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SECURING THE "BLESSINGS OF LIBERTY" FOR ALL: LYSANDER SPOONER'S ORIGINALISM

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ABSTRACT

On January 1, 1808, legislation made it illegal to import slaves into the United States.[1] Eighteen days later, in Athol, Massachusetts, Lysander Spooner was born. In terms of their influence on the abolition of

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[1] Act to Prohibit the Importation of Slaves, ch. 22, 2 Stat. 426 (1807).

slavery, only the first of these events has gained widespread recognition. The importance of Spooner's reading of the U.S. Constitution as a document that did not sanction slavery has been overlooked, and his abolitionist work continues to be disparaged as the incoherent ramblings of an unserious polemicist. As this essay demonstrates, this conclusion about Spooner's mid-nineteenth century work, *The Unconstitutionality of Slavery*,[2] is unfortunate because his observations about the relationship between law and individual liberty are timeless.

Drawing on his writings (including a previously unpublished manuscript) and voluminous correspondence, with supporting material from abolitionist newspapers and periodicals, I focus on Spooner's contribution to a mid-1840s debate about constitutional interpretation. Spooner's natural rights–based reading of the Constitution's original meaning never matched the popularity of fellow abolitionist Wendell Phillips's emphasis on the Framers' original pro-slavery intentions. Phillips won the day with conclusions that seemed to vindicate the Garrisonian condemnation of the Constitution as a "covenant with death, and an agreement with hell."[3] However, Phillips's conclusions about the law were underpinned by a misleading emphasis on political history. They could not match the fiercely logical and legal emphasis of Spooner's conclusions. In this respect, only Spooner offered an approach that was faithful to the guarantee, that appears in the Preamble to the U.S. Constitution, to protect the "Blessings of Liberty."[4]

I bring the article to a close with a short twenty-first century postscript that shows the potential for Spooner's unpublished views on the Bill of Rights to play an important role in the debate about whether, in light of the Supreme Court's decision in 2008 in *District*

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[2] LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (1860), *reprinted in* THE COLLECTED WORKS OF LYSANDER SPOONER, VOL. IV: ANTI-SLAVERY WRITINGS (Charles Shively ed., M & S Press 1971). This work originally appeared in two separately published parts in 1845 and 1847; the 1860 reprinting that appears in THE COLLECTED WORKS is the most complete edition of these parts brought together in a single volume. In the 1860 reprinting, Part First occupied pages 1–132, Part Second pages 133–277.

[3] DOCUMENTS OF UPHEAVAL: SELECTIONS FROM WILLIAM LLOYD GARRISON'S *THE LIBERATOR*, 1831–1865, 216 (Truman Nelson ed., 1966) [hereinafter DOCUMENTS OF UPHEAVAL].

[4] U.S. CONST. pmbl.

of Columbia v. Heller,[5] the Second Amendment to the U.S. Constitution restricts the actions of the state and local governments. The content of the postscript took on added significance when in 2009 the U.S. Supreme Court announced that it had granted certiorari in *McDonald v. Chicago*.[6]

INTRODUCTION

> Few except close friends and sponsors seem to have taken the time to realize that Spooner's view of the Constitution required nothing less than a complete reinterpretation of how the Constitution had been formulated and what it authorized. His view was the truly radical one, but it offered an emotionally less satisfying alternative.[7]

Born two hundred years ago in Athol, in central Massachusetts—"the most unique and remarkable character" to call that town home—Lysander Spooner lived a long life during which he wrote about many aspects of the law.[8] He addressed a diverse range of topics but never strayed from a strong intellectual commitment to the basic principles of libertarianism. He was unafraid to take radical positions, even if they deprived him of the fame and fortune that he clearly thought he deserved. Sadly, to this day, the libertarian theory of constitutional interpretation that Spooner set forth in the two volumes of his most substantial (but often overlooked) work,

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[5] 128 S. Ct. 2783, 2821–22 (2008) (holding that "the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense").

[6] *See* McDonald v. City of Chicago, 130 S. Ct. 48 (2009). *McDonald* will address whether the Fourteenth Amendment incorporates the Second Amendment against state and local authorities, after the 7th Circuit declined to extend the Second Amendment to state and local gun control efforts. *See* NRA of Am., Inc., v. City of Chicago, 567 F.3d 856 (7th Cir. 2009).

[7] C. William Hill, Jr., The Place of Lysander Spooner in the American Higher Law Tradition 9 (1980) (unpublished manuscript, on file with the New York University Journal of Law & Liberty).

[8] LILLEY B. CASWELL, ATHOL MASSACHUSETTS, PAST AND PRESENT 362 (1899).

The Unconstitutionality of Slavery, published in 1845 and 1847,[9] continues to be described as "more polemical than serious."[10]

In the two volumes of *The Unconstitutionality of Slavery*, Spooner presented a fiercely logical argument that slavery violated natural rights, which, as understood using the correct rules of legal interpretation, the U.S. Constitution did not sanction.[11] At the time, though, the alternative argument (primarily made by followers of William Lloyd Garrison) that both the nation's supreme law and its Supreme Court were at the beck and call of "slave power" enjoyed far greater support within the abolitionist community.[12] There were notable exceptions—Frederick Douglass, for example, attributed to the works of Spooner his 1850s conversion to the belief that slavery was unconstitutional.[13] However, these were never the prevailing views. In the middle of the nineteenth century, the argument that the Constitution was a "covenant with death, and an agreement

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[9] SPOONER, *supra* note 3. If scholars take note of Spooner's writings, they instead tend to focus on his much later, anarchical arguments in LYSANDER SPOONER, NO TREASON, NO. VI.: THE CONSTITUTION OF NO AUTHORITY (1870), *reprinted in* THE COLLECTED WORKS OF LYSANDER SPOONER, VOL. I: DEIST, POSTAL, AND ANARCHIST WRITINGS (Charles Shively ed., M & S Press 1971).

[10] PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 201 n.33 (2d ed. 2001). However, it should be noted that Professor Finkelman has recently revised his description of Spooner; he now describes him as a "constitutional outlier." Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 SUP. CT. REV. 349, 354 (2008).

[11] SPOONER, *supra* note 3, at 56–57 (arguing that "the constitution of the United States, not only does not recognize or sanction slavery, as a legal institution . . . it presumes all men to be free . . . it, *of itself*, makes it impossible for slavery to have a legal existence in *any* of the United States" (emphasis in original)). Spooner's theory flies in the face of both the "ugly reality" that was the enslavement of human beings and the judiciary's "pro-slavery" readings of the Constitution. WENDELL PHILLIPS, REVIEW OF LYSANDER SPOONER'S ESSAY ON THE UNCONSTITUTIONALITY OF SLAVERY: REPRINTED FROM THE "ANTI-SLAVERY STANDARD," WITH ADDITIONS 3 (Arno Press & The New York Times, 1969) (1847). It was this fact that led Robert Cover, in his famous work *Justice Accused*, to label Spooner a "constitutional utopian." ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 154–58 (1975).

[12] For an analysis of the distinction between "slavery" and "slave power" and abolitionists' usage of them in the nineteenth century, see Larry Gara, *Slavery and the Slave Power: A Crucial Distinction*, *in* ABOLITIONISM AND AMERICAN POLITICS AND GOVERNMENT 203–16 (John R. McKivigan ed., 1999).

[13] For an excellent discussion of Spooner's influence on Douglass's understanding of the Constitution, see PETER C. MYERS, FREDERICK DOUGLASS: RACE AND THE REBIRTH OF AMERICAN LIBERALISM 89–102 (2008).

with hell"[14] powerfully captured the imagination of slavery's opponents. Today, scholarly attitudes have changed very little. Writing at the same time as Spooner, Wendell Phillips, the outspoken Garrisonian orator, produced two works that laid out a method of interpretation diametrically opposed to that of Spooner. Despite the fact that they are based on assumptions about the historical intentions of the Constitution's framers rather than on solid principles of law, Phillips's *The Constitution: A Pro-Slavery Compact* [hereinafter "*Pro-Slavery Compact*"][15] and *Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery* [hereinafter "*Review*"][16] are widely respected as solid interpretations of the pre–Thirteenth Amendment Constitution. There is a common belief that Phillips's works "destroyed Spooner's position."[17]

This article is an effort to build on some of the other attempts, made in recent years, to change these attitudes towards the works of Phillips and Spooner.[18] It emphasizes that only the latter gave us a theory of constitutional interpretation that secures the "Blessings of Liberty" for whose protection the Constitution established a distinctively limited government. In Part II, I provide an overview discussion of the works that constitute the legal philosophical debate in which Phillips and Spooner engaged in the 1840s. This is followed, in Parts III and IV, by detailed analyses of the different methods of constitutional interpretation and their implications for individual liberty employed by the two men. Finally, in Part V, I draw on a previously unpublished manuscript and Spooner's voluminous correspondence to show that Spooner had every intention of publishing (but ultimately did not publish) even more parts of The Unconstitutionality of Slavery.

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[14] DOCUMENTS OF UPHEAVAL, *supra* note 4.

[15] WENDELL PHILLIPS, THE CONSTITUTION: A PRO-SLAVERY COMPACT: SELECTIONS FROM THE MADISON PAPERS, &c. 3 (Negro Universities Press 1969) (1844).

[16] PHILLIPS, *supra* note 11.

[17] COVER, *supra* note 11, at 151; A. John Alexander, *The Ideas of Lysander Spooner*, 23 NEW ENG. Q. 200, 206 (1950) (arguing that in the REVIEW, "Phillips demolished the Spooner argument in short order").

[18] The most prominent of these is Randy E. Barnett, *Was Slavery Unconstitutional before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation*, 28 PAC. L.J. 977 (1997).

These materials demonstrate that, when properly understood, *The Unconstitutionality of Slavery* is a treatise that confirms that Spooner is a figure of continuing importance when engaging in twenty-first century interpretations of the U.S. Constitution. In a short postscript, I show that both the historical and libertarian aspects of this unpublished material took on new significance following the U.S. Supreme Court's 2008 decision in *District of Columbia v. Heller*.[19]

II. SPOONER VERSUS PHILLIPS: AN OVERVIEW OF THEIR "GREAT DEBATE"

In 1855, Lewis Tappan, a New York abolitionist, wrote to Louis Alexis Chamerovzow, the Secretary of the British and Foreign Anti-Slavery Society, about abolitionist organizations in the United States. Writing about the founders of the American and Foreign Anti-Slavery Society, Tappan observed that they initially:

> conceded that they could not constitutionally touch the slavery question in the States except by agreement and persuasion; but in the progress of its history not a few began to believe that something more could be done, that *slaveholding was not only sinful but illegal and unconstitutional*, and within the power of the people of the U.S. through the national legislature and judiciary.[20]

It was appropriate that he only gave as an example the work of Lysander Spooner. As I have shown elsewhere, in the 1830s, abolitionists who disagreed with the Garrisonian condemnation of the Constitution offered modest and cautious arguments that the document permitted but did not actually sanction slavery.[21] More radical theories of constitutional interpretation took hold during the

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[19] 128 S. Ct. 2783 (2008).

[20] Letter from Lewis Tappan to L.A. Chamerovzow (Apr. 13, 1855), *quoted in* A SIDE-LIGHT ON ANGLO-AMERICAN RELATIONS, 1839–1858: FURNISHED BY THE CORRESPONDENCE OF LEWIS TAPPAN AND OTHERS WITH THE BRITISH AND FOREIGN ANTI-SLAVERY SOCIETY 357, 359 (Annie Heloise Abel & Frank J. Klingberg eds., 1927) (emphasis added).

[21] Helen J. Knowles, *The Constitution and Slavery: A Special Relationship*, 28 SLAVERY & ABOLITION 309 (2007).

1840s, but only Spooner's could claim a methodologically rigorous, absolutist commitment to the position that slavery was unconstitutional. Into the 1850s, Spooner's arguments were beginning to attract some prominent abolitionists, including Frederick Douglass. By the middle of that decade, however, his work still stood alone in its logical and legal integrity.

Unfortunately for Spooner, and indeed for the abolitionist community at large, too many people were eager to dismiss his work because it was based upon a conception of law and a notion of the judicial role that looked beyond what American judges were actually doing. It was impossible to deny that Spooner's work championed individual liberty. However, the title of "Prophet of Liberty, Champion of the Slave" ultimately went to Wendell Phillips,[22] the Boston Brahmin who, ironically, interpreted the Constitution as offering no protection for individual liberty. In November 1842, Phillips made his first public pronouncement that the Constitution should be abandoned. He was met with considerable hostility, in large part because he chose to offer these views at a meeting in Boston's "Cradle of Liberty," Faneuil Hall. The meeting was called to discuss the imprisonment in Boston of George Latimer, a fugitive slave. Phillips argued that the truly guilty parties in the affair were those who failed to accompany their criticism of fugitive slave laws with criticism of the U.S. Constitution. This document, he said, was the "chain which binds you to the car of slavery"; it made "white slaves" out of its adherents.[23] To the outrage of the audience he proclaimed that the "spirit of liberty" is "chained down by the iron links of the United States Constitution."[24] He argued that it prevented people, *even if they were so willing*, from rising in defense of Latimer.

Two years later, when the debate between Phillips and Spooner formally began—upon publication of *Pro-Slavery Compact*—Phillips was able to shore up his interpretive position with what he considered to be irrefutable evidence that the Constitution was a "covenant

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[22] The inscription on the bronze statue of Phillips, dedicated in 1915 and situated in the Boston Public Garden, reads "Prophet of Liberty, Champion of the Slave."

[23] Wendell Phillips, Remarks at Faneuil Hall Meeting (Oct. 30, 1842), *reprinted in* THE LIBERATOR #45, Nov. 11, 1842 (on file with the New York University Journal of Law & Liberty).

[24] *Id.*

with death."[25] Produced for the American Anti-Slavery Society, the book was a compendium of selections from various historical documents, most prominently James Madison's recently published *Notes of Debates in the Federal Convention of 1787*. Phillips argued that these works demonstrated "most clearly all the details of that 'compromise,' which was made between freedom and slavery, in 1787."[26] The following year, Spooner responded with *The Unconstitutionality of Slavery* [hereinafter *Part First*].[27] He argued that the Constitution in no way sanctioned slavery; the peculiar institution was in fact unconstitutional; and the use of historical documents to prove otherwise was a fraudulent exercise. In Spooner's opinion, the only legitimate reading of the nation's supreme law was one that adhered to the original meaning of its text.[28] In 1847, Phillips responded with the *Review*.[29] The final word in this debate came from Spooner's pen, just a few months later, when he wrote *The Unconstitutionality of Slavery: Part Second* [hereinafter *Part Second*],[30] in which he provided additional evidence for the argument made in *Part First*.

What are the legitimate sources to consult when interpreting the law? This was a question to which Phillips and Spooner had very different answers. Only the answer provided by Spooner offered any hope of securing the "Blessings of Liberty" for which the Constitution existed to protect. However, before proceeding to an analysis of their different interpretive methodologies, it is necessary

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[25] PHILLIPS, *supra* note 15.

[26] *Id.* at 3. In addition to Madison's *Notes*, Phillips excerpted a speech given by Luther Martin to the Maryland legislature; the debates from the state ratification conventions in Massachusetts, New York, Pennsylvania, Virginia, North Carolina, and South Carolina; the Federalist, numbers forty-two and fifty-four; the debates in the first Congress; the address of the executive committee of the AA-SS, given by William Lloyd Garrison at that organization's tenth anniversary celebration in 1844; a letter from Francis Jackson to Governor George N. Briggs (1844); and extracts from speeches given by Daniel Webster and John Quincy Adams (1844). Pro-Slavery Compact is, as Stanley Burton Bernstein has written, a "scissors-and-paste pamphlet." Stanley Burton Bernstein, Abolitionist Readings of the Constitution 148 (1969) (unpublished Ph.D. dissertation, Harvard University) (on file with the New York University Journal of Law & Liberty).

[27] SPOONER, *supra* note 3.

[28] *Id.* at 57–58.

[29] PHILLIPS, *supra* note 15.

[30] SPOONER, *supra* note 2.

to gain an understanding of the contrasting definitions of "law" from which these two men worked.

In keeping with William Blackstone's argument that slavery was inconsistent with natural law, Lord Mansfield famously wrote in *Somerset v. Stewart* that slavery could only be supported with the force of positive law.[31] Besides being an opinion "that molded American constitutional development for ninety years,"[32] *Somerset's Case* was pivotal with regard to Phillips's understanding of the relationship between slavery and American law. As a "concise definition" of the positive law to which Mansfield had referred, Phillips admiringly quoted from *Commonwealth v. Aves*,[33] wherein Chief Justice Lemuel Shaw commented on Mansfield's reasoning:

> [B]y *positive law*, in this connection, may be as well understood *customary law* as the enactment of a statute; [and] the word is used to designate *rules established by tacit acquiescence*, or by the legislative act of any state, and which derive their force [and authority] from such acquiescence or enactment, and not because they are the dictates of natural justice, and as such of universal obligation.[34]

To this definition Phillips added the following:

> *Positive* law is the term usually employed to distinguish the rules, usages, and laws which are made *by man*, from those which God has implanted in our nature. It matters not whether these rules and laws are written or unwritten, whether they originate in custom, or are expressly enacted by Legislatures. In a word, *positive* means *arbitrary*, and is used as opposed to *moral*.[35]

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[31] (1772) 98 Eng. Rep. 499 (K.B.).

[32] HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875, at 88 (1982).

[33] 35 Mass. 193 (1836).

[34] *Id*. at 212 (*quoted in* PHILLIPS, *supra* note 15, at 85 (the italics were added by Phillips, and the words in brackets represent those that he failed to include in the quotation)).

[35] PHILLIPS, *supra* note 15, at 85.

When combined, these two definitions show that, to Wendell Phillips, law represented the following principles: (1) fidelity to custom/tradition and/or text; (2) an emphasis on rules; and (3) a *legal* irrelevancy of moral obligations. Out of these principles emerged an unwavering commitment to majority rule and a limited conception of the proper judicial role.

Lysander Spooner offered a very different definition of the law. Indeed, in an 1846 letter to George Bradburn, a close acquaintance, Spooner concluded that Phillips's criticism of his book served to demonstrate that Phillips "is no lawyer. . . . He lacks one indispensable requisite of a lawyer—to wit, a knowledge of the purpose of law." Why was this important? As Spooner proceeded to explain, "It is an old saying that a man cannot know the law, until he knows the reason of the law."[36] Phillips, Spooner concluded, did not know "the reason of the law" and cared little about respecting the classic libertarian commitment to the political primacy of the individual.

In *Part First*, after bemoaning the fact that "popular opinions" of both "the true definition of law" and "the principle, by virtue of which law results from" were "very loose and indefinite," Spooner asserted that law is "an intelligible principle of right, necessarily resulting from the nature of man."[37] Departing sharply from Phillips, he did not see law as "an arbitrary rule, that can be established by mere will, numbers or power."[38] He would not accept that the morality of a law was irrelevant, because whether or not something was in fact a "law" could only be determined by judging its concordance

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[36] Letter from Lysander Spooner to George Bradburn (Mar. 5, 1846) (on file with the New-York Historical Society), *available at* www.lysanderspooner.org/NY51.HTM. On April 12, 1908, the New York Herald reported that Benjamin R. Tucker's Unique Bookstore (which stocked libertarian and anarchist volumes), in New York City, was lost to fire. Amongst the destroyed materials were manuscripts entrusted to Tucker by Spooner, one of his mentors. JAMES J. MARTIN, MEN AGAINST THE STATE: THE EXPOSITORS OF INDIVIDUALIST ANARCHISM IN AMERICA, 1827–1908, at 273 (Ralph Myers Publisher 1970) (1953); WENDY MCELROY, THE DEBATES OF LIBERTY: AN OVERVIEW OF INDIVIDUALIST ANARCHISM, 1881–1908, at 20 (2003). Although Spooner's 'papers' did not survive, approximately four hundred letters did—although where they were actually stored is not clear. Transcripts of the majority of Spooner's letters are available online at www.lysanderspooner.org. The originals are held at the New-York Historical Society in New York City, New York and at the Boston Public Library in Boston, Massachusetts.

[37] SPOONER, *supra* note 3, at 5.

[38] *Id.*

with the dictates of natural justice, dictates which spoke of the "moral obligations" of individuals.[39] The "principle, by virtue of which law results" is "*the rule, principle, obligation or requirement of natural justice*," whose true origins lie in individuals' natural rights. From this line of reasoning emerges the conclusion that "[t]he very idea of law originates in men's natural rights."[40]

III. WENDELL PHILLIPS: GIVE ME HISTORY, NOT LIBERTY!

One of the most important things to understand about the Phillips-Spooner debate is that the text of the Constitution alone could not conclusively support the arguments of either Phillips or Spooner.[41] For Phillips, the way in which to determine the intentions of the Framers was to look to external, historical sources. He was enamored with the historical mystique that attached to the writings excerpted in his *Pro-Slavery Compact*, even if they did seem to prove that the Framers had made an "agreement with hell."[42] Interestingly, the importance of Madison's *Notes*[43]—which in 1844 Phillips heralded as the primary indication of the Framers' evil intentions[44]—was significantly reevaluated in the *Review*.[45] Indeed, by the time he wrote the *Review* in 1847, Phillips had made a conscious move away from his earlier endorsement of the interpretive value

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[39] The "true and general meaning" of law, he wrote, is "that *natural*, permanent, unalterable principle, which governs any particular thing or class of things. The principle is strictly a *natural* one; and the term applies to every *natural* principle, whether mental, moral, or physical. Thus we speak of the laws of mind; meaning thereby those *natural*, universal and necessary principles, according to which mind acts, or by which it is governed. We speak too of the moral law; which is merely an universal principle of moral obligation, that arises out of the nature of men, and their relations to each other . . . ." *Id.* at 5–6.

[40] *Id.* at 6.

[41] *Cf.* Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1047 (1991) (only pointing to Spooner, rather than both Spooner and Phillips, as someone who could not "derive any positive support for his thesis" from the Constitution's text).

[42] DOCUMENTS OF UPHEAVAL, *supra* note 4.

[43] Notes of Debates in the Federal Convention of 1787 Reported by James Madison (Ohio University Press 1966) (1840).

[44] PHILLIPS, *supra* note 15, at 6 (stating that Madison's *Notes* demonstrate that "our fathers bartered honesty for gain and became partners with tyrants that they might share in the profits of their tyranny").

[45] PHILLIPS, *supra* note 11, at 32–33.

of the *Notes*.[46] Phillips even went so far as to concede that Spooner was correct in his evaluation "that those men [the Framers] were employed merely to draft the Constitution. Their office was that of clerks."[47] What Phillips would not accept, however, was that this fact completely devalued the *Notes*. He pointed out that the product of the Framers' work was sent to *state* conventions that met "*in the name of the people*" in order to determine the document's ratification.[48] More importantly, this historical evidence made an essential contribution to our understanding of the all-too-often ambiguous Constitution. This was because of the central role he believed "contemporaneous exposition" played in legal interpretation and construction.[49]

Phillips's faith in this historical material—a faith that prevented him from ever coming to terms with the Constitution's genuine commitment to individual liberty—was demonstrated when he sought to counter Spooner's arguments by showing that they did not comport with the "ugly reality" that was the judiciary's "pro-slavery" readings of the Constitution.[50] For support of his method of constitutional interpretation, Phillips triumphantly observed that there was no need to go further than the authoritative word of the Supreme Court itself. Take, for example, Chief Justice John Marshall's opinion

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[46] As Phillips explains, Spooner's writings influenced this change of mind. As Professor Baade points out, though, given the close attention paid by Phillips to the Supreme Court's work, an additional factor was probably the Court's opinion in *Aldridge* v. *Williams*, 44 U.S. 9 (1845), wherein Chief Justice Taney rejected the interpretive validity of Madison's *Notes*. Baade, *supra* note 41, at 1050.

[47] PHILLIPS, *supra* note 11, at 32.

[48] *Id.* (emphasis in original).

[49] As justification for the use of such sources, Phillips cited "the oft-repeated maxim of Lord Coke, '*Contemporanea expositio est optima et fortissima in lege*.' (Contemporaneous exposition is of great weight and authority in the law.)." *Id.* at 28. Phillips also cited *The Federalist No. 83,* presumably referring to Hamilton's statement that "[t]he rules of legal interpretation are rules of *common-sense*, adopted by the courts in the construction of the laws." *Id.* at 30 (*quoting* THE FEDERALIST NO. 83, at 519 (Alexander Hamilton) (Benjamin F. Wright, ed., 2002)). (To read this statement as justifying a positivist method of constitutional interpretation is, however, to overlook the content of *No. 83* in its entirety). Other justifications that Phillips cites include various passages from Joseph Story's COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Melville M. Bigelow ed., William S. Hein & Co. 1994) (1891) and numerous Supreme Court opinions. PHILLIPS, *supra* note 11, at 30–31.

[50] PHILLIPS, *supra* note 11, at 3.

in *Cohens v. Virginia*.[51] Here, said Phillips, was an opinion that clearly legitimized consultation of external, historical sources, as evidenced by the following passage:

> Great weight has always been attached, and very rightly attached, to contemporaneous exposition. . . .
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> The opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed.[52]

Passages such as these became the evidentiary cornerstones of Phillips's argument that only by looking at contemporaneous usage could a law be labeled as unjust or wicked: "words, when doubtful and ambiguous, are to be interpreted by the context, by the object sought, and by contemporaneous usage,"[53] a methodology that justified the consultation of external materials such as Madison's *Notes*. Were we to go in search of judicial vindication of this argument, then surely we would need to look no further than Marshall's opinion in *McCulloch v. Maryland*, where he uses "subject," "context," and "intent" to determine the meaning of "necessary."[54]

As Christopher Wolfe's research shows, however, this is not an example of a Marshallian adherence to "extrinsic" intent; rather, it is one very good example of the Chief Justice's conception of constitutional interpretation based on "*intrinsic*" intent.[55] The following

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[51] 19 U.S. (6 Wheat.) 264 (1821).

[52] *Id.* at 418; *see* PHILLIPS, *supra* note 11, at 29.

[53] PHILLIPS, *supra* note 11, at 29.

[54] 17 U.S. (4 Wheat.) 316, 414–15 (1819).

[55] Christopher Wolfe, *John Marshall & Constitutional Law*, 15 POLITY 5, 10 (1982) (emphasis added).

excerpt from *Ogden v. Saunders*[56] represents a "typical general statement"[57] of Marshall's rules of interpretation:

> To say that the intention of the instrument must prevail; that this intention must be collected from its words, that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers;—is to repeat what has been already said more at large, and is all that can be necessary.[58]

This elaborates on the intrinsic intent that Marshall pursued with the approach he adopted in *McCulloch*. For the Chief Justice, "interpretation is not a 'mechanical' process in which a set number of technical rules is applied seriatim. It is rather the prudential application of complex and overlapping rules to a given set of facts."[59] Marshall arrived at his understanding of ambiguous words by looking at the "cumulative interaction" of, amongst other things, the subject, context, and intent that were by no means independent factors.[60] They were factors that could be used to interpret the Constitution in accordance with the "general" principles of the Framers.[61] An understanding of one clause could not, Marshall believed, be achieved without consideration of the entire document of which it was a part.[62]

In *Pro-Slavery Compact* and *Review*, therefore, Wendell Phillips took aim at the "ugly reality" of a Supreme Court making decisions by expressing fidelity to a legal document that sanctioned slavery. He was not, however, attacking the justices by analyzing their work

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[56] 25 U.S. (12 Wheat.) 213 (1827).

[57] Wolfe, *supra* note 55, at 7; *cf.* John Choon Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607, 1619 (1992) (describing *Ogden* as a "general statement" of Marshall's interpretive methodology).

[58] *Ogden*, 25 U.S. (12 Wheat.) at 332.

[59] Wolfe, *supra* note 55, at 11.

[60] *Id*.

[61] On the occasions that Marshall did look to external evidence of intent, it was to determine the Framers' understanding of these principles, not their views on specific clauses or issues. *Id*. at 10–11.

[62] *Id*. at 8–11.

on their own terms. He used evidence of extrinsic intent in order to criticize opinions based on rules of interpretation reflecting the intrinsic nature and structure of the law. These were the intrinsic intentions of the document upon which Lysander Spooner based his understanding of the relationship between slavery and the Constitution.

IV. LYSANDER SPOONER: GIVE ME LIBERTY . . . "[W]ITH [I]RRESISTIBLE [C]LEARNESS"[63]

By Spooner's definition of law, it was clear that law and morals were not separate concepts. What role did natural justice play, however, in an interpretation of the U.S. Constitution? In order to answer this question, Spooner also looked to the writings of Chief Justice Marshall. He did so not, like Phillips, for vindication of the use of external evidence to support readings of the Constitution, but in order to find a rule of interpretation that would confirm the libertarian foundations of that document. He found that rule in *United States v. Fisher*,[64] an opinion accurately described as "the Marshall Court's most extensive discourse on interpretive methodology."[65] Although better known as an exposition on the Necessary and Proper Clause (predating *McCulloch*), *Fisher* was of relevance to Spooner because of the one passage of Chief Justice Marshall's opinion that read as follows:

> 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.[66]

This *Fisher* rule, whose "reasonableness, propriety, and therefore truth" were proven by the fundamental principles of natural justice,[67] formed the heart of Spooner's original meaning method of interpreting

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[63] SPOONER, *supra* note 2, at 19.
[64] 6 U.S. (2 Cranch) 358 (1805).
[65] Yoo, *supra* note 57, at 1619.
[66] *Fisher*, 6 U.S. (2 Cranch) at 390, *quoted in* SPOONER, *supra* note 3, at 18–19.
[67] SPOONER, *supra* note 2, at 155.

the U.S. Constitution.[68] Whether this rule is in fact one of construction and not of interpretation is subject to debate. I would argue that, properly understood, it is a rule of interpretation because it provides us with the operative presumption that Spooner uses to determine the original meaning of the Constitution. He assumes that people are fully aware of their natural rights.[69] The original meaning of the Constitution is what the reasonable person would have understood it to be (this is a notion of "hypothetical" consent because Spooner realized, quite correctly, that the Constitution was not ratified by the unanimous consent of the people). And the reasonable person would not have consented to violations of his or her natural rights. Therefore, any such violations must be "expressed with irresistible clearness."[70] Wendell Phillips agreed with Chief Justice Shaw's reasoning in *Aves* in its totality. Spooner, by contrast, agreed that the people had "tacitly acquiesced" to the Constitution, but only believed that they had done so because the document did not infringe on their rights unless it explicitly said so.

Prior to the articulation of the *Fisher* rule in *The Unconstitutionality of Slavery*, Spooner permits only one role for positive law. A statute only becomes a (positive) law that is "binding, on the ground of contract, upon those who are parties to the contract, which creates the government, and authorizes it to pass rules and statutes to carry out its objects" if it is consistent with natural justice.[71] The *Fisher* rule of legal interpretation is used to determine if this consistency exists. Given Spooner's definition of law, it follows that government

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[68] Although *Fisher* dealt with statutory rather than constitutional construction and interpretation, Spooner would argue that there was no legal difference between the two: "A constitution is nothing but a contract, entered into by the mass of the people, instead of a few individuals. This contract of the people at large becomes a law unto the judiciary that administer it, just as private contracts, (so far as they are consistent with natural right,) are laws unto the tribunals that adjudicate upon them. All the essential principles that enter into the question of obligation, in the case of a private contract, or a legislative enactment, enter equally into the question of the obligation of a contract agreed to by the whole mass of the people. This is too self-evident to need illustration." SPOONER, *supra* note 2, at 65.

[69] SPOONER, *supra* note 2, at 141, 153. For a useful, and concise discussion of the differences between interpretation and construction, see Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 973–74 (2009).

[70] SPOONER, *supra* note 2, at 190.

[71] *Id.* at 8.

can only have the power that "individuals may rightfully delegate to it." These delegations of power, he believed, should not be inconsistent with natural rights, whose inalienability gave them automatic supremacy over positive law.[72] "[F]or the sake of argument," however, he was willing to concede that such violations might indeed exist. This was not a huge concession, though, because this statement immediately followed it: "I shall only claim that in the interpretation of all statutes and constitutions, the ordinary legal rules of interpretation be observed."[73] If this then led to the conclusion that the people had delegated power to a government in such a manner that it violated their natural rights, then one could bemoan but not challenge the legality of these actions.[74]

The *Fisher* rule took on a major role because it provided an opening for explaining: (1) how originalist interpretation might be undertaken without recourse to extraneous evidence; and (2) why the use of such evidence was not a permissible way in which to understand legal rules. "The pith of this rule is," Spooner explained, "that any *unjust* intention must be '*expressed with irresistible clearness*,' to induce a court to give a law an unjust meaning."[75] But just what did "expressed" mean? In terms of the Constitution, was it any more helpful (or legal) to talk of the document's "expressions" as opposed to its "intentions"? To Spooner there was little to distinguish the intention of the Constitution from that which it expressed.

Original Intentions

Original intent originalism has fallen from favor in recent years, to be replaced by an emphasis on the original meaning or original understanding of the Constitution,[76] and Spooner's theory fits

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[72] *Id.* at 8, 14.

[73] *Id.* at 16–17.

[74] *Id.* at 17–19. In both parts of *The Unconstitutionality of Slavery*, Spooner defines and provides detailed analysis of numerous rules of interpretation. *See id.* at 60–65, 155–205. In this article I only identify the most important of these rules.

[75] SPOONER, *supra* note 2, at 190 (emphasis in original).

[76] Some influential works that are part of the ever-growing body of literature on this subject are Lawrence B. Solum, *Semantic Originalism* (Univ. of Ill. Coll. of Law, Ill. Pub. Law & Legal Research Paper Series, No. 07-24, 2008), *available* at http://ssrn.com/abstract=1120244; RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION:

squarely into the original meaning originalism literature. Spooner does not, however, disavow the use of the words "intent" or "intentions" in constitutional interpretation. Indeed, one finds more references in *The Unconstitutionality of Slavery* to the intentions of the document than to its meaning. This is because, in Spooner's mind, there really was no need to separate the two. Original intent(ion) originalism, as he describes it, is in fact what we today would call original *meaning* originalism. Where he departs from the way in which we traditionally understand original intent originalism is that he only imparts legal relevance to the intentions of the Constitution. The Framers' intentions, interesting as they may be to historians, should play no role in determining the meaning of the Constitution.[77] These intentions are determined, Spooner explains, from the words of the Constitution itself. Spooner argued that when someone (such as Phillips) says that the Constitution "intends" to sanction slavery, he or she really means that it "does" sanction slavery.[78] In the absence of textual support for this assertion, there is a resort to the rhetoric of intent. This "personifies" the Constitution as a "crafty individual" that is "capable of both open and secret intentions."[79] The "open" intentions drawn from the text of the Constitution are mixed with "secret" ones drawn from external historical evidence of the Framers' intentions. This does not, Spooner argues, lead to an understanding of the legal meaning of a document of law. "As a written legal instrument," the Constitution "must have a fixed, and not a double meaning." One cannot attribute to its text a "soul," "motive," or "personality," with the exception of "what those words alone express or imply."[80]

Using reasons very familiar to modern originalist constitutional theory, Spooner disavowed the historical relevance of Madison's *Notes* and wholeheartedly condemned the worth of Jonathan Elliott's

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TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

[77] SPOONER, *supra* note 2, at 121.

[78] *Id.* at 57–58.

[79] *Id.*

[80] *Id.* at 58.

compilation of the states' constitutional ratification debates.[81] "The intentions of the framers of the constitution (if we could have, as we cannot, any *legal* knowledge of them, except from the words of the constitution,) have nothing to do with fixing the legal meaning of the constitution."[82] The only intentions that have *legal* relevance are those of "The People"; we learn those from the Constitution's text. The intentions of the constitutional conventions in Philadelphia and in the states are "at best a matter of conjecture and history, not of law, nor of any evidence cognizable by any judicial tribunal."[83]

Spooner does allow for one particular, limited interpretive use of external evidence. We know what the legal meaning of a law is by looking at its text, but words are ambiguous and susceptible to multiple meanings. Therefore, he says, we use the following two rules of interpretation:

1. "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;"

2. "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."[84]

In accordance with these rules, and that stated in *Fisher*, external evidence may be used to resolve the ambiguities of a law that is consistent with natural justice because such a use would be an additional means for ensuring the protection of individual rights.[85]

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[81] *Id.* at 116–18 (quoting JONATHAN ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, at iii (Jonathan Elliot ed., 2nd ed. 1836) (1830)).

[82] SPOONER, *supra* note 2, at 114.

[83] *Id.* at 21.

[84] *Id.* at 58–59 (emphasis in original).

[85] *Id.* at 190–91.

Judicial Role and Overcoming the Moral-Formal Dilemma

These rules created a limited role for judges. In terms of protecting the "Blessings of Liberty"[86] of which the Constitution speaks, however, it was an extremely important role. Spooner bemoaned the fact that the judiciary, while nominally an independent branch of government, had in fact become increasingly beholden to the wishes of the other branches. The solution to this problem, he believed, was more rigorous use of judicial review; in the interests of liberty, he saw an active role for the judiciary.[87] This would not be "judicial activism" (in the pejorative sense), however, because the judges would be bound by the interpretive rules outlined above. Adoption of Spooner's theory would not create a "countermajoritarian problem" because, as Spooner wrote elsewhere, "[t]here is no particle of truth in the notion that the majority have a *right* to rule, or to exercise arbitrary power over, the minority, simply because the former are more numerous than the latter."[88] Enforcement of this understanding of the relationship between majorities and minorities and application of the proper rules of interpretation would of course fall to the judiciary.[89]

How did Spooner actually expect the judiciary to do this work when, as Phillips argued[90] and as Robert Cover famously explained in *Justice Accused*,[91] many antebellum judges were actually beholden to, and took an oath to uphold, laws that were clearly antithetical to

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[86] U.S. CONST. pmbl.

[87] SPOONER, *supra* note 2, at 15.

[88] LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY (1852), *reprinted in* THE COLLECTED WORKS OF LYSANDER SPOONER, VOL. II: LEGAL WRITINGS (I) 207 (Charles Shively ed., M & S Press 1971).

[89] *See* Larry M. Hall, The Political Thought of Lysander Spooner, at 125 (1986) (unpublished M.A. thesis, University of Tennessee-Knoxville) (on file with the New York University Journal of Law & Liberty); SPOONER, *supra* note 2, at 130. I discuss Spooner's intended role for the judiciary in more detail in Helen J. Knowles, *"The Pen Is Mightier Than The Sword": Lysander Spooner's Constitutional Response to Increasing Abolitionist Violence in the 1850s* (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1465876.

[90] *See* WENDELL PHILLIPS, Removal of Judge Loring, (Feb. 20, 1855) *in* SPEECHES, LECTURES, AND LETTERS 159 (James Redpath, 3d ed. 1868) (1863) (rejecting Judge Greely's defense that he did not violate any positive Massachusetts law and that he acted in accordance with the U.S. Constitution in upholding the Fugitive Slave Law of 1850).

[91] COVER, *supra* note 11.

their personal anti-slavery views? How was the judiciary to overcome what Cover described as this "moral-formal" dilemma?[92]

When reviewing *Justice Accused*, Ronald Dworkin offered a normative solution to the moral-formal dilemma. He suggested that antebellum judges could have employed a constitutional theory which, while "not set out in any influential work of jurisprudence…was not unknown or foreign to contemporary lawyers." This common law theory stated that (contrary to Phillips's claim):

> the law of a community consists not simply in the discrete statutes and rules that its officials enact but in the general principles of justice and fairness that these statutes and rules, taken together, presuppose by way of implicit justification.[93]

Dworkin can be criticized for declining to suggest reasons why judges did not use this theory. Here, however, the most important observation is that Spooner's interpretive framework had the potential to create far fewer juridical problems than Dworkin's proposal. To be sure, Spooner would agree that the legitimacy of positive law should be determined by reference to its presupposed incorporation of "general principles of justice and fairness." He could never agree, however, that fidelity to the proper judicial role would come through decision-making based on a judge's individual belief that he was correctly applying the principles that he knew that the written law "implicitly justified." Dworkin tries to avoid this problem by saying that:

> These principles were not simply the personal morality of a few judges, which they set aside in the interests of objectivity. They were rather, on this theory of what law is, more central to the law than were the particular and transitory policies of the slavery compromise.[94]

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[92] *Id.*

[93] Ronald Dworkin, *The Law of the Slave-Catchers*, TIMES LITERARY SUPPLEMENT, Dec. 5, 1975, at 1437 (book review).

[94] *Id.*

This may be true, but it still fails to shield the judge from the most fundamental objection to a jurisprudence that is either based upon, or incorporates principles of natural law—the objection that there is no way in which to objectively identify and determine the content and boundaries of these principles. Determining the original meaning of a law by examining its words from a natural law perspective, as Spooner did, cannot completely eradicate this problem. However, the judge who refers to "general principles of justice and fairness" as they are written into positive law should encounter fewer charges of countermajoritarian decision-making. He or she might be less likely to encounter the moral-formal dilemma than the judge who presupposes that these principles guide his or her judicial work because of an understanding that positive law implicitly justifies the existence of these principles. More importantly, they serve as an additional way of ensuring that the principle goal that judges work towards when interpreting the U.S. Constitution is the limiting of government in order to protect individual liberty.

V. THE LIBERTARIAN PROMISE OF AN UNFINISHED TREATISE

When *Part First* was published, it made no mention of *Pro-Slavery Compact*. The content of Spooner's work made it clear that it did not constitute a direct response to Phillips's arguments. Spooner chose not to mention his intellectual adversary by name until two years later when he specifically noted that the writing of *Part Second* was his way of rising to the interpretive methodological challenge set by the Garrisonian.[95] After all, Phillips had titled his second work *Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery*. What Spooner did not do, however, was to devote *Part Second* to a detailed discussion of the flaws of Phillips's observations. His work was not a "review" because Spooner simply did not consider the observations worthy of a detailed response. Instead, as its name suggested, the second volume was needed because Spooner had "other matters which . . . [he] wish[ed] to put into a sequel."[96]

At times during the summer of 1847, Spooner thought that he could make *Part Second* his last word on the subject. By August,

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[95] SPOONER, *supra* note 2, at 156.

[96] Letter from Lysander Spooner to George Bradburn (June 1, 1847) (on file with the New-York Historical Society), *available at* http://www.lysanderspooner.org/NY61.HTM.

however, his letters to George Bradburn demonstrated that Spooner was experiencing a mixture of emotions about the product of his labors. The progress he was making made him feel as though his views about the Constitution were being vindicated. Ultimately, though, he was sufficiently frustrated by the content of his work, that, before *Part Second* was finished, he had already begun contemplating a third part to *The Unconstitutionality of Slavery*. "I cannot, in the book I am now writing," he wrote, "reply to Phillips so much in detail as I could wish to do, without leaving out more important things."[97] Even after the publication of *Part Second* and repeatedly stated concerns that it was too long (he described it as "verbose, obscure, and ha[ving] some repetitions that might have been avoided"), Spooner fully intended to "close up the subject" by writing another part.[98] He never intended *Part Second* to be a "Part Second of Two." As he wrote to Bradburn in December 1847, "I am pleased to know of your satisfaction with what is already done—and as to your desire to have something asked on other points, I can only say, 'Have patience, and I will tell thee all.'"[99] Further correspondence and a manuscript which was only ever published as a newspaper article give us glimpses of the "other points" upon which Spooner expected to "tell all."

In 1848, *The Daily Chronotype*, a Boston newspaper, published Spooner's "Unconstitutionality of Slavery in the District of Columbia." Spooner clearly intended this to form part of the next installment of his

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[97] Letter from Lysander Spooner to George Bradburn (Aug. 25, 1847) (on file with the New-York Historical Society), *available at* http://www.lysanderspooner.org/NY54.HTM.

[98] A prominent theme contained in Spooner's correspondence is his concern about lack of finances. It was to this that he attributed many of the flaws of *Part Second*. With "more time," he wrote, "I could have improved it, but the demands of the cause, and the emptiness of my pocket, compelled me to publish now." This suggests that there was a demand for his work that he needed to meet without delay. However, given that the letter is dominated by his complaints about lack of money, it is difficult to determine (without further research, beyond the scope of this article) just how much this demand really existed. Letter from Lysander Spooner to George Bradburn (Oct. 4, 1847) (on file with the New-York Historical Society), *available at* http://www.lysanderspooner.org/NY56.HTM.

[99] Letter from Lysander Spooner to George Bradburn (Dec. 5, 1847) (on file with the New York Historical Society Library), *available at* http://www.lysanderspooner.org/NY55.HTM.

treatise.[100] However, the appearance in the *Chronotype* was the only publication of any of the views that would have filled part three. As I have explained elsewhere, Spooner's reading of Article I, Section 8, Clause 17 of the Constitution, the District Clause,[101] had great potential to build upon previous abolitionist interpretations because it was underpinned by solid and logical legal reasoning.[102] Spooner's main argument was that the Constitution did not distinguish between the power of Congress with regard to the District and its power over the rest of the nation. In order to gain a full appreciation of the extent to which Spooner-the-abolitionist contributed to our understanding of the boundaries of liberty, it is worth considering one particular aspect of the discussion that was contained in this unpublished part of his abolitionist treatise.

Unlike the first and second parts of *The Unconstitutionality of Slavery*, Spooner devoted a considerable portion of his District of Columbia discussion to provisions of the Bill of Rights. He wrote that the First, Second, and Fourth Amendments "all apply to the power of Congress within the District of Columbia; and they all imply personal liberty on the part of the people."[103] In *Part Second*, Spooner had found it necessary to expound upon the meaning of the Tenth Amendment.[104] The Tenth Amendment states: "The powers

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[100] Lysander Spooner, *Unconstitutionality of Slavery in the District of Columbia*, THE DAILY CHRONOTYPE, May 12, 1848, *reprinted in* 5 N.Y.U J.L. & Liberty [PAGE NUMBER] (2010).

[101] "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States . . . ."

[102] Knowles, *supra* note 21, at 319–20.

[103] Spooner, *supra* note 100.

[104] Spooner did not believe, however, that it was really necessary to discuss the Tenth Amendment, because he felt (perhaps naively) that the principle of limited government that it embodied was so fundamental that it would constrain the actions of the states without needing to be stipulated in an additional provision of the Constitution. He wrote:

> [T]his amendment was inserted only as a special guard against usurpation. The government would have had no additional powers if this amendment had been omitted. The simple fact that all a government's powers are delegated to it by the people, proves that it can have no powers except what are delegated. And this principle is as true of the State governments, as it is of the national one . . . .

not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Rejecting as a "bald and glaring falsehood" the interpretation that held this to mean "that the State governments *had all power that was not forbidden to them*," Spooner argued that what the Amendment actually did was to impose upon the states the same principle of limited government to which the rest of the Constitution held the federal government. He wrote, "Of necessity, therefore, instead of their having all authority except what is forbidden, they [the states] can have none except what is granted."[105] By arguing that his constitutional theory imposed limits on actions by both the federal and state governments, Spooner opened himself up to calls from the abolitionist community for him to venture an opinion on whether the Bill of Rights was a similarly limiting set of constitutional provisions. And this is exactly what happened.

In 1833, in *Barron v. Baltimore*, the Supreme Court held that the Bill of Rights did not limit actions of the state governments.[106] The abolitionist community wanted to know whether Spooner believed the opposite to be true. The correspondence in the Spooner papers relating to this issue all stems from 1849, strongly suggesting that Spooner was not the only person who believed that the manuscript published in the *Chronotype* was the latest, but not the last, installment of *The Unconstitutionality of Slavery*.[107] In the spring of 1849, the New York abolitionist Gerrit Smith (who had underwritten much of Spooner's treatise) sought, albeit indirectly, to "draw out" Spooner on the "Amendments."[108] Spooner's initial knee-jerk reaction was to refuse to provide more commentary. He feared that other abolitionists would freely, as he believed they had done in the past, plagiarize

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SPOONER, *supra* note 2, at 272.

[105] *Id*. at 271.

[106] 32 U.S. 243 (1833).

[107] The issue had arisen on previous occasions, but the surviving Spooner correspondence suggests that it was not until after *Part Second* and the *Chronotype* article appeared that Spooner was strongly encouraged to address it. *See* Letter from George Bradburn to Lysander Spooner (Sept. 8, 1845) (on file with the New-York Historical Society), *available at* http://www.lysanderspooner.org/NY31.HTM.

[108] Letter from Lysander Spooner to George Bradburn (Mar. 9, 1849) (on file with the N.Y. Historical Society Library), *available at* http://www.lysanderspooner.org/NY66.HTM#a.

his arguments and profit at his expense.[109] By July, however, he could no longer contain his desire to respond to Smith's request.

In a letter on July 5, 1849, Spooner began by informing Smith that the significance of the question of applying the Bill of Rights to the states paled in comparison to the importance of emphasizing that they did *not* apply to actions of "private persons." "Slaveholding," he wrote, "is not an act of the government. It is merely a private crime committed by one person against another—like theft, robbery, or murder."[110] If one insisted on drawing him out on the state-national question, however, Spooner was ready with an answer. He believed that only the Second Amendment[111] applied to "both governments."[112] In a letter on July 17, Spooner reaffirmed that this was his belief.[113] He never tells us why this should be so. Instead, he asks us to wait until "my third part" is published (he states that he has written it), wherein he "prove[s] that [the Second Amendment] applies to both governments" and "that the others do not."[114] For whatever

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[109] "My answer is that if he or any body else expects to 'draw out' of me *gratis* an argument, for which I ought to be paid $100, or $200, more or less, he will probably find himself mistaken. . . . I have learned that a man must *eat* to live. I know too that I have given the Abolitionists nearly every valuable idea they have had for years. They have not given me bread in return. I am now literally a beggar—almost a 'common beggar.' If they want any more of my ideas, they must help me live. If they would have promoted, as they might, the sale of my books, or if they would have furnished me means to live and finish and publish the rest of my argument, and taken the copyright as security for their pay when it was done, I would have made no complaint. I would even have been thankful for such aid. But instead of this, they can squander thousands on men who will give them no ideas, and who have no ideas except what they steal from me. And when they want more ideas, they come to me, with all the innocence imaginable, and expect I shall stay my stomach with chips while I furnish them with ideas gratis. I'll see 'em damned first." *Id.*

[110] Letter from Lysander Spooner to Gerrit Smith (July 5, 1849) (on file with the New-York Historical Society), *available at* http://www.lysanderspooner.org/LT50.HTM.

[111] "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 be infringed." U.S. CONST. amend. II.

[112] Letter from Lysander Spooner to Gerrit Smith (July 5, 1849) (on file with the New-York Historical Society), *available at* http://www.lysanderspooner.org/LT50.HTM.

[113] Letter from Lysander Spooner to Gerrit Smith (July 17, 1849) (on file with the New-York Historical Society), *available at* http://www.lysanderspooner.org/LT49.HTM.

[114] Letter from Lysander Spooner to Gerrit Smith (July 5, 1849) (on file with the New-York Historical Society), *available at* http://www.lysanderspooner.org/LT50.HTM; *see also* Letter from Lysander Spooner to Gerrit Smith (July 17, 1849) (on file with the New-York Historical Society), *available at* http://www.lysanderspooner.org/LT49.HTM.

reason, *Part Third* never appeared.[115] Thanks to the *Chronotype* and to Spooner's letters, however, what we do know is that had it been published, this next component of *The Unconstitutionality of Slavery* would have been further evidence that the true libertarian protections of the Constitution come from within that document rather than, as Wendell Phillips alleged, from external sources.

VI. TWENTY-FIRST CENTURY POSTSCRIPT

On June 26, 2008, a citation inserted into Justice Antonin Scalia's opinion for the Court in *District of Columbia v. Heller* inadvertently confirmed the twenty-first century relevance of Spooner's views, particularly as they relate to the incorporation of the Second Amendment.[116] Justice Scalia devoted much of his opinion to an extensive survey of sources that served to support the conclusion that a rich body of historical sources pointed to an individualized (rather than collective) reading of that Amendment's protection of the "right of the people to keep and bear Arms." Spooner's *The Unconstitutionality of Slavery* was one of the antislavery sources that Scalia cited. He directed our attention to one of the passages of the work that interpreted this provision of the Bill of Rights as "enabl[ing] 'personal defence.'"[117]

In the two parts of his treatise, Spooner made two main references to the Second Amendment. Just like the other references to provisions of the Bill of Rights, they were brief, only meant to support his interpretations of other sections of the Constitution's text. He first related the Second Amendment to the clause of Article I, Section 8 that empowers Congress to organize and arm a militia that could, amongst other things, be used to "suppress insurrections." When combined with his reasoning that slavery was unconstitutional, the meaning of this provision led Spooner to conclude that it clearly gave the federal government, and only the federal government, the power to "enroll and arm" this militia. The body of men from whom it could draw its enrollees included all of

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[115] Spooner's correspondence provides no direct clues as to why this was so, but one can surmise from his letters that the failure to publish more of *The Unconstitutionality of Slavery* resulted from a combination of factors—financial, personal, political, and social.

[116] 128 S. Ct. 2783, 2807 (2008).

[117] *Id.* (quoting SPOONER, *supra* note 2, at 98). Scalia mistakenly cited page 116.

"those whom the States call slaves"—the men that the Constitution compelled the federal government to view as free. No other conclusion could be consistent with the dictates of natural justice. To this end, the Second Amendment was instructive because it similarly spoke of the *natural* right afforded *every individual*—"the natural right of *all* men 'to keep and bear arms' for their personal defence."[118] Spooner's second main *The Unconstitutionality of Slavery* reference to this right came when he used the Second Amendment as an example of what might happen "[i]f the courts could go beyond the innocent and necessary meaning of the words, and imply or infer from them an authority for anything contrary to natural right."[119] The Second Amendment implicitly sanctioned the individual use of arms. Consequently, were one inclined to interpret it without regard for natural justice, then one could plausibly make the case that it permitted such usage "not merely for the just and innocent purposes of defence, but also for the criminal purposes of aggression—for purposes of murder, robbery, or any other acts of wrong to which arms are capable of being applied."[120]

It remains to be seen whether Spooner's works make any future appearances in U.S. Supreme Court opinions (*Heller* was the first).[121] Perhaps his theories will be (re)visited by at least one member of the Court when that institution addresses the question of whether the Second Amendment applies to the actions of state and local governments when it decides *McDonald v. City of Chicago*.[122] If a Justice were inclined to pursue this avenue of research, then he or she would do well to pay attention to the content of the intended part three of *The Unconstitutionality of Slavery* and to Spooner's correspondence.[123] Together, these works leave us with no doubt that

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[118] SPOONER, *supra* note 2, at 98 (emphasis added).

[119] *Id*. at 66.

[120] *Id*.

[121] Some of his works have been cited in other lower federal court opinions. *See, e.g.*, U.S. Postal Serv. v. Brennan, 574 F.2d 712, 717 n.11 (2d Cir. 1978) (referring to the arguments made by Spooner in *The Unconstitutionality of the Laws of Congress Prohibiting Private Mails* (1844)); Lindsey v. United States, 133 F.2d 368, 376 (D.C. Cir. 1942) (citing SPOONER, *supra* note 88).

[122] NRA v. City of Chicago, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom.* McDonald v. City of Chicago, 130 S. Ct. 48 (2009).

[123] Spooner also discussed the Second Amendment in SPOONER, *supra* note 88, at 208, and in LYSANDER SPOONER, ADDRESS OF THE FREE CONSTITUTIONALISTS TO THE PEOPLE OF THE UNITED STATES (1860), *reprinted in* THE COLLECTED WORKS OF LYSANDER

Spooner believed that the right to "personal defence" is a right that every individual possesses, and is a right that no government, federal or state, may abridge.[124]

VII. CONCLUSIONS

Lysander Spooner's contributions to constitutional theory rarely receive serious scholarly praise. Instead, the Athol, Massachusetts, native is described as having "always [been] a pamphleteer/advocate before he [was] a philosopher."[125] It is conceded that he was responsible for "the most highly developed and *workable* system of individualist anarchism that emerges in nineteenth century America," but it is most often said that this did not result in the emergence of a consistent and highly developed political (or legal) philosophy.[126] It is largely because of this prevailing attitude that *The Unconstitutionality of Slavery* has not been recognized as a valid work of constitutional theory. As this article has shown, a reevaluation of Spooner's abolitionist reading of the Constitution is a worthwhile enterprise. This is because, unlike the more popular work of Wendell Phillips, it is a theory that heralds the commitment to individual liberty that lies at the heart of America's supreme law.

SPOONER, VOL. IV: ANTI-SLAVERY WRITINGS 25 (Charles Shively ed., M & S Press 1971). As Todd Zywicki notes with regard to the first of these works (but his comment is equally applicable to the other), its radical content means that "if the Supreme Court ever cites to 'Trial By Jury' that'll really be interesting!" Posting of Todd Zywicki to The Volokh Conspiracy, http://volokh.com/2008/06/30/supreme-court-cites-lysander-spooner/ (July 1, 2008, 12:27 EST) (comment in response to posting of Randy Barnett).

[124] For an additional overview of Spooner's writings on the Second Amendment, see David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1436–40 (1998).

[125] Hall, *supra* note 89, at 2 (emphasis in original).

[126] *Id*. at 56.