REVIEW

OF

LYSANDER SPOONER'S ESSAY

ON THE

UNCONSTITUTIONALITY OF SLAVERY.

REPRINTED FROM THE "ANTI-SLAVERY STANDARD,"

WITH ADDITIONS.

BY

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REVIEW.

"Domestic Slavery is the most prominent feature in the aristocratic countenance of the proposed Constitution." — Gouverneur Morris in the Convention of 1787. Madison Papers.

Two years ago, Lysander Spooner, Esq. published an essay on the Unconstitutionality of Slavery. We shall but fulfill an old promise in reviewing the argument it contains. Events beyond our control have delayed us till now, which we regret only as it seems to have led some of Mr. Spooner's admirers to imagine that the delay proceeded from an unwillingness, on our part, to measure lances with so skillful an adversary. We exhort them, on the contrary, to believe that we have no innate antipathy to the idea of an Anti-Slavery Constitution; — that so far from being obstinately wedded to our own opinion, Mr. Spooner, or any one else, shall find in us a most ready, willing, and easy convert to a doctrine, which will restore to us the power of voting, — a right we much covet, — and a direct share in the Government of the country, a privilege we appreciate as highly as any one can. Only *convince* us fairly and we will outdo Alvan Stewart himself in glowing eulogy of this new-found virtue of the American Constitution. Indeed, if merely *believing* the Constitution to be Anti-Slavery would really make it so, we would be the last to stir the question. If the beautiful theories of some of our friends could oust from its place the ugly reality of a pro-slavery administration, we would sit quiet, and let Spooner and Goodell convert the nation at their leisure. But alas, the ostrich does not get rid of her enemy by hiding her head in the sand. Slavery is not abolished, although we have persuaded ourselves that it has no right to exist. The pro-slavery clauses of the National

Compact still stand there in full operation, notwithstanding our logic. The Constitution will never be amended by persuading men that it does not need amendment. National evils are only cured by holding men's eyes open, and forcing them to gaze on the hideous reality. To be able to meet a crisis men must understand and appreciate it.

All that we have to do, *as Abolitionists*, with Mr. Spooner's argument is to consider its influence on the Anti-Slavery cause. He maintains that the *Judges of the United States Courts have the right to declare Slavery illegal*, and he proposes that they should be made to do so. We believe that, in part, he mistakes fancy for argument; in part, he bases his conclusions on a forced interpretation of legal maxims, and that the rest of his reasoning, where not logically absurd and self-contradictory, is subversive of all sound principles of Government and of public faith. Any movement or party, therefore, founded on his plan, would, so soon as it grew considerable enough to attract public attention, be met by the contempt and disapprobation of every enlightened and honest man. To trust our cause with such a leader is to insure its shipwreck. To keep, therefore, so far as our influence extends, the Anti-Slavery movement in its legitimate channel, to base it on such principles as shall deserve and command the assent of every candid man, to hold up constantly before the nation the mirror of its own deformity, we undertake the distasteful task of proving the Constitution hostile to us and the slave.

It is but justice to Mr. Spooner to acknowledge that his performance differs from most of those which have preceded it, not only in the ingenuity of the argument, but in the honest aim of the writer. With him "the wish" does not appear to have been "father to the thought." He did not first found a party and then stretch out both hands to clutch something that would sustain him in the right of voting at all. He did not violate his own convictions, and then, obstinately shutting his eyes, cry out, "I do not *see* where I am inconsistent." His logic does not grow out of a lingering love of the ballot, or a secret desire to put "non-resistance *hors du combat*." He did not, in order to save a corrupt and trembling Church and shield it from the storm of deserved rebuke, endeavor to build an ark of political refuge out of legal scraps and disjointed and misunderstood quotations. He seems to have persuaded himself of the

truth of his own theory, and then to have thrown it fearlessly out to the world, trusting in its truth to make it useful, and with no ulterior object or private end to serve.

Before we touch on the argument of Mr. Spooner's Essay, we wish to call attention to two points:

1st. Allowing, for the moment, as he claims, that the Constitution contains no guarantee or recognition of Slavery — and granting him, also, in his own words:

"That the instrument was plain, and the people had common-sense; and those two facts cannot stand together consistently with the idea that there was any general or even any considerable misunderstanding of its meaning." —*p.* 126, 2*d edition.*

We go on to ask, (of Abolitionists, not of Mr. Spooner,) how comes it that, as he all along confesses, Courts, Congress, and the people have uniformly warped and twisted the whole instrument aside and awry to serve and sustain Slavery? that the whole *Administration* of the Government, from its very commencement, has been pro-slavery? If the Constitution be guiltless of any blame in this matter, then surely there must be some powerful element at work in the Union itself, which renders it impossible for this to be an Anti-Slavery *nation*, even when blessed with an *Anti-Slavery* Constitution; and thus the experience of fifty years proves *Union* itself, under *any form*, to be impossible without guilt. In such circumstances, no matter what the Constitution is, whether good or bad, it is the duty of every honest man to join in the war-cry of the American Anti-Slavery Society, "*no Union with Slaveholders.*" For if we could not escape the infamy and the sin of such a pro-slavery *administration* as ours has always been, under a Constitution pure as Mr. Spooner describes this to be, then, as we never can have a better, we ought to give up the experiment.

2d. As far as we can understand him, Mr. Spooner does not deny the universal Northern doctrine, that the Executive officers of the Government are bound, while they retain their situations, to obey and execute the laws in that manner and sense which the Supreme Court decide and enjoin. [His views of the duty of the Supreme Court itself we have stated and shall soon discuss. But from the importance he attaches to them we have a right to infer his concurrence in the opinion that the decisions of that Court are binding on the other departments of Government. For if they are

not so, of what consequence is it what those decisions are?] Of course no one has ever denied that the Supreme Court now construes the Constitution in a pro-slavery sense. This, then, is the law of the land until altered. Here again the position of the American Anti-Slavery Society is untouched. For whatever be the real character of the Constitution, if those who *now swear* to support that instrument are bound to support it in the sense which the Courts give it, then, surely, no Abolitionist can consistently take such an oath or ask another person to do so.

With neither of these points has Mr. Spooner himself anything to do. He, we believe, does not profess to be an Abolitionist; at least, in this essay he considers the question simply as a lawyer, without entering into its further bearings. We suggest them for the benefit of those Abolitionists who try to hide themselves behind him, and make a use of his argument which he never intended, and probably would not sanction.

WHAT IS LAW?

Mr. Spooner's first chapter is employed in answering the question, "What is law?"

"That law, I mean, which, and which only, judicial tribunals are morally bound, under all circumstances, to declare and sustain?

"In answering this question, I shall attempt to show that law is an intelligible principle of right, necessarily resulting from the nature of man; and not an arbitrary rule, that can be established by mere will, numbers, or power." —*p.* 5, *2d edition.*

His conclusion is, "that law is simply the rule, principle, obligation, or requirement of natural justice." —*p.* 6.

And finally he maintains:

"If, then, law really be nothing other than the rule, principle, obligation, or requirement of natural justice, it follows that government can have no powers except such as individuals may *rightfully* delegate to it; that no law, inconsistent with men's natural rights, can arise out of any contract or compact of government: *that constitutional law, under any form of government, consists only of those principles of the written Constitution, that are consistent with natural law, and man's natural rights;* and that any other principles, that may be expressed by the letter of any constitution, are void and not law, and all judicial tribunals are bound to declare them so." —*p.* 14, *2d edition.*

We might pass this chapter by without notice, as not concerning our inquiry, since Mr. Spooner not only conducts his argument afterward without reference to it, but distinctly allows that a definition exactly the opposite of his is the one usually adopted by the people, by Courts of Justice, and by Governments. So that,

"The very name of law has come to signify little more than an arbitrary command of power, without reference to its justice or its injustice; its innocence or its criminality." — *p.* 9.

Our only object is to abolish Slavery, and not to correct the fundamental ideas which men hold as to law or Government; and hence, all we have to do with law, is to find out what it *practically* is, and then amend it if we can. We might, therefore, we repeat, pass this chapter by, taking *law* to mean what Mr. Spooner allows that our Judicial tribunals, our Government, and the general sense of the people have defined it to be, in the words he quotes from Noah Webster, "a rule of civil conduct prescribed by the Supreme power of a State, commanding what its subjects are to do, and prohibiting what they are to forbear."

Or, as Heineccius describes it:

"Civil laws are the commands of the Supreme power in a State."

Or as Chancellor Kent defines it:

"Municipal law is a rule of civil conduct prescribed by the Supreme power in a State."

Or with Nathan Dane, the author of the ordinance of 1787:

"Municipal or civil law is the rule of municipal or civil conduct, prescribed by the Superior power in the State commanding what the Legislature deems right, and prohibiting what it deems wrong."—*Abr.* 6, *p.* 430.

Or with Chief Justice Wilmot:

"Statute law is the *will of the Legislature* in writing. Common law is nothing but statutes worn out by time."

Or with the Roman law, from which Mr. Spooner takes some of his definitions:

"What the people command, let that be law."—*XII Tables of Rome*

"The will of the Prince — that is law."—*Justinian's Inst.*

"The rule which each State chooses for itself, that is the law of such State."—*Ibid.*

We might extend these; but as they are only the varied expression of what Mr. Spooner *allows* is the generally accepted definition, further quotation is useless.*

We shall, however, dwell awhile on this chapter. Mr. Spooner himself draws the line very clearly and fairly between his own speculations and what he allows to be the generally received definition, and never confuses the two. But that portion of the Abolitionists who are misled by his book, often find their greatest difficulty in the points discussed in this chapter. We shall endeavor, therefore, to unravel it a little, since the views it contains are not new, but have been floating a long time in the Anti-Slavery horizon; and only spared, because no one has cared to notice them.

Mr. Spooner's doctrine is, that "only what is just and right is law." This proposition is both true and false, simply because the word *law* has many meanings, like its Latin synonym, *jus*, which Dr. Taylor says (Elem. Civil Law,) has forty significations. The most usual source of mistake in argument is the use of ambiguous terms. Now, Mr. Spooner's proposition is true of the law of Nature, which Cicero calls "*right reason, the same thing at Athens as at Rome;*" but it is false when applied to municipal, national, civil law, which is often a very different thing at Louisville from what it is at London. It is with this civil law, only, that we have to do in an argument like the present. Mr. Spooner's quotations, at the close of this chapter, relate mostly to the law of Nature, to law in its most comprehensive sense, or the science of Justice; such is Hooker's sublime poetry, assuring us of law, "that her seat is the bosom of God, and her voice the harmony of the world."

* If the reader asks why we do not cite Blackstone's definition, — "Municipal law is a rule of civil conduct, prescribed by the Supreme power in a State, commanding what is right, and prohibiting what is wrong," (*I Comm. p.* 44,) — we reply: because we think the last clause equivocal and superfluous, and, if taken in its obvious sense, false. So thought his commentator, Prof. Christian — see his note. As do his later commentators, Hovenden and Ryland. Bentham, also, and Austin. — *Jurisprudence, p.* 278, *London*, 1832.

So, evidently, did Stephens, Noah Webster, and Chancellor Kent, who have all quoted the first half and omitted or changed the last. As did Marshall, 12 Wheaton, 332. So thought Nathan Dane, who, applying the first clause, has altered this latter one as above. Tomline, Law Dictionary, Art. Law, holds that Blackstone meant to be understood substantially as Dane has expressed it; and this seems probable, if we scrutinize the remainder of the chapter in which the definition occurs.

This discussion, however, is a matter of no consequence to the argument. Leaving it, therefore, let us consider Mr. Spooner's main proposition. "Only that which is just is law, and all judicial tribunals are bound so to declare:" taking law to mean the rule of civil affairs in a nation, the only sense of the term with which this argument has any thing to do.

In the first place, a proposition may be justly suspected not to be sound, when the author confesses in regard to it, as Mr. Spooner does here, that —

"It may make sad havoc with constitutions and statute books," and "it is *possible*, *perhaps*, that this doctrine would spare enough of our existing constitutions to save our governments from the necessity of a new organization!!!"

Surely, mankind cannot be presumed to have so universally mistaken what they were about, as to have *uniformly* set up Governments, that were not *legal* in their own sense of the term! And as surely words must be interpreted according to the sense mankind choose to put upon them, and not according to the caprice of an individual. Mr. Spooner is at liberty to say, that much of what the world *calls* law is not obligatory, because it is not just in the eye of God; and there all good men will agree with him. But to assert that because a thing is not right it is not *law*, as that term is commonly and rightfully used, is entering into the question of what constitutes the basis of government among men; and according to a man's theory of Government, will be his denial or assent to the proposition. Does Mr. Spooner mean to say merely, that a nation in making its laws has no right, in the eye of God, to perpetrate injustice? We agree with him. It is a doctrine certainly as old as Cicero, and may be traced through Grotius and Locke, and all writers on the subject, down to Jefferson and Channing. Nations are bound by the same rule of right and wrong, as individuals: agreed. Or does he mean to say that in settling what shall be *the rule* of civil conduct, the voice of the majority is not final and conclusive, on its own officers, in *all the departments of government?* Then we differ from him entirely, and assert, that, on his plan, Government is impossible. An individual may, and ought to resign his office, rather than assist in a law he deems unjust. But while he retains, under the majority, one of *their* offices, he retains it on *their conditions*, which are, to obey and

enforce *their* decrees. There can be no more self-evident proposition, than that, in every 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." After all, Messrs. Goodell and Spooner, with the few who borrow this idea of them, are the real no-government men; and it is singular, how much more consistent and sound are the notions of Non-resistants on this point, — the men who are generally considered, though erroneously, to be no-government men.

According to Mr. Spooner, no provision would be law until it had secured the assent, not only of the Legislature, — the power appointed to *make* laws — but of the Judiciary also, — the power appointed only to *construe* and *apply* them. Apply this principle to our Union and it brings upon the present Constitution a similar disease to that which killed the old confederation, under which laws were of no practical value unless the several States *chose* to execute them. According to Mr. Spooner, however, it is an evil inseparable from all forms of Government, since every decision of the National Legislature must be *perpetually* subject to the discretionary power of every Court in the twenty-eight States!

REMEDY FOR UNJUST LAWS.

"Only that which is just, is law, and all judicial tribunals are bound so to declare." This is Mr. Spooner's proposition. Grant, for the purpose of this argument, that only what is just is law. We allow that no laws in support of Slavery are *morally* binding. Possibly Mr. Spooner means the same thing, only expresses it more strongly. The only important point at issue is — *when Governments enact such laws, what is the proper remedy?*

This question has been answered in three ways.

1st. Old-fashioned patriotism replies, with Algernon Sydney: "Resistance to tyrants is obedience to God." Mr. Spooner states that "the only duties any one owes a wicked Constitution, are disobedience, resistance, destruction."

2d. Next comes the Christian rule, that too sanctioned by Locke, and by Plato — the course of the Quakers — the motto of the American Anti-Slavery Society — "SUBMIT to every ordinance of man" — but suffer any penalty rather than JOIN in doing a wrong act; meanwhile, let your loud protest prepare a speedy and quiet revolution.

3d. Thirdly comes Mr. Spooner's plan:

"If the majority, however large, of the people of a country enter into a contract of government, called a constitution, by which they agree to aid, abet, or accomplish any kind of injustice, this contract of government is unlawful and void — and for the same reason that a contract of the same nature between two individuals, is unlawful and void. Such a contract of government confers no rightful authority upon those appointed to administer it."

* * * * * * *

"Judicial tribunals, sitting under the authority of this unlawful contract or constitution, are bound, equally with other men, to declare it, and all unjust enactments passed by the Government in pursuance of it, unlawful and void. These judicial tribunals cannot, by accepting office under a Government, rid themselves of that paramount obligation, that all men are under, to declare, if they declare anything, that justice is law; that Government can have no lawful powers, except those with which it has been invested by lawful contract; and that an unlawful contract for the establishment of Government, is as unlawful and void as any other contract to do injustice."

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"No oaths, which judicial or other officers may take to carry out and support an unlawful contract or Constitution of Government, are of any moral obligation." — *p.* 9.

And here begins the real and only important dispute between us. The reader may forget, if he pleases, all we have said. Mr. Spooner's differences and our own, up to this point, are mere questions of theory. It matters little which side be adopted. His position now is:

That laws and constitutions which violate justice, are void. They are as little binding in the eye of the law, as in the eye of God. They are *legally* as well as morally void.

So far we agree with him, or differ so slightly, that here we care not to dispute the matter. He goes on:

A Judge *holding office under such Constitutions* is authorized and bound to treat them as *void*, and to decide cases, not according to them, but as his sense "of natural justice" dictates.

Here we differ from him, maintaining that the position of the

officers of such a Government differs from that of the private individual; their duty is to resign their posts whenever unwilling to fulfil the conditions on which they receive them, and then, AS MEN, *treat the laws as void.*

This question is not to be confounded with one somewhat similar to it, and which has been sometimes discussed, especially in England, whether a Judge there may disregard an unjust statute? Our present question is different, for it should be remembered that in England, there is no written Constitution. Even if a Judge had such powers there, WHICH HE HAS NOT, it would, by no means follow, that he had the same under our form of Government. There the Judge swears, simply to bear true allegiance to the King. It might, therefore, with some plausibility, be argued, that having no test to which to bring acts of Parliament, except the rules of natural justice, Judges were authorized to declare them void when inconsistent with those rules. Such a doctrine, however, is repudiated by the almost unanimous voice of the English law.

But however it may be in England, here the case is different. Our Government is founded on contract. See, Pream. Mass. Cons.: J. Q. Adams's Oration at Quincy, p. 17: Jay, C. J., 2 Dall. 471. So agrees Mr. Spooner:

"The Constitution is a contract; a written contract, consisting of a certain number of precise words, to which, and to which only, all the parties to it have, in theory, agreed. Manifestly neither this contract, nor the meaning of its words, can be changed, without the consent of all the parties to it." —*p.* 123.

"A contract for the establishment of Government, being nothing but a voluntary contract between individuals for their mutual benefit, differs in nothing that is essential to its validity from any other contract between man and man, or between nation and nation." —*p.* 8.

"Our constitutions are but contracts." —*Note, p.* 8.

Under our Constitution, then, the people and the office-holder make a contract together. They grant him certain specified powers, and demand of him certain specified duties. He deliberately looks over the catalogue (that is, the Constitution,) — assents to it, — swears that he agrees to it, and will perform his part, — and so takes office and acquires power. *That power*, Mr. Spooner thinks, he may retain while he refuses to perform the conditions on which he received it; and *that power*, granted him expressly, and only for

the support of the Constitution, he is *bound* to use for the destruction of that instrument! Mr. Spooner's ground is that, "immoral contracts are void." Granted; but if they are absolute nullities, then the Governments supposed to spring from them, do not exist, since they have nothing to spring from. Accordingly, the supposed Judge is *no Judge*, and has no authority to *declare or decide anything*. As Mr. Spooner says (p. 9,) "Such a contract of Government confers *no rightful authority* upon those appointed to administer it." Of course he would not have a Judge use a *wrongful* authority, for any purpose.

"Immoral contracts are not binding." Agreed. But are men at liberty to enter into agreements which they know at the time are immoral? Of course not. Is not the mere fact that men swear to support the Constitution sufficient proof to the nation that *they* do not consider the clauses of that instrument immoral, but feel at liberty, and really intend, to carry them out? What higher evidence or pledge can a man give that he considers a contract moral, than taking an oath to execute and support it?

Again, "immoral contracts are not binding." True. But if I receive a sum of money, on my promise to commit murder, and afterward, my moral sense awakens, and I refuse to do the deed, does that authorize me to retain the money? Such a moral sense would be a most accommodating one! and such godliness might well be "accounted gain!"

The rule plainly is that, if power is put into our hands on certain conditions, and we become, *from any cause*, unable or unwilling to fulfill those conditions, we ought to surrender back the power to those who granted it. If, therefore, the Constitution is pro-slavery, (as Mr. Spooner and ourselves are now supposing it to be,) the Judges have agreed to do certain pro-slavery acts, and they must perform their whole contract, or yield up the power they received on that condition. Judges are the people's servants, employed to do certain acts. If they cannot *do those acts*, let them "be no longer stewards."

This argument seems to us conclusive as it stands. But Mr. Spooner's principles give it additional force. He says, (p. 99, 2d edition,) that

"Office is not given to any one because he has a right to it, nor because it may be even a benefit to him. It is conferred upon him, or rather

confided to him, as a trust, and solely as a trust, for the sole benefit of the people of the United States. The President, as President, is not supposed to have any rights in the office on his own account; or any rights except what the people, for their own benefit, and not for his, have voluntarily chosen to grant to him."

If this be so — if the President, or Judge, has *no rights* but what the people have granted him, will Mr. Spooner affirm that the people ever granted to any Judge the right to disregard the pro-slavery clauses of *their* Constitution? If office be a "trust, and solely a trust," is the trust-holder to execute his duty according to his own views, or according to the trust deed?

Again, Mr. Goodell had maintained that Governments have certain inherent powers, as that, for instance, of abolishing Slavery, and executing justice, &c.; — that these enter into the very idea of a Government, and every Government possesses them, whether specifically granted to it or not. But Mr. Spooner (p. 8,) scouts as "an imposture, the idea of any necessary or inherent authority or sovereignty in our Government, as such," and maintains that they are nothing but "contracts." If then, they are only contracts, will he explain where Judges get a power which the other party to the contract never meant to give them?

If, therefore, Mr. Spooner or any one else could show us an English Judge, for instance, putting aside an act of Parliament because of its injustice, he would not even then reach our case. Let him show an English Judge holding himself authorized to disregard the terms of the union between Scotland and England, or between Ireland and England, and he will have advanced somewhere within sight of the position of an American Magistrate under our Constitution. Even those, however, are not equally strong cases, for such a Judge has never *expressly sworn* to maintain those compacts.

The royal oath, to maintain "the church established," comes nearest to our case; and it is well known with what scrupulous anxiety even the profligate George IV. clung to what he fancied his duty under that.

"These Judicial tribunals," says Mr. Spooner, "cannot, by accepting office under a Government, rid themselves of the paramount obligation that all men are under to declare, if *they declare anything*, that justice is law."

"If *they declare anything;*" that is a very significant "IF." Was there a lurking doubt in the writer's mind whether our view

was not the correct one? whether Judges had a right to "declare anything" in such circumstances? If there was, let him cherish it. True, such Judges cannot rid themselves, *as men*, "of the paramount obligation to declare, if they declare anything, that Justice is law." But it is as men, as simple individuals, units in the sight of God, that this "paramount obligation" rests upon them. God knows them not as Judges. Their only "paramount obligation," as Judges, is to do what they agreed to do when they were made Judges, or quit the bench. God does not require of any of his creatures to juggle their fellows out of the gift of power, and then use that power contrary to their promises, in order to serve humanity. That were to ask "robbery for burnt offering."

NO-GOVERNMENTISM AND ANARCHY.

But putting out of view this point of *contract*, between the people and their servants, we maintain that such a line of judicial duty is inconsistent with the existence of uniform and regular Government. It is the first step toward anarchy.

"Only what is just and right is law." Granted, but who is to decide what is just and right? We say that *for the purpose of the civil government of any nation*, the majority of that nation is to decide, and their decision is final, and constitutes, for that nation, LAW. Mr. Spooner thinks not; he thinks that each Judge is to decide for himself and act accordingly. A uniform Government is impossible on this plan. Mr. Spooner himself admits as much at pp. 60, 61, 122, 123. "Statutes," says Webster, "are but recommendations, if each man is to construe them as he pleases." *Quot homines, tot sententiæ*, ("many men, many minds.") Law would be one thing in Maine and another thing in Maryland — one thing to-day, another thing to-morrow. And each day and each Court would think itself infallibly right. "Orthodoxy is *my* doxy," said the English Bishop. "By *right reason*," says Atterbury, "every one would be willing to mean *his own*." "Discourses about Natural Law," says another eminent writer, "are the fullest of mistakes and most liable to error." Let us look at it. In these United States some think that neither men nor nations have the right to make war — to take life by the gallows — to authorize the holding of the soil as individual property — to debar women from the right of voting. One not in-

considerable sect holds that the magistrate should enforce theological orthodoxy. Will Mr. Spooner inform us on his principle what is *law* on each of these points; and also what a Judge in such case is to pronounce? He will not, of course, maintain that a principle is right merely because the majority entertain it. A vote-receiver is sitting at the ballot-box; a woman appears and offers him a vote. His own opinion is that natural law, "the rule of natural justice," obliges him to receive it. The majority have told him, by specific statute, to receive the votes of men only. Which way is he to act? Which is "*law*" to him? A Judge is sitting on the bench — the jury find the prisoner guilty of murder. His own opinion is that no Government has a right to take life — the majority have ordered him, by specific statute, in such case made and provided, to doom the culprit to the gallows. How is he to act? Which is "law" to him? We say to him, quit the bench rather than violate your conscience. Mr. Spooner instructs him that all laws inconsistent with natural justice are void, and that he is bound to stay there and declare them so. Accordingly as every man's own conscience is, for the time being, his highest and holiest guide, he must set up his own idea of right; and as of old, every man's foot rule was regulated by the length of the reigning King's foot, so now, Judges are to reverse the advice of Lord Coke, and "be guided by the crooked cord of discretion, and not by the golden metwand [*measuring wand*] of the law."

Cicero, the *pagan*, maintains that for a merchant in time of famine to conceal the fact that a plenty of grain will come to-morrow, and thus grind a high price to-day out of the starving people, is contrary to "natural justice." *Christian* jurists, Grotius, Puffendorf, and others, think such conduct right. If such a sale is brought before Mr. Spooner, to be enforced, which way will he decide? Which is law? this eternal, unalterable, unmistakable law, he so much praises.

Gerrit Smith thinks the three-fifth slave basis an Anti-Slavery provision, "a bounty on liberty — an attempt to promote the Anti-Slavery cause." Mr. Spooner thinks just the reverse. Which way shall the poor Judge, in search of *natural law*, interpret the clause?

Incidit in Scyllam cupiens vitare Charybdin.

If he steers clear of Spooner one way, he is sure to run foul of Smith the other. How grateful will he be to our author for getting

him clear of the "old chaos of conflicting edicts," and introducing him to such a "natural, unalterable, universal, *simple*, intelligible principle," which supercedes *all* other law, and "*is necessarily the only law!!!*"

The wisest men in all ages have held, that relying on the conscience or discretion of Judges is but another name for tyranny. Among the legal maxims collected by Lord Bacon there are two of sterling value: "It is miserable slavery to have the law vague or uncertain." "That is the best law, which trusts the least to the discretion of a Judge, and he is the best Judge, who trusts least to himself." Lord Coke has even gone so far as to affirm that it is more important the law should be fixed and certain, than that it should be just. "No man," said Sir Wm. Jones, "would ever know how to act, and no lawyer how to advise, unless courts were bound by authority, as firmly as the Pagan deities were supposed to be bound by the decrees of fate." "Equity," said the learned Selden, "is a roguish thing; for law we have a measure, — know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. It is all one as if they should make the standard for the measure we call a foot, a chancellor's foot; what an uncertain measure would this be! One chancellor has a long foot, another a short foot; a third an indifferent foot; it is the same thing with a chancellor's conscience." "The discretion of a Judge," said Lord Camden, that learned and pure jurist, the early and tried friend of our Revolutionary fathers, "is the law of tyrants; it is always unknown, different in different men; it is casual, depends on constitution, temper, passion. In the best it is oftentimes caprice — in the worst, it is every vice, folly and passion, to which human nature is liable."

See also Kent's Comm., 1. 476. Story's Equity, 1. 12.

It was on this principle of construing laws according to our own ideas of justice that Georgia acted, when, in defiance of the Government, she robbed the Indians and imprisoned their missionaries; as does Carolina when, in spite of the Constitution, she imprisons colored seamen and banishes Samuel Hoar under penalty of jail and fine. The supreme authority of individual judgment and conscience is sound doctrine in matters of religion: and what is the result? The healthful emulation of a thousand rival sects. Introduce the same principle into government, and instead of one system

of laws and one interpretation, we should have, as in the case of the Bible, a thousand; and uniform government would be impossible.

If Mr. Spooner, to escape this dilemma, shall explain his principle to mean that a Judge is to decide, not according to his own individual idea of right, but the general sense of the age or nation in which he lives, we hardly care to dispute such a proposition with him; — for it is of little practical importance; since in the *words of its statute-book* will each magistrate always find the best, if not the only, evidence of what his nation thinks just and right. "The laws," says Aristotle, "are the morals of the State and the character of the whole people taken collectively." If Mr. Spooner should feel disposed to appeal from the decision of one nation to the general sense of Christendom, he will find that there never was a sin, which any Judge, desirous of supporting it, could not find abundance of philosophers to uphold him in thinking right; and surely Slavery at present, finds many such, both in Church and State. Hence, on either plan there could be no uniform and regular Government.

LEGAL AND JUDICIAL OPINIONS.

We shall conclude our discussion of this point by showing that the almost unanimous, if not unanimous, voice of lawyers and judicial tribunals repudiates this power. Our extracts will be drawn from as many different sources as possible, because it has been a favorite course with Liberty party debaters and others to maintain that all acts of Parliament, or of any legislative body, contrary to reason and justice are void, and that Judges may treat them as such — a proposition identical with Mr. Spooner's, and clearly not sound.

The authorities which follow are not however intended for Mr. Spooner, since, (p. 62,) he candidly states it as the settled doctrine of all the Courts, that they possess no authority to overrule wicked laws. We adduce them merely to complete our view of the subject, and for the sake of those who are not so wise or so candid as Mr. S. in this particular.

This doctrine is usually sustained by disconnected quotations from Blackstone, among which the following generally occupies the first place:

"This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid, derive all their force, and all their authority, mediately or immediately, from this original."—*Blackstone, Vol. 1, p. 41.*

Mr. Justice Coleridge, in his edition of Blackstone, says, that "here the author means merely that a law, contrary to nature, has no binding force *on the conscience*."

It will be observed that Blackstone only asserts that *bad laws are void*, without touching the question of the remedy in such case, or whether judges may declare and treat them so. His able commentator, Prof. Christian, in a note on the passage, discusses this point, and decisively rejects the doctrine. He says:

"If an act of Parliament should, like the edict of Herod, command all children under a certain age to be slain, the Judge ought to resign his office rather than be auxiliary to its execution, *but it could only be declared void by the same legislative power by which it was ordained.*"

With this, the other commentators, Chitty and the rest, agree. Sedgwick unites with them in the same opinion. Woodeson, Blackstone's second successor in his professorial chair, adds his assent in these words:

"We cannot expect that all acts of legislators will, or can be, entirely good, or ethically perfect: but if their proceedings are to be decided upon by their subjects, Government and subordination cease."—*Chitty's Blackstone, Note, p. 41.*—*Wood's El. Jur., p. 81.*

Blackstone himself, in a subsequent page of his work, distinctly denies the doctrine which some might infer from the general terms he had used above. On the 91st page of his first volume he says:

"I know it is generally laid down more largely, that acts of Parliament, contrary to reason, are void. But if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power, in the ordinary forms of the Constitution, that is vested with authority to control it: and the examples usually alledged, in support of this sense of the rule, do none of them prove, that, where the *main object* of a statute is unreasonable, the Judges are at liberty to reject it: for that were to set the judicial power above that of the Legislature, which would be subversive of all Government. * * * * * * If we could conceive it possible for the Parliament to enact that a man should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the Legislature,

when couched in such evident and express words, as leave no doubt whether it was the intent of the Legislature or not."

Chancellor Kent, also, of New York, the highest living authority, though citing and praising the few old cases which sustain a different doctrine, concludes with Blackstone, thus:

"It is a principle, in the English law, that an act of Parliament, delivered in clear and intelligible terms, cannot be questioned, or its authority controlled in any court of Justice. When it is said in the books that a statute contrary to natural equity and reason, or repugnant, or impossible to be performed, is void, the cases are understood to mean that the courts are to give the statute a reasonable construction. They will not readily presume, out of respect and duty to the lawgiver, that any very unjust or absurd consequence was within the contemplation of the law. *But if it should happen to be too palpable in its direction to admit of but one construction, there is no doubt, in the English law, as to the binding efficacy of the statute.* The will of the Legislature is the supreme law of the land, and demands perfect obedience."—*Kent's Comm.* 1. *p.* 447.

Locke lays down the same principle substantially, when he says: "In all cases while the Government subsists, the *Legislature* must be supreme. When that transgresses its bounds, the right of revolution begins." And Paley also:

"There necessarily exists in every Government a power, from which *the Constitution has provided no appeal*, absolute, omnipotent, *uncontrollable*, arbitrary, despotic. This person or assembly is the supreme power of the State * * * the Legislature of the State."—*Mor. and Pol. Phil., Bk.* 6, *ch.* 6.

With this Blackstone agrees. See Comm. 1. pp. 161, 186:

"Where the law is known and clear, though it be unequitable and inconvenient, the judges must determine as the law is, without regarding the unequitableness or inconveniency. Those defects, if they happen in the law, can only be remedied by Parliament; therefore we find many statutes repealed, and laws abrogated by Parliament as inconvenient, which before such repeal or abrogation, were in the Courts of Law to be strictly observed."—*Vaughan's Rep., pp.* 37, 38.

Says the United States Circuit Court:

"We cannot declare a legislative act void, because it conflicts with our opinions of policy, expediency, or justice. * * *

"The remedy for unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fails, the people, in their sovereign capacity, can correct the evil; but courts cannot assume their rights.

* * * * *

"That would submit laws to a test as fallible and uncertain as all rules must be, which have not their source in some certain and definite standard, which varies neither with times, circumstances, or opinions. * *

"There is no paramount and supreme law which defines the law of nature, or settles these great principles of legislation, which are said [*that is, by the counsel in this case,*] to control State Legislatures, in the exercise of the powers conferred on them by the people in the Constitution.

"If it is once admitted that there exists in this Court a power to declare a State law void, which conflicts with no constitutional provision, if we assume the right to annul them for their supposed injustice, or oppressive operation, we become the makers and not the expounders of Constitutions. Our opinions will not be a judgment on what was the pre-existing law of the case, but on what it is, after we shall have so amended and modified it as to meet our ideas of justice, policy, and wise legislation, by a direct usurpation of legislative powers, and a flagrant violation of the duty enjoined on us by the Judiciary act."—1 *Baldwin, C. C. R. p.* 74.

Mr. Justice Iredell, of the Supreme Court of the United States, says:

"Some speculative jurists have held that a legislative act against natural justice must, in itself, be void, but I cannot think that under such a Government, as (that of England,) *any court of Justice would possess a power to declare it so.*"

After quoting Blackstone, to sustain that position, he adds:

"If any act of Congress violate constitutional provisions it is void; * * * If, on the other hand, the Legislature of the Union, of any member of the Union, shall pass a law within the general scope of their constitutional power, the court cannot pronounce it to be void merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and purest men have differed upon the subject."—3 *Dallas's Rep., p.* 399.

"If the Legislature should pass a law in plain, unequivocal, and explicit terms, within the scope of their constitutional powers, I know of no authority in this Government to pronounce such an act void, merely because, in the opinion of the Judicial tribunals, it was contrary to the principles of natural justice. For this would be vesting in the Court latitudinarian powers which might be abused, and would necessarily lead to collision between the Legislative and Judicial departments, dangerous to the well-being of society, or at least, not in harmony with the structure of our ideas of natural government. Justice is regulated by no certain or fixed standard, so that the ablest and purest minds might sometimes differ with respect to it. * * * Necessity dispenses with general principles. The Legislature must be the judges when that necessity exists."—2 *Rawle's (Pennsylvania) Reports, p.* 374.

The Supreme Court of the United States affirm the same doctrine, in a sentence which Mr. Spooner makes the corner-stone of his book:

"Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with *irresistible clearness*, to induce a court of justice to suppose a design to effect such objects."—*United States* vs. *Fisher et. al.* 2 *Cranch*, *p.* 390.

"This language of the Supreme Court," says Mr. Spooner, "admits, 1st, that the preservation of men's *rights* is the vital principle of law; and 2d, that courts — and the Supreme Court of the United States in particular — will trample upon that principle at the bidding of the Legislature, when the mandate comes in the shape of a statute of such '*irresistible clearness*,' that its meaning cannot be evaded."

Lord Mansfield recognizes the same principle in that sentence, which forms the other bulwark of Mr. Spooner's argument. In the "Sommersett" case, Lord Mansfield said, speaking of the acknowledged sin of Slavery:

"So high an act of dominion must be recognized by the law of the country where it is used. * * * The state of Slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political — but only *positive law*, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from the memory. It is so odious, that nothing can be suffered to support it but *positive law*."—*Howell's State Trials*, 20. *p.* 1.

Positive law, then, can so establish even Slavery, that courts must treat it as legal.

The same doctrine shines out in all the cases, either on this side the ocean or in England, in which the Slave-trade has been brought in question. Certainly, here would be a case in which, if anywhere, a Judge would use the power, if he had it, to treat bad laws as void. Still, no Judge, whatever his private opinion, has usurped the right to overrule, on that account, the law of nations, which holds that trade to be lawful. Sir Wm. Scott, one of the highest, if not the highest, authority among recent English Judges in his department, holds the following language, in a case where the question of that trade was before him, and in which he decided that the Slave-trade was not a crime by the law of nations:

"I must remember that in discussing this question, I must consider it not according to any *private moral apprehensions* of my own, (if I entertained them ever so sincerely,) but as *the law* considers it. * * An act must be *le-*

gally criminal, because neither this Court nor any other can carry its private apprehensions, independent of law, into its public judgments, on the quality of actions. It must conform to the judgment of the law upon that subject, and acting as a Court, in the administration of law, it cannot attribute criminality to an act where the law imputes none. It must look to the *legal* standard of morality on a question of this nature." — 2 *Dodson, Adm. Rep. p.* 210.

C. Justice Marshall says, in a similar case:

"That it (the Slave-Trade) is contrary to the law of nature, will scarcely be denied. * * * Whatever might be the answer of a moralist to this question, a jurist must seek its *legal* solution in those principles of action which are sanctioned by the usages, the national acts, and the general assent of the world, of which he considers himself a part. * * * A jurist could not say that a practice thus supported was illegal." — *Antelope*, 10 *Wheaton*, *p.* 66.

See, also Lord Mansfield, 1 T. R., 313: Judge Story, 1 Gall., 66: Judges Best and Bayley, 3 B. & A., 353: Lord Hardwick, Dwarris, 785: C. J. Shaw in the "Med. Case," 18 Pick. Rep., 193: Dwarris, 645: Blackstone, 4. 11: Madison, cited in Story's Comm., 3 422: Amos' Fortescue, 198–200: 8 Wheaton, 543: 4 Howard, 572: 2 Howard, 197: 8 Bingh., 515, 557: 1 Kent, 468.

I know that there are a few early cases, and a few rash assertions of Lord Coke, plausible perhaps in a Government like the English, where, as there exists no written Constitution, it might possibly be argued that the courts had a right to bring all laws to the test of those great principles of common sense and common justice, which form the only thing that can be called a foundation for British law. But *here* we have a specific, definite, limited, *written* Constitution. It contains ALL the principles which the people, the nation, have agreed shall form the foundation of our *national* law. The only test, therefore, to which our courts have any right to submit the action of the Legislature is, to ask, is it constitutional? If so, it is legally binding on them — no matter how unjust or how unreasonable it is. Such is the frame-work of Government under which we live.

But of even this assertion of Coke, Lord Chancellor Ellesmere, his contemporary, has remarked, that it is,

"A paradox which derogateth much from the wisdom and power of Parliament, that when the three estates, King, Lords, and Commons, have spent their labor in making a law, three Judges on the bench, shall destroy and prostrate their pains, advancing the reason of a particular court above the judgment of all the realm. Besides, more temperately did that reverend Chief Justice Herle, temp. Ed. III. deliver his opinion, cited by Coke, 8 R. 118.

when he said, some acts of Parliament are made against law and right, which THEY THAT MADE THEM, perceiving, would not put them into execution; for it is *magis congruum* (more fit) that acts of Parliament should be corrected by the same pen that drew them, than be dashed to pieces by the opinion of a few Judges." — *Quoted by Dwarris, p.* 643.

And further, still, Lord Coke qualifies the general language he had used when he elsewhere holds:

"That Judges are not to be encouraged to direct their conduct by the crooked cord of discretion, but by the golden metwand of the law; that is, not to construe statutes by equity, but to collect the sense of the Legislature by a sound interpretation of its language according to reason and grammatical correctness, and to be controlled by the *common law*." — *Dwarris on Statutes, pp.* 645, 703.

Dwarris, a learned and distinguished writer, in his late able work on "Statutes," sums up the matter thus:

"The general and received doctrine certainly is, that an act of Parliament, of which the terms are explicit and the meaning plain, cannot be questioned, or its authority controlled in any Court of Justice," and "where the meaning is plain, to regard consequences in the interpretation, would be assuming legislative authority."

For Judges to mould statutes according to their sense of right would suppose the Legislature,

"To have abdicated its functions and delegated its power and duties to the Judges." — *pp.* 646, 720, 755.

To detain the reader one moment longer with the example of another nation, let us add that the French law, generally considered much more loose on this point of judicial duty, is substantially the same with what we have been quoting. It allows the Bench to consult equity and use its individual discretion only on those points where *the law is silent.*

"*Si l'on manque de loi il faut consulter l'usage ou l'equité. L'equité est le retour a la loi naturelle, dans le silence, l'opposition ou l'obscurité des lois positives.*"

"*Le pouvoir judiciaire etabli pour appliquer les lois, a besoin d'etre dirigé dans cette application par certaines regles. Elles sont telles que la raison particuliere d'aucun homme ne puisse jamais prévaloir sur la loi, raison publique.*"

(Where there is no law, consult custom or equity. Equity is the return to natural law in case of the silence, self-contradiction, or obscurity of statutes. Judges appointed to apply the laws, must be guided by fixed rules. These

are such that the conscience of an individual can never be allowed to overrule the law, which is the national conscience.) *Quoted by Dwarris, p.* 787. 8.

Are we not, then, borne out in our assertion that neither any practical theory of Government, nor the recorded opinions of Statesmen or Jurists countenance the doctrine of this Essay, that Judges are the proper persons to remedy, by overruling, the bad laws of a State. On the contrary all combine to point us to the duty of submission, or to the ultimate and extreme right of Revolution, as the appropriate course in the circumstances; and allow the Judge no choice but to apply the laws, as they are handed him by the Supreme Power, or to vacate his seat.

Indeed the most famous definition of Civil Liberty makes it consist in the "being governed only by *known, pre-constituted, inflexible* rules." What becomes of this if the decisions of the Court are to vary as fast as the moral sense of the Bench rises higher and higher in its perception of right and wrong? On this plan justice becomes as much "matter of accident," as Madame de Stael told Alexander Liberty was, under a despotism. To Mr. Spooner's doctrine we may apply what was said on another occasion:

"If these principles prevail there are no longer any Pyrenees. Every bulwark and barrier of the Constitution is broken down; it becomes *tabula rasa, carte blanche,* for every one to scribble on what he pleases."

MR. SPOONER'S ARGUMENT.

Leaving the question whether Law, properly speaking, *can* establish Slavery, Mr. Spooner next attempts to show that it has never *actually* been established by law in this country. For this purpose he examines the written Constitutions of the several States and of the Union.

"In making this examination, [he says, p. 15,] I shall not insist upon the principle of the preceding chapter, that there can be no law contrary to natural right; but shall admit, for the sake of the argument, that there may be such laws I shall only claim that in the interpretation of all statutes and constitutions, the ordinary legal rules of interpretation be observed. The most important of these rules, and the one to which it will be necessary constantly to refer, is the one that all language must be construed '*strictly*' in favor of natural right. The rule is laid down by the Supreme Court in the United States in these words, to wit: 'Where rights are infringed,

where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with *irresistible clearness*, to induce a court of justice to suppose a design to effect such objects.'" — 2 *Cranch, p.* 390.

The following are the clauses in the United States Constitution universally supposed to refer to and recognize Slavery:

"Art. I. Sec. 2. Representatives and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, *three-fifths of all other persons.*

Art. I. Sec. 8. Congress shall have power * * * to suppress insurrections.

Art. I. Sec. 9. The migration or importation of such persons, as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

Art. IV. Sec. 2. 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.

Art. IV. Sec. 4. The United States shall guarantee to every State in this Union a republican form of government; and shall protect each of them against invasion; and, on application of the Legislature, or of the Executive, (when the Legislature cannot be convened,) *against domestic violence.*"

The first of these clauses, relating to representation, gives to ten inhabitants of Carolina equal weight in the Government with forty inhabitants of Massachusetts, provided they are rich enough to hold fifty slaves; — and accordingly confers on a slaveholding community additional political power for every slave held among them, thus tempting them to continue to uphold the system.

Its result has been, in the language of John Quincy Adams, "to make the preservation, propagation, and perpetuation of Slavery the vital and animating spirit of the National Government;" and again, to enable "a knot of slaveholders to give the law and prescribe the policy of the country." So that "since 1830, Slavery, slave-breeding, and slave-trading, have formed the whole foundation of the policy of the Federal Government." The second

and the last articles relating to insurrection and domestic violence, perfectly innocent in themselves — yet being made with the fact directly in view that Slavery exists among us, do deliberately pledge the whole national force against the unhappy slave if he imitate our fathers and resist oppression, thus making us partners in the guilt of sustaining Slavery. The third is an express toleration of the Slave-trade till 1808, leaving it *optional* with Congress whether to abolish or not afterwards. The last clause is a promise on the part of the whole North, to return fugitive slaves to their masters; a deed which God's law expressly condemns, and which every noble feeling of our nature repudiates with loathing and contempt.

Mr. Spooner's argument may be briefly stated thus:

1st. The people never intended to recognize or guarantee Slavery in the National Constitution.

2d. If such was their intention it was never effected; for that instrument, *legally interpreted*, contains no recognition or guaranty of the Institution.

3d. Such recognition, if it exists, is void, and wholly inoperative, since there is no *legal* Slavery in any of the States to which it can refer.

In our review we shall follow the *order* thus briefly sketched, rather than the one adopted by Mr. Spooner, as it will enable us to say all we wish in a smaller space.

INTENTIONS OF THE PEOPLE.

And first, the intentions of the people. It is very convenient for Mr. Spooner to make light of the meaning which the people attached to the Constitution in 1789, and since, as of no practical value; though he is ready to allow that the intentions of the *adopters* of the Constitution when legally shown from the Instrument itself, taken as a whole, are binding and conclusive. It is a point we can afford to spare, this of the meaning affixed to the Instrument by the people themselves. We are perfectly willing at any time to waive it and discuss the strict legal effect of the written Instrument, without aid from collateral history or national circumstances. But it is idle in an argument of this kind to keep out of sight a view which common sense, the nature of the case, and the

maxims of law, demand shall make a part of it. We shall, therefore, devote a brief space to the point.

It will be remembered that Mr. Spooner is now professing to argue a law question, as such, on strictly *legal* principles, referring to legal authorities and rules as tests of the correctness of his opinions. In interpreting the Constitution the Supreme Court have made use of the rules usually adopted. His object is to show, not that the Court ought to lay down any *new* rules, but that they should carry out those already established, and according to these, he thinks that Court is bound to declare Slavery illegal even within the several States.

Bearing this in mind let us see what these rules are, for, of course, the question is not to be decided by looking alone at that *one rule* of the Court, which Mr. Soooner has quoted, and made the corner-stone of his argument. To judge fairly it is necessary to look over the whole ground. Let us then open the records of the Supreme Court. We shall find that following the example of all other Courts, the dictates of good sense, and of all the authorities, it has uniformly allowed great weight to the contemporaneous interpretation of the Constitution, to the understanding of the nation when it has been universal: according to the oft-repeated maxim of Lord Coke, "*Contemporanea expositio est optima et fortissima in lege.*" (Cotemporaneous exposition is of great weight and authority in the law.) The reason of this rule is very evident. Where the words of a statute are plain and clear, and admit but of one meaning, there is, of course, no room for interpretation; they speak for themselves. Where they will equally well admit of two meanings, our object must be to ascertain which of these the makers *intended* they should bear. If that intention can be *legally* discovered, it is to prevail whether it be just or unjust. See 1 Kent, 468: Dwarris, 689: 6 A. & E. 7: 9 A. & E. 980. This we consider Mr. Spooner to allow. Now this intention is to be discovered by considering the language of the particular clause and of the context — the design of the law — the situation of the country at the time, its institutions and circumstances. If we can discover which of the two constructions was supposed to be the true one at the time, and which has been used and practised upon from the very making of the law, this will go far to show which the makers intended should be affixed to it. Contemporaneous

practice then is one of the most convincing commentaries on the language of statutes. No doubt as Marshall, quoted by Spooner, says, we are to discover the intentions of the lawmaker from the *words* he uses; but words, when doubtful and ambiguous, are to be interpreted by the context, by the object sought, and by contemporaneous usage. The reader may consult on this point Story's Comm. vol. 1, bk. 3, c. v. Blackstone, 1. 59, 60 — Rutherforth — Dwarris — C. J. Tindall, 5. Scott, 1037. Justice Coleridge, 6 A. & E. 7. Coke's Inst. 2. 11. Kent, 1. 462. 18 Pick. 193.

Penal statutes, also, are to be construed *strictly*, — yet Courts are not prevented by this rule, from inquiring in such cases into the intent of the Legislature. See 1 Paine, 32, &c.

No work is oftener quoted by the Supreme Court than the "Federalist," as showing the sense in which the Constitution was adopted; in the words of Chief Justice Marshall:

"Great weight has always been attached, and very rightly attached to contemporaneous construction. The opinion of the Federalist has always been considered as of great authority, &c., &c. A contemporaneous exposition certainly of not less authority than that just cited is the Judiciary Act." 6 Wheaton, 418-20. In Wheaton, 1. 304, the Court alludes at length to the 'weight of extemporaneous exposition by all parties, the acquiescence of State Courts,'" &c.

9 Wheaton, 1. Chief Justice Marshall says, speaking of one of the powers of Congress:

"If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not conclusive argument to prove that the construction is correct."

"Contemporary practice is to be consulted," says Rutherforth, a Scottish writer, always quoted with deference on this subject, "that which prevailed among the people when the law was made and immediately after it, — the one as showing why it was made, — the other how it was understood by those who had the best means of knowing its meaning."

"When there is any doubt," says Rutherforth, cited and approved by Story, "light may be obtained from contemporary facts or expositions, from known habits, manners and institutions." — *Story's Comm.* 1. 385.

"In the construction of statutes and local laws it is necessary to refer to the history and situation of the country to ascertain the reason as well as the meaning of their provisions, to enable the Court to apply the different rules for construing them." — 1 *Wheaton*, 115.

"In doubtful cases usage may be safely recurred to, to ascertain the meaning of the Legislature." — 2 *Overton*, 157.

As the old legal maxim tells us: "*Optimus legum interpres consuetudo*" (Usage is the best interpreter of laws.)

"If in any case doubt arise from the terms employed by the Legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute." — *C. J. Tindal*, 8 *Jur.* 795.

"The meaning of things spoken and written must be as hath been constantly used." — *Vaugh*, 169. *Bac. Abr. Stat.*

"Great regard ought, in construing a statute, to be paid to the construction which the sages of the law, who lived about the time or soon after it was made, put upon it, because they were best able to judge of the intention of the makers." — *Coke, cited by Dwarris*, 693.

"THE COURT WILL GATHER THE INTENTION OF THE LEGISLATURE FROM THE LANGUAGE USED IN THE ACT ITSELF, COMPARING IT, WHEN ANY AMBIGUITY EXISTS, WITH THE LAWS ON THE SAME SUBJECT, AND LOOKING, IF NECESSARY, TO THE PUBLIC HISTORY OF THE TIMES IN WHICH IT WAS PASSED." — *Supreme Court, U. S.*, 3 *Howard*, 24.

Again, we are told by the Federalist, 83, and the doctrine is confirmed by Judge Story, 1 Comm. 435, that:

"Precise legal maxims are inapplicable to a constitution of Government. In relation to such a subject the natural and obvious sense of its provisions, apart from technical rules, is the true criterion of its construction."

The same rule is laid down by C. J. Tilghman in 3 Sergeant & Rawle, 69:

"Conventions intended to regulate the conduct of nations are not to be construed as articles of agreement at common law. In these, strict rules of construction may be adhered to, and individual inconvenience is richly compensated by general good. But where multitudes are affected by the construction of an instrument, great regard should be paid to *spirit* and *intention*. In deciding this question, then, it will be important to consider the *situation* of the United States, at the time of framing their present Constitution, and the probable intent of the makers."

We all know very well that the Constitution is a peculiar instrument—neither wholly a statute nor wholly a contract, but partaking of the nature of both. The rules applicable then to *contracts*, as distinct from laws, have a place here: and the first of those named by Blackstone is "*Verba intentioni debent inservire.*" (Words must effect the intention of the parties.)

Next in importance comes Paley's rule. "Promises are to be performed in that sense in which the promiser apprehended at the time that the promisee received it." For which see Chitty on Contracts.

Judge Story, Comm. 2. 528, speaking of a protective tariff, points to this rule:

"If the Constitution was ratified under the belief, sedulously propagated on all sides, that such protection was afforded; would it not now be a fraud upon the whole people to give a different construction to its powers?"

The reasonableness of this is so self-evident, that it seems unnecessary to enlarge upon it.

We submit, of course, to the rule which Marshall lays down, and which Mr. Spooner makes the corner-stone of his book, that of two meanings, one honest and the other wicked, the Court will, if possible, adopt the former. But the point to which we draw attention is, that if the other parts of the law, its object, and its contemporaneous construction afford irresistible evidence that the Legislature intended to make a wicked law, the Courts acknowledge it to be their duty to yield. In other words, contemporaneous expositions and uninterrupted acquiescence are *one of the* means the Court has always used to arrive at that *irresistible* clearness and certainty on which Mr. Spooner depends so much. Judge Story, Comm. 2. 526, speaking of the disputed power of protection to manufacturers, says:

"The terms of the Constitution are sufficiently large to embrace the power; all nations have used it: the exercise of it was one of the very grounds on which the establishment of the Constitution was urged and vindicated. The argument, then, in its favor, would seem to be *absolutely irresistible* in this aspect."

In 1 Cranch, 299, the Supreme Court, in reply to objections, say:

"Practice and acquiescence for a period of years, commencing with the organization of the Judiciary, afford an *irresistible* answer and fix the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."

With such maxims universally acknowledged, it is evident that the understanding of the nation at the time, uniform practice since, and uninterrupted acquiescence by all parties, form one of the most obvious methods of determining with irresistible clearness the meaning of the Constitution, and one which all courts admit and respect. Indeed the constant and undisputed practice of the people may be considered a declaratory act passed by the law-making power itself, (the people,) determining what their own meaning and intention

was and is; and declaratory acts, says Coke, cannot be further explained or interpreted. 3 Reports, 31, a. Mr. Spooner, speaking of the Constitution, ridicules as "preposterous,"

"The pretence that the majority of the people of all the States either intended to establish, *or could have been induced to establish*, any other than a free one for the nation: or that they *believed* or understood that they were establishing any but a free one." — *p.* 126.

We confess this last statement made us pause. To argue that Slavery was not tolerated by the Constitution has been aptly considered by Edmund Quincy as "arguing the nose off of one's face," an illustration which the sentiment of Gouverneur Morris, taken for our motto, sanctions and might almost suggest. But it needs a much bolder man to maintain that the American people did not *believe* that Slavery was alluded to in the so-called pro-slavery clauses! We hardly know of a more daring flight of genius in the whole range of modern fiction than this. Archbishop Whately once framed an argument, in jest, to prove that Napoleon never existed. The attempt of Mr. Spooner here seems a counterpart to that, but then he is in earnest. Mr. Spooner tells us that:

"To suppose that the nation at large did not look upon the Constitution as destined to destroy Slavery, whenever its principles should be carried into full effect, is obviously to suppose an intellectual impossibility; for the instrument was plain, and the people had common sense; and those two facts cannot stand together consistently with the idea that there was any general, or even any considerable, misunderstanding of its meaning." — *p.* 126.

If, then, there could be no general *mis*understanding of the meaning, what was *the* understanding? If we can get that, we shall, according to Mr. Spooner, have the *right* understanding of the instrument.

Throughout his book Mr. Spooner expends a great deal of very excellent indignation upon those who refer to the Madison Papers, and the Convention which met at Philadelphia, in 1787, to ascertain the meaning of the people. He tells us very truly that those men were employed merely to draft the Constitution. Their office was that of clerks. Still, their opinions are of value. But he mistakes the point. The Conventions referred to are those which met in the several States, and, *in the name of the people, adopted* the Instrument. Theirs were the hands which ratified, and theirs the voices which, meanwhile, explained the *sense in which* they rat-

ified and adopted the paper. Their opinions, therefore, are fair and legitimate evidence of the sense in which the Constitution was accepted. Very good evidence exists of the views they took on all the main points; and when they were all agreed, as they were on the Slave clauses, it is idle to say of a *contract*, like the Constitution, that the views of those that made it are to be thrown entirely out of notice.

But we can throw all these debates and the Federalist also aside, and yet furnish Mr. Spooner with abundant, aye, and legal, evidence what was the meaning attached to the chief pro-slavery clause in the Constitution by the people themselves: we mean that relating to the three-fifth slave basis; and whether he thinks it an "*intellectual impossibility*," or not, he will find that the meaning thus affixed to it was the same it has borne ever since, and everywhere, except in his pages.

This clause the reader will hereafter see, Mr. Spooner maintains has no relation or reference to the slaves.

Now, in 1789, the Constitution was launched. In 1790, the census was taken. In 1792, elections were held throughout the Union, for members of Congress.

If there was no understanding that the slaves were to be counted in a distinct manner, why were they kept carefully separate in that census? Why, in 1792, were the State numbers settled on the basis of reckoning only three-fifths of the slaves? The North he represents as ready to spurn any allusion to Slavery, and the South surely would not willingly be shorn of her strength, unless it were so "nominated in the bond." If neither party wished it, how was such an interpretation foisted upon the text? Again, why did *each voter go to the polls* and elect his candidate on *that basis? Every one is presumed to know the law;* and hence, while history tells us that every intelligent man did actually know how the Representatives were apportioned, the law presumes and holds every voter bound to know the same fact also, whether he did or not. In so far, then, as this clause is concerned, we have brought home to Congress, and *to every voter in* 1792, — *only four years after the Constitution was adopted,* — full and unequivocal knowledge that they understood it, as we ourselves and the nation do now. Let, then, Mr. Spooner explain this intellectual impossibility, "for the Instrument was plain, and the people had common sense, and those

two facts cannot stand together consistently with the idea that there was any *general*, or even any *considerable*, *misunderstanding* of its meaning!"

If human ingenuity had been tasked to imagine a practicable method of proving, after the lapse of half a century, how any public document had been understood by the *nation at large*, it could not have devised one more complete and perfect than this.

The same may be said of the fugitive slave clause. We know that from 1791, downward, cases were frequently occurring under it, in various parts of the country; yet no one ever denied, till now, that the clause was meant to apply to such cases. Even the stout old Vermont Judge, who asked, in 1807, for a bill of sale from God Almighty, before he would consider the proof "sufficient," could not deny the meaning of the bond. Here, again, is one of those "intellectual impossibilities," of which Mr. Spooner's view is fruitful.

The reader will excuse us for detaining him by an attempt to show that the pro-slavery clauses, above quoted, were understood as pro-slavery by the people. It is as much waste of time as to heap up proof that the sun shines, or that water will run down hill.

We very readily agree that there was a prevailing opinion,— which time has shown to have been a mistaken one,— that the abolition of the Slave-trade would *ultimately* put an end to Slavery. There is no evidence of any general expectation that the Constitution would have any influence *otherwise* in producing such a result. Such being the general idea, how far, *in the mean time*, they thought it right to tolerate it, is quite another question. Pennsylvania, in her noble statute of 1780, proposed and achieved an *ultimate* emancipation; but she guaranteed to the master, meanwhile, the right of property in the slaves he then had. Gradualism was the creed of that day. No one dreamed of meddling with the master's hold over the slaves then living. If we place ourselves in their position, there is nothing that need surprise us in the thirteen States, (twelve of which still held slaves,) agreeing to base their representative system on Slavery, to aid each other against a slave insurrection, and to return fugitives. They expected,—perhaps they wished, still, that Slavery should cease, but thought these measures not wrong in the meantime, and no hindrance to its ceasing. Time has shown they were mistaken. But that mistake does not

free their children from the agreements made under it, foolish and wicked as time has shown them to be, and none the less so because the makers may have thought them harmless and right. Fire will consume, spite of foolish men's thinking that they may handle hot coals and not be burnt. The only way their sons can free themselves, is to disown their fathers' act, the Constitution itself. The only path to such release is *over* the Constitution, trampling it under foot; not *under* it, trying to evade its fair meaning.

The reader will observe that we have all along looked at the Constitution in the light of a statute, or simple contract, and applied the technal rules usual in such cases. This has been done because we are willing to meet Mr. Spooner on his own ground, and think that even there, his argument has no solid footing. But in strict truth, the Constitution ought not so to be viewed. Its character is peculiar. It is not so much a statute as a great national event, and is to be interpreted not by technical rules, but by liberal reference to the history of the times, the circumstances which produced it, the great parties and interests represented in it, and the national objects it has in view. It was meant for the hands of the statesman, not for the quibbling distinctions of the mere lawyer. As such it has always been approached. If here we omit this view, it is not because we do not sincerely entertain it, but solely in order to follow our author, and, taking his own principles for granted, to show him that the result is just as much in our favor as it would be on every other possible basis.

THE CONSTITUTION ITSELF.

RULES OF INTERPRETATION.

We pass to the next point of Mr. Spooner's argument, that the Constitution of the United States, legally interpreted, does not recognize or sanction Slavery. He considers himself to have proved:

"That the Constitution of the United States not only does not recognize or sanction Slavery, as a legal institution, but that, on the contrary, it presumes all men to be free; that it positively denies the right of property in man; and that it, *of itself*, makes it impossible for Slavery to have a legal existence in *any* of the United States."—*pp.* 56, 57.

What, then, are the legal rules by which the Constitution is to be interpreted? The following are those selected by Mr. Spooner, and upon these he bases his argument:

1st. The language of C. J. Marshall, in Ogden *vs.* Saunders; (12 Wheaton, 332;) where he said that, in construing the Constitution:

"The intention of the Instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are *generally used* by those for whom the Instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers."

2d. The rule laid down by the Supreme Court in 2 Cranch, 390. Here Mr. Spooner has, rightly enough, quoted but a single sentence. We prefer, however, to give the entire paragraph, that the reader may have before him the *whole* doctrine, as the Court laid it down. The sentence quoted and relied upon by Mr. Spooner is the second, which, for distinction, we have included in brackets:

"That the consequences are to be considered in expounding laws, where the intent is doubtful, is a principle not to be controverted; but it is also true that it is a principle which must be applied with caution, and which has a degree of influence dependent on the nature of the case to which it is applied. [Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws * is departed from, the legislative intention must be expressed with irresistible clearness, to induce a Court of justice to suppose a design to effect such objects.] But where only a political regulation is made, which is inconvenient, if the intention of the Legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, it would be going a great way to say, that a constrained interpretation must be put on them to avoid an inconvenience which ought to have been contemplated in the Legislature when the act was passed, and which, in their opinion, was probably overbalanced by the particular advantages it was calculated to produce."

This latter rule is explained by Mr. Spooner to amount to this: —(p. 62.)

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* Mr. Spooner has, inadvertently, printed this "the general system of the law." The language used by the Court is, "the general system of the *laws;*" which conveys a slightly different meaning. The first might refer to the general system of law, as a science; the last form, that used by the Court, clearly relates to the general spirit of *the laws of this nation*, which is quite a different thing.

"That where words are susceptible of two meanings, one consistent, and the other inconsistent, with justice and natural right, that meaning, and *only that* meaning, which is consistent with right, shall be attributed to them — unless other parts of the Instrument overrule that interpretation."

And that, in order to sanction anything contrary to natural right, the terms must be "plenary, express, distinct, unequivocal," (p. 59,) and must need no "extraneous or historical evidence to fix upon them their immoral meaning," (p. 62.)

We shall defer our criticism on this *explanation* to a future time, and granting Mr. Spooner, for the present, all he asks, proceed to consider the argument he has erected upon this basis. We will first, however, remind the reader of two other rules, which Mr. Spooner will not dispute, so universally recognized as not to need proof, but which will be found in the places named.

1st. "Every word in the Constitution is to be expounded in its *plain, obvious, and common sense*, unless the context furnishes some ground to control, qualify, or enlarge it. If a word has a technical and a common sense, the latter is to be preferred, unless some attendant circumstance points clearly to the former."

Story's Comm., 1. 436, 438. C. J. Marshall, 9 Wheaton, 188. 12 Wheaton, 332. 1 Brock, 423. Dwarris, 702. Kent's Comm., 1. 462. Chitty on Contracts, 81. Blackstone, 1. 60. Federalist, 83.

In 4 Wheaton, 202, Chief Justice Marshall, speaking of a "departure from the obvious meaning of words," says — and the remark may be considered as an EXPLANATION BY THE COURT ITSELF, of the rule as to *irresistible clearness*, above cited by Mr. Spooner: —

"If in any case the *plain meaning* of a provision, not contradicted by any other provision in the same Instrument, is to be disregarded, because we believe the framers of that Instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

2d. Every word must be made to have some meaning. — *Chitty on Contracts*, —*Blackstone*, 2. 380, — *Bacon's Abridgment, Statute*, — 1 *Cranch*, 174, — 12 Wheaton, 147.

THREE-FIFTHS REPRESENTATION — SLAVE BASIS.

In the light of these rules let us open the Constitution. The first clause we meet is as follows: (Art. 1, Sec. 2.)

"*Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of* FREE *persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand; but each State shall have at least one Representative: and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.*"

Upon this Mr. Spooner remarks:

"The argument claimed from this clause, in support of Slavery, rests entirely upon the word 'free,' and the words 'all other persons.' Or rather, it rests entirely upon the meaning of the word 'free,' for the application of the words 'all other persons' depends upon the meaning given to the word 'free.' The slave argument *assumes, gratuitously*, that the word 'free' is used as the correlative of Slavery, and thence it infers that the words, 'all other persons,' mean slaves."—*p.* 73.

He then proceeds to argue that the clause has no relation or reference to slaves; that to suppose it to have, subjects us to all sorts of "difficulties, inconsistencies, contradictions, and absurdities," but he assures us that these will all vanish if, with him, we hold that:

"The word 'free' describes the native and naturalized citizens of the United States, and the words 'all other persons' describe resident aliens, 'Indians not taxed,' and possibly some others."—*p.* 78.

Mr. Spooner nowhere denies that the "*plain, obvious and common*" use of the word "free" is to designate one not a slave: and he allows that if it be so interpreted here, the Constitution must be confessed to recognize Slavery. But he informs us that the word has also a technical legal meaning, designating a person in any

community, who is invested with peculiar privileges, &c., and so might describe a citizen as distinguished from an alien. This is true. He asks us to pass by the plain, obvious, and common meaning, and adopt this technical one, in accordance with his rule above quoted, that where words are capable of two meanings, the one consistent with justice, is to be preferred to that which is not so. Now, here the Court is in a dilemma. We bow to his rule; we are anxious to construe this clause so as to defeat injustice and sustain the right. But while, on the one side, *he* tells us that by adopting the obvious meaning of the word "free," we shall recognize Slavery, — Mr. Gerrit Smith and other tender consciences, intreat us to hold that this word "free" does exclude slaves, and that hence the clause allows only three-fifths of such to be represented; assuring us that this arrangement is "a bounty on liberty, and an attempt to promote the Anti-Slavery cause." — (Smith, to Whittier.)

Besides, we know that the clause, in our sense, was reluctantly submitted to by the South, as an unfair abridgement of their rights, and exulted in at the North, as a just rebuke of a bad system. This, therefore, cannot be a case "so monstrous" that, in the language of Marshall, "all mankind would, *without hesitation*, unite in rejecting the application." It rather resembles one of those "political inconveniences," referred to in the citation from Cranch, with whose *results* Courts have nothing to do.

Again, Mr. Spooner and his friends, object to our construction as working injustice, because the master now votes (practically) for three-fifths of his slaves. Suppose the Court adopts *his* interpretation. The master will then get *all* his slaves counted instead of three-fifths of them! The Court cannot see how that result will much aid the cause of justice. We cannot oblige Carolina to allow her slaves to vote, no, not even if they should be emancipated. If the Constitution considers the slaves property, then it recognizes Slavery. If, as Mr. Spooner asserts, it does not recognize Slavery, then it must, as he all along allows, consider the slave a person. The slaves being persons, they *must be included* either among "free persons," or among "three fifths of all *other* persons." The last is the old pro-slavery construction. If, on the other hand, Mr. Spooner, or any one else, shall so construe "free persons," as to include the slaves, the only result of this new interpretation will be to *in-*

crease the political weight of the slaveholders by just two-fifths of their slaves! The Court thinks it better, *in this view*, to adhere to the *obvious* meaning of the clause. It acknowledges that the clause is bad, as now interpreted, but the proposed change only makes it "TWO-FIFTHS" worse. The Court will cheerfully go out of its track and adopt a strained construction to subserve justice, but never will do so, when the only result of such "departure from the plain and obvious meaning" is, to strengthen the hand of the tyrant. Mr. Spooner's rule, therefore of preferring the righteous to the unrighteous meaning of ambiguous words, does not apply here. Unhappily no *choice* is left us, and we must adhere to the *obvious* meaning, which leaves the Constitution pro-slavery.*

But though Mr. Spooner does not deny that this use of the word "free" is the plain, obvious, and common one, he yet maintains that the word had, at the time of the adoption of the Constitution, obtained a fixed and well-known usage, in the law, in his sense. He says:

"Up to the time of our revolution, the *only* meaning which the words 'free' and 'freemen' had, in the English law, in the *charters granted to the colonies*, and in the important documents of a political character, when used to designate one person as distinguished from another, was to designate a person enjoying some franchise or privilege, as distinguished from aliens or persons not enjoying a similar franchise. They were never used to designate a free person as distinguished from a slave — for the very sufficient reason that all these *fundamental* laws presumed that there were no slaves." — *p.* 48.

"But throughout the English law, and among all the variety of ways, in which the word 'free' and 'freemen' are used, as *legal* terms, they are *never used as the correlatives or opposites of slaves or Slavery* — and for the reason that they have in England no such persons or institutions, known to their laws, as slaves or Slavery." — *p.* 46.

"The English law had for centuries used the word 'free' as describing persons possessing citizenship, or some other franchise or peculiar privilege — as distinguished from aliens, and persons not possessed of such franchise

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* The only possible reply to this argument is that the Supreme Court will first *free* the slaves, and then this bad result will not follow from the new interpretation. Of course if the slaves are freed, Mr. Spooner may construe the Constitution as he pleases. That Judges have no power to emancipate under the general principles of law, we think we have already proved; — that the Constitution gives them no such power, we shall show further on. Unless they have it, in one way or another, the above argument seems irresistible.

or privilege. This law, and this use of the word 'free,' as has already been shown, (Ch. 6.) had been adopted in this country from its first settlement. The colonial charters all (probably without an exception) recognized it. The colonial legislation generally, if not universally, recognized it. The State Constitutions, in existence at the time the Constitution of the United States was formed and adopted, used the word in this sense, *and no other.*" — *p.* 74.

The above italics are Mr. Spooner's.

We might allow this, and still remind Mr. Spooner that all jurists and statesmen have held the Constitution to be a popular instrument, — intended for the people at large, and hence that all words are to be taken in their obvious and general sense, unless something in the context requires a technical one: and such is this which he suggests.

But the statements above quoted are entirely unfounded in fact. "The words free and freeman never used in English law to designate a free person as distinguished from a slave!" Open Jacobs' Law Dictionary, a book of good authority, and choose the edition of 1772, which the makers of the Constitution might have used, and we read, "*Freeman, — liber homo, is one distinguished from a slave*, that is born or made free." This is the *first* clause of the definition. In his citation from Jacobs, Mr. Spooner has omitted it, and quoted only what follows; see his 45th page.

Unroll the parchment of Magna Charta; its most famous clause begins, "*Nullus liber homo,*" *(no free man,)* which Coke tells us (2 Inst. 45.) "extends to villeins saving against their lords, for they are *free* against all men, saving against their lord."

Villeins, Coke tells us, were *servi*, (slaves,) and he deduces their origin from Ham, as men do our present Slavery. This is the system of Slavery which the Common Law allowed and recognized, though Messrs. Spooner and Goodell will have it that the Common Law never allowed Slavery. The words "free and freeman" in the sense of not a slave, occur frequently, both in Littleton and Coke. We take a few instances:

"No tenure shall ever make a *freeman* villeine." — *Coke Litt. s.* 172.

"If a freeman take lands to hold by villein service, this maketh not the *freeman* a villeine." — *Ib. s.* 174.

"If a freeman hath divers issues *(children)* and afterwards confesseth himself to be a villeine in a court of record, yet those issues, which he hath before the confession are *free;* the issues after shall be villeines." — *Ib. s.* 176.

In the year 1514, Henry the VIII. manumitted two of his villeins in the following deed, the first words of which are wonderfully like those of our Declaration and our State Constitutions:

"Whereas God created all men *free*, but afterwards the laws and customs of nations subjected some under the yoke of servitude, we think it pious and meritorious with God to manumit," &c., &c. — *Barrington's Stat. 2d ed.* 249.

Again; Blackstone tells us (2. 104,) that the old definition, by Britton, of a *freehold* estate in land, as distinguished from other tenures, was, "the possession of the soil by a *freeman*." Now as aliens cannot hold land in England, this definition is nonsense, if we interpret the word "freeman" in Mr. Spooner's sense, one not an alien. But interpreted as the writer and Blackstone meant it to signify, one not a villein or slave, it rightly distinguishes this kind of estate from copyhold and base tenures.

We might adduce other instances; but here are enough to test Mr. Spooner's assertion that these words are *never* used in the English law as opposed to slave and Slavery.

Let us come to our own side of the ocean. "Every public document previous to the Revolution, and every State Constitution in America at the time of the adoption of the United States Constitution, used these words in his sense *and no other*," says Mr. Spooner. Let us see. The United States Constitution was adopted in 1787.

The Declaration of Independence, 1776, says, "A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a *free* people."

In March, 1776, South Carolina adopted her first Constitution, and declared that the "claims of Parliament would reduce them from the rank of *freemen* to the most abject *slavery;*" and that "Governors, &c., have proclaimed *freedom* to servants and slaves, and armed them against their masters."

In 1776, Virginia adopted her Constitution, declaring "that all men are by nature equally *free* and indepen ent."

Constitution of Pennsylvania, 1776: "All men are born equally *free* and independent."

Constitution of Massachusetts, 1780: "All men are born *free* and equal." These words are held to have abolished Slavery

in the Commonwealth, and, Dr. Belknap says, were inserted for that special purpose.

Constitution of New Hampshire, 1783: "All men are born equally *free* and independent;" words which, Dr. Belknap tells us, freed all slaves *born there after* that date. — *Mass. Hist. Coll.*, 4. 204.

The great Anti-Slavery Statute of Pennsylvania, in 1780, has this clause: "No man or woman, except the negroes and mulattoes registered as aforesaid, shall be held as slaves or servants for life, but as *free men* and *free women*."

In 1784, Connecticut enacted that no negro or mulatto child born in the State after 1st of March, 1784, should be held in servitude longer than till the age of twenty-five years, "but such child, at the age aforesaid, shall be *free*."

To fix the meaning of a word in the Constitution of thirteen United States, it is fair to consult the laws of all. As, in interpreting a treaty, it is usual to explain the meaning of the terms used, by reference to the laws of both the contracting nations. (See the Amistad Case.) But if we open the Statute Books of any of the States, we shall find the words "free and freemen" used almost every year in contradistinction from slaves; and, of course, more frequently, the further South we go in our search. Indeed, it is ludicrous to say of the legislation of thirteen States, *all of which had held slaves till within seven years, and twelve of which still held them, in* 1787, that they did not use the word "free" to distinguish those persons not slaves. They could not have framed their Statutes, without the use of such a word.

It matters not whether we consider these Slave Laws valid or void; they are, at least, in either case, good evidence of the common meaning, at that time, of the words used in them.

With these facts, we leave the reader to rate, at its true value, this assertion of Mr. Spooner's, as to the use of the word "free," in the public documents and Constitutions of these States, in his sense and NO OTHER.

But let us look again at the clause itself, and see, from the context, whether we can, without making nonsense of the whole, allow the word "free" to have any meaning but the one usually given it, *i. e.*, not enslaved. For it is a rule alike of law and common sense, that law-makers must be supposed to mean something, and

that any construction which makes words superfluous or insignificant, or the whole clause foolish, is not to be admitted. And Mr. Spooner himself allows, (p. 62,) as above quoted, that the wicked meaning must be adopted, if the "other parts of the instrument" (the context) require it.

1st. "By adding to the whole number of *free* persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."

So says the Constitution. If "free persons" is taken to mean persons at liberty — persons not bound to servitude, we see at once the propriety of the law-makers giving an express direction to include, among such, those "bound to service for a term of years" only, if they wished so to distinguish their case. Had this been omitted, some might have argued, that, strictly speaking, such were not *free persons*. Hence the necessity of this special direction. But on Mr. Spooner's interpretation of "free persons," meaning all native born citizens, where is the necessity of giving any such direction? Nobody ever dreamt that being bound apprentice destroyed a man's citizenship! They would naturally have been included among *his free persons*, without any special direction. The careful insertion of this parenthesis proves that Mr. Spooner's notion was not in the mind of the writer.

2d. Again; "excluding Indians not taxed." Chief Justice Marshall says (12 Wheaton, 438,) that:

"It is a rule of interpretation, to which all assent, that the *exception* of a particular thing from general words proves that, in the opinion of the law-giver, the thing excepted would be within the general clause, had the exception not been made," and that this is "applicable to the Constitution."

Apply this rule, and it proves our construction correct, and Mr. Spooner's unsound. With our view of the meaning of "free persons," Indians being *persons*, and also *free*, (not enslaved,) would naturally be included, unless, as here, there was special direction given to exclude them. But, on Mr. Spooner's hypothesis, why insert any caution when there was no danger of mistake? A few civilized Indians had joined the whites, and *been taxed*, and were sometimes considered to resemble *citizens*, though that is still a disputed point. But it had never entered the wildest imagination to consider the roving, *untaxed* tribes as native *citizens* of the

States, any more than now the dwellers on the Rocky Mountains would be considered citizens of the United States. This, again, shows his view to be incorrect. (See Judge Marshall, in the Cherokee Nation *v.* Georgia, 5 Peters 1, allowing that Indians are foreigners, aliens.)

3d. "Other persons" Mr. Spooner defines to be aliens and "Indians not taxed." These last cannot be included, because, 1st. The grammatical construction of the sentence forbids it. They are to be "other" than *free*, other than those "*bound to service*," and other than *Indians*. 2d. According to the well-known rule of law which bids us interpret doubtful clauses in any law by referring to the same words in other laws, of the same nation, on the same subject, (see Kent, 1. 463. Lord Mansfield, 1 Burr, 447. Blackstone, 1. 60. Dwarris, 699. Bacon's Ab. Statute,) we must construe this by the old Resolve from which it is copied, passed by the Continental Congress, 18th April, 1783, that "expenses should be paid by the several States in proportion to the whole number of white and other free inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all *other persons*, not comprehended in the foregoing description, *except Indians*, not paying taxes, in each State. (Story's Comm. 2. 112.) 3d. Why should States agree to pay direct taxes for even three-fifths of those from whom they were not themselves getting any tax or gain? The same reason, — that they were not taxed, — which excluded Indians from the list of "free persons," would exclude them, also, from the three-fifth portion of the basis. If this be so, then,

4th. Aliens are the only ones left to be included among "other persons," on Mr. Spooner's plan. Now *there never yet was a State which took any special account of aliens in fixing its basis of representation.* Again, the reason why three-fifths, only, of a certain class, was allowed to be reckoned, was evidently because it was supposed that class would be *unequally distributed* through the Union, and a portion of it, only, was reckoned to restore the balance. If of this class (whichever it was) all the States had had equal portions, it would manifestly be indifferent whether all of it was counted or none. Now the slaves answer to this description, and make the provision a sensible and intelligible one. But aliens do not. All the States were on or near the seaboard; they had

all enough land to spare, and held out different, but about equal, advantages to immigrants. All were anxious to get such, and regarded the arrival of foreigners, bringing with them, as they did, always labor, and often capital, as a real blessing, — witness the debates of that day, — so much of a gain that they would gladly have paid, and would have been considered, by their sister States, as bound and able to pay, full tax for them, instead of being let off with three-fifths. The provision becomes, therefore, on Mr. Spooner's hypothesis, absurd; and hence the interpretation is not to be admitted. Or, as the States expected about *equal* increase from this quarter, it would be inoperative and void — which again renders the construction legally inadmissible.

But the consideration that conclusively shows Mr. Spooner's hypothesis to be untenable is the construction put upon this clause by the Constitution itself. The latter part of the clause *fixes the first apportionment of representatives*. We can examine that scale and test the whole matter, seeing which interpretation comports with the numbers there set down.

Referring to that, the reader will find that New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania, then considered as free States, were allowed, *by the Constitution itself*, thirty-five Representatives. Delaware, Maryland, Virginia, North and South Carolina, and Georgia, the slave States, were allowed thirty Representatives. Now we have no exact census to refer to; there was none. The *data* probably used to estimate these numbers were the same with those by which the old Congress apportioned taxes under the Resolve above cited. (See Journal of Congress, Sept. 27, 1785, and elsewhere.) As the above numbers conform generally to the ratio there used, which was *confessedly* calculated on the basis of reckoning *three-fifths of the slaves*, it proves that the *same rule was followed here*, and so settle the question.

If Mr. Spooner dislikes this method of proof we can give him a different one. Let us refer to the nearest official census, that of 1790, taken only three years after. The above named free States had then 1,968,455 inhabitants. The slave States had 1,303,845 free inhabitants, and 657,527 slaves. If the reader will go over the calculation he will find that on the basis of reckoning three-fifths of the slaves, the number of Representatives (35 and 30) given to each

grand division is as exact as could *possibly* be. On Mr. Spooner's plan, being equal in absolute numbers (1,968,455, to 1,961,372) they should have been equal also in the number of their Representatives.

Again; take separate States, where to be sure there would be more chance of error than in a general survey. Still, making due allowance for such mistakes, unavoidable before any general census had ever been made, we find evidence of the same rule being observed. Select the old and best known States, about which there would be least probability of error. Take first two free States. Compare Pennsylvania — 434,000 inhabitants — with Massachusetts, — then including Maine, 475,000. About equal in population, they have, as we should anticipate, an equal number of Representatives, *eight*, assigned to each. Compare Virginia, — then including Kentucky, 821,000 — with North Carolina, — then including Tennessee, 429,000 — the first nearly double the last, and their Representatives preserving the same ratio, 10 to 5. Now compare a free and a slave State; Pennsylvania, (434,000,) with North Carolina, (429,000,) about equal in population, the first is allowed *eight*, and the last only *five* Representatives. How is this to be explained on the "alien" hypothesis? Again, compare Pennsylvania, (434,000,) with Virginia, (821,000); the last nearly double of the first, but not as was the case in comparing her with North Carolina, allowed double the number of Representatives; no, she has only *ten* to Pennsylvania's *eight*. How is this to be explained on the alien hypothesis?

If we allow Mr. Spooner to include three-fifths of the Indians among "other persons," their numbers are not sufficient to explain this difficulty. Their whole number in all the thirteen States was supposed to be only 30,000. (See Jefferson's Notes. Holmes's Annals. North American Review.)

And at the time this first apportionment was made there were, according to Mr. Spooner's own admission, (pp. 56, 100, &c.) absolutely *no aliens* at all to be counted in any way; as he says the Constitution made citizens of all persons then residing in the country. This makes these differences of numbers still more inexplicable on his plan.

But now glance along the census and observe how many of the swelling numbers of the Old Dominion are marked "*slaves*," and then reckon only three-fifths of those — and the whole riddle is solved. So too of North Carolina.

We have made the above calculations on the official census of 1790. But if we recur to the estimates which *might* have been, and probably were, in the hands of the Convention, the result is the same. For instance — Massachusetts, by her private census of 1784, contained 357,510 inhabitants. Virginia never had a census, but by Jefferson's calculation from accurate data, made in 1782, she had at that time 567,614 inhabitants, viz: — 296,852 free, and 270,762 slaves, (Notes, p. 126, &c.) Now according to these numbers, on Mr. Spooner's plan, if Massachusetts had eight Representatives, Virginia should have had thirteen. On our plan she should have had, *as she did*, just ten.

Mr. Spooner's hypothesis, then, if admitted, proves that the Constitution did not understand itself! He does not deny that the words are *capable* of bearing the common pro-slavery construction; they are then "*plenary*," as he demands, words should be to make a wicked law valid. Taking the above considerations into view, they are seen to be "*express, explicit, distinct and unequivocal*," and any Court must hold the meaning, wicked as it is, to be expressed with "irresistible clearness."

Thus granting Mr. Spooner all the principles of construction, he asks, and allowing also that the word "free" is susceptible of two meanings, we have still shown —

1st. That to adopt the most unusual meaning does not get rid of the injustice of the old interpretation, but only *increases* it, — consequently his rule of preferring a righteous to an unrighteous meaning does not apply here.

2d. That the context will not allow any meaning but the usual one to be given to this word without making nonsense of the whole clause. Even then if his rule does apply, we have brought the case within the *exception* stated by Mr. Spooner in the sentence above quoted from his 62d page; that the righteous meaning must be given up and the unrighteous one adopted, however reluctantly, when "the *other parts* of the Instrument require it."

In addition to the argument on the word "free," Mr. Spooner makes but three points.

1st. That there was no Slavery in the States to which our meaning can apply. This falls under our third division and will be fully considered then.

2d. He says: "It is very evident that the word 'free' is not used as the correlative of Slavery, because 'Indians not taxed' are 'excluded' from it application, yet they are not, therefore, slaves." — *p.* 74.

This is a strange mistake on his part. The inference here is precisely the other way. Indians are *specially* "excluded," *because* they are "free," and not slaves, and would *naturally* have been reckoned with free persons; hence the necessity, as it was not designed to include them, to insert a precise direction.

3d. The difficulty of ascertaining who are free and who slaves. He says the Government, on our plan, have no legal information, and are obliged to depend on varying State laws. Very true; this is often the case in other matters, and furnishes no objection to our interpretation. In this very section of the Constitution, the electors of Representatives in each State, are to be those who are "electors of the most numerous branch of the State Legislature." Congress, therefore, in ascertaining whether its own members are chosen, has to depend on the laws of the States, which may be, and are, different in different States, and may be changed every year. Beside, it is as easy to find legal evidence that a man is or is not a slave, as that he is or is not an Indian, an apprentice, or an alien. These three things are to be proved even on Mr. Spooner's plan, and he must go out of the Constitution to prove them, to family Bibles, to private indentures, to actual inspection. Proving slavery is just the same, and just as easy.

But even if any special "inconveniences" would result, they are not to be considered by a Court when the language is clear and the intention plain. See our quotation above, from 2 Cranch, 390 — 9 Cr. 203; Dwarris, &c., &c. — 10 Mod. 344; Mr. Justice Coleridge, 6 A. & E. 7.

So far we have taken for granted all the explanations which Mr. Spooner has given of these legal rules. Under another head we shall offer some criticisms on those explanations. And here we would remind the reader, that while Mr. Spooner does not sustain his hypothesis unless he shows *every* clause in the Constitution to be pure and Anti-Slavery, — our making out that any *single one* recognizes the institution, as fully destroys his argument, as if we proved a dozen to be in that predicament.

SPOONER'S RULES EXAMINED.

In our criticism of the Constitution we have proceeded thus far on the plan of allowing Mr. Spooner to explain the rules of law in his own way, and to extend them as far as he pleases. Let us now pause a moment, and see whether any legal decisions or principles sustain him to the full extent of the rules he lays down. These are, (p. 62,)

1st. "Where words are susceptible of two meanings, one consistent, and the other inconsistent, with justice and natural right, that meaning, and *only that* meaning, which is consistent with right shall be attributed to them — unless other parts of the instrument overrule that interpretation.

2d. "Another rule is, that no *extraneous or historical evidence* shall be admitted to fix upon a statute an unjust or immoral meaning, when the words themselves of the act are susceptible of an innocent one."

The only authority he adduces in support of these is the following sentence from 2 Cranch, 390:

"Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with *irresistible clearness*, to induce a Court of justice to suppose a design to effect such objects."

In the first place it must be remembered that this language is used by the Court in reference to common laws; — and it must, therefore, be applied with some caution to a case so different as that of a National Constitution. The United States Constitution is an act of the whole people, undertaking to settle what shall be "the fundamental principles" and "the general system of the laws" for this Nation. It stands alone, and is to be expounded according to its natural meaning; — other laws are to be tested by it; but, springing from the immediate act of the sovereign people, it is itself above all such tests.

Further, we see nothing here which supports the second rule laid down by Mr. Spooner. The Court hold that "the intention must be expressed with irresistible clearness," but say nothing of the *means* by which they will arrive at such irresistible certainty as to the intention of the legislator, whether they shall be exclusively *internal* or not. Elsewhere he cites the language of Marshall, — "The inten-

tion is to be collected from the words."—(12 Wheaton, 332.) But neither does this support Mr. Spooner's second rule, for it is evident from all the other decisions of the Chief Justice, that where words are ambiguous, and admit of a construction more or less extended, the extent of the power is to be fixed by considering the general objects of the Constitution, the practice under it, and the historical evidence of the meaning. In all his great decisions he *constantly* refers to the history and institutions of the country. He does so in the very case from which these words are cited. Also at length in 4 Wheaton, 122; 6 Wheaton, 264; 9 Wheaton, 1; 12 Wheaton, 419. In these cases the Chief Justice refers to the history of the times,—the state of the country,—the objects of the Constitution, as apparent from history,—the purpose for which the Judiciary was erected,—the experience of the Confederation, &c., &c. Our limits do not permit us to give the long extracts which illustrate these points. In 9 Wheaton, 1, he says:

"We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."

Speaking of an ordinary statute, he says, 12 Wheaton, 151:

"There is always difficulty in extending the operation of words beyond their plain import; but the *cardinal* rule of construction is, that, where any doubt exists, the intent of the legislature, if it can be plainly perceived, ought to be pursued."

Let the reader refer, on this point, to the authorities cited under the head, "Intentions of the people;" especially to that from 3 Howard, 24. In the whole course of the Supreme Court decisions, we know of no such rule as this second one of Mr. Spooner's. In the whole of Judge Story's chapter on rules of interpretation, (Comm. Bk. III. c. V.) where he has grouped together all the decisions of the Supreme Court on this point, there is no allusion to any such principle. On the contrary, Story lays it down that "a power granted in general terms, is to be *co-extensive* with the terms unless some clear restriction on it is deducible from the *context*." "Arguments from impolicy or inconvenience ought to have no weight; they are an unsafe guide; men differ, and times differ," &c., &c. And again; "The *causes* which led to the enactment of a law are often

the best exponents of its words." — Comm. 1. 384, 407, 410. That the same rule prevails in England is shown by our previous extracts. In 8 Bingh. 181, also, Chief Justice Tindal said:

"If the words of an instrument be ambiguous, the Court will call in aid the *acts done* under it, as a clue to the intention of the parties." — *See Dwarris*, 696. 1 *Kent*, 462.

So far is it from being a rule that extraneous evidence is not admissible to aid us in getting at the meaning of a statute, that Lord Coke in laying down the rules, to which all writers since have assented, expressly bids us to have recourse to it. He tells us, 3 Rep. 7, that in order to construe a statute truly, the Judges held four things necessary to be understood and considered: 1. What the Common Law was before the statute was made. 2. What the mischief was for which the Common Law had not provided. 3. What remedy the Parliament hath resolved and appointed to cure the mischief. 4. The true reason of the remedy. What is all this but a recurrence to the condition and public opinion of the country at the time a Law is made?

Indeed, as we have remarked before, reference to the institutions of the country and its history is one of the means the Courts use to determine, with *irresistible clearness*, the meaning of statutes.

Any other principle would lead to innumerable absurdities. We will adduce one or two.

The Constitution makes every "natural born citizen" eligible to the office of President. Now, women are citizens. Are they eligible? Here is a case precisely within Mr. Spooner's rules; the words are susceptible of a meaning consistent with natural justice; in which case he says, "that meaning, *and only that* meaning, is to be adopted."

Rutherforth (Natural Law, a work of high authority,) admits that antecedent to some *especial* "compact," women have the same "natural right" as men, to act, vote, &c., as members of civil society. — p. 288. We know, also, that taxation and representation, on American theory, ought to go together — and women are taxed; this forms another reason for allowing them a participation in the honors and authority of office. Plainly, then, according to Mr. Spooner's rules, women are eligible to the Presidency. But it is just as plain that this is not law, nor the meaning of the Constitu-

tion; and that the Supreme Court would be justified in referring to the history and customs of the country, and of the race and class of nations to which we belong, in so construing this clause.

Mr. Spooner has foreseen this absurd consequence of his rules, and unwilling to follow them to their natural result, has endeavored to guard against it, by pointing out that the Constitution, in speaking of the President, always uses the masculine gender. But this argument proves too much. It would shut women out of the protection of almost all Constitutional provisions. For instance, "no person shall be compelled to be a witness against HIMSELF, nor be deprived of life, liberty or property without due process of law;" "the accused shall enjoy the right to be confronted with the witnesses against HIM," "to have counsel for HIS defence." "A person charged with crime, shall be delivered up on demand of the State from which HE fled." Here and elsewhere the masculine gender only is used, but are women not included? It is a principle of law too well known for Mr. Spooner to have overlooked it, that in statutes the masculine gender includes both sexes. See Coke, 2 Inst. 45. Chitty's Contracts. Dwarris, 713.

If, instead of legal rules, we refer only to general and popular usage, the same is true. "HE that believeth and is baptized shall be saved, and HE that believeth not shall be damned," has always been *supposed* to apply as much to women as to men.

In a previous notice we pointed this out to Mr. Spooner — and in his second edition he tries to avoid this absurd result of his principles, by pretending that where an office filled by a single individual is spoken of, the masculine gender would not include women. But this ingenious evasion cannot avail him. In English statutes and maxims it is quite general to use only the masculine gender, — "the King," "*his* Majesty," — and yet such laws and maxims would be equally binding and valid under a Queen. Still this is an office filled by a single individual.

But further, the office of President is not the only part of the Constitution to which our argument will apply. It relates just as well to Senators and Representatives, — which are not cases of offices filled by *single individuals.*

In this case, therefore, if we construe the Constitution according to Mr. Spooner's rules, women are constitutionally eligible to the Presidency and to Congress; nothing but "extraneous and his-

torical evidence" shields us from this result. As Mr. Spooner does not allow of this when it will fix upon a clause any meaning contrary to "natural right," he is bound to hold that women may now *legally* fill these offices, or to give up his rules, and more especially, his second one.

So Congress has the power to "define and *punish* piracy."

Suppose the Anti-Capital Punishment party should increase, and insist that "to punish" may mean to imprison — does not necessarily refer to CAPITAL punishment — that this last is "inconsistent with natural right;" — hence, "as an innocent meaning, *and no other*, must, if possible, be affixed to the Constitution," the Supreme Court are bound to decide that the Constitution does not give Congress power to punish pirates with death. This would be legitimate on Mr. Spooner's rule, but would it not be absurd? Ought not that Court to inquire what were the ideas and laws of 1789 on the subject, and if, "on this extraneous and historical evidence," they found that capital punishment was not then deemed wrong, ought they not to consider this "as irresistible clearness of expression," and to hold the construction innocent and admissible? The same may be said of Slavery.

The Constitution says, "the writ of *Habeas Corpus* shall not be suspended." Recurring to common law, we find what this technical term means. But *which* writ of *Habeas Corpus* is referred to? There happen to be five or six of them. It is only "extraneous and historical evidence" that tells us how vital to liberty *one* of these writs is considered, and hence enables us to decide that this is the one meant.

Again; "where words are susceptible of two meanings, one consistent and the other inconsistent *with justice and natural right*," *&c.*

Mr. Spooner may say, "True historical evidence is admitted in common cases, *but not* where the question is between a righteous and an unrighteous meaning." We reply, the idea of such a distinction, as far as our Constitution is concerned,. is denied by Story, see 1. 410 and 1 Wheaton, 347. But suppose the case were so, then the question arises, who is to decide whether a construction is or is not consistent with natural right? By what test are Courts to determine what is right and what is wrong? Mr. Spooner leaves it to be supposed that wherever a thing is generally considered

wrong, there the Court will act on this principle. The use of an ambiguous word is here again the source of his mistake. It is true, as he says, that Courts will always give "an *innocent* meaning to words where they will bear it," but the test by which they try the guilt and innocence of a meaning is not general opinion or their own conscientious convictions; but by comparing it with *the general system and spirit of the law.* They will always "strain hard," as they phrase it, to give a *legally* innocent meaning to words,—nothing more. But in doing so, they never will go counter to the general system and spirit of national law. We will offer some authorities on this point, referring, also, to the argument of our first article, since a Judge might almost as well take counsel of his individual opinions and overrule laws, as on the same account evade them under pretence of construction.

And first, Marshall, in the very sentence cited, refers to cases where "fundamental principles are overthrown, where *the general system of the laws* is departed from," &c.—clearly showing that he referred to violations of legal principles, not of moral ones: indeed, to *such* legal principles as this nation has adopted by *its laws.*

This is the form in which the whole Bench of Massachusetts, with PARSONS at their head, lay down the principle:

"The natural import of the words of any Legislative act, according to the common use of them, when applied to the subject matter of the act, is to be considered as expressing the intention of the Legislature, unless the intention so resulting from the ordinary import of the words, be repugnant to sound and *acknowledged principles of national policy.*"—7 *Mass.* 524.

In the Girard case, whose exclusion of ministers from his college was objected to as void, because contrary to religion, the Court say:

"We do not claim the right, and we are not at liberty to look at general considerations of supposed public interest and policy, beyond those which the Constitution, laws, and judicial decisions make known."—2 *Howard*, 197.

Lord Coke has undertaken to define *discretion* several times; and his idea of what sort of discretion Courts may exercise in these matters is shown by his definitions. "*Discretio est discernere per legem quod sit justum.*" *(Discretion is the science of determining, according to law, what is just.)*—2 *Inst.* 298. Again: "Dis-

cretion is well described as *scire per legem quid sit justum.*" (To find out *by law* what is just.) — 10 *Rep.* 140.

So Sir J. Jekyl:

"Equity is said to be *secundum discretionem boni viri*, (according to the discretion of a good man.) Yet when it is asked, *Vir bonus, est quis?* (Who is a good man?) the answer is, *Qui consulta patrum, qui leges jura que servat*, (The one who adheres to the opinions of the fathers, to *laws* and to *precedents.*)"—2 *P. Wms.* 753.

We may illustrate the proper meaning of Mr. Spooner's rule by the construction put by the Courts upon one exactly parallel to it in relation to customs and usages. It is a well settled doctrine that "bad (wicked) customs are not law," that rules are to be disregarded if absurd or unjust. (See Blackstone and Coke.) But what is meant by "wicked customs"?

It was long the *custom and rule* in England that acts of Parliament, passed the *last* day of the session, had the same efficacy as if passed the *first* day of the session. Hence if, during the session, a man did an act, legal at the time, he was still liable so suffer any punishment, even death, *afterwards* prescribed by the statute. On this principle, acknowledged to be absurd and unjust, one man would have been executed, for an act which was not murder when he did it, unless the King had pardoned him. (1 Lev. 91.) Still this custom so far conformed to *legal principles*, that it remained in force three centuries, and no authority but that of the whole Parliament could repeal it. (See note to Blackstone, 1. 70.) Here we see that the Courts by *wicked* customs do not mean morally wicked, but such as violate the general system of the law.

"Customs," says Blackstone, "must be reasonable." "Which is not always," says Coke, "to be understood of every unlearned man's reason, but of *artificial* and *legal* reason, warranted by authority of law."—*Blackstone Comm.* 1. 70, 77. *See other instances*, 3. 430. *Story's Equity*, 1, *s.* 12.

"Slavery," says Lord Stowell, one of the first Judges of the age, "never was in Antigua the creature of law, but of that custom which operates with the force of law, and when it is cried out that *malus usus abolendus est*, (bad customs are to be abolished,) it is *first to be proved* that, even in the consideration of England, the use (custom) of Slavery is considered as a *malus usus* (bad custom) in the colonies."—2 *Hagg. Adm.* 94.

In the face of this rule, that "bad customs are not binding and not law," the system of villeinage *(white* Slavery, under which

men and women were bought and sold like cattle — see Stephens, Blackstone, Coke,) grew up from custom alone, was held legal for centuries, and died out only by disuse — without the enactment of a law in regard to it from the beginning to the end of its existence; clearly showing that the Courts, in construing the word *bad*, in this connection, will have respect to the usages and laws of the land in which they are sitting.

Dwarris, also, in discussing the question, whether laws against *reason* are void, says:

"We must distinguish between right and power, between moral fitness and political authority. It must not be entertained as a question of *ethics*, but of the bounds and limits of *legislative power*."—*p.* 646.

And Coke, even, when he went so far as to think that bad law might be disregarded, tells the Judges that "they are not to be guided by the crooked cord of discretion, but by the golden met-wand of the *law*."

It is a general principle, that no Court will give effect to the law of another nation, if that law be inconsistent with sound morals. — *See Story's Conflict of Laws.*

But who shall decide what "sound morals" are?

The Court of King's Bench, in London, perhaps the first Court in the world, awarded to a Spaniard damages against an Englishman who had taken possession on the high seas, wrongfully, of certain slaves belonging to the Spaniard, on the ground that Slavery, though *contrary to justice*, was not forbidden by the law of nations or the law of Spain.

Contracts founded on immoral considerations are void. But Chief Justice Shaw stated, in the Med. case, that a contract for the sale of a slave, made in New Orleans, where Slavery is lawful, would be enforced in Massachusetts. The same doctrine was laid down by Mansfield, in the Sommersett case. Judge Story, even, while expressing a doubt as to the soundness of this opinion of Judge Shaw, recognizes the very principle we are illustrating, namely, that Courts will regulate their judicial ideas of right and wrong by the laws of the nation in which they are sitting. Story says of Shaw's statement, (Conflict of Laws, p. 259, note,) "It may be so *here*, but this doctrine, as one of universal application, may admit of question in other countries, where Slavery may be denounced as inhuman and unjust, and against public policy."

These instances show that Courts will look to the general spirit of the national laws, to discover whether a rule or provision be immoral or inconsistent with right, and will find out "by the law," as Coke says, "what is justice."

The word "merchandize" is certainly capable of an innocent meaning. Still in the AMISTAD CASE, the Supreme Court put an unrighteous meaning on it, because the *laws* of Spain, one of the parties to the treaty, did so. In that case the Court say:

"If these negroes were lawfully held as slaves under the laws of Spain and recognized by those laws as property, capable of being lawfully bought and sold, we see no reason why they may not justly be deemed, within the intent of the treaty, to be included under the denomination of *merchandize*, for, on that point, the laws of Spain would seem to furnish the proper rule of interpretation."

The language of Lord Stowell in regard to the Slave-Trade proceeds on the same principle:

"I must remember that in discussing this question, I must consider it not according to any *private moral apprehensions* of my own, (if I entertain them ever so sincerely,) but as *the law* considers it. * * * An act must be *legally criminal*, because neither this Court or any other can carry its private apprehensions, independent of law, into its public judgments, on the quality of actions. It must conform to the judgment of the law upon that subject, and acting as a Court, in the administration of law, it cannot attribute criminality to an act where the *law imputes none*. It must look to the *legal* standard of morality; and upon a question of this nature that standard must be found in the law of nations, as fixed and evidenced by general, ancient, and admitted practice, by treaties, and by the general tenor of the laws and ordinances and the formal transactions of civilized States." — 2 *Dodson Adm.* 210.

Marshall quotes and endorses this in 10 Wheaton 66, cited in our first article.

Sir Wm. Grant, in the case of the Amedie, 1 Acton, 240, says:

"Whatever opinion, as private individuals, we might before have entertained upon the nature of this trade, no Court of Justice could with propriety have assumed such a position (that it was contrary to the principles of justice and humanity) as the basis of its decisions, *while the trade was permitted by our laws.*"

The language of our Supreme Court, whenever the justice of Indian land titles has come before them, will show the same principle.

In 8 Wheaton, 543. Chief Justice Marshall:

"We will not enter into the controversy whether agriculturists, merchants, and manufacturers have a right, *on abstract principles*, to expel hunters. Conquest gives a title, which the courts of the conqueror cannot deny, whatever the *private and speculative opinions of individuals* may be respecting the *original justice* of the claim. However extravagant the pretension of converting the discovery of a country into conquest may appear, if the principle has been asserted in the first instance and afterwards sustained; if a country has been acquired and held under it; if *the property of the great mass of the community originates in it;* it becomes the law of the land and cannot be questioned. * * * However the restriction may be *opposed to natural right*, if it is indispensable, it may, perhaps, be supported by reason and *certainly* cannot be *rejected* by Courts of justice."

In 4 Howard, 572, the Supreme Court say of the same point, Indian titles:

"It would be useless, at this day, to inquire whether the principle thus adopted *is just or not.*

"If it were an open question, it would be one for the law-making department of the Government, and not for the judicial. It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute."

If, therefore, Mr. Spooner shall urge the Supreme Court to reject the plain meaning of any clause of the Constitution because that meaning sanctions an unjust system, that Court will naturally ask him whether the *general system of American law*, at the time the Constitution was made, looked upon that system as unjust and illegal? We say, at the *time* the Constitution was made — for contracts are to be held void or valid according as they are illegal *at the time* they are made. — See Comyns Con. 1. 31: see Spooner, p. 124. *On this principle* will not the Courts consistently decide that a pro-slavery meaning of the National Constitution cannot be held immoral or inadmissible, since twelve of the thirteen States, which made it, held slaves at that time, and one-half of the nation still continues so to do? Or take the principle as Judge Marshall himself has laid it down, 4 Wheaton, 202.

"If in any case, the plain meaning of a provision is to be disregarded, because we believe the framers of the instrument *could* not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be *so monstrous* that *all mankind* would, *without hesitation*, unite in rejecting it."

This is the *explanation which the Supreme Court give of their own language and meaning.* And could they, sitting at the capital of slaveholding States, under a Constitution *practically* pro-slavery ever since its existence, — making a part of that Christendom, more than half of which now hold slaves, and the international law of which they have so often decided does not hold the Slave-Trade to be a crime, could they, with either truth or decency, affirm that the existence of a pro-slavery clause in that Constitution would be so "monstrous an absurdity and injustice that all mankind would, without hesitation, unite in condemning it!" This they must do before Mr. Spooner's maxim will apply to the subject of *Slavery.*

We conclude, then, 1st. That in deciding whether a possible meaning of any clause be immoral or not, Courts will have regard to the general system of National Law under which they sit.

2d. That Slavery neither can be, nor has been, by the law of nations, or our own laws, held criminal, however the *law of nature* may view it.

SLAVE TRADE.

Having settled, then, the real meaning of these rules, let us pass to the other clauses of the Constitution, alluded to by Mr. Spooner. We shall dispose of them as briefly as possible:

"*The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.*" — U. S. Cons. Art. 1, Sec. 9.

On this clause Mr. Spooner remarks that "importation" is sometimes used in reference to the voluntary arrival of foreigners, and has no necessary reference to slaves. Granted: still its *ordinary* and *common* use is to describe the bringing into a country, of articles of merchandize and for sale. Mr. Spooner says, p. 83, that *migration* means *going out* from a country, and hence argues that importation is used as its opposite, and refers simply to persons *coming in.* This construction is unsound; because the dictionary tells us that migration means merely "change of place." Emigration is used when we speak of going out of a country. Beside, it

is "the migration or importation of such as the State will ADMIT." We admit people *in*, never *out* of a country. Both words, therefore, refer to persons arriving; and they either relate, as Marshall says, (9 Wheaton, 216,) "migration to voluntary arrivals, and importation to involuntary," — which would settle it that nothing else but the Slave-Trade could be referred to, — or migration means motion on land, and importation arrivals by sea. In the Declaration of Independence, which would be good authority in this case, the word "migration" is used to mean all *voluntary arrivals* by sea or land.

Mr. Spooner claims that this clause must refer to the arrival of foreigners only, and have no reference to slaves, because that is the only *innocent* meaning which can be given to it.

We reply, 1st. If it refers to the arrival of foreigners merely, what is the reason of the provision? Why was Congress allowed to tax them *until* 1808, and *no longer?* And after that date allowed to *prohibit their arrival altogether?* Such an arrangement seems entirely unintelligible; and it is indispensable to *make sense* of an instrument. Any construction which makes nonsense is to be rejected. See Dwarris, Blackstone, Marshall.

Again; does Mr. Spooner really maintain that this clause, so harmless in appearance, gives to Congress the monstrous power of prohibiting forever any foreigner from landing on our soil? and, (on his meaning of "migration,") of prohibiting every citizen from ever leaving it!!! Such a power some might think more inconsistent "with natural right," than the one he is striving to avoid. It can be only vindicated on the score of being *absolutely necessary;* and if absolutely necessary now, how were we safe in forbidding it to Congress for twenty years, till 1808 had arrived? If necessary now, why not then?

These considerations are sufficient to show that the meaning Mr. Spooner placed upon this clause cannot be the true one. If, on the contrary, we take it as it has usually been taken, to refer to the Slave-Trade, it becomes consistent and intelligible, and does not confer upon Congress such a fearful power as that of, at any time, forbidding natives to leave, and foreigners to land in, the country. Beside, this meaning is *legally* innocent, as we have above explained the meaning of the word, that is, taken in connection with our national laws and institutions. For instance, not only the State

slave laws, (which we shall by and by prove Constitutional and valid,) but our slave basis of representation, and our Ordinance of 1787, expressly guaranteeing the surrender of fugitive *slaves*, &c., &c., as well the Constitutional provision on that point, to which we now pass.

FUGITIVE SLAVES.

"*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.*" — U. S. Cons., Art. 4, Sec. 2.

Mr. Spooner's argument on this clause is the following: — (p. 68, &c.)

1st. "'The clause must be construed, if possible, as sanctioning nothing contrary to natural right.' It may refer to apprentices, &c.; hence, not being 'expressed with irresistible clearness,' it is not necessary to apply it to slaves, and being not necessary, it is not allowable to do so.

2d. "'Held to service or labor' is no legal description of Slavery. Slavery has no necessary reference to 'service or labor;' it is property in man."

3d. "'Under the laws thereof.' There were no Constitutional or valid laws in the States, relating to Slavery, at the time the Constitution was adopted."

This is his argument; let us look at it. In the first place, we deny that his rules have any place here, since the legislative intention, of referring to slaves, is "expressed with that irresistible clearness," which the Court require. For it is a fundamental rule of interpretation, that all statutes relating to one subject are to be taken together, and any phrase in one is to be explained by referring to the use of the same phrase in the others.

Lord Mansfield says: (1 Burr, 447.)

"Where there are different statutes *in pari materia*, (on the same subject,) though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, *as one system*, and as explanatory of each other."

This rule has been recognized and acted on by every Court in this country and England. See the Digests.

Now in 1787, the same year that the Constitution was drafted, Congress passed the Northwestern Ordinance, which says:

"There shall be neither Slavery nor involuntary servitude in said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: Provided always, that any person escaping into the same, from WHOM LABOR OR SERVICE IS LAWFULLY CLAIMED in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person CLAIMING HIS OR HER LABOR OR SERVICE, as aforesaid."

This refers to Slavery, *for it says so.* It refers to *American* Slavery, for it was that which it proposed to exclude from this Northwest Territory. But when it provides for the surrender of fugitive slaves, it describes them as "PERSONS from whom LABOR OR SERVICE IS LAWFULLY CLAIMED."

Now in that same year, 1787, the Constitution was drafted. We might expect a similar provision, and we find that, in providing for the surrender of certain persons, it describes them as "persons held to *service or labor*, under the *laws*, to be delivered up on *claim*," &c.

The descriptions are exactly alike, and must refer to the same case. Any Court would hold, and be justified in holding, under Mansfield's rule, that the meaning — to wit, the surrender of fugitive slaves — was "expressed with irresistible clearness."

We might stop here, as having made out our case; but we are willing to meet Mr. Spooner on his own ground.

The Supreme Court, and the nation at large, interpret this clause to refer to slaves, and to mean that no State shall shelter them, but shall allow them to be taken, from its limits, back to Slavery.

Mr. Spooner thinks this meaning inadmissible, because "contrary to natural right;" we allow that the provision is infamous. But is the world agreed on this point? The Court must certainly refer to some standard. Is the world then agreed on this point? The English and French Courts, and our own, have held that, *in the absence of express legislation*, a slave ought not to be returned to his prison-house. But the writers on Jurisprudence maintain that a law to return him, if made, is "no encroachment on the rights of the fugitive, for no stranger has any just claim to the protection of a foreign State against its will, and each State

has a right to determine who may come to reside, or seek shelter within its limits." Such was the opinion of Shaw, even in his noble judgment in the Med. case, and of Best, the distinguished English Judge, in an equally famous case in the annals of Liberty, 2 B. & C. 468. Mr. Spooner himself has just told us that the *innocent* meaning of the Slave-Trade clause of the Constitution is not that which expressly gives Congress power, after a time, to destroy that trade, but a construction which secures to Congress the power, after 1808, of *prohibiting any* foreigner from landing on our soil! What is this but an endorsement, by Mr. Spooner, of the views of Judges Shaw and Best, and the writers generally, that every State may *justly* determine for herself who shall seek shelter within her limits? It is not then so very evident, that the verdict of the world in general would consider a clause, refusing slaves a shelter, as contrary to natural right. To what standard, then, shall the Courts have recourse? To that of our national system of law? That has generally been considered to sanction Slavery, and before we close we shall see if it does not actually do so. Its Ordinance of 1787 expressly orders the surrender of slaves. If it does, of course, judged by that test, the Court could not pronounce such a construction "bad," in a legal sense.

In reply to Mr. Spooner's first point, then, we say, let him show by the *general assent* of the world, that the refusal of a sovereign State to shelter slaves is contrary to natural right. The Abolitionists think so. I wish they were a majority — unfortunately they are not, and the verdict of the world is against them.

Certainly the case is not one where, in the language of Chief Justice Marshall, "the *absurdity and injustice is so monstrous* that all the world would, *without hesitation*, unite in rejecting it;" and such it must be, before the Court will feel justified in disregarding the plain meaning of a clause.

Again; to justify him in calling upon our Courts to esteem such a construction bad, he must show it to be "bad," *i. e.*, contrary to the general system of our law. They cannot "attribute criminality where the law imputes none." Now the Ordinance of 1787, *still in force*, establishes just this arrangement for the Northwest Territory. The Courts of such a nation would no more feel entitled, in such circumstances, to call it *bad*, than a Court in a slave State would refuse to enforce a slave contract, under the plea that it was immoral.

The reader will observe that the question is not now what he or we think wrong, but what is so generally regarded as wrong and monstrous by all mankind, or by the law, that the Courts may ground their decisions on such opinion.

Mr. Spooner's second point is that:

"'Held to service or labor' is no legal description of Slavery. Slavery has no necessary reference to 'service or labor;' it is property in man."

This is originally T. D. Weld's argument. Anything from him deserves the most respectful attention.

"*The terms of the Constitution*," says *Marshall*, "*must be understood in that sense in which they were universally received in this country when the Constitution was framed.*"—4 Cranch, 477.

To this well settled and reasonable principle Mr. Spooner assents, (p. 124:)

"The only question is, what was the meaning of the Constitution, as a legal instrument, when it was *first drawn up* and presented *to the people* and before it was adopted by them?"

This, too, is the rule by which we interpret Shakspeare, or any writer — turning to the dictionaries *of his period*, to find the meaning of the terms he uses.

Now, how was Slavery defined in 1788, and previous to, and about that period? We have seen how the nation itself described a slave in the Ordinance of 1787:

"A PERSON FROM WHOM LABOR OR SERVICE IS LAWFULLY CLAIMED."

"No negro child shall be *held in servitude*, &c., notwithstanding the parent of such child was *held in servitude* at the time of its birth," &c.—*Connecticut Emancipation Act*, 1784.

"Slavery is an *obligation to labor* for the benefit of the master, without the contract or consent of the *servant*."—*Paley, Definition of Slavery*, 1785.

Obligation comes from the Latin word to *bind* or *hold*.

Hargrave, in his defence of Sommersett, before Lord Mansfield, 1772, gives us a definition of Slavery, which begins thus:

"Slavery imports an *obligation* of perpetual *service*."

Grotius's definition is this:

"Slavery is an *obligation* to *serve* another for life, in consideration of being supplied with the bare necessaries of life."

Rutherforth, about 1770, defines it:

"An *obligation* to be directed in all one's actions."

Johnson's Dictionary, 1755:

"Slave, one mancipated (*bound*) to a master."

Bailey's Dictionary, the best of his day, edition of 1782:

"Slave, a perpetual *servant;* a person in the absolute power of a master."

Ash's Dictionary, 1775:

"Slave, one sold to a master, *one sold to labor.*"

The Constitution of Vermont, *about* the same period, 1793, provides that:

"No male person ought to be *holden by law to serve* any person as a servant, *slave*, or apprentice.*

Mr. Spooner thinks, (p. 73,) that "*bound* to service" and "*held* to service" are the same thing. Now, *bondman (bound*man) is the old and usual English word for slave, and *bondage* for Slavery. It is so used in the Bible. We get *slave* from the Russian and kindred languages—*villein* from the French, and *servant* from the Latin, *servus*, a slave. Bondage and bondman are Saxon. "Held and holden" are still the popular description of slavery. For we say slave*holder*, seldom slave*owner*.

Again, as to "*service*" having no relation to Slavery; *service*, *servant*, and *servitude*, are all derived from the Latin word for *slave*, SERVUS; and they have been always used to designate Slavery. Joseph, who was bought by Ishmaelites and paid for, was called, in King James's translation, 1611, *a servant;* so of others.

So much for Mr. Spooner's idea that, in 1788, "service and labor" did not enter into the idea of Slavery.

Such, then, were the common, popular, philosophical, and legal descriptions of Slavery in 1788. I know that the law sometimes uses the technical terms "chattel personal," to describe a slave. But the makers of the Constitution were not *obliged* to use *techni-*

* Stephens,—the relative and coadjutor of Wilberforce,—in his learned work on the "Law of Slavery in the West Indies," gives, as late as 1820, a definition of slavery similar to these—"Slavery is constrained *servitude* during the life of the slave,—it is *service* without wages."

cal terms. In framing a popular instrument for the use of the whole people, they naturally would avoid technical terms; this they have always done where they could, and used instead the terms common in the dictionaries and writers of the day. The above quotations show that, in 1788, "service and labor" were thought to make a part of Slavery, and that slaves were *usually*, if not *always*, described as *persons held, bound, and sold to service or labor.* Beside, the provision was meant to cover many States and only the most universal definition would suffice. It would not do to describe them as "chattels personal;" that might include South Carolina; but Kentucky, and now Louisiana, consider them *real estate;* in in such case, the term would not be broad enough. Again, had they been called, generally, *property*, such a term would hardly have included the thousands in Rhode Island, Connecticut, and Pennsylvania, then held in a modified Slavery created by recent laws.

Judged, then, by the usage of 1788, the term "held to service or labor" does aptly describe the condition of a slave, and was the phraseology usually employed for that purpose. This is our answer to Mr. Spooner on this point.

Lastly, "under the laws thereof." Mr. Spooner says this implies Constitutional laws. He is right. We shall discuss this under our last division.

DOMESTIC INSURRECTIONS.

With regard to the clauses giving the General Government "power to suppress insurrections," and guaranteeing the States "against domestic violence," the only objections Mr. Spooner makes to their applying to slave insurrections is,

1st. That the word "insurrection," refers to rising against the *laws*, and as, in his opinion, there are no valid slave laws, there can be no slave insurrections. The discussion of this point comes under our third head. We may remark that the phrase, "domestic insurrections," is used in the Declaration of Independence, with reference, it would seem, to slave risings; if so, this use of it would go far to settle its meaning here.

2d. Mr. Spooner says the Government of the States must be *republican*, and no Republic can hold slaves; hence the above

clauses cannot apply to slaves. This point, also, (the meaning of the word "Republic,") we shall consider in a moment.

If we shall remove these two difficulties, as we trust, in the proper place, to do, to the reader's satisfaction, we shall then have the right to rank these clauses with their pro-slavery brethren.

CITIZENSHIP, &c.

Mr. Spooner now passes to the consideration of those clauses which he considers as positively authorizing the Supreme Court to declare Slavery illegal, and the slave free. There is no dispute between us that Slavery is illegal in the District of Columbia, and in the Territories. Mr. Spooner maintains further, that Slavery is illegal in the several States, and that the Supreme Court has authority to set the slaves there free. We shall dispose of his points as briefly as possible.

1st. He says the Constitution made *citizens* of "all the people of the United States," living in 1789. No citizen can be a slave: hence, the negroes, being citizens, are free.

We reply: The Constitution did not make *citizens* of ALL the people, &c. The Indians, for instance, were people, residing and born within the limits of the United States. That the Constitution did not make them citizens is very evident from the fact that they are several times referred to in it, as an independent body, under the name of "the Indian tribes." (See, also, 5 Peters, 1.) This shows that we are to consult the other parts of the Constitution to discover in what sense to interpret the word *people*. This is not unusual. The word "commons," in England, is sometimes used to designate the House of Commons, sometimes all persons not noble, and sometimes those only who vote. The question, who were made citizens in 1789, is one of legal construction. It has been universally decided that no one was then made a citizen of the United States, who was not previously a citizen of one of the several States. (See 7 Wh. 545, and 4 Johns. 75.) That it was not intended to include the slaves under the phrase, "people of the United States," or to make citizens of them, is evident from the various slave clauses which we have been considering. General terms are always to be restrained by any *special* clause in an instrument. — *Bacon's Abr. Statute. Dwarris*, 765.

Hence the general terms of the Preamble are to be restrained by the special pro-slavery clauses. Indeed, according to legal rules, on which Mr. Spooner professes to rely, the Preamble is *no part of a statute*, and is not to be taken into account except when it will help to explain an ambiguity. — *Bacon's Abr. Statute. Kent*, 1. 460. *Dwarris.*

We cannot leave this point without adducing a specimen of the loose logic of this much-praised essay. Mr. Spooner argues (pp. 101, 131,) that because the Constitution speaks of "natural born citizens," therefore, *all* natives are citizens. Whether the fact be so or not, this phrase proves nothing either way. The argument is sheer nonsense. On such a principle, when one speaks of "English noblemen," he implies that all Englishmen are noble; or of "Yankee pedlers," that every Yankee is a pedler; or of "natural born fools," that all persons born in the course of nature are fools! This is very bad logic. Some fools may be born such, but this does not prove that all persons born in the course of nature are fools. So of "natural born citizens;" some citizens may be native and some not, but this does not show that all natives are *necessarily* citizens. If the fact be so, it must be proved in some other way.

2d. "Congress have the power to lay a capitation or poll-tax. Upon whom shall it be levied? Is the Government under the necessity of taking notice of the fact of Slavery?" &c. &c. (p. 94.) To these questions Mr. Spooner answers "No," and hence concludes that a man, subject to such a poll-tax, cannot be a slave. We forbear to say that the premise and conclusion have no connection with each other — that answering the question either way proves nothing. It is enough to ask the reader to remember that "all direct taxes," (and such are poll-taxes,) are to be levied on "free persons, and *three-fifths* of all other persons." The meaning of that clause we think we have settled; and hence the Constitution itself determines what is to be done with poll-taxes when levied on slaves. It recognizes, in such case, the condition of Slavery, and provides for it.

We group together the seven next points made by Mr. Spooner. Referring to the exclusive power of Congress over *Commerce, the Post Office, Patents*, and the *Militia;* also to the States being forbidden to interfere with the *obligation of contracts;* he says,

slaves have, equally with other persons, unless Congress forbid it, the right to trade, to take out patents, to receive letters, to enlist, to make contracts, &c. &c. Hence as the State laws which make them slaves, practically forbid these things, they are unconstitutional and void, and all persons held by them ought to be set free.

We reply, that if we have made out to the satisfaction of the reader the true meaning of the *slave clauses*, as they are called, then, as the Constitution recognizes the existence of Slavery in the States, all these general provisions must be understood in a limited sense, and interpreted so as to be consistent with those other clauses: this is the universal rule.

Though it is not necessary to go further, still we may remind the reader that *State* laws fix the time at which persons shall be deemed *of age;* that until that period a man is debarred from most of the facilities of trading; if he takes out a patent it is not his, but his father's; he cannot make contracts except in special cases, of necessity, &c. So of convicts; the laws which doom them to prison prevent them from enlisting, trading, receiving letters, and, to a great extent, from making contracts. In a word, the same disabilities, in *most of these particulars*, which State laws impose on the slave, the same State laws impose on every person under twenty-one years of age, every married woman, and every convict. Still no one ever thought of contending that, in virtue of these provisions in the Constitution, Congress had a right to set aside the State laws relating to infancy, marriage, and imprisonment; but it has the same right to do so, as it would have to interfere with slave laws on these accounts.

As for enlistment, we presume Congress would have a Constitutional right to disregard infancy, at least to some extent. Public necessity justifies it. And the same public necessity would justify their enlisting slaves, without engaging to compensate their masters. Such laws, we believe, were enacted during our Revolution. See Remarks of Patrick Henry, in Virginia Conv., 1788. But this no more proves that, ordinarily, the master has not the legal right to the service of his slave, than the same power over minors proves that parents, because such may be enlisted, have not ordinarily the right to their earnings. The truth is, Mr. Spooner perpetually forgets that the United States Constitution has nothing to do with the municipal rights or private relations of men; all these are left to

be regulated by the States. They are to say who shall *vote*, who shall inherit property, who shall marry — who shall make contracts, &c., &c.

"States shall make no law impairing the obligation of contracts," says the United States Constitution. But a slave cannot make contracts. Hence, says Mr. Spooner, any State law which makes a man a slave is inconsistent with the above provision.

But marriage is a contract. Yet Massachusetts says, "no man shall marry his sister." This is, in Mr. Spooner's sense, hindering a man from making a contract — it is *so far* preventing him from forming this contract. But is there any one who supposes that the law is inconsistent with the above provision in the Constitution? Our space forbids us to enlarge, but any one may for himself illustrate in various particulars, the absurd consequences of this position of Mr. Spooner's.

3d. Mr. Spooner quotes the second amendment — "the right of the people to keep and bear arms shall not be infringed," — and Art. 1. Sec. 9, as to habeas corpus.

We have so recently and so much at length, (in our reply to Mr. Goodell,) shown that these amendments, &c. do not restrain the States, but only *the General Government*, from the various things therein mentioned, that we shall not enlarge, simply referring the reader to the following cases where the point is not only *decided*, but most *indisputably proved*, by Marshall, 7 Peters, 243; 2 Cowen, 818; 3 Cowen, 686; 12 Ser. & R. 220; 8 Wendell, 85; 10 Wendell, 449. These are, with one exception, cases in free States, and none of them had any connection with the question of Slavery. See also the elaborate and conclusive argument of Judge Jay, in the Emancipator, May 31, 1838.

The States, therefore, may establish slavery, even if such a system be contrary to these clauses.

We were surprised that Mr. Spooner allowed this careless mistake to be perpetuated in a second edition.

REPUBLICAN GOVERNMENT.

4th. Mr. Spooner's last point is that the "United States shall guaranty to every State a republican form of government," &c.

Mr. Spooner says, (p. 106:)

"It is indispensable to a republican form of government, that the public, the mass of the people, if not the entire people, participate *in the grant of powers to the Government*, and in the protection afforded by the Government. It is impossible, therefore, that a Government, under which any considerable number of the people, (if indeed any number of the people,) are *disfranchised* and enslaved, can be a republic. A slave Government is an oligarchy; and one too of the most arbitrary and criminal character."

The italics are our own.

If this be his opinion, then we can only say, that Mr. Spooner's idea of a republic does not agree with that described in the *Constitution itself!* Which is to have the preference the reader will decide.

It will certainly be allowed that the word "republic" is of a very vague character. Mr. Jefferson (vol. 4. 275,) allowed, in his day, that it had been applied to almost every description of Government, Holland, Genoa, Switzerland, Venice, Poland, &c. Madison (Federalist, No. 39,) confesses that if we refer to usage, *no satisfactory definition* can be given. And to what but *usage* do we refer to find the meaning of words? It is by such a chameleon test as this, — a word of which no *satisfactory definition* could be found in 1788, that Mr. Spooner proposes to decide the character of the Constitution and the extent of the powers of the Supreme Court!!!

Mr. Spooner decides that no State can be a republic unless "the mass of the people, if not the *entire* people, participate in the grant of the powers to the Government." Now it happens that the Constitution itself directs, that "the electors of Congress, in each State, shall have the qualifications requisite for electors of the most numerous branch of the State Legislature," thereby *distinctly* and *expressly* recognizing the right of each State to determine *how many* of its citizens shall VOTE, that is, shall *participate in the grant of power to Government.*

Hence if the States choose (as all States always have done) to let only half of the "ENTIRE PEOPLE" (to wit, the men) vote, they are allowed to do so — if they choose to go further, and allow only one-half of the *men* (that is, only those above twenty-one years old) to vote, they may; — and thus base the powers of Government, not as Mr. Spooner requires, on the "*entire people*," but on *one quarter* of them; all this the Constitution recognizes! So of other disqualifications. Yet this Mr. Spooner tells us is inconsistent with

his idea of a republic. If so, we can only reply, that the Constitution of the United States has the misfortune to differ from Mr. Lysander Spooner in this particular.

The reader will hence perceive that any definition of a republic, which is got up in order to make Slavery inconsistent with it, will be found *equally inconsistent* with what the Constitution confessedly permits, namely, that the States should regulate for themselves who, and how many, shall be permitted to participate in the Government. This being the case, all such definitions are proved absurd, (logically we mean,) and must be thrown aside.

It is very easy for Messrs. Spooner and Goodell to frame their own definitions of words, and then proclaim certain other things utterly inconsistent with those definitions. But if we recur to the dictionaries, either of that period or of our time, we shall find that Madison was perfectly right in saying that no strict definition could be given of the word "republican." We give a few definitions that the reader may see how extremely indefinite these standard authorities have always held the word to be.

"Republic: A State in which the exercise of the sovereign power is lodged in representatives elected by the people." — *Webster*, 1845.

"Republic: That form of government in which the supreme power is vested in the people, or in representatives elected by the people. A republic may be either a *democracy* or an *aristocracy;* in the former the supreme power is vested in the whole body of the people or in representatives elected by the people; in the latter it is vested in a *nobility*, or a *privileged class* of comparatively a *small number* of persons." — *Worcester*, 1846.

"Republican (subs.): One who thinks a commonwealth without monarchy the best Government.

"Republican (adj.): Placing the Government in the people.

"Republic: A Commonwealth — State in which the power is lodged in *more than one.*" — *Dr. Samuel Johnson*, 1755.

"Republic: A Commonwealth without a King." — *Walker's School Dictionary.*

"Republic: A Commonwealth without a King." — *Perry*, 1775.

"Republic: A Commonwealth, a free sort of Government, where many bear rule." — *Bailey*, 1730.

"Republic: A Commonwealth, a free State." — *Bailey*, 1782.

"Republic: A Commonwealth — A State or Government in which the supreme power is lodged in more than one." — *Ash*, 1775.

Montesquieu, Spirit of Laws, 1750, defines a Republic to be, "a Government where the people, in mass, or only *a part of the people*, possess the sovereign power." The first he considers a Democracy, — the second, an Aristocracy; but includes both under the term *Republican*.

The above citations show us how entirely loose and indefinite the use of the word has always been.

What, then, is the meaning of this clause? We answer, it is a general guarantee of the State Governments *as they then existed;* it undertakes to secure to the States, Governments similar to those they then had. The reader will please to recollect our authorities for the rule of construing the Constitution, as the words were used and understood *at the time.* (4 Cranch, 477; Spooner, p. 124.) In the light of this rule, let us look at this clause. And first, what is the meaning of the word "*guaranty*."

"To *guaranty* a republican form of government," says Madison, (Federalist, 43,) "SUPPOSES A PRE-EXISTING GOVERNMENT OF THE FORM WHICH IS GUARANTIED. As long, therefore, as the *existing republican* forms are continued by the States, they are guarantied by the Constitution."

Again; "It is *sufficient* for such a Government that the persons administering it be appointed either directly or indirectly by the people, &c.; otherwise, every Government in the United States, as well as every other popular Government, *that has been*, or *can be* well organized or well executed, would be *degraded from the republican character.*"—*Federalist*, 39.

We cite these sentences, from a source which Mr. Spooner's friend Goodell acknowledges to be *a competent one*, to show how the word "republican" and the word "guaranty" were understood in the year 1788. The meaning affixed to the latter no one will deny. It implies that the Governments *then existing* were republican. We *guaranty* a thing in existence, not a thing to be afterwards created.

Again; Madison, one of the best of witnesses, acknowledged to be *competent*, after entering at large into the history of the word, and contending that it should have some strict and definite meaning, goes on deliberately to apply the epithet to thirteen States, twelve of which *then held slaves.* In the face of such authority as this, as well as the fact, that the mass of men in the old republics, from whom we copy the word, (Athens, Sparta, Rome,) were slaves, — and that in Holland and Italy, their modern imitators,

not one man in a thousand had any share in the Government, — who will undertake to say that this word, either in its general sense, or as used in our Constitution, has any necessary inconsistency with Slavery? If there be such a man, he must find some other and better authority for his meaning than the *general use and understanding of the word;* and that has hitherto, at least, been considered the only test. Indeed, what better evidence could we have of the *general use* of the word at that time, than the fact that the delegates of twelve slave Governments deliberately applied it *to themselves.* They surely did not mean to cut their own throats, or to use words not descriptive of things. Hence it must be presumed that the word "republican," in 1788, did not exclude the idea of Slavery. Any other construction makes the public of that day absolute fools.

These are all the arguments adduced in support of Mr. Spooner's assertion that the Supreme Court is authorized to set free the slaves in the several states; — that is, to uproot the foundations of political supremacy, and dry up the chief source of what the law calls property, in one-half of the Union. We think them utterly weak, fanciful and unsound; at the best, mere twigs and cobwebs, upon which to hang so weighty and important, (though desirable,) a power. When placed side by side with the pro-slavery clauses of the Constitution, and construed, as they must be, in connection, these arguments become entirely unworthy of notice.

NO LEGAL SLAVERY IN THE COLONIES.

Having finished the consideration of Mr. Spooner's first two points, — namely, that the people never intended to sanction Slavery, — and that even if they did, the Constitution, *legally interpreted,* does not sanction it, — we pass to his third and last argument:

That there was no Constitutional or legal Slavery existing in the States in 1789, to which the pro-slavery clauses, if there really are any, in the United States Constitution, could apply, or can now apply. In attempting to sustain this position, he argues as follows:

1st. The Colonial Charters did not authorize the establishment of Slavery here.

2d. The English statutes never recognized it.

3d. If it were tolerated here, the decision of Lord Mansfield, in the Sommersett case, 1772, put an end to its legal existence.

4th. The Colonial Statutes establishing it were void, because they did not sufficiently define the persons who were to be slaves.

5th. The Declaration of Independence abolished it.

6th. The Articles of Confederation do not refer to it; and the State Constitutions of 1789 are either inconsistent with the existence of any such institution, or wholly silent about it.

We shall notice each of these points in order, and as briefly as possible.

1st. "The Colonial Charters did not authorize the establishment of Slavery here."

Mr. Spooner says, (p. 21):

"The general provisions of those charters, as will be seen from the extracts given in the note, were, that the laws of the colonies should not be repugnant or contrary, but, as nearly as circumstances would allow, conformable to the laws, statutes, and rights of our kingdom of England."

Slavery, he thinks, utterly inconsistent with the common law, which was adopted throughout the colonies. To this point he cites the following language of the Supreme Court, who, quoting the New Hampshire Charter, remark upon it thus:

"The charter of New Hampshire provided, 'So always that the form of proceeding in such cases, and the judgment thereupon to be given, be as consonant and agreeable to the laws and statutes of this our realm of England, as the present state and condition of our subjects inhabiting within the limits aforesaid, (*i. e.* of the province,) and the circumstances of the place will admit.' Independent, however, of such a provision, we take it to be a clear principle that the common law in force at the emigration of our ancestors, is deemed the birthright of the colonies, unless so far as it is inapplicable to their situation, or repugnant to their other rights and privileges. *A fortiori* the principle applies to a royal province."—9 *Cranch's United States' Reports*, 332—3.

To this we reply: Slave Laws are not repugnant, or contrary, to the laws of England. Till within a few years of the date of these Charters, villeinage, *white* slavery, existed in the mother country, and at the time they were made, the system was not illegal. Besides, laws regulating the slave trade were common on the English statute book, from this time down to 1807. See also remarks of Lord Stowell, in 2 Hagg. Adm. 94. Waiving all this, nothing more

is necessary, than to point the reader to the qualifications contained in the above extracts. The laws are to be conformable to English law, "*as nearly as circumstances allow*," "*as the present state and condition of our subjects, and the circumstances of the place will admit.*" The common law is adopted, "unless so far as it is *inapplicable to their situation*," &c. Now these exceptions are broad enough "to drive a coach and six through," as was said of a famous English statute: or as we once heard Elihu Burritt assert, "If you make a breach in the golden rule, no matter how small it be, Hell and all its legions can pass through."

The Colonial Assemblies and the King were to judge how far, and when "circumstances," and "their state and condition," &c. &c., rendered it necessary to depart from their English model. The only question is one of fact and history; how far *did* they find it necessary to do so, and what laws did they enact in consequence? If we open the Statutes enacted by these colonies under their Charters, and approved by the Kings, who granted the Charters, we shall find they all legalized the Slave-Trade and Slavery. It is too late now to say that such acts were not warranted by their Charters. *They* were the judges whether, and how far, it was necessary to vary from English law, and they have declared, by their acts, that they judged it necessary. Their decision, when approved by the King, is final. There is no appeal. As Mr. Spooner does not deny that the Colonies *tried* to make slave laws, and as such *attempts* are conclusive proof that they thought such laws "allowed by their state, condition, and circumstances," and that the common law on this subject was "inapplicable," — and further, as they are allowed by the Charters to be the *only* and final judges of the matter, we consider this point settled — and the consistency of slave laws with the Charters made out.

Mr. Spooner tells us, (p. 22):

> "Those charters were the fundamental Constitutions of the colonies, with some immaterial exceptions, up to the time of the revolution; as much so as our national and state Constitutions are now the fundamental laws of our governments."

But, since the first publication of these remarks, my friend Wm. I. Bowditch, Esq., suggests to me, that this whole argument of Mr. Spooner's, on the inconsistency of the Slave Laws with the Char-

ters, is unfounded and absurd; since, in the more important slave States, the Charters were forfeited and withdrawn long before these slave laws were passed! Hence the above assertion of Mr. S. is entirely groundless. The Charter of Virginia ceased in 1624. Her slave laws were enacted 1667, — 1670, — 1753. The Charter of Carolina, North and South, was forfeited 1729. The great slave statute of South Carolina bears date 1740. The Charter of Georgia ceased 1751. Her slave law was passed 1770. To suppose such laws void because inconsistent with those expired Charters, (if such inconsistency really existed,) would be as absurd as to try the acts of our present Congress by the provisions of the Charters, or of the Articles of the old Confederation.

2d. The English Statutes never recognized Slavery here — (pp. 24, 25.)

Mr. Spooner must be a Tory in disguise, or a tyro in law, to imagine that it was necessary they should do so in order to render the system legal. Has he read our history so superficially — has he omitted that somewhat important (!) page of it, the Revolutionary discussions of 1775, so entirely, as not to know that, who should vote here, how property should be divided and held, who should marry and how; — in a word, all individual rights and relations, and all matters of property, were settled by *Colonial* laws and customs; — and that this we claimed as our dearest birthright? Aye, and fought for it seven years? No matter, as to this question of domestic slavery, what *English* laws said, the question is, what did American law say? Every child knows this.

Mr. Spooner says, that parliamentary "toleration of the Slave-*Trade* could not make Slavery — *the right of property in man* — lawful anywhere, not even on board the slave ship." — (p. 23.)

This is strange, we might almost add, foolish doctrine. All laws must have a reasonable interpretation. The right "to declare war," given to Congress, means, of course, not only *to say* that war exists, but *to carry it on*, otherwise Congress does not possess that power. So "to raise and support armies," means not merely to *keep* these expensive baubles, but to *use* them. — (Story's Comm., 1. 412.) Mr. Spooner tells us, (p. 66,) that the right "to keep and bear arms," secured by the Constitution to the people, "implies the right to use them, as much as a provision to buy and keep food, would imply the right to eat it." Plainly, then, when Parliament

allow men to *trade* in slaves, thereby affirming it to be legally right to do so, they impliedly allow them to hold and own that, which they are permitted to buy and sell. This is too plain to need argument.

Mr. Spooner says, speaking of *Slavery* itself:

"It is also doubtful whether Parliament had the power — or perhaps, rather, it is certain that they had not the power — to legalize it anywhere, if they had attempted to do so.

"Have Parliament the Constitutional prerogative of abolishing the writ of *habeas corpus?* the trial by jury? or the freedom of speech and the press? If not, have they the prerogative of abolishing a man's right of property in his own person?"—*p.* 24.

To these questions we answer unhesitatingly, yes. The Constitution of the English Government supposes Parliament to possess these powers. It is a self-evident proposition, that the power which enacts a law can repeal it. Now Parliament establishes *habeas corpus;* of course the same power can repeal it. "Parliament might, if public opinion would allow them, abolish the *habeas corpus* act forever." This is the language of Lieber, speaking of the omnipotence of Parliament. (Pol. Her. p. 187.) Parliament does abolish the right of jury trial every year, as to every Englishman in a naval or military situation. The same might be done as to slaves, equally as well. That it might regulate Slavery was very clearly the opinion of Mansfield, in the Sommersett case. We need not dwell on this. In this country the case is different. In most, if not all of the States, the Constitution protects the writ of *habeas corpus* even against the Legislature; clearly showing, that without such a provison it was thought our Legislatures might, like the English, do with that as with all other laws — alter and repeal them at their pleasure. Any one who wishes to learn how "absolutely despotic," how "sovereign and uncontrollable to repeal all laws, civil, military, ecclesiastical, &c. &c.; to alter the established religion, to *change the constitution* of the kingdom and of Parliaments themselves;" in short, "to do everything not *naturally impossible,*" Parliament is, may consult Blackstone, 1. 160, 161; also 2 Dall. Rep. 308; De Lolme, p. 134.

To show that this despotic power did undertake to act, and to establish *slave property* in the colonies, we shall trouble the reader by citing a single Statute, pointed out to us by William I. Bowditch,

Esq., though Mr. Spooner was not able to find any. Did time permit, doubtless we might fill our pages with more. The quotation given below is an express command by Parliament to seize and sell negro slaves, like any other property, when needed to pay the debts of the master; being the clearest and most distinct recognition, it will be seen, of *slave property*. The language here is unambiguous, and serves to explain the wording of other Statutes, about which Mr. Spooner has quibbled, trying to make out that they did not refer to *slaves*, because they merely spoke of *negroes*, (see his page 26.) "Negro" is the usual term in many old laws for slave, and the two words are used interchangeably. The Virginia Constitution, of 1776, charges George III. with "prompting *our negroes* to rise in arms against us, — those very negroes, whom, by an inhuman use of his negative, he hath refused us permission to exclude." See also Conn. Act, 1784; Cons. S. Carolina, 1790.

(5 George II. c. 7. 6 Statutes at Large, 74.)

"*An Act for the more easy recovery of debts in his Majesty's Plantations and Colonies in America.*

"4. And be it further enacted by the authority aforesaid, that from and after the said 29th day of September, 1732, the *houses*, *lands*, *negroes*, *and other hereditaments*, and *real* estates, situate or being within any of the said Plantations belonging to any person indebted, shall be *liable to*, and *chargeable with* all just *debts*, duties, and demands, of what nature or kind soever, owing by any such person to his Majesty or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings, and process, in any court of law or equity in any of the said Plantations respectively, for seizing, extending, *selling*, or *disposing of* any such *houses*, *lands*, *negroes*, and other hereditaments and real estate, towards the satisfaction of such *debts*, duties, and demands, in like manner as personal estates in any of the said Plantations respectively are seized, extended, sold or disposed of for the satisfaction of debts."

See also 23 George II. c. 31, A. D. 1750:

"*An Act for extending and improving the trade to Africa.*

"Whereas the trade to and from Africa is very advantageous to Great Britain, and necessary for the supplying the Plantations and Colonies thereunto belonging with *a sufficient number of negroes at reasonable rates*," &c. &c.

Further on the Act speaks — though Mr. Spooner, who quotes liberally from it, never got so far as to see it — of "NEGROES OR OTHER GOODS!" Yet Mr. Spooner thinks there is nothing in this

Statute to show that "negroes" means slaves, or that they are considered property!

SOMMERSETT CASE.

3d. If Slavery was tolerated here, the decision of Lord Mansfield, in the Sommersett case, 1772, put an end to its legal existence.

James Sommersett was the slave of Charles Steuart, once an officer in the Custom House of Boston. He was bought in Virginia, and carried thence to London, in 1769. Sometime after, he quitted Mr. Steuart; who thereupon had him seized, and placed on board ship to be carried to Jamaica. Granville Sharpe caused him to be brought before Lord Mansfield, on a writ of *habeas corpus*, to try the question, "whether a slave, by coming into England, became free?" Lord Mansfield, in 1772, decided that no slaveholder could exercise any authority over his slave while in England, or could carry a slave out of England without his consent. [The English Courts have since held, that if a slave chooses to leave England, and return to a slave country, he resumes the condition of a slave.]

So far as the case of Sommersett has any reference to the Colonies, it *recognizes the legal existence of Slavery in Virginia.* For the arguments of Counsel and the decision of Mansfield, all proceed on the supposition, that *at home*, in Virginia, Sommersett *was a slave.* The decision was, that a person held as a slave abroad, if once landed in England, could not be taken thence against his will. Now if Sommersett was not a *slave* in Virginia, the whole case proceeded on a mistake. *As far as this case goes*, therefore, it recognizes the legal existence of Slavery in Virginia.

The case of Sommersett was adopted in the Colonies to the exact extent to which it went. Those Colonies which abolished Slavery, (Massachusetts, Pennsylvania, Rhode Island, Connecticut, New Hampshire, &c.) either refused, under its authority, to deliver up slaves brought or flying into their limits, or specially provided on what conditions masters should be allowed to bring their slaves with them.*

* Mr. Geo. Bradburn, in a recently published letter, thinks he has found additional evidence of the correctness of Mr. Spooner's view of the Som-

The Sommersett case has never been supposed to have any further reference to the Colonies than that above specified. In-

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mersett case in the following extract from Dr. Belknap's Letter to Judge Tucker, Mass. Hist. Collect. 4. 202. He regards it as a proof that the Massachusetts Court, following what he thinks the authority of that case, did overrule the Slave Laws of the State, and hence he infers that other States ought, and in due time will, follow the example.

"The blacks had better success in the judicial courts. A pamphlet, containing the case of a negro, who had accompanied his master from the West Indies to England, and had there sued for and obtained his freedom, was reprinted here; and this encouraged several negroes to sue their masters for their freedom, and for recompense for their service, after they had attained the age of twenty-one years. The first trial of this kind was in 1770. The negroes collected money among themselves to carry on the suit, and it terminated favorably for them. Other suits were instituted between that time and the revolution, and the juries invariably gave their verdict in favor of liberty. The pleas on the part of the masters were, that the negroes were purchased in open market, and bills of sale were produced in evidence; that the laws of the province recognized slavery as existing in it, by *declaring that no person should manumit his slave without giving bond for his maintenance*, &c. On the part of the blacks it was pleaded, that the royal charter expressly declared all persons born or residing in the province to be as free as the king's subjects in Great Britain; that by the laws of England, no man could be deprived of his liberty but by the judgment of his peers; that the laws of the province respecting an evil existing, and attempting to mitigate or regulate it, did not authorize it; and, on some occasions, the plea was, that though the slavery of the parents be admitted, yet no disability of that kind could descend to children.

"During the revolution-war, the *public opinion* was so strongly in favor of the abolition of Slavery, that in some of the country towns votes were passed in town-meetings, that they would have no slaves among them; *and that they would not exact of masters any bonds for the maintenance of liberated blacks, if they should become incapable of supporting themselves.*"

The answer to this use of Dr. Belknap's statement is as follows:

Dr. Belknap does not probably refer to the Sommersett case. That was in 1772, whereas his case occurred previously, in 1770. To be sure, other similar cases had occurred before this of Sommersett. The truth is, the movements in behalf of slaves were simultaneous on both sides the ocean. This, however, is of little consequence. The true explanation of the success of the negroes here is quite different from that suggested by Mr. Bradburn.

1st. By the law of 1646, no one *born* in Massachusetts, could legally be a slave. The recognition of this principle doubtless freed some. Parker, C. J., says, 16 Mass. 75: — "By the Colonial law of 1646 no bond slavery could exist, except in the case of lawful captives taken in just war, or such as willingly sold themselves, or were sold to the inhabitants. Of course, the children of those who in fact were, or who were reputed to be, slaves, not coming within the description, could not be held as slaves. And in the year 1796 it was solemnly and unanimously decided by the Court, that the issue of slaves, although born before the adoption of the Constitution, were born free."

2d. As to the rest, a more truly Yankee notion than pure love of liberty probably secured their freedom. Parsons, C. J., 4 Mass. 128, A. D. 1808, remarking that the conclusion above referred to by Judge Parker was, however sound, contrary to general practice and usage, tells us, referring to

stead of deciding Slavery to be illegal here, it made no decision respecting American Slavery either way. But if it is to be quoted at all, the only thing found in it is a tacit recognition of the legal existence of Slavery in Virginia. This view of the case is fully confirmed in the able review of it by Lord Stowell, in the case of the slave Grace, 2 Hagg. Adm. 94.

COLONIAL STATUTES.

4th. The Colonial Statutes establishing, or relating to Slavery, are void, because they do not define, with sufficient precision, who are to be slaves.

In most of the English colonies in America, Slavery originated in custom. Such has usually been its origin wherever it has existed. Some of the Colonies afterwards regulated, recognized, and established it by particular statutes; some left it to that irregular custom in which it commenced. In this respect, *black* Slavery, on this side the water, exactly resembled *white* Slavery (villeinage) in the mother country. Both originated in custom, and the rules regulating each were, from time to time, laid down by the Courts, or by the Legislatures, as it chanced.

If to this any one shall object, that "all customs must have a reasonable beginning," and that *malus usus abolendus est*, (a bad custom is to be disregarded,) we shall reply:

1st. Why did not these maxims of the Common Law, if they are to be taken literally, abolish villeinage (white slavery) in England? Any explanation which makes them consistent with that system of Slavery, will show that they were consistent with our Slavery also.

2d. We reply, with Lord Coke, that "*reasonable* is not to be understood of every unlearned man's reason, but of *legal* and *artificial*

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those cases where slaves obtained their freedom *previous* to the Constitution of 1780, "The defence of the master was faintly made, for such was the temper of the times, that a restless, discontented slave was worth little; and *when his freedom was obtained in a course of legal proceedings, the master was not holden for his future support, if he became poor.*"

The few lines of Dr. Belknap, which we have italicised, point to the same idea, and afford, probably, the true explanation why men went through Court, to free slaves, in 1776. — See Remarks of Shaw, C. J., in the Med. case, 18 Pick. 193. For an interesting statement as to the first line of the Massachusetts Constitution, and its being specially intended to abolish Slavery, see the Letter of Rev. Dr. Lowell, in the Boston Courier, May 20, 1847.

reason, warranted by authority of law;" and with Sir William Scott, (Lord Stowell,) "when it is cried out that 'bad customs are to be disregarded,' it is *first* to be *proved*, that even in the consideration of England, the custom of Slavery is considered a *bad custom* in the Colonies."

But Mr. Spooner goes further, and asserts that Slavery cannot legally originate in custom. It must be authorized, he says, from the very first by express statute. He founds this opinion on the language of Mansfield; which is the *only* evidence he quotes in support of such a novel and strange idea. See the remarks of Lord Stowell, as to Slavery in Antigua, 2 Hagg. Adm. 94. In the Sommersett case, Mansfield said:

"So high an act of dominion must be recognized by the law of the country where it is used. * * * The state of Slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political — but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from the memory. It is so odious that nothing can be suffered to support it but positive law."

From this Mr. Spooner infers, as follows:

"Slavery, then, being the creature of positive legislation alone, can be created only by legislation that shall so particularly describe the persons to be made slaves, that they may be distinguished from all others. If there be any doubt left by the *letter* of the law, as to the persons to be made slaves, the efficacy of all other slave legislation is defeated simply by that uncertainty. * * * Custom imparts to Slavery no legal sanction." — *p.* 32, *and see p.* 24.

We confess we do not see anything of this in the remarks of Lord Mansfield. He says merely that Slavery must be created by *positive law*, but not a word as to the exactness with which the persons must be pointed out and distinguished. All this is Mr. Spooner's addition.

Again; what is meant by *positive law?* Does it refer exclusively to *statutes*, written *acts* of Legislatures, or may it include usages, customs, and rules of Courts also?

We answer, it includes all these; the epithet is as often applied to these as to written statutes. This indeed is evident from the very language of Mansfield; "positive law, which preserves its force *long after the reasons, occasion, and time itself, from whence it was created, is erased from the memory.*"

Now the *time*, date, of a written statute endures as long as the statute itself, and so often of the rest. Lord Mansfield is evidently describing a usage or custom, which insensibly grows up in a country, unmarked and unregarded, until by and by, it is impossible to tell precisely where, when, and how it commenced.

Chief Justice Shaw, in the Med. case, says of this remark of Lord Mansfield:

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

We have quoted the above remark of Judge Shaw, not only as reliable authority for our assertion, but also as containing a concise definition of "positive law." Authority on this point we do not need, for every reader of law books knows the meaning; and the only wonder is, how so ingenious a man as Mr. Spooner ever fell into the gross error of founding an essential portion of his argument on so plain a mistake. *Positive* law is the term usually employed to distinguish the rules, usages, and laws which are made *by man*, from those which God has implanted in our nature. It matters not whether these rules and laws are written or unwritten, whether they originate in custom, or are expressly enacted by Legislatures. In a word, *positive* means *arbitrary*, and is used as opposed to *moral*.

Our limits will not permit quotations to show the use of this word, neither are they necessary, but any one who is curious on the point, may find the word used in this sense everywhere in law books, and especially, Blackstone, 1. pp. 62, 70; Chritian's Note to Blackstone, p. 58, and Doctor and Student quoted there; Selden on Fortescue, quoted at the end of Mr. Spooner's first chapter; Taylor's Civil Law, p. 132; Wooddesson, p. 46, &c. &c.; Bouvier and Tomline's Law Dictionaries; Austin's Jurisprudence; Rutherforth, Wheaton, &c. &c.

Such being the meaning of the word *positive*, Mr. Spooner's argument falls to the ground; and we are authorized, in asserting that custom and usage are not only a usual, but a *legal* commence-

ment of Slavery; and that there is nothing in the language of Mansfield opposed to this idea.

Nevertheless, the Colonies *did* take care to point out and define by statute, very precisely, who were to be slaves. We need not spread out the laws here. They will be found in Stroud, and a part of them in the notes to Mr. Spooner's fourth chapter. They enact:

1st. That all negroes, Indians, and mulattoes, &c. and their offspring, except those then *free*, shall be slaves.

2d. That, in every trial, it shall be presumed, that every negro and mulatto is a slave until he *proves* the contrary.

We hardly see how a more precise description or direction could be given. The rules may be short, but they speak with "irresistible clearness," leave no case unprovided for, and sweep all clean before them. All of a certain race are slaves, and in case of any doubt, they are to be *presumed* slaves till the contrary is *proved.* Surely there never can be any doubt or hesitation in any Court how to act under such rules; provided always a Court can be found base enough to act at all under such an accursed system. Indeed the system of Slavery will never be successfully attacked by objections like these. In cold, calculating, *systematic* plan and foresight, the slaveholders of this, as of every other country, have always been distinguished. The people have seldom regained their freedom by finding a loose joint in the harness of their tyrants; no, it has usually been necessary to trample armor and armor-wearers together in the dust.

Mr. Spooner says, "the fact that Slavery was *tolerated* in the Colonies, is no evidence of its legality." This is true, on his supposition that custom is no legal or competent source of the system, a doctrine which he tries, but in vain, to deduce from Lord Mansfield's language. Having shown the unsoundness of his view of the meaning of "positive law," the above assertion falls also to the ground. Toleration or acquiescence is what gives force, effect, and legal validity to custom, especially when such customs are recognized by legislative action.

DECLARATION OF INDEPENDENCE.

5th. "The Declaration of Independence abolished it."

In reply, we have only to say, that the Declaration had nothing to do with Slavery. That paper "dissolved the political bands" that bound the Colonies to England, and that was all it did, or was intended to do. No Court has ever held it to be the "fundamental law" of the country. On the contrary, it is simply a State paper, a political act, — changing the form of government, and having no relation to individual rights. We cannot better describe the *legal* character of the Declaration, that given to it by the Courts of the country, than in the words of J. Q. Adams. — (Oration at Quincy, 1831, p. 20.)

"The Declaration of Independence asserted the rights and acknowledged the obligations of an independent nation. * * * *It made no change in the laws* — none in the internal administration of any one of the Confederates, other than such as necessarily followed from the dissolution of the connection with Great Britain. *It left all municipal legislation*, all regulation of private individual rights and interests to the people of each separate colony; and each separate colony thus transformed into a State of the Union, wrought for itself a Constitution of Government."

Every one knows, and every page of our history proves, that the Declaration was neither intended nor supposed to abolish Slavery. Among other facts, we may refer to the insertion, in the Massachusetts Constitution, of a special clause for this purpose; which would have been unnecessary if the Declaration had already done the work. Of such acts as the Declaration, the intention is the main thing, in getting at the meaning. See the Letter of Dr. Belknap, in the Mass. Hist. Coll., and that of Dr. Lowell, in the Boston Courier of May 20, 1847.

6th. The Articles of Confederation do not refer to Slavery; and the State Constitutions of 1789 are either inconsistent with the existence of any such institution, or wholly silent about it.

This is Mr. Spooner's last point. The Articles of Confederation speak of "free inhabitants," and "free citizens." The *natural and obvious* meaning of this language is, inhabitants and citizens not enslaved. This we have shown, and, in fact, Mr. Spooner allows it. He tries to affix a technical meaning to the word "free."

It is true the word has a technical meaning, as we have before stated, when used alone, or with "*men*," as in "free men:" but never, we believe, when joined with "inhabitants," or "citizens." However, the question whether the Articles of Confederation did, or did not, speak of slaves, is of no consequence. We shall leave it, merely remarking that any plain reader of them will at once say that they do; which is the best evidence that the fact is so.

EARLY STATE CONSTITUTIONS.

We have reached, then, the State Constitutions of 1789. At that time, Slavery existed in the midst of the nation; was tolerated by the acquiescence of the whole people, and known to all as a *great fact*, a prominent part of their social arrangements; recognized by the sovereign power of Parliament; established, regulated and defined, by repeated Statutes of the Colonial Assemblies.

Suppose that Mr. Spooner's assertion be true, and that in such a state of things these Constitutions did not allude in any way to Slavery, what then? Does that prove that the system could not exist after such Constitutions were adopted? Not at all. These Constitutions, many of them, at least, if not all, make no allusion whatever to property in land — to the rights of marriage — to the right of a father to his infant son's earnings — to a man's property being answerable for his debts; some, that of Virginia, for instance, make no provision for raising taxes, or even punishing crime. Are all these things, therefore, *unconstitutional?* Certainly not. Polygamy is not forbidden in any one of them. Is polygamy therefore legal? No; these Constitutions do not attempt to regulate, describe, or even notice, the organic skeleton of social life, — the granite ribs of the social globe. They take them for granted, and proceed to erect upon them, (suffer us to change the figure) as upon a recognized and well-known foundation, the more changeable framework of a Government. That the union of one man and one woman make marriage — that land may be owned and sold — that creditors may sue and debtors must pay, — these things and others, *the customs and usages of the race, for which the Constitution is intended,* are taken for granted. It is not specially provided that Court proceedings shall be in English, or that laws shall be printed

in that language. All these things are presumed; and as according to the well-known rule of law, statutes are to be interpreted according to the *subject matter*, so Constitutions are unintelligible, unless we know first the race, usages, time, country, and general institutions, for which they were intended.

Now, suppose that our Constitutions had taken Slavery, one great American Institution, for granted, as they did the other "*great facts*" of social life, there would have been nothing wonderful in such an occurrence. Unless we found some *express* abolition of the system, or some clause equivalent to it, it would have continued as before. It was the first line in the Massachusetts and New Hampshire Constitutions, "all men are born free," that abolished Slavery in those States. Blot that out, and the omission elsewhere to mention Slavery would have been no bar to its existence. The abolition of so gigantic and deep-rooted a system is never "done in a corner," or by stealth. It is preceded by an agitation sufficient to shake a continent, by long and angry discussion, by convulsion and fierce resistance; and when the long-dreaded and long-wished moment comes, "the boldest holds his breath for a time." Where were all these characteristics of such an event in 1776, or 1789? — when, as Mr. Spooner thinks, one fine morning folks waked up, and were agreeably surprised to find the system gone, although they *all designed and expected its abolition!*

Again; Mr. Spooner says that the Constitution of Virginia commences with the declaration that "all men are by nature equally free,"—and this would abolish all the slave laws of that State. True; it ought to do so. Suppose it had: he has only, by this means, got rid of *one slave State*. There are plenty more to which the pro-slavery clauses of the Constitution can apply. The presence of one slave State in the Union is, morally, as bad as the presence of a dozen. But the question now is, not what *we* think *ought* to be the result of certain provisions in the Virginia Constitution; but *what is* the interpretation given to it by that Court, which, and WHICH ALONE is authorized to construe it, namely, — the Supreme Court of Virginia.

The reader will recollect that Mr. Spooner is attempting to show that the United States Supreme Court has, *according to the rules of law*, authority to declare all the slaves in this nation free. One

reason why he thinks so is, that the slave laws of Virginia conflict with her Constitution, and are, therefore, void. Now it happens that the Supreme Court of that State do not think so. And the Supreme Court of the United States hold that they have no right to reverse or control the decisions of State Courts in relation to such a question, "to declare State laws void, although they may be repugnant to the Constitution of the State." (See Story, Comm. 3. 701.) Especially is this the case in questions affecting property, (5 Peters, 291, and the note, 6 Peters, C. R. p. 498.)

However, this question as to Virginia is unimportant. If we grant Mr. Spooner all he asks, it only rids us of *one slave* State, and there were five more in 1789.

But, lastly, the State Constitutions do refer to and recognize Slavery. Virginia speaks of "our negroes," &c. as we have above quoted. Interpreted, as that must be, by the usage of that day, it refers to slaves. So of Pennsylvania, and her mention of "slaves," quoted by Mr. Spooner. Maryland and South Carolina specially provided for the continuance in force of all laws not repugnant to the new Constitutions, and there is nothing in them repugnant to Slavery. Mr. Spooner, on his supposition that the old Charters did not warrant Slavery, says there were no *valid laws* in South Carolina and Maryland to be continued. We have before disposed of this argument, and shown that those laws were valid and consistent with the Charters; consequently they were continued; indeed, whether so consistent or not, having always been considered "*laws*," up to that time, and *all laws* being continued, it seems to us any Court would hold, and common sense would ratify the decision, that those were *the laws* which the SOVEREIGN PEOPLE, the makers of the Constitution, and not bound even by Charters, intended and *had the power* to re-enact and continue. All laws "not repugnant to the Constitution" were continued. It mattered not, *then*, how repugnant they might have been to the old Charter.

The use of the word "*free*," also, in those Constitutions, shows the same thing. We have already sufficiently exposed Mr. Spooner's rash and unfounded assertions as to this term; we shall not repeat what we have before said. Neither shall we go over all the slave State Constitutions; it would require too much space. We simply state that the word "free" had been sometimes used technically, and still was so, but not usually in the slave States;

there the primary meaning was preserved to distinguish the class not enslaved. We shall confine ourselves to one State; — one is enough to sustain our argument, and our space forbids us to enlarge. We choose South Carolina.

South Carolina (then including North Carolina,) early recognized Slavery. Her celebrated Constitution, drafted by JOHN LOCKE, and which went into operation in 1669, and continued till 1693, provides that "every freeman of Carolina shall have absolute power and authority over his negro slaves, of what opinion or religion soever."

The sanction thus early given was continued by successive legislation down to the Revolution. The Constitution, adopted March 26, 1776, provides, by reference to a former statute, of 1759, that only "free white men, *residents* and *inhabitants* of the Province, for one year," &c., should vote: and that "free born subjects of Great Britain, residents in the Province one year, &c., having at least five hundred acres of land and *twenty slaves*," should be eligible to office. In October, 1776, the number of slaves necessary was reduced to *ten*, and only "free white men, *subjects of this State*, and resident in the State twelve months, &c., having at least five hundred acres of land and *ten slaves*," were declared qualified for the Assembly. Here not only the word "slaves" gives us a distinct recognition of the system, but the use of the word "free." It cannot mean merely, as Mr. Spooner suggests, men who are citizens, because it would not then have been necessary to go on and specify that they should be "residents," "inhabitants," "*subjects:*" — since a "free man" in Mr. Spooner's sense, that is *a citizen*, must necessarily have been a *subject*. In our sense of "free," not a slave, there might be many "free white men" in the state, who, not being subjects and citizens, would have been qualified as members, unless it had been specially provided that such should be *subjects*, as well as free. This Constitution continued till 1778, when the one from which Mr. Spooner quotes was adopted, which remained in force till 1790. In this, all direct mention of slaves was dropped. In the Constitution of 1790, the State returned to her old policy, and made the holding of "*ten negroes*," the being "a free white man, of the age of twenty-one years, and *a citizen* and resident of the State," the qualifications for a seat in her Legislature. When the Constitution of 1778, from which Mr. S. quotes, speaks of "every

free white man resident and inhabitant of this State," &c., Mr. S. says this word "free" has no reference to Slavery. Let us see. The clause is copied from laws which had been in force for half a century, and distinctly recognized by the Constitution of 1776. In all those, the "*free* white man" is the holder of "*twenty slaves*," "*ten slaves*," — he is to be a resident — *subject*, and, in 1790, *citizen* of the State. To make the term "free," in this connection, express merely citizenship, as Mr. Spooner proposes, is to make it superfluous and unnecessary. Taken in connection with these terms, there can be no doubt of its true signification. It meant the class that held slaves, and was used to distinguish them from their slaves. The reader will remember Lord Mansfield's rule, the universal rule, that ambiguous words are to be taken to mean what they have *clearly* meant in *other similar laws*. This consideration fixes *beyond a doubt*, the true signification of the word in this place.

Mr. Spooner says "free," in this connection, ("free *white* man,") cannot be the opposite of slave, because it would imply that some *white* men might be slaves. This objection would never have been brought by an Abolitionist. Such know too well by Southern advertisements, Southern law cases, aye, and by the recent action of the Carolina Legislature, how often "*pure white*" men are found in chains.

Finally, suppose any of the slave States were deficient in valid slave legislation in 1789; they have made up for it since. Their Constitutions now are full of Slavery. But, says Mr. S., they cannot enslave people, once free. Who will prove this? We assert, and challenge a contradiction, that Pennsylvania may, in perfect *consistency with the United States Constitution*, re-create Slavery to-day. No clause in that instrument forbids any of the old thirteen States from setting up Slavery, if any one is mad enough to wish it; and once established, it could claim the benefit of all the pro-slavery clauses as fully as the more ancient wickedness of the Old Dominion or of Carolina. It is idle, therefore, to waste time in ferreting out the precise condition of the Constitutions of 1789. That is a very immaterial point. Indeed, the whole discussion is a waste of time. The Constitution of the United States deals with Slavery as a *fact*, and gives it, as such, certain rights. Such is the general rule as to *ante-constitutional* matters. (See Story, 1. 206.) The Constitution no more undertook to decide whether Slavery was

legally planted here, than it did to determine, before it gave Congress the right to regulate commerce with the Indians, whether they had the best original title to this soil, five hundred years ago, &c. Suppose it should turn out, that those tribes had no legal right here, it it would not alter the force or meaning of the Constitutional provisions respecting them.

We close here our protracted review of this essay. The only apology we can offer to the readers of the Standard for occupying so many of their columns, is not the ingenuity of the argument — though that we are willing to confess, in Mr. Spooner's favor, deserves some credit, — but we were told that the book, hoisted into undue notice by the loud vaunts of unthinking friends, was misleading worthy men, whose want of time, or scanty acquaintance with the subject, or too high opinion of its critics, prevented them from fully seeing the unsoundness of the pretended argument. In general, we think the American Society may well take the Constitution to be what the Courts and Nation allow that it is, and leave the hair-splitters and cob-web spinners to amuse themselves at their leisure. Sufficient for us is our appropriate and gigantic work, of trying to convert a community which exults in being, and in being considered, the lover and the supporter of Slavery.

NOTE.

We have referred so often to the English system of villenage that we make here, for the reader's satisfaction, a few extracts to show its nature and extent, — and to qualify the general statement, so often made, that the Common Law does not allow Slavery. Our American slavery was but a shoot of the same tree, a little varied in its form by the climate. So far from its being repugnant to English Law, the interval between the death of villenage in England and the birth of Negro Slavery on this side the water was so brief, that an active fancy might almost see, on the principle of Hindu transmigration, the vital spirit of Saxon bondage passing with colonists across the ocean, to reappear, in another form, and with fresh life, on the virgin soil of the New World. Though the number of villeins gradually decreased till they finally disappeared, still it would be difficult to say when, if ever, English law distinctly forbade the system; certainly not till some time after the settlement of this country. It was partially destroyed in 1660: but, unless it must be considered to have been too much hated to need a law forbidding it, it waited for final extinction till 1834. Stephens, in his "Slavery," gives an elaborate account of villenage, but the extracts below are from Hargrave's argument on the Sommersett case, and from Blackstone's Comm. 2. 93, 4 6. Mr. Hargrave says:

"The only Slavery our law-books take the least notice of is that of a villein. * * * No Slavery can be lawful in England, except such as will consistently fall under the denomination of ville nage. The condition of a villein had most of the incidents which I have before described in giving the idea of slavery in general. His service was uncertain and indeterminate, such as his lord thought fit to require, or, as some of our ancient writers express it, he knew not in the evening what he was to do in the morning — he was bound to do whatever he was commanded. He was liable to beating and imprisonment and every other chastisement his lord might prescribe, except killing and maiming. He was incapable of acquiring property. * * *He was himself the subject of property; as such saleable and transmissible.* * * If he was a *villein in gross*, he was an hereditament, or chattel real, according to his lord's interest, being descendible to the heir where the lord was absolute owner, and transmissible to the executor, where the lord had only a term of years in him. Lastly, the Slavery extended to the issue, if both parents were villeins, or if the father only was a villein. The ex-

tinction of villenage, all agree, happened about the latter end of Elizabeth's reign, or soon after the accession of James. [James came to the throne 1603.] But though villeinage is obsolete, by a strange process of human affairs, the memory of *Slavery expired*, now furnishes one of the chief obstacles to the introduction of slavery attempted to be revived."

Blackstone, after giving much the same account, adds:

"A villein, in short, was in much the same state with us, as Lord Molesworth describes to be that of the boors in Denmark, and which Stiernhook attributes also to the *traals*, or slaves, in Sweden; which confirms the probability of their being in some degree monuments of the Danish tyranny."

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"When tenure in villenage was virtually abolished, by the statute of Charles II., there was hardly a pure villein left in the nation. For Sir Thomas Smith testifies, that in all his time (and he was secretary to Edward VI.) he never knew any villein in gross throughout the realm; and the few villeins regardant that were then remaining were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations, in the preceding times of popery. For he tells us, that 'the holy fathers, monks and friars, had in their confessions, and specially in their extreme and deadly sickness, convinced the laity how dangerous a practice it was, for one christian man to hold another in bondage: So that temporal men by little and little, by reason of that terror in their consciences, were glad to manumit all their villeins. But the said holy fathers, with the abbots and priors, did not in like sort by theirs; for they also had a scruple in conscience to impoverish and despoil the church so much, as to manumit such as were bond to their churches, or to the manors which the church had gotten; and so kept their villeins still."

Cooper, in his 'Justinian,' p. 414, quotes Smith further, as saying, that "at last some bishops manumitted their villeins for money — and others on account of popular outcry: and at length the monasteries falling into lay hands, was the occasion that almost all the villeins in the kingdom were manumitted."