

**WHAT IS OUR CONSTITUTION, - LEAGUE,
PACT, OR GOVERNMENT? TWO LECTURES ON
THE CONSTITUTION OF THE UNITED STATES,
CONCLUDING THE COURSE ON THE MODERN
STATE, TO WHICH IS APPENDED AN ADDRESS
ON SECESSION, WRITTEN IN THE YEAR 1851**

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649281022

What is Our Constitution, - League, Pact, Or Government? Two Lectures on the Constitution of the United States, concluding the course on the modern state, to which is appended an address on secession, written in the year 1851 by Francis Lieber

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Cover @ 2017

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FRANCIS LIEBER

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WHAT IS OUR CONSTITUTION,—LEAGUE, PACT, OR GOVERNMENT?

TWO LECTURES

ON THE

CONSTITUTION OF THE UNITED STATES

CONCLUDING A COURSE ON

THE MODERN STATE,

DELIVERED IN THE

LAW SCHOOL OF COLUMBIA COLLEGE, DURING THE WINTER OF 1860 AND 1861,

TO WHICH IS APPENDED

AN ADDRESS ON SECESSION

WRITTEN IN THE YEAR 1851.

BY

FRANCIS LIEBER, LL.D.

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NEW YORK:

PRINTED BY DIRECTION OF THE BOARD OF TRUSTEES.

1861.

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The author of these Lectures, emboldened by a friendship which he esteems a high honor, laid the manuscript before the Hon. Horace Binney, with a request that he would make such annotations as might appear necessary. The opinions of the senior member of the American Bar, and of so profound, philosophical, and elevated a jurist, must needs enhance the value of any discourse on the American Constitution. When, therefore, the manuscript was returned, the author could not allow himself to withhold from his readers Mr. Binney's notes, although they were strictly intended as memoranda for himself alone. He obtained permission, not indeed without repeated entreaty, to publish these along with the Lectures—a liberality for which he wishes to express his grateful and affectionate acknowledgment. *Apex autem senectutis tanta auctoritas.*

New-York, March, 1861.

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FIRST LECTURE.

HAVING classified the constitutions of modern states, and discussed the characteristic features of the most prominent European fundamental laws, we now approach the question: What is the Constitution of the United States? Do the States form a league? Or is the Constitution a pact, a contract—a political partnership of contracting parties? Do we live in a confederacy? and if so, in a confederacy of what degree of unitedness? Or is the Constitution a framework of government for a united country—a political organism of a people, with its own vitality and self-sufficing energy? Do we form a union, or an aggregate of partners at pleasure?

These are momentous questions—not only interesting in an historical or scientific point of view, but important as questions of political life and social existence, of public conscience, of right and truth in the highest spheres of human action and of our civilization. At no time has the very character and essence of our Constitution been so much discussed as in ours. Never before have measures of such importance been so made to depend, in appearance, upon the fundamental character of the document called the Constitution of the United States, while never before have those in high authority attended less to its genesis, its contents, and its various provisions, in order to justify actions affecting our entire polity. Never before, either in our own, or in the history of our race, have whole communities seemed to make acts of elementary and national consequence depend upon a single term; upon the question whether the Constitution is a mere contract, or whether the word, derived as it is from *constituere*, must be understood in the sense in which Cicero takes it, when he speaks of *constituere rempublicam*—that is, organizing the common weal, putting it in

order and connecting all the parts in mutual organic dependence upon one another.¹

I have used the words *apparently* and *seemingly*, because it admits of little doubt, if of any, that those among the leaders in the present disturbances who make a world of consequences depend upon the solitary question, Is or is not the Constitution of the United States a contract? argue on a foregone conclusion. Or is there a man living who believes that they would give up their pursuit of disunion, if it would be proved, by evidence ever so fair, substantial, and free from embittering passion, that the Constitution is not a compact, or is not a mere contract?

The difference between the attenuated logic of special pleading, drawn like wire through the draw-plate of technical terms, in order to make out a case, on the one hand, and a comprehensive search after truth and loyal adhesion to it when found, becomes more distinct and more important as the sphere of action is more extended or the region of argument higher. It is a rule of fallacy—and fallacy has its rules, too—to seize upon one point, one term, to narrow down the meaning even of this one point, and then keenly to syllogize from that single starting point, irrespective of all other modifying and tributary truths or considerations. Wherever you find it, be at once on your guard—whether the discussion relates to religion, philosophy, to law, politics, or economy, to science, or to interpreting a document, a treaty of nations, or the last will of an individual. The search after truth may be symbolized by the soaring eagle rising to the regions of light in order to view things from above, and not by the perforating gimlet, which alone would be no useful tool.

You have probably seen, in the papers of this week, a letter written by a former Senator from Louisiana, in which he accepts the nomination for the convention of his State, which is to decide whether his State shall secede from the Union. This gentleman states that, in order to enable the people to

¹ The reader will keep in mind, through the perusal of these lectures, that they were delivered in the beginning of the month of January, 1861—that year, which the Europeans will call the Italian Year, and which our historian may have to call the Sad Year.

vote for or against him understandingly, it is necessary that his views and convictions should be distinctly known. He is for secession, and the course of his argument is this—I state it with punctilious correctness:—

The Constitution of the United States is a contract.

Mr. Webster says a contract broken at one end is broken all over.

The Constitution of the United States has been broken.

Therefore, the contract is broken all to pieces, and is at an end.

Therefore, each component part of the former United States stands for itself. (He does not say, where it stood before the adoption of the Constitution, for he speaks of Louisiana.)

Therefore, each portion, thus floating for itself, can do what seems best to itself—become a separate empire, join a new confederacy, or become again (I suppose) a French dependency, or else a starting point for a new government throwing its seine over Mexico.

Now, this argument contains almost as many fallacies as it contains positions, which it will be appropriate briefly to exhibit.

Suppose, for argument's sake, that the Constitution is a contract, the important questions remain, What sort of contract?—for every lawyer knows full well that there are many different species of contracts,—and, Is it a mere contract? Almost all former publicists of note and weight (not to speak of such as Filmer) have considered, and very many of the present day continue to consider, all government to be founded upon an original pact or contract, as I have amply shown you in preceding lectures.¹ This supposed social contract was formed for the common welfare of all, and every bad law is doubtless an infringement of the contract, but has any publicist mentioned that thereby each contracting member is authorized to become a *fuor-uscito*, whom I have described to you? On the contrary, all publicists have maintained that the government contract is made in perpetuity. If I am asked, Where is the his-

¹ Even Napoleon III. gave the name of compact to the so-called French Constitution, in his throne-speech of February, 1861.

torical proof that this government compact was made in perpetuity? I answer, Nowhere; nor is there a historical proof of the original contract, altogether. Those who founded their theory of the origin of government on a supposed contract, were forced by the inherent nature of society to acknowledge the perpetuity of society, and to make it tally with their original contract. They felt, although they did not formulate, the truth that society is a *continuum*.

The laws of all European countries, and of those that have been peopled by Europeans, have called monogamic matrimony a contract. Asiatic law does not. When we call, however, wedlock a contract, we merely designate a certain aspect of this varied institution. Treat the relation of husband and wife, "for better and for worse," as a mere contract, and a common contract, and you will speedily and logically make out a special pleading for licentiousness, and end with what has been shamelessly called Free Love. Who would seriously pretend that he was expressing the whole character or indicating the chief meaning of matrimony,—with its preceding love and poetry, its exclusive and purifying affection, its school of unselfishness, its ordained procreation, and the founding of the family—that feeder of the State—its necessity, material and moral, for society, its sacred ties and indissolubleness, its religion and industrial power, its internal communism and external individuality, its venerable history and energetic action,—simply by calling it a contract and nothing more?

Mr. Webster, we are continually told, has said that a contract broken at one end is broken all over. The great advocate made this statement when he spoke as counsel for his client. He overstated a certain truth; he was too great a lawyer not to know that this does not apply to all contracts; indeed, that it is applicable to a small class of contracts only. If this statement,—which represents contracts like Rupert's drops, shivered into countless fragments by the least crack at one end,—is to be applied literally to all contracts and agreements, it is easy to prove, by the same show of logic, that every short-coming of the fulfillment of a promissory oath amounts to perjury, which, nevertheless, the law of no country admits. Everything de-