal science. Law reflected general rather than local custom, modeled on the boundary-traversing commercial customs collected in the law merchant. Ordering commercial custom as interpreted by courts was an institutional conception of commerce as a stable, predictable course of development through familiar trades. Commercial development therefore involved the public nurturance of particular commercial interests, by contrast to the Jacksonian identification of development with unrestricted individual opportunity. Whig lawyers believed the law should foster merchants who, like themselves, were prudent stewards of the public interest. Properly channeled commercial development would ensure continuity of political leadership; such desirable develop-

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<sup>41</sup> Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise 1870-1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* 70, 84 (Gerald L. Geison ed., 1983).

ment was the social change to which law, including constitutional law, must adapt. Because development involved merely the proliferation of familiar enterprises, the legal and social conditions for development could be distilled from accumulated experience. Whig legal science could therefore prescribe

how people should behave toward one another in a wide range of social situations in which neither they themselves nor the legislature had prescribed express obligations. Their private law . . . was full of what we would call obligations implied by law, inhering in good custom, precedent, and general considerations of public policy concerning persons of different status in their relations with one another.<sup>42</sup>

Whig legal science supplied the antebellum lawyer with a professional identity as an interpreter of laws; but although resistant to the broader culture trends of the Jacksonian era, Whig legal science lived less by challenging than by accommodating and interpreting the positivism and populism of its time. In this respect, Whig tactics mirrored Whig ideology: the legal hermeneutic impulse was also the spirit of compromise. The Whigs' political leaders are remembered for accommodating slavery to preserve union; Lieber spent the bulk of his academic career as a South Carolinian on cordial terms with John C. Calhoun, prudently suppressing the antislavery and nationalist sentiments he penned in private letters to Charles Sumner.<sup>43</sup> The Whigs' willingness to deal could not, in the long run, buy them political success. But their institutional positivism did persuade many Democrats, whose hostility to government could accommodate them to checks on popular sovereignty. One Democratic publicist wrote, "[t]he people do not any the less govern, by thus governing in a certain mode which they themselves prescribe."<sup>44</sup> Theodore Sedgwick, Democratic appointee to various federal posts, who later authored an influential treatise on statutory interpretation aimed at limiting judicial discretion, nevertheless agreed that "the constitutional check [on tyranny and corruption] is the only one which people voluntarily assume, and is the only one known, that is based upon a liberal representation of

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<sup>42</sup> *Id.* at 88 (emphasis omitted).

<sup>43</sup> FREIDEL, *supra* note 3, at 233-58. Lieber actually went so far as to hire a black servant to accompany him on his job interview to reassure his hosts of his taste for slavery, and he soon acquired slaves. *Id.* at 236. The price of his hypocrisy was high: twenty years of suppressing his opinions could not overcome the suspicions that ultimately denied him the presidency of the University of South Carolina; but when he resigned his position and moved North, he left behind a son who died in a Confederate uniform.

<sup>44</sup> GEORGE S. CAMP, *DEMOCRACY* 214 (New York, Harper and Brothers 1841).



the popular will."<sup>45</sup> The inroads Whig institutionalism made in Democratic thought would later facilitate the mobilization of northern Democrats to the Union cause.<sup>46</sup>

## VI. LIEBER'S SYNTHESIS

In *Legal and Political Hermeneutics*, Lieber may be said to have bred Schleiermacher's romantic philology with the Whigs' institutional positivism, to spawn an account of law as the hermeneutic perpetuation of institutions. The match was not implausible: both movements frankly acknowledged that interpretation is an institutional practice, organized by the evolving aims and customs of the institutions within which it took place. Both movements tended to view both the writing and reading of texts as the deployment of linguistic conventions. Both movements thereby viewed meaning for all practical purposes as public and social rather than private and psychological. Schleiermacher grasped the further point that because linguistic conventions are developed and altered by usage within dispersed linguistic communities, conventional meanings are inconsistent and instable. When read in light of these traditions, Lieber's book emerges as a surprisingly pragmatic account of interpretation.

Originally intended as part of the *Manual*, Lieber's treatise on legal hermeneutics was "the definitive defense"<sup>47</sup> of the interpretive discretion favored by Whigs—although its meager sales<sup>48</sup> suggest that Lieber preached to the converted. Lieber conceded to prevailing Jacksonian opinion that the meaning of legal instruments depended on authorial intent,<sup>49</sup> that compacts should be strictly interpreted to reflect the will of the parties, and even that constitutions could be regarded as compacts.<sup>50</sup> In point of fact, Lieber rejected the Democrats' characterization of the Constitution as a compact of states—an enthusiast of national union in his adopted and his original country, Lieber was a leading proponent of American nationalism,<sup>51</sup> who would later write pro-Unionist

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<sup>45</sup> Theodore Sedgwick, *Constitutional Reform*, U.S. MAG. & DEMOCRATIC REV. 563, 564 (1843).

<sup>46</sup> RUSH WELTER, *THE MIND OF AMERICA: 1820-1860*, at 371-91 (1975).

<sup>47</sup> COVER, *supra* note 10, at 137.

<sup>48</sup> FREIDEL, *supra* note 3, at 178 n.14.

<sup>49</sup> See LIEBER, *supra* note 1, at 7 [at 1897].

<sup>50</sup> *Id.* at 166-70 [at 2008-11].

<sup>51</sup> See Merle Curti, *Francis Lieber and Nationalism*, 4 HUNTINGTON LIBR. Q. 263 (1941).

propaganda and advise Lincoln's War Department.<sup>52</sup> Yet Lieber's *Legal Hermeneutics* did not take Calhounian originalism straight on; rather than debating whose intent should govern constitutional interpretation, Lieber exposed the very aspiration to strict intentionalist interpretation as incoherent.

His argument proceeded from an expressive conception of meaning reminiscent of Schleiermacher's and Hegel's. According to Lieber, all linguistic expression is motivated by an impulse of sociability, linked to religious and aesthetic feeling, to externalize and articulate the self in a concrete, sensuous, and inherently social medium.<sup>53</sup> Accordingly, meaning is not conferred on language by private intentions that preexist their articulation; instead, meaning inheres in language's use by communities of language users, especially institutions.

Lieber's expressive conception of meaning enabled him to qualify his assent to the prevailing intentionalism with a number of formalist caveats. Like other Whig writers, Lieber held that textual language was the best evidence of authorial motives.<sup>54</sup> Indeed, for Lieber the presumed authorial motive was to externalize the self by using the language employed. Yet Lieber's insistence on textual indeterminacy meant that his reduction of intent to language was merely a stratagem to justify an active interpreter. In the end, he approved intentionalist interpretation, reinterpreted as the expansive interpretation of instruments in light of their institutional purpose rather than the "motives" of their authors.<sup>55</sup> He favored the legislative articulation of goals in preambular language and the publication of legislative debates to aid, though not to control, interpretation.<sup>56</sup>

Lieber mocked the aspiration to "strict" or "literal" interpretation as resting on a naive, even illiterate dichotomy between literal and metaphoric meaning. Following idealist philosophers, Lieber insisted that the physical objects to which language refers are distinguished from the flux of experience only by the constructive activity of mind.<sup>57</sup> Accordingly, Lieber argued that all meaning is figurative or "tropic," so that the Luddite aspiration to purify

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<sup>52</sup> PHILLIP S. PALUDAN, *A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA* 23 (1975).

<sup>53</sup> LIEBER, *supra* note 1, at 1-4 [at 1893-95].

<sup>54</sup> *Id.* at 99-102, 119 [at 1960-62, 1975].

<sup>55</sup> *Id.* at 128-29, 132-34, 176-77 [at 1983-84, 1985-86, 2015-16].

<sup>56</sup> *Id.* at 30-31 [at 1912-13].

<sup>57</sup> *Id.* at 22-23 [at 1907-08].

language of rhetoric could only succeed at the cost of purifying language of meaning.<sup>58</sup>

Lieber added that new metaphoric meaning is constantly being generated by the rhetorical creativity of communities of language users. With application to different contexts, concepts become more or less specific, acquiring and shedding connotations and implications. Because "these processes are going on at the same time, with many people,"<sup>59</sup> the meaning of a text is instable and uncertain even at the very moment it is written. Even the simplest instruction depends on infinitely many contextual assumptions and can be reduced to nonsense by a perverse literalism.<sup>60</sup> The more complex an injunction the more easily it can be traduced.

Men have at length found out that . . . nothing is gained by attempting to speak with absolute clearness and endless specifications, but that human speech is the clearer the less we endeavor to supply by words and specifications that interpretation which common sense must give to human words. . . .

. . . .

The more we strive in a document to go beyond plain clearness and perspicuity, the more we do increase, in fact, the chances of sinister interpretation.<sup>61</sup>

Sophisticated language users realize this historicity and contextuality of language and often frame their injunctions to the future broadly, inviting future interpreters to use their good sense.<sup>62</sup> The impulse to control future interpreters through elaborate and precise instructions bespeaks dictatorial egoism and foolish naiveté. Over time these superfluous instructions will become contradictory; they will hobble well-meaning interpreters with arbitrary absurdities, or license unforeseen mischief.<sup>63</sup>

Lieber showed that a static conception of meaning is inconsistent with the very legislative supremacy its proponents desire. Legislatures sometimes interpret earlier legislation: to treat these later interpretations as authoritative would be to ignore the original intent of the enacting legislature. Official legislative interpretations are therefore "authentic" and possibly "binding" but not actually "correct."<sup>64</sup>

<sup>58</sup> *Id.* at 22-23, 54-57 [at 1907-08, 1928-29].

<sup>59</sup> *Id.* at 14 [at 190].

<sup>60</sup> *Id.* at 17-18 [at 1904-05].

<sup>61</sup> *Id.* at 19-22 [at 1905-07].

<sup>62</sup> *See id.* at 37 [at 1917-18].

<sup>63</sup> *See id.* at 33-34, 86-87 [at 1914-15, 1951-52].

<sup>64</sup> *Id.* at at 62-63 [at 1934-35].

That successive legislatures composed of multiple members may be fictively viewed as a single author underscores Lieber's larger point that legal authors are institutions, whose identity over time depends upon the very process of interpretation that naive intentionalists fear.

It is one of the most efficient agencies in the civil progress of a nation, that, certain principles being established, they should be left to unfold themselves gradually, and to be expanded, modified, and limited, by the civil action of the nation itself, by the practical political intercourse of society.<sup>65</sup>

Because interpreters are properly devoted to the perpetuation of institutions, Lieber argued, they must set aside not only the original but even the contemporary meaning of a legal text when unforeseen circumstances arise which the text does not sensibly address.<sup>66</sup> Lieber called this process "construction" rather than "interpretation":

Construction is unavoidable. . . . [R]elations change with the progress of time, so that, after a long lapse of time, we must give up either the letter of the law, or its intent, since both, owing to a change in circumstances, do not any longer agree. . . . Interpretation, seeking but for the true sense, forsakes us when the text is no longer *directly* applicable; because the utterer, not foreseeing this case, did not mean it, therefore it has no true sense in this particular case.<sup>67</sup>

The more drafters try to constrain future interpreters by framing inflexible language, the more inevitable construction will become because "[t]he benefit of the community is the supreme law. . . . Laws must be understood to mean something for the advantage of society."<sup>68</sup> Accordingly, construction is frankly instrumental: "The effects, which would result from one or the other construction, may guide us in deciding which construction we ought to adopt."<sup>69</sup>

It is tempting for the contemporary reader to map Lieber's distinction between interpretation and construction onto the familiar distinction between applying and making law, or the distinction between judicial deference and judicial discretion. Yet Lieber insists upon the inevitability and desirability of judicial discretion.

The interpretation/construction distinction functions within his argument to blame "noninterpretive" adjudication on misguided

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<sup>65</sup> *Id.* at 32 [at 1914] (footnote omitted).

<sup>66</sup> *Id.* at 44-45, 100-101 [at 1921-22, 1960-61].

<sup>67</sup> *Id.* at 110-111 [at 1969] (footnotes omitted).

<sup>68</sup> *Id.* at 124-26 [at 1979-82].

<sup>69</sup> *Id.* at 136 [at 1988].

legislative draftsmanship that deploys rules instead of standards in a futile and counterproductive effort to limit judicial discretion. Thus the interpretation/construction distinction should not be misunderstood as an expression of any naive formalism that purports to legitimate adjudication as mechanical, neutral, or nondiscretionary. Instead, it distinguishes and defends two different ways that judges exercise discretion, depending in part on the extent to which legislators have foolishly attempted to prevent it.

Thus, Lieber's interpretation/construction distinction is parasitic not on the now disreputable distinction between following and making law, but on the rules/standards distinction so important in recent and contemporary legal scholarship.<sup>70</sup> While some Critical Legal Studies scholars have deconstructed this distinction,<sup>71</sup> others acknowledge that few practicing lawyers or legislators would find rules and standards indistinguishable. Consider Mark Kelman's admission that

[i]t is possible to establish legal rules, increasingly detailed in covering available cases, that can become mechanically applicable to the vast bulk of actual controversies, but practice may well be settled only at the . . . risk that it becomes openly arbitrary, that all rules become rules maintained simply for rules' sake. The Realist hope that vague language will be rescued by recourse to settled purpose is turned on its head in the CLS critique: language remains relatively clear, but a knowledge of purpose makes the clarity appear arbitrary.<sup>72</sup>

Kelman adds that "the use of nondiscretionary decision-making procedures will inexorably lead on at least some occasions to results the policy maker did not intend."<sup>73</sup> That, in a nutshell, is Lieber's critique of rule-formalism. Adjudication inevitably involves the discretionary application of standards: either legislatures will provide them or courts will have to construct them.

Having established the inevitability of discretionary legal interpretation, Lieber consoled his readers that it posed no threat to democracy. Lieber argued that because interpretation is the condition of institutional survival it is a broadly participatory process in a pluralistic polity like America, permeated by institutions. In

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<sup>70</sup> MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Kathleen Sullivan, *The Supreme Court 1991 Term—Foreward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

<sup>71</sup> See, e.g., Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

<sup>72</sup> KELMAN, *supra* note 70, at 46-47 (emphasis omitted).

<sup>73</sup> *Id.* at 15.

Lieber's vision of an "organic" republic, legal interpretation was an edifying process of deliberation, a universal civic duty.<sup>74</sup> Arguing that freedom from tyranny depended upon an ever-vigilant people rather than written rules,<sup>75</sup> Lieber concluded that the educative benefits of the popular participation in the interpretive process far outweighed the threat of judicial usurpation.

## VII. CONCLUSION

In the end, the failure of compromise in the sectional crisis would demoralize the Whigs and discredit their vision of an institutional polity unified by hermeneutic discourse. The Civil War bequeathed us a contradiction between our racially stratified society and our aspirational constitution that no amount of interpretive ingenuity is sufficient to resolve. The result is described by Kelman: "While settled *practice* is not unattainable . . . settled *justificatory schemes* are in fact unattainable. Efforts at norm legitimation are radically indeterminate not because the source of authority *cannot* speak clearly . . . but because, if pressed, she would not want to."<sup>76</sup> That legal interpretation is unequal to the task of reconciling our society with our constitutional aspirations, however, does not mean it is unequal to the everyday tasks confronting most lawyers. Lieber saw that legal interpretation is a practice enabled by evolving linguistic conventions and institutional customs. In this respect, he anticipated conceptions of meaning and justification later developed by pragmatists. We may regret Lieber's political *conventionality*—but his philosophical *conventionalism* has much to recommend it.

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<sup>74</sup> LIEBER, *supra* note 1, at 64-65 [at 1935-36].

<sup>75</sup> *Id.* at 67-68 [at 1937-38].

<sup>76</sup> KELMAN, *supra* note 70, at 13.

