Constitutionalism in “Second America”: an Empire of Forced Equality

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Introduction

If by “constitutionalism” one means simply the public’s advocacy of our American system, the United States is surely not currently involved in any sort of “crisis”: Americans in general seem to be quite vocal defenders of our system—at least as far as they understand it—now as much as anytime in history. Whether Democrat or Republican, both sides feel they are the true heirs of the American republic, and only their partisans are the keepers of “truth, justice, and the American way” since they alone know what the United States Constitution of 1787 actually means. However, the modern constitutionalism in which these groups believe is not what was intended by the First Founders of the United States. I refer to them as “First Founders” because the republican government those extraordinary 18th century men forged has been overthrown: not in any of our lifetimes, mind you; it was years ago. Sadly, it was just one of the many casualties of U.S. President Abraham Lincoln’s unauthorized actions and illegal war. That system of government—American republicanism—ironically was destroyed by the man under solemn oath to protect it. And what took the place of republic was empire.

So to the long list of admirable qualities attributed to Benjamin Franklin, we can now add “prophet,” for we did not “keep” the republic. It ended in 1861 after only eighty-five years. And those men who destroyed American republicanism—Abraham Lincoln, Charles Sumner, Salmon P. Chase, Hiram Ulysses Grant, William Tecumseh Sherman, Benjamin Butler, and a long list of other scoundrels too numerous to name, but certainly up-to-and-including U.S. Supreme Court Chief Justice Earl Warren—became the “Second Founders” of America. “Second America,” the America in which we live today: no longer a federated republic dedicated to preserving and
protecting the liberty of its citizens, but now instead a unitary state demanding abject equality of all persons, contrary to natural law and the rationalism upon which we were initially founded.

I. The Republic

So exactly how was the American federal republic destroyed and surreptitiously replaced with an empire of forced equality? We must first understand that besides the mechanical definition of “republic” as a state in which elected representatives run the government, the conceptual definition states that it is one which embodies a system based upon droits et devoirs, or rights and duties. It is a form of limited government where only minimal control can be exercised by the duly constituted authority; that authority being expounded in a supreme law, oftentimes organized in a “constitution.” But if the supreme law as written holds no sway, the government that it constitutes, defines, and limits is lost; and, “Natura abhorret vacuum.” By acts ultra vires—by going “beyond the authority” granted the President in the United States Constitution and having the U.S. Supreme Court rubber-stamp the illegal actions after-the-fact—it was Abraham Lincoln, not the secession of southern States, which rendered the document nugatory. And as the foundational document goes, so goes the government. With no legitimate authority in place in 1861, with the supreme law of the land rendered a trifle, the former seat of power became a sucking maw ready to install and extol any theory of government that was politically expedient—any that assisted in the quest for domination—in contravention of the stated law those individuals were sworn to uphold. This was (and is) the only “crisis of constitutionalism” that ever mattered in America.

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2 Or “Nature abhors a vacuum”: an old Latin proverb whose resurrection is attributed to François Rabelais (c. 1534).
3 See, e.g., *The Prize Cases*, 67 U.S. 635 (1863).
It is the fair and consistent application of the law—*LEX REX*—that is the bedrock of constitutionalism. Acting within the bounds of the law is therefore the ultimate in American civic virtue. For if the law is inconsistent, *i.e.* if it applied capriciously; if jurisdiction is unlawfully expanded; if punishments no longer fit crimes; if the positive law is in direct opposition to natural law; if judges are politicians first and jurists second; if political expediency replaces what is politically right; if tradition and precedent are shunned for what is momentarily popular; if members of a supposedly free society are held captive at gunpoint; if citizens fear the power of government to the point that they no longer feel safe in their own homes; if the words on the page are held to have other than their plain meaning; or if the courts—the final authorities of law and justice—hold that “something” is present in the law when “nothing” is actually there, then not only the laws and the constitution will crumble, but so will the republic they create and sustain; and rightfully so.

II. The Constitution

But before I get on my soap-box and stray too far afield, we should know precisely the type of document of which we are discussing: legally, what is a *constitution*? *Black’s Law Dictionary* (the standard of the legal profession) defines a constitution as:

The organic and fundamental law of a nation or state, which *may be written or unwritten*, establishing the character and conception of its government, *laying the basic principles to which its internal life is to be conformed*, organizing the government, and *regulating, distributing, and limiting* the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers. A charter of government, *deriving its whole authority from the governed*. The *written instrument agreed upon* by the people of the Union or of a particular state, as *the absolute rule of action and decision* for all departments and officers of the government *in respect to all points covered by it, which must control until it shall be changed by the authority which established it* (*i.e.* by amendment), and in opposition to which any act or ordinance of any such department or officer is null and void (*emphasis added*).
Thus, a constitution is an *organic* document—organic not only in the sense that it organizes the fundamental law of a government, but organic also in that it relates to and is derived from living things. (This is not to say that the U.S. Constitution is a “living document”; it is not. Rather, it is capable of *amendment*, with such modifications becoming part of the organic whole. This process therefore precludes the need or desire of some parties to haphazardly *interpret* the document to comport with a certain plan of political action or social engineering.) But more to the point, from the legal definition we can see that the United States Constitution, is a *contract*—a philosophically-based *social contract*—memorialized in an instrument by being reduced to a legal writing. Thus, and to use a legal term-of-art, the Constitution must “sound in contract.” So while most Americans (and, sadly, some lawyers and jurists) may think of “constitutional law” as a wholly separate theory of law within the broad science of law, constitutional law is merely a form of *contract* law; and therefore standard common law interpretation of contracts *must* apply.

There is no great mystery: the Constitution is a contract and nothing more.

But our peculiar contract is certainly not perfect, as it is noticeably deficient in at least one way: it speaks of *rights*, even including a Bill of Rights, but nowhere does it mention the necessary corresponding *duties*. Where is our “Bill of Responsibilities?” We are guaranteed the right of free speech, but where is it written that we surely have a duty to say something credible? We have the right to bear arms in defense; but where is listed the important duty to not be reckless in handling and securing one’s squirrel gun? Apparently the First Founders, living in an age of manners and etiquette, could never have imagined the breakdown of social mores brought about by tragedies like the War Against Northern Aggression and the rise of the Baby-Boomer Hippie generation. For all intents and purposes, our Constitution was written by a group of 18th
century British elites: filled with all the manners, graces, societal conformity and proper level of shame that accompany such.

Regardless, to truly understand the United States Constitution, one need have a grasp on the basic tenets of English common law, especially the “right of contract” and all that such entails. In the common law—that species of law brought over with the settlers—both *written* and *oral* contracts are valid and enforceable in general (with the Statute of Frauds requiring certain types of contracts to be written only, in order to be valid and enforceable, in specific). But it was not the Statute of Frauds that compelled the First Founders to put pen-and-ink to parchment; rather it was the fact that Mother England’s constitution is referred to as “unwritten.” That is to say, while *Magna Charta*, the Habeas Corpus Act, the [English] Bill of Rights, *etc.*, are certainly all “printed,” other expressions of English constitutional law—such as the steady stream of Acts of Parliament, the “royal prerogative,” and in fact daily court cases based on different judges’ understandings of *stare decisis*—lend an air of instability to the English Constitution due to the requirement of constant interpretation and re-interpretation of an ethereal idea as opposed to a written statute. Having been subject to and harmed by despotic whim in the past, our First Founders thought it best to detail *exactly* what the new government could and could not do. Their purpose was to establish order and stability while protecting, first and foremost, the *liberty* of the citizenry.

Having this fully-integrated written contract at our disposal, it would be wise of us to study the actual language of said document in context. In simplest terms, a contract is the “bargained-for exchange”: there must be an *offer*; there must be *acceptance*; and there must be
consideration (i.e. the reason or material cause for contracting) for the agreement to be valid as to form. Legally a contract, again as defined by Black’s, is, in pertinent part:

An agreement … which creates an obligation to do, or not to do, a particular thing. A legal relationship consisting of the rights and duties of the contracting parties; a promise or set of promises constituting an agreement between the parties that gives each a legal duty to the other and also the right to seek a remedy for the breach of those duties. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation (emphasis added).

Thus, conceptually a contract is a statement of rights and duties, the same definition as for a republic. But a contract, as noted in the legal definition, often has many more parts than a mere agreement between parties. In a quest to exhibit further proof that our Constitution is simply a contract (and therefore should only be interpreted as such), the following quick dissection of its parts will allow us to compare its form and substance with that of other standard legal contracts.

The U.S. Constitution’s Preamble is a perfect example of a statement of intent (“in Order to form a more perfect Union”), and also a recital (“We the people [already] of the United States”). Thirteen independent states—the competent parties to the agreement and the basic unit of participation—were offered by the juridical person of the United States the opportunity to contract (for the purposes of “common defence” [sic], “welfare,” securing “Liberty,” et al.), which all parties eventually accepted—even though “the Ratification of the Conventions of nine States [i.e. two-thirds only], shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.” In consideration, all parties shall be mutually obligated to aid each other and the federal government as long as said contract remains in force, including but not limited to financial and military assistance. The subject matter is well delineated: it is the creation of a new federal government. (It should be noted that our term “federal” comes from

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4 In Louisiana and other civil law jurisdictions, the requirement is cause rather than consideration—but that is another lesson entirely.
the Latin *foedus* and was a *contract* between the Roman Republic and one or more allied states (or *foederati*) establishing permanent friendly relations between the contracting parties, and who were obliged to assist each other when called upon.) And lastly, the “mystery” of Amendments IX and X is solved: they are *merger clauses* that declare the contract to be the complete and final agreement between the parties by stating that while the list of guaranteed rights is not exhaustive, anything **not** included in this writing falls under the purview of other authorities.

Now that the contract is **fully integrated**, the *parol evidence rule* is triggered, which seeks to preserve the integrity of written contracts by refusing to allow the consideration of any prior or contemporaneous oral declarations during contract interpretation. This necessarily leads into the *four corners rule*, where the intention of the parties is to be gathered from the contract as a whole rather than from isolated parts thereof. If during interpretation any term or phrase is argued by different parties to be *ambiguous*, the term must be resolved in favor of the non-writing parties (in this case the States over the federal government). We could go on, and on, and on….

But now that we all know our Constitution is simply a contract, we should also know that there is not now, nor ever has there been, **any** theory of law anywhere in the free world that states a contract **cannot** be broken. In fact, the legal definition, *supra*, states plainly a “**right to seek a remedy for the breech of duties.**” In common law jurisdictions, the most typical remedy awarded by far is *monetary damages*. The extraordinary remedy of *specific performance* is rarely used, and only in certain special circumstances. For example, if you are a subcontractor on a construction job who has signed a contract with the general contractor to install the plumbing in a new office building, the court will award money damages to the general contractor if you break the agreement by never showing up on the job site. Absent some very special
circumstances, no court in the land would ever force you to install the plumbing on that job; *i.e.* the general contract would not be awarded specific performance. You can *always* get out of the contract, but it’s probably going to cost you. In fact, many contracts are broken not because of an inability to fulfill the terms, but because it is more profitable to denigrate the contract and pay the liquidated damages than it is to “live up to their word.” This is called an *efficient break,* and American courts adjudicate such cases every day. It is important to realize that in such a situation as between the subcontractor and general contractor, one party’s break does not adversely affect the master contract as regards any other party to the agreement: even though Joe’s Plumbing “craps out,” Jim’s Drywall and Rico’s Earth-Moving are unaffected as to Schlomo’s General Contracting and are still under contract.

Similarly, in our political history the eleven Southern States who thought it best to break the “Big Contract”—what we call secession—were perfectly legal in their actions (the maxim of *pacta sunt servanda* notwithstanding). They “noisily exited” by putting the federal government on notice with various “Ordinances of Secession” and proceeded to exercise control over their lands that had formerly and voluntarily been under U.S. government supervision. Any United States employee who remained against the express will of a seceding State was therefore trespassing. In 1860, there were 33 States in the Union. By the end of May 1861, 22 States remained, completely unaffected in their contractual relationship with each other and to the federal government. By seceding, those States lost all benefits of the Big Contract—that is the legal “punishment”—and were going to be made to pay for all losses and damages the Union incurred. This is how the conflict should have been settled, and Abraham Lincoln knew it.
In the “Proclamation of April 15, 1861,” Lincoln called for 75,000 volunteers to form an Army for the sole purpose of marching on the (at-that-time seven) seceding States, in order to “suppress the combinations.” He wrote:

WHEREAS the laws of the United States have been, for some time past, and now are opposed, and the execution thereof obstructed, in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by law (emphasis added).

Of course he knew that the proper course of action was “ordinary judicial proceedings”; he was a lawyer. But instead he sent armed troops under what he stated was “the power in me vested by the Constitution and the laws,” as well as ordering the Navy to blockade all Southern ports. As a matter of law, Lincoln’s constitutional “war powers” were never triggered because the United States Congress never declared war on the South. And unlike the Southern States, he acted in contravention of the Constitution and laws of the Union. The moment that on his orders yankee soldiers invaded the sacred soil of Virginia, the republic was lost. The Potomac River, separating Virginia from Washington City, became the American Rubicon: the invaders initiating a war that led to the end of republicanism and the beginning of empire.

In a calculated attempt to steal the moral high ground from a new American Confederacy again fighting for independence from an oppressive regime, “Honest Abe” lied to the world by grounding his illegal actions in abject equality for all. Whether purposive of that end, or by the cruel “law of unintended consequences,” the documents attributed to Founder Lincoln’s leadership have become the new organic documents of Second America: his inauguration speeches, the Gettysburg Address, the Reconstruction Amendments (especially XIV), and even the Emancipation Proclamation, which, as a matter of law, isn’t worth the paper it’s written on.

Yet the Jagannath of Equality rolls along, continually crushing Liberty under its massive wheels. Legally, this Second Founding opened a “Pandora’s Box of Rights” that never were
intended by the First Founders, not to mention setting in motion a convoluted stream of overreaching jurisprudence that does violence to a proud tradition. Consider the U.S. Supreme Court’s holding in *Loving v. Virginia*: an open-and-shut, black-letter law “freedom of contract” case that the Court chose to instead ground in the Fourteenth Amendment’s Equal Protection Clause. Why? Because *equality* is Second America’s *mantra*. Compare *Plessy v. Ferguson* to *Brown v. Board*: in *Plessy*, the Fourteenth Amendment was dispositive, but Justice Henry Brown wrote in the 1896 opinion that “in the nature of things, [Amend. XIV] could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races unsatisfactory to either.” With no substantive change in any law, fifty-eight years later that same body again found the Fourteenth Amendment dispositive in *Brown I*, but came to exactly the opposite conclusion. Why? Because *social equality* had become politically expedient, and the Court had no problem overreaching its authority to club a State into submission yet again for the sake of abject equality. In 1964’s *Heart of Atlanta Motel* and *Ollie’s Barbecue*—two privately-owned businesses that restricted their clientele to whites only—the Court found that Title II of the Civil Rights Act of 1964, passed under the auspices of Congress’s Commerce Clause powers, prevented restaurants and places of public accommodation from selecting their guests as they saw fit, free from governmental regulation. Whether it is your opinion that these cases were decided correctly or incorrectly is immaterial. What *is* material is that the United States Supreme Court decided to push a social agenda instead of deciding cases on the pertinent law in force. Apparently jurisprudence was another casualty of Lincoln’s War.

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7 *Plessy v. Ferguson*, 163 U.S. 537 (1896).
Conclusion

In North America, the thirteen colonies began as completely separate and distinct entities, with different philosophies and legal systems (although all were based on the common law). But the universal mistreatment at the hands of a tyranny was palpable enough to cause them to band together against the common foe. Upon declaring independence from the British Empire, it was a conscious decision to then bind their independent States together for mutual economic benefit and defense from foreign powers. To avoid the problems that had brought about the need to declare independence in the first place, the “rights of Englishmen” were enumerated and included in the fundamental organic document—the supreme law of the land—so that there need be no further discussion on what basic rights all citizens possessed. Within the rights so listed, one will notice that *abject equality* was not included.\(^\text{11}\) *Liberty*, however, was the watchword.

I consider the First Founders to be quite Aristotelian in their efforts to create a *novus ordo seclorum*: they strove not for an unattainable utopia, but the “best regime possible” given their particular situation. These First Founders were more lawyers and businessmen than philosophers; still well-versed in the philosophy of the Enlightenment, granted—at least enough so to use that philosophy as a perfect justification for attaining their desired social and economic goals—but practical men all the same. Sadly, their republic did not last much beyond a generation after their deaths: Thomas Jefferson died only 35 years before Lincoln’s invasion. It was a political failure that led to a social failure, which led to both a legislative and a judicial failure, in turn leading to the constitutional failure that Americans are now experiencing. When the words on the pages of the Big Contract have no meaning anymore—when every word, idea,

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\(^{11}\) Of course, Thomas Jefferson writes in the Declaration that “all men are created equal,” but one can assume that his status as a Virginia planter and slave-holder meant that that phrase was to be directed at the British peerage, rather than the population in general.
and sentiment is open to any number of interpretations and variations—there is no longer a foundation upon which a legitimate government can stand. This is Abraham Lincoln’s legacy.

While being held prisoner for two years in the dark, dank casemate at Ft. Monroe—awaiting trial for treason that never was to come, for obvious reasons—Confederate States President Jefferson Davis wrote, “A question settled by violence, or in disregard of law, must remain unsettled forever.” And so it is.

_Abraham Lincoln destroyed the “Republic” in order to save the “Union!”_