



THE SIGNIFICANCE OF LYSANDER SPOONER

In this month's Liberty Matters online discussion Randy Barnett, the Carmack Waterhouse Professor of Legal Theory at the Georgetown University Law Center, explores the political thought and constitutional theories of the 19th century American individualist, anarchist, and abolitionist Lysander Spooner (1808-1887). He concludes that "Spooner's approach to constitutional interpretation, construction, and legitimacy is as fresh today as it was in 1845. Indeed, it is more sophisticated and persuasive than the theorizing of most contemporary legal academics." He is joined in the discussion by Roderick T. Long, professor of philosophy at Auburn University, Aeon J. Skoble, professor of philosophy at Bridgewater State University, and Matt Zwolinski, associate professor of philosophy at the University of San Diego.

THE SIGNIFICANCE OF LYSANDER SPOONER

by Randy E. Barnett

Born in rural Athol, Massachusetts, Lysander Spooner (1808–1887) was a man of many hats: lawyer, radical abolitionist, land speculator, entrepreneur, legal theorist, and eventually individualist anarchist. The intellectual origin and exact timing of Spooner's anarchism is unknown, but it may well have been a product of the pervasive anarchistic tendencies of "nonresistance" abolitionists.

As chronicled by Lewis Perry in his study *Radical Abolitionism: Anarchy and the Government of God in Antislavery Thought* (1973), many of the radical abolitionists were opposed to political activism.^[1] Their arguments against slavery, based on the lack of authority of one person to own another, led them to take a similar stance against all government. Among these abolitionists, Spooner's anarchism would have been mainstream. Perry describes Spooner's letters in the 1840s as expressing a "latent anarchism."^[2]

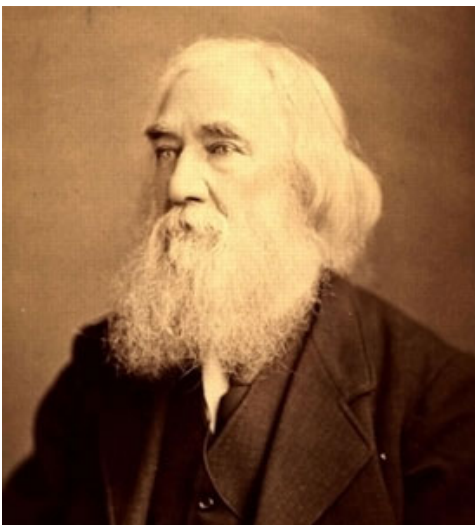
Spooner is best known to libertarians today for his explicitly anarchistic essay *No Treason: The Constitution of No Authority*.^[3] My favorite passage is where Spooner

unfavorably compares the government with a highwayman:

[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.^[4]

While most libertarians know Spooner largely from *No Treason*, in his own time he was better known for his antislavery constitutionalism. In 1845 Spooner produced the first edition of *The Unconstitutionality of Slavery*, which Lewis Perry described as “influential” and “the most famous antislavery analysis of the Constitution.”^[5] Perry situates Spooner outside some of the principal fault lines of abolitionism, but still respected for his legal acumen by all abolitionists regardless of their camp.^[6] Unlike the Garrisonians, he was a deist rather than a Christian;^[7] and whereas the Garrisonians believed the Constitution to be a “covenant with death and an agreement with hell” because it sanctioned slavery,^[8] Spooner believed slavery to be unconstitutional. Unlike the political abolitionists, however, he privately disclaimed any interest in politics, including the antislavery Liberty Party.^[9] As Perry described it, Spooner “was a maverick abolitionist who belonged to none of the familiar factions in the movement.”^[10]



Lysander Spooner

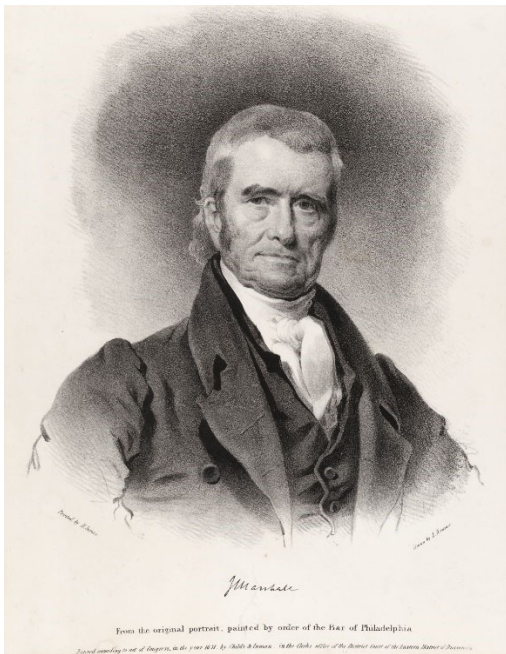
Spooner was “the leading authority for the view that slavery was illegal under the Constitution, and he was greatly respected by other abolitionists.”^[11] After Spooner, more abolitionists came to claim that slavery was illegal even in the original slave states. Eventually, even Garrison conceded that a man could be for the Constitution and yet not be pro-slavery “if he interpreted it as an anti-slavery instrument....”^[12]

Spooner’s principal argument was that the “original meaning of the constitution itself” should not be overridden by the unexpressed intentions of those who wrote it or by subsequent decisions of the courts.^[13] The “original meaning” is “the meaning which the courts were bound to put upon it from the beginning; not the meaning they actually have put upon it. We wish to determine whether the meaning which they have hitherto put upon it be correct.”^[14]

Spooner maintained that the “constitution, of itself, independently of the actual intentions of the people, expresses some certain fixed, definite, and legal intentions; else the people themselves would express no intentions by agreeing to it. The instrument would, in fact, contain nothing that the people could agree to.”^[15] In short, “[a]greeing to an instrument that had no meaning of its own, would only be agreeing to nothing.”^[16]

Today this stance is known as “original public meaning” originalism and is the dominant mode of originalist interpretation. As early as the 1980s Supreme Court Justice Antonin Scalia urged originalists to abandon their quest for the “intentions of the framers” and seek instead the meaning that the text of the Constitution would have had to a member of the general public at the time the Constitution was ratified.^[17] The only intentions that matter are the ones that were expressed by the language of the Constitution. Or, as Spooner put it, it “is not the intentions men actually had, but the intentions they constitutionally expressed, that make up the constitution.”^[18] Indeed, “if the intentions could be assumed independently of the words, the words would be of no use, and the laws of course would not be written.”^[19]

Spooner maintained that the Constitution contained no explicit reference to “slavery,” and the passages that supposedly do are literally ambiguous, in the sense that their words have multiple meanings.^[20] When confronted with multiple meanings, one of which is innocent and the other is immoral and unjust, courts and others should choose the innocent one. Spooner took this rule of construction from the 1805 Supreme Court case of *United States v. Fisher*,^[21] in which Chief Justice John Marshall articulated a “clear statement” rule of construction for resolving ambiguities in the public meaning of statutes: “Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from,” he wrote, “the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects.”^[22]



John Marshall

As elaborated by Spooner, under this rule of construction, when the original public meaning is ambiguous—that is, when there is more than one possible meaning—“[the court will never, through inference, nor implication,](#) attribute an unjust intention to a law; nor seek for such an intention in any evidence exterior to the words of the law. They will attribute such an intention to the law, only when such intention is written out in actual terms; and in

terms, too, of ‘irresistible clearness.’”^[23] He then devoted the bulk of his efforts to establishing that the original public meaning of the clauses allegedly referring to slavery was either innocent or ambiguous and properly construed as innocent.

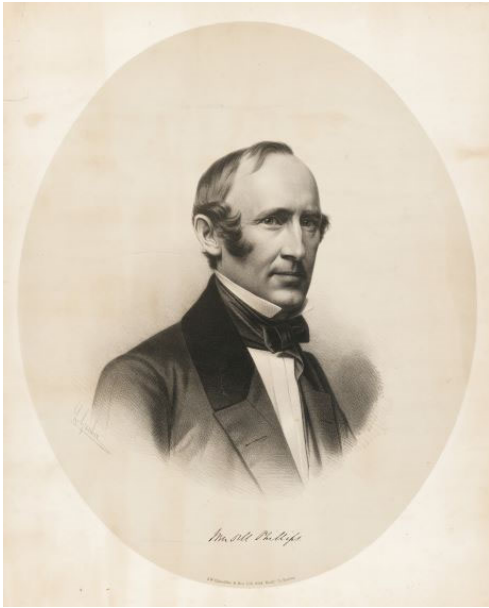
Spooner’s argument exploited the fact that, while most ambiguity is inadvertent, the drafters of the Constitution deliberately introduced ambiguity into the text by using euphemisms to avoid any express reference to slavery. With euphemisms there is a normal and obvious innocent meaning. The only way to identify the offensive meaning of a euphemism is to appeal to “parol evidence,” extrinsic to the writing itself, which is barred by the rule of construction that Spooner borrowed and adapted from Marshall.

In formulating his methodological apparatus Spooner was responding to a pamphlet by Harvard-trained Wendell Phillips, which relied on quotes from the recently released notes of James Madison on the Philadelphia convention. Phillips used these statements to show that, notwithstanding their refusal to use the term, various passages of the Constitution were intended by its framers to refer to slavery.^[24] It was Spooner’s compelling methodological rejoinder to this evidence of original framers’ intent that made Spooner’s work so influential among abolitionists. Frederick Douglass, for example, was persuaded by Spooner’s argument to abandon the Garrisonian reading of the Constitution.^[25]

Spooner’s argument reverberated throughout the abolitionist movement. Phillips was “[g]loaded by charges that he was afraid to tackle the most famous antislavery analysis of the Constitution—Lysander Spooner’s *The Unconstitutionality of Slavery*.”^[26] In 1847 Phillips responded with a self-published, 90-page reply, to which Spooner responded that same year with a “[part second of The Unconstitutionality of Slavery](#)” that doubled its length.^[27]

In a speech to the House in 1847 U.S. Rep. (and future Confederate general) Thomas Clingman of North Carolina displayed a close familiarity with Spooner’s book, “which seemed to be spreading itself like a ‘green bay tree,’” reflecting its popularity among

abolitionists.[28] The novelty of the book, Clingman noted, accounted for its popularity, “and the abolitionists collected around Mr. Spooner and applauded him, until he began to think that he had at length carried off the ‘gates of Gaza.’”[29] Clingman chided Spooner for an interpretive methodology that might be used to prove that a woman could become the president of the United States. He then praised the objections of Wendell Phillips, “an abolitionist of the old Garrison, or disunion school,” to undercut Spooner’s argument.[30]



Wendell Phillips

Despite Clingman’s hope that Spooner’s theories would be forgotten, Spooner continued to be cited in Congress. In 1854 Senator Albert Brown, a Democrat from Mississippi, characterized Spooner’s book as “ingeniously written” and conceded that “[i]f his premises were admitted, I should say at once that it would be a herculean task to overturn his argument.”[31] One supposes that the “premises” to which Brown referred were Spooner’s interpretive methodology, coupled with his rule of construction.

Over the years I have vacillated on whether Spooner’s argument about slavery ultimately worked, but I now think it fails. Spooner’s approach trades on the purely semantic ambiguity of the words in the text. What original public meaning originalism seeks, however, is the *communicative content* of the text.[32] This content is

informed by the *context* that would be known to the audience at whom it is aimed.[33] In this case, whether proslavery or against, no one would have mistaken the euphemistic references in the Constitution as anything other than references to slavery. If there is no actual communicated ambiguity, then there is no warrant to resort to Spooner’s rule of construction.

I may be the only person in the United States who became an originalist as a result of reading *The Unconstitutionality of Slavery*. As I was teaching a seminar in constitutional theory, I noticed a footnote citation to Spooner’s book. Knowing Spooner only from *No Treason*, I was intrigued. Reading Spooner’s rejection of framers’ intent in favor of public meaning was a revelation. At the time I was unaware that Justice Scalia had urged the same shift some 10 years earlier.

But reading *The Unconstitutionality of Slavery* also provided me with something else that was quite unexpected: a reply to Spooner’s argument about the authority of the Constitution in *No Treason: The Constitution of No Authority* (no. 6). In that work Spooner questioned the authority of the Constitution on the ground that it was never consented to. It begins:

[The Constitution has no inherent authority or obligation.](#) It has no authority or obligation at all, unless as a contract 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. And it can be supposed to have been a contract then only between persons who had already come to years of discretion, so as to be competent to make reasonable and obligatory contracts. Furthermore, we know, historically, that only a small portion even of the people then existing were consulted on the subject, or asked, or permitted to express either their consent or dissent in any formal manner. 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. 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. That is to say, the instrument does not purport to be an agreement between any body but “the people” THEN existing; nor does it, either expressly or impliedly, assert any right, power, or disposition, on their part, to bind anybody but themselves.[34]

Spooner then analyzed at length arguments for “tacit” consent based on, for example, voting or paying taxes, and why these arguments fail.

In my book *Restoring the Lost Constitution*, which is dedicated “to James Madison and Lysander Spooner,” I join with Spooner in rejecting these and other tacit consent arguments. I contended that though “genuine consent, were it to exist, could give rise to a duty of obedience, the conditions necessary for ‘We the People’ actually to consent to anything like the Constitutions or amendments thereto have never existed and could never exist.”[35] And yet, another of Spooner’s arguments in *The Unconstitutionality of Slavery* points the way to how a constitution that lacks genuine consent might nevertheless be legitimate.

The key move is to recognize that a constitution does not bind the people themselves; instead, a constitution is supposed to bind those who govern the people. To the extent that consent is relevant, each and every office holder takes an oath to obey the Constitution and thereby consents to its terms. So what matters is not whether a constitution was assented to by the people, but whether *the laws* that are imposed under its auspices bind the people in conscience to obedience.

In short, people need not consent to obey the law to be bound by it. Instead, a law can bind in conscience if it does not violate the rights of those on whom it is imposed—so their consent is unnecessary—and if it is necessary to protect the rights of others—so it is obligatory for the same reasons our rights are obligatory.

In *The Unconstitutionality of Slavery*, Spooner argued that statutes must be consistent with natural justice as defined by natural rights because only then would such statutes be binding on the citizenry: “[If legislation be consistent with natural justice](#), and the natural or intrinsic obligation of the contract of government, it is *obligatory*: if not, not.”[36] For Spooner, then, the choice was a conception of law that was consistent with natural justice, which would then carry with it a duty of obedience, or a conception of law based solely on the successful imposition of power, which there would be no moral duty to obey.

How then would a government achieve legitimacy? Spooner begins by acknowledging the fictitious nature of the “consent of the governed”:

[Our constitutions purport to be established by “the people,”](#) and, *in theory*, “all the people” *consent* to such government as the constitutions authorize. But this consent of “the people” exists only in theory. It has no existence in fact. Government is in reality established by the few; and these few assume the consent of all the rest, without any such consent being actually given.[37]

But it is the fictitious or theoretical nature of this consent that imposes limits on the just powers of government:

[All governments ... that profess to be founded on the consent of the governed](#), and yet have authority to violate natural laws, are necessarily frauds. It is not a supposable case, that all or even a very large part of the governed, can have agreed to them. Justice is evidently the only principle that *everybody* can be presumed to agree to, in the formation of government.[38]

In other words, any government that depends for its legitimacy on the “theoretical” as opposed to the actual consent of the governed must operate consistently with the principles of justice to which everybody *presumably* could agree. And no one can be presumed to have parted with his inalienable rights. For a constitution to be “valid and lawful,” it “[cannot lawfully](#)

[authorize government to destroy or take from men their natural rights](#): for natural rights are inalienable, and can no more be surrendered to government—which is but an association of individuals—than to a single individual.” Natural rights “are a necessary attribute of man’s nature; and he can no more part with them—to government or anyone else—than with his nature itself.”^[39] Still, “the contract of government may lawfully authorize the adoption of means—not inconsistent with natural justice—for the better protection of men’s natural rights. And this is the legitimate and true object of government.”^[40]

In this way Spooner’s concept of “theoretical” consent can yield a theory of constitutional legitimacy with following steps:

- Constitutions do not bind the people themselves, but provide instead the law that governs those who govern the people, to which government officials bind themselves by oath;
- Only laws that are consistent with the natural and inalienable rights of the people can justly claim a duty of obedience; therefore,
- A legitimate constitution is one that adopts procedures to ensure that the laws that are imposed on the nonconsenting public are likely to be just.

Why Spooner changed his mind about the Constitution is unknown. Yet in *The Unconstitutionality of Slavery*, he provided a powerful case for why a constitution can be legitimate if it provides procedures to assure that the laws imposed on *nonconsenting* persons do not violate their preexisting natural rights. Then, when such a constitution is put in writing to preserve these safeguards, its text should be interpreted according to its original meaning. Where that meaning is unclear, however, rules of construction should be adopted to protect the rights retained by the people.

Lysander Spooner’s approach to constitutional interpretation, construction, and legitimacy is as fresh today as it was in 1845. Indeed, it is more sophisticated and persuasive than the theorizing of most contemporary

legal academics. I know it changed my views on the Constitution in a fundamental way. Not bad for a self-taught young man from Athol.

Endnotes

[1.] Lewis Perry, *Radical Abolitionism: Anarchy and the Government of God in Antislavery Thought* (Ithaca, NY: Cornell University Press, 1973).

[2.] Ibid. at 198-202.

[3.] Lysander Spooner, *No Treason: The Constitution of No Authority*, no. 6 (Boston: Lysander Spooner, 1870). Online edition: <[/titles/2194](#)>.

[4.] Ibid. at 13.

[5.] Perry, *Radical Abolitionism*, 195, 165.

[6.] Ibid. at 194.

[7.] Lysander Spooner, “The Deist’s Immortality, and an Essay on Man’s Accountability for His Belief,” and “The Deist’s Reply to the Alleged Supernatural Evidences of Christianity,” in Charles Shively, *The Collected Works of Lysander Spooner in Six Volumes*, vol. 1 (Weston, MA: M&S Press, 1971). Online edition: in *The Shorter Works and Pamphlets of Lysander Spooner vol. I (1834-1861)* (Indianapolis: Liberty Fund, 2010). <[/titles/2290](#)>:

- “The Deist’s Immortality, and an Essay on Man’s Accountability for His Belief” (1834) <[/titles/2290#lf1531-01_head_001](#)>
- “The Deist’s Reply to the Alleged Supernatural Evidences of Christianity” (1836) <[/titles/2290#lf1531-01_head_006](#)>

[8.] William Lloyd Garrison, “The Constitution: A ‘Covenant with Death and an Agreement with Hell,’” in *The Liberator*, vol. 12 (1842), 71.

[9.] Perry, *Radical Abolitionism*, 165-66, 194-204, 208, 282-85.

[10.] Ibid. at 194.

[11.] Ibid.

[12.] William Lloyd Garrison, “Practical Christian,” in Perry, *Radical Abolitionism*, 193.

[13.] Lysander Spooner, *The Unconstitutionality of Slavery* (Boston: Bella Marsh, 1860), 114. Online edition: </titles/2206>

[14.] Ibid. at 18.

[15.] Ibid. at 22.

[16.] Ibid.

[17.] See, e.g., Antonin Scalia, “Originalism: The Lesser Evil,” *The University of Cincinnati Law Review* 57 (1988-1989).

[18.] Spooner, *The Unconstitutionality of Slavery*, 59.

[19.] Ibid. at 220.

[20.] Ibid. at 222.

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

[22.] Ibid. at 390.

[23.] Spooner, *The Unconstitutionality of Slavery*, 220.

[24.] Wendell Phillips, *The Constitution: A Pro-Slavery Compact; or Selections from the Madison Papers* (Boston, 1844).

[25.] See Frederick Douglass, “Change of Opinion Announced,” in *The Liberator*, May 23 (1851), attributing his change of opinion to “[a] careful study of the writings of Lysander Spooner, of Gerrit Smith, and of William Goodell.”

[26.] Perry, *Radical Abolitionism*, 165.

[27.] Wendell Phillips, *A Review of Lysander Spooner’s Essay on the Unconstitutionality of Slavery* (Boston: Andrews & Prentiss 1847).

[28.] *Congressional Globe*, 30th Congress, 1st Sess., (1847, Appendix: 45), Speech of Thomas Clingman on Dec. 22, 1847.

[29.] Ibid.

[30.] Ibid.

[31.] *Congressional Globe*, 34th Congress, 3rd Sess. (1854, Appendix: 14), Speech of Albert Brown, Dec. 2, 1854.

[32.] See generally, Lawrence B. Solum, “Communicative Content and Legal Content,” *Notre Dame Law Review* 89 (2013).

[33.] Ibid.

[34.] Spooner, *No Treason*, no. 6.

[35.] Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: Princeton University Press, 2d ed. 2013), 14.

[36.] Spooner, *The Unconstitutionality of Slavery*, 8 (emphasis added).

[37.] Ibid. at 153; see id. at 225 (“The whole matter of the adoption of the constitution is mainly a matter of assumption and theory, rather than of actual fact.”).

[38.] Ibid.

[39.] Ibid. at 8

[40.] Ibid.

SPOONER DEFENDED

by Roderick T. Long

1. Preliminaries

Lysander Spooner was by any standard a remarkable person. I can’t resist mentioning two fascinating items that Randy Barnett omitted from his brief biography of Spooner: his entrepreneurial operation, from 1844 to 1851, of a private mail service in illegal (or at least contrary-to-statute) competition with the U.S. Postal Service (he argued that the federal postal monopoly was unconstitutional,[41] and attributed a reduction in federal postage rates to his own efficiency in underselling the government),[42] and his attempt, in 1859, to secure John Brown’s release from prison by organizing an (in the event unsuccessful) effort to kidnap the governor of Virginia and hold him hostage against Brown’s freedom[43] (Spooner himself in the previous year had prepared a broadside encouraging opponents of slavery to foment slave insurrections, only to be discouraged by Brown himself from publishing it on the grounds that it might serve to tip Brown’s hand.[44]



John Brown

Moving on to the substance of Randy's essay: while Randy shares my enthusiasm for Spooner's work, he argues that Spooner's two best-known contributions – his 1845-47 case for the unconstitutionality of slavery and his 1870 case against the authority of the Constitution – both fail. I think that on the contrary they both largely succeed. Let me say why.

2. Interpreting the Constitution

I believe there is more to Spooner's theory of legal interpretation than the "original public meaning" approach to which Randy assimilates it. The "original public meaning" approach, as I see it, is essentially in agreement with its rivals (original-intent on the one hand and living-constitution on the other) in taking the decisive question to be: *whose semantic intentions* are to determine the meaning of contested terms and phrases in a constitution (or in any law for that matter)? Oversimplifying somewhat, the original-intent approach says "those of the framers" (or perhaps of the ratifiers); the living-constitution approach says "those represented by society's understanding today"; and the original-public-meaning approach says "those represented by society's understanding at the time of adoption."

Spooner, by contrast, does not think that *anyone's* semantic intentions *all by themselves* are sufficient to establish the meaning of a legal provision. Consider how he handles the [Constitution's notorious fugitive-slave clause](#), which provides that a person "held to service or labor in one State" and "escaping into another" must be "delivered up on claim of the party to whom such service or labor may be due." One of Spooner's principal moves here is to focus on the meaning of the term "due." Since, he argues, by natural justice all persons are free and equal, it follows that one person's labor cannot be "due" to another except as a result of of free consent and contract; inasmuch as "[the 'service or labor,' that is exacted of a slave](#)" is not "such as can be 'claimed,' consistently with natural right, as being 'due' from him to his master," the fugitive-slave clause cannot authorize anyone's forcible return *except* in the case of those who have freely contracted to perform some service and then broken the contract (which was not the case with the slaves).[\[45\]](#)

Here Spooner is assuming that the correct interpretation of a contested normative term like "due" must invoke the correct moral account of which things are *due* from one person to another (and similar treatment of normative legal terms can be found throughout his book) – not the framers' account, not the prevailing social understanding in 1789, not the prevailing social understanding today, but the correct account.

In short, Spooner is implicitly relying on a *realist theory of reference*, according to which what a term means is determined not by semantic intentions alone but by semantic intentions *in conjunction with* the way the world really is, whether or not it is known or believed to be that way by those using the term. Spooner thus partly anticipates the groundbreaking approach to reference developed in the 1970s by such philosophers as Hilary Putnam and Saul Kripke,[\[46\]](#) according to which facts about reality can play a role in determining what we mean when we speak, even if we are unaware of those facts. And if one takes there to be objective facts about morality and justice (as Spooner of course does), then facts about, *e.g.*, what is really "due" from one person to

another will play a role in determining what the word “due” in the fugitive-slave clause means, even if no one at the time had been aware of those facts about justice.

Philosopher and legal theorist David Lyons shows how the realist theory of reference, coupled with an objective theory of justice, applies to constitutional interpretation:

Imagine that you and I disagree about the substantive requirements of social justice. We then differ as to how the concept of justice applies; we differ, that is, about the principles of justice. This is possible if the concept of justice admits of different interpretations, or competing conceptions.... Now consider a constitutional example.... [A] court applying the just compensation clause would not necessarily decide a case as the original authors would have done.... Instead, a court would understand the Constitution to mean precisely what it says and thus to require *just* compensation. A court would need to defend a particular conception of just compensation ... against the most plausible alternatives.... Contested concepts do not seem confined to morality and law. Their properties are at any rate similar to those of concepts referring to natural substances or phenomena, such as water and heat. On a plausible understanding of the development of science, for example, the caloric and kinetic theories of heat are (or at one time were) competing conceptions of the concept heat.... If, as most people would agree, ‘heat’ refers to a determinate physical phenomenon, there can be, in principle, a best theory of heat. This implies that there can be a best conception of a contested concept. This suggests, in turn, that contested concepts in the Constitution might have best interpretations.... Now if the idea that the Constitution includes contested concepts is correct, then to apply the Constitution in terms of their best interpretation is, in effect, to apply doctrines whose application is called for by the

original Constitution. But, just as interpretation of the concept heat requires more than mere reflection, any interpretation of this type inevitably draws upon resources that are neither implicit in the text nor purely linguistic. It ... requires that courts applying ‘vague clauses’ of the Constitution interpret ‘contested concepts,’ which requires reasoning about moral or political principles.^[47]

While I doubt that Lyons was aware of Spooner, I take him to be essentially reformulating Spooner’s position in light of contemporary developments in philosophy of language.

Thus in reply to Randy’s charge that the context of the Constitution’s communicative content forbids a Spoonerite reading, I reply, with Spooner, that that context must include not only the social understandings prevailing in 1789 but also objective facts about justice according to which the services of slaves are not “due” to their masters (and so on for the Constitution’s other contested terms).

3. Rejecting the Constitution

From defending the Constitution, in 1845, against the charge of being a pro-slavery document, Spooner famously passed, in 1870, to rejecting the Constitution as a document of “no authority.” Randy remarks: “Why Spooner changed his mind about the Constitution is unknown.”

If what’s in question is a change of mind about the *interpretation* of the Constitution, then I don’t think Spooner *did* change his mind. In his 1870 assault on the Constitution, Spooner still notes that his strictures apply only to the Constitution “*not as I interpret it, but as it is interpreted by those who pretend to administer it*”^[48] (Spooner’s emphasis) and adds that “the writer thinks 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.”^[49] In short, he continues

to regard the Constitution, properly interpreted, as having a pro-liberty content.



Nor is the fictional nature of the Constitution's consent-based authority a new discovery of Spooner's in 1870, since in the earlier work he had already described the "[assent and intention of the people](#)" on which the Constitution claims to rest as "a thing of assumption, rather than of reality," and had pointed out that without that assumption (which he admits is false) "the constitution itself is denied, and its authority consequently invalidated."[\[50\]](#) Just as he still maintains in 1870 the constitutional interpretation he had defended in the 1840s, so as early as the 1840s he has already anticipated the view of constitutional authority that he will elaborate in 1870.

What Spooner changes his mind about between 1845 and 1870, I think, is neither the *interpretation* of the Constitution nor its *authority*, but rather its *utility*. He tells us explicitly: "[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."[\[51\]](#)

Randy thinks he sees in Spooner's *Unconstitutionality of Slavery* a way to defend the Constitution against Spooner's *Constitution of No Authority* – namely, by maintaining that "a law can bind in conscience if it does not violate the rights of those on whom it is imposed – so their consent is unnecessary – and if it is necessary to protect the rights of others – so it is obligatory for the same reasons our rights are obligatory." To this claim, Spooner would make two replies.

First: while the requirements of objective justice may bind in conscience, a statutory law with the same content as what justice requires does not *itself* bind in conscience. In Spooner's words: "[If \[laws\] command men to do justice](#), they add nothing to men's obligation to do it, or to any man's right to enforce it. They are therefore mere idle wind, such as would be commands to consider the day as day, and the night as night."[\[52\]](#)

Second: while the Constitution, correctly interpreted by Spoonerite principles, may be a libertarian document, it is *no accident* that it has not traditionally been so interpreted; the *actually* nonconsensual nature of the United States government creates an incentive structure that renders such a government exceedingly unlikely to remain bound by any even slightly libertarian reading of its own powers. As Spooner noted in 1852, the only way that the administrators of the legal system can be "[restrained from seeking their own interests](#), and the interests of those who elected them, at the expense of the rights of the remainder of the people" is by curtailing their "authority in the enactment and enforcement of laws" – and *not* simply by regaling them with paper prohibitions urging them to exercise their authority in nice ways.[\[53\]](#)

4. Other Issues

While Spooner's views on the Constitution – its interpretation, its authority, and its utility – will no doubt rightly continue to occupy us as we proceed in this conversation, I hope we will also have a chance to talk about some of Spooner's other ideas. These include positions I am willing to defend: Spooner's view that an unjust law is not a law; his support for jury nullification and opposition to *voir dire* (particularly topical in light of recent reports of racially discriminatory abuse of *voir dire*);[\[54\]](#) his views on property rights and the rectification of land theft; his theory of class conflict; his curse-on-both-your-houses attitude toward the Civil War; his bottom-up approach to political change; and his anticipation of the set of positions known nowadays as "left-libertarianism" or "free-market anti-capitalism." They also include positions where I think Spooner went astray: his defense of intellectual property

(copyrights and patents); his severely minimalist approach to the grounding of a natural-law ethic; and some of his specific economic and political proposals. I'd also be interested in discussing the relation between Spooner's and Hayek's theories of law, where I think each has something to learn from the other.

Endnotes

[41.] Lysander Spooner, *The Unconstitutionality of the Laws of Congress, Prohibiting Private Mails* (New York, 1844). Online <[/titles/2231](#)>.

[42.] Spooner, *Who Caused the Reduction of Postage? Ought He to Be Paid?* (Boston, 1850). Online <[/titles/2290#lf1531-01_head_034](#)>.

[43.] Janet Kemper Beck, *Creating the John Brown Legend: Emerson, Thoreau, Douglass, Child and Higginson in Defense of the Raid on Harpers Ferry* (Jefferson, NC: McFarland, 2009), pp. 127-29

[44.] Spooner, *To the Non-Slaveholders of the South: A Plan for the Abolition of Slavery* (n.p., 1858). Online <[/titles/2181](#)>.

[45.] Spooner, *The Unconstitutionality of Slavery*, Part I (Boston, 1845), pp. 81-82. Online <[/titles/2206](#)>.

[46.] Hilary Putnam, *Philosophical Papers, vol. 2: Mind, Language and Reality* (Cambridge, 1979); Saul Kripke, *Naming and Necessity* (Harvard, 1980). Those familiar with Ayn Rand's work on reference may notice a similarity here as well; see Roderick T. Long, "Reference and Necessity: A Rand-Kripke Synthesis?," *Journal of Ayn Rand Studies* 7.1 (2005), pp. 209-28.

[47.] David Lyons, "Constitutional Interpretation and Original Meaning," pp. 85-99; in *Social Philosophy & Policy* 4.1 (Fall 1986), pp. 75-101. For my own attempt to develop this approach as a reading of Spooner, see my working paper "Inside and Outside Spooner's Natural Law Jurisprudence," available online at: <<http://praxeology.net/Spooner-OB.doc>>.

[48.] Spooner, *No Treason, no. VI: The Constitution of No Authority* (Boston, 1870), pp. 22-23). Online <[/titles/2194](#)>.

[49.] Ibid., p. 59.

[50.] Spooner, *The Unconstitutionality of Slavery: Including Parts First and Second* (Boston, 1847), p. 225.

[51.] *Constitution of No Authority, op. cit.*, p. 59.

[52.] Spooner, *A Letter to Grover 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, 1886), p. 4. Online <[/titles/2224](#)>. For a contemporary elaboration of this point, see Charles W. Johnson, "Liberty, Equality, Solidarity: Toward a Dialectical Anarchism," online at: <<http://radgeek.com/gt/2010/03/02/liberty-equality-solidarity-toward-a-dialectical-anarchism>> and "A Place for Positive Law A Contribution to Anarchist Legal Theory," online at: <<http://charleswjohanson.name/essays/a-place-for-positive-law>>.

[53.] Spooner, *An Essay on the Trial by Jury* (Boston, 1852), p. 217. Online <[/titles/2181](#)>. For the contrast between constitutions as sets of paper prohibitions and constitutions as institutions embodying real-world incentive structures, and the superiority of stateless legal orders over governmental ones as instances of constitutionalism in the second sense, see my "Market Anarchism As Constitutionalism," in Roderick T. Long and Tibor R. Machan, eds., *Anarchism/Minarchism: Is a Government Part of a Free Country?* (Aldershot: Ashgate, 2008), pp. 133-54.

[54.] See my "Black Jurors Need Not Apply," Center for a Stateless Society (22 October 2015), online at: <<http://c4ss.org/content/41089>>.

THE SPOONER ZONE: RANDY BARNETT ON SPOONER, NATURAL RIGHTS, AND CONSTITUTIONALISM

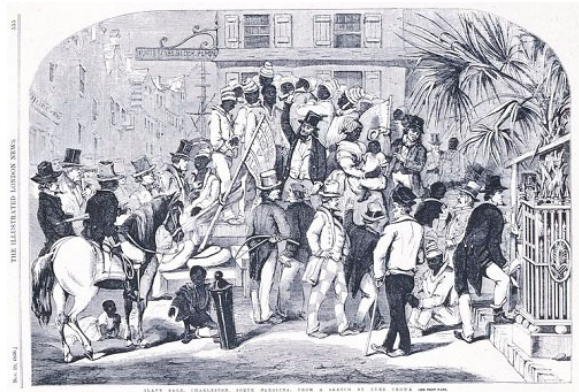
by Aeon J. Skoble

Randy Barnett argues that Lysander Spooner is an important and influential legal theorist. Barnett also explains how Spooner’s work influenced Barnett’s own thinking about how to interpret the Constitution. Since Barnett is himself an important and influential theorist, the first claim is therefore true. QED. But there are more interesting questions, such as why Barnett finds Spooner compelling and whether we should as well.

Spooner’s influence is on display in Barnett’s conception of originalism. It’s not the older version of originalism, which looks to the original intent of the framers, but the newer version (or an even older version), which looks to the original public meaning of the language, the communicative context of the text. Barnett argues that Spooner’s own use of this method to find that slavery was unconstitutional turns out not to work, that Spooner has misapplied his own method. Spooner appeals to semantic ambiguities in arguing that slavery is unconstitutional, but the theory would require actual communicated ambiguities. However, other aspects of Spooner’s theory suggest that the Constitution can’t bind people to respect the institution of slavery. Spooner also notes that “only laws that are consistent with the natural and inalienable rights of the people can justly claim a duty of obedience.” Since there isn’t a natural right to own another person, then no laws respecting the institution of slavery can be legitimate, *whether or not* the Constitution allows them. Let’s examine those premises.

Why, first of all, should we think that the only laws that can justly impose a duty of obedience are ones that are consistent with natural rights? Because the very idea of rights is a moral one. “Rights” is an ethical concept. To have a natural right to x is, if nothing else, a morally

legitimate claim to x. The idea that justice can require you to be unjust is contradictory, so I can’t have a justice-based duty to violate someone’s natural rights. Similarly in the second premise: there can’t be a natural right to own another person, for logical reasons. If there are natural rights, they are borne by all persons, so Smith and Jones have the same ones. Jones therefore can’t have a natural right that violates Smith’s natural rights; that would be contradictory. If Smith has a morally legitimate claim, Jones can’t have a morally legitimate claim to block Smith’s claim. The idea that one could have a right to violate rights is oxymoronic. (This entails that natural rights must be negative rights, or liberties. The right of every person to live and be free, to acquire and trade, doesn’t create any contradictions; whereas an alleged natural right to be provided with a thing suggests that someone has a nonconsensual duty to provide it.) So, if there’s a natural right to live and be free, it is borne by both Smith and Jones, and Jones therefore can’t have a *natural* right to own Smith. This means that if Jones *claimed* to have a property right in Smith, it wouldn’t be morally binding – not on Smith himself, of course, but also not on anyone else. So a legal system couldn’t legitimately enforce Jones’s alleged right to own Smith. Indeed, on Spooner’s view, a legal system can’t legitimately enforce *any* claims that violate natural rights.



Slave Sale

The Constitution, then, can’t respect the institution of slavery, not because there’s a way to read it such that it doesn’t “really” legitimize slavery, but because it can’t have the authority to violate rights in the first place. Barnett argues that this represents a shift in

Spooner's thinking about the Constitution, a matter on which I'm happy to defer to Barnett. What I find most powerful in Barnett's analysis of Spooner is the insight that the Constitution shouldn't be seen as something that binds the people, but rather as something that binds the governors. Since governors take an oath, their consent is explicit and not tacit. They are thus bound *in the exercise of their power* not to violate the rights of the people. The people themselves, Spooner says, aren't legally bound to anything they don't explicitly consent to, but they are morally bound to not violate rights either. So laws arising under the Constitution that are consistent with natural rights are binding on everyone anyway, and laws that are not so consistent have no authority. The people are already bound not to violate other people's rights, so they aren't legally bound to anything that governors say that isn't consistent with natural rights. As Spooner put it, "[If legislation be consistent with natural justice](#), and the natural or intrinsic obligation of the contract of government, it is *obligatory*: if not, not."

This leaves us with both a theoretical basis for objecting to abuses of constitutional authority as well as a practical method for countering them. Where possible, we should interpret the Constitution according to its original meaning, and where it is unclear, we should resolve any ambiguities in rights-protecting ways and reject interpretations that are inconsistent with natural rights. Interestingly, this creates a space within which one can be an anarchist and a constitutionalist at the same time. The "Spooner zone" here is anarchistic in the sense that real authority can only exist (1) by actual agreement among people who are presumed to be equals, or (2) by respecting natural, negative, rights. So governors can legitimately make only those laws that we would be morally bound by even if there were no lawmakers, such as laws against murder and theft. But people in this Spooner zone don't have to exempt themselves from meaningful engagement with current legal controversies. Ironically, since people who *reject* Spooner's views on natural rights and the relationship between consent and authority think that the Constitution is a legally binding document, they must take its authority seriously. So originalism as an

interpretive doctrine offers us a way to motivate even those with a more expansive conception of tacit consent and state power.

The whole point of having a written Constitution, Barnett argues, is to have limits on power. Those limits are established by the communicative context of the text, its original meaning (as opposed to "it means whatever I want it to mean"). Laws imposed on people without their consent must be shown to be consistent with the Constitution's original meaning and in as rights-protecting a way as possible. In actual legal cases this will not always produce anarchistic results: since the Constitution clearly gives Congress the power to raise a navy, originalist interpretation is unlikely to lead to the conclusion that I as an individual have the right to raise my own navy. But in a court case challenging, say, a putative government power to conduct warrantless searches, originalism is very likely to show that there is no constitutional authority to do so. This result increases individual liberty in the real political world, and it's important to be able to have a mechanism for doing so. Writing books that explain the state's lack of moral authority is helpful in advancing the cause of liberty in its own way, but actually rolling back encroachments of state power using the state's own apparatus is valuable in a more tangible and publicly visible way. Is there a natural moral power the state has which gives it the right to monitor my communications? I am pretty sure the answer is no, but there's no book I could write which would reestablish my privacy rights better than a legal challenge would. It is of immeasurable value to the protection of a free society that there is a Spooner zone, a place of natural rights, and an originalist constitutionalism that is understood as serving them. We should be grateful to Barnett for showing us that zone.

ON CONSTITUTIONS, COERCION, AND COORDINATION

by Matt Zwolinski

Lysander Spooner, like many libertarians, believed that individual consent was a necessary condition for political authority. In other words, for a government to have legitimate authority, every single individual living under it must give his or her actual (as opposed to merely hypothetical) consent to it. Since that condition is manifestly not met in the case of the government of the United States – or, I might add, any other government that currently exists or ever has existed – Spooner believed that the government lacks legitimate authority. And this is, no doubt, the correct conclusion to draw from his premises. Once one accepts any version of consent theory strong enough to be worthy of the name, the road to philosophical anarchism is but a short one.



Lysander Spooner

In his introductory essay, Randy Barnett tries valiantly to steer Spooner down a different road. He does this, in effect, by abandoning the consent theory of political authority. Consent, on Randy's view, is a sufficient condition for political authority. But it is not a necessary

one. There are other ways in which a government can acquire legitimate authority. In Randy's words,

The key move is to recognize that a constitution does not bind the people themselves; instead, a constitution is supposed to bind those who govern the people. To the extent that consent is relevant, each and every office holder takes an oath to obey the Constitution and thereby consents to its terms. So what matters is not whether a constitution was assented to by the people, but whether the laws that are imposed under its auspices bind the people in conscience to obedience.

Consent still plays a role in this argument, but it is a strictly limited one. The Constitution has authority for the people who form the government because they consent to it when they take their oath of office. But for the rest of us who never take any such oath, whatever authority the government has is a function of the content of the laws that it produces. If the laws are in accordance with natural law and therefore binding in conscience, they have authority. If not, then not. A legitimate constitution, then, is one "that adopts procedures to ensure that the laws that are imposed on the nonconsenting public are likely to be just."

On this view, a government is something like a private club, and a constitution like the charter of that club. Since the charter is only binding on those who sign up to be members of the club, the substantive content of that charter can be just about anything at all. So long as those who are bound by it consent to it, it is legitimate. But nothing in the club's charter can alter the club's moral obligations toward nonmembers. The club's members still have the same obligations toward nonmembers that they had before incorporating.

This simple picture is complicated somewhat by Randy's claim that a legitimate constitution must adopt procedures that ensure that laws that are imposed under it are "likely to be just." Without hearing more about the rationale behind this stipulation, I'm not sure what to make of it. It's one thing to say that people have a duty not to violate the laws of natural justice. It's another thing

to say that they have a duty not to do things that make it likely that they will violate the laws of natural justice. If reading Carl Schmitt makes you more likely to become a fascist, do you have a duty not to read it?



Carl Schmitt

Putting that issue to the side, however, the deeper problem with Randy's proposal is that it seems to leave the government without any real authority at all. On Randy's view, legitimate constitutions establish governments that have the authority to pass laws consistent with natural justice. But, as Spooner himself pointed out, this puts governments in a bit of a pickle.

[If their laws command anything but justice](#), or forbid anything but injustice, they are themselves unjust and criminal. If they simply command justice, and forbid injustice, they add nothing to the natural authority of justice, or to men's obligation to obey it. It is, therefore, a simple impertinence, and sheer impudence, on their part, to assume that their commands, as such, are of any authority whatsoever.[\[55\]](#)

In other words, the theory of authority that Randy has suggested seems to entail that all governments are necessarily either "criminal, as commanding or licensing men to do what justice forbade them to do, or as forbidding them to do what justice would have permitted

them to do; or else they have been superfluous, as adding nothing to men's knowledge of justice, or to their obligation to do justice, or abstain from injustice."[\[56\]](#)

To illustrate: it is a violation of natural justice to knowingly and intentionally cause the death of an innocent person. So if the government passes a law forbidding murder, one has a moral obligation to obey that law. But it is not because murder is illegal that one has an obligation not to murder. One's moral obligation is entirely a function of the natural injustice of murder. The law, in this case, adds nothing to one's moral duties. It is superfluous.

Thus, if all that government may legitimately do is restate and enforce the duties of natural justice, then it would seem to lack any real authority at all. It cannot impose duties upon us. Whatever duties we have are independent of and prior to government. Natural law is the sole authority.

Now, there are a couple of ways in which one might seek to avoid this problem and to establish some form of independent authority for government above and beyond the authority of natural law. One way we might go is the epistemic route: we might claim that governments have authority in the same way and for the same reason that doctors or lawyers do, because they know more than us. This view is compatible with the claim that, as a substantive matter, only natural law has the authority to impose any real duties upon us. But even if this true, it might be the case that most of us aren't in a very good epistemic position to figure out just what exactly the natural law is.

If governments are in a better position to discern the natural law than the masses of people, this might provide them with a kind of epistemic authority. Just as we obey our doctor when he tells us what drugs we ought to take, we might obey our governments when they tell us what taxes we ought to pay. In neither case does the authority's proclamation create a new duty for you. They simply provide you with expert advice regarding what your duty independently is.

This is something like the theory that Joseph Raz gave us in *The Morality of Freedom* (1988).^[57] But without getting into the difficulties that have been pointed out with that theory, I'll note that it is a particularly difficult theory to reconcile with Spooner's view. After all, Spooner held that natural law is "[usually a very plain and simple matter](#), easily understood by common minds," that we have an "almost intuitive perception" of its basic principles, and that even "children learn the fundamental principles of natural law at a very early age."^[58] If natural law is so easy to discern, is it really plausible to suppose that we have a duty to obey the dictates of government as a kind of epistemic authority? I would think not -- especially if we take as dim a view of the motivations and competence of government agents as Spooner seemed (justifiably!) to take.

But perhaps there's another way to go. Rather than claiming that government authority comes from its knowledge of natural law, we might instead say that it comes from its specification of it. After all, the "fundamental principles" of natural law to which Spooner refers are probably best understood as highly abstract generalizations. Locke's famous dictum that "[no one ought to harm another in his life, liberty, or possessions](#)" seems to fit Spooner's description of a "plain and simple" principle that is almost intuitively perceived.^[59] But of course that principle leaves a lot of questions unanswered. Precisely what legal rules should we employ to determine the scope of a person's possessions? How should liability be assigned in the case of unintentional harm? And so on.

It might be that there is no single set of answers to these questions picked out by the basic principles of natural law. Those principles, we might suppose, establish a set of constraints to which any legitimate set of answers will have to conform. But within those constraints there might be room for a variety of different but non-simultaneously realizable answers. It doesn't so much matter which system of tort liability we settle upon so much as it matters that we settle upon the same system. People need to be able to form reliable expectations of how their neighbors will behave -- and how the law will

respond to that behavior -- in order to coordinate their actions effectively. Some authority that specifies and publicizes the abstract principles of natural law can greatly aid in this process.

I suspect this kind of argument might be along the lines of what Randy has in mind. It is, after all, very similar to an argument he set forth in his excellent book *The Structure of Liberty* (1998).^[60] And as far as arguments for political authority go, it's not a bad one. Still, it has its problems. First, it's not always necessary, in the first place, for all people to coordinate upon a single set of norms. It is often possible, and desirable, to have a polycentric order in which different groups coordinate around different norms. Furthermore, even when universal coordination is necessary, it's not always necessary that the state be the agent of that coordination. Private entities can fill this role as well, in which case it's unclear why we should grant any kind of coercive, monopolistic power to the state.

Indeed, it's unclear whether we should ever give that kind of authority to the state, even in cases where universal coordination is necessary, and even where the state is necessary to achieve it. Suppose that effective social coordination requires that everybody drive on the same side of the road. It doesn't matter which side of the road they drive on, so long as everyone's doing the same thing. And suppose, contrary to fact, that private individuals and groups are just utterly incapable of building and managing the roads on their own. Even granting these heroic assumptions, it's still not obvious that government would be justified in forcing people to drive on one side of the road rather than the other. After all, neither driving on the left or driving on the right is a violation of others' natural liberties. So forcibly preventing people from doing one of those things seems to be an instance of "forbidding them to do what justice would have permitted them to do," and therefore impermissible on Spoonerian grounds.

This is a powerful objection. But there might still be one last way around it. The key move is to suppose that people have a natural-law duty to effectively coordinate their actions in ways that are necessary for peaceful

coexistence. If we make this assumption, it would seem to follow that people have a derivative natural duty to abide by whatever effective mechanisms of social coordination are available to them. In some cases – perhaps most – that may just be an informal social norm. If there's a social norm that everybody does X rather than Y, and it's important that everybody acts in the same way in this context, then one has a duty to abide by the norm and X and not Y.

In some cases, however, the law might be the most effective mechanism for facilitating socially necessary cooperation. That it is so would be a purely contingent social fact. Governments, after all, are big and powerful and rather good at bossing people around. But just these very facts might make the government an effective means, in certain contexts, for getting large numbers of people to coordinate their behavior along similar lines. And if these brute facts about government make it the most effective means for facilitating coordination, then individuals with a natural duty to effectively coordinate might be bound in conscience to obey it.

Even if it works, and I'm not entirely sure that it does, this sort of argument still doesn't give the government much authority. It certainly doesn't give it the authority to prohibit marijuana, or bail out banks, or even to run a post office.^[61] But if one is interested in bridging the small but formidable gap between philosophical anarchism and a very minimal state, it strikes me as a promising way to go.

Endnotes

[55.] Lysander Spooner, "A Letter to Grover Cleveland, on His False Inaugural Address, the Usurpations and Crimes of Lawmakers and Judges, and the Consequent Poverty, Ignorance, and Servitude of the People," in *The Collected Works of Lysander Spooner* (Indianapolis, IN: Liberty Fund, 1886), 188. Online version <</titles/2224>>.

[56.] *Ibid.*, p. 188, emphasis added.

[57.] Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1988).

[58.] "Natural Law; or the Science of Justice: A Treatise on Natural Law, Natural Justice, Natural Rights, Natural Liberty, and Natural Society; Showing That All Legislation Whatsoever Is an Absurdity, a Usurpation, and a Crime. Part First.," in *The Collected Works of Lysander Spooner* (Indianapolis, IN: Liberty Fund, 1882), 139-40. Online version </titles/2292#lf1531-02_head_049>.

[59.] John Locke, *The Second Treatise of Government* (New York: MacMillan, 1952), chapter 2. Online version Hollis edition 1764: John Locke, *Two Treatises of Government*, ed. Thomas Hollis (London: A. Millar et al., 1764). <</titles/222>>.

[60.] Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Oxford University Press, 1998), chapter 5.

[61.] See Spooner, *The Unconstitutionality of the Laws of Congress, Prohibiting Private Mails* (New York: Tribune Printing Establishment, 1844). <</titles/2231>>.

THE GAP

by Randy E. Barnett

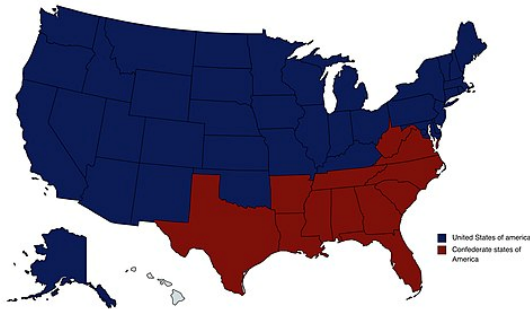
I thank my friends and colleagues Rod Long, Aeon Skoble, and Matt Zwolinski for their very insightful comments on my essay on Lysander Spooner. In some respects, their pieces expand upon mine, which was necessarily limited in what it could cover by a requirement that it be 3000 words and no more. In other respects, however, they register some disagreement.

For example, Rod Long contends that Spooner did not actually change his mind about the Constitution's authority between 1845, when the first edition of *The Unconstitutionality of Slavery* was published, and 1870 when *No Treason* appeared. Although I might contest this claim, I have no interest in prevailing in such an exegetical contest. I would be very content if Spooner had indeed remained consistent in his publicly expressed views. And his correspondence provides reason to believe that Spooner kept some of his views private lest he undermine the appeal of his views on slavery and the Constitution.

Space prevented me from elaborating on two distinctions that might narrow the range of disagreement between Rod and myself, as well as correct a possible misunderstanding of my position expressed by Matt Zwolinski. The first is the distinction between *interpretation* and *construction*. The second is the distinction between *justice* and *legitimacy*. Both are extensively explained in my book *Restoring the Lost Constitution*.

Interpretation and Construction

Constitutional *interpretation* is the activity of identifying the communicative content of the Constitution's text. Constitutional *construction* is the activity of giving that communicated content legal effect. Knowing what the words of a constitution means is not the same thing as applying those words to particular cases. And constitutions with no legal effect, like that of the Confederate States of America, still have an ascertainable meaning.



Confederate States of America

What defines originalism as a method of constitutional interpretation is the belief that (a) the communicative content of the written Constitution was fixed at the time of its enactment, and that (b) this meaning should be followed by constitutional actors until it is properly changed by a written amendment. The first of these propositions is descriptive; the second is normative. In my view, the original meaning of the text provides the law that governs those who govern us; and those who are bound by the Constitution, whether judges or legislators, may not properly change its meaning without going

through the amendment process. But *why* the meaning the text of the Constitution had at the time of its enactment *ought* to be followed is distinct from ascertaining what that meaning is.

The activity of determining the communicative content at the time of enactment required by the first proposition is *empirical*, not normative. Although we can choose to use words however we wish, as Alice discovered in *Wonderland*, the social or interpersonal linguistic meaning of words is an empirical fact beyond the will or control of any given speaker (which was the point being made by *Alice in Wonderland's* author). As Spooner explained in *The Unconstitutionality of Slavery*, "[\[I\]f the intentions could be assumed independently of the words](#), the words would be of no use, and the laws of course could not be written."^[62]

Although the objective meaning of words sometimes evolves, words have an objective social meaning at any given time that is independent of our opinions of that meaning, and this meaning can typically be discovered by empirical investigation. Conducting such an investigation is no more a normative activity to reach conclusions we like than is discovering what is considered good manners in a given society. Say "please" and "thank you"? Shake hands? Bow to someone of higher social status? Wear a veil? We can approve or disapprove of such social practices, and decide whether or not to follow them, but their status as norms is a fact.

So too is linguistic usage. Although I am free to say, "trumetric lyperboly," I cannot expect that anyone but I will have access to what these two words mean. As an empirical matter, this phrase simply has no objective meaning in our community of discourse. By the same token, I can make up my own meaning for "automobile" as a time machine, but if I decide to use the word to communicate my thoughts in an English sentence, others will take me to be referring to a car.

Where the communicative content of the text provides enough information to resolve a particular issue about constitutionality, giving it legal effect will require little, if any, supplementation, and construction will look indistinguishable in practice from interpretation. That

each state is entitled to two senators requires little supplementation to apply. But however much information is contained in the text of the Constitution, there is not always enough information to resolve a particular issue without something more.

To see why this is so, we must understand how language can be either ambiguous or vague. *Ambiguity* refers to words that have more than one sense or meaning. *Vagueness* refers to the penumbra or borderline of a word's meaning, where it may be unclear whether a certain object is included within it or not. Contracts scholar Allan Farnsworth offered this explanation of these two distinct problems of ascertaining linguistic meaning:

Ambiguity, properly defined, is an entirely distinct concept from that of vagueness. A word that may or may not be applicable to marginal objects is vague. But a word may also have two entirely different connotations so that it may be applied to an object and be at the same time both clearly appropriate and inappropriate, as the word "light" may be when applied to dark feathers. Such a word is ambiguous.^[63]

In other words, language is ambiguous when it has *more than one sense*; it is vague when its meaning admits of *borderline cases* that cannot definitively be ruled in or out of its meaning.

When it comes to resolving ambiguity, the context of a statement usually reveals which sense is meant. For example, the term "arms" in the Second Amendment could be referring to weapons or the limbs to which our hands are attached. Context reveals it to refer to weapons. But even when context reveals the intended sense of a potentially ambiguous word, there is still a problem of vagueness. For example, just how much must an object weigh be before we cease calling it light and call it heavy? How tall must a person be before he is no longer short?

The problem of ambiguity can usually, though not always, be resolved by originalist interpretive method. Even when we are not entirely certain which of the multiple senses of a word or phrase is the intended meaning,

historical evidence almost always establishes one meaning as more probable than the others.

Special problems of potentially irresolvable ambiguity can arise either when the evidence of meaning is lost or nonexistent, or when the drafters deliberately injected ambiguity into the text by using euphemisms. This is what the founders did when they referred to slavery by using euphemisms rather than the clear word "slavery," which they fastidiously avoided including in the text.^[64]

It was the potential ambiguity created by these euphemisms that Spooner exploited when he attempted to identify an innocent meaning of each and every passage of the Constitution that was alleged to have referred to slavery. Having identified an ambiguity, he could then employ his "clear statement" rule of construction, which he borrowed from John Marshall. In my essay, I explain why this argument fails if, *in context*, the communicated content of the words was not in fact ambiguous, as I believe to have been the case with the offending passages of the Constitution.

In contrast, when it comes to giving legal effect to vague provisions, the terms themselves—even when interpreted *contextually*—simply do not contain the information necessary to decide matters of application. What is a "reasonable" search? For that matter, what exactly is a "search"? Is the thermal imaging of a house to detect increased heat caused by marijuana growing in the basement a search?^[65] Because even vague terms have paradigmatic applications lying clearly within the core of their semantic meaning and clearly outside their penumbra, they are not wholly indeterminate. Instead, they are *underdeterminate*.^[66] Clear cases of items that are light or heavy, of actions that are a search or not a search, exist.

This is not to say that, when the information provided by interpretation has run out, all *decision rules* have run out. We could adopt a decision rule that, where a term is vague, it is given its narrowest meaning. Or, in constitutional cases, we could say that, whenever the text is vague, legislatures have a free choice in borderline cases and cannot be second-guessed by judges. But such decision rules are rules of construction, not rules of interpretation.

They are rules that apply when the information conveyed by the text itself is insufficient to decide an issue, but the issue still must somehow be decided. They are not found in the communicative content of the written Constitution.

This is exactly how Spooner's proposed rule of construction operated: "[the court will never, through inference, nor implication](#), attribute an unjust intention to a law; nor seek for such an intention in any evidence exterior to the words of the law. They will attribute such an intention to the law, *only when such intention is written out in actual terms*; and in terms, too, of 'irresistible clearness.'"^[67]

Spooner is acknowledging here that clearly communicating an "unjust intention" in "actual terms" would *be* the communicative content of the text. If so, we would still need to decide whether we *ought* to adhere to that meaning or give it "legal effect." But when the intention was clearly conveyed, we could not then deny that such was the meaning of the Constitution, which is why Spooner spent so much energy showing that the communicative content of the text was ambiguous. For each of the references to slavery, he found an "innocent" meaning.

Before the traditional distinction between interpretation and construction was reintroduced into constitutional discourse, constitutional scholars and philosophers often indiscriminately called both activities "interpretation." But because these are two distinct activities, this failure to distinguish them has long caused enormous confusion.

The phrase "just compensation" in the Takings Clause of the Fifth Amendment, the example offered by David Lyons and cited by Rod, is more accurately conceived as a vague provision rather than an ambiguous one. The communicative content of the phrase clearly refers to monetary payments to the property owner. The issue is exactly *how much* compensation is enough to "justly" compensate the owner for the deprivation of his or her property? Just as there are clear cases of "light" and "heavy" objects, there will be clear cases of compensation that is unjustly low or extremely generous. The communicative content of "just compensation," however, does not itself resolve the matter of borderline cases.

Therefore, rules of constitutional construction will be needed to give the Takings Clause legal effect.

Rod focuses on Spooner's treatment of the term "due" in Article IV's requirement that persons held to service be "delivered up on claim of the party to whom such service or labor may be due." Of course, like Lyons, Spooner might be improperly conflating interpretation with construction here, but he need not be read as doing so. Although he might be making a moral realist argument here, Spooner's own rule of construction eschews such an argument when it concedes that the meaning of the "actual terms" of the text might well be unjust provided that meaning was communicated clearly. For this reason, Spooner then focuses on the innocent meaning of the word "due" to show that it renders innocent the entire sentence in which it appears:

[No person held to service or labor in one state](#), under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

But if, at the time it was enacted, the communicative content of this sentence as a whole was taken by all reasonable readers as referring to slavery—then Spooner's argument about the meaning of "due" fails because the sentence, in context, was neither innocent nor ambiguous.

Legitimacy and Justice

Matt Zwolinski notices my claim that a "legitimate constitution is one that adopts procedures to ensure that the laws that are imposed on the nonconsenting public are *likely to be* just." This was an oblique reference to a more extended discussion of constitutional legitimacy in *Restoring the Lost Constitution*. There, I contended that, if a constitution contains adequate procedures to assure that laws imposed on nonconsenting persons are just (or not unjust), it can be legitimate even if not consented to unanimously, whereas a constitution that lacks adequate procedures to ensure the justice of valid laws is illegitimate even if consented to by a majority.

In my account, there is a “gap” between the *justice* of a law’s substance and the *legitimacy* of the law-making procedures that produced it, as well as a gap between a law’s legitimacy and its *validity*. The concept of legitimacy I have advanced looks to whether the *process* by which a law is determined to be valid is such as to warrant that the substance of the law is just.

According to my usage, therefore, a valid law could be illegitimate and a legitimate law could be unjust. A law may be *valid* because produced in accordance with all procedures required by a particular lawmaking system, but be *illegitimate* because these procedures are inadequate to provide assurances that the law is just. Such a law would not be binding in conscience. A law might be *legitimate* because it is produced according to procedures that assure that it is just, and yet be *unjust* because in this case the procedures (which can never be perfect) have failed. Such a law would be binding in conscience unless its injustice was somehow established.

In other words, there is a “gap” between the legitimacy of a law-making system, such as the one established by the Constitution, and the justice of the laws that are produced by this system. This gap is the difference between the actual justice of any particular law and the likelihood that laws resulting from particular procedures are just. Why a law might bind in conscience because it is likely to be just is too involved to fully elaborate here. But consider an analogy.

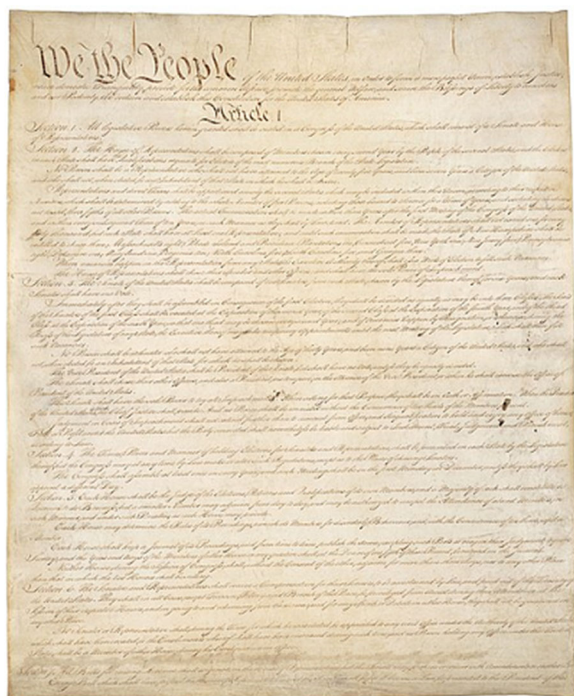
Consumers presume that the sausages they buy in a grocery store are wholesome and fit for consumption, though they have no personal knowledge that this is the case. They give the sausages the benefit of the doubt. Moreover, their presumption is (or ought to be) based not on the inspection of each and every sausage for wholesomeness, but on the process of sausage manufacturing that, if properly designed, assures that sausages produced this way are highly likely to be fit for consumption and are entitled to the benefit of the doubt. In essence, the perception that the sausages are wholesome is based on faith in the system that made them. But the truth of whether the sausage-making

process is indeed “legitimate” is based on whether this faith in the process is rationally warranted.

So too with laws that are produced by a process that ensures their wholesomeness or justice. Like sausages, when laws are made by procedures that assure they are “wholesome,” such laws deserve the benefit of the doubt. There is a duty to obey, not merely because a law was validly made, but because the procedures by which it was made give us reason to believe that such laws do not violate the rights of the nonconsenting persons on which they are imposed. Because this assessment is probabilistic, rather than absolute, the duty of obedience created by such a legitimate law-making process is defeasible or *prima facie*. Like the sausages purchased in the store, the existence of such a duty may be rebutted by close individual inspection.

As I have explained at greater length elsewhere,^[68] this gap between the concepts of “legitimacy” and “justice” necessitates a refinement of contemporary libertarian theory. A radical libertarian could hold that a legal system is unjust because it confiscates its income by force and puts its competitors out of business by force, but still believe it to be legitimate because the laws it imposes on nonconsenting persons are formulated, applied, and enforced by procedures that assure they are just. In short, an unjust legal system could still be legitimate if it has a good design or “constitution.” But, to return to the distinction between interpretation and construction, to decide whether a legal system that is governed by a written constitution is “good,” one must begin by ascertaining what the written constitution means.

Rod contends that by 1870, Spooner came to question the utility of the U.S. Constitution, as well he might have. As I relate in *Restoring the Lost Constitution*, after taking constitutional law in law school, I too concluded that the Constitution had failed, because most of its liberty-protective provisions had been ignored. For this reason, when I went into teaching I became a contracts professor.



United States Constitution

In my writings I claim only that *if it was followed*, the text of the Constitution—as it has been amended—would be legitimate in the sense I use that term. I do not claim that the law-making and application system in operation today can impart the benefit of the doubt on the laws it promulgates and enforces. Of course, even if it does not, one may still obey its laws out of a well-justified desire to avoid the costs of punishment for disobedience.

But *our republican Constitution*^[69] has not been repealed and still means what it says. Most Americans believe that it is the governing document of the United States, which makes it worthwhile to ascertain its meaning and insist that it ought to be followed. This was Spooner's project in 1845. And such insistence would be consistent with justice even if the regime established by text of the Constitution is in some important ways unjust, and even if, as Spooner claimed in 1870, it did not enjoy the actual consent of We the People, each and every one.

Endnotes

^[62.] Lysander Spooner, *The Unconstitutionality of Slavery* (Boston: Bella Marsh, 1860), 220.

^[63.] E. Allan Farnsworth, "Meaning' in the Law of Contracts," *Yale Law Journal*, vol. 76 (1967): 939, 953.

^[64.] See U.S. Const. art. I § 2, cl. 3, *amended* by U.S. Const. amend. XIV (referring to slaves as "other Persons"); *ibid.* at § 9, cl. 1 (referring to slaves as "such Persons" and "each Person"); *ibid.* at art. IV § 2, cl. 3 (referring to slave as a "Person[s] held to Service of Labour"). See James McClellan, *Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government* (3rd ed.) (Indianapolis: Liberty Fund, 2000). <[/titles/679#McClellan_0088_1034](#)>. The specific articles and clauses in "APPENDIX C: Constitution of the United States of America (1787)" <[/titles/679#lf0088_label_092](#)>:

- art. I § 2, cl. 3, amended by U.S. Const. amend. XIV (referring to slaves as "other Persons") <[/titles/679#McClellan_0088_961](#)>
- *ibid.* at § 9, cl. 1 (referring to slaves as "such Persons" and "each Person") <[/titles/679#McClellan_0088_1000](#)>
- *ibid.* at art. IV § 2, cl. 3 (referring to slave as a "Person[s] held to Service of Labour") <[/titles/679#McClellan_0088_1034](#)>

^[65.] See, e.g. *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that thermal imaging a house from a public vantage point is a search under the Fourth Amendment).

^[66.] See Lawrence B. Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma," 54 *Univ. of Chicago Law Review*, vol. 54 (1987): 462, 473 (distinguishing between indeterminacy and underdeterminacy).

^[67.] Spooner, *The Unconstitutionality of Slavery*, 220

^[68.] See Randy E. Barnett, "Libertarianism and Legitimacy: A Reply To Huebert," *Journal Of Libertarian Studies*, vol. 19, No. 4 (Fall 2005): 71-78. <<https://mises.org/library/libertarianism-and-legitimacy-reply-huebert>>.

^[69.] Randy E. Barnett, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People* (Broadside Books, 2016). Amazon.com:

http://www.amazon.com/dp/0062412280/ref=cm_s_w_su_dp.

ON CLEAR CASES OF INJUSTICE

by Matt Zwolinski

Randy's helpful distinction between constitutional *interpretation* and constitutional *construction* helps to make clear that there are two questions we must ask when thinking about how to understand the U.S. Constitution (or any constitution). First, what does the Constitution *say*; and second, what - in practical legal terms -- should we *do* about what it says?

Let's focus on that second question for now. There are three obvious ways of answering that question which reflect different ways of understanding the relationship between the Constitution and natural justice.

1. We ought to implement whatever the Constitution says regardless of the justice or injustice of its principles.
2. We ought to implement whatever the Constitution says *only insofar* as its principles are consistent or can be construed as consistent with justice.
3. We ought to implement whatever the Constitution says only insofar as its principles are consistent or can be construed as consistent with justice, *or if the unjust intention of the author(s) of the Constitution was expressed with irresistible clearness.*

Thankfully, nobody around here seems to be at all interested in option 1. Option 2 seems to be roughly the view expressed by Roderick in his essay. And option 3 is the view that Randy attributes to Lysander Spooner.

My question is: why would anyone ever go for option 3? Option 1 is crazy, of course, but at least, along with option 2, it seems to take a consistent position on the relationship between constitutions and justice. Option 1 says that justice doesn't matter at all in construing the

Constitution. Option 2 says justice reigns supreme -- that the injustice of a construction is always sufficient reason for rejecting it.

Option 3, on the other hand, appears to occupy a kind of wishy-washy middle ground. Basically, it says that we should reject any construction of the Constitution that is inconsistent with natural justice *unless* the authors were really, really clear that injustice is precisely what they wanted.

Why would anyone ever think this? If natural justice is a good reason to read a vague constitutional phrase in one way rather than another, then why isn't it also a good reason to ignore, dismiss, or erase phrases that are clearly unjust?

This is especially puzzling when we recall, as Randy reminds us, that construction is a *normative* enterprise. What we ought to *do* about the question is a separate question from what the Constitution *says*. But if constitutional construction is normative, and justice is something close to the supreme normative principle -- a "trump" -- then why should we ever choose to give practical effect to a clearly unjust aspect of the Constitution?

And why would *Spoooner*, of all people, think this? If he really believed, as he said, that "[If \[the government's\] laws command anything but justice, or forbid anything but injustice, they are themselves unjust and criminal.](#)"^[70] then why would he make an exception when the unjust command is expressed without a trace of vagueness or ambiguity?

Endnotes

[70.] Lysander Spooner, *A Letter to Grover 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: Benjamin R. Tucker Publisher, 1886). <[titles/2224#Spooner_1481_14](/titles/2224#Spooner_1481_14)>.

THESES AND NOMOS

by Aeon Skoble

Roderick Long concludes his essay by saying, “I’d also be interested in discussing the relation between Spooner’s and Hayek’s theories of law.” Let’s do that. Here’s Barnett on Spooner again:

“If legislation be consistent with natural justice, and the natural or intrinsic obligation of the contract of government, it is obligatory: if not, not.” [Spooner, *The Unconstitutionality of Slavery*, 8] For Spooner, then, the choice was a conception of law that was consistent with natural justice, which would then carry with it a duty of obedience, or a conception of law based solely on the successful imposition of power, which there would be no moral duty to obey.

Spooner also notes that “only laws that are consistent with the natural and inalienable rights of the people can justly claim a duty of obedience.” Spooner, then, is aware that there are things we call laws, but which really have no basis other than someone’s use of coercion to compel obedience, and other things, sometimes called laws, which are consistent with natural justice.



Friedrich von Hayek

This distinction calls to mind Hayek’s distinction between *thesis* and *nomos*.^[71] In *Law, Legislation, and Liberty*, Hayek uses *thesis* for rules imposed by the sovereign, a top-down process involving coercion; and *nomos* for rules that emerge in a bottom-up, evolutionary process. While Hayek didn’t claim to be working in the natural-law tradition, the parallels are interesting: *nomos* doesn’t involve coercion and is most consistent with respect for liberty. It reflects the evolving results of people’s attempts to coordinate their actions and live together in peace and prosperity. It is not imposed from above by threat of violence but instead reflects common practice and sensibility.

This seems to be very friendly to Spooner’s conception of natural justice: while Hayek and Spooner seem to oppose coercion for different reasons, they both end up with the idea that coercion is detrimental to human well-being and therefore not a proper basis for the social order. Hayek eschews the language of “natural and inalienable rights” but nevertheless praises liberty and offers us good reasons to disapprove of coercive rules imposed by force. It’s not obvious that the spontaneous order evolves teleologically “towards” natural law, but it’s certainly possible, and in any case a society based on Hayekian *nomos* seems like it would satisfy Spooner’s conditions for legitimate authority.

Roderick suggested that the two theories would benefit from each other; perhaps this is one dimension of that. Perhaps the Hayekian *nomos* needs some idea of a teleology of human good, of which Spoonerian natural law is an example; and perhaps Spooner’s constitutionalism would be sharper with an understanding of the *thesis/nomos* distinction mixed in.

Endnotes

[71] F.A. Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy. Volume I: Rules and Order* (The University of Chicago Press, 1973). Chapter 5: “Nomos: The Law of liberty” and Chapter 6: “Thesis: The Law of Legislation”.

REALISM AND REFERENCE

by Roderick T. Long

Randy says: “The activity of determining the communicative content at the time of enactment ... is *empirical*, not normative.” This is the nub of our disagreement. If we adopt (as I think we should, and as I think Spooner implicitly does) both a realist theory of *reference* and a realist theory of *normativity*, then determining communicative content will in many cases be a normative enterprise.

And here I am indeed talking (in Randy’s terms) about *interpretation*, not just *construction* – that is, I’m talking about what the text of the law means, irrespective of whether it should be applied. (Incidentally, I take Matt’s option 3 to describe Spooner’s approach to interpretation, not his approach to construction, which I would take to be closer to Matt’s option 2.)

I agree with Randy that “words have an objective social meaning at any given time that is independent of our opinions of that meaning.” In the dictum of Hilary Putnam, one of the founders of the realist theory of reference, “meanings’ just ain’t in the head.”^[72] But Putnam wasn’t just saying that the meaning of words isn’t determined solely by the psychological states of any individual speaker; rather, his point was that such meaning isn’t determined solely by the psychological states of society at large either.

Recall from Greek mythology the story of Oedipus. As king of Thebes, Oedipus issues a decree that whoever killed the previous king, Laius, must be punished. Oedipus initially has no idea – nor does anyone else – that he himself is the killer (and incidentally the son) of Laius; he remembers Laius only as a quarrelsome stranger he came to blows with on the road years ago.

Does Oedipus’s decree mean that Oedipus himself should be punished? (I’m asking about what the decree means, i.e., what implementing it would *involve*, not about whether it *should* be implemented.) Surely it does. Yet not only did Oedipus not intend his own punishment, but

no one to whom the decree was promulgated took it as calling for Oedipus’s punishment.

The moral of this example is that what Oedipus’s decree means is determined not solely by anyone’s psychological states (either the enactor’s or the general populace’s), but rather by those psychological states *together with the fact that Oedipus really did kill Laius*.

What determines which person the phrase “the killer of Laius” refers to? Of course the psychological states of the people using the phrase, as well as of the general society in which the phrase is used, are *part* of the story; sounds or marks by themselves don’t mean anything. But those psychological states generate a reference only with the help of external reality, because those using the phrase “the killer of Laius” intend to refer to whatever person, known or unknown, is *actually* the killer of Laius. Thus if all the Thebans were mistakenly convinced that Laius had been killed by his wife Jocasta, “the killer of Laius” would still refer to Oedipus, not to Jocasta. Mind-independent facts of reality, including facts not generally recognized, play a part in determining what people’s words mean.^[73]

Now in this case, determining that the decree requires Oedipus’s killer’s punishment will indeed be a matter of empirical inquiry – not just inquiry into the psychological states of the Theban populace, however, but inquiry into what actually happened to Laius on the road years ago.

But sometimes the terms whose interpretation is at issue are normative. For example, the text of the Fifth Amendment calls for “just compensation” – which means not “compensation we think is just” or “compensation generally thought to be just,” but “compensation that is actually just.” And just as “the killer of Laius” refers to Oedipus even if everyone thinks it refers to Jocasta, so “just compensation” refers to whatever compensation is actually just, even if everyone thinks some other compensation is what’s just.

The communicative content of normative phrases like “just” – or “due” – makes itself hostage to the real, possibly unrecognized nature of justice, just as the communicative content of “the killer of Laius” makes itself hostage to the real, possibly unrecognized facts

about what happened to Laius on the road. The difference is that figuring out what happened to Laius on the road is an empirical enterprise, whereas figuring out the nature of justice requires normative reasoning.

Of course this analysis assumes that there are objective facts about justice, in the same way that there are objective facts about who killed Laius. But this is just what Spooner does assume, since he describes justice as [a “natural principle” that “can no more be changed” than “the law of gravitation” or “the principles of mathematics.”](#)^[74]

If we agree (as I think we should) with the reference realists that unrecognized facts can play a part in determining what our words refer to, and if we agree (as, again, I think we should) with the moral realists that those unrecognized facts can include facts about justice, then Spooner’s interpretation of the fugitive-slave clause becomes much more defensible.

Endnotes

^[72.] Hilary Putnam, “Meaning and Reference,” p. 704; in *Journal of Philosophy* 70 (1973), pp. 699-711.

^[73.] For elaboration, see my working paper “Inside and Outside Spooner’s Natural Law Jurisprudence,” available online at: <http://praxeology.net/Spooner-OB.doc>.

^[74.] Lysander Spooner, *Natural Law: Or a Treatise on Natural Law, Natural Justice, Natural Rights, Natural Liberty, and Natural Society; Showing That All Legislation Whatsoever Is an Absurdity, a Usurpation, and a Crime, Part First* (Boston: A. Williams, 1882), p. 11. Online: [</titles/2182>](#).

LEGITIMACY AND MONOPOLY

by Roderick T. Long

According to Randy, “If a constitution contains adequate procedures to assure that laws imposed on nonconsenting persons are just ... it can be legitimate even if not consented to unanimously.”

I’m inclined to disbelieve that. Unless “adequate procedures” means “infallible procedures” (and these we wot not of), even the presence of adequate procedures will realistically allow *some* unjust laws to slip through; and an unjust law lacks moral force – *both* in the sense of being wrong to impose *and* in the sense of not being wrong to disobey – even if the institution that generated that law is such as to generate just laws most of the time.

Nevertheless, suppose we do grant that the presence of adequate procedures is enough to render a constitution worthy of obedience. I still don’t think that will give much support to the actual U.S. Constitution.

Here’s why. Either the Constitution claims territorial monopoly status for the political system it describes, or it doesn’t.

Suppose it does – and Article VI’s stipulation that [“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land”](#) – certainly gives that impression. Then the problem is that territorial monopolies are *by their nature* subject to incentival and informational perversities that make them extremely *unlikely* to produce reliably just laws. For an excellent presentation of the case for this claim, I refer the reader to Randy’s own book *The Structure of Liberty*.^[75]

But that means that no territorial monopoly can have adequate procedures for avoiding unjust laws; and so, on the assumption that the U.S. Constitution authorizes a territorial monopoly, it follows that the U.S. Constitution cannot meet Randy’s test for legitimacy.

On the other hand, suppose it turns out (perhaps through a creative Spoonerite interpretation of Article VI) that the U.S. Constitution does *not* claim a territorial monopoly. Then the Constitution implicitly acknowledges the potential permissibility of rival legal systems within its territory.

Imagine that such a rival system arises and develops procedures for avoiding unjust laws that are just as good as the Constitution’s. Then it cannot be the case that the mere existence of such procedures generates a duty to

obey the institution that uses them, because then one would have a duty to obey both the U.S. law and the rival system's law even where they diverged, which violates the principle of ought-implies-can.

If the Constitution claims a territorial monopoly, it is too unjust to deserve general obedience. If the Constitution does not claim a territorial monopoly, then it is too just to demand general obedience.

Endnotes

[75.] Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law*, 2d ed. (New York: Oxford, 2014).

CONSENT, LEGITIMACY, AND RISK

by Matt Zwolinski

Randy says that “if a constitution contains adequate procedures to assure that laws imposed on nonconsenting persons are just (or not unjust), it can be legitimate even if not consented to unanimously.” Legitimacy, in turn, is important because “[a] law can be *legitimate* because it is produced according to procedures to assure that it is just, and yet be *unjust* because in this case the procedures (which can never be perfect) have failed. Such a law would be binding in conscience unless its injustice was somehow established.”

In other words, you might be duty-bound to obey an unjust law if that law was produced by a procedure that is generally pretty good at producing only just laws.

I have a couple of worries about this view. First, who gets to decide what count as “adequate procedures”? One of the advantages of requiring universal consent is that *each and every individual* can decide on his or her own. If I'm selling a legal system, and you don't think my procedures are very reliable, you can always say “no.” If we deny individuals this veto power, then we need to have some other way of ensuring that procedures are reliable. But what is it?



Second, by what means must the injustice of a law be “established” in order for it not to be binding in conscience? Must the injustice of a law be recognized by some state-sanctioned authoritative body, like the Supreme Court? Or would it be enough for an individual subject to “establish” the injustice of the law on her own, based on her own understanding of morality and the proper scope of state action? The latter view comes close to establishing a kind of *de facto* requirement of universal consent, which Randy wants to avoid. But is it really plausible to say that an individual is duty-bound to obey a law that she sincerely believes to be unjust, and that *really is* unjust, simply because it was produced by a procedure that has (somehow) been established to be fairly reliable?

Randy is no doubt correct that lawmaking is like sausage-making, at least in the most famous respect in which those two enterprises are often compared. But I get to *choose* who sells me sausage, and which sausage-makers' procedures are reliable enough to be worth the risk of a stomachache. And that makes an important difference – not just in terms of the incentival and informational effects noted by Rod, but in the moral permissibility of imposing risk on innocent persons. People who knowingly and voluntarily subject themselves to others' risky procedures might be morally bound to accept the results when those risks turn out badly. But I'm much less confident that the same is true for individuals who, without ever having had the opportunity to say “no,” are subjected to risky procedures by their governments.

NO LAWS BUT JUST LAWS?

by Roderick T. Long

I've defended Spooner's claim that normative terms in the Constitution (or any statutory law) should be interpreted as invoking whatever is the objectively correct moral truth, rather than invoking the opinions on morality held by the authors or socially prevalent at the time of its enactment. Let's call this View A.

But Spooner's views are still more radical than this. To begin with, he holds that genuine constitutional law "[consists only of those principles of the written constitution](#), that are consistent with natural law, and man's natural rights."[\[76\]](#) This implies that, e.g., slavery wouldn't have been constitutionally legal *regardless* of what the text of the Constitution said. Let's call this view – that any genuine law must be *consistent* with natural law – View B.

Moreover, not content merely with View B, Spooner further holds, more radically yet, that there is *no law other than* natural law: "[being the paramount law, \[natural law\] is necessarily the only law](#): for, being applicable to every possible case that can arise touching the rights of men, any other principle or rule, that should arbitrarily be applied to those rights, would necessarily conflict with it."[\[77\]](#) Consequently, Spooner denies the existence of any "[power, on the part of the legislators, so-called](#), to make any laws of their own device, distinct from the law of nature."[\[78\]](#) Let's call this View C.

Views B and C, today, are even less popular than View A. Nevertheless, I want to say a few words in defense of both of them. I'll focus on View B in the present post, reserving View C for my next post.

View B seems to run counter to ordinary usage; after all, we standardly speak all the time of "laws" we consider to be unjust. In the words of John Austin, one of the foremost proponents of legal positivism, "The *existence* of law is one thing; its *merit* or *demerit* is another."[\[79\]](#)

Yet it's worth noting that far from being an eccentric position, View B was the standard orthodoxy in Western jurisprudence for over two millennia, being endorsed by

thinkers from Plato and Cicero to Thomas Aquinas and William Blackstone; and in the past century, though it had long since ceased to be orthodoxy, it continued to attract such defenders as libertarian writer Rose Wilder Lane and civil-rights leader Martin Luther King Jr.[\[80\]](#) Even today the view has a hold in popular culture; for example, in the 2010 film *Machete*, Jessica Alba's character says: "There are lots of laws. But if they don't offer us justice, then they aren't laws; they are just lines drawn in the sand by men who would stand on your back for power and glory." These endorsements don't show that View B is true, but they do give us reason to take it seriously.



Martin Luther King, Jr.

Why might one think View B is true? Well, to begin with, laws claim *authority*; and one might accordingly think that a *successful* law – that is, something that succeeds in being a law – would have to be one that actually *has* the authority it claims. If only just laws can have authority, we get the upshot that *lex injusta non est lex* – an unjust law is not a law. This style of argument seems to be the dominant one in the natural-law tradition.

A slightly different argument for View B takes laws as having a function; by that reasoning, only statutes that are suited to achieve that function will count as genuine laws, at least in the full-fledged sense. If the function in question is one to which justice is requisite, then *lex injusta non est lex* follows once again.

This latter style of argument seems to be the one that Spooner finds most compelling. For Spooner, knowledge of natural law is “the science which alone can tell us on what conditions mankind can live in peace,” and accordingly “wherever mankind have attempted to live in peace with each other,” they have found obedience to natural law to be an “indispensable condition.”

So long as these conditions [of natural law] are fulfilled, men are at peace, and ought to remain at peace, with each other. But when ... these conditions [are] violated, men are at war. And they must necessarily remain at war until justice is re-established.^[81]

Given the radically libertarian character of natural law as Spooner understands it, he presumably cannot mean that every workable legal system must be libertarian. Rather, his point is that every workable legal system is so *in virtue* of its libertarian aspects and *to the extent* that it is libertarian. Restraining people from aggression against the persons and property of others is the core, the essence, of any legal system, whereas any additions and exceptions to this core are accidental, and indeed are impediments to proper legal functioning. And if a statute’s legal character derives from its libertarian character, then unlibertarian statutes will not be strictly legal. (Spooner’s position here bears some resemblance to that of the 20th-century jurist Lon Fuller, who likewise saw certain moral principles as implicit in the enterprise of law itself, though for Fuller, unlike Spooner, these principles were primarily procedural rather than substantive.)^[82]

But even if we grant that protecting libertarian rights is the true essence and function of law, so that unlibertarian statutes are unsuccessful examples of lawmaking and thus will be bad *as laws* (rather than simply being laws, perfectly in order as laws, that happen to be, in addition but separately, morally bad), why not indeed say that they are *bad* laws rather than *non*laws?

Here I think the terminological question is secondary. In ordinary language the sentences “Three of the Rembrandts in your collection are fakes” and “Three of the paintings in your collection that you think are

Rembrandts actually aren’t Rembrandts, but instead are fakes” both sound like acceptable standard usage, even though the first seems to treat fake Rembrandts as a kind of Rembrandt while the second declines to do so. What is crucial to View B is less whether we call unjust statutes “laws” than whether we regard them as successful or unsuccessful examples of lawmaking.^[83]

On this view, an unjust law is a failed law; whether one regards its failure as so great as to disqualify it from being a law, or merely as marking it as an inferior-grade law (how dull does a knife have to be before it’s no longer a knife?), the point is that it fails to have the full status that a properly formulated law would have. It claims authority, but actually lacks it; it seeks to coordinate human behavior in a peaceful way, but actually promotes unnecessary conflict. Unjust laws are botched laws.

Endnotes

^[76.] Spooner, *The Unconstitutionality of Slavery*, Part I (Boston: Bela Marsh, 1845), p. 14.

^[77.] *Ibid.*, pp. 6-7.

^[78.] *A Letter to Thomas F. Bayard: Challenging His Right – and That of All the Other So-Called Senators and Representatives in Congress – to Exercise Any Legislative Power Whatever Over the People of the United States* (Boston, 1882), p. 5.

^[79.] John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832), p. 278.

^[80.] For citations, see my working paper “Legal Naturalism Is a Disjunctivism,” online at: <http://praxeology.net/legal-naturalism-disjunc.pdf>.

^[81.] Spooner, *Natural Law; or the Science of Justice: A Treatise on Natural Law, Natural Justice, Natural Rights, Natural Liberty, and Natural Society; Showing That All Legislation Whatsoever Is an Absurdity, a Usurpation, and a Crime. Part First*, in *The Collected Works of Lysander Spooner* (Indianapolis, IN: Liberty Fund, 1882).

^[82.] Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969).

[83] For elaboration, see my “Legal Naturalism Is a Disjunctivism,” *op. cit.*

NO LAW BUT THE NATURAL LAW?

by Roderick T. Long

In my last post I distinguished three positions, in increasing order of radicalism, all of which Spooner defends:

View A: normative terms in statutes should be interpreted in accordance with whatever natural law actually says, not in accordance with the opinions of the authors or the wider society as to what natural law says.

View B: no statute counts as a genuine law unless it is consistent with natural law.

View C: natural law is the only genuine law.

I’ve likewise defended Views A and B. What about C?

At first blush, View C seems to run afoul of one of the most basic functions of law. As Charles Johnson writes:

[I]t may be that justice requires that cars going opposite directions on a highway should drive on opposite sides – so that drivers will not needlessly endanger each other’s lives. But natural justice surely has nothing in particular to say about whether motorists should drive on the left or drive on the right. It requires that *some* rule of the road should be adopted, and that *once* adopted, the rule should be obeyed by each individual motorist. But the question of *which* to adopt is a matter that needs to be settled by some means other than appeals to natural justice. Medieval legal writers described these sorts of cases as *reducing* the natural law (in the sense of making it more specific): the idea is to spell out the details for cases where the principles of natural justice underdetermine the correct application of individual rights.[84]

But View C appears to rule out the possibility of “reducing” the natural law in this way. For if natural law doesn’t say which side of the road one should drive on, then according to View C it seems there can be no law settling this. View B by itself doesn’t pose this problem, since it allows laws *in addition* to natural law so long as those laws don’t *conflict* with natural law; but View C apparently rejects any role for convention in law. (This, incidentally, is one place where Spooner seems to part company with Hayek. The two thinkers agree in contrasting law with *legislation*; but the spontaneously evolving norms that Hayek champions certainly do allow a role for convention.)



Friedrich von Hayek

Moreover, not only does View C seem implausible in itself, but it also seems to conflict with View B. What’s the point of telling us that no *unjust* statutes can count as laws if it turns out that *no* statutes, just or unjust, count as laws? After all Spooner tells us that even just statutes – those that “command men to do justice” – nevertheless “[add nothing to men’s obligation to do it](#), or to any man’s right to enforce it,” and so are “mere idle wind.”[85]

To be sure, Spooner does in the very same paragraph suggest a different way that a statute could be a law, for he says of statutes generally that it is “[a falsehood to call them laws](#); for there is nothing in them that either creates men’s duties or rights, or enlightens them as to their duties or rights.” This opens the door to the possibility that a statute might count as a law, despite not creating

any duties or rights, if it did “enlighten” people as to their duties and rights. But it’s still hard to see how to reconcile this with the claim that natural law is the only law.

But let’s think about it this way. Suppose I’m in the country where the established statute says to drive on the right. Should I drive on the right? Yes, but not because of the statute, or at least not directly. The reason I should drive on the right is that most other people are driving on the right, and so I need to drive on the right in order to satisfy natural law’s requirement not to endanger other drivers needlessly.

Now perhaps the other drivers are driving on the right out of respect for the statute, in which case the statute will be *indirectly* the reason I should drive on the right. But the statute’s role is not essential. After all, suppose that the statute said to drive on the left, but in practice most people were still driving on the right; in that case I should still drive on the right. The general practice of driving on the right gives me reason to drive on the right – be that practice the result of top-down legislation, or a spontaneously evolved Hayekian norm, or what have you. But the authority I’m following is not the practice itself, any more than it is the statute (if any) behind it; I’m ultimately following the authority of the natural-law principle not to endanger other drivers needlessly. It’s just that conventions – statutory or otherwise – can play a role in determining what *counts* as following the natural-law in particular situations.

By analogy, suppose that natural law says “shoot anyone wearing a red hat.”^[86] Then Bartholomew, by wearing a red hat, *makes it the case* that I should shoot Bartholomew. But Bartholomew didn’t create any *new* norm for me to follow; in shooting him I’m just following the original norm of shooting anyone wearing a red hat.

Thus it is possible to hold, simultaneously and consistently, *both* that statutory and other conventions can change what genuine law requires, *and* that unchanging natural law is the only genuine law. Whether one wants to call the conventions that “reduce” the natural law’s requirements “laws” or not is an optional

terminological question; the crucial point is that these conventions have no *independent* authority.

Endnotes

^[84.] See Charles Johnson’s working paper “A Place for Positive Law A Contribution to Anarchist Legal Theory,” online at: charleswjohnson.name/essays/a-place-for-positive-law. The position Johnson goes on to defend in his paper is broadly similar to the one I defend here.

^[85.] Spooner, *A Letter to Grover 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: Benjamin R. Tucker, 1886), p. 4.

^[86.] It doesn’t. Just in case you were wondering.

FAKE LAW OR BAD LAW?

by Aeon Skoble

Roderick says, “Even if we grant that protecting libertarian rights is the true essence and function of law, so that unlibertarian statutes are unsuccessful examples of lawmaking and thus will be bad *as laws* (rather than simply being laws, perfectly in order as laws, that happen to be, in addition but separately, morally bad), why not indeed say that they are *bad* laws rather than *nonlaws*?” I agree that this is a problem for those of us sympathetic to natural-law arguments, for it impacts our ability to explain what we’re saying. Are unjust laws bad laws or nonlaws?

Roderick suggests the example of art forgeries – it’s not that you own a fake Rembrandt, but that you own something you think is by Rembrandt but isn’t. I agree that that’s the right way to think about forgeries, but what about prints? If I have a print of a Rembrandt, that’s like the fake in one way (neither was physically produced by Rembrandt), but unlike it in another way – it’s a copy not designed to deceive but merely to show. This means it resembles the thing it’s a copy of, but isn’t actually that thing. It’s a lesser version. If you said, “Show me an example of Rembrandt’s work,” the print *is* an

example. But it's also right to say, "Of course, this isn't really a Rembrandt. It's a copy."

So are the makers of unjust laws like forgers or like printmakers? Neither seems accurate. Rather, they're like bad art students who try to imitate the master's style but have no sense of perspective, color, or composition, and who produce greatly unappealing pictures – but then are allowed to display them in the Rembrandt collection. If the person in charge of the collection gives it a number, it will in fact be "Rembrandt collection item #175" despite not really being a Rembrandt at all. I wonder if unjust laws that have nevertheless passed in accordance with proper rules are like *that*. They're called "laws" by the people in charge of the collection and receive corresponding numbers. But they're not really laws at all. With one exception: we're at liberty to proclaim loudly that Rembrandt collection item #175 is not, in fact, a Rembrandt and that, furthermore, it's horrible -- and we won't get killed. But the unjust things-that-aren't-laws-but-the-state-calls-laws have the force of the state behind them, and we can be killed for disobeying them.

I like Roderick's conclusion that thinking of them as "botched laws" is most accurate, but when he says such a law "claims authority, but actually lacks it" – we must be careful to differentiate senses of authority. They do have authority in the sense that others will enforce them, although I agree that they lack authority in the moral sense. But here's the payoff: To rally people to see that lack of authority, is it better to say, "That's not even a law!" or "That's a bad law"? While I think the former is *true*, it's the latter that has the more effective strategy for mobilizing dissent. People who go around insisting that the income tax is illegal are generally regarded the same way as moon-landing-hoax people or flat-earthers. Might be better to simply argue that it's a bad idea.

PROCEDURAL JUSTICE AND CONSTITUTIONAL LEGITIMACY

by Randy E. Barnett

On the question of the validity of unjust laws, there is an epistemic problem: by what procedure does one conclude that a law is unjust? In this regard, I admit to having been influenced by George H. Smith's *Journal of Libertarian Studies* article "Justice Entrepreneurship in a Free Market" (1979).^[87] In that article, George's aim was to refute my previous essay in which I adopted much the same stance as is being expressed here by others. I found -- and have publicly acknowledged -- George's response to my arguments to be persuasive. And it planted the seed for a conception of *procedural* constitutional legitimacy that I identified in my earlier essays on Spooner in this forum and that I have defended elsewhere.

In his article, George stated the problem this way:

I agree with Barnett that a Victim of invasion has the right to seek restitution from the Invader, and that the *actual guilt* of the Invader is the only germane issue (as far as the Victim is concerned). But Nozick raises an important issue of knowledge of guilt and its relation to the enforcement of justice. In adopting procedural rights, however, Nozick takes a wrong turn and fails to see the solution to his own problem. The important social relation that generates the whole question of reliable procedures is not that between the Victim and the Invader, but the relationship between the Victim and impartial Third Parties. *It is for his own safety, to prevent violent Third Party intervention in his quest for restitution, that the Victim must concern himself with matters of legal procedure.*

As he explains:

Before restitution can be accomplished, ... several preliminary issues must be settled. Did a violation of rights occur? If so, who was

responsible? And what was the extent of the responsibility? These matters of fact must be decided before the subject of restitution is germane, and they are the first priority of a court of justice.

The first task of a court, therefore, is to settle an issue of *knowledge*: Did or did not the accused commit the crime charged against him? A court, as an arbiter of guilt and innocence, is the personification of epistemological standards. It represents the social application of epistemological procedures, whose purpose is to assess the rational basis for a given knowledge claim -- the charge of the plaintiff (the alleged Victim) against the defendant (the alleged Invader). The onus of proof is on the plaintiff to prove his case with certainty -- i.e. "beyond reasonable doubt" -- and the defendant is presumed innocent until proven otherwise.

George then poses the following thought experiment:

Now consider the same situation with the addition of a Third Party who is absent during Crusoe's theft. Suppose that Friday makes no attempt to inform the Third Party of Crusoe's deed, or that Friday charges Crusoe with the theft but provides no evidence to substantiate the allegation. (Crusoe, of course, denies the charge.) Friday proceeds to invade Crusoe's hut in an attempt to reclaim his coconuts (or the equivalent in value). Crusoe, in the meantime, screams that he is being aggressed against and solicits the aid of the Third Party to restrain Friday. The Third Party intervenes, using force to stop Friday.

Friday, acting on his knowledge, is morally justified in seeking restitution. But the Third Party, acting on *his* knowledge, is (as I shall argue) justified in coming to the "defense" of Crusoe, the apparent Victim. With the existence of a Third Party, Friday's act of restitution -- when no effort is made to enlighten the Third Party as to the circumstances -- becomes a high-risk activity.

It exposes Friday to potential harm for which he has no legitimate redress. That is to say, if a Third Party, believing Friday to be the true Invader, injures him in the process of resisting his "invasive" act, Friday cannot then seek restitution from the Third Party. Friday's failure to provide public notice and proof of his claim against Crusoe, generates an inevitable clash between Friday and the Third Party -- a clash, it must be noted, that Friday could have avoided but did not. The responsibility for this Third Party conflict, therefore, rests with Friday; and he undertakes private restitution against Crusoe at his own risk.

From the potential conflict of Friday and the Third Party, there arises a need for a "public trial" to ascertain Crusoe's guilt or innocence. This trial is required not because of special "procedural rights" supposedly possessed by Crusoe (such as the "right to a fair trial"), but because this public demonstration of Crusoe's guilt is the only way to eradicate or minimize the potential conflict between Friday and a Third Party. By allowing the Third Party to examine the basis of Friday's allegation against Crusoe, with the opportunity for Crusoe to respond, it is possible to harmonize the knowledge of Friday (that Crusoe is guilty) with the knowledge of the Third Party, so that the Third Party can cooperate (or at least not interfere) with Friday's quest for restitution.

The same principles apply to any society of three or more persons. Impartial Third Parties are not privy to the special experience of a Victim seeking restitution. Man's knowledge is limited -- he is not omniscient -- and individuals must act on the context of knowledge available to them. Friday may be a true Victim seeking restitution, but this fact may be inaccessible to others. Friday knows it, and Crusoe (presumably) knows it; but Third Parties do not. If Crusoe denies the charge of theft, and if Friday fails to substantiate it, then

Third Parties are epistemologically obliged to view Friday as an Invader. Given their context of knowledge, there is no other rational option.

He then stresses how procedures are needed to address the knowledge problem facing Third parties to any claim of injustice:

We must remember the purpose of public verification: it is not to *justify* the Victim's restitutive act morally, but to *identify* the *kind* of action he is taking. The potential misunderstanding between a Victim and Third Parties is factual, not evaluative. Violent acts do not bear external characteristics which enable one visually to distinguish between invasion and restitution. Invasion, for instance, may involve fraud without overt violence, in which case the Victim may be the first (and only) one to employ actual violence in his quest for restitution. The distinction between invasion and restitution can be drawn only with reference to property rights and property titles, and such particularized information is rarely accessible to Third Parties without deliberate effort.

The problem George identifies with respect to third-party judgments of individuals who are alleged Invaders applies to legislation writ large. Laws that violate the rights of those upon whom they are imposed are unjust wholesale invasions of rights. As such they are not obligatory. But there is still the issue of how to ascertain and establish their injustice. Just as a trial provides procedures by which to assess guilt and innocence *to the satisfaction of third parties*, a legitimate constitution provides procedures to assure the public that a legislature is not acting as an Invader, but is instead protecting the rights of the individuals who are the ultimate sovereign. The citizens are not omniscient, and have limited time to devote to the assessment of the justice or injustice of the laws imposed upon them. As with the inspection of their food supply for wholesomeness, they must delegate this assessment to a legal system. A legal system with procedures that are able to make this assessment reliably is what I am calling a "legitimate" one.

But just as trials are imperfect – innocent people are convicted, and guilty ones acquitted, -- so too are even legitimate lawmaking procedures. The question is whether the particular lawmaking procedures of a particular constitutional order are reliable enough to impart a defeasible duty to obey to the laws that are somehow adjudicated as just? The difference between the results of that adjudication, which create a prima facie duty of obedience, and the actual or underlying justice of each and every law is what I am calling "the gap."

So I ask the others: how do they address the epistemological issue of ascertaining the justice of laws so individuals know which to obey and which to disobey? How do you respond to George Smith's defense of procedural justice?

Endnotes

[87.] George H. Smith, "Justice Entrepreneurship in a Free Market", *Journal of Libertarian Studies* (vol. 3, no. 4, 1979). <https://mises.org/library/justice-entrepreneurship-free-market-0>.

BAD LAWS AND GOOD RHETORIC

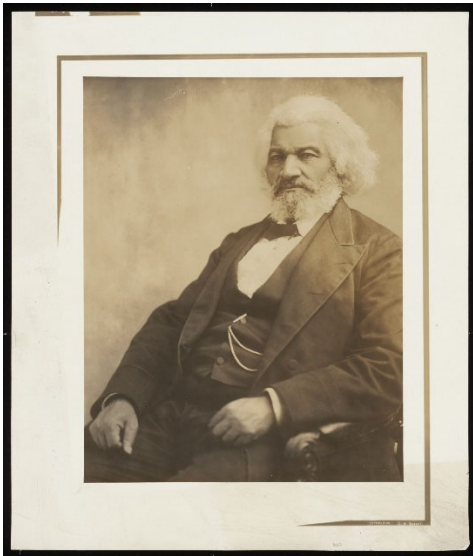
by Roderick T. Long

Aeon asks: "To rally people to see [an unjust statute's] lack of authority, is it better to say, "That's not even a law?" or "That's a bad law?" And Aeon suggests by way of answer that even if the first approach should turn out to be technically correct, the second approach is a "more effective strategy for mobilizing dissent"; and his reason for this is that those who "go around insisting that the income tax is illegal" are "generally regarded the same way as moon-landing-hoax people or flat-earthers."

I think the income-tax denial approach is actually a different strategy from the *lex injusta non est lex* approach. The income-tax denier says, "That's not a law because of the details of positive legislation (e.g., the text of some statute, the history of its enactment, or both)." The *lex injusta* approach, by contrast, says,

“That’s not a law because it’s unjust.” So any rhetorical drawbacks of the income-tax denial approach do not necessarily reflect negatively on the *lex injusta* approach.

Of course Spooner uses both approaches. In 1845 he took the income-tax denial approach in appealing to the text of the Constitution, properly interpreted, to show that slavery lacked legal authority; and in 1870 he in a way took the income-tax denial approach again in appealing to the circumstances of the Constitution’s ratification to show that the Constitution itself lacked legal authority. (Though of course his way of conducting the income-tax denial approach involves normative premises.) And in both periods he also defended the broader view that any legislative enactment inconsistent with natural law lacks legal authority.



Frederick Douglass

In any case, Spooner’s income-tax denial approach with regard to slavery’s legality seems to have had a fair bit of rhetorical effectiveness. *The Unconstitutionality of Slavery* went through several printings, won the endorsement of such prominent abolitionists as Frederick Douglass and Gerrit Smith, and was even “officially adopted by the Liberty Party in 1849”^[88] as the decisive statement on the legal status of the institution. This is hardly akin to the reception accorded flat-earthers.

But the *lex injusta non est lex* approach seems to have its share of rhetorical effectiveness too. After all, it’s the

basis of Martin Luther King’s arguments in his “Letter From Birmingham Jail,”^[89] one of the most popular and frequently cited documents of the civil-rights movements; and as I’ve mentioned before, the doctrine’s use in a mainstream action movie like *Machete* is likewise indicative of its possessing some popular resonance.

Plus it was the rallying cry of Spooner’s great rival William Lloyd Garrison; while the two disagreed on what I’ve been calling, following Aeon, the income-tax denial approach (far from defending the Constitution à la Spooner as a crypto-abolitionist document, Garrison denounced it as “a covenant with death and an agreement with hell”),^[90] the two men were quite close on the *lex injusta* doctrine. Garrison wrote that “properly speaking, there is but one government, – and that is not human, but divine; there is but one law, – and that is ‘the higher law’”; and all human governments, democratic or otherwise, are “based upon the doctrine that ‘might makes right’” and so “must ultimately perish.”^[91] Given Garrison’s status as arguably *the* most influential of the American abolitionists, the *lex injusta* approach must not be such a rhetorical dealbreaker.

As I’ve written elsewhere, “for those of us who are involved in radical political projects such as agorism that involve promoting mass disobedience to and bypassing of governmental edicts,” the *lex injusta* approach has the attraction of “depriving unjust statutes and decrees of the ... aura of authority that attaches to the word ‘law’” – while “those whose political projects are more moderate and reformist may reasonably prefer the weaker ... terminology.”^[92]

I think some remarks of Spooner’s fellow abolitionist Wendell Phillips lend additional (and inadvertent) support for my preference for the *lex injusta* approach. In his 1847 critique of the first volume of Spooner’s *Unconstitutionality of Slavery*, Phillips complains that by upholding the principle that “Only what is just and right is law,” Spooner is taking “the first step toward anarchy.”^[93] Phillips writes:

There can be no more self-evident proposition, than that, in every Government, the majority must rule, and their will be *uniformly* obeyed.

Now, if the majority enact a wicked law, and the Judge refuses to enforce it, 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-governmentism. It leaves every one to do "what is right in his own eyes."^[94]

Phillips, by contrast, insists that "for the purpose of the civil government of any nation," it is properly up to "the majority of that nation" to "decide what is just and right"; and "their decision is final, and constitutes, for that nation, Law."^[95]

I think Phillips is right about the natural connection between the *lex injusta* doctrine and anarchism (even though most historical proponents of *lex injusta* – Plato, Cicero, Aquinas, etc. – have been very far from being anarchists). The difference is that I reverse the evaluation; if Spooner's legal naturalism is "practical no-governmentism," I say not so much the worse for Spooner's approach, but rather so much the better.

Of course Phillips's concern about the dangers of unrestrained private judgment are akin to those that Randy raises in his most recent contribution. I'll address that concern in my next post.

Endnotes

^[88.] Kunal M. Parker, *Common Law, History, and Democracy in America, 1790-1900: Legal Thought Before Modernism* (Cambridge: Cambridge University Press, 2011), p. 180.

^[89.] Martin Luther King, Jr., "Letter From Birmingham Jail," *Liberation: An Independent Monthly* (June 1963), pp. 10-16, 23.

^[90.] Quoted in Wendell Phillips Garrison and Francis Jackson Garrison, *William Lloyd Garrison, 1805-1879: The Story of His Life Told by His Children*, vol. 3 (Boston: Houghton Mifflin, 1894), p. 412.

^[91.] William Lloyd Garrison, "Voting – Government – Slavery and War," *The Liberator* (1 August 1856), p. 2; online at: < <http://praxeology.net/WLG-VGS.htm> >.

^[92.] "Legal Naturalism Is a Disjunctivism," online at: <<http://praxeology.net/legal-naturalism-disjunc.pdf>>.

^[93.] Wendell Phillips, *Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery, Reprinted From the "Anti-Slavery Standard," With Additions* (Boston: Andrews & Prentiss, 1847), p. 15.

^[94.] Phillips, op. cit., p. 10.

^[95.] Phillips, op. cit., p. 15.

PRIVATE JUDGMENT AND PUBLIC JUSTIFICATION

by Roderick T. Long

Unjust statutes have no authority that anyone is bound to respect; so says Spooner, and I agree. But Randy raises an objection. Citing an argument by libertarian theorist George Smith,^[96] Randy maintains that even if I am in my moral rights in any given dispute, it is in my interest to establish my correctness through some public procedure in order to reduce the likelihood of conflicts with third parties. Hence I cannot realistically go around using my sole private judgment as to which laws to obey or disobey, without some concern to vindicate the justice of my actions in a public forum.

With some reservations (which I'll get to), I'm generally in agreement with this defense of concern for public procedures of justice. But I'm a bit puzzled at Randy's glossing this point as equivalent to "the epistemological issue of ascertaining the justice of laws so individuals know which to obey and which to disobey." The question *how do I know I'm justified in disobeying this requirement?* and the question *how do I convince others that I'm justified in disobeying this requirement?* seem like different questions.

For one thing, convincing others of one's justification often involves establishing matters of fact that one doesn't need to establish for oneself. Consider the following two cases:

Case #1: Officer Freundlich seeks to arrest Emma for stabbing her roommate Voltairine. Emma has not in fact stabbed anyone, so she takes herself to be in her rights to resist arrest. But by resisting arrest, she risks conflict with third parties who are not convinced that she's innocent of stabbing her roommate.

Case #2: Officer Freundlich seeks to arrest Voltairine for selling marijuana to her roommate Emma. Voltairine has indeed sold Emma marijuana, but she regards selling marijuana as legitimate, so she takes herself to be in her rights to resist arrest. But by resisting arrest, she risks conflict with third parties who are not convinced that selling marijuana is legitimate.

In case #1 it may be in Emma's interest to convince third parties, via some public procedure, that she hasn't stabbed her roommate; but (absent unusual circumstances – amnesia, hypnotism, or the like) she doesn't need to do any special epistemological work to establish *to her own satisfaction* that she hasn't stabbed her roommate.

But perhaps case #2, involving normative rather than positive inquiry, is more the kind of case that Randy has in mind. Here too, though, establishing for oneself that a requirement is unjust is not quite the same as (though it will ordinarily display considerable overlap with) demonstrating to the wider society that that requirement is unjust; the former requires seeking reflective equilibration within one's own belief-set, while the latter requires seeking reflective equilibration within a set of beliefs widely accepted by the relevant community.^[97] So I'm not sure why Randy seems to be running the two questions together.

I'm even more puzzled by the question of how Randy gets from the suggestion, which I accept, that there's a need for public procedures of justification to reduce the risk of conflict with third parties, to what strikes me as the entirely different suggestion, and one that I don't at all accept, that such procedures, if of the right sort, might "impart a defeasible duty to obey ... the laws that are somehow adjudicated as just" even when those laws lack

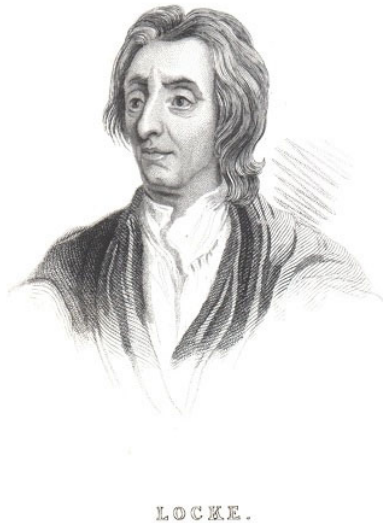
"actual or underlying justice." It's one thing to say that we have prudential reasons (and more than prudential – it's arguably a requirement of civility, at least in many contexts) to try to prove our case in a public forum; it's another thing to say that when the public procedure generates the wrong answer, we somehow magically acquire a duty, even a *prima facie* one, to submit to injustice.^[98]

In any case, while it will often be advisable to submit one's disputes to a public system of third-party arbitration, in many cases there will be no good reason to do so. One such case involves emergency situations of self-defense when there is no time to call in third parties. Another such case is one in which the prevailing legal institutions, or the political culture, or both, are such as to make a fair adjudication highly unlikely. For example, when Frederick Douglass decided, in 1838, to try to escape from slavery in Baltimore to freedom in Philadelphia, he followed his own private judgment that his enslavement was wrong; he did not first convene a hearing in the local community and try to make a public justification of the rightness of his escaping. Given that the legal institutions and political culture of Baltimore were firmly biased in favor of slavery, it would have been grossly unjust to demand of Douglass that he first make his case to a Baltimore court before attempting to free himself.

Now consider the following four propositions about present-day society, in the United States and, really, most places on the planet:

1. Prevailing legal institutions pervasively forbid what they should permit.
2. Prevailing legal institutions, even when what they forbid is what genuinely should be forbidden, pervasively assign punitive penalties when they should instead be focusing on restitution.
3. The failures of prevailing legal institutions are not accidental, but are the predictable result of the incentival and informational perversities inherent in the monopolistic power structure that defines the state itself.
4. Most people support prevailing legal institutions.

For a defense of the first three propositions, I refer the reader to Randy's own previous work.^[99] I take the fourth to be fairly obvious. The first three propositions show that prevailing political institutions are unlikely to generate a fair result. (Randy may protest that these institutions *would* be likely to generate a fair result if their administrators followed the Constitution as he interprets it. But I take the third proposition to show why no legal system is likely to follow the Constitution as he interprets it.) Consequently, even assuming a duty to justify one's disobedience in a public forum, such a duty cannot equate to a duty to justify one's disobedience in a government court. And the fourth proposition shows that prevailing political culture is not likely to generate a fair result either.



John Locke

John Locke famously cites the problem of people being “judges in their own case” as one of the “inconveniences of the state of Nature” that are to be remedied by civil government. I think Locke was correct (within the limitations I’ve just sketched) to see third-party arbitration as generally preferable to unchecked private judgment.^[100] But his mistake lay in seeing the establishment of a territorial-monopoly state as the means of implementing this desideratum. First, a monopoly is *not necessary* to solve the problem, since successful nonmonopolistic systems of public legal

arbitration are fairly common throughout history.^[101] Second, a monopoly *cannot* solve the problem, because a monopoly by definition does not submit its own disputes with its subjects to third-party arbitration.^[102] Randy understands nonstate legal systems too well to make Locke’s mistake; but the argument he is making looks to me surprisingly *like* Locke’s mistake.

Endnotes

^[96.] Incidentally, I think it unlikely that George would agree with all the conclusions that Randy wants to draw from George’s argument.

^[97.] For my defense of the reflective-equilibration approach to moral reasoning, see Roderick T. Long, Review of Leland B. Yeager’s *Ethics as Social Science: The Moral Philosophy of Social Cooperation*, *Quarterly Journal of Austrian Economics* 6.1 (Spring 2003), pp. 89-98; online at: <<http://mises.org/library/review-ethics-social-science-moral-philosophy-social-cooperation-leland-b-yeager>>; as well as Long, *Reason and Value: Aristotle versus Rand* (Poughkeepsie: Objectivist Center, 2000); online at: <http://atlassociety.org/sites/default/files/Reason_Value.pdf>.

^[98.] For related discussion, see my “Eudaimonist Reason versus Public Reason,” *Bleeding Heart Libertarians* (4 May 2013); online at: <<http://bleedingheartlibertarians.com/2013/05/eudaimonist-reason-versus-public-reason>>.

^[99.] Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law*, 2d ed. (New York: Oxford University Press, 2014); see also “Pursuing Justice in a Free Society: Part I – Power vs. Liberty,” *Criminal Justice Ethics* 4 (1985), pp. 50-72; online at <<http://www.bu.edu/rbarnett/4crimjustice50.html>>; and “Pursuing Justice in a Free Society: Part II – Crime Prevention and the Legal Order,” *Criminal Justice Ethics* 5 (1986), pp. 30-53; online at: <<http://www.bu.edu/rbarnett/5crimjust30.html>>.

^[100.] Locke, *Second Treatise of Government* 2.13 (1689): <titles/222#Locke_0057_229>.

[101.] For bibliographic references through 1992, see Tom W. Bell, "Polycentric Law," *Humane Studies Review* 7.1 (Winter 1991/92); online at: <<http://osf1.gmu.edu/~ihs/w91issues.html>> . More recent sources include Peter Leeson, *Anarchy Unbound: Why Self-Governance Works Better Than You Think* (Cambridge: Cambridge University Press, 2014), and Edward Peter Stringham, *Private Governance: Creating Order in Economic and Social Life* (New York: Oxford University Press, 2015).

[102.] For elaboration of this critique of Locke, see my "Market Anarchism As Constitutionalism," in Roderick T. Long and Tibor R. Machan, eds., *Anarchism/Minarchism: Is a Government Part of a Free Country?* (Aldershot: Ashgate, 2008), pp. 133-54.

MORE ON PRIVATE JUDGMENT AND PUBLIC JUSTIFICATION

by Roderick T. Long

A couple of addenda to my last post:

1. I also want to distinguish between the question *What procedures does a provider of legal services (a private court, say) need to follow in order to assure third parties that it's behaving in a reliable manner?* and the question *What procedures does a provider of legal services need to follow in order to generate in others a prima facie duty to obey its edicts even when those edicts are wrong?* In answering the first question, I think Randy's *Structure of Liberty* is a pretty good guide.[103] (One requirement for reliability, though not the only one, is that the provider not forbid competitors.) By contrast, I think the answer to the second question is: no possible procedures could be sufficient to produce this result.

2. In answer to my argument that disputants are not bound to obey the unjust decisions of courts, someone might object: *what if they've contractually agreed to binding arbitration?* My answer is: it depends on the details of the contract. Either the contract surrenders alienable rights

or it seeks to surrender inalienable rights. If the rights the contract seeks to surrender are inalienable, the contract is not binding. (On this point see Randy's excellent article "Contract Remedies and Inalienable Rights.")[104] On the other hand, if the rights surrendered in the contract are alienable, the contract is binding; but in that case, even if the result of arbitration is mistaken, it will not be unjust. (For example, if I've agreed to pay a fine if Court X finds me guilty, then even if I'm innocent there's no injustice in requiring me to pay the fine, since the condition licensing the fine is not my guilt but rather Court X's finding.) In neither case, then, do we find a duty to obey unjust requirements.

Endnotes

[103.] Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law*, 2d ed. (New York: Oxford University Press, 2014).

[104.] Randy E. Barnett, "Contract Remedies and Inalienable Rights," *Social Philosophy and Policy* 4.1 (Autumn 1986), pp. 179-202.

SPOONER ON HISTORICAL INJUSTICE

by Matt Zwolinski

One of Spooner's less-appreciated contributions to political philosophy is his discussion of the problem of historical injustice. That problem concerns what we ought to do *now* about injustices that occurred in the relatively distant past, but that nevertheless affect people living today. For instance, the enslavement of African-Americans in the United States ended more than 150 years ago. Nevertheless, the effects of that injustice are still felt: both by those who have inherited the wealth unjustly acquired by slave-owners and others who profited from slavery, and by those who have inherited the hardships and poverty of slaves. Similarly, much of the land currently owned by Americans was, at some point in the past, violently or fraudulently seized from Native Americans. As a result, the descendants of those

original Native Americans are almost certainly poorer than they otherwise would be, while others who benefitted from that theft are materially better off.

Spooner addressed the problem of historical injustice in one of his last published writings, an 1880 pamphlet entitled, “Revolution: The Only Remedy for the Oppressed Classes of Ireland, England, and Other Parts of the British Empire” (1880).^[105] Here, Spooner takes up the so-called “Irish Question” of how to deal with the increasing resistance of the Irish to British occupation and rule. Ireland had been conquered by the Tudors in the 16th century, and in the process of this conquest most of the land in Ireland was seized by the British. Much of this confiscated land was given to British nobles, who rented it to Irish peasants from afar. By the late 19th century many Irish had become increasingly dissatisfied with this arrangement, viewing it as a sort of feudalism and calling for the British to return their stolen lands and leave the country.

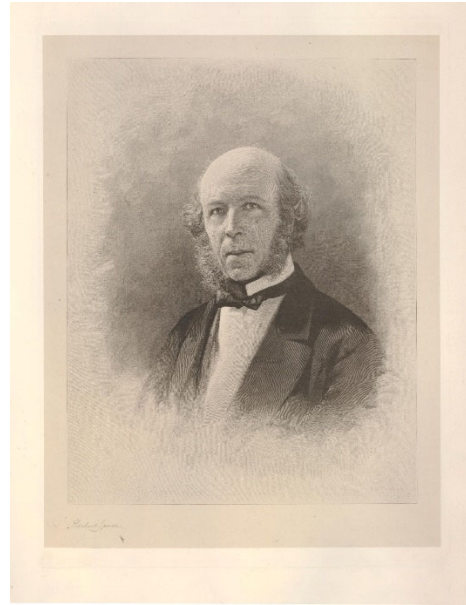
In “Revolution,” Spooner comes down squarely on the side of the Irish peasantry against the British nobility. British landlords, Spooner argued, had no just title to the lands they held.

[These lands, largely or mostly, were originally taken by the sword](#), and have ever since been held by the sword. Neither the original robbers, nor any subsequent holders, have ever had any other than a robber’s title to them. And robbery gives no better title to lands than it does to any other property.^[106]

Of course, the robberies – like slavery and land-theft in America – occurred long ago, in the distant past. And all of the original parties to the injustice – both the perpetrators and the victims – are dead. But, Spooner argued,

[No lapse of time can cure this defect in the original title](#). Every successive holder not only indorses all the robberies of all his predecessors, but he commits a new one himself by withholding the lands, either from the original and true owners, or from those who, but for his

robberies, would have been their legitimate heirs and assigns.^[107]



Herbert Spencer

Others, such as Herbert Spencer and Auberon Herbert had considered this sort of problem before. In his 1851 *Social Statics*, Spencer took essentially the same position as Spooner, arguing that the mere passage of time is insufficient to convert a wrong into a right.^[108] But a little over 40 years later, Spencer claimed that his earlier argument had been based on a mistake. In a letter to the *Daily Chronicle*, Spencer clarified his position, which he felt had been misinterpreted by the general public and deliberately misused by the English Land Restoration League -- a group which sought the establishment of a universal tax on the unimproved value of land in accordance with the writings of Henry George.

My argument in *Social Statics* was based upon the untenable assumption that the existing English community had a moral right to the land. They never had anything of the kind. They were robbers all round: Normans robbed Danes and Saxons, Saxons robbed Celts, Celts robbed the aborigines, traces of whose earth-houses we find here and there. Let the English Land Restoration League find the descendants of these last, and restore the land to them. There never was any equity in the matter, and re-establishment of a

supposed equity is a dream. The stronger peoples have been land-thieves down to the present hour.^[109]

Auberon Herbert took a similarly conservative position, for similar reasons, but the topic remained an intense subject debate among British individualists – see, for instance, this fascinating *Symposium on the Land Question* edited by J.H. Levy (1890) and featuring contributions from Spencer, Herbert, Wordsworth Donisthorpe, and others.^[110]

Spooner, for his part, did not believe that the complexities of historical injustice undermined the Irish case for restitution. The mere fact that we cannot trace the individual descendants of the perpetrators and victims of injustice, he argued, does not shield the present holders of unjustly seized property from liability. Even if we cannot establish precisely who has legitimate title to the lands, we can at least establish that the current titles are illegitimate.

Spooner concludes his pamphlet on a strident note:

The ruling classes in England, from the time the Anglo-Saxons first came there, have been hostes humani generis: enemies of the human race.^[111]

Like pirates, these ruling classes are motivated solely by plunder, and wholly indifferent to whom or where they plundered. And so it followed, Spooner claimed, “that they may justly and rightfully be killed, whenever and wherever they are found, and by whoever could kill them.”

If Spooner is right, then his argument has uncomfortable implications for those of us who live in comfort and prosperity today. How much of our own wealth might be traced, if we cared to look, to unjust origins of the sort that Spooner decries? And if it can be, then what should we do about it?

Libertarians are champions of property rights. But not just any property rights will do. Libertarianism’s theory of justice, as Robert Nozick has noted,^[112] is an historical one. And that means that the justice of any distribution of property rights depends entirely on how that

distribution came about. So, given the bloody and unjust nature of our own history – what does that mean for us?

Endnotes

^[105.] *No. 1. Revolution: The only Remedy for the Oppressed Classes of Ireland, England, and Other Parts of the British Empire. A Reply to “Dunraven”* (Second Edition, n.p., 1880). In, *Shorter Works*, vol. 2: .

^[106.] Spooner, *Revolution*, </titles/2292#Spooner_1531-02_1366>.

^[107.] Spooner, *Revolution*, </titles/2292#Spooner_1531-02_1367>.

^[108.] Herbert Spencer, *Social Statics* (New York: Robert Schalkenbach Foundation, 1995), p. 105. Online: </titles/273>.

^[109.] Herbert Spencer, “Letter to the Daily Chronicle,” 29 August 1894, in Herbert Spencer and Frederick Verinder, *Mr. Herbert Spencer and the Land Restoration League* (London: Page and Pratt, 1895), p. 8. See also his discussion of this issue in “The Land Question,” Appendix B to Herbert Spencer, *The Principles of Ethics* Vol. 2, (Indianapolis IN: Liberty Fund, 1978.) Online: </titles/334#lf0155-02_label_126>.

^[110.] *A Symposium on the Land Question*, ed. Joseph Hiam Levy (London: T. F. Unwin, 1890). Google Books: <https://books.google.com/books?id=V4QO53km3_kC&printsec=frontcover&source=gbs_ge_summary_r&ad=0#v=onepage&q&f=false>.

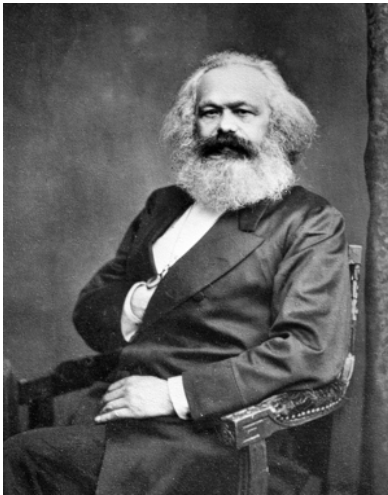
^[111.] Spooner, *Revolution*, </titles/2292#Spooner_1531-02_1384>.

^[112.] Robert Nozick, *Anarchy State, and Utopia* (New York: Basic Books, 1974), chapter 7.

LYSANDER SPOONER'S THEORY OF CLASS

by Roderick T. Long

Modern theories of class struggle come in three principal forms. The best known is the theory, famously associated with Karl Marx, according to which the ruling class is distinguished from the ruled class by its *differential access to the means of production*. In other words, the power of the rulers derives from their having monopolized the land, factories, capital equipment, etc., forcing the class lacking such possessions to work for the rulers on the rulers' terms, or die.



Karl Marx

Although the official Marxist account of how this state of affairs arose appeals to systematic violence, including state violence, Marxists nonetheless tend to view this as inessential, treating class rule as an inevitable consequence of even peaceful private commodity production, and regarding the ruling class's control of the state as more an effect than a cause of its power. In effect, when Marxists are replying to those who defend economic inequality on the grounds that it arose from private property and free exchange, Marxists stress, by contrast, the historical role of state violence in originating and subsequently maintaining such inequality; but when it comes time to evaluate private property and free exchange themselves, Marxists tend to switch hats and

condemn private property and free exchange as the basis of existing economic inequalities.[\[113\]](#)

A different approach was pioneered by the classical liberals of early 19th-century France.[\[114\]](#) For these thinkers, the key to explaining the division between ruling and ruled classes was not differential access to the means of production, but rather *differential access to political power and privilege*. For Adolphe-Jérôme Blanqui, for example, the two great parties are “those who wish to live by their own labour, and those who wish to live off the labour of others.”

Thus, in one country it is by means of taxes that one strips the worker, under the pretext of the good of the State, of the fruit of his sweat; in another, it is by means of privileges, declaring labour the object of royal concession, and charging a heavy price for the right to engage in it. The same abuse is repeated under more indirect but no less oppressive forms when, by means of customs duties, the State shares with privileged industries the proceeds from taxes imposed on all those that are not thus privileged.[\[115\]](#)

Similarly in England, James Mill divided society into “[the ruling Few,](#)” or “[Ceux qui pillent](#)” (those who pillage), and “the subject Many,” or “[Ceux qui sont pillés](#)” (those who are pillaged).[\[116\]](#)



James Mill

But these liberal class theorists, for the most part, saw differential access to the means of production as a harmless byproduct of free exchange, not something to be condemned. Charles Comte, for example – one of the pioneers of liberal class theory – writes that while the division of society into “a large number of men who live off the products of their lands” and “a still larger number who have nothing to live on but the products of their daily labour” initially seems unjust, we ought to be reconciled to the situation once we recognize that it is primarily the product of private property and free exchange, rather than force or fraud.^[117] James Mill likewise defended the rights of existing capital owners,^[118] and described those who criticized differential access to the means of production as purveyors of “mad nonsense” who sought “the subversion of civilised society.”^[119]

A third approach was offered by the British political economist Thomas Hodgskin. Hodgskin, like Marx after him, criticized the division of society into owners of land and capital on the one hand, and proletarian wage-earners on the other;^[120] but he, much more consistently than would Marx, saw this division as one arising primarily from state privilege, and so his proffered solution was not to suppress private property and free exchange, but rather to embrace and extend them.^[121]

In short, Hodgskin’s theory of class could be described (albeit anachronistically, since it preceded Marx) as a fusion of the Marxist approach and the classical-liberal approach: his criterion of class division was neither differential access to political power *per se* nor differential access to the means of production *per se*, but rather *differential access to the means of production rooted in differential access to political power*. Thus if “capitalism” refers to a system based on private property and free exchange, then Hodgskin was an ardent capitalist; but if it refers to the division of society into a class of capital owners on the one hand and a class of wage workers on the other, then Hodgskin was an ardent anti-capitalist.

It was this Hodgskinian approach that would become dominant among the 19th-century individualist anarchists, including Ezra Heywood and Benjamin

Tucker, and in particular it was the approach of Lysander Spooner, who holds that “substantially all the legislation of the world has had its origin in the desires of one class of persons to plunder and enslave others.” Spooner elaborates:

In process of time, the robber, or slaveholding, class – who had seized all the lands, and held all the means of creating wealth – began to discover that the easiest mode of managing their slaves, and making them profitable, was not for each slaveholder to hold his specified number of slaves, as he had done before, and as he would hold so many cattle, but to give them so much liberty as would throw upon themselves (the slaves) the responsibility of their own subsistence, and yet compel them to sell their labor to the land-holding class – their former owners – for just what the latter might choose to give them.

Of course, these liberated slaves, as some have erroneously called them, having no lands, or other property, and no means of obtaining an independent subsistence, had no alternative – to save themselves from starvation – but to sell their labor to the landholders, in exchange only for the coarsest necessities of life....

The result of all this is, that the little wealth there is in the world is all in the hands of a few – that is, in the hands of the law-making, slave-holding class; who are now as much slaveholders in spirit as they ever were, but who accomplish their purposes by means of *the laws they make* for keeping the laborers in subjection and dependence....^[122]

According to Spooner, the “very unequal proportions” in which “property ... is now distributed” are, contrary to the claims of apologists for the present system, “not the result – except in a partial degree – of the superior mental capacities, which enable some men, consistently with honesty and fair competition, to compass more of the means of acquiring wealth than others,” but are rather “the result, in a very important measure, of arbitrary and

unjust legislative enactments, and false judicial decisions, which actually deprive a large portion of mankind of their right to the fair and honest exercise of their natural powers, in competition with their fellow men.”^[123] Where Marxists on the one hand, and classical liberals like Charles Comte and James Mill on the other, are often in agreement in regarding differential access to the means of production as a natural byproduct of differential access to political power, and differ only in the evaluation, Spooner anticipates today’s “free-market anti-capitalists”^[124] in resembling socialists in their *goals* (according to one source, Spooner was even a member of the socialist First International)^[125] but free-market libertarians in their *means*. As an adherent of the same viewpoint, I take this aspect of Spooner’s thought to be a point in his favor.

Endnotes

^[113.] For Marxist inconsistency on this question, see Kevin A. Carson, *Studies in Mutualist Political Economy* (Charleston SC: BookSurge, 2007), pp. 89-164; online at: <http://www.mutualist.org/sitebuildercontent/sitebuilderfiles/MPE.pdf>.

^[114.] See, e.g., David Hart, *Class Analysis, Slavery and the Industrialist Theory of History in French Liberal Thought, 1814-1830: The Radical Liberalism of Charles Comte and Charles Dunoyer* (1994); online at: http://davidmhart.com/liberty/Papers/CCCD-PhD/CCCD_Book_2013.html.

^[115.] Adolphe-Jérôme Blanqui, *Histoire de l'économie politique en Europe* [1837] (Paris: Gauillaumin, 1860), pp. 4-5; translation mine.

^[116.] James Mill, “State of the Nation,” *London Review* I.1 (April 1835), pp. 1-24; online at: [/titles/2520#Mill_1624_2954](http://titles/2520#Mill_1624_2954).

^[117.] Charles Comte, *Traité de la Propriété*, vol. I (Paris: Chamerot, Ducollet, 1834), pp. 159-60; translation mine. Online: davidmhart.com/liberty/FrenchClassicalLiberals/Comte/Books/Comte_1834TdP1.pdf.

^[118.] James Mill, *Elements of Political Economy*, 3rd ed. (London: Henry G. Bohn, 1844); online at: [/titles/302](http://titles/302).

^[119.] Quoted in Alexander Bain, *James Mill: A Biography* (London: Longmans Green, 1882), p. 365.

^[120.] Thomas Hodgskin, *Labour Defended Against the Claims of Capital, or, The Unproductiveness of Capital Proved With Reference to the Present Combinations of Journeymen* (London: Knight and Lacey, 1825); online at: http://davidmhart.com/liberty/EnglishClassicalLiberals/Hodgskin/Hodgskin_1825LabourDefended.pdf.

^[121.] Thomas Hodgskin, *The Natural and Artificial Right of Property Contrasted* (London: B. Steil, 1832); online at: [/titles/323](http://titles/323).

^[122.] Lysander Spooner, *Natural Law; or the Science of Justice: A Treatise on Natural Law, Natural Justice, Natural Rights, Natural Liberty, and Natural Society; Showing that All Legislation Whatsoever Is an Absurdity, a Usurpation, and a Crime, Part First* (Boston: A. Williams & Co., 1882), pp. 19-20.

^[123.] Lysander Spooner, *Poverty: Its Illegal Causes and Legal Cure, Part First* (Boston: Bela Marsh, 1846), p. 7.

^[124.] See, e.g., Kevin A. Carson, *Studies in Mutualist Political Economy*, op. cit.; Carson, *Organization Theory: A Libertarian Perspective* (Charleston SC: BookSurge, 2008), online at: <http://www.mutualist.org/sitebuildercontent/sitebuilderfiles/otkc11.pdf>; Gary Chartier and Charles W. Johnson, eds., *Markets Not Capitalism: Individualist Anarchism Against Bosses, Inequality, Corporate Power, and Structural Poverty* (London: Minor Compositions, 2011), online at: <http://radgeek.com/gt/2011/10/Markets-Not-Capitalism-2011-Chartier-and-Johnson.pdf>; and Roderick T. Long, “Left-Libertarianism, Market Anarchism, Class Conflict and Historical Theories of Distributive Justice,” *Griffith Law Review* 21.2 (2012), pp. 413-431.

^[125.] George Woodcock, *Anarchism: A History of Libertarian Ideas and Movements* (Melbourne: Penguin, 1962), p. 434. Certainly several of the American

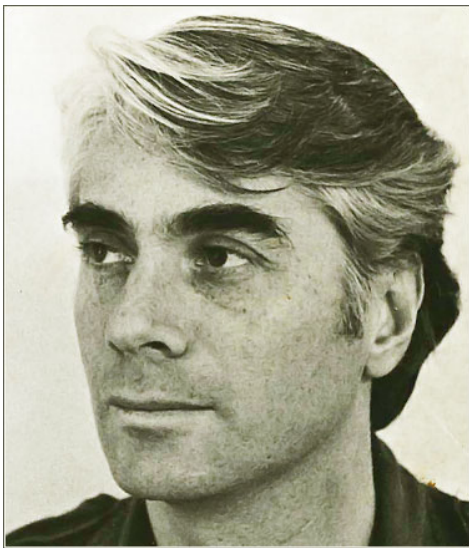
individualist anarchists – including Josiah Warren, Stephen Pearl Andrews, and William Batchelder Greene – are indeed documented as having been members of the First International. However, the only source I’ve thus far come across for Spooner’s membership is this Woodcock citation; so until I find an earlier corroborating source I’m inclined to reserve judgment.

LYSANDER SPOONER’S THEORY OF PROPERTY

by Roderick T. Long

As our conversation on Spooner draws to a close, I’m glad we’ve debated the issues of legal legitimacy in some detail, but sorry we haven’t really explored the breadth of Spooner’s views on other topics. As my final contribution to the discussion, picking up on Matt’s comments on restitution, I want to say just a bit about Spooner’s theory of property rights.

Spooner’s approach to property rights is broadly Lockean; one acquires title “[first, by simply taking possession of natural wealth](#), or the productions of nature; and, secondly, by the artificial production of other wealth.”[\[126\]](#) And we’ve seen from Matt’s post that Spooner accepts what Nozick calls a “historical” approach to distributive justice.[\[127\]](#)



Robert Nozick

Unlike both Locke and Nozick, however, Spooner’s rejects the proviso that first appropriators must leave enough and as good for others. Against the provision that “[the first comer is bound to leave something to supply the wants of the second](#),” Spooner argues, by *reductio ad absurdum*, that such a provision “would be just as good against the right of the second comer, the third, the fourth, and so on indefinitely,” thus rendering all appropriation impossible. He likewise notes that under a rule favouring first appropriators, “the last man’s wants are better supplied than were those of the first.”[\[128\]](#)

Many of Spooner’s fellow individualist anarchists were critical of profit, interest, and rent. Some, like Josiah Warren[\[129\]](#) and Stephen Pearl Andrews,[\[130\]](#) offered moral arguments against these phenomena; others, like Benjamin Tucker[\[131\]](#) and Francis Tandy,[\[132\]](#) offered economic arguments predicting that these phenomena would wither away without state support. Both groups tended to envision a future society in which one must continually use and occupy land in order to retain title to it.[\[133\]](#)

Because Spooner moved in the same circles, and published in the same journals, as many of these thinkers and shared their general “free-market anti-capitalist” perspective, it is often assumed that he must have shared their views on profit, interest, and rent as well. Murray Rothbard, for example, labels the position I’ve been describing the “Spooner-Tucker Doctrine.”[\[134\]](#) But in fact Spooner had no problem with profit, rent, or interest. On the contrary, he writes that “[there is no more extortion in loaning capital to the best bidder](#), than in selling a horse, or renting a house to the best bidder”;[\[135\]](#) and far from condemning absentee land ownership, Spooner insists that “[the owner of a thing has absolute dominion over it](#), whether he have it in actual possession or not, and whether he himself wish to use it or not;” and that “[no one has a right to take possession of it](#), or use it, without his consent.”[\[136\]](#) Spooner did support the rent-strike movement in Ireland, but only on the grounds that the lands in question “[were originally taken by the sword and have ever since been held by the](#)

sword,”^[137] and not because of any inherent illegitimacy of rent.

While I’m generally sympathetic to most of Spooner’s views on property, I regard his position on intellectual property (specifically, copyrights and patents) as a serious mistake.

Spooner argues that if we own the products of our labor, that must include the abstract products of our intellectual labor. Moreover, this ownership must be *perpetual*; if ordinary property rights don’t expire after a certain period of time, intellectual property rights shouldn’t either, for we have the “same reasons” for “[allowing men a perpetual property in their ideas](#)” as we do for “allowing them a perpetual property in the material products of their labor.”^[138] Thus if we could trace, say, the heirs of the inventor of the wheel, it seems, by Spooner’s lights, that we could not licitly use wheels without the current heirs’ permission. We might take this as a *reductio ad absurdum* of Spooner’s position, but he evidently would not.

I do think Spooner performs a useful service of showing what the consistent implications would be of treating abstract ideas as property. But I also think that any defense of intellectual property (perpetual or otherwise) conflicts with one’s ability to defend other forms of property. As Spooner notes: “[if the laborer own the stone, wood, iron](#), wool, and cotton, on which he bestows his labor, he is the rightful owner of the additional value which his labor gives to those articles.”^[139] But how can one defend one’s right to labor on the material objects one owns if one seeks to defend intellectual property as well.

Suppose Spooner writes a poem and recites it aloud; I hear it, and memorize (perhaps inadvertently, perhaps not). I now have a copy of the poem transcribed onto my brain. If I then pick up a pen (that I own) with my hand (that I own), and transcribe the poem from my brain (that I own) onto some paper (that I own), whereupon I either give it to you, or else trade it to you for something that you own, how can Spooner forbid me to do this, without violating my right to use my own property – my brain, my hand, my pen, my paper?^[140]

I’ll also note, in closing, that Spooner’s ideas would probably be much less influential today if they were still under copyright – because they probably wouldn’t be available for free on the Internet. Hence, precisely because I’m a fan of Spooner’s ideas in general, I’m very glad that his ideas on perpetual intellectual property have not prevailed.

Endnotes

^[126.] Spooner, *The Law of Intellectual Property; or An Essay on the Right of Authors and Inventors to a Perpetual Property In Their Ideas*, Vol. 1 (Boston: Bela Marsh, 1855), p. 21.

^[127.] Robert Nozick, *Anarchy, State, and Utopia*, 2d ed. (New York: Basic Books, 2013), ch. 7. For the left-libertarian application of Nozick’s historical approach, see my “Left-Libertarianism, Market Anarchism, Class Conflict and Historical Theories of Distributive Justice,” *Griffith Law Review* 21.2 (2012), pp. 413-31.

^[128.] Spooner, *Law of Intellectual Property*, op. cit., p. 23.

^[129.] Josiah Warren, *Equitable Commerce: A New Development of Principles, as Substitutes for Laws and Governments, for the Harmonious Adjustment and Regulation of the Pecuniary, Intellectual, and Moral Intercourse of Mankind, Proposed As Elements of New Society* (New York: Fowlers and Wells, 1852).

^[130.] Stephen Pearl Andrews, *The Science of Society, No. 1: The True Constitution of Government in the Sovereignty of the Individual As the Final Development of Protestantism, Democracy and Socialism* (New York: William J. Baner, 1851); Andrews, *The Science of Society, No. 2: Cost the Limit of Price: A Scientific Measure of Honesty in Trade As One of the Fundamental Principles in the Solution of the Social Problem* (New York: Fowlers and Wells, 1852).

^[131.] Benjamin R. Tucker, *Instead Of A Book, By A Man Too Busy To Write One: A Fragmentary Exposition of Philosophical Anarchism* (New York: Tucker, 1893).

^[132.] Francis Dashwood Tandy, *Voluntary Socialism: A Sketch* (Denver: Tandy, 1896).

^[133.] For a contemporary defense of this view, see Kevin A. Carson, *Studies in Mutualist Political Economy* (Charleston SC: BookSurge, 2007), ch. 5; online

at: <<http://www.mutualist.org/sitebuildercontent/sitebuilderfiles/MPE.pdf>> . For a critique, see my “Land-Locked: A Critique of Carson on Property Rights,” *Journal of Libertarian Studies* 20.1 (2006), pp. 87-95.

[134.] Murray N. Rothbard, “The Spooner-Tucker Doctrine: An Economist’s View,” *Journal of Libertarian Studies*, 20.1 (2006), pp. 5-15; online at: <<http://mises.org/library/spooner-tucker-doctrine-economists-view-0>>.

[135.] Spooner, *Poverty: Its Illegal Causes and Legal Cure, Part First* (Boston: Bela Marsh, 1846), p. 12.

[136.] Spooner, *Law of Intellectual Property*, op. cit., p. 80. See also my “Spooner on Rent,” *Austro-Athenian Empire* (21 February 2006): <<http://praxeology.net/unblog02-06.htm#12>>.

[137.] Spooner, *Revolution: The Only Remedy for the Oppressed Classes of Ireland, England, and Other Parts of the British Empire: A Reply to “Dunraven”* (1880), p. 4.

[138.] Spooner, *Law of Intellectual Property*, op. cit., p. 136.

[139.] *Ibid.*, p. 25.

[140.] For elaboration of this argument, see my “Thoughtcrime,” *Austro-Athenian Empire* (14 September 2003); online at: <<http://praxeology.net/unblog09-03.htm#02>>.

RECTIFICATION AND KNOWLEDGE

by Aeon Skoble

Matt comments on Spooner’s argument that the Irish were right to want the British to leave and Ireland returned to the Irish: “If Spooner is right, then his argument has uncomfortable implications for those of us who live in comfort and prosperity today. How much of our *own* wealth might be traced, if we cared to look, to unjust origins of the sort that Spooner decries? And if it can be, then what should we do about it?” But unlike the agrarian past, it’s no longer the case that land is the only source of wealth. Bob may live in a 500-square-foot

rental unit but still be incredibly wealthy. To assume that Bob’s wealth is unjustly held is partly fixed-pie fallacy – Bob’s wealth used to belong to someone else the same way British land used to belong to the Irish. But unlike land, new wealth can be created. So while it’s easy to look at British-held land and say, “Actually, that belongs to someone else,” it’s far from obvious that we can say this of Bob’s wealth. The argument that “the justice of any distribution of property rights depends *entirely* on how that distribution came about” overstates the case.

It overstates the case in another way: Spooner assumes the Irish from whom the British seized the land were themselves properly entitled to it. Part of the unclarity arises from falling into the trap of talking about “the Irish” as if that term refers to an entity which can own something and be stolen from. But in reality, some particular Irish person had his land stolen by the British government. This isn’t nitpicking: the particular Irish person, let’s call him Bill, who was dispossessed – was he a legitimate owner in the very sense Spooner is concerned with? Or was *his* title itself illegitimate? The claim is “No lapse of time can cure this defect in the original title,” so on this view if Bill’s great-great-great-great-grandfather acquired that land by dispossessing some prior indigenous person, Bill wasn’t the legitimate owner. Does this mean the British are doing no wrong to seize Bill’s land? That seems like the wrong conclusion. Of course we don’t know the backstory of every single Irish landowner, but we surely don’t want to say either that the British were wrong to seize this one but not that one. The “unjust origins” objection means that no one can clearly be said to own anything. It gets its traction by making us think of common-sense legal principles. If I knowingly buy stolen property, I can hardly complain when the owner wants it back or even uses force to get it back.

There are two possible ways to object to Spooner on this point. One is to deny his claim that time is completely irrelevant. Even after a hundred thousand years? Are we all squatters on Neanderthal land? The other, and they’re related, is accept the irrelevance of time provided that victims and perpetrators are identifiable. Bill’s great-

grandson may be able to produce a deed showing that the land in question had been taken unjustly from Bill. But even there, the “victims” would have to have had just title in the first place. If Bill’s great-grandfather unjustly acquired his land, then it’s not obvious that Bill’s great-grandson can claim timeless justice in claiming reparations from the British. What if the person Bill’s great-grandfather stole the land from emigrated to another part of the world. None of that person’s descendants have worked towards reclaiming their land, and indeed have started a new chain of possession of their new lands (which they acquired justly or unjustly?). So do *other* Irish people then have a claim on this land just because “the Irish” were dispossessed by “the British”?

It’s unsurprising that a proponent of natural law would also have an idea that time doesn’t negate injustice. And I think it’s *true* that time doesn’t negate injustice. But the question isn’t whether an injustice was committed – it’s what to do about it. The rectification of injustice cannot entail new injustice. We can’t rectify injustice without knowing victims and perpetrators, and we must not start thinking that “the British” or “the Irish” are names of intentional entities. On this particular point, I’m afraid Spooner’s theory proves too much: no one can know who justly owns what, so rectification goes to whoever claims it? That’s not justice. The best way to insure justice is to respect people’s natural rights, and apply rectification when knowledge permits.

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