

MEANING AND PROFESSIONALISM IN AMERICAN LAW*

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The Emperor Justinian boasted that his Code would never require the attention of lawyers, because his law was written in such plain language that every literate person would forever comprehend its mandates.¹ As of course we know, lawyers and jurists have for many centuries since argued over the meaning of the good Emperor's Code and of those later codes written to replace his with language plainer still.

In striving for perfect clarity, Justinian had two great advantages. As Emperor, he was free to utter mandates of his own choosing and to express them precisely in words of his own choosing. Also, in writing laws chiefly for use in resolving private disputes rather than to organize or control his own imperial government or even to regulate a national economy, he had less need for complex norms. Despite these advantages, the language of his Codes proved to be highly indeterminate.

Nevertheless, a substantial measure of certainty was afforded by Justinian's work. Many, many disputes were resolved by reference to his Code and many transactions planned and consummated in confidence that judicial decisions had been predicted within the limits of a tolerable margin of error.

It is unlikely that any of these predictions were achieved by reference to the thoughts of Emperor Justinian himself. It would have been preposterous for those relying on his Codes to have pursued Justinian's own "original understanding." First, because his knowledge and understanding of what he decreed was extremely shallow. And, second, because the inquiry would have defeated the

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1. This is inferred from C.7.45.13, which sets forth the maxim *non exemplis sed legibus indicandum est*, meaning that the cases should be decided according to the statutory text, not examples, such as earlier decisions of judges, for these might be wrong. See XIV *The Civil Law* 188-89 (S.P. Scott, ed., Central Trust Co., 1932).

Emperor's purpose, which was to proclaim a common understanding shared by all subjects of the imperial crown.

The stability of the Roman law was achieved by studious lawyers, who by reason of their professional training came to share a substantial measure of common understanding about the meanings of Latin words when encountered in legal contexts.² Legal texts meant what the lawyers of that time and place meant when using those words to signal to one another about a matter of professional import. Thus, in an important sense, Roman law was from its beginning "reader-centered," and in this sense "post-modern." To provide the community of shared understanding that gave legal utterances meaning was the social and political function of the juriconsults who met and debated cases in the baths of Rome.

Few if any Americans engaged in drafting the Constitution of the United States had Justinian's illusions. They did not suppose that the meaning of their utterances would be forever "plain." Nor did they suppose that the Congress of the United States would speak in plainer language than Justinian had been able to muster. Indeed, to the contrary, the Founders were at pains to prevent Congress from speaking too plainly. In contrast to Parliament, for example, which often spoke and continues to speak in a unitary voice, the American legislative power was divided in order to compel compromise among factions.³ And political compromises tend to be expressed in language laden with meanings and nuances not necessarily the same to all the compromising groups. What the Founders clearly contemplated was that their brief Constitution and the later enactments of the divided government they created would often speak loosely, in terms that might be subject to competing and contrasting interpretations.

How did they expect that these problems of language they so freely created would be resolved? Not, we can confidently assert, on the basis of legislative history. The Founders had no apparent interest in what we today describe by that term, even in the legislative history that they themselves made. James Madison was quite explicit in regard to the publication of his Notes on the 1787 Convention. He insisted that they should never be used to supply meaning to the words he had employed as principal draftsman. He emphasized that it was not his intent or that of the Founders whose

2. See generally, John P. Dawson, *The Oracles of the Law* 122-47 (U. of Mich. Law School, 1968).

3. For an insightful treatment of the implications of parliamentary coherence, see P.S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* 298-325 (Clarendon Press, 1987).

thoughts he uttered that mattered. He was the "original" and it was his understanding that there was no "original understanding" among the Founders, but merely acceptance of the words embodied in the charter itself, words to be understood by those who ratified it,⁴ and thus by the professional audience that would interpret them. Madison was in this limited sense yet another "post-modern" person, and he would have had little regard for the efforts of those who today seek to discern an "original understanding" of the Constitution, an "understanding" that he believed never to have existed any more than did Justinian's understanding of the Code that he decreed.⁵ As in Roman times, the meaning of our legal texts would be discerned from the shared understanding of the profession that enforced them.

Thus, aware as they were of the existence of a professional community of lawyers capable of forming a shared understanding of the meanings of words, most of the Founders would have supposed that at least some of their words had, and some of the utterances of Congress would have, "plain meanings" in the sense that any person acquainted with the professional culture of law in America would comprehend one meaning and no other. And even in circumstances of ambiguity, they might have imagined two or perhaps even three plausible meanings of a text, but not an infinite number depending on the imagination of the individual reader.

The Founders' hopes and expectations were fulfilled in the career of John Marshall. Marshall's great achievement was to organize his Court as an effective instrument for supplying meaning to the nation's legal texts. The institutional means by which Marshall achieved the Founders' purpose was the innovation of the opinion of the court, a device previously unknown. The legal world in England and elsewhere was familiar with individual judicial opinions given orally and seriatim and reported at the whim of such persons as might designate themselves as reporters of those opinions. But nowhere was there experience with a court that regularly published reasoned statements of its decisions.⁶

4. Madison does seem to have regarded the legislative history of the ratifiers to have had some legitimacy, inasmuch as the State Conventions that conferred on the Constitution "all the authority which it possesses." Madison to Thomas Ritchie, Sept. 15, 1821. 3 *Letters and Other Writings of James Madison* 228 (J.B. Lippincott, 1865).

5. For those wishing to question this characterization of Madison, the place to begin is Donald O. Dewey, *James Madison Helps Clio Interpret the Constitution*, 15 *Am. J. Legal Hist.* 38 (1971).

6. For an account of the invention of the opinion of the court, see George L. Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-1815* 383-87 (Macmillan, 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

The opinion of the Court did at least two things. It forced the members of the Court to compose their differences to the extent that they were able. To this extent, it brought compromise or group judgment into the judicial process. Texts thus were made to mean what a group of moderately diverse American lawyers serving appointments for life would take their words to mean. But more, the opinion of the Court was a discipline that forced the Court to give reasons that other lawyers could understand and respect even when they did not agree. The opinions of the Marshall Court served to reveal the Court to its constituency and audience, the legal profession, as an institution striving to conform its use of power to the reasonable expectations of fellow professionals, who were in turn striving to comprehend and interpret language in the collective national interest. Thus our texts came more specifically to mean what a group of lawyers serving appointments for life and subject to the discipline of providing generally persuasive written justification for their collective action would take their words to mean. When read in that light by a person acquainted with the professional culture, there is indeed much of our national law that has "plain meaning."

The Marshall Court's willingness to try to unite on the meaning of such phrases as "due process of law," and to explain them to a professional audience, proved to be a powerful device for enhancing the moral authority of the Court. This did not commend it, of course, to those whose disagreements with Marshall were deep and abiding, such as Jefferson's friend, John Taylor. Taylor, in an 1820 book (bearing a title equally suited to 1992: *Construction Construed and Constitutions Vindicated*), deconstructed the Marshall Court's decisions, revealing them to be the product of the aristocratic impulses of its members. The opinion of the Court, despite its proven vulnerability to deconstruction, was nevertheless a device quickly replicated, first in American state courts, and then in Europe.⁷ John Marshall created a new industry, never before known to the world, of timely reportage and publication of judicial opinions.

Marshall's innovation, like all successful political innovations, grew out of the cultural soil. In the America of his time, it was widely perceived that judges were a part of a somewhat elite and pretentious profession that was vested with a public interest, a sort of public utility not wholly dissimilar from the juriconsults of

until the Privy Council Appeals Act of 1832. F.W. Maitland, *The Constitutional History of England* 462-63 (Cambridge U. Press, 1908). See generally, John P. Dawson, *The Privy Council and Private Law in the Tudor and Stuart Period: II*, 48 Mich. L. Rev. 627 (1950).

7. See Dawson, *The Oracles of the Law* at 82, 402, 438 (cited in note 2). And see J.H. Baker, *Records, Reports and the Origins of Case-Law in England* in John H. Baker, ed., *Judicial Records, Law Reports, and the Growth of Case Law* 15 (Duncker & Humblot, 1989).

Rome. Judges were seen as fiduciaries, and the federal judges were to be trustees of our political institutions. While there was general recognition that these trustees were possessed of ordinary human failings and widespread concern that these failings would result in abuse, it was accepted as a necessity that the success of the experiment in democratic governance would depend on the good faith of the judiciary, a good faith that would be kept or not depending on the morality of the legal profession of which the judiciary would necessarily be a part.

Indeed this perceived connection between the fate of the republic and the morality of the legal profession is what excited the substantial interest of the American revolutionaries in legal education. Jefferson and Hamilton, and their contemporaries in almost every state, sought to promote legal education as a means of assuring a faithful judiciary.⁸ In the succeeding generation, Henry Clay, perhaps the most consequential national figure for four decades, was one of the founders of the Transylvania University Law Department.⁹ Clay's partisans, and even those of his most intense rival, Andrew Jackson, sustained their predecessors' keen interest in legal education as an essential element of democratic governance.¹⁰ Their politics were at cross-purposes, but they shared the aim to develop and sustain a professional community that understood the meaning of the nation's legal texts and a judiciary mindful of a moral obligation to exercise the lash of power to implement those texts in accordance with that common understanding. The premier legal subject in the nation's colleges and law departments was thus Constitutional Law, not Contracts.

One expression of the conventional thinking of Marshall's time is found in the work of Hugh Henry Brackenridge.¹¹ Brackenridge was a Princeton classmate and friend of James Madison, a poet, a military chaplain at Valley Forge, a Pennsylvania politician who led the campaign for ratification and then organized the Jeffersonian Republican Party of western Pennsylvania, a frontier lawyer, a novelist and at last a judge. Law and politics was the subject of his

8. Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 *Wm. & Mary L. Rev.* 527 (1990).

9. Paul D. Carrington, *Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years*, 41 *Mercer L. Rev.* 673 (1990).

10. The New York University School of Law first opened in 1835 under the leadership of Benjamin F. Butler, a "barnburner" Jacksonian. See Ronald L. Brown, *The Law School Papers of Benjamin F. Butler* (Greenwood Press, 1987).

11. See generally Paul D. Carrington, *Law and Chivalry: An Exhortation from the Spirit of the Hon. Hugh Henry Brackenridge of Pittsburgh (1748-1816)*, 53 *U. Pitt. L. Rev.* 705 (1992). See also Madeline Sapienza, *Modern Chivalry in Early American Law: H. H. Brackenridge's Legal Thought* (University Press, 1992).

serialized novel, *Modern Chivalry*, which was widely read in the years following its first appearance 200 years ago. Brackenridge also in 1814 published *Law Miscellanies*, a work devoted exclusively to law and the legal profession and addressed to legal novices.

Brackenridge commenced his discourse on the meaning of legal texts with a Roman maxim that he translated to mean: "It is the worst slavery where the law is unknown, or uncertain."¹² He proclaimed that maxim to be the teaching of experience wherever people have tried to dispense with professional legal judgment, as they did in his time in Pennsylvania. Where the law is unknown and unknowable, the persons wielding the lash of power are, Brackenridge observed, out of control and prone to be abusive. Chaos results, and despotism generally follows chaos.

Yet he acknowledged that there is inevitably much uncertainty in legal texts. "But there is the spirit, that is the construction of laws. This depends upon the mind of the construer; and two men may not in some cases, construe alike."¹³ What informs a legal text is reason, and hence the maxim that "nothing which is against reason, can be law."¹⁴ He emphasized that even unwritten law can be reasonably certain if committed to the understanding of a professional community. He noted that some of his contemporaries, notably Rousseau and Godwin, denied the efficacy of legal texts and sought to confer on judges and other officers uncabined discretion to infer such meanings on those texts as might suit their purposes of the moment. This he decried as the despotism of the Ottomans. It is to limit ukase that laws are enacted; to secure constancy of interpretation and construction, Brackenridge invoked professional morality.

Thus Brackenridge celebrated the judiciary as the "belt of Protagoras"¹⁵ that held the nation together; he deplored the actions of his hero, Jefferson, in attacking the federal judiciary. He emphasized that the primary qualification for judicial work was not intellect, useful though that might be. Although himself one of the stronger intellects of his time, and especially of his community, and although he most strongly favored the development of academic institutions, the judge did not regard intellectual attainment as a primary requirement for judicial work. "The knowledge of all law goes but a little way to the discerning the justice of the cause. . . . [I]f my cause is good, and I am to have my choice of two judges, the

12. Hugh Henry Brackenridge, *Modern Chivalry* 541 (Claude M. Newlin, ed., American Book Co., 1937). This novel was published in installments between 1792 and 1815.

13. *Id.* at 542.

14. *Id.*

15. *Id.* at 786.

one of great legal science, but deficient in natural judgment; the other of good natural judgment, but of no legal knowledge, I would take the one that had what we call common sense."¹⁶

On the other hand, Brackenridge counseled young lawyers that a lifetime was not long enough to learn all that one might usefully know about law. "Mere genius," he affirmed, "goes but a little way in making the lawyer; there must be a plodding and often the plodding student will reach the goal when a more lively talent will not. A court and even a jury will rather hear him who has some depth of judgment but without volubility or grace of diction than all the elegant vociferations where the knowledge is pretense."¹⁷ But more important than hard-earned legal knowledge was sound judgment, or as Brackenridge described it, common sense. And more important still was a morality of self-restraint. There is, the judge affirmed, "such a thing as patriotism on the bench."¹⁸

No one in Brackenridge's time doubted that legal decisions entailed political ones. But he emphasized that judging is an anti-democratic activity, especially where the power of judicial review is exercised by life tenure appointees. For this reason, he said that any judicial decision invalidating legislation

must be a plain and broad case that will justify the interference, or render it safe to make the experiment. An omnipotent legislature will not readily yield to any thing but that which will carry the sense of the community with it.¹⁹ . . . [S]crewing up the construction of the constitution too tight, the public mind will revolt against it. Driven to a contention, much that is valuable in the constitution might be lost in that torrent which an overstrained construction had produced, like waters in a dam without a flood-gate.²⁰

Brackenridge affirmed that the willingness and ability of judges to practice self-restraint, to repress their "personal and factious considerations," was dependent on the expectations of the legal profession of which the judiciary was a part. If there were not a legal

16. *Id.* at 616-17. Redolent of Senator Hruska's plea for mediocrity on the Supreme Court of United States was Brackenridge's observation that "A man of very moderate parts can fill an office perhaps the better for being moderate. . . ." Quoted in Claude M. Newlin, *The Life and Writings of Hugh Henry Brackenridge* 273 (Princeton U. Press, 1932).

17. Hugh Henry Brackenridge, *Law Miscellanies: Containing an Introduction to the Study of Law With Some Law Cases and a Variety of Other Matters Chiefly Original xvii-xviii* (1814) (Arno Press ed., 1972) ("*Law Miscellanies*").

18. Brackenridge, *Modern Chivalry* at 544 (cited in note 12). Patriotism is needed because "[A] great difficulty arises, in the administration of the laws, to guard the consciences of men." *Id.* at 543.

19. Brackenridge, *Law Miscellanies* at 67 (cited in note 17).

20. Brackenridge, *Modern Chivalry* at 545 (cited in note 12).

audience to applaud self-restraint and to chastise self-indulgence, the judiciary would likely break its trust. He called upon his young readers to provide just such a professional audience. Pointing to post-revolutionary France, he noted that a nation without lawyers has no stability. "What could you expect," he asked "in return from despotism but the opposite extreme? In the state of the public mind in France, what was there to arrest at a medium? . . . You might as well expect the stone of Sisyphus down hill, of itself, to stop short at a proper point."²¹

The most illuminating early work on the meaning of our legal texts is that of Francis Lieber. Lieber, a German-American immigrant, was teaching Constitutional Law at South Carolina in 1838 when he published a two-volume work entitled *A Manual of Legal and Political Ethics* and a shorter work entitled *Legal Hermeneutics*.²² The latter was originally embodied in the former, but at the suggestion of some readers of the manuscript it was broken out for separate publication.

Lieber was recognized by his contemporaries, including James Kent and Joseph Story, as perhaps the premier legal academic of antebellum times. His works, which included one book entitled *Civil Liberties and Self Government*, were kept in circulation throughout the nineteenth century as a result of late editions by such distinguished persons as President Woolsey of Yale and President Gilman of Johns Hopkins. He deserves much greater notice among law teachers than he has received.

Lieber's writings of 1838 drew heavily on classical sources. He was on intimate terms with Roman traditions. He also drew on the body of literature developed in theology to establish a discipline of interpretation of religious texts, the learning that provided the rudiments of later literary criticism. But Francis Lieber was animated not by his affection for the classics or the scholarly discipline of literary criticism, but by his passionate regard for democratic constitutionalism as it was then emerging in America. His works on ethics proposed standards of conduct for public officers and for citizens at large in exercising their franchise. The inculcation of these standards was the sovereign aim of most early American law teachers, including Joseph Story, who assigned Lieber's books to be read by his Harvard students. Had Lieber appeared in America a decade earlier, Jefferson probably would have selected him to be the law professor at his university.

21. Brackenridge, *Modern Chivalry* at 564 (cited in note 12).

22. See Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 J. Legal Ed. 339 (1992).

For Lieber, Constitutional Law was a branch of the law of Trusts. All of us as citizens are, in his view, fiduciaries. We have no rights, he repeatedly affirms, that are not linked to duties. Especially those exercising power or influence on public affairs have duties to their fellow citizens. For Lieber, the principles of interpretation and construction are an important part of the standards of public ethics, dictates as to how those who apply the lash of power conform their conduct to the common understanding of texts to which their actions give meaning.²³ His hermeneutics are intended to guide judges and others in the repression of the "personal and factious considerations" Brackenridge described as ever tending to subvert one's professional judgment about the meaning of legal texts.

Lieber was fully cognizant of the problem of indeterminacy. Indeed, he catalogues its many causes. And he even extols its benefits, observing that many political and legal blunders can result from excessive effort to be precise and unambiguous. He cautions drafters of legal texts with a couplet he found on the wall of a tailor shop: "tight will tear, wide will wear."²⁴

Lieber joins Madison in questioning the utility of legislative history or original understandings. He asserts that the motives of the utterers of legal texts cannot be known except from the language of their texts.²⁵

Yet Lieber asserts that every text has a single, correct meaning that can generally be discerned by his interpretive methods calling not for literal-mindedness, but for interpretation that remains close to the text but mindful of its context.²⁶ Sometimes, Lieber acknowledges, circumstances require that meaning be constructed outside the text,²⁷ but this should be done with much caution to avoid usurpations.

Both construction and interpretation are to be guided by considerations of the public interest as seen through the spectacles of the community to be served. This discipline requires resistance to meanings that the interpreter may personally prefer, or may find most congenial to factional interests that he or she may favor. Whether or not the judge rejoices in what the public reckons to be

23. For another contemporary review of Lieber, see James Farr, *The Americanization of Hermeneutics: Francis Lieber's Legal and Political Hermeneutics* in Gregory Leyh, ed., *Legal Hermeneutics* 83 (U. of Cal. Press, 1992).

24. Francis Lieber, *Legal and Political Hermeneutics* 195 (William G. Hammond, ed., F.H. Thomas, 1880). This work was first published in 1838.

25. Id. at 102.

26. Id. at 11-12.

27. Id. at 111.

its interest, he or she, Lieber tells us, cannot "run against the movement of" his or her time.²⁸ Laws and courts, he tells us, must be seen by citizens to operate for the advantage of society. The interpreter of the law must therefore be careful not to misjudge his or her own time, for everyone desiring to justify extravagant construction can do so on the ground that a case is peculiar or a time critical.²⁹

Lieber thus understands that his principles of interpretation and construction are no more than loose guides. He would have been unsurprised to have applied to them the criticism that Karl Llewellyn was later to make of the canons of statutory construction.³⁰ For every thrust by one such canon, Llewellyn informed us, there is an appropriate parry by another. Lieber knew that his principles were as vulnerable to misuse as the legal texts they were designed to illuminate. What he sought to foster by his teaching was not an empty formalism based on rules of hermeneutics, but a spirit of duty and of respect for the rights and reasonable expectations of lawyers advising clients, even those clients whom the person wielding the lash of power might despise.

Lieber does not expect to locate the discipline and the wisdom required for wise interpretation in every citizen. He discerns that most persons lacking professional discipline are prone to forget "that there are two parties in questions of justice" or that the law is "not one [found] within [one's own] breast."³¹ Lieber is cautious about lawyers and counsels drafters of legal texts against needless intricacy, which he describes as a national curse because it can "unite the lawyers into a compact, formidable and privileged class, to be compared only to the priesthood of some nations, ruling the uninitiated."³² But in the end, he affirms the indispensability of the legal profession as the instrument of self-discipline in interpretation.

In asserting the relation between the ethics of the legal profession and the efficacy of our law, the work of Brackenridge and Lieber lends support to the thesis advanced by Judge Harry Edwards in a recent issue of the *Michigan Law Review*: that the existing and seemingly growing disjunction between the commercial impulses of much of the bar and the academized and theoretical

28. *Id.* at 126.

29. *Id.* at 129.

30. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About how Statutes Are to be Construed*, 3 *Vand. L. Rev.* 395 (1950).

31. Lieber, *Legal and Political Hermeneutics* at 41 (cited in note 24).

32. *Id.* at 155.

impulses of many law teachers is not good for the law.³³ To interpret legal texts wisely, the practitioners must lay aside the private interests of their clients and the teachers must lay aside the impulse to creativity and novelty.

I would like to conclude by speculating on what Lieber would say to his successors teaching Constitutional Law 120 years after his death. Being one who ever exulted in his own good fortune, he would, I think, emphasize the enormity of the privileges enjoyed by those who teach Constitutional Law in America. He would cite our freedom and independence as unequalled in all history. He would then affirm that these rights, like all others, bear duties, in our case to use our fortunate status wisely and with restraint. He would remind us that we are not called to our roles as law teachers to manipulate legal texts for the advantage of some cause of great interest to ourselves or to our academic colleagues. He would declare that as fiduciaries, when interpreting legal texts, we are obliged to silence within ourselves those "personal and factious considerations" tending to deflect our professional judgment as to what legal texts mean. It was ever his boast that he absolutely "belong(ed) to no party" when teaching.³⁴ And he ever cautioned against the indulgence of emotions allowed to

run so high that the greatest link and tie of humanity, language, loses its very essence, and people cease to understand one another, when even the best-intended words . . . are unintentionally yet passionately or willfully wronged, misconstrued, wrung from their very sense.³⁵

Lieber insisted that, even where there is ambiguity, there is one meaning of the law that best fits the interests of us all. While it is the task of the legal scholar to unfold that meaning, it is framed not by the expectations and understandings of the legal academy but by those of the larger legal profession of which we are a part. And those expectations are in turn informed by the culture of which the legal profession is a part and a product. In his insistence on one meaning, he reminds us that we can have but one Constitution and one body of national law. The most elementary meaning of equal protection of the law requires that all our law must be the same for

33. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992).

34. Francis Lieber, *The Ancient and the Modern Teacher of Politics* in I *The Miscellaneous Writings of Francis Lieber* 374 (Daniel C. Gilman, ed., J.B. Lippincott, 1881). See also letter to Oscar Lieber, Nov. 1860, in Thomas Perry, *The Life and Letters of Francis Lieber* 313 (J.R. Osgood, 1882).

35. Francis Lieber, II *Manual of Political Ethics* 262 (Theodore D. Woolsey, ed., J.B. Lippincott, 1888).

all of us and cannot have different meanings according to the gender, color or ethnic identity of the person interpreting it. It is in that important sense that we are one profession; however conflicted our politics, we are obliged to read our texts together as one. To do so is perhaps the central attribute of being professionals. If the adherents of both Jefferson and Hamilton, and of Clay and Jackson, could unite on that understanding of legal professionalism, so can we.