

The Unconstitutional Constitution: Understanding Post-Civil War Constitutional Disobedience through Lysander Spooner

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The number of American citizens who recognize the name Lysander Spooner (1808-1887) is minuscule. He is most commonly acknowledged among a small group of abolitionist scholars who recall him as the author of the famous and infamous nineteenth-century book, *The Unconstitutionality of Slavery*. In 2008 it was cited by Supreme Court Justice Antonin Scalia in *District of Columbia v. Heller* U.S. (2008) in reference to insurrectionists who used the Second Amendment to provide the legal basis for defeating slavery by force. While some recognize Spooner's abolitionism, few understand him as an attorney who challenged Massachusetts law and argued in favor of jury nullification. Spooner also wrote extensively on the need for a more solvent system of banking and also developed a theory of intellectual property. In total, Spooner published over thirty essays which now fill six volumes. The *Boston Daily Globe* wrote on 18 May 1887, "One of the most remarkable men who has ever walked the streets of Boston" passed away. "His name, Lysander Spooner, is known to but a few [but] it will someday be honored by millions." The *Globe* then proclaimed, "His loss to the country was the greatest since the death of Emerson" ("Lysander Spooner"). The adornment given Spooner seems far-fetched,

especially considering that the eulogist compares him with the esteemed Ralph Waldo Emerson, but begs the question of who was this little-known figure who died penniless and alone?

In 1870, at the age of sixty-two, Spooner finished arguably his most radical essay, *No Treason: The Constitution of No Authority* (*Collected Works* 171). In it he claims the Constitution can no longer be maintained as a legally binding charter. This radical declaration came near the end of Spooner's life, when he no longer believed that the Constitution was a legitimate legal sovereign. At first glance his legal theory of constitutional annulment may seem merely anarchic or ludicrous, conjured by a delusional mind. However, in private letters to James Madison and John Wayles Eppes, Thomas Jefferson also voiced similar sentiments in regard to the perpetual continuation of the Constitution (Jefferson 1280-81).

Spooner's radical streak began fermenting in 1832 when he left the family farm to study law under the tutelage of John Davis and Charles Allen. Davis, who eventually was elected governor of Massachusetts, and Allen, who became Chief Justice of the Supreme Court, were rigorously logical and saw promise in the farmer turned lawyer. As Spooner's education proceeded, he approached Allen and Davis with the proposition to open his own law practice in defiance against Massachusetts state law. Spooner had not yet met the requirement to study in a lawyer's office for five years, but believed this rule discriminated against the "educated poor." According to Massachusetts state law, individuals who studied at a university prior to their apprenticeship in an office only needed three years of first-hand experience before being admitted to the bar. Spooner, who grew up on a farm and did not attend a university, was required five years of apprenticing because of his lack of a college education. Largely influenced by Allen and Davis, Spooner opened his own office believing Massachusetts legislated against less fortunate individuals who were unable to finance a college education. By requiring an additional two years of apprenticeship for the underprivileged,

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Massachusetts law enabled the wealthy élites to control the law practice. Spooner began his endeavor with promise, but his practice eventually failed after he published scathing critiques of the Bible and Jesus Christ that affected his reputation (Barnett, "Was Slavery Unconstitutional" 66).

Prior to the Civil War, Spooner's anti-Constitutional arguments likely would have been heralded by reformers in New England. William Lloyd Garrison, a contemporary of Spooner, aggressively protested against the Constitution. In *The Liberator*, Garrison's uncompromising American anti-slavery journal, he constantly argued that the Constitution was a pro-slavery charter. This led him to declare the Constitution as "the most bloody and heaven-daring arrangement ever made by men for the continuance and protection of a system [slavery] of the most atrocious villainy ever exhibited on earth" ("The Great Crisis"). According to Garrison, the Constitution became a "covenant with death" and "an agreement with hell," and during a Massachusetts Anti-Slavery Society rally on the Fourth of July in 1854, he burned a copy of the Constitution to the applause of many abolitionists (Finkelman 2000). Wendell Phillips, another leading abolitionist, also voiced his frustration with the Constitution for upholding slavery and argued "that any one who swears to support it, swears to do pro-slavery acts and violates his duty both as a man and an abolitionist" (*The Constitution a Pro-Slavery Compact* 7-8).

Spooner was an ardent abolitionist and was often among Garrison's and Phillips' abolitionist circles. However, unlike Garrison and Phillips, Spooner's disillusion with the Constitution came after the thirteenth and fourteenth Amendments successfully prohibited slavery throughout the United States. Prior to the Civil War he was an advocate of the Constitution and largely believed it should be followed. Interestingly, he disagreed with Phillips and Garrison in regard to the Constitution being a pro-slavery charter. He argued against this popular rendering and was commissioned by Gerrit Smith, the wealthy philanthropist, abolitionist, politician, and candidate for the office of

President of the United States in 1848, 1856, and 1860, to vindicate the Constitution as an anti-slavery document. Spooner's first volume of *The Unconstitutionality of Slavery* appeared in 1845 and enjoyed support from Frederick Douglass and John Brown.

Douglass, similar to Spooner, defended the Constitution against those who believed it could be used to uphold the legality of slavery. In a speech delivered during an Independence Day rally in 1852, Douglass affirmed his conviction that the Constitution was anti-slavery and explained he did not have "time now to argue the constitutional question at length. The subject has been handled with masterly power by Lysander Spooner [... who] clearly vindicated the Constitution from any design to support slavery for an hour" (*Oration* 35). Phillips angrily disagreed with Spooner and wrote a ninety-six page rebuttal of Spooner's constitutional abolition claim. Spooner then responded with a second volume, which combined with the first, made up three hundred pages. Frustrated, Phillips summed up Spooner's argument by declaring, "The Constitution will never be amended by persuading men that it does not need amendment" (*Review* 4).

In the same year that Spooner penned *The Unconstitutionality of Slavery*, he published *The Unconstitutionality of the Laws of Congress Prohibiting Private Mails*. In 1845, Spooner formed The American Letter Mail Company in defiance against the Postal Act of 1845 that prohibited private mail services from doing business in competition with the United States Postal Service. Spooner believed the Constitution authorized postal competition, and wrote this legal plea as a defense against the federal agents who seized his mail couriers in New England and issued fines. Suits mounted against Spooner as the federal government tried to force him out of business. In court, Spooner used his essay claiming the Postmaster General's Argument "rest[ed] upon the assumption that there is, or can be, but one power of any one kind, in the whole country – and that if this one power be granted to Congress, it cannot, of course, remain with the states or people" (*The Unconstitutional Laws of Congress* 23). The jury found Spooner not

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guilty, and the judge expressed "doubt" that the United States had the right to "monopolize the transportation of mail" (Goodyear). Vindicated by the ruling, Spooner continued operations but eventually succumbed to federal control as fines, legal expenses, and the irregularity of his mail caused by government seizure led to the demise of the American Letter Mail Company. Spooner eventually offered to cooperate with the government if it would bring "the issue in front of the Supreme Court [and] leave his company unmolested until the issue was settled" (Olds 22). The government balked at this request and slowly drained Spooner's resources, and his once flourishing business was disbanded. At this juncture, Spooner continued to believe the Constitution ought to be praised. Congress was to blame for writing laws not legally backed by the heralded charter of freedom.

However, as his ideas and philosophies evolved during the second half of the nineteenth century, Spooner eventually published his *No Treason* series, outlining his philosophical and legal argument against the Constitution. Spooner became convinced the Constitution was, ironically, unconstitutional. Unlike womb-to-tomb American anarchists such as Benjamin Tucker, Spooner's flight from American constitutional governance was gradual (Symes and Clement 154-57). He never advocated lawless utopias, and his rejection of the Constitution was based primarily on natural law and consent. Spooner's disapproval of the Constitution was not a dismissal of constitutionalism.

In this study I will focus on Spooner's blatant dismissal of a document he once viewed with reverence. His arguments in *No Treason: The Constitution of No Authority* will be explored. Here Spooner argues that his once trusted sovereign could not uphold natural and contractual law requirements. By 1867, Spooner believed that, "The Constitution has no inherent authority or obligation." For Spooner, laws had a "natural expiration date," unless they maintain their authority by the consent of the governed (*Collected Works* 173). Spooner argues that the Constitution before and after the Civil War cannot claim consensual adherence due to the lack of representation

given to American citizens. The mere notion of accordant acceptance to perpetual federal law for Spooner was ludicrous and illegal – unconstitutional.

Spooner represents a minority in his civil disobedience to the Constitution after the Civil War. The oft quoted, “Government is not reason, it is not eloquence – it is force! Like fire, it is a dangerous servant and a fearful master,” attributed to George Washington, outlines past and present American cultural norms in regard to government – but not the charter of that government (Sinclair 305). Abraham Lincoln affirmed, “The people – are the rightful masters of both Congresses, and courts – not to overthrow the Constitution, but to overthrow the men who pervert it” (Abraham Lincoln Papers 2). With the re-unification of the country following the Civil War, Lincoln successfully cemented the Constitution as not only the law of the land, but as a quasi-canonical text that was and is revered by the majority of American citizens. Past presidents and their modern-day successors have successfully fulfilled their oath to “support and defend the Constitution” against not only those who seek to overthrow it, but who question its legitimacy (“Century of Lawmaking”).

Spooner’s eulogist recognized his ideas were unpopular, but hoped they would be recognized by millions. Among Libertarian circles he has seen a resurrection of sorts, and both Anarchists and Libertarians proudly proclaim him as one of the first heroes of both movements (Shone ii). Both groups, however, fail to recognize that Spooner never labeled himself as either an Anarchist or a Libertarian, but rather, he was someone who expressed his ideas and engaged in civil protest through the printed word. Benjamin Tucker notes this ambiguity by asserting, “Whatever he may have called himself or refused to call himself, he was practically an Anarchist” (“Our Nestor” 7). Tucker, perhaps, is correct; however, Spooner seems beyond philosophical or political labels and preferred being aloof from society. He never joined any political party, was not a Free Mason or member of a guild, he never married, was never baptized or part of any religious denomination, and

he also refrained from contractually joining any of the reform movements of the nineteenth century. However unpopular Spooner was among his colleagues, his ideas received attention from numerous reformers including Frederick Douglass, Gerritt Smith, and William Lloyd Garrison. It seems he preferred being an outsider who critiqued virtually every decision made by politicians, legislatures, and reformers. This study will attempt to explore Spooner's ultimate rejection of the charter he once praised. Uncovering Spooner's constitutional qualms sheds light into the mind of one nineteenth-century farmer, lawyer, entrepreneur, and legal philosopher who was unable to praise the United States' highest authority. By viewing the Constitution through Spooner's nineteenth-century arguments against the unconstitutionality of the Constitution, the United States charter can be reexamined with new eyes to uncover the complex world of one man's struggle with constitutional sovereignty.

The Nature of Things

Understanding Spooner's arguments against the Constitution hinges upon Americans' understanding of natural rights in the eighteenth and nineteenth centuries. On 15 May 1776, two months before the Declaration of Independence was signed, George Mason penned Virginia's "Declaration of Rights," which was also adopted by five other colonies and was the precursor to the Bill of Rights. Mason asserted that "all men are by nature equally free and independent and have certain inherent rights." Among those rights is the freedom of press, labeled therein as "one of the great bulwarks of liberty, and can never be restrained but by despotic governments." Also, when a person is born "into a state of society, they cannot, by any compact, deprive, or divest their posterity; namely, the enjoyment of life and liberty [...] and pursuing and obtaining happiness and safety" ("Virginia Declaration of Rights").

The framers also allotted certain axiomatic rights to be written into civic laws, but never intended that citizens would be unable to appeal to natural rights not written into the Constitution. According to Suzanna

Sherry, “The architects of our constitutional system assumed that appeals to natural law would continue despite the existence of a written Constitution.” Supreme Court cases from 1789 until almost 1820 viewed cases from a natural justice angle as well as from the written Constitution. For example, Supreme Court Justice Joseph Story invalidated Virginia’s attempt to revoke legislatively an earlier legislative grant of land to the plaintiffs. By what written law was Story able to invalidate Virginia’s claims? He based his decision on “the common law [...] the common sense of mankind and the maxims of eternal justice [...] to the principles of civil right [...] upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the Constitution of the United States.” Therefore natural rights were not completely surrendered to the Constitution (Sherry 1156, 1160-68, 1175).

It was also understood that civil law was simply a reflection of natural law. “Civil law was expected to adopt and enforce rules that approximated the constraints implied by natural law” (Hamburger 909). Put differently, civil law can only exist with implied natural laws; without the latter the former is baseless. The framers used natural law as the foundation for forming the Constitution.

Spooner’s writings clearly demonstrate the basis for all of his legal disputes as a reflection of nineteenth-century natural law cognizance. Natural law was

the science of mine and thine – the science of justice – is the science of all human rights; of man’s rights of person and property; of all his rights to life, liberty, and the pursuit of happiness. It is the science which alone can tell any man what he can, and cannot, do; what he can, and cannot have; what he can, and cannot, say, without infringing the rights of any other person. It is the science of peace; and the only science of peace; since it is the science of which alone can tell us on what conditions mankind can live in peace, or ought to live

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in peace, with each other. These conditions are simply these: viz., first that each man shall do, towards every other, all that justice requires him to do [...]. The second condition is, that each man shall abstain from doing, to another, anything which justice forbids him to do; as, for example, that he shall abstain from committing theft, robbery, arson, murder, or any other crime against the person or property of another. (*Collected Works* 136)

Spooner's concept of natural law was easily understood. He believed almost all men and women have similar perceptions in regard to what constitutes justice. If human beings live together they cannot avoid learning natural law even if they attempt to avoid such acquisition of knowledge. The questions in regard to justice such as, "Is this act just? Or is it unjust? Is this thing mine? Or is it his? [...]" in regard to the great mass of cases, are answered alike by the human mind everywhere," wrote Spooner (*Collected Works* 140). His understanding of natural law was believed to be universal and understood by every man and woman living in a society with others. Natural law tenets provided Spooner with the constitutional legitimation for forming his mail service company and the rejection of slavery. A proper legal charter such as a constitution, he believed, could only be founded on an understanding of natural law.

The Unconstitutional Constitution

In 1864, Lysander Spooner wrote a letter to Charles Sumner, a senator from Massachusetts and leader of the Radical Republicans, lambasting him for not openly admitting that the Constitution did not sanction slavery. The letter represents Spooner's last commitment to preserving constitutional legitimacy. In it, Spooner identifies Sumner's hypocrisy with the issue of slavery, alleging, "for a dozen years, you have been making the most bombastic pretensions of zeal for freedom, you have really been, all that time, a deliberately perjured traitor to the constitution,

to liberty, and to truth.” Spooner believed, once Sumner became a United States Senator, he no longer fulfilled his mandate “towards educating the people into a knowledge of the true character of the constitution” (“Letter to Charles Sumner”). Spooner’s ire at Sumner derived from his failure to prove that the Constitution did not legally sanction slavery, and was based on the claim that he betrayed the ideals set forth in the Constitution. Within three years, Spooner ironically began arguing for the annulment of the nation’s highest authority.

Spooner remained quiet in regard to constitutional legitimacy during the Civil War, writing primarily on economics and a new system for paper currency, banks, and holders of United States bonds. The constitutional legal battle failed to liberate the slaves; therefore their aspirations for freedom rested on the backs of Union troops. At the Appomattox Court House on 9 April 1865, General Robert E. Lee gave his formal surrender to General Ulysses S. Grant, thus ending the Civil War and introducing a new era of constitutional dominion. The United States were once again united. President Abraham Lincoln had successfully preserved what was arguably his primary objective: to “continue to execute all the express provisions of our national Constitution [...] and the Union will endure forever” (Vorenberg 22). Not only was the Constitution the supreme law of the land, but it began being considered as an important instrument in molding society. By legally emancipating slaves, the Constitution, in some respects, supplanted the Bible as not only a legal but a moral authority. The seedlings of the “cult of the Constitution” planted during the early Republic, but dormant during the first half of the nineteenth century, began to bloom with the successful unification of the South and the reconstruction thereafter (Kammen 22). With the passage of the thirteenth, fourteenth, and fifteenth amendments, African-Americans were deemed full citizens. The Constitution had finally succeeded in the emancipation of the slave and the preservation of the Union.

In this climate of patriotic fervor, constitutional criticism foundered. The Constitution succeeded in nationalizing the constitutional and legal

culture of the United States, and unlike the period from 1788-1860 when open constitutional criticism was more common, the Constitution's initial admiration was gradually growing into adoration (Berg and Gosewinkel 54-55). The framers looked upon it "as the best possible constitution," and after the Civil War it "led all classes of the people to a veneration [...] that bore at once the character of an esteem which did much good and of a most ruinous idolatry in which the idol worshipped was themselves" (Holst 68). During this time of unification and constitutional reverence, Spooner began writing his legal magnum opus against the document perceived to be providential.

"To Ourselves and our Posterity"

Spooner's first argument against constitutional legitimacy adjoins earlier sentiments expressed by Thomas Jefferson, namely, whether the framers had the right to betroth future generations to the laws in the Constitution. The first premise by which the Constitution legitimizes its authority to govern is based on consent. In the Preamble to the Constitution the framers attribute the authorship of the Constitution to "We the People" (U.S. Constitution). This reference was not simply grandiose rhetoric, rather an attempt by the framers to legitimize the document that followed (Barnett, "Constitutional Legitimacy" 115-16). Their authority did not come from God as supposed in the divine right of kings, but from the consent of the people whom the founders represented. Popular Sovereignty, Social Contract, and Republicanism theories of Thomas Hobbes, John Locke, and Jean-Jacques Rousseau were summed up by Benjamin Franklin when he described the premise of American government, namely, "In free governments, the rulers are the servants and the people their superiors and sovereigns" ("Ben Franklin on Liberty"). Although the framers arguably assumed the new American government was based on consent, did the framers have a right to covenant unborn U.S. citizens to their individual and collective precepts?

In 1789, Thomas Jefferson acclaimed the new Constitution as "unquestionably the wisest ever presented to man" (Cappon 212-14),

but asked James Madison if “one generation of men has a right to bind another” (Jefferson 959-60). Because Jefferson was not present at the convention, he was limited not only by his lack of a vote, but also because he was unable to present a philosophical viewpoint he deemed among the “fundamental principles of every government.” Jefferson argued all men are born free, therefore the perpetuation of laws is in direct contradiction with the paragon of American government. According to Jefferson, laws were meant to decrease. He presented his logic in economic terms and maintained a nineteen-year term limit “beyond which neither the representatives of a nation nor even the whole nation itself assembled, can validly extend a debt” (Jefferson 959-61). The thought of enforcing any law or borrowing money beyond the nineteen-year period was for Jefferson an act of coercive state control based on false pretensions of natural rights.

Unlike the Articles of Confederation, whose laws were meant to be perpetual and unalterable “unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State,” the Constitution did not purport to be contractually binding on succeeding generations; therefore it required the consent of the governed (“Articles of Confederation” 7). This understanding of constitutional expiry was struck down by the Supreme Court in 1869. Chief Justice Salmon Chase in the *Texas v. White* decision asserted Texas could not secede from the United States. With Texas’s admission to the United States in 1845, Texas became part of “an indestructible Union, composed of indestructible States,” affirmed Chase (Pavkovic 222). States who joined after 1791 covenanted to obey the statutes of the Constitution by accepting a union with the United States. It is unclear if Spooner was influenced by this decision, but he attempted to provide Jefferson’s philosophy with an effectual voice against hereditary compliance to outdated or unnatural laws.

Spooner begins by inquiring if the framers had a right to bind future generations to the Constitution and if the framers intended to. “They had no natural power or right to make it obligatory upon their children,” and

they "did not even attempt to bind them," argues Spooner. The Constitution refers simply to the people "then existing" and does not "expressly or impliedly, assert any right, power, or disposition, on their part, to bind any body but themselves" (*Collected Works* (4:173-74). The language in the preamble stating the desire of the framers to "secure the blessings of liberty to ourselves and our posterity" (U.S. Constitution, Preamble) is similar to a man who builds a house for himself and his posterity, in that "he does not mean to be understood as saying that he has any thought of binding them, nor is to be inferred that he is so foolish to imagine that he has any right or power to bind them, to live in it." The framers' personal aims may have been to bind generations unborn, but the language in the Constitution "does not assert nor at all imply, any right, power, or disposition, on the part of the original parties to the agreement, to compel their 'posterity'" (*Collected Works* (4:174-75). Because the desire of the framers was to "secure to them the blessings of liberty," they refrained from explicit language of mandating constitutional compliance (U.S. Constitution, Preamble). If the descendants of the framers were explicitly bound to live by constitutional tenets, they would be "nothing less than the slaves of their foolish, tyrannical, and dead grandfathers." The language of the Preamble does not clearly require that generational binding can be maintained; rather, the hope of the framers was that "it might prove useful and acceptable to their posterity; that it might promote their union, safety, tranquility, and welfare; and that it might tend 'to secure to them the blessings of liberty'" (*Collected Works* (4:173-74).

The language in the Preamble also does not emphasize that the framers intended to bind American citizens as one entity. "It cannot be said that the Constitution formed 'the people of the United States,' for all time, into a corporation. It does not speak of 'the people' as a corporation, but as individuals." Corporations in legal language do not describe themselves as "people" nor do they have any descendants. "It supposes itself to have, and speaks of itself as having, perpetual existence, as a single individuality." In essence, Spooner maintains that it is impossible

for a body of men to have the power to create a corporation without voluntary admission of new members, supplanting the dead with the new. If no voluntary members join the existing corporation, it dies with those who originally formed it (*Collected Works* (4:174-75).

Spooner, unable to legally accredit the framers' supposed intentions to bind future generations, concludes that the Constitution died with the framers. He argues, "Those persons, if any, who did give their consent formally, are all dead now. Most of them have been dead forty, fifty, sixty, or seventy years. And the Constitution, so far as it was their contract, died with them. They had no natural power or right to make it obligatory upon their children." The framers, unable by natural rights to bind their posterity to the Constitution's precepts and without specific language describing their intention to do so, placed Spooner in opposition to the venerated document of freedom (*Collected Works* 175).

The lack of the framers to meet natural law tenets, and their failure to interject language into the Constitution of a generational binding nature, caused Spooner to contemplate if the American public had legally bound itself to the charter: "If, then, those who established the Constitution, had no power to bind, and did not attempt to bind, their posterity, the question arises, whether their posterity have bound themselves?" If this can be proven, the populace, including Spooner, had legally consigned themselves to the document, and the citizenry's qualms likely would have been appeased before the completion of his constitutional abandonment (*Collected Works* 176).

Contractual Consent

The emergence of the Constitution as a revered text produced myths understood by the masses without empirical proof. One of the strongest dogmas was the idea "that the entire people of the United States established the Constitution" (Kammen 13). Chief Justice Story, who wrote a series of commentaries on the Constitution used in schools and universities in the nineteenth century affirmed, "The constitution is the will, the deliberate will, of the people" (*Commentaries* 473). Story

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attempted to instruct students that the Constitution was a testament of consent, agreed to by every American both past and present. An American's constitutional consent was thus inbred and every constitutionally prescribed tenet required patriotic obedience.

Spooner presented his disagreements about representation in a wide-ranging time period that began with the inception of the United States and continued throughout the post-Civil War era. In his view, two dominant groups of people or parties determined the fate of the populace. John Bach McMaster, a professor of American history at the University of Pennsylvania in the late nineteenth century, affirmed, "Before the Government was two years old the people were dividing into two great parties – the loose constructionists and the strict constructionists; the men who believed in implied powers and men who believed in reserved powers; the supporters of a vigorous national government and the supporters of State rights" (qtd Kammen 30). Schisms naturally occurred within the parties and new ones were formed, but the basic division into two loose camps persisted. By the Reconstruction period, this division had been largely formalized; two dominant political bodies maintained authority over the government. Because Spooner believed the Constitution no longer held this authority, he looked to the legal merits of contractual and natural law to find if the Constitution's authority was legitimate.

First Spooner argues that the formation of government on the basis of popular consent cannot simply mean the "consent of the strongest party." This presumes the strongest political party in the United States by way of election has authority not only over the weaker party, but those voters who cast opposing ballots, those who were unable to vote, and those who chose not to vote. Spooner asked if it can be said that the consent of the "most numerous" political party is adequate to justify its power over the "less numerous" party (*Collected Works* 129).

If power of the United States resides in the strongest party, the country cannot presume to be founded on popular consent for seven reasons, argues Spooner:

[1] A man's natural rights are his own, against the whole world; and any infringement of them is equally a crime, whether committed by one man, or by millions [...] calling themselves a government [...]. [2] It is not to be supposed that the strongest party would ever submit to the rule of the weaker party [...]. [3] Our Constitution does not profess to have been established simply by the majority; but by "the people;" the minority, as much as the majority [...]. [4] If our fathers, in 1776, had acknowledged the principle that a majority had the right to rule the minority, we should never have become a nation [...]. [5] There is no more reason, then, why a man should either sustain, or submit to, the rule of a majority, than of a minority [...]. Men are dunces for uniting to sustain a government, or any laws, except those in which they are all agreed [...]. [6] Such majorities, very likely, could be found in half [...] of all the countries on the globe [...]. They do nothing towards proving that the governments themselves are legitimate; or that they ought to be sustained, or even endured, by those who understand their true character [...]. [7] The principle that the majority have a right to rule the minority, practically resolves all government into a mere contest between two bodies of men, as to which of them shall be masters, and which of them slaves. (*Collected Works* 130-32)

If the strongest party always rules, America would be relegated to a classical democracy, characterized by the rule of the majority. The framers believed a democracy could only be a transitional stage in government because democracies by nature lead to tyranny or aristocracies (Hofstadter 47). The government established by the framers had republicanism as its foundational principle. In other words, the source of legitimacy was based on popular consent. Because the leading political party maintains its authority by capturing the majority, the Constitution cannot claim to hold the consent of the minority of Americans.

Spooner then attempts to legally delegitimize constitutional authority with the claim that the Constitution fails to meet the legal requirements of both contractual consent and natural law. According to Spooner, "The Constitution has no inherent authority or obligation." The only authority the Constitution maintains is between "man and man, and it does not so much as even purport to be a contract between persons now existing. It purports, at most, to be only a contract between persons living eighty years ago" (*Collected Works* 173). Spooner uses the language of the Constitution to support these claims. The framers state in the Preamble, "We the people of the United States [...] secure the blessings of liberty to ourselves and our posterity" (U.S. Constitution, Preamble). At most, argues Spooner, this statement is only legally binding, based on contractual agreements among those who signed the document. The phrase "We the people" means the people then living, and the phrase "our posterity" is not valid for two reasons. First, the written language in the Constitution nowhere implies the framers' right, authority, or power; and second, they had "no natural power or right to make it obligatory upon their children. It is not only plainly impossible, in the nature of things that they could bind their posterity, but they did not even attempt to bind them" (*Collected Works* 173). In the absence of government, would the framers be able to force such a contract on their future posterity, let alone the millions of American citizens living in nineteenth-century America? The only natural law tenet the framers had in their favor was that Americans gave up portions of their natural liberty to form the government (Hamburger 909). "To our posterity" cannot be legally binding, based on contractual and natural law, Spooner argues. The Constitution therefore has no legal authority over any individual except to those who signed it and those they represented.

Next, Spooner turns to the ballot to reason whether Americans contractually aligned themselves to the Constitution. Representation based on voting is the American peoples' voice – the very essence of American government. If voting can be used to prove the populace

consented to obey the Constitution, who exactly did the signers of the Constitution represent? When it was adopted in 1791, the only individuals allowed to participate in the voting process were property owning white males, with one exception in New Hampshire where both white male adults and white male property owners could participate (Timeline: Voting Rights Act). Women, Blacks, Native Americans, and landless white males in the majority of the states were among those not represented in 1791; nevertheless, they were expected to comply with the newly formed Constitution. In 1856, white males, regardless of property ownership, were given the right to vote on a national level. In short, the signers of the Constitution represented themselves and the white male constituents in their states. If voting is a sign of contractual consent, the Constitution cannot be deemed contractually viable based on the scarce number of legal participants.

Spooner maintained that assumed consent is neither contractually nor naturally viable in a republican form of government. Therefore, who actually votes is an essential element in upholding the statutes of the Constitution. Spooner claims:

At the present time, it is probable that not more than one-sixth of the whole population [is] permitted to vote. Consequently, so far as voting is concerned, the other five-sixths can have given no pledge that they will support the Constitution. Of the one-sixth that are permitted to vote, probably not more than two-thirds (about one-ninth of the whole population) have usually voted. Many never vote at all [...]. Therefore, on the ground of actual voting, it probably cannot be said that more than one-ninth or one-eighth, of the whole population are usually under any pledge to support the Constitution. (*Collected Works* 177)

During the nineteenth century, only a certain percentage of the populace legally could and did vote. According to Spooner, the Constitution reigns supreme despite the fact that it derived its consent for authority from less

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than one-eighth of the populace. Only a small portion of individuals can be proven to have voluntarily approved America's ruler; therefore its contractual authority is specious.

Next, Spooner questions whether the payment of taxes is proof that an individual has consented to the Constitution. He argues, the fact that citizens contribute monetarily to the maintenance of the state is also a false premise for the assumption of constitutional authority because taxes cannot be proven to be voluntarily contributed. The theory of the Constitution is, "That taxes are paid voluntarily; that our government is a mutual insurance company [...] that each man makes a free and purely voluntary contract with all others who are parties to the Constitution, to pay so much money for so much protection." American citizens enjoyed relative protection under the Constitution, but that cannot prove that they voluntarily consented to such security. "The fact is that the government, like a highwayman, says to a man: 'Your money, or your life.' And many, if not most, taxes are paid under the compulsion of that threat." Because taxation is mandatory and cannot be proven to be voluntary, it is based on coercion. Therefore, taxation cannot be used as evidential grounds for allegiance to the Constitution; and as such, no contract can be proven by an individual's payment of taxes (*Collected Works* 182).

Furthermore, the individual who pays the allotted sum has no knowledge of who receives the funds. To the taxpayer "the government is a myth, an abstraction, an incorporeality, with which he can make no contract, and to which he can give no consent, and make no pledge." Doubtless the individual recognizes the agents of the government, but "his paying taxes to them implies, on his part, no contract, consent, or pledge to support them – that is to support 'the government,' or the Constitution." For Spooner, governmental representatives became "a secret band of robbers and murderers, who have taken themselves the title of 'the government' [...]. To say, therefore, that by giving up his money to their agent, he entered into a voluntary contract with them, that he pledges to support them [...] is simply ridiculous" (*Collected Works* 182, 185-86).

Without voluntarily approving the contribution of one's money and without knowledge of how the funds will be allocated, an individual cannot be contractually bound to the support of the Constitution. Unable to prove Americans contractually consented to the Constitution, Spooner ceased to believe that the Constitution was founded by the will of the people.

Spooner's closing remarks identify his complete separation from the Constitution:

It is perfectly evident, therefore, that neither such voting, nor such payment of taxes, as actually takes place, proves anybody's consent, or obligation, to support the Constitution. Consequently we have no evidence at all that the Constitution is binding upon anybody, or that anybody is under contract or obligation whatever to support it. And nobody is under any obligation to support it. (*Collected Works* 187)

Because only a certain percentage of the populace was legally permitted to vote and not all of them exercised that right, agreement to the contract cannot be assumed. Since taxation is compulsory, it is false to assume one's allegiance to the Constitution based on force. The Constitution did not meet the legal requirements of contractual or natural law for Spooner, substantiating his final rejection of its validity.

One argument Spooner fails to recognize is whether the Constitution was meant to bind individuals or the government itself. Rufus King, a delegate from Massachusetts during the Constitutional Convention, stated, "In the establishment of Societies the Constitution was to the Legislature what the laws were to individuals" (Madison 231). In other words, the Constitution is obviously law, but in a "secondary, not a primary sense. It purports to bind government officials, not private individuals." If, then, the Constitution was meant to bind government officials, does the citizenry have a moral obligation to obey the laws enacted by constitutional procedures? Or, does the populace obey out of the fear of punishment? It is difficult to determine private individuals' reasons for obeying laws, yet

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once a law is established it carries with it a duty of obedience, "though this duty might be rebutted in particular cases" (Barnett, "Constitutional Legitimacy" 115-16). One might contend the Constitution does not require the consent of the people to retain its legitimacy; therefore, voting and the payment of taxes in regard to contract law cannot be applied to the Constitution, but instead only to the specific laws enacted by constitutional procedures.

Also, Spooner never argues against a common understanding of the nineteenth century, that residency implies consent. Obviously the Constitution did not represent every individual, but if one takes up residence or is born in a particular area of the United States, one could argue that this particular individual is subject to the laws within their locality without contractual agreements. The Civil War and Reconstruction established "one republic, indissoluble and composed of indestructible states [...]. the Constitution was a compact," binding on all U.S. citizens regardless of consent (McLaughlin 193-94). The nature of constitutional consent was implicit based on one's residence in the country. If one opposed the Constitution's authority, one can simply migrate. It is unclear if Spooner was engaged in an implied consent dialogue. However, Spooner's concerns were focused on whether the language of the Constitution legally bound Americans to its laws.

One might derive from Spooner's arguments that he believes in anti-constitutionalism; however, the conclusion of his *No Treason* series identifies his requirements for a legally binding charter. Spooner sought and reaffirmed a legal constitutional agreement based on consent. He believed a lawful constitution must be one of consummate voluntary agreements. This distinction would satisfy his contractual and natural law arguments. Spooner affirms that members of the United States "will consent to No Constitution, except such an one as we are neither ashamed nor afraid to sign; and we will authorize no government to do anything in our name which we are not willing to be personally responsible for" (McLaughlin 182). This consent must be given in an environment where

an individual is neither disgraced nor coerced in his or her dissent or acclamation. Under this constitution, based on this agreement, the responsibility for government actions is pinned on the individual. Everyone is contractually attached to the statutes therein agreed upon, thus fulfilling the decree in the Declaration of Independence that “governments are instituted among men, deriving their just powers from the consent of the governed” (Declaration of Independence). This contractual constitution would cement the merits of natural and contractual law by also allotting individuals the option to sign or not sign the charter, in essence creating a government based completely on the consent of the governed.

In the years that followed, Spooner, who remained in Boston, was usually seen reading at the Boston Athenaeum and on occasion would meet colleagues in bookstores. He continued writing until his death, and he published articles in the *Radical Review* and *Liberty* newspapers of fellow Bostonian, Benjamin Tucker. By the time Spooner died in 1887, his *No Treason* arguments had virtually no adherents, and many who came across his publication demoted it to the expression of “radical” thought (Shone viii-ix). The Constitution withstood Spooner’s attacks, leaving the reclusive graybeard to ponder if he was the only one who saw the danger of the once “constitutional cult” that grew into a quasi-religion by the time of his death (Kammen 22).

Conclusion

At one o’clock on Saturday, 14 May, Spooner died in his small apartment in Boston. Tucker, who frequented Spooner’s residence in his final years, was present during his last moments. Tucker, who later planned and spoke at his funeral, identified what was arguably the chief characteristic of Spooner. His last breaths were spent declining “either advice or medicine,” and he did not heed the solicitations of those who assured him of his recovery (*American National Biography* (20:467). Defiant to the end, Spooner, who never married and had few friends, died preferring to remain loyal to his own constitution, rather than obey the advice of well-intentioned healers.

The Constitution and the individuals composed as "the government" represented for Spooner what the Revolutionaries fought against – divine rule. Those "who claim to rule 'by the grace of God,' by 'Divine Right,' – that is, by special authority from Heaven, – are intrinsically [...] the merest miscreants and wretches, engaged solely in plundering, enslaving, and murdering their fellow men," argued Spooner (*Collected Works* 221). Although the Constitution itself does not reference claims to authority based on divinity, the American public in the post-Civil War nineteenth century "sacralized the Constitution" (Noll and Harlow), believing it "an inspiration from God" (Siedman 12). Spooner became a constitutional apostate, ardent in his belief in a God who abstained from divining any ruler, be it corporeal or written.

The failure of the Constitution to provide justice in the cases of the usurpation of his mail service and the abolition of slavery highlighted the hollowness of constitutional claims to protect natural rights. Spooner's theory of interpretation defined the Constitution as being based on innate rights. Yet his arguments proved fruitless against the authority of constitutionally appointed stewards with the passage of the Postal Act of 1845 and the Dred Scott decision. Spooner realized that his understanding of the Constitution and its implementation in the nineteenth century were irreconcilable. Therefore he thought "it proper to say that, in his opinion, the Constitution is no such instrument as it has generally been assumed to be; but that by false interpretations, and naked usurpations, the government has been made in practice a very widely, and almost wholly, different thing from what the Constitution itself purports to authorize" (*Collected Works* 228).

The preservation of the Union after the Civil War and the abolition of slavery enhanced Spooner's rejection of the Constitution. The pretensions of the leaders who claimed "they have 'Saved the Country,' and 'Preserved our Glorious Union' [...] of having 'abolished slavery' [...] of establishing 'a government of consent,'" had in his view, only succeeded in compelling the populace to obey the Constitution or be "plundered, enslaved, and murdered" (*Collected Works* 228-29).

After the Civil War, the reverence for the Constitution virtually was unquestioned. Constitutional obedience in some circles reached venerated heights and supposedly radical arguments calling for its nullification were snorted at as preposterous. Constitutional protectors took on a quasi-religious tone akin to that of early nineteenth-century biblical defenders. Americans who disagreed with absolute obedience to the Constitution after the unification seemed to be “violating a sacred text” (Siedman). Spooner sought to resurrect constitutional criticism in order to place the Constitution below natural law. As the nineteenth century rolled on after the Civil War, the Constitution became what Mark Twain defined as a literary classic, namely, a work “which people praise and don’t read” (*Following the Equator* 241). Spooner’s *No Treason* series fell on deaf ears and likely would have been well received by a pre-Civil War audience. He complained, “whether the Constitution really be one thing, or another, this much is certain – that it has either authorized such a government as we have had, or has been powerless to prevent it” (*Collected Works* 229). For one lonely New England intellectual, the Constitution became unconstitutional, and he died talking to an empty room.

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