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Francis Lieber on the Sources of Civil Liberty

Steven Alan Samson

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Among the European visitors whose observations of early American life found a ready audience was a young *émigré* who consorted with the leading scholars, jurists, and literati of his day.¹ Unaccountably neglected for over a century, Francis Lieber (1798-1872), one of the first university-trained German scholars to migrate to America, served as a bridge between the intellectual and political cultures of Germany, England, and America. While cultivating an astonishing range of activities and interests, Lieber helped lay the foundation of academic political science in America and promoted its practical application to public affairs. His theory of institutional liberty, which attributes the rise of civil liberty to the development of an increasingly integrated complex of self-governing institutions, may be his most original contribution to the political science literature.

Such varied accomplishments alone would be sufficient to commend Lieber to our attention today. But there is a more immediate purpose that animates this introduction to a forgotten American. Francis

¹ The full list of Lieber's correspondents is a veritable "Who's Who" of the literary, political, and academic leaders of his day. Among his major correspondents were J. K. Bluntschli, Henry Clay, Dorothea Dix, Edward Everett, Hamilton Fish, Simon Greenleaf, Gen. Henry Halleck, Samuel Gridley Howe and his wife, James Kent and his son William, Henry Wadsworth Longfellow and his wife, K. A. J. Mittermaier, William H. Prescott, Joseph Story, Charles Sumner, George Ticknor and his wife, Alexis de Tocqueville, and Andrew Dickson White. For a more comprehensive list, see Charles B. Robson, "Papers of Francis Lieber," *Huntington Library Bulletin*, 3 (February 1933): 135-55.

Lieber also has much to teach us about the moral requisites of a healthy political community. As the author of treatises that were standard college textbooks to an earlier generation, Lieber might once again serve as a bridge, this time a bridge back to our most vital political traditions and a guide to understanding the roots of American liberty. What follows is an examination of the religious and political factors to which Lieber attributed the historical emergence of modern civil liberty.

*Lieber a bridge
to vital
political
traditions.*

A Biographical Sketch

Born into a once-prosperous business family in Berlin, Franz (later Francis) Lieber witnessed Napoleon's entry into Berlin in 1807 and was severely wounded during the Waterloo campaign in 1815.² As a student leader in the nationalistic *Turnerschaft* movement, Lieber was imprisoned for his political activities and barred from the universities, although he contrived to win admission to the University of Jena and was awarded a Ph.D. in 1820. His adventurous spirit took him to Greece the following year to join the fight for independence, and then to Italy, where, now somewhat disillusioned, he came under the wing of the historian and diplomat Barthold Niebuhr.

Granted a royal pardon, Lieber returned to Germany in 1823 but was still regarded with suspicion by the authorities, who imprisoned him briefly and thwarted his efforts to secure a livelihood. So in May 1826 he slipped out of the country again, took passage to England, and found a place in the social circle of John and Sarah Austin. After spending a rewarding but impecunious year in London, he agreed to take charge of a new gymnastics school in Boston. The convivial Lieber, who arrived late in June 1827, soon found his way into the affections of New England society.

Combining a jack-of-all-trades inventiveness with a facility for self-promotion, Lieber came to embody a peculiarly American character-type: the entrepreneur or self-made man. Waning public interest in gymnastics and swimming soon gave him time to begin work as an American correspondent for a German newspaper chain and to launch

² This account is drawn primarily from Frank Freidel, *Francis Lieber: Nineteenth-Century Liberal* (Baton Rouge: Louisiana State University Press, 1947). See also Lewis R. Harley, *Francis Lieber: His Life and Political Philosophy* (New York: AMS Press, 1970 [1899]); and Henry A. Pochmann, *German Culture in America: Philosophical and Literary Influences, 1600-1900* (Madison: University of Wisconsin Press, 1961), 125-27.

the *Encyclopaedia Americana* (1829-1833), which became a major early conduit for the transmission of German cultural influences to America.

Afterwards the self-styled "publicist" (the word is one of his many coinages) won the first in a series of academic appointments. From 1835-1856 he occupied the chair in history and political economy at South Carolina College, then the chair in history and political science at Columbia College from 1857-1865, and finally the chair in constitutional history and public law at Columbia Law School from 1865-1872. During the Civil War, he drafted the first code of military conduct for use in land warfare, which was later incorporated into the Hague and Geneva Conventions.³

Lieber's work covers a wide range of fields.⁴ His contributions to penology, international law, and higher education have been acknowledged in the standard histories of those fields.⁵ Subsequent to the *Encyclopaedia Americana*, Lieber's larger works include a popular travelogue *Letters to a Gentleman in Germany* (1834), which includes an account of the campaign against Napoleon; the two-volume *Manual of Political Ethics* (1838-1839); *Legal and Political Hermeneutics*⁶ (1839), which sets forth principles of interpretation and construction in law and politics; *Essays on Property and Labour* (1841); *On Civil Liberty and*

³ See Richard Shelly Hartigan, *Lieber's Code and the Law of War* (Chicago: Precedent, 1983).

⁴ Apart from news articles, occasional verse, special lectures, topical pamphlets (including pro-Union propaganda), and several major treatises, Lieber also published a study of the Lancastrian system of education; a booklet of German drinking songs; thirteen volumes of his encyclopedia, which was modeled upon Brockhaus's *Konversations-Lexikon*; an introduction to Beaumont and Tocqueville's work on the American penitentiary system, which he also translated; an education plan for Girard College; reminiscences of Barthold Niebuhr; proposals to Congress concerning statistics and an international copyright; remarks on the relation between education and crime; remarks on comparative philology; a study of penology (a term he coined); a study of the vocal sounds of Laura Bridgman, the blind deafmute; and several essays on nationalism and international law.

⁵ In addition, Lieber's influence on sociology is noted in Albion W. Small, "Fifty Years of Sociology in the United States," *American Journal of Sociology*, 21 (1915-1916): 728-29, note 1; and his place in physical education (along with that of his teacher, Friedrich Jahn) is considered at length in Fred Eugene Leonard, *A Guide to the History of Physical Education*, 3rd ed., revised by George B. Affleck (Westport, CT: Greenwood Press), 242-47.

⁶ This work is the subject of James Farr, "Francis Lieber and the Interpretation of American Political Science," *Journal of Politics*, 52 (November 1990): 1027-49; and, more recently, A Symposium on Legal and Political Hermeneutics in *Cardozo Law Review*, 16 (April 1995): 1879-2351, includes a reprinting of the third edition (1880) of Lieber's text, with some modifications, and ten related articles.

Self-Government (1853), his major political science treatise; a posthumous collection of his shorter writings, *Miscellaneous Writings* (two volumes: 1881); and selections from his letters edited by Thomas Sergeant Perry, *The Life and Letters of Francis Lieber* (1882).

The Character of Lieber's Political Philosophy

Alan Grimes places Lieber at the transition between "the constitutional and legal approach to an understanding of the nature of the American Union, and the rise of the organic concept of the nation."

Lieber skilfully synthesized the English emphasis on civil liberty and the importance of local political institutions, with the German emphasis on nationalism. Thus Lieber's nationalism was built upon decentralized institutions which in turn helped protect the civil rights of the citizens. It was, Lieber believed, the happy combination of local institutions and national purpose which protected and fostered civil liberty in a modern nation state.⁷

Given Lieber's personal background, it was probably natural that the chief concern of his political philosophy should be how to obtain and perpetuate "real and essential self-government, in the service of liberty."⁸ His theory of institutional liberty—that civil liberty is built upon a well-integrated system of self-governing public institutions supported and protected by public opinion—resonates with the echo of earlier disappointments. The Germany of his youth was fragmented among several petty kingdoms that subsisted precariously in the shadow of France and Austria. With Napoleon's defeat Prussia had simply exchanged a French overlord for Austrian hegemony. The kind of liberty and self-government known in England and the United States must have seemed a distant prospect for a young German liberal. Lieber must have wondered what internal as well as outward qualities could account for such differences in national circumstance.

So it was also probably natural that the first of Lieber's two treatises on politics would concentrate on political ethics. As Bernard Brown has noted,

Lieber believed that the problems of politics are primarily ethical and moral. Lieber's concept of morality, like Kant's, is a social one; it de-

⁷ Alan Pendleton Grimes, *American Political Thought*, revised ed. (New York: Holt, Rinehart and Winston, 1960), 283. Grimes draws primarily from Lieber's essay "Nationalism and Internationalism" in *The Miscellaneous Writings of Francis Lieber*, ed. Daniel C. Gilman, vol. 2 (Philadelphia: Lippincott, 1880), 221-43.

⁸ Francis Lieber, *On Civil Liberty and Self-Government*, 3rd ed., revised, ed. Theodore D. Woolsey (Philadelphia: J. B. Lippincott, 1877), 300.

rives from the fact that man is a social being. Each individual, because he exists, has valid claims; but the fact that there are other individuals alike in nature and with similar claims creates a *social* situation and the need for general controls. Because of the existence not only of the individual, but of other individuals, and of a society as well, both right and duties are essential to men in society.⁹

Especially in his early work, Lieber may be classed with the academic moral philosophers of the period who, according to D. H. Meyer, "played a significant role in the formation of America's public conscience."¹⁰ Lieber's sensitivity as a publicist to the need for instruction in ethics is equally evident later in his lectures on "The Character of the Gentleman" and "The Ancient and Modern Teacher of Politics."

Another major dimension of Lieber's thought is theological. Repeated references to God, creation, and Christianity sprinkle the *Manual of Political Ethics* and, more casually, *On Civil Liberty and Self-Government*.¹¹ Far from being incidental to the life of society, Christianity holds a central place that justifies the inclusion of religious instruction in public colleges: "The Christian religion is interwoven with all the institutions which surround us and in which we have our social being. The Christian religion has found its way into a thousand laws, and has generated a thousand others. It can no more be excluded than the common law, or our language."¹²

Christian
religion
interwoven
with America's
"social being."

⁹ Bernard Edward Brown, *American Conservatives: The Political Thought of Francis Lieber and John W. Burgess* (New York: Columbia University Press, 1951), 28. The reference is to one of Lieber's favorite mottos: "No Right without its Duties, no Duty without its Rights."

¹⁰ D. H. Meyer, *The Instructed Conscience: The Shaping of the American National Ethic* (Philadelphia: University of Pennsylvania Press, 1972), vii. Meyer chose to exclude Lieber because his "concerns and approach clearly [differed] from those of the ordinary textbook writers (147)." See also the chapter on Lieber in Wilson Smith, *Professors and Public Ethics: Studies of Northern Moral Philosophers before the Civil War* (Ithaca, NY: Cornell University Press, 1965), 95-110, and a well-integrated treatment of Lieber's ethics and hermeneutics in Mike Robert Horenstein, "The Virtues of Interpretation in a Jural Society," *Cardozo Law Review*, 16 (April 1995): 2273-2304.

¹¹ Lieber's attention to theology was not unusual at this time. Theodore Woolsey's *Political Science* (1877) and Elisha Mulford's *The Nation* (1870) show a clear theological orientation. Woolsey, the president of Yale, was much indebted to Lieber's *On Civil Liberty and Self-Government*, which Yale adopted as a textbook in the 1850s. Another political scientist at Yale in the early 1870s, who subsequently adopted scientific naturalism, was the Rev. William Graham Sumner. See George M. Marsden, "God and Man at Yale (1880)," *First Things*, 42 (April 1994): 40. Likewise, John W. Burgess studied theology before he succeeded to the political science chair at Columbia once held by Lieber.

¹² "The Necessity of Religious Instruction in Colleges," in *Miscellaneous Writings*, vol. 2, 529.

Lieber, a professing Episcopalian, adhered to a dynamic view of divine creation, believing that humanity is providentially designed for a higher destiny. A pervading theocentricity is typical of Lieber's academic writing. While discussing the importance of "calmness of mind" and trust in politics, Lieber casually added: "Great and calm souls look upon their God, who when He created the rivers and the sea, knew that man would invent bridges, boats, and sails; who when he called the earth into existence and placed man upon it, knew that the plough would be contrived in due time."¹³

It was Lieber's firm conclusion that human nature reaches its fullest amplitude of expression in a state of civilized interdependence—in cultural maturity—rather than primitive isolation. He focused on the dynamic interplay of man's individuality and his sociality, involving the conjugal union, the family, language, and the institution of property, to explain the rise and progress of civilization. "Man was either made to be stationary or for civilization; a medium is not imaginable. . . . Civilization develops man, and if he is, according to his whole character and destiny, made for development, civilization is his truly natural state, because adapted to and effected by his nature."¹⁴ Lieber attributed cultural and developmental differences primarily to tractable historical influences and as a rule was wary of invidious racial or biological comparisons.¹⁵

*Civilization
man's
"natural state."*

Lieber consciously sought to distinguish his views from the dominant German schools of law and politics. He charged that the historical school sacrificed "right and justice, freedom, truth, and wisdom at the shrine of Precedent and at the altar of Fact" while the philosophical school sought "a predetermined type of social development in each state and nation, and in every race, reducing men to instinctive and involuntary beings, and society to nothing better than a bee-hive."¹⁶

¹³ Francis Lieber, *Manual of Political Ethics, Designed Chiefly for the Use of Colleges and Students at Law*, 2nd, revised, ed. Theodore D. Woolsey, vol. 1 (Philadelphia: J. B. Lippincott, 1888), 427. While discussing the importance of a representative form of government, he noted: "In the highest point of view there are no accidents, inasmuch as we imagine Providence overruling the universe in all its elements." *Ibid.*, vol. 2, 317 note.

¹⁴ *Manual*, vol. 1, 127-28.

¹⁵ Charles B. Robson, who did pioneering work in the Lieber Papers in the 1930s and 1940s, noted that "it is possible to charge Lieber with a certain doctrine of racialism; but he neither identified the concept of race with that of a nation nor explained racial characteristics in terms of biological heritage." C. B. Robson, "Francis Lieber's Nationalism," *Journal of Politics*, 8 (1946): 57.

¹⁶ *Miscellaneous Writings*, vol. 1, 339-40. See also vol. 2, 8-9, 381.

He likened both society and the state to living organisms, especially to the animal body, which he called "a republic of action."¹⁷ But in describing his ideal of "hamarchy" (cooperative rule), he avoided the totalitarian implications of the organic model by basing it not, "as it is in so many biological analogies, on the centrally directed nervous and muscular system of the animal, but upon the vital generative power of the disparate 'systems [which] act and produce independently.'" ¹⁸

Lieber associated the rise of the nation-state in the modern era with the development of autonomous *public* institutions. "The ancients knew of no nations" that could fuse "many discordant elements into one society."¹⁹ At best, the ancient city-state (a term Lieber claimed to have coined) permitted a liberty that "consisted mainly in the equal participation of each citizen in government." By contrast, the modern representative system, which Lieber called "a flower of civilization," operates in the context of a nationalized society and a socialized population, which gives much greater scope to the protection of the individual and his rights.

Similarly the Middle Ages lacked a true state: that is, "a clearly organized, enlarged political society."

Everything in the middle ages had a tendency to individual and isolated independence, a condition of things most necessary in the course of civilization, but below our broad civil liberty. The castles, cities, bishoprics, republics, communities, or whatever the character of the various independent clusters and groups was, were not strictly socialized with one another, that is, they had not grown into one comprehensive society. . . . The various populations had not, properly speaking, become nationalized.²⁰

Lieber was careful to distinguish nationalization, which he likened to the "diffusion of the same life-blood through a system of arteries," from centralization, which in the absence of "national and public liberty" leads to despotism.²¹ The real problem with the decentralized

¹⁷ Lieber, *Manual*, vol. 1, 353.

¹⁸ C. B. Robson, "Francis Lieber's Theories of Society, Government, and Liberty," *Journal of Politics*, 4 (1942): 241.

¹⁹ *Manual*, vol. 2, 314.

²⁰ *Ibid.*, 315.

²¹ *Ibid.*, 315 note. Nearly three decades later he wrote: "Centralism . . . may be intelligent and formulated with great precision; but centralism remains an inferior species of government. It is no government of peaceful development, and decentralization becomes necessary as self-government or liberty are longed for and present themselves clearer to the mind of a people waxing in manliness and independence." *Miscellaneous Writings*, vol. 2, 226.

corporate structure of medieval life is that the various "little independent circles" acted as though sovereign. They were "in contact with one another, but not joined; connected, but not united."²² Even royal power was just one more feudal power. "We find in the middle ages power enough, but not public power; an infinity of institutions, but not public institutions; numberless chartered and frequently highly valued privileges, but not what we now term public law. We have, in brief, as indicated already, separate yet clustered independence, not individual yet public liberty."²³

*Nationalization
not the same as
centralization.*

Later summarizing this argument, Lieber identified three major characteristics of the development of the modern era. The first is "national polity" or the nation-state. The second is "the general endeavor to define more clearly, and to extend more widely, human rights and civil liberty."²⁴ The third is the simultaneous flowering of many leading nations, rather than a single imperial hegemon, under the aegis of international law and "in the bonds of one common moving civilization."²⁵ Significantly, he believed that "there will be no obliteration of nationalities" in this commonwealth of nations. Internationalization is merely the latest manifestation of an "all-pervading law of interdependence."²⁶

Each of these themes converges in Lieber's theory of institutional liberty. The theory itself developed through several stages of its own: the idea of hamarchy as the ideal form of the jural society in *Manual of Political Ethics* (1838, 1839); the contrast between "Anglican Liberty and Gallican Liberty" (1849) in an essay by that title; and, most importantly, the long section on institutional liberty in *On Civil Liberty and Self-Government* (1853).

Nationalism

The character of institutional liberty is easiest to grasp by starting with Lieber's essay on "Nationalism and Internationalism" (1868), where the concept was unobtrusively integrated into his theory of nationalism. Lieber regarded the nation as the product of a slow, organic growth that merges the people of a given area into a greater whole. As Alan Grimes notes:

²² *Manual*, vol. 2, 316.

²³ *Ibid.*, 318.

²⁴ *Miscellaneous Writings*, vol. 2, 222, 239.

²⁵ *Ibid.*, 222, 239.

²⁶ *Ibid.*, 241-42.

This institutional and evolutionary emphasis in Lieber led him to discard the contract theory of the state, holding that the state arose from the social necessities of man's being. The nation, in Lieber's conception, was a homogeneous population, in a coherent territory, with a common language, common literature and institutions, possessed of a consciousness of a common destiny. It was this aspect of commonality of culture, of history, of political institutions and of destiny which made a given people in a given place a nation. This organic concept of the nation was certainly far closer to Burke than it was to the contract theorists in America.²⁷

The role of nationalism (another term Lieber coined) was clearly delineated in Lieber's thinking from the first, although it appears to have gone through some stages in its development. In his early *Manual of Political Ethics*, Lieber attributed the change between ancient and modern times to six factors:

- 1) Christianity;
- 2) the barbarian conquest of the Roman empire;
- 3) the increased size and population of states;
- 4) printing;
- 5) the increased importance of taxpayer, science, and industry; and
- 6) the discovery of America.²⁸

The first of these factors, Christianity, introduced the crucial pre-supposition of modern civil liberty by emphasizing the importance of individual character apart from birth, fortune, caste or color:

A spiritual God, not attached to any nationality, is preached to all men, whatever language they may speak, whatever country they inhabit—a father to all men.

The moral value of the individual became thus immeasurably raised. Everyone is declared to have a moral being of his own, with high responsibilities, to answer for hereafter; no one will find favor before the high judge on the ground that he was born in a certain country or descended of a certain class. A God had been proclaimed to be the God of all men, high or low, distant or near; a God before whom all are equal. The state could no longer remain all and everything; a territory had been discovered beyond the state; man is something, and something important, besides his being a citizen; he is a man for himself, a moral agent, called upon by the Almighty himself, not any longer imagined as having any national attribute, to fulfil his duties and to receive his reward according to his deeds. The farther this religion extends, the more its preachers insist that no language,

²⁷ Grimes, *op. cit.*, 283-84. In fact, Lieber was critical of Locke's contract theory. He probably owed much more to Montesquieu's idea of the separation of powers and to the influence of Burke on German liberals like Niebuhr and Wilhelm von Humboldt.

²⁸ *Manual*, vol. 1, 370.

no political limits are boundaries for Christians, as members of their one great church.²⁹

Taken together in roughly chronological order, these six factors marked the long medieval transition from the ancient polity and culminated in the rise of the modern nation-state system. The importance of this historical transformation is again acknowledged in Lieber's treatise *On Civil Liberty and Self-Government*:

How necessary for modern liberty a national representative government is—a representative system comprehending the whole state, and throwing liberty over it broadcast—will appear at once, if we remember that local self-government exists in many Asiatic countries, where, however, there is no union of these many insulated self-governments, and no state self-government, and therefore no liberty. We shall also presently see that where there is only a national representative government without local self-government, there is no liberty as we understand it.³⁰

The modern representative system, then, is a pluralistic union made up of several distinct elements within a single social matrix and bonded according to some principle of what has been called "subsidiarity." Lieber here anticipates later theories of political development.

Lieber's mature views on the subject of nationalism must be discerned in more fragmentary fashion in his last essays. In an early version of his essay on nationalism, Lieber claimed that "the national polity is the normal type of modern government."

As the city-state was the normal type of free communities in antiquity, and as the feudal system was one of the normal types of government in the Middle Ages, so is the national polity the normal type of our own epoch—not indeed centralism.

Large nations have been formed out of the fragmentary peoples on the continent of Europe, England alone dating the blessing of a national polity over a thousand years back; others are in the act of forming; others, already existing, are carrying out more distinctly or establishing more firmly the national elements of their polities.³¹

The modern nation-state represents a marked advance over the "market-republics" of earlier times and the "absorbing centralism and dissolving communism" of Asian and European despotism. But this advance beyond the feudal system of local and class privileges has taken two opposing forms, as summarized by Charles Robson:

²⁹ *Ibid.*, 372-73.

³⁰ *Civil Liberty*, 168.

³¹ *Miscellaneous Writings*, vol. 2, 225.

In so far as nationalism served to break down isolated groupings and the stratification of the middle ages, to do away with petty territorial obstructions to cultural and economic exchange, . . . it contributed to the realization of freedom. When it took the form of absolutism and centralization, however, the concept of liberty was distorted and the actuality destroyed.³²

Lieber held that "extensive and organized power over large populations does not suffice to make a nation."³³ More essential is a full, comprehensive development in terms of a unifying ideal or standard. This requisite appears to be partially met in his *Manual of Political Ethics* by the representative system: "These enlarged societies, however, cannot obtain or guarantee liberty, except by representation, and their representation must be social, national, that is, it must represent not only the separate component parts but the totality of society as one organized whole."³⁴ The wording of this passage suggests that Lieber was fully conscious of both the uniqueness and the fragility of the American union.

As with his theological predilections, Lieber's pro-Union sentiments were echoed throughout his more than three decades of scholarly writing. Despite what he called the "national humiliation and suicide" of the ancient Hebrews "before their national government had fully and comprehensively developed itself," he considered it very significant that "the only monotheistic people, and the people for whom Moses legislated, formed, in the earliest times of history, a nation in the modern sense. The same cannot be said of ancient Egypt."³⁵

Lieber regarded England as the first modern nation and the native land of modern liberty. He dated its origin back to the time of Alfred the Great, its early lawgiver, and maintained that "in her alone liberty and nationality grew apace."³⁶ By contrast, the still incomplete process

³² C. B. Robson, "Francis Lieber's Nationalism," *Journal of Politics*, 8 (1946): 63.

³³ *Miscellaneous Writings*, vol. 2, 229.

³⁴ *Manual*, vol. 2, 322.

³⁵ *Miscellaneous Writings*, vol. 2, 230. Enoch Cobb Wines, whose interests included prison reform, had a similar regard for what he called the Hebrew Republic. See E. C. Wines, *Commentaries on the Laws of the Ancient Hebrews, with an Introductory Essay on Civil Society and Government*. (Philadelphia: William S. & Alfred Martien, 1859 [1853]). The idea that the Israelites had a republican form of government was not a new one. See, for example, the election sermon of Samuel Langdon preached before the General Court of New Hampshire on June 5, 1788, which is reproduced in Ellis Sandoz, ed. *Political Sermons of the American Founding Era, 1730-1805* (Indianapolis: Liberty Press, 1991), 941-67.

³⁶ *Ibid.*, 226. Alfred's code began with the Ten Commandments.

of creating the Italian and German nations had begun only much later when Dante and Luther each raised his native dialect to the dignity of a national tongue.

Turning to the question of whether the early American states formed a distinct nation, Lieber argued that neither the accidents of geography nor the intentions of the crown were determinative. Instead, he began by noting that the American colonists hailed from a country where national institutions were part of their birthright and already displayed considerable expertise in self-government.

*American
national unity
preceded
independence.*

Long before the American independence was actually declared, the consciousness of our forming a national entirety was ripening. The Continental congress used the words country and America in its official acts—in resolutions and appointments—before that day of mark, the Fourth of July. The very name Continental congress, Continental army and money, shows that the idea of a national unity was present to the minds of all—at home as well as abroad.³⁷

Like Orestes Brownson, Lieber concluded that the American union predated the Declaration of Independence. Specifically, he held John Adams's view that James Otis's speech against the writs of assistance in 1761 "breathed into this nation the breath of life." Thus the American nation was born out of a struggle for civil liberty: "all exertions were instinctively national, or in the spirit of a nation to be born."³⁸ The fact that the founders adopted a general rather than a specific name for the country—the "United States of America" or simply "America"—seemed significant to Lieber as well as Brownson.³⁹ But whether the name was distinct or not, "all felt that we were a nation."⁴⁰

The United States were afterward transformed into a national representative republic by the adoption of the Constitution.

The instrument is called a Constitution, not Articles; the word sovereign does not appear once; a national legislature, the members of which vote individually and personally, not by states, and an eminently national and individual executive, in the person of one man, are established, and a portion of the people or of the states (though it

³⁷ *Ibid.*, 233.

³⁸ *Ibid.*, 235.

³⁹ In the name United States "there are no sovereign people without states, and no states without union, or that are not *united* states." At no time were the states independent of each other, in Brownson's judgment. He held that sovereignty was vested "in the states united, not in the states severally, precisely as we have found the sovereignty of the people is in the people collectively or as a society, not in the people individually. . . ." Alvan S. Ryan, ed. *The Brownson Reader* (New York: P. J. Kenedy & Sons, 1955), 77.

⁴⁰ *Miscellaneous Writings*, vol. 2, 234.

must be a large majority) can oblige the smaller portion to adopt amendments to the Constitution. No minority of *sovereigns*, however small, can be made subject to a majority of sovereigns, however large. This single fact would annihilate *sovereignty*. We are a nation. The general government was always called in the early years of our present government, a national government, and rightly so.⁴¹

It is this condition of self-government *with* union, then, that provides a context for evaluating Lieber's theory of institutional liberty.

Liberty

Lieber opened his 1853 treatise *On Civil Liberty and Self-Government* with words that, following the collapse of the Soviet empire, resonate very strongly once again. "Our age, marked by restless activity in almost all departments of knowledge, and by struggles and aspirations before the unknown, is stamped by no characteristic more deeply than by a desire to establish or extend freedom in the political societies of mankind."⁴²

This is the second modern characteristic: a concern to define and extend human rights and civil liberty. Lieber surveyed the prospect in 1853, describing it as a period of "marked struggle in the progress of civilization" resembling the Reformation in its scope and violence. He invited his readers to accept the task of diffusing civil liberty as the mission assigned their generation. "The love of civil liberty is so leading a motive in our times, that no man who does not understand what civil liberty is, has acquired that self-knowledge without which we do not know where we stand, and are supernumeraries or instinctive followers, rather than conscious, working members of our race, in our day and generation."⁴³

Hundreds of political constitutions had been drafted during the first half of the nineteenth century. However short-lived, they would leave roots "which some day will sprout and prosper." Alluding to the revolutions that had recently convulsed Europe, Lieber remarked that blood "has always flowed before great ideas could settle into actual institutions, or before the yearnings of humanity could become realities."⁴⁴

The most concentrated expression of Lieber's thought on the sub-

⁴¹ *Ibid.*, 237.

⁴² *Civil Liberty*, 17.

⁴³ *Ibid.*, 17.

⁴⁴ *Ibid.*, 18.

ject of civil liberty is found in his essay "Anglican and Gallican Liberty," published in 1849. Lieber argued that external liberty is an outgrowth of internal freedom. Real freedom is "personal, individual, and relates to the whole being." Liberty is "granted, guaranteed, and, therefore, generally of a public character." It is the political expression of this preexisting moral condition of the people. It is a practical result of flourishing, self-governing institutions. "In its ultimate sense, freedom is perfect self-determination: Absolute freedom . . . can be imagined only in conjunction with perfect power. The Almighty alone is perfectly free. To all other beings we can attribute freedom, but only in an approximate or relative sense."⁴⁵

*Internal
freedom the
source of
external
liberty.*

Given its "relative" character, civil liberty is the highest degree of independent action that is compatible with obtaining those essentials that are the proper objects of public power. Since these objects vary, the character of civil liberty "varies with the different views which men may take, at the various stages of civilization, of that which is essential to man—in other words, of the essentials of humanity and the object and purpose of this terrestrial life."⁴⁶

The classical idea of human nature, represented by Aristotle, treated citizenship as man's highest estate. Lieber believed that Aristotle's *Politics* was confounded by its pre-Christian metaphysics. More positively, Aristotle regarded the presence of certain institutions as indicators of whether liberty existed in a particular state. But even so, neither the Greeks nor the Romans ever succeeded in extending self-government beyond the city-state.

The modern view of man, on the other hand, emphasizes individuality. Christianity and modern civilization place the individual, with his individual responsibility, his personal claims, and his individual immortal soul as the highest object, and the state, law, and government, however vitally important to each person and to civilization, are for the moderns still but a means to obtain the yet higher objects of humanity.⁴⁷

In modern times, "entire nations are agreed among themselves, with a remarkable degree of unanimity, upon the political principles and measures necessary for the establishment or perpetuation of liberty," although there might be disagreement over some of the particulars. Lieber believed these guarantees "will be found to consist in the

⁴⁵ *Miscellaneous Writings*, vol. 2, 371.

⁴⁶ *Ibid.*, 372.

⁴⁷ *Ibid.*, 372.

highest protection of the individual and of society, chiefly against public power, because it is necessarily from this power that the greatest danger threatens the citizen, or that the most serious infringement of untrammelled action is to be feared."⁴⁸

Gallican
liberty exists
at whim of
absolute
government.

Two distinct ideas of modern liberty have evolved, which may be differentiated as to whether they are centralized or decentralized. *Gallican liberty* is what Lieber called the kind that is granted by absolute governments, whether the monarchic absolutism of the Bourbon kings and Bonaparte emperors or the democratic absolutism of the French revolutionaries. In either case, the individual is left naked and powerless before the state or the general will.

Anglican
liberty rooted
in non-
political
institutions.

Anglican liberty, by contrast, is rooted in the habits and loyalties of long-standing communities, as Charles Robson has noted in his summary of Lieber's views:

England had developed political institutions consisting of a national representative system, a common law presided over by an independent judiciary, and local self-government, which permitted non-political institutions 'of all sorts, commercial, religious, cultural, scientific, charitable and industrial' to flourish under the protection but not the control of the national state.⁴⁹

In a later work, Lieber defined Anglican liberty in relation to the historic struggle between the Crown and Parliament. This liberty consists of

the guarantees which our race has elaborated, as guarantees of those rights which experience has shown to be the most exposed to the danger of attack by the strongest power in the state, namely, the executive, or as most important to a frame of government which will be least liable to generate these dangers, and also most important to the essential yet weaker branches of government.⁵⁰

Lieber designated this type of liberty "Anglican" because he viewed it as a development "common to the whole Anglican race. . . ." ⁵¹ Its guarantees are designed to help prevent abuse of the powers exercised by the national government. All this accords with Robson's appraisal of Lieber's nationalist theory of liberty: "This type of nationalism was the model for modern states, for in it the liberty of the individual could be realized and the loyalty of free men could be enlisted." ⁵²

⁴⁸ *Ibid.*, 373.

⁴⁹ Robson, "Nationalism," 63-64.

⁵⁰ *Civil Liberty*, 53-54.

⁵¹ *Ibid.*, 55. Lieber used the term "British liberty" to similar effect in his *Manual*, vol. 2, 319.

⁵² Robson, "Nationalism," 64.

Lieber's reflections on the differences between the decentralized, highly institutionalized Anglican liberty and the centralized, largely unmediated Gallican liberty of Napoleonic France were deepened by first-hand observation of the aftermath of the revolutions which broke out early in 1848. When the news arrived one spring day, the agitated professor dismissed his classes early. He waited impatiently for the end of the school year, then left for Germany late in June. But his hopes for the advent of a liberal regime had been dashed even before his arrival in July.

Much as Lieber wished to see the establishment of Anglo-American institutions in his homeland, he realized that "they presuppose a people well skilled, trained and formed in the politics of liberty."⁵³ On leaving Germany for the last time, he sadly wrote his friend Mittermaier in Heidelberg: "I take with me the clear conviction, that Germany cannot be great, strong or happy with her many princes. She could be a great country if united under one government. . . ."⁵⁴

Self-Government

At the time Lieber wrote *On Civil Liberty and Self-Government* (1853) the word "self-government" had not yet come into general use. Although the word is a literal translation of the Greek *autonomeia* [autonomy], Lieber gave it a much wider application than did the Greeks, for whom "it meant in reality independence upon other states, a non-colonial, non-provincial state of things."⁵⁵ By contrast to the Greeks, who were faced outwardly by foreign states, the English term originated with theologians who used it in an inward, moral sense. "Self-

⁵³ The context of this remark in Lieber's letter to Matilda (August 8, 1848) indicates that he was still optimistic: "No revolution in history was ever so difficult as the German. It is a great misfortune, but natural according to the antecedent circumstances, that an overwhelming majority of the continental people look infinitely more toward France than England. England is shunned as aristocratic, and the whole drift of things here is pre-eminently democratic. This has produced one evil: in the Parliamentary proceedings they have adopted and are daily adopting the French *Règlements*, instead of the English or American wise rules. However, I doubt very much whether, under all the existing circumstances, the English rules could have been adopted, or if they would have worked well. They presuppose a people well skilled, trained, and formed in the politics of liberty. Yet I must add that the United States is universally mentioned with respect and admiration. This does my heart good." Thomas Sergeant Perry, ed. *The Life and Letters of Francis Lieber* (Boston: James R. Osgood, 1882), 218-19.

⁵⁴ Freidel, *op. cit.*, 248.

⁵⁵ *Civil Liberty*, 39 note.

government, the same word [as *autonomeia*], has acquired with ourselves, chiefly or exclusively, a domestic meaning, facing the relations in which the individual and home institutions stand to the state which comprehends them."⁵⁶ It suggests an internal or moral autonomy or independence from others, including other institutions.

Lieber's concept of domestic self-government is already evident in the *Manual of Political Ethics*. Lacking an English word for it, Lieber simply coined one, hamarchy, which he derived "from *ama*, at the same time, jointly, coöperatingly, and *archein*, to rule."⁵⁷ He began by defining hamarchy in contrast with "autarchy."

I call autarchy that state in which public power, whole and entire, unmitigated and unmodified, rests somewhere, be this in the hands of a monarch, or the people, or an aristocracy, it matters not for our division. Provided there be absolute power, or absolutism, a power which dictates and executes, which is direct and positive, we call the polity an autarchy. As the word autocracy has already its distinct meaning, namely, that of absolute monarchy, I was obliged to resort to another, which would comprehend the absolute monarchy as well as absolute democracy or aristocracy. The democratic autarchy stands, therefore, in the same relation to a democracy in general, as the absolute monarchy or autocracy stands to monarchy in general.⁵⁸

Lieber deliberately drew his analogies and language—"power," "direct," "positive"—from physics to underscore the impersonality of autarchy in contrast with hamarchy. Cold, industrial, mechanical, even geometric images are deployed as if arrayed for battle against the warm and supple image of a living system.⁵⁹ His definition of hamarchy points ahead to the idea of institutional liberty:

Hamarchy . . . is that polity, which has an organism, an organic life, if I may say so, in which a thousand distinct parts have their independent action, yet are by the general organism united into one whole, into one living system. . . . In the autarchy the law is the positive will of power; in the hamarchy it is much more the expression of the whole after a thousand modifications. Hamacratie polities rest materially on mutuality; autarchy on direct power. The principle of autarchy is sacrifice; the principle of hamarchy is compromise. Blackstone had in mind what I call hamarchy, when he said, 'every branch of our civil polity supports and is supported, regulates and is regulated by the rest.' It is not the 'balance of power' which makes the hamarchy, but

⁵⁶ *Ibid.*, 39 note.

⁵⁷ *Manual*, vol. 1, 352.

⁵⁸ *Ibid.*, 352-53.

⁵⁹ See also "Anglican and Gallican Liberty" in *Miscellaneous Writings*, vol. 2, 380.

the generation of power. A hamarchy cannot be compared to a pyramid, or to concentric circles, or to a clock-work, but only to the living animal body, in which numerous systems act and produce independently in their way, and yet all functions unite in effecting that which is called life. If ever there was a republic of action it is the animal body. . . .⁶⁰

*Hamarchy
rests on
mutuality,
autarchy on
direct power.*

Although biological analogies had been used to support arguments for the divine right of kings, Lieber here anticipated the general systems theory that developed a century later.

Institutional Liberty

Lieber apparently dropped both hamarchy and autarchy from his political lexicon by the time he wrote *On Civil Liberty and Self-Government*, substituting the terms "self-government" and "absolutism." He wrote that "there is no formula by which liberty can be solved, nor are there laws by which liberty can be decreed, without other aids."⁶¹ These prerequisites may be acquired only through practice. "How then is real and essential self-government, in the service of liberty, to be obtained and to be perpetuated? There is no other means than by a vast system of institutions, whose number supports the whole, as the many pillars support the rotunda of our capitol."⁶²

Lieber defined institution as "a system or body of usages, laws, or regulations of extensive and recurring operation, containing within itself an organism by which it effects its own independent action, continuance, and generally its own farther development. Its object is to generate, effect, regulate, or sanction a succession of acts, transactions, or productions of a peculiar kind or class."⁶³ Self-government is one of its chief properties. It "insures perpetuity, and renders development possible." Otherwise, history "sinks to mere anecdotal chronology. . . . Impulsiveness without institutions, enthusiasm without an organism, may produce a brilliant period indeed, but it is generally like the light of a meteor. That period of Portuguese history which is inscribed with the names of Prince Henry the Navigator, Camoens, and Albuquerque

⁶⁰ *Manual*, vol. 1, 353. Note also the attributes of the state, the "jural society," the "society of moral beings," "the society of societies" (162), which Lieber regarded as a distinct moral entity.

⁶¹ *Civil Liberty*, 298.

⁶² *Ibid.*, 300.

⁶³ *Ibid.*, 300.

is radiant with brilliant deeds, but how short a day between long and dreary nights!"⁶⁴

Lieber extended this idea to include entire systems of institutions. Much of his *magnum opus* is devoted to a comprehensive list of what he considered to be the constituents of civil liberty (56-255). This lengthy section is introduced by a chapter entitled "Anglican Liberty" (51-55).

Constituents
of civil liberty.

Lieber's characterization of these civil liberties reinforces his view that they depend upon well-articulated and firmly established political and social institutions. The following partial list drawn from "Anglican and Gallican Liberty" and *On Civil Liberty and Self-Government* is organized simply for the sake of convenience.⁶⁵

Briefly, the following are protected: persons generally; public and private communication; free production and exchange; religion or worship; lawful opposition to the administration; the minority against the majority; aliens and foreigners; freedom of the people to adopt the government they think best; free choice of residence; freedom of emigration and immigration; and the rights of petition, assembly, bearing arms, and resisting unlawful authority or unlawful demands.

The following are prohibited: extra-governmental power, domination by the central government, unconsented legislation, quartering soldiers in private homes without consent of Parliament, and dictation by one or many.

Finally, the institutional safeguards of liberty include popular control over public funds, self-taxation, judicial review, trial by jury, trial by common courts, due process, publicity concerning political and judicial activities, submission of the army to the legislature, the parliamentary veto, responsibility of ministers and other officers, dependence of the executive on legislative appropriations, restraints on the war-making and peace-making power, independence of the judiciary, the common law principle of precedent, and supremacy of the law.

In summing up these principles and institutions, it appears that they are guarantees of the security of individual property, of personal liberty, and individual humanity, of the security of society against the assaults or interference of public power, of the certainty with which public opinion shall become public will in an organic way, and protection of the minority. Many of these have originated, nearly all of them have first been developed, in England. . . .⁶⁶

⁶⁴ *Ibid.*, 306.

⁶⁵ *Miscellaneous Writings*, vol. 2, 373-75; *Civil Liberty*, 83-85.

⁶⁶ *Civil Liberty*, 375.

Thus modern liberty—that is, institutional liberty—consists in “practical provisions and political contrivances.” Herein lies the difference between medieval and modern liberty. Medieval rulers isolated political independence by chartering freedom. In modern times, governments are chartered by the people themselves.⁶⁷ Modern liberty requires an integration of these principles and institutions in custom and public consciousness so that they enjoy the protection of public opinion. As D. J. McCord, Jr., remarked in his review of Lieber’s *Manual of Political Ethics*: “The progress of civilization, in all christian countries at least, has created a public opinion, which now protects the personal liberty of men in a greater degree than formerly, regardless of the form of government.”⁶⁸

The chapter on “American Liberty” (256-69) adds the following to the list of Anglican liberties: republicanism, federalism, separation of church and state, political equality, popular elections, separation of powers, judicial review, impeachment, a written constitution, freedom of navigable rivers, and several others.

Lieber maintained that these liberties were still in a “nascent stage” on the European continent, which had gone through “periods of absorbing and life-destroying centralization.”⁶⁹ Instead, a prudential balance of local and central initiative is required. It resolves the age-old dilemma of unity and diversity—the problem of the One and the Many—through a fluid mixture of what he called individualism⁷⁰ and socialism, reason and tradition. Human nature and society should be regarded as both singular and plural:

*Liberty
requires
prudential
balancing of
opposites.*

Two elements constitute all human progress, historical development and abstract reasoning. It results from the very nature of man, whom God has made an individual and a social being. His historical development results from the continuity of society. Without it, without traditional knowledge and institutions, without education, man would no longer be man; without individual reasoning, without bold abstraction, there would be no advancement. Now, single men, entire societies, whole periods, will incline more to the one or to the other element, and both present themselves occasionally in individuals and entire epochs as caricatures. One-sidedness is to be shunned in this as in all other cases. . . .⁷¹

⁶⁷ *Miscellaneous Writings*, vol. 2, 376.

⁶⁸ David J. McCord, Jr., “Lieber’s Political Ethics,” *Southern Quarterly Review*, 12 (October 1847): 477.

⁶⁹ *Ibid.*, 388.

⁷⁰ Both Lieber and Tocqueville claimed credit for coining the term.

⁷¹ *Civil Liberty*, 260-61.

Institutional self-government is distinguished by its tenacity, assimilative power, and transmissible character. It can be successfully exported. But it increases only slowly and it depends on the conscientious willingness of citizens to obey lawful exercises of authority. It is threatened by "sejunction" (schism) if local interests begin to dominate, as in the Netherlands after it had won independence, and it may perish if the institutions themselves become corrupted or degenerate. Lieber also recognized that evil institutions may thrive for a time, and lamented the malignant growth of slavery as a threat to American liberty.

At the opposite pole from institutional liberty is the fusion of legislative and executive functions that Lieber called, variously, "the power," "Caesarism," and "Rousseauism." He examined the perplexing notion of an "elected despot" in two chapters on "Imperial Sovereignty" (374-88) and found the ultimate form of this "democratic absolutism" in the Bonapartist claim that the emperor is the embodiment of the general will. In this ultimate expression of Gallican liberty, Lieber, echoing Edmund Burke, clearly had in mind the French Revolution and its aftermath.⁷²

Concluding Observations

It is easy to read Francis Lieber's theory of institutional liberty merely as an idealization of the American constitutional tradition. But in the context of the times, it was also a defense of union against the fragmentation that sectional rivalries seemed to threaten.

The sensitivity of Lieber's position at South Carolina College compelled him to maintain a discreet public silence on the subject of slavery. One consequence was a personal rupture with Charles Sumner that lasted for several years. As the country drifted toward the

⁷² Years later Hannah Arendt acknowledged a similar debt to Burke in her own conception of totalitarianism. "A conception of law which identifies what is right with the notion of what is good for—for the individual, or the family, or the people, or the largest number—becomes inevitable once the absolute and transcendent measurements of religion or the law of nature have lost their authority. And this predicament is by no means solved if the unit to which the "good for" applies is as large as mankind itself. . . . Here, in the problems of factual reality, we are confronted with one of the oldest perplexities of political philosophy, which could remain undetected only so long as a stable Christian theology provided the framework for all political and philosophical problems, but which long ago caused Plato to say: "Not man, but a god, must be the measure of things." Hannah Arendt, *The Origins of Totalitarianism*, new edition (New York: Harcourt Brace Jovanovich, 1973), 299.

"sejunction" he dreaded, Lieber chose to move where his greatest sympathies lay, a year before securing another academic appointment. But the move north did nothing to insulate him from the tragedies of the conflict he foresaw.

As an *émigré* scholar, Lieber was a multiple exile. His attachments were cosmopolitan rather than local. In the end it was the strength of an idea—a commitment to the Union as an ideal—that prevailed over all considerations of place. If indeed it was disunion that had kept Germany so long in thrall, it was natural that Lieber should keenly feel the threat of disunion as an American. His theory of institutional liberty may be regarded, at least in part, as a response to John C. Calhoun's theory of the concurrent majority.⁷³

The Lieber family, like so many American families, was torn by the war. The talented eldest son, Oscar, died in the service of the Confederacy.⁷⁴ Two other sons fought—and one was severely wounded—for the Union. In the hour of crisis, Lieber supported policies that could be challenged from the pages of his own books. But his theory was pliant enough to make a place for prudence and the use of temporary expedients.

Lieber was a nationalist of an unusual sort. He consistently encouraged economic free enterprise in his teaching and writings.⁷⁵ He regarded the rise and fall of nations as simply part of a larger picture. National institutions permit the encouragement of commerce and interdependence among nations. This, in turn, puts absolutism on the defensive, as the chapter on "Gallican Liberty" (279-96) makes clear.

This growing interdependence, then, permits the principle of institutional liberty to operate on a global scale as well as locally. It is this third characteristic of the modern epoch—the flourishing of many nations "in the bonds of one common moving civilization"⁷⁶—that seems to have been the greatest encouragement to Lieber's hopes for the continued growth of liberty.

To learn liberty, I believe that nations must go to America and England, as we go to Italy to study music and to have the vast world of the fine arts opened up to us, or as we go to France to study science, or

⁷³ See Freidel, *op. cit.*, 274.

⁷⁴ James O. Breeden, "Oscar Lieber: Southern Scientist, Southern Patriot," *Civil War History*, 36 (1990): 226-49.

⁷⁵ See "A Letter of Dr. Francis Lieber to D. J. McCord," in Frederic Bastiat, *Sophisms of the Protective Policy*, trans. D. J. McCord (New York: Geo. P. Putnam, 1848), 5-14.

⁷⁶ *Miscellaneous Writings*, vol. 2, 239.

to Germany that we may learn how to instruct and spread education. It was a peculiar feature of antiquity that law, religion, dress, the arts and customs, that everything in fact, was localized. Modern civilization extends over regions, tends to make uniform, and eradicates even the physical differences of tribes and races. Thus made uniform, nations receive and give more freely. If it has pleased God to appoint the Anglican race as the first workmen to rear the temple of liberty, shall others find fault with Providence? The all-pervading law of civilization is physical and mental mutual dependence, and not isolation.

Many governments deny liberty to the people on the ground that it is not national; yet they copy foreign absolutism. There is doubtless something essential in the idea of national development, but let us never forget two facts: Men, however different, are far more uniform than different; and most of the noblest nations have arisen from the mixture of others.⁷⁷

⁷⁷ *Civil Liberty*, 295-96.