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## Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation

Randy E. Barnett\*

### INTRODUCTION

In 1843, radical abolitionist William Lloyd Garrison called the Constitution of the United States, “a covenant with death and an agreement with hell.”<sup>1</sup> Why? Because it sanctioned slavery, one of the greatest crimes that one person can commit against another. Slavery was thought by abolitionists to be a violation of the natural rights of man so fundamental that, as Lincoln once remarked: “If slavery were not wrong, nothing is wrong.”<sup>2</sup> Yet the original U.S. Constitution was widely thought to have sanctioned this crime. Even today, many still believe that, until the ratification of the Thirteenth Amendment prohibiting involuntary servitude, slavery previously had been constitutional, and for this reason, the original Constitution was deeply flawed.

But in 1845 one man disagreed with the conventional wisdom. That man insisted that slavery was not only a moral abomination; it was also *unconstitutional*. His name was Lysander Spooner and he defended this position in a book, entitled *The Unconstitutionality of Slavery*.<sup>3</sup> While rejecting his conclusion, Garrison wrote of Spooner's argument: “We admit Mr. Spooner's reasoning to be ingenious— perhaps, as an effort in logic, unanswerable.”<sup>4</sup>

Historians of abolitionism know Spooner's name,<sup>5</sup> but lawyers, law professors<sup>6</sup> and their students generally do not. This is a pity. For Lysander Spooner deserves a

\* Austin B. Fletcher Professor, Boston University School of Law. This Essay is based upon a lecture given at the University of the Pacific, McGeorge School of Law, on March 13, 1997 as part of the Distinguished Speakers Series. It was also presented in faculty workshops at Boston University and the Roger Williams School of Law. © 1997 Randy E. Barnett. Permission to photocopy for classroom use is hereby granted.

1. *Resolution adopted by the Antislavery Society*, Jan. 27, 1843 (“The compact which exists between the North and the South is a covenant with death and an agreement with hell.”).

2. Letter by Abraham Lincoln to A.G. Hodges, Apr. 4, 1864.

3. LYSANDER SPOONER, *The Unconstitutionality of Slavery* (1845), reprinted in 4 THE COLLECTED WORKS OF LYSANDER SPOONER (Charles Shively ed., 1971) [hereinafter WORKS].

4. LYSANDER SPOONER, *The Unconstitutionality of Slavery* (1860), 4 WORKS, *supra* note 3 (This quote is taken from an unnumbered page).

5. See, e.g., ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 154-58 (1975) (discussing Spooner's views on the unconstitutionality of slavery).

6. A Westlaw search (Lysander +2 Spooner) conducted on March 7, 1997 turned up 37 articles by 32 authors referring to Spooner's writings on a number of subjects, some by law professors and some student notes. Most consist of no more than a sentence or two. Perhaps the most extensive discussion of Spooner's views on interpretation is contained in Hans W. Baade, “Original Intent” in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1046-51 (1991).

place of honor among American lawyers, both for the principles for which he stood against the crowd and for the brilliance with which he defended those principles. In this Essay, though I will be unable to do his analysis complete justice, I want to describe the method of constitutional interpretation that led Spooner to his conclusion about slavery. In many ways, Spooner's interpretive approach has a very modern ring. In important respects, however, his approach is preferable to those commonly used today and worthy of study for this reason alone.

But before I present Spooner's views, I want to tell you something about the life of this remarkable individual.

### I. SPOONER'S LIFE AND CAREER<sup>7</sup>

Lysander Spooner was born January 19, 1808, on his father's farm in rural New England near Athol, Massachusetts. Raised as one of nine children, Spooner left home to live in nearby Worcester where, in 1833, he began studying law in the offices of John Davis, a prominent Massachusetts politician who shortly thereafter served as Governor and then Senator. In Davis' absence, Spooner also studied with Charles Allen, a state senator who eventually served as Chief Justice of the Massachusetts Supreme Court.

The rules of the Massachusetts courts in those days required a student to study in a lawyer's office before admission to the bar. College graduates were required to study for three years, while non-graduates were required to do so for five years. Spooner's first act as a lawyer was to challenge what he thought was a rule that discriminated against the poor. After just three years of study, with encouragement from both Davis and Allen (who had graduated from Yale and Harvard respectively), Spooner set up his practice in Worcester in open defiance of the rules. Spooner published a petition in the local newspaper and sent copies of it to each member of the state legislature. He argued that "no one has yet ever dared advocate, in direct terms, so monstrous a principle as that the rich ought to be protected by law from the competition of the poor."<sup>8</sup> In 1836, the legislature abolished the restriction.

Spooner's writing career began at about the same time as his legal one, with essays criticizing Christianity from a deistic perspective.<sup>9</sup> Possibly in part for this reason, his law practice did not flourish and, in 1836, he left Massachusetts to make his fortune in "the West"—meaning in this case, Ohio. There, Spooner vied with other speculators of the time to buy land where future cities would spring up. He

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7. Except as noted, the biographical information in this section comes from Shively, *Biography*, in 1 WORKS, *supra* note 3, at 15-62. For an intellectual biography focusing more on the evolution of Spooner's views, see James J. Martin, *Lysander Spooner, Dissident Among Dissidents*, in MEN AGAINST THE STATE 167-201 (1970).

8. 1 WORKS, *supra* note 3, at 18.

9. See LYSANDER SPOONER, *The Deist's Immortality, and An Essay On Man's Accountability For His Belief* (1834), reprinted in 1 WORKS, *supra* note 3; LYSANDER SPOONER, *The Deist's Reply to the Alleged Supernatural Evidences of Christianity* (1836), reprinted in 1 WORKS, *supra* note 3.

purchased a tract along the Maumee River for a town called Gilead, which today is named Grand Rapids, Ohio. But Gilead lost out to better connected rivals and a general real estate collapse, so that by 1840, Spooner returned to his father's farm.

After writing about how the banking system should be reformed to avoid the kind of speculative collapse he had experienced,<sup>10</sup> Spooner struck out in an entirely new direction: In 1844, he founded the American Letter Mail Company to contest the U.S. Post Office's monopoly on the delivery of first class mail. Postal rates in those years were notoriously high and several companies arose to challenge the government's monopoly. As he had when he confronted restrictions on entering the Massachusetts bar, Spooner vigorously defended his action with a pamphlet entitled, *The Unconstitutionality of the Laws of Congress Prohibiting Private Mails*.<sup>11</sup> Unfortunately, this time he was up against a more intransigent foe. Although Spooner's mail company was very successful, legal challenges by the government soon exhausted his financial resources and by July, 1844 his business was all but defunct without his ever having the opportunity to fully litigate his constitutional claims.

It was after this dispiriting experience that Spooner returned to Athol and began writing about slavery. With financial assistance from wealthy New York philanthropist and abolitionist Gerrit Smith, Spooner produced the first volume of *The Unconstitutionality of Slavery* in 1845. Spooner's arguments drew criticism to be sure, especially from abolitionist Wendell Phillips,<sup>12</sup> to which in 1847 he responded

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10. See LYSANDER SPOONER, *Constitutional Law, Relative To Credit, Currency, and Banking* (1843), reprinted in 5 WORKS, *supra* note 3; LYSANDER SPOONER, *Poverty: Its Illegal Causes, and Legal Cure* (1846), reprinted in 5 WORKS, *supra* note 3.

11. See LYSANDER SPOONER, *The Unconstitutionality of the Laws of Congress, Prohibiting Private Mails* (1844), reprinted in 1 WORKS, *supra* note 3.

12. See WENDELL PHILLIPS, REVIEW OF LYSANDER SPOONER'S ESSAY ON THE UNCONSTITUTIONALITY OF SLAVERY (1847) (reprint ed. 1969) [hereinafter PHILLIPS, REVIEW OF SPOONER]. Phillips' essay ran 95 pages and was subsequently republished in 4 MASS. Q. REV. 3 (1851). Phillips' critical reaction to Spooner's essay was predictable insofar as "the chief target of Lysander Spooner's monograph . . . had been Wendell Phillips's tract espousing the contrary thesis of the Constitution as a pro-slavery compact." Baade, *supra* note 6, at 1049 (referring to THE CONSTITUTION: A PRO-SLAVERY COMPACT: OR SELECTIONS FROM THE MADISON PAPERS [Anti-slavery Examiner—No. XI, 1844; 2d ed. 1845] which had been authored by Phillips). Nonetheless, the popularity and influence of Part I of Spooner's book within abolitionist circles, if no other, is evidenced both by the length and obvious care of Phillips' reply, by his reference therein to Spooner's "much-praised essay," (PHILLIPS, REVIEW OF SPOONER, at 69), and by the fact that Phillips published his pamphlet "at his own expense." CARLOS MARTYN, WENDELL PHILLIPS: THE AGITATOR 216 (1890).

in a second, entirely new volume of the book which was appended to the first.<sup>13</sup> The entire work runs nearly 300 pages.

The passion of Spooner's opposition to slavery is evidenced by his conspiratorial efforts to free the captured John Brown. He had met Brown shortly before Brown's ill-fated raid on Harper's Ferry, and afterwards attempted to implement a plan in which radical abolitionists would kidnap the governor of Virginia and hold him hostage for Brown's release. The plan was never acted upon, though Spooner's associates had gone so far as to locate a boat and crew. Spooner also provided legal arguments to aid abolitionists charged with violating the Fugitive Slave Act, and his work on behalf of such defendants led him in 1854 to publish a book, *Trial by Jury*,<sup>14</sup> in which he defended as essential to a free society the jury's role as triers of both fact and law—the position sometimes referred to as “jury nullification.”

Until his death in 1887 at the age of 79, Spooner eked out an impoverished existence as a writer, activist, and legal theorist. His writings were extensive, including a lengthy, though never-completed, book defending intellectual property.<sup>15</sup> At a memorial service in his honor the following resolution was passed:

*Resolved:* That while he fought this good fight and kept the faith, he did not finish his course, for his goal was in the eternities; that, starting in his youth in pursuit of truth, he kept it up through a vigorous manhood, undeterred by poverty, neglect, or scorn, and in his later life relaxed his energies not one jot; that his mental vigor seemed to grow as his physical powers declined; that although, counting his age by years, he was an octogenarian, we chiefly mourn his death, not as that of an old man who has completed his task, but as that of the youngest man among us,—youngest because, after all that he had done, he still had so much service that the best we can do in his memory is to take up his work where he was forced to drop it, carry on with all that

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13. Although Spooner and Phillips were locked in debate, given the close timing and multiple publications of their respective essays, the number of revised editions in which additional material was added, and the rarity and imprecision of citation practices in those days, it is not entirely clear at any given point who was responding to which work of the other. Phillips does once mention a “second edition” by Spooner (PHILLIPS, REVIEW OF SPOONER, *supra* note 12, at 53), but the reference to which he refers in Spooner appears in a footnote in Part I (of the 1860 revised edition)—a footnote apparently added in a “second edition” which appeared sometime before Part II was published in 1847. Although James J. Martin says Part II was initially published in 1846 and then attached to Part I in 1847, he consults the 1856 edition of Part II, owing to the fact of “the 1846 edition being especially scarce.” MARTIN, *supra* note 3, at 180 n.52. In contrast, on the page facing the reproduction of the 1860 edition, Charles Shively notes that “Part II first appears in 1847, both separately and with Part I.” 4 WORKS, *supra* note 3. Moreover, 1847 is its copyright date. Perhaps Martin, not having seen the 1846 edition confused a “second edition” of Part I appearing in 1846 with Part II. Moreover, throughout Phillips' essay, he never refers to any page number in Part II of Spooner's book. In contrast, several arguments in Part II of Spooner's book, indeed entire chapters, are clearly responding to arguments advanced in Phillips' 1847 review. Thus, it appears that Part II of Spooner's work was responding to Phillips review of Part I.

14. LYSANDER SPOONER, *An Essay on the Trial by Jury* (1852), reprinted in 2 WORKS, *supra* note 3.

15. LYSANDER SPOONER, *The Law of Intellectual Property; or An Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas, Vol. I* (1855), reprinted in 3 WORKS, *supra* note 3.

we can summon of his energy and indomitable will, and as old age creeps upon us, not lay the harness off, but following his example and Emerson's advice, "obey the voice at eve obeyed at prime."

In the spirit of that resolution let us now consider Lysander Spooner's approach to constitutional interpretation that led him to conclude that slavery was unconstitutional.<sup>16</sup>

## II. LEGAL INDETERMINACY AND NEED FOR NATURAL LAW

In setting out his method of constitutional interpretation, Spooner was under no illusions about the determinacy of written texts. Indeed, it was the indeterminacy of written words that Spooner thought gave rise to the need for a theory of interpretation. "The words, in which statutes and constitutions are written," he observed

are susceptible of so many different meanings,—meanings widely different from, often directly opposite to, each other, in their bearing on men's rights,—that, unless there were some rule of interpretation for determining which of these various meanings are the true ones, there could be no certainty at all as to the meaning of the statutes and constitutions themselves.<sup>17</sup>

As an example of this in the Constitution, he offered the word "free."

Yet, the word *free* is capable of some ten or twenty different senses. So that, by changing the sense of that single word, some ten or twenty different constitutions would be made out of the same written instrument. But there are, we will suppose, a thousand other words in the constitution, each of which is capable of from two to ten different senses. So that, by changing the sense of only a single word at a time, several thousands of different constitutions would be made.<sup>18</sup>

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16. In what follows, I include far more and longer quotes from Spooner than is common in a law review article. I do so because, to the extent possible in an essay of this kind, I want the reader to hear Spooner in his own voice.

17. LYSANDER SPOONER, *The Unconstitutionality of Slavery* 137 (rev. ed. 1860), reprinted in 4 WORKS, *supra* note 3 [hereinafter SPOONER, *The Unconstitutionality of Slavery*]. Page numbers are to the 1860 "enlarged edition" as reprinted in 4 WORKS, *supra* note 3, which includes both the original version published in 1845, the second part published in 1847, additional appendices, and reviews of earlier editions. This edition, published in Boston, sold for \$1.00 in cloth and 75¢ in paper.

18. *Id.* at 138.

Without some way of ascertaining a single meaning, therefore, the whole point of adopting a written statute or constitution would be defeated. “[E]ach written law, in order to be law, must be taken only in some *one* definite and distinct sense; and that definite and distinct sense must be selected from the almost infinite variety of senses which its words are capable of.”<sup>19</sup> Spooner then asked, “How is this selection to be made?”<sup>20</sup> For his answer, he turned to natural law.

By natural law Spooner meant a “universal principle of moral obligation, that arises out of the nature of men and their relations to each other, and to other things—and [which] is consequently as unalterable as the nature of men.”<sup>21</sup> This he called “the rule, principle, obligation or requirement of natural justice.”<sup>22</sup> And the requirement of natural justice “has its origin in the natural rights of individuals, results necessarily from them, keeps them ever in view as its end and purpose, secures their enjoyment, and forbids their violation.”<sup>23</sup> Put another way, “this natural law is no other than that rule of natural justice, which results either directly from men’s natural rights, or from such acquisitions as they have a *natural* right to make, or from such contracts as they have a *natural* right to enter into.”<sup>24</sup>

Years later, Spooner explained his conception of natural law as follows:

The science of mine and thine—the science of justice—is the science of all human rights; of man’s rights of person and property; of all his rights to life, liberty, and the pursuit of happiness.

It is the science which alone can tell any man what he can, and cannot, do; what he can, and cannot, have; what he can, and cannot, say, without infringing the rights of any other person.

It is the science of peace; and the only science of peace; since it is the science of which alone can tell us on what conditions mankind can live in peace, or ought to live in peace, with each other.

These conditions are simply these: viz., first that each man shall do, towards every other, all that justice requires him to do; as for example, that he shall pay his debts, that he shall return borrowed or stolen property to its owner, and that he shall make reparation for any injury he may have done to the person or property of another.

The second condition is, that each man shall abstain from doing, to another, anything which justice forbids him to do; as, for example, that he shall abstain from committing theft, robbery, arson, murder, or any other crime against the person or property of another.

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19. *Id.* at 138-39.

20. *Id.*

21. *Id.* at 5-6.

22. *Id.* at 6.

23. *Id.*

24. *Id.* at 7.

So long as these conditions are fulfilled, men are at peace, and ought to remain at peace, with each other. But when either of these conditions is violated, men are at war. And they must necessarily remain at war until justice is re-established.<sup>25</sup>

The “science of justice,” then, was to figure out the preconditions of peace.<sup>26</sup>

Although Spooner wrote in a day when, especially among abolitionists, natural law and natural rights were more familiar than they are today, he did not assume his audience understood these concepts or accepted them. Instead, he explained why an appeal to natural law and natural rights was both inescapable and feasible. Spooner argued that statutes and constitutions must be consistent with natural justice as defined by natural rights because only by so doing would such statutes or constitutions be binding on the citizenry:

Natural justice is either law, or it is not. If it be law, it is always law, and nothing inconsistent with it can ever be made law. If it be not law, then we have no law except that which is prescribed by the reigning power of the state; and all idea of justice being any part of our system of law, any further than it may be specially prescribed, ought to be abandoned; and government ought to acknowledge that its authority rests solely on its power to compel submission, and that there is not necessarily any *moral obligation of obedience* to its mandate.

Putting the matter more succinctly, Spooner wrote: “If legislation be consistent with natural justice, and the natural or intrinsic obligation of the contract of government, it is *obligatory*: if not, not.”<sup>27</sup>

For Spooner, then, the choice was a conception of law that was consistent with natural justice, which would then carry with it a duty of obedience, or a conception of law based solely on the successful imposition of power, which there would be no moral duty to obey. “If physical power be the fountain of all law, then law and force are synonymous terms. Or, perhaps, rather, law would be the result of a combination of will and force; of will, united with a physical power sufficient to compel

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25. LYSANDER SPOONER, *Natural Law; or The Science of Justice* (1882), reprinted in 1 WORKS, *supra* note 3, at 5-6.

26. As might be expected, Spooner thought that “[e]ach individual being secured in the enjoyment of this liberty, must then take the responsibility of his own happiness and well-being. If his necessities require more than his faculties will supply, he must depend upon the voluntary kindness of his fellow-men. . . .” SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 20 n.\*. Nevertheless, Spooner maintained that extreme necessity could change a person’s obligation if “he be reduced to that extremity where the necessity of self-preservation overrides all abstract rules of conduct, and makes a law for the occasion—an extremity, that would probably never occur but for some antecedent injustice.” *Id.*

27. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 8 n.\* (emphasis added).



obedience to it, but not necessary having any moral character whatever."<sup>28</sup> The implications of this definition of law were obvious to Spooner. "On this principle, then—that mere will or power are competent to establish the law that is to govern an act, without reference to the justice or injustice of the act itself, the will and power of any single individual to commit theft, would be sufficient to make the theft lawful, as lawful as is any other act of injustice, which the will and power of communities, or large bodies of men, may be united to accomplish."<sup>29</sup>

But are not the commands of legitimate governments distinguishable from the commands of a thief? Spooner argued that this would only be true on the assumption that a government's legitimacy is not itself a product of mere will or power. "The numbers concerned," he wrote, "do not alter the rule."<sup>30</sup> How then would a government achieve legitimacy? Spooner's answer was the traditional American answer: from the consent of the governed. "[G]overnment can have no powers except as individuals may *rightfully* delegate to it."<sup>31</sup> But once again, Spooner's argument takes on a modern appearance. For he understood as well as any political theorist today the impossibility of gaining unanimous consent.

Our constitutions purport to be established by "the people," and, *in theory*, "all the people" *consent* to such government as the constitutions authorize. But this consent of "the people" exists only in theory. It has no existence in fact. Government is in reality established by the few; and these few assume the consent of all the rest, without any such consent being actually given.<sup>32</sup>

One might conclude from a lack of actual consent either that the government was illegitimate<sup>33</sup> or that actual consent is not what legitimates government. Or one might contend, as Spooner did in his book on slavery, that the lack of actual consent imposed severe constraints on any government which depended for its legitimacy upon the consent of the governed. Specifically, it limited the government to exercising only those powers to which every honest person could be *presumed* to have consented.<sup>34</sup>

Spooner's answer to the lack of actual assent was, therefore, to employ a presumption based on what today might be called rational choice.

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28. *Id.* at 12.

29. *Id.* at 12-13.

30. *Id.* at 12.

31. *Id.* at 14.

32. *Id.* at 153; *see id.* at 225 ("The whole matter of the adoption of the constitution is mainly a matter of assumption and theory, rather than of actual fact.").

33. Later in his life Spooner reached this conclusion in what may be his best remembered essay. *See* LYSANDER SPOONER, *No Treason, No. VI: The Constitution of No Authority* (1870), *reprinted in* 1 WORKS, *supra* note 3.

34. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 143.

All governments . . . that profess to be founded on the consent of the governed, and yet have authority to violate natural laws, are necessarily frauds. It is not a supposable case, that all or even a very large part, of the governed, can have agreed to them. Justice is evidently the only principle that *everybody* can be presumed to agree to, in the formation of government.<sup>35</sup>

In other words, any government who depends for its legitimacy on the consent of the governed must operate consistent with principles of justice—the conditions of peace—to which everybody presumably could agree.

Moreover, lawmakers must make laws that adhere to natural justice because they have promised to do so, and judges must so construe them: “[E]very instrument, and every man, or body of men, that profess to establish a law, impliedly assert that the law they would establish is reasonable and right. The law, therefore, must, if possible, be construed consistently with that implied assertion.”<sup>36</sup>

Finally, because some rights are inalienable, governments cannot claim that the citizenry has consented to their infringement.

[I]n order that the contract of government may be valid and lawful . . . [i]t cannot lawfully authorize government to destroy or take from men their natural rights: for natural rights are inalienable, and can no more be surrendered to government—which is but an association of individuals—than to a single individual. They are a necessary attribute of man’s nature; and he can no more part with them—to government or anyone else—than with his nature itself.<sup>37</sup>

And this leads Spooner to a particular conception of government’s purpose: “But the contract of government may lawfully authorize the adoption of means—not inconsistent with natural justice—for the better protection of men’s natural rights. And this is the legitimate and true object of government.”<sup>38</sup>

What of the practicality of basing law on natural justice which, in turn, is based on natural rights? In assessing Spooner’s proposal it is important to bear in mind that, while Spooner advocated the non-binding nature of statutes that violate or were *inconsistent* with natural justice, he did not think that abstract principles of justice dictated the precise content of all laws. He allowed, for example, for the necessity of laws to establish much-needed conventions.

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35. *Id.*

36. *Id.* at 205.

37. *Id.* at 8.

38. *Id.*

This condemnation of written laws must, of course, be understood as applying only to cases where principles and rights are involved, and not as condemning any governmental arrangements, or instrumentalities, that are consistent with natural right, and which must be agreed upon for the purpose of carrying natural law into effect. These things may be varied, as expediency may dictate, so only that they be allowed to infringe no principle of justice. And they must, of course, be written, because they do not exist as fixed principles, or laws in nature.<sup>39</sup>

What he vehemently denied is that natural law was somehow ineffable and unknowable. Because this remains a common objection to natural rights, and as his response to this questions also reveals what he thought to be the content of natural rights, I quote him at length:

The objections made to natural law, on the ground of obscurity, are wholly unfounded. It is true, it must be learned, like any other science, but it is equally true, that it is easily learned. Although as illimitable in its applications as the infinite relations of men to each other, it is, nevertheless, made up of simple elementary principles, of the truth and justice of which every ordinary mind has an almost intuitive perception. *It is the science of justice*,—and almost all men have the same perceptions of what constitutes justice, or of what justice requires, when they understand alike the facts from which their inferences are to be drawn. Men living in contact with each other, and having intercourse together, *cannot avoid* learning natural law, to a very great extent, even if they would. The dealings of men with men, their separate possessions, and their individual wants, are continually forcing upon their minds the questions,—Is this act just? or is it unjust? Is this thing mine? or is it his? And these are questions of natural law; questions, which, in regard to the great mass of cases, are answered alike by the human mind everywhere.<sup>40</sup>

For Spooner, natural law was knowable because, in the abstract, it was limited to the following proposition:

The ultimate truth on this subject is, that man has an inalienable right to so much personal liberty as he will use without invading the rights of others. This liberty is an inherent right of his nature and his faculties. It is an inherent right of his nature and faculties to develop [sic] themselves freely, and without restraint from other natures and faculties, *that have no superior*

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39. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 140 n.\*.

40. *Id.* at 140-41 n.†.

*prerogatives to his own.* And this right has only this limit, viz., that he do not carry the exercise of his own liberty so far as to restrain or infringe the equally free development of the natures and faculties of others. The dividing lines between the equal liberties of each must never be transgressed by either. This principle is the foundation and essence of law and of civil right. And legitimate government is formed by the voluntary association of individuals, for the mutual protection of each of them in the enjoyment of this natural liberty, against those who may be disposed to invade it.<sup>41</sup>

It is a principle so obvious in itself and in most of its applications that children learn it “before they have learned the language by which we describe it”<sup>42</sup>:

Children learn many principles of natural law at a very early age. For example: they learn that when one child has picked up an apple or a flower, it is his, and that his associates may not take it from him against his will. They also learn that if he voluntarily exchange his apple or flower with a playmate, for some other article of desire, he has thereby surrendered his right to it, and must not reclaim it. These are fundamental principles of natural law, which govern most of the greatest interests of individuals and society; yet, children learn them earlier than they learn that three and three are six, or five and five, ten.<sup>43</sup>

Why then is natural law supposed to be so confusing and unknowable? Spooner’s answer is surprisingly compelling:

If our governments would but themselves adhere to natural law, there would be little occasion to complain of the ignorance of the people in regard to it. The popular ignorance of law [that is, *just* law] is attributable mainly to the innovations that have been made upon natural law by legislation; whereby our system has become an incongruous mixture of natural and statute law, with no uniform principle pervading it. To learn such a system,—if system it can be called, and if learned it can be,—is a matter of very similar difficulty to what it would take to learn a system of mathematics, which should consist of the mathematics of nature, interspersed with such other mathematics as might be created by legislation, in violation of all the natural principles of numbers and quantities.

But whether the difficulties of learning natural law be greater or less than here represented, they exist in the nature of things and cannot be removed. Legislation, instead of removing, only increases them. This it does

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41. *Id.* at 19-20 n.\* (emphasis added).

42. *Id.* at 140-41 n.†.

43. *Id.*

by innovating upon natural truths and principles, and introducing jargon and contradiction, in the place of order, analogy, consistency, and uniformity.<sup>44</sup>

In this manner, Spooner began his interpretive approach with an affirmation of natural rights that he shared with other abolitionists and with the revolutionary generation that came before him.

### III. NATURAL RIGHTS AND CONSTITUTIONAL INTERPRETATION: SPOONER'S ANALYSIS OF SLAVERY

It would seem that the argument against slavery that follows from Spooner's views of natural law and natural rights is obvious and almost trivial. (1) Written laws, including written constitutions, that violate natural justice as defined by natural rights are not to be enforced by judges. (2) Slavery is unjust because it violates the natural rights of the slave. Therefore, (3) slavery is unconstitutional and not to be enforced by judges. Q.E.D. Yet, despite the fact that Spooner would have accepted this syllogism as sufficient to condemn slavery,<sup>45</sup> this was not the principal method of constitutional interpretation he brought to bear on its constitutionality. "I shall not insist," he wrote, "upon the principle . . . that there can be no law contrary to natural right; but shall admit, for the sake of argument, that there may be such laws."<sup>46</sup> His primary interpretive strategy was more interesting.

Spooner argued that the primacy of natural justice meant that the following rule of *statutory* interpretation, enunciated by Chief Justice John Marshall in the 1805 case of *United States v. Fisher*,<sup>47</sup> should be applied to the constitution as well:

Where rights are infringed, where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed with *irresistible clearness*, to induce a court of justice to suppose a design to effect such objects.<sup>48</sup>

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44. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17.

45. In Spooner's words, "no rule of civil conduct, that is inconsistent with the natural rights of men, can be rightfully established by government, or consequently be made obligatory as law, either upon the people, or upon judicial tribunals. . . ." *Id.* at 15.

46. *Id.* at 15-16.

47. *United States v. Fisher*, 6 U.S. [2 Cranch] 358, 390 (1805).

48. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 18-19 (quoting *United States v. Fisher*) (emphasis added by Spooner). Despite the appeal to Spooner of Marshall's formulation, near the end of his life, Spooner expressed, with his usual feistiness, his loathing for Marshall as a judge:

John Marshall has the reputation of having been the greatest jurist the country has ever had. And he unquestionably would have been a great jurist, if the two fundamental propositions, on which all his legal, political, and constitutional ideas were based had been true.

These two propositions were, first, that government has all power; and, secondly, that the people have no rights.

There two propositions were, with him, cardinal principles, from which, I think, he never departed.

Spooner's rendered this interpretive maxim as follows:

1st, that no intention, in violation of natural justice and natural right . . . can be ascribed to the constitution, unless that intention be expressed in terms that are *legally competent* to express such an intention; and 2d, that no terms, except those that are plenary, express, explicit, distinct, unequivocal, *and to which no other meaning can be given, are legally competent* to authorize or sanction anything contrary to natural right.<sup>49</sup>

In short, "all language must be construed '*strictly*' in favor of natural right."<sup>50</sup> But, given its rationale, this rule of construction is not symmetrical.

The rule of law is materially different as to the terms necessary to legalize and sanction anything contrary to natural right, and those necessary to legalize things that are consistent with natural right. The latter may be sanctioned by natural implication and inference; the former only by inevitable

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For these reasons, he was the oracle of all the rapacious classes, in whose interest the government was administered. And from them he got all his fame.

LYSANDER SPOONER, *A Letter to Grover Cleveland* 87 (1886), reprinted in 1 WORKS, *supra* note 3.

49. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 58-59. When he added the second part of the work in 1847, Spooner identified, defended and applied the following fourteen rules of interpretation:

- (1) In the interpretation of the Constitution, as of all other laws and contracts, the intention of the instrument must prevail;
- (2) The intention of the Constitution must be collected from its words;
- (3) We must, if possible, give a word the same meaning appropriate to the subject of the instrument itself;
- (4) Where technical words are used, a technical meaning is to be attributed to them;
- (5) The sense of every word, that is ambiguous in itself, must, if possible, be determined by reference to the rest of the instrument;
- (6) A contract must never, if it be possible to avoid it, be so construed, as that any one of the parties to it, assuming him to understand his rights, and to be of competent mental capacity to make obligatory contracts, may not reasonably be presumed to have consented to it;
- (7) Any unjust intention must be expressed with irresistible clearness to induce a court to give a law an unjust meaning;
- (8) Where the prevailing principles and provisions of a law are favorable to justice, and general in their nature and terms, no unnecessary exception to them, or to their operation, is to be allowed;
- (9) Be guided, in doubtful cases, by the preamble;
- (10) One part of the instrument must not be allowed to contradict another, unless the language be so explicit as to make the contradiction inevitable;
- (11) The Constitution ought never be construed to violate the law of nations, if any other possible construction exists;
- (12) All reasonable doubts must be decided in favor of liberty;
- (13) The instrument must be so construed as to give no shelter or effect to fraud;
- (14) Never unnecessarily impute to an instrument any intention whatever which it would be unnatural for either reasonable or honest men to entertain.

*Id.* at 157-205. Spooner's elaboration, defense, and application of these rules are excerpted in Lysander Spooner, *The Unconstitutionality of Slavery*, 28 PAC. L.J. 1015 (1997) [hereinafter MCGEORGE EXCERPT].

50. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 17-18.

implication, or by language that is full, definite express, explicit, unequivocal, and whose *unavoidable* import is to sanction the *specific wrong* intended.<sup>51</sup>

From this interpretive starting point, we can now see Spooner's basic strategy for finding slavery unconstitutional.

To assert, therefore, that the constitution *intended* to sanction slavery, is, in reality, equivalent to asserting that the *necessary* meaning, the *unavoidable* import of the *words alone* of the constitution, come fully up to the point of a clear, definite, distinct, express, explicit, unequivocal, necessary and peremptory sanction of the specific thing, *human slavery, property in men*. If the *necessary* import of the *words alone* do but fall an iota short of this point, the instrument gives, and, legally speaking, intended to give, no legal sanction to slavery. Now, who can, in good faith, say that the *words alone* of the constitution come up to this point? No one, who knows anything of law, and the meaning of words. Not even the name of the thing, alleged to be sanctioned, is given. The constitution itself contains no designation, description, or necessary admission of the existence of such a thing as slavery, servitude, or the right of property in man. We are obliged to go out of the instrument, and grope among the records of oppression lawlessness and crime—records unmentioned, and of course unsanctioned by the constitution—to *find* the thing, to which it is said that the words of the constitution apply. And when we have found this thing, which the constitution dare not name, we find that the constitution has sanctioned it (if at all) only by enigmatical words, by unnecessary implication and inference, by innuendo and double entendre, and under a name that entirely fails of describing the thing. Everybody must admit that the constitution itself contains no language, from which *alone* any court, that were either strangers to the prior existence of slavery, or that did not assume its prior existence to be legal, could legally decide that the constitution sanctioned it. And this is the true test for determining whether the constitution does, or does not, sanction slavery, viz. whether a court of law, strangers to the prior existence of slavery or not assuming its prior existence to be legal—looking only at the naked language of the instrument—could, consistently with legal rules, judicially determine that it sanctioned slavery. Every lawyer, who deserves that name, knows that the claim for slavery could stand no such test.<sup>52</sup>

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51. *Id.* at 59.

52. *Id.* at 59-60.

Assuming one accepts the premise that slavery is a natural injustice which violates the natural and inalienable rights of those who are enslaved, Spooner's interpretive strategy gives rise to two obvious questions. First, what about those notorious sections of the Constitution that have long been accepted as sanctioning slavery? Second, what about the evidence of the original intentions of the framers concerning the constitutionality of slavery? Spooner spent the bulk of his nearly three hundred page work addressing these issues—particularly the first one—in detail, and I simply cannot do his analysis complete justice here. Virtually each page of this portion of his book contributes an additional argument, piece of evidence, or refinement of previous arguments. Yet, for you to appreciate his approach to interpretation, I must try to give at least a flavor of his responses.

*A. Alleged Textual References to Slavery*

There are three passages in the original Constitution that are commonly thought to refer to and constitutionally legitimate slavery. The first is in Article I, Section 2:

Representatives and direct Taxes shall be apportioned among the several State, which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of *free Persons*, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all *other Persons*.<sup>53</sup>

The term, “other Persons” in this clause is interpreted as referring to slaves. The second passage is also in Article I, but in Section 9:

The Migration or *Importation of such Persons* as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.<sup>54</sup>

The term “Importation of such Persons” in this clause is interpreted as to referring to slaves. The third passage is in Article IV, section 2:

No *Person held to Service or Labour* in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.<sup>55</sup>

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53. U.S. CONST. art. I, § 2 (emphasis added).

54. U.S. CONST. art. I, § 9 (emphasis added).

55. U.S. CONST. art. IV, § 2 (emphasis added).



The term “person held to Service or Labour” in this clause is interpreted as referring to slaves.

One of the striking things about these three passages, when one stops to consider the matter, is that none of them uses the term “slave.” As Spooner wrote: “Not even the name of the thing, alleged to be sanctioned, is given.”<sup>56</sup> Now we may all think we know the reasons why this word was avoided, but there is one reason that cannot be advanced. The word was not avoided because it was unknown to those who framed and ratified the Constitution or was not in common parlance at the time. Indeed, to the contrary, if one wanted to avoid any ambiguity as to the meaning of these three provisions, and one meant to refer to slaves, then “slave” would be by far the most obvious term to use. Had the framers or ratifiers wished to bind themselves and future generations by their written constitution to sanction slavery, they could have used the word that expressed this intention in no uncertain terms. And yet, for whatever reason, those who wrote and ratified this Constitution chose not to do so. And if by failing to do so, they failed to explicitly ratify and incorporate into the Constitution the natural injustice of slavery, then the reasons for their failure are immaterial. “It is not the intentions men actually had,” Spooner contended, “but the intentions they constitutionally expressed, that make up the constitution.”<sup>57</sup> Spooner finds one reason for this precept in the indeterminacy of basing legal rules on actual intentions:

Men’s *presumed* intentions were all uniform, all certainly right, and all valid, because they corresponded precisely with what they said by the instrument itself; whereas their actual intentions were almost infinitely various, conflicting with each other, conflicting with what they said by the instrument, and therefore of no legal consequence or validity whatever.<sup>58</sup>

But does this not presuppose the existence of some free-floating “plain-meaning” wholly independent of the intentions of the people who ratified it? Not really. It only presupposes that language comes to have an objective meaning within a particular community that can be discerned independently of individual opinions and usages. Indeed, were language not to have some such meaning, it is not clear how it could serve as a general medium of communication. Moreover, the process of ratification presupposes that the Constitution has meaning independent of individual intentions. As Spooner argued:

We must admit that the constitution, *of itself, independently of the actual intentions of the people*, expresses some certain fixed, definite, and legal intentions; else the people themselves would express no intentions by

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56. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 59.

57. *Id.* at 226.

58. *Id.*

agreeing to it. The instrument would, in fact, contain nothing that the people *could* agree to. Agreeing to an instrument that had no meaning *of its own*, would only be agreeing to nothing.<sup>59</sup>

How then is the Constitution's meaning to be determined? "[T]he only answer that can be given," Spooner concluded,

is, that it can be no other than the meaning which its words, interpreted by sound legal rules of interpretation, express. That and that alone is the meaning of the constitution. And whether the people who adopted the constitution really meant the same things which the constitution means, is a matter which they were bound to settle, each individual with himself, before he agreed to the instrument; and it is therefore one with which we have now nothing to do.<sup>60</sup>

By this reasoning if the people ratified a document that failed to clearly authorize slavery and which omits all explicit reference to the practice using the most obvious and well-known term to describe it, we cannot presume that these enigmatic references are to slavery if some other meaning can reasonably be assigned to them.

It is also striking that the terms in two of these three passages refer to persons: *persons* held to service or labor, and the importation of such *persons*. Persons are people and part of "We the People" who presumably assented to the Constitution in order to "establish Justice . . . and secure the Blessings of Liberty"<sup>61</sup> to themselves and their posterity.

[T]here is no legal ground for denying that the terms "the people of the United States," included the *whole* of the then people of the United States. And if the whole of the people are the parties to it, it must, if possible, be so

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59. *Id.* at 222; *see id.* at 220 ("[I]f the intentions could be assumed independently of the words, the words would be of no use, and the laws of course would not be written.").

60. *Id.* at 223. Spooner thought that general rules of interpretation were needed to choose among the various meanings of language:

[T]he same words have such various and opposite meanings in common use, that there would be no certainty as to the meaning of the laws themselves, unless there were some *rules* for determining which one of a word's various meanings was to be attached to it, when the word was found in a particular connection. . . . Their office is to determine the legal meaning of a word, or, rather, to *select* the legal meaning of [a] word, out of all the various meanings which the word bears in common use.

*Id.* at 162. But the rules of interpretation must themselves be selected to enhance the fit between constitutional meaning and justice, for "unless the meaning of words were judged of in this manner, words themselves could not be used in writing laws and contracts, without being liable to be perverted to subserve all manner of injustice. . . ."

*Id.* at 163. "[T]he rules are but a transcript of a common principle of morality, to wit, the principle which requires us to attribute good motives and good designs to all the words and actions of our fellow-men, that can reasonably bear such a construction." *Id.* at 164.

61. U.S. CONST. preamble.

construed as to make it such contract as each and every individual might reasonably agree to.<sup>62</sup>

In sum, the Constitution refers in these two clauses to “persons” and in the preamble to “We the People.” Nowhere does the Constitution exclude either those persons referred to in these sections or those persons then held as slaves to be excluded from “the People.” Persons who are part of the People cannot be presumed to assent to a document that would hold them in bondage. And, short of this, the government of the United States would not rest on the consent of the governed.

Even more fundamentally, creatures who are persons are in possession of certain inalienable natural rights. This much was conceded by those advocates of slavery who were compelled to argue that slaves were not people. Thus, if slaves are not people, and if it is permissible to enslave another only if that other creature is not a person, then these two passages cannot be referring to or sanctioning slavery, since they explicitly refer to “persons” and persons cannot justly be held as slaves.

But Spooner’s interpretive methodology requires that the terms in these three passages be given *some* definitive legal meaning. How do we do so? Spooner would require us, if we can, to draw this meaning from the Constitution itself, and failing that from the ordinary meanings these terms have in law or in common usage. What else could these terms be reasonably construed as referencing other than slavery? Although I can relate to you the meanings advocated by Spooner, I cannot recount all the evidence and arguments he provides on behalf of these meanings.<sup>63</sup> Let us take up these passages in order.

### 1. Distinguishing “Free Persons” from “Other Persons”

First, what does “other persons” as opposed to “free persons” mean in Article I, Section 2? Spooner argues, at length and with considerable authority,<sup>64</sup> that “English law had for centuries used the word ‘free’ as describing persons possessing citizenship, or some other franchise or peculiar privilege—as distinguished from aliens, and persons not possessed of such franchise or privilege.”<sup>65</sup> For instance: “A man was said to be a ‘free British subject’—meaning thereby that he was a naturalized or native born citizen of the British government, as distinguished from an alien, or person neither naturalized nor native born.”<sup>66</sup>

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62. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 188. I shall consider, below, Spooner’s response to the objection that the slave holders cannot be presumed to have agreed to a constitution under which slavery was unconstitutional. See *infra* notes 128-31 and accompanying text.

63. See generally, SPOONER, MCGEORGE EXCERPT, *supra* note 49.

64. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 44-54, 247-55, 265-70.

65. *Id.* at 74.

66. *Id.* at 45.

By this interpretation this clause refers to two classes of persons: free persons and other persons. The class of "free" persons corresponds to what Spooner calls "full citizens," both native born and naturalized, who have not for some reason been dispossessed of their rights of citizenship, perhaps because they are convicted felons, whereas the class of "other persons" corresponds to "partial citizens" or what are commonly called aliens.

The real distinction between these two classes was, that the first class were *free of the government*—that is, they were *full* members of the State, and could claim the *full* liberty, enjoyment and protection of the laws, *as a matter of right, as being parties to the compact*; while the latter class were not thus free; they could claim hardly anything *as a right*, (perhaps nothing, unless it were the privilege of the writ of *habeas corpus*.) and were only allowed, *as a matter of favor and discretion*, such protection and privileges as the general and State governments should see fit to accord to them.<sup>67</sup>

By this interpretation, taxation and representation are apportioned as follows: each "full citizen" of the United States counts for one; each resident alien or "partial citizen" is counted as two-thirds a full citizen.<sup>68</sup> The reason for the partial taxation and representation of resident aliens, is straight-forward:

They are protected by our laws, and should pay for that protection. But as they are not allowed the full privileges of citizens, they should not pay an equal tax with the citizens. They contribute to the strength and resources of the government, and therefore they should be represented. But as they are not sufficiently acquainted with our system of government, and as their allegiance is not made sufficiently sure, they are not entitled to an equal voice with the citizens, especially if they are not equally taxed.<sup>69</sup>

But can these two classes be grounded in the Constitution itself? As evidence that this meaning is incorporated in the U.S. Constitution, Spooner looked to the power granted Congress in Article I, Section 8 "To establish an uniform Rule of Naturalization."<sup>70</sup>

The power of naturalization is, by the constitution, taken from the States, and given exclusively to the United States. The constitution of the United States, therefore, necessarily supposes the existence of aliens—and thus

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67. *Id.* at 247.

68. Spooner offers a lengthy explanation of why the term "free persons" was preferable to the term "citizen." *See id.* at 251-55.

69. *Id.* at 242-43.

70. U.S. CONST. art. I, § 8, cl. 4.

furnishes the correlative sought for. It furnishes a class both for the word “free,” and the words “all other persons,” to apply to.<sup>71</sup>

After extensive analysis of both text and general usage, Spooner concludes:

It is perfectly manifest, from all the evidence given in the preceding pages . . . that the word “free,” when used in laws and constitutions, to describe one class of persons, as distinguished from another living under the same laws or constitutions, is not sufficient, *of itself*, to imply slavery as its correlative. The word itself is wholly indefinite, as to the kind of restraint implied as its correlative. And as slavery is the worst, it is necessarily the last, kind of restraint which the law will imply. There must be some other word, or provision, *in the instrument itself*, to warrant such an implication against the other class. But the constitution contains no such other word or provision. It contains nothing but the simple word “free.” While, on the other hand, it is full of words and provisions, perfectly explicit, that imply the opposite of slavery.<sup>72</sup>

## 2. The “Importation of such Persons”

What has Spooner then to say about the meaning of the term “Importation of such Persons” in Article I, Section 9? The argument made by those asserting this to be a reference to slavery is that, because only property can be “imported,” any person who is “imported” is a slave. Spooner rejects this definition of “importation.” The word “applies correctly to both persons and things. The definition of the verb ‘import’ is simply ‘to bring from a foreign country, or jurisdiction, or from another

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71. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 75. Indeed one authority which Spooner mentions in support of the distinction between “free persons”—meaning—citizens and aliens is Madison’s explanation of the Naturalization Clause in Federalist No. 42 in light of the privileges and immunities clause found in the Articles of Confederation. Madison “takes it for granted that the word ‘free’ was used in that political sense . . . —that is, as distinguishing ‘citizens’ and the ‘inhabitants’ or ‘people’ proper, from aliens and persons not allowed the franchises enjoyed by the ‘inhabitants’ and ‘people’ of the States.” *Id.* at 53. Spooner was arguing that the word “free persons” meant citizens as distinct from aliens, not because Madison intended this meaning, but because Madison’s usage was evidence of this commonly accepted meaning and, therefore, of its legal meaning.

72. *Id.* at 268. In a footnote, Spooner adds the following observation:

I doubt if a single instance can be found, even in the statutes of the slaveholding States themselves, *in force in 1789*, where the word *free* was used, (as the slave argument claims it was used in the constitution,) to describe either white persons, or the mass of the people *other than slaves*, (that is, the white and free colored,) *as distinguished from the slaves*, unless the statute also contained the word *slave*, or some other evidence, beside the word *free* itself, that that was the sense in which the word *free* was used. If there were no such statute, it proves that, by the usage of legislation, in 1789, even in the slaveholding States themselves, the word *free* was insufficient, *of itself*, to imply slavery as its correlative.

*Id.* at 268 n.†.

State, into one's own country, jurisdiction or State."<sup>73</sup> Spooner's next argument is particularly insightful:

When we speak of "importing" things, it is true we mentally associate with them the idea of property. But that is simply because *things* are property, and not because the word "import" has any control, in that particular, over the character of the things imported. When we speak of importing "persons," we do not associate with them the idea of property, simply because "persons" are not property.

We speak daily of the "importation of foreigners into the country;" but no one infers therefrom that they are brought in as slaves, but as passengers. . . . A man imports his wife and children—but they are not therefore his slaves, or capable of being owned or sold as his property. A man imports a gang of laborers, to clear lands, cut canals, or construct railroads; but not therefore to be held as slaves."<sup>74</sup>

On the basis of this common usage, Spooner thus reads the term "importation" in this clause to refer to persons coming into the country. Whereas the term "migration" refers to persons going out of the country.<sup>75</sup> "An innocent meaning must be given to the word, if it will bear one. Such is the legal rule."<sup>76</sup>

Spooner offers several other arguments in favor of this interpretation, but one is particularly, though typically, clever. The restriction on the "Importation of Persons" cannot refer to a restriction on Congress' power to refuse to recognize slavery, because Congress' power to naturalize anyone who enters the country is unqualified. Even if it could not *bar* the entry of slaves, by the slavery reading of the clause, it could free every slave thus imported upon arrival. Congress has

the perfect power to pass laws that shall naturalize every foreigner without distinction, the moment he sets foot on our soil. And they had this power as perfectly prior to 1808, as since. And it is a power entirely inconsistent with the idea that they were bound to admit, and forever after to acknowledge as slaves, all or any who might be attempted to be brought into the country as such.<sup>77</sup>

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73. *Id.* at 81.

74. *Id.* at 81-82.

75. Spooner might also have offered the following innocent meaning of these terms: "importation" refers to the activity of *one person bringing another* into the country, whereas migration refers to a person who seeks on his or her own behest to enter the country. This would answer those who might think, contrary to Spooner, that the term "migration" refers not only to emigration but to immigration as well. In contrast, notice that the pro-slavery reading of this clause would apply to "migration" as well as "importation," though it is difficult to imagine how chattel slaves can possibly "migrate" or be taxed when they do.

76. *Id.* at 82.

77. *Id.* at 87.

To argue that the power of Congress to naturalize persons held as slaves upon their entry into the country is qualified by the clause barring restrictions on importation is, once again, to assume what is at issue: that "importation of persons" refers to slaves.

3. "No person held to Service or Labour."

By now I trust that those of you who are in the "Spoonerian" swing of things can easily generate an "innocent" interpretation of the passage that requires the return of a person held to service or labor in one state who escapes from into another state. Why, of course, "persons held to Service or Labour"<sup>78</sup> refers, not to slaves, but to indentured servants and convicts. It has been estimated that a majority of early immigrants to this country came as indentured servants or convicts.<sup>79</sup> And Northern nonslave states had runaway servant laws akin to the runaway slave laws in slave states.<sup>80</sup>

Neither "service" nor labor is necessarily slavery; and not being necessarily slavery, the words, cannot, in this case, be strained beyond their necessary meaning, to make them sanction a wrong. . . . An indented apprentice serves and labors for another. He is "held" to do so, under a contract, and for a consideration, that are recognized, by the laws, as legitimate, and consistent with natural right. Yet he is not owned as property. A condemned criminal is "held to labor"—yet he is not owned as property.<sup>81</sup>

Spooner also considers whether the phrase, "No Person held to Service or Labour in one State, *under the Laws thereof*," delegates to states the sole power to declare when someone is or is not held to service, such that, under this provision, Congress and the federal judiciary must defer to state law whenever it defines a persons as being held to service. He answers:

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78. U.S. CONST. art. IV, § 2.

79. See ABBOT EMERSON SMITH, *COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA, 1607-1776* 336 (1947) ("If we exclude the Puritan migrations of the 1630's, it is safe to say that not less than one-half, nor more than two-thirds, of all white immigrants to the colonies were indentured servants or redemptioners or convicts. . . .").

80. ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE 1350-1870* 11 (1991).

Under colonial, and later state, servant statutes an elaborate set of provisions safeguarded the master's right to the servant's labor during the term of service. These statutes established procedures by which masters could recover runaway servants; subjected runaways to additional servitude, in some cases to multiple additional days of service for each day's absence; and authorized masters to administer corporal punishment to disobedient servants.

*Id.* at 11. By the way, in Steinfeld's words, "[l]arge numbers of servants continued to be *imported* as late as 1819 . . . . But in 1820, after nearly two centuries, the mass *importation* of indentured servants abruptly came to a halt." *Id.* (emphasis added).

81. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 70.

The simple fact, that an act purports to “hold persons to service or labor,” clearly cannot, *of itself*, make the act constitutional. If it could, any act, purporting to hold “persons to service or labor,” would necessarily be constitutional, without regard to the “persons” so held, or the conditions on which they were held. It would be constitutional, *solely because it purported to hold persons to service or labor*.<sup>82</sup>

Under this theory any person could be made a slave by state law and, by this interpretation of this clause, such “acts of legislatures would be constitutional, *solely because they made slaves of the people*.”<sup>83</sup> Spooner concludes: “Certainly this would be a new test of the constitutionality of laws.”<sup>84</sup> To the contrary, any state law purporting to authorize holding a person to service must be assessed to see if it is constitutional and such an assessment would “depend upon a number of contingencies—such as the kind of service or labor required, and the conditions on which it requires. Any service or labor, that is inconsistent with the duties which the constitution requires of the people, is of course not sanctioned by this clause. . . .”<sup>85</sup>

But what of the argument that the framers of the Constitution intended these clauses to refer to slavery, and that the people ratifying the Constitution understood this as well? I turn now to Spooner’s analysis of original intent.

#### B. *The Original Intentions of the Framers and Ratifiers: Wendell Phillips’ Critique of Spooner*

Although Spooner persuaded some people that slavery was unconstitutional, including Frederick Douglass,<sup>86</sup> he failed to persuade other abolitionists, such as Garrison, or the judiciary, or posterity. Why were his arguments rejected? The most comprehensive criticism of Spooner was leveled by Wendell Phillips in his *Review of Lysander Spooner’s Essay on the Unconstitutionality of Slavery*.<sup>87</sup> Whereas the

82. *Id.* at 71.

83. *Id.*

84. *Id.*

85. *Id.* at 72.

86. A speech given by Frederick Douglass in Glasgow, Scotland in March of 1860 concisely tracks most of Spooner’s major arguments, cites the same passage from Marshall’s opinion in *United States v. Fisher*, and adopts Spooner’s interpretive presumption. See Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?*, reprinted in PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 207 (1992) (“[T]he intentions of those who framed the Constitution, be they good or bad, for slavery or against slavery, are to be respected so far, and so far only, as will find those intentions plainly stated in the Constitution. . . . It was what they said that was adopted by the people, not what they were ashamed or afraid to say, and really omitted to say.”). See also WILLIAM S. MCFEELY, FREDERICK DOUGLASS 205 (1991) (Douglass’ “arguments were those of Lysander Spooner and William Goodell as he had acknowledged at the time of his change of heart about the Constitution in 1851”).

87. PHILLIPS, REVIEW OF SPOONER, *supra* note 12. In this volume Phillips pairs Spooner with William Goodell, author of another book arguing that slavery was unconstitutional, though Phillips does not particularly focus on Goodell’s arguments. See WILLIAM GOODELL, AMERICAN CONSTITUTIONAL LAW AND ITS BEARING UPON



self-educated Spooner slashed at slavery with a broadsword, Phillips, the Harvard-trained student of Joseph Story, assailed Spooner with a rapier. The thrust of Phillips lawyerly and elegantly-written critique was, first, that Spooner had misconstrued or distorted judicial pronouncements as authority for Spooner's interpretive presumption against unjust interpretations. Yet, although Spooner, in his reply to Phillips, supplemented his argument with additional authority, his discussion of the nature of law preceding both Parts I and II clearly shows that his defense of his interpretive principles was normative, rather than based on precedent.

Some of Phillips' polemics against Spooner's theory of interpretation, while persuasive when written, would not ring as true today as they may have sounded at the time. For example, as a *reductio ad absurdum*, he argues that

if we construe the Constitution according to Mr. Spooner's rules, women are constitutionally eligible to the Presidency and to Congress; nothing but "extraneous and historical evidence" shields us from this result. As Mr. Spooner does not allow of this when it will fix upon a clause any meaning contrary to "natural right," he is bound to hold that woman may now *legally* fill these offices, or to give up his rules. . . .<sup>88</sup>

He then offers capital punishment as another example of something the Supreme Court could prohibit Congress from imposing on pirates pursuant to its Article I, Section 8 powers, should the Court be captured by members of "the Anti-Capital Punishment party."<sup>89</sup> "This would be legitimate on Mr. Spooner's rule, but would it not be absurd?"<sup>90</sup>

There is one other respect in which the passage of time has undermined Phillips' argument. In addition to the three passages considered above, Phillips contends that two additional constitutional provisions are "universally supposed to refer to and recognize Slavery."<sup>91</sup> It would be a useful test of Spooner's theory (and Phillips' critique) for the reader to put down this article and examine the Constitution to find these two provisions. No fair resorting to Madison's Notes to find them. (Those that remember the historical evidence are disqualified.) For Spooner would argue that, like the other three, these two provisions only sanction slavery if they are *assumed* to be about slaves based on recourse to extrinsic evidence.

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AMERICAN SLAVERY (1845). Goodell, by the way, relies on the Ninth Amendment (*id.* at 93) and other provisions of the Bill of Rights as embodying a "'spirit' of security to personal rights, and of consequent hostility to slavery." *Id.* at 92.

88. PHILLIPS, REVIEW OF SPOONER, *supra* note 12, at 53-54.

89. *Id.* at 54.

90. *Id.* Regardless of the history, Phillips is clearly on weaker textual ground here since, unlike slavery, the Constitution explicitly refers to capital punishment. *See, e.g.*, U.S. CONST. amend. V ("nor shall any person be twice put in jeopardy of *life* or limb").

91. *Id.* at 26.

Give up? Here is the allegedly “pro-slavery”<sup>92</sup> language: “Congress shall have Power . . . to *suppress Insurrections*.”<sup>93</sup> And “The United States shall guarantee to every State in this Union a Republican Form of Government; and shall *protect* each of them against Invasion; and . . . *against domestic Violence*.”<sup>94</sup> Now here is Phillips’ argument: “The . . . articles relating to insurrection and domestic violence, *perfectly innocent in themselves*—yet being made with the fact directly in view that Slavery exists among us, do deliberately pledge the whole national force against the unhappy slave if he imitate our fathers and resist oppression. . . .”<sup>95</sup> If we adopt the historical approach to interpret the three clauses discussed above, are we not also bound to reject what Phillips concedes to be the “perfectly innocent” interpretation of these clauses in favor of the pro-slavery interpretation? Which interpretation of the text is “strained”?

Phillips also disputed Spooner’s claim that slavery had not been expressly authorized in the Constitution with elaborate criticisms of Spooner’s textual analysis of the Constitution, colonial charters, statutes, the Declaration of Independence, Articles of Confederation, state constitutions, etc. To be sure, some of Phillips’ arguments are persuasive,<sup>96</sup> but Spooner’s reply in Part II shows that many miss the mark. For example, to counter Spooner’s interpretation of the terms “free persons” and “other persons” in Article I, Section 2, Phillips cites numerous examples of where the word “free” or “freeman” had previously been used in other legal writings as the correlative of slave.<sup>97</sup> In Part II, Spooner argues that, whenever this occurs, it is in juxtaposition, not with the words “other persons” as it is in Article I, Section 2, but with the term “slave” or “negroes.”<sup>98</sup> The presence of these words in each of Phillips’ examples, Spooner argues, is needed to render the term “free” unambiguous. Standing alone, the words “other persons” is insufficient to do so and, therefore, we are obliged to reject an unjust interpretation of these ambiguous terms in favor of a meaning consistent with justice.

More fundamentally, Phillips hotly rejects Spooner’s natural law approach in favor of a strongly majoritarian version of Austinian positivism.<sup>99</sup>

There can be no more self-evident proposition, than that, in every Government, the majority must rule, and their will be *uniformly* obeyed. Now, if the majority enact a wicked law, and the Judge refuses to enforce it,

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92. *Id.* at 68.

93. U.S. CONST. art. I, § 8 (emphasis added).

94. U.S. CONST. art. IV, § 4 (emphasis added).

95. PHILLIPS, REVIEW OF SPOONER, *supra* note 12, at 26-27 (emphasis added).

96. A comprehensive tally of all the philosophical, textual, and historical issues in dispute and which man got the better of the other in each would be an enormous undertaking that I shall not attempt here.

97. See PHILLIPS, REVIEW OF SPOONER, *supra* note 12, at 42-43.

98. See *supra* note 72 and accompanying text.

99. PHILLIPS, REVIEW OF SPOONER, *supra* note 12, at 8 n.\* (citing John Austin, *Jurisprudence* (1832)).

which is to yield, the Judge, or the majority? Of course, the first. On any other supposition, Government is impossible.<sup>100</sup>

While this is not the place to examine fully the merits of this claim, in Part II Spooner took issue with the assertion that either legislation or the Constitution itself necessarily reflects the will of the majority:

Only the male adults are allowed to vote either in the choice of delegates to form constitutions, or in the choice of legislators under the constitutions. These voters comprise not more than *one fifth* of the population. A bare majority of these voters,—that is, a little more than *one tenth* of the whole people,—choose the delegates and representatives. And then a *bare majority of these delegates and representatives* (which majority were chosen by, and, consequently, represent but little more than *one twentieth* of the whole people,) adopt the constitution, and enact the statutes. Thus the actual makers of constitutions and statutes cannot be said to be the representatives of but little more than *one twentieth* of the people whose rights are affected by their action.<sup>101</sup>

Moreover, in words reminiscent of modern Public Choice theory, Spooner notes that:

[b]ecause the representative is necessarily chosen for his opinions on one, or at most a few, important topics, when, in fact, he legislates on an hundred, or a thousand others, in regard to many, perhaps most, of which, he differs in opinion from those who actually voted for him. He can, therefore, with certainty, be said to represent nobody but himself.<sup>102</sup>

Thus, for Spooner, the suggestion that representative government constituted rule by the majority was a mere fiction. In light of this, Spooner countered Phillips' objection to the practicality of judicial interpretation that strives to be consistent with natural justice, with a practical objection of his own:

If the principle is to be acted upon, that the majority have a right to rule arbitrarily, there is no legitimate way of carrying out that principle, but by requiring, either that a majority of the whole people, (or of the voters,) should vote in favor of every separate law, or by requiring the entire

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100. *Id.* at 10.

101. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 153. Spooner goes on to observe that, because only a bare majority is required for a quorum, in practice the opinions of only a fortieth of the people need be represented in statutory legislation. *Id.*

102. *Id.* at 154.

unanimity in the representative bodies, who actually represent a majority of the people.<sup>103</sup>

Of course, Spooner denied “that a majority, however large, have any right to rule so as to violate the natural rights of any single individual. It is as unjust for millions if men to murder, ravish, enslave, rob, or otherwise injure a single individual, as it is for another single individual to do it.”<sup>104</sup>

Despite the occasional smugness of his tone towards Spooner, Phillips’ position was not unmoved by the force of Spooner’s arguments. As noted by Hans Baade, whereas in his previous pamphlet Phillips had relied

on the debates of the Philadelphia Convention as reported in Madison’s Notes, Phillips now followed Spooner’s lead in characterizing the Founding Fathers as mere clerks employed to draft the Constitution. . . .

In a basic shift from the “subjective” originalist position underlying his “Pro-Slavery Compact” tract, Wendell Phillips now argues that the intent of those who had adopted the Constitution had to be ascertained not from convention reports but from contemporaneous expositions.<sup>105</sup>

In defense of this position, Phillips offered many learned authorities and passages from Supreme Court cases, but one stands out: Chief Justice Taney’s opinion in *Aldridge v. Williams*<sup>106</sup> decided the same year that Spooner’s book was published.

In *Williams*, Taney rejects any reliance on “the construction placed upon [the statute in question] by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered.”<sup>107</sup> While this statement supports Spooner’s rejection of Phillips’ reliance upon Madison’s Notes, Phillips seizes upon Taney’s further statement that “we must gather [the] intention [of the majority of

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103. *Id.* at 154-55 n.\*.

104. *Id.*

105. Baade, *supra* note 6, at 1049-50. Phillips now defended reliance on Madison’s Notes as “fair and legitimate evidence of the sense in which the Constitution was accepted” by the state conventions. PHILLIPS, REVIEW OF SPOONER, *supra* note 12, at 33.

106. *Aldridge v. Williams*, 44 U.S. [3 How.] 9 (1845). Phillips also cites for authority, Chief Justice Marshall’s opinion in *The Antelope*, 23 U.S. [10 Wheat.] 66 (1815), the case in which Marshall ordered the return to their foreign “owners” of at least some of the slaves captured by pirates who had been apprehended by a United States revenue cutter. The passage by Marshall, which Phillips cites (PHILLIPS, REVIEW OF SPOONER, *supra* note 12, at 23), reads, in part: “That it [the slave trade] is contrary to the law of nature, will scarcely be denied. . . . Whatever might be the answer of the moralist to this question, a jurist must seek its *legal* solution in those principles of action which are sanctioned by the usages, the national acts, and the general assent of the world, of which he considers himself a part.” *The Antelope*, 23 U.S. at 66. In contrast, Spooner excoriates Phillips’ teacher, Justice Story, for his opinion in *Prigg v. Pennsylvania*, 41 U.S. [16 Peters] 539 (1842), in which Story rejects all appeals to “uniform rules of interpretation” or “rules of interpretation of a general nature” to reach a pro-slavery outcome on historical grounds. See SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 282, Appendix A.

107. *Williams*, 44 U.S. at 24.

both houses] from the language there used, comparing it, when any ambiguity exists, with the laws on the same subject, and looking, if necessary, to the public history of the times in which it was passed.”<sup>108</sup> That Northern abolitionist Phillips would rely on the authority of Southerner Taney is not merely ironic. If Taney provides authority for an “objective” approach to original intent, Phillips returns the favor by providing Taney the evidence he uses in his most infamous opinion to establish that the intent, and therefore the Constitution itself, is pro-slavery.<sup>109</sup>

For despite Phillips effort to dispute Spooner on Spooner’s terms, the principal *theoretical* reason for rejecting Spooner’s approach Phillips shared with Chief Justice Taney in his opinion in *Dred Scott v. Stanford*<sup>110</sup>: Spooner’s interpretation runs contrary to the intentions of the framers of both the Declaration of Independence and the Constitution. Referring to the Declaration’s affirmation “that all men are created equal; that they are endowed by their Creator with certain inalienable rights,”<sup>111</sup> Taney answered:

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were *not intended* to be included, and formed no part of the people who framed and adopted this declaration. . . .<sup>112</sup>

As for the Constitution, Taney interpreted its meaning in light of attitudes towards slaves held by members of the founding generation. “The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its *true intent* and meaning when it was adopted.”<sup>113</sup>

Thus, Taney asserted that “there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed,”<sup>114</sup> notwithstanding the fact that the word “negro” does not appear in the Constitution. He asserts that “[o]ne of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808, if it thinks proper,”<sup>115</sup> though, in the passage he is discussing, the Constitution refers to “persons” not

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108. See PHILLIPS, REVIEW OF SPOONER, *supra* note 12, at 30 (quoting from Taney’s opinion in *Aldridge v. Williams*, 44 U.S. [3 How.] 9 (1845)) (emphasis added).

109. See Baade, *supra* note 6, at 1051 (referring to “the embracement of Wendell Phillips’s constitutional theory by a Southern-dominated Supreme Court”).

110. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

111. THE DECLARATION OF INDEPENDENCE para. \* (U.S. 1776).

112. *Dred Scott*, 60 U.S. at 410 (emphasis added).

113. *Id.* at 405 (emphasis added).

114. *Id.* at 411.

115. *Id.*

“slaves.” He asserts that in “the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories,”<sup>116</sup> though in this provision, the Constitution speaks not of slaves, but of “persons held to service.” Taney never actually presents any evidence as to the meaning of these clauses, but rather assumes these clauses “directly and specifically”<sup>117</sup> refer to slavery, probably because of the evidence he presents concerning the general attitudes towards and legal treatment of slaves by members of the founding generation.

Though Spooner was seeking the “original meaning”<sup>118</sup> of the Constitution, he did not think this meaning could be grounded on the original intent, either of the Constitution’s framers or its ratifiers. One reason I have already mentioned, is his contention that such intentions were hopelessly conflicting and indeterminate.<sup>119</sup> “No two of the members of the convention would probably have agreed in their representations of what the constitution really was. No two of the people would have agreed in their understanding of the constitution when they adopted it.”<sup>120</sup> But Spooner also rejected relying on original intentions either of the framers of the constitution or of the ratifiers, even were such intentions determinable. “It is not the intentions men actually had, but the intentions they constitutionally expressed; that make up the constitution.”<sup>121</sup>

Spoooner’s reasons for rejecting the intentions of the Framers as a source of constitutional meaning—reason that are applicable both to Taney and Phillips—sound quite modern:

The intentions of the framers of the constitution . . . have nothing to do with fixing the legal meaning of the constitution. That convention were not delegated to adopt or establish a constitution; but only to consult, devise and recommend. The instrument, when it came from their hands, was a mere proposal, having no legal force or authority. It finally derived all its validity and obligation, as a frame of government, from its adoption by the people at large.<sup>122</sup>

Spoooner rejected any reliance on Madison’s then-recently-disclosed notes of the convention (or Elliot’s Debates) where these notes reveal an intention that suborns

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116. *Id.*

117. *Id.*

118. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 218 (“It is the original meaning of the constitution itself that we are now seeking for. . .”).

119. *See supra* note 56 and accompanying text.

120. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 122.

121. *Id.* at 226.

122. *Id.* at 114.

the written constitution and natural justice.<sup>123</sup> Spooner refers to these as “meagre [sic] snatches of argument, intent or opinion, uttered by a few only of the members; jotted down by one of them, (Mr. Madison,) merely for his own convenience, or from the suggestions of his own mind; and only reported to us fifty years afterwards by a posthumous publication of his papers.”<sup>124</sup> He then asks,

Did Mr. Madison, when he took his oath of office, as President of the United States, swear to support these scraps of debate, which he had filed away among his private papers?—Or did he swear to support that written instrument, which the people of the country had agreed to, and which was known to them, and to all the world, as the constitution of the United States?<sup>125</sup>

Assuming a majority of the convention really had intended to sanction slavery, Spooner rejects any suggestion that this intention would be binding on others. Were this the case:

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123. *Id.* at 117-18 n.\*:

“Elliot’s Debates,” so often referred to, are, if possible, a more miserable authority than Mr. Madison’s notes. He seems to have picked up the most of them from the newspapers of the day, in which they were reported by nobody now probably knows whom. . . . [Spooner then quotes from prefaces to several volumes in which the sources of information are described.] It is from such stuff as this, collected and published thirty-five and forty years after the constitution was adopted—stuff very suitable for constitutional dreams to be made of—that our courts and people now make their constitutional law, in preference to adopting the law of the constitution itself. In this way they manufacture law strong enough to bind three millions of men in slavery.

124. *Id.* at 117.

125. *Id.* For what it is worth, Madison, in response to a representative arguing against the constitutionality of the first national bank, offered the following as guides to interpreting the powers granted to the general government by the Constitution:

- [1.] An interpretation that destroys the very characteristic of the Government, cannot be just.
- [2.] Where a meaning is clear, the consequences, whatever they may be, are to be admitted; where doubtful, it is fairly triable by its consequences.
- [3.] In controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide.
- [4.] Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties.
- [5.] In admitting or rejecting a constructive authority, not only the degree of its incidentality to an express authority is to be regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction.

1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 1896 (1791). Notice that Madison speaks, perhaps ambiguously, of the *meaning*, not the *intentions*, of the parties to the instrument. Thus, “contemporary and concurrent expositions” may be evidence only of how certain words or terms were commonly used, not whether they were intended to be used in some other manner. But any such meaning must be squared with the overall scheme of government established by other parts of the Constitution. For additional examples of interpretive methods used by the founding generation, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Baade, *supra* note 6.

Any forty or fifty men, like those who framed the constitution, may now secretly concoct another, that is honest in its terms, and yet in secret conclave confess to each other the criminal objects they intended to accomplish by it, if its honest character should enable them to secure for it the adoption of the people.—But if the people should adopt such a constitution, would they thereby adopt any of the criminal and secret purposes of its authors? Or if the guilty confessions of these conspirators should be revealed fifty years afterwards, would judicial tribunals look to them as giving the government any authority for violating the legal meaning of the words of such constitution, and for so construing them as to subserve the criminal and shameless purposes of its originators?<sup>126</sup>

Most thoughtful modern-day originalists will concede much of this when they are being careful.<sup>127</sup> Instead they assert that it is the intention of the *ratifiers* that provides the basis of a proper interpretation<sup>128</sup> and, as Taney and Phillips argue, everyone in those days knew that the Constitution sanctioned slavery. Spooner rejects the suggestion that there was a consensus among the founding generation that the Constitution *sanctioned* slavery:

If the instrument had contained any tangible sanction of slavery, the people, in some parts of the country certainly, would sooner have had it burned by the hands of the common hangman, than they would have adopted it, and thus sold themselves as pimps to slavery, covered as they were with the scars they had received in fighting the battles of freedom.<sup>129</sup>

Assuming the framers of the Constitution intended to sanction slavery, Spooner offers this as the reason why they chose not to include any explicit reference to slavery. “[T]he members of the convention knew that such was the feeling of a large

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126. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 118.

127. See, e.g., Richard S. Kay, *Adherence to The Original Intentions in Constitutional Adjudication: Three Objections And Responses*, 82 NW. U. L. REV. 226, 247 (1988):

[T]he role of “the People” was played by the special ratifying conventions in the individual states. The drafters at the Philadelphia Convention could claim no such mandate from “the people.” Some supporters of the Constitution went so far as to disparage the importance of the Convention, except insofar as it was able to place a proposal before the state conventions.

*Id.*

128. See, e.g., *id.* (“The inquiry into original intent, therefore, should focus on the intentions of the various ratifying bodies who possessed the constituent authority.”); see also Richard S. Kay, “Originalist” Values and Constitutional Interpretation, 19 HARV. J.L. & PUB. POL’Y 335, 338 (1996) (“The relevant actors were not the actual drafters of the language, but the members of the ratifying conventions that gave it the force of law.”).

129. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 119.



portion of the people; and for that reason, if for no other, they dared insert in the instrument no legal sanction of slavery.”<sup>130</sup>

Construing the Constitution like a contract means that, while the subjective *agreement* of all parties may trump any objective meaning, where there is a subjective *disagreement*, parties are entitled to rely on the objective meaning.<sup>131</sup> So

[i]f there were a single honest man in the nation, who assented, in good faith, to the honest and legal meaning of the constitution, it would be unjust and unlawful towards him to change the meaning of the instrument so as to sanction slavery, even though every other man in the nation should testify that, in agreeing to the constitution, he intended that slavery should be sanctioned.<sup>132</sup>

But what of Taney’s argument that the slaveholders would never have consented to a constitution that did not sanction slavery?<sup>133</sup> Such a hypothetical lack of consent does not move Spooner, because, by this argument slaveholders are presumed to *have* consented to *this* Constitution and yet nevertheless this Constitution did not sanction slavery. “The intentions of all the parties, slaves, slaveholders, and non-slaveholders, throughout the country, must be presumed to have been precisely alike, because, in theory, they all agreed to the same instrument.”<sup>134</sup> Moreover, “when communities establish governments for the purpose of maintaining justice and right,

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130. *Id.*; see *id.* at 201 (“We have abundant evidence that this fraud was intended by some of the *framers* of the constitution. They knew that an instrument legalizing slavery could not gain the assent of the north. They therefore agreed upon an instrument honest in its terms, with the intent of misinterpreting it after it should be adopted. The fraud of the framers, however, does not of itself, implicate the people.”).

131. See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 858-59 (1992) (“[I]n contract law, we protect a party’s reliance on objective appearances, unless it can be shown that the parties shared a common subjective understanding of a term.”). Cf. E. ALLAN FARNSWORTH, *CONTRACTS* § 7.9, at p. 511 (2d ed. 1990):

The court does indeed carry out their intentions in those relatively rare cases in which the parties attached the same meaning to the language in question. But if the parties attached different meanings to that language, the court’s task is the more complex one of applying a standard of reasonableness to determine which party’s intention is to be carried out at the expense of the other’s. And if the parties attached no meaning to that language, its task is to find by a standard of reasonableness a meaning that does not accord with any intention at all.

*Id.*

132. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 123.

133. See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393, 416 (1857): “[I]t cannot be believed that the large slaveholding States regarded [slaves] as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State.” Of course, none of the *states* ratified the constitution, only the *people* of each state in convention, and therefore Spooner is more careful than Taney when he refers to the consent of slaveholders, rather than “slaveholding states.” Moreover, Spooner also notes that slaveholders were themselves a minority among the people of so-called slaveholding states. See SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 125.

134. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 215.

the assent of all the thieves, robbers, pirates, and slaveholders, is as much presumed, as is the assent of the most honest portion of [the] community."<sup>135</sup> Thus, Spooner, concludes:

There would be just as much reason in saying that it cannot be supposed that thieves, robbers, pirates, or criminals of any kind, would consent to the establishment of governments that should have authority to suppress *their* business, as there is in saying that slaveholders cannot be supposed to consent to a government that should have power to suppress slaveholding.<sup>136</sup>

We may sum up Spooner's analysis of these three clauses as follows: even if we assume that the framers or ratifiers of the Constitution intended to reference slavery in these three passages, when the framers of the Constitution chose to speak euphemistically rather than making their intentions explicit, they simply failed—whether by intention or inadvertence—to effectively incorporate an authorization for slavery into the Constitution. These sections cannot, therefore, prevent other portions of the Constitution<sup>137</sup>—such as that providing for the writ of habeas corpus<sup>138</sup>—from being interpreted to render slavery unconstitutional. Even had everyone in the founding generation “known” that certain clauses were “intended” to sanction slavery,<sup>139</sup> the generally accepted meaning of the language chosen to carry out their intentions fell short of the mark. In this respect, Spooner's version of “original meaning” runs contrary to those modern originalists who base interpretation on original intent.<sup>140</sup> It views the framers as teachers who well-understood the scheme

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135. *Id.* at 186.

136. *Id.* The passage continues:

If this argument were good for anything, we should have to apply it to the state constitutions, and construe them, if possible, so as to sanction all kinds of crimes which men commit, on the ground that the criminals themselves could not be supposed to have consented to any governments that did not sanction them.

*Id.*

137. *See id.* at 270-77 (discussing the “power of the general government over slavery”).

138. U.S. CONST. art. I, § 9.

139. In this regard, Spooner observed:

Why . . . do not men say distinctly, that the constitution *did* sanction slavery, instead of saying that it *intended* to sanction it? We are not accustomed to use the word “*intention*,” when speaking of the other grants and sanctions of the constitution. We do not say, for example, that the constitution *intended* to authorize congress “to coin money,” but that it *did* authorize them to coin it. . . . The reason is obvious. If they were to say unequivocally that it *did* sanction it, they would lay themselves under the necessity of pointing to the *words* that sanction it; and they are aware that the *words alone* of the constitution do not come up to that point.

SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 57.

140. Richard Kay, for example, distinguishes between “original understanding”—which corresponds to Spooner's “original meaning”—and “original intentions” versions of originalism. Original understanding “differs from the . . . ‘original intentions’ version by eschewing reliance upon the supposed subjective intentions of the enactors of the Constitution.” Kay, “*Originalist Values and Constitutional Interpretation*,” *supra* note 129, at 337. Kay favors the latter when the two come in conflict:

they adopted, rather than as wardens whose commands must be interpreted consistently with their subjective intentions.<sup>141</sup> Were evidence of history to overrule an innocent interpretation of the text, in Spooner's words, "it would follow that the constitution would, in reality, be *made* by the historians, and not by the people."<sup>142</sup>

Although the founding generation is today often condemned for its refusal to abolish slavery, were Spooner's interpretative method to have been adopted, slaveholders would have been the ones to condemn the framers for their failure of nerve. For they failed to *legally* sanction the crime they could not bring themselves to name.

#### CONCLUSION: ASSESSING SPOONER'S APPROACH

Lysander Spooner's book, *The Unconstitutionality of Slavery*, represents, perhaps, the most extensive effort to interpret the United States Constitution in light of the natural rights that were expressly recognized in the Declaration of Independence and which provided the background for the written Constitution. Of greatest interest is the sophistication and scope of this approach. Spooner is not content simply to condemn as unenforceable provisions of the Constitution or acts of legislation that he thinks violate natural rights. That part of his analysis consumes a mere twenty pages out of nearly three hundred. In addition, he adopts a presumption in favor of reading the words of a constitution in a light most favorable to justice as defined by natural rights, and then takes on the burden of finding such a meaning. To find a defensible meaning of the words used in the Constitution that is both consistent with legal usage and inconsistent with injustice, Spooner examines other provisions of the Constitution, and how the disputed terms were used in colonial charters,<sup>143</sup> colonial statutes,<sup>144</sup> the Declaration of Independence,<sup>145</sup> state constitutions in 1789,<sup>146</sup> and the Articles of Confederation.<sup>147</sup>

Reading all three hundred pages, one is struck by the herculean nature of Spooner's endeavor—indeed by its similarity to what Ronald Dworkin argues that Hercules, Dworkin's hypothetical judge, ought to do: construct a set of principles of justice that both explain and justify the constitutional text at hand in such a way as to render it consistent with all other texts recognized as authoritative within this legal

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[L]egitimacy concerns may oblige us to choose a constitutional meaning that was intended by the enactors, even when that meaning was not inferable from an examination of the text, either on its face or in the context of the time of enactment."

*Id.* at 338. For Spooner, who grounds the legitimacy of the Constitution on the natural rights that persons bring to the compact and on their consent, "legitimacy concerns" cut in the other direction.

141. See generally Randy E. Barnett, *The Relevance of Framers' Intent*, 19 HARV. J.L. PUB. POL'Y 403 (1996).

142. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 284, Appendix A.

143. See *id.* at 21-31.

144. See *id.* at 32-36.

145. See *id.* at 36-39.

146. See *id.* at 39-51.

147. See *id.* at 51-54.

tradition.<sup>148</sup> Where the text and other authoritative materials provide competing meanings, Hercules attempts to make the Constitution, in Dworkin's words, "the best it can be."<sup>149</sup> Here's how Spooner expresses this Dworkinian point (in words that also echo Dworkin's distinction between principle and policy):<sup>150</sup> "When the intentions of statutes and constitutions are not clearly expressed in the instruments themselves, the law always *presumes* them. And it presumes the most *just and beneficial* intentions, which the words of the instruments, taken as a whole, can fairly be made to express, or imply."<sup>151</sup>

Moreover, like Hercules,<sup>152</sup> Spooner views himself as constrained by the very texts and authorities he is attempting to interpret: "Not that, in interpreting written laws, the plain and universal principles of philology are to be *violated*, for the sake of making the laws conform to justice; for that would be equivalent to abolishing all written laws, and abolishing the use of words as a means of describing laws."<sup>153</sup> Spooner allows for, what Dworkin has usefully called "embedded mistakes."<sup>154</sup> An embedded mistake is statute or constitutional provision whose meaning is unjust but which meaning and specific authority cannot be denied. Yet, though such a mistake may still have authority, it does not provide the basis, or what Dworkin refers to as its "gravitational force,"<sup>155</sup> for interpreting by extension other provisions in an unjust manner.

Despite the resemblance between Spooner's and Hercules' interpretive method, Spooner faces a less herculean a task than does Dworkin's Hercules. For Spooner did not have to construct on his own a political theory that did justice to the legal materials he sought to interpret. Instead, he could start with the fundamental assumptions about natural rights and justice that he shared with those who wrote and ratified the Constitution—including many of those who held slaves or defended slavery—and which is reflected in their handiwork here and elsewhere. Thus it

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148. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105-30 (1977); RONALD DWORKIN, *LAW'S EMPIRE* 239-54 (1986).

149. DWORKIN, *LAW'S EMPIRE*, *supra* note 149, at 379.

Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. They try to make that complex structure and record the best these can be.

*Id.* at 255.

150. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 149, at 90 ("Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal.").

151. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 157 (last emphasis added).

152. See, e.g., DWORKIN, *LAW'S EMPIRE*, *supra* note 149, at 380 ("[Hercules'] convictions about justice or wise policy are constrained by his overall interpretive judgment, not only by the text of the statute but also by a variety of considerations of fairness and integrity.").

153. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 210.

154. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 149, at 121.

155. *Id.* ("[E]mbedded mistakes are those whose specific authority is fixed so that survives its loss of gravitational force. . . .").

should be no great surprise to find a constitutional meaning that is consistent both with a particular conception of natural rights and with other authoritative texts, when the Constitution and these other texts were all authored by persons who shared the same commitment to natural rights and justice.

Assuming one agreed that Spooner has succeeded in his quest for a reasonable meaning that is consistent with both his and the founding generation's conception of natural justice, there remains the question of whether their conception of justice is correct. Perhaps it is asking too much of a self-educated lawyer from Worcester to provide a complete justification for this then-widely accepted conception of natural rights. Nevertheless, what justification he does offer, while rooted in the classical natural rights tradition, has a surprisingly modern flavor.

The more classical part of Spooner's argument might today be termed prudential: the recognition and respect for a particular set of natural rights are necessary conditions of social peace.<sup>156</sup> Other parts of his argument, particularly his argument for why government has an obligation to respect these prudential norms, resembles the approach known today as "rational choice."<sup>157</sup> Spooner argues that, if government is justified at all,<sup>158</sup> then it can only be on the basis of unanimous consent. But, as unanimous consent was not in fact obtained, then it must be presumed. And the only intention that can be presumed is that to which *all* honest persons would consent. And no honest person would consent to authorize a government to violate the very liberty that government is being instituted to protect.<sup>159</sup> Though Spooner does not maintain it to be impossible for the people to have made a "law" explicitly purporting to alienate a portion of their liberty (as defined by natural rights),<sup>160</sup> it cannot simply be assumed that they have done so in the absence of a clear and unambiguous expression of this intent.

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156. See *supra* note 25 and accompanying text. For an excellent account of classical natural rights theories, see MICHAEL P. ZUCKERT, *NATURAL RIGHTS AND THE NEW REPUBLICANISM* (1994).

157. See, e.g., DAVID GAUTHIER, *MORALS BY AGREEMENT* 9 (1986):

Moral principles are . . . the objects of fully voluntary *ex ante* agreement among rational persons. Such agreement is hypothetical, in supposing a pre-moral context for the adoption of moral rules and practices. But the parties to agreement are real, determinate individuals, distinguished by their capacities, situations, and concerns. . . . As rational persons understanding the structure of their interaction, they recognize a place for mutual constraint, and so for a moral dimension in their affairs.

*Id.* I do not mean to suggest that the "modern flavor" I attribute to a rational choice approach is not itself rooted in more classical political philosophy. Gauthier considers his approach to be Hobbesian. See *id.* at 10 ("Our theory of morals falls in an unpopular tradition, as the identity of its greatest advocate, Thomas Hobbes, will confirm.").

158. After the Civil War, Spooner came to reject the legitimacy of the Constitution in his famous essay, *No Treason, No. VI: The Constitution of No Authority*, *supra* note 34. Yet even in his earlier work on slavery, he is careful to argue hypothetically, i.e. if the Constitution has authority, then it must be interpreted in the following manner.

159. Cf. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* II, § 131 (1698) (Mentor ed., 1965), at 398-99. There Locke says that individuals only surrender a portion of their power to enforce their rights to society, "yet it being only with the intention in every one to better preserve himself his Liberty and Property; (For no rational Creature can be supposed to change his condition with an intention to be worse.)" *Id.* at 398.

160. However, if the right purported to be alienated was inalienable, any such "law" would not be obligatory or binding in conscience on the citizenry.

Thus, hypothetical consent is asked to do the work that actual consent cannot in justifying the authority exercised in the name of the Constitution,<sup>161</sup> and it does so by presuming a meaning to which all would agree in the absence of clear evidence that would rebut this presumption. Spooner uses much the same approach to justify the method of interpretation he employs:

But of the reason and authority of all these rules [of interpretation], the reader must necessarily judge for himself; for their authority rests on their reason, and on usage, and not on any statute or constitution enacting them. *And the way for the reader to judge of their soundness is, for him to judge whether they are the rules by which he wishes his own contracts, and the laws on which he himself relies for protection, to be construed.*<sup>162</sup>

Does Spooner's endeavor succeed or is it merely an interesting failure? Since this is a question that can only be answered by assessing all the analysis and evidence Spooner presents, I ask you not to reach your own opinion on the basis of my brief and necessarily incomplete summary, but to read Spooner for yourself.<sup>163</sup> For what it is worth, having read the entire work, my own assessment is that it offers an interpretation of the Constitution that is superior to the rival one presented, for example, by Justice Taney in *Dred Scott*. And, while Wendell Phillips mounted a formidable challenge and exposed some genuine errors of Spooner, for reasons I have given above,<sup>164</sup> I cannot agree with Robert Cover's entirely unsupported claim that Phillips' response "destroyed Spooner's position."<sup>165</sup> Nor can I share David Richards' characterization of Spooner's interpretation of the allegedly pro-slavery provisions of the Constitution, amidst an otherwise favorable treatment, as "textually strained."<sup>166</sup> Bear

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161. Spooner's later explicit rejection of the authority of the Constitution can be viewed as a rejection of hypothetical consent as a sufficient justification of constitutional legitimacy, although, to my knowledge, he does not discuss this issue, or what motivated his apparent change of heart. See, e.g., LYSANDER SPOONER, *No Treason, No. VI: The Constitution of No Authority*, *supra* note 34, at 31 ("[T]here exists no such thing as a government created by, or resting upon, any consent, compact, or agreement of 'the people of the United States' with each other. . . .").

162. SPOONER, *The Unconstitutionality of Slavery*, *supra* note 17, at 222.

163. Of course, you should also read Wendell Phillips' critique of Spooner. Apart from adding balance and showing where Spooner overreached, examining Phillips—after reading Part I of Spooner's book, but before reading Part II—helps explain the presence of some lengthy and seemingly esoteric arguments in Part II, as well as the addition of so much otherwise cumulative evidence and authority.

164. See *supra* Part III.B.

165. COVER, *supra* note 5, at 151 n.\*. Cover gives no reasons to support his characterization and fails even to acknowledge Spooner's lengthy response to Phillips in Part II.

166. David A. J. Richards, *Abolitionist Political and Constructional Theory and The Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1187, 1193 (1992):

The interpretive primacy of political theory was sustained and defended by the most theoretically profound advocate of this position, Lysander Spooner, by denying any weight to the constitutional text or history in conflict with the claims of rights-based political theory. The clauses of the Constitution apparently recognizing state-endorsed slavery were to be interpreted not to recognize slavery on the theory that any interpretation should be accorded the words, no matter how textually strained, that did

in mind that, if Spooner did not succeed, then perhaps *Dred Scott* was rightly decided after all, as were *Prigg* and *The Antelope*.

Instead, I would suggest that, if Spooner failed, it was at a more fundamental level than the specific interpretive issue of whether or not the original Constitution authorized slavery. For if Spooner failed, it was in failing to offer a theory by which the Constitution can be interpreted so as to make laws enacted pursuant to its authority legitimate and therefore binding in conscience on the citizenry. Spooner's later, more radical, writings reflect his own rejection of the Constitution's authority, an authority he had assumed, perhaps *arguendo*, throughout *The Unconstitutionality of Slavery*. Those who wish today to contend that the Constitution has authority to bind the citizenry in conscience should hope that Spooner's interpretive method, if not its specific application to slavery, succeeded.

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not recognize slavery. . . .

*Id.* As with *Cover*, no evidence is adduced in support of this claim, though the statement is repeated in David A. J. Richards, *Comparative Revolutionary Constitutionalism: A Research Agenda For Comparative Law*, 26 N.Y.U. J. INT'L L. & POL. 1, 20 (1993). Richards' mischaracterization of Spooner's methodology has given much aid and comfort to Raoul Berger who has quoted it repeatedly in place of dealing directly with Spooner's claims. *See, e.g.*, Raoul Berger, *Constitutional Interpretation and Activist Fantasies*, 82 KY. L.J. 1, 19 (1993/94) (quoting Richards).