

From the Constitutional Abolitionism
to the Abolition of the Constitution:
Lysander Spooner on Freedom,
Slavery and the Limits of the Social Compact

*Del abolicionismo constitucional a la abolición de la
constitución: la posición de Lysander Spooner sobre la
libertad, la esclavitud y los límites del pacto social*

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Abstract

Lysander Spooner (1808-1887) – a self-taught lawyer whose opinions have been quoted by the Supreme Court of the United States, a private entrepreneur challenging government monopolies, and a doyen of American individualism, is currently known mainly as a trenchant critic of the United States Constitution, who openly contested its legitimacy. His early abolitionist works, in which he argued that slavery was illegal under the Constitution, are far less known but equally thought-provoking and important. The aim of this paper is to analyze the evolution of Spooner's political stance from the most influential exponent of the antislavery constitutionalism to an anarchist who demanded the abolition of constitution, as well as to mark out the limits he tried to put on the social compact.

Keywords: Lysander Spooner, antislavery constitutionalism, anarchism.

Resumen

Lysander Spooner (1808-1887) – un abogado autodidacta cuyas opiniones han sido citadas por la Corte Suprema de los Estados Unidos, un empresario privado que desafió los monopolios del gobierno y un decano del individualismo americano, es

principalmente conocido en la actualidad como un incisivo crítico de la Constitución de los Estados Unidos que puso abiertamente en cuestión su legitimidad. Sus primeros trabajos abolicionistas, en los que argumentó sobre la ilegalidad de la esclavitud de acuerdo con la Constitución, son mucho menos conocidos, pero igualmente relevantes y merecedores de reflexión. El propósito de este artículo es analizar la evolución de la posición política de Spooner, evolución en virtud de la cual, de ser el exponente más influyente del constitucionalismo antiesclavista, pasó a convertirse en un anarquista que reclamaba la abolición de la constitución, así como a delinear los límites que pretendía aplicar al pacto social.

Palabras clave: Lysander Spooner, constitucionalismo antiesclavista, anarquismo.

1. Lysander Spooner (1808-1887) – a self-taught lawyer whose opinions have been quoted by the Supreme Court of the United States¹, a private entrepreneur challenging government monopolies, and a doyen of American individualism, is currently known mainly as a trenchant critic of the United States Constitution, who openly contested its legitimacy. His early abolitionist works, in which he argued that slavery was illegal under the Constitution, are far less known but equally thought-provoking and important. The aim of this paper is to analyze the evolution of Spooner's political stance from the most influential exponent of the antislavery constitutionalism to an anarchist who demanded the abolition of constitution, and to mark out the limits he tried to put on the social compact.

The paper is organized as follows. Section II contains a short intellectual biography of Spooner and places him in the wider milieu of the nineteenth century American radical individualism. Section III presents an overview of the ideas developed in the major Spooner's anti-slavery writings and contrasts them with the views of the anti-constitutional wing of the abolitionist movement. Section IV outlines Spooner's *postbellum* political stance, and traces the changes his ideas went through over the years in between the publication of his two most influential works - *The Unconstitutionality of Slavery* (1860) and *No Treason No. VI. The Constitution of No Authority* (1870). Section V concludes the paper.

¹ See: e.g. J. J. Martin, *Men Against the State. The Expositors of Individualist Anarchism in America 1827-1908*. Colorado Springs, CO, Ralph Myles, 1970, pp. 167-201 and S. J. Shone, *Lysander Spooner: American Anarchist*, Lanham, MA, Lexington Books, 2010.

2. Lysander Spooner was born on January 19th, 1808 on the Athol farm, Massachusetts,² about 110 kilometers West of Boston.³ He was the second child of Asa and Dolly Spooner, an unorthodox Puritan couple that made its living on farming. He was bound with his father by a contract stating that he had to work for the full costs of his raising and hence, spent the first 25 years of his life on his father's farm. Despite the lack of formal education, Spooner acquired a comprehensive knowledge that enabled him to become a local school teacher. After meeting all financial commitments presented in the contract, in 1833 he moved to Worcester. At first, he worked in a notarial office and then he started practice in the law office of John Davis and Charles Allen.⁴

After three years of practice, with the permission from his patrons, he decided to open his own office, which was an act against the state law ruling that a future lawyer who had not graduated from college was obliged to undergo five years of practice. Simultaneously, in a local newspaper, he published an open letter to the members of the state legislature urging them to lift regulations that artificially limited free competition on the market for legal services.⁵ His one-man campaign drew a positive reaction from local prominent politicians which resulted in establishing a new bill that changed the requirements in the field and which involved Spooner's postulates. Despite that fact, his legal career did not flourish. Because of two pamphlets criticizing Christianity and clergy from deistic perspective,⁶ he had great difficulties attracting new clients.

Since he was unable to make a living, after two years of independent practice, he decided to move to New York, where he was employed by Albert Gallatin (future US Secretary of the Treasury) at the National Bank of New York City. After a couple of months he managed to accumulate resources he planned to invest in the eighty-acre piece of land in Ohio. He wished to sell it with profit to the arriving settlers, however, his plans were destroyed by the decision of the state legislature to build a shipping route between Indiana and the Eire lake, far from the land that he had

² If it is not stated otherwise, all biographical information comes from C. Shively, *Critical Biography of Lysander Spooner*, in: *idem* (ed.) *The Collected Works of Lysander Spooner*, Weston, MA, M&S Press, 1971, vol. 1, pp. 15-62. It is worth nothing that contrary to the title and information provided in the introduction to this book, the six-volume collection of almost 2400 pages does not contain all of the works written by Spooner – its most significant omission is an essay *Vices are not Crimes. A Vindication of Moral Liberty* published anonymously in 1875.

³ R. Barnett, "In Search of Lysander Spooner", in *Liberty* 13, 1999, pp. 43-46.

⁴ The future Massachusetts governor as well as the member of the US House of Representatives for two terms of office, and the future Attorney General of Massachusetts (respectively).

⁵ L. Spooner, "To the Members of the Legislature of Massachusetts", in *Worcester Republican*, 26.08.1835.

⁶ L. Spooner, *The Deist's Immortality, and an Essay on Man's Accountability for his Belief*, Boston, MA, 1834; *Idem, The Deist's Reply to the Alleged Supernatural Evidences of Christianity*, Boston, MA, 1836.

purchased. Spooner made an unsuccessful attempt to block the investment using his legal skills,⁷ however, the economic crash of the 1837 (Panic of 1837)⁸ ruined his undertaking completely. When he lost all of his wealth, he decided to go back to his family farm.

The financial failure and developing crash of the American economy made Spooner look more closely at the economic issues, especially those concerning banks and other credit institutions that were blamed for the 1837 crisis by most of his contemporary commentators. He drew the conclusion that the cause of the crash was the “money monopoly” which gave the right to issue promissory notes only to corporations who fulfilled certain requirements prescribed by the law. He then decided to undertake the endeavor to prove the unconstitutionality of all laws violating the freedom of contract in the field of the finances. According to Spooner, “To issue bills of credit, that is, promissory notes, is a natural right. [...] It is one that the state governments cannot take from their citizens, and all those laws, which have attempted to deprive them of this right, are unconstitutional. The act of incorporation, then, gives no new right in this respect”.⁹

In the future, he would elaborate on that idea by designing an original monetary system in which each individual would have the right to issue their own money and participate in lending activities based on their private wealth.¹⁰ He believed that the banking system he postulated would promote self-employment, financial independence and that it would balance the distribution of material goods by the market. This, in turn, would contribute to harmonizing the society and eliminating the class conflict which was the result of economic inequalities much greater than those resulting from “natural and necessary causes.”¹¹ *The overgrown rich*,¹² as he referred to those

⁷ *Spoooner v. McConnell*, 22 F 939, 943. This case is the subject of an anonymous essay *Spoooner vs. McConnell et al., An Argument Presented to the United States Circuit Court in Support of a Petition for an Injunction to restrain Alexander McConnell and Others from Placing Dams in the Maumee River Ohio*, n. p., 1839.

⁸ Today, the region once owned by Spooner constitutes a small village, Grand Rapids (Wood County, OH) with 965 citizens.

⁹ L. Spooner, *Constitutional Law Relative to Credit, Currency and Banking*, Worcester, MA, 1843, p. 24.

¹⁰ *Idem*, *A New System of Paper Currency*, Boston, MA, 1861; *Idem*, *A New Banking System: The Needful Capital for Rebuilding the Burnt District*, Boston, MA, 1873; *Idem*, *The Law of Prices: A Demonstration of the Necessity for an Infinite Increase in Money*, Boston, MA, 1877; *Idem*, *Gold and Silver as Standards of Value*, Boston, MA, 1878. For the analysis of Spooner’s reflections on the banking system from the libertarian perspective, see: M. N. Rothbard, “The Spooner-Tucker Doctrine, An Economist’s View”, in *Idem*, *Egalitarianism as a Revolt Against Nature and Other Essays*, ed. 2, Auburn, AL, 2000, pp. 205-218.

¹¹ L. Spooner, *Poverty: Its Illegal Causes and Legal Cure*, Boston, MA, 1846, p. 41. See also: *Idem*, *Our Financiers, Their Ignorance, Usurpations and Frauds*, Boston, MA, 1877 and *Idem*, *Universal Wealth Shown to be Easily Attainable*, Boston, MA, 1879.

¹² L. Spooner, *Poverty...*, *op. cit.*, p. 41.

who came into possession of their wealth through the money monopoly established in their interest, could not act justly towards the poor and *vice versa*, since justice requires close relations, the understanding of the needs and sharing life experiences. When those requirements are not fulfilled, “the rich will often defraud, oppress, amid insult the poor, and the poor defraud and commit violence upon the rich, with less compunction than the same individuals would have defrauded, injured, or insulted one of their own number. And every man, who will defraud others at all, will more willingly defraud a stranger than an acquaintance”.¹³ The freedom of issuing money and entering into contracts on all conditions accepted by the parties involved would lead to relative financial equality, elimination of “casts”, it would bring people closer to one another and spread such experiences that “being common to all, enables [an individual] to sympathize with all, and insures to himself the sympathy of all. And thus the social virtues of mankind would be greatly increased”.¹⁴

Spooner’s activity in the field of the so-called free banking did not go beyond the theoretical reflections – his pursuit to create a new kind of financial institution was fruitless. His next attempt at challenging the government monopoly, this time in postal services, was more successful, although short lived. In 1844 Spooner created American Letter Main Company (ALMC), whose aim was transporting letters between Boston and New York and, later on, between Philadelphia and Baltimore as well. This was, once again, an enterprise undertaken against the federal law, which banned individuals from delivering parcels other than periodicals in exchange for money. It was not the first company of this kind,¹⁵ however none of the others challenged the law so openly. Spooner not only advertised his services in local papers – clearly stating that one of the company’s aims was to test “the constitutional right of free competition in the business of carrying letters” – but he also sent a letter to the Post Master General of the United States in which he informed the latter about undertaking this enterprise and revealing his whereabouts in case the government would like to issue a lawsuit against him.¹⁶ The letter was accompanied with a pamphlet in which Spooner aimed to prove that the Article 1, Section 8, Clause 7 of the US Constitution, which enabled the Congress to establish Post Offices and post roads, could not be basis for introducing legal constraints on the competition on the postal market.¹⁷

¹³ *Ibidem*, p. 46.

¹⁴ *Ibidem*, p. 47.

¹⁵ See: R. R. Jr. John, “Private Mail Delivery in the United States During the Nineteenth Century: A Sketch”, in *Business and Economic History* 15, 1986, pp. 135-147 and K. B. Olds, “The Challenge to the Postal Monopoly, 1839-1851”, in *Cato Journal* 15, 1995, pp. 1-24.

¹⁶ L. Spooner, *A Letter to Honorable Charles A. Wickcliffe, Postmaster General U.S.*, 11.01.1844, retrieved 28 February 2016 from: <http://static1.squarespace.com/static/55a3c833e4b07c31913e6eae/t/55a516dce4b08efc48d5f7e6/1436882652806/LT130.pdf>.

¹⁷ L. Spooner, *The Unconstitutionality of the Laws of Congress Prohibiting Private Mails*, New York,

At first, the government reacted to Spooner's challenge by extralegal means: since it could not compete with his company in terms of prices – ALMC was selling stamps for 5 cents/each which was almost three times less than the price offered by the US Post Office, who delivered mail on the same distance for 14.5 cents¹⁸ – the Postmaster General started to put pressure on the transport companies that Spooner cooperated with, threatening to terminate their contracts, in order to make them break their contracts with Spooner. However, when these actions proved insufficient and other private mail companies started to emerge, the US Congress decided to amend the law and criminalize the private, for-profit delivery of parcels (The Post Office Reform Act of 1845), simultaneously lowering the official prices to the level of that offered by the ALMC.¹⁹ Spooner wished to file a lawsuit and pursue legal recourse, but the increasing sum of fines he needed to pay and the growing number of arrests of his couriers and confiscation of parcels forced him to close the company after several months. Despite being unable to challenge the constitutionality of the U.S. postal monopoly Spooner did find satisfaction in the fact that he played a significant role in the process of lowering the official postage rates. He was even posthumously named “the father of cheap postage in America”²⁰.

The economic failure of the ALMC forced Spooner to go back to his family farm once again. In Athol, owing to the support of his friend, a rich entrepreneur and a philanthropist, Gerrit Smith (1797-1874) who financed many progressive social causes, he decided to undertake even more difficult task – to prove the unconstitutionality of “our peculiar institution” as slavery was known in the American South.²¹ Thereby, he put himself in opposition not only to the dominant legal doctrine of his time, but also to the mainstream abolitionist movement which following Lloyd Garrison (1805-1879) – the founder of the American Anti-Slavery Society (AASS) and the tireless publisher of *The Liberator*²² – assumed that the American Constitution by sanctioning slavery was equal to “a covenant with death, an agreement with hell.”²³ Spooner's monograph, *The Unconstitutionality of Slavery*, which was the crowning of long-lasting research (and which will be described in more detail in the next section of this paper) caused a stir among all factions involved in the dispute over slavery. Its main theses were cited during the Congress sessions,²⁴ and they

NY, 1844.

¹⁸ At that time, there were no unified prices in all states.

¹⁹ R. R. Jr. John, *op. cit.*, pp. 142-143.

²⁰ J. J. Martin, *op. cit.*, pp. 171-172.

²¹ K. M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South*, New York, NY, A.A. Knopf, 1967.

²² H. Mayer, *All on Fire: William Lloyd Garrison and the Abolition of Slavery*, New York, NY, St. Martin's Press, 1998.

²³ Resolution of the American Anti-Slavery Society of 27.01.1843.

²⁴ *Congressional Globe*, 30th Congress, 1st Sess., (1847, Appendix: 45) and *Congressional Globe*,

drew a positive response from Frederick Douglass (1818-1895), a former slave and an iconic activist of the abolitionist movement,²⁵ who, under the influence of Spooner's work, rejected Garrison's interpretation of the federal Constitution.²⁶ His work also made some radical abolitionists re-evaluate their stance on the constitutional status of slavery.²⁷ Liberty Party – a new political group of former members of the AASS who aimed at abolishing slavery through the electoral politics²⁸ – officially approved the arguments presented in *The Unconstitutionality of Slavery* and made a proposal of candidacy from their party to Spooner. However, much to the surprise of the reformist fraction of abolitionist, the latter categorically refused, claiming he is opposed the "political machinery" based on the claim that the majority had the right to dictate the rules of behavior.²⁹ Later, while analyzing the suffragettes' postulates, with whom he agreed with regard to the socio-economic status of women, he would state that it was not women who should gain the right to vote, but it was men who should lose them.³⁰

According to Spooner, the right way to abolish "the peculiar institution" was to convince the judges that it was unconstitutional. If they were not willing to accept arguments presented in *The Unconstitutionality of Slavery*, he saw a chance in *jury nullification* – a rarely used common law institution which gives a jury the power to acquit an individual guilty of crime if they believe the relevant law to be unjust.³¹ A consistent use of this power would enable the slaves that escaped to the North and those who were helping them to avoid punishment, which in the long-run would make it impossible for the slave-owners to keep their slaves in captivity.³²

In extreme situations, Spooner allowed for the use of force against the slaveholders. He wrote: "the state of Slavery is a state of war. In this case it is a just war, on the part of the negroes – a war for liberty, and the recompense of injuries; and necessity justifies them in carrying it on by the only means their oppressors have left to them. In war, the plunder of enemies is as legitimate as the killing of them; and stratagem is as legitimate as open force. The right of the Slaves, therefore, in this war, to take

34th Congress, 3rd Sess. (1854, Appendix: 14).

²⁵ N. Buccola, *The Political Thought of Frederick Douglass: In Pursuit of American Liberty*, New York, NY, NYU Press, 2012.

²⁶ F. Douglass, "Change of Opinion Announced", in *The Liberator*, 1851.

²⁷ W. Phillips, *Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery*, Boston, MA, 1847.

²⁸ R. O. Johnson, *The Liberty Party, 1840–1848: Antislavery Third-Party Politics in the United States*. Baton Rouge, LA, Louisiana State University Press, 2009.

²⁹ L. Spooner, *Letter to G. Bradburn*, Retrieved February 28, 2016 from: <http://static1.squarespace.com/static/55a3c833e4b07c31913e6eae/t/55a3f9d8e4b0f21644223dbb/1436809688848/NY55.pdf>

³⁰ L. Spooner, "Against Woman Suffrage", in *Liberty* 22, 1882, p. 4.

³¹ L. Spooner, *An Essay on the Trial by Jury*, Boston, MA, 1852.

³² Spooner himself defended runaway slaves and people who were helping them in front of the judges, *pro publico bono*, on more than one occasion. See: C. Shively, *op. cit.*, chapter 6.

property, is as clear as their right to take life; and their right to do it secretly, is as clear as their right to do it openly. And as this will probably be their most effective mode of operation for the present, they ought to be taught, encouraged, and assisted to do it to the utmost, so long as they are unable to meet their enemies in the open field.³³ It was not just an empty declaration. In 1859 Spooner consulted the plans of the attack on the Harpers Ferry Armory (Virginia) prepared by John Brown (1800-1859) which was supposed to start an armed revolution of the slaves.³⁴ When the plans proved unsuccessful, he plotted an attempt to capture the governor of Virginia, who was to be exchanged for John Brown waiting in a state prison cell for the execution.³⁵

In the second volume of *The Unconstitutionality of Slavery*, written as a response to criticism from Wendell Phillips, a lawyer closely associated with W. L. Garrison, Spooner's anti-statist views start to surface for the first time. He begins to perceive the government as a mechanism of dominance of the well-organized special interest groups that defend their privileged position by using laws which violate the innate right of each individual to self-determination, regardless of their gender, race and ancestry.³⁶ Further radicalization of his views would come as a result of the American Civil War.

Before the attack of the Southern militia on Fort Sumter, the majority of the radical abolitionists followed the AASS slogan seen on the front page of *The Liberator*: "No Union with Slaveholders," and advocated immediate breakdown of any political and economic ties with states that legitimized slavery. The actions undertaken by the Confederates changed their views. Even Garrison, who was an absolute pacifist, claimed the war was justified.³⁷ Spooner, as one of the few abolitionists, adamantly opposed maintaining the Union by force. In his three-volume essay *No Treason*, referring both to the history of the struggle for the American independence and his own constitutional theories, Spooner aimed to prove that the Southerners who pursued secession from the United States did not commit treason.³⁸ For the one who proclaims disobedience to a union established on the basis of (supposedly) voluntary

³³ L. Spooner, *To the Non-Slaveholders of the South: A Plan for the Abolition of Slavery*, b.m.w., 1858, p. 1. It is also noteworthy that Spooner saw revolution as the only way for the Irish to improve their position in the British Empire. See: L. Spooner, *Revolution the Only Remedy for the Oppressed Classes of Ireland, England, and Other Parts of the British Empire*. Boston, MA, 1880.

³⁴ See: T. Horowitz, *Midnight Rising: John Brown and the Raid That Sparked the Civil War*. New York, NY, Picador, 2011 and J. Earle, *John Brown's Raid on Harpers Ferry: A Brief History with Documents*, Boston, MA, Bedford Books, 2008.

³⁵ Ultimately, the plan of this abduction was abandoned since it was impossible to get resources needed in such a short period of time.

³⁶ See: e.g. L. Spooner, *The Unconstitutionality of Slavery, Part Second*. Boston, MA, 1846, p. 142.

³⁷ H. Mayer, *op. cit.*, pp. 517-577.

³⁸ L. Spooner, *No Treason I*, Boston, MA, 1867; *idem*, *No Treason II: The Constitution*, Boston, MA, 1867; *idem*, *No Treason VI: The Constitution of No Authority*, Boston, MA, 1870.

agreement is not a traitor. Spooner's analysis led him to a radical and iconoclastic conclusion – despite emancipation, “the number of slaves, instead of having been diminished by the war, has been greatly increased; for a man thus subjected to a government that he does not want is a slave”³⁹ and a Constitution that legitimizes this kind of slavery violates natural law and therefore cannot be binding (this issue will be elaborated on in the section IV of this paper).

Because of his increasing radicalism, at the beginning of the eighth decade of the nineteenth century, Spooner decided join the group of individualist anarchists focused around the Boston biweekly paper *Liberty* published by Benjamin R. Tucker (1854-1939).⁴⁰ However, even in this *par excellence* eclectic circle of the supporters of the “contractual society”,⁴¹ he stood out with his originality of views and non-conformism. While most of the “Boston anarchists,” as Tucker's supporters were referred to,⁴² remained under the influence of Stirner's egoism, Spooner continued to advocate for natural law until the end of his life.⁴³ The paper *Natural Law or the Science of Justice* published in 1882 was the first one that gave him international recognition outside the abolitionist circles.⁴⁴ Another issue that Spooner and anarcho-individualists did not agree on was the property right, especially the ownership of land and the intellectual property.⁴⁵ While Tucker and his closest colleagues firmly rejected property in relation to immaterial goods and they accepted land ownership only when it fulfilled the requirement of *occupancy and use*,⁴⁶ Spooner claimed both institutions not only as natural rights of an individual, but also as the *sine qua non* requirement for the existence of free society, whose rejection would be equal to supporting communism, the ideology evoking disdain in individualist anarchists circles.⁴⁷

³⁹ *Idem*, *No Treason I*, *op. cit.*, p. 5.

⁴⁰ W. McElroy, *The Debates of Liberty. An Overview of Individualist Anarchism 1881-1908*, Lanham, MD, Lexington Books, 2002. See also: *idem*, “Benjamin Tucker, Individualism, & Liberty: Not the Daughter but the Mother of Order”, in *Literature of Liberty* 4, 1981, pp. 7-39.

⁴¹ See: e.g. B. R. Tucker, “The Relation of the State to the Individual”, in *Individual Liberty. Selections from the Writings of Benjamin R. Tucker*, New York, NY, CreateSpace, 1926, pp. 24-25.

⁴² In contrast to anarcho-communists gathered mainly in Chicago and New York, mostly originating from immigrant circles. For broader characterization of the American anarchist movement and its fractions, see: J. J. Martin, *op. cit.*, and E. Schuster, *Native American Anarchism. A Study of Left-Wing American Individualism*, New York, NY, Da Capo Press, 1970.

⁴³ W. McElroy, *The Debates of Liberty...*, *op. cit.*, pp. 51-67. For Stirner's egoism, see: M. Chmieliński, *Max Stirner. Jednostka, społeczeństwo, państwo*, Kraków, Księgarnia Akademicka, 2006.

⁴⁴ J. J. Martin, *op. cit.*, p. 199.

⁴⁵ C. Watner, “Spooner vs. Liberty”, in *Libertarian Forum* 7, 1975, pp. 5-7 .

⁴⁶ W. McElroy, *The Debates of Liberty...*, *op. cit.*, pp. 85-101.

⁴⁷ L. Spooner, *The Law of Intellectual Property or An Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas*, vol. I, Boston, MA, 1855, esp. pp. 77-88.

Despite these fundamental differences Spooner was highly respected in the Boston anarchist circles and *vice versa*. The papers he wrote during the last years of his life were clearly influenced by views of Tucker and his close colleagues.⁴⁸ His last important work, an open letter to the president Grover Cleveland (1837-1908) published by *Liberty* in nineteen parts, constituting the summary of his intellectual achievements, is openly anarchist.⁴⁹

Lysander Spooner died on May 14th, 1887 in a private apartment in Boston, surrounded by his closest followers and dozens of unfinished manuscripts.⁵⁰ In a eulogy published by *Boston Daily Globe*, a remarkable Irish poet, essayist and activist, John Boyle O'Reilly (1844-1890) referred to Spooner's death as the greatest loss of the US since the death of Ralph Waldo Emerson and predicted that the name of Spooner will be worshiped by millions as one of the heroes of abolitionism and "a man whose nature was so large and his love for humanity so great that he distinguished no race or creed or nationality".⁵¹

3. Massachusetts, where Spooner spent most of his life, was the first American state to abolish slavery with immediate effect.⁵² It was also the state where abolitionist views were particularly strong and passionate. It was in Massachusetts, where the first mass organization advocating for emancipation of black people in the USA – New England Anti-Slavery Society – was created. Both Spooner's parents, and patrons who supervised his legal practice, were abolitionists. From his correspondence with Gerrit Smith during the 1840s it is clear that the issue of the legal status of slavery was of his interest "for years,"⁵³ however, the direct impulse to write *The Unconstitutionality of Slavery*, seems to have been the stir in the abolitionist circles caused in 1840 due to the disclosure of James Madison's papers containing a detailed report of the debates over slavery held by the participants of the Constitutional Convention.⁵⁴ For W. L. Garrison and his supporters from the American Anti-Slavery So-

⁴⁸ J. J. Martin, *op. cit.*, pp. 200-201.

⁴⁹ L. Spooner, *A Letter to Glover Cleveland, On His False Inaugural Address, the Usurpations and Crimes of Lawmakers and Judges and the Consequent Poverty, Ignorance and Servitude of the People*, Boston, MA, 1886.

⁵⁰ B. R. Tucker, "Our Nestor Taken From Us", in *Liberty* vol. 4, no. 22, 1887, pp. 4-5.

⁵¹ J. B. O'Reilly, "Lysander Spooner: One of the Old Guard of Abolition Heroes, Dies in His Eightieth Year After a Fortnight's Illness", in *Boston Daily Globe*, 18.05.1887.

⁵² Earlier, effective abolition had been conducted in the Vermont Republic, but at that time, it had not been a part of the Union. For more information on the history of the emancipation in the Northern states of the USA, see: A. Zilversmit, *The First Emancipation: The Abolition of Slavery in the North*, Chicago, IL, University of Chicago Press, 1967.

⁵³ L. Spooner, *A Letter to Gerrit Smith*, 08.09.1844, retrieved March 2, 2016 from: <http://static1.squarespace.com/static/55a3c833e4b07c31913e6eae/t/55a41d48e4b0ddaed6a75e8/1436818760795/Athol+Mass+Sept+8%2C+1844.pdf>

⁵⁴ W. M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848*, Ithaca, NY,

ciety *Madison Papers* constituted indisputable evidence that the Founding Fathers made a compromise between freedom and slavery “granting to the slaveholder distinct privileges and protection for his slave property, in return for certain commercial concessions on his part toward the North.”⁵⁵

In the light of these revelations, as well as the consistent jurisprudence of federal courts, Garrison’s followers thought it obvious that the US Constitution was clearly an openly a pro-slavery compact and anyone who swore to protect and enforce its provisions “violate[ed] his duty both as a man and an abolitionist.”⁵⁶ To manifest his disdain for the Constitution Garrison burnt a copy of the supreme law of the United States at the abolitionist convention in Farmingham. While doing it, the publisher of *The Liberator*, shouted to a rousing round of applause from his followers: “so perish all compromises with tyranny!”⁵⁷

The abolitionists’ disregard for the Constitution was further manifested by the fact that they refused to take part in elections, take on any public offices,⁵⁸ or in a few cases in their refusal to pay taxes.⁵⁹ In rejecting the political action, Garrison’s supporters saw the chance of abolishing slavery through propaganda, ostracizing the slave-owners and boycotting their products, and most of all, excluding states that sanctioned slavery from the Union.⁶⁰ Through this last strategy, they wished to make the North a haven for runaway slaves. By crossing the border of the new Union, free of slavery, the escaped slaves would be granted personal freedom. Was this process to gain a mass character, “peculiar institution” could be abolished on the frontier regions in a relatively short period of time, and in the long run – in whole America.

According to Spooner, the strategy of the abolitionist movement, both in the variant of Garrison and reformist vision advocated by Liberty Party, was doomed to be fruitless. Propaganda against slavery could not be successful since the Northern states – the only region where it was possible to be carried out freely – were inhabited by people who no longer needed to be convinced that slavery is evil. Moreover, slave owners could not be convinced *en masse* to voluntarily give up on all the bene-

Cornell University Press, 1977, p. 239.

⁵⁵ W. Phillips, (ed.) “The Constitution A Pro-Slavery Compact: or Selections from The Madison Papers”, in *The Anti-Slavery Examiner*, 1845, p. viii.

⁵⁶ *Ibidem*.

⁵⁷ L. Filler, *The Crusade Against Slavery 1830-1860*, New York, NY, Harper, 1963, pp. 215-216.

⁵⁸ W. Phillips, *Can Abolitionist Vote or Take Office Under the United States Constitution?*, New York, NY, American Anti-Slavery Society, 1845.

⁵⁹ Undoubtedly, the most famous example in this regard was Henry David Thoreau. However, he was not the only person who refused to pay taxes due to his political views. See: D. M. Gross, *We Won’t Pay. A Tax Resistance Reader*, Createspace, 2008, n.p., pp. 175-220.

⁶⁰ For more information on the strategies proposed by radical abolitionists gathered around Garrison, see: A. S. Kraditor, *Means and Ends in American Abolitionism. Garrison and His Critics on Strategy and Tactics 1834-1850*, Chicago, IL, Ivan R. Dee, 1989.

fits that they enjoyed thanks to the “peculiar institution.”⁶¹ Liberty Party contributed nothing to the cause of emancipation. It did not even have a consistent plan that it would follow in case of – according to Spooner highly improbable – victory in the elections. And if the actions undertaken by the members of LP would be limited to the attempts to establish amendments to the Constitution, taking into consideration complexity of such operation, abolition would be postponed so long that most of the slaves would not live to see that moment.

Spooner believed that the only way to achieve emancipation of black people in America in a reasonably short period of time was to convince the legal profession as a whole that slavery is unconstitutional. This strategy had proven successful in his home state, Massachusetts, where in 1783 the Supreme Court accepted the arguments of a runaway slave and stated that slavery was incompatible with the state constitution which granted that all men were born free and equal.⁶²

According to Spooner, similar outcome was achievable at the federal Constitution level as well. However, he believed “giving the constitution its true construction, and carrying it to effect necessary. [It is to be done] by bringing the matter to the knowledge of the bar and the bench, who are to decide the questions, and to the people who are to support them in deciding it rightly. It can be done no otherwise.”⁶³ For Spooner, whose professional career was based on proving the unconstitutionality of regulations put upon banking and post offices, the task of proving unconstitutionality of an institution that was so deeply rooted in the American social system as slavery was a particularly alluring challenge. The result of his efforts was a two-volume, almost three-hundred-page-long work that came to be known as the most influential analysis of the unconstitutionality of slavery.⁶⁴

Spooner’s arguments for immediate abolishment of slavery were highly original.⁶⁵ Most abolitionists tried to prove that the “peculiar institution” was incompatible with natural law – which they most often derived from the divine law – and wished all laws sanctioning slavery to be declared void according to the maxim *lex iniuria non est lex*. The author of *The Unconstitutionality of Slavery*, while also being a *iustnaturalist* set out to prove instead that slavery was an institution that was

⁶¹ L. Spooner, *A Letter to S. P. Andrews*, 31.03.1849, retrieved March 2, 2016 from: <http://www.lysanderspooner.org/s/LT48.HTM>

⁶² *Massachusetts--Commonwealth v. Jennison* (1783), Proc. of Mass. Hist. Soc., Vol. 1873-1875, pp. 292-295.

⁶³ L. Spooner, *A Letter to Gerrit Smith*, 11.01.1847, retrieved March 2, 2016 from: <http://static1.squarespace.com/static/55a3c833e4b07c31913e6eae/t/55a41d7ee4b0114751ba1b81/1436818814110/LT48.pdf>

⁶⁴ L. Perry, *Radical Abolitionism: Anarchy and the Government of God in Antislavery Thought*, Ithaca, NY, Cornell University Press, 1973, p. 165.

⁶⁵ R. E. Barnett, “Was Slavery Unconstitutional Before the Thirteenth Amendment? Lysander Spooner’s Theory of Interpretation”, in *Pacific Law Journal* 28, 1977, pp. 988-1014.

incompatible with the standing law of the land. He was convinced that, in order to change the Southern socio-economic system, it is not necessary to change federal law, but to interpret it correctly. Therefore all the remarks that he made in his essay are, according to him, *de lege lata* and not *de lege ferenda*.

In order to convince judges that slave owners did not have any basis for their peculiar institution in the Constitution, Spooner applied the statutory interpretation that had been used by the Chief Justice of the United States, John Marshall, in the case *United States v. Fisher*.⁶⁶ Already in his lifetime, Marshall was named one of the most influential American lawyers.⁶⁷ He was respected both in the Northern, as well as Southern states, for his balanced views rejecting any kind of radicalism. As a judge, he avoided voicing his personal opinions in cases involving the issue of slavery, however, privately he was a member of American Colonization Society, an organization that advocated a peculiar solution to the problem of the peculiar institution – liberating all black slaves under the condition that they immediately return to Africa.⁶⁸ Spooner referred to the interpretation outlined, but not elaborated on in the *Fisher* case when trying to prove that his argumentation was rooted in the mainstream of the American law.⁶⁹

The case *United States v. Fisher* did not involve slavery, but the question whether the United States are entitled to priority of payments in all cases of bankruptcy or insolvency of a debtor. In the court ruling in this case, Chief Justice Marshall emphasized that any limitation of the rights of an individual requires using terminology that explicitly presents the purpose of the law-maker: “Where fundamental principles are overthrown, when the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness.”⁷⁰

According to Spooner, this principle played a key role in the issue of unconstitutionality of slavery since it requires sanctioning slavery either by means of using common and unambiguous terms, or legal definitions that leave no doubts as to their meaning⁷¹ The United States Constitution does not contain terms that would explic-

⁶⁶ L. Spooner, *The Unconstitutionality...*, *op. cit.*, p. 63.

⁶⁷ C. F. Hobson, *The Great Chief Justice. John Marshall and the Rule of Law*, Lawrence, KS, University Press of Kansas, 1996.

⁶⁸ E. Burin, *Slavery and the Peculiar Solution: A History of the American Colonization Society*, Gainesville, FL, University Press of Florida, 2005.

⁶⁹ Spooner did not have a high opinion of judge Marshall. In an open letter to Glover Cleveland, he wrote: “John Marshall has the reputation of having been the greatest jurist the country has ever had. And he unquestionably would have been a great jurist, if the two fundamental propositions, on which all his legal, political, and constitutional ideas were based, had been true. These propositions were, first, that government has all power; and, secondly, that the people have no rights.” L. Spooner, *A Letter to Glover...*, *op. cit.*, p. 87.

⁷⁰ *United States v. Fisher*, 6 U.S. 2 Cranch 358 358 (1805).

⁷¹ L. Spooner, *The Unconstitutionality...*, *op. cit.*, pp. 58-66.

itly refer to slavery including “slaves” or “enslavement.”⁷² Instead, the authors of the Constitution used terms that did not have any legal definitions, such as “other Persons” or “Person held to Service or Labour.”⁷³ These notions, contrary to what supporters of the peculiar institution claimed, could not be considered as references to slavery, Spooner argued. He claimed that this interpretation would be incompatible with their common meaning, as well as with other provisions of the Constitution.

In an attempt to interpret the constitutional terms supposedly referring to slavery in the light of “general principles of law and reason,”⁷⁴ Spooner referred to the text of the Constitution, court rulings, Blackstone’s commentaries and the common language.⁷⁵ On the basis of a thorough and painstaking analysis that would be later on cited by the Supreme Court of the United States (although in different context),⁷⁶ he concluded that constitutional “other Persons” were inhabitants of the US who did not possess the citizenship, and “Persons held to Service and Labour” were convicts and debt slaves that constituted majority of American colonists (after excluding Puritans, such people constituted almost 2/3 of the early settlers).⁷⁷ As regards the Article 1, §9 of the American Constitution that granted the right to regulate the issue of “the migration or importation of [other] persons” to the Congress, Spooner argued that the term “importation” meant only “to bring from a foreign country, or jurisdiction, or from another State, into one’s own country, jurisdiction or State” and did not have any connotation with slavery whatsoever. “A man imports his wife and children – but they are not therefore his slaves, or capable of being owned or sold as his property. A man imports a gang of laborers, to clear lands, cut canals, or construct railroads; but not therefore to be held as slaves. An innocent meaning must be given to the word, if it will bear one. Such is the legal rule.”⁷⁸

In his argumentation, Spooner avoids referring to the intentions of the Founding Fathers. From James Madison’s notes that were revealed in the 1840s it was clear that most of the Philadelphia Convention participants wished to legitimize slavery without explicitly referring to it in the Constitution. However, he claimed that the intentions of the authors of the Constitution did not matter for the process of statutory interpretation.⁷⁹ Indeed, the legitimacy of the Constitution was not based on

⁷² The term “slavery” was first used with the introduction of the Thirteenth Amendment.

⁷³ For, respectively, “other persons” and “persons held to service or labor,” see: *The Constitution of United States Article 1 Section 2 and Article 4 Section 2*.

⁷⁴ This term can be often found in his analysis.

⁷⁵ Spooner’s method of argumentation is very similar to that propagated in recent years by Richard Dworkin, who postulated that a judge as tirelessly as the ancient Hercules, should refer to all principles and clues of interpretation that are part of the legal system. See: R. Dworkin, *Taking Rights Seriously*, Cambridge, MA, Harvard University Press, 1977, pp. 105-123.

⁷⁶ *District of Columbia v. Heller*, 554 US 570 (2008); *McDonald v. Chicago*, 561 US 3025 (2010).

⁷⁷ L. Spooner, *The Unconstitutionality...*, *op. cit.*, pp. 67-80.

⁷⁸ *Ibidem*, p. 82.

⁷⁹ *Ibidem*, pp. 114-123. For the analysis of Spooner’s arguments from the perspective of the modern

the agreement reached by the participants of the Constitutional Convention, but its ratification by the American people. The agreement of the latter could not have included provisions kept secret from them. If that was the case, one could say that the law-makers under some secret agreement have the right to impose duties on citizens which are incompatible with the common understanding of the text of the laws. "Any forty or fifty men, like those who framed the constitution, may now secretly concoct another, that is honest in its terms, and yet in secret conclave confess to each other the criminal objects they intended to accomplish by it, if its honest character should enable them to secure for it the adoption of the people. – But if the people should adopt such constitution, would they thereby adopt any of the criminal and secret purposes of its authors? Or if the guilty confessions of these conspirators should be revealed fifty years afterwards, would judicial tribunals look to them as giving the government any authority for violating the legal meaning of the words of such constitution, and for so construing them as to subserve the criminal and shameless purpose of its originators?"⁸⁰ Spooner believed that there was only one answer to these questions – the intentions of the lawmaker could be taken under consideration while interpreting the law only if they had been clearly expressed in the text of the law in question, enabling those obliged to abide by it to acknowledge and accept it. Since the Founding Fathers had not openly and clearly sanctioned slavery, the secret compromise they had achieved had no binding force.

The conclusion of Spooner's analyses seems clear – the Constitution of the United States, contrary to the argumentation presented by Southern lawyers, as well as radical abolitionists, is not a pro-slavery document and it cannot be interpreted as providing legitimacy for personal enslavement. This implies that judges who wish to act in accordance with the law are required to take stance for freedom, regardless of the opinion of majority, common practice or the socio-political consequences of widespread emancipation.⁸¹

The Unconstitutionality of Slavery attracted widespread interest in the abolitionist circles. Spooner's arguments received particularly favourable response from the moderate fraction of the emancipation movement represented by the Liberty Party. During the party convention in 1849, it was decided that members of the party would provide each lawyer in the US with a copy of the essay. Additionally, the leaders of LP, who were mostly rich businessmen and philanthropists, offered distribute the book, by means of their private networks, to people outside the legal profession.

Further publicity of Spooner's argumentation was a result of the stance expressed by Frederick Douglass, a runaway slave and one of the closest supporters of W.

legal theory, see: e.g. H. W. Baade, "'Original Intent' in Historical Perspective: Some Critical Glosses", in *Texas Law Review* 69, 1991, pp. 1046-1051.

⁸⁰ L. Spooner, *The Unconstitutionality...*, *op. cit.*, p. 118.

⁸¹ *Ibidem*, p. 14.

L. Garrison, who, distancing himself from the editor of *The Liberator*, declared in several abolitionist papers that after reading *The Unconstitutionality of Slavery*, he arrived at the conclusion that: “the Constitution, construed in the light of well established rules of legal interpretation, might be made consistent in its details with the noble purposes avowed in its preamble; and that hereafter we should insist upon the application of such rules to that instrument, and demand that it be wielded in behalf of emancipation.”⁸²

Not all abolitionists were equally positive about Spooner’s theses. As a reaction to the growing popularity of the argumentation, Wendell Phillips (1811-1884) – a lawyer from Garrison’s circles – published a thorough critique of *The Unconstitutionality of Slavery* with the help of American Anti-Slavery Society. He argued that Spooner was wrong about the constitutional status of slavery and following the strategy which the latter proposed would lead the abolitionist movement to an inevitable failure.⁸³ He believed that some of Spooner’s postulates were a threat not only to slavery itself, but also to the fundamental principles of the American legal system, languishing on the edge of anarchism.

The most threatening argument presented by Spooner was, according to Phillips, that judges and other public figures were obliged to disregard the opinion of majority and interpret all laws with the presumption in favour of liberty: “An individual may, and ought to resign his office, rather than assist in a law he deems unjust. But while he retains, under the majority, one of their offices, he retains it on their conditions, which are, to obey and enforce their decrees. There can be no more self-evident proposition, than that, in every [legitimate] Government, the majority must rule, and their will be uniformly obeyed. Now, if the majority enact a wicked law, and the Judge refuses to enforce it, which is to yield, the Judge, or the majority? Of course, the first. On any other supposition, Government is impossible. Indeed, Mr. Spooner’s idea is practical no-governnmentism.”⁸⁴

Phillip’s accusation that the presumption of liberty was equal to rejecting any form of power was harshly criticized by Spooner himself. In the second volume of *The Unconstitutionality of Slavery* he argued that the government based on unconditional respect for inherent rights of an individual was not only possible to establish, but also the only one that could be normatively legitimized. Indeed, only this kind of government could be constituted with the consent and for the benefit of the citizens. “Protecting the rights of all, it would naturally secure the cordial support of all, instead of a part only. The expense of maintaining it would be far less than that of maintaining a different one. And it would certainly be much more practicable to live under it than under any other. Indeed, this is the only government which it is practi-

⁸² F. Douglass, *Change of ...*, *op. cit.*, p. 155.

⁸³ W. Phillips, *Review of Lysander...*, *op. cit.*, p. 4 and following.

⁸⁴ *Ibidem*, pp. 9-10.

cable to establish by the consent of all the governed; for an unjust government must have victims, and the victims cannot be supposed to give their consent. All governments, therefore, that profess to be founded on the consent of the governed, and yet have authority to violate natural laws, are necessarily frauds. It is not a supposable case, that all, or even any very large part, of the governed, can have agreed to them. Justice is evidently the only principle that everybody can be presumed to agree to, in the formation of government.”⁸⁵ In the following years, this remark that used to be a marginal argument in a much broader debate would become a central point in Spooner’s legal and political doctrine. It seems that the direct cause of the evolution of his views towards anarchism was the bloodiest conflict on the history of the United States – the war between the North and the South over the right to leave the Union.

4. The American Civil War is considered the turning point in the history of the US.⁸⁶ As George Ticknor (1791-1871), a remarkable literature scholar, wrote soon after it was finished, “it does not seem to me as if I were living in the country in which I was born.”⁸⁷ The war was the cause of death of 625 thousand up to even 850 thousand people, complete destruction of the Southern states⁸⁸ and a great increase in the power of the federal government.⁸⁹ Even the language that Americans used to refer to their country was changed – the term “union” suggesting a voluntary association of different jurisdictions was substituted by “nation” and for the first time, the United States themselves were considered a singular entity in terms of grammar (people started using the form *The United States is...*, instead of *The United States are...*).⁹⁰

However, along with the huge number of casualties and enormous economic cost, the war resulted in granting personal freedom for almost four millions of black people living in America. Its direct consequence was adopting three Amendments to the Constitution that abolished the “peculiar institution” completely – the 13th abolished slavery, the 14th granted citizenship to former slaves and the 15th banned limiting the right to vote on the basis of race, skin color or the previous condition of servitude. For most abolitionists, adopting these Amendments was the crowning of their long-lasting efforts, a reason for personal satisfaction, and often a reason

⁸⁵ L. Spooner, *The Unconstitutionality... Part Second*, *op. cit.*, p. 143.

⁸⁶ J. R. Hummel, *Emancipating Slaves, Enslaving Free Men. A History of the American Civil War*, Chicago, IL, Open Court, 1996, pp. 349-365.

⁸⁷ G. Ticknor, *A Letter to George T. Curtis*, 30.06.1869, in A. Ticknor, G. S. Hillard (eds.), *Life, Letters, and Journals of George Ticknor*, vol. 2, Boston, MA, University of Michigan Library, 1876, p. 485.

⁸⁸ The American Civil War is often considered the first modern total war. See: e. g. D. G. Faust, *This Republic of Suffering: Death and the American Civil War*, New York, NY, Vintage, 2008.

⁸⁹ J. R. Hummel, *op. cit.*, pp. 313-348.

⁹⁰ J. M. McPherson, *Ordeal By Fire: The Civil War and Reconstruction*, New York, NY, McGraw-Hill Education, 1982, p. 488.

to withdraw from the socio-political activity altogether.⁹¹ Those, who had argued that slavery was unconstitutional, were particularly satisfied since their opinions had a great influence upon the substance of the 14th Amendment to the United States Constitution.⁹² However, Spooner, who provided the constitutional abolitionists with their most powerful arguments, was far from feeling satisfaction that his colleagues felt. He thought that the Civil War did not result in the widespread emancipation, but it merely substituted personal enslavement with political enslavement. What is more, the latter one affected a much greater number of people, making the slavery rate increase.⁹³

Spooner analyzed the Civil War and its consequences in a series of three essays published in 1967-1870 titled *No Treason*.⁹⁴ The thesis presented in them was contrarian and iconoclastic: it was not the South that betrayed the Union, but the Union betrayed Americans by trying to keep the South by force. “The pretense that the «abolition of slavery» was either a motive or justification for the war, is a fraud of the same character with that of «maintaining the national honor» Who, but such usurpers, robbers, and murderers as they, ever established slavery? Or what government, except one resting upon the sword, like the one we now have, was ever capable of maintaining slavery? And why did these men abolish slavery? Not from any love of liberty in general – not as an act of justice to the black man himself, but only «as a war measure» and because they wanted his assistance, and that of his friends, in carrying on the war they had undertaken for maintaining and intensifying that political, commercial, and industrial slavery, to which they have subjected the great body of the people, both black and white. And yet these imposters now cry out that they have abolished the chattel slavery of the black man – although that was not the motive of the war – as if they thought they could thereby conceal, atone for, or justify that other slavery which they were fighting to perpetuate, and to render more rigorous and inexorable than it ever was before. There was no difference of principle – but only of degree – between the slavery they boast they have abolished, and the slavery they were fighting to preserve; for all restraints upon men’s natural liberty, not necessary for the simple maintenance of justice, are of the nature of slavery, and differ from each other only in degree. If their object had really been to abolish slavery, or maintain liberty or justice generally, they had only to say: All, whether white or black, who want the protection of this government, shall have it; and all who do not want it, will be left in peace, so long as they leave us in peace. Had they said this, slavery would necessarily

⁹¹ After the ratification of the last Amendment in 1870, the AASS officially dissolved.

⁹² R. E. Barnett, “Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment”. In: *Journal of Legal Analysis* 3, 2011, pp. 165–263.

⁹³ L. Spooner, *No Treason I*, *op. cit.*, p. 5.

⁹⁴ It was first meant to be divided into six parts – hence the surprising order: I, II and VI.

have been abolished at once; the war would have been saved; and a thousand times nobler union than we have ever had would have been the result.”⁹⁵

The starting point for Spooner’s argument is specifying the character of the Union formed in 1787 by the citizens of America and defining the constitutional meaning of the term “treason” (Article III § 3).⁹⁶ Based on the history of the American colonies’ struggle for independence and the preamble to the Constitution, he argued that the United States were created by the voluntary consent of Americans who chose and established the government. However, the text of the constitutional agreement did not state that the parties involved – be that individuals as claimed by Spooner or states as maintained by the constitutionalists from the South – were bound by its provisions for a certain, specified, period of time. What is more, for that agreement to be considered voluntary, it should be possible to terminate it at any time. This is why the author of *No Treason* maintained that the citizens of the South had every right to withdraw from the agreement making them a part of the Union and a subject to the shared government. Therefore, by disobeying the federal government they did not commit treason. When fighting against it, they were doing so not as frauds, betrayers or false friends – synonyms of traitors that Spooner presented in accordance with his rule of interpreting constitutional terms as in the common language and daily use – but as enemies.⁹⁷ The actual traitors, according to Spooner, were the government of the Union, since by making it impossible for the Southerners to secede, they violated the assumption that their power was based on the consent of the governed. In fact, their authority was based only on the consent of those whose support was necessary to keep all others dependent on their mercy. Spooner thought the *postbellum* United States to be “a mere conspiracy of the strong against the weak.”⁹⁸

That conclusion, according to Spooner, called for reevaluation of the normative basis of power which could reveal that not only the government, but also the Constitution from which the government derives its authority, lacked legitimacy. “Previous to the war, there were some grounds for saying that – in theory, at least, if not in practice – our government was a free one; that it rested on consent. But nothing of that kind can be said now, if the principle on which the war was carried on by the

⁹⁵ *Idem, No Treason VI...*, *op. cit.*, p. 86.

⁹⁶ *Idem, No Treason II...*, *op. cit.*, pp. 17-30. The article of the Constitution that Spooner referred to: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”

⁹⁷ *Ibidem*, pp. 27-30.

⁹⁸ *Ibidem*, p. 30 *No Treason* is not a defense of the Confederate States of America, but of the right of self-determination inherent to each individual. Spooner believed that the lack of coercion was the *sine qua non* condition for the legitimacy of the government based on the rule of law and both the North and the South violated this principle. *Ibidem*, p. 28.

North [that men may rightfully be compelled to submit to, and support, a government that they do not want; and that resistance, on their part, makes them traitors and criminals], is irrevocably established. If that principle be not the principle of the Constitution, the fact should be known. If it be the principle of the Constitution, the Constitution itself should be at once overthrown.”⁹⁹ In order to indicate the limits of the social compact that establishes the legitimate government, in *No Treason*, Spooner attempted to identify the requirements that should be fulfilled by the Constitution to be considered normatively legitimized and then checked whether the US Constitution fulfilled those requirements.

According to Spooner, the only Constitution that could be considered legitimate was the one that constituted a voluntary agreement signed by specific individuals, on their own behalf and within their rights to peacefully govern oneself and one’s wealth. The consent of the parties must be stated explicitly and approved in a manner that would be verifiable in the future, e.g. by signing, and be free of any kind of coercion. If individuals constituting it wished to extend it to include third parties – constitutional *the people* – that do not wish to become a part of this endeavor, their actions should be considered violence and they should be regarded as thugs. Indeed, no individual has the right to force others to take on commitments that they do not give their consent to. In the same way that one cannot force others to enter a marriage, a business agreement or a church, one cannot force other to become a part of a constitutional agreement. As Spooner claimed, “There is no other criterion whatever, by which to determine whether a government is a free one, or not, than the single one of its depending, or not depending, solely on voluntary support.”¹⁰⁰

The preamble to the Constitution of the United States includes a statement that it has been constituted and adopted by the citizens of the US with the aim of granting blessing of liberty for themselves and their offspring, strengthening the Union, establishing justice, ensuring domestic tranquility and providing for the common defense. *Prima facie* this declaration indicates that the normative legitimacy of the agreement constituting the Union is founded upon the consent of Americans. According to Spooner however, the doctrine of *popular sovereignty* which was the basis for the American republic¹⁰¹ is a very dangerous myth since it suggests the existence of the common consent in the time when it could not have been reached, and the possibility of including the future generations that at the time of concluding the agreement were not even born yet.¹⁰²

⁹⁹ *Ibidem*, p. 6.

¹⁰⁰ *Ibidem*, p. 27.

¹⁰¹ See: E. S. Morgan, *Inventing the People. The Rise of Popular Sovereignty in England and America*, New York, NY, W. W. Norton & Company, 1988.

¹⁰² L. Spooner, *No Treason II...*, *op. cit.*, p. 25 and *idem*, *No Treason VI...*, *op. cit.*, pp. 43-48.

The doctrine of *popular sovereignty* that Founding Fathers referred to assumes that the legitimate governments are granted “their just powers from the consent of the governed.”¹⁰³ However, during the state conventions that ratified the US Constitution only few citizens had the right to vote. Women, juveniles, black slaves and debt slaves were not asked for their consent. Even among white males, who constituted the majority at the ratification conventions, not all had the right to vote since many states established highly restrictive property qualifications. As a consequence, the majority of Americans were bound by an agreement on whose provisions they did not have any influence whatsoever, their acceptance thereof was of no interest to anyone, nor did it matter to anybody if they wished to reject it. Therefore, the popular consent of *We the people* on establishing the United States as designed in the Constitution was a fiction even in the times of the Founding Fathers.

Even if, contrary to sources, we were to assume that the federal Constitution was ratified and accepted by the people and not only a small minority, it would still lose its legitimacy with the death of those who ratified it, as Spooner claimed.¹⁰⁴ They did not have the right to make its provisions binding for next generations. Their declaration that the Constitution was established to ensure the blessings of liberty for themselves and their offspring is as binding as the hopes of parents building a house that one day at least one of their adult children would wish to live in it. They can make the house attractive in order to influence the decision of their children to voluntarily stay there, but they do not have the right to force them to do so.¹⁰⁵

The offspring of the citizens of the United States who established the Union by the end of the 18th century were never asked for giving their opinion on the Constitution and therefore their consent to bear its provisions could be only presumed. Anticipating harsh criticism from the supporters of *popular sovereignty*, Spooner argued that the only actions that could establish *presumed consent* of the individuals to become subjects to the constitutional power would be participation in the elections and/or paying taxes. However, none of these could be considered a proof of voluntarily supporting the Union.¹⁰⁶

¹⁰³ *The Declaration of Independence and the Constitution of the United States of America*. Washington, DC 2002, p. 9.

¹⁰⁴ L. Spooner, *No Treason VI...*, *op. cit.*, p. 36.

¹⁰⁵ *Ibidem*, p. 34.

¹⁰⁶ *Ibidem*, pp. 33-48. Spooner does not take into consideration other popular forms of presumed consent, such as long-termed inhabiting the territory of a given state or using the public services offered by the state. However, these examples can be found in the works of one of the most influential exponent of Spooner's theses, an American constitutionalist, Randy Barnett. See: esp. R. E. Barnett, “Constitutional Legitimacy”, in *Columbia Law Review* 103, 2003, pp. 111-148 and *Idem*, *Restoring the Lost Constitution. The Presumption of Liberty*, Princeton, NJ, Princeton University Press, 2004, pp. 9-31. For a broader analysis of the issue of legitimacy of political power in the context of different views on the social compact see: M. Huemer, *The Problem of Political Authority. An Examination of the Right to Coerce and the Duty to Obey*, New York, NY, Palgrave Macmillan, 2013, pp. 20-80.

With regards to taxation, Spooner points out the obvious fact that the public tributes are compulsory. People who are obliged to pay them have no possibility of refusing to do so. Those subjected to taxation are in a similar situation to that of a victim of the robbery. “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. The government does not, indeed, waylay a man in a lonely place, spring upon him from the roadside, and, holding a pistol to his head, proceed to rifle his pockets. But the robbery is none the less a robbery on that account; and it is far more dastardly and shameful.”¹⁰⁷ Acting under the threat of force or actual force *ipso facto* excludes the possibility of refusing to take the particular action, hence, paying taxes can never be treated – if there is no other clear and explicit declaration – as support for constitutional power.

Voting cannot be considered manifestation of such support either. Spooner presents several arguments for this thesis. Firstly, not all citizens of the US had the right to vote,¹⁰⁸ hence the fact that the elections are held regularly does not mean that the government chosen through them has the support of all individuals that are subjects to their power. Secondly, a large part of those who have the right to vote, do not participate in the process, which does not mean that they give consent to become subjects to the choice made by other people. Their absence could be a purposeful manifestation against power itself. Those, who vote only occasionally, could do so in order to support a particular person or to minimize the chances of the victory of a candidate whose postulates they consider particularly harmful. Even regular participation in the process cannot be considered a proof of support for the people in power, because due to the use of the secret ballot, it is not certain for whom (or what) or against whom (what) they voted and what was their reason. According to Spooner, this last remark is particularly important since some voters can treat voting as the only form of self-defense available in a democratic state. The author of *No Treason* presents an analogy with a battlefield. Just because a person thrown into the middle of a battle shoots aiming at the other side of the conflict it does not mean they support the country whose troops they find themselves in – it only means they are trying to survive. Similarly, some voters may find themselves in a situation where they are living under the government that they did not give their consent to and that they cannot confront effectively. “Doubtless the most miserable of men, under the most oppressive government in the world, if allowed the ballot, would use it, if they could see any chance of thereby meliorating their condition. But it would not, therefore, be a legitimate inference that the government itself, that crushes them, was one which they had voluntarily set up, or even consented to.”¹⁰⁹

¹⁰⁷ L. Spooner, *No Treason VI...*, *op. cit.*, p. 43.

¹⁰⁸ At the time when Spooner published the essay, only about one sixth of the American population had the right to vote.

¹⁰⁹ *Ibidem*, p. 38.

Therefore, Spooner believes the presumed consent, which is the foundation for the popular sovereignty doctrine, to be the instrument of enslavement – a fraud by means of which people in power and those who owe their privileged positions to the support they get from the government, like bankers who benefit from the money monopoly established in their interest,¹¹⁰ subjugate individuals unable to oppose their power effectively. This kind of “shameless absurdity, falsehood, impudence, robbery, usurpation, tyranny, and villainy of every kind” cannot constitute the basis for the legitimacy of the government.¹¹¹ According to Spooner, a street thug might as well claim that he has the right to presume that a traveler gives his consent to share his money with him.¹¹² In fact, the government is even more perverse than a street thugs, since the latter do not usurp the support for their actions and do not claim that their crimes are committed in the interest of the victims of their violence. ”The highwayman takes solely upon himself the responsibility, danger, and crime of his own act. He does not pretend that he has any rightful claim to your money, or that he intends to use it for your own benefit. He does not pretend to be anything but a robber. He has not acquired impudence enough to profess to be merely a «protector» and that he takes men’s money against their will, merely to enable him to «protect» those infatuated travellers, who feel perfectly able to protect themselves, or do not appreciate his peculiar system of protection. He is too sensible a man to make such professions as these. Furthermore, having taken your money, he leaves you, as you wish him to do. He does not persist in following you on the road, against your will; assuming to be your rightful «sovereign» on account of the «protection» he affords you. He does not keep «protecting» you, by commanding you to bow down and serve him; by requiring you to do this, and forbidding you to do that; by robbing you of more money as often as he finds it for his interest or pleasure to do so; and by branding you as a rebel, a traitor, and an enemy to your country, and shooting you down without mercy, if you dispute his authority, or resist his demands. He is too much of a gentleman to be guilty of such impostures, and insults, and villainies as these. In short, he does not, in addition to robbing you, attempt to make you either his dupe or his slave.”¹¹³

Basing on his analysis, Spooner concludes that the Constitution of the United States has no binding force. Taking into consideration that only a minor part of Americans supported its ratification, it was not binding even at the moment of its ratification and it is obvious that it could not be binding after the American Civil War, when the Southerners were forcibly refused the possibility of leaving the Union. As Spooner concludes, “it is plain, then, that on general principles of law and

¹¹⁰ *Ibidem*, pp. 81-85.

¹¹¹ *Idem*, *No Treason II...*, *op. cit.*, p. 30

¹¹² *Ibidem*, pp. 30-31.

¹¹³ *Idem*, *No Treason VI...*, *op. cit.*, p. 44.

reason – such principles as we all act upon in courts of justice and in common life – the Constitution is no contract; that it binds nobody, and never did bind anybody; and that all those who pretend to act by its authority, are really acting without any legitimate authority at all; that, on general principles of law and reason, they are mere usurpers, and that everybody not only has the right, but is morally bound, to treat them as such.”¹¹⁴

5. During the quarter of a century between the publication of the first volume of *The Unconstitutionality of Slavery* and *No Treason VI: The Constitution of No Authority*, one can clearly see a radical change in views of the author. The Constitution that before the Civil War he thought to be the tool of the widespread emancipation loses all its utility. Although he still believes it better than “it has generally been assumed to be” and for any departures from the liberal values expressed in its preamble blames the government, that through “false interpretations, and naked usurpations” corrupted its meaning, *postbellum* he arrives at the conclusion that in the light of maintaining the Union by force, it is perhaps of no importance what its true legal meaning, as a contract, is¹¹⁵. “But 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. In either case, it is unfit to exist.”¹¹⁶ The change in Spooner’s views is not concerned with the issue of how to properly interpret the Constitution, but whether it is an efficient instrument for protection of the rights of an individual. The author of *The Unconstitutionality of Slavery* abandoned the belief in the statute law and in the possibility that it can be used to achieve goals other than promoting the interests of plutocrats.¹¹⁷

Before the Civil War, despite having many reservations over the political and legal system of the US, Spooner seemed willing to admit that the Constitution was designed to realize the values expressed in the preamble, and that it could be used to protect inherent rights of an individual on the condition that it was interpreted in accordance with the presumption of liberty. However, after the War, while observing the ongoing Reconstruction, during which the US went through a radical political transformation, he came to the conclusion that when lawmakers refer to the constitutional values, it is only to hide the fact that the laws they ratify are designed to protect the interests of those in power and their clients.

Postbellum, Spooner begins to see the norms and institutions that he attacked before the conflict as incompatible with rights and freedoms provided by the Consti-

¹¹⁴ *Ibidem*, p. 55.

¹¹⁵ *Ibidem*, p. 88.

¹¹⁶ *Ibidem*, p. 88.

¹¹⁷ See: R. T. Long, *Inside and Outside Spooner’s Natural Law Jurisprudence*, 2007, pp. 24-25, a lecture given during the 23rd Internationale Vereinigung für Rechts- und Sozialphilosophie, Kraków 1-7 VIII, retrieved March 4, 2016, from: <http://praxeology.net/Spooner-Krakow.doc>

tution – such as slavery or the money monopoly – not as incidental departures from liberal values, but as the manifestation of the real nature of the legal system and a proof that the system is based on force and violence. Violence cannot however provide a normative legitimacy for the state that is supposedly based on the rule of law. As he stated even before the Civil War, “if the majority, however large, of the people of a country, enter into a contract of government, called a constitution, by which they agree to aid, abet or accomplish any kind of injustice, or to destroy or invade the natural rights of any person or persons whatsoever, whether such persons be parties to the compact or not, this contract of government is unlawful and void – and for the same reason that a treaty between two nations for a similar purpose, or a contract of the same nature between two individuals, is unlawful and void. Such a contract of government has no moral sanction. It confers no rightful authority upon those appointed to administer it. It confers no legal or moral rights, and imposes no legal or moral obligation upon the people who are parties to it. The only duties, which anyone can owe to it, or to the government established under color of its authority, are disobedience, resistance, destruction.”¹¹⁸

This conclusion is in line with the views of radical abolitionists, who called for breaking up any relationship with the government established in accordance with the Constitution that allowed for the existence of slavery. According to Garrison and his colleagues, the only proper response to the violence that is inherent to any legal system that allows for treating people as property is disobeying the law and acting in accordance with the Christian principle of love of one’s neighbor. As he wrote more than a decade before the Thoreau’s Concord lectures on the duties of an individual in relation to the unjust government, he did not care for what the statutory law required from him, nor what it banned, since “there is no other source of laws than the Bible,” however, if he breaks the statutory law, “[he] will submit to the penalty, unresistingly, in imitation of Christ, and his apostles, and the holy martyrs.”¹¹⁹

This view was later extended by Garrison onto the doctrine of *non-resistance*, which called for abolitionist to carry their actions completely outside the political system, and if necessary – against it, however, on the condition that they do not engage in any violence themselves.¹²⁰

Spooner was never a pacifist, nor did he derive the natural law from the Bible,¹²¹ but he agreed with Garrison and his followers that institutionalized violence, i.e. slavery, did not deserve to be regarded as the law and needed to be disobeyed. The difference between the author of *The Unconstitutionality of Slavery* and the abolitionist circles gathered around the editor of *The Liberator* was that while the major-

¹¹⁸ L. Spooner, *The Unconstitutionality...*, *op. cit.*, p. 9.

¹¹⁹ H. Mayer, *op. cit.*, p. 224.

¹²⁰ See: A. S. Kraditor, *op. cit.*, *passim*.

¹²¹ R. T. Long, *op. cit.*, pp. 26-30.

ity of Garrison's colleagues rejected the normative legitimacy of the Constitution before the Civil War, stating that it was a "pro-slavery document," Spooner refused to give it any "authority" after the War, which turned it – contrary to the values stated in its preamble – into an instrument in the hands of politicians who wished to substitute the unconstitutional personal slavery with a common "political, commercial, and industrial slavery."¹²²

¹²² L. Spooner, *No Treason VI...*, *op. cit.*, p. 86.