Seeing the Light: Lysander Spooner's Increasingly Popular Constitutionalism

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On Tuesday July 4, 1854, it was hot and humid at Harmony Grove; "the heat of the weather. . .was extreme." But this did not deter a large audience from gathering at this location in Framingham, Massachusetts. This was the spot upon which many of them had assembled, under the organization

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of the Massachusetts Anti-Slavery Society, for the past 8 years. They came by crowded railroad cars (from Boston, Milford, and Worcester), and by horse and carriage from many other surrounding towns, eager to hear speeches by prominent members of the antislavery community. William Lloyd Garrison was not the first to speak, but his actions were the most memorable. Addressing the audience, Garrison held up, and systematically burned, three documents: a copy of the 1850 Fugitive Slave Act; a copy of a recent court decision that ordered the free state of Massachusetts to use its facilities to assist in the capture of fugitive slaves; and a copy of the United States Constitution. This was no mere symbolic act; it conveyed an important part of the Garrisonian argument. Namely, that the Constitution was "a covenant with death, and an agreement with hell."[1]

This indictment of America's supreme law comported with the "ugly reality" (to use the apt phrase of the Garrisonian Wendell Phillips) of the mid-nineteenth century.[2] The 1840 publication of James Madison's *Notes of Debates in the Federal Convention of 1787* made it clear that the Framers struck a compromising deal with the devil; "slavery" may have been textually absent from the Constitution, but its presence was implicitly obvious. This reality only seemed to be confirmed by the actions of the United States Supreme Court, which repeatedly interpreted the Constitution as offering no legal sanctuary for the nation's enslaved population. From our post-1865 perspective, the validity of the Garrisonian position seems even stronger. We know that the Constitution that emerged from the Convention in Philadelphia ultimately proved unable to bring a legal end to slavery in the United States, and that it took the Thirteenth Amendment, rather than enlightened antislavery court decisions, to strike the specter of slavery from the text of the Constitution.

However, many members of the antislavery community concluded that slavery was actually unconstitutional. Historians are to be forgiven for

1. "The Meeting at Framingham," *Liberator,* July 7, 1854, 106.

2. Wendell Phillips, *Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery. Reprinted From The "Anti-Slavery Standard," with Additions*. (1847; reprint, New York: Arno Press & The New York Times, 1969), 3.

of course, my responsibility. I am grateful to the staffs of the American Antiquarian Society, Berea College Special Collections & Archives (especially Shannon Wilson), the Rare Books Department of the Boston Public Library (especially Kim Reynolds), the Historical Society of Pennsylvania, and the Newspaper & Current Periodical Reading Room of the Library of Congress, for their excellent research assistance. This research was made possible by funding from the American Historical Association (Littleton-Griswold Research Grant) and the American Political Science Association (Small Research Grant).

describing some aspects of this argument as "more polemical than serious."[3] How, when faced with the "ugly reality" of proslavery Court decisions and the damning evidence of the Framers' compromising actions, could any individual seriously argue that slavery was unconstitutional? Explaining and analyzing the different motivations of, and positions taken by, the individuals who made these arguments is beyond the scope of this article. Therefore, in the pages that follow, analysis is confined to the antislavery constitutionalism of Lysander Spooner (1808–1887), who authored the most extensive unconstitutionality of slavery treatise. Specifically, this article examines Spooner's answer to an important and omnipresent question in American constitutional history: Who possesses the authority to interpret the United States Constitution?

In recent years, a number of prominent scholars have set forth an answer to this question that envisions a much smaller Constitutional interpretive role for the courts. This "popular constitutionalism" movement argues that greater interpretive authority should be placed in the hands of "The People."[4] The "basic principle" of popular constitutionalism is "the idea that ordinary citizens," rather than the courts, "are our most authoritative interpreters of the Constitution." This concern about judicial power is not new. As Larry Kramer demonstrates in *The People Themselves*, American history is replete with rich examples of men and women passionately exhibiting a populist concern about leaving constitutional interpretive power in the hands of politically insulated federal judges. Kramer shows that on many occasions, and in many ways, "The People" have refused to accept the argument that courts have "normative priority in the conversation" about the meaning of the United States Constitution.[5]

3. Paul Finkelman, "Affirmative Action for the Master Class: The Creation of the Proslavery Constitution," *Akron Law Review* 32 (1999): 438 n. 59; and Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, 2nd ed. (Armonk, NY: ME Sharpe, 2001), 201 n. 33.

4. While it is difficult to identify, with certainty, the academic literary origins of this movement, a good case can be made that it began in earnest in 1988 with the publication of Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988). This argument is made in Lee J. Strang, "Originalism as Popular Constitutionalism?: Theoretical Possibilities and Practical Differences," *Notre Dame Law Review* 87 (2011): 259. If one had to identify "great books" of this movement, the two at the top of the list would be (in no particular order) Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999) and Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

5. Larry D. Kramer, "Undercover Anti-Populism," *Fordham Law Review* 73 (2005): 1344; Kramer, *The People Themselves*; and Mark Tushnet, "Popular Constitutionalism as Political Law," *Chicago-Kent Law Review* 81 (2006): 999.

Should abolitionists be included in the historical popular constitutionalism narrative? The answer to this is yes; they were constantly confronted with courts and judges unwilling to act for liberty and justice. Therefore, one might expect to find them supporting the idea of "taking the Constitution away from the courts" (to borrow Mark Tushnet's phrase).[6] This support cannot be found in the well-known arguments of Garrison and his followers. Labeling the Constitution a "covenant with death" and burning it were acts of *anti-constitutionalism*. Support for popular constitutionalism can be found in the writings of Lysander Spooner, but not those that he penned in the 1840s. Spooner was initially adamant that the time would come when the Constitution would be seen for what it was: a covenant with natural justice and liberty, and that this legal light would be lit, and spread across the nation, by the courts. This is best described as *un-popular constitutionalism.*

Judicial Light, Not Popular Heat: *The Unconstitutionality of Slavery* (1845–1847)

Between the American Revolution and the 1830s, American abolitionism underwent what Richard S. Newman has described as "the first great period of transformation." Up until the 1820s the dominant approach—most prominently associated with the work of the Pennsylvania Abolition Society (PAS)—emphasized the involvement of elites who could formulate legalistic antislavery arguments. The PAS employed a "tactical and strategic arsenal [that] reflected a late eighteenth-century republican worldview"; its members "operated in a rational, enlightened, and highly dispassionate manner. . .[and] worked conscientiously within the American political and legal system," "using loopholes, technicalities, and narrow legal opinions to liberate African Americans on a case-by-case basis."[7] They were replaced, in the late 1820s, by more "modern" abolitionists—led by members of the Massachusetts Antislavery Society (MAS)—who adopted a populist approach, encouraging "The People" to engage in grassroots activism (in part a reflection of the broader, political changes occurring in American society). They pursued immediate, rather than gradual emancipation, preferring fire in the belly lectures and provocative pamphleteering to legal briefs. As Newman observes, over the course of the first 60 years of the American republic, antislavery activists became abolitionist agitators,

6. Tushnet, *Taking the Constitution Away from the Courts*.

7. Richard S. Newman, *The Transformation of American Abolitionism: Fighting Slavery in the Early Republic* (Chapel Hill: University of North Carolina Press, 2002), 6, 61.

and moved from "working the courts" to "working the streets."[8] Eventually, however, even the "mass action enthusiasm" of these "second-wave agitators" "gave way to [the] reality" that "[t]he people's movement could be stifled by political maneuvering, by alternate constitutional construction, or by the American people themselves."[9] At the beginning of the 1840s, when abolitionists failed to agree about the way in which they should respond to this situation, the movement irrevocably fractured into competing factions.

These factions disagreed about the answers to many questions, including that which asked whether the United States Constitution empowered the federal government to address slavery in the states. By the middle of the nineteenth century most members of the antislavery community generally took one of four positions on the subject. They either 1) followed the disunionist lead of Garrison and completely rejected the proslavery Constitution; 2) concluded that slavery was a peculiar institution to be created or abolished by state law alone: an institution with which the federal government only had jurisdiction to interfere in the District of Columbia; 3) viewed slavery as a problem covered by the jurisdiction of the national government; or 4) concluded that slavery had never been sanctioned by the Constitution; that it was unconstitutional.[10]

The construction of arguments challenging the assumption that the United States Constitution was proslavery began, in earnest, during the late 1830s. Individuals such as Nathaniel P. Rogers began to argue that the Constitution did nothing more than "recognize" and "permit" the existence of slavery.[11] The publication of Madison's *Notes* temporarily interrupted efforts to sustain these arguments, and emboldened the Garrisonians' proslavery interpretation. However, the antislavery community's support for the Garrisonians had long since begun to decline.[12]

8. Ibid., 2, 7, 175.

9. Ibid., 6, 149.

10. This list is only meant to represent the principal positions in the antislavery constitutionalism debate, taken by those individuals for whom abolitionist work could be considered the primary activity in which they were engaged at the time when they took one of these positions. It is not meant to represent, for example, the views on the Constitution that were held and expressed by politicians in the course of their debates on major issues such as slavery and territorial expansion.

11. Helen J. Knowles, "The Constitution and Slavery: A Special Relationship," *Slavery and Abolition* 28 (2007): 309–28.

12. Although it should be noted that it was support for the radical tactics of Garrison and his followers that was fading; the immediate emancipation principles for which they stood remained popular. As Julie Roy Jeffrey points out, in the 1830s, the predominant position for the majority of female abolitionists was disagreement with the radical Garrisonian tactics but support for immediatism. Julie Roy Jeffrey, *The Great Silent Army of Abolitionism:*

This did not mean, however, that non-Garrisonian antislavery constitutionalism enjoyed either immediate or widespread support. The earliest of these 1840s arguments consisted of the ill-constructed, half-baked ideas that came from the pen of George Washington Frost Mellen in *An Argument on the Unconstitutionality of Slavery, Embracing an Abstract of the Proceedings of the National and State Conventions on this Subject* (1841).[13] This was not an auspicious start for those abolitionists seeking to establish a credible alternative approach to interpreting the Constitution.

Within 4 years, however, there emerged a solid body of literature arguing that slavery was unconstitutional, led by the writings of Lysander Spooner. The second of nine children born to Asa and Dolly (Brown) Spooner in Athol, in rural central Massachusetts, Spooner was raised on the family farm where reformist attitudes—with particular emphases on temperance and antislavery—were welcomed. These attitudes profoundly shaped his upbringing, and when he left home in 1833 (at 25 years of age) he took with him a defiantly individualistic and unabashedly radical approach to life. Little is known about the next 3 years that he spent in Worcester, at the time the second largest city in the Bay State. We do not know whether he left a rural environment for an urban one with plans to pursue a legal education, or exactly how, within months of arriving in Worcester, he was able to secure a legal apprenticeship in the offices of John Davis and Charles Allen, two of the most prominent members of the city's legal and political community. Similarly, the literature about the legal and political views of these two men provides us with little information about any jurisprudential values that they may or may not have passed on to their student. What we do know, however, is that by the end of his apprenticeship, Spooner had developed an approach to legal interpretation that was driven by a commitment to natural justice, and articulated (often stubbornly so) using fiercely logical arguments.

In the 1840s, when Spooner decided to use this devotion to logical legal reasoning to attack slavery, the result was *The Unconstitutionality of Slavery*.[14] Although Spooner did not explicitly refer to it, the first part of

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Ordinary Women in the Antislavery Movement (Chapel Hill: University of North Carolina Press, 1998).

13. George Washington Frost Mellen, *An Argument on the Unconstitutionality of Slavery, Embracing an Abstract of the Proceedings of the National and State Conventions on This Subject* (1841; reprint, New York: AMS, 1973). On Mellen and his work, see Henry B. Stanton, *Random Recollections*, 2nd ed. (New York: Macgowan & Slipper, 1886), 76; William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848* (Ithaca, NY: Cornell University Press, 1977), 256; and David Tatham, "An Unrecorded Winslow Homer Lithograph," *American Art Journal* 19 (1987): 75–76.

14. Charles Shively, "Biography," in *The Collected Works of Lysander Spooner*, ed. Charles Shively (Weston, MA: M&S Press, 1971), 1:15–62; and Lysander Spooner,

this treatise was published in response to *The Constitution: A Pro-Slavery Compact* (1844), which had been produced for the American Anti-Slavery Society by Wendell Phillips. This was a "scissors-and-paste pamphlet" of excerpts from historical documents, including Madison's *Notes*.[15] It was a clear statement of the Garrisonian view of the Constitution; in Phillips's opinion, the historical documents provided "most clearly all the details of that 'compromise,' which was made between freedom and slavery, in 1787."[16] Phillips did not care about the textual silence of the Constitution on the subject of slavery. What concerned him was the indisputable *historical* evidence that the Framers had deliberately omitted references to the peculiar institution. The legal meaning of the Constitution was to be determined by consulting these original intentions of the Framers, and the evidence pointed in only one direction: to an evil, proslavery covenant.

Whereas Phillips believed that law represented a fidelity to custom, tradition, and text, and that it was important to draw a sharp distinction between legal and moral obligations, Spooner concluded that law is "an intelligible principle of right, necessarily resulting from the nature of man" rather than "an arbitrary rule, that can be established by mere will, numbers or power." Both the intertwined nature of law and morals, and fundamental principles of natural justice proved the "reasonableness, propriety, and therefore truth" of the rule that became the interpretive centerpiece of his antislavery reading of the Constitution.[17] Spooner plucked this rule from the United States Supreme Court's 1805 decision in *United States v. Fisher*: "'Where rights are infringed, where fundamental principles are overthrown, where the general system of the 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.'"[18] Spooner concluded that any reasonable person would not consent to a wholesale violation of his or her natural rights, of which slavery was

The Unconstitutionality of Slavery (1845) and *The Unconstitutionality of Slavery: Part Second* (1847), both in *The Collected Works*, vol. 4.

15. Wendell Phillips, *The Constitution: A Pro-Slavery Compact—Selections from the Madison Papers, &C*. (1844; reprint, New York: Negro Universities Press, 1969); and Stanley Burton Bernstein, "Abolitionist Readings of the Constitution" (PhD diss., Harvard University, 1969), 148. Spooner did make specific references to Phillips's work when he published the second part of *The Unconstitutionality of Slavery* in 1847. Spooner, *Part Second*, 155–56, 243.

16. Phillips, *A Pro-Slavery Compact*, 3.

17. Spooner, *The Unconstitutionality of Slavery*, 5; and Spooner, *Part Second*, 155.

18. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 390 (1805), quoted in Spooner, *The Unconstitutionality of Slavery*, 18–19.

clearly such a violation. Applying the notion of hypothetical consent (Spooner correctly realized that the Constitution was not ratified by unanimous consent), the *Fisher* rule told him that the document did not sanction slavery because such a violation of natural rights is not "expressed with irresistible clearness." A statement of support for slavery was not spelled out in the Constitution, it only appeared by interpretive inference. And the original meaning of the Constitution could only be derived from the words themselves; otherwise it was clear that "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."[19]

In *Justice Accused*, Robert Cover famously described as "moral-formal" the dilemma faced by the nineteenth century judges who were morally opposed to slavery but professionally obligated to apply laws that sanctioned the peculiar institution. It is often forgotten, however, that Cover described a judicial response to this dilemma that was complex and nuanced. Indeed, it was the rare judge who believed he had an either–or choice between fidelity to antislavery natural law and fidelity to proslavery positive law. This aspect of Cover's analysis is frequently overlooked because many of the abolitionists that Cover also discusses (and admires)—most notably the Garrisonians—reduced their analysis of judicial obligations to just such a stark choice; for them, as Cover observes, "[t]he solution to the moral-formal dilemma was," quite simply, "resignation." An alternative existed, which Cover describes as "judicial enforcement of natural law, preferably through a forced reading of positive law instruments, but if need be, as an act of naked power." This, he contends, was the position adopted by the "constitutional utopians" —a group that included Spooner—who "searched, not for a legal theory, but for a way out of the Garrisonian argument with regard to 'obligation.' The purpose

19. Spooner, *The Unconstitutionality of Slavery*, 119. Alvan Stewart made a similar comment in his oral argument in two habeas corpus cases before the Supreme Court of New Jersey in May, 1845. If the proslavery reading of the Constitution was true, he argued, then "[m]ost of the thirteen States, on organizing the conventions of 1788, for rejection or adoption, would have resolved to have let the common hangman hang this Constitution on the gallows, with caricatures of the leaders in the convention of 1787, and closed the scene by burning it up, and have adjourned *sine die*. Another convention of the United States would have been called by an indignant people, and the first article would have abolished slavery, by name, in the United States, as an everlasting disturbing cause, no longer to be trusted to disgrace our soil." Alvan Stewart, "Argument, on the Question Whether the New Constitution of 1844 Abolished Slavery in New Jersey (1845)," in *Writings and Speeches of Alvan Stewart, on Slavery*, ed. Luther Rawson Marsh (1860; reprint, New York: Negro Universities Press, 1969), 342.

of the argument was not to prove slavery unconstitutional (whatever that means in a confessedly utopian context) but to prove that antislavery men may become judges and may use their power to free slaves."[20] There are two reasons why this description needs to be revisited. First, it does not account for Spooner's belief, during the 1840s, that there was a simple way for judges to avoid the moral-formal dilemma. Second, it also fails to recognize that, in Spooner's eyes, the popular constitutionalism he embraced in the 1850s was just as legally legitimate as the formalistic approach to Constitutional interpretation that he adopted during the previous decade.

Spooner had a simple response to the arguments that the theory articulated in *The Unconstitutionality of Slavery* completely disregarded the realities of proslavery court decisions. The judges making these decisions were misinterpreting the Constitution. The power of judicial review was entirely legitimate; there was nothing fundamentally wrong with courts playing the supreme role in determining the Constitution's meaning. Spooner conceded that, at present, the courts did not share his natural justice reading of the Constitution; however, the time would come when courts would see the light, and see the Constitution for what it was: a covenant with liberty. There were occasions when he realized that this was an extremely naïve and, indeed, "utopian" position to adopt. However, his shift towards a more popular constitutionalism provides us with a story of abolitionist attitudes to Constitutional interpretation and the role of judges that is complementary to that which is told in *Justice Accused*.

Regardless of how one defines it, *The Unconstitutionality of Slavery* was not a work of "popular constitutionalism." In it Spooner hinted at the problems associated with governmental abuses of legal authority. However, he saw no problem with placing the power of constitutional interpretation in the hands of the nation's judges. The one criticism that Spooner had of judges was that they had thus far exercised *insufficient* judicial review: "Although the legislation of the country generally has exhibited little less than an entire recklessness both of natural justice and constitutional authority, the records of the judiciary nevertheless furnish hardly an instance where an act of a legislature has, for either of these reasons, been declared void by its co-ordinate judicial department."[21] Spooner lamented this excessive judicial tendency to defer to the elected branches. It was almost as if the courts were following the election returns, and tipping the scales of justice in favor of slavery, not freedom. In passing, he

20. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), 156, 158.

21. Spooner, *The Unconstitutionality of Slavery*, 17.

implied that this situation was partly attributable to the Constitution, because that gave Congress the power of controlling the judicial purse strings. However, Spooner was more concerned with remedies than causes. He rejected the Garrisonian argument that judges should resign. He did not believe that "any of our present judges would. . .'resign their offices' rather than be auxiliary to the execution of an act of legislation" that transgressed the dictates of natural justice.[22] But, more significantly, he also believed that no "moral-formal" dilemma would exist if judges simply followed the proper rules of legal interpretation.

Spooner laid out an elaborate and extensive set of these rules in part two of his treatise, rules which, if followed, would ensure that decisions would be made consistent with natural justice.[23] As Spooner explained:

> The judiciary cannot depart from these rules, for two reasons. First, because the rules embody in themselves principles of justice, reason and truth; and are therefore as necessarily law as any other principles of justice, reason and truth; and, secondly, because if they could lawfully depart from them in one case, they might in another, at their own caprice. Courts could thus at pleasure become despotic; all certainty as to the legal meaning of instruments would be destroyed; and the administration of justice, according to the true meaning of contracts, statutes and constitutions, would be rendered impossible.[24]

Perhaps this faith in judicial review was misplaced and naïve. However, what is clear is that Spooner had a plan for improving the chances that the judiciary would follow his interpretive rules. He would place the book in the hands of the nation's lawyers; at the bench and the bar.[25]

22. Ibid.

23. These rules received their most extensive treatment in Spooner, *Part Second*, 157–205.

24. Spooner, *The Unconstitutionality of Slavery*, 61.

25. However, this does not mean that he believed a legal education made you receptive to his arguments. It was pointless, for example, to appeal to someone such as Wendell Phillips. As he wrote in a letter to George Bradburn: "I concur with you, in part, as to the cause of Phillips's attack on my book. But an additional reason for it was that he is no lawyer. I saw some ridiculous evidences of it on one other occasion. He lacks one indispensable requisite of a lawyer—to wit, a knowledge of the purpose of law. It is an old saying that a man cannot know the law, until he knows the reason of the law. There are any number of such pettifoggers as Phillips—they are called case lawyers—that is, they remember how particular questions were decided in such and such instances—and that is about all they know—they cannot tell you whether the decisions were right or wrong—they take their law at second hand, and take it for granted that decisions are correct. For the worst of any ruling ideas, they are continually misled by words." If only, he proceeded to lament, people would see the importance of the words that made up the proper rules of interpretation. "Phillips," continued Spooner, "seems to think that it is allowable to give a word as many meanings in the law, as it has in the dictionary, in the poets, or in the Bible: (you know he quoted the Bible) without any

On numerous occasions throughout his life, Spooner expressed his hopes and desires for the dissemination of his antislavery writings. And there are times when his vacillation between sending his works to members of Congress and to members of the bar might lead one to question the sincerity of his belief in the importance of judicial interpretations of that document. If he really, truly believed that justice would be achieved at the hands of the judiciary, why would he advocate placing his writings in the hands of other actors? The answer is that Spooner was his own best and worst publicist. He never tired of complaining when he thought someone else had stolen the antislavery limelight by publishing ideas similar to his. It rarely crossed his mind that other unconstitutionality of slavery abolitionists had independently conceived of their ideas; his first thought almost always ran to plagiarism.[26] He constantly sought the funding that he was sure would afford him the time and resources needed to write *the* definitive work on the relationship between slavery and the Constitution, a work that only he could produce. And in his quest for fame and fortune he often fell back on the position that any publicity was good publicity (especially if it represented a timely reaction to certain events), even if that publicity did not represent the best hope of ensuring judicial cognizance of his ideas.

For example, in November 1845, a few months after the publication of part one of *The Unconstitutionality of Slavery,* last-ditch efforts to prevent the annexation of Texas led Spooner briefly to flirt with the idea of distributing his book to members of Congress. However, within a month of making this suggestion to George Bradburn, he was writing to say that

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regard to the effect upon justice and right; that the meaning to be given to a word, in any particular instance, is entirely arbitrary—that the court may give it such meaning as they please, and that thenceforth that is its true meaning." Letter from Spooner to George Bradburn, March 5, 1846, available from the digitized New-York Historical Society collection, https://www.nyhistory.org/slaverycollections/ (hereafter N-YHS online).

26. For example, see the letter from Spooner to Gerrit Smith, April 23, 1850 (N-YHS online), in which Spooner says: "I have received a copy of what purports to be 'Gerrit Smith's Constitutional Argument.' [He is referring to Gerrit Smith, *Constitutional Argument Against Slavery* (Utica, NY: Jackson and Chaplin, 1844)]. I consider a large portion of it a flagrant violation of my copyright, and I do not think that the requests of others that you would publish my arguments under your own name, afford any justification for your doing so. This injustice to me is increased by the loose, crude, and imperfect mode in which you have stated my argument – for your readers will naturally infer from your declaration that you are indebted to me for them, that I have stated them in the same careless manner as yourself." Also see the letter from Spooner to William Goodell, December 27, 1853 (11-9 - Correspondence - Lysander Spooner; The William Goodell Family Papers, Berea College Special Collections & Archives, Berea, KY), in which Goodell stood accused of infringing Spooner's "copyright. . .on the same subject" in the "Legal Tenure of Slavery" series of articles that he published in the *National Era* newspaper between 1853 and 1855.

now it was "too late to do any good sending my book to Congress, do you think there are any, who will take the expense of sending it to the members of the United States Supreme Court?"[27] Eighteen months later, in the spring of 1847, when the ink was barely dry on the pages of the manuscript which, later that year, would be published as part two of the treatise, Spooner wrote several letters to Gerrit Smith. As he had done so on many previous occasions, Spooner solicited funds from the wealthy New York abolitionist-philanthropist. This time he sought financial support for his latest plan to disseminate the argument that slavery was unconstitutional. Spooner had long believed it necessary to make a "systematic effort. . .to spread the truth in relation to the constitution," and since the 1845 publication of part one of *The Unconstitutionality of Slavery*, he had firmly believed this would be best accomplished by placing his work in the hands of the nation's lawyers and judges.[28] Now, he wrote Smith to argue that the halls of Congress (and legislatures more generally) represented the most effective venues for achieving the goal of interpreting the Constitution as antislavery, because "our courts are corrupt to a degree of which few persons are aware."[29] Something—either a particular event or an accumulation of happenings—had begun to shake his faith in the ability of judges to act impartially and to administer the correct (natural justice-based) interpretation of the law. However, he only briefly flirted with the idea that the proper answer to the question "Who should interpret the Constitution?" was "The People" rather than "governmental machinery." Ultimately, he kept coming back to the idea "that, were they [the courts] acquainted with the fact that slavery is unconstitutional they would yet deny it so long as they supposed. . .the people to be ignorant of it," which would not be very long were an educated bench and bar to lead the way in taking a properly interpreted Constitution to the people.[30]

On March 13, 1848, an anguished Spooner once again wrote to Gerrit Smith; once again he sought money, financing that would enable him to purchase the stereotype plates for printing parts three, four, and five of *The Unconstitutionality of Slavery*.[31] Anticipating one of his correspondent's concerns, Spooner made the following observation:

27. Letters from Spooner to Bradburn, October 27 and November 19, 1845 (N-YHS online). Ten years later, he again advocated distribution to members of Congress, but was extremely skeptical that it would make anything other than good fuel for their fireplaces. Letter from Spooner to Smith, November 2, 1855 (N-YHS online).

28. Letter from Spooner to Smith, April 20, 1847 (N-YHS online).

29. Letter from Spooner to Smith, March 14, 1847 (N-YHS online).

30. Ibid.

31. Spooner gives few clues about the intended content of the other parts of his treatise, which were never published. Letter from Spooner to Smith, March 13, 1848 (N-YHS

> You will ask me perhaps whether I expect so large a book will be read by the majority of the people? I answer no. I have no such expectation, however much I may wish for their own-sakes that they would read it. But lawyers will read it, if abolitionists will but give it to them to read. And I know that judges, especially the northern judges dare not think of standing up against both the truth and the bar, on this matter. And if but the northern judges were with us, it would be all that we need . . . . I cannot but believe there are antislavery sentiment and common honesty enough in any and all parties to sustain the judiciary, if the judiciary can have the truth presented to them, and can have the support of the bar. I am therefore persuaded that it is light, and not heat that is needed for the abolition of slavery.

This last comment typifies Spooner's 1840s approach to antislavery constitutionalism. Abolitionists needed to "urge matters rapidly to a crisis," but Spooner preferred to see them using educational and enlightening means; he wanted people to see the light rather than feel the heat.[32]

"The Right of the People": *A Defence for Fugitive Slaves* (1850)

During the 1850s, a significant percentage of abolitionists began to move away from a nonviolent response to slavery. Increasingly, they infused their writings with calls to arms; some went further, becoming involved in endeavors that were designed to, and sometimes actually did, result in violent confrontations with "Slave Power". This is not to say that the antislavery movement had been inherently peaceful prior to this decade. Events in previous decades challenged the nonresistance principles of many abolitionists who were challenging an inherently violent institution.[33] However, into the 1850s, the futility of actions grounded in peaceful principles became more apparent. As James Brewer Stewart observes, "Two decades of preaching against the sin of slavery had yielded, not

online). I discuss this in Helen J. Knowles, "Securing the 'Blessings of Liberty' for All: Lysander Spooner's Originalism," *NYU Journal of Law & Liberty* 5 (2010): 34–62.

32. Letter from Spooner to Smith, March 13, 1848 (N-YHS online); Letter from Spooner to Smith, April 20, 1847 (N-YHS online).

33. Generally, see John R. McKivigan and Stanley Harrold, *Antislavery Violence: Sectional, Racial, and Cultural Conflict in Antebellum America* (Knoxville, TN: University of Tennessee Press, 1999); Merton L. Dillon, *Slavery Attacked: Southern Slaves and Their Allies* (Baton Rouge, LA: Louisiana State University Press, 1990); and Lawrence J. Friedman, *Gregarious Saints: Self and Community in American Abolitionism, 1830–1870* (New York: Cambridge University Press, 1982). Also instructive on this point, especially regarding its relationship to the evolution of antislavery thought from the founding of the American Republic, are the essays in Matthew Mason and John Craig Hammond, eds. *Contesting Slavery: The Politics of Bondage and Freedom in the New American Nation* (Charlottesville, VA: University of Virginia Press, 2011).

emancipation, but an increase to over four hundred thousand black people held in bondage."[34]

The passage of the 1850 Fugitive Slave Act—which served as the principal trigger for this new wave of more aggressive abolitionist activism—also exposed the futility of antislavery constitutionalism grounded in a commitment to the "proper" rules of interpretation. As Robert Cover has shown, the prevailing definition of law during the antebellum period was "not simply words in instruments. It was the fabric of purposes and motives associated with the men who wrote them. Even when men proclaimed and declared 'natural' rights, it was not the natural but the human fabric that gave it its shape and import."[35] For the judges who struggled with the "moral-formal" dilemma, and sought to accommodate "the natural law tradition" into their interpretation of statutes, there were three main options. One could 1) determine that the authors of a statute had intended it to further a goal that was consistent with natural law; 2) identify situations in which natural law could aid in the application of a statute; or 3) conclude that natural law should trump codified law unless the language of that law explicitly (in other words, textually) stated otherwise. Judges were frequently confronted with statutes that, for numerous reasons, lent themselves to antislavery interpretations consistent with one or both of these first two options.[36] The Fugitive Slave Act of 1850 was different. It "evinced a clear congressional policy favoring harsh and summary enforcement of the rendition policy over any solicitude for procedural or substantive rights of alleged fugitives. . . .there was substantially less room for the outlet of principled preference for liberty, which operated in more amorphous doctrinal situations."[37] As his use of the *Fisher* rule indicates, in *The Unconstitutionality of Slavery* Spooner embraced the third and most controversial of the options outlined above. However, he clearly recognized that the explicitly proslavery language of this new law made it very difficult for natural law to play *any* role in its interpretation. How, then, did he intend to remedy this problem, and what role would judges play in a post-1850 world of antislavery constitutionalism?

The answers came in *A Defence for Fugitive Slaves, against the Acts of Congress of February 12, 1793, and September 18, 1850*, which marked a sharp departure from Spooner's earlier "un-popular" antislavery

34. James Brewer Stewart, *Holy Warriors: The Abolitionists and American Slavery*, revised ed. (New York: Hill and Wang, 1997), 156 (quotation), and, generally, ch. 7.

35. Cover, *Justice Accused*, 60.

36. Ibid., 62.

37. Ibid., 121.

constitutionalism.[38] Writing about the effects of the 1850 Act on abolitionist activism, Jane H. Pease and William H. Pease observed, "[w]hen the reality of events runs counter to the moral imperative of an era, reasonable men join fanatics in rejecting quiet argument and compromise for more vigorous action."[39] In *A Defence for Fugitive Slaves*, Spooner provided numerous reasons why the 1793 and 1850 laws were unconstitutional. In doing so, he made it very clear why the passage of the 1850 law pushed him away from the "quiet argument" of the courtroom to "more vigorous," and more "popular" antislavery constitutionalism action. The reasons for the laws' unconstitutionality fell into two main categories: violations of legal procedure, and judicial "ignorance" and "corruption."[40] Although he considered the procedural objections to the laws important, Spooner spent far greater time 1) explaining why the courts would not actually strike down either of the laws, and 2) outlining "The Right of Resistance": ways in which "The People" could respond to what he now recognized as the "ugly reality" of proslavery constitutionalism.[41]

Shedding any remnants of his earlier faith in the judiciary, Spooner wrote that "judges are in the nearly unbroken habit of holding all legislation to be constitutional." Courts are "always. . .ignorant, servile, or corrupt enough" to defer to legislatures, even when those bodies pass laws circumventing basic legal rules. Spooner defended this argument by first pointing to the 1842 decision in *Prigg v. Pennsylvania*, in which the Supreme Court held that under the Constitution's Supremacy Clause, the 1793 Fugitive Slave Act trumped Pennsylvania's personal liberty law (which had made it far more difficult than the 1793 Act did for slaveholders to recover individuals they alleged were fugitive slaves). Spooner was convinced that it was only a matter of time before the Court similarly upheld the 1850 Act.[42] In the face of this judicial reality, and to ensure the "maintenance" of the Constitution, Spooner encouraged popular resistance to such travesties of justice. Indeed, argued Spooner, the Constitution gave "The People" an "absolute and unqualified" Constitutional "right" to do so. He pointed to the Second Amendment as evidence of this right. Spooner wrote that the language of the Amendment—"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not

38. Lysander Spooner, *A Defence for Fugitive Slaves, against the Acts of Congress of February 12, 1793, and September 18, 1850* (1850), in *The Collected Works*, vol. 4.

39. Jane H. Pease and William H. Pease, "Confrontation and Abolition in the 1850s," *Journal of American History* 58 (1972): 923.

40. Spooner, *A Defence for Fugitive Slaves*, 6–26.

41. Ibid., ch. 2.

42. Ibid., 21, 30; 41 U.S. (16 Pet.) 539 (1842).

be infringed"—"implies the right to use" these arms, and "[t]his is the *only* remedy suggested by the constitution, and is necessarily the *only* remedy that can exist, when the government becomes so corrupt as to afford no peaceable one."[43]

Scholars have failed to reach a consensus about whether the Second Amendment is the source (or has, throughout history, been a source) of a legitimate popular constitutionalist response to the problems associated with judicial supremacy.[44] Therefore, one might be hesitant to describe *A Defence for Fugitive Slaves* as consistent with the principles of popular constitutionalism were it not, however, for the twenty-two page Appendix to that work, an Appendix that formed the basis of Spooner's *An Essay on the Trial by Jury*.[45] This 1852 treatise continues to be cited as one of the most important texts on the theory of jury nullification, and Spooner considered it his magnum opus (even if it had "proved to be a very laborious book to write").[46] However, *A Defence for Fugitive Slaves*, although receiving far less scholarly attention, remains important in its own right, particularly with regard to the evolution of Spooner's antislavery constitutionalism from the "un-popular" to the popular. For one can see in this document significant evidence of the ways in which the passage of the 1850 Fugitive Slave Act shook Spooner's faith in the ability of the nation's courts to interpret the Constitution in a manner consistent with the dictates of natural justice. It did not engage in a substantive defense of jury nullification; this was left to *An Essay on the Trial by Jury* (and is the principal reason for that work's lasting significance). However, Spooner's argument that liberty was much safer in the hands of jurors than in those of judges was laid out in quite some detail, and with considerable conviction in

43. Spooner, *A Defence for Fugitive Slaves*, 27–29 (emphasis added). Spooner clearly interpreted the Second Amendment as providing for an individualized right to bear arms.

44. For different discussions of this see, for example, Tushnet, *Taking the Constitution Away from the Courts*, 30–31; Reva B. Siegel, "Dead or Alive: Originalism as Popular Constitutionalism in *Heller*," *Harvard Law Review* 122 (2008): 191–245; and Saul Cornell, "Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion," *Chicago-Kent Law Review* 81 (2006): 883–903.

45. Lysander Spooner, "An Essay on the Trial by Jury" (1852), in *The Collected Works*, vol. 1.

46. Letter from Spooner to George Bradburn, September 20, 1852 (N-YHS online). Also see Lysander Spooner to George Bradburn, June 28, 1852 (N-YHS online). For academic references to the importance of *An Essay on the Trial by Jury*, see Steve J. Shone, "Lysander Spooner, Jury Nullification, and Magna Carta," *Quinnipiac Law Review* 22 (2004): 651–69; Clay S. Conrad, "Redefining the Role of the Jury: Scapegoating the Jury," *Cornell Journal of Law and Public Policy* 7 (1997): 10 n. 23; and Roger A. Fairfax, Jr., "Harmless Constitutional Error and the Institutional Significance of the Jury," *Fordham Law Review* 76 (2008): 2054 n. 148.

A Defence for Fugitive Slaves. And there was no mistaking the popular constitutionalist nature of this argument.

As Larry Kramer observes, in the late eighteenth and early nineteenth centuries the jury was "[t]he principal device expressing popular control over ordinary law."[47] By 1852 the idea of the jury as the ultimate power of populist expression still enjoyed extensive support in American society, support that Spooner sought to tap into. Crafting what might be considered his own jury-related version of the *Fisher* rule, he argued that, "under the trial by jury, no man can be punished for resisting the execution of any law, unless the law be so clearly constitutional, as that a jury, taken promiscuously from the mass of the people, will *all* agree that it is constitutional." In an America bound by the terms of the Fugitive Slave Act of 1850, the jury was the only trusted form for administering justice. And "The People," from whom juries were composed, were the only persons that could be trusted to interpret the Constitution.[48]

Tackling Taney: Spooner's "Manifesto" (1858)

After the publication of *A Defence for Fugitive Slaves*, Spooner produced very little new material about antislavery constitutionalism until 1857 when the United States Supreme Court issued its infamous decision in *Dred Scott v. Sandford*.[49] Spooner described Chief Justice Taney's opinion for the Court in that case as composed of "palpably false and ridiculous" premises. The opinion stood for every aspect of judicial reasoning and constitutional interpretation that Spooner abhorred. Taney had engaged in a classic case of judicial overreaching, used tortured and historically disingenuous reasoning, and interpreted the Constitution by drawing on extrinsic evidence of the original intent of the Framers. It should, therefore, come as no surprise to find that this decision destroyed Spooner's residual faith in the judiciary, and solidified his decision to continue on the path of popular constitutionalism that he had begun to construct in *A Defence for Fugitive Slaves*.[50]

47. Kramer, *The People Themselves*, 157 (and more generally, ch. 6).

48. Spooner, *A Defence for Fugitive Slaves*, 34 (quotation), and 35–39.

49. 60 U.S. 393 (1857).

50. Letter from Spooner to Gerrit Smith, September 10, 1857 (N-YHS online). Ironically, Taney's opinion in *Dred Scott* evinced an affinity for the same original intent methodology that underpinned the Garrisonians' indictment of the Constitution. Randy E. Barnett, "Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation," *Pacific Law Journal* 28 (1997): 1004–5; and Hans W. Baade, "'Original

Spooner's principal response to *Dred Scott* came in 1858 when he published a radical broadsheet (he later referred to it as a "Manifesto") that proposed a decidedly populist "stratagem" for ensuring that the nation's governments—including the courts—conformed to his antislavery constitutionalism. On one side of the broadsheet was printed "A Plan for the Abolition of Slavery"; the reverse issued a call "To the Non-Slaveholders of the South."[51] In "To the Non-Slaveholders of the South," Spooner laid out the four "self-evident principles of justice and humanity" that would guide the implementation of "A Plan for the Abolition of Slavery." Adopting the natural rights position that readers of his work had come to expect, the first principle he identified was that "Slaves have a natural right to their liberty." Second, they have a natural right to compensation for the suffering wrought by enslavement. Spooner did not identify the party from whom compensation could be sought, but he did say it was contingent upon the ability of "the property of the Slaveholders and their abettors" to provide the compensation. Third, slaves have a right to obtain this compensation by "stratagem or force" if the governments "refuse to give them liberty or compensation." Significantly, he did not say that this was a natural right. As natural rights are prepolitical, this suggests that he expected some kind of positive governmental involvement in the compensation process. The fourth and final principle Spooner noted was "the duty *of all, who can*, to assist" the Slaves in securing these rights.[52]

Spooner expected this assistance to be rendered through the adoption of five measures. First, "all the corrupt and tyrannical [proslavery] political institutions" were to be "ignore[d] and spurn[ed]." Second, new governments were to be established in order to criminalize slaveholding and instigate civil lawsuits for slaves seeking compensation. Third, until such time as these profreedom governments were created, slaves were to be recognized (presumably by the law, but Spooner does not make this clear) as "freemen" and holders of the property currently owned by their masters. This property "would pass to them, if justice were done." Fourth, anticipating minimal governmental cooperation with these measures, he urged the formation of Vigilance Committees that would serve as temporary

Intent' in Historical Perspective: Some Critical Glosses," *Texas Law Review* 69 (1991): 1049–55.

51. Lysander Spooner, "To the Non-Slaveholders of the South (1858)" and "A Plan for the Abolition of Slavery (1858)," in *The Collected Works*, vol. 4. Spooner referred to this as a Manifesto in a letter to Octavius Brooks Frothingham, February 26, 1878, Lysander Spooner Papers, Boston Public Library, Rare Books Department (hereafter BPL).

52. Spooner, "To the Non-Slaveholders of the South," emphasis added.

sociopolitical entities, bodies that would ensure "justice were done." Finally, invoking the spirit of the Biblical "golden rule," Spooner expected "you" to teach the former slaves to do unto their former masters that which was done to them. He clarified that this did indeed include stripping and flogging the former slaveholders.[53]

The intended audience for "To the Non-Slaveholders of the South" is unclear (the title of the document notwithstanding). When outlining the forms of assistance required to secure the slaves' rights, Spooner consistently used the indefinite pronoun "you." However, the party to whom he addressed himself changed constantly. The third and fourth measures spoke to nongovernmental actions that would be necessitated by the corruption of society's bodies of governance. And one can read into Spooner's Manifesto an underlying current of pessimism. Spooner had long since shed his naïve belief that governments were inherently just organizations. Now he began to exhibit sympathy for anarchistic solutions to the problem of unjust governments. However, as an important stated goal of "To the Non-Slaveholders of the South" made clear, none of the five measures were predicated upon a belief that proliberty governments could never exist. Spooner encouraged his readers to effect change in "political institutions soon as possible" by, among other things, refusing to give witnesses testimony in court and, as jurors, delivering "no verdicts, in support of any Slaveholding claims."[54]

In "A Plan for the Abolition of Slavery," Spooner went into greater detail, listing the eleven actions that would be undertaken to achieve the "self-evident principles of justice and humanity." The first eight actions were intentionally nonconfrontational and nonviolent:

1. Forming groups of individuals willing "*publicly*" to support "the enterprise."[55]
2. Printing papers in support of "the enterprise."
3. Withholding votes from prospective officeholders who were not committed to "the enterprise."
4. Fundraising, and obtaining military hardware.
5. "Forming and disciplining such military companies as may volunteer for actual service."
6. Encouraging nonslaveholding Southerners to break from those with ties to slavery.
7. Educating slaves about emancipation plans.
8. Encouraging abolitionists to move to the South.

53. Ibid.
54. Ibid.
55. It is not clear whether Spooner meant the general enterprise of abolishing slavery or achieving that goal through the use of the specific methods outlined in his Manifesto.

These actions were nonviolent because they were "preliminaries" to three other, more important actions. First, organized "land[ings]" of military troops, in numerous strategic locations in the South, "shall raise the standard of freedom, and call it to the slaves, and such free persons as may be willing to join it." Second, assuming that only warfare could bring about emancipation, the laws of warfare would serve as justification for taking slaveholders' property in order to compensate the slaves. In "To the Non-Slaveholders of the South," Spooner described slavery as an act of war. Slave rebellions, by contrast, were acts of a "*just* war. . .a war for liberty," and this gave legal justification to the act of appropriating the property of slaveholders. For any "laws" that "have the power to make that right which is naturally wrong, or wrong that which is naturally right" are no "laws" at all.[56] Spooner's final planned action was to establish proliberty governments in the South, governments that would presumably administer Spooner's natural rights understanding of law and interpret the Constitution in a like manner.

Spooner's Manifesto was not widely distributed; it lacked the logical acumen of his other works, and its inflammatory content was cause for concern among many abolitionists.[57] For example, John Brown and the circle of people connected with the planning of the Harpers Ferry raid recognized that it was impractical, but knew they could not guarantee that the nation's "Slave Power" would interpret it as such. It worried some members of the Secret Six, causing them to have second thoughts about the safety and wisdom of providing Brown with financial support.[58] Even Thomas Wentworth Higginson, the least "ambivalent" member of this group, and himself the author of a published article that offered justifications for slave insurrection, tried to dissuade Spooner from circulating it. Two days after receiving a copy of the document in late November, 1858, he wrote to Spooner to express sentiments that he reinforced when the two men met in Boston a few days later.[59] Higginson acknowledged the likelihood that slave insurrections would occur "within a few years,"

56. Spooner, "A Plan for the Abolition of Slavery"; Spooner, "To the Non-Slaveholders of the South." This argument was entirely consistent with the definition of law that he outlined in *The Unconstitutionality of Slavery*.

57. An estimated 200 copies were printed and distributed. Charles Shively, introduction to "To the Non-Slaveholders of the South" and "A Plan for the Abolition of Slavery," by Lysander Spooner, 3, in *The Collected Works*, vol. 4.

58. Edward J. Renehan, Jr., *The Secret Six: The True Tale of the Men Who Conspired with John Brown* (New York: Crown, 1995), 173–74.

59. Jeffery Rossbach, *Ambivalent Conspirators: John Brown, the Secret Six, and a Theory of Slave Violence* (Philadelphia: University of Pennsylvania Press, 1982), 182–88; Lysander Spooner to Thomas Wentworth Higginson, November 28, 1858 (BPL); Thomas Wentworth Higginson to Lysander Spooner, November 30, 1858 (BPL); and Renehan, *Secret Six*, 175.

and that they would take place "with the aid of secret co-operation from the whites." And he conceded that had these occurred earlier, they would have brought an end to slavery and greater Northern awareness of the importance of individual liberty. However, he also believed that Spooner had things backwards. "People's hearts go faster than their heads. In place therefore of forming a society or otherwise propounding insurrection as a plan, my wish would be to assume it as a fact. The concrete will arouse more sympathy than the abstract." Although Higginson's letter strongly implied that plans were already afoot for insurrectionist activities such as those outlined in the Manifesto: "Were I free to do it, I could give you assurances that what I say means something," there is no evidence that Spooner had any knowledge that the plans in question were for John Brown's raid the following year.[60]

Even though Spooner's 1858 Manifesto does not mention the United States Constitution, it makes an important contribution to our understanding of the ways in which Spooner's antislavery constitutionalism became increasingly "popular." It is the most significant of his written responses to *Dred Scott*, and demonstrates that by 1858 the seedlings sewn in 1850, in reaction to the Fugitive Slave Act, had flourished and grown into strong powerful trees of popular constitutionalism. Elements of the Manifesto did foreshadow Spooner's 1870s anarchism, and, on their own, those elements might be viewed as an endorsement of a "democratic repudiation" of the law, statutory or constitutional; something that could not be described as consistent with the principles of popular constitutionalism. The Garrisonians engaged in an equivalent "democratic repudiation" of the Constitution, and, as I noted from the outset, burning the Constitution is fundamentally different from offering a nonjudicial answer to the question "Who possesses the authority to interpret the U.S. Constitution?" It would be wrong, however, to argue that Spooner's 1858 Manifesto was defined by its anarchical elements. When one examines the document in its entirety, one finds clear and convincing evidence that the 1850s had been a transformative decade for Spooner. He now accepted the "ugly reality" that judges were anything but enlightened repositories of natural justice-oriented interpretations of the Constitution.[61]

60. Higginson to Spooner, November 30, 1858.

61. In this context, I have borrowed the phrase "democratic repudiation" from Corey Brettschneider's excellent review of Kramer's *The People Themselves*, in which he observes that it is unclear "why Kramer's theory is constitutionalist at all and not merely a democratic repudiation of constitutionalism." Corey Brettschneider, "Popular Constitutionalism and the Case for Judicial Review," *Political Theory* 34 (2006): 517.

Can You Find Me "A FEW FRIENDS Of Freedom"?: *Address of the Free Constitutionalists* (1860)

In the days immediately following the raid on Harpers Ferry, the Democratic *New York Herald* relentlessly attacked Gerrit Smith (who had funded Brown's raid). The paper believed—justifiably—that Smith was the abolitionist with the strongest ties to Brown. Interestingly, however, it tried to connect Smith to the raid using Spooner's Manifesto, but without mentioning Spooner. "A Plan for the Abolition of Slavery" and "To the Non-Slaveholders of the South" appeared together in the lead article in the newspaper on October 22, 1859. The broadsheet had been forwarded to the paper's editor by an anonymous resident of the St. Nicholas Hotel in New York City[62] with the accompanying curious statement: "The recent outbreak at Harper's Ferry has recalled to my remembrance a document put into my hands during a recent tour through the New England States. . . .In a conversation with the person who gave the 'plan' to me, he indicated three points at which disturbances might occur—viz: Harper's Ferry, the neighborhood of the Mammoth Cave in Kentucky and of the Arkansas river."[63] Five days later, at the behest of the New York Democratic Vigilant Association, the newspaper again published "A Plan for the Abolition of Slavery." Once again, Spooner was never mentioned; in fact, everything points to the conclusion that neither the paper nor the group of Democrats had any idea that the document was not the work of a Smith- and Brown-led organization.[64] It was, therefore, ironic that in March 1860 Lysander Spooner was retained as "consulting counsel" for the libel suits brought on Smith's behalf against members of the Vigilant Association.[65]

Retaining the legal services of Spooner at the beginning of 1860, as the country stood on the brink of civil war, was a strange move, because by this time, Spooner had clearly lost faith in the ability or willingness of the government (especially the courts) to champion either liberty or justice. He now saw how true it was that "the law is what we live with. Justice

62. Opened on Broadway in 1853, this was, at the time, one of the most luxurious hotels in the city. Lloyd R. Morris, *Incredible New York: High Life and Low Life of Last Hundred Years* (New York: Random House, 1975), 5.

63. "To the Editor of the New York Herald," *New York Herald*, October 22, 1859, 1.

64. "The Rise and Progress of the Bloody Outbreak at Harper's Ferry," *New York Herald*, October 27, 1859, 8 (this article only excerpted "To the Non-Slaveholders").

65. Exactly why Spooner was selected remains a mystery. Lysander Spooner to Charles B. Sedgwick, and Lysander Spooner to Charles D. Miller, March 23, 1860 (N-YHS online); and Ralph Volney Harlow, "Gerrit Smith and the John Brown Raid," *The American Historical Review* 38 (1932): 55–56.

is. . .harder to achieve."[66] He expressed this sad truth in his *Address of the Free Constitutionalists to the People of the United States*. This fifty page pamphlet was the product of Spooner's labors to make good on a promise that he made in a letter to Senator William H. Seward in January 1860. It confirmed that Spooner had now shed any vestiges of his earlier "un-popular" constitutionalism.[67]

Seward had long been familiar with Spooner's works, and on occasion he had endorsed some of the positions they contained.[68] However, in 1860, Spooner did not write to congratulate the Senator on his opposition to slavery. Instead, he described Seward as a "jesuitical leader" (a label he also applied to "the Chases, and Sumners, and Wilsons, and Hales.") Appalled at their moderate stance on the slavery question, he lashed out at these Republicans, whom he described as disingenuously "profess [ing] that they can aid liberty, without injuring slavery." He brought the letter to a close with the following promise. "I shall very likely make the whole of this correspondence public; and if it shall serve any purpose towards defeating yourself and the Republicans, I shall be gratified; for I would much rather the government be in the hands of declared enemies of liberty, than in those of treacherous friends."[69]

66. This phrase was spoken by Sherlock Holmes (as portrayed by Jeremy Brett) in the television adaptation of Arthur Conan Doyle's "The Red Circle"; Granada Television, March 28, 1994.

67. Lysander Spooner, "Address of the Free Constitutionalists to the People of the United States" (1860), in *The Collected Works*, vol. 4. The letter was from Lysander Spooner to William H. Seward, January 22, 1860 (BPL). Although originally intended as a pre-election criticism of the Republican Party (it was first published in September 1860), in a second printing of the "Address of the Free Constitutionalists" 2 months later, Spooner noted that Lincoln's victory did not make the pamphlet redundant because its Constitutional arguments were timeless. Spooner, "Address of the Free Constitutionalists," prefatory note to November 1860 edition.

68. For a reference to Seward's views about *The Unconstitutionality of Slavery,* see "'State Rights and State Equality,' Speech of Hon. Thomas Ruffin," February 20, 1861, *Congressional Globe,* 36 Cong., 2nd sess., Appendix 227.

69. Spooner to Seward. In the "Address of the Free Constitutionalists," Spooner argued that Seward was a good example of a politician who believed the Constitution was antislavery (and maybe even that slavery was unconstitutional) but was unwilling to admit this in public. Four years later Senator Charles Sumner similarly incurred Spooner's wrath because in his opinion Sumner acted too much like a politician; he was, in Spooner's eyes, the epitome of a "professed (though hypocritical) advocate of liberty." Spooner did not doubt that his Senator was for freedom rather than slavery; nor did he question Sumner's belief that he was acting in ways he considered faithful to the Constitution that he had sworn to support. The problem was that Spooner had received word, from several prominent Bostonians, that Sumner privately expressed support for the thesis of *The Unconstitutionality of Slavery*. As Samuel G. Howe had told him, "Sumner always said it was true, but some how or other he could not think it was practical." Spooner must have scoffed at the charge of impracticality,

The *Address of the Free Constitutionalists* made good on this promise, and expressed Spooner's belief that the country's populace now had two choices. "If we wish to enjoy any liberty ourselves, or do anything for the liberation of others," we have "to emancipate ourselves from our intellectual and moral bondage to the frauds and crimes of dead slaveholders and their accomplices, *and either read and execute our constitution as it is, or tear it in pieces*."[70] After the war, Spooner increasingly lost faith in the Constitution. In 1860, however, he still felt there were good reasons to "read and execute" the document. The *Address of the Free Constitutionalists* demonstrated, however, that his answer to the question "Who possesses the authority to interpret the U.S. Constitution?" was no longer "the judiciary," as it had been 15 years earlier. Now, the answer was "The People."

The *Address of the Free Constitutionalists* was primarily intended to discourage people from supporting the Republican Party. Spooner rejected what the Republican Party "would have us believe": that the "real question, that is now convulsing the nation…[is] whether slaves shall be carried from the States into the Territories." This was a non sequitur because it was based on the unconstitutional premise that slavery could exist *anywhere* in the nation, state, or territory. The Constitution was a "warrant for giving liberty to all the people of the United States"; therefore, "the man, who, like the Republican party, consents to the existence of slavery, so long as the slaves are but kept out of his sight, is at heart a tyrant and a brute."[71] This was a fascinating formulation of the concept of popular sovereignty. On the one hand, it was eerily reminiscent of the 1840s Southern states-rights Democratic position on the federal government's power over slavery. On the other hand, however, it was a formulation that turned that position on its head.

The principle of popular sovereignty has been described as "[b]eautifully simple in theory and thoroughly American in its essence." However, it is also a thoroughly "malleable" doctrine, as evidenced by the multiple conflicting ways in which it was invoked by both the friends

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because in a moral and constitutional battle for natural justice it was no defense of inaction to say that reality inevitably trumped theory. This was formulated in Spooner's publicly circulated letter to Sumner, in which he said that Sumner could never be a true friend of liberty when he did not publicly stand up for the real Constitution—the one that, in private, he acknowledged to be an antislavery document. Lysander Spooner, "Letter to Charles Sumner (1864)," in Shively, *The Collected Works*, 4: 1. For a short summary of Sumner's constitutional views, see David Herbert Donald, *Charles Sumner and the Coming of the Civil War* (New York: Fawcett Columbine, 1960), 231–33.

70. Spooner, "Address of the Free Constitutionalists," 17 (emphasis added).

71. Ibid., 3, and September 1860 prefatory note.

and foes of slavery.[72] In the 1840s, Southern Democrats adopted a strict constructionist approach to Constitutional interpretation, and saw in the Constitution a simple, clear, and thoroughly American statement of popular sovereignty. They argued that the document created a federal government of limited powers. Crucially, the power to determine the status of slavery in newly appropriated territory was *not* a power given to that government. Instead it was reserved to the "sovereign states," for whom the federal government acted as a "common agent." This was the way in which the Constitution guaranteed individual property rights.[73] When Lysander Spooner looked at the Constitution, the principle of sovereignty that he saw protected—the prevailing constitutional principle of self-government—was incompatible with slavery because it placed the right to govern oneself over the power to govern anything, or anyone else.[74]

By 1860, the nation had long since realized that when confronted with political reality, the "beautifully simply" principle of popular sovereignty turned out to be wonderful in theory, but fatal in fact.[75] As Spooner recognized in the *Address of the Free Constitutionalists*, this was in no small part because of *Dred Scott*. Recall that in *The Unconstitutionality of Slavery* Spooner adopted a rule from the Supreme Court's opinion in *United States v. Fisher*, stating: "Where rights are infringed, where

72. Christopher Childers, "Interpreting Popular Sovereignty: A Historiographical Essay," *Civil War History* LVII (2011): 48; and Elizabeth R. Varon, *Disunion! The Coming of the American Civil War, 1789–1859* (Chapel Hill, NC: University of North Carolina Press, 2008), 199.

73. Michael A. Morrison, *Slavery and the American West: The Eclipse of Manifest Destiny and the Coming of the Civil War* (Chapel Hill: University of North Carolina Press, 1997), 58 (quotation), and, generally, ch. 2.

74. On this point, Mark Brandon provides an excellent comparison of the positions of Spooner and John C. Calhoun: "The logics of Calhoun and Spooner were like mirrored opposites. Both supplied constitutional theories of nullification. But where Calhoun would have permitted state conventions to nullify national decisions that were incompatible with local interests, Spooner would have had judges annul (usually local) decisions that did not cohere with the national application of principles of natural law and right. . . .The boundaries of Calhoun's world were defined by the connection of antifederalist localism to the preservation of slavery. Spooner's world, on the other hand, grew around the junction of federalist nationalism to abolition." Mark E. Brandon, *Free in the World: American Slavery and Constitutional Failure* (Princeton: Princeton University Press, 1998), 61–62.

75. To borrow the essence of Gerald Gunther's famous phrase about the strict scrutiny standard of judicial review ("'strict' in theory, and fatal in fact"). Gerald Gunther, "Foreword: In Search of Evolving Doctrine on a Changing Court—A Model for a Newer Equal Protection," *Harvard Law Review* 86 (1972): 8. The nineteenth century confrontations between the theory of popular sovereignty and political reality, and the ways in which the latter shaped the former are discussed in excellent detail in Morrison, *Slavery and the American West*; also see Christopher Childers, "Popular Sovereignty, Slavery in the Territories, and the South, 1785–1860" (PhD diss., Louisiana State University, 2010).

fundamental principles are overthrown, where the general system of the 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." With regard to popular sovereignty and the status of slavery in the territories, Spooner now argued that if the Constitution made any person a slave (which, of course, it did not), then that person would have to be a slave wherever he or she went in the country, for as Spooner explained at length, only the federal government possessed the constitutional power to determine "who are, and who are not (if they are not) citizens of the United States."[76]

This was a profound argument to make after *Dred Scott,* because it followed that if slavery was constitutional everywhere, then any slaveholders could take their slaves to any part of the country and be reassured by the thought that the Constitution, much less any statutory law, protected that property. This was exactly the point that Spooner sought to make, because it provided another, very powerful way in which to attack the Republican Party's 1860 platform, which "denounce[d] the lawless invasion, by armed force, of any State or Territory, no matter under what pretext." "This," exclaimed Spooner, "is giving to slavery more than it ever asked," and more than "[e]ven the *Dred Scott* judges themselves" claimed. For "[t]hose judges [only] conceded that slavery could not be extended beyond the limits of a single race; whereas the Republicans acknowledge no such, or any other, limit to slavery in the States; or what is the same thing, to slavery in the United States."[77] By 1860, Lysander Spooner's faith in the nation's government had evaporated; the last best hope for those who were enslaved lay not with the governors, but with the governed. Only "The People" could now see and act upon the true antislavery meaning of the United States Constitution.

Conclusion

When Lysander Spooner wrote to Gerrit Smith in March, 1848, he demonstrated very little faith in the American public. He was "persuaded that it is

76. He provided the following summary of his three "decisive proofs" of this argument: "otherwise the United States government could not know its own citizens. . .could not know when it had fulfilled its guaranty of 'a republican form of government'. . .[and] could either do more for foreigners (by naturalization) than they can do for those born on the soil. . ." Spooner, "Address of the Free Constitutionalists," 12–13. He followed this with an extensive discussion that drew heavily from *The Unconstitutionality of Slavery*. See Spooner, "Address of the Free Constitutionalists," 13–17.

77. Spooner, "Address of the Free Constitutionalists," 46.

light, and not heat that is needed for the abolition of slavery," but he believed that enlightened advances toward the achievement of this goal could only come from antislavery court decisions. "The People," he concluded, were unlikely to read or seek to enact the principles expounded upon in *The Unconstitutionality of Slavery,* the second part of which was published the previous year.[78] As the inconsistencies between some of his correspondence and his published writings show, on occasion Spooner clearly appreciated the naïveté that was bound up with his 1840s approach to antislavery constitutionalism. It was impossible to ignore the "ugly reality" of slavery and the inability of judges to resolve their personal "moral-formal" dilemmas in favor of the slave rather than the master. Nevertheless, during that decade, Spooner's devotion (some might say stubborn devotion) to a natural justice *theory* of constitutional interpretation led him to ignore what was actually happening in favor of explaining what *should* be happening.

To the Garrisonians, when an antislavery judge was confronted with the "moral-formal" dilemma he had only one legitimate choice: resignation. In *Justice Accused*, Robert Cover argued that the contrasting response to this dilemma provided by the "constitutional utopians" did not consist of "a legal theory"; instead, these individuals—including Spooner—sought to "prove that antislavery men may become judges and may use their power to free slaves."[79] It is true that during the 1840s Spooner did seek to achieve this particular juridical goal. However, as we have seen, his response to the "moral-formal" dilemma most definitely consisted of a "legal theory." And, to Spooner, it was a very simple theory: a judge could avoid the dilemma by adhering to the proper rules of legal interpretation.

After the passage of the Fugitive Slave Act in 1850, Spooner began to move away from this "un-popular" constitutionalism in favor of an approach that adhered to the principles at the center of the modern popular constitutionalism movement. He gradually "realized that the courts had been corrupted by the wealthy in their own favor, and the obvious question was how to recover justice"; by the end of the 1850s the answer was clear: let "The People" take the lead in determining the meaning of the Constitution. The Garrisonian response to a "legal" system that appeared to ignore the "moral" was to burn the Constitution and call for disunion. Even into the 1850s, when he embraced popular constitutionalism, Spooner "continued to have faith in *law*—if not in government, judges,

78. Letter from Spooner to Smith, March 13, 1848 (N-YHS online).
79. Cover, *Justice Accused*, 156.

courts, and laws."[80] Popular constitutionalism became his new "legal" way of achieving the "moral."

This evolution in Lysander Spooner's legal thought cautions against arriving at quick answers to the question of whether or not antislavery constitutionalists should receive substantive discussion in the historical narrative of popular constitutionalism. Beginning with his *Defence for Fugitive Slaves*, then in "A Plan for the Abolition of Slavery" and "To the Non-Slave-Holders of the South," and finally in the *Address of the Free Constitutionalists to the People of the United States,* Spooner outlined an answer that placed the onus on "The People." As he wrote in 1860: "If we dare not correct the frauds of the past, and interpret our constitution by the same rules by which it ought to have been interpreted from the first. . .we are ourselves wretched cowards and slaves, fit to be used as instruments for enslaving each other."[81] As the country stood poised to enter into a bloody civil war, Spooner finally realized that if the abolition of slavery were to be achieved without "heat," his fellow Americans would need to see the "light" of antislavery constitutionalism. In other words, by 1860 Lysander Spooner had himself seen the light of popular constitutionalism.

80. Charles Shively, introduction to Spooner, "Natural Law (1882)," 4, in *The Collected Works,* vol. 1.

81. Spooner, "Address of the Free Constitutionalists," 17.